DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

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No. 892

STATES MARINE LINES—HOHENBERG BROTHERS VIOLATION OF SECTION 16

Decided October 6, 1961

Respondents, Hohenberg Bros. Inc., as shippers, found to have knowingly and willfully, directly, by an unjust or unfair means obtained transportation by water for property consisting of 400 bales of cotton at less than the rates or charges which would otherwise be applicable in violation of Sec. 16 of the Shipping Act, 1916, as amended.

Respondents, States Marine Lines, Inc., as a common carrier by water, found, directly and in conjunction with another person, to have allowed a person to obtain transportation for property consisting of 400 bales of cotton at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing and by an unjust device or means in violation of Sec. 16 of the Shipping Act, 1916, as amended.

Elkan Turk and *Herman Goldman* for respondent States Marine Lines, Inc.

Alan F. Wohlstetter for respondent Hohenberg Brothers Company.

Edward Aptaker as Public Counsel.

REPORT OF THE COMMISSION

Acting Chairman, JAMES L. PIMPER; *Acting Commissioners:* FRANK BARTON, JOHN HARLLEE, THOMAS LISI and OSCAR H. NIELSON

BY: JOHN HARLLEE, *Acting Commissioner*

PROCEEDINGS

The Federal Maritime Board ordered that an investigation be instituted to determine whether Hohenberg Bros., Memphis, Tenn. (herein called "Hohenberg") as a shipper, and Global Bulk Transport Corp. (formerly States Marine Corp.) and States

Marine Lines, Inc. (formerly States Marine Corp. of Delaware) (herein called "States Marine"), common carriers by water in foreign commerce, had acted in violation of Sec. 16 of the Shipping Act, 1916, as amended (Act) (25 F.R. 2118, No. 50, March 12, 1960). Hohenberg and States Marine were made respondents. Hearings were held before an Examiner and briefs and replies were filed. The Examiner concluded that both Hohenberg and States Marine had willfully violated Sec. 16 of the Act. Exceptions to the recommended decision have been filed and the Federal Maritime Commission (Commission) has held oral argument.

FACTS

1. Hohenberg, a shipper of cotton in Memphis, Tennessee, in the latter part of 1957 shipped 600 bales of cotton in 6 100-bale lots or packages to the Howard Terminals at San Francisco, California.

2. Howard Terminals was instructed to have the cotton placed on board a vessel for shipment to Bremen, Germany.

3. Hohenberg, by its forwarder, prepared a States Marine bill of lading No. 6 covering the shipment on board the *SS Alca*, a Finnish flag vessel. The Shipper is shown as the United States Commodity Company, a trade name for Hohenberg. Under the heading "Particulars Furnished by Shipper" the following appears: (States Marine furnished the information for this part of the B/L).

"Marks and Numbers	No. Pkgs.	Description of Packages & Goods	Measurement in Cu. Ft.	Gross Weight In Pounds
ICOE/USCO	100 (A)			50,959#
CYOE/USCO	100 (A)	BUYER'S FORWARDING AGENT		51,315#
SCOE/USCO	100 (A)	FREDERICH ELLMERS		51,887#
GIOE/USCO	100 (A)			51,108#
BOOE/USCO	100 (B)			51,576#
ZEOE/USCO	100 (B)			51,893#
	600	BALES STANDARD DENSITY COTTON		308,738#

The total freight is shown as $8616.00. The bill of lading is dated at San Francisco, California December 20, 1957 and is over the signature of D. W. Fleming "For the Master States Marine-Isthmian Agency Inc."

4. The freight was based on the following provisions of the Pacific Coast European Conference Tariff No. 13 showing the rates and charges established by States Marine applicable to the shipment and are as follows:

"   7th Rev., Page 17

GENERAL SECTION	Rate Basis	***	Groups[1] 3	
***				
COTTON AND COTTON LINTERS, subject to rules prescribed by the Cotton Inspection Division, Cargo Protection and Inspection Bureau, San Francisco, California				
Cotton, compresed to densities per cubic foot at shipside as indicated.				
High Density Bales, 32# or more,	100#		2.20	
Standard Density Bales, 27# and up to 32#,	100#	***	2.45	***
22½# and up to 27#,	100#		2.70	
Gin Bales, Less than 22½#	100#		4.90	
***				"

5. While on the pier awaiting shipment, the packages were inspected by the Pacific Cargo Inspection Bureau, Cargo Inspection Division, an agency of the Pacific Coast European Conference and four reports containing "a Statement of the Weights, Measurements and Densities" were prepared covering four of the 100 bale packages. The reports are dated December 27, 1957, signed by J. Kelley, under the certification that his statements are "true and correct to the best of my information." Each report showed the weight, length, width, thickness, cubic feet and density of each bale measured (identified by number) and summarized the average densities of each lot of bales as follows:

1. Marked ICOE-25 of 99 bales of cotton-25 lbs. 9 oz.
2. Marked CYOE-25 of 100 bales of cotton-25 lbs. 12 oz.
3. Marked SCOE-25 of 99 bales of cotton-26 lbs. 10 oz.
4. Marked GIOE-25 of 100 bales of cotton-24 lbs. 4 oz.

[1] "Groups", refers to rates to destination ports; "3" to the ports of Copenhagen, Denmark; Bremen and Hamburg, Germany.

(Note: The inspected bales cover the lots identified as "(A)" in the bill of lading).

6. The Pacific Cargo Inspection Bureau (identified in the tariff as, "Cargo Protection and Inspection Bureau") was engaged to assist States Marine, as a Member of the Pacific Coast European Conference, in enforcing the transportation rates and charges contained in its established tariffs.

7. a. Hohenberg had knowledge of the Inspection Bureau Report about the same time that it received the bill of lading, but it did not receive a copy of the inspection report as shown by the following testimony by witness Rudi E. Scheidt, Vice President of Hohenberg Bros.:

Q. Did you have any knowledge that the Pacific Company's inspection bureau had weighed and measured these bales?

A. We received knowledge of it at about the same time as the bill of lading. However, we did not receive a copy of the inspection report. We got that verbally and on the bill of lading.

b. After the shipper was billed, Hohenberg's Fresno manager telephoned a representative of States Marine and asked him for a lower rate on the cotton covered by bill of lading No. 6 as shown by the following testimony of witness Joseph A. de la Pena, Vice President of States Marine:

Q. Will you, in referring to paragraph 4 of this letter, and I quote the last sentence: "Hohenberg also stated that this complaint had been previously handled by their Mr. Bischoff with Mr. de la Pena in San Francisco but had been unable to receive any satisfaction." Would you say that that sentence refers to your personal meeting with Mr. Bischoff, or the later telephonic conversation with him?

A. As I recall it, it was a telephone conversation.

Q. He asked whether or not he could get a lower rate on the cotton after the shipment had been made and after the bill was sent. What did you tell him?

A. I told him that we couldn't reduce the rate because the inspection bureau had inspected the shipment and found that some of the bales were oversized.

Q. And his reply to that, do you recall it?

A. He didn't pursue it further with me. All I told him was that I could do nothing for him.

c. Hohenberg's representative had also indicated previously that it would be shipping some "oversized" bales and knew by the reference to oversize that it meant bales having a lower density than 27 lbs. per cu. ft. as shown by the following testimony of witness Joseph A. de la Pena:

MR. WOHLSTETTER: I'd like to have clarified as to what Public Counsel means by oversized.

EXAMINER JOHNSON: I think his question is clear enough. I think this witness can answer it.

A. The bales were oversized.

Q. Did Mr. Bischoff indicate this to you in his conversation at that time?

A. Yes, he did.

Q. So Mr. Bischoff knew that some of these bales in the 400 group were oversized and would not properly take a lower rate?

A. I just can't say in the 400. He mentioned the shipment to me. He didn't mention how many were oversized, what particular lots it might be. In fact, I didn't get into any detailed discussion with him at all. He just generally mentioned it to me and that was my comment to him.

Q. Did he generally mention that some of the bales in this particular shipment were oversized so as to not qualify properly for the $2.45 rate?

A. Yes, he did mention that some of the bales were oversized.

***

Q. When you talked to him later by phone, did you have any doubts of what he was talking about?

A. No.

Q. What was he saying to you, then?

A. It was bill of lading 6.

Q. What did he say?

A. He said in substance that the bill of lading had been processed and the shipper had been billed—

Q. Did he—

Mr. WOHLSTETTER: Let him finish.

A. (Continuing) He specifically mentioned about this shipment and this bill of lading.

***

8. Hohenberg was informed that States Marine had rated only 200 of the 600 bales at $2.45 per cwt. and the remaining 400 bales at $2.70 per cwt. Hohenberg questioned the rating in February of 1958 and presented arguments as to the probability of error in measurements, based on its reliance on the capabilities of a Murray gin-press to make a bale having a density in excess of 27 lbs. per cu. ft. Hohenberg did not inspect the bales but relied on its experience with the gin-press that was used.

9. In response to Hohenberg's arguments and requests, States Marine issued a "Correction to Freight List (Manifest)" dated January 31, 1958 for the shipper United States Commodity Company and the manifest of the *SS Alca* bill of lading No. 6 revising the bill of lading to show the freight on 400 "A" bales of cotton as $5029.09 instead of $5542.26. States Marine sent on February 10, 1958 a refund check in the amount of $513.17 payable to the order of Hohenberg Bros. which was subsequently endorsed by Hohenberg Bros. and negotiated.

10. The following statements from States Marine inter-office correspondence are also contained in the exhibits:

a. An inter-office States Marine memorandum dated January 27, 1958:

> Re S/S ALCA, Voy. 1—SF/Bremen, B/L 6 states: . . . This lading indicates that 400 bales is rated at $2.70/100 lbs. while the remaining 200 bales is rated at $2.45/100 lbs.
>
> Hohenberg was aware that some of the bales were oversized but was of the understanding that we would protect them with the $2.45 rate on the entire 600 bales provided actual measurements were not taken by the inspection bureau.

The memorandum is signed by H. H. Woody, Jr. of the States Marine Memphis office and is addressed to N. E. Wallen of the Los Angeles States Marine Office.

b. A letter dated February 6, 1958 from J. A. de la Pena of the San Francisco States Marine office to L. D. Estes of the New Orleans States Marine office says referring to this shipment:

> Frankly, the inspector was justified in imposing this penalty because Hohenberg in Fresno informed me that the bales were oversized but he had hoped they would be cleared before the inspector caught up the shipment.
>
> Since the inspector examined the bales before they were loaded and issued an inspection report, there was no choice other than for us to follow through. However, because of Woody's outline to you of this situation, we are issuing a correction and will try to conceal it from the Inspection Bureau, which I am sure we can do.

DISCUSSION

1. *Charges against the shipper under the first paragraph of Sec. 16.*

The first paragraph of Sec. 16 of the Act provides that " it shall be unlawful for any shipper . . . or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing . . . false reports of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable". The recital in the Board's order instituting the proceeding is that there is information before the Board that Hohenberg in connection with the shipment of certain cotton on the *SS Alca* on or about January 8, 1958 from the port of San Francisco, California through the means of false billing, false classification, and by other unfair devices or means attempted to and did obtain transportation by water for such property at less than the rates which would otherwise be applicable.

The proofs show that the shipper Hohenberg shipped 600 bales of cotton on the *SS Alca* for transportation to Bremen, Germany pursuant to a bill of lading showing 400 of such bales to be of "Standard" density and rated "(A)" which relates to the freight rate applied to bales having 22 1/2 and up to 27 lbs. per cu. ft. density. The freight rate to Bremen for such rating is $2.70 per 100 lbs. The correct freight was paid by Hohenberg.

At this point Hohenberg had a clear choice of actions. It could either accept the Inspection Division's report and not contest the freight charges or it could prove that the bill of lading was wrong and obtain a revision of the freight charges based on a correct bill of lading. Instead of either course, the shipper made a conscious choice of method which involved getting a lower freight rate regardless of the true facts, and in disregard of the applicable rates and charges and in disregard of the circumstance that it did not make its own inspection of the bales.

The circumstantial evidence in this case coupled with the direct testimony convinces that Hohenberg's successful campaign to compel States Marine to refund part of Hohenberg's original freight payment was conducted "knowingly and willfully." Hohenberg's Vice President, Rudi Scheidt (as previously quoted) admitted that Hohenberg knew of the inspection report which showed that the rate applicable was the rate originally charged by States Marine. Nevertheless (see the quoted testimony of Mr. de la Pena, previously quoted), Hohenberg continued to press for and eventually secured a lower rate, which is to say, it secured the transportation of the cotton "at less than the rates or charges that would otherwise be applicable". It need not be labored that to stand upon a demand for a lower rate unsupported by factual proof (or even attempted proof) that the cargo is entitled to carriage at the lower rate constitutes a device which is unjust, unfair, and forbidden by the statute.

It is highly significant that Hohenberg has at no time offered any proof as to what the density of the cotton *actually was* - and that is what determines the applicable rate. Its evidence at most indicates that prior to the time but not *at* the time it sought and secured the refund, Hohenberg may have believed that the cotton density entitled it to move at the lower rate Hohenberg sought. There is no evidence that at the time Hohenberg pressed for and secured the refund (or at any time after States Marine and Hohenberg were informed of the inspection results reported December 27, 1957) either Hohenberg or States

Marine believed or had reason to believe that the cotton was entitled to move at the lower rate claimed by Hohenberg.

After the measurement of the bales and the recomputation of the densities by the Inspection Division, Hohenberg's previous uncertainty about the size of the bales became a certainty. It then knew precisely what density was claimed by the carrier as the basis of its bill of lading. Hohenberg was shown to have knowledge about the inspection report and its contents and to have discussed the oversize bales and their effect on tariff rates both before and after the report was issued. Notwithstanding its knowledge about the inspection report, Hohenberg neither offered nor attempted to offer contradictory evidence either in the form of its own measurements or of any change caused by atmospheric conditions and by not successfully impeaching the truthfulness of the bill of lading or the inspection report.

There is other testimony in the transcript of hearings indicating that the reference in a telephone conversation between a Hohenberg employee and a States Marine employee to "oversize" bales may not necessarily have referred to the particular 400 bales. Such testimony, however, came out principally on cross-examination in the form of questions which also contained answers and required the witness to simply agree, or was about what the witness didn't know or what was not mentioned rather than about what the witness did know. Such testimony is not as persuasive as the responses which give the witness's own version of what he did know about his conversation. Moreover, Hohenberg did not meet its burden of overcoming the evidence concerning the telephone conversation about the shipment by bringing in its employee, who was on the telephone, as a witness, as it might have done if it wanted to make the record entirely clear on this point. Also, nowhere in the record does Hohenberg deny or contradict any of the assertions made in the States Marine inter-office letters that indicate Hohenberg's awareness or understanding of the facts. While these letters do not constitute direct evidence of all the facts they recite, they constitute circumstances which corroborate direct testimony in the record of Hohenberg's knowledge of facts which prevents successful argument that its claim for a refund was made believeing it was just. The record without the letters, however, is sufficient to support our conclusions that the conduct of Hohenberg was knowing and willful.

2. *Charges against the common carrier by water under Sec. 16 Second.*

The second paragraph of Sec. 16 provides that it shall be unlawful for any common carrier by water, either alone or in conjunction with any other person directly or indirectly ". . . Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing" or by any other unjust or unfair device or means. The recital in the Board's order is that there is information regarding the foregoing shipment showing that States Marine, common carriers by water in foreign commerce, knowingly allowed Hohenberg to so obtain said transportation at less than the regular rates or charges then established and enforced.

The proofs show States Marine accepted the Hohenberg property for transportation by issuing a bill of lading showing States Marine as the carrier, by receiving the freight charges and by causing the 400 bales of cotton to be transported overseas. States Marine had the inspection report showing the true measurements, weights and densities of the 400 bales and based its freight charges on the tariff provisions applicable to such densities. The report was prepared by a Bureau engaged to assist in enforcing tariff rates and charges of the conference of which States Marine is a member. Even though it knew the true facts about the size, weight and densities of the bales and correctly interpreted and applied the tariff containing the rates and charges then established and enforced, States Marine after several contacts with Hohenberg changed its mind and yielded to the requests of Hohenberg and revised its charges to apply rates which it knew were not applicable, although it had other evidence than the reports of the Bureau on which it based its initial charges. States Marine did this by revising the correct billing as shown in its bill of lading through the substitution of an incorrect billing as shown in the "Notice of Correction to Freight List" over the signature of a States Marine-Isthmian Agency Inc. representative. Such a "corrected" billing based on untrue facts constitutes false billing. States Marine's contacts with Hohenberg and its resulting assent to Hohenberg's claims constituted action in conjunction with another person and was action taken directly. Thereafter States Marine carried out its agreement with Hohenberg by refunding enough of the freight payment to bring the charges to the shipper down to the established tariff rates applicable to cotton bales having a higher density than those which it transported. The charge of the lesser freight rate was done knowingly as the Board's specification states. The agreement to make a refund based on inapplicable tariff rate, followed by a refund payment is an unfair or unjust means of obtaining less than the regular rates established and enforced by States Marine.

EXCEPTIONS

The exceptions are (1) to the failure to make certain findings, (2) to the admission of certain documents as hearsay evidence, (3) to certain statements made by the Examiner, and (4) to some of the Examiner's findings, as not being supported by the evidence.

States Marine's exceptions as to the failure to find the Howard and States Marine dock receipts conclusive as to the density of the bales were not properly taken in the absence of any showing that the information therein was based on inspection and measurement of the bales, whereas the inspection report, prepared for the purpose of enforcing conference tariff provisions and prepared in the ordinary course of business of the Cargo Inspection Bureau, was based on actual measurements and computations which were not shown to be false or inaccurate. The dock receipts show all six bale lots to measure exactly 1800 cubic feet, which would be a remarkable coincidence for irregularly shaped cotton bales. No evidence overcoming the inspection reports was introduced by respondents to show the bales were measured to obtain information to be written in the dock receipts, nor how the 1800 cu. ft. measurement was obtained.

The failure to find that the measurements shown on the inspection report were made by longshoremen is not an error because this fact does not control the result. Measurement by longshoremen does not of itself impeach the accuracy of the measurements in the absence of any proof that longshoremen are incapable of taking accurate measurements or that other specific means were taken showing innaccuracy. The failure to find that 99% of the cotton exported is high density cotton and to infer therefrom that the density of this cotton shipment is above 27 lbs. per cu. ft. is not controlling in the face of the actual measurement made of this particular shipment which was not shown to be wrong. Other omitted findings requested by respondents consisting of incorrect evidences of density are equally irrelevant. The failure to use inaccurate or non-controlling premises for the Examiner's conclusions was not error.

The exceptions of both parties as to the admission of the inspection report as hearsay, and its use, is the basis of most of the exceptions. The inspection bureau report was introduced and received in evidence without objection; no demand for its corroboration by cross-examination of the inspector who signed it was made, and it was accepted as valid at the time it was submitted. All evidence in the record relating to the dimensions of the bales was taken to be accurate without question at the time of transactions involved herein as shown by correspondence and by testimony in the record. At no time during the proceedings did the respondents question the authenticity or accuracy of the report, but only the possibility of error by longshoremen or because of the lack of supervision or of the usual results of compression by the Murray gin-press. The inspection report has rational probative value and is corroborated by the entire record. Responsible persons in their business would normally rely on a report of this kind unless clear evidence of inaccuracy or of lack of qualification of the inspector was shown. The report was not contradicted by any substantial evidence. All the evidence here shows, if anything, the authenticity of the inspection report made by an authorized and qualified agency and its appointed inspector. Respondent States Marine also did not refute (a) the clear implication that it relied on the report in furnishing information for its bill of lading and used the bill of lading as the basis for collecting freight shown in its applicable rates and charges before the refund was made, nor (b) the testimony of its vice president that because of the report it would not make any change in its freight billing. The exceptions based on a claim of hearsay as to the inspection report and the data and the computations therein, are not substantiated. A States Marine inter-office letter stating that "Hohenberg was aware that some of the bales were oversized, but were of the understanding" that States Marine "would protect them with the $2.45 rate on the entire 600 bales provided actual measurements were not taken by the inspection bureau" was also properly admitted for consideration as having some probative value to corroborate other testimony in the record.

Respondents cite *United Nations, et al* v. *Hellenic Lines Limited, et al*, 3 F.M.B. 781 (1952) for the proposition that the Commission cannot make a finding of guilt based upon uncorroborated hearsay. The case, however, is not controlling. The shipper of

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the bales of cotton complained that its bales were of high density whereas the freight was computed at an intermediate density rate. The bales were shipped from Brazil to New York by Moore-McCormack Lines under a bill of lading prepared pursuant to a written report of weights and measurements compiled in Brazil but the record was found to lack "details of the time or the place of any measurement of the shipment in Brazil and even the identity of the measurers." At New York the cotton was unloaded and then loaded into a States Marine ship for movement to Trieste. Another bill of lading was issued by States Marine which showed a lower density for the same cotton. Complainant sought to recover the difference between the higher freight rate charged by States Marine based on the density shown on its bill of lading and the lower rate which would have been charged for the density shown on the Moore-McCormack Lines bill of lading based on the density report made in Brazil. In the *United Nations* case the Moore-McCormack Lines bill of lading was contradicted by direct, positive and probative evidence produced by States Marine showing that in New York it had the cotton measured and weighed again resulting in a measurement and density justifying the rate charged by States Marine. In the present case there is no valid evidence to contradict the inspection report as there was in the *United Nations* case. Further, here the authenticity of the inspection report is corroborated by the conduct of all the parties in this proceeding and was accepted as valid at all times. The admissibility, not the validity of the inspection report, was challenged by the respondents herein.

The findings to which the parties except are: (1) that Hohenberg's Fresno manager advised States Marine's vice president some of the bales were "oversized" and would not qualify for the $2.45 per cwt. rate and that Hohenberg knew such facts; (2) that Murray gin-press bales have a density of 27 to 28 lbs. per cu. ft. "if properly operated" machines are used and there is no showing in the record that the gin compress was operated under normal conditions; and (3) the dock receipts do not counteract the inspection report.

Our review of the facts shown by the records and credible testimony indicates that the Examiner's findings are based on facts which are not disproven in this record.

In view of our discussion of the violation of Sec. 16 of the Act we also find that the exceptions to the Examiner's conclusions are likewise not well taken. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified.

Conclusion

We conclude that the Examiner's findings are consistent with the allegations and proofs.

We conclude that by the preponderance of credible evidence the charges against the shipper Hohenberg have been proven and Hohenberg has been shown to have knowingly and willfully, directly, by an unjust or unfair means, obtained transportation by water for property, consisting of 400 bales of cotton, at less than the rates or charges which would otherwise be applicable.

We conclude further that by the preponderance of credible evidence the charges against the common carrier by water States Marine have been proven and States Marine directly and in conjunction with another person, has been shown to have knowingly allowed a person to obtain transportation for property consisting of 400 bales of cotton at less than the regular rates or charges then established and enforced on the line of States Marine by means of false billing and by an unjust or unfair device or means.

Both Hohenberg and States Marine have violated Sec. 16 of the Act. Our conclusions and this report and order shall be reported to the Department of Justice for such action as it considers appropriate.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D.C., on the 6th day of October, 1961.

No. 892

STATES MARINE LINES—HOHENBERG BROTHERS. VIOLATION OF SECTION 16

This proceeding having been initiated by the Federal Maritime Board upon its own motion, and having been duly heard and submitted after investigation of the things and matters involved having been had, and the Federal Maritime Commission, as transferee, pursuant to Reorganization Plan No. 7 of 1961, effective August 12, 1961, of the functions vested in the Federal Maritime Board (abolished pursuant to Sec. 304 of said Reorganization Plan No. 7 of 1961), on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is Ordered, 1. That, the following respondents be and each one is hereby notified and required, (a) to hereafter abstain from the practices herein found to be unlawful under Sec. 16 of the Shipping Act, 1916, as amended; and, (b) to notify the Commission within twenty-five (25) days from date of service hereof whether such respondent has complied with this order, and if so, the manner in which compliance has been made, pursuant to Rule 1 (c) of the Rules of Practice and Procedure (46 CFR 201. 3):

States Marine Lines, Inc. (formerly States Marine Corp. of Del.) and Global Bulk Transport Corp. (formerly States Marine Corp.)

Hohenberg Brothers

2. That, the proceeding be, and it is hereby, discontinued.

BY THE COMMISSION.

(Signed) GEO. A. VIEHMANN
Acting Secretary

FEDERAL MARITIME COMMISSION

No. 931

AGREEMENT NO. 8555 BETWEEN ISBRANDTSEN STEAMSHIP COMPANY, INC., ISBRANDTSEN COMPANY, INC., AND AMERICAN EXPORT LINES, INC.

Decided November 27, 1961

F.M.B. Agreement No. 8555 found properly filed pursuant to Section 15 of the Shipping Act, 1916. Said agreement further found not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Further found that said agreement is not in violation of the Shipping Act, 1916; will not operate to the detriment of the commerce of the United States, and is not contrary to the public interest.

F.M.B. Agreement No. 8555 approved, pursuant to Section 15 of the Shipping Act, 1916.

Francis T. Greene, Whitman Knapp, David Simon, and *Robert Arum* for Prudential Steamship Corporation.

Richard W. Kurrus, John W. Castles, III, and *Leonard S. Leaman* for Isbrandtsen Company, Inc. and Isbrandtsen Steamship Company, Inc.

Ralph D. Ray, Frank B. Stone, Alan S. Kuller, and *Eugene R. Anderson* for American Export Lines, Inc.

Robert B. Hood and *Donald V. Brunner* as Public Counsel.

INITIAL COMMISSION DECISION [1]

BY THE COMMISSION:

This case presents two questions (a) is the Commission authorized and required to act with respect to certain agreements which have been filed with it, and (b) if so, what should the Com-

[1] The evidentiary hearing was held before an Examiner. Thereafter opportunity was afforded all parties to file proposed findings, conclusions, and supporting briefs. After such documents were filed, the Commission required the entire record to be certified to it for this initial decision, which is based on our consideration of the entire record, including proposed findings and conclusions, and supporting briefs.

mission's action be? The controlling statute, section 15 of the Shipping Act, 1916 (39 Stat. 733, 46 U.S.C. 814), hereinafter "the Act", reads in pertinent part as follows:

". . . every common carrier by water . . . shall file . . . with the Commission a true copy . . . of every agreement with another such carrier . . . controlling, regulating, preventing, or destroying competition . . . .

"The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements . . .".[2]

We find the following facts:

(1) Isbrandtsen Company, Inc., and American Export Lines, Inc., both common carriers by water, and New York corporations, have filed with this Commission, and ask this Commission to approve under section 15 of the Act, an agreement between them dated November 25, 1960, an important part of which (Exhibit "A") is an agreement between Isbrandtsen Company, Inc. and its wholly-owned subsidiary, Isbrandtsen Steamship Company, Inc. (also a New York corporation) dated November 23, 1960.[3]

(2) Isbrandtsen and Export are both primary United States-flag liner operators on Essential United States Foreign Trade Route No. 10[4] which runs between United States North Atlantic ports (Maine—Virginia, inclusive) and ports in the Mediterranean Sea and Black Sea, Portugal, Spain, South of Portugal and Morocco (Tangier to southern border of Morocco).

[2] This quotation is from the Act as amended by Public Law 87–346, 87th Cong., 1st Sess., effective Oct. 3, 1961 (75 Stat. 763). The characterization of this quotation as section 15 "in pertinent part" is not intended to indicate that the balance of the statute is not considered in deciding this case. As later indicated we have carefully considered the entire section and all arguments based on any provision in it. The quotation however, highlights (a) the character of agreements covered by the section, and (b) the statutory rule of decision with respect to them.

[3] Hereinafter "Isbrandtsen" means Isbrandtsen Company, Inc., "Export" means American Export Lines, Inc.

[4] "Essential United States Foreign Trade Route" as used herein, means a route which has been determined pursuant to section 211 of the Merchant Marine Act of 1936 (49 Stat. 1989, 46 U.S.C., 1121), to be an ocean route from ports in the United States to foreign markets essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States.

(3) The percentages of total commercial cargo moving on Trade Route 10 in 1957, 1958, and 1959 carried by Isbrandtsen and Export were approximately as follows:

Outbound	*Export*	*Isbrandtsen*
1957	29.8	4.0
1958	24.9	2.4
1959	20.6	2.4
Inbound		
1957	35.4	—
1958	29.2	—
1959	27.6	—

(4) Isbrandtsen and Export are both primary United States-flag liner operators on Essential United States Foreign Trade Route No. 18, which runs between United States Atlantic and Gulf ports (Maine-Texas, Inclusive) and ports in southwest Asia from Suez to Burma, inclusive, and in Africa on the Red Sea and Gulf of Aden.

(5) The percentages of total commercial cargo moving on Trade Route 18 in 1957, 1958, and 1959 carried by Isbrandtsen and Export were approximately as follows:

Outbound	*Export*	*Isbrandtsen*
1957	11.0	6.7
1958	7.6	5.6
1959	6.9	4.0
Inbound		
1957	11.7	.4
1958	12.4	.2
1959	9.5	.0

(6) The overall effect of the Isbrandtsen-Export arrangement before us (which has been designated F.M.B. Agreement No. 8555 and is hereinafter called "No. 8555") will be for Isbrandtsen, which recently acquired 26.37% of the outstanding Export common stock, to transfer its liner fleet of 14 ships, and its entire business (including good will) as a common carrier by water in the foreign commerce of the United States to Export, agreeing as a part of the transaction not to compete in the services transferred without Export's consent.

> The foregoing findings require us to conclude, as we do, that F.M.B. Agreement No. 8555 in its entirety constitutes an agreement and arrangement between Isbrandtsen and Export, common carriers by water, and citizens of the United States, controlling, regulating, preventing, and destroying competition.

The clear, unqualified language of section 15 of the Shipping Act, 1916 therefore requires us to approve, disapprove, cancel, or modify No. 8555.[5]

The first question is therefore answered in the affirmative: we are required to act with respect to No. 8555. We now turn to the remaining question which is *what* should our action be, and with respect thereto, we find the following additional facts: [6]

(7) In this case there is neither claim nor evidence that No. 8555 is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or as between exporters from the United States and their foreign competitors, or is in violation of the Act.[7]

(8) Prudential Steamship Corporation (hereinafter "Prudential") does not operate on Trade Route 18, but is a primary United States-flag liner operator (subsidized) on Trade Route 10.

(9) Prudential has successfully operated on Trade Route 10 for more than ten years, most of that time unsubsidized, and has steadily increased its outbound carryings of

[5] We hold that Congress means what it says. Congress (by Section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify "*every* agreement . . . controlling, regulating, preventing, or destroying competition". To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny*, would constitute statutory *amendment* masquerading as statutory *construction*. We are not authorized anywise, with respect to particular types of agreements, (or anything else), to emasculate the Act to the detriment of the public interest, and this (although it might make our task substantially easier) we will not do.

[6] If we found that No. 8555 is unjustly discriminatory or unfair as between (1) carriers (2) shippers (3) exporters (4) importers (5) ports, or (6) exporters from the United States and their foreign competitors, it would necessarily be disapproved, cancelled, or modified as provided by section 15 of the Act, as would also be required if we found that it would operate to the detriment of the commerce of the United States, be contrary to the public interest, or be in violation of the Act. Otherwise, according to the legislative mandate, it must be approved. This test presents questions for highly specialized judgment in the maritime transportation field, for what is "unjustly discriminatory" or "unfair," will "operate to the detriment of the commerce of the United States" or "be contrary to the public interest" in that area, depends in large measure upon considerations not elsewhere applicable.

[7] This leaves for consideration whether No. 8555 is unjustly discriminatory or unfair as between carriers (i.e. as between Export and Prudential), will operate to the detriment of the commerce of the United States, or be contrary to the public interest.

commercial cargo from 1957 to 1959 inclusive from 3.8% to 5.5% while Isbrandtsen's fell from 4% to 2.4% and Export's fell from 29.8% to 20.6%. Inbound, Prudential's percentage-carriage rose from 7.7% in 1957 to 10.4% in 1959, while Export's fell from 35.4% to 27.6%. Isbrandtsen's operating pattern does not permit it to carry substantial inbound cargo on this trade route.

(10) Export, Isbrandtsen, and Prudential, as United States-flag liner operators on Trade Route 10, face strong, increasingly effective competition from more than 30 foreign-flag lines. To prosper, even to survive, United States-flag operation must achieve maximum operating efficiency, and the public interest demands its achievement by all lawful means.

(11) Outbound sailings on Trade Route 10 by United States-flag lines and foreign-flag lines, 1957-1960 were approximately as follows:

	1957	*1958*	*1959*	*1960*
U. S. Flag	210	271	268	246
Foreign Flag	346	426	415	463

For the four-year period, foreign-flag sailings outnumbered United States-flag sailings by an average of more than 160 sailings per year. In 1960 foreign flags outnumbered United States flags by 217 sailings, and made 65.3% of that year's sailings on the route.

(12) Although from 1957 to 1959 the volume of liner-cargo moving outbound on Trade Route 10 has held steady, and the inbound cargo movement substantially increased, the proportion of cargo carried by United States-flag ships both outbound and inbound has steadily and substantially declined. Cargo-carryings under foreign flag have increased proportionately to United States-flag losses.

(13) No. 8555 will result in substantial economies and improved operating-results in the combined Export-Isbrandtsen operation, and increase the efficiency of performance.[8]

[8] Aside from alleged fear of wholly hypothetical injury at some necessarily unspecified future date, this appears to be the primary (if not the only) basis of Prudential's protest against our approval of F.M.B. Agreement No. 8555. Not only is it unsubstantial; to adopt

(14) No. 8555 will result in the performance of Isbrandsen's service competitive with Prudential being performed by a subsidized operator or a subsidized operator's wholly-owned subsidiary.

(15) The operations of subsidized operators and their subsidiaries, competitive with other United States-flag lines as distinguished from Isbrandtsen's present, unsubsidized competition with Prudential, are particularly restricted by law, and subject to constant policing by the Maritime Administration.[9]

(16) There is no reasonable probability that No. 8555 will result in any substantial loss of revenue by Prudential or that Prudential will as a result of No. 8555 be hampered anywise in maintaining and improving its service, or be otherwise injured.[10]

Based upon the findings we have made and the whole record in this case, we find, determine and conclude that No. 8555 is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; that it will not operate to the detriment but will operate to the advancement of the commerce of the United States; that it is not in violation of the Shipping Act, 1916; and that it it is not contrary but beneficial to the public interest.

It follows that we should approve F.M.B. Agreement No. 8555, and we do approve it. An appropriate order will be entered.[11]

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it would in our opinin, be contrary to the dominant public interest, which is the basis of our decision on the merits, and on the jurisdictional point, as well. Prudential may have an interest in preventing its United States-flag competitors from increasing the economy and efficiency of their operations. If so, the private interest must yield to the public interest, which demands that United States-flag steamship lines in foreign trade (especially, subsidized operations) operate as economically and efficiently as possible.

[9] e.g., Section 804 of the Merchant Marine Act of 1936 provides *inter alia*, that it shall be unlawful for a subsidized operator or its subsidiary to operate foreign flag vessels in competition with United States-flag operators (such as Prudential) on essential United States foreign trade routes. And see certain standard provisions in all operating-differential subsidy contracts.

[10] While each and every result of maritime operating pattern changes cannot, of course, be predicted with certainty, it is significant that no evidence in this record would, in our opinion, support a finding that, as a result of this agreement, Prudential will lose a ton of cargo in the foreseeable future.

[11] Except to the considerable extent that the proposed findings and conclusions are substantially embodied herein, they are denied as unsupported by substantial evidence, contrary to the weight of the evidence, or irrelevant to decision under Section 15 of the Shipping Act, 1916.

FEDERAL MARITIME COMMISSION

No. 931

AGREEMENT NO. 8555 BETWEEN ISBRANDTSEN COMPANY, INC., ISPRANDTSEN STEAMSHIP COMPANY, INC., AND AMERICAN EXPORT LINES, INC.

ORDER

Whereas the Commission has this day determined herein that Agreement No. 8555 is subject to the provisions of Section 15 of the Shipping Act, 1916, and meets the standards of said section, which therefore requires the Commission to approve it.

Now therefore, It is ordered, That said agreement be, and it hereby is, approved, and this proceeding is discontinued.

By the Commission November 27, 1961.

(Sgd.) GEO A. VIEHMAN
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 883

UNAPPROVED SECTION 15 AGREEMENTS WEST COAST SOUTH AMERICA TRADE

Decided: December 7, 1961

Respondents not shown to have been acting pursuant to an unfiled agreement or cooperative working arrangement under section 15 of the Shipping Act, 1916, in the West Coast South America trade during the years 1956 and 1957.

John R. Mahoney and *Robert P. Beshar* for respondent Atlantic and Gulf/West Coast of South America Conference and its member lines.

Leonard G. James and *Robert L. Harmon* for respondent Pacific/West Coast of South America Conference and its member lines.

John E. Cograve and *Edward Aptaker* Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*; JOHN HARLLEE, *Vice Chairman*; ASHTON C. BARRETT, *Commissioner*; JOHN S. PATTERSON, *Commissioner*.

BY THE COMMISSION:

In January 1960, the Federal Maritime Board, the Commission's predecessor, ordered an investigation upon its own motion to determine whether the Atlantic and Gulf/West Coast of South America Conference and the Pacific/West Coast of South America Conference and their members[1] in 1957 or prior thereto had acted under an agreement or agreements relative to rates or rate information that had not been filed for Board approval as required by section 15 of the Shipping Act of 1916.

A hearing was held before an Examiner on March 2, 1961 in San Francisco. At that time there were introduced in evidence a number of letters and telegrams between the two conference chairmen, and both chairmen testified. They were the only witnesses. The documents had been produced by the conferences, under protest, and after a period of delay during which they resisted as improper Public Counsel's motion for the production of such information. Subsequently briefs were submitted by respondents and by Public Counsel and the Examiner issued his Recommended Decision.

In his decision the Examiner recommends that we find that "although the record unquestionably shows a cooperative *spirit*, for the most part, between the two conferences, it discloses no 'agreement' or 'understanding' for a 'cooperative working arrangement' which would destroy competition between them" and that "on this record, . . . respondent's actions during 1956-57 have not been shown to be in contravention of section 15."

No exceptions to the Recommended Decision were filed. Oral argument was neither requested nor held. The matter is accordingly before us for final decision.

Member lines of both conference respondents serve the West Coast of South America and carry cargoes for shippers competing in that area with respect to certain commodities, including wheat, woodpulp, asphalt, dynamite and newsprint. During 1956 and 1957 the chairmen of the two conferences exchanged correspondence concerning rates on such commodities and charges thereon. Principally these communications took the form of inquiries and replies concerning rate changes which one conference or the other had adopted or had under consid-

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[1] Members of the Atlantic and Gulf/West Coast of South America Conference are as follows: Compania Colombia de Navegacion Maritima, S.A. (Coldemar Line), Compania Sud Americana de Vapores (Chilean Line), Flota Mercante Grancolombiana, S.A., Grace Line Inc. (Grace Line), Gulf & South American Steamship Co., Inc., Rederiet Ocean A/S and West Coast Line, Inc. (West Coast Line).

Members of the Pacific/West Coast of South America Conference are as follows: Compagnie Generale Transatlantique (French Line), Compania Chilena de Navegacion Interoceanica, Compania Naviera Independencia, S.A. (Independence Line), Compania Naviera Rosaria S.A. (Peru Line), Flota Mercante Grancolombiana, S.A., Grace Line Inc. (Grace Line), Kawasaki Kisen Kaisha, Ltd., Nippon Yusen Kaisah, Ltd., N.V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn", Royal Mail Line, Ltd., Westfal-Larsen & Company, A/S (Westfal-Larsen Company Line), Wiel & Amundsen A/S (Latin American Line).

eration. Usually the inquiries were prompted by shippers' requests for rate quotations or rate reductions. For the most part, the respondents furnished each other the requested information, but after having reached an independent decision as to whether to change or maintain the rate in question. There were, however, a few exchanges of rate information and opinions before either conference had reached a decision on the matter.

The pertinent parts of section 15 of the Shipping Act of 1916 require common carriers by water and other persons subject to the Act to file with the Commission (formerly the Federal Maritime Board) copies of every agreement with another carrier or other person subject to the act which fixes or regulates transportation rates; controls, regulates, prevents or destroys competition; or in any manner provides for an exclusive, preferential or cooperative working arrangement. If an agreement is oral, a memorandum describing it must be filed. Section 15 further provides that "before approval, or after disapproval, [by the Commission] it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement . . ."

Discussion and Conclusions

The case submitted to us for decision turns primarily on the question whether there was an agreement, understanding or cooperative working arrangement between respondents. On this question we are faced with a want of proof.

The documents in the record do not show any formal agreement between the two conferences to exchange rate or rate making information, and the conferences deny the existence of any such agreement. While a formal agreement is not necessary, the absence thereof obviously increases the difficulty of establishing the nature of any mutual understanding or arrangement between the parties. Though they cannot be as easily proved, practices, understandings and arrangements violative of the law can as easily result from tacit agreements as from formal stipulations. Moreover, the mere existence of the kind of situation we have here, involving a rather frequent interchange of rate information by competitors, is enough to suggest that they may be acting outside the requirements of the statute and warrant inquiry as to whether in fact they are.

The respondents engaged in a series of inquiries concerning rates. These were usually prompted by requests from shippers for rate reductions or quotations. In most instances, the information which passed between respondents regarding these requests referred to rates already independently adopted, although they might not yet have been made effective. On a few occasions, it appears that there was some discussion of rates and rate considerations prior to the decision on the rate in question by either conference, but this was not shown to be an established practice. Notice of a rate change was not automatically forthcoming from either conference.

As noted, the Examiner concluded that this evidence established only the existence of a cooperative "spirit" between the two conferences and did not show an agreement or understanding for a cooperative working arrangement which would destroy competition between them. A cooperative "spirit" does not quite achieve the status of an agreement or understanding or a cooperative working arrangement that would be included within the scope of section 15.

We concur with the Examiner that there was not sufficient evidence of an agreement or understanding for a cooperative working arrangement. Accordingly, there is no occasion to go into a discussion of anti-competitive questions that might arise where an agreement exists. In so holding, however, we wish to state that we deem it a serious matter for parties subject to the Act to engage in exchanging rate information without our knowledge. In some circumstances, the exchange of rate information may not affect the public interest. But the natural consequences of such activity can clearly be a step toward or the very basis of improper practices, and the activity should therefore be avoided.

The proceeding will be discontinued.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D.C., this 7th day of December, 1961.

No. 883

UNAPPROVED SECTION 15 AGREEMENTS - WEST COAST SOUTH AMERICA TRADE

This proceeding having been instituted by the Federal Maritime Board upon its own motion, and having been duly heard and submitted, and investigation of the things and matters involved having been had, and the Commission, on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is Ordered, That this proceeding be, and it is hereby, discontinued.

BY THE COMMISSION.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 948

IN RE: PACIFIC COAST EUROPEAN CONFERENCE

Decided December 21, 1961

The Federal Maritime Commission has the right and duty to be informed of the concerted activities of common carriers and others who are parties to agreements under Section 15 of the Shipping Act, 1916, in order to discharge its statutory responsibility for maintaining continuous supervision and control over such activities. The Commission is compelled to withdraw approval of the section 15 agreements of parties who fail to comply with the Commission's requests for information or otherwise fail in their obligation to keep the Commission fully advised of their concerted activities.

Pacific Coast European Conference and its member lines ordered to furnish the Commission prior to close of business on January 22, 1962 specified information and documents, otherwise the Commission will withdraw approval of their basic conference agreement, No. 5200.

Leonard G. James and *Charles F. Warren* counsel for respondents.

Edward Schmeltzer and *Edward Aptaker* Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*; JOHN HARLEE, *Vice Chairman*; ASHTON C. BARRETT, *Commissioner*; JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

PROCEEDINGS

This proceeding was initiated by an order of the Commission's predecessor, the Federal Maritime Board (the Board), served June 20, 1961, directing that the Pacific Coast European Conference (the Conference) and its member lines show cause on or before July 20, 1961 why they should not comply with certain requests for information made by the Board and its Office of Regulations, or in the alternative, why FMC Agreement No. 5200 should not be disapproved.[1] The order authorized the filing of affidavits of fact and memoranda of law on or before July 10, 1961, and the filing of replies thereto on or before July 17, 1961. Oral argument before the Board was scheduled for July 20, 1961. Upon request of respondents the above times were subsequently extended to July 20, 1961 for affidavits and memoranda, July 27, 1961 for replies, and July 31, 1961 for oral argument. No affidavits of fact or memoranda of law were filed. The Board heard oral argument on July 31, 1961.[2]

FACTS

The Pacific Coast European Conference is an association of common carriers by water, subject to the Shipping Act, 1916, operating from United States Pacific Coast ports to ports in the United Kingdom, Ireland, the Scandinavian Peninsula, Continental Europe, and North Africa. The operations and activities of the Conference are conducted pursuant to the terms of Agreement No. 5200 which was approved some 24 years ago under the provisions of section 15, Shipping Act, 1916.

On December 15, 1959 the Board's Office of Regulations advised all conferences operating pursuant to agreements approved under section 15, that thereafter all information furnished the Board of actions taken under the approved agreements, whether by way of minutes or other reports, must be certified and subscribed to by the chairman, secretary or other responsible official of the conference submitting the information.

On February 5, 1960, the Office of Regulations, in a letter to Mr. J. F. McArt, Chairman of the Pacific Coast European Conference, noted that certain minutes of Conference meetings received in January of 1960 had not been certified and requested certified copies thereof. Although the Board in subsequent letters followed up this request, the Conference at no time complied

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[1] Agreement No. 5200 is the basic agreement authorizing the Pacific Coast European Conference. It was approved by the United States Maritime Commission on May 26, 1937, pursuant to the provisions of section 15, Shipping Act, 1916, and has been amended from time to time since then.

[2] Oral argument to the Board was heard by Chairman Stakem and Member Wilson, shortly before the Commission succeeded to the Board's regulatory functions. Mr. Stakem was subsequently appointed Chairman of the Commission. The other Commissioners joining in this report have carefully and fully considered all of the documents and the transcript of oral argument in this proceeding.

with it. Finally, on May 16, 1960, the Conference chairman wrote the Board that it was the view of the Conference that minutes of its meetings were kept solely for the convenience of the members and there existed no legal requirement for their submission to the Board. He also questioned the authority of the Office of Regulations to issue the December 15 communication relating to certification but said the conference had no objection to continuing the practice of furnishing the Board with copies of such minutes of meetings as the Conference kept.

Article 16 of the Conference agreement expressly requires that the Conference shall furnish to the Board, among other things, copies of minutes of all meetings. It does not, however, mention certification. In view of this and the Conference's position, the matter of certification will be made the subject of separate proceeding and will not be further dealt with in this Report.

On January 25, 1961 the Office of Regulations wrote the Conference chairman about Item 3134 of the minutes of Conference Meeting No. 450 (General) held November 1-3, 1960, which stated:

> Resolved, that entertainment of shippers of the type and kind given to a shipper and his wife on May 28 to June 3, 1960 on the Yacht Westerly of States Marine Lines shall be clearly understood to constitute a gift of substantial value prohibited by Article 3 of the Conference Agreement. Further, to this resolution, it is the sense of the Conference that any entertainment of shippers of extended, overnight duration and/or involving immoderate expense shall be considered excessive and as such prohibited. For purposes of this resolution, the term shippers includes consignees, their respective agents, employees, families, friends and relatives.

The letter requested information as to the action the Conference contemplated regarding this matter and in addition the identity of the shipper involved and the details of any particular shipment that formed the basis of the "gift." On March 28, 1961 the Conference was again requested to furnish this information.

The March 28 letter also requested that the Conference furnish a full and complete record of proceedings on its docket items and specifically asked for a detailed report of the facts on one such item, namely, several incidents involving alleged violations of the Conference Agreement by States Marine Lines. Request was further made for a statement of the basis of any action taken by the Conference with respect to these alleged violations, and for copies of the pertinent documents. This matter had come to the attention of the Office of Regulations through an indication in the minutes of Conference Meeting No. 419 that the Conference had continued on its docket for the next general meeting an item relating to violations of the Conference Agreement by States Marine and through a document introduced in evidence in another Board proceeding which bore the Conference letterhead and was entitled "Docket Item No. 8", subject "States Marine Lines agreement violations reported at Celler Committee hearings."

In connection with the foregoing, it should be noted that agreement No. 5200 binds the Conference to the maintenance of the agreed uniform rates and practices (Article 1), prohibits the members from engaging directly or indirectly in transportation under terms, conditions or rates different from those agreed upon (Article 2), and provides for the Conference's assessment of "liquidated damages" of from $500 to $10,000 for a member's nonobservance of the agreement or any of the Conference rules, regulations or tariffs, and also possible expulsion of the offending member from the Conference (Article 15).

In two letters dated April 7, 1961, the Conference chairman, Mr. McArt, responded to the requests of the Office of Regulations by asking it to state the specific purpose for which the information had been requested. To these letters the Secretary of the Board, at the Board's direction, replied on May 4, 1961 in part as follows:

The Board has a duty to detect possible violations of the Shipping Act, 1916, as well as possible violations of the approved agreement under which your member lines operate. The Board must be informed with respect to your Conference activity in order to determine whether such activity is within the scope of your approved agreement (No. 5200). The Board must also determine whether, on a continuing basis, the agreement meets the standards of section 15 and merits continued approval, or, conversely, whether it should be modified or disapproved as no longer meeting those standards. The Board has a duty to be informed in addition of the efficacy of the conference agreement as a respected and meaningful contract between members.

To date you have filed minutes of meetings so sketchy and incomplete that the activities and actions of the member lines are effectively withheld from proper review of the Board. You have refused to certify minutes of meetings as being true and complete reports of the actions of the member lines, although your conference agreement requires that minutes of your meetings—presumably true and complete—will be filed with the Board, and you have refused to admit the District Representative of the Office of Regulations to Conference meetings. Your actions in this regard indicate a willful withholding of information from the agency responsible for the enforcement of the Shipping Acts under which your Conference is permitted to exist.

> We reiterate the requests set forth in our letters . . . calling for information required by the Board in the administration of the Shipping Act, 1916, in order that it may be informed as to whether the agreement of your Conference continues to meet the standards of section 15, Shipping Act, 1916. Your reply furnishing the requested information and documents must be made by May 19, 1961. Failure to comply herewith will result in appropriate Board action to modify or cancel Agreement No. 5200, as amended, pursuant to the Shipping Act, 1916.

The Conference did not furnish the requested information. Instead, Mr. McArt by letter dated May 15, 1961 informed the Board in relevant part as follows:

> We cannot agree that this Conference has withheld any information from the Board that it is legally entitled to receive. Your letter speaks of the Board's "duty to detect possible violations of the Shipping Act, 1916" but does not refer to any particular violations which the Board is seeking to detect so far as the members of this Conference are concerned. We know of no violations of the Shipping Act or of possible violations and are completely at loss to understand the reason for your demand for further and additional information with regard to the decisions of the members of this Conference.
>
> Counsel for this Conference has given his legal opinion that there is no statutory requirement for the filing of Conference minutes, nor for Conferences to admit non-members to Conference meetings, nor for the Conference members to furnish to the Board a full and complete report, in detail, of actions with respect to breaches of the Conference Agreement by member lines. Counsel has advised that if such information should be called for by the Board in connection with an investigation of any violation of the Shipping Act, and if such information were pertinent and relevant to such investigation, then under such circumstances such information might become subject to subpoena, but is not otherwise subject to demand.

Following receipt of this explanation of the Conference's position, the Board served its Order to Show Cause. In that order the Board stated, so far as here pertinent:

(1) That the Board was under a continuing duty to maintain a constant surveillance over the activities of conferences operating in the foreign commerce of the United States pursuant to agreements approved under the provisions of section 15 of the Act;

(2) That the respondent Conference had failed, in whole or in part, to comply with specific requests for information by the Board and its Office of Regulations;

(3) That the Conference by its action had precluded the Board from effective review of the activities of respondent, thereby preventing it from carrying out its duties under the Act; and

(4) That respondents were directed to appear before the Board and show cause why they should not comply with the requests for information, or in the alternative have their basic conference agreement, No. 5200, disapproved.

As hereinbefore noted, counsel for the respondents appeared before the Board at the hearing on the order to show cause and argued respondents' position with respect to the issue framed by the order. However, respondents filed no affidavits, written memoranda, or replies, although granted the right to do so.

DISCUSSION AND CONCLUSIONS

Respondents' position is that the Commission has no duty or authority under the Shipping Act to maintain a continuing surveillance of their concerted activities, and that they have no obligation to furnish the Commission with information concerning such activities unless it is subpoenaed in connection with, and is relevant to, an investigation of a specifically charged violation of the Act. They also question the propriety of the show cause procedure utilized by the Board in this case. Stated another way, respondents' position is that they will furnish such information as they see fit to furnish concerning their conference activities and anything more the Commission may want it must attempt to obtain through compulsory process issued in a formal proceeding wherein violations of the Act are charged.

In our view, respondents are laboring under a gross misconception of their obligations and the Commission's duties. Their position must be rejected. Section 15 of the Shipping Act, 1916, which is reproduced in the margin,[3] does not confer upon steamship conferences and others subject thereto the right to conduct any of the concerted activities within its broad sweep, unless with the Commission's approval and under its continuing supervision and control. By the same token, it seems to us clear that the respondents may not frustrate the Commission's right and its duty to be informed at all times as to the nature of their conference activities.

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[3] Section 15 of the Shipping Act, 1916, as amended October 3, 1961 by Public Law 87–346 (75 Stat. 762, 763–4) reads as follows:

"SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regu-

Section 15 is a grant of limited legislative permission for carriers and others operating in this Nation's foreign water-borne commerce to engage in certain forms of concerted activity which would otherwise be unlawful under the antitrust laws, but only if and to the extent approved by the Commission and only so long as approved by it. The section expressly confers on the Commission the power of disapproval "whether or not previously ap-

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lating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

"The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adapt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

proved" and thus necessarily imposes a continuing duty upon the Commission to insure that the parties to section 15 agreements are at all times complying with the Act and their approved agreement and that their operations are not detrimental to the commerce of the United States or contrary to the public interest. This appears from the face of the statute. In addition, the legislative history of section 15 makes plain that Congress granted an antitrust exemption only because it envisioned that the permitted activities would be subjected to constant and effective government control and regulation.

The House Merchant Marine and Fisheries Committee in the report of its Investigation of Shipping Combinations, the legislative study underlying the Shipping Act, 1916,[4] made an exhaustive analysis of the problems presented by anticompetitive combinations in our water-borne foreign commerce. The Committee pointed out that Congress had but two courses. It could either restore unrestricted competition by prohibiting the anticompetitive agreements and understandings then widely used, or it could recognize these agreements and understandings along lines which would eliminate the evils flowing therefrom. While admitting the advantages of allowing steamship agreements and conferences in our foreign commerce,[5] the Committee was not disposed to recognize them "unless the same are brought under some form of effective government supervision." The Committee pointed out that to permit such agreements without this supervision would mean giving the parties an unrestricted right of action, which it definitely did not favor. (Alexander Report Vol. 4, pp. 415-17.)

This philosophy took shape and was enacted as section 15 of the Shipping Act, 1916, confiding to the agency administering the Act extensive powers of supervision and control as the condition precedent to any of the concerted activities covered by the section's rather all-inclusive language. As was pointed out by the court in *Isbrandtsen Co., Inc.* v. *United States*, 211 F. 2d 51 (D.C.

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[4] Committee on the Merchant Marine and Fisheries, House of Representatives 63rd Congress, Report of Investigation of Shipping Combinations under House Resolution 587 in 4 volumes, hereinafter referred to as the "Alexander Report."

[5] Among the advantages claimed for conferences were, greater regularity and frequency of service, stability and uniformity of rates and better distribution of sailings.

Cir. 1954), in discussing the authority to permit antitrust exemptions under section 15:

> The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does no invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute. (211 F. 2d, at page 57.)

Only recently in Public Law 87–346 (75 Stat. 762), amending the Shipping Act, 1916, Congress has reasserted the original philosophy that exemptions from the antitrust laws must be accompanied by effective governmental supervision and control of the concerted activities covered by section 15. By the enactment of that statute, moreover, Congress has provided new safeguards against the abuses which such activities make possible and has indicated that there is a need for even closer surveillance of the operations of conferences under their section 15 agreements.

Implicit in respondents' position is the notion that these statutory requirements for effective supervision and control were satisfied for all time when their agreement was originally filed and approved; thereafter, some sort of an immunity from our surveillance, as well as from the antitrust laws, set in. This is plainly erroneous. Section 15 quite clearly demands that we constantly inspect and if necessary regulate the activities of persons subject thereto. It imposes upon us, as it did upon our predecessors, the duty and authority of insuring that those who are permitted to engage in activities which would otherwise be unlawful, satisfy the statutory standards not only at the time they file for initial approval of their agreement but continuously thereafter. The section expressly does this by providing that we shall "disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved" that we find to be contrary to the Act's provisions.

It is manifestly not enough under the language of section 15 that we are apprised merely as to the terms of respondents' agreement. It is essential also that we know at all times the nature of their activities under the agreement, for how else can we determine whether it is being complied with, and is not being carried out in a way that violates the Act, is detrimental to commerce, or incompatible with the public interest.

Despite the plain thrust of section 15, respondents have denied the legal obligation to furnish the Commission any information respecting their conference activities.[6] They say we can find out what they are doing, if at all, only by subpoena issued in connection with a formal hearing or investigation which charges a specific violation of the Act. In advancing this contention respondents are apparently alluding to section 27 of the Act, which gives us subpoena power in formal complaint and violation proceedings. This, however, in no way impairs or relates to our power to demand information in other ways and for other purposes. We have the right, for example, to require the submission of information simply because we want to know whether the law is being complied with. Thus, in *United States* v. *Morton Salt Co.,* 338 U.S. 632 (1950), the Court in language particularly appropriate here had the following to say:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law. (338 U.S. 642–643).

The courts, moreover, have specifically upheld the power of the agency administering the Shipping Act to demand information for any of the purposes so well described in *United States* v. *Morton Salt Co., supra,* and have in this regard recognized the obligation to comply imposed on persons subject not only to section 15, but to the proscriptions embodied in the Act generally. See *Kerr Steamship Co.* v. *United States and FMB,* 284 F. 2d 61 (2nd Cir. 1960) with respect to our right to require information from persons subject to section 15, and the *Kerr* case, *Montship Lines, Ltd., et al.* v. *FMB and United States,* 295 F. 2d 147 (D.C. Cir. 1961), and *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139 (1937), with respect to our right under section 21 to require information in aid of our enforcement powers generally under the Act.

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[6] We are unable to reconcile this denial with article 16 of respondents' agreement, which requires them to furnish the Commission copies of minutes of all meetings, rates, charges, classifications, rules and/or regulations.

Aside from the fact that they are plainly wrong as to our legal authority, respondents have taken a position that would undermine the Act by rather completely thwarting our efforts to discharge our section 15 responsibilities. The technical argument they urge would relegate the discovery and correction of prohibited conduct to chance—the chance that the Commission might learn, not from the persons regulated under section 15 but from some accidental source, information adequate to draft a charge and institute a formal hearing thereon. Absent this, of course, nothing could be done, since the Commission cannot take action of the sort respondents propose in a vacuum. But the respondents could continue what they have been doing, namely, deciding for themselves whether and to what extent they will reveal the nature of their conference activities.

Nor is there any merit to respondents' contention that there is a distinction between the Commission's authority regarding breaches of the Conference agreement and its authority regarding violations of the Act. Respondents' conference agreement is not some sacrosanct private arrangement but a public contract, impressed with the public interest and permitted to exist only so long as it serves that interest. The purpose of the agreement was to spell out the ground rules under which the respondents could lawfully operate in concert if the agreement was approved, and it was wholly ineffective without approval. If the Conference departs from the approved rules, it is violating the Act, and if individual members do, it is more than likely that they too are violating the Act. But even if a member's conduct happens to involve only a breach of the agreement, this would not justify the Conference's refusal to furnish the Commission information. It is for the Commission to decide, in all cases, whether a given course of conduct under a section 15 agreement is violative of the Act, detrimental to commerce, or contrary to the public interest. We cannot discharge our duties under the Act by allowing conferences to substitute their judgment for ours in determining what activity violates the statute and what information they will furnish.

We should note moreover, that the respondents' agreement provides for Conference policing of breaches, *i.e.*, non-observance of the agreement or of Conference rules, regulations or tariffs, and it authorizes levies of from $500 to $10,000 against the offending member as well as the member's possible expulsion. The information which respondents refused to furnish the Board related, *inter* *alia,* to the manner in which they were implementing this provision of their approved agreement. Obviously, this is an important provision, directly bearing upon the Conference's vitality as an instrument whose continuance is in the public interest. Congress itself emphasized this fact in its recent amendments to the Act, Public Law 87–346, *supra,* which added to section 15 the requirement that we disapprove any agreement "on a finding of inadequate policing of the obligations under it."

As matters now stand in this case, respondents have refused even to convey information that they took policing action on a series of alleged agreement violations, much less information which would show us that their action was adequate. It is, perhaps, unnecessary to point out that this new requirement for the parties to adequately police their section 15 agreement would alone suffice to support our right to be fully and continuously informed as to their concerted activities.

We need not dwell on the questions respondents raise as to the propriety of this proceeding. They are but a corollary of respondents' contention that the Commission can only demand information by subpoena issued out of a formal evidentiary-type hearing. The complaint is that such a proceeding is necessary to provide proper notice and hearing, and an evidentiary record on which to base findings. Respondents also claim an order to show cause is unauthorized by the Act.

This procedural argument is but a play on form and words. The order to show cause was expressly provided for by the Board's rules,[7] it fully specified the charges against the Conference and alleged that respondents' actions had prevented the Board from carrying out its statutory duties, and it was well within the powers vested in the Board by the Act.[8]

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[7] The order to show cause was issued by the Board pursuant to Rule 5(g) of its Rules of Practice and Procedure, later also adopted by the Commission. Rule 5(g) entitled "Order to show cause" provides:

> "The Board may institute a proceeding against a person subject to its jurisdiction by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in rule 10(c), may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified."

Rule 10(c) provides that persons entitled to notice of hearings will be duly and timely informed of "(1) the nature of the proceeding, (2) the legal authority and jurisdiction under which the proceeding is conducted, and (3) the terms, substance, and issues involved, or the matters of fact and law asserted as the case may be."

[8] For example, section 22 of the Act provides that the Commission may, upon its own motion, investigate any violation of the Act "in such manner and by such means, and make such order as it deems proper."

The order gave respondents notice of the issues involved and time to prepare to meet them. Respondents asked for and received more time. The questions raised by the order, and by the correspondence between respondents and the Board which preceded the order (see our statement of facts), were purely legal. There was no factual issue and hence no occasion to compile an evidentiary record in a hearing. The Board had before it as background documents copies of the correspondence referred to, and the Conference agreement. Being privy to these documents, the respondents were, of course, fully aware of their contents. They were given ample opportunity to submit additional material, on both the facts and the law, but they at no time offered anything else. They were apparently content to stand on their position as advanced in oral argument and in their prior letters to the Board. Be that as it may, the proceeding in our view quite adequately satisfied the requirements of due process.

Through their continued refusal to supply the requested information, the respondents have shown a complete unwillingness to cooperate with the Federal Maritime Commission, the agency responsible for administering the Shipping Act. It is manifest that our predecessor, the Board, extended to them in a spirit of cooperation every opportunity to honor its requests, but they have preferred to shield their activities and stand on a technical legal argument of the sort we should think steamship conferences and others who must survive under section 15, would be the last to advance. We are accordingly left with no choice but to direct that respondents furnish the information specified in the accompanying order prior to close of business January 22, 1962, otherwise we shall withdraw approval of Agreement No. 5200.

APPENDIX A

PACIFIC COAST EUROPEAN CONFERENCE

Regular Members:

Anglo Canadian Shipping Company Limited

Blue Star Line, Limited (Blue Star Line)

Canadian Transport Company Limited

Compagnie Generale Transatlantique (French Line)

De Vries Pazifik Linie (Schiffahrtsgesellschaft De Vries & Co., m.b.H.)

The East Asiatic Company, Ltd. (A/S Det Østasiatiske Kompagni East Asiatic Line)

Fruit Express Line A/S (Fruit Express Line)

Furness, Withy & Co., Ltd. (Furness Line)

Global Transport, Ltd. (Global Transport Lines)

Hamburg-Amerika Linie (Hamburg American Line)

(Hanseatic-Vassa Line)—Joint Service (as one member only) of Hanseatische Reederei Emil Offen & Co.
Vaasan Laiva Oy

"Italia" Societa Per Azioni di Navigazione (Italian Line)

Italnavi Societa de Navigazione per Azioni (Italnavi Line)

Mitsui Steamship Co., Ltd. (Mitsui Line)

Norddeutscher Lloyd (North German Lloyd)

N.V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij (Holland-America Line)

Osaka Shosen Kaisha, Ltd. (O.S.K. Line)

Fred. Olsen & Co. (Fred. Olsen Line)

Rederiaktiebolaget Nordstjernan (Johnson Line)

Royal Mail Lines, Limited

Seaboard Shipping Company, Limited

(States Marine Lines)—Joint service (as one member only) of States Marine Corporation
States Marine Corporation of Delaware

Wegal A. B. (Totem Line)

Westfal-Larsen & Co. A/S (Interocean Line)

Western Canada Steamship Company, Limited

Associate Member:

American President Lines, Ltd. (American President Lines)

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held in its office in Washington, D. C., on the 21st day of December 1961

No. 948

PACIFIC COAST EUROPEAN CONFERENCE

This proceeding having been initiated by an Order to Show Cause issued by the Federal Maritime Board upon its own motion, and having been duly heard and submitted, and the Federal Maritime Commission, as successor to the Board, having fully considered the matter including the transcript of oral argument and having this date made and entered of record a Report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, (1) That pursuant to sections 15, 21 and 22 of the Shipping Act, 1916, respondents, the Pacific Coast European Conference and its member lines (specified in Appendix A), prior to the close of business on January 22, 1962, shall submit to the Commission information which the Commission deems necessary to the discharge of its responsibility under section 15 of the Act for exercising continuing and effective supervision and control of respondents' activities under their section 15 agreement, identified as FMC Agreement No. 5200, in order to insure that such activities are not in violation of the Act or said agreement, and are not detrimental to the commerce of the United States or contrary to the public interest, as follows:

1. A complete report on the entertainment of a shipper and his wife on May 28 to June 3, 1960 on the Yacht Westerly of States Marine Lines referred to in Item No. 3134 of the Minutes of Conference Meeting No. 450 held on 1-3 November 1960, including the identity of the shipper and the details of any particular shipment or shipments forming the basis of such entertainment, and a statement of any action contemplated or taken by the Conference in this matter and the facts affording the basis for such action;
2. A complete report of the facts, including the action taken by the Conference and the basis therefor, with respect to each incident listed in the document bearing the Conference letterhead dated February 10, 1960, entitled "Docket Item No. 8" subject "States Marine Lines agree-

ment violations reported at Celler Committee hearings," and listing the following items to be considered by the Conference:

"(a) Automobile Transportation—Star Kist Foods
(b) Yacht 'WESTERLY'
(c) Volkart Brothers interest Claim
(d) Volkart Brothers Predated Bills of Lading
(e) Shaw Cotton Company, Inc.
(f) Hohenberg Bros. False Rate Application
(g) Automobile Transportation—Bissinger & Co.
(h) Passenger Transportation—Calcot"

3. Copies of all correspondence or other documents relating to the matters referred to in 1 and 2 above;

It is further ordered, That in the event respondents fail to furnish the foregoing information and documents within the time specified the Commission shall by further order withdraw its approval of Agreement No. 5200; and

It is further ordered, That this preceding is continued pending further order of the Commission.

By the Commission:

(Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 904

PUGET SOUND TUG AND BARGE CO.
v.
FOSS LAUNCH & TUG CO., ET AL.

No. 914

PUGET SOUND TUG AND BARGE CO.
v.
WAGNER TUG BOAT COMPANY, ET AL.

Decided January 4, 1962

Foss Launch & Tug Co. held a common carrier with respect to general cargo carried under agreements with Northland Freight Lines, and said agreements held subject to Section 15 of the Shipping Act, 1916.

Further held that Northland Freight Lines is a non-vessel-owning common carrier subject to the jurisdiction of the Federal Maritime Commission.

Allegations of damages found not to have been sustained.

Mark P. Schlefer and *John Cunningham* for complainant.

Wallace Aiken, James T. Johnson and *Alan F. Wohlstetter,* for respondents.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*; JOHN HARLLEE, *Vice Chairman*; ASHTON C. BARRETT, *Commissioner*; JOHN S. PATTERSON, *Commissioner*.

BY THE COMMISSION:

This case results from complaints filed by Puget Sound Tug and Barge Co., hereinafter "Puget Sound".

There is no dispute as to the facts of the case or the primary issue, which is if Foss Launch & Tug Company (hereinafter "Foss") is a common carrier by water in the (now interstate) Alaskan trade. We find the relevant facts to be as follows:

(1) Foss for at least 10 years has been carrying cargo between Seattle (and other Washington ports) and Alaska by towed barge.

(2) Foss's chief shipper, without which it is doubtful if it would be in business, is Permanente Cement Company (hereinafter "Permanente"), whose bulk cement Foss carries from Seattle to Anchorage. The Permanente cement is Permanente's property and moves under a contract which began in 1950 and has been continued in effect (with some modification) since that time.

(3) Between January 7, and September 30, 1960, Foss towed from Washington ports to Alaska ports 72 barges in 51 tows.

(4) 11 barges of the 72 carried Permanente cement only, and 1 (Foss 206 which sailed from Seattle on April 6, 1960) carried Permanente cement and general cargo dispatched by T. F. Kolmar, Inc., doing business as Northland Freight Lines (hereinafter "Northland").

(5) On some voyages (when barges were not filled to capacity by the primary shipper's cargo) Foss has carried "filler" cargo, employing such devices as purchasing the cargo from the shipper in Seattle and reselling to the shipper in Alaska at a "profit" calculated to yield Foss the same amount it would have received as payment for carrying the cargo from Seattle to Alaska. On others, Foss has given the principal shipper the privilege of loading cargo other than his own along with his, and very little filler cargo has been directly secured by Foss.

(6) Foss has moved general cargo (ostensibly for Northland as shipper, and ostensibly as a contract rather than a common carrier) as follows:

(a) On Foss 206 which sailed from Seattle April 6, 1960, and arrived at Anchorage April 15, 1960, there was carried approximately 3,600 tons of Permanente cement, and approximately 400 tons of general cargo received by Foss from Northland. The general cargo was not owned by Northland but was covered by an agreement (apparently oral) between Foss and Northland under which Northland paid Foss fixed sums of approximately 50% of the sum received from the cargo owners by Northland for moving the cargo to Alaska.

(b) On each of 4 subsequent sailings Foss towed a barge carrying nothing but general cargo gathered from many sources by Northland, from Seattle to Anchorage. These barges moved under separate agreements between Northland and Foss.[1] Although there is no specific provision with respect to Alaska-to-Washington trips, the agreements do provide that "it shall be Northland's obligation to load and lash the cargo at Seattle, Washington, *and perform the same service at Anchorage, Alaska*" (emphasis supplied), and Foss has carried Northland's vans, containing small amounts of cargo on four southbound trips. Foss has received from Northland 50% of payments received by Northland on account of southbound cargo.

The four agreements provide, *inter alia*, that Northland shall have the exclusive use of the barges, be obligated to load and lash the cargo at Seattle and Anchorage; assume all berthage, wharfage, and accessorial charges; insure the lading with Foss as a co-insured; and fully protect Foss with respect to claims by the owners of the cargo. Actually, the primary action required of Foss, which is to transport the loaded barges from Washington ports to Alaska ports, *is not specifically stated in any of the agreements*. The closest things to it are (a) the provision that Foss "will make its steel barge Foss * * * available for Northland's capacity", (b) the provision that "Foss shall also have the privilege of towing said barge in conjunction with any other barges which may be destined to Anchorage or way ports", and (c) the provision in the "Force Majeure" clause, referring to "transportation of cargo hereunder". It is a necessary inference, however, that this is Foss's primary "operation and obligation", which Foss has fully performed. The barges are not manned, but the master and crew of the Foss towing vessel are Foss employees. Notwithstanding the provisions in the agreements that say that

[1] The Foss-Northland sailing dates April 6, May 22, July 31, and September 16, suggest an attempt to maintain regular monthly service. The identical language contained in the second "whereas clauses" of the four agreements providing for the May, June, July and September sailings, stating that "Northland and Foss desire to enter into an appropriate agreement covering their respective operations and obligations under *said arrangement*" (emphasis supplied) is interesting and significant. The word "arrangement" does not precede (or succeed) the quoted language. It may, of course, have been stricken from a preliminary draft. What does precede it is the statement that "Northland is a common carrier by water engaged in the business of transporting goods and merchandise between ports in the State of Washington and places in Alaska, and has appropriate tariffs on file with the Federal Maritime Board for the movement of such goods". This common carrier business then must constitute the "arrangement" (and cooperative working arrangements are specifically covered by Section 15 of the Shipping Act, 1916) under which Foss and Northland have respective operations and obligations.

Northland is obligated to load and lash the cargo at Seattle, Foss has loaded and unloaded at Seattle.

(7) The general cargo solicited from the general public and secured by Northland but owned by many individual shippers is received at Foss's wharf; loaded on the Foss barge by Foss at Seattle (southbound cargo is similarly unloaded); covered by bills of lading issued by Northland under the statement "In witness whereof, the master or agent of the ship has signed this bill of lading", and by manifests issued by Northland with copies to Foss.

(8) Northland solicits general cargo from the public for transportation to Alaska by water at rates stated in its tariff on file with the Commission, and it is general cargo so secured that Foss tows in its barges to Alaska under the agreements referred to in finding (6) above, and handled as described in finding (7) above.

Based upon the foregoing findings of fact[2] and the whole record, we conclude that with respect to the general cargo carried by Foss pursuant to the agreements (oral and written) covering sailings of April 6, May 22, June 28, July 31, and September 16, 1960, Foss is a common carrier by water in interstate commerce (Alaskan trade) and as such, subject to the jurisdiction of this Commission.

Two cases decided by our predecessor, the United States Maritime Commission, *New Automobiles in Interstate Commerce,* 2 U.S.M.C. 359 (1940), and *New York Marine Co.* v. *Buffalo Barge Towing Corp.,* 2 U.S.M.C. 216 (1939), were relied upon by the examiner in declining to hold Foss a common carrier, stating that these decisions are "decisive". Neither of these cases involved a wholly comparable situation. Here, in effect, two companies have established a service for all who care to ship general cargo at tariff rates on file with the Commission. One solicits and secures the cargo and the other furnishes and tows the barges which carry the cargo from port to port, each of the participants receiving 50% of the charge made for carrying the cargo.

Therefore, neither of the decisions cited can be regarded as decisive of this case, but to the extent they may be considered applicable, they are hereby overruled. To a great extent they are based upon what we consider over-emphasis of two points. The first is that the carrier did not hold itself out to be a common carrier. Where as here there is an obvious prearrangement that

[2] No findings or conclusions other than ultimate conclusions substantially in statutory language were proposed.

"A" will gather the cargo, and "B" will *actually carry it,* the holding-out by "A" that the cargo will move to its destination is attributable to "B" to the extent necessary to make "B"'s operations pursuant to the "A-B arrangement" common-carrier operations. We paraphrase *Globe Cartage Co., Inc., Common Carrier Application,* 42 M.C.C. 547, 550, as follows:

We are satisfied that in the circumstances here present, the relation between Foss and Northland is not the same as that between ordinary shipper and carrier. Northland is not like an ordinary shipper which tenders its own goods to a carrier for transportation. Northland merely tenders for transportation freight belonging to the general public, which it has accepted and assembled as the result of an understanding with many shippers that it will undertake to have the same transported to ultimate destinations. Northland has tendered to Foss, and Foss has transported, not traffic belonging to Northland but freight belonging to the general public, which Northland accepted and assembled as the result of the understanding with the shippers thereof that it would undertake to have the same transported. The facts which satisfy the requirement, insofar as Foss is concerned, that to be a common carrier there must be a holding out to transport for the general public are, first, that Northland dealt with the shipping public in general, and did not limit its activities to selected shippers, and second, that Foss transported traffic of the shipping public in general which was assembled by Northland as a result of the latter's undertaking to have the same transported. Under these circumstances, we think Northland must be treated not as an ordinary shipper but as an intermediary agency through which Foss held itself out to the general public to engage in the transportation of property by towed barges.

The force of the foregoing analysis is in no wise weakened by the fact pointed out by the examiner that the common carrier classification does not have the same significance (i.e. results) under the Interstate Commerce Act and the Shipping Acts, or by his comment as to a "liberal attitude" of the Interstate Commerce Commission.

The second over-stressed point is that as stated in *New Automobiles,* "such transportation * * * as they undertake [for others] . . . is the subject of special and individual contracts or arrangements between them and such other carriers". 2 U.S.M.C. 359, at 361-2. This has been soundly discounted not only by the Interstate Commerce Commission, as in *Charles Bleich Common Carrier Ap-*

plication, 27 M.C.C. 9 (1940), but by the Supreme Court in several terminal cases, notably *United States* v. *Brooklyn Eastern District Terminal*, 249 U.S. 296, 305-307 (1918).

It is quite clear that in the Foss-Northland arrangement, Foss has felt that by utilizing an agreement naming one company, Northland, as the sole *technical* shipper, it has prevented itself from becoming a common carrier. While we hold to the contrary, it is only fair to point out that we can perceive in Foss's and Northland's conduct no conscious law violation. "Common carrier", however, is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common-carrier status while remaining free to operate independent of common carriers' burdens. In practice, this means that where, as here, the "holding out" to carry cargo for the public is *indirect*, this holding out will nevertheless be attributed to the carrier, and considered to bring it within the scope of the ancient phrase saying that a common carrier is a carrier which "holds *itself* out" as willing to carry for the public. *Union Stockyards Co. of Omaha* v. *United States*, 169 F. 404 (1909). Similarly, the Supreme Court has held that common carrier status cannot be avoided by the device of acting as *agent* for a common carrier. *Union Stockyard and Terminal Co.* v. *United States*, 308 U.S. 213, 220 (1939). Where as here the service is essentially the carriage of cargo for the general public; *it is none the less common carriage* because the carrier adopts a device, such as the Foss-Northland contracts, to make it appear that the vessels are serving one shipper, whereas they actually are serving many.

Our decision is based upon the particular facts of this case, and nothing in this opinion is to be construed to mean that Foss's carriage of filler cargo or multiple-towing make Foss a common carrier, or that in its carriage for approximately twenty principal shippers[3] (even when filler cargo[4] was carried) Foss was *anything but a contract carrier*.

We further conclude that the oral agreement between Northland and Foss with respect to the April 6, 1960, sailing, the written agreements between Foss and Northland relative to the barges which sailed May 22, June 28, July 31, and September 16, 1960, and any oral agreements supplementing them were, and similar

[3] Northland is not considered one of these.

[4] The 400 tons of general cargo carried April 6, 1960, on Foss 206 is not considered filler cargo.

agreements will be, agreements between common carriers apportioning earnings and providing for a cooperative working arrangement and subject to the provisions of Section 15 of the Shipping Act, 1916.

The only suggestion that Northland is not a common carrier comes from the complainant, Puget Sound. Puget Sound argues that Section 8 of Public Law 86-615, 86th Cong., 1st Sess., changed Northland from a non-vessel-owning common carrier in the Alaskan trade, subject to this Commission's jurisdiction, to a forwarder subject to the jurisdiction of the Interstate Commerce Commission. We disagree. So (on the legislative record of P.L. 86-615) does the Interstate Commerce Commission, a fact which alone should decide the point against complainant, even without the firmly-fixed Congressional policy evidenced by Section 27 of the Alaska Statehood Act (P.L. 85-508, 85th Cong.) and elsewhere to preserve Maritime Commission jurisdiction in the Alaska trade. Considered together the statement and policy are conclusive that Northland remains a non-vessel-owning common carrier, subject to our jurisdiction. In a report dated August 11, 1959, to Hon. Oren Harris, Chairman of the House Committee on Interstate and Foreign Commerce, the Committee on Legislation of the Interstate Commerce Commission said the following about Section 8, which section is the sole support of complainant's argument:

> Section 8 of S. 1509, which was added to the bill at the time it was passed by the Senate, would amend section 303(e) of the Interstate Commerce Act by adding to that section a new paragraph "3" providing as follows:
>
> > "Notwithstanding any other provision of this Act, any common carrier by motor vehicle which was engaged also in operations between the United States and Alaska as a common carrier by water subject to regulation by the Federal Maritime Board under the Shipping Act of 1916, as amended, and the Intercoastal Shipping Act of 1933, as amended, prior to January 3, 1959, and has so operated since that time, shall as to such operations, remain subject to the jurisdiction of the Federal Maritime Board."
>
> The purpose of this provision, according to the Senate committee report, is to preserve the status of motor carriers operating as non-vessel common carriers by water under the jurisdiction of the Federal Maritime Board. In recommending this amendment, the committee stated in its report that it had noted the manner in which motor carriers, in conjunction with water and rail lines, have provided shippers a through bill of lading, a single-factor through rate, and single carrier responsibility from store door in Seattle to store door in Alaska, and that it was of the opinion that such service should be continued. The committee report also states that the new section would make it clear that motor carriers which do not operate vessels, but which enter into agreements under section 15 of the Shipping Act of 1916 as

common carriers by water with steamship companies so as to establish single-factor through rates in their own name for movements between Alaska ports and other U.S. ports are not freight forwarders subject to part IV of the Interstate Commerce Act. As explained in the report, if such carriers were placed in the category of a freight forwarder they would be precluded from carrying on the described operations since it would prevent the continuation of joint rates and interchange between land and water carrier.

It should be noted in this connection that section 27(b) of the Alaska Statehood Act specifically provides for the preservation of the exclusive jurisdiction of the Federal Maritime Board over common carriers engaged in transportation by water between ports in Alaska and other ports in the United States. It further provides that nothing in that act or any other act shall be construed as conferring upon this Commission jurisdiction over such transportation by water. As indicated above, the operations described in section 8 are now under the jurisdiction of the Federal Maritime Board, and under section 27(b) of the statehood act would remain there. Since there is nothing in any provision of S. 1509, or any other provision of law of which we are aware, that would disturb that jurisdiction, or have the effect of converting such operations to those of a freight forwarder subject to part IV of the Interstate Commerce Act, we do not see that section 8 of S. 1509 would serve any useful purpose. It appears to be merely duplicative of the effect of section 27(b) of the statehood act insofar as the described operations are concerned, and should probably be eliminated in order to avoid confusion. (*House Report No. 1914, 86th Cong., 2d Sess., p. 8*).

This disposes of the substantial issues other than approval, disapproval, etc. of Agreement No. 8492 between Northland and Wagner Tug Boat Company, (which the parties agree, as we do, should be administratively processed) and the issue of damages. Complainant alleges that it was damaged by losing cargo as a result of the Northland-Foss agreements and Northland's charging less than tariff rates. The evidence is insufficient to support the damage claim.

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

No. 831

PRACTICES AND AGREEMENTS OF COMMON CARRIERS BY WATER IN CONNECTION WITH PAYMENT OF BROKERAGE OR OTHER FEES TO OCEAN FREIGHT FORWARDERS AND FREIGHT BROKERS

Decided January 18, 1962

The compensation provisions of Public Law 87–254, amending the Shipping Act, 1916 to provide for licensing independent ocean freight forwarders, and for other purposes, are permissive. The statute does not require common carriers by water to pay brokerage to freight forwarders nor forbid carrier agreements prohibiting or limiting brokerage payments to freight forwarders.

Though not forbidden by Public Law 87–254, carrier agreements prohibiting brokerage or limiting the amount thereof to less than 1¼% of freight charges in the outbound foreign commerce of the United States, are detrimental to the commerce and contrary to the public interest, in violation of section 15 of the Shipping Act, 1916, as amended. Conferences or associations of common carriers by water engaged in such commerce, including the Pacific Coast European Conference, directed to comply.

The prior Report and Order in this proceeding are set aside and superseded to the extent inconsistent with this Supplemental Report.

J. Richard Townsend, for Pacific Coast Customs and Freight Brokers Association, intervenor

Gerald H. Ullman, for New York Foreign Freight Forwarders and Brokers Association, Inc., intervenor

Herman Goldman, Elkan Turk, and *Seymour H. Kligler,* for Customs Brokers and Forwarders Association of America, Inc., intervenor

Mark P. Schlefer and *John Cunningham,* for A. H. Bull Steamship Co., Lykes Bros. Steamship Co., Inc., and United States Atlantic & Gulf-Puerto Rico Conference, respondents

Robert L. Harmon and *Leonard G. James*, for Capca Freight Conference, Pacific Coast/Caribbean Sea Ports Conference, Pacific Coast European Conference, Pacific Coast/Mexico Freight Conference, Pacific Coast/Panama Canal Freight Conference, Pacific Coast/River Plate Brazil Conference, and Pacific/West Coast of South America Conference, respondents

John T. Rigby and *Arnold, Fortas & Porter*, for The Commonwealth of Puerto Rico, intervenor

T. R. Stetson and *Edwin A. McDonald, Jr.*, for United States Borax & Chemical Corporation, intervenor

James M. Henderson, Sidney Goldstein, F. A. Mulhern, Arthur L. Winn, Jr., Samuel H. Moerman, J. Raymond Clark, Burton Fuller, Louis J. Lefkowitz, Dunton F. Tynan, J. Bruce MacDonald, Walter J. Myskowski, Leo A. Larkin, Samuel Mandell, and *Sidney Brandes*, for The Port of New York Authority, The State of New York, and The City of New York, intervenors

Robert J. Blackwell as Public Counsel.

SUPPLEMENTAL REPORT BY THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

BACKGROUND

On June 29, 1961 our predecessor, the Federal Maritime Board (the Board), rendered its decision in consolidated Dockets 765 and 831. The Board therein found (p. 46) that payments of "brokerage" by common carriers by water to freight forwarders result in indirect rebates to shippers in violation of section 16 of the Shipping Act, 1916 (the "Act"), and constitute unjust and unreasonable practices in violation of section 17 of the Act. In accordance with this decision the Board finalized and issued new forwarder regulations (General Order 72, Revised, 46 CFR Part 244), under which such payments would have been completely prohibited. However, on September 19, 1961, prior to the effective date of these regulations, Public Law 87-254 (75 Stat. 522) was enacted to provide for the licensing of freight forwarders and to authorize carriers to compensate forwarders if duly licensed by this Commission and if they have performed certain specified services. The statute incorporates these provisions into a new section 44 of the Shipping Act.

Numerous petitions for reconsideration of the Board's Report were filed, and on October 4, 1961 the Acting Commission [1] cancelled General Order 72, Revised, since Congress had overruled the Board's ban on brokerage and new regulations based on P.L. 87-254 were necessary. That body also stayed the proceedings in Docket 831 pending further consideration of the petitions for reconsideration.

So far as here relevant, the purpose of Docket 831 was to reconsider the extent to which common carriers by water, in the outbound foreign commerce of the United States and in the domestic offshore trades, may by concerted action prohibit, control or limit brokerage paid to freight forwarders. Prior to institution of the proceeding the Board and its predecessor, the U. S. Maritime Commission, had held in several cases that carrier agreements prohibiting brokerage or limiting the amount thereof to less than 1¼% of freight, violated section 15 of the Act. However, having concluded to order a ban on all brokerage, the Board in its decision of June 29, 1961, reversed these earlier cases by making the following finding (Finding 8, p. 47):

> That the findings in the prior decisions cited in the order of Docket 831, to the effect that agreements between common carriers by water subject to the Act prohibiting the payment of brokerage, or limiting the payment of brokerage to less than 1¼ percent of freight charges, are or would be detrimental to the commerce of the United States in violation of section 15 of the Act, are no longer valid orders and the proceedings cited carrying such findings into effect will no longer be considered effective.

In view of the enactment of P. L. 87-254, we entered an order November 20, 1961, authorizing interested parties to submit briefs to us limited to the issue "whether agreements between common carriers subject to the Shipping Act, 1916, prohibiting the payment of brokerage or limiting the payment of brokerage to less than 1¼% of freight charges are, or would be in violation of said Act, as amended." Nine briefs were filed by interested parties and on December 12, 1961, we heard oral argument.

DISCUSSION AND CONCLUSION

On this reconsideration of this proceeding, two essentially different questions are presented. The first involves the impact, if any, of the forwarder statute, P. L. 87-254, on carrier agree-

[1] See sec. 302 of Reorganization Plan No. 7, H. Doc. 187, 87th Cong., 1st Sess.

ments prohibiting brokerage or limiting it to less than $1\frac{1}{4}\%$ of freight. The second is whether on this record such agreements may be approved under section 15 of the Shipping Act, 1916, as amended.

The forwarders and the intervenor New York authorities supporting them, make a series of arguments as to why carrier agreements prohibiting brokerage or limiting it to less than $1\frac{1}{4}\%$ of freight violate the Shipping Act, as amended, some of which we mention here. It is contended that in the amendments provided by the forwarder statute, P. L. 87-254, Congress said that an individual carrier "may compensate" forwarders and a carrier agreement prohibiting brokerage is contrary thereto because it would preclude a party to the agreement from acting independently if it desired to pay brokerage. It is said that Congress intended brokerage "should be" paid, and at the rate of $1\frac{1}{4}\%$ of freight. To support this position much reliance is placed on a statement in the House Merchant Marine Committee's report on the legislation, set out in the margin.[2] The argument is also made that such carrier agreements are unlawful because destructive of competition and outside the scope of section 15 of the Act.

As to section 15, which sets forth the criteria for approval of concerted carrier activities, the forwarders alternatively argue that agreements prohibiting or unduly restricting brokerage are detrimental to commerce in violation of that section. Along with Public Counsel they also point to the "public interest" clause which was added to section 15 by the so-called "dual rate" statute, Public Law 87-346 approved October 3, 1961 (75 Stat. 762), and contend that such agreements are "contrary to the public interest" under the Act as thus amended. The serious effect which the loss of brokerage revenue would have on an industry of recognized importance to the commerce of the United States, is urged in support of these arguments.

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[2] The following statement appears on page 3 of the report of the House Committee on Merchant Marine and Fisheries (House Rept. No. 1096, 87th Cong., 1st Sess.):

"To summarize the feeling of the Committee, we might say that services which have been performed by forwarders for shippers should be compensated for by the shippers and that where brokerage fees have been earned by the forwarders or brokers, then the carriers in turn should pay for those services at the historical rate [$1\frac{1}{4}\%$]. Both the carrier and the shipper should be expected to pay and the charge to each by the forwarders should be the reasonable value of the forwarder's service to each."

On the other hand, the conferences, supported by intervenor United States Borax & Chemical Corporation and also, on this issue, by Public Counsel, argue that the compensation provisions of P.L. 87-254 are clearly permissive, giving carriers the option to pay or not pay, consequently they say an agreement to prohibit or restrict brokerage cannot be violative of this statute. In their view, the sole question is whether such compacts are approvable under section 15. The conferences contend the record herein shows they are, whereas Public Counsel says, as previously noted, that a conference prohibition of brokerage must now be regarded as contrary to the public interest.

We agree that the statute is permissive. In enacting it Congress did not direct that brokerage be paid. By the same token it did not proscribe agreements among carriers not to pay it or to restrict it to less than 1¼%. Hence there is no basis for an argument that such agreements, in their impact upon an individual member with contrary desires respecting brokerage, run counter to the statute. The Committee Reports accompanying P.L. 87-254 contain no comment on such carrier agreements, although Congress unquestionably was aware of the matter and had undertaken to deal with it in some of the earlier legislative materials. Obviously, we cannot infer that Congress intended us to read into the statute important exceptions to the language it employed.

Basically, P.L. 87-254 was designed to overcome the Board's regulations, which would have eliminated carrier payments of brokerage to freight forwarders in the export foreign commerce of the United States as being the source of much malpractice. Congress disagreed that the remedy should be a complete ban on brokerage. It concluded that brokerage could be authorized if forwarder licensing and other safeguards were provided to take care of malpractices. It also found "most persuasive" testimony by carriers who were supporting the forwarders that the forwarders' services were in fact of value to them and they were willing and desired to continue to pay a reasonable fee therefor, if permitted to do so.[3]

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[3] Thus, the Senate Commerce Committee (Senate Rept. 691, 87th Cong., 1st Sess., p. 3, 4, 5-7) reported that the carriers supporting the forwarders felt "the work of the forwarders was of value to them, well worth the 1¼ percent brokerage they now pay and would gladly continue to pay." In the House Committee Report, House Rept. 1096, *supra*, p. 3) it was phrased this way: "Testimony before the committee by the carriers was to the effect that this [1¼ percent brokerage] was a justifiable fee to be paid by them and that this arrangement would be entirely satisfactory to the various conference lines."

Congress accordingly consented to the payment of brokerage. But it did not see fit to require a carrier to make such payment and it set no rate therefor if paid. The language Congress employed in the statute (section 44(e)) is that a carrier "may compensate" a forwarder. The forwarders themselves concede that this is permissive, at least as to an individual carrier, who they admit is free to compensate a forwarder or not (assuming of course the statutory conditions for payment are met). While disputing a like freedom for group action *not* to pay, the forwarders further admit that conferences may agree to pay brokerage, may agree to set the upper limit of brokerage so long as it is at least 1¼% of the freight charge, and may agree to prohibit brokerage altogether in the domestic offshore trades, although P.L. 87-254 expressly applies to these trades. The interpretation the forwarders seek to give the statute is therefore manifestly inconsistent.

Congress' handling of the brokerage rate question lends further support to our construction of P.L. 87-254. Although it considered specifying the rate for brokerage if paid, or an upper limit on what could be paid, no attempt was made in the statute as finally written to fix any figure. Instead, P.L. 87-254 by its language permits the carrier to determine "the extent of the value rendered" by the forwarder. Commenting on this language, the House Committee said it did not intend that it "should act as a diminution of the historical 1¼ percent as brokerage," and the forwarders stress this in their argument. However, the following statement by the Senate Committee does not express the same view but one which shows that brokerage if paid may vary in amount and is thus compatible with the permissive nature of the statute's compensation provisions: [4]

> Before deciding to delete the provision limiting brokerage to 5 percent, your committee considered reducing that maximum percentage or even specifying 1¼ percent. However, the amount of brokerage which carriers or conferences thereof pay is a matter which, like the fixing of ocean freight rates, has been and we think, should continue to be left to free enterprise determination. Such determination must be subjected to the Board's vigilant enforcement of pertinent provisions of the Shipping Act, 1916, as amended by this Act, and all other applicable laws. In our opinion, an element of elasticity is necessary in order to meet ever-changing needs of international shipping serving the foreign commerce of the United States.

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[4] House Rept. 1096, *supra*, p. 3; Senate Rept. 691, *supra*, p. 5.

Brokerage agreements among carriers regulate competition and it is well settled that they are within the plain compass of section 15.[5] That section, we think, must furnish the answer to our problem, since such agreements are not proscribed by P.L. 87-254. As amended by the "dual rate" statute, P. L. 87-346, *supra,* section 15 requires the disapproval, cancellation or modification of carrier agreements which we find, *inter alia,* to be detrimental to the commerce of the United States or contrary to the public interest. We see no occasion here to determine what the "public interest" amendment may add to section 15. Throughout the long-standing brokerage controversy "detriment to the commerce" has been interpreted and applied in a manner that encompasses the public interest, and we are satisfied that it must control our present course.

It will be helpful in illuminating the result we reach to briefly review at this juncture the law concerning carrier agreements affecting brokerage as it existed at the time of the prior report herein. Until 1957 the Board and its predecessor had consistently held that carrier agreements prohibiting brokerage or limiting it to less than 1¼% of freight are detrimental to the commerce of the United States. *Pacific Westbound Conference Agreement,* 2 U.S.M.C. 775 (1946); *Agreements and Practices Pertaining to Brokerage,* 3 U.S.M.C. 170 (1949); *The Joint Committee of Foreign Forwarders Assn., et al.* v. *Pacific Westbound Conference, et al.* 4 F.M.B. 166 (1953). The *Agreements and Practices* case, like the instant proceeding, was a general investigation into the subject. The named respondents were all outbound conferences and their member lines having prohibitions on the payment of brokerage, except the Pacific Coast European Conference which for some reason, presumably inadvertence, was not named. However, this conference appeared in the proceeding and offered evidence.

As expressed particularly in the *Agreements and Practices* case, the substance of the above holdings was that the forward-

[5] The forwarders argument that carrier agreements regulating brokerage are beyond the scope of section 15 of the Act, cannot be taken seriously. Put forth in the alternative, one facet of the argument is bottomed on the premise that the carriers are in competition with the forwarders for forwarding business and conspire to refuse brokerage in order to destroy the forwarders and take over their business. Another facet is discussed at page 36 of the prior Report herein. The argument is at odds with the facts, with precedent, and with much of the forwarders' principal position.

ing industry makes a valuable contribution and is essential to the United States commerce, that a considerable portion of its revenue is derived from brokerage, and that it is determental to the commerce to allow concerted carrier action that would, in its ultimate over-all effect, seriously impair the industry's ability to function by depriving it of such revenue. The respondent conferences were accordingly ordered, in March 1950, to remove from their agreements or tariffs prohibitions against the payment of brokerage and limitations on the amount thereof to less than 1¼% of freight. This they did but not until they had unsuccessfully challenged the order in two separate three-judge district courts, one on the east coast and one on the west. Both courts specifically upheld the finding of detriment to the commerce.[6]

In October 1954 the Board commenced an action against the Pacific Coast European Conference, aimed, *inter alia*, at bringing its brokerage practices into line with the foregoing decisions, since they did not in some instances conform thereto. The conference took the position that it was not a named respondent in the *Agreements and Practices* case, *supra*, hence the order therein was inapplicable to it. So far as here relevant, the result of the proceeding was inconclusive. The Board decided not to require the conference to modify its practices as per the prior holdings, pending the outcome of a new general investigation which the Board announced it would conduct for the purpose among others of reconsidering "the extent to which conferences may properly prohibit or limit brokerage payments without detriment to the commerce of the United States." The Board explained that certain of the premises underlying the *Agreements and Practices* decision "may not generally be true today" though it could not so find on the record then before it. *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 225, at 237 (1957).

The instant proceeding, Docket 831, is the general investigation the Board thus announced it would undertake. It was instituted in January 1958 and was subsequently consolidated for hearing

[6] *Atlantic & Gulf/W. Coast of Central America and Mexico Conf., et al.* v. *United States*, 94 F. Supp. 138 (USDC, S.D.N.Y., 1950); *Pacific Westbound Conf., et al.* v. *United States*, 94 F. Supp. 649 (USDC, N.D. Calif., 1950). In the latter case the court said: "We agree with the New York court that the record sustains the conclusion that the activities of the freight forwarders have had a substantial proximate bearing upon the development of American maritime commerce and that the challenged provision of the conference agreements results in detriment to the commerce of the United States."

with Docket 765, which had been commenced some years earlier as a general investigation into the practices of ocean freight forwarders with a view to amending the Board's General Order 72 pertaining to freight forwarders. In its Report of June 29, 1961 on these consolidated dockets, the Board's major conclusion, as previously noted, was that brokerage payments were the source of malpractices and therefore should be totally prohibited. This conclusion having been reached on the larger issue of permitting brokerage at all, subsidiary questions as to the propriety of carrier agreements that regulate brokerage were rendered academic, and the findings in the prior cases concerning such agreements became, as the Board said, "of no further material effect" (p. 42).

The premise for this action of the Board—that brokerage would not thereafter be paid—was of course reversed by Congress. The practice of paying brokerage in the outbound foreign commerce has continued uninterruptedly, and is very widespread. The situation in this and other significant respects is thus exactly what it was at the time of the Board's Report, and what it had been for a decade or more prior thereto under the added impetus given the practice by the aforesaid agency and court decisions condemning certain conference activity against brokerage.

In its Report the Board found, as the earlier decisions had, that United States exporters are largely dependent upon forwarders to perform essential services and "the forwarding industry is an integral part of the commerce of the United States, and makes a valuable contribution to foreign trade" (p. 7–8). The industry's substantial revenue from brokerage was detailed (p. 10–11), and the importance thereof recognized—the impact of losing such revenue "would undoubtedly be severe" (p. 21, 35).[7] The Board believed, however, that the loss of brokerage revenue could and should be wholly recovered through increased forwarding charges to the shippers, a position much disputed by the forwarders and others, and now settled, we think, by the action of Congress authorizing brokerage payments. The Board did not dispute, and seems to have acknowledged, that if its solution to the problem of lost brokerage revenue were wrong, then the record herein confirmed, as the earlier cases had held, that it would be detrimental to the commerce for carrier agreements to deny brokerage or restrict it below 1¼% of freight (p. 41).

[7] The Senate Commerce Committee also noted these facts and stressed them as reasons for passing legislation that would permit brokerage to be paid. Senate Rept. 691, *supra*, pp. 3-4.

In our view the foregoing circumstances point clearly to a finding on this reconsideration of Docket 831 that carrier agreements of the type described are detrimental to commerce. We are reinforced in this view by the fact that Congress in permitting brokerage undertook to provide its own remedy, in the form of licensing, conditions precedent to payment, and increased regulatory authority, for dealing with the malpractices the Board had found and which had influenced its decision so heavily. In effect, the grounds for the Board's actions, including its overturning of the prior cases, were eliminated. We have found no other ground for upsetting the prior cases in this record or in the conferences' argument, and the Board's findings, read in the light of the radically changed situation that actually evolved, appear to support adherence to those cases. If, therefore, there is to be a revision of the prior holdings, as respects either prohibitions or the 1¼% minimum rate, it will have to come in a future proceeding as the result of some new and compelling factors which can stand the test under the several requirements of section 15, as amended.

We conclude and find on this record that agreements between common carriers by water in the export foreign commerce which prohibit brokerage or limit the amount thereof to less than 1¼% of freight charges, operate to the detriment of the commerce of the United States and are contrary to the public interest, in violation of section 15 of the Shipping Act, 1916, as amended. All conferences or associations of common carriers by water in the outbound trades in the foreign commerce of the United States, including the Pacific Coast European Conference, are respondents herein and required to conform their brokerage practices to this ruling. An appropriate order accompanies this Supplemental Report.

Agreements concerning brokerage in the offshore domestic trades are excluded from this ruling since the conditions in those trades are materially different and brokerage is not normally paid, as more fully set forth at pages 29-30 of the Board's Report.

Finding 8 of the Board's Report and Order is set aside and, to the extent inconsistent with this Supplemental Report, the Board's Report and Order are superseded.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., this 18t hday of January, 1962 1962

NO. 831

PRACTICES AND AGREEMENTS OF COMMON CARRIERS BY WATER IN CONNECTION WITH PAYMENT OF BROKERAGE OR OTHER FEES TO OCEAN FREIGHT FORWARDERS AND FREIGHT BROKERS

Petitions having been filed for stay and for reconsideration and reargument of the Report and Order of the Federal Maritime Board entered in this proceeding on June 29, 1961, the proceeding having been stayed pending further consideration, pursuant to such petitions, and the Federal Maritime Commission, as successor to the Board, having fully considered the matter including briefs and oral argument submitted to the Commission by the parties, and having entered of record a Supplemental Report containing the Commission's findings and conclusion thereon, which Supplemental Report is by reference incorporated herein;

It is Ordered, That Finding 8 of the Board's Report and Order of June 29, 1961 is set aside and, to the extent inconsistent with our Supplemental Report, said Report and Order of the Board are superseded; and

It is Further Ordered, That all conferences or associations of common carriers by water in the outbound trades in the foreign commerce of the United States, including the Pacific Coast European Conference, shall prior to March 23rd, 1962 modify their conference agreements, regulations and tariffs so as to eliminate therefrom any provisions which are not in compliance with the findings and conclusion contained in the said Supplemental Report.

By the Commission.

(Sgd.) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 243

Y. HIGA ENTERPRISES, LTD.

v.

PACIFIC FAR EAST LINE, INC.

Decided January 18, 1962

Pacific Far East Line found to have violated section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844), by charging and collecting compensation for the transportation of vans, knocked down, from Honolulu, Hawaii, to Agana, Guam, between July 21 and August 8, 1961, at less than the rate specified in its tariff schedule on file with the Federal Maritime Commission.

Permission granted to PFEL to abstain from collecting undercharge.

John Cunningham for Pacific Far East Line, Inc.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

On October 20, 1961, Pacific Far East Line, Inc. (PFEL) filed an application pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure, seeking an order granting permission to waive the collection of undercharges with respect to a shipment of vans, knocked down, from Honolulu, Hawaii, to Agana, Guam.

No oral argument or briefs were submitted. The presiding examiner in an initial decision served on December 5, 1961, found the rate as filed to be unjust and unreasonable and granted the waiver sought by PFEL. On January 4, 1962, we served notice of our determination to review the examiner's decision.

Prior to the shipment involved here, the applicable filed tariff [1] of PFEL contained no classification for "vans, knocked down" and that cargo should have moved under the classification of "Cargo, NOS, W/M, $80.00". PFEL found that it could not obtain the carriage of vans, knocked down, from Hawaii to Guam at the $80.00 rate. PFEL learned from discussions with Y. Higa Enterprises that such carriage could be secured if PFEL would reduce its rate to $43.00.

Thereafter, PFEL, pursuant to section 2 of the Intercoastal Shipping Act, 1933, applied for permission to establish in its tariff on less than the required thirty days' notice a new classification, to wit: "Vans, Knocked Down and Packing Material, W/M, $43.00, local rate." Permission to do so on not less than three days' notice was granted by the Federal Maritime Board on July 1, 1961 (Special Permission 3936). Pursuant to that grant, PFEL published the new classification in its tariff FMB–F No. 3, as Item No. 2172, on second revised page No. 85, issued July 14, 1961, effective July 19, 1961. However, PFEL neglected to file the new tariff with the Board, as required by section 2 of the Intercoastal Shipping Act, and consequently, the change did not become legally effective.

On July 20, 1961, PFEL transported a shipment of vans, knocked down, for Y. Higa Enterprises from Honolulu to Agana. PFEL charged and collected freight in the amount of $1,526.00 computed on the newly established but unfiled tariff. The rate legally in effect at that time would have produced an additional charge of $1,795.00. It is the collection of the undercharge that PFEL seeks permission to waive. When PFEL became aware of its failure to file the new rate, it again sought permission to establish the new rate on less than thirty days' notice. Permission to do so was granted and the new rate and classification properly filed with the Board on August 4, 1961.

DISCUSSION

PFEL admits that the rate ($43.00) charged was not the legally effective rate, and that it should have charged and collected freight charges at the $80.00 rate. PFEL further admits "that the freight charges applicable [$80] when this shipment moved were unlawful in violation of section 18 of the Shipping Act, 1916, as amended."

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[1] Pacific Far East Line, Inc., Guam Freight Tariff No. 3, FMB–F No. 3.

We agree with PFEL that the legally applicable rate for the shipment under consideration was $80.00, not $43.00. The shipment under consideration is subject to the provisions of the Intercoastal Shipping Act, 1933, which makes it unlawful to charge or demand or collect or receive a greater or *less* or different compensation for the transportation of property than the rates, fares, and/or charges which are specified in its schedules *filed with the Board and in effect at that time*. PFEL therefore has violated section 2 of the Intercoastal Act. The facts before us do not indicate that the violation was a deliberate or intentional act by PFEL. Had PFEL promptly filed the tariff revision of July 14, 1961, with the Board, there would have been no violation, and the $43.00 rate charged and collected would have been legally in effect.

PFEL circulated a tariff supplement to the shipping public showing that the $43.00 rate was to become effective on a date prior to the shipment by Y. Higa Enterprises, Ltd. The $43.00 rate had been determined after discussions with shippers and in view of the fact that the legal effective rate—$80.00—was too high to economically warrant any movement of vans. The failure of PFEL to file the rate with the Board was an unjust and unreasonable practice, the results of which however should not be placed upon a seemingly innocent shipper. Accordingly, we will grant the waiver sought.

We need not here determine whether the $80.00, Cargo NOS, rate was unjust or unreasonable, nor are we required to exercise our powers under either section 18 of the Shipping Act or section 4 of the Intercoastal Act. The rate has now been properly changed pursuant to the permission granted by the Federal Maritime Board.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., this 18th day of January, 1962 1962

SPECIAL DOCKET NO. 243

Y. HIGA ENTERPRISES, LTD.

v.

PACIFIC FAR EAST LINE, INC.

Whereas, the Commission, on the 18th day of January, 1962, having made and entered a report stating its conclusions and decision herein, which report is hereby referred to and made a part hereof:

It is ordered, That the application of Pacific Far East Line, Inc., to waive collection of certain undercharges be, and hereby is, granted.

By the Commission.

(Sgd.) THOMAS LISI,
Secretary.

(SEAL)

FEDERAL MARITIME COMMISSION

No. 927

WEST INDIES FRUIT COMPANY AND DOW JENKINS SHIPPING COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Decided January 22, 1962

Respondent's rate on bananas from Ecuador to Galveston, Texas, found not to be unduly preferential or prejudicial between shippers or ports in violation of Section 16, Shipping Act, 1916, nor unjustly discriminatory between shippers or ports in violation of Section 17, Shipping Act, 1916.

Robert N. Kharasch, William J. Lippman, and *Samuel W. Shapiro,* for complainants.

Renato C. Giallorenzi, for respondent.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

This proceeding arises out of a complaint filed by the West Indies Fruit Company and Dow-Jenkins Shipping Company (complainants) alleging that the rate charged by respondent, Flota Mercante Grancolombiana, S. A. (Flota) for the carriage of complainants' bananas from Ecuador to Galveston, Texas, subjects complainants and the Port of Galveston to an undue and unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act,[1] 1916 (the Act) and results in a rate

[1] 46 U.S.C. 815 and 816.

which is unjustly discriminatory between shippers and ports in violation of Section 17 of the Act for the following reasons: (1) the rate charged complainants by Flota for the carriage of their bananas from Ecuador to Galveston is the same as that charged other shippers for the carriage of bananas from Ecuador to North Atlantic ports, particularly Baltimore; (2) Galveston is closer to Ecuador than North Atlantic ports; (3) the vessels used by Flota in its Gulf service are older and slower than those used in its North Atlantic service; (4) the Gulf service is irregular; and (5) the difference in service to the respective areas has "profound competitive effects." Hearing was held before an examiner and in his initial decision he concluded that no violation of Sections 16 or 17 had been shown. Exceptions to the initial decision were filed and oral argument was heard. Exceptions and proposed findings not discussed in this report nor reflected herein have been considered and found not justified by the facts or not related to material issues in this proceeding.

Complainants, with their principal place of business in Miami, Florida, have imported bananas into Galveston from Ecuador since 1951, and the predecessor of complainant, West Indies, began using Flota's vessels in 1957 on a contract basis. As of August 1959 the rates to Galveston ranged from $26.00 to $27.00 a ton, or between 9 and 16 percent lower than Flota's rates to the North Atlantic from Ecuador. Under Flota's pro forma forward-booking contracts, dated September 1, 1959, which were offered to all qualified shippers of bananas, a rate of $34.00 a ton was established from Ecuador to both Baltimore and Galveston. Both before and subsequent to the signing of the forward-booking contracts, complainant West Indies made repeated efforts to get the Galveston rate reduced, and on each of these occasions Flota agreed that the Galveston rate was too high and should be lower than the Baltimore rate. Despite the efforts of complainant and the agreement of respondent, the rate remained $34.00 a ton.

Galveston is 408 miles closer than Baltimore to Guayaquil, the principal banana port in Ecuador—the equivalent of about one day's steaming time. The vessels used by Flota in its Galveston service are older and slower than the vessels used in the Baltimore service. Between September 1959 (the date of the present forward-booking contracts) and the middle of February 1961 (one month prior to hearing), there were 50 voyages in Flota's Galveston service as compared to 73 voyages in its Baltimore service. There are three sailings a month in the Galveston service but the booking contracts contain no provision as to the scheduling of arrivals. Of the 50 Galveston arrivals, only 18 (or 36 percent) were within one day of a regular schedule. In contrast, 60 of the 73 Baltimore arrivals (or 82 percent) were within one day of a regular schedule. Compainants used Galveston as a distribution center and some shipments are made as far north as Winnipeg and Toronto, Canada, as far east as Ohio, and as far west as Colorado, Arizona, and New Mexico. Prior to September 1959, the market price of bananas at Gulf ports had been, generally, a half cent a pound ($10 a ton) below the market price at North Atlantic ports;[2] and through absorption of the inland freight differentials and by the expanded use of trucks, Gulf importers were able to compete to some extent in the above northern and eastern areas with importers at North Atlantic ports. The parity of the Gulf and North Atlantic rates lessened the ability of Gulf importers to compete.

Complainants' total sales in the so-called common market area are 6% of their total imports through Galveston, but only 3% of the fruit carried on Flota's vessels goes to this common market. Complainants' principal competition comes from bananas imported into New Orleans. Only 18 of the hundreds of buyers in the common market have purchased bananas from both complainants and North Atlantic importers. Houston is the regular port of call for Flota for the loading and unloading of general cargo, and a short deviation is made to Galveston to discharge complainants' bananas.

Complainants have alleged two separate violations of Sections 16 and 17 of the Act, the relevant portions of which read as follows:

> *Section 16* . . . That it shall be unlawful for any common carrier by water . . . either alone or in conjunction with any other person, directly or indirectly:
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage . . .
>
> *Section 17* . . . That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports . . .

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[2] In the opinion of the witnesses, United Fruit Company sets the market price of bananas at both North Atlantic and Gulf ports.

Complainants contend that (1) it is not necessary to prove competitive injury from a preferred *shipper* to establish a *port* discrimination violating Sections 16 and 17 of the Act, and (2) it is not necessary to prove loss of specific sales to a preferred shipper in order to prove competitive injury from a discrimination.

On the one hand complainants have charged that Flota's rate of $34.00 a ton on bananas to Galveston subjects complainants to undue and unreasonable prejudice; confers an undue or unreasonable preference upon banana importers into Baltimore; and is unjustly discriminatory as between complainants and Baltimore importers. Complainants also charge that Flota's rate to Galveston confers an undue or unreasonable preference upon the *Port* of Baltimore; subjects *Port* Galveston to undue or unreasonable prejudice and is unjustly discriminatory as between the Port of Galveston and the Port of Baltimore. Thus, complainants allege discrimination as between *shippers* and discrimination as between *ports* both in violation of Sections 16 and 17 of the Act. Complainants have confused their arguments in support of these two separate and distinct violations. We deal with them separately herein.

The manifest purpose of the Sections, 16 and 17, is to require common carriers subject to the Act to accord like treatment to all shippers who apply for and receive the same service. *American Tobacco Co.* v. *Compagnie Generale Transatlantique,* 1 U.S.S.B. 53, 56 (1923). Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. *Port of Philadelphia Ocean Traffic Bureau* v. *The Export S.S. Corp., et al.* 1 U.S.S.B. 538 (1936). There must be at least two interests involved in any case of preference, prejudice or discrimination, and it is essential that there be established an existing and effective competitive relationship between the two interests. *Huber Mfg. Co.* v. *N.V. Stoomvart Maatschappij "Nederland", et al.* 4 F.M.B. 343 (1953), *American Peanut Corp.* v. *M. & M. T. Co.,* 1 U.S.S.B. 78 (1925), *Boston Wool Trade Assn.* v. *M. & M. T. Co.,* 1 U.S.S.B. 24 (1921), *Eagle-Ottawa Leather Co.* v. *Goodrich Transit Co.,* 1 U.S.S.B. 101 (1926). This competitive relationship is necessary not only to show the extent to which the complaining shipper was damaged by the alleged preference, prejudice or discrimination; its establishment is also necessary to prove the violation itself. *American Peanut Corp.* v. *M. & M. T. Co., supra; Boston Wool Trade Assn.*

v. *M. & M. T. Co., supra.* Complainants have confused proof of the competitive relationship itself with proof of the character, intensity and effect of that relationship. In order to prove a violation of Sections 16 and 17, it is necessary to first establish the competitive relationship itself. Proof of the character, intensity and effect of the competitive relationship is necessary to prove the amount of damages and sustain an award of reparations.

It is for complainants to establish the existence of an effective competitive relationship between themselves and banana importers into Baltimore. On the record before us they have failed to do so. Of the hundreds of buyers in the common market only 18 purchase Galveston bananas from complainants, and there is no substantial evidence in the record to show that complainants' bananas compete with bananas imported into Baltimore. It is worthy of note that the evidence of record leads just as reasonably to the conclusion that complainants' primary competition in the so-called common market comes from North Atlantic ports other than Baltimore. Complainants' principal witness stated that he had no conception of the percentage of fruit imported into Baltimore on Flota's vessels actually purchased by the 18 buyers in question. Rule 10 (o) of this Commission's Rules of Practice and Procedure places the burden of proving the fact of the necessary competitive relationship upon complainants as the proponents of the order in this proceeding. This burden cannot be satisfied by mere assertions of competition unsupported by substantial evidence of record.

In order to sustain an award of reparations for damages resulting from a discrimination, complainant must show specific pecuniary loss. This principle was recognized by our predecessor in *Waterman* v. *Stockholms,* 3 F.M.B. 248 where the Board said at page 249:

> It has long been established by the courts and Government agencies having jurisdiction in such matters that (a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself *without proof of pecuniary loss* resulting from the unlawful act does not afford a basis for reparation. Citing *Pennsylvania R.R. Co.* v. *Int'l Coal Co.,* 230 U.S. 184, 203, 206. (Emphasis supplied.)

See also *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.,* 1 U.S.S. B. 41, and *Cudahy Packing Company* v. *Atchison, Topeka and Santa Fe Railway Company et al,* 234 I.C.C. 569 (1939).

In attempting to show pecuniary loss complainants point to the "historical" differential of half a cent a pound between the market price of bananas at Gulf ports and the market price of bananas at North Atlantic ports, with the Gulf price the lower. Complainants contend that this differential is due to the fact that transportation costs to the Gulf are half a cent a pound less than transportation costs to North Atlantic ports. As authority for this assertion complainants cite the testimony of Mr. Fulks, Vice President of Marketing, Standard Fruit and Steamship Company, which is engaged in the business of importing and distributing bananas. Mr. Fulks, admitting that he was not a "shipping man," testified in a general way that as a "rule of thumb" his company used half a cnet a pound as the difference in cost between operating chartered ships into New Orleans (the only Gulf part served by Standard) and operating chartered ships to New York or Charleston. Evidence regarding the operation of chartered ships into New Orleans, New York, and Charleston does not support a charge of discrimination against common carrier vessels operating into Galveston and Baltimore, and we find that such testimony does not support complainants' assertion that the $10.00 a ton differential in market price is due to a corresponding differential in transportation costs.

After pointing to the historical differential in market prices at Gulf ports and Atlantic ports, and equating this differential with an alleged corresponding differential in transportation costs in favor of Gulf ports, complainants argue that Flota abolished the differential by raising both the Baltimore rate and the Galveston rate. The Galveston rate was raised from $26 to $27 a ton to $34 a ton, and at the same time the Baltimore rate was raised to $34. The complainants argue that their pecuniary loss is half a cent a pound, or $10 a ton, but they are willing to accept $7.00 a ton, or the difference between the old Galveston rate and the present Galveston rate of $34.00. Fatal inconsistencies appear in complainants' arguments. Complainants, in their brief, state that Flota in 1958 established its Gulf rates 15 percent below its Baltimore rates, citing a table appearing at page 6 of their brief. We need only point out that the table to which complainants refer compares the Galveston rates with rates into Philadelphia; no mention is made of Baltimore. Various ships are involved, and the percentage of differential between Philadelphia and Galveston ranges from 9% to 16%.

Charges that Flota has discriminated against complainants and the Port of Galveston and preferred banana importers into Baltimore and the Port of Baltimore are not sustained by evidence showing rates, cost of service, etc. to New York, Philadelphia, Charleston, or New Orleans.

It is the contention of complainants that it is unnecessary to show a competitive relationship between the prejudiced and preferred port to establish discrimination as between localities and ports in violation of Sections 16 and 17. We do not agree. As in cases of discrimination between shippers, it is essential to establish an existing and effective competitive relationship in cases of port discrimination. In *New York Port Authority* v. *A. B. Svenska,* 4 F.M.B. 202 (1953), our predecessor, the Federal Maritime Board, discussing proof of unjust discrimination under Sections 16 and 17, said at page 205:

> In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) that the preferred *port,* cargo or shipper *is actually competitive with the complainant,* (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable or unjust. *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.,* 1 U.S.S.B.B. 538, 541, (1936); *H. Kramer and Co.* v. *Inland Waterways Corp. et al.,* 1 U.S.M.C. 630, 633 (1937). (Emphasis added.)

The need for such a competitive relationship is obvious for the evil which Congress sought to correct when it included localities and ports in the prohibitions of Sections 16 and 17 was the unnatural diversion of cargo from one port to another by common carriers by water through the medium of unjustly discriminatory rates or charges. Thus, to the extent that cargo is diverted from one port to another, the two ports occupy a competitive relationship with respect to the diverted cargo. *Port of Philadelphia Ocean Traffic Bureau* v. *Export S.S. Co., et al., supra.*

Complainants cite two cases, *Sun Maid Raisin Growers Assn.* v. *Blue Star Line,* 2 U.S.M.C. 31 (1939) and *Grays Harbor Pulp & Paper Co.* v. *A. F. Klaveness & Co.,* 2 U.S.M.C. 366 (1940), as supporting their proposition that it is not necessary to show a competitive relationship to establish port discrimination. In the *Sun Maid Raisin* case the Commission found violations of Section 16 and 17 because there was substantial competition among the ports in question. As stated by the Commission at page 37:

> As hereinbefore indicated, as between Stockton, Oakland, Alameda and San Francisco *there is substantial competition.* Various shippers competing with shippers using the terminal ports on San Francisco Bay are desirous of routing their traffic through the port of Stockton, but due to the existing rate adjustment, they cannot do so except to their prejudice. (Emphasis supplied.)

We agree, as in the *Gray's Harbor* case, that a carrier's action which precludes the movement of cargo through a port constitutes discrimination; however, the competitive relationship being present, the removal of the discrimination would result in a resumption of actual competition. That is not the case here, however. All of the shipments here at issue moved pursuant to two year forward-booking contracts. All of Flota's space suitable for the carriage of bananas to both Galveston and Baltimore was contracted for during the period in question. Complainants admit that under such conditions there was no diversion of cargo from Galveston to Baltimore, but at the same time they contend that such a diversion was merely delayed and would take place in the future. There are two deficiencies in complainants' argument.

First, complainants seek reparations and allege port discrimination for a period in which we have found that there had been no diversion of cargo. Secondly, there is no evidence in the record showing that should such a diversion occur it would be to Baltimore. In failing to establish the required competitive relationship between the Port of Baltimore and the Port of Galveston and in failing to show by substantial evidence of record that Flota's rates resulted in a diversion of cargo from Galveston, complainants have failed to sustain their allegation of discrimination between ports in violation of Sections 16 and 17 of the Act.

On the record before us, we find that complainants have failed to show a violation of either Section 16 or Section 17 of the Act.

The complaint shall be dismissed.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., on the 22nd day of January, 1962

No. 927

WEST INDIES FRUIT COMPANY AND DOW JENKINS SHIPPING COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

This proceeding being at issue upon complaint and answer on file, having been duly heard, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made a report stating its conclusions, decision and findings therein, which report is hereby referred to and made a part hereof:

It is Ordered, That the complaint in this proceeding is dismissed.

By the Commission.

(Sgd) THOMAS LISI
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

No. 898

CALIFORNIA STEVEDORE & BALLAST CO., ET AL.

v.

STOCKTON PORT DISTRICT, ET AL.

Decided January 25, 1962

Agreements between Stockton Elevators, Inc., and Stockton Port District held subject to Section 15 of the Shipping Act, 1916.

Further held that by said agreements and acting thereunder respondents Stockton Elevators, Inc., and Stockton Port District have put into effect a practice related to and connected with receiving, handling, and delivering property, which practice is unjust and unreasonable, operates to the detriment of the commerce of the United States, and is contrary to the public interest. By putting into effect and carrying out that practice said respondents have failed to establish the just and reasonable practices required by Section 17 of the Shipping Act, 1916.

Cease and desist orders entered.

Richard W. Kurrus for complainants.

J. Richard Towsend for Stockton Port District, respondent.

H. Stanton Orser and *Joseph Martin, Jr.* for Stockton Elevators, Inc., respondents.

John Hays for Stockton Bulk Terminal Company of California, respondent.

J.Kerwin Rooney and *Lloyd S. MacDonald* for California Association of Port Authorities, intervener.

John F. McCarthy and *Willard Walker* for Port of Longview and Port of Vancouver, interveners.

Norman Sutherland for Commission of Public Docks of the City of Portland, Oregon, intervener.

775-794 O-65-7

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

Complainants are stevedores who attack an arrangement and agreements between the respondents Stockton Elevators, Inc. (hereinafter "Elevators"), and Stockton Port District (hereinafter "the Port").[1]

By said arrangement and agreements Elevators grants to the Port the exclusive right to perform all the usual or necessary dockside and other wharfinger and stevedoring services in connection with the mooring, loading to and unloading from water craft of bulk grain and other bulk commodities. It is the "exclusive" which is to say the monopolistic character of the arrangement to which the excluded complainant stevedores object.

Relevant facts in some detail were found upon substantial record evidence by our Chief Examiner who heard the testimony, and we adopt those findings (set out in the six numbered sections which follow) as our own. The Chief Examiner's footnotes have been changed to underscored statements within brackets, so as to avoid confusion with our own footnotes.

"1. Complainants hold themselves out, and are ready, able and willing to perform stevedoring work of all types at Stockton, as well as in the San Francisco Bay area. Generally, they are employed by the vessel owner or operator and work under the direction or control of the master of the vessel. In loading grain the functions of the stevedore begin only after grain leaves the loading spout.

"2. The Port of Stockton, located 75 nautical miles from the Golden Gate, is a public corporation operating terminal facilities at Stockton, California, and as such is admittedly an 'other person (subject to the 1916 Act) carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facili-

[1] Complainants are California Stevedore and Ballast Co., Marine Terminals Corporation, The San Francisco Stevedoring Co., Schirmer Stevedoring Co., Ltd., Seaboard Stevedoring Corporation, and Yerba Buena Corporation.

As defined in Section 15 of the Shipping Act, 1916, and as used in this opinion the term "agreement" includes understandings and arrangements.

ties in connection with a common carrier by water.' (See section 1 of the 1916 Act.) It publishes a terminal tariff which sets forth the exclusionary stevedoring practice. The tariff does not apply to bulk milled rice since the Port contends that the rice operation is not subject to the Board's jurisdiction, inasmuch as it is not in connection with a common carrier by water. As of now, the exclusionary practice extends only to grain, rice, logs and Army cargo. The Port sub-contracts its stevedoring work to private stevedoring companies, which load the grain onto the vessel under supervision of port personnel.

"3. Respondent Elevators is a private corporation which owns and operates, as a public utility, grain elevators and terminal facilities at the Port. It owns or leases the land on which the facilities are located. It has facilities for unloading rail cars, trucks and barges. Originally, it had a capacity of two (2) million bushels for grain and pelletized feed, which was enlarged considerably by the construction of four additional silos for the exclusive storage and handling of the rice of Rice Growers Association of California. When a ship is to be loaded, employees of Elevators run the elevator operation which moves the grain and rice to the end of the spout aboard ship. An employee stationed in one of the towers receives signals from the stevedore on the ship as to when to pour or stop pouring grain. The grain is conveyed by belts to two spouts which swing fore and aft on the ship and which can be extended or retracted in and out of the ship. The rice facility is used only for handling rice of the Association, which ships the rice to Puerto Rico on the *Marine Rice Queen*, a ship converted for the carriage of bulk milled rice. This vessel does not hold itself out as a common carrier, but transports only the rice of the Association, which is the owner, shipper and consignee thereof.

"4. In performing stevedoring services on grain, i.e., trimming, the stevedore hires the necessary personnel who load the ship either by direct pour or by a mechanical grain trimmer which, by means of a high speed belt, throws the grain into the desired location. [*The Port owns two trimmers costing $9,000 each.*] The stevedore contacts the ship's agent in advance of loading to prepare for the proper stowage of the vessel so that it will be seaworthy, and the compartments will be utilized in accordance with the terms of the charter party. Prior to loading, the stevedore must obtain from the vessel a certificate from the National Cargo Bureau stating that the fittings [*The fittings are installed by ship-*

wrights and not by the stevedore.] are in compliance with Coast Guard regulations for loading bulk grain. However, the inspector of the Bureau, who watches the loading, enforces loading requirements and thereafter issues a loading certificate which is *prima facie* evidence of compliance with the regulations. Any stevedoring company at Stockton would obtain all of its men, except its own superintendent, from the union hiring hall, including a walking boss. For direction of the men, the superintendent turns to the walking boss who watches the loading during the entire operation. All of the work is performed within the vessel, and the only use made of wharf facilities is electricity to operate the trimming machines, and use of the pier for movement of men and equipment to and from the ship.

"5. Many vessel operators and charterers have requested the services at Stockton of the various complainants, which they could not provide due to the exclusionary practice in question. Steamship company officials testified that the vessel operator has the responsibility and legal obligation to deliver the cargo; that the selection and hiring of the stevedore is not only normally done by the vessel operator, but as one witness said: 'it is practically a universal right'; and that if they (the steamship witnesses) could exercise such right, they would not employ the stevedoring services of the Port, but would rather employ one of the complainants because, as in any other business activity, competition produces more reasonable rates. However, there is no evidence that the companies concerned suffered in any way by not having a choice of stevedores at Stockton, or that any of the complaining stevedores would charge lower rates than the Port.

"6. The agreements which define the relationship between respondents, and which grant to the Port the exclusive right to perform wharfinger and stevedoring services on grain and rice have not been filed with the Board for approval under section 15 of the 1916 Act. [*The original agreement conferring this exclusive right as to grain, dated October 4, 1955, expired on November 7, 1960, with an additional 90-day period in which to negotiate a new contract. These negotiations were being carried on at the time of hearing.*] The Port did not file the agreements because it contends that Elevators is not an 'other person subject to the Act.' This, because (a) Elevators' delivery of grain at the end of the spout is a matter of convenience and is simply a delivery out of storage and the completion of the storage functions, and (b) Elevators' rice operation is not in connection with a common carrier by water. It is also contended that Elevators operates only as a warehouseman and is subject only to the jurisdiction of the Secretary of Agriculture under the United States Warehouse Act (7 U.S. Code 241).

"The agreement covering grain provides that the Port shall pay certain sums of money for the exclusive right to stevedore bulk grain cargoes, which have ranged from approximately $150,000 to $250,000 per year since November 1958. Furthermore, this agreement, dated October 4, 1955, grants to the Port the preferential right to use Elevators' wharf; provides for the method by which the Port shall fix rates to be charged against the vessel, and stipulates that Elevators will deliver the grain at end of spout on ship, and will maintain and operate the belts, conveyers, boxes, tower and tower houses necessary for use in the loading and unloading of vessels to or from elevator and/or wharf.

"The agreements covering rice consist of (a) an agreement dated September 15, 1959, which grants to the Port for 20 years the exclusive wharfinger and stevedoring rights as to rice, bulk grain and other bulk cargoes, including packages, loaded to or from deep draft vessels; provides that Elevators will deliver rice to end of spout on ship; provides for the method of fixing rates against the vessel; fixes the rates to be paid by the Port to Elevators on the above-named commodities, except rice owned by the Association (which exception will be void if the Association transfers its rice operations to Sacramento); and provides that Elevators shall maintain the facilities; (b) an operating agreement dated October 13, 1959, between the Port and Elevators providing that the latter will perform 'the terminal services of receiving, storing and delivering' of rice to end of spout which the Port has agreed to handle for the Association, and fixing the rates to be paid by the Port to Elevators for said terminal services, with provision for an annual distribution of finances between the parties; and (c) a lease dated October 19, 1959, of the facility by Elevators to the Port for 20 years, at a specified rental, which grants to the Port an easement to use the conveyor system through the facilities of Elevators to the end of spout on the vessel.

"An official of Elevators testified that the reason for giving the Port the exclusive stevedoring right was the inexperience of his company in stevedoring work, a desire to avoid possible labor troubles, and the fact that its competition for grain would come from the Bay area. [*Apparently this statement has reference to the fact that complainant Marine Terminals has a fifty percent interest in Islais Creek Grain Terminal in San Francisco which competes with Elevators.*] The Port's witness testified that it was necessary for the Port to control the operational features of the grain facility in order not only to ensure its success, but to protect the Port against competition from terminals in the Bay area. [*All of the complainants, except San Francisco Stevedoring, either operate or have an interest either directly or indirectly in the terminal business at San Francisco.*] It is customary in the Bay area for terminals to reserve to themselves the right to perform accessorial services in connection with the wharfinger business. But, as a general rule, they allow outside stevedoring companies to perform stevedoring work on their facilities."

The facts stated above are undisputed by exception or otherwise, except that respondents question the traditional right of a vessel's master to select stevedores, and deny that Elevators operates terminal facilities. Upon both points respondents are overwhelmed by the evidence. As to the first, it is clear that proper loading of grain is an essential element in the ship's seaworthiness for which the master is responsible, and see the uncontradicted testimony of J. W. M. Schorer, Pacific Coast Manager of Holland-America Lines (Tr. 82). With respect to the second, the elevator here is in and of itself a terminal facility in that it contains grains going aboard ships and which flow from the elevator to ships moored at the elevator's wharf. The elevator functions as an important unit in loading common carriers by water at the port of Stockton. Respondents' chief witness, C. W. Phelps, Traffic Manager of the Port, testified to the interest of the Port and Elevators in seeing that Elevators' facility "performs a service to the grain trade [moving through the terminal] and a success to the Port of Stockton."

Elevators itself testified through Exhibit 10 that its facilities, which are utilized by common carriers by water, include dock and wharf facilities suitable for docking of deep draft vessels and facilities for storage and elevation of bulk grain and other bulk commodities, and also loading facilities for loading bulk commodities from its storage facilities to vessels. We come now to determine if in the light of these facts, the arrangement between Elevators and the Port is (and the exclusionary agreements included in it are) subject to the provisions of section 15 of the

Shipping Act, 1916.[2] Our answer must be in the affirmative. Every agreement between persons subject to the Shipping Act, 1916, if (as here is undeniably the fact) such agreement gives special privileges or advantages, controls, regulates, prevents or destroys competition, or in any manner provides for an exclusive, preferential, or cooperative working arrangement is subject to section 15.

Respondents first claim that section 15 does not apply because, while the Port is admittedly a person subject to the 1916 Act, Elevators is not such a person, because Elevators is licensed and operates under the United States Warehouse Act (7 U.S.C. 241). This contention was considered and denied by the Federal Maritime Board in *D. J. Roach, Inc.* v. *Albany Port District*, et al., 5 FMB 333, 334 (1957), and by the Board and the Court of Appeals for the Fifth Circuit in the *Cargill* case, 5 FMB 648, 287 F. 2d 86. We hold here as was held in those cases that a grain elevator carrying on the business of furnishing terminal facilities in connection with common carriers by water, as Elevators does, is a person subject to our regulation under the Shipping Act, 1916, although in its grain storage functions it can be regulated by the Secretary of Agriculture under the United States Warehouse Act.

Respondents' second claim that section 15 does not apply, and that we lack power to strike down an unjust and unreasonable practice setting up a stevedoring monopoly, because we lack power to regulate the stevedoring business, is also without merit, and a plain *non sequitur*. Our action in condemning and preventing such unjust and unreasonable practices does not constitute regulation of stevedoring.

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[2] Section 15 reads in pertinent part, as follows:

"That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

As the agreements of September 15, 1959, and October 13, 1959, between Elevators and the Port are subject to section 15, and have not been approved by this Commission or a predecessor, they are made unlawful by the plain langauge of section 15, and carrying them out has been and will continue to be unlawful.[3]

We must now decide if the agreements and their performance constitute an unjust or unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.[4] We have already found that Elevators and the Port are persons subject to the Act, and carrying out the arrangement and agreements undeniably constitutes a practice relating to and connected with the receiving, handling, storing, or delivery of property. The basic question remaining then, is if the practice is unjust or unreasonable. We hold that it is both unjust and unreasonable; that as such, it operates to the detriment of the commerce of the United States, and is contrary to the public interest. The essence of this practice is that it sets up a stevedoring monopoly at a United States port (Stockton, California) serving common and contract carriers which operate in the foreign and domestic commerce of the United States, and prevents such carriers from selecting stevedores of their choice to serve their ships.

Such a practice runs counter to the anti-monopoly tradition of the United States, upsets the long-established custom by which carriers pick their own stevedoring companies, deprives complainants and other stevedoring companies of an opportunity to contract for stevedoring work on ships using Elevators' facilities,

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[3] Carrying them out would, of course, become lawful, if and when we approve them, but it is clear from the balance of this opinion that they will not be approved. The plain language of section 15, referred to, reads:

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

[4] Section 17 reads in pertinent part as follows:

"Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs.[5]

Such a practice is *prima facie* unjust, not only to stevedoring companies seeking work, but to carriers they might serve, and the general public which is entitled to have the benefit of competition among stevedoring companies serving ships carrying goods in which the public is interested as shipper or consumer. for the same reasons it is *prima facie* unreasonable.

The principles just stated are well recognized. The *Roach* case, and the *Cargill* case, *supra*, and this case are all decided upon those principles. In *Cargill*, Judge Wisdom, speaking for the Fifth Circuit, pointed out the necessity for "a close relation between the stevedores and the vessel," something scarcely attainable when the stevedores owes his employment not to the vessel but to a monopoly conferred by a third party. Judge Wisdom also said that our "national policy favors free and healthy competition; monopoly is the exception."

We have as is our duty weighed and considered the meager argument offered to justify this monopolistic practice, and find it singularly lacking in weight. It seems to be primarily that the terminal facilities would be safer in hands selected by respondents (there is no *proof* of this), and that only the monopoly prevents the employment of stevedores operating terminals in San Francisco, which employment would bring about a conflict of interest which "would be detrimental to the welfare and investment" of respondents. Assuming the validity of both propositions, any "benefits" they point out in the monopoly are, in our judgment, of value to respondents entirely too insignificant to justify the disadvantage to complainants, carriers, and the public inherent in the existence of a stevedoring monopoly.

Respondents also argue that "it does not make any practical difference who performs the stevedoring," primarily because whoever does the stevedoring must obtain from the National Cargo Bureau a certificate that the fittings comply with the Coast Guard Regulations for loading bulk grain, and an inspector of the Bureau specifies the manner of loading the grain and issues a loading certificate which is *prima facie* evidence that the stevedore has complied with loading regulations.

These facts do not relieve the owner and master of their re-

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[5] It is not significant that these evils have not been proved to actually exist yet at Stockton. Healthy competition for business which is the best known insurance against such evils has been destroyed.

sponsibility for well-trimmed cargo and seaworthy ship, and the selection of the stevedore remains a matter of importance and concern to the master and shipowner.

Another reason, so respondents argue, why "it makes no difference" who stevedores, is that the Port, any of complainants, or any other stevedoring company would secure personnel *except for the superintendent* from the same hiring hall. The importance of the superintendent, and even more, the importance of the master being able to choose a company in which he and his principals have confidence and whose charges are determined by free competition deprives this argument of any weight.

Respondents take the position that a decision by us that respondents' practices are unjust or unreasonable can be justified only if (a) we are bound by a holding in *Cargill* that all monopolistic stevedoring agreements must be unlawful, notwithstanding economic benefits which may accompany them, or (b) if the facts in *Cargill* and this case are in every particular the same. We do not agree with this position.

First, it was not held in *Cargill* and we do not hold here that all monopolistic stevedoring agreements are necessarily and inevitably unjust and unreasonable practices which must be prohibited at any cost.[6]

In *Cargill,* in *Roach,* and in this case, respondents failed to advance evidence of economic or other advantages flowing from monopolistic arrangements, sufficient to justify them notwithstanding the evils and detriment to the public interest inherent in monopoly. Our national policy makes free competition the rule, and monopoly the exception which must be justified, and here (as in *Roach* and *Cargill*) respondents have failed to justify the desired monopoly.

Respondents argue also that if the Commission prohibits a stevedoring monopoly as an unjust or unreasonable practice, this prohibition takes respondents property without just compensation in violation of their rights under the Fifth Amendment to the Constitution of the United States. The argument is unsubstantial. The cited cases do not support it. None of them would even remotely relate to prohibition of unjust and unreasonable practices by a party subject to a regulatory statute. Nothing herein will prevent respondents from making fair and non-discriminatory charges for the use of any of their facilities.

[6] It is clear however that the burden of sustaining such practices as just and reasonable is a heavy one.

Premises considered, and basing our action on the foregoing findings and conclusions, the whole record, and the applicable statutes, it is held:

(1) The agreements between Elevators and the Port, dated September 15, 1959, and October 13, 1959, are subject to section 15 of the Shipping Act, 1916, and have not been approved by this Commission or a predecessor. Said agreements have always been and now are unlawful; it has always been and it now is unlawful to carry them out. Elevators and the Port have been carying them out since their effective dates.

(2) Said agreements, and respondents' actions thereunder, constitute a practice by persons subject to the Shipping Act, 1916 (Elevators and the Port) which is related to and connected with receiving, handling and delivery of property, and the said practice is unjust and unreasonable, operates to the detriment of the commerce of the United States, and is contrary to the public interest. By putting said practice into effect and carrying it out, respondents have failed to establish, observe, and enforce just and reasonable practices required by section 17 of the Shipping Act, 1916.

(3) Respondents Elevators and the Port will be required to cease and desist from carrying out the practice above described, including without limitation the agreements between them of September 15, 1959, and October 13, 1959.[7]

An appropriate order will be entered.

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[7] Elevators and the Port are now the only respondents. Stockton Bulk Terminal, originally named a respondent, was eliminated at the hearing by amendment to the complaint.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., this 25th day of January, 1962.

No. 898

CALIFORNIA STEVEDORE & BALLAST CO., ET AL. v.
STOCKTON PORT DISTRICT, ET AL.

Whereas, the Commission, on the 25th day of January, 1962, having made and entered a report stating its conclusions and decision herein, which report is hereby referred to and made a part hereof:

It is ordered, That respondents herein cease and desist from carrying out agreements between them, dated September 15, 1959, and October 13, 1959, and practices thereunder referred to in said report.

(SEAL) (Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 807

ATLANTIC & GULF-PUERTO RICO GENERAL INCREASE IN RATES AND CHARGES

Decided February 1, 1962

Rates between North Atlantic and Gulf ports of the United States and Puerto Rico, as increased 15 percent or 6 cents per cubic foot or 12 cents per 100 pounds, whichever produces the greater increase in revenue, and as further increased 12 percent, found just and reasonable.

Odell Kominers, Mark P. Schlefer, and *Sterling F. Stoudenmire, Jr.*, for respondents.

Eduardo Garcia, Walton Hamilton, William D. Rogers, Abe Fortas, Seymour Berdon, and *William L. McGovern* for Commonwealth of Puerto Rico, intervener.

John Regan for Administrator of General Services, intervener.

Mitchell J. Cooper, Frank M. Cushman, Vernon C. Stoneman, and *John B. Street* for Asociacion de Industriales de Puerto Rico (Manufacturers Association of Puerto Rico) and Commonwealth Manufacturers Association, interverners.

John B. Street, Frank M. Cushman, and *Vernon C. Stoneman* for Paula Shoe Company, intervener.

John B. Street and *Vernon C. Stoneman* for Caribe Shoe Corporation, intervener.

Mitchell J. Cooper and *Frank M. Cushman* for Coastal Footwear Corp., intervener.

L. Merrill Simpson for Bata Shoe Company, Inc., intervener.

William M. Requa for Association of Sugar Producers of Puerto Rico, intervener.

J. W. Harnach for Cooperative Grange League Federation, Inc., intervener.

Harold L. Copp for Atlantic Industries, Inc., interverner.

T. A. Smith for Louisiana State Rice Milling Company, Inc., intervener.

Wm. M. Reid for The Rice Millers' Association, intervener.

Alan F. Wohlstetter for Trailer Marine Transportation, Inc., intervener.

Alfred K. Kestenbaum for Cigar Manufacturers Association of America, Inc., intervener.

Edward Aptaker as Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

On December 4, 1956, the United States Atlantic & Gulf-Puerto Conference (the Conference), then comprised of Bull Insular Line, Inc., Lykes Bros. Steamship Co., Inc., Waterman Steamship Corporation, and Alcoa Steamship Company, Inc. (Bull, Lykes, Waterman, and Alcoa), filed with the Federal Maritime Board (Board) Tariffs FMB F-No. 14, Homeward Freight Tariff No. 7, and FMB F-No. 13, Outward Freight Tariff No. 7, naming increases in commodity rates over the applicable rates then in effect, to become effective January 5, 1957, between United States Atlantic and Gulf of Mexico ports and ports in Puerto Rico.

On December 20, 1956, J. W. de Bruycker, Agent for the Conference, filed special permission application to modify on short notice the increases in rates to reflect an adjustment not in excess of 15 percent or 6 cents per cubic foot or 12 cents per 100 pounds, which ever produces the greater increase in revenue, over the applicable rates then in effect. This increase will be referred to as the 15 percent increase.

On January 4, 1957, pursuant to section 18 of the Shipping Act, 1916, as amended, 46 U.S.C. 817 (the 1916 Act), and the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. 843 et seq. (the 1933 Act), the Board ordered an investigation into the reasonableness and lawfulness of the rates, charges, regulations, and practices stated in the tariff schedules filed December 4, 1956, and ordered the operation of these schedules suspended until midnight January 8, 1957, unless otherwise ordered.

On January 8, 1957, the Board amended its order of January 4, 1957, and granted the special permission to publish the rate increases, as modified, to be effective on one day's notice but not earlier than January 9, 1957.

After hearing on the 15 percent increase, but before briefs of the parties were due, the respondents published on July 18, 1957, a 12 percent general rate increase (the 12 percent increase), to become effective September 14, 1957. On August 14, 1957, Pan-Atlantic Steamship Corporation (Pan-Atlantic), an affiliate of Waterman, filed revisions to its Homeward Tariff No. 1, FMB F-No. 1, to become effective September 18, 1957, naming local commodity rates from Puerto Rico to United States Atlantic ports based on the same pattern as the Conference rates.

By supplemental order of September 5, 1957, the Board (a) expanded the proceeding to include an investigation into the lawfulness of the rates as further increased by 12 percent; (b) suspended the operation of the Conference and Pan-Atlantic schedules naming the 12 percent increase until January 14, 1958; (c) made Pan-Atlantic a respondent; and (d) ordered a further hearing in the proceeding.

Further hearings were held.[1] An initial decision was issued by the hearing examiner and exceptions thereto filed with the Board. One of the principal issues raised in the exceptions was whether the examiner had erred in not requiring the carriers to produce books and records to substantiate certain financial statements which they had offered in evidence. On June 13, 1958, the Board remanded the proceedings to the examiner for further hearings with a direction to the carriers to produce substantiating records for financial exhibits submitted at the previous hearings. Following further hearings, the examiner issued a decision in which he found both the 15 and the 12 percent rate increases to be just and reasonable.

Exceptions were filed and oral argument held by the Board. Thereafter, the Board issued a Report and Order dated April 28, 1960, in which it found the aforesaid increased rates just and reasonable. (6 F.M.B. 14).

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[1] Interveners who appeared during the course of the proceedings were the Commonwealth of Puerto Rico (the Commonwealth), the Administrator of General Services, Asociacion de Industriales de Puerto Rico (Manufacturers Association of Puerto Rico), Commonwealth Manufacturers Association, Paula Shoe Company, Caribe Shoe Corporation, Coastal Footwear Corp., Bata Shoe Company, Inc., Association of Sugar Producers of Puerto Rico, Cooperative Grange League Federation, Inc., Atlantic Industries, Inc., Louisiana State Rice Milling Company, Inc., The Rice Millers' Association, Trailer Marine Transportation, Inc., and Cigar Manufacturers Association of America, Inc.

The Board's order was appealed to the United States Court of Appeals for the District of Columbia Circuit, which in an opinion, stated:

> The Board's order is . . . vacated and the case remanded for the Board to reconsider and clarify the rate base question. The Board should also pass upon the Commonwealth's argument that it is not fair to rate payers to let an accumulated depreciation reserve be depleted and depreciation charges thereby increased. *Commonwealth of Puerto Rico* v. *Federal Maritime Board*, 288 F. 2d 419, at 421. (D.C. Cir.—1961).

The Board thereafter reopened the proceeding for reconsideration of all matters bearing upon the justness and reasonableness of the increased rates, and supplemental briefs and memorandums of law were filed, and oral argument held.

THE CARRIER RESPONDENTS

1. *Alcoa.*—Alcoa offers weekly service from the North Atlantic ports of New York and Baltimore, Md., and weekly service from the Gulf ports of Mobile, Ala., and New Orleans, La., to ports in Puerto Rico. Each of the sailings serves all ports in Puerto Rico. The vessels in the North Atlantic service, after discharge at Puerto Rico ports, proceed into other trades, generally contract services. In the Gulf service, the vessels return from Puerto Rico to the Gulf ports, a service inaugurated in March 1958.

2. *Bull.*—Bull provides three sailings per week from North Atlantic ports to Puerto Rico. One sailing proceeds from Baltimore and Philadelphia, Pa., to Puerto Rico and return. Another sailing proceeds from New York to Puerto Rico and return (the Thursday sailing), and the third from New York to Puerto Rico, thence to the Dominican Republic and return (the Friday sailing). Basically, the services are provided with six C-2 type vessels, operated on a strict two-week turnaround. In addition, Liberty-type vessels are also employed to lift stators, generators, ammunition, and other specialized cargo destined to Puerto Rico which cannot be handled on the regular C-2 vessels. Liberty ships were also utilized in some instances to carry full cargoes of bagged raw sugar under the tariff, but this movement declined rapidly in 1957 due to conversion of the raw sugar movement to bulk movement under contract, and has since come to a virtual halt. Caribbean Dispatch, Inc., an affiliate of Bull, is a major contract carrier of bulk sugar.

3. In a transaction closed December 18, 1956, characterized in the brief for the Conference as "an irrefragibly [sic] arm's-

length transaction between completely unrelated interests," Olympia Corporation, incorporated in Delaware, acquired substantially all of the stock of A. H. Bull Steamship Co., a New Jersey corporation (A. H. Bull New Jersey). Prior to the transaction, the purchaser and the sellers had no stockholders, directors, or other interests in common, or any similar relationship. Olympia had been organized by its parent company American Coal Shipping, Inc., (ACS), as the instrument designed to facilitate the consummation of the transaction. ACS paid $100,000 for all of Olympia's outstanding stock. ACS and its own stockholders also loaned to Olympia about $5 million, at interest of 5 percent. Between December 18, 1956, and January 21, 1957, Olympia's name was changed to A. H. Bull Steamship Co. (A. H. Bull Delaware). The transaction contemplated purchase by Olympia of all of the outstanding stock of A. H. Bull New Jersey for a total consideration of $40 million (which was not finally accomplished until February 28, 1957), the liquidation of A. H. Bull New Jersey, and the transfer of all of its assets to A. H. Bull Delaware.

4. On December 18, 1956, A. H. Bull New Jersey had over $18 million in cash, obtained from surplus, liquidation of quick assets representing in part depreciation funds, release of vessel replacement funds, and receipt of repayments of advances and dividends from subsidiary companies, among others. On the closing date of the stock purchase, this $18 million was declared by A. H. Bull New Jersey as a dividend, paid principally to Olympia, and the remainder of the purchase price of $40 million was met from the proceeds of the loans from ACS and its stockholders of $5 million mentioned above, and bank loans of some $17 million at interest rates ranging from 4¼ to 5 percent, guaranteed by ACS.

5. The net purchase price paid by Olympia for A. H. Bull New Jersey was therefore about $22 million. The book net worth of A. H. Bull New Jersey at the time of closing was about $12,-330,000. Incident to the purchase, the physical assets of A. H. Bull New Jersey and its subsidiaries had been independently appraised. About January 21, 1957, in partial but almost complete liquidation of A. H. Bull New Jersey, its assets were transferred to the books of A. H. Bull Delaware, and in the process the vessel book values were raised from $5,160,421.85 to $12,892,-610.21, effective as of the closing date, the latter figure representing about 70 percent of the appraised values of the vessels. The ascribed values of certain other assets were changed also for

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consolidated statement purposes, but on the corporate books only the vessel values were changed. Thus, on the books of A. H. Bull Delaware the vessel book values are carried presently at amounts, less accrued depreciation since the closing date, representing a pro rata share of the total purchase price paid by A. H. Bull Delaware for the assets of A. H. Bull New Jersey.

6. Corporate entities affiliated with respondent Bull, so far as is here pertinent, include A. H. Bull Delaware of which respondent Bull is a subsidiary; A. H. Bull & Co., which provides continental United States overhead services for Bull and others in the corporate family in return for management and operating commissions composed principally of a percentage of revenues and a per diem husbanding charge; several separate corporations which own and operate pier facilities in Puerto Rico; Caribbean Dispatch, Inc., mentioned above; and Dafton Realty Co., owner of office facilities in New York utilized by Bull.

7. For 65 days between August 19 and October 22, 1957, Bull's operations were immobilized by a strike arising out of a jurisdictional dispute between seafaring unions. The strike was not unrelated to the fact that ACS, the new owner of the Bull properties, was in part owned by the United Mine Workers. Other strikes which have affected the operations of Bull at various ports, for varying reasons, and for periods of time ranging from 2 to 44 days, totaled 33 days in 1951, 1952, and 1956; 12 days in 1953; 101 days in 1954; 78 days in 1955; 14 days in February 1957; and 20 days in the first 6 months of 1958.

8. *Lykes.*—Lykes operates its weekly service between the Gulf ports of Lake Charles, La., and Houston and Galveston, Texas, and occasionally other western Gulf ports, and Puerto Rico, as a part of its subsidized service on Trade Route 19 (Line A service) between Gulf ports of the United States and Cuba, Haiti, the Dominican Republic, Venezuela, Columbia, and Panama. No voyages are operated to or from Puerto Rico exclusively.

9. *Waterman.*—At the outset of this proceeding Waterman operated a weekly service between New Orleans and Mobile and Puerto Rico, utilizing two vessels on a 14-day turnaround, with additional vessels for relief purposes and when extra cargo demanded. Beginning in October 1957, Waterman also inaugurated weekly sailings, utilizing two vessels on a 14-day turnaround in regular breakbulk service, between New York, Baltimore, and Puerto Rico. Waterman intended to provide a permanent North Atlantic-Puerto Rico service, at first with regular breakbulk ves-

sels, and later converting to trailership service. Waterman is a subsidiary of McLean Industries, Inc.

10. Effective February 4, 1958, Waterman withdrew from the Conference and simultaneously ceased all operations in the Puerto Rico trades, which were taken over without break in service by Waterman Steamship Corporation of Puerto Rico (Waterman P. R.). The latter is a wholly-owned subsidiary of Waterman, is not a respondent, and is not a member of the Conference, although its rates are in all respects the same as those of the Conference. When filing its initial tariffs with the Board, and in subsequent pleadings herein, Waterman P. R. has agreed to be bound by the results of this proceeding so far as its rates are concerned. Statistical and financial data reflecting the combined Waterman and Waterman P. R. operations are of record, although no recent data were presented forecasting operating results for the entire year 1958 as was the case with the other Conference respondents.

11. On February 28, 1958, Waterman P. R. inaugurated its North Atlantic-Puerto Rico trailership service, with the sailing of the *Bienville*. This vessel, upon arrival in Puerto Rico, was prevented from discharging its cargo because of labor difficulties. After some delay the *Bienville* proceeded to New Orleans, where her cargo was discharged and that which had not spoiled was transferred to a ship regularly employed in the Waterman P. R. Gulf-Puerto Rico breakbulk service. The *Bienville* voyage consumed in all 34 days. After this experience, Waterman P. R. discontinued its North Atlantic-Puerto Rico service, which has not since been resumed either on a breakbulk or trailership basis.

12. *Pan-Atlantic.*—Pan-Atlantic is an affiliate of Waterman, and as such was required to maintain the same rates as the Conference by the terms of the Conference agreement to which Waterman was a party. Between April 1957 and early 1958, Pan-Atlantic provided a northbound service from Puerto Rico to Miami and Jacksonville, Fla., in conjunction with its intercoastal and West Coast-Puerto Rico services, which was suspended at the end of this period and has not been resumed. The tariff under which such service was operated was canceled effective August 22, 1958. So far as the record discloses, this service was minimal, since the cargo carried averaged only 51 tons per voyage, with gross revenue per voyage of $1,506. These data are not important enough to warrant their inclusion in our consideration, although the rates under investigation will remain subject to the findings.

13. Pan-Atlantic instituted a trailership service between New

York and Puerto Rico on July 30, 1958, which is presently being operated. On October 27, 1958, the Board denied a petition by the conference requesting that this investigation be broadened by naming Waterman P. R. as a respondent, and bringing in issue the current tariffs of Pan-Atlantic and Waterman P. R.

THE PUERTO RICAN ECONOMY AND THE TRADE

14. Puerto Rico is a small island, 100 miles long and 25 miles wide, separated from the nearest point in the United States by over 1,000 miles of open water. The economy of the Island has never been self-sustaining, and it has few natural resources. It is one of the most densely populated areas of the world. Puerto Rico's external trade is almost entirely with the United States. About 40 percent of all goods produced, and about 54 percent of all goods consumed, by the people of Puerto Rico are destined to, or originate in, the United States. Average income per capita in Puerto Rico in 1954 was $446, as compared with $1,770 in the United States. The percentage of the labor force of Puerto Rico unemployed or only partially employed has consistently exceeded that in the United States. These data indicate that increases in the cost of shipping such as are here involved affect the economy of Puerto Rico and the living standards of its populace more sharply than would similar increases elsewhere in the nation.

15. The Conference rates in the Puerto Rico trade are determined by three-fourths majority vote of the members. Therefore, no one carrier can dominate the making of rates. Waterman P. R., presently operating in the Gulf-Puerto Rico trade, is not a member of the Conference, and its rates can be made by individual action, subject only to the competitive impact of the rates maintained by the Conference. As is indicated by the revenue statistics shown in Table I below, Bull is the largest carrier in the trade, receiving approximately fifty percent of the trade revenues even in the year 1957 whn Bull's operations were immobilized by strike for more than 65 days.

TABLE I

GROSS TRANSPORTATION REVENUES OF THE RESPONDENTS

Carrier	1956	1957	First half 1958
Bull	$24,993,850	$21,646,383	$11,682,207
Waterman	6,534,389	9,416,267	4,651,468
Alcoa	6,244,864	9,175,949	4,215,049
Lykes	3,843,368	3,774,843	1,940,279
Totals	$41,616,471	$44,013,442	$22,489,003

16. The available traffic and revenue projections of the respondents, where given, are based on an extension of their most recent experience, that for the first half of 1958, subject to adjustments for known or contracted cost increases. Although there is testimony of record to the effect that a gradual increase may be expected in the movement of general cargo between Puerto Rico and the mainland, the statistics of record disclose a decline in tonnage carried of cargo subject to the tariffs here involved. This decline is attributed in large part to the conversion of the raw sugar movement from bagged movement under the tariffs to bulk movement under contract, and to the construction of a fertilizer plant in Puerto Rico, which virtually eliminated the movement of prepared fertilizer and substituted therefor the movement of fertilizer raw materials in tramp vessels. Table II below shows the tonnage data submitted for the year 1955-1957 and the first half of 1958, and the projections for the full year 1958 where given. Weight tons are computed on the basis of the weight of the cargo carried, and freight payable tons on the basis on which the freight charges were paid, either weight or measurement. The data for the full year 1957 in Tables I and II reflect the impact of the long strike in that year against Bull, and the consequent diversion of substantial amounts of traffic normally carried by it to Alcoa and other carriers.

TABLE II

TONNAGE CARRIED IN FREIGHT PAYABLE TONS, EXCEPT WHERE INDICATED

Carrier	1955	1956	1957	First Half 1957	First Half 1958	1958 Projected
Bull	1,876,964	1,828,275	1,151,993	710,877	558,880	1,117,760
Alcoa	429,470	312,710	418,509	186,422	169,363	340,000
Waterman	239,535	238,895	298,831	148,526	132,202	—
Lykes	—	—	203,438	—	107,822	215,644
Lykes	245,334*	262,389*	186,220*	102,522*	102,918*	205,836*
*Weight tons						

17. Taking into consideration the factors mentioned in paragraph 16 above, and the entry into the trade of Pan-Atlantic with its new and attractive trailership service, which will no doubt succeed in diverting some traffic from the services maintained by the other respondents, it is found that the projections of the respondents as to the year 1958 are reasonable.

SPECIFIC COMMODITY RATES

18. In the first initial decision issued herein, the examiner found as follows:

60. The shipper interveners, generally, are those who ship commodities under so-called "promotional rates." These rates have been maintained by the carriers, prior to the proposed increases, at comparatively low levels designed to promote the movement of the commodities so rated. The promotional rates apply primarily to northbound traffic, and most of them have been used since 1946 in cooperation with and at the request of the newly-developing industries in Puerto Rico. This traffic, in gross tons, in 1955, amounted to approximately 20,000 tons northbound and 1000 tons southbound. In 1956 it amounted to approximately 25,000 tons northbound and 2000 tons southbound. The revenue from this traffic in relation to total revenue was perhaps less than ½ of 1 percent.

61. Selected commodities from those transported at promotional rates, stated by the carriers to be typical, were northbound: shoes, paperboard, chinaware, coffee, cigars, rugs, artificial flowers, boxes kd, scrap metal, scrap tobacco and confectionary; and southbound: tin cans, iron and steel articles, glass jars, bottles n.o.s., paper and paper products, and tiles. Two shippers, understood to be representative of shippers of such commodities, testified at the first hearing. One was a shipper of candy and the other of shoes, both shipping from Puerto Rico to the United States mainland. Their main objections were that the first rate increases on the commodities were greater than 15 percent. This is so because of the 6 cents per cubic foot or 12 cents per 100 pounds aspect of the first increase.

62. The shippers gave important consideration to the relatively low shipping rates for their products, it is stated, in their decisions to establish business in Puerto Rico, since transportation charges are vital factors in their business prospects. The record shows that the 15 percent rate increase raised footwear costs 1.13 percent of the value of the product, and candy 1.78 percent. These increases, it is stated, seriously limit the possibilities of expanding mainland business, and discourage people from establishing business in Puerto Rico.

63. The record shows that the promotional rates are too low, and appear to be noncompensatory, even with the 15 percent increase, and there is some question as to whether the further 12 percent increase renders said promotional rates compensatory.

19. No exceptions were taken to the findings quoted above. They are borne out by the record, and no additional evidence was presented at the second further hearing relating to these issues. We adopt the findings set forth above.

COST INCREASES

20. The cumulative rate increases under investigation herein aggregate about 29 percent. The last prior general rate increase in the Puerto Rican trade was made effective November 12, 1951.

Since that date, the expenses of the respondents have increased substantially. For example, Bull shows that stevedoring wages in the United States have increased 46 percent and in Puerto Rico about 63 percent; fuel oil costs have increased 23 percent; vessel operating costs as a whole 54 percent; crew wages 62 percent; vessel repair costs 50 percent; and insurance 52 percent. Comparable cost increases are shown for the other three carriers in the trade.

21. There is evidence that the carriers, through increased efficiency of operations, have endeavored to minimize the impact of the stated cost increases. Stevedoring expenses account for a substantial proportion of total operating expenses. Bull shows that from 1951 to the end of 1957 loading costs in New York increased from $4.06 per ton to $4.69 per ton, and discharge costs at the same port from $4.80 per ton to $5.74 per ton, increases of 15.5 percent and 19.6 percent respectively, far lower than the wage increases shown. This favorable result is attributed to increased efficiency in loading and discharge operations, the leasing of modern improved terminal facilities, and in some degree to the use of containers and vans. Loading and discharge costs at San Juan, P. R., however, reflected more closely the wage increases, attributed to the lesser efficiency of port arrangements and labor. Loading costs at that port in the same period increased from $2.02 to $3.07 per ton, and discharge costs from $2.79 to $4.71 per ton, increases of 52 percent and 68.8 percent, respectively.

22. Waterman shows, in addition to the cost increases stated above, that effective in October 1958 longshore wage increases at Puerto Rican ports will increase stevedoring expenses by about 92 cents per ton, and that known prospective wage increases will by the end of 1958 increase crew wage cost by $160,000 annually.

ALLOCATION METHODS

23. Of the principal respondents, Waterman is the only carrier which operates an exclusive Puerto Rican service. The remaining respondents, as shown in paragraphs 1-9, *supra,* operate their services to and from Puerto Rico either wholly or partially on a joint basis with other services. This has necessitated allocation of the joint service expenses of the respondents, and of the assets devoted to these services, so as to ascertain as nearly as possible the proper apportionment of expenses and assets between the regulated and non-regulated trades in order to determine the

adequacy of revenue in the regulated trade. For this purpose, the respondents have made their allocations principally on ton-mile prorate formulae.

24. Where possible, such as in the case of port and cargo handling expenses incurred in Puerto Rico, the expenses were directly assigned. Most other expenses, including vessel operating expenses, cargo and port expenses in the United States, vessel depreciation, and overhead, were subject to allocation. The need for allocation does not alter the basic factors contributing to vessel operating expenses, the tonnage and the distance carried. In applying the ton-mile prorate, the respondents used the straight-line distances between ports of loading and discharge, since a vessel sailing toward Puerto Rico is also sailing toward the foreign ports of call. Vessel operating expenses and certain other expenses were then allocated to the Puerto Rican service in the proportion that Puerto-Rican ton-miles bore to total ton-miles operated in the joint services.

25. Where the ton-mile prorate involved a heavy burden, as where the allocation was between the Puerto Rican trade and the entire company operation, a revenue prorate was substituted therefor, using as factors the proportion that Puerto Rican revenue bore to total revenue. In the case of loading costs, distance is not a relevant factor, and allocations were generally made on the basis of the number of tons handled, except in the case of Bull's substantially equi-distant Puerto Rican and Dominican destinations, the use of a ton-mile prorate in the allocation of loading and stevedoring costs in the United States resulted in an approximately equal allocation of loading expense per ton.

26. Strike expenses incurred by Bull in 1957 were allocated by it on the basis of a revenue prorate, because the development of a ton-mile formula would have made necessary a port-to-port analysis of tonnage and distances for a minimum of 155 sailings. Since the Dominican revenue is substantially higher per ton than Puerto Rican revenue for approximately the same distance, as shown below, this actually allocated a higher proportion of strike expenses to the Dominican traffic, and a lower proportion to Puerto Rican traffic, than would have resulted from the use of a ton-mile prorate.

27. Vessel assets were assigned to the Puerto Rican services or the respondents on the proportion of the vessel operating days in those services, allocated where necessary on the basis of a ton-mile prorate. Assets in Puerto Rico were directly assigned to the

Puerto Rican service, and terminal property in the United States was generally allocated on a revenue prorate.

28. At the request of other parties, the respondents in most instances, in addition, computed their expenses on the basis of revenue prorate formulae. The interveners contend that for the purposes of this proceeding revenue prorate allocations should be used. For example, the Commonwealth argues that segregation of the joint voyage results on the Friday sailings of Bull gave inordinately excessive profits to the Dominican portion and exceptionally large losses to the Puerto Rican portion in 1957, as to which on a ton-mile prorate Bull shows a combined net revenue on the joint sailings, after depreciation and overhead but before taxes, of $46,345, with allocation of a loss of $244,973 to the Puerto Rican portion and a profit of $291,318 to the Dominican portion.

29. In 1957 total tonnage carried by Bull on the joint voyages was 311,699 tons, of which 36,784 tons were Dominican cargo. In the same year total joint voyage freight revenue was $5,367,625, of which Dominican revenue was $924,140. The Commonwealth characterizes as anomalous the results of the ton-mile prorate which attributes to the Dominican trade net revenue equal to 30 percent of each dollar of revenue. Bull's revenue per ton in the Dominican trade in 1957 was 36 percent higher than in the Puerto Rican trade ($27.04 v. $19.94), and costs of discharge in the same year in the Dominican Republic were only 22.5 percent of like costs in Puerto Rico ($1.06 v. $4.71). These data indicate that the profit results derived through use of ton-mile prorate formulae reflect with a reasonable degree of accuracy the inherent differences as between the Dominican and Puerto Rican trades. The Commonwealth also argues that the use of the ton-mile prorate results in somewhat higher unit costs on the joint service voyages than on the Thursday sailings of Bull which serve only Puerto Rico. These results are fully explained by the facts that there were more sailings in 1957 in the joint service with about the same amount of total tonnage, and consequently lower tonnage per voyage and higher costs per ton, and also that the joint voyages were subject to overtime costs because of late sailings not incurred on the Thursday sailings.

30. The Manufacturers Association of Puerto Rico contends that allocation of expenses for the Friday joint service sailings of Bull should be made on a so-called "known-cost-per-ton" method. By this method, allowable expenses on the joint service voyages

would be confined to the unit costs incurred on the Thursday sailings which serve Puerto Rico exclusively, which costs can be computed without the necessity for further allocations. Such a method bears no relation to the realities of the situation.

31. The Commonwealth alternatively suggests that in the case of Bull's Friday sailings, the total profit results on the joint voyages should be included, on the grounds that the Dominican operation is a by-product of the Puerto Rican trade which could not stand on its own feet; that only 13 percent of the cargo on the joint voyages is Dominican; that Dominican cargo is less than one-half of one percent of the total Bull Puerto Rico tonnage; and that the carrier itself recognizes the incidental nature of the Dominican operations by failing to allocate out of its asset statements any portion of vessel and other property values attributable to the Dominican operation. The issue here is not the profit accruing to Bull as a result of its joint service operations, but the justness and reasonableness of the rates under investigation, which in the nature of the case must be decided on the basis of the adequacy of the revenues derived therefrom. There is no suggestion that allocation is not necessary in the case of the other respondents which operate joint services, and no good reason appears why Bull should be accorded special treatment in this respect. The authorities cited clearly support agency action in general rate proceedings in adopting appropriate means of effectuating a separation of the regulated and non-regulated portions of an integrated enterprise. See *Cities Service Gas Co.* v. *Federal Power Com'n,* 155 F. 2d 694, 704-5 (10th Cir. 1946) *cert. den.* 329 U. S. 773 (1946); and *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 586-92 (1945). The facts of record clearly indicate that dissimilar rates and cost factors as between the Puerto Rican and Dominican operations make allocation necessary in order to avoid distortion of the operating results in the Puerto Rican trade.

32. In the light of the findings in paragraphs 23-31, *supra,* we agree with the examiner that the use of the ton-mile prorate formulae, where utilized, and the other allocation methods adopted by the respondents, are reasonable and acceptable for the purposes of this proceeding.

VALUATION AND RATE BASES

33. *General.*—The Conference advocates rate bases calculated as of June 30, 1958, notwithstanding that the first increase here

involved became effective in January 1957. Waterman individually contends for rate bases compiled as of December 31, 1957. Public Counsel and the Manufacturers Association of Puerto Rico contend that rate bases should be constructed as of December 31, 1957, applicable to the 1957 rate increase, and as of June 30, 1958, applicable to the 1958 rate increase. The Commonwealth assigns values based on a composite analysis of the evidence of record.

34. This proceeding involves two separate rate increases, the second superimposed upon the first. The record includes data concerning the actual operations of the respondents for almost a full year under the first of these increases, and for almost six months under the combined increases. In the usual rate increase case, determination of the lawfulness of the increases proposed is necessarily predicated upon projections of revenues and expenses expected in the future, and the property values for the purpose of calculating the expected rate of return are most readily determinable as of the time the rate increases are proposed. Here, however, particularly with regard to the 15 percent increase, the results of operations under the increased rates can be ascertained with some degree of certainty. The most precise method of resolving the issues presented by this proceeding would be to determine average values of the property of the respondents employed during 1957, applying operating results for the year 1957 to the resulting figures to determine rates of return actually earned during that year. Then, ascertain the values as of December 31, 1957, the approximate date when the 12 percent increase became effective, and apply projected operating results for the year 1958, based on actual operations during the first six months of that year, to ascertained values as of December 31, 1957, so as to compute expected rates of return for the year 1958. Such extreme precision, however, is not required, and for the purposes of this proceeding, therefore, property values will be determined as of December 31, 1957, and the resulting rate bases applied to the actual operating results so far as they can be determined on the record for the year 1957, and the projected results for the year 1958. While this may have a tendency to lessen somewhat the values applicable to the year 1957 because of depreciation accrued during that year, it is deemed that the results will not be unreasonable.

35. In Table III below are set forth the rate bases claimed by the Conference; in Table IV the rate bases claimed individually by Waterman.

TABLE III

RATE BASES CLAIMED BY THE CONFERENCE

Bull:	Vessels	$12,048,584*	
	Working Capital	2,000,000	
	Brooklyn Terminal (non-owned)	5,000,000	
	Philadelphia Terminal (do.)	3,064,916	
	Baltimore Terminal (do.)	6,000,000	
	Puerto Rico Terminals	4,062,194	
	Other Property	747,387	
	Claims Pending	22,584	
	Total		$32,945,665
Alcoa:	Vessels	$ 5,183,638	
	Working Capital	1,233,955	
	New York Terminal (non-owned)	2,015,400	
	Baltimore Terminal (do.)	1,117,000	
	Mobile Terminal (do.)	1,901,800	
	New Orleans Terminal (do.)	825,700	
	Puerto Rico Terminal (do.)	1,500,000	
	Terminal Equipment (do.)	356,600	
	Structures	98,371	
	Equipment	231,957	
	Spare Parts	67,734	
	Total		$14,532,155
Lykes:	Vessels	$ 3,784,230	
	Working Capital	445,212	
	Terminal Property	3,589	
	Other Property	92,801	
	Statutory Reserve Funds	2,022,488	
	Total		$ 6,348,320
Waterman:	Vessels	$ 4,170,856	
	Working Capital	1,208,091	
	Mobile Terminal (non-owned)	1,000,000	
	New Orleans Terminal (do.)	750,000	
	Puerto Rico Terminal	1,242,716	
	Furniture, Fixtures and Other Equipment	167,604	
	Office Building, Mobile	289,491	
	P.R. Stevedore Equipment	23,863	
	P.R. Wharf Equipment	1,239	
	Total		$ 8,853,860
	Grand Total		$62,630,000

* This figure does not include any value assigned for Liberty ships, and because of an error in calculation in the Conference brief, should be $12,288,581 on the basis claimed by the Conference.

TABLE IV

RATE BASES CLAIMED BY WATERMAN

Method 1:	Vessels, Average of Reproduction Cost Depreciated and Net Book Value	$ 4,666,171*
	Other Property	3,474,913
	Working Capital	1,892,107
	Total	$10,033,191
Method 2:	Vessels, Market Value	$ 3,070,500
	Other Property	3,474,913
	Working Capital	1,892,107
	Total	$ 8,437,520

* This figure, although labeled average of reproduction cost depreciated and net book value, embraces as an element the depreciated value of replacement vessels rather than reproduction cost depreciated of the vessels employed.

36. The items listed in Table III designated as other property, structures, equipment, spare parts, terminal property, furniture, fixtures and other equipment, office building, and stevedore and wharf equipment represent allocations of owned property carried into the claimed rate bases at net book value, and there is generally no dispute concerning the propriety of including such asset values. The item called claims pending in the rate base claimed for Bull is disallowed. It does not constitute a specific investment in property required in performing the service.

37. Lykes alone among the respondents does not claim as a part of its rate base the values of any non-owned terminals, on the ground that its vessels utilize a number of different public terminals, and the ratio of its use of any particular terminals would be minimal and difficult to determine. Accordingly, it claims as expense items in its profit and loss statements the full rentals paid for terminal use. Lykes includes in its claimed rate base statutory reserve funds amounting to $2,022,488, made up of capital reserve funds of $1,734,919 representing accumulated depreciation on the portion of its vessels allocated to the Puerto Rican services, and special reserve funds amounting to $287,569. Both of these reserve funds are required to be maintained by Lykes in connection with its subsidized foreign operations under section 607 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1177. To the extent they represent depreciation on vessels, they are not allowable as part of the rate base property. Amounts other than

depreciation cannot be said to be devoted to the Puerto Rican trade in light of the statutory provisions under which the funds are maintained. Therefore, they will not be included in the rate base.

38. Table V below shows, after allocation, the original and reproduction costs, depreciated as of December 31, 1957, the averages thereof, and the market values of the vessels employed by the respondents. The record shows the domestic market value in April 1957, for C–2 vessels, exclusive of extras, as $1,350,000, which by October 1958, had declined to $875,000. The 1957 value reflects the result of the Suez Canal crisis which created a sudden shortage of vessels. The 1958 value reflects the decline resulting from the recession in shipping which occurred between the given dates. For C–1 vessels corresponding values shown on this record were $1,100,000 for April 1957, and $575,000 for October 1958. The market values are averages of the said domestic market values, taken so as to eliminate extremes of value occasioned by the special circumstances detailed. As in the case of Table III, the vessel values in the case of Bull do not include assigned values for Liberty-type vessels which the record indicates will occupy a diminishing role in its operations.

TABLE V
VESSEL VALUES

	Original Cost Depreciated	Reproduction Cost Depreciated	Average	Domestic Market Values
Bull	$2,922,317	$16,890,740	$ 9,906,529	$ 7,620,900
Alcoa	1,421,166	7,487,081	4,454,124	3,913,972
Lykes	993,200	5,409,969	3,201,585	2,359,806
Waterman	1,152,132	6,535,356	3,843,744	3,167,275
Totals	$6,488,815	$36,323,146	$21,405,982	$17,061,953

DISCUSSION AND CONCLUSIONS

Under the 1933 Act we are required to determine whether the increased rates are "just and reasonable".

The carriers are entitled to a fair return on the reasonable value of the property at the time it is being used in the service of the public.

The Conference respondents contend that the operating ratios experienced by the carriers (ratio of expenses to gross revenues) should be utilized as the controlling test in determining the reasonableness of the rates under investigation.

We agree with our predecessors that the fair-return-on-reasonable-value standard is proper in judging rates in the domestic offshore trades. *General Increase in Hawaiian Rates*, 5 F.M.B. 347, 354 (1957); *General Increases in Alaskan Rates*, 5 F.M.B. 486, 495 (1958). They have invariably followed the rate base approach, and have rejected the contention advanced in previous rate investigations that the operating ratio theory should be adopted as a measure for determining the reasonableness of rates in the offshore trade.

We find nothing in this record that warrants departure from the rate base method. In any event the use of the operating ratio theory would not affect our ultimate conclusions arrived at by applying the standards employed by our predecessors and most Federal regulatory agencies.

Various parties urge that Bull be considered as the ratemaking line. Those so contending argue that Bull is the most important carrier in the trade; that its activities are primarily devoted to this service; that it is the only North Atlantic carrier providing turnaround service; and that the operations of other carriers are so diverse that no meaningful composite picture can be drawn for ratemaking purposes.

In this proceeding there are five carrier respondents serving the Puerto Rico trade, some from the Gulf and some from the North Atlantic. The rates are the same from the North Atlantic and Gulf ports. Bull provides Puerto Rico service only from the North Atlantic. To make findings determinative of the issues herein, based solely on the operating results of Bull, would fail to give consideration to operations from the Gulf. If separate findings were made with regard to North Atlantic and Gulf rates, a disparity of rates which might result would be disruptive to the trade. Moreover, Bull did not overwhelmingly dominate the trade. Bull's gross revenues for the first six months of 1958 were some $11,682,207, as compared with the combined gross revenues of $10,806,796 for Lykes, Waterman, and Alcoa. On this record we hold that neither the strongest nor the weakest lines control rate determinations, but our findings are based on average conditions confronted by respondents as a group. This is the long-standing practice of the Interstate Commerce Commission. *Increased Freight Rates, 1947*, 270 I.C.C. 403 (1948); *Increased Freight Rates, 1951*, 284 I.C.C. 589 (1952); *Increases, Calif., Ariz., Colo., N. Mex., and Tex., 1949*, 51 M.C.C. 747 (1950).

In its decision of April 28, 1960, the Board found that "the value of the vessels on the domestic market at or about the time the rate increase was requested, with adjustments to eliminate short-term peaks in vessel values", is the proper method for determining the reasonable value of the property being used for the public.

The United States Court of Appeals for the District of Columbia Circuit in remanding the Board's order of April 28, 1960, stated:

> The Board did not say why it adopted market value as a rate base or why it rejected Puerto Rico's contention that this base is grossly excessive and rates should be based on prudent investment less depreciation. *Commonwealth of Puerto Rico* v. *Federal Maritime Board, supra.*

The following methods of valuing the vessels used in the trade were proposed in this case: (1) prudent investment, (2) market value, and (3) average of original and reproduction costs depreciated.

The so-called "prudent investment" standard for measuring the rate base is widely used in the regulation of public utilities on the authority of Supreme Court approval. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

"The rate base is a figure representing the money prudently invested in the properties and equipment utilized in the . . . business" and "prudent investment" has become the traditional "rate base approach" for most Federal regulatory agencies. *City of Detroit, Michigan* v. *Federal Power Commission*, 230 F. 2d 810, at 813 (1955), cert. den. 352 U.S. 829 (1956).

There is, in our opinion, no sound reason why the prudent investment standard is not equally applicable in the determination of just and reasonable rates in the domestic offshore trades and, in fact, there is much in favor of its use.

A market value rate base would produce erratic rates which are in the interest of neither the shipping public nor the owning companies. Market values fluctuate widely. For example, the market value of C-2 vessels was $1,350,000 in April 1957 and $875,000 only 18 months later in October 1958. C-1 vessels showed an even more striking fluctuation, $1,100,000 in April 1957 and $575,000 in October 1958. This variation was due to factors totally unrelated to the utilization of the vessels involved herein, which was the same on both dates. More often than not in the case of ships, market value is based largely on opinions and predictions, and the same would be true of rates derived therefrom. Logically, market value should lead to an increase or a decrease in rates as vessel prices rise and fall, but obviously, such rate instability would not be practical. It would disrupt the trade to the detriment of the shippers, the carriers, and the general public.

Nor can we accept reproduction cost as proper for ratemaking purposes. This assumes that a carrier has reproduced or will reproduce its vessel. Those devoting their property to the public service are entitled to a fair return on their actual investment, not on some speculative amount which they have not invested and may never invest. If and when a vesesl is replaced, or amounts are expended for capital improvements, then the carrier is entitled to a fair return on the new vessel or the improvements. Until that is done the shipping public should not be forced to pay rates based to any extent on speculative vessel values.

We therefore utilize the prudent investment standard to determine the fair value of property being devoted to the service of the public in the domestic offshore trades. Thus, amounts which have been invested prudently in ships, terminals, lands, other facilities and property as of the time they are first devoted to the particular trade, plus amounts prudently invested in betterments, all depreciated to the period for which the rates are being tested, will be included in our determinations of the rate base of respondent carriers.

An incidental but important advantage in the use of this method is that the ready availability of data on original costs and capital improvements will contribute to speedier, less expensive disposition of rate cases.

An important element bearing on the reasonableness of the rates under investigation is the determination of the proper depreciation of the carrier's property. The Conference claims that depreciation for the purposes of this proceeding should be based on the valuation placed on Bull's vessels when A. H. Bull New Jersey assets were transferred to A. H. Bull Delaware. ACS purchased the stock of A. H. Bull of New Jersey in, they say, an arm's length transaction. It is contended that the transfer of the assets from New Jersey to Delaware should be viewed as a part of a single transaction, i.e., the acquisition of Bull by ACS, and that the values placed on the vessels were reasonable, only 70 percent of the appraised value.

To allow depreciation based on values assigned to the vessels at the time they were transferred to A. H. Bull Delaware, would disregard and eliminate from consideration the 10 years of depreciation which shippers have already paid. These large sums of depreciation were completely liquidated by the payment of the

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$18 million dividend previously described in paragraph 4, *supra*. The inauguration of an entirely new depreciation cycle based on increased book values would be unfair to the public. It could result in the public being forced to pay two or three times for the same property. Every time some occasion arose which was thought to justify the assignment of new values to the property, existing depreciation reserves could be ignored and the depreciation cycle commenced anew on some new valuation base. Obviously, this would be inequitable. There was no additional investment in new assets created by the purchase of the stock by ACS. Exactly the same assets continued to serve the trade.

The Commonwealth contends that vessel depreciation should be computed on the difference between original cost and the amount which it is estimated Bull will realize at the end of the depreciation period rather than the difference between such cost and scrap value. The vessels, they say, have already been depreciated below their market values. The Commonwealth conjectures that when the vessels are retired they will bring not merely the residual scrap value, but instead will be disposed of at prices considerably in excess of scrap value.

This record discloses graphically the extreme fluctuations which occur in the market prices of vessels, by reason of political upheavals and economic changes in world-wide market conditions. In these circumstances, it is impossible to forecast, even in the relatively near future, the probable disposable value of vessels at the end of the depreciation cycle. The residual values utilized by the respondents accord with the conventional long-standing practice of vessel owners, are the basis of depreciation allowable to compute income tax liability, are the only certain standard upon which we can rely, and in our opinion are not unreasonable.

We find the amount the several respondents prudently invested in the vessels devoted to the trade after allocation, depreciated to December 31, 1957, to be—Bull, $2,922,317; Alcoa, $1,421,166; Waterman, $1,152,132; and Lykes, $993,200. There is no suggestion in this record that the sums originally paid for the vessels, or any other property we have included in each respondent's rate base, were not prudently invested.

We further find that, of the amounts claimed by Bull as depreciation on its vessels, $532,627 for 1957, $170,084 for the first of 1958, and $340,168 for projected 1958, should be disallowed.

The examiner found that a fair and reasonable allowance for working capital as an element of the rate bases would be approximately one-twelfth of the annual operating expenses experienced in 1957 of the respective carriers, exclusive of depreciation, or $1,800,000 for Bull, $860,000 for Alcoa, $360,000 for Lykes, and $615,000 for Waterman.

The Conference excepts to this finding, contending that the carriers are entitled to (1) a buffer fund equivalent to one-twelfth of annual operating expenses, exclusive of depreciation, plus (2) an amount sufficient to cover the lag in revenue collections behind the related disbursements, citing *Alaskan Rates,* 2 U.S.M.C. 558, 566 (1941) and 2 U.S.M.C. 639, 645 (1942).

In *General Increases in Hawaiian Rates, supra,* the Board used General Order 71[2] as the method for the computation of working capital as an element of the rate base. In *General Increases in Alaskan Rates and Charges, supra,* working capital computed by the formula detailed in *Alaskan Rates, supra,* was disallowed. Working capital is required to meet the need which "arises largely from the time lag between payment by the Company of its expenses and receipt by the Company of payments for service in respect of which the expenses were incurred." *Alabama-Tennessee Nat. Gas. Co.* v. *Federal Power Commission,* 203 F. 2d 494, at 498 (1953). The Conference tariff specifies that freight must be prepaid. There would appear to be, therefore, no substantial lag between payment of expenses and receipt of revenues. To the extent there is any such lag, the working capital allowed by the Board—an amount approximately equal to one round voyage expense of each vessel in the service—is ample to take care of the carrier's needs (6 F.M.B. 14).

We agree with the Board's prior decision in this case and find that the fair and reasonable allowance for working capital would be $1,087,000 for Bull, $264,100 for Alcoa, $222,100 for Lykes, and $260,000 for Waterman.

As is indicated in Table III, Bull, Alcoa, and Waterman claim as elements of their rate bases substantial amounts representing the value of terminals and terminal equipment used by them in their Puerto Rican services which are owned by others. In conjunction with these claims, Bull has adjusted its operating expenses to substitute owners' expenses, detailed on the record in the case of the Brooklyn and Philadelphia terminals, for terminal rentals, and has credited its revenues with the profits derived

[2] 46 C.F.R., part 291.

from the operation of the Puerto Rican terminals by its subsidiaries; Alcoa has adjusted its operating expenses to eliminate rental costs for terminals; and Waterman has adjusted its operating expenses to eliminate profits from the operation of its Puerto Rican terminal owned by Waterman P. R. However, Waterman claims as operating expenses the rentals paid for terminals at Mobile and New Orleans, and the record affords no basis for determining the amount of such rental payments. The Baltimore terminals used by Bull and Alcoa are leased to them free by the owners as an inducement to increase the amount of traffic moving over the piers, and Bull's rental payments for its Philadelphia pier are substantially less than owners' costs.

In the earlier decision in this case (6 F.M.B. 14), the Board determined, correctly we think, that the value of terminal facilities used but not owned by the carriers should not be included in the rate base. The carriers are not devoting their capital to the public use insofar as such property is concerned.

It is proper to include as expenses the rentals paid and other expenses of the carriers which arise by reason of the use of the facilities. However, to include the value of non-owned property in the rate base and owners' expenses, instead of rentals as expenses, results in a windfall to the carriers at the expense of the shipping public.

Bull owns certain Puerto Rican terminals having a net book value of $2,144,572 as of December 31, 1957, which are used in the trade. It is contended by some that this value should not be included in Bull's rate base, and by others that the amount should be reduced by some $475,000 representing the total acquisition cost of certain property adjoining one of the terminals on which is located a building which occupies about one-twelfth of the area, and which is leased for purposes not related to the Puerto Rican trade. The remainder of the property is admittedly used for terminal services and the building rentals are credited to the Puerto Rican services of Bull. The property is owned by Bull and devoted to the trade and should be included in Bull's rate base. Rentals from the building will be credited to Bull's Puerto Rican service, as well as any profits realized from the operation of the terminal.

Separate amounts for going concern value are claimed. The amounts based on a percentage of the physical assets devoted to the trade are speculative estimates. We have valued the property as successful going enterprises. The carriers have been in business a long time and the costs of development have long since been paid out of rates collected from the public. *Alaskan Rates, supra,* 568.

Table VI, below, sets forth the total values of the property of the respondents devoted to their Puerto Rican services. They reflect the findings specifically made above concerning the valuation of vessels, working capital and terminals, as of December 31, 1957. In the case of other property, they reflect the net book values as of December 31, 1957, as found in the record, except as to Lykes, which values are the average of net book values shown in the record as of June 30, 1957, and as of June 30, 1958. The December 31, 1957 values for Lykes are not a matter of record.

TABLE VI

Bull	$ 6,901,276
Alcoa	2,083,328
Lykes	1,311,690
Waterman	3,137,045
Total	$13,433,339

As stated above, in the present posture of this proceeding it is possible to determine with reasonable accuracy the actual operating results experienced by the respondents during 1957 in the performance of their Puerto Rican services, and thus to make findings concerning the lawfulness of the 15 percent increase. Reasonable projections for the future may be made based upon revenue and expense data submitted by the respondents covering the first six months of operations in 1958 under the combined 15 percent and 12 percent increases, by which lawfulness of the combined increases may be gauged. Numerous issues are raised by the parties concerning the revenues to be assigned to the Puerto Rican trade, and the expenses allowable. Certain of these, relating to allocation methods employed by the respondents, depreciation claimed by them, and the adjustment of expenses to eliminate rental costs for non-owned terminals or to substitute owners' costs therefor, have been treated separately above, and need not be restated here. In stating the assignable revenues and allowable expenses, the findings there made will govern.

It is contended that the revenues of the respondents for 1957 should be restated so as to give effect to a full year's operations under the 15 percent increase, which became effective on January

10 of that year. It is also contended that the expenses of Bull for that year should be adjusted so as to eliminate the expenses incurred during the strike mentioned in paragraph 8 above, of which $643,037 of general operating expenses and $146,483 of depreciation are allocable to the Puerto Rican services, on the ground that this strike was unique in character, and occurred for reasons not related to the Puerto Rican trade. The strike was unrelated to the ordinary labor management controversies, and the general operating expenses incurred during the strike should be excluded from Bull's expenses for 1957, but no sound reason is shown for the elimination of depreciation expenses incurred during that period. With respect to the restatement of revenues to cover a full year of the 15 percent increase, since the operating results for 1957 do not enter into projections for the future, a restatement of revenues to cover a full year of the 15 percent increase would serve no useful purpose.

1957 revenues and expenses.—Bull shows operating revenues for 1957 of $21,646,383 which are adjusted to include amounts of $117,954 covering interest revenue from a mortgage on the Brooklyn terminal held by Bull, $86,018 covering net profit of the Puerto Rico terminal companies, and $68,187 covering top wharfage collected in Philadelphia. Public Counsel and the interveners contend that the revenues should be further adjusted so as to include $38,335 of the net profits of Caribbean Dispatch, Inc., earned in carrying bagged raw sugar under contract terms which would normally have been transported by Bull at tariff rates, and $60,069 of profits earned by Bull in conducting independent stevedoring operations at Puerto Rico for other carriers during the strike period. The interest revenue from the Brooklyn terminal is no more a part of the earnings derived from the Puerto Rican service than the revenue from any other unrelated investment. The terminal is not a part of Bull's rate base. The elimination of the strike expense for 1957 requires also that the bagged raw sugar and stevedoring profits should be excluded from the assigned revenues.

Bull shows total allocated operating expenses of $22,644,027. Adjustments upward include $95,872 covering costs incurred as a result of actions brought in Puerto Rican courts for overtime wages by stevedore foremen, and $69,273 covering the excess of actual Puerto Rican overhead expenses over budget provisions therefor. Adjustments downward include a credit of $145,299 for stevedore overhead charged into the stevedoring account; $3,813 to cover a correction in the allocation of 1957 strike expenses;

and a stipulated correction of $35,232 in management and operating commissions. The Manufacturers Association of Puerto Rico contends that the adjustment of expenses to cover the foremen's overtime suits is improper on the ground that the expense is attributable to a violation of law by Bull. The suits arose from a difference of opinion as to Bull's liability for overtime payments, and the costs incurred by Bull are operating costs properly includable.

The Manufacturers Association of Puerto Rico also contends that Bull's 1957 expenses should be adjusted downward by $6,398 to reflect an allocation of inactive vessel expense and depreciation of other equipment to the Dominican traffic not made by the respondents, and this adjustment is considered proper. Bull's operating expenses should also be reduced by $139,404 to cover the excess of commissions paid to A. H. Bull & Co. over and above the costs of the latter as allocated on a revenue prorate.

Alcoa shows gross operating revenues in 1957 of $9,175,949. Operating expenses after allocation were $10,615,037.

Lykes shows gross operating revenues in 1957 of $3,774,843. Operating expenses after allocation were $4,540,813.

Waterman shows gross operating revenues in 1957 of $9,416,267, covering both its Gulf and North Atlantic operations. Expenses were $8,771,685. Interveners contend that the expenses should be adjusted to eliminate charter hire of $32,400 on a vessel included in the rate base, and to eliminate $13,770 interest on a vessel mortgage. Since the vessel is not included in the rate base the charter hire paid is a proper expense. Interest payments are not operating expenses as such, but are rather costs of capital employed which should be borne out of profits earned, and an adjustment is proper. It is also contended that Waterman's revenues and expenses for 1957 should be restated so as to eliminate the results of its North Atlantic service, which was conducted in that year at a loss, for the reason that such service was only temporarily operated. As stated above, operating results for 1957 do not enter into projections for the future, and the service was instituted by Waterman with the full intention of making it permanent. To eliminate the results of this service would distort the actual revenue position of Waterman, contrary to the facts of record.

Giving effect to the findings above, including elimination of strike expenses and adjustments relating thereto, and the adjustment in Bull's revenues as found above, and the inclusion of rental expenses and deletion of owners' expenses for non-owned property disallowed in the rate base, Table VII below shows the operating results of the respondents in 1957, as adjusted:

TABLE VII

1957 OPERATING RESULTS

	Revenues	Expenses	Net Profit or (Loss)
Bull	$21,800,588	$21,303,362	$ 497,226
Alcoa	9,175,949	10,615,037	(1,439,088)
Lykes	3,774,843	4,540,813	(765,970)
Waterman	9,416,267	8,757,915	658,352
Totals	$44,167,647	$45,217,127	($1,049,480)

1958 revenues and expenses. As stated in paragraph 16 above, the revenue projections of the respondents, where given, were based on an extension of their most recent experience, that for the first half of 1958, subjected to adjustments for known or contracted cost increases. Revenues for 1958 were calculated as twice those for the first six months, adjusted to give effect for the full year to the 12 percent increase which became effective January 15. Expenses for the first six months were adjusted upward by about 1 percent. Waterman did not submit future projections, basing its position on the fact that it ceased operations in the trade and its successor in the operation is not a respondent herein. Waterman contends, therefore, that no consideration may be given to the future operations of Waterman P. R. in the trade in determining the lawfulness of the rates here under investigation. Waterman P. R. is, however, an existing operator in the Gulf/Puerto Rico trade, its rates are identical with those under investigation, and it has agreed to be bound by the findings herein. Accordingly, for the purposes of this report, projected 1958 results for the combined Waterman and Waterman P. R. operation from the Gulf ports to Puerto Rico are calculated below on the same basis as used by the other respondents. Revenues for the first six months are doubled, and adjusted upward by $54,000 as suggested by Public Counsel to reflect a full year's operation under the 12 percent increase. Expenses for the first six months, as adjusted, are doubled and adjusted upward by 1 percent to reflect the cost increases expected by the other respondents. This will fail to give effect to the cost increases shown by Waterman individually as stated in paragraph 22 above, but it is expected that similar cost increases will also affect the other respondents, and they are disregarded here in order to treat all the carriers similarly.

In computing operating expenses for the first six months of 1958, Bull included vessel repair expenses on a reserve basis in its voyage accounts. For the period these reserves totaled $197,428. Actual repair expenses during the period were $57,951 less than this amount, and it is contended that the excess should be credited to Bull's expenses and only actual repair costs allowed. Bull's actual repair expenses were $413,311 in 1957, and $562,795 in 1956, and it does not appear that the reserves are excessive. For the purpose of projecting expenses over the full year 1958, the reserves for repair expenses will be allowed.

The combined Waterman and Waterman P. R. expenses reported for the first six months of 1958 in their Gulf/Puerto Rico service include costs of $8,617 attributable to transfer of the *Bienville* cargo at New Orleans into a vessel regularly providing breakbulk service to Puerto Rico. Waterman contends that this amount should not be disallowed. It is a cost of a non-recurring nature and for the purpose of projecting future operating results it will be disallowed.

Giving effect to the findings relating to 1957 revenues and expenses, and those made specifically with regard to 1958, Table VIII shows the revenues and expenses of the respondents for the first six months of 1958, and the projected operating results for the full year 1958.

TABLE VIII
1958 OPERATING RESULTS

	First half 1958		1958 Projected		
	Revenues	Expenses	Revenues	Expenses	Net Profit or (Loss)
Bull	$11,706,918	$11,214,148	$23,650,643	$22,730,182	$ 920,461
Alcoa	4,215,049	4,990,803	8,484,000	10,027,000	(1,543,000)
Lykes	1,940,279	2,150,083	3,919,737	4,318,234	(398,497)
Waterman and Waterman P.R.	4,121,323	3,417,080	8,296,646	6,902,501	1,394,145
Totals	$21,983,569	$21,772,114	$44,351,026	$43,977,917	$ 373,109

The parties agree that income tax liabilities may be considered as an operating expense before calculation of rates of return earned or expected. However, it is contended that income tax liability should be computed on the basis of "actual liability", and from computed operating results there should be deducted interest which Bull may claim on its tax returns. They argue that

Bull has no tax liability for its earnings in the Puerto Rican trade so long as such earnings are within the zone of reasonableness, because its fixed annual interest payments would exceed such earnings.

The Commonwealth contends that the rate of return allowable on the capital invested in the trade should not exceed 5 percent, because 5 percent represents the actual needs and costs. They point out that Bull's $22 million capital structure is all debt except $100,000, consisting of some $16 million of bank loans with annual interest at 4¼ to 5 percent, or about $720,000 per annum, and roughly $5 million from stockholders of ACS, with annual interest at 5 percent or $250,000 per annum.

Apparently, the position of the Commonwealth is that the owners of Bull are entitled to no return on borrowed capital, although a part of it came from the stockholders of ACS and ACS guaranteed the bank loans. This would be a sure way to inhibit investment.

The investors or the carriers are entitled to enough revenue not only for operating expenses but also for capital costs, including service on the debt and dividends. The equity owner's return should be sufficient to ensure confidence in the financial integrity of the Company, so as to maintain its credit and attract capital.

We need not in this proceeding determine what the maximum rate of return allowable is in this trade, since, as shown above, the carriers suffered a composite loss in 1957 of over $1 million, and in 1958 earned before income taxes only $373,109, or less than 3 percent. In those circumstances, no further consideration need be given the question of the amount of income taxes allowable.

We find and conclude that the 15 percent and 12 percent increases here under investigation are just and reasonable.

An order discontinuing this proceeding will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D. C., on the 1st day of February 1962.

No. 807

ATLANTIC & GULF-PUERTO RICO GENERAL INCREASE IN RATES AND CHARGES

Full investigation of the matters and things involved in this proceeding having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates and charges herein under investigation are just and reasonable:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 951

INVESTIGATION OF CERTAIN RATE PRACTICES OF THREE CONFERENCES FOR TRAFFIC FROM GREAT LAKES TO EUROPE

Decided February 5, 1962

Rates from Erie, Buffalo, Rochester, Oswego and Ogdensburg which are the same as rates from Cleveland, and higher than rates from Toronto and Hamilton, found not shown to operate to the detriment of commerce of the United States or to be otherwise unlawful.

Thomas Roche and *Edward L. Johnson* for respondents.

Paul J. Williams for Williams Marine Agency, *Edwin Avery* for Toledo Lucas County Port Authority, *Joseph M. Arnold* for Chicago Regional Port District, and *Robert Jorgensen* for Board of Harbor Commissioners, City of Milwaukee.

Donald J. Brunner and *Robert J. Blackwell* as Public Counsel.

INITIAL DECISION BY WILLIAM J. SWEENEY, EXAMINER[1]

This investigation was initiated by the Federal Maritime Board in an order dated July 6, 1961. The Federal Maritime Commission, successor to the Board, has continued the investigation in order to determine whether rates established and maintained by respondents[2] for application on commodities shipped from Erie, Buffalo, Rochester, Oswego or Ogdensburg to foreign destinations, are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or are unjustly discrimina-

[1] This decision became the decision of the Commission on February 5, 1962. (Rules 13(d) and 13(h) Rules of Practice and Procedure, 46 CFR Sec. 201.224, 201.228).

[2] United States Great Lakes, Scandinavian and Baltic Eastbound Conference, and its members (Agreement No. 8180); United States Great Lakes-Bordeaux/Hamburg Eastbound Conference, and its members (Agreement No. 7820); and Great Lakes-United Kingdom Conference, and its members (Agreement No. 8130).

tory, prejudicial or unfair to exporters of the United States as compared with their foreign competitors, or make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, or operate to the detriment of commerce of the United States.

One of the respondents, the Great Lakes-United Kingdom Eastbound Conference, has a tariff on file with the Commission in which rates are published from both United States and Canadian ports on the Great Lakes. The other respondent conferences do not publish rates from Canadian ports, although their member lines do participate in rates from such ports as parties to Canadian conferences.

There are two specific rate situations named in the order of investigation as being possible sources of unlawfulness. One of these is the question of whether rates from the Canadian ports of Toronto or Hamilton are lower than those applicable on the same commodities from Erie, Buffalo, Rochester, Oswego or Ogdensburg, and if so, whether such differences in rates are unlawful. The applicable commodity tariff[3] publishes rates from Toronto and Hamilton which, depending on the commodity, are higher, lower, or the same as rates on the same commodity from Erie, Buffalo, Rochester, Oswego and Ogdensburg. The following examples illustrate these various rate relations: (1) rates applicable on aluminum ingots, in bundles, up to 6,720 pounds, are $23 per long ton from Erie, Buffalo, Rochester and Oswego, $19 per long ton from Ogdensburg, and $3 per 100 pounds or $67.20 per long ton from Toronto and Hamilton; (2) rates applicable on canned goods are $1.45 per 100 pounds from United States ports and $1.20 per 100 pounds from Toronto and Hamilton; and (3) the rate applicable on small arms ammunition is the same from United States and Canadian ports.

There is nothing inherently unlawful in the fact that some rates from Toronto and Hamilton are lower than those on similar commodities from United States ports, and the same is true of the fact that rates from the latter ports are lower on some commodities than rates from Toronto and Hamilton.

[3] Great Lakes-United Kingdom Eastbound Conference Freight Tariff No. 14, effective April 15, 1961.

An intervener, Williams Marine Agency, contends that rates from United States ports located east of the Welland Canal are unlawful to the extent they exceed rates from Toronto and Hamilton. Nothing is said concerning rates from such United States ports which are lower than those from Toronto and Hamilton. Evidence submitted by this intervener as proof of the alleged unlawfulness is shown in the following table which lists the tons of imports and exports through specified ports, and the number of vessel movements at such ports, in the navigation season of 1960.

Port	Import/Export Tons	Number of Sailings
Toronto	762,282	852
Hamilton	570,659	519
Buffalo	102,809	104
Rochester	7,800	79
Oswego	9,600	19
Ogdensburg	10,400	16

The foregoing statistics afford no foundation for any direct or inferential conclusion concerning the rates under consideration. Since the tonnage figures cover both import and export traffic, it is not even known how many export tons or outbound sailings are included in the totals shown. There is neither a description of the cargoes, nor a listing of destinations. Consequently, there is no showing as to the amount, if any, of freight which moved under rates in issue herein, and no probative evidence of unlawful rate discrimination by respondents.

In contrast, testimony on behalf of respondent Great Lakes-United Kingdom Eastbound Conference shows that rates from Toronto and Hamilton are not made in consideration of, or in relation to rates from United States ports. The competition which that respondent must meet at Toronto and Hamilton is from a Canadian conference composed of, and limited to, British and Canadian flag operators. The latter conference publishes dual rates from Canadian ports and respondent must establish rates in relation thereto in order to be competitive in any degree.

Additionally, official representatives of the ports of Milwaukee, Chicago, Toledo, Oswego and Ogdensburg testified that such ports are not in competition with, and had lost no traffic to Toronto or Hamilton. It was indicated that the cost of transportation from an origin in the United States to Toronto or Hamilton exceeds the difference between rates applicable from the latter ports and United States ports, thus making transportation via Toronto or

Hamilton uneconomical for goods produced in the United States. An official representing the Port Authority at Oswego stated that the latter port is basically in competition with the port of New York for goods manufactured in the area tributary to Oswego and New York. It was explained that for Oswego to be competitive, the rates applicable from it must be related to the prevailing rates from New York. Thus, it would not be realistic to establish rates from Oswego on a level with, or in relation to rates from Toronto or Hamilton because rates from such Canadian ports need not be competitive with rates from New York.

The other tariff situation under investigation concerns rates from Erie, Buffalo, Rochester, Oswego and Ogdensburg which by applicable rule in respondents' tariffs are the same as the rates from Cleveland. For the sake of convenience such rule, reproduced below, will be called the Cleveland Rate Rule.

RATES FROM ERIE, BUFFALO, ROCHESTER, OSWEGO and OGDENSBURG, N. Y. Whenever rates from Erie, Pa., Buffalo, Rochester, Oswego or Ogdensburg, N. Y., are NOT shown in this tariff, the rates as published from Cleveland shall be applied. However, application of Cleveland rates to Erie, Pa., Buffalo, Rochester, Oswego or Ogdensburg, N. Y., shipments are to be only when vessel makes direct call at such port or ports.

The rates under investigation are published in commodity tariffs which are established with the intention of specifically naming each commodity which is moving, or can reasonably be expected to move, through ports on the Great Lakes or St. Lawrence River. Each tariff also contains a commodity rate which applies on cargo not named specifically in the tariff. The purpose of the latter publication is to accord a rate which can be quoted and applied by respondents on any new movement, pending establishment of a specific commodity description and lower rate if the movement proves to be steady and in sufficient volume. The respondents are receptive to requests by shippers or port officials for the establishment of rates lower than the general cargo rate in advance of a prospective movement of a commodity not specifically described. The same is true as to requests for rates from Erie, Buffalo, Rochester, Oswego, or Ogdensburg lower than those applicable under the Cleveland Rate Rule. The record contains no evidence that such requests have been denied but on the contrary it is shown that the tariffs published by respondents contain 25 commodity rates from United States ports east of Cleveland which are lower than rates from Cleveland on the same commodities.

It is a common and reasonable practice for water carriers to publish a general cargo rate in their commodity tariffs, pending the development of some traffic movement. The establishment of the Cleveland Rate Rule by respondents is simply a refinement of such practical method of establishing rates.

A factor favoring rates from Erie, Buffalo, Rochester, Oswego and Ogdensburg on a lower basis than rates from Cleveland, is that such ports are closer than Cleveland to foreign destinations. However, distance is but one of several important considerations in formulating a rate which is reasonable for a shipper and yet profitable to a carrier. Some of the other factors which must be considered in rating a commodity are its value, density, fragility, stowage characteristics, similarity to other commodities, volume of movement, and possible problems in connection with stevedoring. Additionally, the location of a port in relation to a competitive port and the point of production of a commodity is a very important consideration. Thus, only if other factors are relatively equal does distance become of controlling importance in establishing rates lower than those applicable under the Cleveland Rate Rule. See *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936), *Eastbound Intercoastal Lumber*, 1 U.S.M.C. 608, 622 (1936), and *Increased Rates—Alaska Steamship Company*, 3 F.M.B. 632, 637 (1951).

The foregoing indications that the Cleveland Rate Rule is not unlawful, particularly in the light of respondents' willingness to establish departures from it upon reasonable request, is supported by answers to an interrogatory sent by Public Counsel to the Foreign Trade Club of Syracuse, New York. The membership of such club is composed of shippers in the Syracuse area who are interested in foreign trade. Syracuse is the nearest center of manufacturing which is naturally tributary to the port of Oswego. It was resolved at a meeting of the club that the prime elements considered by an exporter in selecting a port of export are: (1) regular scheduled sailings; (2) forwarding agents facilities; (3) prompt customs clearance; (4) international banking facilities; (5) marine insurance facilities; and (6) foreign consular offices to expedite document clearance. Regularly scheduled sailings, accompanied by the foregoing services, are regarded as more important than lower freight rates from Lake Ontario ports. It was specifically stated that a reduction of $2 per ton from Lake Ontario ports would not induce the movement of any additional traffic from the Syracuse area through such ports.

There is no evidence of record indicating any dissatisfaction by a shipper, exporter, importer or port authority with the Cleveland Rate Rule, or that Erie, Buffalo, Rochester, Oswego or Ogdensburg are in competition for traffic with the port of Cleveland.

CONCLUSIONS

It is hereby concluded that:

1. The rules established by respondents which make rates from Cleveland applicable on cargo shipped from Erie, Buffalo, Rochester, Oswego, or Ogdensburg are not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and do not operate to the detriment of the commerce of the United States.

2. The charging by respondents of higher rates on cargo shipped from Erie, Buffalo, Rochester, Oswego or Ogdensburg than is charged by respondents on cargo shipped from Toronto or Hamilton is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and does not operate to the detriment of commerce of the United States.

3. The practices specified above are not unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors, and such practices do not make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, nor do they subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

An order will be entered discontinuing this investigation proceeding.

775-704 O-65-10

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D. C., on the 5th day of February, A.D. 1962

No. 951

INVESTIGATION OF CERTAIN RATE PRACTICES OF THREE CONFERENCES FOR TRAFFIC FROM GREAT LAKES TO EUROPE

The initial decision of the examiner herein having become the decision of the Commission on February 5, 1962, which decision is hereby referred to and made a part hereof;

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

(SEAL) (Signed) THOMAS LISI,
Secretary.

No. 951

INVESTIGATION OF CERTAIN RATE PRACTICES OF THREE CONFERENCES FOR TRAFFIC FROM GREAT LAKES TO EUROPE

NOTICE OF EFFECTIVE DATE OF DECISION

No exceptions having been filed to the initial decision of the examiner herein, and the Commission having determined not to review such decision, notice is hereby given, in accordance with section 13(d) of the Commission's Rules of Practice and Procedure (46 CFR 201.224), that the initial decision of the examiner became the decision of the Commission on February 5, 1962.

By order of the Federal Maritime Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 931

AGREEMENT NO. 8555
BETWEEN ISBRANDTSEN STEAMSHIP COMPANY, INC.,
ISBRANDTSEN COMPANY, INC., AND AMERICAN EXPORT LINES, INC.

Decided February 5, 1962

F.M.B. Agreement No. 8555 found properly filed pursuant to Section 15 of the Shipping Act, 1916. Said agreement further found not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Further found that said agreement is not in violation of the Shipping Act, 1916, will not operate to the detriment of the commerce of the United States, and is not contrary to the public interest.

F.M.B. Agreement No. 8555 approved, pursuant to Section 15 of the Shipping Act, 1916.

Francis T. Greene, Whitman Knapp, David Simon, and *Robert Arum* for Prudential Steamship Corporation.

Richard W. Kurrus, John W. Castles, III, and *Leonard S. Leaman* for Isbrandtsen Company, Inc., and Isbrandtsen Steamship Company, Inc.

Ralph D. Ray, Frank B. Stone, Alan S. Kuller, and *Eugene R. Anderson* for American Export Lines, Inc.

Robert B. Hood and *Donald V. Brunner* as Public Counsel.

REPORT OF THE COMMISSION[1]

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

[1] The evidentiary hearing was held before an Examiner. Thereafter opportunity was afforded all parties to file proposed findings, conclusions, and supporting briefs. After such documents were filed, the Commission required the entire record to be certified to it for an initial decision, which was based on our consideration of the entire record including proposed findings and conclusions, and supporting briefs.

BY THE COMMISSION:

This case presents two questions (a) is the Commission authorized and required to act with respect to certain agreements which have been filed with it, and (b) if so, what should the Commission's action be? The controlling statute, section 15 of the Shipping Act, 1916 (39 Stat. 733, 46 U.S.C. 814) hereinafter "the Act" reads in directly pertinent part, as follows: ". . . every common carrier by water . . . shall file . . . with the Commission a true copy . . . of every agreement with another such carrier . . . controlling, regulating, preventing, or destroying competition . . . .

"The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements . . . ."[2]

We hereby find the following facts:

(1) Isbrandtsen Company, Inc., and American Export Lines, Inc., both common carriers by water, and New York corporations, have filed with this Commission, and ask this Commission to approve under section 15 of the Act, an agreement between them dated November 25, 1960, an important part of which (Exhibit "A") is an agreement between Isbrandtsen Company, Inc., and its wholly-owned subsidiary, Isbrandtsen Steamship Company, Inc. (also a New York corporation) dated November 23, 1960.[3]

(2) Isbrandtsen and Export are both primary United States-flag liner operators on Essential United States Foreign Trade Route No. 10[4] which runs between United States

[2] This quotation is from the Act as amended by Public Law 87-346, 87th Cong., 1st Sess., effective Oct. 3, 1961 (75 Stat. 763). The characterization of this quotation as section 15 "in directly pertinent part" is not intended to indicate that the balance of the statute is not considered in deciding this case. As later indicated we have carefully considered the entire section and all arguments based on any provision in it. The quotation however, highlights (a) the character of agreements covered by the section, and (b) the statutory rule of decision with respect to them.

[3] Hereinafter "Isbrandtsen" means Isbrandtsen Company, Inc., "Export" means American Export Lines, Inc.

[4] "Essential United States Foreign Trade Route" as used herein, means a route which has been determined pursuant to section 211 of the Merchant Marine Act, 1936 (49 Stat. 1989, 46 U.S.C., 1121), to be an ocean route from ports in the United States to foreign markets essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States.

North Atlantic ports (Maine-Virginia, inclusive) and ports in the Mediterranean Sea and Black Sea, Portugal, Spain, South of Portugal and Morocco (Tangier to southern border of Morocco).

(3) The percentages of total commercial cargo moving on Trade Route 10 in 1957, 1958, and 1959 carried by Isbrandtsen and Export were approximately as follows:

Outbound	*Export*	*Isbrandtsen*
1957	29.8	4.0
1958	24.9	2.4
1959	20.6	2.4
Inbound		
1957	35.4	—
1958	29.2	—
1959	27.6	—

(4) Isbrandtsen and Export are both primary United States-flag liner operators on Essential United States Foreign Trade Route No. 18, which runs between United States Atlantic and Gulf ports (Maine-Texas, inclusive) and ports in southwest Asia from Suez to Burma, inclusive, and in Africa on the Red Sea and Gulf of Aden.

(5) The percentages of total commercial cargo moving on Trade Route 18 in 1957, 1958, and 1959 carried by Isbrandtsen and Export were approximately as follows:

Outbound	*Export*	*Isbrandtsen*
1957	11.0	6.7
1958	7.6	5.6
1959	6.9	4.0
Inbound		
1957	11.7	.4
1958	12.4	.2
1959	9.5	.0

(6) The overall effect of the Isbrandtsen-Export arrangement before us (which has been designated F.M.B. Agreement No. 8555 and is hereinafter called "No. 8555") will be for Isbrandtsen, which recently acquired 26.37% of the outstanding Export common stock, to transfer its liner fleet of 14 ships, and its entire business (including good will) as a common carrier by water in the foreign commerce of the United States to Export, agreeing as a part of the transaction not to compete in the services transferred without Export's consent.

> The foregoing findings require us to conclude, as we do, that F.M.B. Agreement No. 8555 in its entirety constitutes an agreement and arrangement between Isbrandtsen and Export, common carriers by water, and citizens of the United States, controlling, regulating, preventing, and destroying competition.

The clear, unqualified language of section 15 of the Shipping Act, 1916 therefore requires us to approve, disapprove, cancel, or modify No. 8555.[5]

The first question is therefore answered in the affirmative: we are required to act with respect to No. 8555. We now turn to the remaining question which is *what* should our action be, and with respect thereto, we hereby find the following additional facts: [6]

(7) In this case there is neither claim nor evidence that No. 8555 is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or as between exporters from the United States and their foreign competitors, or is in violation of the Act.[7]

(8) Prudential Steamship Corporation (hereinafter "Prudential") does not operate on Trade Route 18, but is a primary United States-flag liner operator (subsidized) on Trade Route 10.

(9) Prudential has successfully operated on Trade Route 10 for more than ten years, most of that time unsubsidized, and has steadily increased its outbound carryings of commercial

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[5] We hold that Congress means what it says. Congress (by Section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify "*every* agreement . . . controlling, regulating, preventing, or destroying competition." To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement . . . controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny*, would constitute statutory *amendment* masquerading as statutory *construction*. We are not authorized anywise, wih respect to particular types of agreements (or anything else), to emasculate the Act to the detriment of the public interest, and this (although it might make our task substantially easier) we will not do.

[6] If we found that No. 8555 is unjustly discriminatory or unfair as between (1) carriers (2) shippers (3) exporters (4) importers (5) ports, or (6) exporters from the United States and their foreign competitors, it would necessarily be disapproved, cancelled, or modified as provided by section 15 of the Act, as would also be required if we found that it would operate to the detriment of the commerce of the United States, be contrary to the public interest, or be in violation of the Act. Otherwise, according to the legislative mandate, it must be approved. This test presents questions for highly specialized judgment in the maritime transportation field, for what is "unjustly discriminatory" or "unfair," will "operate to the detriment of the commerce of the United States" or "be contrary to the public interest" in that area, depends in large measure upon considerations not elsewhere applicable.

[7] This leaves for consideration whether No. 8555 is unjustly discriminatory or unfair as between carriers i.e., as between Export and Prudential, will operate to the detriment of the commerce of the United States, or be contrary to the public interest.

cargo from 1957 to 1959 inclusive from 3.8% to 5.5% while Isbrandtsen's fell from 4% to 2.4% and Export's fell from 29.8% to 20.6%. Inbound, Prudential's percentage-carriage rose from 7.7% in 1957 to 10.4% in 1959, while Export's fell from 35.4% to 27.6%. Isbrandtsen's operating pattern does not permit it to carry substantial inbound cargo on this trade route.

(10) Export, Isbrandtsen, and Prudential, as United States-flag liner operators on Trade Route 10, face strong, increasingly effective competition from more than 30 foreign-flag lines. To prosper, even to survive, United States-flag operation must achieve maximum operating efficiency, and the public interest demands its achievement by all lawful means.

(11) Outbound sailings on Trade Route 10 by United States-flag lines and foreign-flag lines, 1957-1960, were approximately as follows:

	1957	*1958*	*1959*	*1960*
U.S. Flag	210	271	268	246
Foreign Flag	346	426	415	463

For the four year period, foreign-flag sailings outnumbered United States-flag sailings by an average of more than 160 sailings per year. In 1960 foreign flags outnumbered United States flags by 217 sailings, and made 65.3% of that year's sailings on the route.

(12) Although from 1957 to 1959 the volume of liner-cargo moving outbound on Trade Route 10 has held steady, and the inbound cargo movement substantially increased, the proportion of cargo carried by United States flag ships both outbound and inbound has steadily and substantially declined. Cargo-carryings under foreign flag have increased proportionately to United States flag losses.

(13) No. 8555 should result in substantial economies and improved operating results in the combined Export-Isbrandtsen operation, and increase the efficiency of performance.[8]

[8] Aside from alleged fear of wholly hypothetical injury at some necessarily unspecified future date, this appears to be the primary (if not the only) basis of Prudential's protest against our approval of F.M.B. Agreement No. 8555. Not only is it unsubstantial; to adopt it would in our opinion, be contrary to the dominant public interest, which is the basis of our decision on the merits and on the jurisdictional point as well. Prudential may have an interest in preventing its United States flag competitors from increasing the economy and efficiency of their operations. If so, the private interest must yield to the public interest, which demands that United States flag steamship lines in foreign trade (especially subsidized operations) operate as economically and efficiently as possible.

(14) No. 8555 will result in the performance of Isbrandtsen's service competitive with Prudential being performed by a subsidized operator or a subsidized operator's wholly-owned subsidiary.

(15) The operations of subsidized operators and their subsidiaries, competitive with other United States flag lines as distinguished from Isbrandtsen's present, unsubsidized competition with Prudential, are particularly restricted by law, and subject to constant policing by the Maritime Administration.[9]

(16) There is no reasonable probability that No. 8555 will result in any substantial loss of revenue by Prudential, or that Prudential will as a result of No. 8555 be hampered anywise in maintaining and improving its service, or be otherwise injured.[10]

Based upon the findings we have made, and the whole record in this case, we find, determine and conclude that No. 8555 is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; that it will not operate to the detriment but will operate to the advancement of the commerce of the United States; that it is not in violation of the Shipping Act, 1916; and that it is not contrary but beneficial to the public interest. It follows that we should approve F.M.B. Agreement No. 8555, and we do approve it.[11]

We must now consider exceptions on file with respect to the foregoing.

These exceptions argue that agreements such as those before

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[9] e.g., Section 804 of the Merchant Marine Act, 1936, provides *inter alia*, that it shall be unlawful without permission for a subsidized operator or its subsidiary to operate foreign flag vessels in competition with United States flag operators (such as Prudential) on essential United States foreign trade routes. And see certain standard provisions in all operating-differential subsidy contracts.

[10] While each and every result of maritime operating pattern changes cannot, of course, be predicted with certainty, it is significant that no evidence in this record would, in our opinion, support a finding that, as a result of this agreement, Prudential will lose a ton of cargo in the foreseeable future.

[11] Except to the considerable extent that the proposed findings and conclusions are substantially embodied herein, they are denied as unsupported by substantial evidence, contrary to the weight of the evidence, or irrelevant to decision under Section 15 of the Shipping Act, 1916.

us are not subject to the provisions of section 15 of the Shipping Act, 1916. The argument appeared in a brief filed by exceptors, which asserts that F.M.B. Agreement No. 8555 offends neither the standards of the Shipping Act nor those of the antitrust laws, and should be approved by the Commission, if within the Commission's jurisdiction. The hamstringing argument that we lack jurisdiction, now embodied in exceptions, was considered in connection with our initial decision.

The exceptions argue that steamship lines are not required to file such agreements with the Commission, thus being left free to keep this regulatory agency in the dark about such situations, even if they are wholly repugnant to the Shipping Act and the public interest. We hold, to the contrary, that such agreements must be filed with the Commission, and the Commission fully informed.

The exceptions argue that such unfiled, unapproved agreements may be carried out by the parties without violating section 15 of the 1916 Act.

We hold, to the contrary, that carrying out such agreements (unfiled or unapproved) violates section 15, and subjects the parties to penalties of as much as $1,000 for each day the agreements are effective.

The exceptions argue that the Commission lacks power to approve such agreements (under any conditions whatsoever), even those which are consistent with maritime and antitrust standards and may be expected to have beneficial results.

We hold, to the contrary, that we have, as the public interest requires us to have, power to approve such agreements, modifying them with safeguards in appropriate cases.

The exceptions argue that we have no power to disapprove and thereby prevent such agreements, even if they will operate to the detriment of the commerce of the United States, and are contrary to the public interest.

We cannot agree. The exceptions are overruled. An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

No. 931

IN THE MATTER OF AGREEMENT NO. 8555 BETWEEN ISBRANDTSEN COMPANY, INC., ISBRANDTSEN STEAMSHIP COMPANY, INC., AND AMERICAN EXPORT LINES, INC.

ORDER

Whereas the Commission on the 5th day of February 1962, issued its report herein, which is made a part of this order,

Now therefore, for the reasons stated in said report, *it is ordered* that said agreement be, and it hereby is approved, and this proceeding discontinued.

BY THE COMMISSION:

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 972

ORDER THAT A. H. BULL STEAMSHIP CO. SHOW CAUSE

Decided February 28, 1962

Respondents found not to have complied with the requirements of section 2 of the Intercoastal Shipping Act, 1933, in its attempt to impose an embargo on the carriage of sugar from ports in Puerto Rico to the United States North Atlantic Ports of Baltimore, Philadelphia, and New York; and on the carriage of all freight destined for Ponce and Mayaguez, Puerto Rico from the ports of Baltimore, Philadelphia and New York.

Mark P. Schlefer, John Cunningham, T. S. L. Perlman for A. H. Bull Steamship Co.

John Mason, Gerald A. Malia for Sugar Producers of Puerto Rico, Puerto Rico American Refinery, Inc., Western Sugar Refining Company, Central Roig Refining Company and Olavarria & Co. Inc.

Donald J. Brunner and *Robert J. Blackwell* Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

This proceeding arises out of the Commission's order to show cause of February 9, 1962, as amended by order of February 19, 1962. The order to show cause was issued as a result of the circumstances and conditions set forth below.

By an "Embargo Notice" dated February 1, 1962, the A. H. Bull Steamship Co., a common carrier by water engaged in the transportation of property between ports in Puerto Rico and ports in the United States, advised all shippers that effective March 3, 1962 it would be necessary for Bull to place an "embargo" on the carriage of sugar refined and turbinated, in bags, from ports in Puerto Rico to the ports of Baltimore, Philadelphia, and New York. By a second "Embargo Notice" dated February 5, 1962, Bull advised shippers that, due to a realignment of schedules and a curtailment of service, effective February 10, 1962, freight destined for Ponce and Mayaguez, Puerto Rico would not be accepted at the ports of New York, Baltimore and Philadelphia.

The Commission's order of February 9, 1962, directed Bull to show cause why it should not be ordered to withdraw its so-called embargoes substituting therefor new schedules filed in accordance with section 2 of the Intercoastal Shipping Act, 1933, and which would cancel the schedules then in force for the commodity and service which Bull proposed to discontinue. Oral argument was scheduled for February 20, 1962, but was postponed by our order of February 19, 1962 until February 27, 1962.

Bull is a respondent in *Investigation of Increased Rates on Sugar, Refined or Turbinated, in Bags, in the Atlantic/Gulf Puerto Rico Trade,* F.M.C. Docket 954 (Sub 2) instituted by the Commission on December 7, 1961. The proceeding involves a proposed rate increase by Bull on sugar, the commodity which Bull sought to "embargo" by its notice of February 1, 1962. When Bull's proposed increase was filed, we ordered the effective date of the increase suspended pending final determination by the Commission as to the reasonableness of the proposed new rate. On January 17, 1962 Bull filed a "Petition to Omit Initial Decision and For Immediate Final Decision". The petition was grounded on Bull's contention:

> . . . that respondent (Bull), contending that the present rate is so low as to be confiscatory and that the order of suspension in this case is an unconstitutional confiscation of its property, will embargo all refined sugar traffic upon 30 days' notice to be published on February 1, 1962, unless the proposed rate under investigation is permitted to go into effect on or before that date; and that such an embargo may leave the Puerto Rican shippers without common carrier steamship service to the mainland; in these circumstances an immediate decision may prevent termination of respondent's service and vast disruption of the Puerto Rican sugar refining business.

On February 12, 1962, Bull filed a motion in the instant proceeding "For Clarification, Particulars, Additional Hearing, Vacation of Suspension, Consolidation, and Other Relief." In its motion Bull sought, among other things, vacation of the order of suspension in Docket 954 (Sub 2) *supra*, consolidation of this proceeding with that docket, and reiterated the contentions made in its motion to Omit Initial Decision. We denied Bull's motion on February 16, 1962. Memoranda of law were filed and oral argument was had on February 27, 1962.

The sole issue in this proceeding as manifested by the order to show cause is whether Bull has properly complied with section 2 of the Intercoastal Act, 1933, and section 18 of the Shipping Act, 1916, in that its tariff presently on file with the Commission accurately reflects the common carrier service of Bull.

Section 2 of the Intercoastal Act, 1933, requires carriers in the off-shore domestic trades to file and post schedules showing all their rates and charges for or in connection with transportation. The section further provides that no change in rates filed and published shall be made except by the publication, filing, and posting of new schedules which shall not become effective earlier than 30 days after the date of posting and filing, and that no carrier shall engage in service as a common carrier by water unless and until it has complied with the requirements of the section.

The right of a common carrier to impose an embargo under certain emergency operating conditions has been recognized. In *Boston Wool Trade Asso.* v. *Merchants and Miners Trans. Co.*, 1 U.S.S.B. 32 (1921), it was held that:

> The right of a common carrier to declare an embargo when the circumstances warrant such action is established, as is also the fact that the necessity for placing embargoes is a matter to be determined in the first instance by the carrier. On the other hand an embargo is an emergency measure to be resorted to only where there is congestion of traffic, or when it is impossible to transport the freight offered because of physical limitations of the carrier. During the existence of the embargo, the common carrier obligations of the transportation company are suspended insofar as the embargo has application, and the reality of a situation sufficient to justify this suspension of obligations is requisite if the embargo is to be justified. *Id* at 33.

Of immediate concern here is whether the actions of Bull under the notices of February 1, and 5, 1962 constitute true embargoes, thus relieving Bull of the necessity of complying with the requirements of section 2 of the Intercoastal Act.

As pointed out in the *Boston Wool Trade* case, *supra*, an embargo "is an emergency measure to be resorted to only where there is a congestion of traffic, or when it is impossible to transport the freight offered because of physical limitations of the carrier." (1 U.S.S.B. at page 33.) See also, *New York Central Railroad Company* v. *United States*, 201 F. Supp. 958 (USDC, S.D.N.Y., 1962) and cases cited therein. There is no evidence in the record that Bull is unable to perform the carriage in question because of physical limitations. The only reason proffered by Bull for its cessation of service is that of financial loss. Generally speaking financial loss is not justification for the imposition of an embargo. *New Orleans Traffic & Transp. Bureau* v. *Mississippi Valley Barge Line Co.* 280 I.C.C. 105 (1951); *New York Central R.R. Co.* v. *U.S., supra.*

Bull's attempts at embargo present essentially the same factual pattern as that presented to our predecessor in *Embargo on Cargo, North Atlantic and Gulf Ports*, 2 U.S.M.C. 464. In that case the respondent sought by means of an embargo to completely abandon its intercoastal service to and from the Gulf. After a discussion of section 2 of the Intercoastal Act, the Commission held at page 465:

> While the foregoing provisions do not specifically require that such schedules shall be cancelled upon withdrawal of service or before withdrawal of service, they clearly contemplate that such schedules shall serve as notice to the Commission and the public of the services maintained and the charges therefor. It follows that the maintenance by common carriers of schedules of rates for services they do not perform cannot be justified. *Intercoastal Investigation, 1935*, 1 U.S.S.B. 400, 449. *Id* at 465

In view of the above, we find that the actions of Bull taken pursuant to its notices of February 1 and 5, 1962 do not constitute true embargoes. We are not here dealing with the right of Bull to discontinue any part or all of its common carrier service. Our decision is restricted to the issue of whether in its attempts at discontinuance Bull has complied with the requirements of section 2 of the Intercoastal Act, and on the basis of the record before us we find that it has not. Compliance with that section requires that Bull withdraw and cancel the "embargoes" imposed by its notices of February 1 and 5, 1962 in the same manner in which they were imposed, and substitute therefor new schedules, filed pursuant to the provisions of section 2 of the Intercoastal Act, 1933. An appropriate order will be issued.

FEDERAL MARITIME COMMISSION

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its Office in Washington, D. C. on the 28th day of February, 1962.

ORDER THAT A. H. BULL STEAMSHIP CO. SHOW CAUSE

This proceeding having been initiated by an Order to Show Cause, issued by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That respondent A. H. Bull Steamship Co. withdraw and cancel the "embargoes" imposed by the "Embargo Notices" of February 1, 1962 and February 5, 1962, in the same manner in which the embargoes were instituted.

BY THE COMMISSION.

(Sgd.) THOMAS LISI,
Secretary.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its Office in Washington, D. C. on the 9th of February 1962.

No. 972

ORDER THAT THE A. H. BULL STEAMSHIP CO. SHOW CAUSE

It appearing, That on or about February 1, 1962, the A. H. Bull Steamship Co., a common carrier by water engaged in the carriage of goods between ports in Puerto Rico and United States North Atlantic ports, issued a notice to all shippers, entitled "Embargo Notice" wherein said carrier advised shippers that effective March 3, 1962, it is necessary for said carrier to place an "embargo" on the carriage of sugar, refined and turbinated, in bags, from ports in Puerto Rico to United States North Atlantic ports of Baltimore, Philadelphia, and New York; and

It further appearing, That on or about February 5, 1962, said A. H. Bull Steamship Co. also issued an "Embargo Notice" wherein said carrier stated that effective February 10, 1962, due to a realignment of schedules and a curtailment of service, freight for Ponce and Mayaguez, Puerto Rico, will no longer be accepted; this notice to apply to service from the United States North Atlantic ports of New York, Baltimore, and Philadelphia; and

It further appearing, That there is no evidence of any emergency condition or physical limitations of said carrier necessitating the imposition of embargoes; and

It further appearing, That said carrier has on file with this Commission a schedule of freight rates which includes a rate for the carriage of sugar, refined and turbinated, in bags, from Puerto Rican ports to the United States North Atlantic ports of Baltimore, Philadelphia, and New York; neither a supplemental schedule nor a new schedule has been filed with the Commission by said carrier cancelling the aforementioned schedule of rates; and

It further appearing, That said carrier also has on file with this Commission a schedule of freight rates for the carriage of commodities from the United States North Atlantic ports of Baltimore, Philadelphia and New York to Puerto Rican ports including

Ponce and Mayaguez; said carrier has not filed a new or supplemental schedule with this Commission cancelling this aforementioned schedule; and

It further appearing, That section 2 of the Intercoastal Shipping Act, 1933, and this Commission's Freight and Passenger Tariff Regulations require a carrier to file with this Commission a new schedule or schedules to become effective not earlier than thirty days after date of filing, before any change shall be made in the rates, fares, charges, classifications, rules or regulations that have previously been filed with the Commission; and

It further appearing, That the imposition of said embargoes may constitute unjust and unreasonable practices in violation of section 18(a) of the Shipping Act, 1916:

Now, therefore, It is ordered, Pursuant to section 2 of the Intercoastal Shipping Act, 1933, and sections 18 and 22 of the Shipping Act, 1916, That the A. H. Bull Steamship Co. show cause on or before February 20, 1962 why it should not be ordered to withdraw the aforementioned embargoes and to file and post new schedules cancelling the schedules now in force for the commodity and service which it proposes to discontinue; and

It is further ordered, That this order be published in the Federal Register and served on the A. H. Bull Steamship Co. who is named as respondent in this proceeding. Oral argument in this proceeding will be heard by the Commission on February 20, 1962, in Room 4519, 441 G Street, N. W., Washington, D. C. at 9:00 a.m. EST. Notwithstanding the rules as to time and service of documents of this Commission's Rules of Practice and Procedure, the parties to this proceeding shall adhere to the following schedule: Affidavits of fact and memoranda of law may be submitted to the Commission on or before the close of business on February 16, 1962 and replies thereto on or before the close of business on February 19, 1962. All persons having an interest in this proceeding, desiring to intervene therein, should notify the Secretary of the Commission promptly and may file petitions for leave to intervene up to the time of oral argument before the Commission; replies to petitions for leave to intervene shall be filed on or before the close of business on February 23, 1962. Parties seeking leave to intervene may file affidavits of fact and memoranda of law and replies in accordance with the schedule previously set forth. All documents or pleadings filed in this proceeding including petitions to intervene and replies thereto must be served by the person filing same upon all parties of record. The parties to this proceeding are directed to file their requests for time allotment for oral argument with the Secretary of the Commission on or before February 19, 1962.

BY THE COMMISSION.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 954

INVESTIGATION OF RATES AND PRACTICES IN THE ATLANTIC-GULF/PUERTO RICO TRADE

Decided March 5, 1962

Motion for order invalidating reduced rates for the carriage of zinc from the continental United States to Puerto Rico denied.

Matter remanded to Examiner for further hearing and initial decision.

George F. Galland and *Robert N. Kharasch* for respondent, American Union Transport.

Mark P. Schlefer for respondents, A. H. Bull Steamship Company and Lykes Brothers Steamship Company.

Sterling Stoudenmire for respondent, Waterman Steamship Company.

Warren Price, Jr. and *Carl H. Wheeler* for respondent, Sea-Land Service, Inc.

Edward T. Cornell for respondent, TMT Trailer Ferry, Inc.

William L. Hamm for respondent, Alcoa Steamship Company, Inc.

John T. Rigby and *William D. Rogers* for intervener, Commonwealth of Puerto Rico.

Donald J. Brunner and *Robert J. Blackwell* Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

This particular segment of this case is concerned with a just and reasonable charge for the carriage by water of zinc from the continental United States to Puerto Rico.[1]

We have before us a motion by Sea-Land Service, Inc., Puerto Rican Division, (hereinafter "Sea-Land") which is supported by Hearing Counsel, and which urges us to hold that a suspended but presently-effective rate of $1.03 per 100 pounds for the carriage of zinc from the continental United States to Puerto Rico is unjust and unreasonable in violation of the Intercoastal Shipping Act, 1933, and the Shipping Act, 1916.[2] We refuse so to hold, because we are wholly dissatisfied with the state of the record.

Treating the motion as seeking an order compelling the cancellation of the rate,[3] we refuse to issue such an order because as heretofore stated, we are dissatisfied with the state of the record (a situation which must and will be corrected), and because to enter such an order at the present time would be detrimental to the public interest, and contravene sound regulatory principles of general application.

For some years practically all zinc has moved from the continental United States to Puerto Rico out of the North Atlantic at a rate of $1.25 per 100 pounds. A. H. Bull Steamship Company (hereinafter "Bull") and Sea-Land have carried almost all of it; Waterman Steamship Corporation (hereinafter "Waterman") carried 10 tons in 1960, none in the first half of 1961. Lykes Bros. Steamship Company (hereinafter "Lykes") apparently has carried none. During the summer of 1961 conditions in the United States-Puerto Rican trade, which had for some time been unstable, became almost chaotic. Confronted with what may well have been the early stages of a full-scale rate war, our predecessor, the Federal Maritime Board, gave particular attention to rate changes in the trade, especially reductions which might well be in the nature of noncompensatory "fighting rates". In July 1961, the Board instituted this proceeding as an investigation of revision (both rate increases and decreases) of tariffs by various operators in the Puerto Rican trade. Among such operators were Sea-Land, Lykes, Waterman, and Bull. From time to time thereafter the scope of the proceeding was expanded

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[1] The procedural details out of which this opinion grows are stated in the appendix.

[2] The argument on which the rate of $1.03 was suspended was that this rate is unjust and unreasonable because it is *too low*. The suspension period expired by operation of law on January 14, 1962, and the rate (proposed by the United States Atlantic and Gulf-Puerto Rico Conference) thereupon went into effect.

[3] e.g. *Commodity Rates Between Atlantic Ports and Gulf Ports*, 1 USMC 642, 645 (1937). *Pacific Coastwise Carrier Investigation*, 2 USMC 191, 196, 197 (1939).

to include investigation of other rates in the trade. The rate of $1.03 per 100 pounds on zinc, which we are here urged to strike down as unjust and unreasonable because it is alleged (not proved) to be too low, was published by the United States Atlantic and Gulf/Puerto Rico Conference (hereinafter "the Conference" with Lykes and Waterman, its carrier members) as a decrease from a rate of $1.25 per 100 pounds, to become effective September 15, 1961. (Conference Freight Tariff No. 1, FMB-F No. 1, first revised page No. 98.)

On August 25, 1961, Sea-Land, which then had and now has in effect a zinc rate of $1.25 per 100 pounds, protested the $1.03 rate as too low, and petitioned for its suspension. On September 7, 1961, the Acting Members of the Commission (which had by that date succeeded the Board) by the fourth supplemental order in this proceeding, served September 14, 1961, suspended the $1.03 zinc rate for the full 4-month statutory period, which expired January 14, 1962. By the same order the Acting Members of the Commission "with a view to making such findings and orders in the premises as the facts and circumstances shall warrant" expanded the scope of the proceeding to include, *inter alia,* not only the $1.03 zinc rate but the then (and now) effective zinc rates of Sea-Land, $1.25 per 100 pounds (Sea-Land Service, Puerto Rican Division Outward Freight Tariff No. 2, FMB-F No. 3, first revised page No. 118), of Bull, $1.25 per 100 pounds (Bull Outward Freight Tariff No. 1, FMB-F No.1, second revised page No. 84), Alcoa Steamship Company, Inc. (hereinafter "Alcoa"), $1.25 per 100 pounds (Alcoa Outward Freight Tariff No. 2, FMB-F No. 2, original page No. 91), American Union Transport, Inc. (hereinafter "AUT"), $1.07 per 100 pounds (AUT Outward and Inward Freight Tariff No. 6, first revised page No. 46), and TMT Trailer Ferry, Inc. (hereinafter "TMT") of $1.19 per 100 pounds trailer load, and $1.24 per 100 pounds less than trailer load (TMT Freight Tariff No. 3, FMB-F No. 3, second revised page No. 142).

The $1.03 zinc rate having been suspended, the burden of proving it fair and reasonable is placed upon its proponent carriers, Lykes and Waterman by section 3 of the 1933 Act (46 U.S.C. 844), which provides in pertinent part that:

> At any hearing [on a suspended rate] the burden of proof to show that the [suspected] rate . . . is just and reasonable shall be upon the carrier or carriers.

Normally, the failure to sustain the burden results in cancellation of the suspended rate (see cases cited in footnote 3), but this is not a normal situation. Neither Lykes nor Waterman could complain of a cancellation order, for, as stated by Sea-Land in its motion here under consideration (pp. 2-3), "Neither Waterman, Lykes nor the Conference have sustained their burden of proof in showing the justness and reasonableness of the proposed reduced rate applicable to the carriage of zinc".

As Sea-Land also points out in the instant motion, Lykes' counsel expressed for Lykes a position which we cannot condone, namely, that "Lykes is unconcerned with the rates, if it doesn't sustain its burden of proof, it is unconcerned about whatever the consequences may be " (Tr. 388). We hope that one of the consequences of this opinion will be a more seemly attitude by carriers and their counsel with respect to rates filed by them in the future. A changed attitude in this regard may well be the only alternative to more drastic measures. Certainly this Commission is *very much concerned* about these rates, all of them.

The Acting Members of the Commission by the fourth supplemental order in this proceeding placed under investigation the zinc rates of the Conference (Lykes, Waterman), Sea-Land, Bull, Alcoa, AUT and TMT. Hearing counsel describes the record as one wherein "all the rates under investigation . . . *save the 'zinc'* rate were the subject of extensive examination and various exhibits were introduced relating to the cost of transporting these commodities" (other than zinc).[4] Such a record in a proceeding investigating zinc rates will not serve. We will not issue an order striking down the decreased $1.03 zinc rate on such a record, notwithstanding the procedural grounds presented by Sea-Land and Hearing Counsel. We are primarily interested in the merits of the matter, not with procedural technicalities. We agree with the unavoidable inference from statements in Sea-Land's motion and Hearing Counsel's reply, that the record in this proceeding is deficient.

Exhibit 10 was offered by Bull for identification (Tr. 11), and is the subject of examination and cross-examination, which has not been struck. As to zinc, Exhibit 10 shows without explanation the highest costs of any of the selected 21 commodities. Although on cross-examination, Bull's witness explained that loading costs on chemicals were so much larger than for most other cargo be-

[4] (Emphasis added).

cause chemicals are hazardous cargo, requiring special precautions, no explanation was solicited or volunteered as to why costs for zinc are even higher. Notwithstanding these highest of costs, and the fact that in computing measurement ton revenue Bull used a stowage factor of 25, the exhibit showed (at a rate of $1.25 per 100 pounds) the highest gross and net revenue return of any of the 21 selected commodities. (The proper stowage factor, which is the number of cubic feet required to stow a ton weight of a specific commodity is all-important in comparing costs with revenue. A measurement ton is 40 cubic feet. No explanation, other than the generalization that all stowage factors used are based on experience and measurement, is offered for the use of zinc stowage factors of 25 and 38. "Modern Ship Stowage" indicates stowage factors for zinc from 8 to 12. There may *be* justification for utilizing in this trade stowage factors several times as large, but it is not in this record.) The gross revenue shown against measurement tons costs of $34.45 was $44.80. Had Bull used the same stowage factor (10) used by Lykes, which is supported by the standard reference work "Modern Ship Stowage" issued by the Department of Commerce in 1942, the revenue figure would be $112.00. Although offered for identification Exhibit 10 was, with no very informative explanation, in effect withdrawn thereafter when Bull's counsel said he "was not offering" it, and the Examiner said that it "will stand on the record as rejected". Exhibit 57 purports to cover the same ground. Costs are stated under five methods. Under the first, costs are stated as $22.64 plus 38c additional for vessel depreciation. Under the second, costs are stated as $13.26 plus 38c for vessel depreciation. Under the third, costs are stated as $13.66 plus 38c for vessel depreciation. Under the fourth, total "stevedore and terminal cost" is stated as $14.38. Under the fifth, costs are shown as $19.48.

With respect to the $1.03 zinc rate, Lykes included in Exhibit 71 cost data aggregating $45.28 per measurement ton and revenue of $92.28 per measurement ton. Lykes had no witness to support the exhibit. On November 22, 1961, this matter was brought up by Lykes' counsel who said that he did not propose to put the Lykes exhibits in evidence "unless somebody is particularly interested in them". When the Examiner asked if Lykes' counsel would have a witness at the next hearing, counsel replied:

I wasn't planning to, and I talked to public counsel about this. He is not concerned about it. We furnished the information because you ordered us to, and nobody indicated any—so far as I know—any particular interest in our bringing a witness up from New Orleans on this subject. Lykes is unconcerned about whatever the consequences may be. (Tr. 387-388).

The matter was held open, and later, on December 8, 1961, came up again. At this time Hearing Counsel and counsel for Waterman evinced proper concern for the introduction of Lykes' Exhibit 71, Waterman counsel pointing out that Lykes and Waterman were the members of the respondent conference which filed the $1.03 zinc rate. Sea-Land counsel stated a general objection to Lykes' cost-calculations, but said his objections were primarily aimed at the zinc data. He was supported by Counsel for TMT. Sea-Land counsel then said that if "they" (Lykes) would eliminate the line containing the zinc data "and concurrently cancel their suspended matter from the tariff we would have no objections" (Tr. 909-914). Again the matter was delayed. Lykes' counsel later offered Exhibit 71 for identification, stating that "the line for zinc should be striken from the document as identified". There was no objection, and Exhibit 71 was received in evidence "upon stipulation" (Tr. 985-988). As received, there is a light line drawn through the zinc figures, which are legible however, and show the figures for cost and revenue heretofore stated.[5]

AUT reported no data on zinc, stating that it carried none. TMT, for the same reason, reported no zinc data. Waterman merely reported that it carried no zinc.

Sea-Land's data on zinc is particularly interesting (Ex. 32—No. III, Part 1—p. 2 of 3). It shows that Sea-Land carried only 186 long tons of zinc in 1960 but carried 252 long tons in the first half of 1961. (The stowage factor reported is 38). In Exhibit 32, No. IV, p. 2 of—, Sea-Land reports zinc costs (terminal expense, stevedoring expense, vessel expense, and overhead, including administrative and general expenses plus amortization and depreciation) of $14.24 per long ton. This exhibit does not show revenue, but Sea-Land's rate of $1.25 per 100 pounds would result in a revenue figure of $28.00 per long ton. Exhibit 32, No. V., p. 3 of 3, purports to show that Sea-Land has been increasing its zinc carrying at the rate of 27 tons per month, which together with the fact that, according to its Exhibit No. IV, the revenue on zinc approximately *doubles* the zinc transportation costs, may explain Sea-Land's interest in the commodity.

[5] This exhibit (as to zinc), and exhibit 10 are not probative of costs or revenue in this proceeding, but do illustrate the deficiency of the record.

In a later exhibit (No. 63), Sea-Land shows measurement ton costs of $15.40 (Method A) and $15.666 (Method B) against a revenue of $30.00 which would reflect a stowage factor of 37⅓. The nearest approach to a questioning of any cost data on zinc is found in Exhibit 78, admitted in evidence over objection by Sea-Land's counsel. It was prepared by a partner in the Price Waterhouse accounting firm after a study of some of Sea-Land's records, and was described by Lykes-Bull counsel as "exactly similar to a parallel Sea-Land exhibit", obviously Exhibit 63. In this exhibit zinc costs stated in Exhibit 63 under "Method A" (which in the Price Waterhouse partner's opinion "is the preferable one"), at $15.400 were decreased to $13.662; the zinc costs in Exhibit 63 under "Method B" at $15.666, were increased to $16.284. There is no particular significance as to zinc in the Price Waterhouse testimony, and it is stated here only to round out the picture.

Viewing this record in detail, we are compelled to conclude that it must be amplified with respect to zinc, in spite of the small quantity of the commodity moving in the trade. We have here a distinctly unusual situation—one where even pennies may be important to both cargo and carrier interests, and even more important to the people of the Commonwealth of Puerto Rico, who are struggling to better their economic condition. Considering the special dependence of the Commonwealth, and the States of Alaska and Hawaii on ocean shipping, coupled with the continuing regulatory responsibility placed upon the Federal Maritime Commission by the Congress; it is basic that just and reasonable rates and practices by the steamship lines serving their ports be assured to the full extent legally possible.

We know it is particularly important to the shippers and consignees of zinc that the cost of moving cargo to Puerto Rico shall not be excessive, and if zinc is used in Puerto Rican manufacturing, as seems probable, the Commonwealth may well have special interest in this commodity.

We know it is particularly important to carriers in this troubled trade where they are having some difficulties, that the rate on all cargo shall be sufficient to yield a fair return on invested capital.

To the end, therefore, that the zinc rate shall be just and reasonable, which is to say, neither too high nor too low, we shall make provision for a limited reopening of the record. We regret even the small amount of lost time this may involve. It is a well-established principle that all the speed compatible with sound decision is an essential element of effective regulation. Adherence to that principle caused us to require the record to be certified to us for decision at this time, and only because we are convinced that the present state of the record is incompatible with sound decision now, causes us to remand the matter to the Examiner. We note especially three things. First, we know that we are giving Lykes and Waterman a second chance to meet their burden of proof. They show no sign of wanting a second chance, and we do not intend in any way to favor them. The rationale of this decision is that the public interest is paramount, and while we realize that a remand will afford the proponents of a suspended rate a second opportunity to meet their burden of proof, in a proceeding of this nature the Commission is charged with special responsibility, and since we feel that a more complete record is essential for us to decide the matter on the merits, the case will be remanded.

Second, we are fully conscious of the importance of holding proponents of suspended rates strictly accountable for their burden of proof, because such suspended rates go into effect in no more than four months. But, as previously pointed out, this is an unusual case, and it involves a decreased rate to which the public is entitled if it is just and reasonable.

Third, this proceeding contemplated that it might involve the fixing of just and reasonable maximum-minimum rates on certain commodities, either or both. The parties and the Examiner were conscious of this fact from the beginning. As to zinc, the record is wholly insufficient for a determination if such rates should be prescribed, and if so, at what level.

Premises considered, we decline to order the Conference zinc rate of $1.03 now in effect cancelled, and we remand the record to the Examiner for further hearing and an initial decision.[6]

The carriers will be expected to present at least the following:

(1) Total amount of zinc carried in 1961, and how it was shipped, i.e. in what form, in containers or packages, loose, and the nature and dimensions of containers, crates, etc.

(2) Point of zinc's origin, port of loading, and port of discharge.

[6] In so doing, we stress the fact, that this action is essential, regardless of the ultimate decision on the zinc rate. The conference rate of $1.03 per hundred pounds may be too low or too high as also the Sea-Land rate of $1.25 per hundred pounds. We are uninformed by this record about the rate, and it is our duty to be so informed.

(3) Cost per measurement ton (40 cu. ft.) to the ship of carrying zinc from port of loading to port of discharge, stating cost factors separately, and showing if they are known or allocated (and if allocated), the basis or method of allocation.

(4) Gross revenue per measurement ton on the basis of the carriers' tariff rates, including (separately) suspended rates.

(5) Stowage factor used in converting zinc to a measurement ton, and full explanation of the basis and authority for this stowage factor.

Appendix

After the hearing closed, and on January 8, 1962, Sea-Land Service, Inc. filed a motion for an immediate finding by the Commission that a proposed rate of $1.03 per 100 pounds for the carriage of zinc from the continental United States to the Commonwealth of Puerto Rico is unjust and unreasonable. The motion is unopposed, and our Hearing Counsel supports it.

On January 22, 1962, we made the requisite statutory findings, and required the record to be certified to the Commission for decision of the issue tendered by the motion.

On January 24, 1962, the record was certified to the Commission by the Examiner.

Meanwhile, on January 15, 1962, the rate which had been suspended, became effective by operation of law, the maximum suspension period expiring January 14, 1962.

FEDERAL MARITIME COMMISSION

No. 926

INVESTIGATION OF INCREASED INTER-ISLAND CLASS AND COMMODITY RATES BETWEEN PORTS OF CALL WITHIN THE STATE OF HAWAII

Decided April 5, 1962

Increased class and commodity rates between ports in the State of Hawaii found just and reasonable.

George F. Galland, Robert N. Kharasch and *Amy Scupi* for Respondent.

Shiro Kashiwa, Arthur S. K. Fong, William D. Rogers and *Richard S. Sasaki* for State of Hawaii.

Robert J. Blackwell as Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT and JOHN S. PATTERSON, *Commissioners*

BY THE COMMISSION:

This is an investigation under the Intercoastal Shipping Act, 1933 (Act) to determine whether increased class and commodity rates filed by Young Brothers, Ltd. are just and reasonable. The Federal Maritime Board (Board) suspended the increased rates for the four months statutory period from December 4, 1961 to April 4, 1962, when they became effective. After hearings the examiner issued an initial decision in which he found:

"I. Fair value for ratemaking purposes of property owned and used by respondent determined to be $3,650,000 which will probably yield a return of 5.62%.

"II. The rates in the new tariff are just and reasonable, except the rates on fruits and vegetables from Kailua and Kawaihae to Honolulu are unreasonable to the extent they were increased by more than 9%."

Respondent excepted to the initial decision and oral argument was held.

1. Young Brothers, has operated, since 1947, a common carrier service by towed barges among the islands of the State of Hawaii (State). In 1951 respondent merged with, and became a wholly owned division of Oahu Railway and Land Company (O.R. & L.). On October 31, 1960, with approval of the Hawaiian Public Utilities Commission, respondent was established as a separate corporation (still owned by O.R. & L.) so that its costs and accounting for the common carrier operation could be more closely supervised. All of the barges and certain other common carrier equipment was transferred to respondent. O. R. & L., which maintains a fleet of oceangoing tugs for contract towing, continues to supply respondent with general overhead service, at no profit, and towing service at a fixed amount per trip based on a rate of $60 for each hour the tugs are in use. This rental arrangement saves respondent the expense of maintaining separate offices and accounting and supervisory personnel, and avoids a heavy investment in tugs. Respondent's officers are also officers of O.R. & L., and each company pays a portion of salaries, respondents' portion being approximately 1% of projected revenues for 1961. Overhead allocated to respondent approximates 8% of projected revenue.

2. Respondent has expanded its services in the face of competition from three successive carriers, which in turn failed. It provides 11 sailings a week between Honolulu (Oahu) and the other four major outer islands—Hawaii, Maui, Molokai and Kauai. Its present competition is from inter-island airlines, carrying perishables, furniture and appliances, and direct water services from the United States mainland coasts to the outer islands. The State is studying whether to subsidize inter-island sea or air ferries, which might provide additional competition.

3. The inter-island trade is: (1) seasonal and imbalanced, almost 70% of revenue coming from outbound cargoes, consisting of consumer goods, feed, fertilizer, cement and automobiles, which substantially fill outbound barges at the peak of the shipping season; and 30% from inbound traffic consisting of agricultural products which cargo is insufficient to fill the inbound barges; (2) difficult, involving short hauls over rough water; and (3) comparatively small, with revenue of less than $3,000,000 annually. Respondent claims that the trade is fairly static. The facts are that while Oahu has been growing, the outer islands

have been losing population since 1930. Revenues have increased by 44% over the last three years (including estimated revenue for 1961) which respondent attributes to the increased demand on Oahu for fruits and vegetables from the outer islands and the establishment on Oahu of manufacturing plants and bulk storage facilities which permit the shipment from Oahu to the outer islands of products formerly shipped direct from the mainland. These factors resulted in a 7 percent growth in cargo in late 1960. Respondent predicted that this trend would not obtain beyond the first half of 1961, and that the total increase for 1961 over 1960 would be somewhat less than 3%.

4. Respondent owns and operates barges, one of which is self-propelled—the Hualalai. Five are double-deck barges, purchased new in 1958 at a cost of some quarter-million dollars each. They have ramps from upper deck to hold which permits rapid loading of cargo on pallets by lift truck from pier to hold or open-deck. Containers are used for asphalt, feed and other bulk commodities, and reefer boxes and vans, recently purchased, are used for refrigerated cargo. This method of handling cargo eliminated shipper's packing costs, minimizes cargo damage, and enables respondent to provide an efficient and low cost express service among the islands. The Haulalai, although especially designed as the most efficient barge to carry the fairly small traffic to and from Kailua and Kawaihae (Hawaii), has operated at a heavy loss and respondent expects to incur some losses under the new rates.

5. Respondent provides class rates, based generally upon distance, for general cargo. Lower special commodity rates are published on (a) economically important commodities such as those related to agriculture, and on automobiles, (b) containerized cargo, and (c) commodities coming into competition with shipments to the outer islands direct from the mainland. The class rates were increased 13% generally, or only 7% if shippers obtain the allowance of 50 cents a ton by delivering cargo loaded on their own pallets. Many commodity rates were increased less than 13%, as for instance 6% on containerized propane, 8% on feed, 4% on lime, and no increase on fertilizer, for competitive reasons. According to respondent the new rates would have increased revenue during all of 1961 by $240,000 or 9%. However, their suspension during the first three months of 1961 reduces the anticipated revenue by one-fourth or $60,000, leaving $180,000 which is only 6½% additional.

6. The only challenge to any specific rates comes from spokesmen for fruit and vegetable growers and produce dealers in Honolulu. They oppose the increases on empty crates; and on fruits and vegetables—which amount to 26% from Kailua and Kawaihae and 9% from the other ports. The gist of their testimony pertinent here is: that the farmers are caught in a "cost-price" squeeze; that the proposed rate increases will increase retail prices of fresh fruits and vegetables, forcing (a) increased consumption of canned or frozen items, and (b) the importation of fresh fruits and vegetables from the mainland; that instead of increasing rates which will discourage further expansion in production on the outer islands, respondent should seek additional revenue from the increasing volume of perishables shipped from the outer islands; that the 26% rate increase from Kailua and Kawaihae, served by the Hualalai, will force some farmers out of business; that the poor service on empty crates does not justify an increase thereon; and that refrigeration capacity and service are inadequate.

7. The facts cited by respondent in support of the increases are that the new rates on fruits and vegetables: (a) are half or less than half of the regular class rates, at which most of the other traffic moves; (b) are being increased a lesser percentage than most other rates (e.g. 5% on cabbage from Maui); (c) are actually lower than those in effect in 1947; and (d) have been increased insignificantly when compared with Matson's rates on competing items from the mainland; and (e) are less, from ports served by the Hualalai, than one-half of the rates of the predecessor carrier which went broke serving these ports. The rates on empty crates were supposedly applicable only to *returned* crates which had moved full to Honolulu via respondent's line. However, the testimony is that some growers were actually shipping full crates to Honolulu by air and returning their empties via respondent's line. Respondent, in order to prevent the wholly uneconomic carriage of empty boxes for the convenience of the airlines, increased the rates per ton from the equivalent of $1.00 (on deck) and $1.60 (under deck) to $1.80 and $2.40 a ton respectively. The latter are a third or a fourth of class rates.

8. Gross revenue and expenses estimated by respondent for 1961 are $3,118,969 and $3,004,209 respectively, leaving net earnings of $114,760. This is based on application of the old rates for three months and the new rates for nine months. Public Counsel and the State take issue with this method, contending that the new

rates should be applied for the full "test year", 1961. On this basis the figures should be $3,179,649 revenue, $2,974,378 expenses, and $205,271 net earnings. Pro forma calculations by respondent show a loss of $62,000 for 1958 and $94,000 for 1959, and a profit of $31,000 in 1960.

9. The property used by respondent in its common carrier service is listed in Column A of the table below. As indicated, the allocated tug property is owned by O.R. & L. The book values, less depreciation, (bv) and fair market values (fm), used in the succeeding columns to arrive at the various rate bases, were assigned by respondent and they are unchallenged.

COMPARISON OF RATE BASES PROPOSED BY PARTIES

	Respondent	Public Counsel	State
(a)	(b)	(c)	(d)
FLOATING EQUIPMENT			
Barges	$1,535,362 bv	$1,535,362	$1,535,362
Tugs (O.R. & L.)	1,701,975 fm	1,172,532 bv	1,069,940
SHORE FACILITIES			
Equipment	334,912 bv	334,912	334,912
Equipment (fully depreciated)	56,818 fm	-0-	-0-
Tugs parts (O.R. & L.)	161,189 bv	161,189	omitted
LAND & IMPROVEMENTS	419,922 fm	109,872 bv	109,872
Tug shop (O.R. & L.)	205,410 fm	30,292 bv	omitted
	$4,415,588	$3,344,159	$3,050,086
WORKING CAPITAL	361,604	314,113	343,493
TOTALS	$4,777,192	$3,658,272	$3,393,579
RATES OF RETURN	4.29%	5.61%	6.04%
Net Earnings	$205,271		

It will be noted that the rate bases proposed by Public Counsel and the State are based entirely on book value less depreciation. (Col. c & d). However, the State omitted certain items of tug property apparently through inadvertence (Col. d). Respondent's rate base, including allocated tug property, which it contends should be eliminated, is composed of both book values and fair market values. (Col. b).

10. Respondent, who extends one month's credit to shippers in order to speed up the loading and handling of cargo, arrives at its figure of $361,604 for working capital in 1961 on basis of the peak amount receivable from shippers during 1960, which was

$362,241 in August, 1960, and on the theory that revenues for 1961 should be projected on the application of the old rates for the first three months and the new rates for the last nine months.

11. A Honolulu investment banker testified that based on the premise that the business is small and static and has been unprofitable, an investor would require a 7½ to 8% dividend return plus earnings coverage of the dividend of at least double percent—that is, a return on capital of 15 or 16%.

The respondents contend that the examiner was wrong in including an allocated portion of the value of the tugs owned by its affiliate O.R. & L. in the rate base and excluding the $60 per hour rental paid to O.R. & L. by Young Bros. We agree with the examiner. There is nothing in the record to show whether the rental is reasonable. It is experimental in nature and will be adjusted as the companies gain experience and knowledge regarding the cost of operation. It is admitted that O.R. & L. hope to make a reasonable profit on the tug service it supplies to its affiliate, Young Bros. Only the cost of service rendered by an affiliate of a regulated carrier should be allowed as operating expense, and the affiliate's profits should be excluded from the revenues and expenses of the carrier in rate determinations. *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236 (1936). On this record it is impossible to determine either the reasonableness of the rental charged Young Bros. or the profit realized by O. R. & L. In view of the uncertainties and the admission that a reasonable profit is contemplated, we will treat the respondent as a division of O.R. & L. and include an allocated portion of the capital investment in the tugs in the respondent's rate base.

While the rental charge for the tugs in the rate base will be disallowed as an expense, an allocable portion of the wages and other operating expenses will be included.

On the basis of the foregoing and adjusting respondents revenues and expenses for 1961 so as to reflect 12 months operations under the new rates we find that Young Bros. would realize earnings after taxes of $205,271.

While agreeing that the barges and certain property devoted to the trade should be valued under the prudent investment standard, the respondents contend that the tugs and certain land should be valued on a basis of fair market value. They argue that where values under the prudent investment theory are totally unrealistic, market value should be employed.

Young Bros. is entitled to a fair return of its property being used in the service of the public.

We recently held that in the domestic offshore trade the prudent investment standard would be used to determine the fair value of property. *Atlantic & Gulf/Puerto Rico General Increases in Rates and Charges*, 7 F.M.C. 87 (1962)

We find nothing in this record that warrants our departing from the prudent investment standard.

Working capital required to pay operating expenses prior to time revenues are received for the services rendered was found by the examiner to amount to $304,366. We agree.

We find the fair value of the property being devoted to the public by respondent to be $3,648,495 including working capital of $304,166.

With earnings after taxes of $205,271 respondent's rate of return would be 5.63 percent.

While the respondent presented testimony that a return of capital of 15 or 16 percent was reasonable the record in this case is totally inadequate for us to determine the maximum reasonable rate level. A 5.63 percent return on property valued on the basis of the prudent investment standard is not unreasonable.

Respondent excepts to the examiner's finding that the proposed rates on fruits and vegetables from Kailua and Kawaihae to Honolulu are unjust and unreasonable to the extent they were increased by more than 9%. The record shows losses during 1960 for Young Bros.' service to Kailua of $63,000 and for service to Kawaihae of $61,000 during the same year. Even at the new rates, it is doubtful that the service will be profitable. Rates after the increases, which amount to less than a tenth of a cent a pound, will be less than the rates in effect in 1947. The rates on fruits and vegetables are half or less than half of the regular class rates at which most other traffic moves; thus, leaving the shippers of the former commodities in a preferred position. Young Bros.' rate of return on all of its operations, even under the increased tariffs, will remain low, and this service will in all probability operate at a loss. On this record we are unable to find the proposed 26% increase on fruit and vegetables from Kailua and Kawaihae to Honolulu to be unjust and unreasonable.

We find and conclude that the rates under investigation are just and reasonable.

An Order discontinuing this proceeding will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D. C., on the 5th day of April, 1962.

No. 926

INVESTIGATION OF INCREASED INTER-ISLAND CLASS AND COMMODITY RATES BETWEEN PORTS OF CALL WITHIN THE STATE OF HAWAII

Full investigation of the matters and things involved in this proceeding having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to an made a part hereof, and having found that the proposed rates and charges herein under investigation are just and reasonable:

It is ordered, That this proceeding is hereby discontinued.

BY THE COMMISSION.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 882

UNAPPROVED SECTION 15 AGREEMENTS—SOUTH AFRICAN TRADE

Decided April 9, 1962

1. Respondents (except Baron Iino Line) found during the period 1954-58 to have made and carried out an unfiled and unapproved cooperative working arrangement or agreement for the fixing of transportation rates and related matters affecting the trade between the United States and South and East Africa, in violation of section 15, Shipping Act, 1916. Respondents not found to have entered into or carried out unfiled and unapproved agreements in the trade in violation of said section after September 10, 1958.
2. Respondents Farrell Lines and Robin Line (Division of Moore-McCormack Lines) not found to have operated vessels during 1957-59 in the United States Atlantic/South and East Africa trade, in violation of section 14, Second, Shipping Act, 1916.
3. The permission granted by section 15, Shipping Act, 1916 for activities that would otherwise be unlawful is conditioned upon government supervision and control of such activities. Rigid compliance with the filing and approval provisions of the section is required.
4. Failure immediately to file an agreement within the purview of section 15, Shipping Act, 1916 is a distinct violation of the section.
5. Oral, informal or general agreements are subject to section 15, Shipping Act, 1916.
6. Unapproved discussions and exchanges of rate and similar information among persons subject to section 15, Shipping Act, 1916, clearly indicate the existence of an agreement, understanding or arrangement prohibited by the section.
7. An investigation by the Federal Maritime Commission is an administrative proceeding looking to the regulation of present or future activity. It is not a penal or criminal trial for past violation of law and should not be conducted as such. Matters in extenuation or mitigation of punishment for such violation are not relevant in a Commission investigation.
8. Strict evidentiary rules do not apply in proceedings before the Federal Maritime Commission. Contemporaneous letters and memoranda

from respondents' files which showed or tended to show the existence of a cooperative rate-fixing arrangement were not objectionable as hearsay or otherwise, but were relevant, reliable and probative evidence.

9. A restricted or fragmented approach to the evidence is likely to defeat the objectives of an investigation, particularly one concerning informal, secret or general agreements subject to section 15, Shipping Act, 1916.

10. Only the Federal Maritime Board was empowered to modify its orders instituting the investigation and establishing the issues of fact and law involved. It was improper to direct the public Counsel in effect do so by filing statements particularizing such issues, and otherwise to circumscribe his efforts to fully develop the pertinent information.

Edwin Longcope and *Morton Liftin* for respondent Louis Dreyfus Lines.

Elmer C. Maddy and *Ronald A. Capone* for respondent Farrell Lines Inc.

John W. Douglas and *Peter S. Craig* for respondent Lykes Bros. Steamship Co., Inc.

Burton H. White and *Elliott B. Nixon* for respondent Nedlloyd Line.

Ira L. Ewers, W. B. Ewers and *Albert Chrystal* for respondent Robin Line (Division of Moore-McCormack Lines, Inc.).

Wharton Poor and *R. Glen Bauer* for respondent South African Marine Corporation, Ltd.

Morton Zuckerman for respondent Baron Iino Line.

Robert B. Hood, Jr. and *Edward Aptaker* as Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman,* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

By order of January 7, 1960 and amendment of January 15, 1960, our predecessor the Federal Maritime Board initiated an investigation to determine whether any of the named respondents, Louis Dreyfus Lines (Dreyfus), Farrell Lines, Inc. (Farrell), Lykes Bros. Steamship Co., Inc. (Lykes), Nedlloyd Line (Nedlloyd), Robin Line (Division of Moore-McCormack Lines, Inc.), and South African Marine Corp., Ltd. (Safmarine), during the period 1954 through 1959, had entered into and effectuated without approval under section 15 of the Shipping Act, 1916 (the "Act"), any agreements affecting trade between the United States and East Africa requiring such approval.[1] Robin Line has been a division of Moore-McCormack since about May 1, 1957, at which time Mormac acquired the equipment of Seas Shipping Co., Inc. Robin is identified herein as Robin/Mormac as to events after May 1, 1957 and Robin/Seas as to events prior thereto:

The Board's amended order of January 15, 1960 also enlarged the investigation to determine whether respondents Farrell and/or Robin/Mormac had operated vessels in violation of section 14, Second, of the Act during 1957, 1958, or 1959 in the U. S. Atlantic-South and East Africa trade. By supplemental order of June 27, 1960, the proceeding was further enlarged to determine whether any of the original respondents and Baron Iino Line, therein named an additional respondent, during 1958 and 1959 and thereafter through the date of the supplemental order, had entered into and carried out prior to approval under section 15 agreements fixing or controlling freight rates on certain commodities in this trade.

Testimony was taken at hearings held August 2 through 5, 1960 in Washington and October 13 and 14, 1960 in New York. Further sessions were held in New York on October 17 and 18, 1960 for the sole purpose of considering the admissibility of exhibits theretofore tendered, following which the hearings were concluded. In accordance with his responsibility in proceedings of this type for assembling and presenting evidence relating to the investigation the agency has ordered, Public Counsel subpenaed relevant documents of the respondents and produced during the hearings some 160 exhibits which had originated in their files. With the exception of one Maritime employee, all of the witnesses in the case were officers or agents of the respondents subpenaed by Public Counsel. They were called to the stand by him and identified exhibits which they had either authored, received, or were otherwise able to authenticate, and in many instances they were examined regarding the contents of exhibits.

On rulings of the Examiner, pursuant to respondents' requests, respondents (1) were furnished by Public Counsel six weeks before the hearings commenced a statement particularizing the "charges" or "violations" intended to be asserted; (2) were furnished another such statement by Public Counsel on September 6, 1960, during the interval between the Washington and New York

[1] Louis Dreyfus Lines is a joint service of Louis Dreyfus et Cie., Buries Markest, Ltd., and Nedlloyd Line is a joint service of N.V. Stoomvaart Maatschappij "Nederland" Koniklije Rotterdamsche Lloyd, N.V.

sessions; and (3) all of their cross-examination was deferred until Public Counsel had finished presenting his case in chief. Upon the completion of such presentation, respondents' counsel cross-examined respondents' officers and agents regarding the exhibits and testimony given on direct examination, and also took the occasion to present additional exhibits and develop other testimony through these witnesses. At the conclusion thereof, respondents elected to offer no further evidence. Public Counsel then offered into evidence, *seriatim*, 142 of the exhibits previously identified and testified to, but the Examiner, sustaining numerous objections by respondents, admitted only 29 of them. The rejected exhibits were made the subject of an offer of proof by Public Counsel in the manner provided by Rule 10(l) of our Rules of Practice and Procedure, and are therefore before us for consideration.

Briefs were filed by all parties and thereafter, on August 3, 1961, the Examiner issued a Recommended Decision. His ultimate conclusions were "that none of the respondents has entered into or carried out" during the period 1954-59 "any agreement as described in the Board's orders of investigation" in violation of section 15 of the Act, that respondents Robin/Mormac and Farrell had not operated vessels during 1957-59 in the Atlantic portion of that trade in violation of section 14 of the Act, and that "the charges against respondents" should be dismissed. Public Counsel filed exceptions to the section 15 segment of this decision and respondents replied objecting to the exceptions. Oral argument before us was not requested, nor have we deemed such argument necessary to the proper disposition of the case.

We are compelled to overrule the Examiner's recommended decision that no section 15 violations occurred, and to reverse his rejection of the documentary evidence tendered by Public Counsel. While entitled to weight, any recommended or initial decision which comes before us for our review remains only a recommendation. Upon review thereof we possess and must exercise when the situation requires "all the powers [we] would have in making the initial decision," including determinations of law, fact, policy and discretion. Where, as here, we find upon consideration of the entire record before us that substantial errors were committed, we must alter the Examiner's disposition of the case to whatever extent is necessary in our judgment to cure the errors and discharge our responsibility for insuring that the ultimate decision is correct. See section 8(a) of the Administrative Procedure Act, 5 U.S.C. 1007(a); Davis, Administrative Law Treatise, sec. 10.03; *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951); *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955).

During most of the period encompassed by the orders of investigation herein, respondents comprised the only common carriers in the United States/South and East Africa trade. By the early part of 1954 Lykes, Safmarine and Dreyfus were the only common carriers engaged in the USA Gulf/South and East Africa portion of the trade. Lykes was the surviving and hence the only member of an approved conference for this portion of the trade (Gulf/South and East Africa Conference, Agreement No. 7780).

The only common carriers operating at the time in the United States Atlantic/South and East Africa portion of the trade were the respondents Farrell, Robin Line, Dreyfus and Safmarine, and a nonrespondent, the British South & East Africa Group. Only Farrell and the British Group were members of an approved conference for the Atlantic portion, namely, USA/South Africa Conference (outbound) Agreement No. 3578, and South Africa/USA (inbound) Agreement No. 3579. In 1955 the British Group discontinued service leaving Farrell the sole surviving member of such conferences. Beginning in January of 1954, Nedlloyd served South African ports with one sailing per month from United States Pacific Coast ports. On return it provided inbound service to the North Atlantic before proceeding to the Pacific Coast. Dreyfus suspended its service in the trade in February 1957. Later, in December 1957, Baron Line entered the trade and was succeeded in early 1959 by the respondent Baron Iino.

Pursuant to section 15 of the Act, Farrell and Robin/Seas in March 1956 submitted to the Federal Maritime Board and on July 2, 1956 the Board approved an agreement, No. 8054, permitting these two lines to confer together and agree on rates and other tariff matters in the trade, with the reservation that either of them could alter for itself the agreed rates and related matters on giving the other party at least 48 hours' notice. Robin/Mormac (as successor to Robin/Seas), Lykes, Nedlloyd and Safmarine subsequently became parties to the agreement, on August 19, 1957 in the case of Mormac and on April 3, July 28 and September 10, 1958, respectively, in the case of the others. Neither Dreyfus nor Baron Iino ever became parties. Agreement 8054 is currently in existence and is the sole section 15 agreement respecting the United States/South and East Africa trade which has included the mentioned respondents.

Section 15 of the Act requires every ocean common carrier to file immediately with the agency administering the Act a true copy, or if oral a true and complete memorandum, of every agreement with another such carrier to which it is a party or conforms in whole or in part, fixing or regulating transportation rates or fares; controlling, regulating, preventing or destroying competition; or in any manner providing for a cooperative working arrangement. The section defines "agreement" to include "understandings, conferences, and other arrangements." It also makes it unlawful for any common carrier to carry out any such "agreement" prior to approval of the agency, in this instance the Board.

The respondents severally deny being parties to any agreement covered by these provisions except agreement 8054. They also argue matters in extenuation or mitigation of their activities. These are commented upon at the end of this report, since they are not relevant to the question whether respondents have acted in violation of the statute. On that question, so far as it concerns section 15, our conclusion is that Agreement 8054 simply formalized an unfiled, unsanctioned and therefore unlawful cooperative working arrangement or agreement for the fixing of rates and related matters which existed between and was implemented by the respondents (other than Baron Iino) long prior to Agreement 8054 and which thereafter continued to exist as to Dreyfus, until it withdrew its service in February 1957, and as to the remaining respondents, until Safmarine, the last of the respondents to sign, did so on September 10, 1958.

Nature of the Case—Procedure. Initially we must review and discuss, at some unavoidable length, the more important procedural and evidentiary errors that pervaded this case from its inception. In this connection, citation of some specific examples of the evidence received and rejected will be helpful. These errors appear to have been generated mainly by a basic misconception of the nature and purpose of the proceeding.

Respondents repeatedly portrayed the case as a penal or criminal proceeding involving the possible imposition upon them of heavy sanctions. In that connection they laid down a steady barrage of procedural and evidentiary demands and objections. It was a serious mistake for the Examiner to adopt respondents' view of the case. This gave rise to other errors and adversely influenced the entire course of the proceeding. The case was in no sense penal and respondents were "charged" with nothing. It was an administrative inquiry into activity possibly violative of the Shipping Act, instituted by the Board pursuant to its responsibilities under the Act to regulate present or future conduct through the issuance of appropriate orders or rules.

The agency administering the Act has no power to punish past conduct. It cannot impose penalties, monetary or otherwise, for violating the Act's provisions. That may be done only in a penalty suit brought in a district court by the Department of Justice. The character of such a suit is distinctly different from that of an administrative inquiry. Its trial is governed by different and more strict principles, procedures and evidentiary rules which are wholly unnecessary to the objectives and proper conduct of our proceedings. This same subject was dealt with by the Board in its 1955 decision in *Alleged Practices of Fabre Line and Gulf/Mediterranean Ports Conf.*, 4 F.M.B. 611 (1955), which was also an investigation on the agency's own motion and from which we quote the following (p. 636):

> Nor do we consider, as argued by Fabre, that the nature of this proceeding requires application of evidentiary standards proper in criminal or "quasi-criminal" proceedings. Although section 16—Second of the 1916 Act provides criminal penalties, those penalties may only be imposed in a proceeding commenced by the Department of Justice* in a court of competent criminal jurisdiction. No penalties may be imposed in this proceeding nor may the record here be used as the basis for collection of fines.**

Under the Shipping Act, the Board's primary function was, and ours is, to regulate, not to punish, and it does seem to us that there is no room for any further confusion on this point. Investigation is indispensable to the administrative regulatory function and may be undertaken "merely on suspicion that the law is being violated, or even just because [the agency] wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642-43 (1950). Where, as here, the agency investigation is a formal one, the essentials of a full and fair hearing can easily be observed without attempting to convert the proceeding into some sort of penal or criminal trial.

The respondents also made frequent demands for particularization of what they called the "charges" against them. It was in

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* 28 U S.C.A. 507.

** See Davis, Administrative Law, 1951, at pp. 305, 306, on the constitutional requirement for trial by jury in criminal matters.

response to these demands that the Examiner, as previously noted, required Public Counsel to furnish respondents on two separate occasions with detailed statements of "charges" or "violations" intended to be urged, and in addition, postponed respondents' cross examination until completion of Public Counsel's entire evidentiary presentation. These extraordinary measures on respondents' behalf were not warranted by anything in the nature and purpose of the proceeding, nor indeed by any actual ignorance on respondents' part of the matters under investigation.

Respondents were notified by the Board's orders of the possible proscribed activity, the areas of their operations and the periods of time to be investigated. These orders clearly satisfied the requirements of subsection 5(a)(3) of the Administrative Procedure Act (5 U.S.C. 1004(a)(3)) and the Board's Rule 10(c) which only provide that notice be given of "the matters of fact and law asserted," *i.e.*, the legal and factual issues involved, and that sufficient time be allowed to prepare to meet such issues.[3] Nearly seven months elapsed between the issuance of the orders and the commencement of the hearings, so that respondents manifestly had adequate opportunity to prepare. The facts, moreover, were exclusively in the respondents', not the Board's, possession. Documents in respondents' files and knowledge possessed by their officers and agents constituted virtually all the evidence. No basis existed at any time for the inference that respondents did not know what the Board proceeding concerned or were unable fully to represent their interests.

It is apparent that in demanding the aforesaid statements from Public Counsel respondents were seeking to have him in effect modify the issues of fact and law stated in the Board's orders of investigation, whereas only the Board could have done so. Public Counsel neither initiated nor was responsible for the contents of the orders and he could not amend them. If respondents believed them lacking in any respect, their recourses were solely to the Board. Respondents recognized the orders were controlling where they thought it to their advantage. In other instances they sought to exclude issues or evidence within the scope of the orders on the ground that Public Counsel's statements did not specify them. The Examiner himself was not entirely consistent in this matter.

In a formal investigation ordered by the agency, Public Counsel

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[3] See Attorney General's Manual on the Administrative Procedure Act (1947), p. 47, 129.

has the duty to insure that the relevant and probative evidence is developed to the fullest possible extent. His primary mission is to get the pertinent information, often from the persons least interested in giving it. In the proper pursuit of this mission it would seem to be obvious that he should be encouraged, not circumscribed, if the investigative aims are to be achieved. The various demands that were here permitted to be made upon Public Counsel amounted to putting him on trial for the fact that an investigation had been ordered. The statements he was required to furnish interfered with the performance of his duty to develop the evidence, as the respondents themselves demonstrated by their attempts to hamstring his submissions. Moreover, if viewed simply as position papers, the statements at best represented only tentative estimates of possible ultimate findings. One was prepared before, the other during the hearings, without benefit of all the evidence and respondents' positions thereon. In such circumstances, we fail to see how they could have contributed usefully to the case, and they plainly were not germane to an investigative proceeding. On the other hand, they disadvantaged the presentation of evidence and caused delay and some confusion, although certainly nothing about which the respondents could justifiably complain. Such statements are not provided for in the rules but were an undesirable innovation in this case. Since then it appears they have been required in a few other investigations. We think it is clear that the practice should be discontinued.

Evidence. Section 7(c) of the Administrative Procedure Act permits the *receipt* in evidence of "any oral or documentary evidence," subject only to the admonition that irrelevant, immaterial or unduly repetitious evidence should be excluded. (5 U.S.C. 1006(c)). This exclusion is provided for in the Board's Rules of Practice and Procedure (now adopted by us) and, conversely, they authorize the admission of "all evidence which is relevant, material, reliable and probative" (Rules 10(g) and (h)). The statute and the rules are consistent with the long-established principle that the technical evidentiary requirements, sometimes also called "the common law exclusionary rules," do not apply in proceedings before administrative agencies (unless of course the agency's organic statute so requires, and ours does not). A major reason for this is that administrative agencies, unlike the lay juries for whom the exclusionary rules were meant, are presumed competent to judge the weight that should be given evidence. The

Board in its *Fabre Line* decision, *supra,* also reviewed this subject, and at some length, 4 F.M.B. 611, 633-36.[3]

The efficient performance of our regulatory functions demands that we find the truth as expeditiously as possible. Strict evidentiary rules are not conducive to expedition if, as here, they are made the vehicle for innumerable objections which result in much delay and confusion. Since as indicated the rules are not necessary in the proper conduct of our proceedings, controversy over evidentiary niceties and formalities should not be invited by attempting to apply them. We do not, of course, suggest the substitution of an overly-relaxed approach to acceptable evidence nor anything which lacks essential fairness, having due and correct regard for the nature and purpose of our proceedings. We simply point out that evidence which appears to satisfy the nonrigorous standards of our rule ought to be received promptly and without controversy grounded upon technical exclusionary rules. If upon consideration of the whole record it is found that some of the evidence so admitted is not substantial and should be disregarded in formulating the proposed agency action, that can readily be done. We doubt that any harm flows from such procedure but if it does it is small indeed in comparison with that occasioned by needless squabbles over strict evidentiary principles. As the Court of Appeals for the Second Circuit stated, in *Samuel H. Moss, Inc.* v. *F.T.C.*, 148 F. 2d 378, 380 (1945), cert. den. 326 U.S. 734:

> Why either he [the Examiner] or the Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chances that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy.
> (See also *Donnelly Garment Co.* v. *N.L.R.B.*, 123 F. 2d 215, 224 (1942))

In the instant proceeding "idle bickering" about technical niceties in connection with the evidence consumed much of the

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[3] See also Attorney General's Manual, *supra*, p. 76, 134; *F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948), reh den. 334 U.S. 839; *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676 (CA 9, 1949), cert. den. 338 U.S. 860; *Concrete Materials Corp.* v. *F.T.C.*, 189 F. 2d 359 (CA 7, 1951); *Rhodes Pharmacal Co.* v. *F.T.C.*, 208 F. 2d 382 (CA 7, 1954), mod. other grounds, 348 U.S. 940; *Buchwalter* v. *F.T.C.*, 235 F. 2d 344 (CA 2, 1956); *Yiannopoulos* v. *Robinson*, 247 F. 2d 655 (CA 7, 1957); *O'Boyle* v. *Coe*, 155 F. Supp. 581 (D.C.D.C., 1957); *Smith* v. *General Truck Drivers, etc.*, 181 F. Supp. 14 (DC.Cal., 1960).

hearing time and resulted eventually in the exclusion of about 80 percent of the evidence, all of it of relatively good quality. Rejected were more than 100 undeniably-authentic, contemporaneously-written letters and memoranda from the files of respondents or their agents which were relevant and probative on the questions under investigation. There was considerable erroneous reliance upon the hearsay rule. In some instances, the exhibit in question did not, in our judgment, constitute hearsay. In others, we believe the exhibits could have been received, even under strict evidentiary principles, as being within one of the exceptions to the hearsay rule, *e.g.*, as an admission or statement against interest, or as part of the *res gestae*.

More importantly, however, hearsay objections were not tenable as a basis for exclusion of evidence in this administrative investigation. Neither the Administrative Procedure Act nor the Board's rules excluded hearsay and the hearsay rule has been expressly held inapplicable in administrative proceedings. For example, see *I.C.C.* v. *Baird*, 194 U.S. 25 (1904); *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1941). The Board so held in the *Fabre Line* case as follows:

> Fabre states that the examiner erred in overruling objections to the introduction of hearsay evidence, arguing that the decision in *Edison Co.* v. *Labor Board*, *supra*, [305 U.S. 197 (1938)] on which the examiner relied, was based on a statute which specifically relaxed the rules of evidence, which has since been amended, and which does not represent the law applicable to proceedings before this agency. These contentions are unsound; hearsay evidence is clearly *admissible* under the terms of the APA and under our rules which, as hereinbefore stated, follow the APA. Further, the cited decision was relied on in drafting section (10) (e) of the APA. 4 F.M.B. 611, 635-36.

The weight to be accorded the statement of someone not on the witness stand (*i.e.*, hearsay) does not govern and should not be confused with its admissibility. If competent under the criteria applicable in an administrative proceeding, the statement is receivable in evidence and may be used to support agency action if there is at least some other supporting proof in the record of a direct nature. There is no question here as to the exclusive use of hearsay. To the contrary, there is more than ample proof in the record, both oral and written and often squarely related to and corroborative of the hearsay evidence, to justify according the latter credibility and weight. See *N.L.R.B.* v. *Remington Rand*, 94 F. 2d 862, 873 (CA 2, 1938), cert. den. 304 U.S. 576.

The record reveals evidentiary positions, rulings and results which are quite inconsistent. Contributing to this, no doubt, were the number and variety of objections respondents saw fit to urge at every turn. Comments on specific aspects of this situation appear at a later stage of this report, following the evidentiary examples below. At this point we simply note our inability to discern any material distinction between the quality and competency of the evidence the Examiner properly received and that of the evidence he rejected.

Set forth in the following paragraphs are examples of the admitted and excluded exhibits and testimony thereon by respondents' officers and agents. These are instructive as to the evidence which was offered and are quite illuminating as to the unapproved rate activity. It will be noted that the several respondents (other than Baron Iino) constantly name one another in these samples of their contemporaneous comments on their discussions, arrangements and agreements. References to Dreyfus will be found in pars. 3, 4, 6, 11-13, 15-18, 20; to both Farrell and Robin in each of the 22 pars. except No. 4; to Lykes in pars. 1-4, 6-9, 11-20; to Nedlloyd (which was concerned only with the inbound traffic from Africa) in pars. 6, 16, 17, 22; and to Safmarine (which was concerned only with the outbound traffic to Africa) in pars. 1-3, 7-9, 11, 13, 17-21.

Examples of Admitted Evidence.

1. The following is from a memorandum by President James Farrell, Jr., of Farrell Lines to Messrs. Shields and Unver of his company dated February 11, 1954 (Ex. 43), regarding a possible rate reduction on lubricating products he had discussed with Mr. Ray Vaughn, a representative of Standard Vacuum Oil Co.:

> I then said to Mr. Vaughn [of Standard Vacuum] I was sympathetic to such a reduction but could not and would not put the rate into effect without the concurrence of both our Conference and non-Conference colleagues. I said that since Safmarine, Robin, and Lykes were not in conference with us, it would be best if before we undertake to explore the matter with these carriers [sic], making it clear that I had made no commitment to him, nor would I make any commitment to him without their agreement and support. . . .
>
> Mr. Vaughan undertook to lay the ground work in accordance with my suggestion. . . .
>
> In order that the question of a possible reduction in rates on lubricating products may be considered without any misunderstanding as to the position of Farrell Lines, Inc. or of me personally, I now suggest that Mr. Unver bring Mr. McCracken up to date and that Mr. Shields discuss the matter with appropriate representatives of Robin, Safmarine and Lykes. I have

made no commitment. Unless all concerned share my view as to the advisability of a reduction, I do not intend to make any.[4]

On direct examination in connection with this memorandum, Mr. Farrell stated that he and his personnel had conversations with the lines therein mentioned which resulted in "concurrence" among the lines on rate matters.

2. On August 13, 1954, Mr. Farrell wrote a letter to a shipper, Wilbur-Ellis Co., regarding a reduction on rates on fishmeal, which stated (Ex. 47):

We are also pleased to advise that this rate has been concurred to by the Robin Line, Lykes and SAFMarine.

On direct examination concerning this statement Mr. Farrell testified "it was furtherance of our cooperative efforts with Robin Line and Lykes and, of necessity, with Safmarine" and further said:

It was not unusual for someone in our company to contact someone in their company and ask if such rate was agreeable.

3. In February 1955 Lykes' assistant secretary O'Kelley in New York sent to Lykes' New Orleans office a series of teletypes. These concerned exceptions to the 15 percent general rate increase, which respondents (other than Nedlloyd and Baron Iino) had agreed to put into effect March 1, 1955 in the outbound trade and which in fact became effective that date, and the 48-hour notice of rate changes the respondents had concurrently agreed to give one another. In one of these (Ex. 99) the following appears:

"UNDERSTANDING SO. AFRICA SPECIFICALLY CARRIES COMMITMT EA LYKES DEYFUS SAF MARINE NOTIFY OTHERS INCLUDG CONF. [Farrell] & ROBIN 48 HOURS BEFORE MKG ANY RATE CHANGES AND CERTAINLY ONCE WE HAD EXCEPTNS CLEAR . . . IT WAS UNDERSTOOD NO MORE EXCEPTIONS WLD BE MADE AT LEAST UNTIL MARCH 1 ACCT ABSOLUTE NECESSITY HOLD THE LINE BECAUSE ALRDY PRESSURE IS GREAT FOR EXCEPTNS SHIPPERS CLAIMG DISCRIMINATION ETC . . . WE HONESTLY DO NOT FEEL SAFMARINE OR DRYFUS HAVE FAILED LIVE UP UNDERSTANDG AND WE THINK IT IS THEIR INTENTN TO DO SO ON BASIS WE ALL AHEAD FINANCIALLY. . . ."

When queried as to the nature of the "understanding" he felt the other respondents would live up to, Mr. O'Kelley testified:

although there might have been some areas of differences of opinion, that basically we felt that we all had a common interest and to that end, which would be increase of revenue, rate stability, that the other lines, as their best judgment dictated, would proceed in accordance with the thoughts expressed by them during our conversations.

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[4] Bracketed matter in quotations supplied.

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4. Another such Lykes' New York—New Orleans memorandun by Mr. O'Kelley in February 1955 (Ex. 101), on the questioi whether Dreyfus was required by the "agreement" to quote th(same rates as Lykes, contains the following:

PLS REMEMBER THAT OUR AGREEMENT WAS THAT WE WLI INCREASE ALL RATES 15 PCT AND NEVER DID WE EVER AGREI THAT RATES WLD BE QUOTED ON PARITY HOWEVER BELIEVI PARITY CAN BE ACHIEVED ONCE WE GET LOOK AT TARIFF ANI NEGOTIATE ON INDIVIDUAL RATE BASIS WITH DREYFUS.

5. On July 1, 1955 Mr. Farrell wrote a memorandum (Ex. 69) to W. C. Shields of his company about a meeting he had Jun(29, 1955 with Mr. Cook, president of Robin/Seas, on the possi- bility of having Robin and other lines join the USA/South Afric: Conference, of which Farrell was then the only surviving member containing the following:

Cook then said that his position remained unchanged. Robin would join th(Conference if *all* Lines were in.

Mr. Cook dwelt at some length upon the fact that Mr. Maguire now occupie: senior position [in Robin/Seas] and we could expect full cooperation on rate: and no rate cutting. He said that Mr. Maguire had been instructed to kee; in touch with W.C.S. [W. C. Shields] and keep the rate situation to ou mutual satisfaction.

6. By letters of January 23 and 27, 1956, Mr. J. C. Severiens, president of Java Pacific Line, Nedlloyd's general agent in the United States, addressed Farrell, Robin/Seas, Dreyfus and Lykes about increasing the rate on sisal tow in the Africa/Atlantic trade, in which Nedlloyd operated inbound before returning to the Pacific, and about a proposed general increase in the rate from Africa to Pacific Coast ports (Exs. 62, 131–34). Mr. Severiens' letter of January 23, 1956 to Mr. Farrell (Ex. 62) reads in part as follows:

I shall be glad to hear whether you agree with us that an increase under the circumstances, is fully warranted. I am addressing similarly Messrs. Robin, Dreyfus and Lykes Lines.

For your guidance I wish to inform you that, as far as our rates from Africa to Pacific Coast ports are concerned, we are contemplating announc- ing an increase amounting to 15% to 20% effective March 1st.

Looking forward to your advices, . . .

Mr. Farrell, by letter of January 30, 1956 (Ex. 63), replied regarding the increase to Pacific Coast ports in part as follows:

[I]n agreement with Robin Line (Seas Shipping Company, Inc.) we have already raised our through bill of lading rates to Pacific Coast ports from South and East Africa via New York, to the levels which you have suggested.

7. On December 6, 1957, Mr. J. M. Phillips as Secretary, USA/South Africa Conference, who was acting in reality as agent for Farrell, the sole member of that conference, sent out a notice which states (Ex. 34):

USA/SOUTH AFRICA CONFERENCE

TO ALL LINES: DECEMBER 6, 1957

ASPHALT OR ASPHALTUM

Further to my circular of November 21st on the above subject please note that it has now been proposed that the present rates on Asphalt or Asphaltum be made effective through June 30, 1958.

Please advise if you concur.

Among other respondents who received this notice was Robin/Mormac, whose freight agent, Harold Flad (also previously employed by Robin/Seas), testified that on the bottom thereof he had written, "All lines agreed," and that "all lines" meant Farrell, Robin/Mormac, Lykes and Safmarine. At the time only Farrell and Robin/Mormac were parties to Agreement No. 8054 approved July 2, 1956, as hereinbefore mentioned.

8. Mr. Flad of Robin/Mormac also prepared detailed memoranda of rate meetings he attended in September and October 1957 and March of 1958 (Exs. 35-38), at which times as before indicated Farrell and Robin/Mormac were the sole signatories of Agreement 8054. One of these memos, dated September 11, 1957 (Ex. 35), states in part:

Subject: RATE MEETING—SEPTEMBER 10, 1957

Meeting convened at 2:30 p.m. at the USA/South Africa Conference Room, 26 Beaver Street.

Attended by:

J. Phillips—Chairman USA/South Africa Conf.

J. Unver—Farrell Lines

V. O'Neill—Farrell Lines

L. Buser—SAF Marine

P. O'Kelly—Lykes Bros.

J. Kelly—Robin/Moore-McCormack

H. Flad—Robin/Moore-McCormack

Thereafter follows a listing of 11 rate, classification and related items which were discussed, with agreement reached as to the action to be taken on over half of them and the balance "tabled for further study."

9. Another such memorandum by Mr. Flad (Ex. 36) states in part:

Subject—RATE MEETING—SEPTEMBER 16, 1957

Meeting convened at 2:30 p.m. at the USA/South Africa Conference Room, 26 Beaver Street.

Attended by:

J. Phillips—Chairman USA/South African Conf.
F. Unver—Farrell Lines
V. O'Neill—Farrell Lines
L. Buser—SAF Marine
P. O'Kelly—Lykes Bros.
J. McAvoy—Robin/Moore-McCormack
J. Kelly—Robin/Moore-McCormack
H. Flad—Robin/Moore-McCormack

Thereafter follows a listing of 13 separate rate, classification and related items discussed and the action which those attending agreed upon. An example of these entries is as follows:

(13) POWDERED MILK

This item has been under review by all the lines and after a full discussion it was decided to amend tariff as follows:

MILK, POWDERED (including Dietetic)	$42.25
FOOD, INFANT DIETETIC, N.O.S.	59.75

(effective Sept. 17, 1957)

Examples of Excluded Evidence.

10. A memorandum (Ex. 5) written on February 11, 1954 to one of Robin's traffic employees by Mr. S. J. Maddock, then vice president for traffic of Robins/Seas (later deceased and succeeded by Mr. C. H. McGuire), contains this comment:

Fred Unver [general traffic manager for Farrell] called today and advised they have a letter from Clarence Provost of the International General Electric Co. asking for rates on three Diesel locomotives for shipment to Durban. . . . I have not seen it but would like to have a copy of this rate request.

You can tell Provost that it is customary procedure with most shippers to send us a copy of their request for rate reductions to the Conference [Farrell] and that we and Farrells usually discuss such rate requests before anything is decided and then we always quote the same rates.

11. A letter to Safmarine dated April 6, 1954, by Mr. W. H. McGrath, a States Marine Lines vice president, in charge of the latter's Safmarine Agency (Ex. 116), discusses the rate reduction proposal made by Mr. Vaughn of Standard Vacuum Oil Co., the same subject mentioned above in par. 1, and contains the following:

As a result of all of this we advised both Farrell and Robin and Ray Vaughn that we could not see a rate reduction at this time and that we were fearful that such a reduction might initiate some of the oil companies taking advantage of Dreyfus' offerings and there was no telling where the rate would finally end.

Previously on direct examination Mr. McGrath conceded he had held rate discussions as Safmarine's agent with Robin, Farrell, Lykes and Dreyfus.

12. On September 1, 1954 Mr. Maddock of Robin/Seas wrote that line's agent at Mombasa a letter (Ex. 18) reading in part as follows:

This same propaganda was spread around New York about a month ago and if it were not for the fact that the Robin Line had just made an agreement with Dreyfus to work together on rates, it is probable that Farrells, Robin and the others would have reduced the rates unnecessarily. . . .
We have been intending to write to you and London about our very recent negotiations with the Louis Dreyfus Line and their New York agents, Ponchelet & Company. . . . There is a man working for them and in charge of traffic, by the name of John Boyes. . . .

I told Mr. Boyes that we would be most happy to work with the Dreyfus Line on rates if we could depend on them but that our experience in the past had not assured us on this matter. I told Mr. Boyes that it would probably only work if Paris would agree not to reduce any rate without first submitting it to Mr. Boyes to discuss it with us. . . . Mr. Boyes offered to submit the proposal to his principals in Paris and endeavor to obtain their concurrence. . . . We received a message a few days later from Mr. Ponchelet that Mr. Moine had confirmed that the Dreyfus Line in Paris had agreed to this arrangement. This is now in effect and before we reduce any rate on any commodity being shipped to or from Madagascar or South and East Africa, we call Mr. John Boyes and discuss it with him, just as we have been doing with Farrells and Lykes. Mr. Boyes now telephones us when he has any proposal for reducing rates and we exchange information as to whether or not it is advisable to grant the reduction.

Farrell and Lykes have been informed by me of this working arrangement that we have with Dreyfus and they are very pleased about it. Farrells and Lykes always consult us before reducing rates and we now discuss the matter with Dreyfus before giving any decision to Farrells or Lykes.

13. In a teletype from New Orleans to his New York office dated December 23, 1954 (Ex. 81), Lykes' vice president for traffic, Alec C. Cocke, stated:

"AS YOU RECALL SOMETIME BACK WE WERE FORCED REDUCE GULF RATE ACCT MADDOCK'S [of Robin/Seas] INSISTENCE IN DOING IT OVR OUR OBJECTION THAT GULF ASPHALT RATE MUST BE THE SAME AS TRINIDAD. AS I VIEW YOUR TELETYPE HE IS NOW ABOUT-FACE THIS SITN. WE ARE PERFECTLY WILLG NOTIFY ALL CONCERNED AS TO LONG-RANGE COMMITMNTS WE HV ON OUTWARD RATES. THIS IS A DEF AGRMNT BETWEEN THE LINES AND WE ARE FIRMLY OF THE OPIN SOME SORT OF AGRMNT BE-

TWEEN ALL THE LINES INVOLVED MUST B FILED WITH THE FMB AND AM WONDERING HOW STATES MARINE [agent of Safmarine] WL VIEW THIS AS THEY HAVE STEADFASTLY NOT BN WLG TO CONSDR ANY CONFRNC SETUP SO TO SPEAK."

Mr. Cocke on the witness stand identified "all concerned" as being Farrell, Robin, Safmarine and Dreyfus.

14. A memorandum written by Mr. Cocke on December 29, 1954 to Lykes' Durban office (Ex. 82), refers to respondents' agreement on the 15 percent general rate increase and the 48-hour notice of rate changes, stating in regard to the latter:

This is really an informal agreement and I still think something should be filed with the Maritime Administration but Messrs. Robin and Farrell feel otherwise, and in this connection New York advised us on December 27 as follows:

"ROBIN AND FARRELL CONSIDER EXCHANGE TARIFFS AND DISCUSSIONS PRIOR RATE CHANGES BETWEEN GULF LINES NO DIFFERENT FROM PRACTICE BETWEEN NO. ATL LINES WHICH HAS WORKED OUT SATISFACTORILY WITHOUT FMB FILING."

15. On January 20, 1955 Dreyfus' principal in Paris by Mr. Jean Cassegrain wrote Mr. J. E. Ponchelet of Ponchelet Marine Corp., New York, Dreyfus' general agent in the United States (Ex. 140), regarding among other things the aforesaid 15 percent general increase which was due to become effective March 1, 1955, as follows:

As regards the general increase of 15% it seems that this is now as good as done with the only exceptions so being: Bitumen, Petroleum Products, Synthetic Rubber. . . .

As regards our relations with LYKES, we agree with your viewpoint that for the present it is a sufficient step to start an agreement on rates similar to that which we now have with ROBIN and FARRELL, but we have indicated to you that you should leave the door open to something more comprehensive. The idea is that, if and when the rate agreement works satisfactorily, for some time, your contacts with LYKES should become more frequent and more friendly and, then, it might be easier to bring about something closer to what is our main purpose, i.e.: an agreement to limit direct competition.

16. On March 24, 1955 Mr. Arend Drost, treasurer of the Java Pacific Line, Nedlloyd's general agent in the United States, wrote his principal in Amsterdam regarding inbound rate increases (Ex. 124), in part as follows:

Enclosed please find copy of a circular dated March 22nd of the South Africa/USA Conference [Farrell], indicating increases and changes in freight rates which have been tentatively agreed upon between the Conference Lines and Robin, who are still in communication regarding same with Dreyfus Line and Lykes, besides ourselves. The matter is expected to be finalized shortly, at which time it will also be decided when the new rates will become effective.

[I]t is our idea to increase rates to the Pacific Coast on a dollar for dollar basis with those arranged to the Atlantic.

17. Mr. Drost on May 13, 1955 also wrote his principal, Nedlloyd (Ex. 125), in part as follows:

We wish to confirm the following cables sent you and Capetown Agents on May 11th:

FARRELL ROBIN DREYFUS SAFMARINE LYKES WE AGREED INCREASES AS PER CIRCULARS ATTACHED OURLETS AMSTERDAM MARCH 24 28 MAY 9 BECOMING EFFECTIVE JUNE FIFTEENTH AS PER TARIFF RULE ONE G

18. On November 2, 1955 Mr. C. H. McGuire, Mr. Maddock's successor as traffic vice president of Robin/Seas, and later in the same post with Robin/Mormac, sent Robin's London representative a cablegram (Ex. 6) which states in part:

REFERENCE CONVERSATION ASPHALT BITUMEN RATES LYKES FARRELL SAFMARINE DREYFUS OURSELVES HAVE AGREED FOLLOWING NEW RATES . . . ALL NEW RATES WOULD BE EFFECTIVE FROM JANUARY FIRST THROUGH JUNE THIRTIETH 1956

On direct examination Mr. McGuire stated that rate changes were often prefaced by conversations with Farrell, Lykes, Safmarine and Dreyfus.

19. On June 6, 1956 Mr. McGuire wrote a memorandum for the file (Ex. 9) reading in part as follows:

As requested by Mr. Farrell and Mr. Mercer [Safmarine] during our general discussion this morning, I called Alec Cocke of Lykes Bros. on the telephone this afternoon and outlined to him the views of Farrell, Safmarine and ourselves with respect to specific increases on automobiles and agriculturals and on container board/Kraft paper as well as the suggested 5% general rate increase after adjustment of the aforementioned specific rates. . . .

Upon being pressed by me for a definite statement of his position on the several proposed rate increases, he advised that he would support (provided all other lines did so as well) the upward adjustment proposed for automobiles and agriculturals and for container board/Kraft paper and would also agree to the proposed 5% general rate increase after adjustment of those individual items. . . .

20. On June 27, 1956 Messrs. Flad and McAvoy of Robin/Seas, later of Robin/Mormac, wrote a memorandum to Mr. McGuire (Ex. 14) which states in part:

In accordance with decision taken at meeting of Friday, June 22nd the undersigned met on June 25th and 26th at the office of the Conference with representatives from Farrell Line (F. Unver), Safmarine (F. DeMarco), Lykes (P. O'Kelly) and Dreyfus (G. Connelly) to set up uniform and accurate new rates based upon an anticipated 5% increase over rates presently in effect. Copy of the new schedule is attached hereto.

The memorandum then details various other rate and tariff actions agreed upon by the respondents. On direct examination Mr. McGuire testified that the meetings referred to took place and that what he described as "generally similar action" was later taken by Robin/Seas, Farrell, Lykes, Dreyfus and Safmarine.

21. Mr. W. H. McGrath of the States Marine agency for Safmarine, wrote his principal Safmarine on November 6, 1957 (Ex. 118), at which time Farrell and Robin/Mormac but not Safmarine were members of Agreement No. 8054 approved July 2, 1956, in part as follows:

I am going to have lunch today with Hugh TenEyck [of International Ore & Fertilizer] along with Robin and Farrell, in the hope that we can all agree with him on equitable freight rate on his business and keep him away from U. S. Navigation....

On direct examination Mr. McGrath affirmed that this meeting took place, with Mr. McGuire representing Robin/Mormac and Mr. Gorman representing Farrell Lines, but stated the meeting was fruitless because "we never did get from Mr. TenEyck what he felt was a rate which . . . he was willing that the lines each charge for participating in the carriage of this particular commodity."

22. On November 25, 1957 Mr. McGuire, by this date traffic vice president of Robin/Mormac, wrote a memorandum to J. E. Fee of his company (Ex. 15) reading in part as follows:

In company with John Gorman of Farrell Lines I met this afternoon with Charles McLagan of Turnbull Gibson and Company (London) and Frank Marick and Al Shields of American Metal Company at the latter's office to resume our negotiations on Copper rates for the coming year.

* * *

With respect to our competition I had the assurance before going into this meeting from Mr. Hans Severiens of Nedlloyd that his company would agree and abide by any rate that Mr. Gorman and I negotiated with the Copper people and I have advised him as to the outcome of the meeting. . . .

On direct examination Mr. McGuire acknowledge that he had the conversation referred to with Mr. Severiens of Nedlloyd and that his recollection of it was in accord with the statement made in this memorandum.

Evidentiary Errors. The general nature and extent of this problem has already been indicated. We shall here comment on some of the specific evidentiary faults we find. The matter unfortunately does not lend itself to brevity but we shall to the extent possible strive for it.

The four exhibits discussed in pars. 3, 4, 13 and 14 were part of a series of 27 from the files of respondent Lykes (Exs. 81, 82, 84-92, 94, 95, 98-104, 106-111, 113). All 27 were authored by Lykes' Messrs. Cocke or O'Kelley who, as above indicated, were vice president for traffic in New Orleans and assistant secretary handling traffic matters in New York, respectively. Both men were called as witnesses in the case by Public Counsel and were subjected to direct and cross examination regarding the exhibits and otherwise. Respondents succeeded in having 13 of Mr. Cocke's writings excluded, contending, *inter alia,* that they contained hearsay and opinions and were intra-company communications not admissible against third parties (Exs. 81, 82, 84-92, 94, 95).

Similar objections were then urged against one of the O'Kelley writings and it was excluded (Ex. 98). The same attack was then made on 10 more O'Kelley writings, all comparable to the foregoing rejected exhibits (Exs. 99-104, 106-109). This group was admitted, as all of these exhibits should have been, and the ruling was adhered to despite respondents' lengthy protests that the exhibits were in precisely the same class as those just rejected. Immediately thereafter three similar O'Kelley writings were excluded (Exs. 110, 111, 113). At another stage of the proceeding 21 more Cocke-O'Kelley communications, all comparable to those here discussed, were excluded (Exs. 146 -148B, 151-156, 158-163B).

The memorandum of Mr. Farrell quoted in par. 1, an admitted exhibit (Ex. 43), discusses the identical matter Safmarine's agent, Mr. W. H. McGrath, discussed in the letter partially quoted in par. 11, namely, Standard Vacuum's request for a rate reduction on lubricating products (Ex. 116). Mr. McGrath, a States Marine Lines vice president in charge of the Safmarine agency, was a witness in the case, like Mr. Farrell. The McGrath letter was excluded, the objections being that it antedated Public Counsel's "specification of charges" (as did Mr. Farrell's letter), that States Marine was not a party to the case, and that Mr. McGrath testified nothing resulted from the rate discussions, which immaterial fact the letter itself showed. Next, there was admitted, over objections, a similar McGrath letter, but of a later date, regarding discussions among respondents on the rate for tobacco leaf (Ex. 117). Another such McGrath letter, which is quoted ir par. 21, was then rejected (Ex. 118). It was objected to not a: being authored by States Marine, a non-party, but as being ar "intra-company" Safmarine communication. It was objected to also, on the same immaterial ground that Mr. McGrath had testi fied that no result came out of the rate conference therein men tioned.

The letter to Mr. Farrell by Nedlloyd's agent, Mr. Severiens quoted in par. 6 as an admitted exhibit, was one of a group o: similar letters that Severiens concurrently sent Farrell, Robin, Seas, Dreyfus and Lykes. When more of the group were offere((Exs. 131-134), Farrell's counsel objected, asserting Severien: had not been called as a witness and the letters were "hearsa; and unilateral." They were thereupon excluded. Mr. Farrell': reply to Mr. Severiens, also an admitted exhibit quoted in par. 6 shows that these objections had no substance. Ten additiona Nedlloyd communications, two of which are quoted in pars. 1(and 17, written by its agent Mr. Drost, who was a witness in th(case, were excluded as hearsay because Drost said he got th(information for these communications from the USA/Soutl Africa Conference secretary, Mr. Phillips. If that was so, Dros had a reliable contact. Phillips was the agent of Farrell, the sol(member of the conference, and was at times the focal point fo unapproved rate activity among the respondents, as shown by th(admitted evidence in pars. 7 to 9. The exhibit in par. 17 was als(objected to as at variance with Drost's testimony that when h(wrote "we agreed," he meant only that he had concurred fo Nedlloyd in a rate understanding Phillips told him the other re spondents had reached. If there is a variation between thi explanation and "we agreed," we do not detect it.

About 40 exhibits from the files of Robin Line were offere(in evidence by Public Counsel. They had been produced by re spondent Moore-McCormack which it will be recalled acquire(Robin's property in May 1957 from the since-inactive Seas Shir ping Company. All but a handful of these exhibits were rejectec principally on the theory that they constituted "admissions" o Seas Shipping, which had not been made a respondent. Mormac' counsel suggested this theory when he reminded that his clien had purchased Seas' property, "not its sins." However, to prc ceed from this technically accurate point to the sweeping notio: that these documents were incompetent and inadmissible for an; purpose, was quite unjustified.

For one thing, about half the exhibits were written by two of the witnesses in the case, namely, Messrs. Charles H. McGuire and Harold C. Flad who were, as before noted, vice president in charge of traffic and freight agent for Robin, respectively. At least as to this group, therefore, no basis existed for the suggestion that the exhibits were hearsay or the work of an absent or disinterested person. Four of these rejected exhibits are quoted in pars. 18, 19, 20 and 22. Three others involving or written by Mr. Flad had previously been admitted, as shown in pars. 7 to 9. Of the remaining rejected Robin exhibits some were messages sent to Messrs. McGuire or Flad, and the balance were virtually all letters or memos authored by Mr. S. J. Maddock, McGuire's predecessor as Robin's traffic vice president. See pars. 10 and 12 for two Maddock writings.

Mr. Maddock is deceased and could not be called to testify. The same was true of Mr. F. J. Unver, Farrell's general traffic manager at some of the times in question. There were other participants who for one reason or another could not be called. But their writings were not thereby stripped of all evidentiary value. The authenticity of the documents was beyond question, other indisputable evidence corroborated them by depicting the same rate cooperation among respondents to which the unavailable parties had addressed themselves, giving their writings credibility and trustworthiness. As indicated in our prior comments on hearsay, such exhibits were plainly admissible in this administrative proceeding as being reliable, relevant and probative. They were admissible, moreover, not only against the authoring respondent but against other respondents named therein because they showed or tended to show the existence of an agreement among respondents, and that was the heart of the matter under investigation.

The activities of Robin did not change with the passing of Mr. Maddock, nor with the Lines' acquisition by Mormac. On the contrary, as one of the admitted exhibits shows (see par. 5), Robin informed Farrell in June 1955 that with Mr. McGuire's succession to senior position in Robin, Farrell "could expect full cooperation on rates and no rate cutting." Mr. McGuire, Mr. Flad and others who had been employed by Robins/Seas were employed by Mormac when it purchased Robin's property in May 1957 and continued to handle its traffic and rate matters in the trade between the United States and Africa just as they had before. See pars. 7 to 9 and 22.

Public Counsel was able to subpoena material witnesses from each respondent except Louis Dreyfus Lines. A French corporation, Dreyfus' traffic interests in the US/South Africa trade were handled by principals located in Paris, including Mr. Jean Cassegrain, and by its general agent in the United States, Ponchelet Marine Corp. of New York, chiefly Mr. J. E. Ponchelet. Mr. Ponchelet was reportedly not connected with Dreyfus at the time of the hearings and his whereabouts were unknown. As in the case of the other respondents, a subpoena was addressed to Dreyfus and its agent, Ponchelet Marine, for relevant documents in the possession or control of Dreyfus or its agent, and in response thereto Dreyfus' counsel produced various files together with an affidavit by their custodian that they contained all documents of the kind described in the subpoena.

Five documents from these Dreyfus files, being principal-agent correspondence written by Messrs. Ponchelet or Cassegrain, were offered in evidence (Exs. 140-144). The exhibits were objected to by Dreyfus' counsel as "not authenticated by any witness who was produced by the Government." He and other counsel also questioned whether the communications "were actually sent or received" and indeed whether they even related to Dreyfus. The exhibits were thereupon rejected. That they were admissible seems hardly debatable. It was obvious on their face and from the circumstances surrounding their production that the exhibits were authentic and what they purported to be, namely, official Dreyfus correspondence concerning Dreyfus participation in the same concerted rate activity in the US/South Africa trade which was the subject of numerous exhibits in the case composed by other respondents. For an example of this rejected Dreyfus correspondence, see par. 15. For ample additional evidence of Dreyfus participation, see pars. 3, 4, 6, 11-13, 16-18 and 20. What we have said previously as to the evidentiary value of such exhibits, even though no witness was available to testify concerning them, applies with equal force here.

A restricted or fragmented approach to the evidence, which was usually the one taken in this section 15 investigation, can defeat the very purpose for which the investigation was instituted. The conduct proscribed by section 15 includes oral and informal agreements, understandings and arrangements which by their nature can be difficult to detect and prove and may well require the putting together of numerous individual evidentiary items so as to construct an integrated whole that will provide the basis for a conclusion. The respondents here should not have been allowed to isolate and attempt to destroy the documentary proof link by link, in disregard of the interrelated and complementary character of the various links as well as their cumulative delineation of respondents' common course of unapproved activity. But for the abundance of the proof that happens to be available here, such an approach might have transformed the entire proceeding into an academic exercise.

We would add one final, and perhaps obvious, comment on the quality of the excluded exhibits. They were authored in the main by experienced, highly-placed officials who were responsible for the all-important traffic phases of large and complex ocean transportation enterprises, in what was a very competitive trade area. Like many a businessman with less at stake, we are quite sure these officials of respondents and their agents had the capacity to know and state accurately anything so significant to their operations as the fact that they had reached an agreement, understanding or arrangement relating to rates with one or more of their competitors. Contrary to contentions advanced by respondents' counsel, such statements did not constitute expressions of legal opinion, nor opinion as to what someone else meant. Respondents' counsel also complained often, even where the author had been examined on the witness stand, that the exhibits were intra-company communications, which was true as to many of them. However, in our view this enhanced rather than detracted from their evidentiary validity because the communications contained completely candid utterances bearing directly on the subject of the inquiry.

We find that the 113 exhibits the Examiner rejected were reliable, relevant and probative and should have been admitted in this proceeding. The Examiner is accordingly overruled and the exhibits are received in evidence. Anticipating the possibility of this result, some of the respondents argue that they should be given the opportunity to meet the evidence thus admitted. The argument is misleading and without substance. No rulings were made on the exhibits until the end of the hearings, in line with procedure the respondents themselves urged. The exhibits had previously been tendered and identified and were for all practical purposes a part of the case. Many of the exhibits were the subject of both direct and cross examination, and in the course thereof the material contents of some of them were also read into the record.

It is to be recalled, moreover, that all the proof in the case relating to possible violations originated with the respondents, so that could have been no surprises. Respondents not only had full opportunity to meet Public Counsel's presentation, they were peculiarly well situated to demolish it if any such evidence existed. They in fact undertook to meet the presentation to the extent they had something to offer. Additionally, at the conclusion of the testimony, but before the admissibility of the exhibits was ruled upon, the Examiner specifically inquired if the respondents had "any further affirmative offerings" and received negative replies. While most of the exhibits respondents had tendered were ultimately withdrawn, they remained physically a part of the record and have been reviewed by us. They do not, however, contain material that could affect our conclusion.

Findings and Conclusions—Section 15 Violations Not Involving Baron Iino. The evidence, of which pars. 1–22 above are but samples, clearly establishes and we find with respect to section 15 violations of respondents other than Baron Iino, in the United States/South and East Africa trade during the years 1954-58, inclusive, the following:

An agreement, or cooperative working arrangement, for the exchange of information relating to rates and related matters and for the fixing of rates, existed during the entire five-year period. It was participated in by all of the respondents and often resulted in the establishment of identical rates adhered to by each of them. From the beginning of 1954 this arrangement included on a regular basis Farrell and Robin/Seas, operators in the Atlantic portion of the trade, and to a lesser extent, Lykes, their American counterpart in the Gulf portion of the trade. By no later than April of that year, the arrangement included Safmarine, which operated in both the Atlantic and Gulf portions and for most of the relevant period was a common carrier only outbound from the United States.

At first the cooperation in the Gulf portion of the trade involving Lykes, Dreyfus and Safmarine was less firm, chiefly because of Dreyfus, but even so the discussions and exchanges of rate information resulted in considerable parity of rates. About August 1954, Robin/Seas persuaded Dreyfus, an operator also in the Atlantic segment "to work together on rates" and thus participate more completely in the arrangement. By the end of 1954 there was much closer Gulf cooperation between Lykes, Dreyfus and Safmarine. By January 1955 Dreyfus was ready to work with the other respondents for a comprehensive "agreement to limit direct competition." Nedlloyd's interests mainly concerned a limited number of commodities moving in the inbound U. S. Atlantic trade. It sailed to Africa from the U. S. Pacific Coast. During 1954 and thereafter it exchanged rate information with the other lines, usually through Farrell's agent, the secretary of the USA/South Africa Conference. This included consultation and concurrence in rate changes, as well as the initiation itself of rate proposals on which it directly secured agreement from the other respondents.

In late 1954 and early 1955 Farrell, Robin/Seas, Lykes, Dreyfus and Safmarine considered in concert and finally agreed to a 15 percent general rate increase for the outbound trade. They put this into effect on March 1, 1955, with exceptions as to a few commodities. They also concurrently firmed up an understanding for the giving to each other of 48 hours' notice and opportunity for advance discussion of any rate alteration, in which Nedlloyd likewise concurred. In March 1955, shortly after the outbound increase became effective, Dreyfus, Farrell, Robin/Seas and Lykes (Safmarine having no interest here) began joint consideration of rate increases for the inbound trade, and certain other tariff matters, and reached agreement thereon by May of 1955. Nedlloyd participated in these negotiations to the extent of its commodity interests through its liaison with Farrell's agent, the conference secretary.

The cooperative arrangement was thereafter maintained between the respondents along the same lines but with ever-increasing closeness. The numerous discussions and conferences they held brought about agreement on the rate levels for specified commodities and groups of commodities, and from time to time on general rate increases, and resulted in their tariff rates being identical on most items by early 1956. The filing by Farrell and Robin/Seas of Agreement 8054, approved by the Board July 2, 1956, changed nothing except possibly to step up the tempo of activity between the signatories. The arrangement continued among all the respondents, whether or not signatory to 8054.

The arrangement was terminated as to Dreyfus, which never signed 8054, upon its suspension of service in the trade in February 1957. Mormac became an active party in the arrangement after it acquired Robin's property and personnel in May 1957, and was such both before and after it signed 8054 in August 1957.

Lykes, Nedlloyd and Safmarine, all of whom had continued their regular participation, did not sign 8054 until April 3, 1958, July 28, 1958, and September 10, 1958, respectively, on which latter date the respondents at last brought their long-standing agreement or cooperative working arrangement into compliance with section 15.

We further find and conclude that the respondents did not file immediately with the Board their cooperative working arrangement nor any of their numerous subsidiary rate agreements and understandings, as aforesaid, contrary to section 15 of the Shipping Act, 1916; that the sole agreement which was filed, No. 8054, was not a true and complete copy or memorandum of the arrangement in that it failed to disclose all of the parties thereto, never disclosed Dreyfus' participation, and did not fully reveal the remaining parties until September 10, 1958, contrary to section 15; that the arrangement and subsidiary agreements and understandings were carried out by the respondents in the manner aforesaid during the years 1954-58, without the knowledge much less the approval of the Board, contrary to section 15; and that all of the respondents were in violation of section 15 of the Act beginning at the approximate times indicated in 1954 until September 10, 1958, except that Dreyfus' period of violation ended in February 1957.

Discussion—Section 15 Violations Not Involving Baron Iino. No one would doubt that Agreement 8054, approved July 2, 1956 with Farrell and Robin/Seas as signatories, and adopted on various dates over the next two-plus years by Robin/Mormac, Lykes, Nedlloyd and Safmarine, is an agreement which was required to be filed and approved under section 15 of the Act, failing which the activities therein described were unlawful. It will be recalled that the agreement, which is quite brief in its terms, authorized the parties thereto to discuss and agree on rates to be charged by them and related tariff matters, and also stated that any party might itself alter any rate or tariff matter upon giving at least 48 hours' notice to the other parties. Although essentially the same as the informal arrangement or agreement under which the signatories to 8054, and also Dreyfus, operated throughout the five-year period involved, respondents managed to convince the Examiner that their arrangement did not violate section 15 because, as he puts it, they had "no meeting of the minds" and were not "legally obligated" before 8054.

Inconsistent on its face, this result in our judgment is insupportable on any ground, factual or legal, and it must be set aside. Factually, even the limited proof admitted by the Examiner indicates clearly that the respondents had a meeting of the minds for a cooperative rate arrangement and when the entire record is brought into focus the picture of it is most convincing. That record, as has been noted, was largely built of highly incriminating evidence from the files of each respondent (except Baron Iino). Respondents did not offer and could not have had any real answer to that evidence. It is, or at least should be, next to impossible to overcome statements repeatedly written in company correspondence by the president, vice president for traffic, or other official that an "agreement," "commitment," "concurrence" or "understanding" has been reached with one or more competitors regarding the rate level at which transportation will be furnished. It appears to us respondents' inability to provide any answer was why from the outset they fought so strenuously to keep the evidence out of the case, and is why in their argument they only attempt to interpret it.

The Examiner likewise had difficulty in this respect. His report acknowledges that respondents held numerous rate discussions and conferences and that these covered various rate matters including the 15 percent general increase that all of them put into effect on March 1, 1955 and the plan for 48 hours' advance notice of a rate change. The Examiner further found that respondents' discussions and conferences "generally, but not always, resulted in the quotation of similar rates," and by February 1956 had resulted in Robin, Farrell, Lykes, Dreyfus, Nedlloyd and Safmarine having rates "on most items [that] were identical." In our view, such findings logically lead to a conclusion just the opposite from the one the Examiner reached.

We cannot regard obvious anticompetitive activity as though it were normal business conduct. Nor can we regard the use of parallel rates following joint rate discussions as though it were the fortuitous product of "independent judgment" or just the result of "business economics." Both law and reason demand of us a considerably more realistic approach than this. Persons subject to the Act who expect us to give credence to such claims should conduct their activities in a way that is consistent with the claims. As we recently stated in *Unapproved Section 15 Agreements—West Coast South America Trade*, 7 F.M.C. 22, 25 (1961), which was found not to be a rate-fixing situation:

> [W]e deem it a serious matter for parties subject to the Act to engage in exchanging rate information without our knowledge. In some circumstances, the exchange of rate information may not affect the public interest. But the natural consequences of such activity can clearly be a step toward or the very basis of improper practices, and the activity should therefore be avoided.

Here the respondents, in their frequent communications, were not simply keeping one another posted, any more than they were exchanging reminiscences. They were engaged in what is most aptly described as a cooperative working arrangement for the joint fixing or regulating of transportation rates, which was unauthorized and therefore improper. The manifest objective of this arrangement was to achieve agreement or understanding on the level of such rates and the record everywhere shows that respondents accomplished this to a substantial degree. It is quite immaterial that the arrangement did not in every instance produce firm or complete accord. Even if no firm results had been reached—a highly unlikely situation—the agreement to cooperate in attempting to fix rates would have been improper. However, respondents' arrangement, encompassing as it did all the common carriers in the trade during much of the relevant period, was quite successful in producing concrete results. It "generally . . . resulted in the quotation of similar rates" by all of them, as the Examiner himself found.

It may also be recalled at this juncture that 8054, the section 15 agreement by which respondents finally formalized their arrangement, stipulates that a party may individually alter a rate subject to giving at least 48 hours' notice to the other parties. This is exactly the same sort of reservation of so-called "independence" that influenced the Examiner to conclude the respondents had "no meeting of the minds" and no agreement, although 8054 is plainly an agreement. Such a notice provision, moreover, does not reflect independence. It demonstrates anticompetitive agreement. Its effect is to assure the parties an opportunity either to institute simultaneously the proposed rate change, dissuade the proponent from effectuating it, or at the least talk him into an acceptable compromise.

As a matter of law the Examiner's decision decimates section 15. It would read out of the section oral, tacit or general agreements, understandings and arrangements. These, however, are even more effective anti-competitive vehicles than formal, detailed and legally-binding agreements. Section 15 is not concerned with formality but with the actual effect of the arrangement. The

Examiner's construction of the section cannot be reconciled with its language or its history. It reflects, moreover, a fundamentally erroneous concept of the section's meaning and function which we must emphatically reject. As to that meaning and function, we made the following pertinent comments in the *Pacific Coast European Conference* case, 7 F.M.C. 27, 33-35 (1961) :

Section 15 is a grant of limited legislative permission for carriers and others operating in this Nation's foreign water-borne commerce to engage in certain forms of concerted activity which would otherwise be unlawful under the antitrust laws, but only if and to the extent approved by the Commission and only so long as approved by it. . . . This appears from the face of the statute. In addition, the legislative history of section 15 makes plain that Congress granted an antitrust exemption only because it envisioned that the permitted activities would be subjected to constant and effective government control and regulation.

The House Merchant Marine and Fisheries Committee in the report of its Investigation of Shipping Combinations, the legislative study underlying the Shipping Act, 1916, made an exhaustive analysis of the problems presented by anticompetitive combinations in our water-borne foreign commerce. The Committee pointed out that Congress had but two courses. It could either restore unrestricted competition by prohibiting the anti-competitive agreements and understandings then widely used, or it could recognize these agreements and understandings along lines which would eliminate the evils flowing therefrom. While admitting the advantages of allowing steamship agreements and conferences in our foreign commerce, the Committee was not disposed to recognize them "unless the same are brought under some form of effective government supervision." The Committee pointed out that to permit such agreements without this supervision would mean giving the parties an unrestricted right of action, which it definitely did not favor.*

This philosophy took shape and was enacted as section 15 of the Shipping Act, 1916, confiding to the agency administering the Act extensive powers of supervision and control as the condition precedent to any of the concerted activities covered by the section's rather all-inclusive language. As was pointed out by the court in *Isbrandtsen Co., Inc.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954), in discussing the authority to permit antitrust exemptions under section 15:

> "The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." (211 F. 2d 51, 57).

Congress was fully aware, furthermore, that its plan for "effective government supervision" would be largely frustrated unless the Act were made broadly applicable to all agreements, understandings and arrangements including particularly the kind of

"* Committee on the Merchant Marine and Fisheries, House of Representatives, 63rd Congress, Report of Investigation of Shipping Combinations under House Resolution 587 in 4 volumes, hereinatfer referred to as the 'Alexander Report,' Vol. 4, pp. 415-17."

informal arrangement which existed among the respondents here. The Alexander Report, *supra*, summarized the problem as follows (pp. 293-94):

> Reference should here be made (1) to the tendency toward oral understandings, instead of written agreements, between the lines operating to and from ports of the Unitd States, and (2) the care which has been exercised to prevent agreements and understandings from becoming public. Oral understandings were described by various witnesses as "safer" than written agreements, and the preceding chapters refer not only to many agreements which were of an oral nature from their inception but to several instances where written agreements were terminated and oral understandings substituted, the witnesses however admitting that the lines continue to follow the same rates and conditions which were previously observed under the written agreements. In fact, witnesses repeatedly drew the distinction between formal written agreements and oral or "tacit" understandings.
>
> While not involving as strong a moral obligation as written agreements, the evidence shows that for all practical purposes oral arrangements are quite as effective. Judging from the manner in which the lines observe the same, the existing oral understandings give unmistakable evidence of the high order of integrity prevailing in modern business, and justify fully the phrase "gentlemen's agreements." Written agreements seem to have accomplished their purpose in many trades and are apparently no longer needed. The lines in some instances need not even meet in conference; they may avoid every appearance and every act which would seem to show the existence of an agreement or understanding; and yet operate in the same spirit of harmony that would prevail if a written agreement existed.

Accordingly, section 15 requires—as it has for the 45 years since enacted—the filing of a copy, or "if oral" a true and complete memorandum, of "every agreement" covering any of the wide range of anticompetitive activities therein mentioned, "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The word "agreement" is specifically defined to include "conferences, understandings, and other arrangements."[5] The language of the section thus clearly embraces every agreement, understanding, or arrangement, whether

[5] The relevant portion of section 15 of the Shipping Act, 1916 (46 U.S.C. 814), which was not changed by the amendments of October 3, 1961 (Public Law 87-346, 75 Stat. 762) except to substitute "Commission" for "board," reads as follows:

"SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Board [now Commission] a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating ir any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

formal or informal, written or oral, detailed or general. The section has been applied in other cases to informal working arrangements not nearly so conspicuous as this one. For example, see *In the Matter of Wharfage Charges & Practices at Boston, Mass.*, 2 U.S.M.C. 245, 248, 251 (1940) and *Maatschappij "Zeetransport N.V. et al.* v. *Anchor Line Ltd. et al.*, 6 F.M.B. 199 (1961); aff'd sub. nom *Anchor Line Ltd.* v. *F.M.C.*, 299 F. 2d 124, (D.C. Cir. 1962).

Respondents Farrell, Nedlloyd and Safmarine, and to some extent Lykes, object to having been "charged" with "failure to file" agreements.[6] They argue that section 15 only makes it an offense "to carry out" an agreement, citing in support thereof certain Board decisions and testimony given before a Congressional Committee by two Board officials. We are aware that on occasion past there has been some *obiter dicta* on this subject that might comfort respondents but we have found no cases actually ruling on the question until early 1961, and they reject rather than support respondents' interpretation, as the statute itself does. If there has been any past doubt, we fail to see why.[7]

At the root of respondents' position is the following language which was included in the fourth paragraph of the original section 15, and is retained in the same paragraph by the amendments to the section added by Public Law 87-346 approved October 3, 1961 (75 Stat. 762):

> [B]efore approval or after disapproval it shall be unlawful to carry out * * * any such agreement, modification, or cancellation.

On the other hand, section 15 opens with the flat command that agreements "shall" be filed "immediately," which obviously means without delay or at once, if not sooner. Moreover, by the final paragraph of section 15 a penalty is imposed for violating "any

[6] Respondents Farrell and Nedlloyd also contend the Board's orders posed no question of failure to file agreements. We think they did, both expressly and by necessary implication. The orders recited that agreements might have existed among respondents which "have not been filed" and that they might have been "carried out before approval." Even assuming they lacked some precision, they were orders of invstigation, not an indictment nor a penal complaint, and not required to be drawn with the specificity usually found in such papers. Moreover, respondents' position was and is that no agreements but 8054 existed. It is undisputed that the Board's orders raised the question of respondents' effectuating unapproved section 15 agreements other than 8054. They necessarily put into issue whether any such other agreements existed and had not been filed.

[7] Respondents' citations are: *In re Pan-American S.S. Co., et al.*, 2 U.S.M.C. 693, 697 (1943); *City of Portland* v. *Pacific Westbound Conf.*, 4 F.M.B. 664, 674 (1955); *Pacific Coast European Conf.—Limitation of Membership*, 5 F.M.B. 39, 45 (1956); *American-Union Transport* v. *River Plate & Brazil Confs.*, 5 F.M.B. 216, 224 (1957); *Pacific Coast European Conf.—Limitation on Membership*, 5 F.M.B. 247 (1957); *Associated-Banning Co.* v. *Matson Nav. Co.*, 5 F.M.B. 336, 343 (1957); *Monopoly Problems in Regulated Industries*, Hearings of Antitrust Subcommittee (Celler Committee) of House Judiciary Committee, 86th Cong., 1st Sess., Part 1, Vol. 1, pp. 71-75.

provision" of the section. Unless the filing requirement is somehow to be interpreted out of the section, it must be given effect as a provision and quite a positive one, for violation of which the penalty applies. We will not make any such attempt to expunge the provision but will construe it as written, fortified by the belief that failure immediately to file an anticompetitive agreement was intended by Congress to be a distinct violation of section 15.

There is nothing perfunctory about the language in question. It does not say file if and when you plan to effectuate, nor does it indulge in the fantasy that an anticompetitive arrangement will be kept on ice and not effectuated. On the contrary, it assumes effectuation is a foregone conclusion and that it is likely to be clandestine. The language is therefore an urgent injunction with a clear purpose. Effective government supervision, which was the cornerstone of the whole regulatory plan Congress embodied in section 15, would be greatly handicapped if not defeated were parties to anticompetitive agreements allowed to file them at their convenience, which could be never. Supervision cannot be effective, and may well be nonexistent, if the supervisor is uninformed.

As before noted, Congress took particular cognizance of the industry's tendency toward the widespread use of informal, tacit and secret agreements and of the difficulties of detecting them. We think it did not want the parties to such arrangements in a position to effectuate them at will, under a clandestine cloak. It therefore undertook to compel immediate disclosure of anticompetitive arrangements by requiring that they be put on record and exposed to government supervision forthwith, otherwise the statute was violated.

The Board ruled over a year ago that failure to file an agreement is a violation of section 15. *Maatschappij "Zeetransport", supra; Agreements and Practices Pertaining to Freighting Agreement—Gulf & Atl. Havana Conf.*, 6 F.M.B. 215 (1961). And, though it may not have expressly so held, we think the Supreme Court as long ago as 1932 clearly indicated that section 15 was violated by failure to file an agreement. *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 486-87 (1932). We note, also, that Congress, apparently troubled by the same *obiter* which we mentioned above, added language to section 15 in its recent revision thereof (Public Law 87-346, *supra*) making it even more plain (if that is possible) that failure to file immediately is a violation.

Statutory Violations Involving Baron Iino. The Board's orders of January 15 and June 27, 1960 enlarged this proceeding to include investigation into (1) possible violation of section 14, Second of the Act (*i.e.*, use of a vessel or vessels for the purpose of preventing competition by driving another carrier out of the trade) by Farrell and/or Robin/Mormac during 1957-59 in the African trade, the other carrier being Baron Iino or its predecessor Baron Line; and (2) possible violation of section 15 by reason of agreements covering certain commodities in the same trade during 1958-59 and thereafter, between the six original respondents and Baron Iino.

Baron Iino in January 1959 succeeded Baron Line in the trade, the latter having operated therein since the end of 1957. Both Barons were represented in the United States by U. S. Navigation Co. and both gave the respondents what might be termed in the vernacular "a hard time" by undercutting their rates, at least on some commodities, and by refusing to join Agreement 8054 unless given rate concessions. The evidence adduced with respect to the section 14 violation indicated that Farrell and Robin/Mormac considered taking measures against Baron such as "blanketing" its sailings and might have made threats to do so, but these were not carried out.

The question of possible section 15 violations involved Kraft paper, wool and bulk tallow and stemmed from conversations on a few occasions over a period of about 18 months, initially between Baron's agent and Farrell, Robin/Mormac and Lykes and later between Baron's agent and Safmarine's agent, the latter acting as representative of the other respondents. The conversations were initiated by the respondents because of their desire to have Baron join the group, and included the lesser possibility that some understanding might be obtained on specific commodities. However, Baron, as before noted, appears to have remained generally uncooperative, at least absent concessions. Baron's agent denied having any agreement, understanding or arrangement with the other respondents at any time. The proof tends to support this claim except as to tallow, where it casts some doubt on the claim, but does not destroy it as occurred in the section 15 violations discussed above.

With respect to tallow only, Public Counsel urges that section 15 was violated. The tallow rate had been driven down deeply during 1958 and was $18 per long ton by early 1959, which was less than break-even for at least one of the 8054 carriers. Precisely what happened from this time on is controversial and, to us, somewhat confusing. The 8054 group apparently decided to publish a $20 rate effective May 1, 1959 and beginning in February 1959 filed tariff amendments covering same. We are unable to find, however, as we are asked to do, that prior to this the 8054 group had a "commitment" from Baron Iino that it would use the $20 rate. Nor can we find that a subsequent increase in the rate to $22 effective July 1, 1959, was based on Baron Iino's agreement.

It is true that a couple of the conversations between the agents of Baron Iino and Safmarine occurred during this period but it is not clear from the testimony of the participants that Baron Iino could be said to have agreed on tallow rates. In view of such testimony, and Baron's record of disagreeing rather than agreeing, we are disposed to view the remaining evidence on this matter as insufficient to establish the violation. This is another instance, however, where a carrier who claims to be free of unapproved anticompetitive alliance, has come close to potentially serious difficulty by failing to avoid questionable involvement with its competitors.

In accord with the foregoing, respondents Farrell and Robin/Mormac are found not to have violated section 14, Second of the Act, and Baron Iino and the other respondents are found not to have violated section 15 of the Act, in respect of the matters referred to in the Board's orders of January 15 and June 27, 1960 which involve Baron Iino or its predecessor Baron Line.

Matters in Extenuation. While we have stated our findings and conclusions and the reasons therefor, there remain undiscussed several contentions which are particularly urged by the American respondents, both defensively and in extenuation or mitigation. In reality they are matters in extenuation and as such may be material to the question of punishment for past violations but are not relevant to anything within the jurisdiction or intent of this administrative investigation. Nevertheless, some discussion of the contentions appears in order in view of the misleading and erroneous influence they had on the Examiner. He accepted as justifying completely the conduct of Farrell, Robin and Lykes the theory that their activities had been directed or sanctioned by the former Maritime Commission, the Board, or their representatives continuously since back in 1938 and up to and inclusive of the 1954-58 period under investigation. The background of this is as follows:

Operating subsidy contracts in the United States/South and East Africa trade were concurrently sought after passage of the Merchant Marine Act, 1936 (46 U.S.C. 1101, 1171) by both Robin/Seas and Farrell's predecessor, American South African Line, Inc., then the only American carriers in the trade. The former Commission in 1938 decided that both carriers should receive subsidy on an experimental basis but that efforts to effect their merger should continue and if not successful, arrangements should be worked out "covering sailing dates, rates, and pooling of homebound cargo" so as to eliminate to the extent possible competition between two subsidized American lines and enable them "to cooperate in competing against the foreign lines now carrying the bulk of the commerce in this trade." *American South African Line, Inc.—Subsidy S. and E. Africa*, 3 U.S.M.C. 277, 287 (1938). Conformable to this decision, subsidy contracts were awarded the two companies which stipulated they would "establish, publish, and maintain rates, charges" etc. on a basis "satisfactory to the Commission."

Lykes entered the Gulf portion of the trade in January 1941, there being no other American carrier in it at the time. Because subsidized in other trades, Lykes had to and did obtain Commission permission for this venture. The Commission required it to carry certain homebound cargoes. Lykes' vice president testified that it was told by Commission employees to consult with Farrell and Robin on rates for certain strategic inbound, and certain competitives outbound, commodities. During the war years Farrell, Robin and Lykes operated ships in the trade as general agents of the War Shipping Administration, and received copies of the same W.S.A. rate advices. For a time after the war, when they had resumed operations for their own account, they voluntarily continued, at W.S.A.'s suggestion, to maintain rates established by W.S.A. in its tariffs. After the war, also, Lykes obtained subsidy for its Gulf/Africa service.

When Mormac took over the Robin operation in 1957, its subsidy contract was amended initially to include the same provision that had been inserted as aforesaid in the Farrell and Robin/Seas subsidy contracts back in 1938 but this was almost immediately changed, at the request of Maritime's Office of Government Aid, in favor of a "coordination" clause similar to one Mormac already had in another subsidy contract. This substituted clause was likewise inserted in Farrell's contract in lieu of the prior provision. The clause states that the operator will from time to time as required by the United States "coordinate the spacing, regularity and frequency of its sailings" in conjunction with other subsidized services on the trade route, and gives the Government's consent to such prescribed coordination for the purposes of Art. II–18(c) of the subsidy contract and any other contractual or statutory provision requiring that consent. Besides the foregoing, it appears there occurred through the years sporadic contacts or discussions, of uncertain content, between the subsidized operators and Maritime personnel.

The mere recital of this background seems to us to show that it in no way supports the subsidized respondents' claim of agency knowledge and consent to the rate-fixing activities hereinabove set forth, nor the Examiner's finding that these respondents were only maintaining uniform rates "in compliance with" subsidy contracts and agency advices. The 1957 coordination clause is a routine subsidy contract provision covering sailings and does not mention rates. Assuming the prior 1938 provision and the advice Lykes says it received, were factors in the early rate cooperation among Farrell, Robin/Seas and Lykes, that cooperation was not authorized to be undertaken without reference to section 15's requirements. One of its purposes, also, was to provide for competition against the foreign lines.

The record does not show that Maritime personnel told respondents section 15 could be disregarded, or even that the subject came up. The burden was on respondents to raise it, and in any event to file under section 15 and set forth the arrangement they had. It is interesting to recall in this regard that Lykes did raise the subject with its colleagues in December 1954, and expressed its opinion that a "definite agreement" existed and "must be filed with the FMB." The record likewise does not show that anything like the arrangement which prevailed during the 1954-58 period was revealed to or known to the Board or its personnel, as successors to the Commission, much less that it was directed or approved by them. That arrangement, involving as it mostly did, widespread rate-fixing among all carriers in the trade, citizen and non-citizen alike, was not at all what the 1938 provision of the subsidy contracts envisaged. The American carriers were not united to compete with the foreign-flag lines, they were acting in concert with such lines to eliminate competition.

Respondents' argument that the arrangement "promoted stability," aided the subsidy program, was "in the public interest," and not objectionable under section 15, is quite beside the point. Such matters were for the Board, the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves. Respondents prevented any Board consideration by ignoring the eminently clear requirements of section 15 and thus frustrated it for years. We think it impossible for anyone now to state that what transpired between respondents was all well and good but even if this were not so, the impact of the statute manifestly cannot be made to depend on the *ex post facto* chance that the violation was not harmful. Section 15 may as well be scrapped as to attempt to administer it in this fashion.

It goes without saying that we find untenable the suggestion that respondents' arrangement constituted a "technical" violation of the law. It should be noted, furthermore, that section 15 affords little room for so-called technical violations. To us the breadth and force of its language literally implore attention and obedience, or at the very least inquiry if in any doubt as to the propriety of proposed conduct.

Since the respondents are not currently acting contrary to section 15, we have no occasion to issue an order against them and the proceeding will be discontinued. In accordance with our usual practice where statutory violations have been found, the matter will be referred to the Department of Justice for appropriate action.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D.C., this 9th day of April, 1962.

No. 882

UNAPPROVED SECTION 15 AGREEMENTS—SOUTH AFRICAN TRADE

This proceeding was instituted by our predecessor, the Federal Maritime Board, upon its own motion. Investigation of the matters involved having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

It is Ordered, That this proceeding be and it is hereby discontinued.

BY THE COMMISSION.

(Signed) THOMAS LISI,
Secretary

FEDERAL MARITIME COMMISSION

No. 988

AGREEMENTS 8745 AND 8745-1,
PURCHASE OF VESSELS "ALICIA" AND "DOROTHY"

Decided April 16, 1962

Agreements 8745 and 8745-1 found not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. Further found that said agreements are not in violation of the Shipping Act, 1916, will not operate to the detriment of the commerce of the United States, and are not contrary to the public interest.

Agreements 8745 and 8745-1 approved, pursuant to Section 15 of the Shipping Act, 1916.

Mark P. Schlefer for A. H. Bull Steamship Company.

Sterling Stoudenmire for Waterman Steamship Corporation and Sea-Land Equipment, Inc.

Edmund E. Harvey for Seatrain Lines, Inc.

Gerald A. Malia for Association of Sugar Producers of Puerto Rico, Puerto Rican American Sugar Refinery, Central Roig Refining Company, Western Sugar Refining Company, and Olavaria & Co., Inc.

John Rigby for the Commonwealth of Puerto Rico.

Donald J. Brunner as Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

By our action herein we approve two agreements (Nos. 8745 and 8745-1) which, taken together, constitute one and are hereinafter referred to as "the Agreement." The parties to the agreement are Commonwealth Steamship, Inc. (Commonwealth). A. H. Bull Steamship Company (Bull), Bull Lines, Inc. (Bull Lines), A. H. Bull & Co. (A. H.), Waterman Steamship Company of Puerto Rico (Puerto Rico), and Sea-Land Equipment, Inc. (Sea-Land). The agreement provides *inter alia* that Commonwealth will sell Puerto Rico two partially containerized C4-3-B2 vessels, "Alicia" and "Dorothy", and that for one year after the sale Bull will not compete with Puerto Rico in the Gulf-Puerto Rico trade. This agreement then is an agreement which regulates, prevents and destroys competition, and being between parties subject to the Shipping Act, 1916 (Act), it is required by Section 15 of the Act to be filed immediately with the Commission, as it was. The Commission is authorized and directed by Section 15 of the Act to approve all such agreements not found by the Commission to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest or to violate the Act. *In the Matter of Agreement No. 8555 between Isbrandtsen Steamship Company, Inc., Isbrandtsen Company, Inc., and American Export Lines, Inc.,* 7 F.M.C. 125 (1962).

When the agreement was filed and approval requested the matter was publicized in the Federal Register. Written comments pursuant to this publication were received. Public hearing was held before us on April 11, 1962. Prior to the hearing, the Commission invited the views and comments of the Department of Justice. The head of the Antitrust Division advised us that the Department interposed no objection to our approval of the agreement.

The two vessels here involved were acquired from the government pursuant to the provisions of Section 510(i) of the Merchant Marine Act of 1936. They are under conversion into partially containerized ships, and the conversion is practically completed. Such vessels are particularly qualified for efficient, economical operation in the U.S./Puerto Rican trade, both from North Atlantic and from Gulf ports. Originally intended for operation from North Atlantic ports in the Bull service, the "Alicia" and the "Dorothy" are now intended for operation from Gulf ports by Waterman. This being the intended effect of the agreement, we will first consider if we would be justified in making findings that the agreement will on this account or for any other reason operate to the detriment of the commerce of the United States, or be contrary to the public interest. We would not, in our opinion, be justified in making either finding.

The "Alicia" and the "Dorothy" are to be operated in United States/Puerto Rican service from Gulf ports. There, as stated by the Commonwealth, "the economies and conveniencies afforded by such vessels will redound to the benefit of both the carrier and the public." It appears distinctly beneficial to the commerce of the United States, and the public interest for the shippers of both the Gulf and the North Atlantic areas to Puerto Rico to have container ships available, which will be the situation if this agreement is carried out, rather than to have container ships available only from North Atlantic ports, as is now the case. There is of course no indication in the record that performance of the agreement will make the North Atlantic/Puerto Rican service inadequate, or overtonnage the Gulf/Puerto Rican service.

There is neither allegation nor evidence that the agreement is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or as between exporters from the United States and their foreign competitors, or that it violates the Act. No finding to such effect is made or could be made.

One carrier (Seatrain Lines, Inc.) was apprehensive lest "Alicia" and "Dorothy" may be diverted from the Puerto Rican service and put in competition with Seatrain ships on other routes, and supports as a condition of approving the agreement a requirement that Waterman agree to operate "Alicia" and "Dorothy" in the Puerto Rican trade as long as that operation is profitable, and shall not place them in competition with Seatrain unless after notice and hearing, in which Seatrain and others shall be entitled to participate, the Commission shall approve such operation. It cannot be—and it has not here been—contended that, absent such an agreement, the contract is unjustly discriminatory or unfair between carriers simply because it is possible that at some later date Waterman may put "Alicia" and "Dorothy" in competition with Seatrain ships. Nor has anything been advanced which persuades us that the agreement is contrary to the public interest because this may happen, or will operate to the detriment of the commerce of the United States if (and because) it does happen.

It has also been suggested that an agreement by Waterman to operate "Alicia" and "Dorothy" in the United States/Puerto Rican trade for a period of years should be insisted upon in the public interest. If the ships were now so obligated, such an agreement might be justifiably insisted upon in order that the agreement should not deprive the government of a right at least theoretically valuable. But our attention has not been called to any such obligation. Under the circumstances of this case, we do not believe we should impose upon Commonwealth's vendee a burden not imposed on Commonwealth. Our approval therefore should be, and is, unconditional.

Having fully considered application, protests, affidavits, statements of position and oral argument, the Commission finds upon the whole record that Agreements Nos. 8745 and 8745-1 are not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; that said agreements will not operate to the detriment but to the benefit of the commerce of the United States; do not violate the Act; and are not contrary but beneficial to the public interest. It follows that we should approve the agreements, and we do approve them.

Protests and arguments not discussed herein are considered unsubstantial or irrelevant.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D.C., on the 16th day of April, 1962.

No. 988

IN THE MATTER OF AGREEMENTS 8745 AND 8745-1, PURCHASE OF VESSELS "ALICIA" AND "DOROTHY"

Whereas, the Commission, on the 16th day of April, 1962, issued its report herein, which is made a part hereof,

Now therefore, for the reasons stated in said report, *it is ordered* that Agreements 8745 and 8745-1 be and they are hereby approved, and this proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

(SEAL)

775-794 O-65-15

FEDERAL MARITIME COMMISSION

No. 920 and No. 920 (Sub. 1)

States Marine Lines, Inc. and
Global Bulk Transport Corporation

v.

Trans-Pacific Freight Conference of Japan, et al.

Decided April 16, 1962

1. Respondents found to have violated section 15 of the Shipping Act, 1916 by the establishment and operation of a "Neutral Body" self-policing system which did not conform to the agreement that was approved by the Federal Maritime Board.
2. Respondents ordered to cancel fines found to be unlawful and to cease and desist from attempting to collect these fines or any other fines assessed by the "Neutral Body" and to cease and desist from carrying out the Neutral Body amendment to the conference agreement in any manner inconsistent with the amendment approved by the Federal Maritime Board or the Commission's Report.

George F. Galland and *Amy Scupi* for complainants States Marine Lines, Inc., and Global Bulk Transport Corporation.

Chalmers G. Graham, Leonard G. James, Alexander D. Calhoun, Jr. Dan F. Henderson, and *Charles F. Warren* for respondent Trans-Pacific Freight Conference of Japan and its member lines.

Robert B. Hood, Jr. Public Counsel.

Report of the Commission

Thos. E. Stakem, *Chairman;* John Harllee, *Vice Chairman;* Ashton C. Barrett, *Commissioner;* John S. Patterson, *Commissioner*

By the Commission:

The consolidated proceedings arise out of complaints filed on November 7, 1960 (No. 920) and April 7, 1961 (920 Sub. 1).

The respondents are a conference of ocean common carriers and its member lines[1] engaged in trade from Japan, Korea and Okinawa to Alaska, Hawaii, ports on the West Coast of the United States and Canada. Complainants are affiliated steamship lines jointly holding a membership in respondent conference. These two complaints were filed after fines were assessed against complainant States Marine Lines, Inc., by a self-policing unit of the conference, called the Neutral Body, which had been established by the conference to investigate complaints of violations of the conference agreement and empowered to fine conference members for violations that it discovered. Subsequent to the filing of the second complaint, our predecessor Federal Maritime Board by its order served May 31, 1961 ordered respondents to cease and desist from collecting or assessing any fines against complainants or to take any action to collect fines heretofore assessed against complainants.

The allegations of the complaints filed in Dockets 920 and 920 (Sub. 1) were, in substance, that actions taken by the Neutral Body and respondents were in violation of section 15, Shipping Act, 1916; that the granting of access to records as requested by the Neutral Body would violate section 20, of the Shipping Act, 1916; that the Board's approval of the Neutral Body agreement was arbitrary and capricious constituting an abuse of the Board's discretion and an unlawful delegation of statutory authority under the Shipping Act, and a denial of rights of appeal granted by the Shipping Act, the Hobbs Act and the Administrative Procedure Act.

Hearings were held before an examiner and briefs were submitted. The Examiner served his initial decision on the parties on October 19, 1961. Exceptions to the Examiner's decision were filed and oral argument was heard by the Federal Maritime Commission on December 18, 1961.

1. Respondent Trans-Pacific Freight Conference of Japan is a conference of common carriers engaged in the trade from Japan,

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[1] Respondent member lines are: American Mail Line, Ltd., Waterman Steamship Corp., American President Lines, Ltd., Barber-Wilhelmsen Line, Fernville Far East Lines, Daido Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Kawasaki Kisen Kaisha, Ltd., Knutsen Line, Maersk Line, Maritime Company of the Philippines, Mitsubishi Shipping Co., Ltd., Mitsui Line, Nippon Yusen Kaisha, Nissan Kisen Kaisha, Ltd., Nitto Shosen Co., Ltd., Osaka Shosen Kaisha, Ltd., Pacific Far East Line, Inc., United States Lines Co., Pacific Orient Express Lines, Philippine National Lines, United Philippine Lines, Inc., Shinnihan Steamship Co., Ltd., States Steamship Company, Yamashita Steamship Co., Ltd., Ivaran Lines.

Korea and Okinawa to Alaska, Hawaii, and West Coast ports of the United States and Canada. It operates under a basic conference agreement that was filed with and approved by the Federal Maritime Board pursuant to section 15, Shipping Act, 1916 (46 U.S.C. 814). The conference agreement, in addition to providing for the setting of rates for the carriage of cargoes in this trade, prohibits the member lines from granting rebates or special privileges and engaging in other unfair practices.

2. Prior to March 1958, several members of the conference had threatened to resign because of alleged breaches of conference obligations by other members. A conference meeting was held in Japan in March of 1958 and as a result of the threatened resignations and possible dissolution of the conference the members agreed to establish a self-policing unit to enforce the conference obligations. By written agreement which was styled "Undertaking of Principals" a Neutral Body was created to perform this self-policing function.

3. The Neutral Body was given broad powers to receive and investigate complaints and report violations, and it was to have "absolute discretion" to determine whether there had been an infringement of the conference agreement and assess a fine therefor. The fines that could be assessed were substantial,[2] and all member lines agreed "to accept the decision(s) and any assessment(s) of fines thereof by the Neutral Body as final and binding." It could "engage agents, lawyers or other experts in connection with its investigation and consideration of complaints . . . ." Any fines that were assessed were payable by the offending line to the conference and if not paid by the line could be levied against a $25,000 performance bond that had already been posted with the conference by each member.

4. The Neutral Body was to be "selected and appointed by the conference from responsible accountants or other person or persons, not a party to nor employed by or financially interested in any party to the agreement upon such terms as are agreed between the conference and the Neutral Body."

5. When the conference established its neutral body system, it did not file the agreement covering same with the Federal Mari-

[2] $10,000 maximum for a first offense, $15,000 and $20,000 maximum for second and third offenses, and $30,000 maximum for fourth and subsequent offenses.

time Board for approval under section 15.[3] The Board's Office of Regulation discovered the existence of the neutral body plan in the minutes of the conference meeting and advised the conference that the plan could not be effectuated until filed with and approved by the Board. The conference subsequently filed the plan as an amendment to its conference agreement and the Board approved it on March 12, 1959. However, the conference had appointed its Neutral Body and it had begun operating before the Board had given its approval.

6. Shortly after establishing the neutral body system, but prior to Board approval, the conference retained the international accounting firm of Lowe, Bingham and Thomsons (Lowe), which had been selected by a committee of conference members. Initially the committee had some reservations about the selection of Lowe, since the conference agreement stipulated that the Neutral Body could "not be a party to nor employed by nor financially interested

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[3] The following is the text of section 15 as it read prior to its amendment in 1961 by P.L. 87–346 (75 Stat. 762 *et seq.*). The amendments will be discussed herein where pertinent to this case.

SEC. 15 That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages [sic]; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement The term "ageement" in this section includes understandings, conferences, and other arrangements.

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

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

in any party to the (conference) agreement," and the committee had been informed that Lowe was the Tokyo correspondent of Price, Waterhouse & Co. (Price), the regular auditor of United States Lines, which was a member of the conference. However, United States Lines informed the committee that it had no objections to the appointment of Lowe as the Neutral Body. The relationships between these two accounting firms and United States Lines were not within the general knowledge of the conference membership nor known to complainants at the time Lowe was selected and appointed to serve as the Neutral Body.

7. Lowe received a complaint of alleged rebating in connection with States Marine's carriage of mandarin oranges from Japan to Canada during the year 1958. In January 1959, Lowe visited the Tokyo office of States Marine and stated it wanted to inspect records relating to said movement of mandarin oranges. States Marine made its Tokyo records available, but the only indication of possible malpractice that Lowe discovered was the solicitation of States Marine by two shippers of mandarin oranges for free passage from San Francisco to Japan.

8. Lowe's Tokyo investigation having failed to produce evidence that free passage was granted to these shippers in response to their requests, Lowe directed its New York correspondent Price to continue the investigation in New York. On April 28, 1959, Price approached States Marine and requested access to its head office records to continue the investigation. States Marine refused to permit Price to inspect these records, initially stating that this would interfere with its annual audit, then suggesting that its own auditors make the inspection and report whatever facts were required by Price. Lowe declined the offer and insisted that Price conduct the examination of States Marine's records. On July 27, 1959 States Marine informed the conference that it understood Lowe and Price were employed as accountants by at least one member of the conference, that under the terms of the conference agreement they were disqualified to act as the Neutral Body, and that the investigation itself was of doubtful legality since it involved matters which occurred prior to the Federal Maritime Board's approval of the neutral body system. States Marine also suggested that audits required by a qualified Neutral Body should be obtained through the regular auditors of the conference member concerned, as this would "tend to avoid possible violation" of section 20 of the Shipping Act, 1916 which prohibits the disclosure

of certain information.[4] Lowe also informed the conference that it now had doubts about its qualifications to serve as the Neutral Body under the standards set by the conference agreement.

9. At a regular conference meeting held on August 19, 1959, the conference adopted what they termed an "official interpretation" of the neutral body provision of the conference agreement requiring that the party selected as the Neutral Body not be "a party to or employed by or financially interested in any party" to the conference agreement. The "interpretation" was that this requirement did not apply to agents employed by the Neutral Body. Isthmian and States Marine voted against this action.

10. By letter dated August 28, 1959, Lowe advised States Marine that it was assessing a fine of $10,000 against it for refusing to grant Price access to records. This assessment led to the complaint filed in Docket No. 920.

11. The complaint in Docket No. 920 (Sub. 1) was filed after Lowe called at States Marine's Tokyo office on February 27, 1961, requesting that States Marine make available records in connection with the carriage of mandarin oranges from Japan to British Columbia during the year 1960. States Marine refused this request on the basis that this new investigation should be held in abeyance pending the final determination of the issues raised in Docket No. 920. Lowe thereupon assessed a second fine of $15,000 against States Marine for its refusal to grant access to records.

12. After the filing of this second complaint, the Board issued a cease and desist order directing respondents not to assess further fines against complainants, or make efforts to collect those already assessed pending the determination of the issues raised in these proceedings.

DISCUSSION AND CONCLUSIONS

The disputes which led to these proceedings raise issues that directly concern United States foreign commerce and the Commission's regulatory functions under the Shipping Act, 1916 (the Act). Before we touch upon the aspects of Canadian com-

[4] Section 20 (46 U.S.C. 819) makes it unlawful for a "common carrier * * * to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee or routing of any property tendered or delivered to such common carrier * * * for transportation * * * in foreign commerce which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor or which may be used to the detriment or prejudice of any carrier * * *."

merce which respondents claim preclude us from jurisdiction in this case, we believe it necessary to briefly consider the duties and responsibilities imposed by the Act upon both this Commission and the respondents.

Respondents operate as a conference under an agreement approved pursuant to section 15 of the Act. When they decided to inaugurate a self-policing system and adopted their neutral body plan, they were amending or modifying the basic conference agreement. Modifications must be approved under section 15 before they can lawfully be carried out.

After the Federal Maritime Board approved the neutral body provision, the conference could lawfully establish the neutral body system, but only in conformity with the provisions of the conference agreement as thus amended and approved. Any departure from the approved system would be unlawful.

Section 15 is an exception to the general philosophy of American jurisprudence as expressed in our antitrust statutes that monopolistic or anticompetitive practices are *per se* contrary to the public interest. It grants antitrust immunity to certain agreements and actions authorized thereunder if the agency administering the Act approves such agreements. It necessarily follows that agreements authorized and approved under this statute should be strictly construed, and the parties' actions must be limited to such conduct as is authorized under the agreement.

In conjunction with the grant of power to approve agreements that fall within the scope of section 15 Congress has imposed upon this Commission, as upon its predecessors, the continuing responsibility of regulating and supervising action carrying out these agreements.[5] It is vitally necessary that the Commission maintain a constant vigil over the operations of the parties under approved section 15 agreements to insure that their activities conform to the agreements as approved and warrant continued exemption from the provisions of the antitrust laws, and we of course have the powers necessary to perform this regulatory function.

Before recent amendments to section 15 the agency administering the Act could disapprove, cancel or modify any agreement, or any modification thereof whether or not previously approved by it that it found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors or to

[5] For an extensive discussion of our obligations in respect to continued supervision see Pacific Coast European Conference, Docket 948 (Report served December 22, 1961).

operate to the detriment of the commerce of the United States or to be in violation of the Act.

When Congress amended section 15 (Public Law 87–346, 75 Stat. 763–64), it reemphasized our responsibilities in this regard by directing that—

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

Congress also added the following provision which is pertinent to the discussion at hand:

> The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it. . . .

Thus not only must we insure that the parties are properly operating *within* the scope of the agreements as approved, we must disapprove agreements when the parties are not fulfilling their obligations thereunder.

Viewing the instant case in light of our regulatory responsibilities under the Act, it is quite clear that the effectuation of neutral body agreements is of vital and proper concern to us. If the respondents departed, intentionally or unintentionally, from the approved agreement, the Commission in its regulatory capacity was duty bound to discover this and take steps to remedy the situation and prevent continued or future departures from the approved agreement. The Commission cannot operate in a vacuum or blindly. It must be cognizant not only of what the parties to these agreements have said they are going to do, but what they actually are doing.

Respondents' neutral body plan as approved provided for an impartial individual or group independent of any conference member to serve as the Neutral Body. If the person selected was not actually neutral or impartial, then unquestionably there was a departure from that which the Board had approved and to which the conference membership had agreed.

Not only was the Commission duty-bound to prevent such departure, any conference member was entitled to raise the same objection and could turn to the Board for relief. Whether or not a conference member protested or filed a complaint, section 22 of the Act (46 U.S.C. 821) empowered the Board to institute an investigation into the matter on its own motion.

While it seems quite clear that the issues raised by the complaints are well within our jurisdiction, the respondents have argued in these proceedings, and in a petition for review of our cease and desist order,[6] that we do not have the jurisdiction, solely because the Neutral Body was investigating alleged malpractices that occurred in the Japan to Canada mandarin orange trade. It is contended that we would be attempting to regulate foreign to foreign commerce if we asserted jurisdiction.

It is true that these controversies had their inception in Lowe's efforts to investigate alleged malpractices in the Japan to Canada mandarin orange trade, but this does not support the claim of no jurisdiction. The manner in which the dispute arose is, in our opinion, immaterial for factually the issues are much broader in scope and concern the very heart of respondents' neutral body system and the proper functioning of the conference under its approved section 15 agreement. These matters are wholly unrelated to the cargo or trade route involved in a particular investigation, and complainants would be entitled to object to an unqualified Neutral Body regardless of the cargo or trade involved. Actually, if the Board had received information that the conference had appointed a Neutral Body that did not meet the standards of the conference agreement, it could have instituted an investigation on its own motion and have taken action before the Neutral Body even commenced its operations. Similarly, any conference member could have filed a complaint with the Board based upon the same facts, for a member certainly has standing to insist that a conference limit its actions to those which are authorized by the conference agreement. We do not see any valid basis for now saying that complainants cannot challenge the Neutral Body's qualifications, or that we do not have jurisdiction to hear and determine these complaints, simply because an investigation of transportation between Japan and Canada first brought to light the question of Lowe's neutrality.

The nature of the fines asssesed against States Marine by the Neutral Body must also be considered. They were not assessed for alleged malpractices in foreign to foreign commerce, but were

[6] *Trans-Pacific Freight Conference of Japan et al.* v. *Federal Maritime Board and United States of America,* 302 F. 2d 875 (1962) Order reversed.

based solely upon States Marine's refusals to grant Lowe access to its records. When States Marine refused to permit Lowe or its correspondent to inspect its records, it challenged Lowe's qualifications to act as the Neutral Body under any circumstances. That challenge raised the principal issue to be determined in this proceeding: Did the conference carry out its neutral body system in conformity with the agreement which the Board had approved? As noted previously, this was purely a question of the proper effectuation of the agreement and we are duty bound to insure that approved agreements are properly effectuated. That is exactly what we must determine herein. We are not called upon to rule on malpractices in commerce between Japan to Canada or regulate that trade and we do not here attempt to do so.

The respondents themselves created the situation of which they now complain. As a matter of their own convenience, they established one conference covering the entire Pacific Coast of the United States and Canada. Their conference agreement does not differentiate between traffic to Canadian ports and United States ports. The Neutral Body was set up to function in exactly the same manner in both trades. United States foreign commerce not only was involved, it predominates in the trade. The conference agreement and its amendments therefore require the Board's approval and continuing supervision under the Act. One obvious answer to respondents' objections, and a course we may have to follow if arguments of this sort are made in the future, would be the elimination of the Canadian trade from agreements presented to us. This would mean that respondents would have to establish a separate conference for the Canadian aspects of their operations, assuming they wanted to operate in concert in that trade. It was an alternative that they could have initially chosen. Having rejected that alternative, we do not think that they may now persuasively or validly contend that we must treat the conference agreement as if it were really two agreements; one applicable to Canadian commerce and the other applicable to United States commerce. The conference agreement itself fails to make such distinction. Nor will we.

The next question before us is whether respondents' use of Lowe, Bingham and Thomsons as the "Neutral Body" was a violation of the approved agreement. The qualifications of this firm to act as the Neutral Body must be determined upon the standards the conference set forth in the agreement submitted to and approved by the Board. That agreement specifically provides:

> There shall be a Neutral Body selected and appointed by the Conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement upon such terms as are agreed, between the Conference and the Neutral Body.

Unquestionably neither Lowe nor Price "were parties to the agreement." Nor does it appear that either firm had any financial interest in any conference member, in the sense of equitable or legal ownership which, we believe, was the intended construction to be placed on this phrase. The first two standards of neutrality are therefore satisfied, but neither firm meets the third. As we interpret the agreement, both are "employed by" a Conference member, United States Lines: Price as the regular auditor and Lowe as Price's Tokyo correspondent or agent.

In some instances the term "employed by" may connote simply a master-servant relationship but that is not the sense in which the term was used in this Neutral Body provision, as is evident on the face of the provision. Even though Lowe and Price may function as independent contractors, they are "employed by" a party to the agreement, namely, United States Lines. They have the same confidential relationship of employment that usually exists between accounting firms and business concerns that employ them to audit their records. They are squarely within the words "responsible accountants . . . employed by" a conference member, the standards established by the conference agreement itself. They are therefore precluded from serving as the Neutral Body of this conference under the approved agreement so long as they continue in a member's employment. The obvious purpose of the clause setting forth the neutrality requirements was to insure impartiality by eliminating any possibility of bias or influence. It would not be consistent with the broad scope of this provision to construe the term "employed by" as applicable only to a master-servant situation, particularly in view of the fact that accountants are specifically named therein as persons who if appointed are to have no employment relationship with a conference member.

The conference's "interpretation," issued after the neutrality of Lowe was questioned, was not an interpretation at all but was a modification or amendment of the Neutral Body provision and as such required Board approval before it could be lawfully effectuated.

Respondents argue that complainants could not in these proceedings validly challenge the selection of Lowe as the Neutral Body since the committee which selected Lowe had knowledge of the relationships here in question. This argument stretches theories of agency and imputed knowledge too far. The committee was only authorized to select as a Neutral Body an individual or organization that was qualified according to the terms of the conference agreement. This they failed to do and for that reason their action is not binding upon the complainants, and would not be even if complainants had known of the relationships. The parties to agreements approved under section 15 are not empowered to alter their terms *inter se*. They must file an amendment and secure Commission approval.

This case, of course, in no way concerns the conduct or ethics of the accounting firms involved. Lowe does not qualify as the Neutral Body simply because it does not meet the specifications set forth by the conference itself and approved by the Board. Nor is there any question here as to whether a firm of accountants that also serves as the auditor for a conference member could properly be appointed as a conference policing agent in the absence of a provision such as the one here.

Although we have not ruled in favor of the contentions of the respondents, we do not hereby intend to condemn the neutral body concept in general. As we have stated previously in this opinion, Congress has only recently amended section 15 to require self-policing of conference agreements which indicates quite specifically that a proper self-policing system is not only desirable but necessary. We do not concur with the Examiner that the conference must amend its neutral body provision. It has several choices; it may appoint a Neutral Body which conforms to the requirements of its existing agreement or it may modify the conference agreement (subject to Commission approval) to permit the use of Lowe, Bingham and Thomsons or another international accounting firm as the Neutral Body or adopt some other effective method of self-policing. The choice of the appropriate course of action should remain with the conference and its members, but they must take action in this regard as soon as possible.

Several collateral issues were raised by the parties, on which some comment is appropriate for guidance of the future conduct of this and other conferences and their members.

The question was raised: Must a Neutral Body in its investigations only operate prospectively or may it investigate events that transpired prior to the approved establishment of the neutral body system? This conference agreement was silent on this question; however, if it is the purpose of a conference to have its neutral body or other self-policing system deal with past events, this purpose should be specifically included in the agreement establishing the self-policing system when it is submitted for approval.

In addition to challenging the neutrality of Lowe, complainants attacked the basic neutral body system itself claiming that the procedures as approved by the Board deprived them of a fair hearing; and the Board unlawfully delegated its authority to the Neutral Body, and that they were deprived of any right to appeal in violation of the Shipping Act, 1916,[7] the Hobbs Act,[8] and the Administrative Procedure Act.[9] All of the foregoing contentions are based upon the premise that functions of the agency administering the Shipping Act were delegated to the Neutral Body. This, of course, is not the case. Investigations and findings made by the Neutral Body do not in any way preclude a separate hearing before this Commission nor are the findings of the Neutral Body binding upon us. The functions and powers of the Commission remain the same and the mere fact that the conference members have elected to discipline themselves does not and cannot bar or control appropriate proceedings before us. Moreover, Congress has determined that self-policing is a requisite of proper conference operation and specifically incorporated this requirement in the recent amendments to section 15.

There were a number of issues raised in these proceedings that either because of our previous findings or irrelevancy do not require our determination at this time. Complainants raised the questions of the validity of the conference two-third's vote procedure for amending the conference agreement and its secret ballot. It is our opinion that this record does not require resolution of these questions. It is also unnecessary to judge the effects of this neutral body system upon United States foreign commerce for Lowe was not a properly qualified Neutral Body. Since we have found that States Marine was justified in refusing to grant access to its records, it is not essential that we determine whether these refusals were violations of the conference agreement or whether the Neutral Body's demands for information were limited to the mandarin orange trade or were more general. In the

[7] 46 U.S.C. 830

[8] 5 U.S.C. 1031, *et seq.*

[9] 5 U.S.C. 1009

same vein, it would add nothing to this opinion to rule on the contention that States Marine would be violating section 20 of the Act by permitting the Neutral Body free access to its business records. That section of the Act has also recently been amended to clearly authorize the giving of information to a Neutral Body or other conference policing unit (P.L. 87–346, 75 Stat. 765–66).

Although we have not dwelt in length upon the activities of the Neutral Body prior to Board approval of this system, it should be noted that the neutral body plan was not immediately filed with the Board for approval and was effectuated before it was approved which are both distinct violations of section 15 of the Act. However, while we do not excuse or condone these violations, we have been primarily concerned with the improper effectuation of the agreement which would be contrary to the Act regardless of when it was filed with and approved by the Board.

Having found that the Neutral Body appointed by the conference does not conform to the requirements of the conference agreement, we hereby find that the conference has violated section 15, Shipping Act, 1916, and the fines levied against States Marine are unlawful and unenforceable; therefore, they must be cancelled and respondents must cease and desist from attempting to collect these fines either in proceedings to deduct the fines from the States Marine bond or in any other manner.

An order shall be entered in conformity with the findings and conclusions herein.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its office in Washington, D.C., this 16th day of April, 1962

NOS. 920 and 920 (Sub. 1)

STATES MARINE LINES, INC. AND GLOBAL BULK TRANSPORT CORPORATION

v.

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN, ET AL.

These consolidated proceedings were instituted after complaints were filed with our predecessor, the Federal Maritime Board. Having been duly heard and submitted and the Federal Maritime Commission, having fully considered these matters, has this date made and entered of record a Report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof.

Having found that respondents have violated section 15 of the Shipping Act, 1916:

It is ordered, That respondents Trans-Pacific Freight Conference of Japan and its members:

(1) cancel the fines that were found to be unlawful in these proceedings; and

(2) cease and desist from attempting to collect these fines or any fines assessed by the Neutral Body (Lowe, Bingham and Thomsons) in any manner; and

It is further ordered, That respondents cease and desist from carrying out the amendment to the conference agreement approved by the Federal Maritime Board on March 12, 1959 in any manner inconsistent with (1) said amendment as approved by the Board or (2) the Commission's Report in these proceedings.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA, INC.
v.
FALL RIVER LINE PIER, INC.

Decided April 16, 1962

Fall River Line Pier, Inc. found to be "another person" subject to the Shipping Act, 1916, and subject to the jurisdiction of the Commission.

Fall River Line Pier, Inc. found not to have violated Sec. 16 or 17 of the Shipping Act in the matter of berthing and storage space allocation.

Fall River Line Pier, Inc. found to have violated Sec. 16 First and Sec. 17 in the matter of free time allowances and storage charges.

I.T.C. Virginia found not to have proved that the 10-day billing requirement imposed on I.T.C. New England to be unlawful.

Proceeding remanded to Hearing Examiner for the purpose of determining reparation, if any, due to complainant.

W. B. Ewers, for complainant

Frank L. Orfanello and *John F. Dargin, Jr.*, for respondent

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice-Chairman;* *Commissioners* ASHTON C. BARRETT, JOHN S. PATTERSON AND JAMES V. DAY

BY THE COMMISSION:

FACTS

Complainant, International Trading Corporation of Virginia (I.T.C. Virginia) is a Virginia corporation with its place of business in Norfolk, Va., engaged in the business of importing cement. By complaint filed on June 8, 1961, and amended on June 30, it alleges that respondent, Fall River Line Pier, Inc. (the Pier) has violated Sections 16 and 17 of the Shipping Act, 1916, (1)

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by giving undue and unreasonable preference and advantage to complainant's competitor in the allocation of berthing space and pier storage space at respondent's pier during 1959, 1960, 1961; (2) by charging complainant storage rates greater than that charged other persons for the same type of cargo; and (3) by subjecting complainant to undue and unreasonable prejudice and disadvantage through certain practices concerning payment of terminal charges. Complainant further alleges that it has been damaged in the amount of $14,265.50 by respondent's unlawful acts, and seeks reparation in that amount. Complainant also seeks an order directing respondent to cease and desist its alleged unlawful activities.

Respondent Pier is a corporation organized under the laws of Massachusetts. Its articles of organization state that its purpose is to hold, lease, sublease, or build a pier and wharf with buildings, storage space, sidings, and other equipment, and to operate said facilities or any other business which may advantageously be carried on in connection with the foregoing in Fall River Harbor; and to do any and all things necessary or incidental thereto with the end in view of stimulating the shipment of freight and merchandise by water to the extent of the pier's capacity, to be equally accessible to all men interested in handling, receiving, and storing freight and merchandise.

There is no evidence in this record as to any advertising of the pier facilities nor of the manner by which Pier's services are held out to the public other than its letterhead. The letterhead, in addition to listing the name, address, and names of the corporate officers, lists under the heading "Facilities" the following information:

Covered Pier Storage—108,000 square feet—35′ depth water—Unlimited length and beam—Full length Toledo Electronic Truck Scale—4 N.Y., N.H. and H.R.R. tracks full length of Pier—Car or truck level shed platform—24 Hour Guard Protection—Sprinkler System—Flood Lights for Night Operation—Quick Turn-around—Minimum Stevedoring Rates—Minimum Insurance Rates—Ample trouble-free Labor.

The letterhead additionally advertises respondent's pier as "New Modern Marine Terminal—Serving All New England". Throughout the entire proceeding the Pier contended that it was not an "other person" subject to the Shipping Act within the meaning of Secs. 1 and 17 because it never rendered terminal services to a common carrier by water. On September 17, 1961, it filed a motion to dismiss the complaint on the aforesaid grounds.

During the period from February 28, 1959 through January 3, 1961, there were 33 ships and 1 barge which docked at respondent's pier. Except for the barge which discharged only paper rolls, one ship which discharged 290.5 tons of general cargo on January 3, 1961, and two ships which in addition to bagged cement also discharged coil wire or office furniture for unknown consignees, the aforesaid ships discharged only bagged cement at Fall River. The cement was imported by complainant or its competitor, Foreston Coal Company (Foreston), and in each case was carried in a ship of foreign registry. Some of the ships of Swedish registry were operated by Thorden Lines which advertised in 1961 the availability of cargo, refrigerated and deep tank space on its vessels sailing between certain Swedish ports and Boston, Philadelphia, Baltimore, Hampton Roads and New York, but not Fall River. The manifest covering one voyage of the Thorden Line's ships in May 1959 shows that in addition to the discharge of bagged cement and office furniture at the Fall River pier miscellaneous general cargo was discharged at New York, Philadelphia, Baltimore, Newport News and Norfolk. The latter freight included diverse commodities ranging from edibles and potables to chemicals and manufactured goods.

There is no evidence in this record as to the arrangements by which Foreston shipped its cement to Fall River, nor is there any proof that the 16 other ships that carried I.T.C. Virginia's cement also carried other cargo even though space may have been available on such ships. Foreston and I.T.C. Virginia are the only regular users of the Fall River pier with respect to ocean borne cargoes. I.T.C. Virginia's prime function is the importation of cement from Northern Europe and Sweden. Its carriage of the cement is under space charter arrangement whereby all the cement available to the foreign factor is loaded on the first available ship. The amount of cement thus carried varied from one third of the ship's capacity to its full capacity. It is alleged that all the cement unloaded at Fall River was consigned to I.T.C. Virginia and that bills of lading were issued by the carriers even though no such document was introduced into evidence by complainant.

I.T.C. Virginia claims to be the sole owner of the International Trading Corporation of New England (I.T.C. New England), a corporation organized under the laws of Rhode Island and having its place of business in Providence, Rhode Island. It is alleged that the latter corporation is merely one of convenience and that its officers are the same as those of complainant, I.T.C. Virginia.

It is alleged that none of the cement unloaded at Fall River was consigned to I.T.C. New England, and that complainant, for the purposes of these transactions, regarded the two corporations as one and the same. I.T.C. New England is not a party to this proceeding since the Examiner refused to permit a second amendment to the complaint in the midst of the taking of testimony some four months after this action initially was instituted.

There is testimony in this record that the Pier billed both I.T.C. Virginia and New England for terminal charges connected with the cement unloaded at Fall River, although no supporting document was offered into evidence. It is alleged that both I.T.C. Virginia and New England paid such charges but again no supporting evidence was offered. None of the officers of I.T.C. New England reside in New England although its General Manager resides in Providence. It was stated that the General Manager only had authority to sign payroll checks and no others. It was further stated that if a bill from the Pier came to I.T.C. New England it had to be sent to I.T.C. Virginia where it was checked and then payment was made. There is no evidence as to which corporation paid what bill, or if I.T.C. Virginia or I.T.C. New England paid all or none of such bills.

Evidence submitted by I.T.C. Virginia relating to the alleged discrimination in the allocation of berthing space is limited to one instance. In May of 1959, it requested space for a ship having an estimated time of arrival of June 1 at Fall River. This request was denied by respondent on the ground that another ship with a prior reservation was due to arrive at that time. Investigation by complainant showed that no ship was scheduled to arrive at Fall River until June 11th. Upon confronting respondent with this information, the requested berthing space was allocated to and used by a ship hauling cement for I.T.C. Virginia, and the cargo was unloaded without delay. The Pier did, however, subject I.T.C. Virginia to some inconvenience by not informing it when asked when pier space would be available. Instead the Pier compelled complainant to submit daily requests for space until it by chance happened to request an open date. At no time was any ship actually delayed or refused a berth when it arrived at Fall River.

The respondent allocated a maximum of 25,000 of the available 100,000 square feet of storage space to I.T.C. Virginia but permitted complainant's competitor, Foreston, to use twice that much space. The space allocated to I.T.C. Virginia was adequate for storage of the cargoes consigned to it. There is no evidence in this record showing in what manner the respondent's allocation of storage space operated to the undue or unreasonable prejudice or disadvantage of complainant or to its competitor's undue or unreasonable preference or advantage. In one instance I.T.C. Virginia was allowed to, and did, unload a cargo of cement estimated to require about 30,000 square feet of storage space. The Pier at first did object, but upon arrival unloading was permitted. At no time was I.T.C. Virginia precluded from off-loading any cargo because of a lack of storage space.

The Pier did not require Foreston to pay charges on or before a specific date. Foreston paid respondent as late as 62 days after being billed, and frequently paid bills more than 10 days after billing. On the other hand, the respondent required I.T.C. New England, to pay bills within 10 days. If payment was not received by the due date, the Pier would not permit removal of cargo from the pier until payment was made. The Pier claims this was necessitated because of the poor payment record of I.T.C. New England.

Insofar as the prayer for reparation is concerned, the gravamen of the complaint pertains to storage charges assessed by the Pier under different rates and free time allowances. It billed I.T.C. New England, for the storage of cement, at a rate of 1 cent a bag per 30 days, or any portion thereof, after a free time allowance of 5 days, excluding Saturdays, Sundays or holidays. During the same period of time in 1959, 1960 and 1961, the Pier allowed Foreston 35 days free time, excluding Saturdays, Sundays, or holidays, and charged for the storage of cement thereafter at a rate of 6/10 cent a bag per 30 days, or any portion thereof. In June 1961 the Pier began to charge Foreston the same storage rate for cement, after the same free time allowance, as had been used in billing the I.T.C. New England.

The charges billed to I.T.C. New England were allegedly paid by that corporation or by I.T.C. Virginia. The record does not show how much was paid by each corporation but does show that together they would have paid $14,265.50 less, if the Pier had presented bills computed under the free time allowance and storage rate used in connection with charges billed Foreston for like storage of its cement.

In an initial decision the Examiner found (1) that the Pier was an "other person" subject to the Shipping Act, and thereby subject to the jurisdiction of the Federal Maritime Commission;

(2) that the Pier had not prejudiced I.T.C. Virginia, nor preferred another shipper in the allocation of berthing or storage space; (3) that the Pier had subjected I.T.C. Virginia to undue and unreasonable prejudice and disadvantage, and has given a competitor of I.T.C. Virginia an undue and unreasonable advantage, through difference in billing practices, storage rates, and free time allowances in violation of Secs. 16 and 17 of the Act; (4) that on June 19, 1961, the Pier established the same storage rate and free time allowance for all users, thereby ending the unlawful discrimination in rates and free time allowances; and (5) I.T.C. Virginia has failed to prove the nature or extent of its alleged damages.

The Examiner stated that an order requiring the Pier to cease and desist its discriminatory billing practices and to maintain uniform rates, rules, regulations and practices for all users of its facilities should be issued. The Examiner also suggested a further hearing and an order denying reparation at this time. Exceptions to the initial decision were filed and we heard oral argument. Exceptions and proposed findings not discussed herein have been considered and found not justified by the facts or not related to the material issues in this proceeding.

DISCUSSION

Respondent Pier objects to our jurisdiction over it on the ground that it is not an "other person" subject to the Shipping Act, 1916, within the meaning of section 1 thereof. That section declares that any person not included in the term "common carrier by water" who is carrying on the business of "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" is an other person subject to the act, and hence our jurisdiction. The Pier does not deny that it carries on the business of furnishing such terminal facilities, but insists that it does not do so in *connection with a common carrier by water*. It is well settled that states and cities, or instrumentalities thereof, are included in the term "other person subject to this Act." *California* v. *United States*, 320 U.S. 577, at 585 (1944); *Greater Baton Rouge Port Commission et al* v. *United States*, 287 F. 2d 86 (CA5-1961); cert. den.—368 U.S. 985, February 19, 1962; *Wharfage Charges and Practices at Boston, Mass.*, 2 U.S.M.C. 245 (1940).

The question to be decided here is whether respondent has furnished its services in connection with a common carrier by water. There is evidence in this record that common carriers call at respondent's pier at Fall River. In response to a direct question from the Chairman, counsel for respondent admitted that some general cargo was in fact discharged at the pier. There is further evidence, a vessel manifest, that at least one ship carrying general cargo called at respondent's pier during the period under consideration. It is clear that respondent held itself out as a modern terminal capable of servicing any type of ocean common carrier and that it made no effort to restrict its services to contract carriers.

We agree with the Examiner that complainant has not established any undue or unjust discrimination by respondent in the matters of storage space allocation and berthing arrangements. Complaint has shown no injury, nor has it demonstrated wherein those practices have caused it any undue disadvantage. Its ships were berthed on arrival; its cargo was unloaded and stored; and it could not show how its traffic would increase if the practices complained of were different than as demonstrated in this record.

Complainant's allegations concerning the two facets of respondent's billing practices are not so readily decided. There is confusion in the record because of inadequate proof as to who was injured and the extent of such injury caused by respondent's actions. The confusion arises from the existence of, and relationship between, complainant and another corporation, I.T.C. New England. It is alleged that the latter is a wholly owned subsidiary of complainant, and we are asked to consider the two corporations as one in this proceeding.

During the course of the proceeding before the Examiner, respondent objected to evidence offered to establish a parent subsidiary relationship between the two corporations. Over the objection complainant was permitted to state that such a relationship existed but no supporting evidence was offered. Instead, I.T.C. Virginia sought to *amend its complaint* a second time to bring in a new party complainant, I.T.C. New England. The amendment was not permitted by the Examiner because of the then posture of the proceedings and respondent's statement that its case was prepared only against complainant's allegations. We think the Examiner should have permitted the amendment and allowed the Pier adequate time at the conclusion of complainant's case to prepare whatever additional defense it may have required.

While we do find the billing practice of respondent with regard to the matter of storage charges and free time allowances assessed against complainant and I.T.C. New England to be unjustly discriminatory in comparison with those assessed Foreston, this record does not indicate the extent I.T.C. Virginia was injured thereby. However, since respondent has stopped the discriminatory assessment, there is no reason for us now to issue a cease and desist order in the matter. In view of the confusion in this record concerning the relationship of I.T.C. Virginia and New England we cannot now decide if the 10-day payment requirement imposed on I.T.C. New England, not a party in this proceeding, was unjustly discriminatory or not. There is no proof to show that I.T.C. Virginia was subjected to such a requirement by respondent.

We are therefore remanding this proceeding to the Examiner to authorize an amendment to the complaint to include I.T.C. New England and thereafter for the purposes of determining the amount of reparation due under the complaint as amended.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its Office in Washington, D.C. on the 16th day of April, 1962.

No. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA, INC. v.

FALL RIVER LINE PIER, INC.

The Commission has considered the record, heard oral argument, and has entered a report this date, which is made a part hereof, in which the Commission for reasons stated therein deemed it necessary to take further evidence in the proceeding.

Now therefore, for the reasons stated in the Commission's report, the record is remanded to the Examiner for further proceedings consistent with the Commission's report.

By the Commission

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 906

AGREEMENTS, CHARGES, COMMISSIONS AND PRACTICES OF THE NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION

DENIAL OF APPEAL FROM RULING BY PRESIDING EXAMINER, AND MOTION TO DISMISS

Decided May 3, 1962

Ronald A. Capone, Robert Keari Binder, Cletus Keating and *Elmer C. Maddy* for respondents.

Roger A. McShea and *Robert J. Blackwell* as Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

This is an appeal from a ruling of the Examiner granting the motion of Hearing Counsel for the discovery and production of certain documents alleged to be in the custody and control of respondents.[1] The circumstances and events leading to this appeal are set forth below.

[1] The appeal here is taken by Anchor Line, Limited; the Bristol City Line; Cunard Steamship Co.; Ellerman's Wilson Line; Furness, Withy & Co.; Irish Shipping Ltd.; Manchester Liners, Ltd.; Ulster Steamship Company, Ltd.; and United States Lines Company. All are members of the North Atlantic Westbound Freight Association. Two members of the Association, Fjell Line and South Atlantic Steamship Line, did not participate in the appeal. Rule 10(m) of the Commission's Rules of Practice and Procedure provides: "Rulings of presiding officers may not be appealed prior to, or during the course of, hearing except in extraordinary circumstances where prompt decision by the Board is necessary to prevent unusual delay, expense, or detriment to the public interest, in which instances the matter shall be referred forthwith by the presiding officer to the Commission for determination."

On the basis of information referred to it by the Antitrust Subcommittee of the House Judiciary Committee, the Federal Maritime Board instituted this investigation[2] to determine the extent to which the agreements and practices of respondents in the Great Britain, Northern Ireland, and Eire to United States Atlantic Coast trade were in violation of the Shipping Act, 1916. Of particular concern to the Board was the alleged existence of agreements between respondents providing for the payment of commissions to forwarding agents only on shipments to ports south of New York and Boston (for example, Philadelphia, Baltimore and Hampton Roads), and concomitantly that no payments would be made on shipments to either New York or Boston.

On January 13, 1961, the Examiner scheduled a prehearing conference to be held on February 23, 1961; and on January 27, 1961, Hearing Counsel filed their first motion for discovery and production of documents pursuant to Rule 12(k) of the Board's Rules of Practice and Procedure.[3]

At the prehearing conference, after vigorous opposition to Hearing Counsel's motion, counsel for respondents stated that "the British lines would not be unwilling to make a factual statement regarding the payment of commissions provided that a reasonable basis for so doing could be worked out with the Federal Maritime Board." (Prehearing Tr. 85). Hearing Counsel withdrew their motion for discovery and indicated willingness to consult with counsel for respondents as to the area to be covered by the statement. (Prehearing Tr. 101).

On July 12, 1961, the British lines submitted a document entitled "History of the Payment of Commission to Forwarding Agents in the United Kingdom and the Republic of Ireland on Traffic Shipped to East Coast Ports of the United States of America." On November 3, 1961, Hearing Counsel advised counsel for respondents that in their opinion the statement submitted by the British lines did not meet the requirements of the investigation

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[2] The investigation was instituted by Board order on May 17, 1960 The order was served on respondents on May 20, 1960, and notice of investigation and hearing was published in the Federal Register June 15, 1960 (25 F.R. 5352).

[3] Rule 12(k) provides: "Upon motion of any party showing good cause therefor and upon notice to all other parties, the Board or presiding officer may direct any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding, and which are in his possession, custody or control. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

and that Hearing Counsel would have to resort to compulsory process to obtain the information. On January 2, 1962, Hearing Counsel filed their second motion for discovery and production of documents. A second reply by respondents was filed on January 22, 1962, and on January 26, 1962, the Examiner granted hearing counsels' motion.

Respondents, on March 8, 1962, filed a motion with the Examiner for leave to appeal the Examiner's ruling. Simultaneously with the motion for leave to appeal, respondents filed their appeal with the Commission. On March 19, 1962, Hearing Counsel replied to respondents' motion for leave to appeal, stating that they did not oppose the granting of the appeal; and on March 26, 1962, they filed their reply to the brief of respondents on appeal. Leave to appeal was granted respondents by the Examiner on March 27, 1962.[4] The extraordinary circumstances required by Rule 10(m) were found by the Examiner in the fact that the pleadings showed that by a directive issued March 9, 1962, the Minister of Transport of the Government of the United Kingdom directed the respondents not to produce or make available such documents as were outside the United States, and that the documents requested by Hearing Counsel were located in the United Kingdom.

Of immediate concern in this appeal are the contentions of respondents regarding the validity of Rule 12(k) as used by the Examiner in this proceeding. If respondents are correct and Rule 12(k) is not supported by statutory authority, the Examiner's ruling must be reversed on that ground, and it would be unnecessary to consider respondents' contentions concerning our authority under the Shipping Act to call for the production of documents located abroad.

Rule 12(k) was promulgated pursuant to the provisions of Section 204(b) of the Merchant Marine Act, 1936.[5] That section provides:

> The Commission is hereby authorized to adopt all necessary rules and regulations to carry out the powers, duties and functions vested in it by this Act.

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[4] The appeal of respondents is accompanied by a Motion to Dismiss based on the grounds of the appeal.

[5] Section 204(b) was enacted during the existence of the United States Maritime Commission and vested rule making authority in that agency. This authority was transferred to the Federal Maritime Board by Presidential Reorganization Plan No. 21 of 1950 (64 Stat. 1273) and from the Board to this Commission by Reorganization Plan No. 7 of 1961 (26 F.R. 7315, 75 Stat. 840). By General Order No. 1, dated August 14, 1961, the Commission continued in effect the rules promulgated by the Board (26 F.R. 7788).

It is upon the word "necessary" that respondents ground their attack on Rule 12(k). They contend that so long as Congress has in explicit statutory terms granted the subpoena power to the Commission, any device for the discovery and production of documents is "needlessly duplicative" and cannot be deemed necessary within the meaning of Section 204(b). Inherent in this contention is the suggestion that Congress meant to deny to the agency charged with the administration of the Shipping Act any discretion, latitude or flexibility in devising procedures to deal with the myriad and unforeseeable problems involved in regulating an industry as far-flung and complex as the shipping industry. It would attribute to Congress an intent to limit this Commission to the issuance of subpoenas in every investigation in which the Commission sought information. Such a restrictive interpretation would render nugatory the power granted in Section 204(b), and we think it clear that no such intent can be attributed to Congress.

As times and conditions change it is fitting that an administrative agency, before resorting to Congress, should seek to invoke means of coping with still unsolved problems. As stated by the Court of Appeals in *Cella* v. *United States,* 208 F. 2d 783, 789 (7th Cir. 1953):

> Administrative agencies should be "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

Moreover, in grounding their arguments on the word "necessary", respondents are obviously using the word to import absolute physical necessity or inevitability. It is, however, an adjective expressive of degree, and a word which must be considered in the connection in which it is used. "Necessary" may connote that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. *Black's Law Dictionary* (Fourth Ed., 1951, p. 1181). We believe that Congress intended the latter construction.

We agree with the statement of the Board made in answer to another challenge to Rule 12(k) under very similar circumstances:[6]

> We are of the opinion . . . that the power to direct the production of documents in the manner prescribed by Rule 12(k) is impliedly contained in the Shipping Act, 1916, as a necessary adjunct to the power vested in the Board by that Act to conduct administrative proceedings.

[6] *Unapproved Agreements—Spanish-Portuguese Trade,* 6 FMB 103, 105 (1960)

By Section 22 of the Act the Commission is authorized to investigate any alleged violation of the Act "in such manner and by such means, and make such order as it deems proper." The power involved is bounded only by the scope of the statute and answerable only to the established principles of administrative justice and fair play. It is sufficient if the rules are consistent with the regulatory system embodied in the statute. *American Trucking Association* v. *United States,* 344 U.S. 298 (1953).

But respondents argue that Rule 12(k) is not consistent with the regulatory system of the Act and is in fact "out of harmony with the Shipping Act and is a nullity." Respondents here rely on extensive quotations from the legislative history of Public Law 87–346 which they contend establish (1) that the Federal Maritime Board sought to obtain from Congress the very power that the Commission is here attempting to exercise—the production of documents outside the United States; (2) that Congress refused to vest that power in this Commission and (3) thus the Commission cannot now find this power in the provisions of the Shipping Act. The portions of legislative history cited by respondents[7] deal with two proposed amendments to Sections 15 and 21 of the Shipping Act respectively. One amendment would have included in Section 15 a requirement that no agreement would be approved by the Commission under that section unless it (1) designated a person upon whom service of process may be made within the United States, and (2) contained a provision that every signatory to the agreement would provide records or other information wherever located in response to a proper order of the Commission issued under Section 21 of the Act. The second amendment would have amended Section 21 to impose the same requirements upon "every common carrier by water engaged in the foreign commerce of the United States." The failure of Congress to enact these amendments, in respondents' view, declares the intent of Congress to deprive this Commission of the power to obtain documents overseas. Thus respondents suggest that Congress overruled the decisions of two United States Courts of Appeals[8] and numerous decisions of our predecessors by the mere failure to enact two

[7] Hearings before the Special Subcommittee on Steamship Conferences, of the House Committee on Merchant Marine and Fisheries on H.R. 4299, 87th Congress, 1st Sess. (1961) pages 2, 8, 11, 28, 161-164, 234-36, 541, 550; House Report No. 498, 87th Cong. 1st Sess. (1961) (to accompany H.R. 6775) page 7; Hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce on H.R. 6775, 87th Cong. 1st Sess. (1961), Part I pages 48-49, 71, 76, 161, Part II page 212.

[8] *Kerr Steamship Company* v. *United States,* 284 F. 2d 61 (2nd Cir. 1960) and *Montship Lines, Limited* v. *Federal Maritime Board,* 295 F. 2d 147 (D.C. Cir. 1961)

amendments to the Shipping Act. Such a conclusion is wholly untenable and must be rejected. The remarks of Chairman Bonner before the House on H.R. 6775 before the two amendments at issue here were removed clearly establish the Congressional intent regarding them:

> While it places certain burdens on foreign flag lines by way of requiring them to make available records of their business in the American trades, these provisions merely recast existing law that has been in effect since 1916 and do not represent any departure from or addition to requirements presently in existence. Their inclusion was dictated by the fact that as a result of activity growing out of the Committee on the Judiciary, the procedures contained in the 1916 Act have proven ineffective to obtain promptly information required by the Federal Maritime Board and the Department of Justice to effectively process violations of our laws.
>
> The procedures set forth in this bill requiring the appointment of an individual in this country to accept process on behalf of all the members of each conference will in the opinion of the committee be more effective in obtaining the information without attempting to extend American jurisdiction beyond its present limits. (107 Congressional Record 9371-9372).

Moreover the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce has clearly stated the reasons for the failure to include the proposed amendments in the final bill. The Senate Committee stated in its Report No. 860 which accompanied H.R. 6775:

> To date two U. S. courts of appeal have held that under the present section 21, Shipping Act, 1916 the Commission may lawfully order foreign flag ocean common carriers serving U.S. ports, inbound or outbound, to furnish documents in compliance with lawful section 21 orders. How the United States will be able to enforce such orders in the face of directives not to produce from five friendly maritime nations (Belgium, Italy, Japan, the Netherlands, and the United Kingdom) is a question of great foreign policy importance. Certainly, we would only muddy the waters and do violence to our foreign policy were we to leave such provisions in the bill. Furthermore, we are convinced that if we did so a number of steamship conferences would have to dissolve since a number of foreign lines would be compelled by their governments to withdraw, rather than submit to the receipt-of-process and document production pledge required by the language of the bill.

We think it clear from the above that Congress felt that the Commission already possessed the power sought by the two amendments, and chose to leave the law in its present state. Far from being out of harmony with the Shipping Act, Rule 12(k) and its use by the Examiner in this proceeding are in complete accord therewith. We turn now to respondents' arguments regarding the Commission's power under the Shipping Act to compel the production of documents located outside the United States.

Respondents' arguments on the extraterritoriality of the ruling are in the main a restatement of those made to the Examiner. Their basic objections are that the ruling constitutes an unwarranted invasion of the sovereignty of the United Kingdom and the Irish Republic and that compliance with the ruling is forbidden by the Government of the United Kingdom. The Examiner treated the first of these contentions as a challenge to the Commission's authority to call for documents held overseas by respondents subject to our jurisdiction. He rejected this contention, relying upon *Kerr Steamship Company* v. *United States,* 284 F. 2d 61 (1960) and *Montship Lines, Limited* v. *Federal Maritime Board,* 295 F. 2d 147 (1961). We think the Examiner was correct. Respondents, however, maintain that the *Kerr* and *Montship* cases are inapplicable to this proceeding.

First respondents seek to distinguish the cases on the ground that they dealt only with Section 21 of the Shipping Act and not with Rule 12(k). Respondents suggest a distinction without a difference. The power involved is the same—the authority to call for documents located abroad. Once the validity of Rule 12(k) is established, as it has been, we can imagine no basis in law or reason for restricting its application to the territorial confines of the United States. But respondents go further. They contend that the ruling is wholly in violation of international law—a matter which they argue was ruled upon in neither *Kerr* nor *Montship.*

The basic premise upon which respondents proceed is that "neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . .; *U.S.* v. *Curtis-Wright Export Corp.,* 299 U.S. 304, 318 (1936)" [9] (Respondents' brief on appeal, page 5). Thus, respondents are placing in issue the question of the extraterritorial application of the Shipping Act—a question explicitly decided in both *Kerr* and *Montship.* As stated by Judge Hand in *Kerr, supra,* at page 847:

> [T]he petitioners complain that the orders were beyond the competence of the Board because they required petitioners to produce copies of contracts that were outside the United States . . .

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[9] As a corollary to this argument, respondents offer the premise that no court has the right to order the doing of acts outside its territory This is an incorrect proposition of law. *Vanity Fair Mills* v. *T. Eaton Co.,* 234 F. 2d 633, cert. denied 352 US 871, rehearing denied 352 U.S. 913 (1956), and cases cited therein.

And in *Montship*, the Court speaking through Judge Bazelon stated:

> In the light of the coverage and the purposes of the Shipping Act, we can see no reason to restrict § 21 to cover only information within the United States . . . If the [Commission's] investigatory powers were limited to the territorial confiines of the United States, regulation of foreign carriers would be hampered to a substantial degree. Consequently, we will not read into § 21 a territorial limitation which appears to be contrary to the purposes of the Shipping Act.

We find it hard to imagine a clearer statement of extraterritorial applicability.

Respondents challenge the Examiner's ruling on still another ground. They urge that the ruling seeks to investigate activities of respondents outside the scope of the regulatory authority of the Commission. The basis of argument is that portion of the Board's order, which respondents cite, referring to "commissions" and "forwarding fees" fixed or paid in "the trade from Great Britain and Northern Ireland and Eire to U.S. North Atlantic ports." From this respondents fashion their own statement of the scope and purpose of this proceeding which they contend consists "of an investigation into alleged business dealings between foreign forwarders, brokers and shippers in the United Kingdom and the Irish Republic and a group of shipping companies in the British export trade, concerning commissions paid and fees charged in the United Kingdom and the Irish Republic." Obviously respondents seek to create the impression that the investigation is concerned only with the purely internal affairs of another sovereign.

Respondents deal at considerable length with past regulation of the domestic freight forwarding industry. They suggest an unbroken pattern of administrative construction limiting our power over the forwarding industry to those located in the United States which culminated in the passage of the "freight forwarder" legislation, now Section 44 of the Shipping Act. The examiner quite correctly disposed of this contention by noting that the order in this proceeding "is clearly limited to an investigation of the practices of the respondents as common carriers by water in the foreign commerce of the United States, as to which they are subject to our jurisdiction and the argument is untenable." (Ruling, p. 3). Respondents assert, however, that the Examiner indulged in the "sheerest question begging," and wholly failed to discuss their contentions.

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We agree that the past investigations pointed to by respondents have been primarily concerned with domestic forwarders and the agreements of conferences and carriers regarding payment of brokerage thereto. We also agree that one of the results of these investigations was the passage of Public Law 87-254, the so-called "freight forwarder bill." It is from these propositions that respondents contend: (1) this freight forwarder legislation is in part a new and compelling guide to the scope of Section 15 under which this investigation is conducted, (2) that by reenacting Section 15 at the same session Congress intended to limit the scope of that section to "agreements" covering payments of brokerage solely in the outbound trades, and to exclude therefrom agreements in the inbound trades, and (3) such a construction is in accord with the controlling principle of judicial construction that statutes apply only to those transactions in which American law would be considered operative under prevalent principles of international law.

Respondents have ignored critical portions of the order of investigation, and have misinterpreted the nature and scope of this proceeding. The order states that the investigation is directed to respondents' practice of "paying commissions on shipments to ports south of New York and Boston, such as Philadelphia, Baltimore and Hampton Roads to the exclusion of New York and Boston." The order makes it clear that of principal concern to the Commission is whether this practice subjects "the ports of New York and Boston to undue or unreasonable prejudice or disadvantage or may give ports south thereof undue or unreasonable preference in violation of Section 16, Shipping Act, 1916." Such an investigation is clearly in accord with the principle enunciated by Judge Hand in *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 443 (2d. Cir. 1945):

[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and those liabilities other states will ordinarily recognize. *Strassheim* v. *Daly*, 221 U.S. 280, 284, 285; . . . *Lamar* v. *United States*, 240 U.S. 60, 65, 66; . . . *Ford* v. *United States*, 273 U.S. 593, 620, 621 . . .; Restatement of Conflict of Laws § 65.

Respondents' position is untenable. An act designed to license and regulate the business activities of freight forwarders in the United States can have absolutely no bearing in logic, law or reason on the application of Section 15 to an agreement between carriers to regulate the payments of commissions to forwarders abroad in such a manner as prefer shipments to one port to the disadvantage of another. This investigation is not concerned with the business activities of British forwarders. It is concerned with the practices of the carriers made respondents herein. We do not agree that an investigation into the activities of the carriers without a concurrent inquiry into the practices of forwarders discriminates against the carriers, as respondents suggest.

Respondents urge that we should not command production of the documents called for because the Government of the United Kingdom has forbidden respondents to produce them. The primary concern of the British Government is that the activities with which this investigation are concerned appear to be without the substantive jurisdiction of the United States.[10] We think we have made it clear that the activities in question are a proper subject of investigation. We hope the documents called for will be forthcoming. However, should they not be produced, several alternatives are open to us. We do not deem it appropriate to choose one here. If the choice becomes necessary, it will be made after careful consideration of the problem in the light of all its implications. The primary concern, of course, is how we may best discharge to the fullest extent our regulatory responsibilities under the statutes we are charged with administering.

There remain two arguments of respondents. They contend that Hearing Counsel has failed to show "good cause" for his motion. We agree with the Examiner that good cause has been shown. Hearing Counsel sought to secure the material requested by voluntary submission. The documents requested are specified with particularity and are *prima facie*, relevant and material to the proper determination of the issues. Finally, respondents urge that the statutes of limitation contained in 18 U.S.C. 3282 and 28 U.S.C. 2462 bar the investigation of matters as to which no suit for collection of a fine or civil penalty may now be brought. The Examiner's disposition of this matter was correct. The statutes cited by respondents relate to proceedings, criminal or otherwise, brought in court, and are no bar to the authority of the Commission to proceed with the investigation.

The appeal and motion to dismiss are denied.

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[10] Aide Memoire of February 17, 1961 and January 22, 1962, and letter from the Minister of Transport dated March 9, 1962, addressed to each of the British respondents.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at its office in Washington, D. C., on the 3rd day of May, 1962

No. 906

AGREEMENTS, CHARGES, COMMISSIONS AND PRACTICES OF THE NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION

Consideration of the matters involved in this appeal and motion to dismiss, having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

It is ordered, That the appeal and motion to dismiss be, and they are hereby, denied.

By the Commission.

(Sgd.) THOMAS LISI,
Secretary

FEDERAL MARITIME COMMISSION

No. 949

MATSON NAVIGATION COMPANY—
VAN MEASUREMENT/HEAVY CARGO RULES

Decided May 15, 1962

Rule of Matson Navigation Company, application of which determines rate on cargo shipped in vans from San Francisco Bay ports to Hawaii, found just, reasonable, and lawful.

Proceeding discontinued.

George D. Rives and *Robert N. Lowry* for Matson Navigation Company, respondent.

LaForest E. Phillips, Jr., Alexander D. Calhoun, Charles F. Warren, and *Winston Churchill Black,* for Wilsey Bennett Company, complainant.

T. W. Curley for Swift & Company, complainant.

Richard S. Harsh, as Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner*

BY THE COMMISSION:

We have before us for decision the legality of a rule [Rule 1-A(c)] of Matson Navigation Company (Matson), the application of which increases Matson's charge for carrying cargo by van from San Francisco Bay ports to Hawaiian ports.

The co-called "cargo van" is in fact, a simple container. The applicable charges for van cargo are computed on a measurement basis.

Prior to October, 1958 both Matson and a competitor, Hawaiian Textron (Textron) provided by rule that van cargo rates would be assessed on the outside measurement of the vans. The original cargo vans were of light plywood, about 8′ by 8′ by 8′, and 8′ by 8′ by 12′, and were primarily used for shipping household goods. From the beginning of van movement in 1957, Matson's "rate" has (except for general rate increases) been unchanged. The amount paid for shipping cargo by van has been changed, however, by application of measurement rules. Except for two or three vans of experimental type, the vans then in use were as above described, and their ratio of inside to outside measurement was 91-94 to 100.

Effective October 8, 1958, Textron changed its rule. The significant feature of the change was to assess charges on the measurement of the *cargo*—not the van. Thus, Textron's *maximum* charge for carriage of cargo by van from San Francisco Bay to the Hawaiian Islands became less than Matson's minimum (and maximum) charge, computed on the *outside* measurement of the van for the same service.

In about 60 days Matson met this competitive situation by also adopting cargo-measurement in place of van-measurement to assess charges.[1]

Both carriers (first Textron, then Matson) remedied what may be considered a built-in defect in their rules, by making it necessary in effect for the shipper to load the van to full capacity (otherwise the carrier could utilize the unused van-space for other cargo) and for practical purposes the charge became for both carriers an amount determined by the *inside* measurement of the van. The effect of the 1958 change in rules as to vans in general use was (for both carriers) a decrease of from 6% to 9% in van-revenue from 1957.

Subsequently, and before Matson published the rule under consideration, Textron ceased operations.

Some two years later, in the fall of 1960 (apparently as a result of the use of the experimental vans mentioned above for the transportation of dairy products and other perishables), Wilsey Bennett Company (Wilsey) and Swift & Company (Swift) became interested in shipping fresh meat via Matson in necessarily-insulated vans, and each acquired 19 vans at a cost of about $1,000 per van

[1] Both carriers made other changes in their rules, but the exterior against interior van-measurement is the point at issue here.

for that purpose. An understanding of the construction of these insulated vans is essential in understanding the problem before us.

The insulated vans, which measure 8′ by 8′ by 12′ (exterior), are heavily built of wood, metal, and insulating material. The ratio of inside to outside measurement of the insulated van is approximately 71% as compared to 91%—94% for the uninsulated van. It thus becomes clear that whereas Matson revenue for carrying an *uninsulated* van in late 1960 was between 91% and 94% of the early 1958 revenue, Matson's revenue for carrying an *insulated* van in late 1960 was only 71% of what it would have received had it carried the same van in early 1958,[2] something Matson certainly did not anticipate when it changed the rule in 1958. The general use of the insulated van made what had appeared to be revenue-decrease of 6%-9% on uninsulated vans, a 29% decrease on insulated vans. After some months, Matson not unnaturally changed the measurement rule back to its early 1958 status.[3] It is the rule thus changed that is before us. It reads in pertinent part as follows:

> Except as otherwise provided in this tariff, rates named herein apply on a weight or measurement basis and will be assessed on the actual over-all outside measurements of the three greatest outside dimensions of the Cargo Van and/or the actual gross weight of the Cargo Van and the combined pieces, packages or other freight units loaded therein, whichever yields the greater revenue . . . When freight charges are assessed on a measurement basis, Cargo Vans will be measured from the bottom of the floor to the top of the Cargo Van and the measurement of the skids below the floor will be excluded.

While neither by this rule nor otherwise has Matson, strictly speaking, changed the "rate" (which, except for application of general rate increase has remained constant at $20.70 per measurement ton since 1957) the rule increases the charge per van, California-Hawaii, from approximately $348.00 to approximately $492.00, or about 41%.[4]

The rule was suspended by our predecessor, the Federal Maritime Board, and therefore (although it is now effective) Matson carries the statutory burden of proving that it is just and reasonable. Upon its face, it clearly is just and reasonable. Space on

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[2] This statement does not take into account an intervening general rate increase.

[3] In stating the facts herein some use is made of Matson and Textron rules and tariffs not put in evidence, but on file with the Commission. We take official notice of such matter, and any party upon request, will be afforded an opportunity to show the contrary. *Rule 13(q)*.

[4] This takes into account the general rate increase, 10%, which became effective August 15, 1961.

shipboard is what an ocean carrier has to sell. It is just and reasonable for Matson to measure ship-space occupied by the shipper's cargo-carrying van, and charge the shipper for that space. This is what the rule, standing alone, provides. The real problem, however, is not the merit or demerit of the rule standing alone. What counts is if Matson's charge for transporting a cargo-van from California to Hawaii (which is determined by the application of the *changed rule* to the *unchanged rate*) is just and reasonable. In our opinion the charge is just and reasonable. This, of course, is Matson's position. The position taken by Wilsey, the only shipper now opposing the rule is stated in its exceptions to the initial decision of our Chief Examiner (with whose disposition of the matter we agree), as follows:[5]

At best, Matson has purely and simply failed to present sufficient credible and probative evidence from which it can be determined whether or not the rates under review are compensatory, just or reasonable; at worst it has established that its proposed increase is excessive.

Before looking at the evidence it may be well to look for a moment at the positions of Matson and Wilsey, *vis a vis*. Matson seeks to return the charge to the 1957 level (plus general rate increase). Wilsey does not object to the general rate increase, but argues that it should be applied to only 71% of the 1957 level. In effect, Wilsey seeks to perpetuate a charge in the nature of a windfall to the extent of at least 20% of the 1957 charge. This windfall flows from the fact that in 1958, Matson's change in its rule so as to decrease the charge on *uninsulated* vans by 6% to 9%, resulted in an unintentional decrease in the charge which would apply to Wilsey's insulated vans when they began to move in late 1961 of 29%. We cannot but assume that the Wilsey vans would have moved in 1960 and 1961 at the 1957 rate plus general rate increase. As previously indicated (footnote 5) the comparable Swift movement can be counted on to continue at that rate for the foreseeable future, and Wilsey also indicates that it will continue using the service although it predicts a falling off in traffic.

Wilsey's attack upon the credibility of Matson's witnesses, and the reliability of the evidence they submitted was initially addressed to our Chief Examiner, who has passed upon the credibility of witnesses in maritime rate cases, and the reliability of rate-evidence for about a quarter of a century. He found in favor

[5] Swift, in view of Matson's elimination of "heavy lift" charges which Matson originally proposed, no longer complains against the rule, stating that it can continue to ship "with the freight charges assessed on the outside measurement" of the vans.

of credibility and reliability, and we agree. Of course, this is not to say that each detail of Matson's testimony and evidence is considered wholly accurate. It does mean, however, that all things considered (including Wilsey's evidence and argument), we feel that it satisfies Matson's burden of proof, and supports our conclusion that Matson's proposed (and now effective) rule is just and reasonable.

Matson's proof that its charge is fair and reasonable was made along conventional lines. Its cost and operating results study was made on a measurement ton basis, and took into account the standard method of operation which is as follows:

The vans which are shippers' property secured at a cost of approximately $1000 each (the shipper may of course, use vans leased from others, but Wilsey and Swift use their own) are loaded by the shipper with hard-frozen meat (zero degrees), and usually dry ice, and delivered to the carriers' shipside in California. They are loaded on board by the carrier, and when they reach their destination in Hawaii, are discharged by the carrier.

It is naturally important for these vans to be carried on deck where they can be last in, first out. If carried below decks, they would go in several days before the ship sailed, and would not come out for a day or two after the ship docked. This would result in a substantial risk that the fresh meat and poultry shipped in the vans would spoil. Although there is dispute in the testimony as to whether the shipper insists upon deck-carriage of the vans, it is logical, and constitutes preferred treatment which Matson grants the shipper. Spoilage in carriage of this nature (as distinguished from the more expensive reefer service) is shippers' risk, but it would clearly mean the end of the traffic if the vans' location aboard ship resulted in the ruin of their contents.

Turning now to the general method of Matson's proof, we find that it determined vessel expense per revenue ton by dividing the average vessel expense of 28 voyages terminated during the first 9 months of 1961 carrying insulated vans by the average revenue tons carried. As this cargo van service is operating only between San Francisco and Honolulu, the mileage element is not significant, and Matson's method is practically equivalent to the ton-mile method of determining vessel expense, which we have heretofore approved.

Wilsey contends that we should not rely upon Matson's vessel expense because it is defective in that it applies round-trip expense to westbound revenue but excludes eastbound revenue from empty vans returning from Hawaii, and that Matson's $6.26 figure for vessel expense is therefore subject to decrease in an amount not capable of determination here. We cannot agree. Matson's method above described results in allocation of vessel expense attributable to westbound movement to loaded cargo vans, which move west. Matson correctly excluded both revenue and cost data on eastbound vans from its cost study. Had they been included, the results would have certainly been no more favorable to Wilsey than the study as it stands.

As to cargo expense, loading and discharging costs, including stevedoring, heavy lift service, and terminal service, Matson in its cost study, determines and directly allocates to van service the costs based upon actual experience at the ports involved. Such costs are best determined by actual experience, and their direct application appears practicable and desirable. (It is true that the Honolulu discharge cost utilized the expense of a floating derrick, which is more expensive than the whirly crane on Matson's container-ship dock at Honolulu which was used to discharge vans at Honolulu on the voyages studies. This point will be discussed in detail.)

The carrier's loading and discharging costs for loaded vans, weighing on the average 20,300 pounds at least, are substantial. Loading aboard and unloading vans from shipboard requires heavy equipment. While the ship's jumbo boom can handle the vans, rigging the boom would result in lost stevedore time and added port time. These facts, plus the necessity of placing vans in particular deck-locations accessible to the jumbo boom, would obviously result in excessive unloading costs with the use of this tackle. Matson has utilized the cost of an outside derrick barge in its cost study, stating that this is the only feasible method of unloading vans which Matson can count upon using. Wilsey contends that Matson should compute the unloading cost item upon the use of a whirly crane located on Matson's container dock at Honolulu. While Matson has been able upon occasion, to use the container-ship dock to unload vans, it is quite clear that it cannot do so at all times. The container-ships must have first call on that dock and its equipment. If pinpoint accuracy were essential here, as it is not, probably the closest approach to such accuracy might be secured by assuming part-time use of the container-ship dock and crane for unloading cargo vans. The accuracy of such an assumption would be highly questionable however. In any event, we do not believe that any reasonably foreseeable use of that Matson-owned shoreside equipment instead of an outside-owned derrick barge would decrease future cargo-handling cost enough to make the proposed charge per van more than is just and reasonable. Wilsey has not questioned the accuracy of Matson's expense figure for the use of floating lift, which of course is based upon actual experience.

Matson's allocation of Administrative and General Expense items primarily on the vessel expense basis closely approximates an allocation by relation to operating costs, which may well be the most desirable method. Matson's further allocation of overhead to the insulated van service on a per ton basis appears satisfactory. Wilsey has raised no objection as to method or amounts involved under this head.

Agency commissions and federal income tax are the other items involved and Wilsey excepts to neither. Commissions are based upon present figures, and 52% of net profit as an income tax figure appears reasonably accurate for use in connection with this unit rate.

Matson's study of operating results shows net profit after federal income tax per measurement ton of $2.28 and an operating ratio of 91.1%. Wilsey contends that the proposed rule will result in net profit, before federal income tax, per measurement ton of $7.21 and an operating ratio of 72%. After taking federal income tax into consideration Wilsey's profit figure becomes $3.46 and the operating ratio 86.5%. The main factor in the not-too-great difference in operating expense ($18.41 vs. $20.86) is found in Wilsey's assumption that all cargo vans will be discharged at Honolulu by the whirly crane on Matson's container ship dock. For reasons heretofore stated we cannot with respect to what is essentially an operating procedure, substitute a shipper's opinion of how the carrier will or should operate for the carrier's opinion. It was reasonable for Matson to determine costs upon what it considers a normal operation. We consider its cost study, based upon a reasonably foreseeable operating pattern, reliable and probative evidence that the rule and charges based upon the rule are just and reasonable, and we so find. This finding is to say the least, consistent with the intention of Swift and Wilsey expressed upon the record, to continue using the service at the increased cost.

What has been said shows that the proposed rule and charges meet the test of section 18 of the Shipping Act, 1916, which requires that they be just and reasonable. In so finding we have given full consideration to Wilsey's evidence and argument.

We turn now to Wilsey's allegation that the rule subjects it to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Shipping Act, 1916. Here, the burden of proof is upon Wilsey, and it has not been sustained. The record contains no substantial evidence which would sustain such a finding, and much less, evidence which in our opinion would justify us in holding that Matson in any way discriminates against Wilsey or any similarly-situated shipper.

Wilsey's contention that in 1958 Matson reduced its van-cargo rate below a fair and remunerative basis with the intent of driving out or otherwise injuring a competing carrier (Textron), and hence according to section 19 of the Shipping Act, 1916, cannot increase such rate unless after hearing we find that the proposed increase rests upon changed conditions other than the elimination of competition also fails for complete lack of proof. Conceding *arguendo,* that by changing its rule in 1958, Matson *reduced its rates* below a fair and remunerative basis, the record establishes definitely that Textron amended its rule so as to decrease charges before Matson made its similar move to meet Textron.

Wilsey's attempt to show that Matson induced Wilsey to build vans by some character of express or implied assurance that charges would remain at the 1958 level failed utterly, and would have availed Wilsey nothing had it succeeded. Changes in rates are not invalidated by a pre-existing contract of a carrier not to change its rates. *Com. Club, etc.* v. *Chicago & Northwestern Ry. Co.,* 7 I.C.C. 386, 401 (1897).

Based upon the foregoing and the whole record in this proceeding we find and conclude that Matson's rule 1-A(c) is just and reasonable; is not unduly or unreasonably prejudicial, disadvantageous, preferential, or discriminatory; and is therefore legal. An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION, held at is Office in Washington, D. C., on the 15th day of May, 1962.

No. 949

MATSON NAVIGATION COMPANY
VAN MEASUREMENT/HEAVY CARGO RULES

Full investigation of the matters involved in this proceeding having been completed, and the Commission having on May 15, 1962; entered its decision herein, which decision is made a part hereof;

It is ordered, That this proceeding be, and it hereby is, discontinued.

By the Commission.

(Sgd.) THOMAS LISI,
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

No. 918

MITSUI STEAMSHIP CO., LTD.—ALLEGED REBATES TO A. GRAF & CO

DENIAL OF MOTION TO VACATE SECTION 21 ORDER

Decided June 5, 1962

Alan F. Wohlstetter for respondent Mitsui Steamship Co., Ltd.
Donald J. Brunner and *Robert J. Blackwell*, as Hearing Councel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner*

BY THE COMMISSION:

This proceeding is before us upon a motion of respondent Mitsui Steamship Co., Ltd., to vacate an order of the Federal Maritime Commission directing Mitsui to furnish the Commission certain information, wherever located, in its possession, custody or control.[1]

On October 3, 1960 our predecessor, the Federal Maritime Board, on its own motion, instituted an investigation into the activities of Mitsui in connection with the transportation aboard its ships of canned goods purchased by Alfred Graf & Company of Nurnberg, Germany (Graf).[2] The shipments under investigation

[1] The order, issued pursuant to section 21, Shipping Act, 1916 (46 U.S.C. 820) was entered on March 1, 1962, and served on Mitsui March 12, 1962. The order is hereinafter referred to as the section 21 order.

[2] Section 22 of the Shipping Act (46 U.S.C. 821) authorizes the Commission (or in this case the Board) to investigate any alleged violation of the Act "in such manner and by such means and make such order" as it deems necessary The order of investigation initiating this proceeding was entered by the Board on October 3, 1960 and was served on Mitsui October 4, 1960. Notice of the investigation was published in the Federal Register on October 14, 1960 (25 FR 9874).

moved in the export trade from U.S./California ports to European ports in the Antwerp/Hamburg Range. The purpose of the investigation is to determine whether Mitsui entered into an arrangement with Graf whereby Mitsui would return, refund or rebate to Graf a portion of the freight monies paid to Mitsui for the shipments in question. Should investigation prove the existence of such an arrangement, it is further the purpose of the proceeding to determine whether the arrangement: (1) provided for a deferred rebate, or an unjustly discriminatory contract based on volume of freight; or (2) gave to Graf an undue or unreasonable preference or advantage, or allowed Graf to obtain transportation at less than the regular rates then established and enforced by Mitsui; or (3) resulted in rates which were unjustly discriminatory between shippers in violation of sections 14, 16 and 17 of the Shipping Act (46 U.S.C. 812, 815, 816).

A prehearing conference was held by the Examiner on May 29, 1961. At the prehearing, Hearing Counsel presented Mitsuit with a request for information as specified in four numbered paragraphs. The Examiner directed Mitsui to produce for inspection and copying the information specified in three of the four numbered paragraphs, and ruled that the information sought in the remaining paragraph was outside the scope of the Board's order of investigation.[3] As a result of these rulings, hearing counsel on October 5, 1961 inspected certain documents produced by Mitsui in the office of Mitsui's counsel. The only documents made available were gathered from various Mitsui offices located in the United States.

At this time counsel for Mitsui also presented Hearing Counsel with copies of two letters. The first, dated July 30, 1961, was from Mitsui's New York representative to its home office in Japan and the second was the reply thereto from the home office in Tokyo, dated September 30, 1961. The letter of Mitsui's New York representative stated that he had requested Mitsui's London office to forward those documents subject to the Examiner's ruling which were then in the files of the London office but the latter had refused based on what it believed to be the position of the Government of Japan. The New York representative's letter then urged the home office to ask the Government of Japan for a waiver as to this proceeding. According to the reply of the home office, the request for a waiver was made but the Japanese Government "strongly in-

[3] The Examiner's ruling was the subject of a motion for clarification in certain particulars not here relevant. Subsequently the date fixed for Mitsui's compliance was set for October 5, 1961.

structed" Mitsui not to submit any documents located outside the United States.

As a result of Mitsui's failure to comply fully with the Examiner's ruling, Hearing Counsel on October 19, 1961 petitioned the Commission for the issuance of a section 21 order directing Mitsui to produce the requested information. Attached to this petition were the aforesaid letters of the New York representative and the reply from the home office. Mitsui opposed this petition, taking the position that a waiver from the Government of Japan was necessary, that the waiver had been refused, and that even if the statements made in the exchange of correspondence between New York and Tokyo were considered no more than allegations in pleadings, the proper course for the Commission to follow was to proceed through channels available to it to verify the position of the Government of Japan.

According to the New York representative's letter, the refusal of Mitsui's London office to submit the documents in their files was based upon the views of the Government of Japan as expressed in two aide memoire transmitted to the Department of State by the Japanese Embassy. The first aide memoire, dated August 23, 1960, was a protest lodged against a section 21 order of the Federal Maritime Board then under review by the Court of Appeals for the District of Columbia Circuit in the case of *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F. 2d 147 (D.C. Cir. 1961). Insofar as here relevant the aide memoire provided:

The Ambassador of Japan . . . wishes to draw attention to the Order issued by the Federal Maritime Board on April 11, 1960 . . . which purports to require production of a wide range of documents . . . both within and without the United States and to state the views of the Government of Japan as follows:

(1) The Government of Japan wishes to remind the Department of State of the memorandum of March 7, 1960, in which it stated that the subpoenas *duces tecum* issued in connection with the Grand Jury investigation of the shipping industry initiated by the United States and the Department of Justice purporting to require Japanese shipping companies to produce documents located in Japan are not in conformity with established principles of international law and that the authority of the said subpoenas does not extend to any documents which might be found within the territorial jurisdiction of Japan. The Government of Japan now reasserts its view as stated therein in connection with the proceedings instituted by the Federal Maritime Board under said order.

(2) While the Government of Japan considers that the Japanese shipping companies involved will continue to cooperate with reasonable requests of the Federal Maritime Board which are deemed properly within the jurisdiction of the United States, it is felt that the instant Order, apparently involving

a claim of jurisdiction over and beyond any such limitation, may give rise to conflicts of jurisdiction and maritime policies.[4]

The second aide memoire dated March 20, 1961 expressed the views of the Japanese Government with respect to a bill (H.R. 4299) then before Congress to amend the Shipping Act. The aide memoire provides in relevant part:

(3) The views of the Government of Japan on the section 21 orders issued by the Federal Maritime Board requesting various documents located abroad have already been transmitted to the Department of State. The provisions of H.R. 4299 which would require that shipping lines agree to the submission of documents, wherever located, as a condition precedent to the validation of conference agreements, completely disregards the rights of other states which might be affected. This provision which would involve an attempted exercise of authority by an agency of the United States within the jurisdiction of Japan is in violation of the principles of international law and one which the Government of Japan cannot countenance.

It appeared to the Commission from the evidence before it that there must be some misapprehension on the part of Mitsui or the Japanese Government or both as to the precise nature of the inquiry being conducted and the request for information made pursuant thereto. We therefore enlisted the aid of the Department of State in an attempt through diplomatic channels to clarify our position and dispel any misunderstandings. On February 28, 1962 we received the advices of the State Department based on its contacts with the Japanese Government. State informed us that the Government of Japan pointed out that the documents called for were not located within its territorial jurisdiction but were in the United Kingdom, and that Japan did not consider it appropriate even to suggest to Mitsui that it supply documents which were located in a third country.

Our efforts to secure cooperation having failed, we entered the section 21 order here under review on March 1, 1962. On March 30, 1962 Mitsui filed a motion to vacate this order. Accompanying the motion is a letter dated March 20, 1962 from the Japanese

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[4] The subpoenas *duces tecum* referred to were the subject of motions to quash before the United States District Court for the District of Columbia. See *In the Matter of the Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (1960). The court reserved the question of the production of documents located abroad until such time as the documents located within the United States had been examined and the necessity of obtaining the overseas documents was determined. As to the protests filed by foreign governments the court had the following to say:

"There was no indication in the correspondence on file emanating from the foreign embassies that they would interfere with the production of documents located in their respective countries if this Court, in the exercise of its discretion, found that it was necesary." 186 F. Supp. 298, at 318 (note 25).

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Minister of Transportation to Mitsui's president reading as follows:

With reference to the section 21 order issued by the Federal Maritime Commission on March 5, 1962, in Docket No. 918, I order you not to comply with the order of the Commission insofar as it relates to the production of documents located outside the United States which might be in the possession of your company, for the following reasons:

The above mentioned Order requests your Company to produce documents held by your Company outside the United States. It is well established international custom and practice that the U.S. Government if it desires to obtain documents located outside the United States, must obtain them through the judicial authorities of the foreign country wherein such documents are located. The attempt of the U.S. Government compelling you to produce documents located outside the United States would therefore constitute an act in disregard of this well established international practice.

It is Mitsui's position that the Commission should, in the exercise of its discretion, vacate the section 21 order. Mitsui invites our attention to *Montship Lines Ltd.* v. *Federal Maritime Board, supra.* There the Court said:

Consequently, these petitioners [foreign flag lines] should upon the remand bring any arguments that their local law prohibits compliance before the [Commission] so that it can then initially determine whether petitioners have made a good faith effort to secure waivers and, if so, whether compliance is to be required. (295 F. 2d at 156)

The amount of discretion the Commission can exercise in a case such as this, is, in our opinion, limited. Our first duty is of course to Congress, for it is to the Commission that Congress looks for the effectuation of the regulatory program embodied in the shipping statutes. We have, it seems clear, the duty to expend every effort compatible with sound regulation, to obtain the information necessary to the determination that all who engage in our commerce do so in compliance with the law. We are asked now by Mitsui to cease all efforts to obtain information necessary to determine whether there exist in an export trade of the United States practices violative of the Shipping Act. In effect, we are asked to abandon our statutory duty to investigate alleged malpractices in the trade. Such a request exceeds the bounds of our discretion and cannot be granted.

Mitsui is a Japanese flag carrier with its principal office located in Japan, and is admittedly obligated to obey the laws of Japan. But as a common carrier by water which chooses to engage in the commerce of the United States, Mitsui is equally obligated to meet the terms and conditions imposed by Congress upon all who participate in our commerce. These terms and conditions prescribed in the regulatory shipping statutes enacted by Congress apply with equal force to all water carriers engaged in U. S. commerce, and they must be administered impartially. Obviously, they cannot be so administered if their application is to turn upon the incidental, or accidental, circumstance that needed information is not physically located within the United States. This would make a shambles of the law.

The Shipping Act, 1916, under which the present investigation was instituted, establishes the basic pattern of United States regulation of its ocean foreign commerce. The underlying philosophy of the Act was that certain practices then prevalent in such commerce constituted unjust, unfair and unreasonable methods of competition which should be prohibited or in some cases placed under government control and regulation. The practices outlawed included those of the type which the Commission is here seeking to investigate, and there can be no question that the traffic involved, namely, canned goods produced in this country and moving out of its ports, is properly a matter of concern to the United States. This interest in competitive practices deemed unjust, unfair and unreasonable in United States commerce has been established for more than 45 years, and the basic regulatory pattern implementing it remains unaltered under the recent amendments to the Shipping Act.[5]

We cannot emphasize too strongly that, as respects regulation of the competitive practices of water carriers, all carriers regardless of flag or nationality are placed on an equal footing under our laws. It is a prime concern of these laws to insure that competition among carriers for cargo moving in United States foreign commerce should be open and above board, with no curtain of secrecy preventing the disclosure of pertinent data to the Commission. Foreign flag carriers, although charged with the responsibilities imposed by our laws, are also the recipients of the benefits they confer. Indeed, the respondent here, Mitsui, has availed itself of these benefits on occasion past. Before this Commission and its predecessors, Mitsui has found a forum in which to air its grievances and seek relief in connection with the competitive practices of other carriers.[6] It would now appear, however, that

[5] The Shipping Act was amended on October 3, 1961 by Public Law 87-346 (75 Stat. 762).

[6] See, for example, *Mitsui Steamship Company Ltd.* v. *Anglo-Canadian Shipping Co., Ltd., et al.*, 5 FMB 74 (1956); *Pacific Coast European Conference—Limitation on Membership*, 5 FMB 247 (1957); and *Pacific Coast European Conference—Payment of Brokerage*, 4 FMB 696 (1955).

the Government of Japan, by its directive ostensibly precluding Mitsui from producing information bearing upon the lawfulness of its practices in an export trade of the United States, is seeking to insulate Mitsui from the responsibilities imposed by our laws.

We are aware of no international custom or practice that would require the United States Government to resort to the courts of another country to obtain information needed in the exercise of its sovereign jurisdiction and functions. Moreover, the Japanese Government's aide memoire refers to such documents as might be found within the territorial jurisdiction of Japan, whereas the information here in question appears to be located in the United Kingdom. Other representations of the Japanese Government indicate that cooperation will be extended in those cases which do not prejudice the interests of Japan, but it is not indicated or shown how the interests of Japan are or can be prejudiced by the Commission's order for Mitsui's production of the information in question and certainly such prejudice is not self-evident. Even if the documents were located in Japan, the trade involved is not an import or export trade of Japan but is the United States export trade from Pacific Coast Ports to European ports in the Antwerp/Hamburg Range.

Japan has a natural and proper interest in the well-being of one of its citizens and is anxious to protect it from unjust or discriminatory treatment at the hands of a foreign government. But there is not the slightest basis here for any suggestion of such discrimination. On the contrary, as we have already noted, the sole purpose of the present inquiry is to insure that Mitsui as a participant in United States commerce is observing requirements of United States law which all other carriers operating in our foreign commerce are required to observe. It would be discriminatory in favor of Mitsui and against all other carriers if the inquiry were not carried out. We cannot believe that the purpose of the Japanese Government is to secure for its citizens either undue preference or unwarranted immunity under the laws of those countries in which they conduct their business.

Our responsibility as we have said, is to insure the effective and impartial administration of the shipping statutes within our jurisdiction. Mitsui's motion to vacate the order must therefore be denied. Any other course would be in derogation of our duty and would frustrate the Shipping Act, 1916. Because of the circumstances herein cited we will grant Mitsui until *July 31, 1962* to produce the information as directed by the section 21 order, without liability for the possible imposition of penalties for its failure thus far to comply with the order. We have accordingly treated Mitsui's motion as a petition for reconsideration tolling the running of the period for compliance, and have fixed a new date for such compliance in the attached order.

For the foregoing reasons, the motion of respondent Mitsui Steamship Co., Ltd. is denied.

(Sgd.) THOMAS LISI,
Secretary.

ORDER

At a Session of the FEDERAL MARITIME COMMISSION held at its Office in Washington, D.C., this 5th day of June, 1962.

No. 918

MITSUI STEAMSHIP CO., LTD.—
ALLEGED REBATES TO A. GRAF & CO.

DENIAL OF MOTION TO VACATE AND EXTENSION OF TIME TO COMPLY WITH SECTION 21 ORDER

Consideration of the matters involved in this motion to vacate the Commission's order entered March 1, 1962, having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

It is ordered, That the motion to vacate is hereby denied.

It is further ordered, That the order of March 1, 1962, is hereby amended by changing the date for compliance from April 4, 1962, to July 31, 1962.

By the Commission.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 920 & 920 (Sub. 1)

States Marine Lines Inc., and Global Bulk Transport Corporation

v.

Trans-Pacific Freight Conference of Japan, et al.

Denial of Petition for Reconsideration and Stay

Decided June 7, 1962

By the Commission:

The Commission, in its report dated April 16, 1962, found that respondents had violated section 15 of the Shipping Act, 1916 (46 U.S.C. 814) by the establishment and operation of a neutral body self-policing system which did not conform to the agreement that was approved by the Federal Maritime Board. Respondents were ordered to cancel fines found to be unlawful and to cease and desist from attempting to collect the fines assessed by the neutral body and from carrying out the neutral body amendment to the Conference agreement in any manner inconsistent with the amendment approved by the Federal Maritime Board or the Commission's report.

On May 17, 1962, respondents filed a petition for reconsideration of the Commission's previous finding, and also requested that the Commission stay the operation and effect of its order pending its ruling on the petition for reconsideration. On May 28, 1962 complainants filed a reply.

Respondents' contentions in support of their petition are for the most part simply reiterations of arguments that were considered and rejected by the Commission. One basically new argument has, however, been introduced. In summary and quite belated fashion, respondents attack the Commission's jurisdiction to approve neutral body or self-policing provisions of conference agreements. Presumably, the question is raised only as to the neutral body agreements involved in this proceeding, since under section 15 of the Shipping Act as amended last October to emphasize our authority and duty over self-policing provisions (Public Law 87–346), the subject does not seem to be even open for discussion.

In effect respondents' position is that their neutral body agreements were matters separate and distinct from the activities embraced by section 15 and the Commission therefore had no jurisdiction to approve the neutral body agreements or regulate their effectuation. Respondents' basic premise ignores the fact that self-policing agreements are major amendments to section 15 conference agreements. They can and do have significant effects upon the operation of steamship conferences. It cannot be seriously contended that we do not have jurisdiction to approve and regulate the operation of the underlying conference agreements, for that is the very purpose of section 15, yet it is argued that we did not have jurisdiction over the manner in which respondents were enforcing their agreement. This reflects a substantial misconception of the Commission's functions and the purposes of the Shipping Act, 1916.

As we pointed out in our decision of April 17, 1962 in this same case, at p. 9-10, the enforcement of conference agreements is of primary concern to this Commission, and the effectuation of neutral body arrangements is part and parcel of that concern. A self-policing system can be used or abused in many ways. The possible deleterious effects of its misuse are innumerable. For example, it could be a means of "whitewashing" or concealing malpractices, or a convenient method by which to harass an individual conference member. On the other hand, if such a system is properly carried out, it may well help to cure many of the ills that beset steamship conferences, and that is the main purpose of the system.

It is not necessary here to discuss all of the ramifications of a neutral body or self-policing agreement. It is sufficient to note that such an arrangement is a basic part of the section 15 agreement and not a severable provision thereof. It affects the entire operation of the conference, and it cannot be viewed or interpreted separately from the section 15 agreement to which it applies. Neither the conference nor its self-policing arrangement can exist without our approval and supervision. Conference agreements are not private contracts to be interpreted as the parties please or prefer, but have significant public aspects. We not only must be cognizant of them but must approve them before they can have any legal effect. See *Swift and Company* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962); *Pacific Coast European Conference*, 7 F.M.C. 27 (1961).

It is therefore ordered, That respondents' petition for reconsideration and stay is denied.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 869

Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates

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No. 935

Hawaii/Crockett and Hawaii/Galveston Bulk Sugar Rates

No. 941

Hawaiian Rates-Ten Percent Increase (1961)

Decided June 28, 1962

Rates between Pacific Coast ports and the State of Hawaii, as increased by 12½ percent and as further increased by 10 percent, and dollar equivalent increases in rates applicable between Atlantic Gulf ports and Hawaii, found just and reasonable.

Rates between the State of Hawaii and Crockett, California, and Galveston, Texas, applicable to raw sugar in bulk, found just and reasonable.

George D. Rives, Alvin J. Rockwell, John Sparks, Robert K. Kai, and *William H. Heen* for Matson Navigation Company and The Oceanic Steamship Company.

Willis R. Deming and *Charles E. Lucey* for Isthmian Lines, Inc.

Ronald A. Capone for United States Lines.

George F. Galland, William J. Lippman, and *William J. Ball* for Consolidated Freightways, Inc., and Hawaiian Marine Freightways, Inc.

Sterling F. Stoudenmire, Jr., for Waterman Steamship Corporation.

Shiro Kashiwa, William D. Rogers, John T. Rigby, Richard S. Sasaki, and *Schuichi Miyasaki* for the State of Hawaii; *Alan F. Wohlstetter, Wm. I. Denning,* and *Ernset H. Land* for van lines and Sea Van Operators Association of Hawaii; *J. F. Morse* for Scott Paper Company; *G. M. Rebman* for United Van Lines, Inc., and Aero Mayflower Transit, Inc.; *Robert Y. Thornton* for the State of Oregon; *Gerald H. Trautman* and *William W. Schwarzer* for Pineapple Growers Association of Hawaii; *William R. Daly* for Harbor Commission of the City of San Diego; *Hiroshi Oshiro* for the City and County of Honolulu; *Roy Vitousek* for Hawaii Automobile Dealers Association; *James M. Morita* for Wholesale Fruit & Produce Dealers Association of Honolulu; *D. P. Falconer* for California and Hawaiian Sugar Refining Corporation, Limited; *C. S. Connolly* and *C. H. Fritze* for Carnation Company and Hawaiian Grain Corporation; *C. H. MacDonald* for California Milling Corporation; and *Harry E. Rockwood* for General Mills, Inc., interveners.

Edward Aptaker, Edward Schmeltzer, and *Richard Harsh* as Public Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner*

BY THE COMMISSION:

These are investigations instituted by the Federal Maritime Board (Board) to determine the lawfulness of increased rates for the transportation of cargo between Pacific coast ports and ports in Hawaii and also between Hawaiian ports and Atlantic and Gulf coast ports.

Three proceedings have been consolidated for the purposes of this report. Docket No. 869 involves a general increase in rates amounting to 12½ percent applicable to the transportation of all cargo except tinplate, molasses in bulk, dry fertilizer, fuel oil, and raw sugar in bulk between the Pacific coast and Hawaii, and amounting to dollar equivalent increases applicable to transportation between Atlantic-Gulf ports and Hawaii. Docket No. 935 involves rates for the transportation of raw sugar in bulk from Hawaii to Crockett, California, and Galveston, Texas.

Docket No. 941 involves a further general increase in rates amounting to 10 percent applicable to the same cargoes and trades as those in No. 869. The proceedings in Nos. 935 and 941 have not been the subject of a decision by the examiner, but the proceedings in No. 869 have been the subject of an initial decision to which exceptions and replies have been filed and oral argument heard. By stipulation, the record in No. 869 was incorporated in the record in Nos. 935 and 941. We ordered the record in Nos. 935 and 941 certified to us and No. 869 consolidated with Nos. 935 and 941 for a single decision by us.

The rates of Matson Navigation Company (Matson), American President Lines, Ltd. (APL), Isthmian Lines, Inc. (Isthmian), The Oceanic Steamship Company (Oceanic), United States Lines Company (USL), Lykes Bros. Steamship Co., Inc. (Lykes), Waterman Steamship Corporation (Waterman), Hawaiian Marine Freightways, Inc. (HMF), Consolidated Freightways, Inc. (Consolidated) are at issue in No. 869. With the exception of HMF and Consolidated, the same parties are respondents in No. 941. The rates for the carriage of bulk raw sugar only are involved in No. 935, which was combined with No. 941 for purposes of hearing. An initial tariff published by Isbrandtsen Company, Inc. (Isbrandtsen), for the transportation of cargo between Hawaii and San Diego, California, was also included by order of the Board.

The State of Hawaii (the State), various shippers, consignees, and shipper groups intervened in opposition to the increases. Briefs were filed by Matson, Isthmian, USL, the State, Pineapple growers Association of Hawaii (the Association), California and Hawaiian Sugar Refining Corporation, Limited (C & H), van line protestants, General Mills, Inc. (Genmil), California Milling Corporation (Calmil), jointly by Carnation Company and Hawaiian Grain Corporation, and Public Counsel.

In the past, Matson has been held to the rate-making line in the Hawaiian trade. *Matson Navigation Company—Rate Structure*, 3 U.S.M.C. 82, 83 (1948), *General Increase in Hawaiian Rates*, 5 F.M.B. 347, 349 (1957). Matson carried 91.3 percent of the Pacific coast/Hawaii cargo in 1957, 88 percent in 1958, and 90.1 percent in 1959. We will therefore determine the lawfulness of the proposed Pacific coast/Hawaii rates upon the results of Matson's operations.

In No. 869 the examiner held that shippers and consignees between the Pacific coast and Hawaii were entitled "to have the lawfulness of their rates determined upon the basis of the results of Matson's operation in that particular trade." We agree. The carriers in the Atlantic-Gulf/Hawaii trade in the past have based the rates in that trade upon the competitive relationship between that trade and the Pacific coast/Hawaii trade. Separate ships and separate solicitation services are needed and employed. There is no showing of interdependence except in rate setting. In a proceeding to determine the lawfulness of rates, the shipping public on the Pacific coast should have rates based on the cost of shipping their own commodities.

RESPONDENTS' SERVICE

During 1959 Matson provided the following cargo service: (a) three C-3 vessels sailing weekly between San Francisco Bay and Honolulu, each vessel equipped to handle 75 deck containers; (b) four C-3 vessels between San Francisco Bay and Honolulu and Hawaii outports, with weekly service from principal ports and fortnightly service to and from some outports; (c) three C-3 vessels between Los Angeles and Honolulu and Hawaii outports, each vessel equipped to handle 75 deck containers, sailing every nine days; (d) one Liberty vessel carrying lumber every 35 days from Humboldt Bay, California, to Hawaii ports, returning in ballast; (e) two C-3 vessels, each with refrigerated cargo capacity, operating on a 30-day turnaround, serve Tacoma, Seattle, Portland, and Honolulu and an outport in Hawaii; an additional nonrefrigerated C-3 vessel operates on a 35-day turnaround.

The pattern of operation was changed in 1960 in the following principal respects: (a) two C-3's, each with 75 deck containers, providing bi-weekly service between Los Angeles and Hawaii, plus the *Hawaiian Citizen,* a full-container vessel, with a 16-day turnaround, provide a triangular service between San Francisco, Los Angeles, and Honolulu; and (b) four C-3's, each with 75 deck containers, provide a weekly service from San Francisco Bay to Hawaii. The *Californian* and the *Hawaiian,* combination container and bulk-sugar vessels, provide container and bulk and bulk liquids service westbound, and bulk sugar, container, and liquids service eastbound, every nine days. Two other vessels provide irregular service. The *Hawaiian Lumberman* was sold during 1960.

In 1960 the *Hawaiian Fisherman* was converted to an all-automobile carrier, with capacity for 500 automobiles and deck cargo, and special equipment to facilitate loading and unloading. It was placed in service at the end of December 1960 on a triangular 14-days turnaround between San Francisco-Los Angeles and Honolulu. In March 1961, the nonrefrigerated vessel was withdrawn from the Pacific Northwest service and the turnaround time for the other two vessels was reduced from 30 days to 27 days by reducing the number of calls at Hawaiian outports. In May 1961, the turnaround time of the two C-3 deck-container ships operating between Los Angeles and Hawaii was reduced from a 28-day turnaround to 21 days by reduction in the number of calls at Hawaiian outports. The Los Angeles ships call at the outports on the average of one each 15 days, and the Northwest vessels on an average of every 41 days.

USL operates a subsidized freighter service between U. S. Atlantic ports and the Far East on Essential Trade Route No. 12 (Line D-U.S. Atlantic/Far East Service) pursuant to an authorization in its Operating Differential Subsidy Agreement No. FMB 19. USL is authorized to call, and on occasion some of its ships do call, at ports in Hawaii while enroute to and from the Far East. USL has been historically a participating carrier and observes the rates set forth in the eastbound freight tariffs filed with the Commission by Matson, covering commodities moving from Hawaii to U. S. Atlantic ports. One of these tariffs, Eastbound Freight Tariff No. 3-0, is under inquiry in this proceeding. USL also is a member of the Atlantic and Gulf/Hawaii Conference and has been and is a participating carrier in westbound tariffs filed with the Commission by that conference, including Freight Tariff No. 14, which also is the subject of investigation in this proceeding. Matson and Isthmian are members of this conference.

Isthmian is a participating carrier in Tariff No. 3-0, and as a conference member it observes Tariff No. 14. Isthmian operates a joint service with Matson westbound from Atlantic and Gulf ports to Hawaii. Service on a 14-day frequency is offered from New York, Philadelphia, Baltimore, Norfolk, Mobile, and New Orleans, and on a 28-day frequency from Boston. Calls at Charleston, Savannah, Miami, and Houston are made as cargo is offered. Loadings are made also at Tampa when offerings justify. The same pattern is offered eastbound. Isthmian has no fixed schedule of operations but only estimates it will make 13 westbound and 20 eastbound sailings in 1961 as against 11 westbound and 22 eastbound sailings in 1960.

CARGO PROJECTIONS

Respondents' traffic and revenue projections are based on an extension of their most recent experience. Matson's estimates include actual experience in 1960. There has been a gradual increase in cargo carried by Matson between Hawaii and the west coast; it predicted a decrease in 1961.

Matson's westbound Pacific coast results for 1960, show 1,808,934 revenue tons of commercial cargo, 58,354 revenue tons of sea vans with military household goods moving on Government bills of lading, and 220,925 revenue tons of Military Sea Transportation Service (MSTS) cargo. For the same period, 1,236,170 revenue tons of commercial cargo, 78,154 revenue tons of sea-van military household goods, and 72,843 revenue tons of MSTS cargo moved eastbound.

In 1960, Matson in its Pacific coast/Hawaii service carried 3,475,380 revenue tons, producing $59,505,000 voyage gross revenue. Using Matson's figures, this left a net income, after Federal income taxes, of $1,054,000. By the same method of computation, Matson had estimated in No. 869 that the net voyage profit in 1960 would be $2,008,000. Matson's estimates for 1961 include cargo actually carried during the first three months of the year. For the balance of the year, estimates were made "on the basis of historical tonnage data and a detailed survey of shippers and consignees to obtain their estimates of cargo expected to be shipped or received".

For 1961, Matson estimated that it will carry about 1 percent less cargo than in 1960. Although the movement of general merchandise westbound is expected to improve to the extent of about 5 percent, based upon the over-all expanded economy of Hawaii, declines are forecast for such commodities as automobiles (10 percent, considering registrations in Oahu (Honolulu) for the first five months); boxes and fibreboard (opening of second plant in Honolulu); furniture, household appliances, iron, steel, machinery lumber, and plywood. A drop in construction activity in the first four months, completion of oil refinery, curtailment of Matson's Northwest service from lumber ports, a barge service for lumber from the Northwest, competition of Hawaii cement with lumber, and completion of two cement plants in Hawaii are advanced as causes. Eastbound, it is thought that the volume may increase about 85,000 tons, the sugar and molasses picture being somewhat brighter as the 1958 strike fades in the background. The pineapple industry predicts a smaller movement.

Public Counsel counters Matson's estimated drop of 1 percent by predicting an increase of 2 percent. He points out that Matson's volume for the first four months of 1961 was about 11 percent greater than for the same period in 1960. Carryings of the Atlantic-Gulf operators for the first six months of 1961 are up over the same period in 1960. Matson's exhibits anticipate substantial growth in the Hawaiian economy in the next decade; and C & H, Matson's largest shipper, plans heavier shipments of sugar in the next five years.

The heavier movement of sugar in the first four months of 1961 accounts in great part for the increased carryings in that period over the same period in 1960 but the increase in sugar has been included by Matson in its forecast for the entire year. April-May volume was below that for the same months in 1960, and 15,000 tons of military cargo can be added to this drop because it represents an acceleration of shipping time from later months, necessitated by the situation in Laos. Another factor to consider is that the curtailment of service from the Northwest will not begin to take on real significance until the last eight months of the year. The record does not explain the increase in Waterman's carryings in the Atlantic-Gulf trade in 1961, but Isthmian's estimated increase in that period can be explained by the shifting of cargo from Matson's vessels to Isthmian's vessels in their joint service resulting from the sale of one of Matson's vessels in the middle of the year.

On a slightly lower volume (37,148 revenue tons) for 1961 over 1960, Matson estimates the new rates will produce voyage revenue of $57,881,000, assuming the new rates to be in effect for the entire year. Assuming the lower volume for 1961, and also assuming the prior rates to be in effect for the entire year, Matson estimates its voyage revenue to be $54,157,000 for 1961. Using Matson's 1961 estimated figures again, this leaves a net profit before taxes of $3,792,000, which, after taxes of $1,782,000, leaves a net income of $2,010.00.

In view of Matson's changed operation we consider it inappropriate to take into account the 3-months' period of 1959 when the increased rates were in effect. The record contains both estimates of Matson's 1960 and 1961 operations and actual results for 1960 operations. Since 1959 Matson's expenses have increased substantially. For example, between December 1, 1956, and May 1, 1960, wages and related items rose from $8,790,549 to $10,104,-571, other vessel expenses except fuel oil, from $18,459,632 to $20,-891,566, and cargo expense from $27,413,235 to $32,031,114. Matson showed that the effect of wage and fuel price increases effective between May 1, 1960, and June 12, 1961, has been to increase Matson's estimated 1961 freighter expenses by over $3,000,000 more. Vessel wages and related items between 1960 and 1961 increased 7.12 percent, fuel oil 3.14 percent, and stevedoring, clerking, and auxiliary labor 8.20 percent.

There is evidence that Matson, through increased efficiency of operations as the result of its containerization program, has endeavored to minimize the impact of stated cost increases, but the containerization program, in turn, has led to increased financing costs.

Matson's 1960 results were poorer than expected because of an increased number of voyages and voyage days by reason of longer turnarounds and greater fluctuations in cargo offerings than anticipated, a fire at the Los Angeles container dock, and a strike at Los Angeles. Substantial wage increases were incurred during 1960. These were shown to have cost Matson $990,000. Cargo dropped about 120,000 tons, construction activity declined, and shippers failed to ship as estimated.

Under the Intercoastal Shipping Act, 1933, we are required to determine whether the increased rates under consideration are just and reasonable. Carriers are entitled to a fair return on the reasonable value of property devoted to the public use. We have recently held that the fair-return-on-fair-value standard is proper in determining the reasonableness of rates in the domestic offshore trades, and that the prudent investment standard would be used to determine the fair value of property. *Atlantic-Gulf/Puerto Rico General Increases in Rates and Charges*, 7 F.M.C. 87 (1962). We find nothing in the records before us which warrants a departure from our holdings in that case.

Before discussing the reasonableness of the general increases, we shall dispose of the issues raised as to (1) the rates on specific

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commodities and (2) the terms and provisions of Matson's sugar tariffs and Waterman's sugar tariff. (Docket No. 935)

SPECIFIC RATES

(a) *Sugar.* One of the principal issues in this proceeding is the effect of Matson's revised rates on bulk raw sugar. As of December 3, 1958, the rate to Crockett, California, was $10.35 a ton, Matson assuming loading and discharging costs. This was the equivalent of a rate of $7.85 where the shipper assumes cost of loading. On the above date, following negotiations between the parties, the rate was reduced to $6.09 a ton, with the shipper paying costs of loading. This resulted in a diminution to Matson of about $3,000,000 in annual net revenue. The rate was further reduced to $4.18 a ton in July 1960, the shipper assuming loading and discharging costs. This meant an additional reduction of $263,000 in annual net revenue. The State and Public Counsel maintain that the rates were not arrived at as the result of arm's length negotiation, the former contending that the rate presently should be no lower then $10.35 and the latter urging that a reasonable rate would be $5.30, free in and out. Under the State's basis Matson would have to credit to itself approximately $2,704,000 in added revenues for rate purposes for 1961, whereas under Public Counsel's basis the revenue credit would be $818,000.

In 1958, 1959 and 1960, nine of Matson's 18 directors were associated with four companies which owned in 1958 approximately 40 percent of Matson's stock. The $10.35 and $6.09 rates were made during this period. As of December 1959, the four companies owned 73.6 percent of the stock. C & H is a nonprofit agricultural cooperative marketing association, the patrons of which are the growers of most all Hawaiian sugar cane. The patrons are 27 plantations and about 1,200 cane farmers cultivating single farms. Matson's four largest stock holders have a beneficial interest in Hawaii's sugar production of slightly more than 50 percent. About 90 percent of C & H's stock is owned by the plantations controlled by these four companies. Each patron has a marketing contract with C & H to deliver his sugar for marketing by C & H; the latter deals with all patrons on an equal basis. C &H owns a refinery at Crockett, near San Francisco, with an annual capacity of 780,000 tons. The refinery competes with beet sugar companies in the western and midwestern parts of the mainland, as well as with raw sugar from foreign companies, the transportation costs for the latter being lower than the costs of Hawaiian producers.

The Hawaiian sugar industry was in a serious financial condition in 1956. As the industry had paid approximately $14,000,000 as ocean freight in 1955, it was decided by C & H to conduct a study of the costs of storing and moving raw sugar to the mainland. It engaged McKinsey & Company, Inc. (McKinsey), a management consulting firm, to make the study. With the full cooperation of the industry, McKinsey was engaged in the task through 1957 and half of 1958.

In three reports, McKinsey estimated that Hawaiian sugar could be moved efficiently to the Crockett refinery by using two "jumboized" T-2 tankers, at a saving of approximately $3,100,000 a year. This estimate was based on a transportation cost of $5.78 per short ton. In furtherance of the three reports, McKinsey was authorized to explore more fully the cost of operating the proposed vessels. Maryland Shipbuilding & Drydock Company, which had had experience in jumboizing vessels, prepared a report which concluded that the plan was feasible. McKinsey conducted a computer study to analyze the storage and movement of raw sugar to Crockett, assuming the use of jumboized vessels. The storage cost was established, the availability and costs of the tankers were determined, and estimates of conversion were obtained from Maryland Shipbuilding.

During 1957 and 1958 Matson was informed of the study being made and was given copies of McKinsey's findings. Comments and criticism were invited. Matson's first proposed rate reduction was not agreeable to C & H, and Matson was advised that (1) the sugar industry considered the McKinsey report realistic, (2) the industry was determined to reduce its transportation costs, (3) the industry was prepared to make arrangements for proprietary or contract carriage, if necessary, in order to secure realistic rates, and (4) if Matson was interested in the sugar traffic it would have to submit a competitive proposal.

Negotiations between Matson and C & H continued. A Matson memorandum criticizing the McKinsey studies as unrealistically optimistic was made available to C & H. The criticisms were rejected, but meetings between C & H, Matson, sugar representatives, and McKinsey followed. These produced no results. The sugar representatives then submitted to a report to C & H, which included revisions in costs, and in which it was concluded that the proposed system could operate at an average cost of $5.70—$6.10 per short ton. The estimate included loading and discharging, ocean transportation, storage in Hawaii, and carrying costs. C & H accepted the report.

The parties, in the meantime, continued negotiations, C & H preferring to come to an agreement with Matson, if possible, in order to eliminate risks inherent in proprietary operation of vessels, and realizing also that the service proposed by McKinsey would require at least a year's time.

Matson's executive vice president, who was in charge of the negotiations, was authorized to make the best arrangements possible. He admitted that his higher figures were used as a basis for bargaining and did not represent the actual costs of carrying sugar. The idea was to set the sugar rate as high as possible and still retain the business. Matson's cost of $6.82 per ton, free in, was arbitrarily increased to $6.95. C & H's offer of $6.00, free in, was rejected by Matson, whose counter offer of $6.68 included a component of 59 cents for adjustment in the rental of the Hilo bulk sugar plant. An additional 19 cents would have to be included if Matson were to bear *force majeure* risks. C & H refused to consider the Hilo and *force majeure* factors, which thus would reduce Matson's $6.68 offer to $6.09 as compared to C & H's $6.00 proposal. As previously seen, the parties finally agreed upon $6.09, free in; this was on an interim basis. There then followed many meetings between the parties; and C & H served notice on Matson of its intention to terminate the sugar freighting agreement called for by the $6.09 rate. C & H finally agreed to take over from Matson the gantries used to unload sugar at Crockett, Matson purchased two C-4 vessels which lent themselves basically to the efficient carriage of bulk raw sugar, and the parties settled on the rate of $4.18, free in and out, referred to earlier. The present rate of $4.24 is the result of an escalation provision in the sugar freighting agreement. This rate is about the same as the $6.09 rate, free in. In that connection, another experienced American-flag company submitted to McKinsey an offer to carry C & H's sugar to Crockett on a 15-year contract of $4.15, free in and out, and using jumboized T-2 tankers.

When the Board ordered the investigation of the sugar tariff in March 1961 (No. 935), C & H asked McKinsey to review its earlier reports as to the feasibility and costs of jumboized tanker service. McKinsey reported that the proposed service was feasible and efficient, and that earlier costs had not increased appreciably as it was possible to eliminate certain contingency allowances included in the earlier cost estimates. McKinsey concluded that the cost of such service would run between $3.51 and $3.85 a short ton, free in and out, and would result in annual savings of $3,600,000 in ocean transportation costs.

Public Counsel's suggested figure of $5.30 a ton as a reasonable rate on sugar to Crockett is composed of (1) the base of $4.50, which is what Matson estimated it would cost C & H to operate its own vessels; (2) escalation—clause increase of three cents; (3) three cents to install pumps in the vessels "at shipper's request"; (4) 19 cents as *force majeure* risks assumed by carrier; (5) 25 cents for "other"; and (6) non-transportation costs of 30 cents.

The initial decision in No. 869 stated that Matson's transportation consultant had analyzed all voyages handling sugar in 1959, and the method employed by the consultant was outlined. The procedure followed was generally approved by the examiner, and he concluded that "the rates on sugar were shown to be compensatory." In the present proceedings Matson placed in evidence a letter from the president of C & H to his directors, dated July 31, 1958, in which he concludes that the proposed rate of $6.09, free in, was fair and reasonable to Matson and to C & H. Attached to the latter was a computation by Matson based upon the $6.09 rate. This computation indicates that such rate would result in a return to Matson of 8 percent after taxes. Another attachment to the exhibit shows that Matson's negotiations with C & H contemplated a full recovery of costs by Matson and a reasonable profit for the service.

Opposition to the level of the sugar rate to Crockett is based upon the relationship between Matson, the four principal stockholders of Matson, and the sugar interests. The contention is made that the rate on sugar is so low as to cast a burden on other cargo, and that, when computing Matson's net revenue position, the company should be charged with the difference between the revenue receivable from a reasonable rate and the revenue received from the rates actually charged.

The record supports the conclusion that, prior to the reduction of the rate of $6.09, Matson's staff made bonafide efforts to ascertain the cost of carrying sugar. Matson's sole shipper of sugar presented a cost study prepared by a consultant with 40 years of transportation experience, particularly in the field of water carrier costs.

The estimates of McKinsey were not shown to be unrealistic, and it is not reasonable to suppose that Matson would deliberately purchase two ships for the specialized handling of sugar if it thought it was going to lose money in carrying sugar. It must be kept uppermost in mind that Matson had the unpleasant choice of losing the sugar business entirely, with its valuable revenue or establishing a lower rate and retaining the business.

In addition to revising its rates for the carriage of sugar to California, Matson published new rates for the carriage of sugar from Hawaii to Galveston (Tariff No. 17). C & H has a contract with Imperial Sugar Company for the delivery of sugar to Galveston, the volume depending upon the size of the crop and the annual requirements of the Crockett refinery. The quantity shipped in 1960 was 99,000 tons. It is estimated that the movement will increase to 170,000 tons. As in the case of Crockett, C & H directed McKinsey to complete its study of the Galveston movement. McKinsey recommended proprietary carriage with a single jumboized T-2 tanker, at a minimum saving to C & H of about $400,000 a year. If back-haul cargo could be obtained, the saving might be in excess of $600,000 a year.

Negotiations between C & H and Matson, conducted during 1959 and 1960, were along the same lines followed in the case of Crockett. The McKinsey report indicated that it would cost C & H $13.90 a ton to load, transport, unload, and store its own vessel Matson proposed a free-in-and-out rate of $12.50; C & H countered at $12.00, subject to a certain daily volume; and a compromise was reached at $12.20, free-in-and-out, at a standard lagtime of 1,680 tons a day, escalation clause for charterline costs, and a 3-year freighting agreement (Isthmian is a party to Tariff No. 17). C & H "recognized that Matson enjoyed greater flexibility than C & H would have if it were committed to a one ship service and was willing to incur certain costs in consideration of Matson's greater shipping experience." C & H remains free to use (and has done so) other common carriers for transporting sugar to Galveston.

In March, 1961, when No. 935 was initiated, C & H asked McKinsey to review the Galveston situation. The conclusion reached earlier was confirmed, with the possibility of eliminating certain contingent allowances included in the earlier cost estimates. The cost to C & H of using its own vessel is comparable to Matson's rate of $12.20. Another established operator offered to carry the Galveston sugar for $12.00 a ton, free-in-and-out, on a 15-year basis, and using a jumboized T-2 tanker.

Tariff No. 4 is Waterman's tariff for the transportation of sugar from Hawaii to Galveston. Waterman submitted data showing the volume of sugar carried and the cost of operation. It did not participate in the hearing and did not file a brief. C & H ships sugar on Waterman vessels, the rate being the same as Matson's. Without any discussion, Public Counsel, in his "Proposed Findings of Fact and Conclusion", finds that Waterman's rates are compensatory.

Upon the record in the three proceedings, it is found (1) that the sugar rates involved were negotiated in good faith and at arm's length, (2) that the rates agreed upon were reasonable and compensatory, and (3) that the sum of $818,000 suggested by Public Counsel need not be credited to Matson. In view of these findings, it is unnecessary to discuss the contentions of the State that the sugar rate to Crockett should be no lower than $10.35, which is higher than the rate proposed by Public Counsel but does not take into consideration the free-in-and-out characteristics of the present rate.

(b) *Tinplate.* Subsequent to *General Increase in Hawaiian Rates, supra* (Hawaii), the westbound rate on tinplate was raised 9 per cent. Shippers from the Atlantic coast continued to use the services of American Union Transport Co., at that time an unregulated carrier which handled about 30,000 tons of tinplate in 1958. On February 14, 1959, Matson's rate was reduced to $11.85 a ton (currently in effect), and its carryings of tinplate during the year increased. To retain the recaptured business, the rate on tinplate has not been increased. Failure to raise the rate was justified under all circumstances.

(c) *Molasses in bulk.* The island shippers of molasses informed Matson that their studies showed they could carry this commodity in their own T-2 tanker at a cost as low as $3.95 per ton, as compared with Matson's rate of $4.90. Furthermore, charter rates on molasses, at the time of hearing, were as low as $3.75. For these reasons, Matson felt it inadvisable to raise its rate, a position which was justified.

(d) *Dry fertilizer.* This commodity can be and is supplied to the islands from Japan and Canada as well as from the U. S. Pacific coast, the Japanese rate being slightly lower than Matson's total charges. Under the circumstances, Matson's failure to increase its rate on this commodity was justified.

(e) *Fuel oil.* About 260,000 tons of fuel oil is carried every year by Matson to the islands. Major oil companies have told Matson that they can carry it in their own vessels at about $4.00 a ton as compared with Matson's rate of $4.23 per ton. Because of Matson's frequency of service and multiple port schedules, the companies give the business to Matson rather than handle it themselves. A refinery has been built in Hawaii but Matson hopes to continue to carry some of the residual oil. The determination not to raise the rate on fuel oil was justified.

(f) *Household goods.* Military household goods are transported between the mainland and Hawaii in either of two ways: First the van lines pack the goods in their own containers at point of origin and transport them to the port, where Matson takes over and delivers them at destination, the entire movement being under a through Government bill of lading for which Matson assesses its regular port-to-port commercial rate against the van lines; and second, the goods are packed in Navy containers by the Government and transported by Matson under a port-to-port Government bill of lading pursuant to rate tenders on file with MSTS, in which case the Government arranges for the inland transportation.

Under the first method outlined above, the rate is $18.93 a revenue (measurement) ton, whereas the MSTS contract rate is $12.00 a revenue ton. It should be noted, however, that the MSTS rate is applicable to "general cargo, N.O.S." and not to household goods only. In contrast, the commercial rate is specifically applicable to household goods in sea vans. The principal reason for the difference in the rates is the fact that under the MSTS method the goods are handled by Matson on a free-in-and-out basis and the vessel must call at a military pier (if Matson exercises its option to lighter or truck the goods from the military facility to its pier, it must bear all transportation, loading, unloading, and overtime costs). Taking the various factors into consideration, the van lines contend the MSTS rate is approximately $3.13 lower than the van line rate from the Pacific coast to Hawaii and approximately $3.45 lower from Hawaii to the Pacific coast. The shipments under the two methods are the same, the containers are substantially the same, and the shipments receive similar stowage aboard ship. The van lines assert that Matson is charging different rates for military and civilian shipments and that the rates to van lines should not exceed the MSTS rates because the nature of the shipments is identical, the services performed are identical, and the cargoes move side by side on the same ship.

The conditions of shipment which affect Matson's costs, however, are not the same. The standard form of MSTS contract which Matson has with the Government provides: "The loading and discharging of cargo at Army or Navy terminals shall be performed or arranged for by the Government; however, the loading or discharging of cargo moving over contractors' regular berth terminals shall be performed or arranged for by the contractors . . ." but that ". . . the Government or the consignee shall bear all expenses of loading, stowing, and discharging the cargo, such as lighterage (including loading and discharging costs in connection therewith), stevedoring, checking, tallying, manifesting, winchmen, . . ." The Government also provides certain other services and pays certain expenses in connection with loading and discharging. There are no solicitation costs to Matson. There is a reduction in administrative costs in that stevedoring, tallying, and manifesting are performed at the expense of the Government, the abbreviated tariff categories eliminate the necessity of classification, and the history of MSTS shipments shows lower damage losses. Considering volume alone, MSTS traffic is over twice as great as that of the van lines. The differences are more significant than the similarities. These facts show that the services may not vary as contended, but there are substantial differences in who performs and who pays for the same services. The differences in the expense burdens justify a difference in the rates. We hold that the reasonableness of the increases in the rates on household goods in shipper furnished containers has been established and that no unjust discrimination has been shown as to this property.

(g) *Canned pineapple and juice.* The initial decision in No. 869 found that it had not been shown that canned pineapple and canned pineapple juice should not take the general increase applicable to cargo in general. The Association argues that pineapple and juice should not be subject to the general increase here under consideration.

The Association offered the following factual situation in substantiation of its position: Pineapple is the only major backhaul commodity which fills space available by reason of the demands of the westbound service; pineapple accounts for the largest 275 revenue of any single commodity; foreign import into the United States increased 600,000 cases in 1960, most of it originating in areas that had hardly any imports two years ago; per capita consumption of Hawaiian pineapple decreased 10 percent; the spread in quality between Hawaiian and imported pineapple is being narrowed; foreign pineapple has lower labor and material costs, and in some instances receives government assistance; foreign pineapple has lower freight rates; foreign pineapple of competitive quality sells below the Hawaiian product in mainland markets; there has been a steady increase in the price spread between pineapple and competitive fruits from California, such as peaches, apricots, pears, and fruit cocktail, all the latter of which are below the 1952 price level; Hawaiian labor is unionized and receives higher wages than mainland fruit workers; Hawaii, unlike California, must bring in practically all of its growing and canning materials and supplies; and carry over inventories of competing fruits are of unprecedented size.

The situation as to pineapple juice is said to be worse since the hearing in No. 869. Prices were reduced in 1960 to the lowest point since 1946; prices were increased slightly in 1946; before the 1960 reduction the per capita consumption was the lowest since 1950; a slight improvement has taken place, but the selling price is about 91 percent of 1948 prices; the index of orange juice prices is 155 against 79 in 1948, and 119 for frozen concentrate against 93 in 1948; Puerto Rico has doubled its juice imports to the mainland; one of the largest processors is going to operate in Puerto Rico.

The Association also points out the following: the Hawaiian legislature reduced the processing tax on pineapple in 1960 by one-half of one percent; one large processor has decided to discontinue planting on Maui and has abandoned canning operations on that island; two other companies have recently closed their canneries, and another has discontinued planting; and another has shut down its canner operations on Kauai and is thinking about commencing operations in Honduras.

The Association contends that the raising of the pineapple rate will virtually wipe out any hope that the pineapple industry may have to market its products on the mainland; that the competitive circumstances justifying rate relief in the case of pineapple are more compelling than in the case of any of the other commodities (heretofore referred to) which have received relief;

that the retention of the pineapple traffic is crucial to Matson's profit picture; that Matson could not maintain its present service if much of the pineapple were lost through diversion to other forms of transportation or market attrition; that there is no other eastbound commodity to take the place of pineapple; that the loss of the pineapple traffic would result in higher rates for the westbound traffic; and that the cost of handling pineapple will decrease approximately $600,000 a year because of palletization and containerization.

Pineapple's competitive position is not a basis for establishing rates nor a reason for treating it differently than other general cargo commodities. Neither molasses nor sugar are comparable cargoes simply on the basis of their being "backhaul cargoes". To create an unreasonable or unjust discrimination, more significant similarities than the mere fact of a backhaul, must be shown. Similarities in handling and facilities used must be present. The facts show that these conditions are not similar. The Association has not shown, however, that pineapple subsidizes other traffic or bears more than its fair share of Matson's expenses. The claims of the Association are rejected.

(h) *Grain and Feed.* Matson's tariff has two rates for bulk grain and feed ingredients: $10.69 applicable to a minimum of 1,000 tons, and $10.13 applicable to a minimum of 2,000 tons. Rates apply from the end of spout at loading elevator, and wharfage and discharging expenses are for account of cargo. Intervener Carnation protests the full application of the 10-percent increase on bulk grain and feed ingredients on the grounds that cargo handling costs are not incurred in the transportation thereof, and that increased handling costs which may have been incurred by Matson cannot be attributable to bulk grain and feed ingredients.

Carnation recognizes, however, that it should share in any increased operating and fuel costs which are found to be justified. The increases advanced by Matson are: vessel wages and related items $667,000; fuel oil, $99,000; stevedoring, clerking, and auxiliary labor, $2,237,000; total of $3,003,000. Intervener points out that stevedoring, clerking, and auxiliary labor are not applicable to bulk grain and feed ingredients since cargo pays those expenses in any event. Vessel wages and fuel oil, totaling $766,000, represent 25.2 percent of the total increased costs of $3,003,000, and because of this, Carnation argues that the increase on bulk grain and feed ingredients should be 25.2 percent of 10 percent, or 2.5 percent.

Matson counters that, by reason of the differential between the free-in-and-out rate on bulk grain and feed ingredients and the berth terms or container rates on feed or ingredients, the application of a uniform 10-percent increase produces substantially the result sought by Carnation. In other words, the rate differential is as much as $17.04 a ton, and the application of the 10-percent increase to bulk grain and ingredients and to feed and ingredients in bags or containers means an increase for the former of only 37 percent of that applicable to the latter.

The rate on manufactured feeds, feed ingredients, and grain shipped in bags or containers is higher than the rate on bulk grain and ingredients. Interveners Genmil and Calmil, which process the former category on the mainland and ship them to Hawaii, contend that the 10-percent increase puts them at a disadvantage with feeds processed by Carnation and others in Hawaii from raw grain and ingredients shipped in bulk from the mainland. Genmil does not dispute the need for the increased revenue nor contend that the resulting level of rates on manufactured feeds in bags or in containers, considered alone, would be unreasonable.

Competition is severe between the mainland manufacturers of animal and poultry feed and the processors of those commodities in Hawaii. The 10-percent increase is equivalent to 90-95 cents a ton on bulk grain as compared with $2.45 a ton on feed in sacks and $2.36 a ton in containers. Genmil concedes that the cost of handling bulk grain and ingredients on an f.i.o. basis is lower than for feed, feed ingredients, and grain in bags or containers, and believes that a rate structure involving a *constant* differential between the two methods of shipment would be reasonable and highly desirable in terms of the public interest. Percentage increases, it is claimed, destroy such differentials.

Matson argues that a percentage form of increase is a presumptively fair method as it apportions the revenue requirement among all commoditities in proportion to present participation in revenues. It believes that the preservation of differentials in revenue proceedings by means of flat increases is impossible in the present instance because of the inadequacy of the record and the problems involved in dealing with specific rates. Furthermore, Matson argues that the decline in the volume of feed shipments from the mainland is beyond its control, and that carriers are not required to equalize opportunities among shippers nor to nullify the advantage of a shipper whose plant is close to the market. In conclusion, Matson says that only if loading and discharging costs on bulk ingredients have remained constant can it be assumed that changes in Matson's costs are the only factors bearing on the rate relationship.

Where possible, it is desirable to maintain reasonable rate relationships. As noted above, the 10-percent increase broadens the dollar differential between bulk grain and ingredients, on the one hand, and manufactured feed, feed ingredients, and grain in bags or containers, on the other hand. Generally, however, a carrier is not required to equalize opportunities among shippers or nullify the advantage of a shipper whose plant is close to the market, and this rule is applicable here.

It has not been shown that the proposed rates are unreasonable as a result of a percentage-across-the-board increase rather than a dollar-differential increase. The use of a percentage form of increase is presumptively fair because it apportions the increased revenue among all commodities in proportion to present participation in revenues.

GALVESTON TARIFFS

It is contended that Tariff No. 17 (Docket No. 935) is unlawful for the following reasons: (1) the service involved is noncommon carriage, not subject to the Commission's jurisdiction; (2) the freighting agreement prevents shippers from chartering vessels of other carriers; (3) Matson has another sugar tariff (No. 3-0) which contains a higher rate, thereby creating a dual rate system; (4) the term of the freight agreement is excessive; (5) the minimum volume requirement is excessive; and (6) the rate is undeterminable.

The argument that Tariff No. 17 sets up a noncommon-carrier service is predicated upon three asserted circumstances: the vessels are to be devoted to the exclusive use of a single shipper, the sugar will move under special contracts, and general cargo will not be solicited nor accepted for the vessels.

While it is possible that in some instances a vessel will carry only sugar, it is equally possible under the tariffs that others will carry general cargo. Tariff 17 does not compel Matson to exclude general cargo from vessels carrying C & H sugar, and the record before us does not warrant such an assumption on our part. We cannot ignore the economical and practical peculiarities of the situation faced by Matson. At present C & H is the sole shipper of sugar from Hawaii to Galveston. The fact that a special arrangement is required to secure the business of C & H for Matson does not of itself convert the arrangement into one of contract carriage.

It is further contended that, because C & H is the only shipper of sugar that can meet the requirements of the sugar freighting agreement, it is an unjustly discriminatory special contract. While it may be correct that only C & H can qualify under the agreement, we fail to see how another nonexistent shipper can be discriminated against and there is no foreseeable prospect of a change in the existing situation.

Paragraph 3 of the sugar freighting agreement enjoins C & H from moving sugar to Galveston "in vessels owned or chartered from others by the shipper" unless it has been offered first to Matson. It is argued that this constitutes an attempt to penalize the shipper for patronizing another carrier, and is an attempt to employ a dual rate system with the intent to stifle outside competition in violation of section 14 Third of the Act. Insofar as relevant, 14 Third of the Act makes it unlawful for a common carrier to "resort to other discriminatory or unfair methods, because such shipper has patronized any other carrier." The obvious purpose of section 14, when read in its entirety, is to protect the independent common carrier from discriminatory retaliation against the shipper for patronizing another common carrier.

The sugar freighting agreement leaves the shipper free to utilize any other common carrier operating in the trade, and indeed, as we read the agreement, the shipper is free to enter into a contract with a contract carrier for the carriage of all or any portion of his sugar. The sole requirement of the agreement is that before the shipper uses his own vessel or operates a chartered vessel himself, he must first offer the cargo to Matson. Such an arrangement is not violative of section 14 Third. Nor do we feel that the three-year initial period of the agreement is unreasonable when the practical and economical circumstances prompting the agreement are considered.

It is said that Matson's use of two rates on sugar, the $12.20 rate in Tariff No. 17 and $18.81 in Tariff No. 3-0 constitutes a dual rate system which is unlawful under the Act. Matson has indicated a willingness to cancel the $18.81 rate in Tariff 3-0, and we assume that it will do so. Therefore, we do not consider the question of the existence of a dual rate system in this proceeding. We note, however, that there is nothing in the tariff or the freighting agreement which requires a shipper to ship all or any fixed portion of his sugar during the period of the agreement.

Finally, it is contended that the escalation clause in the agreement makes it impossible to determine the actual rate to be paid by C & H for shipments on chartered vessels until the voyage is completed. This, it is argued, makes it impossible for Matson to comply with the provisions of section 2 of the Intercoastal Shipping Act, 1933, requiring that a common carrier file with the Commission the rates to be charged and that only the filed rate shall be charged.

As we understand the escalation clause, any increase in the rate under the clause is contingent upon an increase in the cost to Matson of chartering a vessel or vessels to meet the requirements of C & H. Since, in order to meet the requirements of C & H, Matson must charter vessels in advance of shipment, Matson will know what increased costs are involved and will be able to compute the increase in rate in advance of actual shipment. Thus, Matson will be able to file the actual rate to be charged under the tariff as the provisions of section 2 require.

OPERATING RESULTS

In the present posture of this proceeding, particularly in view of the consolidation of the three proceedings, it is possible to determine with better-than-average accuracy the actual operating results experienced by Matson in 1959 and 1960, and thus to make accurate findings concerning the lawfulness of the 12½ percent increase. Reasonable projections for the future may be made, based on revenue and expense data covering 1960 and 1961, under the combined 12½ percent and 10 percent increases, by which the lawfulness of the combined increase may be gauged.

It is contended that, if a carrier is free to readjust its projections based on costs which it later finds will actually happen, the tendency is for the carrier to submit for the record only those cost changes which are beneficial to the outcome of the case, as a carrier has no interest in attempting to bring into the record later circumstances which are detrimental to its case.

While the evidence respecting the new costs came later in the proceedings, the Examiner advised all parties that time would be afforded for consideration of the new data. It cannot be said that anyone was prejudiced by the offer of the material. In the expanded record we cannot ignore evidence of the now available actual results any more than we can ignore other evidence of record in reaching our determination as to the lawfulness of the rates. Moreover, with the inclusion of Nos. 935 and 941 such information became available, and the contention referred to above as well as exceptions to the Examiner's rulings on the 1960 estimates are now academic.

Matson's 1960 cargo and revenue estimates in No. 869 were overoptimistic, as the actual results have shown. Its 1961 estimates include actual experience for the first three months of 1961 and for the remainder of the year are based on historical tonnage data and a survey of shippers and consignees. A predicted 1 percent decline in volume Matson claims is supported by a decline in construction activity and in new automobile registrations in Hawaii and a reduction in service to the Pacific Northwest. We will assume the 1961 results will be no better than those of 1960, for rate purposes.

PROFITS OF RELATED COMPANIES

As respects the use of revenues from shippers to pay profits of closely related companies, in *Atlantic-Gulf/Puerto Rico, supra,* at 113, we held that:

> Bull's operating expenses should be also reduced by $139,404 to cover the excess of commissions paid to A. H. Bull & Co. over and above the costs of the latter as allocated on a revenue prorate.

In that proceeding Bull-Insular Line was wholly owned by Bull Steamship Co., which was the parent of A. H. Bull, & Co. This wholly integrated grouping of companies, in the opinion of Matson, differentiates the situation there present from the situation in these proceedings. The shipping public is entitled to protection from the siphoning-off of revenues by affiliates of the regulated carrier. The profits of $784,693 in 1960 and $487,500 in 1961, derived by Matson's four principal stockholders for services rendered to Matson in Hawaii will be credited to Matson's net profit after taxes.

INACTIVE SHIP EXPENSES

Matson charged as an item in the year 1960 amounts for inactive ship expenses. The reasons for the lay-up were as follows: one ship was out of service while being converted to container use; two ships were laid up for sale; and four ships were withdrawn from service. Where the ships are laid up for repairs or alterations for further use in service to shippers and before sale it is reasonable that shippers should bear an expense for their benefit. The lay-up and sale would protect shippers from expenses on ships no longer required in the service. Pending sale, shippers may reasonably be required to pay for the intervening lay-up expenses between withdrawal from service and sale because the lay-up stops further expense of operation. The ships which had been withdrawn from service altogether, on the other hand, were laid up for the benefit of the company and investors. As to ships withdrawn from service and from the trade, no lay-up expense will be allowed.

CHARTER LOSSES

The State contends that losses suffered by Matson on vessels taken out of the Hawaiian trade and chartered to others during periods when they are not required for the Hawaiian service should be disallowed in fixing Matson's rates. In No. 869 the Examiner offset Matson's losses on ships chartered to other carriers against profits in the Hawaiian trade. The chartered ships were not used in the Hawaiian common-carriage service. Our predecessors have previously disallowed both profits and expenses in unrelated operations even where the same ships were also used in the regulated service. *Atlantic & Gulf/Puerto Rico, supra.* The losses will be excluded as expenses.

DEPRECIATION EXPENSES

The State contends that adjustments should be made in Matson's depreciation expenses and depreciation on funds set aside pursuant to section 511 of the Merchant Marine Act, 1936. Matson claims vessel depreciation expense of $2,629,000 for estimated 1961. Its practice is to use a residual value of 2½ percent and an average useful life of 20 years. The procedure was approved by our predecessor in *Atlantic-Gulf/Puerto Rico General Rate Increases*, 6 F.M.B. 14 (1960). The State and the Association contend that the method results in excessive depreciation charges. In view of our holding in *Atlantic-Gulf/Puerto Rico, supra,* Matson's method of vessel depreciation is approved.

Under section 511 of the Merchant Marine Act, 1936, a shipowner may make deposit in a construction-reserve fund. Fed-

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eral taxes on capital gains deposits of the proceeds of sale and indemnities from loss of ships are deferred. If such funds are used pursuant to the provisions of that section to construct a new ship, the depreciable base of such new ship for Federal tax purposes is reduced by the amount of such funds which represent capital gains. Matson, in computing net earnings on its freight operations, includes depreciation on such funds. We concur for the reason set forth hereafter in our discussion of capital gains, and the amount of $105,300 for 1960 and $80,394, used by Matson for 1961, will be allowed.

CONTAINER RENTAL

Matson shows total 1961 voyage expenses of $45,830,000, which includes container rental expenses as contracted for by Matson, involving large payments in the early years and smaller payments later on. In 1960 Matson placed into service the all-container *Hawaiian Citizen* and the partial-container *Hawaiian* and *Californian.* This required the acquisition of container units in which to stow the cargo and chassis to haul the containers. By the end of 1958 the company had 345 standard containers; the number increased to 1,138 by April 1960; and at the end of October it had 2,070. The containers were supplied by the manufacturer under a lease arrangement whereby the total payment for each dry container, over a 5-year period, was $2,167; for each reefer container it was $4,926; and for each chassis it was $2,749. At the end of such period the containers can be used for a nominal yearly sum of $20-$30 for each unit for as long as the units are usable. The total of the 5-year rental equals the amount Matson would have paid had the units been purchased outright.

Matson staggered its rental payments for rate-making purposes, the largest amount being credited the first year, with lowering amounts for each succeeding year. It is contended by various of the parties that the total rental cost should be normalized by apportioning the cost over the estimated period of the useful life on a straight-line average.

For rate-making purposes it is only fair to spread the 5-year total rentals evenly against Matson's operating expense, in spite of the fact that the lease agreement itself calls for a staggered method of payment. Only in this way can there be portrayed the true picture of Matson's operations in the future. Special expenses should be spread over that period which reasonably represents the useful life of the asset. In the case of containers, they will perform the same service and be of the same relative value to Matson in each year of their operation. The testimony is that the useful life of the containers is about five years. Although it may well be that the actual life will be longer, there is nothing tangible in the record upon which to predicate a longer life span than five years.

The Examiner found that one-fifth of the cost of the container plus one-tenth of the cost of the chassis plus one-fifth of the cost of the tires, should be included as expense for estimated 1960 and constructive 1960. We agree. Matson's vessel expenses for 1960 will be reduced by $689,568, and for 1961 will be reduced by $644,868. For 1961 the voyage expenses are found to be $45,185,-132.

Matson argues that, if there is to be any adjustment of the lease-rental payments for the container equipment (see elsewhere herein), "then the amount of interest deductible for income tax purposes . . . should not be the full amount payable on the loan in its first year but should be one-sixth of the amount of interest payable throughout the six-year term of the loan."

The principal of the loan is repayable in 24 equal installments, plus interest, but the interest is figured on the outstanding balance of the principal. Strictly from an accounting viewpoint, it might be proper to charge to each year's operation only that part of the interest payable that year. Under that method the amount of interest would decrease as the principal decreases. For rate-making purposes, however, and as an aid to rate stability over a period of time, it is proper to split the total interest into equal parts and charge each year of the life of the loan with an equal amount of interest. We conclude that the sum of $260,000 each year for six years should be deducted in computing Matson's net income subject to tax.

CAPITAL GAINS

Since the hearing in No. 869, Matson has sold two Libertys and two Victorys, and three C-3's have been traded to its wholly-owned subsidiary, Oceanic, for four C-2's, three of which were later sold by Matson. The state argues that for 1961 the capital gain realized by Matson from the sale of ships in 1961, some $1,-774,000 should be credited to the rate-payers. It is contended that the ships were depreciated "down to low net book values through the excessive annual depreciation charges and, thereby, Matson charged to the rate-payers in the trade a total of vessel depreciation expenses over the years which was substantially greater than the depreciation expenses with which the rate-payers should have been burdened." The State concludes that "the capital gain enjoyed by Matson measures the amount by which those past annual depreciation charges were excessive", and that the "excess measured by the capital gain on the sale of the vessels ought to be credited now to the rate-payers."

Public Counsel does not subscribe to the State's position. Instead, he proposes that capital gains should be credited to annual depreciation expense and only after realization. This could be accomplished by spreading the deduction over a uniform period, as an annual deduction against over-all depreciation vessel expense. Assuming the useful life of a vessel to be from one to 20 years, it is suggested that 10 years would be a fair period for the deduction; this would retain the straight-line 20-year life theory of vessel depreciation, to which Public Counsel adheres. By this method, Public Counsel concludes that the adjustment for 1961 would be $180,807.

Matson urges that, while it may have realized a capital gain from the sale of the vessels, this does not mean that it has realized any capital gain vis-a-vis its rate-payers; that the capital gain for tax purposes arises merely from the fact that the vessels were sold for an amount greater than their depreciated tax basis; and that for rate purposes the rate-payers have not in reality returned capital to Matson except to the extent that it has actually received its book depreciation accruals and, in addition, a full fair return.

The State proposes that depreciation charges be established, using "realistic" or current market residual values or a 5 percent reducing balance method of charges or a straight-line depreciation with a realistic judgment of the useful life of the vessels. Public Counsel argues that the difference between the undepreciated book value of any vessel withdrawn from the service and its market or sale value should be deducted from the depreciation base of any replacement vessels. Three replacement ships have been brought into Matson's fleet and the acquisition or reconstruction cost should be adjusted, it is contended, to reflect the capital gains realized from the sale of the retired ships. As already noted, Matson's rate base should include ships at their original cost rather than at current market value. Depreciation expenses will be based on actual rather than speculative values. To diminish such expenses by a capital gain would give shippers the capital gain. Shippers are not entitled to receive capital gains any more than they are required to pay for losses on ships or to make capital contributions in the form of excessive depreciation charges. Shippers are required to pay investors the annual capital consumption as depreciation expense for the gradual disappearance of the investment devoted to the trade. Fairness to shippers does not require that they obtain the benefits of investors' profits nor relieve shippers from expenses for depreciation through the replenishment of depreciation reserves with gains received when ships are sold. There should be no deduction from the depreciation base of replacement ships.

ALLOCATION METHODS

Matson operates a passenger as well as a freight service. This necessitates allocation of various expenses between the passenger and freight services.

Matson divides its administrative and general expense into three parts: first, as it relates to shipping and nonshipping activities; second, as it concerns Matson and its wholly-owned (subsidized) subsidiary, Oceanic; and third, as it affects Matson's freight and passenger services. As to the first we agree with the method employed by Matson and the results derived therefrom.

The second formula, which prorates Matson/Oceanic expenses on a revenue basis pursuant to Oceanic's subsidy contract, is opposed by the Association. The Association complains that it is not fair for Matson to assume all expenses not chargeable to Oceanic, because "plainly the result of this allocation method is to place on Matson the entire burden of various expenses which at least in part inure to the benefit of Oceanic." We disagree with the Association in the light of the circumstances and absence of any showing that amounts chargeable to Matson are unreasonable or excessive.

The third stage is the most controversial and is strongly contested. In *Hawaii* Matson used, and the Board approved, the revenue prorate method of allocating expense as between passenger and freight services. In the present case Matson has shifted to expense prorate, which results in a greater amount being allocated to its freight operations.

Interveners contend that for the purpose of these proceedings either a revenue basis of allocation should be used, or a basis of the ratio of vessel expenses, exclusive of cargo handling, in the freighter service to total vessel expenses.

Where direct allocations are impossible or impracticable, expenses should be allocated between the passenger and freight services on the basis of the relation that the expenses incurred in the passenger and freight operations separately bear to the total expenses incurred in the operation of both. Administrative expenses should follow the expenses to which they relate. If revenues were used as a basis of allocating expenses, the increase in revenue resulting from a freight rate increase would result in an increased allocation of expenses. A rate increase might be used as the basis for justifying a further increase in rates. Accordingly, within Matson we have allocated administrative expenses on a voyage expense basis between passenger and freighter services.

ADJUSTED REVENUE AND EXPENSES

After giving effects to the adjustments discussed above, we find and conclude that Matson's projected income statements for 1960 and 1961 in its Pacific coast/Hawaii service, for rate-making purposes, are as follows:

	1960	1961
Revenue	$59,505,000	$57,881,000
Voyage Expense	49,718,432	45,185,132
	9,786,568	12,695,868
Administrative and General Expense	5,514,000	5,481,000
Depreciation	2,196,000	2,629,000
Inactive Vessel Expense	223,000	69,000
Depreciation—511 Funds	105,300	80,394
	8,038,300	8,259,394
	1,748,268	4,436,474
Federal Income Tax	467,995	2,149,101
	1,280,273	2,287,373
Profit of Related Companies	784,693	487,500
Net Income	$2,064,966	$2,774,873

VALUATION AND RATE BASE

Original cost plus betterments are shown as of December 31, 1959, and December 31, 1960, plus a pro rata portion of all improvements and additions made during each year based on that part of the year during which funds were so invested, less a pro rata portion of the funds invested in ships sold during each year based also on that part of the year during which such funds were so invested in those ships. Included in this cost are all section 511 funds employed in the acquisition of vessels, on the basis that such funds represent capital employed in the service regardless of their tax status and therefore should be recognized in the rate base. For 1961 the *Hawaiian Trader* was employed for 50 days and was included in Matson's market value of ships, but as no data was given as to its cost, it has been omitted. The depreciation figure represents the accumulated depreciation as of December 31, 1959, and 1960, including depreciation on section 511 funds invested in the ships. Other property and equipment is shown at original cost depreciated to December 31, 1959, and 1960, plus 50 per cent of the cost of net additions during each year. In the absence of any data as to actual dates of acquisition of other property, 50 per cent has been used as an approximation of the period of use within the year. Working capital is the average voyage expense of the Pacific coast-Hawaii service.

The State argues that depreciation should be computed on the difference between the original cost depreciated and the amount estimated to be realized when the vessels are disposed of rather than the difference between such cost and scrap value. We have held that carriers can charge annual depreciation using a residual value equal to scrap value, *Atlantic & Gulf-Puerto Rico*, supra. We find the amount Matson prudently invested in the vessels devoted to the trade, after allocation and after being depreciated to December 31, 1959, and to December 31, 1960, to be $17,055,671 and $18,215,839, respectively.

In *Atlantic & Gulf-Puerto Rico, supra,* we allowed as working capital an amount equal to one round voyage expense of each ship in the service. Applying the same measure here we find that the fair and reasonable allowance for working capital would be $4,564,906 for 1960 and $3,802,641 for 1961.

The following table sets forth the cost, plus betterments, of the vessels used by Matson in the Pacific coast-Hawaii service, the accrued depreciation thereon, the depreciated value of other property, and equipment, and working capital.

	1960	1961
Vessels—original cost plus betterments	$35,972,673	$36,489,821
Less accumulated depreciation	18,917,002	18,273,982
Net	$17,055,671	$18,215,839
Other property and equipment	3,212,000	4,175,000
Working capital	4,564,906	3,802,641
Total	$24,832,577	$26,193,480

RATE OF RETURN

The next issue is the reasonableness of net income of $2,064,966 in 1960 and $2,774,873 in 1961 (estimated), in relation to Matson's property used in providing the service which produces such a return. A reasonable rate of return is one that is (1) sufficient to produce earnings that meet the carrier's present costs of capital, including fixed charges, such as interest on secured debt, and reasonable dividend requirements for holders of equity obligations; and (2) adequate to attract capital in the future on favorable terms and to pay incidental costs of issuing securities. Protection of existing investors and protection of the carrier through capital attraction should provide returns commensurate with those of enterprises with comparable risks (*F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), *Bluefield Waterworks & Improvement Co.* v. *Public Service Comm.*, 262 U.S. 679 (1923))

A comparison of respondent's business with other transportation or utility-type enterprises affects respondent's ability to meet obligations to investors and to attract capital. In the *Hope* case it was stated: "From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for capital costs of the business. These include service on the debt and dividends on the stock . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." (Page 603—See also *Colorado Interstate Gas Co.* v. *F.P.C.*, 209 F. 2d 717 (10th Cir. 1953)). In the shipping industry a 5-year average return on invested capital for six shipping companies ranged from 7.9 percent to 21.1 percent, averaging 15.5 percent. The return on net worth by 65 of the most profitable of the 500 leading industrial concerns in the country, in the five years 1955 through 1959, was shown to be 15.6 percent, or more.

For the years 1955 through 1959, Moody's 125 industrial common stocks sold at an average of 197 per cent of book value and 24 utility common stocks at an average of 151 per cent of book value. In comparison, the common stock of shipping companies sold at an average of only 43 per cent of book value during the same 5-year period.

Earnings generated by book assets of shipping companies have been discounted by the capital market by more than 50 per cent during the same period that it evaluated monopoly-type utilities at 50 per cent above book value, and that of industrial companies almost 100 per cent above book value. This indicates that the investment market does not consider returns on net worth typified by six shipping companies for the five years 1955-1959 in the same amount of 10.3 per cent, nor returns on invested capital for the same companies in the same period at 15.5 per cent, as adequate to compensate for the risks inherent in the shipping industry in comparison with returns on investment in competing claimants for capital. Average earnings on common stock equity for the five-year period 1955 through 1959, by a representative group of electric companies, gas combination companies, gas distribution companies, and gas pipeline companies, ranged from 11.7 per cent for electric companies to 14.4 per cent for pipeline companies.

Unlike franchised utilities, there are no laws preventing a diminution or abandonment of service by the transfer of ships anywhere in the world where the return is greater. Sale or transfer of ships would be disadvantageous both to shippers and to the economy of Hawaii. Matson is also subject to competition by other carriers who are free to enter the trade, so competition is a factor affecting Matson's ability to attract capital. The attitude of investors toward shipping companies indicates that Matson's allowable rate of return must be commensurate with returns on investments in other enterprises having corresponding risks.

Money must be borrowed in a competitive market, just like any other product or service. The rate of return that is just and reasonable is almost universally recognized as that rate which is adequate to attract additional borrowed capital on favorable terms. Investors weigh the relative attractiveness of an investment in carriers, such as Matson, with the gains expected from other investment opportunities. A carrier must offer inducements in earnings equivalent to those available elsewhere.

Matson was shown to have borrowed 8.7 million dollars of debt capital to finance the acquisition of containers and to convert ships and equipment. This money was obtained on the basis of Matson's general credit, not just the credit of its Hawaii freight operations. Matson claimed inability to obtain the full amount of the capital needed for its conversion program and resorted to leasing of equipment because it could not attract adequate capital to purchase it. The record contains testimony that substantial additional capital expenditures are under consideration in order that the shipping public may be afforded expended and modernized service at lower costs.

A rate base consisting of property valued at original cost depreciated of $24,832,577 and a net income of $2,064,966 in 1960, and of $26,193,480 and $2,774,873 for 1961, will produce a rate of return of 8.32 per cent and 10.59 per cent, respectively, in the two years under review. We find on this record that such rates of return are not excessive.

As previously noted Matson is the rate-making line in the Pacific Coast/Hawaii trade, and the lawfulness of the rates of the other respondents in this trade are determined on the basis of our conclusions with respect to the lawfulness of Matson rates.

As indicated, rates in the Atlantic-Gulf/Hawaii trade in the past have been based on the competitive relationship between that trade. The general increases in the Atlantic-Gulf/Hawaii trade under consideration in these proceedings amount to the dollar equivalent of the percentage increases in the Pacific Coast/Hawaii trade. Except as to the Galveston sugar tariff, these proceedings contain no specific evidence or arguments disputing the evidence presented by the respondents with respect to the lawfulness of the rates in the Atlantic-Gulf/Hawaii trade. Parties opposing the increases under consideration in these proceedings being generally of the view that our determination as to the lawfulness of the rates in the Pacific Coast/Hawaii trade would likewise determine the lawfulness of the increases in the Atlantic-Gulf/Hawaii trade. We agree.

Exceptions and proposed findings not discussed in this report, nor reflected in our findings, have been considered and found not justified.

We find and conclude that the rates, charges, classifications, rules, regulations, tariffs and practices contained in the new schedules under investigation in Docket No. 869 and No. 941, including the 12½ percent and the 10 percent general increases in rates applicable to all cargo, except tinplate, molasses in bulk, dry fertilizer, fuel oil, and raw sugar in bulk between the Pacific coast and Hawaii, and the dollar equivalent increases applicable to transportation between Atlantic-Gulf ports and Hawaii, are just and reasonable.

We further find and conclude that the rates, rules, conditions, charges, tariffs, regulations, and practices stated in the schedules under investigation in Docket No. 935 naming freight rates for raw sugar in bulk from Hawaiian Island ports of call to Crockett, California, and Galveston, Texas, are just and reasonable.

An order discontinuing these proceedings will be entered.

ORDER

FEDERAL MARITIME COMMISSION

No. 869

PACIFIC COAST/HAWAII AND ATLANTIC-GULF/HAWAII GENERAL INCREASES IN RATES

No. 935

HAWAII/CROCKETT AND HAWAII/GALVESTON BULK SUGAR RATES

No. 941

HAWAIIAN RATES—TEN PERCENT INCREASE (1961)

Full investigation of the matters and things involved in these proceedings having been had, and the Commission on June 28, 1962, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates, charges, tariffs, and regulations herein under investigation are just and reasonable;

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, June 28, 1962.

(Sgd.) GEO. A. VIEHMANN
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 896

UNAPPROVED SECTION 15 AGREEMENT—COAL TO JAPAN/KOREA

Decided August 2, 1962.

Respondents (except Isbrandtsen and Isthmian) found during the period May-July 1958 to have carried out an unapproved agreement which established minimum rates for the carriage of coal from U. S. Pacific Coast Ports to Korea in violation of section 15, Shipping Act, 1916, and to have failed immediately to file the agreement with the Federal Maritime Board in violation of said section.

A rate-fixing agreement is carried out where the parties quote or otherwise adhere to the agreed rate.

A claim of disinterest by a carrier who participated in an agreement covered by section 15 of the Shipping Act, cannot be allowed absent positive evidence that steps were taken at the time to manifest its dissociation from the agreement.

The Federal Maritime Commission has no jurisdiction over the assessment of penalties for past violation of the Shipping Act, and matters offered in mitigation thereof are not relevant in Commission proceedings.

Warner W. Gardner and *Robert T. Basseches,* for respondents American Mail Line Ltd., American President Lines, Ltd., Pacific Far East Line, Inc., States Steamship Company and Waterman Steamship Company.

Edward D. Ransom, for respondents States Marine Lines, Inc., and Isthmian Lines, Inc.

Allen R. Moltzen, for intervenor Consolidated Coal Operators.

Wm. Jarrel Smith, Jr., and *Robert J. Blackwell,* Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* and JAMES V. DAY, *Commissioner*

BY THE COMMISSION:

This proceeding was instituted by our predecessor, the Federal Maritime Board, on its own motion, to determine whether respondents had entered into and carried out an agreement fixing and regulating rates and conditions for the transportation of coal from United States Pacific Coast ports to Japan and Korea, without Board approval as required by section 15, Shipping Act, 1916 (the "Act").

Hearings were held before an Examiner, briefs were submitted by the parties, and thereafter an Initial Decision was issued by the Examiner, to which all parties filed exceptions. We heard oral argument on May 1, 1962.

All of the respondents are U.S. flag lines, namely, American President Lines, Ltd. (APL), Pacific Far East Line, Inc. (PFEL), Waterman Steamship Corporation (Waterman), States Steamship Company (States), States Marine Lines, Inc. (SML), American Mail Lines (AML), Isbrandtsen Steamship Co., Inc. (Isbrandtsen), and Isthmian Lines, Inc. (Isthmian). Respondents, with the exception of Isbrandtsen, are members of the Pacific Westbound Conference (PWC). All of the respondents are members of the West Coast American Flag Berth Operators (WCBO). Both PWC and WCBO operate under agreements approved pursuant to section 15 of the Act.

From 1952 until 1956 or early 1957 coal moved to Korea via the Military Sea Transportation Service (MSTS) as defense support cargo financed through International Cooperation Administration funds. Thereafter the responsibility for procuring and shipping these coal cargoes was shifted to the General Services Administration (GSA). Respondents had carried such GSA coal shipments at the PWC tariff rate, averaging $18-$20/ton FIO (free in and out) On September 1, 1957 the PWC opened the rate on this coal, leaving its member lines free individually to quote or set any rate for the carriage thereof. This "open" coal rate under the PWC continued throughout the period here in question.

After the coal rate was opened, it declined rapidly due to competition. The carriers in the trade continued to underbid each other to the point where the rate was approaching the cost of carriage. In April and May of 1958 respondents, with the exception of Isbrandtsen and Isthmian, held three meetings which were called by the WCBO secretary and were characterized by respondents as meetings of the WCBO. At the final meeting on May 5, 1958 respondents agreed to adhere to a minimum rate on coal of $10.75 per long ton FIO to Pusan, Korea on parcel lots, with corresponding rates to other Korean ports.

The WCBO section 15 agreement, No. 8186, authorizes its members jointly to negotiate and set rates for MSTS cargo and related shipper's services, *i.e.*, Army, Navy, Air Force and other United States military services. It includes the following relevant provisions:

WHEREAS, the undersigned common carriers * * * have from time to time been carrying cargo to and from United States Pacific Coast ports * * * for and at the request of the Military Sea Transportation Service and related "Shipper Services" (Army, Navy, Air Force, and other United States military services), and

WHEREAS, it is in the interest of the undersigned carriers and of the Military Sea Transportation Service that the carriers, parties hereto, be in a position to furnish promptly accurate data to the Military Sea Transportation Service and such related Shipper Services as to cargo transportation costs, space availability, sailing schedules, and related matters and to negotiate and establish rates, terms, and conditions for the carriage of such cargo.

NOW, THEREFORE, the undersigned carriers agree as follows:

* * * * * * *

2. That they may meet from time to time and discuss cargo transportation costs, space availability, sailing schedules, and related matters, and agree as to rates, terms, and conditions of carriage of such cargo, and as to matters relating thereto, which are to be used as a basis for discussions with Military Sea Transportation Service and said related Shipper Services for the purpose of negotiating rates, terms, and conditions for the carriage of such cargo; they may also negotiate as a body rates, terms, and conditions which become binding on all parties hereto.

3. * * * Except as otherwise provided for, all actions within the scope of this agreement shall be by unanimous vote of the entire membership. All actions so taken shall be binding on all parties hereto. Records of all final actions so taken shall be furnished promptly by the secretary to the Federal Maritime Board.

The aforesaid minimum rate agreement between respondents did not have the unanimous consent of all members of the WCBO and it was not reported to the Board.

After inviting bids on two cargoes of coal destined for Korea, the GSA on July 2, 1958 accepted the bid of Consolidated Coal Operators (Consolidated), an intervenor herein, to supply four parcels (17,600 tons total) to be shipped from Stockton, California. Before submitting its bid Consolidated asked all respondents except AML for freight quotations and received same at the $10.75 rate. It did not ask them for and did not receive a firm bid or option on space. In computing its bid, however, Consolidated used $10.40 per long ton for freight charges. After the GSA acceptance of its bid, Consolidated's broker contacted respondents regarding the carriage of the coal and attempted to get a $10.00 rate. These efforts were unsuccessful because respondents adhered to the $10.75 "floor" they had set. On July 8, 1958 Consolidated orally booked the coal with APL at the $10.75 rate and two days' later the formal charter party was executed. The four parcels were lifted by APL during July 1958. APL refused a request from Consolidated for an "address commission." This denial was in conformity with the agreement of respondents.

On July 9, 1958 a WCBO meeting was held at the instance of PFEL. At that time PFEL, in the belief that APL had secured the Consolidated cargo by breaking the rate, accused APL of bad faith and announced that the agreement was terminated so far as PFEL was concerned. The other parties to the agreement considered it terminated as of that time.

When Consolidated was seeking prices from respondents for the carriage of this coal, it omitted AML because this respondent did not serve Stockton. AML, though a participant in the meeting at which respondents agreed to the coal rate "floor," maintains that it was "disinterested" and would not have quoted a rate on coal even if it had been approached because coal carriage is incompatible with the carriage of its usual cargoes of flour and paper. PFEL, APL, States, SML and Waterman, the five remaining respondents, all quoted coal rates in accordance with the agreement. Only APL and SML made any firm offers to carry coal. SML's offers were "options" for full shiploads at the $10.75 rate and not parcels to which the agreement was limited. Some of the respondents did not have vessels in position for the carriage of the Consolidated parcels and none of the respondents actually carried any coal except APL, which as indicated lifted the four Consolidated parcels.

DISCUSSION AND CONCLUSIONS

The facts for all practical purposes are undisputed. It is clear that the respondents with the exception of Isbrandtsen and Isthmian, who did not participate, reached an agreement in May 1958 using WCBO machinery by which they fixed a minimum rate on the carriage of coal in the Pacific Coast-Korean trade. The question is whether respondents thereby violated section 15 of the Shipping Act of 1916. The Examiner found that they did and that there were multiple violations in that the agreement was not authorized by the WCBO, was not immediately filed with the Federal Maritime Board for approval, and was carried out without such approval. We agree fully with these findings.

The respondents have contended throughout the proceeding that their coal agreement was within the scope of the approved WCBO section 15 agreement. Although the WCBO Agreement was obviously intended to apply to cargo for MSTS and related shipper services, *i.e.*, Army, Navy, Air Force and other United States military services, respondents argue that the latter part of the second paragraph of the agreement gave them virtually unlimited power to set rates in concert for cargo other than that of MSTS and related shipper services. We have heretofore set out the WCBO agreement at some length and shall repeat here only the paragraph allegedly containing this broad independent authority with the portion respondents rely on underscored:

> That they may meet from time to time and discuss cargo transportation costs, space availability, sailing schedules, and related matters, and agree as to rates, terms, and conditions of carriage of such cargo, and as to matters relating thereto, which are to be used as a basis for discussions with Military Sea Transportation Service and said related Shipper Services for the purpose of negotiating rates, terms, and conditions for the carriage of such cargo; they may also negotiate as a body rates, terms, and conditions which become binding on all parties hereto.

Respondents claim the underscored language is not limited by the first part of the paragraph, preceding the semicolon, or by the agreement as a whole. An extended discussion of this position would serve little purpose. Respondents attempt to read the language out of context and thereby import into the agreement wide authority that is quite beyond anything that was intended by them. The Examiner interpreted this provision according to its plain import. He correctly concluded that it authorizes the WCBO members to meet, discuss and agree upon rates to be used as a basis for discussion and negotiation with MSTS or its related

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shipper's services, and nothing more. The first part of the paragraph covers the preparation and discussion stage among the WCBO members prior to negotiation with the shipper. The latter part of the paragraph provides for their negotiations as a body with the shipper. Significantly, this latter part which respondents contend is independent also includes language binding all of the WCBO members to the results of the final negotiations with the shipper—an important stipulation clearly pertinent to the entire paragraph.

Respondents also argue that the clause is ambiguous and indicate it should be construed in their favor, citing in this connection cases involving the strict rule of construction of penal statutes. We see nothing ambiguous in the language as written. It becomes ambiguous, however, when the attempt is made to engraft upon it respondents' interpretation. Nor is there here any basis for an analogy to the rule applicable in construing a penal statute. In issue is not a penal statute but an agreement respondents themselves wrote and now seek to construe in a manner that is contrary to its plain meaning and intent.

The respondents' coal agreement was not one limited to MSTS cargo and related services and it was therefore beyond the scope of the approved WCBO section 15 agreement. Admittedly the coal agreement was not filed with the Board. However, respondents argue that this is not a violation of section 15, and they also contend that only APL carried out the agreement. The Examiner ruled against them on both counts. He found that all of the respondents (excepting Isbrandtsen and Isthmian) carried out the agreement and all were jointly responsible. We fail to see how he could have found otherwise. To say that only APL which lifted the coal is responsible, would do violence to section 15. A rate-fixing agreement is effectuated by presenting a united front, and participation by simply refusing to carry at less than the agreed rate quite effectively advances the cause of the parties. Here the cause or objective was to stabilize the coal rate at a minimum figure and this respondents achieved by concerted action. It matters not who carried this coal. What is significant is that the respondents jointly agreed to and did set a "floor" on the rate to which they adhered, as Consolidated's experience demonstrated. They thus restricted or eliminated competition. Their agreement would have been a nullity and failed to serve the desired anticompetitive purpose unless all of them had abided by its terms. This is not a new concept by any means. See *Agreements and Practices,* *etc., Gulf & South Atlantic Havana Steamship Conference,* 6 F.M.B. 215 (1961) and *Beaumont Port Comm v. Seatrain Lines, Inc.,* 2 U.S.M.C. 500 (1941), *modified on other grounds* 2 U.S.M.C. 699 (1943) . It is immaterial that some of the respondents, though quoting the agreed rate, did not offer space, or did not have vessels in position, for the Consolidated coal. The rate agreement, moreover, was not made for these particular shipments but was generally applicable to Korean coal.

AML's situation requires some additional comment. It claims to have been "disinterested" in the subject of coal and as proof thereof says that it did not quote coal rates since coal is not compatible with its "ordinary" cargoes. The trouble with this claim is that it comes too late. AML did not express its alleged disinterest at the time. Instead it participated in at least the May 5, 1958, meeting at which respondents reached their coal rate agreement and under the WCBO unanimity rule must have voted for or assented to the arrangement. It was thus a party to the agreement. How are we to know that AML was not interested in coal? If it did not quote a coal rate, that could have been due to any of a number of reasons. Perhaps it was not asked. Consolidated did not ask it for a rate on the four parcels of coal hereinbefore discussed, but that was because they were to be loaded at Stockton which AML did not serve.

The anticompetitive activity covered by section 15 of the Shipping Act is permissible, if at all, under specified conditions which must be strictly complied with. Persons subject to the Act who participate in such activity must be held responsible therefor absent timely and positive steps evidencing their disinterest or dissociation. Unless this is done, it will be next to impossible in many instances to fix responsibility and the door will be thrown open for endless speculation and uncertainty over matters as to which the law commands precision. Nor is it essential that AML be shown to have actually quoted the agreed coal rates. It entered into the unauthorized agreement to limit competition. It is sufficient that one or more of its colleagues in this plan quoted the agreed rates or took other action to carry out the plan.

Respondents, moreover, failed immediately to file their agreement with the Board, consequently even lacking any effectuation of the agreement they breached section 15 of the Act. In our recent decision in *Unapproved Section 15 Agreements—South African Trade,* 7 F.M.C. 159 (1962) we stated that failure to file an agreement requiring section 15 approval is a separate and distinct violation of the Act, and set forth in some detail the bases of this conclusion (see p. 191–3 of said Report). Respondents' argument to the contrary must therefore be rejected. Furthermore, we agree with the Examiner that the amendment to section 15 enacted in October 1961 (Public Law 87–346), so far as it related to this matter, was simply a clarification or reinforcing of the existing law, and not a substantive change therein. We so indicated in our decision in the *South African* case, *supra.*[1]

There are some aspects of the Examiner's decision with which we disagree. He accepted respondents' contention that even if they violated section 15, the infraction was "purely technical." Respondents claimed they acted under a mistaken assumption and in good faith in using WCBO machinery to set coal rates, and that they could have accomplished the same agreement with no trouble had they employed the Pacific Westbound Conference machinery. While recognizing that respondents' testimony to this effect was susceptible "to the natural suspicion that it is self-serving to a degree," the Examiner made the statement that the testimony "is uncontradicted in the record and must be accepted as substantial and probative." Hearing Counsel excepted to this. Perhaps the Examiner did not intend quite what he implied but in any case we think we should clear up any possible confusion in the matter. Testimony does not become sacrosanct when uncontradicted nor is self-serving testimony automatically to be discredited. These are but factors to be considered in determining the validity and probative value of the testimony and the inferences that may properly be drawn therefrom in light of all the evidence.

We do not accept the testimony referred to here. It may not be contradicted but its validity is certainly open to substantial doubt. If respondents could have readily used the PWC to agree on coal rates, it is a fair question why they did not do so. We are by no means persuaded that the answer is that they simply made an honest mistake. The coal rate that was thrown open was a PWC rate and not a WCBO rate, as respondents well knew. Further-

[1] Respondents' argument that failure to file is not a violation of section 15 contains a suggestion that the Board's order of investigation which instituted the proceeding did not put failure to file the agreement in issue. However, the order admittedly raised questions as to whether there was an unfiled agreement and whether it had been carried out, and called for an investigation under section 15 of the Act. This we think necessarily put in issue any activity violative of that section, including failure to file. If the order was not as exact as it might have been, it is nevertheless to be remembered that it was an order for an administrative investigation and not a statement of charges in a penal action. It constituted adequate notice to the parties of the matters of fact and law under inquiry which is all that is required in this type of proceeding. See *Unapproved Section 15 Agreements—South African Trade, supra.*

more, the WCBO as before noted had a limited purpose, and rather obviously so. At least only by strained and difficult construction can the WCBO be enlarged, even colorably, to include the respondents' agreement. Consequently, if indeed means were otherwise readily available to accomplish the same thing, it was certainly unreasonable to have attempted the tortuous WCBO route.

We shall not pursue the point further because it is associated in any event with an immaterial issue as to the respondents' motives. We suppose there could be an occasion where evidence of the parties' motive or intent is useful to the proper disposition of an investigation by this Commission of unlawful conduct. But where, as here, the objective is only to show a so-called "technical viola-irrelevant. This ground, also, we have been over in the *South African* case, *supra.* As stated there (7 F.M.C. 159, at 164–5, 194, 197) proceedings by this Commission inquiring into allegedly unlawful activity are regulatory in nature, not penal. They are instituted for the purpose of investigating and where necessary, insuring compliance with the law through the issuance of appropriate orders or rules to govern present or future conduct. The Commission has no power to punish past conduct and matters in mitigation or extenuation thereof are not relevant in its proceedings. For like reasons, the referral of law violations to the Department of Justice for consideration is not a proper subject of litigation in our proceedings.

Here the Examiner, after finding that the violations were "technical," indulged in respondents' fundamental misconception that the Commission could excuse them from any penalty. The Examiner concluded that they should be excused and that this could be accomplished by discontinuing the proceeding without referral to Justice. But the Commission as we have said lacks the power to assess penalties and it manifestly cannot excuse their assessment, by omitting to refer to Justice or by any other means. Prosecution and the assessment or waiver of penalties are matters that rest within the province of the Attorney General and the courts. In the *South African* case we made clear that our policy is to refer violations to the Justice Department and it may be assumed hereafter that the policy is being pursued, the same as it has been heretofore.

In conclusion, it is worth repeating that section 15 of the Shipping Act—

> affords little room for so-called technical violations. To us the breadth and force of its language literally implore attention and obedience, or at the very

least inquiry if in any doubt as to the propriety of proposed conduct. (*South African* case, *supra*, at 197.)

It is not necessary under section 15 to impute an evil motive. For the purposes of this statute nonfeasance is as objectionable as malfeasance. There is little, if any, excuse for failing to file with the Commission, or at the least make inquiry of it as to whether an agreement comes within the scope of section 15 and therefore must be filed and approved. We cannot view such failure lightly no matter what the parties' state of mind might have been, especially when these easy and safe courses are available to them.

In respondents' case, the unlawful activity herein found seems to be in keeping with a loose approach to the requirements of section 15. Even though they were allegedly acting within the framework of WCBO they did not report their final agreement to the Board. Such reporting of final actions is a WCBO stipulation apparently long ignored by respondents. They also have been interpreting the WCBO unanimous vote provision to only require unanimity by those members having an interest in the subject under consideration, whereas the approved agreement does not read this way and their interpretation is at odds with the meaning given unanimous vote provisions in general. However, these and other items that could be mentioned are not directly involved in this case and we shall drop the subject with an admonition to the WCBO members that they should put their house in order.

We find and conclude that respondents (with the exception of Isbrandtsen and Isthmian) failed to file an agreement fixing coal rates to Korea, which required approval under section 15 of the Shipping Act, 1916, and carried such agreement out without the approval of the Federal Maritime Board, both in violation of section 15.

Since respondents did not operate under the agreement after July 1958, there is no occasion for us to issue an order against them and the proceedings will be discontinued.

FEDERAL MARITIME COMMISSION

No. 952

INVESTIGATION OF TARIFF FILING PRACTICES OF CARRIERS BETWEEN CONTIGUOUS STATES OF THE UNITED STATES AND ALASKA

Decided August 2, 1962.

William Shimmel, an individual, (not now operating) has not operated as a common carrier by water in this trade.

Dan Starkweather, The Alaska Towing Co., Inc., has not operated, and does not operate as a common carrier by water in this trade.

Ghezzi Trucking, Inc., has filed with the Federal Maritime Board, effective June 28, 1961, a tariff covering traffic between Los Angeles, Calif., San Francisco, Calif., Portland, Ore., Seattle, Wash., and Alaskan ports, thus complying with the filing requirements of section 2 of the Intercoastal Shipping Act, 1933, as to common carriers by water, operating in that trade.

This proceeding is discontinued as to the three respondents named above.

Kimbrell-Lawrence Transportation, Inc., Alaska Outport Transportation Association, and Ketchikan Merchants Cooperative Association, Inc., have been and are operating as common carriers by water in this trade, without filing tariffs with this Commission, thus violating section 2 of the Intercoastal Shipping Act, 1933. These three respondents are ordered to cease and desist from their operations until they comply with section 2 by filing with the Commission tariffs covering their said operations, and keeping open to public inspection schedules showing their rates, fares, and charges in this trade.

Julian C. Rice, for Ghezzi Trucking, Inc., respondent.

Raymond J. Petersen, for Kimbrell-Lawrence Transporation, Inc., respondent.

Martin P. Detels, Jr. for Alaska Outport Transportation Association, respondent.

Alan F. Wohlstetter, for Ketchikan Merchants Cooperative Association, Inc., respondent, and Aleutian Marine Transportation Company, intervener.

Ira L. Ewers and *Stanley B. Long* for Alaska Steamship Company, intervener.

Robert J. Blackwell and *Norman D. Kline* as Hearing Counsel

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

The Federal Maritime Board, our predecessor, initiated this proceeding to determine if certain parties have been operating as common carriers by water in the trade between Alaska and other states without filing tariffs with the Board, thus violating section 2 of the Intercoastal Shipping Act, 1933 (Act).

The parties, named as respondents, are William Shimmel, an individual (Shimmel); Dan Starkweather, an individual doing business as Alaska Towing Co., Inc. (Starkweather); Ghezzi Trucking, Inc. (Ghezzi Truck); Kimbrell-Lawrence Transportation, Inc. (KLT); Alaska Outport Transportation Association (AOTA); and Ketchikan Merchants Cooperative Association, Inc. (KMCA).

The pertinent facts are stated in numbered paragraphs below. We agree with the Examiner's conclusions as to the common carrier, noncommon carrier status of respondents Shimmel, Starkweather, KLT, AOTA, and KMCA.

AS TO SHIMMEL:

(1) This respondent, between May 1950 and May 17, 1961, operated his power barge between Seattle, Washington, and Alaskan ports.

(2) Shimmel's operation was conducted as follows: He would bareboat charter his barge and operate it for the charterer under some character of informal agreement, sometimes partaking of the nature of a joint venture. There is no indication that he conducted anything comparable to a recognized service. As an example, he would carry a cannery's fish, and his compensation would be paid, at least in part, by crediting his account with the cannery which canned his fish for him.

(3) On May 17, 1961, Shimmel's power barge burned, and ater sank. He has not operated since.

We conclude that Shimmel has not operated and is not operating as a common carrier by water in this trade, and that as to him, this proceeding should be discontinued.

AS TO STARKWEATHER:

(4) This respondent has since 1955 operated between ports in Alaska, and between Washington ports and Alaskan ports with a tug and barge.

(5) Towing is his most important activity, but he has carried building materials, construction equipment, and used automobiles north to Alaska.

(6) Starkweather's operations are wholly irregular, and his business dealings informal in their nature. He neither advertises nor solicits business. It is necessary for those who wish to employ him to reach him at home in Alaska, or at a Seattle hotel, sometimes through his wife. He utilizes neither formal contracts of affreightment nor bills of lading, and occasionally operates upon oral understandings.

(7) His barge is open and exposed to the elements, and hence unsuitable for transportation of ordinary, dry cargo.

(8) His rates are computed at $500 per day for the tug and barge on an estimated duration of the trip, and he makes no rates upon weight or measurement of cargo. He may make more than anticipated on a short trip or actually lose money if the trip is onger than anticipated.

(9) He operates on no fixed schedules or routes but will go at any time to any safe port in southeastern Alaska.

We conclude that Starkweather has not operated and does not operate as a common carrier by water in this trade, and that as to him, this proceeding shall be discontinued.

AS TO GHEZZI TRUCK:

(10) The Board's order initiating this proceeding did not name Ghezzi Trucking, Inc. It named "Alfred C. Ghezzi, dba Ghezzi Towing Co., and/or Ghezzi Barge Co." No appearance was entered at the Prehearing Conference held August 23, 1961, or the Hearing on Subpenas held October 6, 1961 for the abovenamed, or for any party named "Ghezzi". On October 13, 1961, Julian C. Rice as attorney for "Alfred J. Ghezzi, Jr. and Ghezzi

Trucking, Inc." filed a "Motion for Dismissal of the Responden Alfred C. Ghezzi". This motion, notwithstanding its title, actuall prays that "Alfred J. Ghezzi, Jr. and Ghezzi Trucking, Inc." b dismissed "if in fact they have ever been a party as respondent in this investigation." This motion states that "the person actuall served with the original order in this matter" presumably, a cop addressed and mailed to Alfred C. Ghezzi, dba etc. "as in fact Alfred J. Ghezzi, Jr." The motion states: "It is conceivable tha there has been an error in identity, and that Alfred C. Ghezzi * * * and Ghezzi Trucking, Inc. are in fact one and the same,' and "Alfred C. Ghezzi * * * is believed is one and the same a Alfred J. Ghezzi, Jr., and there has been nothing more than a error in stating the proper name." The basis of the motion t dismiss was (1) that Alfred J. Ghezzi, Jr. is not doing busines as Ghezzi Towing Co. and/or Ghezzi Barge Co., in which styl Alfred C. Ghezzi was named in the Board's order of investigation and (2) that Ghezzi Trucking, Inc., an Alaska corporation o which Alfred J. Ghezzi, Jr. is president, is a common carrier i the intercoastal trade, and on June 26, 1961, filed with the Boar its tariff effective June 28, 1961. Hearing Counsel opposed thi motion upon the ground that the Board should determine afte the hearing if Ghezzi Towing Co. and/or Ghezzi Barge Co. ar one and the same as Ghezzi Trucking, Inc., and upon this groun the Commission on November 30, 1961, denied the motion t dismiss.

(11) The list of appearances in the transcript of the hearin contains the name of Julian C. Rice, on behalf of "Alfred Ghezz Jr." When called as a witness by Hearing Counsel, Julian C. Ric testified that he represented "Alfred Ghezzi." However previou to the hearing, by letter to the Board dated August 1, 1961, Julia C. Rice entered his appearance "on behalf of Alfred C. Ghezz dba Ghezzi Towing Co., and/or Ghezzi Barge Company."

(12) The only evidence with respect to any Ghezzi individua or organization is the testimony of Julian C. Rice. When on th stand, Mr. Rice proposed to file in connection with his motion t dismiss, described above, an affidavit from "Mr. David" not other wise identified, "covering those points which haven't been covere in my testimony here today". Hearing Counsel, in reply to M Rice's request, stipulated that "this affidavit from Mr. Ghezzi should be late-filed as an exhibit "covering the identical points tha you (Mr. Rice) testified to here, namely, to avoid the fact tha

your testimony might have been hearsay." The affidavit was never filed.

(13) On June 23, 1961, a Ghezzi Truck tariff covering traffic between Los Angeles, Calif., San Francisco, Calif., Portland, Ore., Seattle, Wash., and Alaskan ports was mailed to this Commission. This tariff became effective on June 28, 1961.

The Examiner concluded that Ghezzi Trucking, Inc. was operating as a common carrier in interstate commerce prior to June 28, 1961, without an effective tariff on file here, and hence in violation of section 2 of the Act. Although no Ghezzi exceptions have been filed, we have weighed the evidence with respect to this respondent, and in our opinion, it does not support the Examiner's conclusion that Ghezzi Truck has violated the Act. (No question as to credibility of witnesses is involved.) The Examiner's conclusion as to Ghezzi Truck's pre-June 28, 1961 operations is based on a specific finding that its counsel "stated that respondent (Ghezzi Truck) had been operating as a common carrier in interstate commerce prior to June 1961 without having filed a tariff with the Federal Maritime Board." The Examiner describes this testimony as "evidence introduced on behalf of this respondent" Ghezzi Truck. As Mr. Rice, according to the transcript, was "called as a witness", presumably by Hearing Counsel, who directly examined him, the accuracy of the description is at least questionable. More important the statement in question (that Ghezzi Truck had been operating as a common carrier prior to June, 1961, without having filed a tariff with the Federal Maritime Board) was not made. The witness did testify at one point that "I believe at times he (Ghezzi) was actually engaged as a common carrier", but immediately destroyed any weight this statement might carry (even as to the individual he was talking about) by stating that it "is my interpretation from some facts that have been given me." Again, he testified that "it was Mr. Ghezzi's intent to engage as a common carrier", but by continuing the sentence, "and he did attempt to make a filing of what he thought was a tariff with the Federal Maritime Board sometime in the first part of June 1961" makes it quite impossible to construe this as an affirmation of past common carriage, even by the individual, Ghezzi. Mr. Rice testified that in June (prior to June 23) 1961 "I looked the thing over and felt that he had to cease any operations at that time until such time as he had a proper tariff on file", but continued "it is my understanding that he did so from what I know and *did not commence acting as* *a common carrier in this trade until such time as the tariff was actually filed"* (sic).

We are unable on this record to find that Ghezzi Truck operated as a common carrier or otherwise prior to June, 1961. The record is devoid of any evidence that it did, and also of any evidence as to ports served, frequency of service, cargo carried, advertising, charges, or solicitation of business by Ghezzi Truck.

AS TO KLT:

It is quite clear that we cannot make findings or conclusions with respect to the common carrier, non-common carrier status of this respondent if, as alleged in its exceptions, the record before us is that of a proceeding in which the examiner denied this respondent full and fair hearing and due process of law. We would take no action as to KLT if we agreed with KLT's contention that as to it, the evidentiary hearing was unfair, even if such "unfairness" was not serious enough to amount to a denial of due process.

The facts relevant to KLT's contention in this regard are stated in the lettered paragraphs immediately following:

(a) KLT was represented at the hearing by Raymond J. Petersen. Mr. Petersen called no witnesses and introduced no exhibits, but did cross-examine Ed. L. Kimbrell (Captain Kimbrell), president of KLT, who was called and directly examined by Hearing Counsel.

(b) During Captain Kimbrell's testimony, exhibits 3 to 15, inclusive, were introduced in evidence. Mr. Peterson objected to only one, exhibit 5. With respect to this exhibit the Examiner stated that "Exhibit No. 5 will be received in evidence in order to avoid confusion to questions that have been asked on the record. Otherwise, unless Captain Kimbrell was asked some questions regarding Exhibit 5, it will be used for no other purpose."

(c) With respect to exhibit 5, the Examiner in his initial decision, said:

At the hearing an exhibit identified as No. 5 was offered in evidence by the Hearing Counsel. This exhibit had been prepared by an employee of the Federal Maritime Commission from records of the respondent (KLT). The exhibit contains information concerning a northbound voyage made by respondent in 1961, and is alleged by Hearing Counsel to be representative of other voyages. Prior to offering the exhibit in evidence the President of respondent corporation had been queried concerning the exhibit. Neither the underlying documents nor the agent who had prepared the exhibit was present at the hearing. Upon objection to receipt in evidence of the exhibit by counsel for respondent, the exhibit was received for the limited purpose of being available for reference as to questions the respondent's President had answered concerning it. Such answers generally tended to becloud rather than substantiate data in the exhibit. In the circumstances, none of the findings of fact or conclusions of law herein made concerning Kimbrell-Lawrence Transportation, Inc. is based in any degree upon the aforesaid exhibit.

(d) When the Examiner was ready to set dates for brief-filing, etc., counsel for Alaska Steamship Company, a common carrier in the trade, which had intervened, was permitted (no party objecting) to make an oral statement on Alaskan transportation problems in general, and the problems of common carriers by water in the Alaska trade, particularly. This statement summed up at most to an informal complaint about the scope and adequacy of the proceeding. It was in no sense an oral argument by counsel with respect to the common carrier, non-common carrier status of his client or KLT. Alaska Steamship Company is admittedly, a common carrier.

(e) After Mr. Long's statement, and a ruling that a motion to dismiss as to KLT must be in writing, to which Mr. Peterson acceded, the following was said:

Mr. Petersen: Perhaps I might be afforded the same right that was given to Mr. Long, to make a short statement to the Examiner.

Examiner Sweeney: If you care to.

Mr. Petersen: I mainly wanted to point out this, that I am not certain that it has been made clear in the course of this investigation the unique position that Kimbrell-Lawrence Transportation is in because, compared with other respondents and the intervener Alaska Steamship Company—

Mr. Wohlstetter: (Interrupting) Excuse me, Mr. Petersen, I don't mean to interrupt but I feel that it is necessary to do so to protect the rights of the intervener in this proceeding, Aleutian Marine Transportation Company. Mr. Examiner, I must object to what is going to be a legal argument and discussion of facts produced at this hearing prior to the submission of brief. I had no objection to Mr. Long's statement because it covered the position of the Alaska Steamship Company which you will recall I inquired about at the inception of this hearing and related to carriers who have not been named respondents in this proceeding.

I think it would confer an unfavorable advantage upon the respondent Kimbrell-Lawrence to argue this matter orally at this time before the Examiner, prejudicing the position of Aleutian Marine Transport who will take the position that Kimbrell-Lawrence Transportation Company is a common carrier required to file tariffs.

Examiner Sweeney: In view of your objection, we will hear no further from Mr. Petersen then on this mater.

* * * * * * *

Mr. Petersen: Mr. Sweeney, I don't like to labor a point, but Mr. Wohlstetter's statement to you, not withstanding, are you aware or I should say is it within your immediate attention that Rule 10 X does provide that a request for oral argument at the close of testimony will be granted or denied by the presiding officer at his discretion? I might say that if Aleutian Marine is going to be prejudiced by anything we say, we feel that we have already been prejudiced by anything that Mr. Long has said. I don't understand the import of your ruling. One party is allowed to address the court verbally and someone else is not.

Examiner Sweeney: Mr. Long made a statement in lieu of presenting testimony or witnesses.

Mr. Petersen: I presented no witnesses.

Examiner Sweeney: You have exhibits, have you not?

Mr. Petersen: I have no exhibits.

Mr. Wohlstetter: Mr. Examiner, nobody in this room objected to Mr. Long's making a statement, and I certainly didn't acquiesce in it with an idea of setting a standard for this procedure; and as far as the oral argument at the end of the hearing, that has customarily been permitted when no briefs have been filed as a substitute for the filing of briefs.

Mr. Petersen: I appreciate Mr. Wohlstetter's ernest [sic] desire to represent his client. I think at this point we are both reading the same book.

Examiner Sweeney: I have already ruled on it, Mr. Petersen.

Mr. Petersen: I just wanted to make sure that the Examiner was aware of Rule 10 (x) that provides for it.

Examiner Sweeney: Yes, I understand. I made the ruling.

Mr. Petersen: May I ask the Examiner to clarify for me what the distinction in his mind is between my request and that of the counsel for Alaska Steamship Company?

Examiner Sweeney: Because you want to argue now the case as to whether or not your client is a common carrier.

Mr. Petersen: I initially asked for permission to make a motion to dismiss I subsequently—

Examiner Sweeney: (Interrupting) You have the privilege of making a motion to dismiss in writing.

Mr. Petersen: I acceded to your ruling that that cannot be done verbally but then I am now asking the Examiner for the privilege to address—

Examiner Sweeney: (Interrupting) An oral argument?

Mr. Petersen: A clarification position of my client.

Mr. Wohlstetter: I object to any argument at this time on behalf of an adversary party, Aleutian Marine Transport. I waived my objection in the case of Mr. Long, as did everybody else in this proceeding.

Examiner Sweeney: If you feel the record is not clear, Mr. Petersen Captain Kimbrell is here in the room, you may recall him and question him or interrogate him.

Mr. Petersen: Then your ruling is that we will not have an opportunity to make any sort of a verbal statement for the record?

Examiner Sweeney: You asked to make oral argument. That's What I am ruling on.

Mr. Petersen: I just want to make it clear I just want to make the same kind of statement Mr. Long made, just a statement of our position.

Mr. Wohlstetter: I object to an argument or statement on behalf of the respondent in this proceeding over objections.

Examiner Sweeney: I have already ruled on the request for oral argument.

Mr. Petersen: Mr. Sweeney, would you be kind enough to rule on my request, then, to verbally address the Examiner with respect to clarification of our position?

Examiner Sweeney: Do you have a question?

Mr. Petersen: I want to clarify for the record what the position of Kimbrell-Lawrence Transportation, Inc., is as compared to the other respondents.

Examiner Sweeney: You will be given an opportunity in your brief to do that and an opportunity on exception, and you will be given an opportunity to request oral argument before the Federal Maritime Commission.

(f) In due course KLT filed its brief, the Examiner issued an initial decision, and KLT has filed exceptions. Although afforded opportunity to argue the case orally before the full membership of the Commission, KLT counsel (Mr. Petersen) declined to do so. KLT claims in its exceptions that "after first denying KLT the right of oral argument which was extended to another party," (obviously, Alaska Steamship Company, an intervener,) "to this proceeding, the Examiner refused to receive further testimony from KLT unless it elected to recall Captain Kimbrell for interrogation."

There is considerable ambiguity in KLT's oral and written statements. We extract from them two complaints, the first that the Examiner refused to permit counsel for KLT to argue orally the merits of this case. This, the Examiner did, exercising discretion vested in him by rule 10(x) of our Rules of Practice and Procedure. Rule 10(x) reads:

Oral argument at hearings. A request for oral argument at the close of testimony will be granted or denied by the presiding officer in his discretion.

KLT's counsel orally at the evidentiary hearing, and in the written exceptions before us has demonstrated his familiarity with our rule. Any disadvantage (we think there was none) to KLT in presenting its case to the Examiner without oral argument is surely cured by its written brief and exceptions, and the opportunity to argue the case orally before us, which KLT declined. We have carefully considered KLT's brief and exceptions in reaching our decision as to KLT. It is always to be remembered that in this matter we are not simply affirming, reversing, or modifying the examiner's initial decision. We are finding the facts and applying the law to KLT after full consideration of KLT counsel's arguments. It may be pointed out that the only clear-cut decision that oral, as distinguished from written argument is required as due process, was reversed by the Supreme Court, which said that "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations." *F.C.C.* v. *W.J.R.*, the *Goodwill Station*, 337 US 265, 276 (1949). In this decision the court discussed *Londoner*, cited by KLT, and called attention to its statement in *first Morgan* (298 U.S. 468, 481 (1936) that "argument may be oral or written." And in the *W.J.R.* case there was *no opportunity for oral argument.* Here there was complete opportunity for KLT's case to be argued orally before us by its counsel. We fully subscribe to the following statement by Joseph B. Eastman, when as chairman of the Interstate Commerce Commission, he said:

> There is no safe substitute in the procedure of the tribunal for full hearing and argument of the issues, when they are in controversy, *although the hearing need not always be oral.* This takes time, but it is time well spent (Emphasis supplied).

KLT seeks to refine this point in a novel and, as it apparently believes, a more powerful manner, as follows. KLT inferentially and none too clearly alleges that the Examiner acting within the scope of his discretion determined to hear oral argument, and that "once that discretion is exercised in favor of oral argument, each party is entitled to the right of argument." Apparently, KLT seeks to conjure up the spectacle of a judge who, in an adversary proceeding, listens attentively to one side and refuses to let the other side speak at all. But no such unedifying performance occurred. Counsel for Alaska Steamship Company, obviously dissatisfied with the scope of this proceeding, who called no witnesses, filed neither brief nor exceptions, and did not participate in oral argument before us, "blew off a little steam" to the Examiner. His statement certainly was in no sense an argument on the merits of this case (see finding "d", above). Neither KLT nor anyone else objected. Counsel for KLT then sought what he called "the same right that was given to Mr. Long, to make a short statement to the examiner." The Examiner permitted him to proceed. It immediately appeared that KLT's "short statement" would be a detailed, legal argument seeking to convince the Examiner that

KLT had not been operating as a common carrier. While constantly recurring to the theme that the "statement" he desired to make was "the same kind of statement Mr. Long made", counsel's repeated reference to our rule 10(x) on oral argument, shows he knew it was something else. Counsel for intervening Aleutian Marine Transport, stating that his client's position was adverse to KLT, objected to oral argument, and the Examiner decided against it. At the last, KLT counsel reiterated his desire "to clarify for the record what the position of Kimbrell-Lawrence Transportation, Inc., is as compared to the other respondents." The Examiner replied that "you will be given an opportunity in your brief to do that and an opportunity on exception, and you will be given an opportunity to request oral argument before the Federal Maritime Commission."

The record on the point sums up to the fact that prior to the Examiner's initial decision KLT presented written argument to the Examiner. Subsequently, and prior to this decision, KLT declined to present *oral* but did present *written* argument to us. We think it has had more than sufficient opportunity to say its say, and it has said it. We find no evidence in this record that the Examiner was guilty of any "impropriety", or much less, denial of due process of law.

KLT in its exceptions claims that "the Examiner refused to receive further testimony from KLT unless it elected to recall Captain Kimbrell for interrogation." Plainly, this is not so. KLT *offered* no "further testimony" and therefore the Examiner could not and did not refuse to allow further testimony. To support its very serious charge, KLT cites the transcript as quoted in finding "e", above. It shows that KLT counsel asked "to make a short statement to the Examiner." This would not be testimony. It shows that he considered this statement covered by section 10(x) of our rules, which governs argument, not testimony. It shows that KLT counsel contended to the Examiner that this "short statement" was the same as "that of the counsel for Alaska Steamship Company" which certainly was not testimony. He stated that he wished to "clarify for the record" the position of his client, but such a statement is not an offer of testimony. And when the Examiner said "You asked to make oral argument. That's what I'm ruling on", KLT counsel did not demur, but nevertheless now contends that he was asking to *testify,* and *that* is what the Examiner was ruling on. KLT counsel even seeks to take advantage of the

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Examiner's expressed willingness to receive further testimony, by a wholly-unwarranted construction of the Examiner's statement to mean that he would listen to the witness the Examiner named, *and to no other*. The record conclusively negatives KLT's contention that its right to present testimony was limited, and that it "did not receive a full and fair hearing." KLT at this hearing was accorded the right to present its case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination it felt was required for a full and true disclosure of the facts, and to argue the case to the Commission orally. It could ask no more. KLT, after the close of the evidentiary hearing and before issuance of the Examiner's initial decision, filed a brief before the Examiner. After receiving the examiner's initial decision, KLT excepted to it in writing, and its exceptions have been carefully considered in this decision. This, surely, is all that was required as due process, especially as KLT declined to argue the case orally, before us.

We turn now to make findings with respect to the common carrier, non-common carrier status of KLT.

(14) This water carrier is incorporated in the State of Washington, and maintains an office in Seattle. It operates one vessel, which is 180 feet long and has cargo space of 631 net tons, between Seattle and ports in western Alaska in the general areas of Shumagin Island.

(15) On northbound voyages the respondent hauls any type of general cargo, including cargo requiring refrigeration, offered to it by one or more shippers. However, northbound sailings are dependent upon prior commitments from shippers for utilization of the available cargo space on the southbound return trip. Such cargo space on southbound hauls is usually booked by two or three shippers of frozen fish. In order to assure respondent's service at ports in western Alaska, those engaged in the fishing industry in that area use respondent in obtaining supplies via Seattle. On some of the northbound voyages the respondent has hauled shipments for numerous consignees, including individual fisherman, while on other northbound trips the entire cargo space has been devoted to a single shipper.

(16) In 1958 the respondent served 32 shippers, and in 1959 it served 85 shippers. In 1960 the respondent carried 6,604 tons for 89 shippers. The 3 shippers with the most tonnage in 1960 consigned a total of 2,623 tons, and had an average shipment of

245 tons; the three shippers with the least tonnage consigned less than 1 ton each. During the first 8 months of 1961 the respondent hauled 5,085 tons for 77 shippers. Of that total, 3,231 tons were hauled for 3 shippers at an average shipment of 318 tons, and again the 3 smallest shippers shipped less than a ton each.

(17) Northbound shipments of general cargo move under one of two forms of transportation agreements between respondent and the shipper. Such agreements differ only as to whether loading will be by the respondent or at the expense of the shipper. The transportation agreement covering southbound traffic provides for loading by respondent. In other pertinent respects the agreements provide that respondent will make available, and the shipper will hire, a stated amount of space aboard respondent's vessel during a voyage from or to Seattle and a named Alaskan port, on or about a certain date, and in consideration of a specified sum of money to be paid by the shipper to respondent. It is also provided that the shipper will insure the cargo in his own and respondent's name. In addition to such insurance, respondent disclaims any responsibility for loss or damage to cargo. The described agreements are executed prior to carriage of the goods in most but not all instances. The respondent also issues a combination shipping document which receipts for the shipper's goods and bills the shipper for freight charges thereon.

(18) The respondent does not solicit cargo, advertise services or sailings, or sail at regularly scheduled intervals. Nevertheless, shippers in the Alaskan area served by respondent do know that upon request the carrier will advise as to approximate sailing dates. Weather permitting, service has been provided at approximately monthly frequency. A weekly marine trade magazine lists respondent as sailing from Puget Sound to Alaska on a monthly schedule. However, such publication is not made at respondent's request nor with its consent.

(19) Freight charges by respondent are assessed by an employee who did not testify at the hearing. The record does not contain a detailed account of how this employee computes such charges. The President of respondent corporation did, however, give a general description of the manner in which freight charges are determined. The rate making employee has divided general commodities into about eight categories. A different rate level applies to each such category, and further, rates for a category vary with the length of haul. Charges are computed by applying

the rate for the category of shipment and origin or destination port, to the amount of space specified in the transportation agreement. A list of such rates is not published and, so far as is shown of record, respondent's employee establishes rates by adding an undisclosed percentage to rates published in common carrier tariffs. It was stated by way of illustration that a shipper would not object to paying respondent $7,200 for transportation for which he would have been charged about $7,000 under published common carrier tariffs.

(20) KLT has not filed with this Commission or a predecessor, schedules showing its rates, fares, and charges.

The foregoing fact-findings were made by the Examiner who heard KLT's president, Captain Kimbrell, testify. Our independent consideration of the record confirms the Examiner's appraisal of the facts, and we make the above findings our own. KLT has excepted to the statement in finding (15) that northbound, KLT hauls *any type* of general cargo offered. We think it does, and have so found upon substantial evidence of record. As a matter of fact, it is not essential to being a common carrier that the carrier does haul or at least is willing to haul *any type* of cargo. A line may be a common carrier of certain commodities as long as it is willing to carry those commodities for all who wish to ship them. But we cannot feel that KLT, which carries fishing industry supplies for the fishing industry, states that it will carry the products of Montgomery-Ward upon request, has carried the goods of Sears Roebuck, and liquor for the general consumer, can be considered to carry only specialized industry cargo. Captain Kimbrell testified specifically that "We don't specify any commodities" and that the only limitations on which cargo KLT carries are vessel availability and the ports to be served. He stated that if revenue is adequate "whether it arrives off bananas or beans doesn't make any difference to us".

KLT in its exceptions contends that notwithstanding the examiner's specific statement that none of his findings of fact or conclusions of law concerning KLT are based in any degree upon Exhibit No. 5 (see our fact-finding "(c)" above), "it may be that the confusion which this exhibit engendered in the minds of counsel and Examiner at time of hearing still persists." Conceding *arguendo*, that the Examiner erred in admitting Exhibit No. 5 for a limited and legitimate purpose, and that the exhibit "engendered *in the minds of counsel and Examiner at time of hearing* * * * confusion (which) * * * still persists", this is at most, harmless error. Being forewarned by KLT's exceptions, and the Examiner's statement (our finding "c"), we have carefully avoided Exhibit No. 5.

KLT further contends that the Examiner errs in that he "unduly isolates and lends a note of regularity to KLT's operations by finding that respondent's ports in western Alaska are in the general area of Shumagin Island". KLT does not deny that it actually operates between Seattle and ports in western Alaska in the general area of Shumagin Island. This is what the Examiner found and what we have found. This finding should not be construed as "lending a note of regularity to KLT's operations" as KLT argues, *by failing to point out that KLT also serves ports on the south side of the Alaskan peninsula, which may well be considered in the general area of Shumagin, and ports between Kodiak Island and the Aleutian Islands which might not be so considered.* This failure to point out other service (which is the apparent basis of the exception) has not misled, and will not mislead anybody.

Ae we construe Captain Kimbrell's testimony there is a distinct note of regularity in KLT's operations. He said that he sees every issue of the Marine Digest which for a period of one to three years has listed KLT as sailing monthly from Puget Sound ports to Alaska. Unless KLT's sailings were approximately monthly, this listing would certainly not have continued to appear so long. Captain Kimbrell testified that KLT does not sail north until it has commitments south; in other words, KLT's vessel is not a wanderer or tramp; it moves shuttlewise, north and south, and loses no time searching the Alaskan coast for cargo. Captain Kimbrell testified that KLT has no problems in getting cargo, and that he advises shippers of KLT's sailing schedules when asked by shippers, and also that as to the "rough, west side of Alaska, the Aleutian Islands, and the Alaska Peninsula", KLT has no competition. Under such circumstances, Captain Kimbrell's reiteration that KLT does not make regular monthly sailings appears unimportant. Doubtless, KLT tries to live up to its monthly listing, and we believe it is able to maintain an approximately monthly frequency, weather permitting, as we have found. But if KLT's sailings were more or fewer than once a month, or considerably irregular, this fact would not alter our conclusion that KLT is a common carrier in this trade. What we have said disposes of KLT's exception to the Examiner's findings that "KLT has provided service at approximately monthly frequency." Upon exceptions, KLT urges us to hold that its operations are those of a contract carrier, and not a common carrier. The determining factors are the salient facts testified to by KLT's president, and inferences fairly drawn from his testimony. Our findings 14 to 20 inclusive set these out. KLT's service is one occupied busily between Seattle and Alaska, carrying whatever cargo is offered northbound to the Alaskan ports to be served on the voyage, and assured on each voyage, of cargo waiting in Alaska to be loaded aboard for the return trip to Seattle. This is *common carrier service.* "One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier." *Certain Carriers Engaged in Transportation Between Pacific Coast Ports of the United States and Hawaii,* 3 U.S.M.C. 190, 197 (1950).

KLT argues that it is not a common carrier because KLT has never advertised its services or solicited for cargo, has never published a sailing schedule, has no regular routes and no regular ports of call, and carries cargo only after it has initially secured a negotiated, written transportation agreement, and it has neither sought nor assumed an obligation to carry for others.

Each of these points was unsuccessfully urged in support of the contention of respondents in the case just cited. In pertinent part, our predecessor commission said (at 196):

> On the common-carrier issue Mills claims that there is no evidence that he held himself out as a common carrier, pointing out that the record does not show that he ever published a sailing schedule, solicited any cargo, or advertised that he would take the cargo of anyone or everyone to Hawaii. Such acts are not essential to a common-carrier status. (*Citing cases*) Nor is a holding out as a common carrier negatived, as Mills contends it is, by the fact that the printed terms and conditions of the common-carrier form of bill of lading which he used were crossed out and the shipments covered by separate contracts. Common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. (*Citing cases*)

Captain Kimbrell's repeated and carefully calculated assertion that KLT has no "regular" routes, no "regular" ports, and no "regular" sailing dates does not make KLT a tramp, and unless it does, it does not help its contention that it is not a common carrier. This was settled long ago. KLT is much more "regular" than was Mills, who made similar contentions, but was held to be a common carrier between the United States and Hawaii in the case we have just referred to.

It cannot be successfully contended at this late date that a carrier may avoid common carrier status by insisting on a transportation agreement with each shipper. All cargo carried for compensation moves on some form of transportation agreement, express or implied. KLT's statement that "it has neither sought nor assumed an obligation to carry for others" is characteristically cryptic. If it means that KLT seeks only cargo from shippers who will sign transportation agreements, it is answered above. If it means that it has not sought cargo owned by persons other than itself, it is refuted by its own testimony. If it means that KLT has not sought or willingly assumed common carrier status and common carrier obligations; this, while true, is of no aid to KLT. Common carrier status and obligations are results of a carrier's *operations*, not its desires.

In view of other cargo carried by KLT, it is of no significance that its vessel was specially designed for carriage of frozen fish, and generally carries frozen fish and fishing industry supplies for a few fishing companies. Clearly, KLT is not a private or industrial carrier. Of even less consequence is it that KLT, operating under charter to one shipper, may make an occasional *bona fide*, tramp sailing. And certainly, it is not necessary to common carrier status, as KLT implies it is, for a carrier to have a freight agent, a particular place to load and unload cargo, or provide regular and complete terminal service. These are among the characteristics of liner, berth operators, but such operators are, emphatically *not* the only common carriers.

We have carefully considered the evidence and written argument of KLT. We conclude upon the whole record, that KLT has been operating and is operating as a common carrier by water between the States of Washington and Alaska without filing its tariffs under section 2 of the Intercoastal Shipping Act, 1933, thus violating that section of the Act. A cease and desist order will be entered.

AS TO AOTA:

AOTA has taken no exception to the following findings of fact by the Examiner. They are supported by substantial record evidence, and we adopt them as our own.

(21) This unincorporated association of shippers who are located in Alaska was formed in 1959. The purpose of the association is to transport cargo owned by members between places or the inland waters of southeastern Alaska, or between such places

and places on the inland waters of the State of Washington. Membership in the association is on an annual basis which is initiated or renewed in April or May of each year by agreement among the shipper members who as a prerequisite must be doing business in Alaska. Admission to membership is then closed for a year. Applications for membership have been rejected in some instances on the grounds that available cargo space is insufficient to accommodate more members.

(22) In the fiscal year beginning on April 20, 1961, there were 104 members as named in the Appendix hereto. (We omit the names, which can have no relevance.) This membership covers most if not all of the various types of consignors or consignees among the shipping public in southeastern Alaska. The wide range of service offered by respondent is further indicated by the numerous commodities on which freight charges have been assessed. (Appliances, beer and mixer, boats, frozen bread, bin trucks, bottles, wood and fibre boxes, building material, cans, can ends, containers, cigarettes, tobacco, coal, cooperage, cordage, dairy products, eggs, canned fish, cured fish, frozen fish, canned crab, frozen crab, fruits, vegetables, potatoes, onions, furniture, groceries, insulating material, lumber, liquor, plywood, salt, tanks, matches, potato chips, melons, wallboard, radios, and televisions.) Additionally, respondent assesses charges on freight, n.o.s.

(23) The respondent association in its membership agreement each year has appointed Mr. S. B. Dahl, who does business under the name S. B. Dahl Agency, as its attorney with power to charter and operate vessels for the association. Such agreement also provides that the chartered vessels shall not be used to transport the cargo of shippers who are not members; that members will pay for their shipments in an amount equal to that which they would have paid on a specified date (February 1, 1961 in the latest agreement) if they had consigned the shipment via "means customarily used" by the shipper; that members will pay pro rata for costs in excess of annual expenses, and will share pro rata in the distribution of income which exceeds annual expenses; and that the association, the chartered vessels and the owners thereof, and other members are released from liability for loss of or damage to cargo. If members do not use respondents' services they do not pay freight charges, become liable for expenses in excess of income, or share in any surplus.

(24) At the time of the hearing two vessels were being operated by Dahl under bareboat charters. These vessels have refrigerated cargo space and are under 150 gross tons.

(25) Freight charges on shipments are assessed by clerks employed by Dahl at his Seattle office. The amounts they assess are taken from a list which was established by Dahl after reference to, and on the level of commodity rates in the tariffs of a common carrier by water. The latter carrier serves between Seattle and Alaska, and its tariffs are on file with the Commission.

(26) In return for his services Dahl collects agency fees based on the annual gross income derived from freight charges paid during the fiscal year by association members. He pays his employees from such fees. In the fiscal year 1960-1961, the gross assessments were $543,338 and Dahl received agency fees totaling $40,792. During each of the two fiscal years completed at the time of the hearing, there was a surplus. This extra income is being held in reserve for contingent liabilities. Later, if surpluses continue to be earned, an annual pro rata distribution will be made to members in accordance with the terms of the membership agreement.

(27) Solicitation of cargo and advertisement of sailing schedules are unnecessary for operations such as those conducted by respondent. Members know that Ketchikan and Sitka will be served weekly and that, dependent upon the season, other Alaskan ports will be served on a regular but less frequent basis. On northbound sailings from Seattle the members notify parties from whom they purchase goods to send such cargo via Alaska Outport Transportation Association. The latter vendors contact the S. B. Dahl Agency for advice as to sailing dates and receipt of cargo.

(28) In the last completed fiscal year, 1960-1961, the respondent transported 15,866 revenue tons of general cargo for 94 shippers. One shipper consigned a total of 2,719 revenue tons and amounts shipped by other members ranged to as little as one-half revenue ton.

(29) AOTA has not filed with this Commission or a predecessor, schedules showing its rates, fares and charges.

Inasmuch as there is considerable similarity in the factual and legal positions of AOTA and KMCA, we will state the fact-findings as to KMCA at this point, and thereafter take up the contentions of both AOTA and KMCA.

AS TO KMCA:

(30) This corporate respondent is a successor to an unincorporated association known as Ketchikan Merchants Charter Association. The latter organization was created in 1952 by merchants in southeastern Alaska to operate vessels to and from Seattle in the transportation of their freight. Subsequently, upon libel for penalties imposed by the U.S. Coast Guard for violation of 46 U.S. Code, section 404, *supra,* such transportation was considered by the U. S. District Court, Western District of Washington, Northern Division.

(31) A decision by the District Court was rendered on June 9, 1959, and is reported in *U. S.* v. *Ketchikan Mchts. Charter Asso.*, American Maritime Cases (1959) at page 2085. It was found that uninspected diesel screw merchant vessels of above 15 tons were regularly operated between Seattle and ports in southeastern Alaska in transporting freight owned by members of the Ketchikan Merchants Charter Association. Freight charges on the level of common carrier rates were assessed on the basis of the weight or cube of the individual shipments by members. The court decided that although demise charters were used to establish the relationship of the vessel owners and the shippers through the Ketchikan Merchants Charter Association, such document was not in fact a demise charter but merely an arrangement to carry out what was in fact a shipment of goods for hire on uninspected vessels in violation of the statute.

(32) In view of this decision, and the fact that Public Law 85-739, *supra,* had been passed in the meantime, Ketchikan Merchants Charter Association was disbanded in the belief that it was necessary to incorporate to be eligible for exemption from U. S. Coast Guard inspection under that law. On September 14, 1959, articles of incorporation of the Ketchikan Merchants Cooperative Association, Inc. were found to conform with the provisions of the Alaskan Cooperative Corporation Act, Chapter 107, SLA 1959, and a certificate of incorporation was issued by the Commissioner of Commerce, State of Alaska.

(33) There are about 300 members in the respondent incorporated association. Requirements for membership are that an applicant be doing business in Alaska. If accepted by a two-thirds vote of the board of directors, the new member pays a nominal initiation fee.

(34) Four vessels, one owned and the others chartered, are operated by respondent. These vessels are each self-propelled, diesel powered, under 150 gross tons, and with refrigerated space for cargo. General commodities, including some commodities requiring refrigeration, which belong to members of the association are transported in these vessels. The principal lading on southbound voyages consists of fish products. On northbound voyages the shipments are of general commodities which members of respondent corporation have instructed their suppliers to ship on vessels operated by respondent.

(35) The board of directors of respondent corporation meets quarterly and at such times determines the freight charges to be applied to commodities shipped by its members. These charges are labeled assessments by respondent and are based on weight or measurement. They are formulated with due consideration to the rates of common carriers by water, and are designed to return gross revenues sufficient to pay expenses of administration and operation. Freight charges applied by respondent have been insufficient to meet expenses. The deficits have been covered by issuing unsecured notes to some of the members in return for money in the various amounts of the notes. Such loans, both as to the member making the loan and the amount loaned, are voluntary. The loans have been necessary to enable the continuance of operations by respondent. The lenders have little or no expectation of repayment.

(36) The record affords no evidence which shows why this respondent operates at a deficit under freight charges patterned on common carrier rates, whereas respondent Alaska Outport Transportation Association, a carrier also organized on a nonprofit basis with freight charges established in the light of common carrier rates, is able to pay its operating agent a substantial commission and earn a surplus. The existence of such a difference in operating results, however, aptly illustrates why operating expenses and revenue yields are matters which are only incidental to, and not determinative of, common carrier status.

(37) Bills of lading are not issued by this respondent but freight charges are billed to shippers by means of expense bills. The freight charges are applied on a weight or measurement basis, depending on the commodity being shipped, and payment thereof by the shipper is for the actual weight carried or vessel space utilized on the trip from or to Seattle.

(38) There is no solicitation of cargo, or advertisement of sailing schedules by respondent. Since respondent transports only cargo which is shipped or received by its members, such activities are unnecessary. The members do know that respondent, in the operation of four vessels, can give reasonably regular service between Seattle and southeastern Alaska. When members purchase goods which are produced outside Alaska they instruct the sellers to ship via Ketchikan Merchants Cooperative Association, Inc. Upon inquiry by such vendors the respondent's agent in Seattle advises of the next available sailing date when the shipment can be accommodated. Respondent carries insurance covering loss or damage to cargo, subject to a deductible of $500 per voyage.

(39) In the year 1960 this respondent transported 20,874 gross tons for 339 members, the average shipment thus being about 62 gross tons. The most freight charges paid by one shipper were $51,075 and the least total charges paid by a shipper were $2.14. Similar data for the first half of 1961 are: 8,970 gross tons; 264 members; 34 gross tons average shipment; $26,455, largest total freight charges for one shipper; $2.14, smallest total freight charges.

(40) KMCA has not filed with this Commission or a predecessor, schedules showing its rates, fares and charges.

The foregoing findings (29) to (40) inclusive were made by the examiner, are not excepted to by KMCA, and we make them our own. KMCA does request that we make certain findings presented to the Examiner, which the Examiner neither accepted nor rejected. These are set out as an appendix to this decision, except for the first sentence (actually a conclusion) of proposed finding "b", which reads "KMCA does not carry cargo for the general public", and is discussed below. To a considerable extent the requested findings are substantially made above. To the extent that they are not made above, their relevance is doubtful, and their aggregate effect is negligible; and they are not inconsistent with our ultimate conclusions with respect to KMCA. With the exception of the conclusion that "KMCA does not carry cargo for the general public" (First sentence of proposed finding "6"), the request of KMCA that we adopt these proposed findings is granted. KMCA asserts that it carries cargo for its membership, and that the only restriction upon its membership is that members shall be licensed to do business in Alaska. In our opinion, the carriage of cargo in this trade for all persons licensed to do business in Alaska who are willing to pay a nominal membership fee, is the carriage of cargo for the general public. While at KMCA's request, we find that KMCA has refused membership to some, it is clear that membership is refused only to persons not authorized to do business in Alaska.

We question the relevance of finding 12, to the effect that KMCA's president has received certain legal advice (not as to KMCA's carrier status) from his own counsel, and from the Attorney General of Alaska, but make it in order that the complete picture as seen by KMCA itself, may be presented herein. What has been said heretofore in connection with KLT disposes of AOTA's reliance upon lack of overt cargo-solicitation, such as advertising and publication of sailing schedules, as facts which prevent it from being a common carrier. What we have pointed out with respect to KMCA, i.e., that restricting carriage to a substantially unrestricted membership does not make KMCA other than a common carrier applies also to AOTA. A "private", distinguished from a "common" carrier, is essentially, a carrier which carries *for itself,* as distinguished from a carrier which carries for others. This is the effect of various decisions cited by AOTA, such as the Supreme Court's holding with reference to the Uncle Sam Oil Company in *The Pipe Line Cases*, 234 U.S. 548, 562 (1914).

To expand the "private carrier" concept to the arrangements set up by AOTA and KMCA, in which there is no common ownership of cargo between the diverse entities setting up the transportation system is simply not logically or legally sustainable.

Both AOTA and KMCA argue that Public Law 85-739 exempts them from common carrier status. It does not. P.L. 85-739 was enacted for one purpose and one only—to exempt nonprofit or cooperative associations from compulsory inspection of their vessels under 150 gross tons, which prior to P.L. 85-739's enactment was required by 46 USC 404. It accomplishes nothing more. Its effect is expressly limited to 46 USC 404, the statute it amends; and it has no effect upon section 2 of the Intercoastal Shipping Act, 1933.

Public Law 85-739 was the result of a decision of the United States District Court for the Western District of Washington, Northern Division, in 1959, reported in 1959 AMC 2085. Conceding, *arguendo,* that as AOTA complains, the Examiner viewed that case as authority for holding the operations of AOTA and

KMCA common carriage, and that KMCA's operations are now entirely different, we do not base our decision upon any belief that the District Court in that case held that KMCA was operating as a common carrier. It held, as AOTA states, that KMCA was operating "for hire". It is significant, however, that the relief from compulsory inspection sought and secured, had to be by congressional action, which was in no way inconsistent with the court's decision that the carrying was "for hire". It has long been settled (although both KMCA and AOTA contend to the contrary) that it is not necessary to make, or even seek a profit in order to be carrying for hire. *California* v. *United States*, 297 U.S. 175 (1936). No decisions holding to the contrary are cited by respondents.

The contention, made specifically by AOTA, and inferentially by KMCA, that if these organizations are common carriers they are by reason of that fact deprived of the exemption granted by P.L. 85-739 is unsound. It is necessary to say in reply only that Congress has in no way conditioned the exemption upon non-common carrier status. It has conditioned it only upon the vessel's being under 150 gross tons, and being owned or demise chartered to a cooperative or association engaged solely in transporting cargo owned by any one or more of the members of such cooperative or association between designated areas. These conditions can be met by vessels operated by AOTA and KMCA as common carriers. Of course, even if, as to KMCA and AOTA common carrier status would deprive them of the exemption this fact would not determine that they are not common carriers

AOTA makes two other specific contentions with respect to P.L. 85-739, which we set out and answer here.

"1. Congress did not consider vessels operated by nonprofit associations and carrying only the goods of their own members to be common carriers."

There is nothing which supports this statement.

"2. It (Congress) issued its mandate for the performance of transportation of this character until adequate, frequent common carrier service was available."

No such mandate exists.

Both AOTA and KMCA appear to argue inferentially that Congress by enacting P.L. 85-739 has authorized if not directed the Commission to exempt cooperatives and non-profit organizations operating as common carriers from the tariff-filing requirement which section 2 of the Intercoastal Shipping Act imposes upon all common carriers without exception. There is nothing in P.L. 85-739 which constitutes such direction or authorization.

Both KMCA and AOTA complain because the Examiner did not discuss a considerable number of cases argued in their briefs and advanced again in their exceptions. Their conclusion is that his failure to discuss them proves that he did not consider them—a clear *non sequitur*. They have all received careful consideration here, and our own conclusion is that the Examiner did not discuss them because he considered them (as we do) inapplicable upon their facts. We are unable, as an example, to assimilate KMCA or AOTA with the "free enterpriser" the "man of many pursuits" including farming, ginning, livestock raising, and trucking, held a contract carrier in *Home Insurance Company* v. *Riddell*, 252 F. 2d 1, (5th Cir. 1958). Neither AOTA nor KMCA resembles in any way the fishing boat master who chartered his 60 foot motorboat out of Bayou La Battre to carefully selected groups, and was held not to be a common carrier, in *Semon* v. *Royal Indemnity Company*, 279 F. 2d 737 (5th Cir. 1960). The principles which govern the regulation of mutual telephone companies as public utilities by the States are not necessarily those considered by Congress to be applicable with respect to interstate and intercoastal carriers by water.

We conclude that AOTA and KMCA have been operating and are operating as common carriers by water between the States of Washington and Alaska without filing tariffs under section 2 of the Intercoastal Shipping Act, 1933, thus violating that section of the Act, and requiring us to issue to each of them an order to cease and desist from such violation.

AOTA and KMCA take the position that if they are common carriers, they lose the exemption from Coast Guard inspection granted by Title 46, Sec. 404 of the United States Code. To be entitled to this exemption the vessel must be owned by or demise chartered to a nonprofit organization "engaged solely in transporting cargo owned by any one or more of the members of such cooperative or association on a nonprofit basis". It is argued that a common carrier must carry (within its capacity) for all who seek to utilize its services, and *therefore* AOTA and KMCA must carry for *non-members*. We do not agree that they must carry for non-members. Membership in the organization, which carries with it the right to ship, and pro-rata liability with respect to shipments by other members, is a reasonable condition of carriage, and so long as it is required of all shippers alike, will certainly not detract from common carrier status. AOTA and KMCA must know well in advance who will patronize their carriers and to what extent. This is absolutely necessary in order to obtain sufficient vessels for each open season and avoid "shutting out" their members. As nonprofit operators, they can take no chance of overtonnaging. It is true that the unique position of KMCA and AOTA with respect to the exemption statute, poses certain difficulties in regard to the form of tariffs and rules, but we are quite sure that these can be solved.

We also desire to make it quite clear that pro rata return of payments for carrying cargo, in order to avoid profit-making will not be considered violation of the Shipping Act, 1916.

We take occasion here to point out, primarily for the future, that failure of Commission personnel to advise that an organization which has furnished full operating details is a common carrier, and required to file tariffs, in no way militates against Commission decision that the organization *is* a common carrier, and required to file. Neither would a direct statement by our staff that the organization is *not* a common carrier. It is unnecessary to cite cases to support a principle so well established.

At the same time, we wish it to be completely clear that we do not consider an inquiry by a carrier as to its status as any evidence, however slight, that it is a common carrier. Proof of such inquiry is not even admissible for that purpose. The common carrier, non-common carrier status of each operator is always dependent primarily upon the method of operation, made up of many details. This proceeding was originally designed to clarify the question as to what class of carriers in the Alaskan trade are common carriers, required to file tariffs. We hope, and believe it accomplishes its purpose. It makes clear that such as Starkweather and Shimmel are not subject to the filing requirements of section 2 of the Intercoastal Act. It makes equally clear that carriers like KLT, AOTA, and KMCA must file.

It was of course, not necessary for a proceeding of this nature to be filed. The Commission's predecessor might simply have caused proceedings to be instituted for penalties. The unclear situation, prior to this opinion, may have made such action appear harsh. We do not anticipate that those falling within the scope of this opinion will fail to file within a reasonable time.

An appropriate order will be entered.

APPENDIX

FINDINGS REQUESTED (AND AS NUMBERED) BY KMCA IN ITS EXCEPTIONS.

5. KMCA is a non-profit cooperative association. Article V of its articles of incorporation provides as follows:

> This cooperative corporation is one which does not contemplate pecuniary gain or profit to the members thereof and is organized for non-profit purposes and no part of any net earnings thereof shall inure to the benefit of any member or other individual.

6. Its carriage of cargo is restricted to its membership. It has refused cargo offerings by persons who are not members of the Association. It does not handle express shipments; it does not carry mail; it does not carry any military freight; it does not carry personal effects or household goods. The Association does not solicit freight or advertise its sailings or service.

7. The By-Laws of the Association restrict membership to persons who have been licensed to do business in the State of Alaska. The membership requirements have been honored and persons have been refused admission to the Association. A freight forwarder would not be eligible for membership; a branch of the military or government department would not be able to join the Association. Churches and other like institutions would not be eligible for memberships since they are not licensed to do business in Alaska. Members of KMCA are elected by the Board of Directors and an affirmative vote of two-thirds of the Board is required. The membership has been constant during the past two years. A written membership application in form set out in the By-Laws, accompanied by a membership fee of $10, is required.

8. Sailings are made to meet the requirements of the membership and KMCA has held up its sailings as long as three and one-half days to meet membership needs. This is not and cannot be done by common carriers.

9. Revenues of the Association are obtained in the following manner. The Board of Directors determines the amount of initial assessments to be made against members who tender their freight to be transported on the Association's vessels. It is attempted to have these assessments defray the operating cost of the Association and to contain *no* element of profit. The assessments have been on the low rather than on the high side and the Association's operations have resulted in a loss for the eight month period ended May 31, 1961, of $28,822.65 and a cumulative loss from operations as of that date of $184,436.65.

10. The Association has no paid in capital and would not have been able to operate on the basis of these assessments alone.

Additional funds are raised from the membership to make up the deficits, which contributions are unrelated to the volume or particular type of commodity shipped by the member-contributor. For example, one of the smallest shippers in the Association, City Motor Service, was one of these contributors.

Although these contributions are technically carried in the company's books as "loans," there is no expectation whatsoever by the contributing member that he will ever get his money back.

11. The Alaska Cooperative Corporation Act, under which KMCA is incorporated, requires the Association to make distribution to its members of any amounts over and above its expenses. It provides as follows:

> (1) The net proceeds or savings of a cooperative shall be apportioned, distributed and paid periodically to those persons entitled to receive them, at such times and in such reasonable manner as the By-Laws shall provide; except that net proceeds or savings on patronage of the cooperative by its members shall be apportioned and distributed among those members in accordance with the ratio which each member's patronage during the period involved bears to total patronage by all members during that period. The By-Laws may contain any reasonable provisions for the apportionment and charging of net losses. For the purposes of this section work performed as a member of a workers' cooperative shall be deemed to be patronage of that cooperative.

12. The President of the Association testified that he had been advised by Mr. Ralph Moody, the Attorney General for the state of Alaska, that failure to refund to membership revenues in excess of operating expenses would result in revocation of KMCA'S corporate charter. He also testified that his counsel advised him that KMCA could not lawfully make such distribution to its member-shippers if the Commission held that KMCA was a common carrier required to file a tariff.

ORDER

FEDERAL MARITIME COMMISSION

No. 952

INVESTIGATION OF TARIFF FILING PRACTICES OF CARRIERS BETWEEN CONTIGUOUS STATES OF THE UNITED STATES AND ALASKA

Full investigation of the matters involved in this proceeding having been completed, and the Commission on August 2, 1962, entered its decision herein, which decision is made a part hereof,

It is ordered,

(1) That as to William Shimmel, Dan Starkweather, and Ghezzi Trucking, Inc. (including Alfred J. Ghezzi, Jr. and Alfred C. Ghezzi d/b/a Ghezzi Towing Co., and/or Ghezzi Barge Co.) this proceeding be, and it hereby is, dismissed.

(2) That Kimbrell-Lawrence Transportation, Inc., Alaska Outport Transportation Association, and Ketchikan Merchants Cooperative Association, Inc., and each of them be and they hereby are ordered to cease and desist from their operations by water between Alaska and other of the United States, within 60 days after the date of this order, unless within said 60 day period, they shall file with the Commission tariffs covering their said operations and keep open to public inspection schedules showing rates, fares and charges, pursuant to the provisions of section 2 of the Intercoastal Shipping Act, 1933.

By the Commission, August 2, 1962.

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 994

AMERICAN UNION TRANSPORT, INC.—INCREASED RATES ON SUGAR, REFINED OR TURBINATED, IN BAGS

Decided August 16, 1962.

Proposed increased rates on sugar, refined or turbinated, in bags, from ports in Puerto Rico to Atlantic ports of the United States found just and reasonable. Order of suspension should be vacated, and proceeding discontinued.

Robert N. Kharasch for respondent.

Donald J. Brunner and *Robert J. Blackwell* as Hearing Counsel.

INITIAL DECISION OF ARNOLD J. ROTH, EXAMINER[1]

By third revised page No. 20[2] of its Inward Freight Tariff No. 7, FMC-F No. 7, filed with the Commission to become effective May 2, 1962, respondent American Union Transport, Inc., proposed to increase its rate on sugar, refined or turbinated, in bags (sugar), from ports in Puerto Rico to Atlantic ports of the United States, from 65 cents[3], any quantity, to 65 cents, minimum 500 short tons, and 75 cents, any quantity. The proposed rates are restricted to apply on palletized shipments only, the quantity per pallet to be a minimum of one short ton, and include the return

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[1] In the absense of exceptions thereto by the parties, and upon notice by the commission, the initial decision of the Examiner became the decision of the Commission on the date shown (Section 8(a) of the Administrative Procedure Act and the Rules 13(d) and 13(h) of the Commissioner's Rules of Practice and Procedure.)

[2] Fourth revised page No. 20 of the same tariff, filed to become effective May 26, 1962, also suspended and brought under investigation, makes minor changes in the conditions attached to the proposed rates, but does not change the level of the rates. Reference herein to the proposed rates will include the changes thus made.

[3] Rates and charges are stated per 100 pounds.

of empty pallets to the respondent's terminal in Puerto Rico when returned to its terminal in New York. All bookings under the proposed rates are subject to prior arrangement. By order of April 30, 1962, the Commission instituted this investigation on its own motion to determine the justness, reasonableness, and lawfulness of the said tariff schedules pursuant to the Shipping Act, 1916, as amended, 46 U.S.C. 801 *et seq.*, and the Intercoastal Shipping Act, 1933, 46 U.S.C. 843 *et seq.*, and suspended the operation of the schedules to and including September 1, 1962.

No shippers of sugar intervened in the proceeding. By agreement of respondent and Hearing Counsel at a prehearing conference held May 21, 1962, evidence and arguments were received by written submission, in the form specified in Rule 11(b) of the Rules of Practice and Procedure, 46 CFR §201.182.

During 1961 and 1962 to date, respondent has carried no sugar. It shows that its present rate of 65 cents, any quantity, is insufficient by a wide margin to pay the full costs of carrying sugar. Hearing Counsel, while differing with respondent to some extent as to the proper method of calculating unit costs, agree that, based upon the operating and financial data of the respondent for 1961, the proposed rates are not fully compensatory. The data submitted of record do not permit precise resolution of the conflicting claims. However, as to the northbound movement, the lowest cost shown is $13.94 per measurement ton, covering vessel expense, port expenses, stevedoring, and other cargo expenses, before allocation of brokerage, vessel depreciation, and overhead expenses, and before allocation of any expenses to cover the cost of the return movement of empty pallets. Including revenues from the arrimo charge of 2.5 cents applicable in Puerto Rico, the proposed rate of 65 cents, minimum 500 short tons, would yield revenues of $11.72 per measurement ton[4], and the proposed any quantity rate of 75 cents would yield revenues of $13.46 per measurement ton.

Although respondent has had no experience in the carriage of sugar, it estimates that average cargo handling costs would be

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[4] The parties accept for the purposes of this proceeding the finding in the initial decision in Docket No. 954 (Sub. 2), *Investigation of Increased Rates on Sugar, Refined or Turbinated, in Bags in the Atlantic/Gulf Puerto Rico Trade*, that sugar in bags measures 45 cubic feet per gross ton. Hearing Counsel show that pallets measure approximately 6.6 cubic feet each, so that a gross ton of palletized sugar would measure about 51.6 cubic feet. A measurement ton is 40 cubic feet, and is utilized by the parties to calculate unit costs, in view of the fact that the cubic capacity of a vessel generally governs the amount of cargo it can load and

reduced by about $2 per ton because of the required palletizatior and that on shipments of 500 tons or more clerical and accountin costs would be lower.

Upon the record as a whole, the conclusion is inescapable tha the proposed rates are lower than just and reasonable maximur rates, and are not otherwise shown to be unlawful. Accordingly it is found that the proposed rates are just and reasonable. A appropriate order should be entered vacating the order of suspension and discontinuing the proceeding.

FEDERAL MARITIME COMMISSION

No. 885

UNAPPROVED SECTION 15 AGREEMENT—NORTH ATLANTIC SPANISH TRADE

Decided August 30, 1962.

Respondents found during the period from early 1954 to May 1955 to have carried out an unapproved agreement or understanding for the observance by United States Lines of the rates of the North Atlantic Spanish Conference in the trade from the U. S. North Atlantic to Spain in violation of section 15, Shipping Act, 1916, and to have failed immediately to file the agreement or understanding with the Federal Maritime Board in violation of said section.

In determining violations of the Shipping Act, 1916, the contemporaneous writings of persons subject to the Act which indicate the existence of prohibited conduct, are entitled to great weight. The Commission cannot regard as credible testimony subsequently given which is manifestly inconsistent with the contemporaneous documentary evidence or with logic.

Elmer C. Maddy and *Ronald A. Capone* for respondent United States Lines.

Roy C. Megargle and *J. Joseph Noble* for North Atlantic Spanish Conference and its member lines.

Frank Gormley, Roger McShea and *Robert J. Blackwell,* Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner*

BY THE COMMISSION:

This investigation was instituted by our predecessor, the Federal Maritime Board, on its own motion on January 7, 1960. The order of investigation named as respondents in the proceeding United States Lines Company (U. S. Lines) and the North Atlantic Spanish Conference and its member lines (the Conference).[1] The purpose of the investigation was to determine whether, during the period 1953 through 1957, there existed between U. S. Lines and the Conference, or its member lines, an agreement or understanding regarding the fixing or regulating of rates or the limiting or preventing of competition in the trade from United States North Atlantic ports to ports in Spain which had not been filed with nor approved by the Board pursuant to the provisions of section 15, Shipping Act, 1916 (the Act).

In March 1960 Fabre Line and American Export Lines were dismissed from the proceeding because it was ascertained that they had resigned from the Conference prior to the period under inquiry. Thereafter hearings were held before an Examiner who issued a recommended decision in which respondents were found not to have been acting pursuant to an unfiled agreement or understanding in violation of section 15.

The North Atlantic Spanish Conference is an association of steamship lines operating in the foreign commerce of the United States by virtue of Agreement No. 138, which was approved under section 15 of the Act on May 14, 1930. This agreement authorizes the parties to establish in concert the rates, charges, rules and regulations covering cargo carried by them in the trade from U. S. North Atlantic ports to ports in Spain.

For a number of years prior to 1948, U. S. Lines was a member of the Spanish Conference but it resigned therefrom in July 1948. When it resigned, it chose not to file a tariff of its own, but notified the agency then administering the Act that it would continue to use the Conference tariff with such variations as it from time to time saw fit to make. Such a procedure, contingent upon the filing of notice of any variations with the agency, was permitted by the order issued in Docket No. 128, *Investigation—Section 19 of the Merchant Marine Act, 1920*, 1 U.S.S.B. 470 (1935). The

[1] Member lines of the Conference named as respondents were Compania Espanola de Navegacion Maritime, S.A.; Compania Transatlantica Espanola, S.A. (Spanish Line); Compagnie de Navigation Cyprien Fabre (Fabre Line); American Export Lines, Inc., and Home Lines Inc.

record shows no such variations filed by U. S. Lines for the 1954-1955 period to which this case is now limited.

During the period in question U. S. Lines was a member of the North Atlantic United Kingdom Freight Conference (U.K. Conference). The U. K. Conference and the Spanish Conference and their respective members were parties to Agreement No. 1457 under section 15 of the Act, which provides in relevant part:

In consideration of the agreement by the North Atlantic U. K. Conference Lines to maintain the direct rates, terms and conditions of the North Atlantic Spanish Conference on cargo transported on the vessels of the said lines from North Atlantic Ports of the United States to Spain on transshipments via United Kingdom Ports, the members of the North Atlantic Spanish Conference have agreed to furnish said Lines with copies of the Rate Lists of the Conference . . .

Agreement 1457 thus obligated U. S. Lines, as a member of the U. K. Conference, to charge Spanish Conference rates on cargo carried by U. S. Lines and destined ultimately for Spain which was to be transshipped at a port in the United Kingdom. The agreement imposed no obligation upon U. S. Lines to charge Spanish Conference rates on cargo it carried directly to Spain. The record shows a number of such direct shipments carried by U. S. Lines from U. S. North Atlantic ports to ports in Spain during the period in question. The rates charged therefor by U. S. Lines were the same as those of the Spanish Conference.

Subsequent to U. S. Lines' resignation from the Conference and during the period in question, Mr. George S. Kohl, U. S. Lines eastbound traffic manager, attended at least two meetings at which the Conference chairman, Mr. Frederick Rothe, and members were present. The record shows that Rothe often contacted Kohl to "get his views" concerning rate changes proposed by the Conference, and indicates, also, that shipper requests for rate adjustments were distributed by the Conference chairman to U. S. Lines for comment, the same as to the members of the Conference.

There were introduced into the record two U. S. Lines interoffice memoranda, dated April 20, 1955 (Exhibit 1) and April 26, 1955 (Exhibit 13), respectively. The April 20 memorandum, from Mr. Kohl to his superior, Mr. W. B. Rand, then general freight traffic manager of U. S. Lines, was entitled "Spanish Service" and contained a list of the conference and nonconference lines then operating in the trade. This memorandum states in relevant part as follows:

> Elwell and Kerr profess to adhere to Conference Rates, but we have known them to deviate when there was a large parcel in the market. Export generally follow the market, but openly say, that they are not bound by it and will upon occasion, quote lower rates.
>
> American Export Lines are firmly of the opinion that the Garcia & Diaz Lines are in one way or another not always observing Conference Rates and Conditions, and we feel the same way about this. We have also experienced instances when the Conference rate has been formally reduced after the business has been closed by Garcia and Diaz.
>
> Under the circumstances, I feel that we should reconsider the undertaking we gave to Mr. Rothe to abide by the Spanish Conference tariff.

The memorandum bore, in the upper right-hand corner, the penciled notation, "Notified G & D of withdrawal 4/22/55." The handwriting was identified as that of Kohl, who testified that "G & D" referred to Garcia & Diaz, Inc., which was then acting as the agent of two Spanish Conference Lines. Mr. Rothe at that time, in addition to being chairman of the Spanish Conference, was in the employ of Garcia & Diaz.

The April 26 memorandum, from Kohl to R. O. Pickel, U. S. Lines' representative in Spain, states in relevant part:

> After a trial of well over a year we have been forced to the conclusion that if we are to continue to observe the rates and conditions of the Spanish Conference, we cannot expect to secure our fair share of the Spanish Traffic. Consequently, we have informed the Spanish Conference that effective immediately, we withdraw our verbal understanding with them, and hereafter will not undertake to strictly observe the rates, terms and conditions of the Spanish Conference.
>
> Our policy for the present will be to refrain from making any announcement of our new status. We will continue to quote and charge conference rates, but we will upon occasion take quiet independent action when we consider it to our advantage to do so.
>
> * * * * * * *
>
> This new policy, which actually will not take effect before our sailing of May 26th, will place you in a position to deal with situations which have heretofore appeared hopeless.

Witnesses Rand, Kohl and Rothe denied the existence of any agreement between U. S. Lines and the Spanish Conference or its members. Kohl testified that some time in early 1954, as a result of conversations between U. S. Lines vice president for freight traffic and the chairman of the Spanish Conference, U. S. Lines had established a unilateral "policy" of observing Spanish Conference rates. Notwithstanding the other evidence in the record, the Examiner accepted the testimony of these witnesses and found that there had been no agreement and no violation of section 15.

We disagree with this finding.

Before amendment by Public Law 87–346 (75 Stat. 763), and as it existed at the time the activity in question took place, section 15 provided in relevant part:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the Board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, * * * to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; * * * controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.
>
> * * * * *
>
> All agreements * * * shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *.

Section 15 exempts from the antitrust laws agreements approved by the agency administering the Act.

We are of the opinion that the evidence establishes the existence of an agreement or understanding between U. S. Lines and the Spanish Conference and its members within the meaning of section 15. The language of the two interoffice memoranda and the surrounding circumstances, such as the fact that U. S. Lines after it had resigned from the Conference continued to be consulted by the Conference on rate changes, can lead to no other conclusion.

In the April 20 memorandum, Kohl, U. S. Lines' traffic manager for the trade in question, apprised his superior, Rand, that various carriers in the trade were not strictly adhering to the Conference rates and suggested that U. S. Lines should withdraw from its "undertaking" to the Conference to adhere to such rates. Thus, Kohl stated:

> Under the circumstances, I feel that we should reconsider the *undertaking* we gave to Mr. Rothe to abide by the Spanish Conference tariff. (Emphasis ours)

Unless U. S. Lines had an agreement, understanding or arrangement to abide by the Conference tariff, this recommendation makes no sense. If U. S. Lines was merely pursuing a unilateral "policy" to observe such rates, why speak of an "undertaking" to the Conference. The words "undertaking" and "policy" are not susceptible to use interchangeably. Moreover, as we have noted, the memorandum of April 20 bore the notation by Mr. Kohl—"Notified G & D of withdrawal 4/22/55," *i.e.*, notified Garcia & Diaz, Inc., agent of two of the Conference lines and employer of the Conference Chairman.

In the April 26 memorandum we find Kohl, his recommendation having been approved by Rand, advising the company's representative in Spain (R. O. Pickel) of the changed situation, as follows:

> After a trial of well over a year we have been forced to the conclusion that if we are to continue to observe the rates and conditions of the Spanish Conference, we cannot expect to secure our fair share of the Spanish Traffic. Consequently, we have informed the Spanish Conference that effective immediately, *we withdraw our verbal understanding with them* and hereafter will not *undertake to strictly observe the rates, terms and conditions of the Spanish Conference.*
>
> Our policy for the present will be to refrain from making any announcement of our *new status.* * * *
>
> This *new policy* * * * will place you in a position to deal with situations which have heretofore appeared hopeless. (Emphasis ours)

U. S. Lines cites the two paragraphs containing the word "policy" as support for its contention that the observance of the Conference rates was the result of its unilateral policy but it hardly seems necessary to point out that "policy" as used here refers to the change brought about by the "withdrawal" of U. S. Lines' "verbal understanding" with the Conference. It is clear that a change in policy did in fact occur at or about this time, and that U. S. Lines by reason of the change was freed of its "undertaking" to the Conference to abide by the Conference tariff. Thus freed, U. S. Lines was in a position to take, as the April 26 memo states, "quiet independent action" respecting rates when it was to its advantage to do so.

Experienced and responsible corporate officials do not use terms like "undertaking" or "verbal understanding," especially when referring to their relations with their competitors, without intending that the words convey their commonly accepted meaning. The testimony to the contrary is at best unconvincing, and is typical of the denials or explanations encountered when illegal rate arrangements are attempted to be probed. Although witnesses Rand and Kohl were unable, in the main, to recall the facts and circumstances surrounding the interoffice memoranda, they were able to say with some certainty that no agreement existed.

Considering the penalty prescribed by law for illicit anticompetitive activity, it is not to be expected that proof of such activity will be obtained either easily or in abundance. In such cases the solid evidence may consist of no more than a few contemporaneous memoranda or other documents. These, however, are and of necessity must be entitled weight, and far greater weight than oral testimony given at some later date by those who are under investigation and whose "explanations" of the documents simply cannot be squared with their contents. The documents not only record events at the time but also are usually quite reliable evidence of the facts. Particularly is this so of interoffice memoranda, such as we have here. These are never intended to meet the eyes of anyone but the corporate officers themselves, and are therefore most candid. It has been said that they are entitled to the highest validity as evidence and that, to the extent that oral testimony contradicts them, the contradiction only serves to affect the general credibility of the testimony.[3] *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (1916); *United States* v. *Gypsum Co.*, 333 U.S. 364 (1948).

In two other recent cases involving unlawful section 15 activity, we have had occasion to rule on the acceptance of testimony which is contradicted by contemporaneous documents or by logic. *Unapproved Section 15 Agreements South African Trade*, 7 F.M.C. 159 (1962) and *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295 (1962). We cannot regard such testimony as credible. The *South African* case, moreover, disposes of the contention that the memoranda authored by U. S. Lines officials are hearsay as to the Conference and its members and cannot establish a violation of the Act on their part. In that case we discussed at some length the admissibility, reliability, relevancy and probative value of hearsay evidence in an administrative proceeding. As to the admissibility against all respondents of documents like those here involved, we said (at 181):

> They were admissible, moreover, not only against the authoring respondent but against other respondents named therein because they showed or tended to show the existence of an agreement among respondents, and that was the heart of the matter under investigation.

Here as in the *South African* case, the memoranda in question show the existence of the agreement or understanding—the pre-

[3] Concerning the April 26 memorandum and the use therein of the phrase "verbal understanding." Witness Rand testified, "Well that is probably loosely used. This is just an interoffice letter. It was never written to be aired or interpreted at a public hearing I would say."

cise matter under investigation. They were clearly admissible against the Conference and its member lines and were reliable and substantial evidence in light of the entire record.

We find and conclude that from early 1954 until May 1955 there existed between the respondents U. S. Lines and the Spanish Conference and its member lines an agreement or understanding which provided for the observance by U. S. Lines of the Conference rates in the trade from U. S. North Atlantic ports to ports in Spain and therefore controlled or regulated competition between respondents; that such agreement or understanding was within the purview of section 15 of the Act but was neither filed with nor approved by the Board and was carried out by respondents; and that respondents thereby violated section 15 of the Act both by failing to file their agreement or understanding and by carrying it out absent approval. *South African* and *Coal to Korea* cases, *supra.*

We have considered other exceptions which were taken to the Examiner's decision but deem it unnecessary to discuss them in view of our findings and conclusion as herein set forth.

Since there is no evidence that respondents are currently acting contrary to the provisions of section 15, we have no occasion to issue an order against them and the proceeding will be discontinued.

FEDERAL MARITIME COMMISSION

No. 967

ALCOA STEAMSHIP COMPANY, INC.

v.

CIA. ANONIMA VENEZULANA DE NAVEGACION, ET AL.

No. 970

AGREEMENTS 8640 AND 8640-1, BETWEEN GRACE LINE, INC. AND CIA. ANONIMA VENEZOLANA DE NAVEGACION COVERING POOLING IN THE NORTH ATLANTIC-VENEZUELA TRADE

Decided September 5, 1962.

Agreement between Grace Line, Inc. and Cia. Anonima Venezolana de Navegacion (No. 8640 and No. 8640-1) not found unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports, or exporters from the United States and their foreign competitors, or any of them; not found to operate to the detriment of the commerce of the United States; not found to violate the Shipping Act, 1916; not found to be contrary to the public interest. The agreement is approved pursuant to the provisions of section 15 of the Shipping Act, 1916.

Docket No. 970 is discontinued, and Docket No. 967 is dismissed.

Elmer C. Maddy and *William L. Hamm* for complainant— intervener, Alcoa Steamship Company, Inc.

Odell Kominers, J. Alton Boyer and *Gordon Werner* for respondent, Grace Line, Inc

Renato C. Giallorenzi for respondent Cia. Anonima Venezolana de Navegacion.

Burton H. White and *Elliott B. Nixon* for intervener Royal Netherlands Steamship Company.

Thomas K. Roche and *Sanford C. Miller* for intervener Skips A/S Viking Line.

Norman D. Kline and *Robert J. Blackwell* as Hearing Counsel

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chraiman;* JOHN HARLLEE, *Vice Chairman,* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

There has been filed with us, pursuant to the terms of section 15 of the Shipping Act, 1916 (Act), an agreement between Cia. Anonima Venezolana de Navegacion (CAVN) and Grace Line, Inc. (Grace).[1]

Notice of the agreement was given and hearing was held. At the hearing, Alcoa Steamship Company, Inc. (Alcoa), Royal Netherlands Steamship Company (Netherlands), and Skips A/S Viking Line (Viking), complainant and interveners, respectively (hereinafter protestants), urged that the agreement be disapproved.

After termination of the hearing and filing of briefs by all the parties named above, and by Hearing Counsel, the Examiner issued an initial decision. He held that the agreement should be disapproved because (1) Grace and CAVN "have failed to overcome the burden on them of proving that proposed Agreement No. 8640, as amended by Agreement No. 8640-1, is lawful" and (2) "the evidence of record clearly demonstrates that the proposed agreement, if approved, would: create unjust and unfair discriminations which would prefer respondents (CAVN and Grace) over interveners (Alcoa, Netherlands, and Viking), favor ports served by Grace Line, prefer shippers, exporters and importers who use such ports, and prejudice shippers, exporters, and importers unable to use such ports, operate to the detriment of the commerce of the United States, and be contrary to the public interest, in violation of section 15 of the Shipping Act, 1916, as amended;

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[1] Section 15 provides in relevant part as follows:

*** every common carrier by water *** shall file *** with the Commission a true copy *** of every agreement with another such carrier *** controlling, regulating, preventing, or destroying competition ***. The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement *** that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements.

subject ports not served by Grace Line to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act." Exceptions were filed to the Examiner's initial decision and the matter was orally argued before us.

FACTS

(1) The agreement is in two parts, the primary agreement, which we have numbered 8640, executed October 6, 1961, and a clarifying addendum, which we have numbered 8640-1, executed November 8, 1961. Copies of both (collectively referred to as "the agreement") are attached as Appendix I.

(2) The agreement provides for its submission to this Commission, the Maritime Administration, and the Venezuelan Government, and that it shall not become effective until approved by them.

(3) The parties to the agreement are Grace and CAVN ("the flag lines"), and the agreement covers their freighting operations southbound from United States Atlantic ports to ports in Venezuela, including ports on Lake Maracaibo. The agreement provides *inter alia* for (1) a minimum number of sailings in the trade by each party, (2) for the pooling of cargo in excess of a specified percentage carried, (3) the pooling of all revenue earned in excess of a specified percentage, and (4) cooperation between the parties in certain areas of operation. Grace is a privately owned United States corporation, which operates subsidized United States flag vessels in the trade. CAVN is a Venezuelan corporation, the stock of which is held by agencies of the Venezuelan Government, and it operates Venezuelan flag vessels in the trade.

(4) Alcoa, Netherlands, and Viking (the protestants) are "third flag" operators in this trade, inasmuch as the ships they operate in the trade fly the flags of nations other than Venezuela or the United States.

(5) In large measure the proposed agreement represents an attempt by the American flag line, Grace, to counteract the effects of growing pressures and campaigns in Venezuela to ship via CAVN, the Venezuelan national line. In the past 10 or 15 years in South America there has been a growth of nationalism with a concomitant promotion of national steamship lines through legislation and governmental decrees. Increasingly during the last

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few years, pressures have been exerted by various sources in Venezuela on importers to utilize the service of CAVN rather than the foreign lines. These pressures were exerted by the Venezuelan Government, as well as by a group known as the Pro-Venezuelan Organization which disseminates literature in an effort to attract cargo to the national line. In many instances the informal attempts to stimulate Venezuelan importers into patronizing the national line did not have the full effect desired. Without the imprimatur of official decree or legislation, private importers and in some instances even Government agencies resisted the pressures exerted. The lack of complete success of these informal persuasions can be seen by the fact that CAVN actually carried substantially less Venezuelan Government cargo in 1960 than it carried in the preceding year, dropping from 64.4% in 1959 to 48.3% in 1960 of the total volume of government cargo.

(6) Informal persuasions and suggestions, therefore, soon ripened into full fledged requirements imposed by governmental decrees. Thus, decree No. 166, dated September 28, 1959, required that commercial companies under contract to any Venezuelan Government agency for public works construction include in their contracts a clause binding them to the use of the vessels of CAVN. This decree has substantially fulfilled its objectives.

(7) The most serious of the decrees, however, have been Nos. 255 and 331. The former, dated March 18, 1960; sets forth certain classifications of commodities which were exempt from payment of import duties. Such classes of commodities, known as "exonerated" cargo, are:

(a) Machinery, utensils and other effects destined for use in industrial, agricultural or livestock development established or to be established in the country . . .

(b) Raw materials which are not produced in the country nor may become immediate substitutes for articles of national production;

(c) Raw materials or substitutes produced in the country in insufficient quantity or of appreciably deficient grade . . .

(d) Articles destined to be used as containers for national products.

(8) Decree 255 did not attempt to direct routing of exonerated cargo nor did it identify more specifically which commodities were covered by the decree. This lack of specificity in the provisions of Decree 255 was apparently due to a desire to retain a degree of flexibility for achieving the purpose of the decree—the development of the Venezuelan economy. The criterion for determining an exonerated commodity is the ultimate use to which it is to be put after importation into Venezuela. Thus, the same

commodity may sometimes be exonerated and at other times be subject to payment of duty. Decree 255 by itself did not upset the trade.

(9) The issuance of Decree 331, effective March 10, 1961, caused a major disruption in the trade. This decree imposed upon the commodities subject to exoneration a requirement that they be shipped via CAVN or its associates as a prerequisite to exoneration. Article 1 of Decree 331 states:

> The total or partial exemption from import duties handled through this Ministry, as established in Executive Decree No. 255 of March 18, 1960 is predicated upon the obligation of the beneficiary to transport the machinery, utensils, raw material and other items which he may import by means of the CAVN or its associated services.

(10) The immediate result of Decree 331 was period of great confusion among shippers and consignees and the cancellation of bookings with non-CAVN carriers. In some instances shippers booked all cargo on CAVN vessels rather than attempt to distinguish exonerated from non-exonerated commodities. In practice, the determination as to exoneration is made at the discretion of the Venezuelan Minister of Formento (Development) on application for exoneration by the importer or shipper. The application requires the importer to designate the carrier recommended to transport the commodity and a copy of this application is sent to CAVN which is thus informed of the prospective shipment and can determine if it is able to carry it. The actual exoneration from duty occurs after the merchandise arrives in Venezuela, at which time the Minister of Finance effectuates the determination by the Minister of Formento that no duty shall be paid on the particular commodity.

(11) The effect of the Venezuelan Government's program on the carryings of the lines in the trade soon became clear. All lines lost cargo while CAVN increased sharply its participation in the trade. In 1960, the last year of operation before exonerated cargo was diverted to CAVN, participation in the trade from U.S. East Coast ports to Venezuela compared to participation in 1961, was as follows:

1960		1961	
Grace	35%	Grace	30%
CAVN	25%	CAVN	37%
Alcoa	18%	Alcoa	15%
Netherlands	10%	Netherlands	9%
Viking	4%	Viking	3%

(The full impact of Decree 331 is not shown for 1961, because the decree did not go into effect until March 10 of that year.)

(12) A further analysis of the trade before and after the restrictive decree tends to corroborate Grace's testimony that it, as the leading carrier in the trade, was suffering the most. Figures compiled by Grace excluding ports not served and excluding bulk wheat not carried by Grace show a sharp decline by Grace and comparatively low participation by the protesting carriers, as follows:

	1957	1958	1959	1960	1961
Grace	40 %	40.7%	33.2%	35.2%	29.8%
CAVN	21.6%	25.5%	24.2%	24.3%	37.3%
Alcoa	15.7%	8.3%	10.2%	10.5%	9.8%
Netherlands	10.5%	12.3%	9.7%	10.9%	10.6%
Viking	—	—	4.0%	5.5%	4.2%

(13) The effect of the decrees clearly emerges. The carryings of CAVN in the areas it served and cargo it carried in competition with Grace increased by a full 13% whereas Grace's participation declined 5.4% in one year. Other carriers suffered declines to a much smaller degree, i.e., Alcoa, .7%; Netherlands, .3%; Viking, 1.3%. The impact of the decrees on Grace especially and the other lines can be more readily appreciated when we consider that the trade as a whole has been shrinking. Again excluding bulk wheat and limited to ports served by Grace, the total volume of cargo in tons is as follows:

1957	892,464
1958	691,000
1959	577,316
1960	437,366
1961	401,290

(14) Statistics for the critical months of 1961 again reveal the tonnage changes brought about by the decrees:

	Feb. 1961	March 1961	April 1961
Grace	37.2%	31.4%	31.1%
CAVN	24.0%	32.9%	36.6%
Alcoa	11.1%	11.2%	7.8%
Netherlands	11.6%	9.2%	12.8%
Viking	6.6%	3.0%	3.2%

By the end of 1961 the carryings of Grace had further declined while other lines had managed to show a slight recovery toward the 1960 levels. The comparatively slight nature of the decline in tonnage carried by the protesting carriers is shown by the following:

Average Tons Carried per Voyage

	Jan. 1-March 10, 1961	March 11-October 6, 1961
Alcoa	1330	1190
Netherlands	933	944
Viking	1124	954

These figures include bulk wheat, the removal of which would result in a larger decline for Alcoa. Netherlands, despite Decree 331, increased its average tonnage.

(15) Public Resolution 17, 73rd Congress, provides that when loans are made by the Export-Import Bank to foster the exportation of agricultural or other commodities, provision shall be made that such commodities shall be carried exclusively in vessels of the United States, unless waivers are obtained from the Maritime Administration. The Maritime Administration in a statement of policy issued on July 24, 1959 (see Appendix II) declared the policy it would follow in issuing waivers on Export-Import Bank cargo. Under this policy, recipient nation vessels may be authorized to carry up to 50% of such cargo under so-called "general waivers" provided that after investigation the Maritime Administration is satisfied that "parity of treatment is extended to U.S. Vessels in the trade of the foreign nation." Under Decree 331 Grace, of course, was not "extended parity of treatment" by the Venezuelan Government, and so long as the decree continued to exclude Grace from participation in exonerated cargo, CAVN could not expect to be granted "general waivers" by the Maritime Administration. However, the "association" of Grace would remove the onus of Decree 331, and CAVN would again become eligible to carry Export-Import Bank cargo under "general waivers."

Protestants, since they operated neither U.S. flag vessels nor Venezuelan flag vessels, could not carry Export-Import Bank cargo under "general waivers". Under the Maritime Administration statement of policy protestants could only carry Export-Import Bank cargo under so-called "statutory waivers". Such waivers are granted when no U.S. flag nor Venezuelan flag vessel is available to carry the particular shipment.

(16) Despite the desirability of "association", it was not until our predecessor, the Federal Maritime Board, proposed certain regulations to offset the Venezuelan decrees that the agreement here under consideration was worked out by Grace and CAVN These regulations, although never put into effect, were made

available to the Venezuelan Government through our Department of State in June, 1961. A copy is attached as Appendix III. Much of the proposed regulations was in general terms but their "action" provisions were clearly aimed at the discriminatory decrees of Venezuela "against vessels of United States registry", *i.e.* the vessels of Grace.

(17) For several years prior to the disruption caused by the issuance of Decree 331, discussions and negotiations in contemplation of a pooling arrangement between Grace and CAVN had been carried on periodically and informally. They were inclined toward a type of pool offering quota participation such as CAVN had executed with numerous foreign lines in other trades, including one with the Netherlands in the European trade. The issuance of Decree 331 made it essential that Grace reach some sort of arrangement with CAVN, and Manual Diaz, Grace's Vice President, was dispatched to Venezuela in late March 1961 to press negotiations with CAVN. Grace was concerned not only with the harm already occasioned by Decree 331. It feared that the "Ship Venezuelan" campaign which had not abated would cause the Venezuelan Government to extend the coverage of Decree 331 by withdrawing additional cargo from free competition. Communications sent Grace by its agent in Venezuela informed it that unless negotiations between Grace and CAVN were fruitful, additional decrees would be forthcoming which would further promote the participation of the national line. Apprehension about such decrees was shared by all carriers in the trade. The Venezuelan Government had in fact prepared another decree similar in nature to No. 331 which, if promulgated, would have been applicable to all cargo subject to Venezuela's import licensing requirements. Although the figure may be somewhat high, it was feared that the new decree together with 331 would eliminate 80% of all cargo in the trade from free competition. There is some indication that the issuance and implementation of the new decree has been withheld pending the conclusion of negotiations between Grace and CAVN.

(18) Under the foregoing circumstances, the renewed negotiations between Grace and CAVN culminated in the formulation of the agreement here under consideration. It is not a true pooling agreement but an instrument to secure for each party access to cargo which it would otherwise be denied. The fact that neither Grace nor CAVN wished to make payments or receive compensa-

tion because of the periodic adjustments so common to the usual type of pool explains the figures contained in paragraphs 5 and 6(b), which are the only provisions of the agreement that could result in a true pooling of revenue. Under them, revenue will be pooled 50-50 between the parties only from cargo which either party carries in excess of 42.5% of the total volume moving from New York to Venezuela or 50% of the total from other U.S. Atlantic ports to Venezuela. The 42.5% figure represents a compromise between the two carriers and is also the approximate five-year average participation by Grace in this trade. Grace and CAVN believe that these figures will not be attained and that there will be no payments between them. But if there are, the figures appear, at least prospectively, to be equitable. The levels of actual carryings by both carriers in this trade bear out their opinions that there is little probability that actual revenue pooling will occur under the agreement. Similarly, it appears unlikely that there will be pool payments under paragraph 6(b)'s provision for such payments in the event the average annual rate per revenue ton of either party exceeds by more than 10% the average annual rate of the other. There is no evidence indicating that such a wide discrepancy in rates between the two carriers will occur. Unless the trade drastically changes, therefore, payments if any between the parties, should be few and small.

(19) The major categories of cargo which are significant in this proceeding are (1) the so-called exonerated cargo, (2) cargo subject to import licensing requirements (generally equivalent to cargo under freight collect requirements), and (3) low import duty cargo (known as "aforo estadistico".) At the present time the only type of cargo which is subject to routing requirements is the first of these, exonerated cargo. This type, by virtue of Decree 331, must move on CAVN or on an associated service, unless CAVN grants a "waiver" to the shipper. The second type of cargo is cargo subject to Venezuelan Government decrees with respect to import licensing. While the record is not entirely clear on this point, it appears that this licensing procedure relates to control of monetary exchange, *i.e.*, to payment of freight charges in Venezuelan currency at destination rather than in dollars in the United States. By virtue of this licensing procedure a sizeable amount of shipments moving to Venezeula now do so on a freight collect basis. The exact percentage relationship which such commodities bear to the total volume imported into Venezuela has not been estimated with precision. Estimates varying from 20%

to 35% of the total appear in the record. Unless commodities on the import licensing list have been exonerated, however, every carrier may compete for them. There is only a vague suggestion that since the control of routing tends to be exercised by consignees in Venezuela there will, therefore, be a preference for the Venezuelan line as to this type of cargo. The third and less important classification of cargo is that which is subject to low import duties, known customarily as "aforo estadistico" cargo. Unless the Minister of Fomento chooses to designate such cargo for exoneration, it is open to all carriers. A final category for cargo not relevant here is that imported for the exploration of oil in Venezuela, which is exonerated, but not restricted to CAVN.

(20) Certain special type cargoes have been removed from free access to the various carriers as a result of the pressures of the "Ship Venezuelan" campaign. Thus contractors engaged in public works on behalf of the Venezuelan Government customarily insert clauses in their contracts which restrict carriage of imports to CAVN. However, the "Ship Venezuelan" campaign has not deprived the non-Venezuelan lines of appreciable cargo.

(21) Only exonerated cargo and cargo shipped to contractors for the Venezuelan Government are required to move via CAVN. The exonerated cargo now restricted to CAVN approximates 25% of the total movement. CAVN records indicate that in 1960 out of a total of 2 million tons imported into Venezuela from all over the world, 600,000 tons were exonerated, *i.e.*, 30%, but this figure is subject to considerable explanation. Over half of it, 308,000 tons, constituted bulk wheat; another 250,000 tons represented homogenous cargo such as fertilizer, copra, sesame seeds. Thus only 42,000 tons (2.1%) of the 1960 exonerated cargo were general commodities.

(22) The best available estimate of cargo covered by the agreement is 25% of the trade total and assuming that only Grace and CAVN can lift this percentage, it follows that about 75% of the total cargo in the trade is freely accessible to the other lines. There is no showing that the other lines have been or will be disadvantaged or unable to attract cargo in the 75% category. Indeed, despite the "Ship Venezuela" campaign, CAVN lost a substantial percentage of cargo consigned to the Venezuelan Government itself between 1959 and 1960, dropping from 64.6% to 48.3%. On the other hand, Netherlands' participation in such

cargo climbed from 1.5% to 3.9%, Alcoa's from .3% to 6.8% and Viking's from 2.4% to 13.1% while Grace's dropped from 8.3% to 4.3%. Figures for the first nine months of 1961 show CAVN rising to 61%, Netherlands slipping back to 2.2%, Alcoa climbing sharply to 22% (although a good portion of this might have been fertilizer), and Viking declining to 10%. There is no indication that cargo which was freely accessible was lost by Alcoa or the other protestants for reasons other than normal competitive selection, based on requirements of service. Alcoa admits losing oil equipment cargo to Grace by reason of the superior service offered by Grace.

(23) Analysis of the carryings of the protestants reveals that they can be expected to continue to secure substantial exonerated cargo if the agreement is approved. It is true that as an associate of CAVN it will no longer be necessary for Grace to rely on shippers obtaining waivers from CAVN, as they must continue to do if they are to ship via the three protestants. However, the protestants will certainly carry exonerated cargo in instances where CAVN cannot do so and Grace does not offer service either to the port of export or for the type of commodity to be lifted. The record indicates that shippers will probably have to rely on lines other than Grace when cargo is moving from South Atlantic ports and from Searsport, Maine, and on shipments of bulk wheat, an important commodity in this trade. Also there are significant exclusions from cargo subject to the proposed agreement, namely, "FIO" shipments, explosives, gold and silver bullion or coins, dry or liquid cargo in bulk, heavy lift pieces or packages exceeding 35 metric tons, mail, passenger baggage, automobiles (accompanying passengers, or shipped as baggage), and livestock. Bulk wheat moves in volume on an "FIO" basis and constitutes almost one-half of Alcoa's estimated carryings in the trade. Alcoa carries an estimated 1000 tons a month and also vigorously competes for other bulk commodities. Bulk wheat, which Grace does not carry, constitutes a sizeable portion of cargo for which CAVN has granted waivers. Thus, from New York City, out of 13,319,884 kilo tons waived by CAVN from February 14 to December 31, 1961, 3,000,000 constituted wheat. From Baltimore, in the same period, out of 25,485,417 kilo tons waived, some 25,414,839 were wheat.

(24) CAVN does not waive cargo to any particular carrier. It waives to the shipper, who then makes his own selection of a

carrier. The president of CAVN indicated that it will continue its present policy of granting waivers liberally, but intimated that should the agreement in question not be approved, CAVN may reconsider this liberal policy since, absent approval, CAVN will not have the access it desires to cargoes reserved to American flag vessels.

(25) Shippers with waivers will remain free to select any carrier even if this agreement is approved. The status of Grace as an associate of CAVN enables a shipper to utilize Grace if he so chooses without securing a waiver, but should he obtain a waiver he may select any carrier he wishes. While CAVN has in its own ships sufficient capacity to carry all cargo offered from New York, the record shows that CAVN has granted waivers from New York on 14,950,259 kilo tons of cargo. Where CAVN grants waivers, any carrier can secure the exonerated cargo, and Grace has and will have no special claim to it. Nor will exonerated cargo have to filter through Grace to other carriers, as it must through CAVN.

(26) Much exonerated cargo is of a type that Grace would not carry even if the shipper solicited that line instead of CAVN. Some of it Grace does not find attractive and does not carry at all, and it would be no more attractive to Grace if the agreement is approved than it is now. As already mentioned, Grace does not carry wheat in bulk, considering it incompatible with its berth service in this trade. Likewise, Grace finds fertilizer unattractive, and shippers do not usually come to it for carriage of that commodity. Additional commodities such as pulp, paperboard, or cardboard, which Alcoa claims are important articles subject to exoneration together with wheat and fertilizer are considered by Grace to be unattractive cargoes. These move largely from South Atlantic ports and from Searsport, Maine, which are ports not served regularly by Grace. Thus, even under the agreement there will remain a good deal of exonerated cargo that third-flag lines such as protestants will carry.

(27) To the extent that Grace may divert cargo from the protestants, such cargo does not constitute the lifeblood of their business. Of the 15 leading commodities carried by Alcoa in 1961, only four can be definitely identified as exonerated, namely, corn, newsprint, paperboard, and wheat. Six of such commodities, namely, bentonite, corn, oats, soda ash, sulphur and wheat move primarily from the Gulf, a trading area beyond the confines of

the proposed agreement and three more move from ports from which Grace offers no regular service, namely, newsprint, paper board and woodpulp. Bulk wheat appears to constitute almost half of Alcoa's participation in the trade. Netherlands was unable to state how much exonerated cargo it has carried and has made no calculations as to the effect of Decree 331. It appears unable to determine definitely which of the 15 leading commodities it is accustomed to carry have been exonerated. Netherlands acknowledges that it has probably carried exonerated cargo which CAVN was unable to carry because of limited capacity or lack of service to the port from which the cargo moved. Of the 15 most important commodities carried by Viking only three or four could be identified as exonerated. Certain commodities, such as paper board, feldspar, and aluminum sulphate, were lost by Viking because of inability of the shipper to obtain a waiver from CAVN. Viking vigorously sought out other cargo to replace these losses and was able to improve its position in the latter part of 1961.

(28) There is no evidence that the agreement will adversely affect any port interest. The Board of Commissioners of the Port of New Orleans and the Alabama State Docks Department failed to produce data as required in the prehearing conference. An employee of the former testified, as Alcoa's witness, that the agreement is "per se monopolistic and therefore contrary to the Shipping Act, 1916" and that "we also feel" that the agreement in conjunction with the Venezuelan Government decrees "will operate to the disadvantage of the Port of New Orleans" by adding Atlantic Coast sailings which can handle exonerated cargoes. An employee of the latter, also an Alcoa witness, testified it "fears" that "the concerted sales efforts" of Grace and CAVN "will draw Venezuelan tonnage away from Mobile" to Atlantic Coast ports, and that these lines may curtail or discontinue their service from Mobile. However, neither witness had any information as to the amount of traffic actually or potentially involved, or the traffic handled by the parties to this proceeding through their ports, and their claims were in no way substantiated.

(29) To the extent the Gulf is competitive for Venezuelan cargo, it is due to its geographical location, inland freight rate advantages, and specialized storage facilities for certain commodities. None of these will be affected by the agreement. In addition, it is inherently improbable that CAVN would divert Venezuelan Government cargo now moving out of the Gulf, where

CAVN has the exclusive control, to the Atlantic Coast where it would be accessible to Grace without waivers, and CAVN denies any such intention.

DISCUSSION AND CONCLUSIONS

As already noted, the Examiner concluded that the agreement should be disapproved. The underlying reason for this conclusion was the failure, in the Examiner's view, of Grace and CAVN to "overcome the burden on them of proving that the proposed agreement was lawful." The Examiner reasoned that under the provisions of Rule 10(o) of our Rules of Practice and Procedure, respondents "as proponents in quest of an order by the Commission approving the proposed agreement," had the burden of proving "that the proposed agreement is not violative of any of the statutory provisions specified in the order of the Commission instituting the investigation in Docket No. 970." We think this is an oversimplification of the problem, and a misconstruction of Rule 10(o) as applied to this proceeding. Upon a careful review of the record before us, we find that there is ample evidence on which to base a decision on the merits. In view of such evidence the case does not turn on, and it is unnecessary to discuss, questions involving burden of proof.

In rejecting the agreement, the Examiner also made the following conclusory statement:

> The evidence of record clearly demonstrates that the proposed agreement, if approved, would: create unjust and unfair discriminations which would prefer respondents over interveners, favor ports served by Grace Line, prefer shippers, exporters and importers who use such ports and prejudice shippers, exporters, and importers unable to use such ports, operate to the detriment of the commerce of the United States, and be contrary to the public interest, in violation of section 15 of the Shipping Act, 1916, as amended; subject ports not served by Grace Line to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act.

We disagree with this statement. It is without adequate foundation in the record and no specific supporting reasons for it are set forth in the Examiner's initial decision.

Agreements within the scope of section 15 of the Act are approvable unless we find them to be contrary to the provisions of that section. Section 15 in relevant part provides as follows:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between

exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

The agreement cannot be condemned upon any of the above grounds. A careful review of the agreement has convinced us, insofar as it is possible to predict, that neither party will employ it to impose oppressive conditions, or extort unreasonable payments. The agreement does not set up, nor will it set up a monopoly, or lessen competition between the parties to an objectionable extent, and it does not contain any specific provision which would be ground for disapproval.

The agreement is concerned with about 25% of the cargo moving in the southbound trade from United States Atlantic ports to Venezuela. It is apparent that the real basis for the Examiner's disapproval of the agreement is the theory that operations under it will result in the protestants being squeezed out of the trade, or at the least, being so seriously injured that there would be no real chance that they would long continue to serve the route; and that this would be unjustly discriminatory and unfair as between carriers, in violation of the Act, detrimental to the commerce of the United States, and contrary to the public interest. We find ourselves unable to conclude that this will or is likely to happen. The evidence does not show and we do not think the agreement will eliminate or seriously restrict Alcoa, Netherlands, or Viking as carriers on the route. It is not so intended, and is not reasonably likely to have that result.

This brings us to the basic question—what is the agreement intended to do, and what are its reasonably likely results? Article 10, which the Examiner rightly terms the "most important provision in the agreement", has become known in this proceeding as "the equal access clause." It reads:

COOPERATION

(10) In order that both lines may enjoy equal access to all cargoes as defined in Article 4, it is agreed that C.A.V.N. and Grace Line obligate themselves to comply with all necessary proceedings so that the legal or administrative regulations in force in the United States and Venezuela regarding the reservation and protection of cargo to their respective merchant marines are extended to both lines

This clause in particular, and the effectiveness of the entire agreement in general, operate to make Grace and only Grace an "associated service" of CAVN. The mutual benefit accruing to

Grace and CAVN through the "association" of Grace is immediately apparent when the impact of the legislation and decrees of their respective governments is considered. The association of Grace clears the way to participation by both lines in the carriage of cargo otherwise unaccessible to them. It is the fact that Grace alone is made an "associate" that is the crux of the controversy. The immediate benefit to CAVN is that when Grace, the only line flying the American flag in the trade, becomes an associated service of CAVN, the discrimination of Decree 331 against American-flag vessels disappears, and CAVN by the same token becomes "eligible" to carry up to 50% of Export-Import Bank cargo moving to Venezuela. To this Alcoa, Netherlands, and Viking cannot object, because the approval of this agreement has no bearing on their ability to carry Export-Import Bank cargo.

It is to be noted that the Examiner has not found that operations under the agreement are intended or reasonably likely to squeeze Alcoa, Netherlands, or Viking out of the trade. In the light of the oral testimony on behalf of the protestants, no such finding can be made. With commendable candor, witnesses whose interest pointed in the direction of such a finding in effect refused to say that if the agreement is approved their lines will cease operating in the trade, nor could they point to any specific curtailment of the service they render shippers that would result from such approval.

Mr. Bell, a director of Alcoa who is also its vice president and treasurer and has been with Alcoa approximately 20 years, was asked by his own attorney to state Alcoa's plans if the agreement is approved. He replied:

> We plan to do * * * our utmost to stay in the Venezuelan trade; no matter whether or not this pool goes through we hope to be able to stay in the Venezuelan trade. In other words, we have no plans for pulling out of the trade because of the pooling at the present time.

Mr. Kieft, managing director of Netherlands, who has served that company for 36 years, during much of which time he lived in the Caribbean area, was examined at length about the effect of the agreement on Netherlands' Venezuelan operation. In reply he testified that while the agreement represented a serious threat to Netherlands, the line has not, so far, considered withdrawing even from its "minor port" service in the trade or reducing its frequency. Inasmuch as this "minor port" service is much less profitable than Netherlands' service to major Venezuelan ports, it is a fair inference that Netherlands is not considering abandoning or cutting down its major port service, either.

Mr. Dooley, vice president of Viking's general agent, who has had 15 years of maritime experience, said that Viking had "learned to live with" Decree 331, and that Viking's "main worry" was with the "possibility" of new decrees and regulations, rather than with the agreement itself. This witness in no way indicated that Viking is giving any consideration to abandoning or restricting its service if the agreement becomes effective. Viking's policy, as stated by this witness, of cutting conference rates 10%, and its payments of 2½% minimum and up to 10% maximum brokerage are certainly competitive advantages against CAVN, which follows conference rates, and Grace, Alcoa, and Netherlands who are conference members.

The failure of any of the protestants to submit testimony that the agreement would have specific results requiring that it be disapproved, is in itself strong evidence that such results cannot reasonably be foreseen. As heretofore stated, the Examiner did not make findings showing that Alcoa, Netherlands, or Viking will be driven from the trade or that their service will be impaired. He did say that they "fear" CAVN's and Grace's "increased competitive abilities", and indicated their fears were well founded—"these fears are not imaginary but may be reasonably deduced from existing facts". But evidentiary support for this deduction is lacking.

The language used by the Examiner appears to have been drawn from *West Coast Line, Inc. et al.* v. *Grace Line, Inc. et al.*, 3 F.M.B. 586, 595 (1951), wherein the Federal Maritime Board said that it was "only able to decide cases on the evidence of existing facts and the reasonable deductions to be drawn therefrom" and not on "speculative possibilities". The Board approved the agreement there involved notwithstanding a contention that there was a 'reasonable possibility" that the proposed agreement might have an unjustly discriminatory or unfair result. It thus took the view, which we share, that something more than a fear of increased competition is necessary to justify a finding that an agreement is unjustly discriminatory or unfair as between carriers, contrary to the public interest, or otherwise merits disapproval under section 15 of the Act.

Apparently the Examiner was of the opinion that in the immediate future, CAVN and Grace as a result of this agreement will be able to carry at least 78% of the cargo moving in the trade. He said that this was a "realistic estimate * * * neither unreasonable nor a maximum appraisal of their increased competitive abilities under the proposed agreement." We are unable so to conclude. The Examiner's discussion is based upon 1954-1960 figures for Grace, and 1961 figures for CAVN. He argues that Grace may be expected in the future to carry the 1954-1960 average (40.7%), and that CAVN should carry what it carried in 1961 (37.3%), a total of 78%. The two percentages are questionable, *per se.*, and are taken from different years. It cannot be reasonably said, for instance, that because Line "A" carried 50% of available traffic in one year, and Line "B" carried 50% the next year, the two lines together will carry 100% of available cargo thereafter. The Examiner's figure assumes that Grace, by escaping the impact of Decree 331 through association with CAVN, will recover not only the 5.4% it lost in 1961 but the 5.5% it had previously lost (1954-1960 average), a total of 10.9%, from carriers who lost to CAVN in 1961 a maximum of 2.6%. It assumes that CAVN, which apparently took away 5.4% from Grace in 1961 because it had the advantage of Decree 331 over Grace, will retain all that cargo when in actuality, as to Decree 331 cargo, CAVN and Grace will be on even competitive terms. There are other matters which militate against the dependability of the Examiner's estimate, such as the fact that P & O Line, which carried 5% plus of cargo from Atlantic ports in 1961, stopped service that year.

If the total cargo carried by Grace and CAVN combined should go to 78%, it would be difficult to consider this as the result of either the agreement or Decree 331, or both put together. The two lines together carried 76.2% (only 1.8% less) in 1954 before Decree 331 was issued, and 81.6% (or 3.6 more) in December 1961, when Decree 331 benefited only CAVN. Even if the percentage used by the Examiner should be borne out in the future, it by no means necessarily follows that protestants' revenues would shrink dangerously—they may well increase. The average annual cargo tonnage moving in this trade 1954-1959, inclusive, was over 649,000 tons. In 1957 it was almost 900,000 tons. As the record shows, the volume dropped sharply in 1960 (577,316 to 437,366 tons), and there was a further fall of more than 36,000 tons in 1961, the volume in the last year being 401,290 tons. The Alliance For Progress program, Venezuela's strong spirit for progress, and other factors indicate that cargo tonnage in this trade should increase, and it is by no means impossible that the

1954-1959 average may be equalled or even exceeded within a few years. If so, even comparatively small percentages of the total will yield increased revenue.

Apparently, the Examiner considered that the impact of the revenue loss, which he did not explicitly prophesy but upon which he seems to rely to support his conclusions, would be more severely effective on Netherlands than upon Alcoa or Viking. This may be true. Even so, the Examiner's inference that a relatively minor diversion of traffic might result in Netherlands' abandoning its valuable service to minor Venezuelan ports is hard to reconcile with the testimony of Mr. Kieft. Such an experienced operator would certainly be prepared in advance for reasonably foreseeable events, but he testified that "so far we have not considered withdrawing from that (minor port) service or reducing its frequency".

As we have indicated elesewhere, the results of future shipping operations are rarely, if ever, precisely predictable. This record, however, particularly in light of the evidence it contains with reference to the traffic in the trade, does not show that there will be any unjust or unfair discrimination between carriers as a result of this agreement.

The Examiner refers to the possibility of further measures by the Venezuelan government, which would be advantageous to CAVN and Grace, as if there were cogent evidence that such measures will be taken once this agreement has become effective. The evidence upon this point is inconclusive, and it appears at least as probable, and in fact somewhat more probable, that further measures would be taken only if the agreement is not approved, and under such circumstances, of course, they would not favor Grace but only CAVN. The evidence, in any event, will not support a finding as to what measures may be taken by any government in the future. A sound statement applicable to all countries in this regard is made in Netherlands' "Supporting Memorandum", as follows:

> The truth of the matter, as the Commission will surely appreciate, is that no one can predict what the Venezuelan Government will do in the future for the simple reason that that Government will take precisely that action which best suits its own national interests.

The application of this pithy truism would indicate that as a matter of enlightened self-interest, if this agreement becomes effective, the Venezuelan government will be unlikely to issue decrees under which the agreement might present objectionable fea-

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tures which could cause us to reconsider and disapprove the agreement under the reserve powers of section 15. We are satisfied that the same considerations will also operate effectively against any "tightening up" on waivers by CAVN. It must be clearly understood that our approval of this agreement is not what the quoted Netherlands brief claims it is—"the equivalent of the Commission's giving a foreign government a blank check to control the routing of export commerce of the United States commerce to Venezuela." Nor is our decision reached as an attempt to "satiate the appetite of CAVN (or any steamship line) with U. S. Government-controlled cargo." This proceeding lies under section 15 of the Shipping Act, 1916. This section sets out the standards for approval or disapproval of agreements filed according to its terms. We here apply those standards and no others. We are not concerned here with any promotional provision of law, and our action is not affected by and does not affect decisions under section 19 of the Merchant Marine Act, 1920.

We are wholly unable to conclude that the reasonably probable operations under the agreement will, or are likely to, cause Alcoa, Netherlands, or Viking to withdraw from the trade or any part of it (such as service to minor Venezuelan ports), or to reduce the frequency of their service, or to take other action which might be considered a detriment to the commerce of the United States, or contrary to the public interest.

No evidence of record enables us to conclude that the agreement or operations under it will divert cargo from Gulf ports to Atlantic ports. The Examiner, to the contrary, apparently thought it would, but the testimony of the witnesses on behalf of the port authorities of New Orleans and Mobile fails to justify findings of port discrimination in violation of the Act. In order to justify conclusions of port discrimination, it must be found that the preferred port is actually competitive with the complaining port, that the discrimination complained of is the proximate cause of injury to the complaining port, and that the discrimination is undue or unjust. *The Port of New York Authority* v. *Ab Svenska Amerika Linen, et al.*, 4 F.M.B. 202, 205-6 (1953) and cases cited therein. The port testimony herein by no means meets this test. It simply expresses speculative possibilities upon the basis of which findings cannot be made, and which are inherently most improbable.

We are unable to conclude from any evidence of record that this agreement or operations under it will favor or prefer ports, or shippers, exporters, or importers using them over others, or that shippers, exporters, importers, or ports will thereby be prejudiced or disadvantaged.

Hearing Counsel suggests that we require deletion of section 8 of the agreement providing for exchange of documents and data, because the transmission of certain information might constitute violation of section 20 of the Act. That point is met when we say, as we do, that nothing in our approval of the agreement shall be construed to permit either party to the agreement to disclose to or receive from the other party, information in violation of section 20. We lack authority to permit such action.

In conclusion, we do not find that the agreement (No. 8640 and 8640-1) is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports, exporters from the United States and their foreign competitors, or any of them; that it will operate to the detriment of the commerce of the United States; that it violates the Shipping Act, 1916, or any part thereof; or that it is contrary to the public interest.

Except to the considerable extent that proposed findings and conclusions are substantially embodied herein, they are denied as unsupported by reliable and probative evidence, contrary to the weight of the evidence, or irrelevant to this decision.

The said agreement is hereby approved. Our approval of the agreement in Docket No. 970 disposes of the issues in Docket No. 967, and it accordingly will be dismissed. An appropriate order will be entered.

APPENDIX I

AGREEMENT

An Agreement made this 6th day of October 1961 by and between the Cia. Anonima Venezolana de Navegacion (a Venezuelan Corporation) and any interest that they may control, hereinafter referred to as the CAVN., and Grace Line Inc. (a Delaware Corporation) and any interest that they may control, hereinafter referred to as the Grace Line, both common carriers by water in foreign commerce, subject to the United States Shipping Act, 1916, as amended.

WHEREAS, the CAVN and the Grace Line do both charge the just and fair freights and abide by the rules and practices of the Atlantic and Gulf-Venezuelan & Netherlands Antilles Conference; and,

WHEREAS, the CAVN and the Grace Line do desire to promote more efficient service for shippers and consignees, and to provide beneficial and fair cooperation in the southbound movement of general cargo from U.S. Atlantic ports to Venezuela;

NOW, THEREFORE, in consideration of the premises and mutual promises hereinafter contained and for good and valuable consideration, it is agreed and declared between the parties hereto as follows:

GEOGRAPHICAL SCOPE:

1) This agreement covers the freighting operations of the CAVN and the Grace Line on all cargo hereinafter described shipped southbound under local bills of lading from all ports or points on the Atlantic Coast of the United States, Maine to Key West, inclusive, and destined to all Venezuela maritime ports and those of Lake Maracaibo.

RATES

2) In accordance with established procedures currently in effect, all cargo handled under this agreement shall be handled in accordance with the contract/non-contract rates, rules and regulations established by the governing Conference, and in effect at the time shipments move provided however that should either party cease to be a member of or associated with such governing Conference, rates and regulations shall be as mutually agreed to by both the CAVN and the Grace Line.

SAILINGS AND CARGO CAPACITY:

3) The CAVN will offer a minimum of 48 sailings annually from New York to Venezuela (an approximately weekly service) and a minimum of 24 sailings annually from another port or ports, Maine through Key West, on the Atlantic Coast of the United States (an approximately fortnightly service) to Venezuela.

The Grace Line will offer a minimum of 48 sailings annually from New York to Venezuela (an approximately weekly service) and a minimum of 24 sailings annually from another port or ports, Maine through Key West, on the Atlantic Coast of the United States (an approximately fortnightly service) to Venezuela.

Each of the parties hereto will provide cargo capacity southbound from New York to Venezuela averaged over each quarterly period of three months, either equal to that tonnage presently employed at the signing of this agreement or in the alternative adequate to accommodate 42½% of the total cargo in the trade of the description set forth in Article 4.

In determining the cargo capacity to be provided by each party under this Article, fifty (50) cubic feet of the vessel's bale cubic capacity shall be deemed necessary to accommodate one revenue ton of pool cargo carried under deck.

If either party should fail to maintain the minimum number of sailings or the cargo capacity indicated, this pool will be adjusted in accordance with the terms of Article 9 hereunder.

CARGOES TO BE POOLED

4) All cargo shipped from ports on the Atlantic Coast of the United States, Maine through Key West, inclusive, on vessels owned or operated by the parties hereto under local bills of lading and destined to ports in Venezuela shall be included in this pool, except "FIO" shipments, explosives, gold and silver bullion or coins, dry or liquid cargo in bulk, heavy lift pieces or packages exceeding 35 metric tons, mail, passenger baggage, and automobiles accompanying passengers, or shipped as baggage and livestock.

LIMITATION OF POOL TO EXCESS CARGO

5) Except as hereinafter set forth in Article 6(b), only revenue derived by the parties hereto from cargo in excess of 42½% of the total kilo ton cargo movement in the trade from New York southbound to Venezuela, and in excess of 50% of the total kilo ton cargo movement in the trade from the other Atlantic ports, Maine through Key West, southbound to Venezuela, carried by either party hereto, respectively, shall be subject to this pool.

REVENUE TO BE POOLED

6)a) A revenue ton shall be considered as 40 cubic feet on cargo rateable per cubic foot; 2.240 pounds on cargo rateable per long ton; 2.000 pounds on cargo rateable per 2.000 pounds; 1.000 kilos on cargo rateable per metric ton; 500 board feet on cargo rateable on board measurement; 50 lineal feet on cargo rateable per lineal foot.

b) In the event that the average annual rate per revenue ton of either party exceeds by more than 10% the average annual rate per revenue ton of the other party on that cargo which constitutes up to 42½% of the total New York cargo moving to Venezuela and 50% of the total outports cargo moving to Venezuela, the party having such excess rate shall contribute to the other party a sum equal to 50% of the differential in their respective average rate per revenue ton above the 10% differential with respect to cargo which such party with such excess rate has carried up to the aforementioned limit of 42½% and 50% of the cargo moving in the above mentioned trades considering New York and outports separately.

c) To the extent that either party carries in excess of the allowed kilo ton percentages described in Article 5 above, such kilo ton overage shall be converted into a revenue ton overage by multiplying the same by a factor herein after defined.

The factor shall be determined for each line by dividing the total revenue tons carried by such party during any pool period by the total kilo tons carried by such party during such period.

Such revenue ton overage multiplied by the average revenue per revenue ton of both parties hereto during each pool period minus $16.00 per revenue ton (carrying-charge) shall be pooled.

CLAIMS FOR DAMAGED OR LOST CARGO

7) Claims for damage or loss of cargo will be for account of each respective carrier and will not be considered in any calculations of revenues to be pooled.

ACCOUNTING

8) The CAVN and the Grace Line agree to exchange their manifests, and/or freight lists at New York as soon as practical after each sailing from last port of loading on the U.S. Atlantic Coast, but not later than ten (10) days after each respective sailing.

It is agreed that freighted copies of bills of lading, manifests and other pertinent shipping records are to be available at the respective lines offices in New York for check by the other pool party upon request.

For the purposes of direct payment settlements and pool settlements the settlements for the period ending December 31, 1961 shall be considered as the final settlement for that year, and thereafter each settlement year shall end on and include December 31. Provisional settlements shall be made at the end of each three (3) months calendar quarter, that is, March 31st, June 30th, September 30th and December 31, of each year. All settlements under this agreement shall be made in United States currency and/or Venezuelan currency in the currency proportions as freight money is received in such respective currencies by the party making any direct payment or contribution to the pool. All settlements shall be made in New York within sixty (60) days following each provisional or final settlement date.

A yearly statement shall be prepared showing pooling calculations and settlements due, and a copy of this statement and of provisional statements shall be furnished to the United States Federal Maritime Board and Maritime Administration of the U.S. Department of Commerce, Washington, D. C. (or appropriate successor U.S. Government agency or agencies) and to such Venezuelan Government authorities as the CAVN may request.

DIVISION OF POOL REVENUE

9) a) The CAVN and the Grace Line shall each be entitled to 50% of the total pool income.

b) In the event that a party shall fail to maintain the minimum number of sailings per annum as specified in Article 3 above then the percentage of pool income payable to such party shall be reduced by 0.7% for each sailing deficiency and the share of the other party shall be correspondingly increased.

c) In the event that either party does not make available in any three month quarterly period cargo capacity either equal to the tonnage presently employed at the signing of this agreement, or in the alternative adequate to accommodate 42½% of the total cargo offered in the trade from New York to Venezuela the percentage of the trade which may be carried by the other party free of this pool shall be increased 1% for each percent deficiency in capacity of the other party.

COOPERATION

10) In order that both lines may enjoy equal access to all cargoes as defined in Article 4, it is agreed that C.A.V.N. and Grace Line obligate themselves to comply with all necessary proceedings so that the legal or administrative regulations in force in the United States and Venezuela regarding the reservation and protection of cargo to their respective merchant marines are extended to both lines.

INITIATION OF AGREEMENT

11) This agreement shall be submitted for approval to the appropriate authorities of the Venezuelan Government and to the United States Federal Maritime Board in accordance with the provisions of Section 15 of the U.S. Shipping Act, 1916, as amended, and to the Maritime Administration of the United States Department of Commerce, Washington, D. C. (or to appropriate successor U.S. Government agency or agencies) and shall not be effective until it has been so submitted and approved by the appropriate authorities of the respective Governments.

When so approved, this agreement shall take effect with the first sailings immediately following full approval by both respective Governments.

CANCELLATION

12)a) This agreement may be cancelled at any time by mutual agreement of both parties.

b) This agreement may be cancelled by either party hereto by the giving of ninety (90) days written notice to the other party.

c) It is also agreed that if at any time after the execution of this agreement and during the period thereof the Government of the United States of America should adopt any new laws, regulations or other measures affecting the routing of cargo in the trades covered hereby which have the effect of according to the Grace Line treatment different from that accorded thereby to the C.A.V.N., then C.A.V.N. shall have the right to cancel this agreement by giving sixty (60) days written notice to the Grace Line.

It is also agreed that if at any time after the execution of this agreement and during the period thereof the Government of Venezuela should adopt any new laws, regulations or other measures affecting the routing of cargo in the trades covered hereby which have the effect of according to the C.A.V.N. treatment different from that accorded thereby to the Grace Line, then Grace Line shall have the right to cancel this agreement by giving sixty (60) days notice to the C.A.V.N.

d) C.A.V.N. on its part and Grace Line on its part, may cancel this agreement by giving written notice to the other, immediately on the determination that the other party has discontinued service (unless suspension occurs as provided in Article 13) effective from the date of the last sailing and it shall be considered a discontinuance should either party fail to maintain any sailings in the trade for thirty (30) days.

e) Any termination of this agreement not in accordance with the pro visions hereof and any modification of this agreement, shall not be vali or binding upon the parties unless and until it has been filed and approve by the Federal Maritime Board and/or the Maritime Administration of th United States Department of Commerce, Washington, D. C., (or by th appropriate successor U.S. Government agency or agencies) in accordanc with the provisions of Section 15 of the Shipping Act, 1916, as amended and/or in accordance with the contractual obligation of Grace Line to th United States; and also, unless and until it has been filed with and approve by the appropriate authorities of the Government of Venezuela.

f) In case of any termination or cancellation of this agreement, poo revenue and settlements shall be computed and made as of the date of suc termination or cancellation.

SUSPENSION

13) Should either party hereto be unable to maintain the minimum sailings or to provide sufficient cargo capacity in the trade as required by this agreement due to outbreak of war, restraint of Governments, princes or people of any nation or the United Nations, or Act of God (other than ordinary storms or inclement weather conditions), earthquakes, explosions, fire, strikes or other industrial disturbances, riots, insurrection, sabotage, blockades, embargoes, epidemics, barratry, or piracy, or due to any other circumstances beyond the control of such party then the force of this agreement may be suspended by either of the parties upon prompt written notice of such party to the other, such suspension to continue during the period over which the maintenance of service is affected

ARBITRATION

14) Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the Rules of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held either in Caracas or New York as the parties may mutually agree.

SUCCESSORS

15) This agreement shall be binding upon each line, its successors and assigns.

NOTIFICATION

16) A copy of any notice regarding cancellation or suspension given hereunder shall be promptly despatched to the Federal Maritime Board and to the Maritime Administration of the United States Department of Commerce, Washington, D. C. by the party giving such notice.

CONSULTATION

17) Since the parties desire to mutually collaborate in the development of and the rendering of service in the trade, the parties shall make every effort to resolve any differences that might arise by mutual accord. To this

end, conversations between the parties shall be held at least once every six months.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective officers or representatives thereunto duly authorized, as of the day and year herein first above shown.

GRACE LINE INC.

por: ....
Manuel Diaz
Vice-President

por: ....
Robert C. Alsop
Assistant Secretary

AGREEMENT NO. 8640-1

ADDENDUM

It is hereby agreed that U.S. Federal Maritime Commission Agreement No. 8640, dated October 6, 1961 be amended as follows:

1) Article 2 is hereby amended to read as follows:

"2) In accordance with established procedures currently in effect, all cargo handled under this agreement shall be handled in accordance with the contract/non-contract rates, rules and regulations established by the Governing Conference, and in effect at the time shipments move."

2) Article 4 is hereby amended to read as follows:

"4) All cargo shipped from ports on the Atlantic Coast of the United States, Maine through Key West, inclusive, on vessels owned or operated by the parties hereto under local bills of lading and destined to all Venezuelan Maritime ports and those of Lake Maracaibo shall be included in this pool; *except* FIO shipments, explosives, gold and silver bullion or coins, dry or liquid cargo in bulk, heavy lift pieces or packages exceeding 35 metric tons, mail, passenger baggage, and automobiles accompanying passengers, or shipped as baggage and livestock.

3) Article 15 is hereby amended to read as follows:

"15) This agreement shall be binding upon each line, its successors and assigns. Notice of any assignment hereof, together with a copy of any applicable assignment agreement to which either CAVN or Grace Line is a party shall be filed by Grace Line with the Federal Maritime Commission."

4) This agreement shall be submitted for approval to the appropriate authorities of the Venezuelan Government, and to the United States Federal Maritime Commission in accordance with the provisions of Section 15 of the U.S. Shipping Act, 1916, as amended, and to the Maritime Subsidy Board and/or Maritime Administration, of the United States Department of Commerce, Washington 25, D. C., and shall not be effective until it has been so submitted and approved by the appropriate authorities of the respective governments.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective officers or representatives thereunto duly authorized as of the day and year first above shown.

GRACE LINE INC.

for: ....

Manuel Diaz
Vice-Presidente.

APPENDIX II

STATEMENT OF POLICY ON PUBLIC RESOLUTION 17 73rd CONGRESS

The Maritime Administrator has authorized the following statement describing the policies and procedures in administration of Public Resolution 17, 73rd Congress, 48 Stat. 500, 15 USC 616(a) as applied to credits of the Export-Import Bank of Washington. A statement of policies and procedures with respect to other agencies of the government will be issued as required.

1. SCOPE OF APPLICABILITY

Public Resolution No. 17 provides that where loans are made by an instrumentality of the government to foster the exporting of agricultural or other products, provision shall be made that such products be carried exclusively in vessels of the United States unless the Maritime Administration shall certify to the lending agency that such vessels are not available as to numbers, tonnage capacity, sailing schedule or at reasonable rate. The Resolution is considered generally applicable to credits of the Export-Import Bank for the purpose of financing the acquisition and shipment of United States products. The Bank includes in any such credit agreement a requirement that shipments be made in United States flag vessels, except to the extent a waiver of that requirement may be granted by the Maritime Administration, as outlined hereinafter. The Bank refers to the Maritime Administration any requests for waivers received by it and follows the decisions of the Maritime Administration with respect thereto.

2. TYPES OF WAIVERS

(a) WAIVERS OF U.S. FLAG REQUIREMENT ACCOUNT NON-AVAILABILITY

When it appears that U.S. vessels will not be available from the port or area of shipment to the foreign destination within a reasonable time or at reasonable rates, foreign borrowers, official or private, or their representatives in the United States may apply directly to the Maritime Administration, Office of Ship Operations, for waiver of the U.S. flag requirement with copy to Export-Import Bank. Oral requests for waiver shall be confirmed in writing. Applications shall include the number of the Export-Import Bank credit, the value of the goods to be shipped, place and date of shipment and appropriate explanation of the facts related to the necessity for waiver. The Maritime Administration will make such investigation as appears warranted to determine whether U.S. flag vessels are available and will reply in writing with approval or denial of the waiver or may request additional information. Copies will be sent to the Export-Import Bank.

Such waivers shall apply to the specific movements occurring during the period of U.S. flag non-availability as approved and the name of the ship, date of sailing, ocean freight and weight of cargo shall be reported to the Maritime Administration.

(b) GENERAL WAIVERS

In certain circumstances recipient nation vessels may be authorized to share in the ocean carriage of Export-Import Bank financed movements notwithstanding the availability of U.S. flag vessels, under so-called General Waivers. Such participation, representing a reduction of the U.S. flag share, may be granted when the Maritime Administration is satisfied that parity of treatment is extended to U.S. vessels in the trade of the foreign nation. When foreign borrowers, official or private, desire such general waivers in order to make partial use of their own national flag vessels application may be made to the Maritime Administration, Office of Ship Operations, directly or through the Export-Import Bank, for a general waiver applicable to the particular credit. When application is made by private interests, sponsorship by an official of the foreign government may be requested in order to obtain satisfactory understanding that the recipient nation undertakes to maintain conditions of fair and equitable treatment for U.S. flag shipping.

3. CONSIDERATIONS INFLUENCING APPROVAL OF APPLICATIONS FOR GENERAL WAIVERS

In the disposition of applications for general waivers under Paragraph 2(b) the Maritime Administration will take into consideration

(a) the treatment accorded U.S. flag vessels in the trade with the recipient nation, particularly whether U.S. flag vessels have parity of opportunity vis-a-vis national flag or other foreign flag vessels to solicit and participate in movements controlled in the foreign nation; parity in the application of consular invoice fees, port charges and facilities; also parity of exchange treatment including the privilege of converting freight collections to dollars as needed. Information will be sought from U.S. ship owners and other sources as to their experiences in the particular trade.

(b) the national policy of the United States as well as the purpose of the Export-Import Bank in authorizing the credit.

4. CONDITIONS OF GENERAL WAIVERS WHEN APPROVED

(a) Such waivers, if granted, shall apply only to vessels of recipient nation registry to the extent of their capacity to carry the cargo, based on normal flow of the traffic from interior through ports of shipment and not in excess of fifty percent of the total movement under the credit.

(b) General waivers will normally apply throughout the life of the credit, but may be reconsidered at any time by the Maritime Administration or the Export-Import Bank in the light of altered circumstances.

(c) The record of flag distribution between U.S and foreign vessels shall be based on (1) manifest weight in the case of bulk cargoes such as coal and grain (2) ocean freight revenue in the case of machinery, equipment and miscellaneous general cargo on liner vessels (3) such other unit as may be found suitable in exceptional circumstances.

(d) Applicants or their representatives in the United States shall provide reports of movements to the Maritime Administration, Office of Ship Operations, at monthly or other intervals as arranged, in the general form of enclosure hereto. The data to be included on these reports may be varied by the Maritime Administration to meet specific circumstances of the movements from time to time.

6. EXPORTER CREDITS

(a) U.S. exporters who obtain so-called exporter credits or lines of credit from the Export-Import Bank may apply directly to the Maritime Administration, Office of Ship Operations, as provided in paragraph 2(a) above when it appears that U.S. flag vessels will not be available.

(b) Exporters may also apply for a general waiver for participation of recipient nation vessels as provided for foreign borrowers in paragraph 2(b) hereof and consideration will be given to such application along the lines set forth in the several paragraphs hereof to the extent they are applicable.

APPENDIX III

RULES AND REGULATIONS TO MEET CONDITIONS UNFAVORABLE TO SHIPPING; DISCRIMINATION BY THE GOVERNMENT OF VENEZUELA

WHEREAS, Circular No. 166, dated September 28, 1959, issued by the Government of Venezuela, provides that all private contractors who enter into public works contracts with the Venezuelan Government shall be required to use the steamships of Compania Anonima Venezolana de Navegacion whenever they find it necessary to bring in equipment and material from abroad; and

WHEREAS, Decree No. 331, dated February 9, 1961, issued by the Ministry of Development of the Government of Venezuela, provides, "Total or partial exoneration of import duties to be processed through this Ministry in accordance with regulations of Executive Decree No. 255 of March 18, 1960 is conditioned on the compliance, on the part of the beneficiary, with the obligation of transporting the machinery, tools, raw materials and other items imported, on Compania Anonima Venezolana de Navegacion or its associated services"; and

WHEREAS, under Decree No. 480, dated March 17, 1961, and Decree No. 492, dated April 6, 1961, issued by the Government of Venezuela, and under regulations effective pursuant to these Decrees, all freight charges upon imports into Venezuela included in the "List of Importations of the Controlled Market" must be paid in Venezuelan currency by the importer in Venezuela, and such importer is prohibited from remitting such charges abroad; and further, the non-Venezuelan transportation companies, including United States flag carriers, must collect such charges in Venezuelan currency, and are required to accept payment at a currency exchange rate fixed by the Venezuelan Government, but as to a portion of such charges, may exchange that portion into their own national currency or other currencies only at a relatively unfavorable free market exchange rate; and further, the "List of Importations of the Controlled Market" referred to in said Decrees No. 480 and No. 492, is contained in *Gaceta Oficia No. 680 Extraordinario*, dated March 29, 1961, as amended by *Gaceta Oficio No. 685 Extraordinario*, dated May 24, 1961, issued by the Government of Venezuela, and comprises an extensive list of commodities; and

WHEREAS, Compania Anonima Venezolana de Navegacion is a Venezuelan national flag line owned by the Venezuelan Government; and

WHEREAS, the effect of Venezuelan Circular No. 166 and Venezuelan Decree No. 331 is to completely foreclose United States flag and other flag vessels from competing for cargo subject thereto; the effect of Decrees No. 480 and No. 492, and the regulations thereunder, is arbitrarily to deprive exporters from the United States of control of the routing of any imports on said "List of Importations of the Controlled Market," and to transfer such control to Venezuelan importers, without regard to normal freely competitive commercial practices, to the benefit of Compania Anonima

Venezolana de Navegacion and to the detriment of other carriers, including United States flag carriers; and the further effect of Decrees No. 480 and No. 492, and the regulations thereunder, is to impose discriminatory currency exchange restrictions upon such other carriers; and

WHEREAS, the foregoing Venezuelan laws, rules, and regulations also cause diversion of cargo not otherwise subject thereto, due to uncertainty on the part of merchants as to the extent to which particular shipments are subject to such laws, rules, and regulations, and due to advantages of consolidated pier delivery, where only a portion of each consolidated shipment is subject thereto; and

WHEREAS, the total effect of said Venezuelan laws, rules, and regulations and competitive methods or practices is to cause an artificial diversion of cargo to Compania Anonima Venezolana de Navegacion and associated services, unrelated to normal freely competitive commercial practices; and

WHEREAS, during the base period________________________, on the basis of the weight of the cargo carried, Compania Anonima Venezolana de Navegacion carried __________% of the total exports from the United States carried by it and United States flag vessels from United States Atlantic Coast ports north of Hatteras to Venezuela, and __________% of the total of such exports carried from United States Gulf of Mexico ports to Venezuela; and

WHEREAS, it is reasonable to conclude that any freight revenue hereafter accrued to Compania Anonima Venezolana de Navegacion, for transportation of exports from the United States to Venezuela, in a proportion in excess of the above stated proportion accrued in the base period, is a result of a diversion of cargo to Compania Anonima Venezolana de Navegacion by said Venezuelan discriminatory laws, rules and regulations and competitive methods or practices; and

WHEREAS, the benefit or advantage hereafter derived therefrom by Compania Anonima Venezolana de Navegacion, after giving consideration to out-of-pocket handling costs, will be equal to at least 50% of that portion of the total freight revenue accruing to it for the transportation of cargo from the United States to Venezuela in excess of the above stated proportion accrued to Compania Anonima Venezolana de Navegacion in the base period; and

WHEREAS, the Federal Maritime Board has found that the said Venezuelan laws, rules and regulations and competitive methods or practices are discriminatory in favor of vessels of Compania Anonima Venezolana de Navegacion and associated services, and against vessels of other flags, including the United States flag; confer an unjust, unfair and undue advantage upon the owners, operators, agents, and masters of vessels of Compania Anonima Venezolana de Navegacion and associated services; and are detrimental to vessels of such other flags, including the United States flag, in the foreign trade from the United States to Venezuela, thereby creating a general or special condition unfavorable to shipping in that trade; and that said condition arises out of or results from Venezuelan laws, rules or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of Venezuelan national flag vessels; and

WHEREAS, despite the requests of the United States Government, the Government of Venezuela has failed to remove these discriminations with respect to shipping in the foreign trade of the United States; and

WHEREAS, the Federal Maritime Board is authorized and directed pursuant to authority vested in it by section 19(1)(b) of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), to make rules and regulations affecting shipping in the foreign trade, not in conflict with law, in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or result from foreign laws, rules or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country; and

WHEREAS, the Federal Maritime Board by General Order No. 88, adopted February 1, 1960 (46 C.F.R. §§ 206.302-206.303), provided:

"§206.302. Imposition of equalization fees or charges.

"The Federal Maritime Board, in order to counteract the adverse effect of fees or charges imposed by a foreign government which discriminates, directly or indirectly, against vessels documented under the laws of the United States, will impose equalizing fees or charges against vessels flying the flag of the discriminating country or vessels owned, operated, or chartered by shipping companies to which such foreign government has extended the same preferential treatment accorded to vessels flying the flags of the discriminating country, and/or the users of the services of said vessels.

"§206.303. Other off-setting regulations.

"If and when other discriminatory practices against vessels documented under the laws of the United States are found to exist, off-setting regulations will be imposed by the Federal Maritime Board";

and

WHEREAS, the Federal Maritime Board has found it necessary to adopt regulations affecting shipping in the foreign trade in order to adjust or meet said general or special condition unfavorable to shipping in the foreign trade from the United States to Venezuela;

NOW THEREFORE, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), section 204 of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1114), sections 101 and 104 of the Reorganization Plan No. 21 of 1950 (64 Stat. 1273), and other pertinent laws, the Federal Maritime Board hereby prosposes to adopt the following regulations:

"1. The Federal Maritime Board has determined that the Government of Venezuela is engaged in discriminatory cargo routing practices against vessels of United States registry, in favor of national flag vessels of Compania Anonima Venezolana de Navegacion and in favor of other vessels chartered to or operated by Compania Anonima Venezolana de Navegacion or associated companies to which Venezuela has extended the same privileges and benefits as are accorded the vessels of Compania Anonima Venezolana de Navegacion. Such national flag and other vessels are herein referred to as 'favored vessels.'

"2. The Federal Maritime Board has further determined that Compania Anonima Venezolana de Navegacion and associated services and the owner, operator, agent, and master of any favored vessel which carries exports from the United States to Venezuela, receive an unjust, unfair, and undue advantage from such discriminatory cargo routing practices, resulting in a condition unfavorable to shipping in the foreign trade of the United States, which arises out of or results from foreign laws, rules or regulations or from competitive methods employed by owners, operators, agents or masters of vessels of a foreign country.

"3. In order to meet or adjust such unfavorable condition and to offset the discriminatory benefit derived therefrom, the Federal Maritime Board will impose an offsetting charge against Compania Anonima Venezolana de Navegacion, its associated services, and the owners, operators, agents, or masters of their vessels, whenever it appears that the discriminatory cargo routing practices referred to herein have resulted in a diversion of cargo carried by United States flag vessels. Such diversion and the offsetting charge will be determined, as more specifically set forth.

"4. The owner, operator, agent, or master of any favored vessel which carries exports from the United States to Venezuela shall within four days (excluding Saturdays, Sundays, and holidays) after departure of the vessel from the last United States port of call file with the Federal Maritime Board, Washington 25, D. C., a complete manifest of all exports from the United States to Venezuela carried by such vessel. Such manifest shall show the name of the vessel; the owner, operator, agent, and master; the date of departure of the vessel from the last United States port of call; the anticipated first port and date of arrival in Venezuela; the total weight of the exports from the United States to Venezuela carried thereon, in pounds, and the total ocean freight revenue accruing to the carrier for the transportation of such exports from the United States to Venezuela, stated in United States dollars; and shall further show for each individual export shipment,

(a) The name of the shipper and of the consignee;

(b) The description of the shipment, including, where applicable, number and type of packages to be shipped, and the marks and numbers thereof; weight, in pounds; measurement, if expected to be rated on a measurement basis; and the applicable freight rates, in United States dollars; and

(c) The total freight revenue accruing to the carrier for the transportation from the United States to Venezuela, stated in United States dollars.

"5. The owner, operator, agent, or master of any United States flag vessel which carries exports from the United States to Venezuela shall, within four days (excluding Saturdays, Sundays, and holidays) after departure of the vessel from the last United States port of call, file with the Federal Maritime Board, Washington 25, D. C., a report showing the name of the vessel; the owner, operator, agent, and master; the date of departure of the vessel from the last United States port of call; the anticipated first port and date of arrival in Venezuela; the total weight of the exports from the United States to Venezuela carried thereon in pounds, and the total freight revenue accruing to the carrier for the transportation of such exports from the United States to Venezuela, stated in United States dollars.

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"6. The Federal Maritime Board shall keep, for each calendar quarter, records of the total freight revenue from exports to Venezuela carried by Compania Anonima Venezolana de Navegacion and associated services separately from United States Atlantic Coast ports north of Hatteras, United States Atlantic Coast ports south of Hatteras, and the Gulf and Pacific Coasts of the United States, and similar records of the total freight revenue from exports to Venezuela carried on United States flag vessels. The Federal Maritime Board shall also keep current such totals for each quarter. The Federal Maritime Board, upon request, shall promptly make such totals available to authorized representatives of Compania Anonima Venezolana de Navegacion and associated services and the interested United States flag carriers.

"7. A diversion of cargo from United States flag vessels to favored vessels will be considered to have resulted from Venezuelan discriminatory cargo routing practices, whenever at the end of any calendar quarter it appears to the Federal Maritime Board that the proportion of the revenue accrued in that quarter by Compania Anonima Venezolana de Navegacion and associated services for transportation of exports from the United States to Venezuela, as against that accrued by United States flag carriers from the United States coastal district, is greater than the relative percentage proportions carried by favored vessels and United States flag vessels during the base period ________________________ in the same trade.

In the event the Federal Maritime Board finds such a diversion in any quarter, it shall impose upon Compania Anonima Venezolana de Navegacion, its associated services, and the owner, operator, agent, or master of any favored vessel, or any one or more of them an offsetting charge equal to 50 percent of the revenue accrued from cargo which has been diverted. Notice to any one of the foregoing shall constitute notice to each of them. Such charge shall be payable within ______ days after notice and shall bear interest at the rate of 6 percent per annum thereafter.

If, in any quarter next succeeding a quarter in which a diversion has been found and an offset charge determined, favored vessels accrue less than the relative percentage proportion of revenue based upon their carryings during the base period, said deficiency may be back no more than one quarter to reduce the charge previously determined. This subparagraph shall apply only if a satisfactory bond or other guarantee has been posted as hereinafter provided.

"8. The percentage relationships derived from the base period __________ __________ may be amended by the Federal Maritime Board when necessary to take into consideration any substantial variation in service, vessels, or equipment, of either favored vessels or of United States ships from existing service, or when otherwise necessary or appropriate to meet or adjust the said condition unfavorable to shipping in the foreign trade.

"9. In order to insure collection of any applicable charges or penalties resulting from these regulations, the Federal Maritime Board may require Compania Anonima Venezolana de Navegacion, or its associated services, or the owner, operator, agent, or master of any favored vessel, to post with it a bond or other guarantee, the form and amount of which shall be determined by the Federal Maritime Board.

"10. Any owner, operator, agent, or master who fails to comply with any provision of these regulations shall be subject to all applicable remedies and penalties provided by law, in addition to the offsetting charge herein provided.

"11. These regulations shall not apply with respect to the carriage of exports from the United States to Venezuela as to which the Federal Maritime Board hereafter finds that Venezuela does not or has ceased to employ or enforce its discriminating cargo routing practices The Federal Maritime Board hereby finds that the discriminatory cargo routing practices of the Government of Venezuela have no present impact with respect to the carriage of exports from United States Pacific Coast ports to Venezuela. The Federal Maritime Board finds that Compania Anonima Venezolana de Navegacion does not presently maintain a regularly scheduled service from United States Atlantic Coast ports south of Baltimore to Venezuela. These regulations shall not apply to the trade from United States Pacific Coast ports to Venezuela, or to the trade from United States Atlantic Coast ports south of Baltimore to Venezuela, until further notice.

"12. The Federal Maritime Board may from time to time by appropriate notice modify or amend or suspend these regulations in whole or in part if it finds that such action is required or appropriate in order to adjust or meet the discriminating cargo routing practices of Venezuela or to place the favored vessels on a parity with vessels of the United States in competing for cargo, or to reciprocate modification, amendment or suspension of the Venezuelan discriminatory cargo routing practices.

"13. If the Federal Maritime Board hereafter finds the offseting charge herein provided is insufficient to adjust or meet the discriminatory cargo routing practices involved, it will give consideration to increasing said charge."

Persons interested in the proposed regulations may file with the Secretary, Federal Maritime Board, Washington 25, D. C., U.S.A., written comments thereon and request for hearing if desired (original and fifteen copies), within ---------- days after publication of this order in the *Federal Register*.

Dated: June ------, 1961

By the Board

(SEAL)

Secretary

ORDER

FEDERAL MARITIME COMMISSION

No. 967

ALCOA STEAMSHIP COMPANY, INC.

v.

CIA. ANONIMA VENEZOLANA DE NAVEGACION. ET AL.

No. 970

AGREEMENTS 8640 AND 8640-1, BETWEEN GRACE LINE, INC. AND CIA. ANONIMA DE NAVEGACION COVERING POOLING IN THE NORTH ATLANTIC-VENEZUELA TRADE

The Commission having on this day entered its report containing its findings and conclusions herein, which report is made a part hereof:

It is ordered:

(1) That agreements 8640 and 8640-1 be, and they are hereby approved;

(2) That Docket No. 967 be, and it hereby is, dismissed; and

(3) That Docket No. 970 be and it hereby is, discontinued.

By the Commission September 5, 1962.

(Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 870

PACIFIC COAST EUROPEAN CONFERENCE—EXCLUSIVE PATRONAGE CONTRACTS

DENIAL OF MOTION TO CLARIFY ROLE OF HEARING COUNSEL

Decided September 18, 1962

BY THE COMMISSION:

Respondents, Pacific Coast European Conference and its member lines, seek an order from the Commission precluding Hearing Counsel from taking "the position of a prosecutor in this proceeding by filing exceptions to the Examiner's Recommended Decision." Respondent goes even further; it "objects to any participation in this proceeding by Hearing Counsel," on the ground that "authority for the Commission to permit its own lawyers to participate in proceedings before the Commission itself, representing the 'public interest', does not exist in any statute."

The Federal Maritime Board has already rejected this same argument, in this very proceeding, then made in support of a motion to dismiss by these respondents. The argument is made again because respondents contend that the Board's denial of the motion to dismiss was arbitrary with no reasons given and that "the inference is inescapable that the Board evaded meeting the issues."

Respondents seek to give the impression that their objections to the participation of Hearing Counsel in Commission proceedings have never been met. To the contrary the same argument was made to our predecessor, the Federal Maritime Board in Docket 764, *Mitsui S.S. Co., Ltd.* v. *Anglo-Canadian Shipping Co., et al.,* 5 F.M.B. 74 (1956). The position was rejected there; and, upon review of the Board's decision in Docket 764,[1] respondent again made the same argument to the Circuit Court of Appeals. The Court relegated respondents contention to footnote 2 of its opinion and there stated:

> "Petitioners [respondents] questioning the standing of this Public Counsel, assert he was employed, not by the Board, but by the Federal Maritime Administration. We consider this unimportant, since the Board permitted this intervenor, whoever, he was to speak on behalf of the public. This was a matter within the Board's discretion."

Significantly, this case was a complaint proceeding in which Public Counsel had intervened. In such a case the adversary system traditional to Anglo-American jurisprudence can be reasonably expected to work its usual result of a full exposition of both sides of every issue. In a complaint case the Board's, and the Commission's Rules of Practice and Procedure allow the participation of Hearing Counsel only upon leave to intervene.

The instant proceeding is vastly different in nature and scope. It is an investigation instituted by the Commission itself. In such a proceeding, the exclusion of Hearing Counsel would leave respondents unopposed and free to state without fear of contradiction any and all contentions no matter how erroneous or frivolous they may be. No cross examination of witness, and no rebuttal testimony nor evidence would ever be produced. Indeed, the questions which themselves gave rise to the investigation would forever remain one-sided and incapable of impartial resolution. We find it difficult to believe that contentions for this result can be seriously made.

We are unimpressed by respondents' contentions concerning our lack of statutory authority. Review of the Rules of Practice of other federal administrative agencies reveals that "Hearing Counsel" or "Board Counsel" are extensively employed by other regulatory agencies, e.g., Securities and Exchange Commission, 17 C.F.R. § 201.17; Federal Power Commission, 18 C.F.R. § 1.1(f), 1.4, 1.8; Federal Communications Commission 47 C.F.R. §§ 1.76, 1.842, 1.846, 1.853, 1.854, 1.859; Civil Aeronautics Board, 14 C.F.R. § 302.30, 302.210, 302.215, 203.301; Interstate Commerce Commission, 46 U.S.C. 16 (11.).

Section 22 of the Shipping Act, 1916, contains the Commission's authority to conduct investigations "in such manner and by such

[1] The case was then styled *Anglo-Canadian Shipping Co., Ltd.* v. *U.S. and F.M.B.*, 264 F. 2d 405 (1959).

means, and make such order as it deems proper." We find it difficult to conceive of a broader grant, and it clearly suffices here. Since we reject respondents' contention regarding our lack of statutory authority to allow the participation of Hearing Counsel in this proceeding, we must consider their alternative request for clarification of Hearing Counsel's role.

Respondents contend that recent decisions of the Commission preclude *further* participation by Hearing Counsel in this proceeding and that he should not be allowed to file exceptions to the Recommended Decision. Respondents cite: Docket 882, *Unapproved Section 15 Agreements—South African Trade,* decided April 9, 1962; Docket 916—*Investigation of Practices, etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade* (Grant of Petition of Hearing Counsel, July 11, 1962); and, Docket 896, *Unapproved Agreement—Coal to Japan/Korea,* decided August 2, 1962. It is respondents' contention that these decisions are inconsistent with Rule 3(b) of our Rules of Practice and Procedure, which respondents say provides merely that "Hearing Counsel" shall "actively participate in any proceedings to the extent that he deems required in the public interest." The rule to which respondents refer was superseded in its entirety by the present rule 3(b) which became effective April 4, 1954 (46 C.F.R. 201.42). The "new" rule provides:

> The Assistant General Counsel for Litigation [now, Director, Bureau of Administrative Proceedings] shall be a party to all proceedings governed by the rules in this part, except that in complaint proceedings under § 201.62 he may become a party only upon leave to intervene granted pursuant to § 201.74. The [Director, Bureau of Administrative Proceedings] or his representative shall be designated as 'Public Counsel' [now, hearing Counsel] and shall be served with copies of all papers, pleading, and documents in every proceeding governed by the rules in this part, whether a party of record or not. [Hearing Counsel] shall actively participate in any proceeding to which he is a party, to the extent required in the public interest, subject to the separation of functions required by Section 5(c) of the Administrative Procedure Act.

Were further clarification considered necessary, it was amply provided in Commission Order No. 1, Organization of the Federal Maritime Commission, amendment No. 1, effective January 16, 1962 (27 F.R. 677, 78), which provides:

> The *Bureau of Administrative Proceedings* acts as Hearing Counsel in all formal investigations, non-adjudicatory investigations, rule-making proceedings and any other proceedings initiated by the Federal Maritime Commission under the Shipping Act, 1916, and other applicable shipping acts; examines and cross-examines witnesses, prepares and files briefs,

motions, exceptions and other legal documents and participates in oral argument before the hearing examiners and the Federal Maritime Commission; acts as Hearing Counsel, where intervention is permitted, in formal complaint proceedings initiated under section 22 of the Shipping Act; reviews and concurs in all recommendations of other bureaus recommending the institution of formal proceedings; prepares all orders, notices and other documents which institute formal or informal Commission proceedings; furnishes consultative and advisory services and otherwise assists other bureaus in formulating procedures to be followed in connection with investigations and/or formal Commission proceedings; serves, with the concurrence of the Executive Director, as requested by the General Counsel and under his direction in matters of court litigation by or against the Commission arising out of violations previously adjudicated by the Commission.

Respondents have obviously misread the recent Commission decisions cited to us.[2] They contain nothing which is inconsistent with the Commission's Rules of Practice and Procedure nor which would require their revision under the Administrative Procedure Act. In each of the decisions cited the role of Hearing Counsel was discussed only with regard to the practice of requiring from Hearing Counsel particularizations of "charges" against respondents to Commission orders of investigation. In this regard the Commission defined the "primary mission" of Hearing Counsel as that of obtaining pertinent information in the discharge of his duty to the public interest to insure that all probative evidence relevant to the matters under investigation is developed to its fullest possible extent. To argue from this that Hearing Counsel may not after developing a full and complete record take any position regarding what that record demonstrates defies logic. Respondents would apparently have Hearing Counsel stand mute leaving them free to interpret the evidence and the law as they choose, thus depriving the Commission of the development of a full and complete record. This is absurd.

If we have appeared to devote undue time and attention to the "Issues" raised herein, it was done in the hope of laying them to rest finally.

Respondents motion is denied.

[2] We note that in both Docket 882 and Docket 896 Hearing Counsel filed, and the Commission accepted exceptions to the Examiner's decision. No decision by the Examiner has yet been rendered in Docket 916.

FEDERAL MARITIME COMMISSION

No. 990

ALASKA LIVESTOCK & TRADING CO., INC.

v.

ALEUTIAN MARINE TRANSPORT COMPANY, INC.

Decided September 18, 1962

Freight rate of $1.10 per cubic foot on grease wool in bags between Unalaska Island and Seattle, Washington found not to be unjust or unreasonable within the meaning of Section 18 of the Shipping Act, 1916. Order to be entered dismissing complaint.

William H. Bishop, President of Alaska Livestock and Trading Co., Inc., for Complainant.

Niels P. Thomsen, President of Aleutian Marine Transport Company, Inc., for Respondent.

INITIAL DECISION OF E. ROBERT SEAVER, EXAMINER[1]

The main question in this case is whether respondent's rate on wool from the Aleutians to Seattle is unjustly or unreasonably high.

Complainant, Alaska Livestock and Trading Co., Inc., is an Alaska corporation which operates a sheep ranch at Chernofski Bay on Unalaska Island in the Aleutian chain. Respondent, Aleutian Marine Transport Company, Inc., also an Alaska corporation, operates the *Expansion*, a small dry cargo vessel, in common carriage of general cargo and a few passengers between the Aleu-

[1] In the absence of exceptions thereto by the parties, and upon notice by the Commission, the initial decision of the Examiner became the decision of the Commission on the date shown (Section 8(a) of the Administrative Procedure Act and Rules 13(d) and 13(h) of the Commission's Rules of Practice and Procedure.)

tion islands, the Alaska mainland, and Seattle, and in carrying mail between the Aleutians and Seward, Alaska.

The complaint alleges that the rate of $1.10 per cubic foot on grease wool, as shown in respondent's Freight Tariff No. 1-C, Item 430, is an unjust and unreasonable rate in violation of Section 18, Shipping Act, 1916, in that it is too high and also because the rate should be based on the hundredweight rather than the cubic foot. Complainant's contentions regarding the proper unit upon which the rate should be based are founded on the belief that the rate should be $1.10 per hundredweight. In other words, its interest in this matter stems from the amount of the rate rather than from other shipping matters that might be affected by a change in the freighting unit from a cubic to a weight basis. This was made clear in the course of the hearing. A rate of $1.10 per cubic foot is the equivalent of approximately $10. per hundredweight.

Neither side was represented by counsel at the hearing; but each appeared, *pro se,* by its President. Mr. William H. Bishop, complainant's President, appeared and testified on behalf of complainant. Mr. Niels P. Thomsen, respondent's President, appeared and testified on behalf of respondent. There were no other witnesses. Both of these gentlemen were completely forthright in the course of the hearing. For example, Mr. Bishop frankly acknowledged the value of respondent's service to this far outpost, despite his conviction that the rate on wool, southbound, is excessive.

There is little, if any. factual dispute between the parties. Respondent operates the *Expansion* as the "mail boat" on a twice monthly schedule between Seward, on the east, and points along the Aleutian chain as far west as Nikolski, on Umnak Island in the Aleutians, on the west. It also makes a monthly round voyage between these points and Seattle. Respondent carries the mail to and from these points in the Aleutians to Seward under a four year contract with the United States Post Office Department for which respondent is paid $190,000. per year. On September 1 1961, this payment was reduced from $243,000. to its present amount.

The *Expansion* has a cargo capacity of 250 tons (cubic tons of 40 cubic feet) all in a single hold. This hold is equipped to handle refrigerated cargo. The *Expansion* is one hundred and forty-eight feet long, has a beam of thirty-seven feet, and a draft of twelve feet. Patrons for her passenger space for twelve are available only during three or four summer months.

The scope of respondent's operation is small, and decreasing. Mr. Thomsen, founder and President, serves as master of the *Expansion*. Recently, the shoreside office was closed, and the paper work incident to the operation is now done on board the ship.

Aside from the mail, and shipments of frozen crab respondent has carried since last September, petitioner's wool, and that of another sheep rancher located at Nikolski, is the only available southbound cargo. Each of these two ranchers has one shipment of wool a year, in the spring or early summer, and they only patronize respondent occasionally. The wool is clipped in May, June and July and the entire clip—the annual shipment of each rancher—is about 100 bags of about 300 pounds and 27 cubic feet each. In most of the eight years since respondent entered the trade in 1954, these two ranchers have shipped their wool with contract carriers who, in the main, have operated barges with cargo northbound for the military. These operators carried the wool as backhaul cargo at rates less than the $1.10 per cubic foot shown in respondent's Freight Tariff No. 1-C, Item 430. Complainant has shipped the wool on respondent's vessel only three times, and the other rancher about the same: They only do so when one of the tramp carriers is not available.

Respondent is the only common carrier by water that has called at Chernofski Bay since respondent entered the trade in 1954. Alaska Steamship Company publishes a tariff which includes a rate on wool from Chernofski to Seattle; but they do not make calls at Chernofski or Nikolski, and have not done so for many years.

In support of it's contention that respondent's rate is excessive, complainant shows:

1. That Berger Transportation Company, predecessor of respondent as operator of the mail boat, charged $2.65 per hundredweight for transporting complainant's wool from Chernofski to Seattle, as a common carrier, in 1954.

2. Alaska Steamship Company has a tariff rate of $1.85 per hundredweight on wool on this route, plus a 10% surcharge. Complainant cites this tariff item to show the freighting unit used, not the rate.

3. That complainant's most recent shipment of wool, early in 1961, moved from Chernofski to Kodiak on respondent's vessel and thence to Seattle via Alaska Steamship Company. At that

time respondent did not call at Seattle, or any other ports south of Alaska. The charges for the transportation of 101 bags, being 33,547 pounds of wool, from Chernofski to Seattle, on that occasion, came to $2713.20, or about $8. per hundredweight. Respondent's present rate comes to about $10. per hundredweight.

4. Complainant also relies on the Act of Congress of August 10, 1939, ch. 637, as amended, 53 Stat. 1338, 39 U.S.C. 487a, under the terms of which the Postmaster General is authorized to enter into contracts for the carriage of mail between Seward and the Aleutians. This statute provides that the contractor shall "furnish and use in the service a safe and seaworthy boat of sufficient size to provide adequate space for mail, passengers and freight, * * *." Complainant contends that this statute is evidence of an intention on the part of Congress to provide the people along this remote mail route with monthly passenger and cargo service at "reasonable rates". He characterizes the $190,000. annual payment to respondent under the mail contract as a subsidy payment, and concludes that the rate on wool should be somewhat less than respondent's current rate, since respondent is calling at Chernofski in any event under the requirements of the mail contract.

Complainant acknowledged that respondent's service is preferable to that of contract carriers because of the regularity and frequency of the calls of respondent's ship. He also testified that the northbound service of respondent is of value, as the respondent brings the supply of fresh vegetables in; and that complainant has other northbound cargo aboard the mail boat nearly every month.

In 1955, the first year respondent transported complainant's wool, the rate from Chernofski to Seward was 75 cents per cubic foot. Since 1954, respondent's operating costs have increased 60 percent.

The total revenue on one shipment of complainant's wool, at a freight rate of $1.10 per cubic foot, would be approximately $3,000. The cost to respondent of loading and unloading the wool would be about $1500., and the cost of insurance about $500. If carried at a rate of $1.10 per hundredweight, the total revenue on one of complainant's shipments would be somewhat less than respondent's out-of-pocket costs.

Since September, 1961, when the annual payment under the Government mail contract was reduced from $243,000. to $190,000., respondent has experienced a net operating loss of a little over $6,000. per month. This does not reflect any experience in connection with the wool trade, of course, because respondent has not carried any wool during this period. Respondent's President testified that the only reason it stays in the trade is because it has posted a $200,000. performance bond under the mail contract.

Under section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006(c) and Rule 10(o) of the Commission's Rules of Practice and Procedure, the burden of proving that the rate is unjust and unreasonable lies with the complainant. See *Bonnell Company* v. *Pacific Steamship Co.*, 1 U.S.M.C. 143 (1928.)

The rate of Berger Transportation Company in 1954 is too remote in time to be controlling in this case. While a comparison of a rate under study with rates of other carriers is an acceptable test of the reasonableness of the former, the persuasiveness of the test varies directly with the similarity of the circumstances surrounding the rates of the different carriers. The passage of eight years in these times of progressive inflation weakens the probative value of this comparison to the point where it is of little value, particularly where it has little or no support based on other evidence in the record.

The rate recently quoted by Alaska Steamship Company can not be considered because that company does not call at Chernofski, and has not done so for at least eight years. If anything, these facts tend to show that the wool trade in the Aleutians can not be very lucrative to carriers, or they would probably arrange to call there.

The fact that the rate of another carrier on wool from Chernofski to Seattle early in 1961 was the equivalent of approximately eight dollars per hundredweight does not establish that respondent's rate is unreasonably high. Respondent's rate to Seattle is the equivalent of about ten dollars per hundredweight. The services that gave rise to these charges early in 1961 are not available today. That service involved carriage by respondent from Chernofski to Kodiak and by Alaska Steamship Company from Kodiak to Seattle. At the time, there was no direct service between Chernofski and Seattle. A comparison of rates in these two situations is of only limited value, if any.

Complainant has not demonstrated that the Act of Congress cited by complainant, 39 U.S.C. 487a, was intended to amend the Shipping Act, 1916 by requiring the application of different standards as to the reasonableness of rates in the trade covered by the mail contract. There is nothing in the language of the statute that touches upon the matter of rates. While the revenues from the mail contract would be taken into account in an assessment of respondent's profit experience, the cost of providing the service would likewise have to be considered. None of these factors was brought forward in this proceeding. The statutory authority in the Postmaster General to contract for the services of a boat "of sufficient size to provide adequate space for mail, passengers, and freight * * *" may be evidence of a congressional intention to assist in the provision of common carrier service to these distant islands. However, the statute has no direct bearing on the freight rates.

Respondent's rate on wool from Chernofski to Seward was 75 cents per cubic foot in 1954. Its rate of $1.10 from Chernofski to Seattle, a much greater distance, can not necessarily be considered an increase. It is recognized that this does not prove that the latter rate is reasonable; but the existence of this similar rate of such long standing is of some weight in support of the reasonableness of the present rate.

The fact that respondent has operated at a loss in this service may also be considered; and it supports the view that the rate is not too high. The fact that a carrier may lose money in its overall operation is of some value in determining the reasonableness of the rate on a particular commodity, although it is not controlling, of course. *Wool Rates from Boston to Philadelphia,* 1 U.S.M.C. 20 (1921.)

Respondent's Freight Tariff No. 1–C, introduced at the hearing by complainant, provides comparisons of respondent's rate on wool with its rate on other commodities that support the reasonableness of the former. The rate on general cargo (northbound) and every commodity listed (northbound) except "boats, canoes, and skiffs" is higher than the rate on wool. The only other commodity rate shown for southbound movement to Seattle is that on frozen seafood and this rate is the same as that on wool.

The value of the service provided by respondent is relatively high, because of the remoteness of the islands and because no other carrier provides regular service. The statutes do not create a regulated monopoly in this trade, as they do where operating certificates are required. Any American flag operator, with insignificant exceptions, is free to enter this trade.

The factors existing in this trade lead one to wonder why the one carrier and the two shippers have not negotiated together to arrive at a mutually agreeable rate on wool, and perhaps even some forward booking arrangement covering a reasonable period of time such as that covered in the mail contract. However, the testimony did not reveal that any such negotiations have taken place.

Taking the record as a whole, and particularly in view of the fact that the burden of proof lies with complainant, it is concluded that the rate of $1.10 per cubic foot on wool in bags in this trade is not unjust or unreasonable. An order will be entered dismissing the complaint.

ADDENDUM

A matter entirely outside the findings and conclusions that should be brought to the attention of the parties will be mentioned here, briefly. In the course of their dealings and during the hearing both parties treated respondent's rate on wool as being $1.10 per cubic foot in bags. The foregoing decision therefore treats this as respondent's rate. However, there appears to be a technical or typographical inaccuracy in the tariff published by respondent entitled Freight Tariff No. 1-C in that Item 430 quotes the rate "in bales" rather than "in bags." Apparently, rates on wool in bags are not necessarily the same as the rates on wool in bales. See *Wool Rates to Atlantic Ports*, 2 U.S.M.C. 337 (1940). It will be noted also that the n.o.s. rate, Item 300 (also $1.10 per cubic foot) applies only from Seattle northbound, and not from the Aleutians, southbound. Appropriate steps should be taken to clarify this uncertainty.

FEDERAL MARITIME COMMISSION

No. 909

HARBOR COMMISSION, CITY OF SAN DIEGO, CALIFORNIA

v.

MATSON NAVIGATION COMPANY

Decided September 25, 1962.

Respondent not shown to have given undue or unreasonable preference or advantage to Los Angeles nor to have subjected San Diego to undue or unreasonable prejudice or disadvantage, under section 16 First of the Shipping Act, by failure to provide a regular service between San Diego and Hawaii.

William R. Daly for complainant.

Edgar J. Langhofer for intervener San Diego Chamber of Commerce

George D. Rives for respondent.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

The Harbor Commission, City of San Diego, California (San Diego), in a complaint filed June 27, 1960, alleged that the respondent, Matson Navigation Company (Matson), by discontinuing in 1960 its inbound service to, and refusing to provide outbound service from, the Port of San Diego in the trade between the Pacific Coast and Hawaii, has given undue and unreasonable preference and advantage to the Port of Los Angeles and subjected San Diego to undue and unreasonable prejudice and disadvantage, in violation of section 16 First of the Shipping Act

1916.[1] The San Diego Chamber of Commerce intervened in support of this complaint.

San Diego seeks to require Matson to provide regularly scheduled service between San Diego and Hawaii. Matson contends there is insufficient cargo to warrant such service; that its past operations at San Diego were conducted at a loss; and that, aside from a lack of authority in the Commission to prevent a carrier from abandoning service, the proof fails completely to show a violation of section 16 First. The Examiner in an Initial Decision found that no violation of section 16 First was shown. San Diego took exception to this finding but we believe the Examiner was clearly correct.

FACTS

The facts as found by the Examiner are undisputed. The following statement is based largely on the Examiner's findings, though in somewhat less detail:

1. The normal trading area of the Port of San Diego extends through the greater portion of Southern California, Arizona, New Mexico, and west Texas, plus areas of nearby states, and includes Baja California, Mexico. Two railroads and 70 locally-based trucking lines, among others, serve San Diego with daily freight schedules. The City and County of San Diego have enjoyed a substantial growth in population and general economic activity. From 1950 to 1960, San Diego County's population increased over 85 percent, to 1,033,011, and its manufacturing plants went from 419 to 735, with the greatest number of employees working in the aircraft, missile, and shipbuilding industries. New marine terminal facilities of the Port of San Diego completed in and since 1954, include 9 berths for ships, 3 transit sheds, and other facilities, and more facilities are under construction.

2. No ocean common carrier offers regularly scheduled and publicized service between San Diego and Hawaii, but some services have been and are offered on inducement. States Steamship Company is authorized to provide 13 inbound and 13 outbound calls annually at Hawaii in connection with its subsidized operations on Trade Route No. 29 between ports in California and ports

[1] Sec. 16 First of the Shipping Act, 1916 (46 U.S.C. 815), declares it to be unlawful for a common carrier by water "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

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in the Far East. It has in the past advertised calls subject to inducement at San Diego for outbound service to Hawaii, and more recently, within the last year or so, appears to have provided some very limited San Diego-Hawaii service in both directions. Military and civilian shippers at times have utilized the San Diego-Hawaii service of this carrier when available.

3. Beginning in 1954, Matson published rates from Hawaii inbound to San Diego on inducement. From May 1954, through February 1960, it made 35 inbound calls and 6 outbound calls at San Diego. On the outbound calls Matson loaded military rather than commercial cargo. In the Matson tariff, San Diego has been since 1954, and is now, listed as a port of call only when vessels are scheduled for direct calls and discharging. Outbound service generally was not offered, except in special circumstances, because Matson's inbound vessels in a number of instances were scheduled, after unloading at San Diego, to proceed up the Pacific Coast and go on the lumber and bulk cargo berths. The delayed arrival of these vessels in Hawaii, after going on the lumber and bulk berths, did not make them suitable for the handling of cargo outbound from San Diego to Hawaii. Also there was a lack of pressure from consignees in Hawaii to load outbound cargo at San Diego. Matsons' inbound service to San Diego was based generally on the volume of canned pineapple offered. It was irregular, with vessel arrivals at San Diego ranging from 13 to 99 days apart and averaging about 60 days apart.

4. A number of shipper witnesses, both military and civilian, were produced to show the amount of Hawaiian cargo which would be available at San Diego if direct common carrier service were maintained. A monthly or twice-monthly service between San Diego and Hawaii was indicated as necessary to meet the needs of shippers in San Diego and adjacent areas. Generally, these shippers deem the use of Matson's existing service between Hawaii and Los Angeles to be unsatisfactory because of the added cost of overland transportation to and from Los Angeles, which service at San Diego would eliminate. Some shippers said the overland transportation cost to Los Angeles had priced them out of the Hawaiian market.

5. If regular service were available out of San Diego to Hawaii, the average monthly outbound total of commercial shipments, exclusive of household goods, should be about 700 tons. Inbound commercial tonnage should average about 360 tons monthly, prin-

cipally canned pineapple products. Some Hawaiian pineapple now comes to San Diego via the port of Los Angeles. Other pineapple is imported from Formosa and Mexico, but with a regular Hawaii-San Diego service, eliminating the overland costs from Los Angeles, this probably would be supplanted by pineapple brought in from Hawaii.

6. Military passenger traffic from San Diego to Hawaii has increased. The first three months of 1961 equalled about 90 percent of the entire year 1959, and about 50 percent of the entire year 1960. The increased movement of passengers naturally resulted in the increased movement of personal effects and automobiles. Several shippers desire a regular San Diego-Hawaii service in order to participate in the movement of military household goods. They say they cannot absorb the overland transportation costs from San Diego to Los Angeles Harbor. The lack of a regular commercial service has been a factor in causing the Government to move military household goods by MSTS or Naval fleet vessels instead of commercially.

7. Some military tonnage generated at San Diego and destined to Hawaii, which was suitable for handling by ocean common carriers, has been shipped via Naval fleet and Military Sea Transportation Service (MSTS) vessels because of the unavailability of common carrier service at San Diego, and because of the military's reluctance to incur the expense of overland transportation to Los Angeles for shipment by water in common carrier vessels to Hawaii. MSTS has offered military cargo out of San Diego to Matson, and on occasion has been refused service. At times MSTS has routed San Diego military cargoes through the port of Los Angeles because of the lack of commercial service out of San Diego and the unavailability of its own or Naval fleet vessels. MSTS has often moved commercial-type military cargo on MSTS passenger vessels. It foresees about 400 to 500 measurement tons a month of military-generated cargo at San Diego which would be available for commercial carriers.

8. During the fiscal year 1958-59, military cargo between San Diego and Hawaii totaled 11,312 tons, of which commercial vessels carried 14 percent, MSTS vessels 14 percent, and fleet bottoms 72 percent. In the fiscal year 1959-60, the total was 28,163 tons, of which commercial vessels carried 13.5 percent, MSTS vessels 30.5 percent, and fleet bottoms 56 percent. The Naval Supply Depot at San Diego was redesignated as the Naval Supply Center

in 1959, and along with the redesignation its tonnage substantially increased. A regularly scheduled common carrier service of at least one sailing a month in each direction between San Diego and Hawaii would be of benefit to MSTS and the military shipper services in the San Diego area. During the 1958-59 and 1959-60 fiscal years at Los Angeles/Long Beach Harbor, 100 percent of all military cargo for Hawaii was handled on commercial vessels. Of the 49,400 tons for fiscal 1958-59, Matson carried 42,032 tons, and of the 29,709 tons for fiscal 1959-60, Matson carried 28,660 tons.

9. In the shipping business movements of cargo in both directions are usually necessary to provide the economies of a profitable operation. Matson's San Diego service in the past has been mostly a one-way operation, and admittedly irregular, because in its judgment the tonnage to justify regular two-way service simply was not there. Matson submitted an analysis of its costs on its 35 inbound and 6 outbound San Diego calls from 1954 through 1960. This took into account so-called "added vessel costs", *i.e.*, those which were incurred because of the added time required to sail the extra distance to San Diego from Hawaii as compared to Los Angeles (San Diego is 50 nautical miles further from Hawaii), plus the time in port at San Diego and the estimated time required to sail the 95 nautical miles from San Diego to Los Angeles. Exclusive of any allowances for general and administrative expenses and return on investment, Matson's analysis for its total of 41 calls at San Diego shows a net-to-vessel total loss of $87,402. Net losses are shown on all but 8 of these 41 calls. On its last four calls, made in 1960, including two inbound and two outbound, Matson shows a loss on the first voyage of about $1,966, and net-to-vessel revenues on each of the last three voyages, respectively, of $2,408, $2,192, and $2,605, for a net-to-vessel total revenue for 1960 calls at San Diego of $5,239.

10. If Matson were to provide a service at San Diego for the Hawaiian trade, this would have to be either a direct service (a straight turn-around) between San Diego and Hawaii—which San Dego says it is not at this time seeking—or a triangular service with calls at San Diego in connection with the Los Angeles-Hawaii operation—which San Diego does seek and insists is justified by the San Diego tonnage. According to Matson, either service would necessitate adding a vessel to its fleet. It is not entirely clear that this would be necessary for the triangular

service, although the San Diego calls inevitably would lengthen the vessel turnaround time and present other problems due to the fact that Matson now has an extensive containerized-cargo operation. The two vessels it regularly employs on the Los Angeles-Hawaii route are equipped to carry containers on deck. They operate on an approximate 21-day turnaround, with departures from Los Angeles every 10½ or 11 days. Matson deems this frequency necessary and appears to have taken measures within the past year or so to insure maintaining it. According to Matson, calls at San Diego would require stretching the Los Angeles turnaround from 21 to 28 days, *i.e.*, sailing from Hawaii to Los Angeles, thence to San Diego to discharge and load cargo, thence to Los Angeles and back to Hawaii. While San Diego sailing and port time would not in themselves consume an extra seven days, Matson says there would be additional delay due to problems concerning the sequence of loading general cargo and container cargo. Only a few consignees at San Diego receive consignments in sufficient and regular volume to utilize containers. No source of container traffic inbound to San Diego from Hawaii other than pineapple has been developed. If a container service were provided at San Diego, there would be added investments necessary for containers and related equipment which would have to be justified by the container cargo to and from San Diego.

11. Matson puts the cost of operating the C-3 type of vessel which it uses in the Los Angeles-Hawaii trade at about $1,360,000 annually, exclusive of administrative and general expenses and provision for return on investment. Matson's present average net-to-vessel revenue on the Southern California cargo mix, eliminating liquid cargo in both directions, is $10 per ton. According to Matson, 136,000 tons of cargo per year moving between San Diego and Hawaii would be required merely to pay for the cost of operating an additional vessel, and more cargo would have to be obtained to meet administrative and general expenses and provide for some return on investment. The tonnage to support an additional vessel must be all new traffic, not now moving via Matson through the Port of Los Angeles or any other port.

12. The population of the Los Angeles/Long Beach metropolitan area in 1960 was 6,742,692. Historically, Los Angeles has been the principal Southern California port so far as Hawaiian traffic is concerned, and Matson has been providing a regular service there since 1926. During the seven-year period 1954-1960,

Matson carried an average of more than 750,000 tons of cargo annually in the Los Angeles-Hawaii trade. Although complainant believes, taking into account both military and commercial traffic, that there now are available adequate tonnages to support a regular two-way San Diego-Hawaii ocean service, this record indicates that San Diego if regularly served on a monthly, or semimonthly basis would generate only about 22,000 tons of cargo annually to and from Hawaii. Assuming the record does not disclose San Diego's entire potential in this respect, there is nothing to suggest that the maximum tonnage that could be anticipated would approach the annual figure which Matson deems necessary to support a regular San Diego service (finding 11 above).

DISCUSSION AND CONCLUSIONS

A progressive and rapidly growing area, San Diego understandably would like to enhance its stature as a Pacific Coast port by offering regular ocean carrier service to and from Hawaii. Unless, however, some carrier shares San Diego's belief that its growth, facilities, cargo potential, and shipper needs are sufficient to justify such a service, San Diego's aspiration cannot be realized. There is no way by which Matson or any other carrier can be required to provide the service. While we have authority to regulate an established common carrier service, this should not be confused with the power to require that common carrier service be inaugurated, which we do not possess.

Moreover, our authority under section 16 First of the Shipping Act[2] relative to the proposed discontinuance of an established service is at best restricted. Thus, assuming Matson's limited and irregular 1954-1960 San Diego operation could be classed as an established service, on which the trade had come to rely, any exercise of our authority under section 16 First relative to Matson's discontinuance of the operation would have to be tempered by the fact that we lack the power to prevent indefinitely a common carrier by water from abandoning service. *McCormick S.S. Co.* v. *United States*, 16 F.Supp. 45 (N.D.Calif., 1936, three-judge); *Gulf-Puerto Rico Rates*, etc., 2 U.S.M.C. 410 (1940). See also *Lucking* v. *Detroit & Cleveland Nav. Co.*, 265 U.S. 346 (1924).[3]

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[2] Quoted, *supra*, in footnote 1.

[3] CF. *Westbound Intercoastal Rates to Vancouver*, 1 U.S.M.C. 770 (1938); *Sun-Maid Raisin Growers Assn.* v. *Blue Star Line*, 2 U.S.M.C. 31, 38 (1939); *Intercoastal Cancellations and Restrictions*, 2 U.S.M.C. 397 (1940).

As these cases make clear, there is a marked difference between our authority over the discontinuance of service by water carriers, and the authority of other agencies, such as the Interstate Commerce Commission, over carriers who hold certificates of public convenience and necessity and must secure permission to abandon service.

It is unnecessary to attempt here to define the action we might properly take under section 16 First where an established service is sought to be discontinued, because we are satisfied, in any event, that neither undue or unreasonable preference to Los Angeles, nor undue or unreasonable prejudice to San Diego, has been shown as a result of Matson's withdrawal in early 1960 from the service it was providing to San Diego. In taking this step Matson was motivated by its judgment regarding the economics of the situation, not by any intent to prefer Los Angeles or prejudice San Diego. In Matson's opinion, there was a lack of San Diego-Hawaii tonnage to support even a limited regular service, and certainly the evidence in this record does not warrant our adopting the opposite view.

Accepting for purposes of discussion the 22,000 tons of cargo which this record indicates might be anticipated as the annual San Diego-Hawaii traffic, this is but a fraction of the Los Angeles-Hawaii tonnage and the fact remains that it could not be transported by Matson except at a sacrifice to its established service at Los Angeles. A triangler service would be the only feasible method of providing regular calls at San Diego by Matson but this would necessitate extra steaming and port time, delays in cargo handling because of Matson's containerized operation, and less frequent departures both from Los Angeles, which now handles annually over half a million tons of westbound Hawaiian traffic, and from Hawaii. That such calls to San Diego would also result in material operating losses for Matson, seems adequately borne out by its past experience in serving the port (finding 9).

Complainant contends that Matson's past San Diego service was inefficient and uneconomical because largely one-way and irregularly offered. It is true that a two-way service is usually the most economic, that trade often follows or expands with the availability of services, and that Matson has made no special effort to develop the San Diego trade. From these premises, however, it does not follow that Matson has unduly prejudiced San Diego. As the evidence shows, there were good reasons for the primarily inbound service Matson provided (finding 3), and little in the way of tonnage to justify the attendant time and expense of furnishing outbound service. It should not be overlooked, moreover, that a significant portion—perhaps as much as 50 percent—of the San Diego cargo potential reflected by this record is not new Hawaiian traffic, but simply traffic now moving through the Port of Los Angeles which would be diverted therefrom to San Diego.

On the record here, Matson cannot fairly be charged with indifference toward the needs of San Diego, nor complacency in the matter of stimulating sources of added Hawaiian tonnage. Nor does the fact that Matson is by far the dominant carrier in the trade suggest to us that it is any the less interested in seeking or promoting new tonnage susceptible of economic transportation The contrary, it seems to us, should be true. Beyond this, we share the hope, expressed by the Examiner, that San Diego will continue to receive Matson's attention as an area that could possibly develop enough tonnage to make a regular service feasible.

Undue preference and prejudice under section 16 First of the Act must be established by clear and convincing proof. Further similarity of transportation conditions is a necessary element of undue preference and prejudice. *Intercoastal Cancellations and Restrictions*, 2 U.S.M.C. 397 (1940). The conditions need not be identical but should at least be comparable. So far as concerns Hawaiian cargo, there is no similarity but a great disparity between transportation conditions at the ports alleged in this case to be prejudiced and preferred, San Diego and Los Angeles. Discussion of additional points or authorities having a bearing on the application of section 16 First is therefore unnecessary.

We conclude that this record fails to show that respondent Matson has given undue or unreasonable preference or advantage to Los Angeles, or that it has subjected complainant San Diego to undue or unreasonable prejudice or disadvantage, in violation of section 16 First. The complaint accordingly will be dismissed.

ORDER

FEDERAL MARITIME COMMISSION

No. 909

HARBOR COMMISSION, CITY OF SAN DIEGO, CALIFORNIA

v.

MATSON NAVIGATION COMPANY

This case being at issue upon complaint, and having been duly heard and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, September 25, 1962

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 954 (Sub. 2)

Investigation of Increased Rates on Sugar, Refined or Turbinated, in Bags in the Atlantic/Gulf Puerto Rico Trade

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Decided September 25, 1962.

Proposed increased rates on sugar, refined or turbinated, in bags, from San Juan, Ponce, and Mayaguez, P.R., to New York, N. Y., Philadelphia, Pa., and Baltimore, Md., found just and reasonable. Order of suspension vacated, and proceeding discontinued.

Mark P. Schlefer and *T. S. Perlman* for respondent.

John Mason, Gerald A. Malia, and *Robert J. Nicol* for Puerto Rican American Sugar Refinery, Inc., and Olavarria & Co., Inc.; *John Mason* and *Gerald A. Malia* for Association of Sugar Producers of Puerto Rico, Western Sugar Refining Company, and Central Roig Refining Company; and *William D. Rogers* and *John T. Rigby* for Commonwealth of Puerto Rico, interveners.

Donald J. Brunner and *Robert J. Blackwell* as Hearing Counsel.

Report of the Commission

Thos. E. Stakem, *Chairman;* John Harllee, *Vice- Chairman;* Ashton C. Barrett, *Commissioner;* John S. Patterson, *Commissioner;* James V. Day, *Commissioner*

By the Commission:

By fifth revised page No. 27 to its Homeward Freight Tariff No. 1, FMB-F No. 2, filed with the Commission to become effective December 18, 1961, respondent, A. H. Bull Steamship Co., (hereinafter "Bull") proposed to increase its rate on sugar, refined or turbinated, in bags (refined sugar), from Puerto Rican ports to the North Atlantic ports of New York, N. Y., Philadelphia, Pa., and Baltimore, Md., from 59 cents per 100 pounds to 75 cents per 100 pounds.[1] Upon protest, the Commission by its first supplemental order[2] of December 14, 1961, instituted this investigation pursuant to the Shipping Act, 1916 (the 1916 Act), 46 U.S.C. 801 *et seq.*, and the Intercoastal Shipping Act, 1933 (the 1933 Act), 46 U.S.C. 843 *et seq.*, and suspended the operation of the schedule to and including April 17, 1962.

Puerto Rican American Sugar Refinery, Inc., Western Sugar Refining Company, and Central Roig Refining Company, sugar refiners located in Puerto Rico whose refined sugar moves to North Atlantic ports in the United States through the ports of Ponce, Mayaguez, and San Juan, P.R.; Olavarria & Co., Inc., a distributor of sugar in the United States which purchases the output of Puerto Rican American Sugar Refinery, Inc.; the Association of Sugar Producers of Puerto Rico; and the Commonwealth of Puerto Rico intervened in opposition to the proposed increased rate.

On January 22, 1962, following hearing, proposed findings and conclusions, oral argument thereon was held before the Examiner. Subsequent thereto, the sugar interests filed a motion for further hearing to receive evidence concerning a substantial change in the character of the service to be offered by the respondent. The motion was granted and further hearing was held on March 5, 1962, with oral argument before the Examiner immediately thereafter.

By fifth supplemental order served March 5, 1962, upon Bull's application, the Commission granted special permission for Bull to file tariff amendments on one day's notice to eliminate its service at the ports of Ponce and Mayaguez, and to cancel on 30 days' notice the existing rate of 59 cents on refined sugar. However, Bull has not yet filed a tariff change cancelling its 59 cent rate, but has ceased serving Ponce and Mayaguez.

The Examiner in an initial decision served March 12, 1962, found the proposed increased rates on sugar to be just and rea-

[1] Also involved were trailer- and van-load rates of $273.77, minimum 40,000 pounds, and $123, minimum 20,000 pounds, which would be increased to $300 and $135, respectively, but the record indicates that no traffic moves under these rates.

[2] By original order of December 7, 1961, and second supplemental order of January 8, 1962, increased rates on the same commodity filed by the United States Atlantic & Gulf-Puerto Rico Conference, Richard Kinsella, agent, and by Sea-Land Service, Inc., Puerto Rican Division, were brought under investigation and suspended. Upon special permission granted by the Commission, these rate increases were subsequently cancelled, and the investigation as to them was discontinued by third and fourth supplemental orders of January 22 and February 7, 1962, respectively.

sonable. Exceptions were filed by the sugar interests and oral argument was held on April 6, 1962.

The intervening Puerto Rican refiners are the only producers of refined sugar shipping to the North Atlantic. They are each affiliated, or under common ownership, with producers of raw sugar, and purchase their raw sugar from such affiliates as well as from some other producers. More than 60 percent of their total production of refined sugar has been shipped to the mainland and sold in competition with the products of mainland refineries. The remainder is sold in the local Puerto Rican market. Their price of raw sugar is governed by the price offered by mainland refiners, less the cost of transportation. Total sugar imported into the United States from Puerto Rico (including refined sugar) is limited by a quota established by Congress although that quota has not always been fully met.

Prior to 1956, raw sugar moved in bags to the mainland on berth terms, at rates of one cent per 100 pounds below the rates on refined sugar. In that year, raw sugar began to move in bulk at substantially lower transportation costs and many benefits were realized by the raw sugar producers. In 1957 and 1958 Bull and other carriers in the Puerto Rican trade increased their rates by some 29 percent, which adversely affected the competitive position of the Puerto Rican refiners in the mainland market. Puerto Rican refined sugar has traditionally been sold on the mainland at prices 20 to 70 cents per 100 pounds below the list prices of mainland refiners, partly because the mainland product can be purchased in bulk or liquid form, and partly because of user preference for the mainland brands.

These factors have placed the Puerto Rican refiners in a progressively tightening cost-price squeeze. They have had to absorb in full the 1957 and 1958 rate increases, which amounted to 11 cents per 100 pounds over the rates effective in 1954, and would now absorb the proposed increase of 16 cents per 100 pounds. They claim inability to absorb any portion of the presently proposed increase, and fear that they will be forced entirely out of the mainland market and, since the Puerto Rican market cannot use their entire output, production would have to be curtailed. This would adversely affect their labor force which in 1960 numbered 786 persons sharing a payroll of about $1 million. The economy of Puerto Rico, which in 1960 was marked with an unemployment rate of 11.5 percent of the total labor force, would likewise be adversely affected.

At the time of the first hearing, respondent operated six vessels in the Puerto Rican trade (4 were C–2 type, 2 were fully automated containerships put into service during the latter half of 1961). Two C–2 vessels operated on a two-week turn-around from New York, offering weekly service at San Juan, Ponce, and Mayaguez. The other two C–2 vessels operated on a two-week turn-around from Baltimore and Philadelphia, serving the same Puerto Rican ports weekly. The containerships operated out of New York on a 10-day turn-around, serving San Juan only.

On February 10, 1962, Bull drastically curtailed its service by removing all but two of the C–2 vessels from the trade. With these two vessels operating on a two-week turn-around, weekly service is now offered between Baltimore, Philadelphia, New York, and San Juan. The first voyage under this new service was not completed until about February 26, 1962, and the financial results thereof were not available during the hearing.

Bull was the principal carrier of refined sugar moving from Puerto Rico to the North Atlantic ports. Loadings at three Puerto Rican ports in 1960 and the first 11 months of 1961 were 98,093 and 65,373 gross tons, respectively. In 1960, refined sugar comprised about 10 percent of the total cargo handled by Bull, and about 30 percent of total northbound cargo handled by all carriers in the Puerto Rican trade.

In the first 6 months of 1961, on total revenues of $9,219,548, Bull claims a direct loss of $551,557 from vessel operations, before assignment of overhead and depreciation expenses. These results are attributed by Bull to severe overtonnage in the trade, loss of cargo to competitive carriers (particularly in those categories of cargo on which the higher rates are applicable), and the maintenance of allegedly unremunerative promotional rates in aid of the Puerto Rican economy. Bull's vessel space utilization in 1960 service was only 41 percent of capacity and 50.9 percent in the first six months of 1961. Bull contends that the existing refined sugar rate, which returns $13.22 per gross ton, is noncompensatory, and that the per-ton revenue of $16.80 at the proposed 75 cents rate will fail to meet all costs properly assignable. Recognizing that too drastic an increase in the refined sugar rate would destroy the ability of the Puerto Rican sugar refiners to compete with mainland refineries, Bull states that it is willing to compromise the rate level, and claims that the proposed 75 cents rate is therefore just and reasonable. Bull attributes more than $500,000 of its past annual losses solely to the carriage of refined sugar.

DISCUSSION AND CONCLUSIONS

The intervening sugar interests filed 25 exceptions to the Examiner's Initial Decision. These numerous exceptions reduce themselves to essentially the following contentions of error: (1) the Examiner erred when he accepted Bull's evidence of the costs of loading and discharging sugar instead of the figures submitted by intervenors and did not properly consider the "value of service" element in determining the reasonableness of this rate; (2) the Examiner erred in certain cost allocations; (3) the carrier failed to sustain its burden of proving that the proposed rate was just and reasonable; and (4) the Examiner failed to specifically indicate that the Puerto Rican trade was unbalanced with more traffic southbound than moving north.

For cargo handling expense the Examiner used actual loading and discharging costs adjusted for known increases; other costs of operations were allocated by him on the basis of the ratio of sugar tonnage converted to cubic measurement (45 cu.ft./ton) to total revenue tons also converted to cubic measurement. Because of the reduction in service the Examiner assumed that the carrier would achieve a higher vessel utilization which he estimated would be 50% at most. From these calculations he concluded the proposed rate was just and reasonable.[3]

Intervenors except to the Examiner's assignment of overtime applicable to the handling of refined sugar. Intervenors contend that the Examiner should have used the average overtime rate applicable to all cargo loaded rather than overtime only as it was applied to sugar. They also contend that Bull's reduction of vessels in use in this trade will result in a higher vessel utilization than was found by the Examiner; *i.e.*, 80% instead of 50%. For purposes of discussion, we have developed a cost per ton for refined sugar based upon the costs shown in the record adjusted to reflect an 80% vessel utilization and the average rate 9.1% for overtime for all cargo. These calculations are set forth in Table I, *infra*.

[3] Since the issuance of the initial decision, Bull withdrew from the Puerto Rican trade.

TABLE I

Loading	
1961 Costs not including overtime	$282,629
Overtime at overall rate of 9.1%	25,719
	$308,348
Tons of sugar loaded	65,375
Cost per ton—loading	$ 4.72
Increase in stevedoring costs (4.7%)	.22
Projected Cost per ton—loading	$ 4.94
Discharging	
1961 Costs not including overtime	$306,499
Overtime at overall rate of 9.1%	27,891
	$334,390
Tons of sugar discharged	61,793
Cost per ton	$ 5.41
Increase in stevedoring costs (2.9%)	.16
Projected Cost per ton discharging	$ 5.57
Total cost per ton loading and discharging	10.51
Vessel Expense	
80% vessel utilization rate of 9.5¢ per cubic foot (45 cubic feet = 1 ton)—per ton expense	4.28
Total Cost of loading and discharging and vessel expense (excluding wharfage, dockage, other port expense, other cargo expenses, overhead and depreciation	14.79

The total cost of $14.79 per ton shown in Table I which was computed on a basis most favorable to intervenor's position exceeds the revenue per ton at the 59¢ rate which is only $13.22. The rate increase in question would give the carrier a return of $16.80 per ton; $2.01 more than the cost figure reached in Table I. It is quite clear that any fair allocation of depreciation and overhead woud consume all or a major part of the remaining $2.01. The record shows that allocating these two items on a ratio of refined sugar total cargo carried on a measurement basis available both north and southbound would result in an overhead expense of $1.73 per ton and depreciation expense of $.66 per ton. Thus the addition of only overhead and depreciation would produce a $17.18 cost per ton.

Intervenors may quarrel to some extent with overhead and depreciation allocations yet we do not see where it can be validly contended that the remaining $2.01 will fully cover the carrier's overhead, depreciation and other expenses that were not included in the calculation in Table I, let alone result in any sort of profit to this carrier.

Intervenors have objected to the Examiner's cost allocation formula which was based upon a ratio of the cubic measurement of sugar to total cargo carried. They claim he erred by not requiring respondent to submit a breakdown of actual cost figures for every operating expense and not taking into account the factor of broken stowage. We do not think their objections are well taken in either instance. The Examiner in his calculations treated sugar equally with other cargo excluding broken stowage throughout his calculations. While broken stowage conceivably could be a factor in some cases, it is a variable one that depends upon many things including the nature of the cargo, weather conditions to be encountered, the type of containers used, the type of vessel involved and the hold in which a commodity is stowed. As a practical matter, broken stowage will vary with the skill of ship's officers, the carrier's shoreside personnel and the stevedore and longshoremen loading a vessel. We think the Examiner correctly excluded broken stowage in making his calculations since by its variable nature it would not have resulted in a more accurate ratio. Broken stowage is also of relatively little importance when vessels are not being fully utilized which is the case in this trade. It was not, in our opinion, unreasonable or inaccurate for the Examiner to adopt an allocation formula for operating expenses, particiularly when a major part of his overall calculations was based upon direct costs.

The record contains conflicting evidence as to the proper stowage factor to be used in determining the cubic measurement per gross ton of sugar, and the Examiner, after reviewing the problem, concluded that a stowage factor of 45 cu. ft. per gross ton was proper and in accordance with a recognized authority on the subject, *Modern Ship Stowage*,[4] a standard reference manual that was developed by the United States Department of Commerce. The proper stowage factor was much in dispute in the proceedings before the Examiner and the parties even went so far as to actually measure bags of sugar during the hearing. The stowage factors submitted as evidence varied from 43 cu. ft. to 56 cu. ft. per gross ton and from all this conflicting evidence we can only conclude that the Examiner quite reasonably adopted a figure that

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[4] *Modern Ship Stowage*, U. S. Department of Commerce, Bureau of Foreign Commerce, 1942.

fell within the limits of the evidence presented and was in conformity with an established reference manual.

While we acknowledge the obvious fact that there is and will continue to be a substantial reduction in the service offered by Bull, the calculations made in these proceedings were on a unit basis, cost per single ton, for the same type of vessel, a C-2 freighter, that Bull says it will be using in this trade. This we believe should cure any major infirmities that might result from a reduction in service. In addition we have evaluated the rate using the greater vessel utilization recommended by intervenors. It should also be noted that the major portion of the costs of transporting this sugar is attributable to loading and discharging for which the carrier submitted actual costs. Intervenors attack the validity of the actual costs for loading and discharging which respondent submitted and the use of the carrier's operating results for the first half of 1961 in forecasting future costs. They claim these figures are not representative or probative for various reasons; changes in loading ports, difficulties encountered by the carrier in New York as the result of damage to terminal facilities and other similar contentions. They demand a degree of specificity that is impossible. As the Examiner stated, cost finding is not an exact science and if we were to adopt the stringent approach advocated by these intervenors a carrier would rarely, if ever, be able to sustain its burden of proof nor would we be able to evaluate the great majority of proposed rates for future use. We agree with the Examiner that all that is required is that the results obtained represent a reasonably close approximation of the assignable costs. In our opinion this has been achieved and the respondent has sustained its burden of proving the cost of service even in light of its reduction in operations. The intervenors contend that since this trade is heavily unbalanced in favor of the southbound traffic the rate should be based upon essentially an added traffic theory for the carrier's vessels would be sailing light northbound because of this imbalance. In substance, one of the intervenor's major contentions is that only out of pocket costs are really pertinent and the value of this service to Puerto Rico and the Puerto Rican sugar refining industry is the primary consideration. While the carrier has indicated a willingness to compromise, it has decided that the rate on this commodity must reflect cargo handling costs and a proper allocation of vessel operating expense with some contribution towards overhead and depreciation and other expenses of operation. Generally, this is a decision within the province of the carrier's managerial discretion.

In our opinion the Examiner correctly rejected intervenors' added traffic theory and did not err by failing to make a specific finding that there was an imbalance in this trade. Whether traffic is heavier moving north or south, if a shipper does not pay his full share of the expenses incurred in the carriage of his goods including overhead and depreciation, then the deficiency must be spread among other shippers or absorbed by the carrier. This is simply an economic fact of life and applies equally to each leg of a vessel's itinerary and whether a trade is balanced or not. The Examiner rejected intervenors' related argument that value of service should be given prime consideration in evaluating this rate because of the competitive predicament in which the Puerto Rican sugar refiners fiind themselves and the effects of this rate upon Puerto Rico and the refinery workers and we feel he was correct in doing so.

Value of service falls within the realm of public interest and under certain conditions may be the determining factor in resolving the question of the reasonableness of a rate. However, the consideration and effect that must or should be given to the public interest is limited by the Due Process Clause of the 5th Amendment to our Constitution. At one time the Supreme Court expressed the view that under the 5th Amendment public interest could not be invoked to require a carrier to transport a commodity at less than cost or for merely nominal compensation and that the devotion of the carrier's property to public use is qualified by the carrier's right to a reasonable reward, *Northern Pacific RR Co.* v. *North Dakota,* 236 U.S. 585 (1915).

This view was to some extent modified or explained in *Baltimore and Ohio Railroad Co.* v. *United States,* 345 U. S. 146 (1953) wherein the Supreme Court ruled that so long as carriers' rates as a whole afforded them just compensation for their overall services to the public the Due Process Clause should not be construed as a bar to fixing noncompensatory rates for carrying some commodities when the public interest is served. On this basis carriers on occasion have been required to charge a rate for a particular service that is not fully compensatory, but only when the carrier is making an overall profit. See *Pan American World Airways* v. *Civil Aeronautics Board,* 256 F. 2d 711 (D.C. Cir. 1958) *cert. denied* 358 U.S. 836 (1958). Quite clearly the carrier's financial position limits the effect that may be accorded the public interest.

It seems to us that the value of a service to a particular segment of the public is also outweighted by the general public's interest in the carrier's continued existence of a sound economic footing and its ability to serve all shippers at reasonable rates. In this regard it is unnecessary to determine the solvency of Bull for even if it were making a profit on its over-all operations we do not see where it could be sound regulatory policy or in the public interest to require Bull or any other carrier to sustain substantial losses on a large segment of the cargo it carries. Such a practice would simply result in either disproportionately high rates on other cargo or a substantial weakening of the carrier's economic position or both. Even if we were to discount to some extent Bull's claim of losses due to the carriage of this sugar at the 59¢ rate, the record clearly indicates that this rate is not compensatory and that the carrier has sustained substantial losses carrying the refined sugar at this rate. As for the new rate which we have been considering it is not fully compensatory and in our opinion the carrier, although willing to compromise to some extent, has properly exercised its managerial discretion in determining how far it can economically go in its efforts to accomodate the shippers of refined sugar and yet maintain a sound financial position. We recognize and of course are sympathetic to this apparently distressed sugar industry, but we cannot lawfully nor rationally favor its interests over those of an equally distressed carrier subject to our regulation.

In view of our previous discussion it is unnecessary to make findings relative to the Puerto Rican refining industry's inability to absorb an increase in rates or their production costs and revenue from sales. Intervenors made further contentions of error relating to wharfage, brokerage and bill of lading charges. These items were not included in computing Table I and specific findings as to the applicability and actual amounts charged for these expenses are unnecessary in view of the undeniably small return Bull would receive from the 75¢ rate over and above costs of cargo handling and vessel operating expense. We must also reject, as did the Examiner, evidence of stevedoring costs of a contract carrier which intervenors claim is pertinent. Not only is contract carriage quite a different matter, but we have actual cargo handling costs available. Any remaining contentions of error not specifically discussed herein we have found irrelevant, redundant or not persuasive.

Based upon the foregoing we find and conclude that the rate increase here under investigation is just and reasonable.

An order discontinuing this proceeding will be entered.

ORDER

FEDERAL MARITIME COMMISSION

No. 954 (Sub. 2)

INVESTIGATION OF INCREASED RATES ON SUGAR, REFINED OR TURBINATED IN BAGS IN THE ATLANTIC/GULF PUERTO RICO TRADE.

Full investigation of the matters and things involved in this proceeding have been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rate under investigation is just and reasonable:

It is ordered, That this proceeding be, and it hereby is, discontinued. By the Commission, September 25, 1962.

(Sgd.) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 987

J. M. ALTIERI

v.

THE PUERTO RICO PORTS AUTHORITY

Decided October 18, 1962.

Terminal operators' withholding of refund of overpayment on demurrage charges did not violate the Shipping Act, 1916. Not shown to have created a competitive disadvantage nor to consitute a shipping "practice", as distinguished from an isolated incident involving ordinary business activity.

J. M. Altieri, complainant, appeared on his own behalf.
John T. Rigby; Arnold, Fortas and Porter for respondent.

INITIAL DECISION OF E. ROBERT SEAVER, EXAMINER[1]

This matter was submitted without oral hearing, under Rule 11 procedure. The essential facts are not in dispute.

On September 28, 1961, complainant imported a shipment of 151 cartons of footwear into Puerto Rico from the United States mainland. (The fact that the footwear was shipped in domestic commerce does not appear in complainant's statement of the facts, but it appears to be admitted in the respondent's statement. In any event, the examiner will take notice that the vessel *S.S. Beatrice* sailed from New York on the voyage on which the footwear was alleged to have been shipped). On November 6, 1961

[1] In the absence of exceptions thereto by the parties, and upon notice by the Commission, the initial decision of the Examiner became the decision of the Commission on the date shown (Section 8(a) of the Administrative Procedure Act and Rules 13(d) and 13(h) of the Commission's Rules of Practice and Procedure.

complainant paid to respondent, a public body that operates a marine terminal at San Juan, Puerto Rico, the sum of $54.18 for demurrage on the shipment. Respondent had erroneously notified complainant over the telephone that that was the amount of the charge. On December 4, 1961, respondent sent an invoice to complainant which stated the correct amount of the demurrage as $14.01. For these reasons, an overpayment of $40.17 had been made.

Respondent refused and still refuses to refund the amount of the overpayment to complainant. Instead, respondent credited the amount of the overpayment to an indebtedness in the amount of $167.58 which respondent contends complainant owes to respondent by virtue of the following transaction.

On November 24, 1961, respondent sent to complainant an invoice in the amount of $167.58 covering demurrage charges on an import shipment of bicycles. Respondent contends that the shipment was that of complainant and that complainant is therefore indebted to respondent for the demurrage. Respondent applied the overpayment on the demurrage charge on the footwear shipment against this later $167.58 demurrage charge on the bicycle shipment.

Complainant denies that it is indebted to respondent for the $167.58 demurrage charge on the bicycles, and alleges that the import shipment that gave rise to that charge was the shipment of U. S. and Overseas Products, Ltd. He states that the latter concern made a partial payment of $35.70 on the demurrage charge on February 26, 1962, and that this sum was accepted by respondent. Respondent does not deny the acceptance of that sum from U. S. and Overseas Products, Ltd.

Complainant contends that respondent's refusal to refund the overpayment of $40.17 violates the Shipping Act of 1916 in the following three respects, and he seeks reparation and an order requiring respondent to "cease and desist from the aforesaid violations - - - and to establish and put in force and apply in future such other charges as the Commission may determine to be lawful - - -":

1. Respondent's action was unreasonably preferential, prejudicial, and disadvantageous in violation of section 16.[1]

2. It was unjustly discriminatory or prejudicial in violation of section 17.[1]

3. It was unjust and unreasonable in violation of section 18.[1]

[1] See Appendix.

Respondent contends, as to the first charge, that complainant has not established the necessary competitive disadvantage to prove a preference under section 16. That is, he has not proved a disparity between the treatment accorded him and that accorded other importers. They cite *Asgrow Export Corp. v. Hellenic Lines, Ltd.*, 5 F.M.B. 597 (1959) and other cases decided by the Commission's predecessor agencies. The principle is well established, and respondent is correct in its contention that there is no showing of competitive disadvantage. A violation of section 16 has not been shown.

Respondent correctly contends that section 18 applies only to carriers and not to terminal operators. For this reason, respondent can not be found to have violated that section.

As to the remaining contention of complainant - - - that respondent's action was unjustly discriminatory or prejudicial in violation of section 17 - - - respondent argues that section 17 applies solely to any "common carrier by water in foreign commerce", and that since the "Puerto Rico Ports Authority does not fall within this classification - - - complainant's allegation that respondent has violated section 17 is without merit." It is not clear whether respondent means that this section does not apply because respondent is not a common carrier or because the shipment in question was not in foreign commerce. In either case respondent is incorrect.

By its terms, the second paragraph of section 17 applies to "other persons subject to this act." This includes persons providing terminal facilities, according to the definition of the phrase "other persons subject to this act" in section 1. See *California v. United States*, 320 U.S. 577 (1944). This paragraph does apply to domestic commerce insofar as terminal operators are concerned. *Services, Charges and Practices, etc.*, 2 USMC 143 (1939). The question is whether section 17 is applicable to the circumstances involved in this case.

The complainant appears *pro se*. The complaint and statement of facts filed herein are not as complete and precise as might be desired. Taken in their best light, as they should be where, as here, respondent has not filed a counter-statement of facts; complainant's pleadings and sworn statement amount to an allegation that the conduct of respondent constitutes an unjust and unreasonable practice under section 17. If so, that is, if it is the type of conduct covered by section 17, complainant is entitled to relief.

The unjust and unreasonable practices condemned by section 17 are those, in the words of the statute, "relating to or connected with the receiving, handling, storing, or delivering of property." The practices that are intended to fall within the coverage of this section are shipping practices. It is these practices and only these that were assigned to the special expertise of the Agency. Thus, it might be an unreasonable practice for respondent negligently to stow bricks on a high shelf so that they repeatedly fell on the heads of complainant and others. The injured persons would undoubtedly have causes of action against respondent in a court of law, but is could not be seriously contended that this practice would constitute a violation of section 17 even though it is unjust and involves the storing of property. It has been held, to give another example, that claims for loss of or damage to cargo or for damages due to failure to follow routing instructions do not fall within the Act. *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Co.*, 2 U.S.M.C. 517 (1941).

On the other hand, the shipping agencies have taken cognizance under section 17 of such practices as the unfair charging of demurrage, *Atlantic Syrup Refining Co. v. Luckenbach Steamship Co.*, 2 U.S.M.C. 521 (1941); *Sigfried Olsen v. War Shipping Administration et al.*, 3 F.M.B. 254 (1950); and the refusal, by a carrier that was claiming both dead freight and detention damage. to deliver, the cargo, *Hecht, Levis and Kahn, Inc., et al. v. Isbrandtsen Co., Inc.*, 3 F.M.B. 798 (1950)

Complainant's case is, undeniably, an appealing one because respondent has unilaterally effected an offset of monies admittedly owing to complainant against a disputed claim of respondent against complainant. As a general rule, the courts have found such action to be unlawful. *Four-G Corp. v. Ruta*, 131 Atl. (2nd) 566 (N.J. Super. 1957); *Hamilton v. Wilcox*, 140 Atl. 201 (Me. Sup. 1928); Williston on Contracts, Revised ed., Vol. 3, Secs. 887E and 887F (1936); 70 C.J.S., "Payment", Sec. 32, page 242-3, (1951). The categorical statement of respondent's counsel that respondent had a right to withhold the refund and offset it against the other claim is without foundation. This unlawful act of respondent, if it is one, may provide the basis for an action in court; but it is not necessarily a violation of section 17.

Does the action of respondent fall within that class of activities, described above, that are cognizable under section 17 or does it fall within the category, also described above, that is outside the purview of that section? While the question is not entirely free from all uncertainty, a full and detailed consideration of all the aspects of the case leads to the conclusion that the circumstances here do not warrant relief under section 17.

By the time the respondent refused to refund the money, the purely shipping aspects of the transaction had been completed. A dispute as to liability for demurrage or as to the amount of it; or even a persistent and continuing shuffling of the accounts of importers might fall within section 17. But there is no dispute here as to the propriety of the imposition of the charge or the amount of it ($14.01). The dispute is over the question whether respondent must refund an overpayment. The issues incident to this question would be exactly the same if the overpayment were on the purchase price of groceries. They are not so peculiar to shipping matters that they require or warrant the intervention of the Commission. A court can handle all aspects of these issues. This is not to say, of course, that court and agency action are always mutually exclusive.

If the action of respondent were one of a series of such occurrences, a *practice* might be spelled out that would invoke the coverage of section 17. *Hecht, Levis and Kahn, Inc., et al. v. Isbrandtsen Co., Inc.,* 3 F.M.B. 798 (1950). However, the action of respondent is an isolated or "one shot" occurrence. Complainant has alleged and proved only the one instance of such conduct. It can not be found to be a "practice", within the meaning of the last paragraph of section 17.

Complainant's papers filed in this proceeding allege other violations of the shipping statutes by way of conclusions. No facts are stated to support them in the affidavit submitted under Rule 11. They therefore have not been established.

For the foregoing reasons an order should be entered dismissing the complaint.

APPENDIX

SEC. 16. That it shall be unlawful for any shipper consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would othewise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

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

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

SEC. 18. That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increased proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

FEDERAL MARITIME COMMISSION

No. 901

General Increases in Rates—Pacific-Atlantic/Guam Trade

Decided October 23, 1962.

General increases in rates between United States and Guam, Mariana Islands, Midway Island, Wake Island, Ebeye (Kwajalein Atoll), and Eniwetok, for the carriage of commercial cargo, including cement, found to be lawful and just and reasonable.

Mark P. Schlefer and *J. L. Truscott*, for respondent, Pacific Far East Line, Inc.

Warner W. Gardner, *Peter N. Teige* and *George D. Wick, Jr.* for respondent, American President Lines, Ltd.

Eugene L. Stewart and *O. Taft Nelson* for the Government of Guam, and Guam Associates, interveners.

William R. Daly for Harbor Commission of the City of San Diego, intervener.

Malcolm D. Miller, *Max M. Misener*, and *William R. Pierce* for the General Services Administration, intervener.

William Jarrel Smith, Jr., and *Robert J. Blackwell* as Hearing Councel.

Report of the Commission

Thos. E. Stakem, *Chairman;* John Harllee, *Vice Chairman;* Ashton C. Barrett, *Commissioner;* John S. Patterson, *Commissioner*

By the Commission:

This proceeding is an investigation into the lawfulness of two rate increases proposed by Pacific Far East Lines (PFEL) and American President Lines (APL) for the carriage of freight between the United States and Guam and several surrounding islands.

The tariffs under investigation are PFEL Guam Tariff No. 2 (F.M.B.-F. No. 2), APL Pacific-Guam Tariff No. 5 (F.M.B.-F. No. 9), and APL Atlantic-Guam Tariff No. 3 (F.M.B.-F. No. 8), which published a general increase of about 10 percent in rates between ports in the United States and Guam and which, after suspension, became effective on April 30, 1960, and PFEL Tariff No. 3 (F.M.B.-F. No. 3), APL Pacific-Guam Tariff No. 6 (F.M.B.-F. No. 11), and APL Atlantic-Guam Tariff No. 4 (F.M.B.-F. No. 10), which published a general increase of 20 percent in rates between ports in the United States and Guam and which, after suspension, became effective on January 27, 1961.

The Government of Guam, Guam Associates, the Harbor Commission of the City of San Diego and the General Services Administration intervened.

Following hearings the Examiner in an initial decision found the increases of 10% and 20% to be just and reasonable.

Exceptions were filed and oral argument held.

Respondents APL and PFEL are the only common carriers providing service between the United States and Guam and the only United States flag service between Guam and foreign countries.

During the first six months of 1960 PFEL transported approximately 87 percent of the revenue tons of non-military freight shipped from all ports in the United States to Guam, and 96 percent of such traffic from West Coast ports to Guam. In view of PFEL's dominant position in the trade, the Examiner concluded that the lawfulness of the general increases under investigation should be determined in the light of traffic, operations, revenues and net profits or losses of PFEL in the trade. We agree.

Prior to June 30, 1960, PFEL utilized three AP-3 ships and two chartered C-3 ships in the Guam trade. Two sailings a month were made from California, and one call each month was made in the Pacific Northwest and at Honolulu.

On outbound voyages, as required, the AP-3 ships would continue on to Japan, Formosa, and the Philippines, and return via Guam. The C-3 ships would continue on to Japan and return directly to the West Coast. On June 30, 1960, PFEL discontinued its charter of the C-3 ships and replaced them with three C-2 ships chartered from a wholly-owned subsidiary. Sailings to

Guam were increased to three each month. Calls in the Pacific Northwest and at Honolulu were continued at one each month and service beyond Guam was substantially as described above.

PFEL's operations include both subsidized and unsubsidized voyages, and the unsubsidized voyages are further divided into domestic operations to and from Guam and foreign operations. It is therefore necessary to separate such operations in order to determine PFEL's financial experience solely in the Guam trade. Since the unsubsidized operations are conducted with assigned ships, and separate voyage accounts are kept covering such operations, ship operating expenses and depreciation incurred relative to such ships will be directly apportioned to that service. The income and expense of other shipping operations will be divided between the subsidized and unsubsidized services in the ratio of terminated voyage expenses of the unsubsidized operations to terminated voyage expenses of all voyages terminating in the accounting period. The same ratio will be used to apportion overhead expenses (less agency fees, commissions, and brokerage earned), and depreciation expense, other than ships. Overhead expenses should be allocated on the basis of voyage expense. They should follow the expense to which they relate. *Pacific Coast/Hawaii and Atlantic Gulf/Hawaii General Increases in Rates*, 7 F.M.C. 260 (1962).

In the same manner overhead expenses in the domestic operation, sometimes called the "domestic leg," will be distributed between commercial and military cargo. Other expenses in the domestic operation, except the items which can be directly assigned by weight or cost, will be distributed on the basis of a ton-mile revenue prorate; that is, the relation that the number of ton-miles of commercial cargo (including cement) carried bears to the total ton-miles of cargo carried in the domestic trade.

The freight carried in the Guam trade falls into three categories; namely, commercial, military household goods, and military freight. The commercial cargo may be broken down into two categories—general commodities and cement in bulk. Hearing Counsel and interveners contend that revenues from military household goods, military freight, and bulk cement, and expenses assignable to the carriage of such traffic, should be excluded in determining the lawfulness of the rates under investigation.

Military freight and military household goods are carried for the United States Government at special contract rates. Neither the private commercial shippers nor the people of Guam should pay any part of PFEL's expense for such service or for any return on the property PFEL devoted to such carriage. Accordingly, such service will be excluded in determining the reasonableness of rates under consideration.

PFEL's tariffs contain a rate for the carriage of cement in bulk, which rate is available to all commercial shippers. The fact that it is carried in bulk and for only one shipper is not controlling in this proceeding. The controlling fact is that it is common carriage subject to the tariff rates and available to any private shipper. While the record shows that PFEL did not charge the proper tariff rate during 1959 and part of 1960, this does not warrant our excluding it from our considerations in this proceeding. An investigation into the lawfulness of rates is not the proper proceeding for an adjudication of alleged violations of law. We find that the transportation of bulk cement is a part of the service covered by the rates under investigation and the revenues and expenses therefrom will be considered in testing the reasonableness of the proposed rates.

The Examiner in his initial decision projected a net profit, after Federal income tax, of $134,480 for the year 1960. In arriving at that profit, the Examiner allocated expenses between commercial cargo, military household goods, and military cargo in the manner set forth above. He found that military household goods and military cargo accounted for 47 percent of the revenue tons carried in the Guam service in the first six months of 1960.

The following table sets forth the Examiner's projection of PFEL's net profit of $134,480 for the year 1960:

Revenue	$5,990,534
Voyage Expense	4,905,584
	1,084,950
Other Shipping Operations Net	30,740
	1,054,210
Administrative and General Expenses	602,876
Depreciation	171,168
	774,044
Profit before Income Tax	280,166
Federal Income Tax	145,686
Net Profit	$ 134,480

Guam argues that the Examiner erred (1) in adjusting PFEL's projected voyage expenses to reflect the substitution of three

C-2's for two C-3's by giving effect to increased operating expenses twice, and (2) in failing to exclude rentals paid for whaleback pallets, and (3) in failing to reduce the expense of other shipping operations by savings resulting from the reduction of the number of vans and containers under lease.

The Examiner eliminated charter hire on a ton-mile prorate applicable to commercial cargo and substituted operating expense for the three C-2 ships after allocation, and added estimated increases in expenses primarily for wages and fuel. The method adopted by the Examiner was correct and does not result in giving effect to increased operating expenses twice.

With regard to the whaleback pallets, and the reduction of vans and containers under lease, the evidence shows that PFEL reduced its net expenses of other shipping operations by $58,000 for the year 1960, which it claims includes an estimate of the savings resulting from reductions in the number of leased vans, containers, and whaleback pallets. The Examiner found net expenses of other shipping operations for year 1960 to be $30,740. The evidence of record supports the Examiner's finding. The exceptions are disallowed.

We agree that the record supports the Examiner's projections of expenses except as to administrative and general expenses. We find $570,290 to be the just and reasonable amount to be allocated to the carriage of commercial cargo for administrative and general expense in the Guam service. Such amount reflects the deletion of the legal expenses in connection with PFEL's subsidized operations, and reflects savings resulting from reductions in force effected in 1959.

After such adjustment we find that PFEL's net profit after Federal income taxes for the projected year 1960 for the carriage of commercial cargo in the Guam trade under the proposed increases to be $150,121.

PFEL excepts to the Examiner's failure to find that operating ratios should be considered as a measure of the reasonableness of the rates under investigation.

On the record before us, we find that the fair return on the fair value standard should be used in determining the reasonableness of rates in the Guam trade and that the prudent investment standard should be used to arrive at the fair value of the property devoted to the Guam trade. *Atlantic-Gulf Puerto Rico General Increase in Rates and Charges*, 7 F.M.C. 87 (1962). Our reasons

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are adequately set forth in that case and no purpose would be served by restating them here. It is therefore unnecessary to discuss transactions involving the acquisition and disposition of one of the AP's and the three chartered C-2's owned by PFEL's subsidiary and used by PFEL in the trade.

Six ships are used by PFEL in the Guam trade. Two are owned by PFEL and four as stated above by a wholly owned subsidiary. For the purposes of this proceeding all six ships will be considered as though they were owned by PFEL.

In addition to ships other items properly included in the rate base of a domestic water carrier are the values of other floating equipment devoted in whole or in part to the service, other assets and working capital. The principal item claimed by PFEL in the category of other floating equipment is the barge *Adak Isle*. This barge was purchased by PFEL in 1956, and used until late 1958 to speed the unloading of cement from ships used in the Guam service. In 1958 the superstructure and all gear, such as pumping equipment used to unload cement, were removed, and the barge has not been used since. In view of the present condition of the *Adak Isle*, there is no apparent use which can be made of it by PFEL in the Guam service. The barge cannot be considered as property used or useful in providing service to shippers, and therefore will not be included as a part of the rate base.

PFEL claims that a house located in Guam, which is owned by a PFEL subsidiary, Pacific Micronesian Lines, and occupied by PFEL's representative, should be included in the rate base. Such house is being used in the regulated trade, since PFEL's local representative aids in the administration of that trade, and its depreciated value properly allocated will be included in the rate base for this reason. A second house located on Guam, which is owned by PFEL and leased to a shipper, is not used and useful in the trade, but is for the benefit of others, and its value will be excluded.

In *Atlantic Gulf/Puerto Rico, supra*, we allowed as working capital an amount equal to one round voyage expense of each ship in the service. Applying the same measure here and allocating as between commercial cargo, including bulk cement and military cargo on the basis of the relation of the voyage expenses (63 percent to commercial and 37 percent to military), we find the fair and reasonable allowance for working capital to be $1,118,524.

Since working capital is the fund from which voyage expenses are paid, such expenses are the most accurate measure of the employment in working capital.

No allowance will be included in the rate base for "claims pending" or "other deferred charges and prepaid expenses". Working capital based on average voyage expense itself provides for these items.

On the basis of the foregoing, we find the fair value of the property devoted to the carriage of commercial cargo in the Guam trade to be as follows:

Ships	$1,137,274
Other Property	79,542
Working Capital	1,118,524
	$2,335,340

The projected net annual profit of $150,121 is approximately 6.42 percent of the rate base.

PFEL contends that a rate of return of 12.5 percent of its weighted average cost of capital would be lawful. Guam argues that PFEL should be limited to a rate of return equal to 6 percent of its invested capital.

We need not in this proceeding determine what the maximum rate of return is in this trade. A rate of return of 6.4 percent on property valued on the basis of the prudent investment standard is not unreasonable.

Exceptions not discussed here, nor reflected in our findings, have been considered and are denied as unsupported by reliable and probative evidence or are irrelevant to this decision.

It is found and concluded that PFEL's Tariff Nos. 2 and 3 applicable to general commodities and to cement in bulk transported between United States Pacific ports and ports in Guam, Mariana Islands, Midway Island and Wake Island, under investigation herein, are lawful, just and reasonable.

It is further found and concluded that APL's Pacific-Guam Tariff No. 5 and No. 6, APL's Atlantic-Guam Tariff Nos. 3 and 4 applicable to general commodities transported between United States Atlantic and United States Pacific and Hawaiian ports and ports in Guam, Mariana Islands, Midway Island, Wake Island, Ebeye (Kwajalein Atoll) and Eniwetok Atoll under investigation herein are lawful, just and reasonable.

An order discontinuing this investigation shall be entered as to both respondents.

ORDER

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

No. 901

GENERAL INCREASES IN RATES—PACIFIC-ATLANTIC/GUAM TRADE

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on October 23, 1962, having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates, charges, tariffs, and regulations herein under investigation are just and reasonable and lawful;

It is ordered, That this proceeding be, and it hereby is, discontinued.

By the Commission, October 23, 1962.

(Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 854

SWIFT & COMPANY AND SWIFT AND COMPANY PACKERS

v.

GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE, ET AL.

DISMISSAL OF COMPLAINT

On August 23, 1962, complainants filed a stipulation advising that the parties have entered into a settlement of this controversy and all related matters; that complainants accordingly desire to withdraw the complaint herein, and request that the Commission enter an order dismissing the complaint with prejudice; and that upon dismissal of the complaint, the conference and its members shall pay to Swift the sum of $13,335.90, representing the amount of damages. Therefore,

It is ordered, That the complainant herein is hereby dismissed with prejudice to its renewal and the proceeding is discontinued.

By the Commission, October 29, 1962.

(Sgd.) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 946

GRACE LINE, INC.

v.

SKIPS A/S VIKING LINE ET AL.

No. 950

SKIPS A/S VIKING LINE

v.

GRACE LINE, INC.

No. 953

SECTION 19, MERCHANT MARINE ACT, 1920, INVESTIGATION OF PRACTICES OF VIKING LINE

Decided November 13, 1962.

Neither Grace Line, Inc. nor Skips A/S Viking Line is shown upon the record in these cases to have violated section 14, 15, 16, or 18 of the Shipping Act, 1916.

Conditions unfavorable to shipping do not now exist in this trade area within the meaning of section 19 of the Merchant Marine Act, 1920, and no rules will be issued.

The complaints in Dockets No. 946 and No. 950 are dismissed, and Docket No. 953 is discontinued.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman*
ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON
Commissioner; JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

These three proceedings have been consolidated. They involve carrier competition (and a resulting rate war) in the United States, North Atlantic-Venezuela trade (Venezuelan trade).

In No. 946, by complaint filed May 24, 1961, as later amended, the complainant, Grace Line, Inc. (Grace) alleges that the respondents in this proceeding, Skips A/S Viking Line (Viking) and certain individuals, firms, and companies[1] associated in one way or another with Viking, have since early January 1959, carried on a joint service in the Venezuelan trade under the name of Viking Line pursuant to an unfiled and unapproved Section 15 agreement; that this service was provided at rates lower by fixed percentages or by specific amounts than the established rates of the U. S. Atlantic and Gulf-Venezuela and Netherlands Antilles Conference (Conference); that Viking's rates were set without consideration by Viking of the usual rate-making factors; and that the service pursuant to said unfiled agreement was and is detrimental to the commerce of the United States, in violation of Section 15 of the Shipping Act, 1916 (the 1916 Act); and that the competition of Viking caused the Conference to receive numerous requests from shippers to protect them: that to meet this competition the Conference named certain emergency rates and opened other rates; that the Viking competition precluded Grace and the Conference from establishing and maintaining rates on a remunerative basis, and subjected Grace and "other members or associate member of the Conference,"[2] to irreparable injury; that Grace lost revenue of approximately $1,025,000 in 1960, and that this lost revenue was a major factor in its substantial cash loss in 1960 in the Venezuela trade. Grace prays that the Commission direct respondents to pay it as reparation for the injury caused by violations of the 1916 Act, the sum of $1,025,000 for 1960, and such further sums as may be determined to be proper. An amendment to the complaint alleges continuing damages.

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[1] C. T. Gogstad & Co., Jens Henriksen, O. N. Henriksen, Thor Eckert & Co., Inc., Risor Shipping Co. Skips A/S Imica, and D/S A/S Laly.

[2] By "associate member" Grace means Cia. Anonima Venezolana de Navegacion (CAVN). In fact, CAVN participated in many conference activities and privileges as hereinafter appears more fully, but whether CAVN had any true membership status is unclear.

Grace further alleges that the rates charged by Viking are unremunerative; that its service is operated at a loss; that Viking pays to freight forwarders excessive brokerage fees not fairly related to the value of services performed, all for the purpose of preventing and destroying competition among carriers in the Venezuelan trade; that the actions of Viking justify the issuance of a rule under Section 19, Merchant Marine Act, 1920 (the 1920 Act), and that Viking's activities subject the traffic in the Venezuelan trade, shippers and receivers thereof, and localities to undue and unreasonable prejudice and disadvantage, and are unjustly discriminatory and unfair between carriers, shippers, exporters, importers, and ports, in violation of sections 14 and 16 of the 1916 Act.

Other than Grace, no member, nor "associate member" of the Conference (including CAVN) intervened or testified in these proceedings. No shipper, receiver, exporter, importer, nor port intervened or testified. Grace has not in any way supported or followed up its contentions of violations by Viking of sections 14 and 16 of the 1916 Act. There is no evidence of the use by Viking of deferred rebates, fighting ships, retaliation against shippers, unfair contracts, undue preference, or other means of violation by Viking of sections 14 and 16 of the 1916 Act, and accordingly these allegations are not further considered herein.

An allegation by Grace of violation by Viking of section 18(b)(5) of the 1916 Act, was made at the hearing, as a trial amendment to the complaint in No. 946. This section, recently enacted, provides that, "The Commission shall disapprove any rate or charge *filed by a common carrier by water in the foreign commerce of the United States* or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." (Emphasis supplied.) Section 18(b)(1) of the same Act provides in part that from and after ninety days following its enactment common carriers by water in foreign commerce and conferences of such carriers shall file with the Commission tariffs showing their rates and charges to and from United States ports and foreign ports. Since this section was enacted on October 3, 1961, it did not require filing of the rates contemplated by section 18(b)(5) until January 2, 1962. The taking of evidence herein was concluded in November 1961, and consequently the record does not include any rates required to be filed by Viking under section 18(b)(1). There being no such rates of Viking of record, there can be no finding of unlawfulness under that section, of Viking rates, and the section 18(b)(5) allegation will not be further discussed.

In No. 950, by complaint filed June 27, 1961, complainant, Viking, alleges that respondent, Grace, threatened to retaliate against Viking unless Viking should abandon its rate policies and practices; that Grace proposed to the Conference a drastic reduction in rates either by reducing or opening them for the purpose of driving Viking out of the Venezuelan trade; that when the requisite number of other members of the Conference refused to concur in Grace's proposal, Grace indicated it would withdraw from the Conference, and did tender its resignation; that the Conference then agreed to the Grace proposal, and Grace withdrew its tendered resignation; that certain Conference rates were reduced and certain rates were opened; that those rates were on the principal commodities carried by Viking; that Grace reduced its rates on such commodities to the point at which, as Grace knew and intended, Viking could not profitably carry cargo in the Venezuelan trade; that the rate level maintained by Grace in 1960 was well below its costs, and noncompensatory; that such actions by Grace were and are for the purpose of excluding and preventing competition from Viking, and to drive Viking out of the trade, in violation of section 14 (Second) of the 1916 Act, that such actions did subject and now subject Viking to undue and unreasonable prejudice in violation of section 16 (First) of the 1916 Act; that during 1960, Viking's revenues were reduced by the amount of at least $968,000 as a result of the unlawful acts of Grace; that during 1961, in the period to June 8, Viking's revenues were reduced similarly in the amount of at least $253,000, and that Viking's loss of revenue resulting from the unlawful acts of Grace is continuing. Viking prays that the Commission direct Grace to pay Viking reparation of $1,221,000 and such further sums as may be proper. Viking also amended its complaint to allege continuing damages. Should reparation be found justified, and due to either Viking or Grace, both agree that another hearing should be held to determine the exact amount of reparation payable.

In No. 953, by order dated July 17, 1961, of the Federal Maritime Board, an investigation was instituted pursuant to section 19 of the 1920 Act, to determine whether Viking is cutting rates differentially below Conference levels, charging non-remunerative rates, or paying excessive brokerage fees, whether need exists for issuing rules to prevent such practices, and what the substance of such rules should be.

Upon the record, six questions are presented:

(1) Shall Grace Line, Inc. (Grace) recover reparations from Skips A/S Viking Line (Viking)?

(2) Shall Viking recover reparations from Grace?

(3) Are D/S A/S Laly (Laly) and D/S A/S Imica (Imica) violating section 15 of the Shipping Act, 1916 (1916 Act), by failing to file a joint service agreement, and /or by carrying out such agreement which has not been approved by the Commission or a predecessor agency?

(4) Shall we disapprove Viking rates under section 4(b)(5) of Public Law 87-346, 87th Cong., now section 18(b)(5) of the 1916 Act?

(5) Has Grace violated section 14, Second, of the Act by using fighting ships?

(6) Should the Commission promulgate appropriate rules under section 19 of the Merchant Marine Act, 1920 (1920 Act)?

Our Examiner, by initial decision which comes before us on exceptions, answered each question in the negative, and we agree with him.

Controlling facts upon which we base our conclusions and disposition of the matter, are found as follows:[3]

(1) The Conference has a dual rate system in this trade which has been in effect since as early as January 1, 1958. Since January 1, 1959, Conference contracts have been cancellable on 60 days notice by contract holders. As estimated by the Conference's chairman at the time of the events herein, it had tied up to dual rate contracts the great majority of shippers in the trade, and these shippers controlled about 95 to 98 percent of the cargo by volume.

(2) As of November 1961, the Conference had only four members, but in early 1959, when Viking entered the trade, the Conference had eight members, not including CAVN (see footnote 2). Some of the members have operated or operate out of Atlantic ports, and in particular mainly out of North Atlantic ports, some out of Gulf of Mexico ports, of the United States, and some out

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[3] Proposed findings and conclusions not substantially embodied in this report are rejected as cumulative, irrelevant, unsupported by reliable and probative evidence, or contrary to the weight of the evidence. Cf. Chief Judge Prettyman, of the District of Columbia Circuit, in *People v. Federal Power Commission*, 296 F.2d 348, 355 (1961), as follows:

"The inundation of the material with immaterial minutiae is one of the griefs which beset the administrative process. It is well to recognize it."

of both areas. Generally, cargo out of the Gulf ports is lower-rated bulk, while out of the North Atlantic ports, and in particular out of the Port of New York, there is more higher-rated general cargo.

(3) Grace operates only out of Atlantic ports, and is the principal carrier in the trade. Its principal competitor is CAVN. Conference members operating in November 1961, from the North Atlantic ports are Royal Netherlands Steamship Company (Dutch Line) and Alcoa Steamship Company (Alcoa). The last named two lines and CAVN also operate out of Gulf ports, as does Lykes Bros., another Conference member.

(4) While CAVN is only associated (non-technically) with the Conference, it has many of the privileges of Conference members, and has exercised a virtual veto power over Conference rates. CAVN has had an understanding with the Conference members since 1950, under F.M.B. Agreement No. 7777. When the Conference approves a rate, before it is made effective, CAVN is notified, and may concur with the proposal. When CAVN has not concurred, the Conference lines have generally bowed to CAVN's wishes and canceled their proposals, except that in many instances, CAVN made alternative and compromise proposals, or the Conference did so, and these alternative rates became effective. In instances in which the Conference decided to go ahead regardless of CAVN's wishes, the Conference gave CAVN 30 days' notice. The Conference seldom if ever made rates effective contrary to CAVN's wishes.

(5) CAVN is treated as a member of the Conference for the purposes of the shippers' contracts, that is, if a Conference contract-shipper ships via CAVN, the Conference does not consider it to be a violation of the Conference's exclusive patronage contract, whereas if said shipper utilized any non-Conference line, other than CAVN, it would be considered a violation. Prior to February 1961, CAVN generally charged the non-contract rates to all shippers whether or not they were contract signers. Since February 1961, CAVN has generally charged Conference contract rates to contract shippers and non-contract rates to non-contract shippers. The Conference, itself, because of the rate war hereinafter discussed, suspended its non-contract rates from June 1960, through December 31, 1960, and during that period the Conference lines gave all shippers the contract rates. This suspension was continued until February 1961. Prior to February 1961, when CAVN

agreed to abide by the dual rate system, any shipper was free to ship by independent or non-Conference lines, and still obtain the Conference contract rate when shipping via CAVN.

(6) Prior to the rate war in 1960, which resulted in reductions in many Conference rates, there had been no general increase in Conference rates since 1955, because CAVN asked the Conference not to raise rates in the interests of the people of Venezuela. CAVN, in turn, had been told by its owner, the Venezuelan government, not to increase rates.

(7) The Venezuelan trade depends naturally upon the prosperity of that country. The activities of the oil companies and the government's policies on housing, construction and oil prices affect the volume of imports of both industrial and consumer goods. The Venezuelan trade was normal in 1955, 1956, and 1959, and enjoyed a peak or boom in 1957, which lapped over into 1958, but it suffered a major fall-off in 1960, which continued into the late spring of 1961, and since then the volume in the trade has firmed up again. The fall-off in trade in 1960 was about 18 to 20 percent in weight. Much of the fall-off was caused by a lack of cargo moving to the oil companies, which had restricted their operations considerably. Price control by the Venezuelan government hampered oil exported in competition with lower-priced Russian and Arabian oils. The Venezuelan government has from time to time taken actions, such as the exoneration of certain cargo from import duties, to encourage shippers to use CAVN. The government also has provided for the payment of collect freight in Venezuelan money.

(8) Several lines have entered and quit the Conference from time to time. Generally, since January 1959, they left the Conference because of intense competition between all carriers, including the rate war in the trade in 1960, and because of Venezuelan government actions which tended to reduce their share in the volume of cargo and to increase their costs. Torm Lines came into the Conference in August 1958, operated out of Atlantic ports, and left the Conference about October 1960. The Peninsula and Occidental Steamship Company (P. & O.), which also had been operating out of Atlantic ports in 1958, and since, left the Conference on or before May 31, 1961. It now operates sporadically as a non-Conference liner. Belgo-Swedish Lines, operating out of Gulf ports, joined the Conference in February 1959, having been in the trade before that time, and left the Conference

in February 1960, resuming operations as a non-Conference line. Insco Lines left the Conference in or about May or June 1960.

(9) Another carrier left the trade for different reasons. North Atlantic & Gulf Steamship Company (Norgulf) began operations in about October 1954, with a weekly service out of the ports of New York and Baltimore, and a fortnightly service out of the port of Philadelphia, to the principal ports in Venezuela, LaGuaira, Maracaibo, and Puerto Cabello. At one time it also operated a fortnightly service out of the Gulf. Norgulf operated in various areas, including the Venezuelan trade, with a fleet which at times included sixty ships. Its service to Venezuela was profitable, but this was at a time when there was a great demand for ships. Unfortunately for Norgulf, it made a poor estimate of the ship-charter market, suffered financially, went bankrupt, and after operating for a time under a trustee, lost key personnel, including its Venezuelan agent. Norgulf left the Venezuelan trade about July 1, 1958, having made 22 sailings in the trade that year.

(10) While operating in the Venezuelan trade, Norgulf chartered three C1-MAV1 type vessels which now are chartered by Viking, and which now are known as the LAGO VIKING, the LEIF VIKING, and the BENNY VIKING. At the time Norgulf went bankrupt it was chartering these vessels at $32,500 each per month on charters fixed two years ahead. These C1-MAV1 vessels are well suited to the Caribbean service because they have considerable deadweight compared with their cubic capacity, making them efficient northbound bulk carriers. The first two of these vessels were in Norgulf's Venezuelan trade on a permanent basis, and the BENNY was an in-and-outer in that trade.

(11) Some of Viking's New York agent's officers were formerly employed by Norgulf, but otherwise the ownership and management of Viking is entirely new, having no connection with the ownership or management of Norgulf. In the matter of setting rates, the Norwegian management of Viking relied heavily, if not almost entirely, on Viking's New York agent. Viking's entrance into the trade provided to the ships' owners a use for these three ships at a time when the demand for such ships was poor. In fact, at the time, no other profitable employment for these ships was available to their owners.

(12) Viking entered the Venezuelan trade in January 1959, operating out of North Atlantic ports, with these three C1-MAV1 type vessels, offering a fortnightly service as a common carrier

independent of the Conference, charging rates generally lower by 10 percent than the rates of the Conference, and paying brokerage to freight forwarders generally of 2.5%, but in some instances, 5% to 10%, instead of the Conference rate of 1.25 percent. Usually when a non-conference line enters a trade it resorts to higher rates of brokerage, as well as to lower freight rates. Thus, Viking was following custom in its rate and brokerage practices.

(13) From time to time there had been a number of non-Conference operators out of the Gulf ports to ports in Venezuela, but the Conference generally had coped with them, or was not substantially affected by them. However, (except for CAVN, which cooperated with the Conference) there had been no serious attempt to operate a regular liner non-Conference service out of the United States North Atlantic ports to Venezuela. Viking upset this pattern, in that it not only offered a regular fortnightly liner service, but also had good Venezuelan port coverage, carried a large range of general commodities, and offered some refrigerated space along with general cargo space in the same vessels.

(14) The officers of the New York firm which became the agent of Viking, felt, in contrast to the relatively low-paying cargo out of the Gulf, that the higher-rated cargo out of the North Altantic ports, particularly the port of New York, even with rates 10 percent below the Conference's rates, would support the operation of a successful non-Conference line. Of course, even from the North Atlantic ports, all lines need to supplement the so-called "cream" type of the cargo with lower-rated heavier-loading types of cargo, in order to have sufficient revenues, and where C1-MAV1's are used, also to obtain needed weight.

(15) Viking's vessels are relatively slow at about 10.5 knots, compared to the vessels of Grace at about 16 knots and 21 knots, and to the vessels of other Conference lines and of CAVN at about 13.5 knots. Viking offered fewer sailings, one every two weeks, compared to the sailings of the Conference lines and CAVN as a whole, about 18 every two weeks in 1959, when Viking entered the trade. At that time Grace had 3 weekly sailings, CAVN, 2, Dutch Line, 2, Alcoa, 1, and Torm Lines, 1. Since Viking's ships were slower, since its service was less frequent, and since it did not offer container service, or a service with the transportation of cargo on pallets in the vessels, Viking and its New York agent felt that it had nothing to sell but a cut-rate service.

(16) In 1959, the Conference, and Grace in particular, became sufficiently concerned with Viking's competition to publish about 15 so-called emergency rates. These were rates reduced below regular rates, and scheduled to expire on a definite date, at which time the old rates would again become effective.

(17) In the meantime and on later occasions, overtures were made by Grace and by Conference officials to Viking as to the possibility of its joining the Conference, but it declined unless it would be guaranteed a percentage of the tonnage, or unless it could charge lower rates than other members, as a class "B" member, which latter possibility had been suggested in the Office of Regulations of the Federal Maritime Board. The Conference would not consider guaranteed cargo-percentage, or anything but regular membership and Conference rates for Viking.

(18) Besides Viking, there have been and are other non-Conference operators in the Venezuelan trade. Such carriers have included Dovar Line, American Defense Line, American Caribbean Line, Caribbean-Hamburg Line, Three Bays Line, and Wallenius. Wallenius carried automobiles at very low rates, and autos are one of the largest-volume cargoes moving to Venezuela. Viking had little effect on the rates on autos in this trade. These carriers' services have been sporadic, were in small ships, have covered a limited number of ports and fewer commodities or have been limited to particular shippers. Some of these independents have provided service only incidentally to their service at government missile sites in the Caribbean area. Nevertheless, Viking takes the position that were it not in the trade actively as a non-Conference carrier, some other line, such as Dovar, would be more actively competing in Viking's place. At times Viking has had primarily to meet the competition of another independent, rather than the competition of the Conference Lines.

(19) The airlines have competed in the trade, taking cargo such as television sets, and refrigerators. Overall, however, airline competition was minimal. The principal competition, however, has been between the Conference lines and Viking, and intra-Conference competition between member lines themselves, including competition between Conference members and CAVN.

(20) While Grace believed Viking was the cause of the worst troubles in the trade, this opinion was far from unanimous among Conference members, as indicated by the fact that no other mem-

ber joined in Grace's complaint, or intervened herein. At a meeting of Conference principals in June 1960, the Dutch Line felt that the inability of the Conference lines to move effectively against contract-violating shippers was the factor which had unsettled the Conference rate structure. CAVN at that meeting took the position that the Conference's real problem was "open rates," and not Viking competition. Alcoa was opposed to open rates.

(21) For the entire time Viking had operated in the Venezuelan trade, as an overall average, Viking carried no more than about five or six percent of the cargo by volume, although for a short time in the latter part of 1959, it carried about eight percent. Grace carried about 35 percent of the cargo in the trade in 1959, and about 33 percent in 1960.

(22) By January 1960, Grace was genuinely disturbed about the competition of Viking. One of its non-policy-making officials, a highly-regarded freight solicitor and assistant vice-president, in 1959 and 1960, stated to an officer of the New York agent of Viking that Grace was prepared to lose a couple of million dollars to get rid of Viking because Viking was in Grace's hair. Viking's captains told Viking's Norwegian manager that Grace was threatening to retaliate against Viking. The same report also came to Viking's New York agent from its Venezuelan agent. Grace felt that Viking was the first rate-cutter and, thus, the beginner in the rate war of 1960. Grace felt that it had to respond to Viking's rate-level with rate-cuts, in order to retain the loyalty of its shippers, and to keep them competitive with shippers using Viking.

(23) On January 8, 1960, Grace moved the Conference to open rates on nineteen commodities carried by Viking. The motion was passed subject to the concurrence of CAVN, and it was provided that another meeting would be held if CAVN did not concur. CAVN refused to concur. Grace moved at a meeting on January 14, 1960, that the open rates be made effective by giving the required 30-day notice to CAVN. There was no second to Grace's motion. By letter dated January 15, 1960, Grace tendered its resignation from the Conference, effective in 30 days.

(24) A Conference principals' meeting was held on February 10, 1960, at which time Grace withdrew its resignation. At a meeting on February 18, 1960, certain emergency rates on 22 commodities were agreed upon. These rates were later concurred in by CAVN. At a meeting on February 23, 1960, rates were

declared open on more than 30 commodities. The rates were opened effective March 7, to expire April 30, 1960. One rumor in the trade was that the rates were opened for about sixty days because the Conference expected Viking to be out of business in that length of time.

(25) Additional rates were opened from time to time with the concurrence of CAVN, and the expiration dates of open rates were extended. Generally rates were opened on all commodities which Viking carried. The open rates were continued in effect through 1960, and part of 1961, during which year, rates were individually and by groups gradually restored to normal. Some rates were closed in the fall of 1960. The rate war began about February 1960, and substantially ended about February 1961.

(26) The Conference decided to close rates despite the opposition of Grace. Some members apparently felt that intra-Conference competition was having worse effect on their financial conditions than Viking's competition. Certain members even feared that they would be forced to quit the trade. When the rate war ended, Viking was, as it still is, in the trade as an independent. As the Conference raised its rates back to or toward normal, Viking also raised its rates, but still maintained rate-levels below those of Conference's.

(27) When Conference rates[4] were opened, it was the policy of Grace not merely to meet Viking's rate, or go \$1 or \$2 under Viking's rate, but to go down immediately to the minimum rate which Grace considered it could charge. Thus when rates were opened, Grace's rates were not decreased by stages, but generally in one big cut.

(28) The Conference rate effective on and after December 14, 1955, on agricultural implements, was \$27. It was opened March 7, 1960, and Grace made its rate \$12 on that date. Viking's rate prior to the rate war was \$24, except for one shipment at \$20.25 early in 1960. On household washing machines, the normal Conference rate of \$20 was opened with a minimum of \$15 effective February 22, 1960, which was the rate Grace made effective on that date. The Conference opened the rate without any minimum effective March 7, 1960, and Grace's rate on that date became \$11. Viking's rate prior to the rate war was \$18. On toys, with a value of less than \$350 a freight ton, Viking normally charged \$31.50

[4] Rates herein are stated per ton, weight or measurement.

and the Conference charged $35. During August 1960, both Viking and Grace charged $13.50. Grace intended to go as low as Viking's break-even point in setting its rates, but even such low rates were met, and Grace went to even lower rates. On individual rates, both Grace and Viking undoubtedly reached non-compensatory levels.

(29) When the rate war ended, although many rates went up to normal, others while raised, did not rise to their previous levels. Commitments to shippers kept some rates from returning all the way up to their normal levels. Viking's policy during the rate war was to cut its rates, so long as it obtained enough revenue to cover loading, discharging and commissions, plus "something for the ship", such as $1 or $2 a ton.

(30) Viking had its ships under time charters at $18,000 each per month on six-month renewal bases, or about $600 per day. The ships' owners, rather than Viking, had to pay operating expenses, including crews' wages, food, maintenance and repairs, etc. Bunkers, however, were a cost of the charterer. Operating expenses of a C1-MAV1 were about $17,000 a month. The charter rate was adjusted downward slightly for operations in 1959, and downward substantially for 1960, so that technically Viking broke about even instead of operating at a loss in those years. In actuality, both the Viking and the Grace operations in the Venezuelan trade in 1960 lost very substantially. For the first six months of 1961, Viking's operating results considerably improved.

(31) The losses of Viking which were absorbed by the owners of its ships, were in part absorbed by the Norwegian government. The Norwegian income tax rate of at least one of the owning companies was 65 percent and losses of Viking in the Venezuela trade were offset against the profits of other ventures of that company. Similarly, Grace Line's losses may be said to have been absorbed by the United States Government to some extent.

(32) Grace is a subsidiary of W. R. Grace & Co., which said in its annual report for 1960, that "five adverse factors" resulted in Grace's operating at a loss in 1960, for the first year since 1932. These five factors were stated to be the world-wide surplus of cargo shipping capacity, the downturn in trade with Venezuela, losses in Grace's Great Lakes service, Grace's inability to inaugurate its container-ship service in 1960, and inclusion of the high cost of certain South-American government-owned or sup-

ported lines in the determination of the amount of Grace's operating subsidy. No mention was made in this report of competition with Viking Line as a loss factor.

(33) The rate war lasted throughout 1960, in which year there was also a major fall-off in trade with Venezuela. The rate war ended gradually in 1961, and Grace's, the Conference's and Viking's rates gradually increased in 1961. In November 1961, the trade was still improving, but the Conference with fewer members, had a total of only about 12 sailings every two weeks compared to 18 prior to the rate war in 1960.

(34) In its first year of operation, 1959, Viking charged compensatory rates. In 1960, both Viking and Grace charged less than compensatory rates, at least on some commodities. Viking carried refrigerators, washing machines, and household stoves in large quantities, and on this type of cargo Viking was receiving substantial revenues and profits. Such cargo was obtained strictly on a rate basis.

(35) Viking's rates were made generally below the Conference's rates on both the high and low-rated commodities. Where the Conference had low rates, Viking cut as little as possible. Sometimes a cut of $0.25 or $0.50 was all that was needed to attract the cargo. On the higher-rated cargo, Viking generally cut the rates 10 percent, but went even lower where it felt a larger cut was necessary to attract the cargo, and it could still make a profit. The 10 percent cut was in the tradition of other independent lines. Rates cut more than 10 percent were usually on the high side, and in the range of $40, $50, $60, or $70.

(36) Viking's rates did not always go as low as the Conference's rates. For example, Viking refused to go below $15 on New York State beans, but a Conference line carried them at about $13.50 during the open rate period.

(37) As an independent, Viking did not maintain a tariff of its rates open to the public, although it was obliged within 30 days after one of its ships sailed to file the rates on cargo transported by that ship with the Commission.[5] In the meantime another Viking ship could have sailed with cargo booked at lower or higher rates. Thus, the Conference lines might wait as much as 30 days to ascertain Viking's rates from its filings with the Commission, and of course, it took additional time for member lines

[5] *Section 19 Investigation 1935*, 1 U.S.S.B.B. 470, 502 (1935).

to agree on new rates, make them effective, and book cargo. Viking to some extent was able to keep the Conference lines in the dark as to its rates. Its rates could be ascertained to an extent from sources other than tariffs, such as phone calls to Viking. The record as to availability of information from this source is uncertain, one witness saying a telephone call would get the rates, and another witness saying that only known friendly voices would receive rate information. Of course, carrier's rates as quoted to a shipper are often passed on by the shipper to a competing carrier, at times accurately. Venezuelan custom manifests available to competitors would also show Viking's rates.

(38) Viking's cargo comes largely from freight forwarders, and as much as 85 percent of its shipments are made by freight forwarders or list the names of forwarders on the shipping documents. On about 87.5 percent of its shipments, Viking paid 2.5 percent brokerage (the customary rate for "independents") to the freight forwarder. During the period of record, Viking paid brokerage in excess of 2.5 percent on about 100 shipments out of over 4,000 shipments. On a few occasions no brokerage at all was paid. Viking's agent had discretionary authority to exceed the rate of 2.5 percent in paying brokerage. Brokerage of five percent and ten percent was paid at times. The record is convincing that in most instances it was Viking's lower freight rates which attracted the cargo, but that in some instances the cargo was secured by the payment of 5 or 10 percent brokerage. Viking's 2.5 percent brokerage policy was the same as that of other non-Conference lines.

(39) Viking payments to freight forwarders compensated them for the preparation of complicated analyses of manufacturer's lists of articles shipped, with stowage factors and other documents, which Viking's agent did not have the information and facilities to prepare, but were primarily made as payment to the forwarders for bringing the cargo to Viking. Viking's brokerage policy was in part compelled by the competition of Dovar Line or by an unnamed Conference line, not Grace. One line was cited to Viking's agents many times, as competing both rate-wise and brokerage-wise, until it left the Conference in 1960 or early 1961.

(40) Except as to Grace and Viking, the record contains nothing specific about the operating results of carriers in the Venezuela trade, but several Conference lines lost money in 1960. Those carriers generally opposed opening of the rates, and gen-

erally supported closing of the rates after they had been opened because of their losses.

DISCUSSION AND CONCLUSIONS

The foregoing facts support and require denial of reparation and requested rules.

Neither Viking nor Grace can show that the applicable statute (section 22 of the 1916 Act) makes the losses they have sustained legally or equitably recoverable.

Section 22 (under which both Grace and Viking necessarily complain) makes recoverable as reparation, *only* damages *caused by a violation of the 1916 Act.* The complaints and argument of both parties recognize and demonstrate that this is true. Each, as complainant, alleges and seeks to prove violation of the Act (with resulting injury) by the other. As respondent, each denies and disproves the other's allegations just described.

While Grace, in its complaint in No. 946, alleged violations of sections 14 and 16 of the 1916 Act by Viking, the allegations are wholly without evidentiary support, and have not been asserted by brief or argument.

It is shown on pages 3 and 4 of this report that no Viking rate here involved is subject to the provisions of section 18(b)(5) of the 1916 Act, and this disposes of Grace's allegation and contention based upon that section.

From the carefully drawn and detailed counts of the Grace complaint we extract one remaining allegation, which is that the 1916 Act (specifically, section 15) has been and is now being violated.

In effect, Grace's allegations and arguments as to violation of section 15 are (1) that the owners of Viking by agreeing to create Viking as an operator in the Venezuelan trade, entered into an agreement which section 15 requires to be filed immediately with the Commission, and that inasmuch as that agreement has not been filed (as it has not), Viking's owners have violated section 15 by failing to comply with its filing provisions, and (2) that Viking's operations in the Venezuelan trade constitute carrying out by Viking's owners, of an unapproved section 15 agreement,[6] also a violation of section 15.

[6] Common usage has established the term "section 15 agreement" as meaning an agreement subject to the provisions of section 15 of the 1916 Act.

The critical question is whether the agreement to create Viking is, in view of Viking's intended operations in the Venezuelan trade, a section 15 agreement. If so, section 15 is violated, although this would not necessarily mean that Grace should recover reparations. In our opinion, the agreement is not a section 15 agreement, and section 15 has not been violated by failure to file the agreement, or by Viking's operations.

To be subject to the provisions of section 15 an agreement must be an agreement of a common carrier by water or other person subject to the 1916 Act with another such carrier or person "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement."

The agreement between Laly and Imica to create Viking as a berth operator in the Venezuela trade may well be considered to provide for a cooperative working arrangement between them. Assuming, *arguendo*, that it does so, the agreement nevertheless is not subject to section 15 unless it is between a common carrier or other person subject to the 1916 Act and another such person or carrier. As Laly and Imica are not carrying on the business of forwarding or furnishing wharfage, warehouse, or other terminal facilities in connection with a common carrier by water, and were not when they entered into the agreement, neither is or was when the agreement was made an "other person subject to the (1916) Act" (Section 1). Grace contends however that, although when the agreement was made neither Laly nor Imica was a common carrier by water (and this we find as fact), *both* became such carriers the instant Viking began operating; that the agreement thus became an agreement between common carriers; and (as it has been neither filed nor approved) Viking's operations constitute carrying out an unapproved section 15 agreement between Laly and Imica *by Laly and Imica.* The argument's ingenuity exceeds its merit. It is, in effect, that as Viking is operating as a common carrier by water, *so are Viking's owners,* Laly and Imica. The argument proves too much. If it be correct, it means that all individual incorporators of a steamship line have always been and are violators of section 15 of the 1916 Act. This was never the legislative intent, nor is it the legislation's effect. Section 15 was enacted to subject anticompetitive agreements between those engaged in specified maritime enterprises to the scrutiny of a regulatory agency, and to authorize that agency under stated conditions to exempt such agreements from the operation of the antitrust laws, and this it does. This agreement is not between parties specified by section 15. Therefore section 15 does not require that it be filed with and approved by the Commission nor can the Commission, by approval, exempt it from the operation of the antitrust laws. Although, as we have indicated, there is a measure of logic in arguing that because Viking, the *whole*, is engaged in common carriage by water, so are Laly and Imica as Viking's *parts*, sufficient answer is given by our conclusion that this does *not* make Laly and Imica common carriers by water *within the meaning of section 15 of the Act*. Indeed, what Judge Byers said in *The Southern Cross*, 24 F. Supp. 91, 93 (D.C. E.D. N.Y., 1938) is directly applicable to Grace's argument:

> If logic were an end in itself, the argument * * * would at least be plausible. But when logic and common sense are approaching head-on, it is not the latter which must give way.

Inasmuch as all section 15 cases cited by Grace involve agreements between common carriers or other persons subject to the 1916 Act, they are inapplicable here.

Upon the basis of what has been said we conclude that neither Viking nor any Viking interest was obligated to file or forbidden to carry out the agreement under consideration. We now turn to Viking's charge that Grace has violated section 14, Second of the 1916 Act by operating fighting ships.

Section 14, Second forbids any common carrier by water to operate a "fighting ship" and defines the term. The statute states that a "fighting ship" is "a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade."

Viking contends that Grace used its vessels to destroy Viking's competition by driving Viking out of the Venezuelan trade, and therefore each Grace sailing was the operation of a fighting ship. The argument though specious, is not new. Viking recognizes that it was advanced and overruled in *Seas Shipping Co.* v. *American*

South African Line, 1 U.S.S.B. 568 (1936); contends that *Seas* was incorrectly decided, and asks us to hold to the contrary. Due regard to the intention of Congress in enacting section 14, Second prevents.

The Alexander Committee which after its far-reaching and painstaking investigation secured the passage of the 1916 Act, recognized that operating fighting ships on the one hand, and cutting rates for cargo carried on vessels regularly employed on the other, are *two different* methods of competitive operation.

In its report the Committee pointed out the testimony of witnesses that in the Atlantic-Gulf Trade steamship conferences could then crush independents "by putting in steamers to fight the competition" which is to say, the operation of fighting ships, "*or* by having their regular boats cut rates to an unremunerative basis" (Vol. 4, p. 394) (emphasis added.) The Committee's recommendation, which Congress followed by enacting section 14, Second was intended to and does prohibit putting in steamers to fight the competition, but was not intended to and does not prohibit the cutting of rates on "regular boats", even to an unremunerative level. This conclusion is strengthened by the fact that the evidence about "fighting ships" before the Committee all related to ships specially put on to fight competitors, and in no instance to cutting rates on vessels regularly operating on the route.

Grace having put in no steamers to fight Vikings' competition has not operated fighting ships. Nothing in this record indicates that Grace has increased sailings, changed sailing dates, or in any way changed its normal operating pattern.

Viking has failed to support its charge that Grace's rate-cutting subjected Viking to unreasonable prejudice and disadvantage in violation of section 16 of the 1916 Act by appropriate evidence or convincing argument. Grace's cut rates, if not met by rates as low or lower, were effective equally to take cargo away from all other operators—not just Viking. The Examiner's finding that Grace did not violate section 16 as charged is not challenged by exception or by oral argument.

We turn now to the sole remaining issue—if, under section 19 of the 1920 Act, we should issue rules with respect to the payment of brokerage or "systematically undercutting" conference rates. It is wholly unnecessary to discuss the merits or demerits of any proposed rule, because no rule can issue unless and until we find that conditions unfavorable to shipping exist in this trade, and we conclude upon the whole record that such conditions do not now exist. As stated in the initial decision, this trade is now relatively stable, and the carriers' prospects are improving. It is well for us to point out, however, that payment of excessive brokerage in our opinion is a pernicious practice, inimical to the best interest of shipping in our foreign trade and oppressive to the shipper who must eventually bear the cost. Hence, the Federal Maritime Commission will review this matter on an industry-wide scale. We are by no means sure that payment of excessive brokerage is made only by non-conference lines.

Further, we do not consider systematically undercutting a competitor's rates a desirable or even valid method of ratemaking. Advertising by a carrier that its rates are so fixed is provocative of retaliation and rate war, with resulting instability detrimental to our foreign commerce.

Our ultimate conclusions are:

(1) That neither Grace nor Viking has violated any provision of the 1916 Act, and therefore neither is entitled to recover reparations from the other.

(2) Conditions unfavorable to shipping do not now exist in the Venezuela trade and therefore no rules to meet such conditions will be issued.

(3) The complaints in Docket Nos. 946 and 950 should be dismissed and Docket No. 953 should be discontinued.

An appropriate order will be issued.

FEDERAL MARITIME COMMISSION

No. 946

GRACE LINE, INC.

v.

SKIPS A/S VIKING LINE ET AL.

No. 950

SKIPS A/S VIKING LINE

v.

GRACE LINE, INC.

No. 953

SECTION 19, MERCHANT MARINE ACT, 1920, INVESTIGATION OF PRACTICES OF VIKING LINE

The Commission on this day having entered its report containing its findings and conclusions herein, which report is mad[e] a part hereof:

It is ordered:

(1) That Dockets No. 946 and 950 be, and they hereby are dismissed; and

(2) That Docket No. 953 be, and it hereby is, discontinued

By the Commission, November 13, 1962.

(Sgd.) Thomas Lisi
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 244

MARTINI & ROSSI S.P.A. ET AL.

v.

LYKES BROS. STEAMSHIP CO. INC.

Decided November 13, 1962.

Permission granted Lykes Bros. Steamship Co. to waive collection of undercharges on shipments transported from Italy to the United States.

Walter Caroll and *Edward S. Bagley,* for respondent.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

This is an application made by Lykes Bros. Steamship Co., Inc. (Lykes) pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure,[1] for permission to waive collection of undercharges due on certain shipments transported from Italy to the United States on the SS. *James Lykes* in February 1962.[2]

[1] Rule 6(b) provides:

Carriers or other persons subject to the shipping acts may file applications for the voluntary payment of reparation or for permission to waive collection of undercharges, even though no complaint has been filed pursuant to rule 5(b). All such applications shall be made in accordance with the form prescribed in Appendix II(5) herein, shall describe in detail the transaction out of which the claim for reparation arose, and shall be filed within the 2-year statutory period referred to in rule 5(c). Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If allowed, an order for payment will be issued by the Commission.

[2] The shippers and commodities involved are Martini & Rossi S.p.A., vermouth; Fiat, S.p.A., automobiles; Eternit S.p.A., asbestos pipe; Riccardo Giusti & Figli, wine; S.p.A. Lucchese Olii & Vini, olive oil; Serchi Stefani, wine; Calzaturificio Orbio di C. Capobianco, shoes.

By section 18(b) of the Shipping Act, 1916, effective January 2, 1962, water carriers in the foreign commerce of the United States were for the first time required by statute to file with the Commission tariffs showing all their rates and charges, and were prohibited from collecting or receiving other than the rate or charge so filed for the transportation of property, or service connected therewith.[3] During the month of January 1962, the carrier Lykes had on file with the Commission its Special Rate Circular No. 2 containing rates for commodities such as those here involved. This Circular had an expiration date of January 31, 1962, after which the higher rates published in Lykes' Westbound Mediterranean (excluding Spain) U. S. South Atlantic & Gulf Ports Freight Tariff No. 1, also on file with the Commission (hereinafter "Westbound Mediterranean Tariff"), would apply absent an extension of the Circular. Lykes intended to extend the lower rates but due in part to oversight and in part to misunderstanding of the newly enacted tariff requirements, as aforesaid, its Genoa, Italy office (the issuing office for the tariff) failed to make the necessary filing with the Commission.

Lykes' employees continued to solicit cargo on the basis of the lower rates, apparently in ignorance of the fact that Circular No. 2 had expired. On discovering the situation Lykes filed Special Rate Circular No. 3, effective February 20, 1962, reinstating the lower rates but in the interim the shipments here in question had been booked, transported and paid for on the basis of the lower rates. These were not the rates legally applicable to the shipments, since Lykes' Westbound Mediterranean Tariff went into effect, albeit inadvertently, on February 1, 1962, and was in force until February 20, 1962. Having received less than the lawful rates, Lykes is in violation of the new statutory requirement. It is also obligated to collect the undercharges from the shippers concerned.

The Examiner in his initial decision concluded that the Commission was without power to grant Lykes a waiver of the duty to collect the undercharges because, as to the foreign commerce, the Commission lacks the authority "to determine, prescribe, or

[3] Public Law 87-346 (75 Stat. 762, 764-5). Prior to this enactment individual water carriers engaged in the foreign commerce of the United States were not required to file rates in inbound trades except in the East Coast of South America to the Pacific Coast of the United States trade. Conferences pursuant to their agreements filed schedules of inbound rates after they became effective. In the outbound trades, the requirement by administrative regulation was that the rates be filed within 30 days after becoming effective. P. L. 87-346 also provides that no rate increase can be effective until 30 days after its filing, unless the Commission authorizes a shorter period, but a decrease may be made effective upon filing.

order enforced a just and reasonable maximum rate." The theory here is that, were it so empowered, the Commission might find unjust or unreasonable the Westbound Mediterranean Tariff rates and in lieu thereof prescribe the lower rates of the Special Circular as just and reasonable maximums, but lacking such power the Commission may do nothing. Lykes took exception to the Examiner's conclusion and we also disagree with it.

In our opinion, the issue is not one as to the level of rates. Nor is the power to prescribe a substitute rate for one appearing in a tariff a prerequisite to the granting of relief in cases of bona fide rate mistake or inadvertence under Rule 6(b). We so indicated in our most recent case under the rule, *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, 7 F.M.C. 62 (1962). That case arose in the domestic off-shore trade where we have full rate authority and could have exercised it but did not. We thus avoided any suggestion that our power to afford relief was restricted to situations where we could do so by prescribing a rate. In *Higa* we merely described as an "unjust and unreasonable practice" the carrier's neglect in filing a tariff change embodying a rate that the parties, acting in good faith, had agreed would apply. We stated that an innocent shipper should not be made to bear the consequences of the carrier's failure, and thereupon granted the requested waiver.

The instant case presents essentially the same kind of situation. The carrier's failure to continue in effect the rates it had been charging and which it actually quoted during the relevant period, was the result of oversight and misunderstanding as to a statutory provision that had been in force approximately one month. The record contains no hint that the parties concerned were not acting in complete good faith. The fact that the commerce involved is foreign is not significant, in the view we take of our right to afford relief under Rule 6(b).

The paramount question in cases of this type is whether granting the requested relief will result in discrimination. This is because the primary purpose of the new tariff filing provisions of the Shipping Act, 1916, as with similar provisions on which it was based, is to prevent discrimination. If this purpose will not be defeated we think we are unquestionably clothed with discretion to permit corrective action under the rule. We have the responsibility for administering that Act and also the Intercoastal Shipping Act, 1933, and are empowered among other things to see that equity and justice are done in the matter of reparations.[4]

Every precaution will be taken to insure that discrimination does not result from the approval of applications under Rule 6(b). To that end the requirements of the rule must be fully complied with and the Examiners should freely utilize their authority to obtain any additional information deemed necessary. Where the facts show that there will be no discrimination, and that the case is one of bona fide rate mistake or inadvertence, it seems to us clear that we may exercise our discretion to remedy the situation. Our action, however, cannot excuse parties from any statutory penalties to which they may be subject.

The record in this case shows that granting the relief sought will not result in discrimination and that such grant, as in the *Higa* case, *supra*, will relieve innocent shippers from the consequences of the carrier's failure to effectuate an intended tariff filing. For these and other reasons above mentioned, the waiver will be granted.

[4] See *Flota Mercante Grancolombiana, et al.* v. *FMC and USA*, 302 F. 2d 887 (D.C. Cir. 1962).

ORDER

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 244

MARTINI & ROSSI S.P.A. ET AL.

v.

LYKES BROS. STEAMSHIP CO., INC.

WHEREAS, the Commission has this day made and entered a report stating its findings and conclusion herein, which report is made a part hereof by reference:

It is ordered, That the application of Lykes Bros. Steamship Co., Inc., to waive collection of certain undercharges be, and it is hereby, granted.

By the Commission, November 13, 1962.

(Sgd.) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 999

AMERICAN GREAT LAKES—MEDITERRANEAN EASTBOUND FREIGHT CONFERENCE—SURCHARGE ON SHIPMENTS FROM BUFFALO, NEW YORK

Decided November 20, 1962.

Surcharge of 10% imposed by Conference on all cargo moving from Buffalo to Mediterranenan Ports found to be unjustly discriminatory and ordered set aside.

James O. Moore, Jr., Frank G. Raichle, and *Ralph H. Halpern* for petitioner, Nelson A. Rockefeller, Governor of the State of New York.

Burton H. White for respondents.

Harold B. Ehrlich for Niagara Frontier Port Authority, *Edward Brick* and *W. G. Gilbert* for Buffalo Area Chamber of Commerce, *Arthur W. Todd* for Port Control of the City of Cleveland, Council of Lake Erie Ports, Great Lakes Ports Traffic Committee, and *Frank Catanzarite* for the Buffalo Corn Exchange, intervenors.

Donald J. Brunner, Hearing Counsel.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner*

BY THE COMMISSION:

On May 30, 1962, acting pursuant to Section 16, First,[1] of the Shipping Act, the Governor of the State of New York (petitioner) filed with the Commission a protest and petition wherein it was alleged that on April 13, 1962, the American Great Lakes—Mediterranean Eastbound Freight Conference (respondents)[2] amended its freight Tariff No. 4, as follows:

> SURCHARGE ON SHIPMENTS FROM BUFFALO, NEW YORK—Effective June 1, 1962, 10% surcharge is established on all rates and charges on shipments from Buffalo, New York.[3]

The petition further alleges that the surcharge is unjustly discriminatory, in violation of Section 17 of the Shipping Act; and that it unjustly discriminates against the State of New York and creates an undue and unreasonable prejudice against the port and a preference to other Great Lakes ports in violation of Section 16.

On the basis of this petition and pursuant to Section 16, First, the Commission issued an order on June 5, 1962, requiring respondents to show cause why the surcharge should not be set aside.

Respondents filed an answer to the petition wherein it was alleged that the surcharge is justified because of extraordinary high terminal costs incurred by respondents at Buffalo and the serious delays at that port, which costs and delays, it is alleged, greatly exceed those at other Great Lakes ports.

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[1] Section 16, First, was amended by P.L. 87-346, October 3, 1961, by the addition of the following provision:

Provided, That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

[2] Respondents are the Conference and its member lines. The Conference is organized under Federal Maritime Commission Agreement No. 8250 and consists of the following steamship lines: American Export Lines, Inc., Concordia Line—Great Lakes Service, Fabre Line, Hellenic Lines, Limited, Mediterranean Star Line, Montship-Capo Great Lakes Service, Nedlloyd Line, Niagara Line, Orient Mid-East Great Lakes Service, Watts Watts Line Great Lakes Service, Zim Israel Navigation Company, Ltd.

[3] The 10% surcharge is imposed on all commodities moving on respondents' vessels from Buffalo to ports in the Mediterranean. No similar surcharge applies to other Great Lakes ports. There is nothing in the record to indicate that any of the other carriers serving Buffalo have imposed a similar surcharge.

775-794 O-65-31

The Niagara Frontier Port Authority, the Buffalo Area Chamber of Commerce, the Corn Exchange of Buffalo, the Port Control of the City of Cleveland, the Council of Lake Erie Ports, and the Great Lakes Ports Traffic Committee intervened in this proceeding.

Following hearings, the Examiner found the surcharge to be unjustly discriminatory and recommended that it be ordered set aside. Exceptions were filed and oral argument held.

Buffalo is one of the nation's largest flour milling centers. Much of the flour produced there is exported to Mediterranean ports on vessels operated by respondents. Most of this flour is shipped in the name of private relief agencies, such as CARE, as part of the Government foreign relief program, and the United States ultimately pays the freight. The Conference lines also transport machinery, rags and general cargo, in relatively small quantities, out of Buffalo; and they transport flour as well as many other commodities from other ports on the Great Lakes.

The Port of Buffalo is in competition with other ports on the Great Lakes, particularly those that are also on Lake Erie. Some of the flour milling companies that have mills at Buffalo also have mills at other ports on the Great Lakes and elsewhere. The existence of the surcharge will cause other ports to be designated as the port of export for relief flour. The surcharge imposed by respondents has caused a decline in shipments of flour and other commodities from this port.

The rate on relief flour is $28.50 per long ton, which is lower than the rate on flour for private shipment. These rates apply equally from all United States ports on the Great Lakes to the Mediterranean.

The shipping season on the Great Lakes extends from about April 15 to about December 1. For several months prior to the 1962 season, the respondents were concerned over what they considered to be inordinately high terminal costs and time consumed at Buffalo for loading bagged flour, as compared to the costs for these services and the efficiency at the other Great Lakes ports, with which Buffalo competes. Early in 1962, the Conference exchanged letters with the Port Authority at Buffalo on this subject and held meetings with the main stevedore concern there. On April 6, 1962, the Conference decided to impose the surcharge of 10%, which was based on what the Conference considered to be about the differential between terminal costs on relief flour at Buffalo and those costs at other Great Lakes ports. The 10% surcharge became effective June 1, 1962.

DISCUSSION AND CONCLUSION

Petitioners have established that (1) Buffalo competes with other Great Lakes ports for the transportation of flour to the Mediterranean; that (2) Buffalo, as one of the biggest flour milling centers in the United States, is a natural port for the transportation of flour to overseas markets; and that (3) since the imposition of the surcharge at the Port of Buffalo, the shipment of flour from that port has greatly declined. We conclude from these facts that the imposition of the 10% surcharge by respondents is the proximate cause of the decline in flour shipments from Buffalo, and that its continuance will cause irreparable harm to the port and to the State of New York. Therefore, unless the surcharge by the Conference is justified, it must be set aside.

The only justification advanced by the Conference for the surcharge is that, in the opinion of the Conference members, terminal costs (including costs of delay) for loading cargo, principally flour, are higher at Buffalo than at competitive ports on the Great Lakes.

On this point the Examiner found that the over-all cost of loading (terminal charges plus a cost factor representing hourly productivity) at Buffalo exceeds the "average" at the other ports by at least 10%, and possibly a little more. He also found that terminal charges at some of the other ports are not substantially lower than those at Buffalo, nor is loading accomplished at some of the other ports with significantly greater speed than it is at Buffalo.

We cannot agree that the record establishes the "average" with the exactness required in a proceeding such as this. It does not indicate that the elements comprising the average were the same at all ports. It does show that different services are provided at some of the ports as compared to others. At some, the services include unloading railroad cars, storing, checking, and the like. At others, the rate merely covers loading cargo into the ship.

In addition, there is an almost total lack of documentary evidence in the record which would support the average claimed by respondents to be applicable. Most, if not all, of the supporting evidence was within the possession of respondents. Many of the stevedoring arrangements at ports other than Buffalo were oral. These and the data relating to operating costs at the various ports were accessible only to respondents. Requests for the production of documents were only partially complied with by respondents, and then only at the end of the hearings when their accuracy could not be tested.

In our view, the record merely shows that the terminal costs are somewhat higher and the stevedore efficiency somewhat lower at Buffalo than at some other Great Lakes ports. And, as the Examiner found, it also shows that terminal charges and loading time at some of these other ports are not significantly different from those at Buffalo. The evidence relating to commodities other than flour was meager, and it does not establish that the terminal costs at Buffalo on these items differ at all from those at the other ports. In short, the record fails to support respondents' action in singling out Buffalo for the imposition of a surcharge, and it has therefore not been justified.

There are also other elements which should be considered in determining whether a rate differential at a particular port may be upheld, such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and others. *Port Differential Investigation*, 1 USSB 61, 69 (1925). The Conference made no attempt to present evidence on any element except terminal costs.

The justification for a surcharge must be demonstrated by a record that is considerably more complete and solid than the one before us. We conclude that the surcharge constitutes an unjust discrimination against the Port of Buffalo and the State of New York, in violation of Section 16, First. This is also the conclusion the Examiner reached.

Respondents take the position that the State of New York is not discriminated against by the 10% surcharge at Buffalo. The record, on the other hand, shows clearly that the State of New York has, in addition to the interest any State would have in one of its major ports, a pecuniary interest in the Port of Buffalo. The State has advanced money to the port for the development of its terminal facilities, and for operating the port. The Niagara Frontier Port Authority, which operates and owns the major facilities at Buffalo, is an agency of the State of New York whose members are appointed by the Governor and whose operations are financed by State funds. It follows that the discrimination in question constitutes a discrimination against the State as well as the Port of Buffalo.

An order setting aside the surcharge will be entered.

ORDER

FEDERAL MARITIME COMMISSION

No. 999

IN THE MATTER OF AMERICAN GREAT LAKES MEDITERRANEAN EASTBOUND FREIGHT CONFERENCE—SURCHARGE ON SHIPMENTS FROM BUFFALO, NEW YORK

This proceeding having been initiated by an Order to Show Cause issued by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That the 10 percent surcharge imposed at the Port of Buffalo by respondent American Great Lakes—Mediterranean Eastbound Freight Conference be, and it is hereby, set aside; and

It is further ordered, That the respondent publish, issue and file with the commission immediately an appropriate amendment to its tariff indicating that the surcharge is no longer in effect; and

It is further ordered, That the respondent cease and desist from enforcing the surcharge in any manner whatsoever.

By the Commission, November 20, 1962

(Signed) Thomas Lisi
Secretary

FEDERAL MARITIME COMMISSION

No. 905

UNITED STATES LINES AND GONDRAND BROTHERS

VIOLATION OF SECTION 16

Decided December 19, 1962.

Gondrand Brothers found to have knowingly and wilfully obtained fror United States Lines Company transportation of logs by water fror North Atlantic Range ports to the ports of Antwerp and Rotterdam a less than the rates or charges which would otherwise have been appli cable during the period 1954 through 1959, in violation of section 1 of the Shipping Act, 1916.

United States Lines Company found to have allowed Gondrand Brothers t obtain transportation of logs by water from North Atlantic Range port to the ports of Antwerp and Rotterdam at less than the regular rates o charges established and enforced on the line of such carrier during th period 1954 through 1959, in violation of section 16 Second of the Ship ping Act, 1916.

Elmer C. Maddy and *Ronald A. Capone* for respondent Unite States Lines Co.

Howard A. Levy and *Robert J. Blackwell*, Hearing Counsel.

Arnold J. Roth, Hearing Examiner.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*; JOHN HARLLEE, *Vice Chairman* JOHN S. PATTERSON, *Commissioner*; JAMES V. DAY, *Commis sioner*; ASHTON C. BARRETT, *Commissioner*, did not participate ir this case.

BY THE COMMISSION:

This proceeding was instituted by the Federal Maritime Boarc (Board) to determine whether Gondrand Brothers (Gondrand) of Zurich, Switzerland and United States Lines Company (US Lines, also sometimes herein called "respondent") violated sectior 16 of the Shipping Act, 1916, in connection with the shipment of certain logs during the period 1954 through 1959, from North Atlantic Range ports of the United States to the ports of Antwerp, Belgium and Amsterdam and Rotterdam, Holland.

Gondrand is a corporation or association organized under the laws of Switzerland. It entered no appearance in the proceeding although it had actual notice thereof. The Board's initial order of investigation was served by registered mail upon Gondrand's agent in the United States, Intra-Mar Shipping Corp., New York, N. Y. Intra-Mar acknowledged receipt of the order and advised that while it was the agent of Gondrand for some purposes, it was not an agent for service of process, and suggested that the Board contact Gondrand direct in Switzerland. Copies of subsequent notices, orders and other documents issued in the proceeding were forwarded to Gondrand in Switzerland but most were returned by Gondrand with statements that it was not authorized under Swiss law to accept such documents submitted directly to its offices. A representative of Gondrand attended the prehearing conference as an observer. Gondrand's election not to participate in no way impaired the jurisdiction of the Board and this Commission to carry out this investigation and to make and enter findings, conclusions and such order as the circumstances warranted. The parties and conduct involved were clearly subject to the Shipping Act, 1916 and, as stated, Gondrand had actual notice.

Hearing was held before an Examiner, briefs were filed by US Lines and Hearing Counsel, and an initial decision was rendered in which respondents Gondrand and US Lines were found to have violated section 16 of the Shipping Act, 1916. Exceptions to the initial decision were filed by US Lines and a reply thereto was filed by Hearing Counsel, following which we heard oral argument.

We agree with the Examiner that section 16 was violated. We also adopt as our own the facts which he found, as follows:

FINDINGS

US Lines is a common carrier by water subject to the Act, operating in the trade from North Atlantic ports of the United States to Antwerp and Rotterdam, among others. As such, it is and at all times here involved was a member of the North Atlantic Continental Freight Conference (the conference), which was organized and operates under Agreement No. 4490, as amended, approved by the Commission or its predecessors pursuant to section 15 of the Act, 46 U.S.C. 814. At all times here involved, US Lines so far as is here pertinent participated in the conference freight tariffs, and did not publish or maintain any different tariffs.

Gondrand is an agent in Switzerland for US Lines, with responsibility to book cargo for US Lines vessels both east and westbound, to solicit freight, and to perform various other functions for US Lines in Switzerland including the collection of freight monies. For these services, Gondrand is paid a commission based on the gross freight booked by it or through its facilities on cargoes shipped between Switzerland and the United States. Gondrand also operates as a freight forwarder in Europe, and as such it performs services for various consignees including, in many instances, arranging for inland transportation of the goods of such consignees after delivery by the vessel at the port of discharge in Europe, as well as for the ocean transportation. Gondrand's activities with respect to these goods are, however, confined to those of a forwarder, and it does not buy, sell, or use them itself. US Lines was at all times aware of this dual status of Gondrand.

Some time prior to December 1954, Gondrand and an official of US Lines entered into an arrangement covering the eastbound movement of logs, whereby US Lines would make payments to Gondrand so that the ultimate rate assessed on shipments of logs handled by Gondrand would approximate the rates concurrently maintained by competitive nonconference carriers, in order to enable US Lines to obtain, against nonconference carrier competition, a portion of the log movement. In 1955, the existence of this arrangement came to the attention of other officials of US Lines, and instructions were given that the arrangement be discontinued as a possible violation of the conference agreement, but it nevertheless continued until 1959. The ultimate rates assessed under this arrangement did not appear in any tariff participated in by US Lines, nor was a report of these rates made by US Lines to the Board as required by the outstanding order in *Section 19 Investigation, 1935,* 1 U.S.S.B.B. 470 (1935).

The record discloses 59 shipments which were transported on vessels of US Lines under the above arrangement. The earliest of these moved under bill of lading No. 100, dated December 27, 1954, on Voyage 51 of the *American Attorney* which sailed from New York on December 28, 1954, and the latest under bill of lading No. 22 dated March 5, 1959, on Voyage 51 of the *American Guide* which sailed from New York on the same date. The shipments were variously described in the bills of lading as maple logs, birdseye maple logs, peeled maple logs, hardwood logs, and hardwood logs (maple). Except for one shipment in 1956 which was loaded in Norfolk, all were loaded in New York, and they were discharged in Antwerp and Rotterdam, although a number of the Rotterdam shipments were consigned to Amsterdam. Freight charges in each instance were billed to and paid by Gondrand. On 11 of the shipments, Gondrand appeared as sole consignee in the bills of lading. On the remainder, Gondrand appeared as consignee, with an ultimate consignee shown in the body of the bill, or Gondrand was listed as a party to be notified of the arrival of the shipment, or Gondrand did not appear on the bill of lading at all.

The mechanics of the arrangement may be illustrated by a shipment of 71 peeled maple logs, weight 74,860 pounds, loaded at New York on Voyage 8 of the *American Archer* under bill of lading No. 43, sailing date February 6, 1959. Freight charges were entered on the bill of lading at the conference rate of $1.20 per 100 pounds, totaling $898.32, a freight bill in the same amount was tendered to Gondrand under date of February 25, 1959, and paid by it. The bill of lading indicates that the consignee was Transportmij Traffic NV., Rotterdam, with arrival notice to be addressed to Gondrand. Under date of March 31, 1959, a specification was prepared by Gondrand listing this and other shipments handled during the first quarter of 1959, claiming refund on this shipment of $37.43 based upon a rate of $1.15 per 100 pounds. By letter of May 26, 1959, addressed to the Paris, France, office of US Lines, Gondrand submitted copies of the specification, together with paid freight bills, and requested remittance of $534.58 on the shipments handled in the first quarter of 1959, including that mentioned above. Under date of June 24, 1959, the manifest records of US Lines were corrected to reflect the claim made by Gondrand, and a check in the amount of $534.58 was transmitted by US Lines to Gondrand on July 13, 1959. By letter of July 24, 1959, Gondrand acknowledged receipt of this check. The remainder of the 59 shipments were handled in similar manner, with freight bills issued to Gondrand in the first instance and paid by it at the applicable conference rates, and later remittance of amounts to Gondrand to adjust the freight charges to reflect lower nonconference rates. By letter of May 9, 1960, addressed to the London, England, office of US Lines, Gondrand transmitted to US Lines a check in the amount of $12,591.19, covering all refunds previously received by Gondrand under the above arrangement during the years 1956-1959. This letter reads:

> In line with our discussion at Zurich last week, we have talked the matter over here and we realise that the only way this false situation can be corrected, is for us to refund to you the full amount of US $12,591.19.
>
> It is most regrettable that this action is necessary, but we fully realise the situation you have been placed in.

The record indicates that no shipments of logs between the ports here involved were handled by US Lines for any shippers other than those for whom Gondrand was acting. In addition to payments made to Gondrand under the above arrangement, Gondrand also received its regular commissions on the shipments as agent of US Lines.

DISCUSSION AND CONCLUSION

US Lines took exception to the Examiner's findings of fact, as above set forth, and submitted instead its own "Statement of Facts." However, this specifies neither the findings excepted to nor the findings US Lines thinks the Examiner should have made, and it fails to comply with our Rule 13(h) which requires that exceptions "indicate with particularity alleged errors" in the initial decision. Moreover, the findings proposed by US Lines, to the extent they relate to facts, were actually made by the Examiner albeit in slightly different language. The evidence of record fully supports the findings made by the Examiner.

Section 16 of the Shipping Act, 1916, so far as pertinent, provides:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.
>
> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—***
>
> Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

The Examiner concluded that the arrangement between Gondrand and US Lines was entered into knowingly and wilfully, and was effectuated by means of false billing, in violation of section 16. In its exceptions US Lines reiterates the contentions made in its brief to the Examiner. It argues that the net amount paid by Gondrand, after the refund had been made in each instance, was the regular rate then established and enforced by US Lines. It points to the requirement of filing rates in the export trade within 30 days after they become effective, which prevailed at the times involved herein,[1] and claims that since the rates on file could be changed under this policy without prior notice to the Board, the filed rates were, in effect, supplanted every time US Lines carried logs for Gondrand.

A necessary corollary of this reasoning would seem to be that US Lines filed the rate which it gave Gondrand in each instance. But this was not done. We take official notice of the fact that never during the lengthy period in question did US Lines file with the Board its actual rate to Gondrand. During all that time only US Lines conference rate for logs was on file. Surely it is not consistent for a carrier thus to publish and maintain one rate *ad infinitum,* and yet contend that its regular rate was something else. Nothing in the Board's decision in *Filing of Freight Rates in the Foreign Commerce, etc.,* 6 F.M.B. 396 (1961) or other cases cited by respondent, supports the view that a carrier's regular rate is whatever figure it chooses on the spot to give the shipper but which it never files as required. Under this theory, ignoring as it does the rate actually published and any need to perfect changes therein, the principle of a "regular" rate all but vanishes and a violation of section 16 could seldom be shown. Such a position is untenable.

United States Lines was bound by its conference agreement to observe the rates in the conference tariff. These were the only rates filed and published by it or on its behalf. The rates so reported and published were its regular or established rates which it was bound to charge and shippers were bound to pay. *Prince Line, Ltd.* v. *American Paper Exports, Inc.,* 45 F. 2d 242, aff'd 55 F. 2d 1053 (CA 2, 1932); *Compania Anonima Venezolana de*

[1] By Public Law 87-346, approved October 3, 1961, section 18 of the Shipping Act, 1916 was amended to require that every common carrier by water in foreign commerce file with the Commission and keep open to public inspection tariffs showing all its rates and charges for transportation, and that no different rate or charge should be collected or received by such carrier. The prior requirement for filing rates or changes within 30 days is contained in General Order 83 (46 C.F.R. Parts 235 and 535).

Navegacion v. *A. J. Perez Export Co., et al.*, 303 F. 2d 692 (CA 5 1962).[2]

United States Lines offered testimony to the effect that i carried no shipments of logs during the period in question othe than those for Gondrand. It therefore argues that "all shippers' were treated equally and hence no discrimination existed and n violation of section 16 Second can be found. We think it unlikel that over a period of four and one-half years there were no othe shippers of logs in the relevant trade who were not in one way o another prejudiced by the fact that US Lines allowed onl Gondrand to obtain transportation at a rate lower than the one i made available to the shipping public generally. But we need no pursue the matter for violation of section 16 Second clearly is no made contingent upon a showing of instances of such discrimina tion. The command of the section is absolute that a carrier shal not by false means or by other unfair or unjust means directly o indirectly allow a person to obtain transportation at less than th regular rate. The policy underlying this command is the same a that underlying the recent Shipping Act amendment which pro hibits a carrier's deviation from its tariff as filed with the Com mission. (Fn. 1, *infra.*)

In the course of its argument, respondent takes the positio that its transactions with Gondrand were "above board" withi the meaning of these words as used in the opinion in the *Princ Line* case, *supra*. There the court said, in reference to section 1 Second (55 F. 2d, at 1055):

> The law did not forbid all concessions to a shipper; apparently it assume that if these were above board, and known or ascertainable by competitors the resulting jealousies and pressure upon the carrier would be correctiv enough. But it did forbid the carrier to grant such favors, when accompanie by any concealment, and its command in that event was as absolute as thoug it had been unconditional.

It is true, as respondent says, that no deception was practice on Gondrand, since Gondrand was a party to the rebating. Bu this hardly creates an above-board atmosphere for the arrange ment. The shipments were billed and paid for in the first instanc at the regular rates of US Lines, undoubtedly to conceal th arrangement. For a time the fact that Gondrand was receiving a lower rate was not known even among all the US Lines' officials

[2] *Ambler* v. *Bloedel Donovan Lumber Mills*, 68 F. 2d 268 (CA 9, 1933), cited by respondent, is quite a different case in that there the court found, *inter alia*, no effective rate for the transportation of lumber higher than the one which had been agreed upon after negotiation between carrier and shipper.

who apparently should have been aware of it, and certainly it was not known to or ascertainable by the shipping public. It was precisely the sort of unlawful arrangement the court referred to in the above *Prince Line* quotation. In that case the agreement between shipper and carrier covered the transportation of parcels of "paper" the contents of which were undisclosed by the shipper and hence unclassified for rate purposes, although the carrier's tariff specified various classes of paper and rates therefor. In holding that the carrier violated section 16 Second, the court described the arrangement, in language equally appropriate here, as follows (at 1055):

This was an 'unfair device or means,' for it destroyed that equality of treatment between shippers, which it was the primary purpose of the section, and for that matter of the whole statute, to maintain.

Two additional points made by US Lines should be noticed. It says that the word "person" in section 16 Second means "shipper" including "consignee," that there is no proof that Gondrand was either of these, and consequently that US Lines could not have violated the section by allowing Gondrand to obtain transportation at the lower rate. This claim is made notwithstanding that Gondrand is actually named as consignee in the documents covering about a fourth of the shipments. It is clear, moreover, that 16 Second cannot be construed as respondent contends because if it is section 16 becomes an absurdity.

The first paragraph of section 16 forbids "any shipper, consignor, consignee, forwarder, broker, or other person" from obtaining transportation at less than the applicable rate. There is a parallel proscription in section 16 Second against carriers allowing "any person" to obtain such transportation but this would be operative under respondent's construction only where a shipper or consignee was involved. Further, although carriers could not directly allow rate concessions to shippers or consignees, they could under respondent's construction favor forwarders, brokers or others, and through them could also favor shippers and consignees. We are satisfied, as was the Examiner, that the words "any person" as used in section 16 Second are fully as broad as the words "shipper, consignor, consignee, forwarder, broker, or other person" used in the section's first paragraph, and that they plainly encompass Gondrand.[3]

Finally, US Lines asserts that any possibility of violation" was eliminated when Gondrand in May 1960 repaid to it the rebates it had paid Gondrand over the years 1956 through 1959. Respondent does not undertake to explain this novel theory. Suffice it to say that repayment of a portion of the sums Gondrand illegally received from US Lines does not cure the illegality and has no bearing on that matter.

The Examiner describes the arrangement here as "false billing" which it perhaps was in view of the submission and payment in the first instance of bills of lading and freight bills that both parties, by reason of their prior agreement, knew did not reflect the rates Gondrand was ultimately to be charged. Unquestionably the arrangement constituted an "unjust or unfair device or means" prohibited by section 16 and we think it preferable in the circumstances to rest our decision on that ground.

Our conclusions are:

(1) That respondent Gondrand Brothers knowingly and wilfully obtained from United States Lines Company transportation of logs by water from North Atlantic Range ports to the ports of Antwerp and Rotterdam at less than the rates or charges which would otherwise have been applicable during the period December 27, 1954 through March 5, 1959, in violation of section 16 of the Act; and

(2) That respondent United States Lines Company allowed Gondrand Brothers to obtain transportation of logs by water from North Atlantic Range ports to the ports of Antwerp and Rotterdam at less than the regular rates or charges established and enforced on the line of such carrier during the period December 27, 1954 through March 5, 1959, in violation of section 16 Second of the Act.

Since the unlawful arrangement has been terminated, there is no occassion for us to issue an order against the respondents and the proceeding is discontinued.

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[3] Respondent disputes comparison of 16 Second and the first paragraph on the ground that the latter was not added to section 16 until 1936 (49 Stat. 1518), some 20 years after 16 Second was enacted. Without the comparison, the fact remains that 16 Second uses the broad and unqualified language "any person." Furthermore, it is clear that in enacting the first paragraph Congress sought parity. Section 16 Second penalized carriers for allowing any person to obtain unlawful rates, and the first paragraph was designed similarly to penalize any person who obtained or attempted to obtain such rates.

FEDERAL MARITIME COMMISSION

Special Docket No. 245

Uddo & Taormina Corp., Complainant,

v.

Concordia Line (Joint Service of Dampskibsaktieselskabet Alaska, Aktieselskabet Atlas, Dampskibsaktieselskabet Idaho, Skipsaksjeselskapet Hilda Knudsen, and Skipsaksjeselskapet Samuel Bakke), Respondent.

Special Docket No. 246

Domestic Edible Oil Co. v. Concordia Line, Etc.

Special Docket No. 247

A. Sargenti & Co., Inc. v. Concordia Line, Etc.

Special Docket No. 248

Krasdale Foods Inc. v. Concordia Line, Etc.

Special Docket No. 249

Joseph L. Sclafani Inc. v. Concordia Line, Etc.

Special Docket No. 250

D. & A. Sclafani v. Concordia Line, Etc.

Special Docket No. 251

Capitol Foods v. Concordia Line, Etc.

Special Docket No. 252

Rinaldi Bros. v. Concordia Line, Etc.

Special Docket No. 253

Packer Bros. Inc. v. Concordia Line, Etc.

Special Docket No. 254

C. Daniele & Co., Inc. v. Concordia Line, Etc.

SPECIAL DOCKET NO. 255
LUIGI CASO v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 256
VITELLI-ELVEA CO. INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 257
MARINO BROS. v. CONCORDIA LINE, ETC.

Decided January 2, 1963

Permission granted Concordia Line (Joint Service, etc.) to refund freight charges and to waive collection of undercharges on shipments transported from Italy to the United States.

Thomas K. Roche and *Sanford C. Miller*, for Respondent.
E. Robert Seaver, Hearing Examiner.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.**

BY THE COMMISSION:

These are applications by respondent, concurred in by complainants, for an order of the Commission pursuant to Rule 6(b) of the Rules of Practice and Procedure, authorizing the voluntary payment of reparation to some of the complainants and waiver of the collection of undercharges as to others. The applications arise from respondent's transportation for complainants, in March 1962, of certain peeled tomato products (tomato sauce or pulp and peeled tomatoes) from Naples, Italy, to New York.

On February 15, 1962 the member lines of the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference, which include respondent, voted to reduce the freight rate on peeled tomato products from $26.50 per 1000 kilos to $18.00. On February 16, 1962 the Conference notified the Commission of this reduction by cable. Representatives of the Commission advised the Conference that the filing of the rate change could not

* Commissioner Barrett took no part in the hearing or decision of this case

be accomplished by cablegram. Proposed filing tariff rules require that tariffs and amendments thereto be filed with the Commission in a prescribed manner and form, 26 F. R. 12294. Thereafter a tariff revision (First Revised Page No. 14) was prepared and filed effective February 23, 1962, setting forth the reduction in the tomato rate to $18.00.

In the interim, respondent had advised complainants and other shippers that the rate on tomato products was to be reduced to $18.00 effective February 16, 1962, and complainants' tomato products were in good faith booked on that basis. However, in view of the Commission's rejection of the cable filing, respondent charged, and in all but three instances collected from complainants, freight based upon the $26.50 rate. The quantity shipped by each complainant, the freight at the higher and lower rates, and the excess that respondent seeks to refund or to waive are set forth in the following table:

Spec. Docket Number	Complainant (Abbreviated)	Quantity	Freight Charged or Billed	Freight at $18.00	Excess
245	Uddo & Taormina	146. W.	$3,869.00	$2,628.00	$1,241.00
246	Domestic, etc.	10.8 W.	286.20	194.40	91.80
247	A. Sargenti	12. W.	318.00	216.00	102.00
248	Krasdale Foods	12. W.	318.00	216.00	102.00
249	Joseph L. Sclafani	27.85 W.	764.52	501.30	263.22
250	D. & A. Sclafani	7.35 W.	194.77	132.30	62.47
251	Capitol Foods	15. W.	397.50	270.00	127.50
252	Rinaldi Bros.	10.4 W.	275.60	187.20	88.40
253	Packer Bros.	15. W.	397.50	270.00	127.50
254	C. Daniele & Co.	9.18 W.	243.27	165.24[1]	78.03
255	Luigi Caso	15. W.	397.50	270.00[1]	127.50
256	Vitelli-Elvea	57.7 W.	1,529.05	1,038.60[1]	490.45
257	Marino Bros.	15.845 W.	419.89	285.21	134.68

In an initial decision the Examiner found that an order should be issued authorizing the voluntary payment of reparation in Dockets 245 to 253, inclusive, and 257, and the granting of application to waive collection of undercharges in 254, 255 and 256. We agree.

Common carriers by water in the foreign commerce of the United States are required by section 18(b) of the Shipping Act, 1916, to file with the Commission tariffs showing all their rates

[1] In Special Dockets 254, 255, and 256 freight was paid at the lower rate. The application in these three proceedings is for authority to waive collection of the underpayment. In the other cases, the freight was paid at the higher rate.

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and charges for transportation between United States ports and foreign ports. The statute prohibits charging more or less than the rates specified in the tariffs so filed. This requirement for filing was new at the time of the transactions involved in these proceedings, section 18(b) having become effective on January 2, 1962.

The parties do not question the refusal of the Commission to accept the cablegram notice of the change in the freight rate. They urge that the Commission should authorize the relief requested based on the $18.00 rate in order to meet the good faith intentions and expectations of all concerned. They allege that the circumstances here are substantially similar to those in *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, 7 F.M.C. 62 (1962), wherein the Commission waived the collection of certain undercharges. There, Pacific Far East Line had inadvertently failed to file a tariff change which the parties in good faith had agreed would apply, and we held that an innocent shipper should not be made to bear the consequences of the carrier's failure to file the change.

More recently, in *Martini and Rossi S.p.A., et al.* v. *Lykes Bros. Steamship Co.*, 7 F.M.C. 453 (1962), we granted similar relief. In that case, Lykes inadvertently permitted its Special Rate Circular on file with the Commission to expire, bringing into force the higher rates published in its regular tariff. But it continued to solicit cargo based on the lower rates, and did in fact reinstate those rates when it discovered that the Special Circular had expired. In authorizing Lykes to waive collection of the undercharges, we cited the newness of the filing requirements of section 18(b) of the Shipping Act and the carrier's apparent good faith mistake as a result thereof.

The relief sought by the instant applications is in line with our action in the *Higa* and *Martini and Rossi* cases. It should be granted in order to apply the rate that all the parties believed to be in force at the time they contracted for the shipment of the tomato products. The conference attempted to file the reduced rate by cable and, until informed by the Commission that this filing was unacceptable, it was not unreasonable for respondent to book cargo at the reduced rate believed to be the lawful one. The shippers are innocent and no discrimination will result in granting the requested relief. Respondent seeks to provide the same relief to all shippers of tomato products on its vessels during the time in question.

An order will be entered authorizing and directing the payment of reparation to the respective complainants in Special Dockets 245 to 253, inclusive, and 257 in the amounts shown in the last column of the foregoing table, and granting the application to waive collection of undercharges in Special Dockets 254, 255, and 256.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 245

UDDO & TAORMINA CORP., COMPLAINANT,

v.

CONCORDIA LINE (JOINT SERVICE OF DAMPSKIBSAKTIESELSKABET ALASKA, AKTIESELSKABET ATLAS, DAMPSKIBSAKTIESELSKABET IDAHO, SKIPSAKSJESELSKAPET HILDA KNUDSEN, AND SKIPSAKSJESELSKAPET SAMUEL BAKKE), RESPONDENT.

SPECIAL DOCKET NO. 246

DOMESTIC EDIBLE OIL CO. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 247

A. SARGENTI & CO., INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 248

KRASDALE FOODS INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 249

JOSEPH L. SCLAFANI INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 250

D. & A. SCLAFANI v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 251

CAPITOL FOODS v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 252

RINALDI BROS. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 253

PACKER BROS. INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 254

C. DANIELE & CO., INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 255
LUIGI CASO V. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 256
VITELLI-ELVEA CO. V. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 257
MARINO BROS. V. CONCORDIA LINE, ETC.

ORDER

WHEREAS, the Commission has this day made and entered a report stating its findings and conclusion herein, which report is made a part hereof by reference,

It is ordered, That the application of Concordia Line to waive collection of certain underchanges and to refund certain freight charges be, and it is hereby, granted.

By the Commission, January 2, 1963.

(Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 912

MATSON NAVIGATION COMPANY—CONTAINER FREIGHT TARIFFS

Decided January 21, 1963

Tariff of Matson Navigation Company applicable to containerized cargo from California to Honolulu, Hawaii, and publishing single-factor rates which include pickup service in port terminal areas, ocean haul, and delivery at container freight station or container freight yard, is lawful in its present form and not contrary to the provisions of Section 2 of the Intercoastal Shipping Act, 1933.

George D. Rives and *Robert N. Lowry* for Matson Navigation Company.

R. Y. Schureman for Western Motor Tariff Bureau, Inc.

A. P. Davis, Jr., and *C. H. Fritze* for Carnation Company.

John MacDonald Smith for Pacific Motor Trucking Company.

Bruce R. Geernaert for Merchant Express of California and Walkup Drayage and Warehouse Company.

William R. Daly for the Harbor Commission of San Diego, California.

Richard S. Harsh and *Robert J. Blackwell* as Hearing Counsel.

C. W. Robinson, Hearing Examiner.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* ASHTON C. BARRETT, *Vice Chairman;* JOHN HARLLEE, *Commissioner;* JOHN S. PATTERSON, *Commissioner**

BY THE COMMISSION:

This proceeding was instituted to determine the lawfulness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of two tariffs filed with the Commission by Matson Navigation Company (Matson). The tariffs, designated Westbound Con-

* Commissioner Day took no part in the hearing or decision of this case.

tainer Freight Tariff No. 14 and Eastbound Container Freight Tariff No. 15, prescribe the rates, charges, regulations and practices governing the transportation of cargo in containers between United States Pacific Coast ports and Honolulu, Hawaii.

The Western Motor Tariff Bureau (Bureau) on behalf of its members, except Pacific Motor Trucking Company, Pacific Intermountain Express and Navajo Freight Lines, formally protested the tariffs.[1] Petitions to intervene were filed by Pacific Motor Trucking Company, Merchants Express of California, Walkup Drayage and Warehouse Company, the Harbor Commission of San Diego and Carnation Company. Hearings were held and an initial decision was issued.

Tariff 14 [2] (the westbound tariff) differs from the usual ocean carrier tariff in that it combines in a single factor rate a charge for picking up goods at the shipper's premises, the rate for the water transportation (the so-called line-haul) and a charge for delivery to a designated off-dock point in Honolulu. Matson's operations as presently conducted under Tariff 14 are the culmination of a series of studies to find ways of reducing the costs of handling general cargo between dock and vessel. These costs represented over one-half of the total costs of Matson's West Coast-Hawaii service. Containerization of cargo was selected in principle, and further studies were made to develop a suitable container. Matson, under the provisions of Tariff No. 11, inaugurated a container service in the latter part of 1958.

Tariff 14 contains single factor rates on a large selection of containerized cargo from the ports of San Francisco, Stockton, and Los Angeles to Honolulu. The tariff defines and designates "port areas" for each of the ports of San Francisco, Stockton and Los Angeles. The San Francisco port area is slightly smaller than the San Francisco-East Bay cartage zone established by the California Public Utilities Commission in its Decision No. 50,872, Case No. 5,235, issued December 14, 1954; it is also smaller than the San Francisco commercial zone determined in accordance with the ruling of the Interstate Commerce Commission in *Commercial*

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[1] Under the provisions of Rules 3(a) and 5(h) of the Commission's Rules of Practice and Procedure the Bureau became a party to the proceedings by virtue of its protest.

[2] At the prehearing conference the parties agreed that the lawfulness of Tariff 15 (the eastbound tariff) would not separately be placed in issue but that evidence relating to it could be introduced for the purpose of exploring the lawfulness of Tariff 14. No pickup service is provided under Tariff 15, and the rates therein apply to transportation beginning at Matson's container freight yard and apply only to the ocean line haul. No charge for pickup and delivery service is included in this rate.

Zones and Terminal Areas, 46 M.C.C. 665 (1946). The Stockton port area is the same as the Stockton commercial zone which was also determined by the Interstate Commerce Commission in the *Commercial Zones and Terminal Areas* case, *supra.* The Los Angeles port area is the same as the commercial zone of Los Angeles defined by the Interstate Commerce Commission in *Los Angeles, Calif., Commercial Zone,* 3 M.C.C. 248 (1937).

Each of the designated port areas is broken down into "pickup zones," and the applicable tariff rate is determined by the zone in which the cargo originates. "Container freight yards" have been established within each of the port areas. The container freight yard is located in the dock area and is used for the receiving, marshalling and storing of fully loaded and empty containers. In addition to the container freight yard, Matson has established within each port area a "container freight station" where less than full container loads are consolidated with other shipments into full container loads.

The pickup service provided under Tariff 14 is performed within each of the port areas by an exclusive drayage agent selected by Matson on the basis of sealed bids. Each agent is certificated as a common carrier by motor vehicle by the Interstate Commerce Commission. The drayage agents provide the motive power for Matson's container equipment which, at the time of hearing before the Examiner consisted of 1800 dry cargo containers, 270 refrigerated containers, 655 tandem-axle and 195 single-axle semi-trailer chassis. In addition to providing the motive power for the container equipment, the drayage agent receives the cargo, issues Matson's dock receipt and performs other services incidental to the receipt of container cargo.

Under Tariff 14 the pickup service includes transporting the empty container to the shipper's place of business, loading the goods into the container and, in the case of full container loads, transporting the fully loaded container to the container freight yard where it awaits loading on the ship. This service is performed by the agent under the general supervision of Matson. Where a shipper offers less than a full container load, the drayage agent may pick up the shipment using his own equipment and take it to the container freight station where the shipment is consolidated with others until a full container load is obtained. After such consolidation, the fully loaded containers are transported to the container freight yard and then loaded aboard ship.

The use by Matson of a single drayage agent in each of the designated port areas results in maximum utilization of containers and chasss, a reduced number of container and chassis pools which must be maintained, and a reduction in the number of one-way hauls by draymen. Flexibility of operation, and the substitution of containers in the event of cancellation of bookings are also facilitated by the use of exclusive agents. As of January 1, 1961, Matson's investment in its container service totaled $10,-235,000, and its total firm lease obligations for containers and chassis were $7,558,757.

Under the provisions of Tariff No. 14 shippers located within the port area pickup limits may elect to bring their shipments to the container freight station as an alternative to the use of the pickup service offered by Matson. If the shipper elects not to use Matson's pickup service, he receives an allowance of 5 cents per 100 pounds under Rule 23 of the tariff. Under Rule 42 of the tariff cargo situated outside the designated port area pickup limits may be loaded into containers and moved to the container freight station at the shipper's expense. The rate is then 11 cents per 100 pounds less than the within area pickup rate. Shippers outside the port area pickup limits may also bring their shipments to the container freight station. Under these circumstances, Rule 42 provides for a rate which is 5 cents less than the port area pickup rate.

Service at Honolulu terminates with delivery of the cargo to the consignee at a centrally located container freight station. However, consignees may take delivery of the containers themselves at a container yard adjacent to the waterfront and haul them to their premises for unloading and receive an allowance of 5 cents per 100 lbs.

In his initial decision the Examiner disposed of the matters under investigation on the basis of a single issue which he framed as follows:

> The principle issue is whether this Commission has jurisdiction over pickup service and off-dock container freight station service in defined port areas.

The Examiner concluded "that Matson's Tariff No. 14, naming single-factor rates for containerized cargo, is not subject to the jurisdiction of the Federal Maritime Commission and should be stricken from the Commission's files." Exceptions to the initial decision were filed by Matson and Carnation Company.[3] Hearing Counsel and the Bureau filed replies to the exceptions of Matson only.

Matson's specific exceptions to the initial decision fall into two general areas, those which may for the sake of convenience be termed procedural and those which are substantive. Under the first, Matson urges that we remand the proceeding to the Examiner because of his failure to comply with section 8(b) of the Administrative Procedure Act. In this regard Matson contends that the decision is ambiguous and subject to at least two different interpretations; and that the Examiner failed to provide a sufficient statement of the reasons or basis for his findings and conclusions as required by section 8(b) of the Administrative Procedure Act. Matson contends that it is not clear from the initial decision whether Matson may under no circumstances offer a "motor pickup service and off-dock container freight station service" or merely that the "form" of Tariff 14 is inadequate because it provides for a "single factor rate rather than stating separate rates for the various aspects of the service." Hearing Counsel, on the other hand, urges that the decision is legally sufficient and clearly states that Tariff 14 is defective under section 2 of the Intercoastal Act because it contains single-factor rates which include charges for a pickup and delivery service not subject to the jurisdiction of the Commission.

While the decision may, as Matson contends, be subject to two interpretations, we do not agree that the decision should be remanded solely for the purpose of clarification particularly in view of the fact that we disagree with the conclusions reached therein. We think Hearing Counsel is correct in his interpretation of the decision; for if section 2 of the Intercoastal Act does not preclude the quotation of single factor rates including pickup and delivery charges we are aware of no other provision of the applicable statutes which would do so.

Section 2 of the Intercoastal Act provides in relevant part:

The schedules filed [with the Commission] . . . shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force and shall also state separately each terminal or other charge, privilege, or facility granted or allowed, and any rules or regulations which in anywise change

[3] The exceptions of Carnation are directed to the question of whether specific rates in Tariff 14 constitute increases, and deal with somewhat different problems than those posed by the exceptions of Matson. Consequently, we shall deal with the exceptions of Carnation separately after disposing of the other issues presented.

affect, or determine the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered. . . .

Hearing Counsel construes this section as requiring the separate statement in Tariff 14 of that portion of the single factor rate which represents the charge for the pickup and delivery service offered by Matson. The argument of Hearing Counsel runs basically as follows: The language of section 2 of the Intercoastal Act is almost identical to that of section 6(1) of the Interstate Commerce Act and this similarity was intended by Congress. Early in its history the Interstate Commerce Commission construed the provisions of section 6(1) of the Interstate Commerce Act to require that all charges for services not subject to the jurisdiction of the Interstate Commerce Commission must be stated separately from charges for services which are subject to its jurisdiction. This construction is valid for section 2 of the Intercoastal Act, because of its similarity with section 6(1). Jurisdiction over the operations of motor carriers is vested in the Interstate Commerce Commission by Part II of the Interstate Commerce Act, and section 33 of the Shipping Act [4] precludes the exercise by the Commission of any concurrent jurisdiction over motor carriers. Thus, according to Hearing Counsel, section 2 requires the separation of the charge for pickup and delivery, a service not subject to Commission jurisdiction, from the line haul rate, a service subject to Commission jurisdiction, before Tariff 14 can be accepted by the Commission. It is the contention of Matson that the Commission has jurisdiction over the pickup and delivery service offered in Tariff 14, and that Tariff 14 is lawful in its present form.

Two decisions of the Interstate Commerce Commission are cited to us as establishing the proposition urged by Hearing Counsel, *Cosmopolitan Shipping Co.* v. *Hamburg American Packet Co.*, 13 ICC 266 (1908) and *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 ICC 538 (1924).

The *Cosmopolitan* case involved through rates established by a rail carrier subject to the jurisdiction of the Interstate Commerce Commission and an ocean carrier not at that time subject to regulation by any government agency. The Interstate Commerce

[4] Section 33 provides: "That this Act shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confer upon the [Federal Maritime Commission] concurrent power or jurisdiction over any matter within the power or jurisdiction of [the Interstate Commerce Commission]; nor shall this Act be construed to apply to intrastate commerce.

Commission found that if two rail lines or a rail line and a water line subject to the Interstate Commerce Commission's jurisdiction united in a through rate, the law presumed "that no public need exists for the public presentation of any other than the total rate." Such a joint rate could only be changed in accordance with the procedure fixed by law and after public notice of 30 days. However, regarding joint rates established between a rail carrier subject to the Interstate Commerce Act and an ocean carrier not subject thereto, the Commission pointed out that the rail line might charge the joint rate of its tariff, yet by legally altering from day to day its division of such rate, give to the unregulated carrier the means of inducing traffic by granting rebates or preferential rates. The Interstate Commerce Commission, at page 280 of its report, summed up the principal reason underlying its construction of section 6(1):

> The Commission, not having been given control over the ocean carriers cannot compel observance of the law by such carriers, *and if they so choose they may alter their rates at such times as they please or for such patrons as they please.* Therefore the line must be drawn precisely between those carriers whose rates and practices this Commission can control and those which it cannot control; and upon this line of reasoning it has been the consistent ruling of the Commission that 'joint rates' cannot be made between carriers subject to the act and those not subject to the act. . . . (Emphasis supplied.)

The clear rationale for this distinction between jurisdiction and no jurisdiction was the ability of the carrier not subject to the jurisdiction of the Interstate Commerce Commission to circumvent the design and purpose of the Interstate Commerce Act. As we shall point out later, this situation no longer exists.

In the *Motor-Truck or Wagon Transfer* case the Interstate Commerce Commission decided that it had jurisdiction over motor carrier pickup and delivery within a rail carrier's terminal area but it did not have jurisdiction over line-haul transportation by motor vehicle. The decision was prior to the passage of the Motor Carrier Act of 1935 which vested such jurisdiction over motor carriers in the Interstate Commerce Commission. Applying the principle of the *Cosmopolitan* decision, the Interstate Commerce Commission allowed the quotation of single-factor rates which included terminal area pickup and delivery by motor-vehicle, but required that charges for what in fact constituted line-haul carriage by motor vehicle be stated separately from the rail line-haul rates. Again the rationale of the *Cosmopolitan* case was the basis of the distinction drawn between jurisdiction and no jurisdiction

We think it important to note that in both of these cases the Interstate Commerce Commission was dealing with a carrier which was not only without the the Interstate Commerce Commission's jurisdiction but which at the time in question was not subject to the jurisdiction of any governmental agency.[5] Thus, the unregulated carrier could freely grant special rates and preferences without being in violation of any Federal regulatory statute designed to protect the shipping public. In short, the unregulated carrier was free to circumvent the design and purpose of the Interstate Commerce Act with impunity.

Such is not the case presented here. Matson's drayage agents are common carriers by motor vehicle subject to the Interstate Commerce Act and are certificated by the Interstate Commerce Commission under that Act. *Western Motor Tariff Bureau, Inc.* v. *Matson Navigation Company*, No. MC-C 3000, decided June 11, 1962. Their rates may be established and changed only in accordance with the procedures fixed by the Interstate Commerce Act and they are subject to all the applicable provisions forbidding rebates, discriminations, preferences or prejudices. Today common carriers by motor vehicle are subject to government regulation in their dealings as motor carriers with the shipping public and with other carriers. Thus, the conditions which prompted the Interstate Commerce Commission to so construe section 6(1) of the Interstate Commerce Act do not exist today and should not in our opinion dictate our construction of section 2 of the Intercoastal Act. When the reason for the rule ceases to exist so should the rule.

It is not jurisdiction which requires the separate statement of rates and charges but uniformity in the treatment of shippers. Prior to the enactment of the Intercoastal Act, water carriers subject to the Shipping Act were required to file and keep open to public inspection only their maximum rates, fares and charges and the carrier was only prohibited from charging a *greater* compensation for his service than the rates, fares and charges filed in compliance with the Shipping Act. Under these requirements, the carrier in many instances filed and publicly posted an unrealistically high maximum rate, and then charged similarly

[5] The same is true of the two cases cited by Hearing Counsel as standing for court approval of the Interstate Commerce Commission's construction of section 6(1), *News Syndicate Co.* v. *N. Y. Cent. R.R.*, 275 U.S. 179 (1927) and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.* 283 U.S. 654 (1931). The *News Syndicate* case involved a U.S. rail carrier and a Canadian rail carrier while the *Lewis-Simas-Jones* case involved a U.S. rail carrier and a Mexican rail carrier.

situated shippers differing rates for the same service. Shippers were unduly hampered in their attempts to determine whether their competitors were granted preferential rates because of the difficulties involved in ascertaining the actual rate charged.[6] One of the major difficulties stemmed from the manner in which carriers published their rules and regulations providing for various absorptions and allowances. Typical of the rules then current were those considered by the United States Shipping Board in *Intercoastal Rates of Nelson S.S. Co.*, 1 U.S.S.B. 326 (1934).[7] In its decision in the *Nelson* case, rendered the year following the passage of the Intercoastal Act, the Shipping Board found that the vast majority of the tariffs filed with the Board were not in compliance with section 2 because they failed to state "the rates, charges, rules, and regulations in such a manner as to enable the consignor or consignee to see for himself the exact price of transportation." For example, all of the tariffs in question contained instances of "port equalization,"[8] but none specified the actual amount of the equalization and it was necessary for the shipper to examine the tariffs of rail carriers in order to determine the actual cost of transportation to him. Concerning such rules the Shipping Board said:

> To hold that a shipper must look beyond the tariffs of the carrier offering him a service to ascertain the rate would be to put the shipper under an onerous obligation not imposed upon him by law. The inclusion of any provision in a tariff which makes the amount of the charge dependent upon the measure of a rate published in tariffs of some other carrier . . . cannot too strongly be condemned. (1 U.S.S.B. at 339)

Another type of rule condemned by the Board provided for the absorption of certain railroad unloading costs. Thus, one tariff, typical of all, contained a rule providing:

> When railroads do not unload or absorb the cost of unloading, Nelson Steamship Company will absorb the cost of such car unloading, when the cargo is loaded into Nelson Steamship Company vessels.

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[6] See Sen. Rept. No. 651, 72d Cong., 1st Sess. (1932) and House Rept. No. 2006, 72d Cong. 2d Sess. (1932) on S. 4491 which became the Intercoastal Shipping Act, also Hearings before the Subcommittee of the Senate Committee on Commerce, 72d Cong., 1st Sess., and Hearings before the House Committee on the Merchant Marine and Fisheries, 72d Cong., 1st Sess.

[7] While the initial proceeding was concerned only with the tariff of Nelson Steamship Company, all carriers engaged in intercoastal transportation were subsequently made respondents, and three dockets Nos. 139, 144 and 148 were consolidated and considered together. In addition, the record in Docket No. 126, a general investigation of intercoastal transportation, a case which at that time had been heard but not decided was stipulated into the record.

[8] Generally, the term as used in the tariffs meant "the difference between the cost of transportation from the point of origin of the cargo to the port at which it is loaded into [the carrier's vessel] and the cost of transportation on the same cargo from the same point of origin to the port taking the lowest rail rate at which such cargo could be loaded into an Intercoastal vessel."

The Board found that this rule failed to meet the requirements of section 2 because:

Such rules and others contained in the suspended schedules, not necessary to detail, which do not disclose the cost of the service or the specific amount to be absorbed, clearly open the gate to rebates, undue preferences and prejudices prohibited by law. (1 U.S.S.B. at 340.)[8]

We think it clear from the above that section 2 was never intended to require the separate statement of each and every terminal charge which is a component of the final rate for the service offered. To the contrary, the purpose of the "state separately" language of section 2 was to make the carrier, once it had fixed its rate or charge for the service offered, specify individually anything else which would effect a change in the ultimate rate to be paid by the shipper. Thus, if a tariff contains a description of the complete service offered and the total rate charged for that service, section 2 requires only that the carrier specify and state separately any additional charges imposed by the carrier, and all absorptions or allowances granted or allowed by it, which would increase or reduce the total rate for the transportation offered.

In Tariff 14 Matson first states the complete service offered and the rate charged for the service. The tariff then provides an option under which the shipper may elect to use only a portion of the entire service offered. If the shipper so elects, the tariff states in specific amounts the "allowances" granted. None of the evils sought to be corrected by section 2 appear in Tariff 14. The shipper is able, from an examination of the tariff, to determine what the exact price of the transportation is to him and to his competitor as well. This is all that is required by that provision of section 2 here under consideration and we therefore find and conclude that Tariff 14 meets those requirements of section 2.

It is contended that the cents-per-cwt "allowance" granted by Matson to shippers who elect not to use the pickup and delivery service as provided in Tariff 14, is unlawful because a carrier subject to our jurisdiction may neither grant an allowance for nor absorb any part of the cost of any service the performance of which is not a duty imposed upon that carrier by law, and which is in fact performed by a carrier not subject to our jurisdiction. While we have already rejected the jurisdictional distinction, it seems to us there is a basic misunderstanding as to the nature of

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[8] See also *Intercoastal Investigation, 1935*, 1 U.S.S.B. 400 (1935), where the Shipping Board condemned rules which cast absorptions of certain loading costs in minima but did not specify the precise amount to be absorbed in all cases.

the allowances granted by Matson as they appear in the record before us. Under Tariff 14, Matson offers a containerized service which includes a pickup and delivery service. The charge for this service is included in the rate quoted by Matson in the Tariff. If Matson may lawfully include such charge, as we think it may, it would seem clear that it can and should omit the charge when the service is not performed. A shipper choosing not to use the pickup and delivery service provided by Matson thus receives a reduction from the quoted rate, specified in cents per cwt., which Matson chooses to cast in the form of an allowance. He therefore pays less than the shipper using the full service offered by Matson. Each however pays for the service he receives, and each is able to readily ascertain not only the charges he must pay but also those of his competitor. On the record before us we find Matson's so-called "allowance" valid under section 2 of the Intercoastal Act.

It is argued that "common carriers by water" are precluded from performing a pickup and delivery service and that the motor carriers must be found "other persons" subject to the Shipping Act before they can perform such a service. In effect this would restrict common carriers by water solely to the performance of "transportation by water . . . on the high seas," whatever that term may properly include. But such is not the intent or the meaning of the clear language of the Act. In section 1 the Act defines "other persons" subject to its provisions as those who are not included in the term "common carrier by water," and who engage in forwarding or the furnishing of wharfage, dock, warehouse or other facilities. The phrase "not included in the term common carrier by water" was not intended to preclude common carriers from engaging in the other activities but simply to bring within the ambit of the statute those persons who do engage therein. Thus when a terminal operator performs one of the specified services he becomes an "other person" while the common carrier performing the same service does not become an "other person" but remains a common carrier. 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.

It is also contended that our predecessors have "hitherto avoided the task of setting forth 'terminal areas' by regarding 'terminal facilities' as the term is employed in section 1 of the

Shipping Act, 1916, as meaning the particular terminal structures at the point where a vessel berths." No authority is cited to us for this proposition and it is supported only by assertions to the effect that departure from this "traditional approach" would create more problems than it would solve. Again at the heart of this contention is the view that some kind of usurpation of Interstate Commerce Commission jurisdiction is necessary or is the ultimate result of the acceptance of Tariff 14. It is clear that this does not follow.

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. For this purpose it makes little difference whether the service is construed to be an integral part of the "transportation by water" by a common carrier by water; the furnishing of "terminal facilities" by a common carrier by water, or the establishment and observance of reasonable practices relating to "delivering property for transportation." These are services commonly considered as incidental to line haul transportation by water, and our decision herein is limited to such a service. Nothing in this report should be taken as extending our findings and conclusions as applying to other combinations of services such as two line hauls. We are not saying, nor do we mean to imply, that through their contractual relations with Matson the motor carriers operating as Matson's agents somehow remove themselves from the jurisdiction of the Interstate Commerce Commission. They remain subject to the Interstate Commerce Act and all its requirements applicable to such carrier. Nor are we attempting to exercise any concurrent jurisdiction over these motor carriers such as is precluded by section 33 of the Shipping Act. We are merely subjecting to regulation a service authorized by the provisions of the Shipping Act offered by a common carrier subject to that Act. If a portion of that service is conducted by a carrier subject to another agency's regulation and the carrier performs that service in violation of the laws administered by that agency, that is a matter for

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the agency concerned. Practical difficulties and problems may arise but jurisdictional conflicts should not.

There is nothing novel in this approach. It is substantially similar to that taken by the Civil Aeronautics Board in *City of Philadelphia* v. *C.A.B.*, 289 F. 2d 770 (D.C. Cir. 1961). In that case a transcontinental air freight service substituted a truck service from the Newark Airport to Philadelphia (a distance of about 90 miles) in connection with its West Coast service and eliminated the feeder planes previously performing the service between Newark and Philadelphia. The substituted service was challenged on the ground, *inter alia,* that the C.A.B. had no authority to authorize the substituted service because the Interstate Commerce Commission had not exempted the truck haul under section 303(b)(7a) of the Interstate Commerce Act. At page 774 the Court cited with approval the following portion of the Civil Aeronautics Board decision:

> Philadelphia makes the subsidiary argument that the Philadelphia-Newark truck haul is subject to the jurisdiction of the Interstate Commerce Commission. Our finding goes no further than that Flying Tiger Line's proposed service will, as to it, constitute air transportation and that in rendering service through the airports proposed Flying Tiger Line will be fulfilling its obligations under its certificate. We are not asserting jurisdiction over the motor carrier as an air carrier nor are we determining the status of the truck operation under the Interstate Commerce Act. Whether the Philadelphia-Newark truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Act, and thereby exempt from economic regulation under that statute, is a matter for the Interstate Commerce Commission. We do not intend that our action here should influence what that decision should be. If the Commission should conclude under the standards normally applied by it that the truck operation is not exempt, the trucker must have or obtain the requisite I.C.C. authority in order for Flying Tiger Line to operate in the manner it proposes.

In deciding this case we are doing no more than did the Civil Aeronautics Board. And as we have stated, nothing in this decision is to be taken as disturbing the statutory relationship between the truckers acting as Matson's agents and the Interstate Commerce Commission. Our decision leaves to that Commission all those matters within its statutory province including matters regarding the rate contracted for by these carriers with Matson. Once the charge of the motor carrier to Matson becomes fixed it is like any other fixed cost of a water carrier and is to be considered as such in determining the reasonableness of the rate which that water carrier charged the shipping public.

In addition to the jurisdictional difficulties suggested to us, it is urged that the practical difficulties inherent in departing from the "traditional approach" to terminal areas would result in operations which are detrimental to commerce rather than beneficial. Among those suggested are the difficulty of deciding the geographical limitations of the newly broadened concept of a terminal area, the possibility of two terminal areas—one for motor carriers designated by the Interstate Commerce Commission and one for water carriers designated by this Commission. There is of course the possibility of differently designated terminal areas. We fail to see that differing designations by two agencies creates an insurmountable difficulty. The reasonableness of a terminal area of a water carrier subject to the Shipping Act is to be determined upon consideration of the nature of water transportation and the purposes and policies of that Act. We are not persuaded that a modern, more efficient and less costly innovation in water transportation is to be sacrificed because of possible future difficulties of practical application.

The question of the reasonableness of Matson's terminal areas arises. The shipping statutes do not define the term "terminal area". In the absence of definitive criteria the reasonableness of the geographical extent of a given terminal area must be decided on a case by case basis. Basically, a pickup or delivery service is a terminal area operation if it is incidental to or an integral part of the line haul service, as it is in Matson's containerized operation. Thus, the relationship between the terminal area and the line haul is significant. The coincidence of the terminal area with a homogeneous industrial or business community surrounding the port is another significant factor. Present and potential traffic patterns, commercial zones and the concentration of a carrier's shippers are still others.

Tariff 14 designates port areas (here used interchangeably with the term terminal areas) for each of the ports of San Francisco, Stockton and Los Angeles. Matson selected the precise geographical boundaries of its terminal areas on the basis *inter alia* of decisions by the Interstate Commerce Commission in the cases of Stockton and Los Angeles, and the terminal area it selected for San Francisco is smaller than the area established by the Interstate Commerce Commission and the California Public Utilities Commission. (See p.p. 480–81, *supra.*) In selecting its terminal areas consideration was given by Matson to the fact that the San Francisco port area contains 644 shippers who ship

5 tons or more per month by Matson to Hawaii; the Los Angeles port area contains 553 such shippers, and 16 are located within the port area of Stockton. In the case of Matson's service under Tariff 14 the ocean haul is 2,200 miles while the maximum distance within any port area is approximately 40 miles. In *North Carolina Line—Rates To and From Charleston, S. C.*, 2 U.S.S.B. 83 (1939) a predecessor agency approved the furnishing of pickup and delivery service within the corporate city limits of Charleston and Baltimore when that service was performed in conjunction with an ocean haul of 589 miles. After consideration of all factors we find the port areas as designated in Tariff 14 to be reasonable under the circumstances as they now exist.

As we have noted above, Carnation Company challenges the reasonableness of certain of the rates quoted in Tariff 14. Carnation contends that Matson filed Tariff 14 "under a misrepresentation as to the character of the Tariff itself." On the face of Tariff 14 it is stated, "All rates and charges named herein are reductions, except as otherwise noted." It is Carnation's position that certain of the rates published in Items 275 and 341 are not decreases, but increases, and that they are not otherwise noted as increases. Carnation contends that there has been no change in the service rendered to Carnation by Matson which would justify said increases; and it is argued that if the rates in Tariff 11 were just and reasonable the increased rates in Tariff 14 are perforce unjust and unreasonable. Reparation is claimed based on the difference between the old and new rates.

The record before us is insufficient to determine whether there has been an increase in certain rates as alleged, and, if so, whether such increase is just and reasonable. Accordingly, the parties are granted 30 days within which to petition for an order remanding this proceeding to the Examiner for the limited purpose of resolving the issues raised by Carnation. Replies to any petition filed in accordance herewith may be made within 10 days of the service of said petition. No order will be issued in this proceeding pending expiration of said 30 day period. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified.

FEDERAL MARITIME COMMISSION

No. 1062

AGREEMENT 8765 BETWEEN U.S. FLAG CARRIERS IN THE GULF/MEDITERRANEAN TRADE

Decided February 5, 1963

Agreement 8765 between conference and nonconference U. S. flag carriers in the Gulf-Mediterranean trade, covering certain agricultural commodities, found not violative of Shipping Act, 1916, and approved by the Commission pursuant to section 15 thereof.

Ronald A. Capone and *Robert Henri Binder,* for Isthmian Lines, Inc.; Kulukundis Maritime Industries, Inc.; Lykes Bros. Steamship Co., Inc.; T. J. Stevenson & Co., Inc.; Central Gulf Steamship Corporation, General Shipping & Trading Corporation and Compania Maritime Unidas, S.A.; Stockard Steamship Corporation, Atlantic Ocean Transport Corporation and Mediterranean Transport Corporation; and States Marine Lines, Inc. and Global Bulk Transport Corporation, respondents.

Sterling Stoudenmire, for Waterman Steamship Corporation, respondent.

John Hudgins and *Joseph A. Ryan, Jr.,* for the Secretary of Agriculture of the United States, intervenor.

William Jarrel Smith, Jr. and *Robert J. Blackwell,* Hearing Counsel.

John Marshall, Hearing Examiner.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* ASHTON C. BARRETT, *Vice Chairman;* JOHN S. PATTERSON, *Commissioner;* and JAMES V. DAY, *Commmissioner.*

BY THE COMMISSION:

This case involves an agreement, No. 8765, signed by all of the U. S. flag carriers in the trade between the U. S. Gulf ports and ports in the Mediterranean, under which certain nonconference carriers agree to observe the rates, rules and regulations of the Gulf-Mediterranean Ports Conference (conference) on certain agricultural commodities of which the U. S. Department of Agriculture is the primary shipper.[1] The question is whether the agreement should be approved pursuant to section 15 of the Shipping Act, 1916.

The parties to the agreement are Isthmian Lines, Inc.; Kulukundis Maritime Industries, Inc.; Waterman Steamship Corporation; Lykes Bros. Steamship Co., Inc.; T. J. Stevenson & Co., Inc.; Central Gulf Steamship Corporation, General Shipping & Trading Corporation and Compania Maritime Unidas, S.A. (three carriers operating as the Central Gulf Lines joint service); Stockard Steamship Corporation, Atlantic Ocean Transport Corporation and Mediterranean Transport Corporation (three carriers operating as the Levant Line joint service); and States Marine Lines, Inc. and Global Bulk Transport Corporation (two carriers operating as the States Marine Line joint service). By the agreement the nonconference members, Stevenson, Kulukundis and Levant, agree with Isthmian, Lykes, Waterman, Central Gulf Lines, and States Marine, members of the conference, that they, the nonmembers, will observe the rates, rules and regulations of Gulf-Mediterranean Ports Conference Tariffs Nos. 6 and 7 as they apply to cornmeal (in bags, barrels, boxes or cases); wheat (in bags); wheat flour (in bags, barrels, boxes or cases); powdered skimmed milk ("For charitable purposes only—not for resale"); shortening; and clean rice (in bags, bales or cartons). These are hereinafter sometimes referred to as "8765 commodities."

Under the terms of the conference agreement all member lines, American and foreign, participate in rate determinations on all commoditis, including those enumerated in Agreement 8765, but the foreign members accede to the judgment of the American lines in fixing rates on the 8765 commodities because substantially all these commodities are carried by American lines pursuant to the requirements of cargo preference laws and executive policies

On Jun 27, 1962 the Commission on its own motion ordered an investigation into the question whether Agreement 8765 should be

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[1] The Gulf/Mediterranean Ports Conference, operating under Agreement 134, is composed of 19 members, of which 14 are foreign flag and five American. The trade covered by the conference is that from Gulf of Mexico and South Atlantic ports of the United States to ports in the Mediterranean, including Europe, North Africa, the Middle East and adjacent seas.

approved, naming as respondents the eight signatories thereto, who comprise all the U. S. flag carriers in the trade. During hearings and oral argument before the Examiner, these carriers urged approval of the agreement. Hearing Counsel and the U. S. Department of Agriculture (Agriculture), an intervenor in the case, urged disapproval. The Examiner found and concluded that the agreement should be approved. Exceptions and replies to his decision were filed, and we heard oral argument. We have concluded that the agreement should be approved.

DISCUSSION AND CONCLUSION

During the two and one-half year period January 1, 1960 through June 30, 1962, the eight U. S. flag carriers in the trade, the parties to the agreement, lifted an outbound total of approximately 2,324,000 tons, of which 684,000 tons or 29 percent consisted of 8765 commodities. Over 99.8 percent of the 8765 commodity tonnage was shipped directly by or under the sponsorship of Agriculture, at the expense of the United States Government,[2] and was subject to the cargo preference laws. These laws require at least 50 percent shipment in American flag vessels and it is the policy of Agriculture to ship almost exclusively via U. S. flag carriers. 8765 commodities together with Department of Defense (MSTS) cargo, represent nearly half of the carryings of the American flag lines in this trade. The importance of 8765 commodities is further emphasized by the fact that shipments thereof are usually large enough to provide so-called "base cargo loads" or tonnage to which MSTS or bulk cargoes can be added to make a compensatory voyage.

Wheat flour in bags comprised approximately 80 percent of the 8765 commodity tonnage during the period here in question. Wheat in bags represented a substantial part of the remainder. Since February 1957, the conference contract rate on each has been $28.50 per ton. The conference tariff makes the contract rates available to Agriculture and other Government agencies without requiring them to execute contract rate agreements.

Kulukundis first "broke" the $28.50 contract rate on June 14, 1961, when it received a booking from Agriculture for 4938 tons of wheat in bags at $26.50. On July 31, 1961 it received a like

[2] Section 416, Agricultural Act of 1948, and Public Law 480, 83rd Congress. The term "sponsorship" refers to the provision of commodities and reimbursement of shipping costs by Agriculture to approved United States nonprofit relief agencies engaged in the distribution of surplus agriculture commodities abroad.

booking of 2470 tons at $25.30. Next Stevenson broke the rate and from August 1961 through January 1962 received several bookings of wheat flour in bags from Agriculture totaling 34,539 tons at rates ranging from $24.90 to $26.50. Levant, a conference member, thereupon withdrew from the conference and on February 6, 1962 received a booking from Agriculture of 5032 tons of wheat flour in bags at $25.50. Kulukundis also received Agriculture bookings of 7908 tons of wheat flour in bags at $25.90 on January 15, 1962, and 7901 tons at $25.50 on February 6, 1962, although this latter was later rebooked with a conference line at the conference rate of $28.50. Kulukundis is continuing to offer lower than conference rates on all 8765 commodities except wheat flour in bags. From March 25 to April 15, 1962, Levant offered lower rates on wheat flour in bags to Beirut and Port Said. Subsequent to its bookings mentioned above, Stevenson became, at least temporarily, inactive in the trade.[3]

This pattern of rate reductions by nonconference lines on substantial tonnages of the most important commodities moving in the trade, aroused the concern of the conference members. It was feared the rate-cutting would be expanded and/or lead to disintegration of the conference. One line, Levant, did withdraw, as previously noted, and others were threatening to do so. Such conditions can lead to complete deterioration of the rate structure in the trade and possibly the break-up of the conference itself. Contrary to the position of the opponents of the agreement, we think it clear on this record that a serious situation existed in the trade, and that the conference lines were justified in attempting, within the ambit of section 15 of the Act, to find a satisfactory solution with the carriers concerned.

Initially, the U. S. flag conference members sought to prevail upon the nonconference lines to join the conference, without success. Consideration was then given to an agreement which would at least stabilize rates on the 8765 commodities, and this effort succeeded. Of course, the rates on these commodities could have been thrown open permitting the conference lines to meet the nonconference competition but this would likely have led to further rate deterioration and instability, the very condition the conference was attempting to overcome. Certainly, the compromise alternative chosen by the parties was a reasonable solu-

[3] We are unable to find in this record support for the claim that Stevenson "abandoned" the trade. The indications are to the contrary. It became a party to Agreement 8765 and has urged approval thereof through participation in these proceedings.

tion under the circumstances. In our judgment, although full conference participation by the rate-cutting lines would have been more desirable, the limited agreement that was reached is not to be condemned because it does not go all the way in assuring complete stability in the trade. The conference parties to the agreement hope it will lead to full conference participation, and it may.

The Shipping Act recognizes and history has demonstrated that stability of rates is needed to assure continuity and regularity of service in the ocean commerce, which is in the public interest, the interest of the commerce of the United States, and in the interests of both carriers and shippers. Subject to continuous supervision by this Commission, the Act permits rate-fixing agreements among carriers. By their very nature, these reduce or eliminate rate competition, and there are trades where, perforce of such agreements, rate competition is nonexistent. Agreement 8765 is therefore not unique. The controversy over it seems to us to stem more from the fact that the shipper mainly affected is the U. S. Department of Agriculture, than from anything found in the Shipping Act as grounds for disapproving the agreement.

In this connection, the record shows that Agriculture effected a saving of $174,427.82 by reason of securing the aforesaid bookings at less than the $28.50 conference rate for the commodities involved. While we share the desire to conserve the taxpayer's dollar, the record indicates that the saving referred to was accomplished by undercutting a conference rate which is barely compensatory to the carriers and which is admitted by Agriculture to be reasonable. Hence, there is no question before the Commission that the carriers are employing their concerted power to charge an agency of the United States Government an unreasonable rate. Under the circumstances, the mere fact that Agriculture is the shipper mainly affected appears to us to be irrelevant to an issue properly involved in our inquiry into the approvability of the agreement under section 15.

It is contended that the agreement, by eliminating the possibility of rate competition on 8765 commodities while nonconference competition exists as to other commodities, discriminates against Agriculture vis-a-vis shippers of other commodities. This contention, even if valid, overlooks the fact that Agriculture has a number of alternatives if it decides the conference rates (now admitted by it to be reasonable) are too high. It has the legal right under the cargo preference laws to use foreign flag vessels in any case for up to 50 percent of the cargo, and if no U. S. flag vessels are available at fair and reasonable rates it may use foreign flag vessels for all of the cargo. Or it may, as it has done in the past, ship via U. S. flag tramp vessels. These choices, in addition to Agriculture's ability to ship over alternative routes, are sufficient to insure that the rates on 8765 commodities are kept reasonable.

Furthermore, while Agriculture is the predominant shipper, it is not the sole shipper of 8765 commodities, and the agreement applies with equal effect and without discrimination to all shippers of such commodities. There can be no unjust discrimination against a shipper under the Shipping Act unless another similarly situated shipper with whom the complaining shipper competes is preferred. *Wharfage Charges and Practices at Boston*, 2 U.S.M.C. 245, 248 (1940); *The Huber Manufacturing Co. v. N. V. Stoomvaart Maatschappij "Nederland,"* 4 F.M.B. 343, 347 (1953). Here, the fact that the shippers of other than 8765 commodities are in the same position before and after the agreement cannot be said to be a preference in favor of those shippers. It is but an incidental circumstance brought about by the inability thus far to achieve complete conference participation among the regular carriers in the trade. If such participation had been achieved, Agriculture's position rate-wise would be exactly what it is under the present agreement.

What has been said above applies with equal force to the claim that the agreement causes undue or unreasonable prejudice or disadvantage to Agriculture under section 17 because "fixed noncompetitive" rates on 8765 commodities prefers shippers of other commodities on which there are "variable competitive" rates. If in the future there should be actual unjust discrimination or unreasonable prejudice or disadvantage to shippers of 8765 commodities, the Act provides ample means for remedying the situation including the power it vests in us to modify or withdraw approval of any section 15 agreement theretofore approved.

Having examined Agreement 8765 under the standards laid down in section 15, our conclusion is that the record fails to support a finding that the agreement is unjustly discriminatory or unfair, detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act.

Hearing Counsel objects to certain of the procedural provisions of the Agreement as being "vague." Although we do not think the objections so urged are well taken, we do think that Article 2 of the agreement is ambiguous and must be clarified. As written, the article undertakes without qualification to bind the nonconference lines to charge the conference rates on 8765 commodities. These commodities, however, are covered by the conference's dual rate or contract system and the nonconference lines cannot use such a system without the Commission's express permission obtained in the manner and under the conditions set forth in section 14(b) of the Act. Since the parties apparently intended that the nonconference lines simply adhere to one set of rates on 8765 commodities, these being the same as the rates the conference gives its contract shippers, we shall approve the agreement with a modification making clear that the rates quoted in the tariffs of the nonconference lines for 8765 commodities are single rates and not an extension or application of the conference's dual rate system. An appropriate order will be entered.

JOHN HARLLEE, *Commissioner*, dissenting:

Certainly no present urgent necessity has been proven with relation to the agreement concerned here. Even though the necessity were apparent, I would hesitate, on this record, to approve the agreement for the following reasons:

The record, in my opinion, does not support the respondent's claim or the Commission's finding that the rate situation is such that it would probably lead to a rate war and possibly the break-up of the Gulf/Mediterranean Ports Conference. There is no evidence that there has been any extensive rate instability lately or that Stevenson, the carrier offering reduced rates most frequently, is even in the trade any more. In fact, there is evidence that the rate level is barely compensatory, from which we may infer that it would not be economically feasible for the lines to engage in drastic rate reductions for any considerable period, much less precipitate a rate war.

But even if the rate situation in the Gulf-Mediterranean trade were as grim as respondents believe it to be, I would question a rate-fixing agreement aimed solely at one shipper, namely, the Department of Agriculture.[1] Approval of this agreement will deprive Agriculture of the right to obtain rates set in accordance with the competitive forces operative in this trade, whereas shippers of other commodities will be free to "shop around."

[1] As the majority opinion points out at p. 496, "over 99.8 percent of the 8765 commodity tonnage was shipped directly by or under the sponsorship of Agriculture."

Agriculture is, by virtue of the cargo preference laws, a "captive shipper." To sacrifice the right of one shipper to competitive rates for the sake of preserving rate stability among all other shippers is a unique kind of discrimination, but it is discrimination all the same. If outside competition were removed as to all shippers (e.g., by the nonconference carriers joining the conference), then all shippers would contribute to rate stability, rather than only one shipper, as in the matter before us. In my opinion, such an agreement is "unfair as between shippers" within the meaning of section 15.

It is not enough to say that Agriculture has avenues by which it can escape the noncompetitive rates, that is, by shipping over alternate routes or by tramp and foreign flag vessels. If it is possible that Agriculture will be forced to look to means of transportation which it has in the past chosen not to utilize, then the agreement is contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916. But even if Agriculture has other devices, so have the conference members. They have the conference structure, strengthened by the dual-rate system, to use as an economic weapon to maintain rate stabilization. If rates cannot be stabilized within that structure, then we should take another hard look at the conference/dual-rate system. But we should not allow the conference members to go outside of that system to enter into "side" agreements with carriers who wish to remain outside the conference without better evidence of necessity for them.

In summary, then, the record clearly shows that Agriculture will bear the full brunt of this agreement and will thereby lose the benefit of the savings which have accrued to it in the past from the reduced rates.

I believe that this agreement is therefore "unfair as between . . . shippers . . ." and "contrary to the public interest" within the meaning of section 15. My opinion is that such an agreement cannot be approved and, under the clear mandate of section 15, must be disapproved by the Commission.

FEDERAL MARITIME COMMISSION

ORDER

No. 1062

AGREEMENT 8765, BETWEEN U.S. FLAG CARRIERS IN THE GULF-MEDITERRANEAN TRADE

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusion thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That the first sentence of Article 2 of Agreement 8765 is hereby modified by changing the period to a comma and adding the phrase "except that the rates so quoted, charged and collected by the non-conference members shall be single rates and in no manner an extension or application of the Conference dual rate system.";

It is further ordered, That Agreement 8765, as modified by this Order, be and it is hereby, approved.

By the Commission, February 5, 1963.

(Signed) THOMAS LISI
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

No. 989

CERTAIN TARIFF PRACTICES OF SEA-LAND SERVICE, INC., PUERTO RICAN DIVISION

Decided February 5, 1963

Single-factor rates of common carrier by water from inland points in Puerto Rico to a port in United States are required to be filed with the Commission, but a separate statement in the tariff of charges for the included pickup service in Puerto Rico is not required.

C. H. Wheeler and *Warren Price, Jr.*, for Sea-Land Service, Inc., Puerto Rican Division, respondent.

John M. Kinnaird and *George F. Galland* for Consolidated Freightways Corp. of Delaware (Garrison Fast Freight Division), intervener.

L. A. Parrish, Alabama State Docks Department, intervener.

Norman D. Kline, Donald J. Brunner, and *Robert J. Blackwell,* Hearing Counsel.

Charles E. Morgan, Hearing Examiner.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* ASHTON C. BARRETT, *Vice Chairman;* JOHN HARLLEE, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.*

BY THE COMMISSION:

On January 3, 1963 the Commission decided on its own initiative to review the Initial Decision of the Examiner in this proceeding. The proceeding was instituted by the Commission to determine the lawfulness of the filing of certain single-factor rates on "Sugar Refined or Turbinated, in Bags" by Sea-Land Service, Inc., Puerto Rican Division (Sea-Land) as 13th Revised Page No.

34 to its Homeward Freight Tariff No. 4, FMC-F No. 2. Leave to intervene was granted to Consolidated Freightways Corporation of Delaware, Garrison Fast Freight Division (Garrison) and to the Alabama States Docks Department. With the consent of the parties, the Examiner adopted a shortened procedure in which no hearings were held but a verified statement of facts was submitted by Sea-Land. The only evidence of record in this proceeding is Sea-Land's verified statement.

FACTS

Sea-Land began its container service in the North Atlantic-Puerto Rican trade in August of 1958. Container service was instituted in an effort to reduce the cargo handling costs incurred in the traditional breakbulk service. These costs represented approximately one-half of the cost of Sea-Land's operations in the trade. Sea-Land maintains terminals at the ports of San Juan, Ponce and Mayaguez, Puerto Rico, and at Port Newark, New Jersey. At each of these ports container marshaling yards are set up for the receipt, delivery and holding of empty and laden containers.

Sea-Land presently employs three specially converted container ships in the Puerto Rican trade offering two sailings per week in each direction. Each ship can carry a total of 226 containers which are either stowed below deck in specially constructed cells or on deck where they are secured by specially designed fittings.

The single-factor rates here in question apply only to shipments of sugar originating from Aguirre, Central Igualdad, Central San Francisco, Humacao, and Mercidita, in Puerto Rico. The rates include (1) pickup by Sea-Land at the shipper's premises, (2) the wharfage charges and handling charges, (3) ocean transportation to Port Newark and delivery there at Sea-Land's terminal. The shipper using the full container service has Sea-Land call at his premises where the cargo is loaded directly into the container. Movement over the highways of Puerto Rico is accomplished by means of specially constructed semi-trailer chassis into which the containers are locked. The containers are hauled from the shipper's premises to Sea-Land's portside terminal at Ponce, Mayaguez or San Juan, where the containers are loaded aboard the vessel by means of specially designed gantry cranes for transportation to Port Newark. The haul from shipper's premises to Sea-Land's portside terminal is accomplished by motor carriers under contract to Sea-Land. The entire movement from point of origin at shipper's premises to delivery at Port Newark is under the bill of lading and responsibility of Sea-Land.

Shippers have the option under the proposed tariff of electing to make delivery of their goods to Sea-Land's terminal. In such a case, the shipper selects an independent motor carrier and pays that carrier's charges for delivery to Sea-Land. When the cargo arrives at the container marshaling yard it must be unloaded from the motor carrier's vehicle and loaded into Sea-Land's containers which are then placed aboard the vessel. If the shipper elects to make his own delivery he pays Sea-Land's published port-to-port rate. This type of movement involves extra cargo handling and checking of shipments, not required when Sea-Land's pickup service is utilized. The additional cargo handling also increases the possibility of loss or damage to cargoes, and results in costs of handling between the dock and the vessel which the container service was designed to eliminate.

When the pickup service is used, Sea-Land containers are hauled 15 miles from the inland points of Aguirre, Mercidita, and Central San Francisco to the port of Ponce, and about 5 miles from Central Igualdad to the Port of Mayaguez. The distance from Humacao to San Juan is unspecified, however, sugar originating from that point has historically been shipped through San Juan. Single factor rates have been in existence only a short time, yet more than 40% of all current shipments move under these rates.

DISCUSSION AND CONCLUSION

All parties agreed and the Examiner found that the rates for Sea-Land's service here under consideration must be filed with the Commission under Section 2 of the Intercoastal Shipping Act, 1933, which requires every common carrier by water in the offshore domestic commerce of the United States to file and keep open to public inspection schedules showing the rates, fares and charges for the transportation services offered by such carriers. We agree with the Examiner's findings and conclusions with respect to this issue. Sea-Land is a common carrier by water operating between the United States and Puerto Rico and as such is clearly subject to the requirements of Section 2. Thus, there remains only the question of the Commission's jurisdiction to accept for filing in their present form Sea-Land's single factor rates on "Sugar Refined or Turbinated, in Bags."

There is no dispute as to whether Sea-Land's pickup service is a bona fide terminal service incidental to the line-haul transportation. However, Hearing Counsel feels that some clarification is required concerning the validity of Sea-Land's rates under that provision of section 2 which requires that each schedule of rates filed

shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger, consignor, or consignee. . . .

It is suggested that while the Commission may properly find that single-factor rates are valid under section 2 without additional breakdown or separation of charges, clarification of the meaning of section 2 is necessary because of two prior Commission proceedings. In *Aleutian Homes, Inc.* v. *Coastwise Line, et al.* 5 F.M.B. 602 (1959), the tariff of Coastwise Line provided only a tackle-to-tackle rate, and no terminal charges were published. However, the shipper was not permitted to deliver or receive cargo at the end of ship's tackle. Coastwise assessed all terminal charges, and in at least one port it performed certain of the terminal services itself. Instead of publishing the terminal's charges in its tariff and applying them in a lawful manner, Coastwise in effect adopted the terminal's tariffs, misapplied them and collected overcharges. The tariff publishing practices of Coastwise Line were condemned because:

It is the duty of a common carrier by water to provide a place for the receipt and delivery of property. This obligation may be fulfilled by the carrier itself or through an agent. In any event, the 1933 Act requires that the charges for the services involved, regardless of who makes them, must be stated separately in the tariff of the carrier. The failure of coastwise to do this, particularly when it calculated and collected such charges, resulted in a violation of section 2 of the 1933 Act and section 18 of the 1916 Act. 5 F.M.B. 612–613. (Citation omitted.)

In *Intercoastal Investigation, 1935,* 1 U.S.S.B. 400 (1935) it was stated at page 433-434:

If in connection with intercoastal transportation a terminal or other charge is made, or a privilege or facility is granted or allowed, or a rule or regulation in anywise changes, affects or determines any part of the aggregate of the rates, fares, or charges, or the value of the service to the passenger or shipper, it must be stated separately in the tariff of the carrier regardless of

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who makes the charge, grants, or allows the privilege or facility, or applies the rule or regulation.

It is urged that the foregoing interpretations of section 2 render Sea-Land's tariff deficient because there is no separate designation of the charges imposed for the pickup service performed by Sea-Land. We recently had occasion to consider the proper interpretation of section 2 in *Matson Navigation Company—Container Freight Tariffs,* 7 F.M.C. 480 (1963). There respondent included in a single-factor rate charges for pickup service within designated port terminal areas and delivery to an off-dock container freight station. Concerning the validity of those rates under section 2, we said, at page 489,

> We think it clear . . . that section 2 was never intended to require the separate statement of each and every terminal charge which is a component of the final rate for the service offered. To the contrary, the purpose of the "state separately" language of section 2 was to make the carrier, once it had fixed its rate or charge for the service offered, specify individually anything else which would effect a change in the ultimate rate to be paid by the shipper. Thus, if a tariff contains a description of the complete service offered and the total rate charged for that service, section 2 requires only that the carrier specify and state separately any additional charges imposed by the carrier, and all absorptions or allowances granted or allowed by it, which would increase or reduce the total rate for the transportation offered.

In the *Aleutian Homes* case, *supra,* the rate published was for transportation from tackle-to-tackle, but the actual service offered by the carrier was something more since the shipper was not permitted to deliver or receive cargo at the end of ship's tackle. Additional charges were imposed and collected by the carrier, but the shipper was not able from an examination of the tariff of the carrier to determine what these charges were. Thus, the clear purpose of section 2 was defeated because the shipper could not tell from the tariff the exact price of the transportation offered to him and to his competitors. In order to determine the proper charges the shipper had to go beyond the carrier's tariff to the terminal's tariff, and then determine whether the carrier had imposed the correct charges. Such a burden may not be imposed upon a shipper. *Intercoastal Rates of Nelson S.S. Co.,* 1 U.S.S.B. 326 (1934). We do not understand the *Aleutian Homes* case to preclude carriers from including proper terminal charges within single-factor rates. Furthermore, we understand the quoted language from the *Intercoastal* case, *supra,* as requiring the separate statement of only those terminal charges, privileges or facilities not properly identified as included within the quoted rate.

Sea-Land's tariff offers two services, one includes pickup and delivery for which a single-factor rate is quoted while the other requires delivery of the goods to Sea-Land at the container marshaling yard. For the latter a port-to-port rate is quoted. The shipper may easily determine what he is paying for and which service he may most economically employ. The primary purpose of section 2 is achieved when the shipper is able to determine from the tariff the exact price of the transportation to him as well as to his competitor. We accordingly find and conclude that Sea-Land's single-factor rates here under consideration are valid under section 2 of the Intercoastal Shipping Act, 1933.

ORDER

FEDERAL MARITIME COMMISSION

No. 989

CERTAIN TARIFF PRACTICES OF SEA-LAND SERVICE, INC., PUERTO RICAN DIVISION

This proceeding having been duly heard and submitted, and the Federal Maritime Commission, having fully considered the matter and having this date made and entered a Report containing its conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That this proceeding be and it is hereby discontinued.

By the Commission, February 5, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 976

AGREEMENT 8492 BETWEEN T. F. KOLLMAR, INC., D/B/A NORTHLAND FREIGHT LINES, AND WAGNER TUG-BOAT COMPANY IN THE ALASKAN TRADE

Decided February 12, 1963

Agreement 8492 found not violative of the Shipping Act, 1916, and approved by the Commission pursuant to section 15 thereof.

Alan F. Wohlstetter for Wagner Tug Boat Company, Foss Launch & Tug Co., and T. F. Kollmar, Inc., d/b/a Northland Freight Lines, respondents.

Mark P. Schlefer and *T. S. L. Perlman* for Puget Sound-Alaska Van Lines, Inc. and Puget Sound Tug & Barge Co., Inc., protestants.

Calhoun E. Jacobson and *Richard O. Gantz* for port of Anchorage, Alaska, intervenor.

Robert B. Hood, Jr., Hearing Counsel.

A. L. Jordan, Hearing Examiner.

REPORT OF THE COMMISSION

THOS E. STAKEM, *Chairman;* JOHN HARLLEE, *Commissioner;* JOHN S. PATTERSON, *Commissioner;* JAMES V. DAY, *Commissioner.**

BY THE COMMISSION:

This proceeding is concerned with an agreement, No. 8492, between a common carrier tug and barge operator, Wagner Tug Boat Company (Wagner), and a non-vessel-operating common

* Commissioner Barrett took no part in the hearing or decision of this case.

carrier, T. F. Kollmar, Inc., d/b/a Northland Freight Lines (Northland), engaged in the trade between Seattle, Washington, and Anchorage, Alaska. The question is whether the agreement should be approved pursuant to section 15 of the Shipping Act, 1916. The agreement provides that Wagner, in addition to transporting its own cargoes under its own tariff, will transport for Northland common carriage cargoes generated by Northland at Northland's tariff rates.

The agreement includes Foss Launch & Tug Co. (Foss) as a party. Wagner has been a wholly-owned subsidiary of Foss since 1939. Foss has been engaged as a contract or private carrier by tug and barge in the Alaskan trade since 1930. It does not file tariffs with this Commission. Wagner operates as a common carrier in the Alaskan trade, making calls at Anchorage in the ice-free months. It has no full-time personnel, offices or terminal facilities separate from those of Foss. Its first tariff as a common carrier in the Alaska trade covered but a single commodity, bulk cement, but in August 1961 this was replaced by the filing of a tariff of rates covering general commodities, and also bulk cement of at least 3,500 tons. This became effective in September 1961 and was applicable during the 1962 shipping season for transportation between ports in Washington and several ports in Alaska. Wagner owns one ocean-going tug and one non-ocean-going tug, and intends to charter equipment from Foss for use under Agreement 8492, and for the conduct of its own common carrier service. The equipment will be furnished by Foss with crews, stores and fuel. Wagner expects to continue its seasonal common carrier operations to Anchorage whether or not Northland cargo becomes available to it through approval of the agreement.

Northland neither owns nor operates vessels. It does own a number of vans used as cargo containers, and currently has on file with the Commission a common carrier tariff which names class and commodity rates between Seattle, Washington and Anchorage, Alaska. Under this tariff Northland provides containers or vans for the use of shippers and its tariff states that the transportation thereunder "may be by vessels owned by or chartered to carrier, or may be in participation with Wagner Tug Boat Company" (FMC-F No. 1, Rev. Page No. 5 and 3rd Rev.

Page 7).[1] Under Agreement 8492, Northland will solicit and book cargo and issue its own bills of lading, and Wagner will accomplish the physical transportation of the cargo by tug and barge. Such cargo may move on the same barge as cargo booked by Wagner under its own tariff.

Agreement 8492 applies only to "such cargo as Northland tenders to Wagner," and there is no obligation on Northland's part to supply any minimum quantity. Wagner is not obligated to furnish any minimum space or schedule of sailings for Northland cargo, its obligation being limited to "such barge or barges actually being employed" in its common carrier services. On Northland cargo moving to Alaska, Wagner assumes possession at the first place of rest on its pier at Seattle and delivers to Northland at ship's tackle at Anchorage. For cargo from Alaska, Wagner assumes possession only after storage aboard its vessel at Anchorage, and delivery to Northland is completed at the "final place of rest on the pier at Seattle." Wagner assumes loading and unloading costs at Seattle and Northland pays these costs at Anchorage. All cargo insurance is paid by Northland, and Wagner furnishes the necessary dunnage for Northland cargo. Gross revenue derived from Northland cargo will be distributed between Wagner and Northland in accordance with division sheets to be filed with the Commission, the division currently anticipated being 50% to Northland and 50% to Wagner. Either party can cancel the agreement on 90 days' notice.

Both the Northland and Wagner tariffs now on file provide that the carrier will furnish cargo containers or vans for the loading of cargo "the nature, density and dimension of which are, in the judgment of the carrier, suitable for containerization." Both tariffs make weight allowances for cargo loaded into the carrier's vans by shippers. However, Wagner presently owns no vans and does not plan to purchase any until the trade requires it, whereas Northland owns vans and has apparently made full use of them.

Under Wagner's tariff the rate and minimum tonnage for bulk cement are identical to the rate and minimum tonnage for bulk cement contained in a transportation contract Foss has with Permanente Cement Co., and the latter has agreed that its cement

[1] By a Report served January 8, 1962 in Dockets 904 and 914, which were complaint actions by Puget Sound Tug & Barge Co. against Foss, Wagner, Northland, et al., we held that Foss was a common carrier as to general cargo transported on its barges for Northland during 1960, and that Foss-Northland agreements covering such transportation are subject to section 15. Pending this decision, consideration of Agreement 8492, here in issue, was deferred.

may move either under the contract or under Wagner's common carriage tariff, at the option of Foss and Wagner. It would be possible under Agreement 8492 for two barges to be towed in tandem on a single voyage with one of the barges containing a mixture of general cargo booked in part by Wagner and in part by Northland, and the other containing cement or other contract cargo booked by Foss. However, such towing of cement and general cargo barges is considered inadvisable from an operational standpoint. Moreover, it is not the intention of the parties to the Agreement to transport contract cargo under their arrangement.

The tariffs of Wagner and Northland do not limit their operation to warmer months, nor does anything in Agreement 8492. However, the record indicates that the service which Wagner and Northland will provide under the agreement will be seasonal because ice conditions prohibit calls at Anchorage by other than special vessels during the colder months, and there is no evidence the parties intend using such special equipment. The normal shipping season at Anchorage opens in mid-April and is closed by ice to all but special vessels around the first of November, and there are occasional periods during winter when calls at Anchorage are impossible even for such vessels. The only common carrier currently serving Anchorage the year around is Alaska Freight Lines (Alaska Freight), which is also a tug and barge operator. When ice conditions are severe at Anchorage, it calls at Seward or Valdez as alternates.

Coupled with the physical difficulties of winter operation to Anchorage is the seasonal fluctuation in the cargo demands of the trade. There is a much greater demand in summer than in winter. On occasion during the summer Alaska Freight has made as many as three sailings per week, whereas in winter it sometimes offers only once a week service due to lack of cargo. A major reason for this fluctuation is the winter shutdown of the construction and oil exploration industries. This also reduces the population because the workers move south in winter.

Approval of the agreement was protested by Puget Sound Alaska Van Lines (PSAVL), a division of Puget Sound Tug & Barge Company. PSAVL began operation as a common carrier by tug and barge in the Alaskan trade in January of 1960, but its parent corporation has been a contract or private carrier in the Alaskan trade for many years. PSAVL offers one sailing a week from Seattle and one every two weeks from California (via

Seattle) to Seward, Alaska, and maintains that sailing frequency the year around. It does not serve Anchorage directly but, through an arrangement with the Alaska Railroad (U. S. Department of the Interior), does offer a through bill of lading service from Seattle to Anchorage via Seward. The total rate for cargo moving under this through billing arrangement can be found only by resort to an Alaska Railroad tariff which is not filed with this Commission nor subject to regulation by any Federal regulatory agency. Seward is also served twice weekly from Seattle by the self-propelled vessels of Alaska Steamship Company (Alaska Steam). The Port of Seward is owned by the Alaska Railroad, which has expended considerable effort developing it as a transshipment point for rail belt cargo. Substantially all the cargo moving through Seward to Anchorage moves via the Alaska Railroad.

The Port of Anchorage, a municipal department of the City of Anchorage, Alaska, intervened in support of the approval of Agreement 8492. In July 1961 it opened a new municipal terminal. Anchorage is the largest city in Alaska and serves as a distribution center for almost one-third of the State's people. However, as has been indicated, it receives little direct water transportation service and most of the freight destined for it moves by vessel to Seward and thence by the Alaska Railroad to Anchorage. Under Agreement 8492 Anchorage would receive additional direct, although seasonal, water service. Though it would prefer direct year around service, it feels the seasonal service will bring benefits to the Anchorage community not provided by the existing indirect service.

Seward is served regularly by Alaska Steam and PSAVL. But it consumes little of the goods that flow into it. The Port Director at Anchorage estimated that 70 to 80 percent of all the cargo moving to the Port of Seward is ultimately destined either for consumption in the Anchorage area or for redistribution out of Anchorage to other points in the rail belt area of Alaska. The Port of Seward has the natural advantage over Anchorage of being free from troublesome ice in winter. The barge-rail service to Anchorage via the Port of Seward, from Seattle, takes about a day less of transit time than the direct barge service to Anchorage, but this may be offset by savings resulting from all-water transportation and the elimination of extra cargo handling necessitated by transhipment at Seward.

We ordered an investigation into the approval of Agreement 8492. After hearings and the filing of briefs in which all parties except PSAVL urged approval of the agreement, the Examiner found that the agreement was not violative of the Shipping Act and should be approved. Following exceptions by PSAVL and replies thereto, we heard oral argument. We think the Examiner's decision in the case is correct.

DISCUSSION AND CONCLUSION

Although the exceptions of protestant PSAVL are quite numerous, they reduce to four general categories of objections and may be disposed of on that basis. To begin with, PSAVL states that the agreement provides for the filing of rates and consultation between the parties on the level thereof, and it argues that the Examiner erroneously failed to receive evidence on and consider the level of the rates of Wagner and Northland to be charged under the agreement. PSAVL says the arrangement may permit unreasonably high rates derived from transportation contracts held by Foss, to be used "to subsidize unreasonably low rates on Northland and Wagner general cargo."

Agreement 8492 is not a section 15 arrangement providing for uniform rates nor common rate action by the parties, and the section 15 cases of that kind which PSAVL cites are inapposite.[2] Wagner's own rates are not fixed in concert with Northland, nor are Northland's fixed in concert with Wagner, and nothing in Agreement 8492 would authorize this. The agreement does provide for Northland to consult with Wagner on amendments to Northland's tariff which affect the income Wagner will receive under the revenue division previously referred to. But this merely relates to the amounts to be charged for the combined Northland/Wagner service—a service to which Northland and Wagner each contribute a different part. Such activity differs materially from rate-fixing among competitors offering the same service, and the reasonableness of the rates to be charged under the combined service is not relevant to the equestion of approving the agreement.

Both Wagner and Northland are subject to the Intercoastal Shipping Act, 1933, which requires them to file all their tariffs and, if called upon, to justify the rate levels therein. Whether

[2] *Empire State Highway Transportation Assn.* v. *American Export Lines*, 5 F.M.B. 565 (1959); *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946); *Carloading at Southern Calif. Ports*, 3 U.S.M.C. 137 (1949).

or not the Intercoastal Act is a part of the Shipping Act, 1916, as PSAVL argues, it is clear that the provisions of the Intercoastal Act are applicable to the rates of common carriers by water in interstate commerce, like Wagner and Northland, and that the Intercoastal Act affords the proper recourse for inquiry into the reasonableness of their rates. The 1916 Act only authorizes as to the domestic trade the prescribing of a maximum reasonable rate after a finding of unreasonableness (section 18(a), 46 U.S.C. 817a), and this is inapplicable to the present proceeding. PSAVL's complaint is not as to the maximum rates that may flow from the agreement but as to the minimum rates. It concedes it would have no objection if the rates of respondents were no lower than those of the "regular carriers" in the trade, and if respondents operated a year around sailing frequency.

The failure of Wagner and Northland to operate year around is the basis of another of PSAVL's major complaints. It says the agreement should be disapproved because seasonal operation by Wagner and Northland will be detrimental to commerce and contrary to the public interest. At oral argument its counsel contended that the term "contrary to the public interest" now appearing in section 15 as amended by Public Law 87-346, may be used to require that a section 15 joint service agreement meet the prerequisites of a certificate of public convenience and necessity. Wagner and Northland, PSAVL says, did not prove a demand or necessity for their service. The detriment alleged by PSAVL stems from the possibility that Wagner and Northland will deprive PSAVL (and other "regular carriers"), also the Port of Seward and the Alaska Railroad, of summer traffic, without having to operate during winter months when cargo is scarce and operating costs are high.

PSAVL misconceives section 15. Public Law 87-346 did not write into section 15 a public convenience and necessity standard, and we have no authority of the kind suggested. Both Wagner and Northland may, as they already have, individually enter and serve the trade without establishing that their operation serves the public convenience and necessity. No approval or license for such an operation can be required by this Commission. Nor does the fact that they now propose a joint service in the same trade give us the power to veto the proposal on public convenience and necessity grounds.

In connection with the alleged infringement of the public interest and detriment to commerce standards of section 15, it is worthy of note that none of the carrier and port interests which PSAVL asserts will be adversely affected by the operation of the proposed agreement have asked us to disapprove or modify it, and the Port of Anchorage wants it approved. So far as concerns PSAVL itself, the thrust of its position is that the unfair and discriminatory character of the agreement will disappear if the Wagner/Northland combine is required to provide winter service. We are unable to follow this reasoning. Aside from our inability to impose such a requirement, the record makes plain that winter cargoes are relatively light necessitating a curtailment of service by the carriers presently in the trade. We should think these carriers would be hurt rather than helped by the additional overtonnaging that the Wagner/Northland service would bring to the winter trade.

Furthermore, the fact remains that Cook Inlet, on which Anchorage is situated, experiences ice conditions which preclude winter operation except by special vessels, and on occasion even they find it impossible. Alaska Freight, though it offers year around tug and barge service to Anchorage, is forced to make its calls at Seward or Valdez when ice conditions are severe at Anchorage. In testimony, PSAVL's president conceded that he would not operate a scheduled service to Anchorage during winter. Thus, even if it could be said that harm will flow from the Wagner/Northland operation because seasonal, this would result from conditions which are not reasonably within the control of Wagner and Northland. It seems to us the objections PSAVL urges could as validly be urged against the carriers who, because of winter ice, only seasonally serve Great Lakes ports through the St. Lawrence Seaway.

PSAVL's situation as a result of Agreement 8492 is not materially different from what it would be if a single common carrier entered the trade on a seasonal basis, as indeed Wagner appears to have done and plans to continue regardless of whether Agreement 8492 is approved. PSAVL is not, of course, entitled to be protected from competition, and we are unable to find any merit in its argument that the agreement is unfair, detrimental or contrary to the public interest under section 15. Opposed to these charges, moreover, is the interest of Alaska's largest city, Anchorage, which earnestly seeks the benefits inherent in the provision of additional direct water service during the months of heavy traffic, as is contemplated under this agreement.

PSAVL's next argument is based on the possibility that common and contract cargo may be carried in the same barge tow. According to the record this is not likely to occur and is not contemplated by the parties to Agreement 8492. Nevertheless, it concededly could occur and some comment on the matter appears in order. We are unwilling, from our review of the cases PSAVL cites,[3] to accept its contention that the agreement must be disapproved because a mixture of common and contract carriage on one vessel (or barge tow) on the same voyage would, without more, be unlawful. We think the better approach is that such a mixture of cargoes may not be used to evade regulation and must not result in a carrier's avoidance of its common carrier obligations with respect to the fair, nonpreferential and nondiscriminatory treatment of shippers.

We have no evidence which would warrant our concluding that the parties will, or that they intend to handle contract and common carriage under Agreement 8492 in a manner which would violate the Shipping Act. We should not disapprove the agreement on the bare possibility that they could violate the Act. At the least there ought to be a substantial likelihood of such conduct. If it develops that the parties' actual operations entail rate or other practices of questionable legality, the provisions of the Shipping Act afford ample means for reaching and if necessary correcting same. As for PSAVL's allegation that Wagner's tariff already contains an unlawful minimum weight provision for cement, this has not been proved. Moreover this issue, as with others sought to be raised in this case, is relevant in the pending complaint case (Docket 977) which PSAVL's parent brought against Foss, Wagner and Northland for the specific purpose of inquiring into their rates and practices.

PSVAL's final contention is that Wagner and Northland may have a different rate on the same commodity moving on the same barge, creating undue preference or prejudice among shippers. Admittedly, such a movement is possible, since Wagner and Northland are independent common carriers and they could have different rates on the same commodity. But it does not follow that this would result in preference or prejudice to shippers. Both

[3] *Absorption or Equalization on Explosives*, 6 F.M.B. 138 (1960); *Transportation by Mendez & Co.*, 2 U.S.M.C. 717 (1944); cf. *Grace Line v. F.M.B.*, 280 F. 2d 790 (2d Cir. 1960); *Flota Mercante Grancolombiana, et al. v. F.M.C. & U. S.*, 302 F. 2d 887 (D. C. Cir., 1962).

carriers must publish their rates and file them with this Commission, thereby apprising shippers of any rate variance and permitting them to exercise their own choice of carrier. Typically, shippers will book with the carrier having the lower rate, which fact itself would tend to bring about rate parity between the carriers. It is clear, in any event, that shippers will be able to make their own informed selection.

PSAVL's subsidiary claims as to possible rebating, refusals by Wagner to book cargo, and the like, are purely speculative and not supported by logic. It seems to us that acceptance of the position urged would require the disapproval of every agreement between a common carrier and a nonvessel operating common carrier under which each carrier quotes its own rates for cargo moving on the same vessel.

Our conclusion is that Agreement 8492 is not detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act, and it should be approved. We would add, as already indicated, that this approval should serve the public interest in a peculiarly positive way because the agreement envisages additional direct water service to the Port of Anchorage, and at a cost to shippers which is apparently less than the combination water-rail rate to Anchorage via the Port of Seward. An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

ORDER

No. 976

AGREEMENT NO. 8492 BETWEEN T. F. KOLLMAR, INC., D/B/A NORTHLAND FREIGHT LINES, AND WAGNER TUG BOAT COMPANY IN THE ALASKA TRADE

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusion thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That Agreement 8492 be, and it is hereby, approved.

By the Commission, February 12, 1963.

(Seal)

(Signed) Thomas Lisi
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 258

JONDI INC. v. HELLENIC LINES LIMITED

SPECIAL DOCKET NO. 259

UDDO & TAORMINA CORP. v. HELLENIC LINES LIMITED

SPECIAL DOCKET NO. 260

M. DE ROSA, INC. v. HELLENIC LINES LIMITED

SPECIAL DOCKET NO. 261

GIACOMO FOTI v. HELLENIC LINES LIMITED

Permission granted Hellenic Lines Limited to refund freight charges o shipments transported from Italy to the United States.

Stanley O. Sher, Coles and Goertner, for respondent. Com plainants appeared *pro se.*

INITIAL DECISION OF E. ROBERT SEAVER, EXAMINER[1]

By its applications filed August 22, 1962 and amended Fet ruary 6, 1963, respondent seeks an order of the Commission pu suant to Rule 6(b) of the Rules of Practice and Procedure, autho

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[1] **This decision became the decision of the Commission on February 21, 1963. (Rules 13(c and 13(h), Rules of Practice and Procedure, 46 CFR 201.224, 201.228.)**

izing the voluntary payment of reparation to complainants. The amendments to the applications properly name the consignees as the complainants, rather than the shippers, because the freight in question was paid by the consignees. Complainants concur in the applications.

The applications arose out of transactions that are the same as those involved in *Uddo & Taormina Corp.* v. *Concordia Line,* 7 F.M.C. 473 (1963). Due to confusion in the filing of certain tariff changes by the steamship conference of which the respondent here and respondent in Special Docket 245 were members, the complainants in both cases, shippers of tomato paste and peeled tomatoes, were charged freight at the rate of $26.50 per kiloton rather than $18.00, which the parties had contracted for. The carrier seeks authority to refund the excess. The circumstances need not be repeated in detail here, nor the reasons for granting the relief sought, because they are the same as those set forth in the decision in Special Docket No. 245.

The quantity shipped by each complainant, the freight at the higher and lower rates, and the excess which respondent seeks to refund, are as follows:

Special Docket Number	Complainant (abbreviated)	Quantity (Metric Tons)	Freight Charged	Freight at lower rate	Excess
No. 258	Jondi	10.250	$ 271.62	$ 184.50	$ 87.12
No. 259	Uddo	248.640	6,588.96	4,475.52	2,113.44
No. 260	De Rosa	47.000	1,245.50	846.00	399.50
No. 261	Foti	36.800	975.20	662.40	312.80

The shipments were all made and the freight was collected during March and April, 1962. No discrimination will result from granting the requested relief because there were no shippers of tomato products on respondent's vessels during the period in question other than complainants.

An order will be entered authorizing and directing the payment of reparation to the complainants in the amounts shown in the last column of the above table opposite their respective names.

775-794 O-65-35

FEDERAL MARITIME COMMISSION

ORDER

SPECIAL DOCKET NO. 258
JONDI INC. v. HELLENIC LINES LIMITED

SPECIAL DOCKET NO. 259
UDDO & TAORMINA CORP. v. HELLENIC LINES LIMITED

SPECIAL DOCKET NO. 260
M. DE ROSA, INC. v. HELLENIC LINES LIMITED

SPECIAL DOCKET NO. 261
GIACOMO FOTI v. HELLENIC LINES LIMITED

NOTICE OF EFFECTIVE DATE OF DECISION
AND ORDER AUTHORIZING REPAYMENT

No exceptions having been filed to the Initial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on February 21, 1963.

It is ordered, That the application of Hellenic Lines Limited to repay certain overcharges be, and it is hereby, granted.

By order of the Commission, February 21, 1963.

(Signed) THOMAS LISI
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

No. 903

PACIFIC COAST/PUERTO RICO GENERAL INCREASE IN RATES

Decided February 21, 1963

Tariff rates between Pacific Coast ports and Puerto Rico as increased by 15 percent found to be just, reasonable, and lawful.

Sterling F. Stoudenmire, Jr., and *Richard W. Kurrus* for respondents.

George Bunn for Commonwealth of Puerto Rico, and *R. A. Morin* for Fibreboard Paper Products Corporation, interveners.

Wm. Jarrel Smith, Jr., as Hearing Counsel.

Arnold J. Roth, Hearing Examiner

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* ASHTON C. BARRETT, *Vice Chairman; Commissioners* JOHN HARLLEE, JOHN S. PATTERSON.*

BY THE COMMISSION:

By order of April 19, 1960, the Federal Maritime Board (Board) instituted this investigation to determine the lawfulness of a 15 percent increase in the rates of the Pacific Coast/Puerto Rico Conference,[1] and of Isbrandtsen Company, Inc., on traffic moving from United States Pacific Coast ports to ports in Puerto Rico. The operation of the tariff was suspended by the Board for the four months' statutory period until August 18, 1960. By supplemental order of April 28, 1960, the respondents were authorized to publish, on one day's notice, an increase of 10 percent, upon

[1] Conference members include Bay Cities Transportation Company, Pan Atlantic Steamship Corporation, Pope and Talbot, Inc., and Waterman Steamship Corporation (Puerto Rican Division), of whom only Waterman provides eastbound service from the Pacific Coast to Puerto Rico.

* Commissioner Day took no part in the hearing or decision of this case.

their undertaking to keep account of the revenue received by reason of such increased rates, and to make refund of any increased freight charges in excess of those found to be just and reasonable.

The Conference and Isbrandtsen thereafter filed new tariffs to reinstate the 15 percent increase, effective June 16 and June 23, 1960, respectively, which were suspended until October 14 and October 21, 1960. The 15 percent increase became effective on all lines on November 1, 1960.

The Commonwealth of Puerto Rico (the Commonwealth) and Fibreboard Paper Products Corporation (Fibreboard) intervened.

After hearing the Examiner issued an initial decision in which he found that the increased rates on roofing and paint have not been shown to be just and reasonable, and that the rates on these commodities under investigation should be canceled, without prejudice to the establishment of an increase of 5 percent in the rates on paint; that the respondents should be required to account for, and repay to the shippers, in accordance with the Board's order of April 28, 1960, the amounts received by them by reason of these increased rates to the extent indicated above; and that in all other respects the rates under investigation have been shown to be just and reasonable.

Following exception to the Examiner's decision, oral argument was held.

Waterman and Isbrandtsen are the only common carriers by water presently operating in the Pacific Coast to Puerto Rico trade. In the years prior to 1960, Waterman served this trade with vessels inbound from the Far East in its Atlantic and Gulf of Mexico/Far East Service. In February of 1960, Waterman substituted a single vessel shuttle service between West Coast United States ports and Puerto Rico offering 8 sailings annually. This is the service to be offered by Waterman for the foreseeable future.

Isbrandtsen operates over this trade route using inbound vessels of its eastbound Round-the-World service which sail fortnightly from San Francisco and Stockton, California, to Puerto Rican ports. Isbrandtsen intends to continue serving this route in the same manner with 24-26 sailings annually.

Since the last general rate increase in this trade of 7.5 percent, effective August 1957, the operating expenses of both carriers have increased substantially. For example, stevedoring and longshore rates have increased 22 percent at Pacific Coast ports and 29.3 percent at Puerto Rican ports, crew wages are up 20.5 percent, terminal and service charges at San Francisco and Los Angeles have increased 25 and 23 percent, respectively, and total vessel operating costs are higher by 15.9 percent since December 1956.

Table I below shows the tonnage[2] carried in the trade by the respondents herein during prior years, and cargo carryings projected by respondents for the full years 1960 and 1961. Table II sets forth separately the rice tonnages carried or projected for the same periods. Both tables include, in the cargo attributed to Waterman, the tonnage handled during 1956, 1957, and 1958 by Pan-Atlantic Steamship Corporatioin, an affiliate of Waterman. The totals reflect all cargo moving in the trade except for a short period beginning late in 1957, when another carrier entered the trade for a few sailings.

TABLE I.—*West Coast-Puerto Rico Cargo*

					Projected	
	1956	1957	1958	1959	1960	1961
Isbrandtsen	120,383	131,171	132,873	145,423	116,669	85,200
Waterman	110,869	90,341	59,214	85,324	75,600	67.200
Totals	231,252	221,512	192,087	230,747	192,269	152,400

TABLE II.—*Rice—California to Puerto Rico*

					Projected	
	1956	1957	1958	1959	1960	1961
Isbrandtsen	71,467	72,179	86,001	93,955	62,297	42,600
Waterman	23,750	25,154	17.676	24.517	17,248	11.648
Totals	95,217	97,333	103,677	118,472	79,545	54.248

Bearing in mind that the total carryings shown in 1957 and 1958 reflect traffic diverted to another carrier as indicated above, Table I shows a relatively stable movement in total tonnage up to 1960, and Table II reflects a gradual increase in rice tonnage through the same period. As will be noted, a substantial decline in traffic for 1960 and 1961 is projected by both carriers. This is due principally to an irretrievable loss beginning in March 1960 of rice tonnage, through diversion by the principal shipper, who controls about 65 percent of the total movement, to contract carriage in bulk of semi-finished rice in the SS *Marine Rice Queen*,

[2] Tonnages are given in short tons of 2,000 pounds, except where otherwise indicated.

a Liberty vessel specially converted for such service. In this trade rice has been the most important commodity, accounting in 1959 for about 65 percent of Isbrandtsen's cargo and 29 percent of Waterman's cargo.

Isbrandtsen's projected tonnage of rice for 1961 is based upon a proposal by it, pending at the time of the hearing, to convert certain holds in its vessels for bulk rice carriage, in order to provide competitive service for the remaining rice shippers to whom the service of the SS *Marine Rice Queen* is unavailable. Isbrandtsen had on file with the Board proposed bulk rice rates, which were suspended, and have since been canceled. That proposal has been supplanted by a tariff which became effective April 14, 1961,[3] naming a rate of $20.75 per ton on rice in bulk, in special containers.

Waterman's projection for the same year is based upon its expectation that it would continue to carry about 1,300 tons of rice in bags per voyage. To date the Conference has proposed no rate competitive with the new Isbrandtsen rate applicable on bulk rice in containers. Since the existing Conference rate on bagged rice is $1.54 per 100 pounds, or $30.80 per ton, it is assumed that the great bulk, if not all, of the rice available to the respondents will be carried by Isbrandtsen. On one of its latest voyages shown of record, Waterman carried only 70 tons of rice.

The Examiner on the basis of the above evidence of record found that the rice tonnage available to the respondents in 1961 and future years would not exceed about 43,000 or about one-third of the total movement. We agree.

On cargo other than rice, Waterman's projection for 1961 is based mainly upon its experience in the first 8 months of 1960, giving effect to the fewer sailings contemplated in the shuttle service, and is not challenged by the parties. Isbrandtsen for 1961 projected a decline of about 1,600 tons of dried beans, and about 4,400 tons of canned goods, the two commodities other than rice which make up the bulk of the movement, and a decline of about 4,800 tons in carryings of all other commodities, or a total decline of about 10,800 tons. The Examiner found that this decline in tonnage is not supported by the testimony of record, and that it is reasonable to assume, as contended by the Commonwealth and Hearing Counsel, that the cargo available other than rice

[3] See Item No. 1675, fifteenth revised page No. 52, of Isbrandtsen's United States Pacific West Coast to Puerto Rico Tariff No. 2, F.M.B.-F No. 2, of which official notice is taken pursuant to Rule 13(g) of the Board's Rules of Practice and Procedure, 46 CFR § 201.227.

will be substantially equal to that shown for 1959 and the projected year 1960. We agree that the Examiner's projection of 152,400 tons as the total carryings by respondents for 1961 is reasonable.

Except in the case of Waterman's recently inaugurated shuttle service, the West Coast-Puerto Rico services of the respondents are and have been operated on a joint basis with other services. This requires allocation of the joint service expenses, and of the assets devoted to the joint services, so as to ascertain as nearly as possible the proper apportionment of expenses and assets between the regulated and non-regulated trades.

Waterman allocated vessel operating expenses by determining a per diem cost of the vessel operating expenses on the joint service voyages, and applying such per diem cost to the number of days required for the Pacific Coast-Puerto Rico voyages; port and cargo expenses, Panama Canal tolls, and other non-vessel expenses were applied directly, after elimination of intercompany profits on Puerto Rico port operations; vessel depreciation was allocated on a per diem basis as was done in the case of vessel operating expenses; and overhead expenses were allocated on the basis of the proportion that West Coast-Puerto Rican revenues bore to total revenues from all operations of Waterman, or a revenue prorate.[4] On Waterman's shuttle service voyages, past and projected, vessel and other costs were generally assigned directly, except overhead costs which were allocated as above. As vessel assets, Waterman claims the value of one vessel of its fleet which was operating in the West Coast-Puerto Rico service on a shuttle basis on April 30, 1960, the date as of which the parties have agreed by stipulation that the assets should be valued for the purposes of this proceeding as the approximate date on which the increased rates here involved were proposed. The remaining fixed assets claimed by Waterman were allocated on the basis of tonnage prorates, or the proportion that West Coast-Puerto Rican tonnage bore to total tonnage for which such facilities were used. Working capital was computed on the basis of an amount approximately equal to one round voyage expense of each vessel in the service. No party to the proceeding objected to the allocation methods utilized by Waterman, and they are found to be reasonable for the purposes of this proceeding.

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[4] The Examiner properly excluded interest on vessel and other mortgages as operating expenses, see *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges*, 7 F.M.C. 87 (1962).

Isbrandtsen allocated vessel operating expenses, depreciation, overhead expenses, and vessel values and other claimed asset values on the basis of a revenue prorate; agency fees and commissions were directly assigned; and port and cargo expenses and Panama Canal tolls were allocated on the basis of tonnage prorates. Working capital was computed by Isbrandtsen on the basis of one-twelfth of annual vessel expenses, and allocated by means of the revenue prorate. The Examiner allocated vessel operating expenses, depreciation, overhead, vessel and other asset values on a modified revenue prorate. His method involved the elimination of cargo expenses, which the record discloses are higher in United States and Puerto Rican ports than in other ports served by Isbrandtsen, from both total revenues and West Coast-Puerto Rican revenues of Isbrandtsen, and the determination of the revenue prorate from the remaining figures.

We agree that on this record the Examiner in using the modified revenue prorate formula adopted the most reasonable and accurate of all of the methods that were proposed or considered. The use of this proration formula results in an apportionment of Isbrandtsen's expenses in a realistic manner, by evaluating this operation as part of the Round-the-World service; yet it eliminates disproportionate cargo handling expenses which distort the gross revenue proration advocated by Isbrandtsen.

We reject the Commonwealth's proposal that only Isbrandtsen's out-of-pocket expenses should be used to determine net income. The Puerto Rican service is an integral part of this Round-the-World operation and not simply a "by-product" as contended by the Commonwealth. Actually shippers on each leg of the voyage could make the same argument. Each segment of this service should bear its proportionate share of the overall expenses of the carrier.

The Comonwealth contends that expenses should be allocated on the basis of use units if the added cost or out-of-pocket method of determining Isbrandtsen costs is rejected. Under the use unit method, the voyage expenses on the Isbrandtsen West Coast-Puerto Rico leg would be allocated out of total Round-the-World voyage expenses on the basis of days, and then expenses on that voyage leg be allocated on the basis of Puerto Rico's tonnage to total tonnage.

This method fails to take into consideration Isbrandtsen's cost in re-positioning vessels on the North Atlantic after calls at Puerto

Rico, since it counts only the days consumed in the voyage from the West Coast to Puerto Rico. Some part of this re-positioning expense is allocable to the Pacific Coast-Puerto Rico service. Further, as pointed out by the Examiner, the proposed method produced results drastically at odds with cost per revenue ton figure based on a ton-mile formula used in prior cases. Because of the volume of computations required, the time element involved resulting in prohibitive costs, the ton-mile formula in the case of Isbrandtsen's Round-the-World service was not used. However, the ton-mile formula computed on one voyage, resulted in vessel operating expense per revenue ton in excess of that resulting from the use of the modified revenue prorate used herein.

The Commonwealth excepts to the Examiner's failure to make a realistic appraisal of the probable salvage value upon retirement of Isbrandtsen's vessels, and to disallow for rate purpose any future depreciation charges. It contends that Isbrandtsen has already depreciated its vessels below the value Isbrandtsen will receive for them at the end of their useful service lives.

This record discloses the fluctuations which occur in the market price of vessels and the difficulties in determining market value as of a specific past date. It is impossible to forecast, even in the relatively near future, the probable disposal value of vessels at the end of their depreciation cycle. The residual values utilized by the respondents accord with the conventional long-standing practice of vessel owners and, in our opinion, are the most equitable and reasonable certain standards on which to rely in this proceeding. *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.*

Table III below shows the operating results of the respondents for 1959 and the projected year 1961, computed on the basis of the allocation methods adopted. The revenues for Isbrandtsen include for each year $50,000 of passenger revenues, since no attempt was made by Isbrandtsen to allocate out any expenses attributable to passengers carried by Isbrandtsen on its Round-the-World voyages. The Commonwealth proposes a restatement of the revenues of Isbrandtsen for the projected year 1961 to include amounts attributable to the additional cargoes of dried beans, canned goods, and other cargo which as found above Isbrandtsen may reasonably be expected to carry in 1961. The Examiner held that this added revenue would be largely offset by the revenues claimed by Waterman on rice, and therefore the results shown in Table III can be accepted as a reasonable projection of the rates here under suspension. We agree. Isbrandtsen is not the dominant carrier in the trade, and the issues herein will be determined on the basis of the combined operations of both carriers in the trade. (See discussion set forth hereinafter.)

Projected expenses for both carriers are based upon experience in the first half of 1960, adjusted to allow for known increases in costs which will occur in 1961, and Isbrandtsen's expenses are further adjusted to reflect cost savings which were expected at the time of the hearing because of the then planned carriage of rice in bulk. Revenues for 1961 shown in the table include the rate increases.

TABLE III.—*1959 and Projected 1961 Operating Results of Respondents Operating Results of Pacific Coast-Puerto Rican Trade.*

	1959			1961 Projected		
	Isbrandtsen	Waterman	Totals	Isbrandtsen	Waterman	Totals
Revenues	$4,222,862	$2,857,390	$7,080,252	$2,490,680	$2,708,934	$5,199,614
Operating Expenses	3,844,379	2,726,905	6,571,284	2,120,355	2,578,201	4,698,556
Depreciation	219,757	75,778	295,535	98,501	44,868	143,369
Overhead	190,737	227,758	418,495	141,089	180,930	322,019
Net income or (loss) before income tax	(32,011)	(173,051)	(205,062)	130,735	(95,065)	35,670

For the first half of 1960, based on actual revenues—which reflect for the latter part of the period the initial impact of the losses in rice traffic detailed above—adjusted downward to remove the results of the initial 10 percent increase in rates, and with expenses allocated on the same bases as in Table III above, the operations of Isbrandtsen reflect a loss of $184,705, and those of Waterman a loss of $116,629, or a combined loss of $301,334.

In Table IV below are shown the assets claimed by the respondents, valued at depreciated book values as of April 30, 1960, allocated in the case of Waterman on the basis indicated above, and allocated in the case of Isbrandtsen on the basis of the modified revenue prorate explained heretofore, calculated from operating results of Isbrandtsen during the first six months of 1960. The amount of working capital assigned to Isbrandtsen reflects one-twelfth of projected vessel operating costs in the Round-the-World service allocated to the West Coast-Puerto Rican service on the modified revenue prorate basis. Isbrandtsen claims only an allocated portion of its land-based facilities in New York, and does not claim any terminal properties. Waterman claims allocated portions of its headquarters facilities, and the terminal in Puerto Rico and associated terminal equipment. There is no dispute among the parties as to the propriety of the inclusion in the rate bases of the respondents of any of these items.

TABLE IV.—*Rate Bases of the Respondents at Net Book Values as of April 30, 1961*

	Isbrandtsen	Waterman	Totals
Vessels	$679,445	$ 338,323	$1,017,768
Other properties	23,420	412,997	436,417
Working capital	166,910	333,536	500,446
Totals	$869,775	$1,084,856	$1,954,631

The Commonwealth contends that Isbrandtsen is the dominant carrier in the trade, and that the justness and reasonableness of the increased rates should be determined on the basis of Isbrandtsen's operating results. On the record before us it does not appear that Isbrandtsen can properly be classified as the dominant carrier. The two carriers conduct entirely different operations and do not serve the same areas. With only Isbrandtsen and Waterman operating in the trade a 60-40 ratio of cargo lifted by the two carriers is not such a sufficient differential as to justify the application of the dominant carrier theory. Even if the projected operating results of the respondents were adjusted as suggested by the Commonwealth to reflect the increased carrying of cargo other than rice by Isbrandtsen, the projected revenues of Isbrandtsen for 1961 would not exceed those of Waterman by an amount sufficient to justify the adoption of the dominant carrier theory. On this record we hold that neither the strongest nor the weakest line controls rate determinations, and our findings will be based on conditions confronted by respondents as a group. *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.*

We have recently held that the fair-return-on-fair-value standard is proper in determining rates in the domestic offshore trade, and that the prudent investment standard would be used to determine the fair value of property. *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.* We find nothing in this record which warrants departure from our holdings in that proceeding.

Table IV above shows a combined rate base of respondents of $1,954,631. Table III above shows combined income before taxes of $35,670. This will produce a rate of return of 1.82 percent. Such rate of return can in no sense be deemed excessive.

As noted heretofore the Examiner held that the increased rates on roofing and paint commodities "were, are, and will be unjust and unreasonable, without prejudice to the imposition of an increase of 5 percent on the rates on paint." The Examiner's reasons for this conclusion were that the increased rates would result in an almost complete cessation of traffic movement, are more than the traffic can bear and respondents did not prove the existing rates were non-compensatory. Isbrandtsen and Waterman except to this conclusion on the ground that in a general rate proceeding carriers are not required to sustain the burden of proving the reasonableness and justness of the rate on every item and every commodity in their tariffs.

Isbrandtsen argues further that the Commission is without authority to reduce a rate primarily to protect an industry from competition. We have held that a shipper's or a commodity's competitive position is not a basis for establishing rates nor a reason for treating them differently from other general cargo commodities, and that where shippers fail to show that a commodity subsidizes other traffic or bears more than its fair share of carriers' expenses, a justification for exemption from a general rate increase has not been established. *Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates*, 7 F.M.C. 260 (1962).

Interveners have only shown the effect of the higher rates on themselves and not on the carrier respondents whose revenues and costs are in issue. The reasons for the Examiner's conclusions are insufficient and his holding as to rates on paint and roofing are reversed. The increased rates on these commodities likewise are found just and reasonable.

We find and conclude that the rates here under investigation are just and reasonable.

An appropriate order will be entered.

ORDER

FEDERAL MARITIME COMMISSION

DOCKET NO. 903

PACIFIC COAST/PUERTO RICO GENERAL INCREASE IN RATES

Full investigation of the matters and things involved in this proceeding having been had, and the commission on February 21, 1963, having made and entered a report of record stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates, charges, tariffs and regulations herein under investigation are just, reasonable and lawful;

It is ordered, That this proceeding be, and it is hereby discontinued.

By the Commission, February 21, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

NOS. 924 AND 925

UNAPPROVED SECTION 15 AGREEMENTS—GULF/UNITED KINGDOM CONFERENCE AND GULF/FRENCH ATLANTIC HAMBURG RANGE FREIGHT CONFERENCE

Decided February 26, 1963

Respondent conference members found not to have been acting pursuant to an unfiled and unapproved agreement, in violation of section 15 of the Shipping Act, 1916, in failing to file tariffs showing certain rates as "open minimum," but such failure was a violation of Commission General Order 83.

John W. Douglas, Walter Carroll and *Edward S. Bagley,* for respondents.

Wm. Jarrel Smith, Jr. and *Robert J. Blackwell,* Hearing Counsel.

Gus O. Basham, Hearing Examiner.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* ASHTON C. BARRETT, *Vice Chairman;* JOHN HARLLEE, JOHN S. PATTERSON, JAMES V. DAY, *Commissioners.*

BY THE COMMISSION:

These investigations were instituted on the Commission's own motion to determine whether respondents, members of two steamship conferences, during the period January 1, 1955 through November 25, 1960, violated the provisions of their approved conference agreement and carried out prior to approval under section 15 of the Shipping Act, 1916 any agreement or modification of any agreement requiring section 15 approval.[1] In Docket 924, the investigation was concerned with the actions of the Gulf/United Kingdom Conference (FMC Agreement No. 161)[2] regarding its rates on cotton linters and lumber. Docket 925 investigated the actions of the Gulf/French Atlantic Hamburg Range Freight Conference (FMC Agreement No. 140)[3] regarding its rates on cotton linters and cotton seed hull shavings pulp. The cases were consolidated for hearing and decision following prehearing conference. These conferences, as well as three others, had the same chairman and were served by the same staff of conference clerical and administrative personnel.

The basic agreements as approved pursuant to section 15, authorize the conference members to agree upon and fix rates and charges binding upon the membership in the trades covered by the two agreements. These rates and charges must be published in tariffs filed with the Commission in accordance with Commission orders and the agreements themselves. Both agreements contained a provision as follows:

> The rate on any commodity may be declared "OPEN" and subsequently "Closed" in the same manner as hereinafter provided for the establishment of rates on such commodity. When rates are declared "OPEN" the commodity on which the rates have been declared "OPEN" and the extent, if any, to which the Conference relinquishes control over the booking and transportation thereof will be shown at the time in Conference Tariffs.

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[1] Section 15 of the Shipping Act, 1916, as in effect during the period under investigation, provided in relevant part: "That 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 * * *, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; * * * controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

* * * * *

"All agreements, modifications, or cancellations * * * shall be lawful only when and as long as approved by the [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation."

[2] During the period under investigation, the membership of the Gulf/United Kingdom Conference was as follows: Bloomfield Steamship Company (joined April of 1958), Cunard SteamShip Company, Ltd., Holland America Line, Lykes Bros. Steamship Co., Inc., States Marine Corporation, Harrison Line, and Waterman Steamship Corp. (joined July 1957).

[3] During the period under investigation the membership of the Gulf/French Atlantic Hamburg Range Freight Conference consisted of: Compagnie Generale Transatlantique (French Line), Holland America Line, Swedish American Line, Armement Deppe S.A., Bloomfield Steamship Company, Hamburg America Line, Lykes Bros. Steamship Co., Inc., North German Lloyd Line, Ozean/Stinnes Lines, Ropner Line (withdrew June 6, 1956), States Marine Corporation, Waterman Steamship Corporation, Wilhelmsen Line, and Polish Ocean Lines (admitted July 10, 1958, withdrew July 1, 1960).

The tariffs and minutes filed with the Commission by the Gulf/United Kingdom Conference indicated that the rate on cotton linters was declared "open" some time prior to January 1, 1955. From then until July 23, 1960, the conference's official tariff as well as the minutes of its meetings filed with the Commission showed the rates as "open." On July 23, 1960, the tariff on file with the Commission was amended to show the rate as "open" but with minimum rates to the various ports (sometimes referred to herein as "open minima" rates). In addition, the tariffs and minutes filed by this conference showed the rate on lumber as "open" on July 14, 1958 and "closed" on May 23, 1960.

During the period in question, however, the conference members established and observed minimum rates for the commodities referred to. These minima were promptly announced to conference members by means of circulars but the circulars were not filed with the Commission. The various minima were fixed by the members in the regular course of business at conference meetings, were observed and freely quoted by the members, were available to and to some extent were published by a New Orleans daily trade journal and in the rate sheets of some forwarders, and in general were known to or readily ascertainable by any interested party, such as shippers, competing carriers, brokers and forwarders. Anyone who inquired as to what the "going" rate was at a particular moment was given the then current minimum rate, either by the conference office or by the member lines.

The tariffs and minutes of the Gulf/French Atlantic Hamburg Range Freight Conference showed the rates on cotton linters as "open" from January 1, 1955 to November 24, 1959, and the rates on cotton seed hull and shavings pulp as "open" from January 1, 1955 to May 23, 1960. However, the members regularly established and observed minimum rates which were announced by circulars to the membership, were freely quoted and available to shippers and others, as in the case of the Gulf/United Kingdom Conference commodities above, but were not filed with the Commission.

The Examiner in his initial decision found that respondents violated section 15 by agreeing upon and observing minimum rates which "were not sanctioned by", and hence were unfiled and unapproved "modifications" of, their conference agreements. Respondents excepted to this decision, Hearing Counsel replied, and thereafter we heard oral argument.

It is respondents' position that they agreed to open rates with minimums, in accordance with the provisions of their approved conference agreements; that there was no agreement to do otherwise; that the failure to file was not the result of an agreement but of an "oversight" or mistake; and that, if any violation took place, it was a violation of Commission General Order 83, requiring carriers to file complete and accurate schedules or tariffs showing their rates and charges. Hearing Counsel, in supporting the initial decision, urges that respondents removed the rates from conference jurisdiction by declaring them "open" and that minimum rates were subsequently agreed upon and observed by the members and these constituted modifications of the conference agreements which the respondents failed to file with the Commission and carried out in violation of section 15. For the reasons set forth below, we accept respondents' position and conclude that they did not violate section 15.

DISCUSSION AND CONCLUSIONS

To begin with, it is clear that respondents were authorized to do what they say they did, namely, fix "open minima" rates. The conference agreements empower the members to set their common rates and charges and Article 2 permits them to open, as well as to close, rates. No one disputes this. The language of Article 2, moreover, seems expressly to envisage instances where varying degrees of conference control may be maintained even though rates are "open." It provides that when rates have been declared open on any commodity "the extent, if any, to which the Conference relinquishes control over the booking and transportation thereof will be shown in the Conference Tariffs." Thus, the conference may open rates and relinquish complete control, or it may retain some control, such as was done here in the setting of open minima rates. We think the language of the agreements is broad enough to encompass actions of that type.

We move, then, to the more critical question as to the nature of respondents' agreement. The Examiner and Hearing Counsel view the circumstances as justifying the inference that respondents decided to open the rates on the commodities in question, removing them from conference control, and thereafter set and observed minimum rates in an unlawful manner. The foundation for this inference is the fact that respondents, over a protracted period, did not follow the proper procedures with regard to the filing of true and complete tariffs and minutes with the Commission as required by the conference agreements and also by Commission General Order 83.[4] None of the tariffs and, with two exceptions, none of the minutes filed showed anything but that the rates during the years in question were "open." Respondents admit this but they stoutly deny that the filings reflect a decision or agreement by them simply to open rates on the commodities in question. They insist no such action was ever taken, that their decision from the outset was to open the rates *with minimums,* and that at all times pertinent to these investigations the rates on the commodities were in fact open minima. At no time, they say, did they relinquish complete control over the rates. According to respondents, the failure to indicate the minima in the minutes and tariffs filed with the Commission must have been due to mistake or oversight on the part of the conference chairman or personnel of the conference office.

We endorse fully the Examiner's condemnation of respondents' failure to comply with the filing requirements. Neglect of this sort over a long period indicates gross disregard for the responsibilities of a regulated industry. It raises doubt as to whether the Shipping Act is being complied with and could lead to loss of the protection the Act affords ocean carriers with respect to concerted activities. At the very least it evidences slipshod office management and a serious lack of proper supervision of conference employees. But we are not convinced that respondents agreed to any action not authorized by the conference agreement or, more specifically, that they agreed to relinquish their rate control over the commodities in question.

We are persuaded to this view mainly because respondents, throughout the period the erroneous filings were being made, actually were doing what they insist they had from the outset agreed to do—fixing and observing minimums on the open-rated commodities—and these minimums were not kept secret but were

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[4] Title 46 CFR §§ 235.1 and 235.2 (effective Dec. 13, 1957) which succeeded a prior, similar order, General Order 128 (effective Sept. 1, 1935). General Order 83 provides in relevant part:

"235.1 Every common carrier by water in foreign commerce shall file with the [Commission] schedules showing all the rates and charges for or in connection with the transportation of property * * * from points in continental United States * * * to foreign points on its own route * * *. The schedules filed as aforesaid * * * shall contain all the rules and regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates or charges.

"235.2 [Such schedules] shall be filed as aforesaid within 30 days from the date such schedule, change, modification or cancellation becomes effective."

regularly publicized and quoted to shippers, carriers and all other interested persons, as hereinabove more fully detailed. Perhaps it is difficult to account for respondents' erroneous filings but it seems to us next to impossible to explain why they should have openly and at length pursued the mentioned course of conduct if they had any purpose or agreement either to relinquish control of the rates, or falsely to depict them as open while setting minima. Such conduct, we feel, importantly supports and lends credibility to respondents' unanimous testimony that they had no purpose or agreement of that kind.

Respondents also undertook to show that there was a considerable delay in distributing minutes of conference meetings to the members, that the members paid little or no attention to these, and that at least some of their number were ignorant or confused as to the applicable filing requirements. We suppose the latter is possible, albeit inexcusable. It is a fact, though, that the affairs and "paper work" of respondent conferences were being handled in a somewhat massive operation by a chairman and staff personnel who also were serving three other Gulf conferences. Presumably, the chairman could have shed direct light on the filing deficiencies but he passed away prior to the hearings herein.

Of course, the failure to apprise the Commission of the minimum rates where the fixing of such rates was within the authority of the members under the conference agreements, does not of itself render the action unlawful under section 15. In view of this and of what has been said above, our conclusion is that respondents did not violate that section. They clearly did, however, violate General Order 83 and its predecessor, General Order 128. This violation having ceased, there is no reason to issue an order against respondents and the proceeding is hereby discontinued.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 263

UNITED NATIONS CHILDREN'S FUND (UNICEF)

v.

(COLUMBUS LINE) HAMBURG-SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK

Application under section 6(b) for authority to repay overcharges of freight approved.

Elmer C. Maddy for applicant.

Complainant appeared, pro se, and concurred in application.

INITIAL DECISION OF E. ROBERT SEAVER, EXAMINER [1]

Respondent filed an application on December 18, 1962, under Rule 6(b) of the Commission's Rules of Practice and Procedure for authority to voluntarily pay reparation to complainant in the amount of $14,091.44, representing alleged overcharges of freight in connection with nineteen shipments of powdered milk from Milwaukee to various ports in Brazil. The shipments were delivered to the consignee between July 4 and August 1, 1962, under nineteen bills of lading dated June 15, 1962. Payment of freight in the aggregate amount of $165,186.80 was made by complainant on July 20, 1962.

The freight sought to be charged is $151,095.36. The higher charge was made because, through inadvertence occasioned by a stenographic omission, the following rule was omitted from the

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[1] This decision became the decision of the Commission, on March 1, 1963.

applicable tariff (Item 27, third revised page 405, of River Plate and Brazil Conference Tariff No. 12):

"Rates herein are not subject to the Great Lakes Differential, Rule 1(A)."

Under a resolution of the Conference adopted on May 18, 1962, filed with the Commission on May 23, 1962, and its agreement with complainant UNICEF, the shipments in question were not to be subject to the Great Lakes Differential. Through the error described above, the Differential was charged to UNICEF on the nineteen shipments resulting in a total overcharge of $14,091.44.

The shipper should not suffer the consequences of the carrier's failure to effectuate the intended tariff filing. The Commission affords a place of asylum to carriers who, because of an inadvertent misstep through the maze of tariff procedures, charged the wrong rate. It authorizes correction of the overcharge or undercharge in appropriate cases, relieving the carrier of the risk of violating the Shipping Act, 1916, if the correction were made without Commission approval. *Martini and Rossi S.p.a. et al.* v. *Lykes Bros. Steamship Co. Inc.*, 7 F.M.C. 453 (1962). In the *Martini and Rossi* case, as in this case, the carrier charged an excessive rate because of an inadvertence in filing the applicable tariff, and the Commission authorized the refund of the excess.

The granting of the requested relief will not result in discrimination, favoring complainant over other shippers, for there were no shipments of the same or similar commodities of others which moved via respondent's vessels during the approximate period of time that complainant's shipments moved. The application is found to comply with the requirements of Rule 6(b) and the form of application prescribed by Appendix II (5) of the Rules.

Accordingly, an order should be entered authorizing and directing respondent to pay reparation to the complainant in the amount of $14,091.44. Interest will not be included because the concurrence of complainant in the application to repay the above amount is deemed to be a waiver of interest. If repayment is not made promptly, complainant will have an adequate remedy for collection of interest from the date of the order herein.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 263

UNITED NATIONS CHILDREN'S FUND (UNICEF)

v.

(COLUMBUS LINE) HAMBURG-SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK

NOTICE OF EFFECTIVE DATE OF DECISION AND ORDER AUTHORIZING REPAYMENT

No exceptions having been filed to the Intitial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on March 1, 1963.

It is ordered, That the application of Columbus Line to repay certain overcharges be, and it is hereby, granted.

By the Commission, March 1, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 864

INTERNATIONAL LATEX CORPORATION

v.

BULL INSULAR LINE, INC.

Rates charged on shipments of clothing from San Juan, Puerto Rico, to Baltimore, Maryland, found inapplicable. Reparation awarded.

Samuel W. Earnshaw for complainant.

John Cunningham for respondent.

INITIAL DECISION OF A. L. JORDAN, EXAMINER [1]

This proceeding originated by complaint filed with the Federal Maritime Board [2] on June 12, 1959, alleging, in substance, (1) that respondent is a common carrier by water subject to the Commission's jurisdiction under the provisions of the Shipping Act, 1916, and Intercoastal Shipping Act, 1933, (2) that during the period from June 15, 1957, to and including June 16, 1958, respondent transported numerous shipments of "clothing" for complainant from San Juan, Puerto Rico, to United States ports, (3) that respondent billed complainant in the amount of $36,-664.37 which complainant paid and bore, (4) that the said shipments consisted of "clothing", but were erroneously rated and billed as shipments of "Vinyl Film Products" and were therefore overcharged in the amount of $8,288.09, contrary to the provisions of respondent's applicable Tariff, United States Atlantic and Gulf-Puerto Rico Tariff, Homeward Freight Tariff No. 7, and contrary to the provisions of the Shipping Acts. The complainant

[1] This decision became the decision of the Commission on March 12, 1963. (Rules 13(d) and 13(h) Rules of Practice and Procedure, 46 CFR Sec. 201.224, 201.228).

[2] Predecessor of the Federal Maritime Commission.

also alleges that, in addition to said overcharges, the rates applied on the shipments involved were, on January 9, 1957 and January 15, 1958 respectively, subjected to general increases of 15 percent and 12 percent on the respective dates, and that said general increases were unjustified and resulted in unjust and unreasonable rates and charges for the services performed, in violation of Sections 16 and 18 of the Shipping Act, 1916, and of the Intercoastal Shipping Act, 1933. The complaint further alleges that by reason of the violations referred to, complainant has been injured in the amount of $8,288.09 plus the general percentage increases as included in its freight payments of $36,664.37. Reparation with interest is requested.

On August 25, 1959, respondent filed a motion to dismiss the complaint on the ground that it was presented under the Intercoastal Shipping Act, 1933, and that reparation awards are authorized only in connection with proceedings under Section 22 of the Shipping Act, 1916. By order dated October 1, 1959, the Board found that the complaint had been properly filed pursuant to Section 22 of the Shipping Act, 1916, and denied the motion to dismiss.

On April 25, 1962, respondent filed an answer to the complaint denying all violations alleged in the complaint, and alleged by way of specific defense that the complaint was not filed with the Board until July 20, 1959, and insofar as it pertains to any cause of action which accrued more than two years prior thereto, the complaint must be dismissed for want of jurisdiction. In this connection, as before stated, the complaint was filed with the Board on June 12, 1959.

Hearing was held by Examiner Arnold J. Roth, deceased, on June 29, 1962. The shipments involved consisted of "clothing" (baby pants). The tariff rate of 34 cents per cubic foot for "clothing, dry goods", should have been applied on the shipments from June 15, 1957 to December 30, 1957, inclusive, and 38 cents per cubic foot should have been applied on the shipments from January 20, 1958, to June 16, 1958, inclusive. Instead, the tariff "film, vinyl, products" rates of 44 cents and 49 cents respectively, per cubic foot, were applied for the periods stated.

Within the period involved, June 15, 1957 and June 16, 1958, forty-five shipments of "clothing" were made, transported by respondent for complainant from Puerto Rico to Baltimore, Maryland. Each shipment shows invoice number and date, name of vessel and voyage number, cubic feet, rate and amount charged, corrected charge, difference between rate charged and applicable rate, and date the charge was paid by complainant. The overcharges as described resulted in violation of Section 2 of the Intercoastal Shipping Act, 1933, as amended. Complainant paid and bore all of said overcharges between June 24, 1957 and June 23, 1958 inclusive, and was thereby injured in the amount of $8,288.09, representing the difference between the rates applied and those that should have been applied.

Near the end of the hearing, counsel for respondent stated on the record that respondent was satisfied from the evidence in the proceeding that the product shipped was in fact baby pants and that respondent was willing to make refund of overcharges on the basis shown to be applicable in the tariff pages of record.

Counsel for complainant withdrew the allegations in the complaint concerning the rate increases in view of the Board's decision in *Atlantic—Gulf/Puerto Rico General Rate Increases*, 6 F.M.B. 14 (1960), approving said increases. Further, on the basis of respondent's willingness to refund the overcharges, complainant was willing to waive interest, and to withdraw the complaint.

The record was closed on the basis that the complaint, as amended, would be satisfied; and that upon satisfaction thereof, a request would be sent to the Commission indicating the form in which satisfaction was made, and a request that the complaint be withdrawn. Obviously, jurisdiction continues with the Commission until the complaint has been satisfied.

After the hearing, in November 1962, respondent paid $2000 on the overcharges and, as indicated by letter of November 28, 1962, from complainant's Traffic Manager to the President of A. H. Bull & Company, the balance was to be paid as follows:

Second Payment	December 13, 1962	$2000.00
Third Payment	January 14, 1963	2000.00
Fourth Payment	February 13, 1963	2288.08

On January 18, 1963, counsel for complainant, by letter dated January 17, 1963, advised the Commission that no payment on the overcharges involved had been made since the November 1962 payment of $2000, although frequent demands had been made therefor. Counsel, in his said letter, requests the Commission to reactivate this proceeding, confirm the claimed overcharges and violations alleged, and order full payment of the overcharges forthwith in conformity with the applicable tariffs and the Intercoastal Shipping Act, 1933. On January 30, 1963, the Presiding Examiner wrote a letter to respondent, referring to the settlement agreement, and schedule of payments between the parties, and advised respondent of complainant's letter of January 17, 1963. Respondent was advised that before taking action on complainant's request it would be desirable to have a statement of position from respondent, which should be furnished as soon as practicable, and in any event within ten days from date of said letter, January 30, 1963. No reply to said letter has been received.

ULTIMATE CONCLUSIONS

Upon consideration of the foregoing it is found and concluded that the rates charged were inapplicable; that the applicable rates were 34 cents and 38 cents respectively; that complainant received the shipments as described, paid and bore the charges thereon, was damaged thereby, and is entitled to reparation in the sum of $6,288.08, this being the balance due pursuant to stipulation and agreement hereinbefore referred to. An appropriate order should be entered.

FEDERAL MARITIME COMMISSION

No. 864

INTERNATIONAL LATEX CORPORATION

v.

BULL INSULAR LINE, INC.

NOTICE OF EFFECTIVE DATE OF DECISION AND REPARATION ORDER

No exceptions having been filed to the Initial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on March 12, 1963. The decision is hereby referred to and made a part hereof.

It is ordered, That respondent pay complainant the sum of $6,288.08. By the Commission March 12, 1963.

(Signed) THOMAS LISI
Secretary.

(SEAL)

FEDERAL MARITIME COMMISSION

No. 974

PUGET SOUND TUG & BARGE COMPANY

v.

ALASKA FREIGHT LINES, INC.

No. 984

CERTAIN TARIFF PRACTICES OF PUGET SOUND TUG & BARGE COMPANY AND ALASKA FREIGHT LINES, INC.

Decided March 26, 1963

Tariff rule of Alaska Freight Lines, Inc., which provides for a land haul to be substituted for a portion of the water transportation between certain points not now served directly by Alaska Freight's vessels, found lawful.

Mark P. Schlefer, John Cunningham, and *T. S. L. Perlman* for Puget Sound Tug & Barge Company.

Alan F. Wohlstetter for Alaska Freight Lines, Inc.

Robert B. Hood, Jr., Hearing Counsel.

A. L. Jordan, Hearing Examiner.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* ASHTON C. BARRETT, *Vice Chairman;* JOHN HARLLEE, JOHN S. PATTERSON, JAMES V. DAY, *Commissioners*

BY THE COMMISSION:

This consolidated proceeding is before us following oral argument upon exceptions to the initial decision of the Examiner. Docket No. 974 is a complaint action filed by Puget Sound Tug & Barge Company (Puget Sound) alleging that it is unlawful for Alaska Freight Lines, Inc. (Alaska Freight) to substitute land haul for a portion of the water transportation on shipments originating in California and destined for Alaska (hereinafter called "substituted service"), and that Alaska Freight's tariffs, to the extent they provide for such service, should be stricken from the Commission's files. Alaska Freight answered that the complaint fails to state a cause of action, and that Puget Sound and others have tariffs on file with the Commission providing for service substantially similar to its own. It moved for dismissal of the complaint on these and other grounds.

In denying the motion to dismiss, the Commission concluded that the questions raised by the allegations and cross allegations of the parties should be determined upon a record in which the practices of both carriers in respect of substituted service were reviewed. It therefore initiated an investigation, Docket 984, to determine the extent to which these carriers transport goods by means of land haul between ports on the West Coast and in Alaska for which they publish rates as water carriers in tariffs on file with the Commission, and the lawfulness thereof under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933. The Commission's order made both Puget Sound and Alaska Freight respondents, and consolidated Dockets 974 and 984.[1]

In his initial decision the Examiner found lawful the substituted service provision of Alaska Freight's tariff (hereinafter described), dismissed Puget Sound's complaint and discontinued the investigation. The principal exceptions to this decision are taken by Puget Sound which contends, basically, that Alaska Freight's tariff violates section 18(a) of the Shipping Act and section 2 of the Intercoastal Shipping Act because neither section "authorizes the filing of rates for a through route combining land and water carrier service and because the tariff fails to comply with the requirement of those sections for the filing of all rates between points on the water carrier's own route." These are in essence the same arguments made to the Examiner. We agree with the findings and conclusions of the Examiner.

FACTS

1. Both Puget Sound and Alaska Freight have filed tariffs with the Commission as common carriers by tug and barge between

[1] After the hearing in the consolidated proceeding the State of Alaska petitioned to intervene and was granted leave to do so for the purpose of filing briefs and participating in oral argument if held. The State, however, did not file a brief or otherwise participate.

ports in the States of Washington and California and ports in the State of Alaska. Neither carrier provides vessel service to all of the ports listed in its tariffs. Alaska Freight generally calls at Seattle, Washington, and Anchorage, Alaska. Puget Sound generally calls only at the ports of Seattle and Oakland and at Seward, Alaska. Both carriers have substituted service rules in tariffs on file with the Commission. Basically, they provide that when the carrier does not make a vessel call at a port designated in the tariff, it may arrange for shipment by land carrier between such port and the port at which the vessel call will be made.

2. At one time Alaska Freight made direct barge calls to the San Francisco Bay area, but stopped in the fall of 1959 due to the then poor financial condition of the company. From then until September 1961 it handled no cargo to or from the San Francisco Bay area. Its tariff since 1958 has provided for transportation in part by land vehicle and in part by barge. Its substituted service rule as currently stated in its tariff (FMC-F No. 1, Fourth Revised Page No. 20) is as follows:

Item No. 105: The transportation to be furnished by the Company will consist in part of highway transportation by motor vehicle and in part of water transportation by unmanned barge, without motive power, to be towed by a towing vessel. Carrier may at carrier's option substitute self-propelled vessel for barges on water portion and at carrier's option may substitute rail for truck on land portion, or any combination thereof.

3. Since September 1961 Alaska Freight has booked cargo from Oakland to Alaska, and has handled an average of about 80 tons of such cargo per week. Cargo it handles from the San Francisco Bay area is moved by rail or truck to Seattle and thence by Alaska Freight barges to Alaska. These rail and motor carriers are certificated by the Interstate Commerce Commission, and Alaska Freight pays them their published tariff rates. After deducting the cost to Alaska Freight for motor or rail transportation from Oakland to Seattle, Alaska Freight receives less for the carriage of cargo which it books in Oakland than it does for the carriage of cargo, which it books in Seattle, both moving to the same Alaska destination.

4. A typical Alaska Freight shipment under its substituted service rule is as follows: A shipment of 72,100 pounds of groceries destined for Anchorage originated at Oakland, California. It was received on behalf of Alaska Freight at a trucking terminal in Oakland and was then loaded onto rail cars and moved by rail to Seattle where it was placed aboard Alaska Freight's barge

Alaska Freight then transported it to Anchorage. Alaska Freight was billed and it paid the rail freight charges at 73 cents per hundred pounds. In turn it assessed and collected freight charges at its tariff rate of $2.88 per hundred pounds for groceries from Oakland to Anchorage. If the shipment had originated in Seattle, the water rate from Seattle to Anchorage would have been $2.75 per hundred pounds.

5. Alaska Freight has the equipment to provide vessel calls in California but lacks the freight to justify same. It estimates that movements of about 800 tons would be necessary in order to make barge calls feasible. If sufficient cargo were now offered in California, Alaska Freight would make direct calls by barge and consider cancelling the substituted service rule in its tariff. Thus, it bases use of the rule upon economic considerations.

6. Since 1960 Puget Sound has regularly operated vessels to and from Oakland every two weeks. In addition, as cargo offerings have warranted, it has operated vessels to Long Beach and Stockton. To cover those occasions when vessel service was not warranted by the quantity of cargo available, it included in its tariffs provisions for land haul from Long Beach and Stockton to Oakland. Its tariffs also provided for land haul to Oakland from Los Angeles, San Francisco, Crockett and Sacramento. These substituted service rules were as follows:

Puget Sound Tariff FMC-F No. 2, Second Revised Page No. 27 —*Item No. 100:*

(g) Rates between Group 3 and points in Alaska named herein apply in connection with Willig Freight Lines between Group 3 points (See Note) and carrier's terminal at Oakland, California, when not handled to or from Group 3 points by Puget Sound-Alaska Van Lines.

Puget Sound Tariff FMC-F No. 3, Original Page No. 5—*Item No. 110:*

(g) Rates from Crockett, Sacramento, San Francisco and Stockton, California, named herein apply in connection with Willig Freight Lines and Bay Cities Transportation Company when not handled from these points by Puget Sound-Alaska Van Lines.

(h) Rates from Long Beach and Los Angeles Harbor, California, named herein apply in connection with Willig Freight Lines when not handled from these points by Puget Sound-Alaska Van Lines.

7. Under its substituted service rule in Tariff FMC-F No. 2, Puget Sound accepted cargo in the Los Angeles area at the terminal of Willig Freight Lines located at Vernon, California, and had Willig truck it to Oakland for loading aboard Puget Sound's

barge. Puget Sound paid Willig the latter's I.C.C. tariff rate for this service. The cargo moved on a through bill of lading issued by Puget Sound from Willig's terminal at Vernon to its destination in Alaska. Puget Sound has paid Willig 50 cents per hundred pounds (which is the motor carrier's freight, all-kinds rate) for the movement from Southern California to Oakland. However, the difference between Puget Sound's rate from Southern California to Alaska and its rate from Oakland to Alaska has been more or less than 50 cents, depending upon competitive factors such as particular commodity rail rates from Southern California to Seattle.

8. Under its substituted service rule in Tariff FMC-F No. 3, Puget Sound held itself out to truck shipments from Crockett, Sacramento, San Francisco and Stockton to Oakland, as well as from the Los Angeles and Long Beach area to Oakland. The substituted service was performed in the same way as described above in connection with Puget Sound's Tariff FMC-F No. 2.

9. Both Alaska Freight and Puget Sound, as before stated, issue through bills of lading covering the cargo they move by substituted service and thus assume responsibility for the cargo from the time they receive it at point of origin until they deliver it at destination. The cargo so moving on a single occasion may be that of more than one shipper. Alaska Freight, for instance, in its substituted service from Oakland sometimes has several shipments by several suppliers going to several consignees, which it consolidates and moves to Seattle in one rail car on several bills of lading.

10. Under the terms of their substituted service rules, both Alaska Freight and Puget Sound substitute trucks for water service on all shipments tendered to them at Tacoma, Washington, for Alaska delivery. The shipments move on through bills of lading, with the water carriers providing or paying for (at motor carrier tariff rates) the trucking service from Tacoma to Seattle. The shippers pay the water carriers the applicable freight rates set forth in the latters' tariffs. Both water carriers publish identical rates for transportation from Tacoma and from Seattle to Alaska destinations.

11. On March 26, 1962, shortly before the hearing herein, Puget Sound published and filed various revised tariff pages eliminating the provision for overland transportation and restricting the application of its tariff to service on direct vessel calls, except at

Tacoma. These revised tariff pages became effective April 26, 1962.[2]

DISCUSSION AND CONCLUSION

Puget Sound having discontinued its tariff provisions for substituted service, the only issue before us here is whether Alaska Freight Lines, a common carrier by water subject to the Commission's jurisdiction, may lawfully maintain its substituted service, *i.e.*, the substitution of land haul for the Oakland-Seattle portion of its Oakland-Alaska service. The issue reduces itself to the single question of whether the carrier's tariffs quoting rates for such substituted service may be lawfully filed under section 2 of the Intercoastal Shipping Act, 1933. The filing requirements of section 2 are broader and more stringent than those of section 18(a) of the Shipping Act, also cited in our order of investigation, consequently if section 2 does not prohibit the service no other provision of the Shipping Act or the Intercoastal Act would appear to do so.[3]

Section 2 of the Intercoastal Act provides in part:

> That every common carrier shall file with the Federal Maritime Board [now the Commission] and keep open to public inspection schedules showing all the 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.

Puget Sound contends that because the Oakland-Seattle portion of Alaska Freight's service is performed by land carrier, the rates filed therefor are not rates "for or in connection with transportation between points on its own route," and are thus unlawful under section 2. For the most part decisions of the Interstate Commerce Commission (ICC) regarding substituted service under the Interstate Commerce Act constitute the authority relied upon.

Neither we nor our predecessors have had occasion to construe the quoted language of section 2 in connection with a substituted

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[2] Second Revised Page 26 and Third Revised Page 27 to its Local Freight Tariff No. 2, FMC-F No. 2, and First Revised page 25 to its Container Tariff No. 3, FMC-F No. 3.

[3] The order of investigation cites in addition to section 2 of the Intercoastal Act, and section 18(a) of the Shipping Act, sections 3 and 4 of the Intercoastal Act. However, the purpose of the investigation was to determine the lawfulness of the substituted service, not the reasonableness of the level of the rates and charges involved therein, and sections 3 and 4 of the Intercoastal Act are therefore not relevant to any issue in this case.

service, and the legislative history of the Act is silent on tl specific problem here raised. We have, however, had recent occa sion to state that the primary purpose of section 2 is to achie equality and uniformity in the treatment of shippers. *Matsc Navigation Company—Container Freight Tariffs,* 7 F.M.C. 48 (1963). The language of the section say nothing abo the types of service permissible under its requirements. Whi the section assumes that the rates filed will be rates for the com mon carriage of goods by water between points on the carrier route, it does not expressly prohibit the filing of rates whi include a substituted mode of carriage over a portion of tl route. For the reasons herein stated, we will not infer such prohibition.

A brief review of the history of substituted service under tl Interstate Commerce Act reveals that the ICC allows the servi under certain principles which appear to be of general applicabi ity to interstate carriers subject to its jurisdiction. While tl substitution of one mode of transportation for anoth is not a new practice,[4] the first formal proceeding in which tl ICC considered the problems presented by substituted servi appears to have been *Substituted Freight Service,* 232 I.C.C. 68 (1939), a proceeding apparently prompted by the enactment Part II of the Interstate Commerce Act providing for the regul tion of motor carriers. The primary considerations in that ca seem to have been with the impact of the certificate and tari filing requirements imposed upon the substitute carrier by tl various provisions of the Interstate Commerce Act and with i suring full disclosure of the details of the service both to the IC and to the shipping public. The decision also made it clear th a substituted service should not be used for the total transport tion, and that an all-motor tariff must be filed where no actu rail or water haul was performed.

In the succeeding years, the ICC authorized various forms substituted service.[5] In addition to requiring that the substitu carrier be certified for his mode of transportation, *Pacific Mot Trucking Co., Extension—Oregon,* 77 M.C.C. 605 (1958), the IC

[4] For example, the ICC traces various forms of so-called "piggy-back" service backward more than a century. See *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 94-1 (1954).

[5] *Substituted Service on Livestock, Chicago, B. & O. R. Co.,* 304 I.C.C. 433 (1958), substi tion of truck for rail on carload movements; *General Commodities Between Chicago and N York,* 306 I.C.C. 243 (1959), substitution of rail for truck; *Puget Sound Truck Lines, In Extension-Substitute Service,* 66 M.C.C. 357 (1956), truck for water.

has required that the booking carrier should cleary state the names of the substitute carriers and the points between which they may be used. *Substituted Freight Service, supra; Truck Trailers on Flatcars*, 297 I.C.C. 395 (1955), affirmed on reconsideration, 298 I.C.C. 533 (1956). The ICC takes the position that where substituted service is permitted, shippers must nevertheless be accorded the option of nonsubstituted service if they desire. *Grain Flour from Twin Cities to Chicago*, 313 I.C.C. 558 (1961). Shippers, however, have not appeared concerned with the availability of such an option. They have generally participated in substituted service proceedings merely to favor and support the proposed service. *Substituted Service on Livestock*, 304 I.C.C. 43 (1958); *Puget Sound Truck Lines, Inc., Extension-Substitute Service*, 66 M.C.C. 357 (1956).

The service offered by Alaska Freight is basically the same as those approved by the ICC except that the shipper is given no option to select nonsubstituted service. In the view of Puget Sound, the lack of such an option renders defective the rates in question. In the *Substituted Freight Service* case, *supra*, the ICC found that:

> **The substitution of one form of transportation for another at the carrier's option, where the shipper otherwise directs, would constitute a breach of the contract of carriage in contravention of section 20(11) of part I and section 219 of part II; . . . (232 I.C.C. at page 691)**

The sections of the Interstate Commerce Act relied on in this decision set forth detailed provisions governing the issuance of bills of lading by rail and motor carriers. No comparable provisions are found in either the Shipping Act or the Intercoastal Act, indicating that the ICC's rationale is not relevant here. Further, we would agree that substitution "where the shipper otherwise directs" would probably breach the contract of carriage. In the case at hand, such a situation cannot arise for the tariff of Alaska Freight informs the shipper that substituted service may be provided and if the shipper books his cargo with the carrier it seems to us the contract is necessarily subject to that condition. In any case, we cannot find a contract breach in Alaska Freight's mere failure to offer the shipper the right to select all-water service from Oakland to Alaska.

There are further cited to us by Puget Sound some half a dozen decisions of the Interstate Commerce Commission interpreting the language "points on its own route" in section 6(1) of the Interstate Commerce Act which are said to be controlling here.[6] They were not cited to the Examiner, and thus not considered in the initial decision. Section 6(1) of the Interstate Commerce Act requires carriers by railroad to file schedules showing all the rates, fares, and charges for "transportation between different points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established." The cases cited involve various attempts by one rail carrier to publish and file rates from points on its own line to points on the line of another rail carrier without the booking carrier securing the concurrence of the latter. In each instance the ICC found that, without the concurrence of the second carrier, the tariff filed could not properly be designated a joint tariff, and the rates were not joint rates for a through route. No problem of joint rates is presented here and the cases are inapplicable. In connection with all of the foregoing cases, it should be noted that the ICC regulates several modes of transportation and is necessarily concerned with delineating the proper sphere of each for purposes of certification, licensing and operation. There are no certification or licensing requirements imposed upon water carriers subject to our jurisdiction, and there can be no question here of operation outside the scope of any such authority. To the extent the ICC decisions are governed by the necessity of prescribing the proper relationship between two carriers subject to the Interstate Commerce Act they are of little value to us and cannot be taken as binding precedent when this Commission adjudicates the rights and responsibilities of water carriers subject to the Shipping Act and Intercoastal Act.

The decision of our predecessor in *Intercoastal Investigation 1935*, 1 U.S.S.B. 400 (1935), also a case not called to the attention of the Examiner, is likewise urged by Puget Sound as precluding the lawful filing of Alaska Freight's rates. The portion of the Intercoastal case relied upon dealt with an improper attempt by several water carriers to establish certain joint intercoastal rates. Again, the problem in the case at hand is not one of joint rates.

The point is made that the Federal Maritime Board ruled on July 2, 1959, in a matter pertaining to Consolidated Freightways,

[6] *New York, N.H. & H.R. Co. v. Platt*, 7 I.C.C. 323 (1897); *Enterprise Transportation Co. v. Pennsylvania R.R. Co.*, 12 I.C.C. 326 (1907); *Coal Rates on the Stony Fork Branch*, 26 I.C.C. 168 (1913); *Chicago, M. & St. P. Ry. Co. v. Great Northern Ry. Co.*, 49 I.C.C. 302 (1918); *Brick Rates from Danville*, 63 I.C.C. 277 (1921); *Drayage and Unloading at Jefferson City, Mo.*, 206 I.C.C. 436 (1935); *Southern Class Rate Investigation*, 100 I.C.C. 513 (1925).

Inc., that it lacked jurisdiction of a motor carrier's joint motor-water-motor commodity rates between Honolulu, Hawaii and interior points in the United States, and the ruling is said to be controlling here. The Examiner correctly stated that as a motor carrier Consolidated Freightways was not subject to the Board's jurisdiction whereas here the filing is by a water carrier subject to the Commission's jurisdiction.

Finally, Puget Sound appears to be contending that Alaska Freight's rates are unlawful because they "fail to afford publicity, inflexibility, or unalterability to AFL's charges (*i.e.*, share of revenue) for the only transportation actually performed by it—the barge transportation between Seattle and Alaska." In addition, it is suggested that Alaska Freight partially absorbs the transportation cost, resulting in an illegal rebate to shippers. The word "charges" as used in section 2 of the Intercoastal Act can hardly be equated with the carrier's share of revenue. This would ignore the plain meaning of the remainder of the statutory language. Further, there is no evidence in the record of any rebate to shippers, nor explanation as to how any rebate is accomplished. The available evidence indicates that shippers similarly situated receive uniform treatment under Alaska Freight's rule. Nor is there in this case any issue as to discrimination.

We noted at the outset that the requirements of section 2 are designed primarily to achieve uniformity and equality in the treatment of shippers. Publication as called for in the section enables the shipper to determine what the carrier is charging him for the transportation offered and that the charges are to his competitors. *Matson Navigation Company-Container Freight Tariffs, supra.* Alaska Freight's tariff meets these requirements. However, the tariff as presently on file does not specify by name the carrier or carriers performing the substituted portion of the service nor the points between which they may be used, and we shall require that it be amended to correct these deficiencies.

Alaska Freight has shown that it previously served Oakland by vessel (barge); that it discontinued the service in the fall of 1959 because of the company's poor financial condition at that time; that it resumed booking cargo at Oakland for Alaska in the fall of 1961; and that, while this cargo has been and is inadequate to justify direct vessel service at Oakland, Alaska Freight hopes to generate enough tonnage to permit the resumption of direct service. We think this suffices to establish that Alaska Freight has a route between Oakland and Alaska destinations within the language "between points on its own route" in section 2 of the Intercoastal Act.

Moreover, the route remains essentially that of a water carrier even though for economic reasons a portion of it is presently being served by land haul which the water carrier employs. It appears to provide a valuable service to Oakland shippers. We will not destroy the service by reading into the quoted language of section 2 what is in our opinion an unwarranted prohibition. That language was adopted in connection with the imposition of a tariff filing requirement and is, we think, mainly descriptive. We therefore conclude that the substituted service rule contained in Alaska Freight's tariff, FMC-F No. 1, Fourth Revised Page No. 20, Item No. 105, is lawfully on file with the Commission under the provisions of the Intercoastal Act as well as the Shipping Act, 1916, subject of course to the changes to be made therein, as hereinbefore mentioned.

Cargo booked at Tacoma, a port city some 30 miles south of Seattle, is hauled overland to Seattle by both Puget Sound and Alaska Freight. Puget Sound has not cancelled its substituted service tariff provision in this respect. The Examiner found, as urged by Puget Sound, that the motor haul from Tacoma to Seattle is a bona fide pick-up and delivery service within the Seattle terminal area.[7] We think it unnecessary to so find inasmuch as the substituted service thus provided by both carriers seems well within the views we have expressed in validating Alaska Freight's Oakland service.

During the course of this proceeding, Hearing Counsel as well as Alaska Freight (which advanced it as an alternative) have declared that substituted service in the Alaska trade should be made the subject of a full-scale inquiry, with participation by all carriers having provisions for such service in their tariffs. We recognize that the use of substituted service may give rise to a number of problems, some of them possibly unique, but it is not clear, at least at present, that an investigation of the type suggested should be conducted. Nor has it seemed to us that resolution of the questions raised concerning Alaska Freight's substituted service between Oakland and Seattle should be deferred,

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[7] The Examiner cited *North Carolina Line—Rates to and from Charleston, S. C.*, 2 U.S.M.C. 83, 87-88 (1939); *American Trucking Ass'ns v. United States*, 17 F. Supp. 655, 657 (1936).

consequently we have examined and disposed of them in the manner above indicated. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified. An order will be entered dismissing the complaint in Docket 974 and discontinuing the investigation in Docket 984.

FEDERAL MARITIME COMMISSION

No. 974

PUGET SOUND TUG & BARGE COMPANY

v.

ALASKA FREIGHT LINES, INC.

No. 984

CERTAIN TARIFF PRACTICES OF PUGET SOUND TUG & BARGE COMPANY AND ALASKA FREIGHT LINES, INC.

DISMISSAL OF COMPLAINT (NO. 974) AND DISCONTINUANCE OF PROCEEDING (NO. 984)

This consolidated proceeding having been duly heard and submitted, and the Commission having fully considered the matter and having this date made and entered a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That Alaska Freight Lines, Inc., shall, within 30 days from the date of service of this order, amend its Tariff, FMC-F No. 1 to include in any provision authorizing the substitution of motor or rail haul for a portion of the water transportation, the name of the carrier or carriers which may be substituted for the vessels or barges of Alaska Freight and the points on its route between which such substituted carrier or carriers may be used;

It is further ordered, That the complaint in No. 974 be, and it is hereby, dismissed and the proceeding in No. 984 be, and it is hereby, discontinued.

By the Commission, March 26, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 881

General Increases in Alaskan Rates and Charges

Decided April 30, 1963

Rates, fares and charges of Alaska Steamship Company for the transportation of property by water in interstate commerce between Pacific Coast ports of the United States and ports in the State of Alaska, and also between ports within Alaska, as increased, found to be just, reasonable and lawful.

Rates, fares and charges of Puget Sound Alaska Van Lines, Inc., Alaska Northern Express, Inc., Alaska Freight Lines, Inc., and Garrison Fast Freight Division of Consolidated Freightways, Inc., for the transportation of property by water in interstate commerce between Pacific Coast ports of the United States and ports in the State of Alaska, as increased, remanded to Examiner for the taking of further evidence.

Stanley B. Long, Arthur G. Grunke, Ira L. Ewers, and *John Robert Ewers* for Alaska Steamship Company; *Alan F. Wohlstetter* and *Ernest Land* for Alaska Northern Express, Inc., and Alaska Freight Lines, Inc.; and *Mark P. Schlefer* and *Odell Kominers* for Puget Sound-Alaska Van Lines, Inc., respondents.

Malcolm D. Miller, J. H. Macomber, Jr., John Regan, and *Clarence J. Koontz* for Administrator of General Services; *Martin L. Friedman, Ralph Moody, Douglas Gregg,* and *Seymour S. Berdon* for the State of Alaska; *Calhoun Edward Jacobson* and *Richard O. Gantz* for Port of Anchorage, Alaska; *J. D. Paul* for Seattle Traffic Association; *H. E. Franklin, Jr.,* for Tacoma Chamber of Commerce; *Frank S. Clay* for Portland Freight Traffic Association; *Fred H. Tolan* for Northwest Fisheries Association, Northwest Fish Traffic Committee, and Association of Pacific Fisheries; *George W. Brooks* and *Charles Morton* for International Woodworkers of America, AFL-CIO and International Brotherhood of Pulp, Sulphite and Paper-Mill Workers, AFL-CIO; *Ed-*

ward M. Taber for Chase Brass & Copper Company, Incorporated; and *Omar O. Victor* for the United States Smelting Refining and Mining Company, Interveners.

Robert J. Blackwell, Robert B. Hood, Jr., and *Edward Schmeltzer*, Hearing Counsel.

Arnold J. Roth, Hearing Examiner.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*, ASHTON C. BARRETT, *Vice Chairman;* JOHN HARLLEE, JOHN S. PATTERSON, JAMES V. DAY, *Commissioners.*

BY THE COMMISSION:

This is an investigation to determine the lawfulness of increased rates, fares and charges for the transportation of cargo by water in interstate commerce between Pacific Coast ports of the United States and ports in the State of Alaska, and also between ports within Alaska.

Alaska Steamship Company (Alaska Steam), filed, on December 9, 1959, to become effective January 10, 1960, revised tariff schedules setting forth increased rates and charges. The new rates and charges generally amounted to an increase of 10% over those previously filed. Coastwise Line (Coastwise), applied on December 18, 1959, for permission to file, on less than 30 days' notice, revised tariff schedules to become effective January 10, 1960, setting forth increased rates and charges. Coastwise's new rates and charges also amounted to an increase of 10%. Such permission was granted on January 4, 1960. Garrison Fast Freight Division of Consolidated Freightways, Inc. (Garrison), filed on December 28, 1959, effective January 27, 1960, revised tariff schedules setting forth increased rates and charges amounting to increases of approximately 5.3% and 7.9%.

The Federal Maritime Board (Board), our predecessor, upon its own initiative, and upon a hearing concerning the lawfulness of such rates, charges, rules, regulations and practices, named Alaska Steamship Company, Coastwise, and Garrison respondents therein.

Alaska Northern Express, Inc. (Alaska Northern) filed revised tariff schedules on February 1, 1960, effective March 2, 1960, and on March 1, 1960, was made a respondent in the investigation.

Puget Sound Alaska Van Lines, Inc. (PSAVL), (Puget Sound, Tug and Barge Co.), filed on December 15, 1959, effective December 25, 1959, its first tariff schedules (Tariff No. 1, FMB-F No. 1) covering freight rates for transportation between Pacific Coast ports on the one hand and ports and points in Alaska on the other.

No order of investigation was entered prior to the effective date of the PSAVL tariffs. PSAVL by order served May 19, 1960, was made a respondent in the investigation. PSAVL's new tariffs named rates at a level generally the same as those under investigation, and were at such levels on the date of the first order in this investigation.

Petitions to intervene were granted to the State of Alaska (Alaska), the United States of America, by the Administrator of General Services (General Services) representing the executive agencies of the Government, except the Department of Defense; United States Smelting, Refining and Mining Company; the Port of Anchorage, Alaska; International Brotherhood of Pulp, Sulphite and Paper-Mill Workers, AFL-CIO, acting jointly; Chase Brass & Copper Company, Incorporated; Tacoma Chamber of Commerce; Portland Freight Association; Seattle Traffic Association; Northwest Fisheries Association; Northwest Fish Traffic Committee; and the Association of Pacific Fisheries.

At the time of the prehearing conference before an Examiner on March 2, 1960, it was announced by the presiding Examiner, on the basis of correspondence with him, that Coastwise would not participate because it had recently withdrawn its services from the trade. After prehearing conference, Alaska Northern acquired the stock of Alaska Freight Lines, Inc. (Alaska Freight), which thereafter adopted Alaska Northern's tariff schedules and assumed Alaska Northern's position as a respondent in the investigation. Hereinafter, the term "Freight Lines" will be used to designate the operations of these carriers. Garrison did not participate in the proceedings.

After hearing, Examiner Roth issued an initial decision in which he found that:

1. The increased rates of Alaska Steam, Coastwise, Garrison, and Freight Lines, named in tariff schedules specified in the orders entered herein, have not been shown to be just and reasonable for the future. An order should be entered requiring cancellation of the tariff schedules naming the increased rates under investigation, and discontinuing the proceeding as to these respondents.

2. The increased rates as specified are not shown to have been unjust, unreasonable, or otherwise unlawful during the pendency

of this proceeding. The provisions of the orders instituting this investigation that respondents shall keep account of all freight moneys received by reason of the increased rates, and make refund of any increased charges in excess of those determined to be just, reasonable, and otherwise lawful, should be vacated and set aside as unjustified on the record.

3. The rates of Van Lines are unjust and unreasonable for the future to the extent that they exceed the rates maintained by Alaska Steam on January 9, 1960, but are not shown to have been unjust, unreasonable, or otherwise unlawful for the past. An order should be entered requiring this respondent to cease and desist from continued maintenance of the rates found unlawful for the future.

4. Individual rates of the respondents, to the extent assailed, have not been shown to have been or to be unjust, unreasonable, or otherwise unlawful, except as specified above.

Oral Argument was held upon exceptions to the initial decision of the Examiner.

Alaska, which achieved statehood on January 3, 1959, occupies a vast area of 586,400 square miles, and is sparsely populated. Total population in 1960, including military personnel stationed in Alaska and their dependents, was about 225,000, most of whom, except in the Fairbanks area, are concentrated in the coastal areas. Anchorage, the largest city, has a population of about 44,200, with about 40,300 additional living within 30 miles. Fairbanks is about half the size of Anchorage, and the remaining cities range downward in size from Ketchikan and Juneau, the capital, with populations of about 11,000 and 10,000, respectively. Generally, the various coastal areas are not connected by highway or rail, and the State is therefore largely dependent upon transportation by water or air. The Alaskan coastline is about 26,000 miles long, and service to the widely scattered small population centers located along this coastline is thus difficult and expensive.

Prior proceedings have referred to the difficulties and hazards inherent in providing water transportation service in the Alaskan trade.[1] There is an exceptionally large number of small ports to be served. In 1959, for example, Alaska Steam's vessels made 736 calls at 64 different ports. However, only about 13 of the ports

[1] See *Alaskan Rate Investigation*, 1 U.S.S.B. 1 (1919); *Alaskan Rates*, 2 U.S.M.C. 558 (1941); *Alaskan Rate Investigation No. 2*, 3 U.S.M.C. 43 (1948); *General Increases in Alaskan Rates and Charges*, 5 F.M.B. 486 (1958).

are served regularly the year round, the remainder being served only during the summer months or during the salmon season. Cargo movement in the trade is highly seasonal, and severely unbalanced. Of the total cargo handled by Alaska Steam in 1958 and 1959, only 23.7 percent moved southbound, and Freight Lines estimates that its southbound cargo is only about 14 percent of northbound cargo. In the same years, 74 percent and 72 percent, respectively, of the cargo of Alaska Steam moved in the period April-October, inclusive, with the peak movements occuring in the months of June, July, August, and September. At the small ports, berthing accommodations are poor, making operations costly. There are navigational hazards because of ice, wind, fog, shoals, and strong tides in narrow passages, but there is no indication in the record of recent casualties due to these causes, and in any event the navigational risks are diminished by the use of modern navigational aids such as radar which have been added to the vessels and claimed as assets devoted to the trade, and the risks are covered by insurance the cost of which is charged to the trade. It is contended that perhaps the most serious problem of the regulated carriers in the trade arises from the fact that any carrier may enter or leave the trade at will, giving rise to so-called "hit-and-run" competition, and from the fact that in the case of large blocks of cargo moving to particular areas, shippers tend to resort to the use of tug and barge operators under contract. More than 130 carriers have, at one time or another, been engaged in the trade and have subsequently failed or withdrawn, as in the case of Coastwise as indicated above.

Alaska Steam is the only carrier serving all areas of Alaska, and together with its predecessors Alaska Steam has provided such service continuously for 65 years. It is the only respondent which presented comprehensive evidence in support of its rates under investigation. It operates a fleet of 14 vessels, consisting of 7 owned Liberty type vessels, 2 of which were acquired in 1959, 4 owned C1-MAV-1 type vessels, and 3 C1-MAV-1 vessels chartered from the Maritime Administration, the latter of which are utilized principally during the peak season, and remain under charter in an off-hire status when laid up during the off season, Alaska Steam being responsible for all lay-up and maintenance expenses. A fourth C1-MAV-1 vessel, previously chartered by Alaska Steam, was unused and in lay-up status from September 18, 1958, to November 19, 1959, and was returned to the Maritime commodities and (2) the terms and provisions of Matson's sugar tariffs and Waterman's sugar tariff. (Docket No. 935)

SPECIFIC RATES

(a) *Sugar.* One of the principal issues in this proceeding is the effect of Matson's revised rates on bulk raw sugar. As of December 3, 1958, the rate to Crockett, California, was $10.35 a ton, Matson assuming loading and discharging costs. This was the equivalent of a rate of $7.85 where the shipper assumes cost of loading. On the above date, following negotiations between the parties, the rate was reduced to $6.09 a ton, with the shipper paying costs of loading. This resulted in a diminution to Matson of about $3,000,000 in annual net revenue. The rate was further reduced to $4.18 a ton in July 1960, the shipper assuming loading and discharging costs. This meant an additional reduction of $263,000 in annual net revenue. The State and Public Counsel maintain that the rates were not arrived at as the result of arm's length negotiation, the former contending that the rate presently should be no lower then $10.35 and the latter urging that a reasonable rate would be $5.30, free in and out. Under the State's basis Matson would have to credit to itself approximately $2,704,000 in added revenues for rate purposes for 1961, whereas under Public Counsel's basis the revenue credit would be $818,000.

In 1958, 1959 and 1960, nine of Matson's 18 directors were associated with four companies which owned in 1958 approximately 40 percent of Matson's stock. The $10.35 and $6.09 rates were made during this period. As of December 1959, the four companies owned 73.6 percent of the stock. C & H is a nonprofit agricultural cooperative marketing association, the patrons of which are the growers of most all Hawaiian sugar cane. The patrons are 27 plantations and about 1,200 cane farmers cultivating single farms. Matson's four largest stock holders have a beneficial interest in Hawaii's sugar production of slightly more than 50 percent. About 90 percent of C & H's stock is owned by the plantations controlled by these four companies. Each patron has a marketing contract with C & H to deliver his sugar for marketing by C & H; the latter deals with all patrons on an equal basis. C &H owns a refinery at Crockett, near San Francisco, with an annual capacity of 780,000 tons. The refinery competes with beet sugar companies in the western and midwestern parts of the mainland, as well as with raw sugar from foreign companies, the transportation costs for the latter being lower than the costs of Hawaiian producers.

The Hawaiian sugar industry was in a serious financial condition in 1956. As the industry had paid approximately $14,000,000 as ocean freight in 1955, it was decided by C & H to conduct a study of the costs of storing and moving raw sugar to the mainland. It engaged McKinsey & Company, Inc. (McKinsey), a management consulting firm, to make the study. With the full cooperation of the industry, McKinsey was engaged in the task through 1957 and half of 1958.

In three reports, McKinsey estimated that Hawaiian sugar could be moved efficiently to the Crockett refinery by using two "jumboized" T-2 tankers, at a saving of approximately $3,100,000 a year. This estimate was based on a transportation cost of $5.78 per short ton. In furtherance of the three reports, McKinsey was authorized to explore more fully the cost of operating the proposed vessels. Maryland Shipbuilding & Drydock Company, which had had experience in jumboizing vessels, prepared a report which concluded that the plan was feasible. McKinsey conducted a computer study to analyze the storage and movement of raw sugar to Crockett, assuming the use of jumboized vessels. The storage cost was established, the availability and costs of the tankers were determined, and estimates of conversion were obtained from Maryland Shipbuilding.

During 1957 and 1958 Matson was informed of the study being made and was given copies of McKinsey's findings. Comments and criticism were invited. Matson's first proposed rate reduction was not agreeable to C & H, and Matson was advised that (1) the sugar industry considered the McKinsey report realistic, (2) the industry was determined to reduce its transportation costs, (3) the industry was prepared to make arrangements for proprietary or contract carriage, if necessary, in order to secure realistic rates, and (4) if Matson was interested in the sugar traffic it would have to submit a competitive proposal.

Negotiations between Matson and C & H continued. A Matson memorandum criticizing the McKinsey studies as unrealistically optimistic was made available to C & H. The criticisms were rejected, but meetings between C & H, Matson, sugar representatives, and McKinsey followed. These produced no results. The sugar representatives then submitted to a report to C & H, which included revisions in costs, and in which it was concluded that the proposed system could operate at an average cost of $5.70—$6.10 per short ton. The estimate included loading and discharg-

Garrison is a non-vessel-owning common carrier [2] in the Alaskan trade. The cargo handled by it is entirely containerized, in cargo vans owned by Arctic Terminals, Inc., and the water service between Seattle and Alaska is provided by Alaska Steam pursuant to Agreement No. 8173, as amended, approved by the Board under section 15 of the Shipping Act, 1916, 46 U.S.C. 814. The rates of Garrison, concurred in by Alaska Steam, apply between Seattle and ports and interior points in the rail belt of Alaska, and include pickup and delivery. Interior transportation in Alaska is provided by motor vehicle or by the Alaska Railroad. Little evidence was presented concerning the operations of Garrison, and no evidence in justification of its rates under investigation was presented. Revenues of Garrison amounting to $15,227,056 received during the period January 1, 1957, through March 1960 were distributed under a division arrangement, with $4,838,755 or 31.78 percent going to Alaska Steam, $333,765 or 2.19 percent to Terminal Company, $2,075,297 or 13.63 percent to the Alaska Railroad, $2,090,782 or 13.73 percent to Arctic Terminals, Inc., $5,676,-911 or 37.28 percent to Garrison, and the remainder to Valdez Dock Co. and to Garrison to cover cargo insurance. The amount to Arctic Terminals, Inc., apparently covers the rental of containers and associated equipment, and does not appear on the records of any respondent as an expense. In 1958 and 1959, Alaska Steam received $1,258,854 and $2,027,280, respectively, as its share of Garrison revenues from northbound and southbound military and commercial cargo. Effective January 10, 1960, the divisions to Alaska Steam were substantially increased, the increases ranging from 16 percent on fresh meats to 45 percent on numerous categories of general dry cargo.

Freight Lines provides a twice-weekly barge and van service between Seattle and Alaskan ports in the rail belt area. One weekly sailing calls at Anchorage except that in the winter when the Anchorage port is inaccessible the call is made at Seward. The other weekly sailing calls the year around at Valdez. In addition, a new service was inaugurated between Portland, Oregon, and Anchorage, and one sailing was held in this service prior to the hearing, utilizing chartered space on a barge otherwise operating in private carriage. Regular monthly service will be offered at Portland if the operation is financially and operationally successful. Freight Lines made no direct showing in justification

[2] See *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245 (1961)

of its rates under investigation. However, witnesses and operating data were made available to Hearing Counsel, through whose presentation the evidence of record was submitted. As in the case of Garrison, the rates of Freight Lines apply between continental ports and ports at interior points in the Alaskan rail belt area, and include pickup and delivery. Transportation within Alaska is provided generally by motor vehicle, except that when Alaska highways are closed to truck movement piggy-back service of the Alaska Railroad is utilized. Freight Lines is presently owned principally by persons engaged in construction or other businesses in Alaska, who utilize that carrier for their shipments whenever feasible.

PSAVL provides a weekly barge and van service between Seattle and Seward, and twice-monthly sailings between San Francisco and Seward, with calls at Whittier for military cargo as required. It is a wholly-owned subsidiary of Puget Sound Tug and Barge Company, a contract carrier in the Alaskan trade and a common carrier in the intercoastal trade between California and Pacific Northwest ports, which in turn is jointly owned by Drummond Lighterage Company and Cary Davis Tug and Barge Company. PSAVL did not participate voluntarily in the proceeding, and the evidence of record concerning its operations was secured by means of a *subpena duces tecum* issued by the presiding Examiner. Between April 1958 and January 1960 Puget Sound Tug and Barge Company, as contract carrier, provided transportation for the cargoes of Coastwise Line originated in California and destined to Alaska, which were transshipped at Seattle, presumably in lieu of the interchange arrangement between Coastwise Line and Alaska Steam discussed in *General Increases in Alaska Rates and Charges, supra,* at pages 488-9.

The last prior general rate increase in the Alaska trade, of 15 percent, became effective in full in April 1958, and was found just and reasonable by the Federal Maritime Board in *General Increases in Alaska Rates and Charges, supra.* The respondents do not rely upon any particular cost increases occurring since that time in justification of the increased rates here involved. Alaska Steam shows that longshore wages have increased 11.5 percent at Pacific Coast ports and 6.1 percent at Alaskan ports. On the other hand, costs for standard bunker fuel oil decreased from $3.25 per barrel in June 1957 to $2.40 in March 1959 and to $2.375 in December 1959; and costs for P.S. 300 fuel oil decreased from $3.05 per barrel to $2.9925, in December, 1959.

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Table I below shows the total cargo [3] carried by Alaska Steam in the Alaskan trade in the years 1955-1959, and that projected by it for 1960, and the number of vessel voyages completed or projected during the same period.

TABLE I.—*Cargo and Voyages of Alaska Steam*

	1955	1956	1957	1958	1959	Projected 1960
Cargo ------	514,301	532,214	481,411	482,202	461,000	472,392
Voyages ----	173	169	161	163	176	184

Table II below shows a breakdown of the 1958 and 1959 cargo carryings of Alaska Steam by direction and by type of cargo.

TABLE II.—*Cargo of Alaska Steam by Direction*

	Northbound		Intermediate		Southbound	
	1958	1959	1958	1959	1958	1959
Commercial ---------	264,108	278,090	6,933	3,889	114,215	76,875
Military ------------	74,562	79,780	—	—	15,663	14,268
Mail ---------------	5,739	6,997	13	9	969	1,092
Totals ----------	344,409	364,867	6,946	3,898	130,847	92,235

Table III below shows the latest information of record concerning the northbound and southbound carryings of Alaska Steam during the first 7 months of 1960, as compared with the same period in 1959. The Garrison cargo listed reflects the commercial cargo handled by that carrier and transported by water by Alaska Steam under the arrangement referred to above, and also the cargo handled in the same fashion by Garrison for agencies of the Department of Defense under military tender rates. The final hearing session in the proceeding was concluded on December 6, 1960.

In the periods shown in Table III, interport Alaskan cargo was relatively stable but insignificant, being 2,280 tons in 1959 and 2,087 tons in 1960. Total tonnage handled in the first 7 months was 232,832 tons in 1959, and 258,898 tons in 1960, reflecting a 11.1 percent increase in 1960 over 1959, as compared with the 2.5 percent increase for the full year 1960 projected by Alaska Steam as shown in Table I.

[3] In this report, cargo tonnage is shown in payable tons, i.e., tons as freighted on a weight or measurement ton basis.

TABLE III.—*Alaska Steam Tonnage First 7 Months of 1959 and 1960*

	NORTHBOUND		SOUTHBOUND	
	1959	1960	1959	1960
Commercial	140,501	153,507	17,011	19,359
Garrison	28,789	30,426	1,795	1,367
Military	32,542	35,801	5,778	11,017
Mail	3,630	4,548	506	786
Totals	205,462	224,282	25,090	32,529

DISCUSSION

The Examiner rejected Alaska Steam's cargo projection of 472,-392 tons for the year 1960, concluding that Alaska Steam carryings would amount to 511,000 tons or some 38,600 tons more than projected by it. Alaska Steam excepted to the Examiner's conclusions.

In rejecting Alaska Steam's projection the Examiner pointed out that Tables II and III indicate an increasing trend in Alaska Steam's northbound carryings, and that during the first 7 months of 1960 Alaska Steam's total cargo increased by 29,153 tons over the same period in 1959, or about 2.5 times the amount of increase predicted by Alaska Steam for the entire year. The Examiner found that the tonnages of commercial and military cargo for the first 7 months of 1960 exceeded those of the same period in 1959 by 12.6% and then projected this rate of increase over the full year and arrived at a total of 519,086 tons, or 46,694 tons more than projected by Alaska Steam, and 59,086 tons more than carried by Alaska Steam in 1959. However, taking into consideration certain factors, and allowing for competition, the Examiner projected Alaska Steam's 1960 tonnage at about 511,000 tons or 38,600 tons more than the increase projected by Alaska Steam. While the Examiner may have been correct in his projection for the year 1960 certain facts in the record show that 1960 was to be a better than average year for cargo carryings in the Alaskan trade. These factors are:

1. A prediction was made that there would be an exceptionally large salmon pack in Bristol Bay based on evidence then available as of August 1, 1960; at the time of the hearing there was evidence that in southeastern Alaska the salmon run in 1960 was the lowest since records had been kept, but in other areas averages were well up including Bristol Bay where a large increase was shown—an increase of 17,967 revenue tons as of July 27, 1960; and,

2. A large movement of MSTS cargo during the summer and fall of 1960 after the Navy withdrew three ships from service in the Alaskan trade. In the Bristol Bay area, if the salmon pack was as large as it appeared it might be in July, 1960, it could be surmised that the added local income would create a demand for merchandise to be shipped northbound, which would also increase 1960 carryings.

The above would create a temporary increase for 1960 which we do not believe represents a steady level of carryings for the future.

In Docket No. 828 it was shown that Alaska Steam's revenue tons carried fluctuated, but declined generally from 690,626 revenue tons in 1949, with the exception of a peak year in 1951 resulting from the Korean War. The first year shown in this record was 1955 when 514,301 tons were carried. In 1958, 482,202 tons were carried and in 1959, 461,000 tons were carried. For 1960 respondent projected 472,392 tons. The evidence in the record points to the fact that while the population and economy of Alaska might be increasing somewhat, participation by Alaska Steam in Commerce is not. A variety of inhibiting factors was shown in the record:

1. Competition by water carriers with different forms of transportation, i.e., barge transportation is increasing.

2. M.S.T.S. cargo would decrease as a result of decreased military activity.

3. The Fairbanks area was actively trying to divert parcel mail deliveries to trucks causing a probable loss of this cargo in the future.

4. The use of highway motor carriers would increase.

5. Construction material carryings in connection with the defense early warning system line had been completed.

6. There has been some direct importation into the Anchorage area from foreign countries of steel pipe, and building materials; and,

7. No industrial expansion was foreseen in Ketchikan.

8. Generally, conditions in the trade are changing and it is not possible to see clearly any expanding factors as far as Alaska Steam's service is concerned, although some off-setting factors in favor of respondent were shown.

However, certain off-setting factors are present:

1. Service has been improved by Alaska Steam through the addition of voyages which, however, have increased expenses with no corresponding increase in cargo;

2. Alaska Steam has started some container service which promises economies in operations.

Thus, on the basis of the entire record before us we find that the projection of Alaska Steam of 472,392 tons more closely approximates the reasonably expectable level of future carryings than does the Examiner's projection, restricted as it was to the single better than average year 1960. Accordingly, we will base our determinations on cargo carryings by Alaska Steam of 472,392 tons.

Table IV below shows the result of its operation in the Alaskan trade claimed by Alaska Steam for the years 1958 and 1959, and the constructed results for 1960.

TABLE IV.—*Operating Results Claimed by Alaska Steam*

	1958	1959	1960 Constructed
Revenues	$15,718,157	$16,185,665	$17,673,521
Expenses	14,848,824	15,992,656	17,140,098
Net before Income Tax	869,333	193,009	533,423
Estimated Income Tax	452,053	100,365	277,380
Net after Tax	$ 417,280	$ 92,644	$ 256,043

The revenues projected for the year 1960 include actual revenues for the first 5 months of the year, estimated revenues based upon the cargo projection for the last 7 months of the year, and $1,253,533 attributable to the rate increase here involved as applied to commercial cargo, which became effective on January 10, 1960. Expenses for that year are based upon actual expenses for the first 5 months, actual expenses for the last 7 months of 1959 adjusted to include expenses of $557,107 for 6 additional voyages required during the last 7 months of 1960 to bring the total voyages up to the 184 projected for the year and also adjusted to reflect for the last 7 months of 1960 increased costs of $304,071 due to crew and stevedoring wage increases not reflected in the 1959 figures, and constructive increases added to reflect for the full year 1960 wage and other cost increases occurring or expected to occur during the year.

The Examiner at the outset disallowed interest on vessel mortgages in the amounts of $31,582 in 1958 and $33,070 in 1959 and no exception was taken to this action, with which we agree.

The Examiner disallowed as operating expense, deposits in the Skinner Trust of $39,620 in 1958 and $10,500 in 1959. The Trust was shown to be a depositary of charitable donations by the affiliated companies in the Skinner holding company system, and recipients of donations therefrom are all recognized objects of charitable contributions. Since charitable donations have been recognized as justified if for the public good, as these are, we will recognize expenses for charity as eligible expenses chargeable to the shipping public and allowable for rate-making purposes. The Examiner's exclusion of expenses for contributions is reversed.

The Examiner allowed expenses for unfunded liability portions of payments into the Skinner Pension Fund Reserve, amortizable over a period of ten years. Payments by Alaska Steam for such costs were $94,784 in 1958 and $70,900 in 1959. Pension payments are in the nature of wages and constitute a present benefit to employees; and, the use of a ten-year period of amortization for computation of unfunded liability, being allowed for tax purposes, seems to us to be a reasonable exercise of management's discretion. The exception to the allowance of this expense is rejected.

The Examiner allowed certain inactive vessel expenses, incurred because of the need to lay-up some ships during the winter months when activity in the Alaskan service is diminished, or of the need to take ships out of Alaska service, for other reasons, and also made pro rata allocations of inactive vessel expense to charter service in recognition of the fact that the ships were chartered to others, when not used in Alaska service. The Examiner reduced expenses by disallowing $3,312 in 1958 and $8,479 in 1959.

We do not agree that charter service should bear part of inactive vessel expenses and the Examiner's reduction of vessel lay-up expense on this account is reversed. We recognize that by chartering its vessels as charters became available during the off season, Alaska Steam has thereby reduced the inactive vessel expense which would otherwise have accrued. To further reduce the remaining inactive vessel expense by an allocation to the charter operations does not appear to us to be either appropriate nor in accordance with sound accounting practice.

The Examiner allowed inactive vessel expenses for the *Palisana* from September 18, 1958 to December 31, 1958 in the amount of $7,359, but disallowed such expenses from January 1, 1959 to November 19, 1959 in the amount of $24,313 because in 1959 the ship was not used or useful in the Alaskan trade. In March 1959 two ships the *Nenana* and *Talkeetna* were purchased to supplant the *Palisana*. The lay-up expense, however, is a non-recurring one and its inclusion in predicting Alaska Steam's results under the increased rates would unduly distort such results.

Certain other pre-inaugural expenses for the same two newly acquired ships were incurred in early 1959 in the amount of $117,-477 for expenses required to fit them for the Alaskan service. The Examiner disallowed pre-inaugural expenses on the ground that they were capital costs rather than expenses. Alaska Steam, however, distinguished between its capital costs of $24,325 and the balance which was described as for maintenance and repair work. There was no evidence to show the work was not maintenance and repair. The Examiner simply relied on the fact that work was done before the ships were put in service as a basis for classifying the expenses as capital costs. It is not proper to convert maintenance and repair work into capital improvements, just because the work was done before putting the ships into service and for the purpose of making them suitable for Alaskan service. More evidence than the timing and purpose of the work was needed, but not supplied, by those urging the contrary. The exceptions to the Examiner's exclusion of this amount is sustained.

The Examiner also allowed inactive vessel expenses for the *Coastal Monarch* of $8,736 in 1958 and $23,195 in 1959. The winter layup in 1958 is a normal incident of the trade and the inactive status of the ship in 1959 was caused by declines in cargo handled, and we agree that the allowance of expenses was proper.

Exception was taken to the Examiner's allowance of an expense of $20,000 to replenish the reserve for redelivery expenses which had been depleted by about $18,400 to defray redelivery expenses for the *Palisana*. Since the redelivery expense would be allowable, there is no abuse of discretion in first using reserve funds and then later restoring funds to the reserve which were used for this purpose. The exception to the Examiner's action is rejected.

Depreciation expense was claimed on the basis of a 20-year life for all ships in Alaska Steam's fleet except the *Nenana* and the *Talkeetna* to which a 25-year life was assigned. We agree with the Examiner that the vessels owned by Alaska Steam have been extensively modified to fit them for the Alaskan trade, and accordingly are not ordinarily adaptable for use in other trades without reconversion. They are United States Maritime Commission-built ships, which are durable according to the testimony of Alaska Steam's expert witness on ship valuation and vessel reproduction costs, and which with proper maintenance will sail for as much as 30 years. Alaska Steam provides for regular maintenance and repair of its vessels, the cost of which is charged to the Alaskan trade. Despite the fact that most of the vessels were built in 1944, and are nearing the end of a 20-year life, the record is devoid of any indication that vessel replacement is contemplated by Alaska Steam in the foreseeable future. Since 1951, capitalized improvements costing $876,974 have been added to the vessels, many of them required for the containerized service, and a number of these were made in 1958 and 1959 which would, on the basis of a 20-year vessel life, be depreciated over short periods ranging from 36 to 60 months. Alaska Steam has assigned to the vessels salvage values which appear to represent minimum scrap values, and in some instances no salvage values whatever, an indication that it intends to utilize its vessels for the fullest term possible. In the case of the *Nenana* and *Talkeetna,* Alaska Steam is already taking depreciation on a 25-year life, and the record discloses no reason why similar depreciation practices should not be followed with respect to the remainder of the fleet.

Depreciation accounting is a system of accounting which aims to distribute the cost or other basic value of tangible capital assets, less salvage, over the estimated useful life of the unit in a systematic and rational manner. The predictions of estimated use life of the assets must meet the controlling test of experience, otherwise the amounts charged to operating expenses for depreciation are excessive, and to that extent users of the regulated service are required to provide, in effect, capital contributions, rather than amounts representing the consumption of capital on a cost basis. It is clear on this record that the minimum vessel life reasonably attributable to the fleet of Alaska Steam is 25 years. Accordingly, the adjustments to Alaska Steam's depreciation charges contended for by the State of Alaska as stated above are necessary. Allocation of a portion of depreciation expenses to offshore charter services is proper as a part of the cost of such services.

In 1958 Alaska Steam, as a carrier in the Alaskan trade, participated in a joint venture to provide transportation service for the Department of Defense between points in California and Washington and certain isolated points in Alaska, for the purpose of supplying defense installations. The transportation services necessary included a combination of land, water, and barge services which could not have been supplied by any one of the joint venturers individually. Alaska Steam credited to the Alaskan trade for that year revenues equal to the normal tariff charges on the items handled by it, but failed to credit to the trade $138,036 of additional profits earned under the joint venture.

Profits from the unregulated non-common carrier service in a joint venture contract operations are not a recurring item in Alaska SS Co.'s operation. While some days are devoted each year to this so-called off-shore service, principally in connection with the Department of Defense shipments, the periods each year are quite variable and the amount of revenue unpredictable. Inclusion of such amounts as are profits or losses would distort common carrier tariff income in the revenue projections by such unrelated operations in non-common carrier services; hence the $130,000 figure used by the Examiner will not be included in our revenue projections, nor credited to respondent's revenues. The exception to the Examiner's inclusion of such profits is sustained.

The Examiner excluded from 1958 and 1959 revenue experience, used in his projection for 1960, amounts received by Alaska Steam from insurers representing amounts due in excess of actual expenses incurred in repairing the *Coastal Monarch* from fire damage. The exclusion was proper since this too is a non-recurring item, the inclusion of which would distort results designed to project as near normal a year as possible for rate purposes.

The Examiner in line with our decision in *Atlantic & Gulf-Puerto Rico General Rate Increase*, 7 F.M.C. 87 (1962), credited to the regulated trade profits realized from terminal and management operations performed by affiliates of Alaska Steam. The exception to this action is rejected.

With regard to profits of affiliates we have established the principle of protecting the shipping public "from the siphoning-off of revenues by affiliates of the regulated carrier." *Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates*, 7 F.M.C. 260 (1962). This principle exists without regard to the claimed reasonableness of the charges, because the usual buyer-seller conflict does not operate freely where closely related companies deal with each other. Gains to one side of the buyer-seller equation are necessarily reflected in losses to the other before a contract is closed in the usual negotiation. Concessions of interest between the parties are necessary here and there in reaching a contract, but where the parties are subject to common control or one dominates the other by effective control through legal affiliation the negotiation is distorted so as to require unnecessary concessions by one side to the other. The resulting price serves as a poor measure of value for use as a factor in deciding on the reasonableness or justness of rates. The contract in question with Alaska Terminal is a perfect example of such distorted bargaining and of the reason for the principle. Alaska Steam, reasonably assured of its cost from approved rates, has made generous concessions to Alaska Terminal by negotiating a "cost-plus" contract. Charges are not fixed, but are based on costs, and the contract contains escalation clauses which cause an assured profit at shippers' expense regardless of changes in costs to Alaska Terminal. Any profit goes to the Skinner Corp., which effectively controls both the bargaining parties. The leases of office space and wharf and other property from Arctic Terminals and Ketchikan Wharf Co., also affiliates of Alaska Steam, are subject to similar infirmities. The ascertainable profits of $107,211 after taxes derived by Alaska Steam's affiliate under the Skinner Corporation holding company, Alaska Terminal and Ketchikan, will be added to revenues by a credit to Alaska Steam's net profit after taxes.

As a result of the foregoing we have found the estimates of Alaska Steam as to its 1960 revenues based on projected cargo carryings at the proposed new rates are reliable and probative. After making no additions to revenues for joint venture profits and disregarding the Examiner's additional traffic projections as not supported by the record, the amount of such estimated revenue is found to be $17,673,521.

Revenue	$17,673,521
Voyage Expense	14,507,060
Net	3,166,461
Administrative and General Expense	1,648,465
Depreciation	363,644
Inactive Vessel Expense	402,684
Total	2,414,793
Net Income before Federal Income Tax	751,668
Federal Income Tax	385,367
Net Income after Income Tax	366,301
Profits of Related Companies	107,211
Net Income	$ 473,512

Alaska Steam claims $21,130,417 as a rate base as of December 31, 1959, the approximate date upon which the rate increases here involved became effective, consisting of $8,991,862 for owned and chartered vessels valued at the average of net book value and reproduction cost depreciated; $1,020,693 as the fair value of other owned property and equipment having a net book value of $306,-827; $1,072,893 representing the net book value of container vans and associated equipment owned by the Alaska Railroad used in the service of Alaska Steam, and one-half of the net book value of similar equipment owned by Arctic Terminals, Inc.; $508,059 as the fair value of terminal equipment owned by Terminal Company of which the net book value is $106,193; $5,410,117 as the fair value of the pier and equipment owned by the Port of Seattle and leased by Terminal Company, having a net value on the books of the Port of Seattle of $2,544,783; $3,331,226 as working capital computed on the basis recognized by the United States Maritime Commission in *Alaskan Rates*, 2 U.S.M.C. 558, 566-7, 639, 644-6; and $795,567 as going concern value representing 10 percent of the claimed value of owned assets.

In *Atlantic & Gulf-Puerto Rico General Increases in Rates and Charges*, 7 F.M.C. 87 (1962), we held, with respect to common carriers by water in interstate commerce as defined in the first section of the Act, operating between the United States and Puerto Rico, (a) that the cost of property "used but not owned by the carriers should not be included in the rate base," (b) that we would "utilize the prudent investment standard to determine the fair value of property being devoted to the service of the public in the domestic offshore trades", and (c) that working capital should be an amount approximately equal to one round average voyage expense of each ship in the service. The facts here regarding the Alaska trade are so similar to those in the Puerto Rico trade as to justify following these principles and applying them to Alaska Steam. Both trades involve regularly scheduled steamship service from the mainland of the United States to nearby areas served by unsubsidized ships of U. S. registry engaged in ocean transportation. The Alaska service is more seasonal, requires some irregular service to many ports in outlying areas of Alaska, and is more hazardous in many respects than Puerto Rico service, but respondent's long experience in the trade has enabled it to provide a relatively stabilized service with an established nucleus of owned property devoted to the trade. Its many years of experience have enabled Alaska Steam to adjust its rates and insurance coverages to the risks involved. The differences are not sufficient to justify different treatment of the valuation of the rate base property. The Hawaii trade is also similar, and we have applied such a test to carriers in that trade too. *Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates,* 7 F.M.C. 260 (1962). The respondent has a substantial investment in assets which it owns and which are used and useful in providing service to the shipping public and on which respondent is entitled to earn a just reasonable return. Only owned property will be considered for inclusion in the rate base and the claimed "going concern" value will be excluded. Expenses in the form of rent or charter hire of ships are allowable charges to shippers for non-owned property but shippers should not, in addition, pay for a return on such property where no investment is at stake. Going concern value is value built up by developmental outlays charged to operating expenses and paid for by previous shippers over the developmental years. To grant seasoned companies such as respondent a right to continue earning a return on going concern value as though it were an existing investment is an unfair form of double charging against shippers. The working capital rule of the *Puerto Rico* case is equally applicable. We have established as the measure of what a regulated carrier is entitled to for working capital in the rate base an amount equal to one round average voyage expense of each ship in the service. Such a measure has been found to provide adequate amounts to meet the need which arises from the time lag between payment by carriers of expenses and receipt of payment for services in respect of which the services are incurred. In a regulated business such as respondents where rate increases can lag behind cost increases, or where existing rates must provide for temporarily unprofitable operations, the need to provide a substantial reserve exists. Other factors affecting this generalized measure of judgment are the rate of working capital turnover, the seasonality of the business, which here is extreme, and the credit terms on which service is rendered. Accounts receivable of respondent in 1959 were over half its current assets. It is noted that Alaska Steam had a December 31, 1959 working capital consisting of an excess of current assets over current liabilities of $1,578,106. The amount of working capital needed for these purposes cannot be determined with exactitude, but in our judgment the one round average voyage expense rule has proven satisfactory and is adopted for this respondent. Such a rule produces $902,004.

Depreciation as noted above will be accrued after December 31, 1957 on the basis of a 25-year life for Alaska Steam's entire fleet.

After reflecting the foregoing revisions in Alaska Steam's figures, we find the following as regards respondent's rate base as of December 31, 1959.

Vessels—Original Cost Plus Betterments	$6,270,762
Less Accumulated Depreciation	2,455,183
Net	3,815,579
Other Shipping Property and Equipment	306,827
Terminal Property Owned by:	
Alaska Terminal & Stevedoring Co.	140,283
The Ketchikan Wharf Co.	58,138
Working Capital	902,004
Total Rate Base	$5,222,831

Just and reasonable rates should provide enough out of revenues from the regulated service to meet all allowable expenses of providing service, including the cost of acquiring or retaining the capital needed to provide service. We have recognized that regulated carriers should be permitted, through charges to shippers, to meet all actual legitimate costs of rendering service in the regulated trade and consistency seems to require that in allowing a respondent rates sufficient to cover its total recognized costs, the costs of capital or earnings required to retain capital in the business or to reward owner-managers should be one of these. An actual cost measure should be used as far as possible throughout the rate-fixing process, including the cost of capital. Under this method the level of earnings needed to pay interest on respondent's notes and to pay dividends adequate to give stockholders a return comparable with other investments having a comparable risk should be allowable. One test of fairness of the rate of return is its ability to accomplish this capital attracting or capital retaining function.

The record on this subject contains only the testimony of two witnesses on behalf of respondents and the documents they relied upon which were admitted as exhibits. These show their testimony that a rate of return within the range of 15 to 20 percent was necessary on the amount of equity capital required and employed to perform the Alaska service. In their opinion the capital attracting function would be performed, in the light of the risks of the Alaskan trade and business conditions in transportation to Alaska, if such a return were achieved by investors.

Respondent's securities evidencing its investment in ships are not sold in the market for securities; accordingly, there is no evidence of any market place valuation of the required dividend returns on such investment. Expert testimony had to be taken as the next best available guide.

Comparisons with a public stock offering of Lykes in 1958 and Pacific Far East Lines in 1955 showed, with regard to Lykes, a cost of 20.89% and a rate of return on net tangible assets of 9.26% and, with regard to PFEL, a cost of 26.60% and a rate of return on net tangible assets in 1958 of 5.06% and over a period from 1954 to 1958 an average of 14.76%. The method of valuing net tangible assets was not shown. Some infirmities in respondent's method of arriving at this data was shown and the evidence in this record on the rate of return is admittedly meagre, but, it is acceptable. Intervenors did not produce any opposing witnesses or evidence or testimony for our consideration. We conclude on this record that rates which produce a return of 9.07% are not unjust or unreasonable.

Alaska Steam excepts to the Examiner's failure to use an operating ratio test of lawfulness of the rates. The operating ratio test of justness and reasonableness of rates is not applicable where, as here, the regulated carrier has a substantial investment in property used and useful in providing service. The test has been uniformly rejected in such cases. *General Increase in Alaskan Rates, supra; Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.* This method is sometimes used when it is impracticable to determine investment values or where the regulated carrier has no capital investment in transportation property, but this is not a factor in regard to Alaska Steam.

The Examiner was correct in refusing to consider the operating ratio as a measure of the justness and reasonableness of Alaska Steam's rates.

The Examiner referred to our precedents affirming the principle that the dominant carrier in a non-contiguous domestic trade will be taken as the rate-making line, citing decisions, and concluded that such a principle "was promulgated for use in this trade." Our past decisions were not rules promulgated for use in this trade, but were based on the facts of those proceedings. The facts in this case show that the rate-making carrier test is not applicable. Alaska Freight provides barge service twice weekly between Seattle and Tacoma, Washington and Anchorage or Seward, Alaska, and offers voyages from San Francisco. Statistics and data concerning Alaska Freight's rates, schedules and tonnages are in the record, but there is no detailed information concerning its rate base, revenues, expenses and returns. Alaska Freight took the position that the proper level of rates in the Alaska trade is determinable from an examination of the operations of Alaska Steam.

Garrison operates no ships and the record contains no property valuation or other evidence of its rate base, revenues, expenses and return, nor did Garrison file any briefs herein.

PSAVL makes one departure each Saturday from Seattle to Seward, using three specially built barges for van containers. PSAVL provides no service to the rest of Alaska. Alaska Steam provides service by self-propelled ships carrying miscellaneous cargo. In the first six months of 1960 Alaska Steam carried 86,240 revenue tons of Seward area cargo and all the PSAVL, Coastwise and Alaska Freight respondents carried 73,633 revenue tons. PSAVL carried 26,067 revenue tons; Coastwise, 9,381 revenue tons; and Alaska Freight, 38,185 revenue tons. The latter carrier respondents do not serve other areas of Alaska. The difference in services offered by these carriers and the lack of any dominance in the amount of tonnages carried in the areas where they are competitive justify the exclusion of any rate making carrier theory.

The exception by PSAVL that the rate making carrier theory is inapplicable is sustained.

The record herein is insufficient for us to reach any conclusions as to the justness and reasonableness of the rates of Garrison, or Alaska Freight, or PSAVL. A determination as to the rates of these respondents must be made since our conclusions are that the rates of Alaska Steam do not control the rates for the different service of Garrison, Alaska Freight or PSAVL.

We conclude that this proceeding should be remanded to the Examiner for further hearing, and, in order that the full record herein shall contain probative and substantial evidence sufficient for the Commission to make valid determinations as to the lawfulness of the rates under investigation, respondents should produce at such further hearing, or make available to interveners and Hearing Counsel, such original and underlying books, records, accounts, and worksheets, including corporate profit and loss statements and balance sheets, as are required to determine the probative value of the evidence, the accuracy of computations and allocations between regulated and nonregulated activities, if any, and the scope and accuracy of corporate transactions. Further, there should be full disclosure of data with respect to any sales or transfers of corporate assets which would be relevant and material in determining accurately the fair value of properties and assets devoted to this Alaskan service.

The proceedings as to respondent Alaska Steam shall be dismissed.

No conclusions are reached as regards to the rates of Coastwise in view of the fact that it ceased to operate before the hearing was closed and the proceedings will be discontinued as regards Coastwise.

The exceptions of the General Services Administration (1) that the initial decision improperly raises the question of the authority of the Commission to order reparation in a proceeding instituted on its own motion is disposed of by our ultimate conclusion approving Alaska Steam's rates and eliminating the need for reparation.

We conclude:

(1) That the increased rates of Alaska Steam subject to this proceeding are just, reasonable, and lawful since their effective date and during the pendency of this proceeding; and

(2) That there is insufficient evidence to make any findings on the justness, reasonableness and lawfulness of the rates of Garrison, Alaska Freight and PSAVL.

An order will be entered.

FEDERAL MARITIME COMMISSION

No. 881

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on April 30, 1963, having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found (1) that the proposed rates, charges, tariffs, and regulations of respondent, Alaska Steamship Company, herein under investigation, are just, reasonable and lawful; (2) that the proposed rates, charges, tariffs, and regulations of respondents, Puget Sound Alaska Van Lines, Inc., Garrison Fast Freight Division of Consolidated Freightways, Inc., and Alaska Freight Lines, Inc., should be subject to further investigation; and (3) that Coastwise Line has withdrawn its services from the Alaskan trade;

It is ordered, That this proceeding be and it is hereby, discontinued as to respondents, Alaska Steamship Company and Coastwise Line, and remanded to an Examiner for further investigation with respect to rates of respondents, Puget Sound Alaska Van Lines, Inc., Garrison Fast Freight Division of Consolidated Freightways, Inc., and Alaska Freight Lines, Inc.

By the Commission, April 30, 1963.

(Signed) THOMAS LISI
Secretary

775-794 O-63-39

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 262

LUTCHER, S. A.

v.

(COLUMBUS LINE) HAMBURG-SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK

Permission granted to respondent to waive collection of undercharges of freight on certain shipments of Lutcher, S. A. from New York to Santos, Brazil.

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER [1]

This is an application under Rule 6(b) of the Commission's Rules of Practice and Procedure, filed December 18, 1962, for permission to waive collection of undercharges of freight on the following shipments of paper pulp machinery from New York to Santos, Brazil in January, February, and March 1962.

Bill of Lading Number	Freight Computed At Regular Tariff Rate	Freight Charged At Project Rate	Undercharge
55	$ 851.60	$ 599.40	$ 252.20
64	12,339.09	9,050.45	3,288.64
45	1,918.58	1,774.38	144.20

On the shipments covered by B/L Nos. 55 and 64, the higher rate under the regular tariff of the River Plate and Brazil Conference on file with the Commission was charged initially and paid to respondent, the carrier, for the account of Lutcher, S. A., the consignee. The excess of that tariff rate over the project rate was later refunded to Lutcher by respondent. In the case of the

[1] This decision became the decision of the Commission on May 7, 1963. See Rules 13(d) and 13(h), Rules of Practice and Procedure, (46 C.F.R. 201.224 and 201.228).

shipment under B/L No. 45, the lower, project rate was charged initially.

The member lines of the River Plate and Brazil Conference, acting jointly through the Conference, offer special rates to shippers of various kinds of machinery to be used in the construction of industrial projects by the shippers, such cargoes being non-commercial in the sense that they are not for resale by the shipper prior to the proprietary use for which the machinery is intended. In keeping with this practice, the Conference chairman negotiated with representatives of Lutcher, S. A., beginning June 1, 1961, and, prior to the time of the shipments in question, advised them that they would be charged the project rate on the shipments involved here.

On January 2, 1962, a new statute came into force that for the first time required water carriers in the foreign commerce of the United States to file with the Commission tariffs showing all their rates and charges. (Section 18(b), Shipping Act, 1916, as amended.) In the confusion incident to the Conference getting its various tariff schedules on file under the then new statute, they failed to file the page of the tariff covering paper pulp machinery until shortly after the dates of the shipments in question. The tariff (Correction No. 354, Original Page No. 534, River Plate and Brazil Conference Tariff No. 12) was filed on April 24, 1962.

The statute prevents the charging of rates not on file at the time of the shipment. Technically, then, respondent probably violated the statute. I say "probably" because an argument might be made that the charging of the project rate might have been justified under Page No. 505 of Tariff No. 12 covering project rates on power plant machinery to Santos, or even Page No. 507 covering pulp paper machinery to Buenos Aires (being in the same rate range with Santos). Viewing the situation in its worst light the shipments in question fell between the other tariffs, that were then in effect, through mere oversight. In such circumstances, the Commission alleviates the burden that would fall upon an innocent shipper, if the higher tariff rate were charged, by granting permission to repay an excess freight charge or waive collection of an undercharge due to such oversight. *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, 7 F.M.C. 62 (1962). This waiver does not absolve the carrier from its violation of the Shipping Act. *Martini and Rossi* v. *Lykes Bros. Steamship Co., Inc.*, 7 F.M.C. 453 (1962). It merely shields the carrier from a charge of having violated the Act by failure to collect the undercharge.

There is no question that the parties acted in good faith. Mr. Edward F. Hawkins, Senior Tariff Examiner on the Commission's staff, testified that this Conference is one of the most meticulous in following the tariff filing requirements. No discrimination will result as between Lutcher and other shippers if the application is granted, because there were no other shippers of similar equipment on applicant's vessels during the period in question. The shippers to nearby ports received the benefit of project rates, so the granting of the relief requested will actually tend to eliminate a possible discrimination, rather than cause one.

An order will be entered granting the application, as amended.

SPECIAL DOCKET NO. 262

LUTCHER, S. A. v. (COLUMBUS LINE) HAMBURG-SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK

NOTICE OF EFFECTIVE DATE OF DECISION AND ORDER AUTHORIZING WAIVER OF UNDERCHARGES

No exceptions having been filed to the Initial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on May 7, 1963.

It is ordered, That the application of Columbus Line to waive certain undercharges be, and it is hereby, granted.

By the Commission, May 7, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 1065

ALEUTIAN MARINE TRANSPORT COMPANY, INC. — RATES FROM, TO, AND BETWEEN SEATTLE, WASHINGTON AND PORTS IN ALASKA

Rates from, to, and between Seattle, Washington and Alaska ports found to be just and reasonable. Order should be entered discontinuing the proceeding.

Niels Peter Thomsen, President of Aleutian Martin Transport Company, Inc., for respondent.

Harold L. Witsaman and *Robert J. Blackwell*, Hearing Counsel.

INITIAL DECISION OF A. L. JORDAN, EXAMINER[1]

On August 2, 1962, the Commission ordered an investigation, under the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, into and concerning the lawfulness of the rates, fares, charges, rules, classifications, regulations, and practices contained in respondent's tariff schedule naming freight rates from, to, and between Seattle, Washington and Alaska ports designated as FMC-F No. 4 effective February 16, 1962.

Notice of investigation and hearing was published in the FEDERAL REGISTER of August 16, 1962. Hearing was held December 10, 1962, at Seattle, Washington. No one intervened in the proceeding. The State of Alaska filed an informal protest by letter but did not participate in the hearing. On motion of Hearing Counsel, not objected to by respondent, the record in FMC Docket No. 990, *Alaska Livestock & Trading Co., Inc.* v. *Aleutian Marine*

[1] This decision became the decision of the Commission on May 7, 1963. (Rules 13(d) and 13(h) Rules of Practice and Procedure, 46 C.F.R. 201.224, 201.228).

'ransport Company, Inc., 7 F.M.C. 387 (1962), was incorporated nto the record of this proceeding.

?espondent's Service

Respondent operates as a common carrier between Seattle Vashington, Seward, and Kodiak Island and Alaska Peninsula .nd Aleutian Island ports, and locally between ports on Alaska 'eninsula, Kodiak Island and Aleutian Islands. This service, ince July 1, 1961, has been performed by use of one wooden hull 'essel, the *M. V. Expansion* of 544 gross tons, 278 net tons or .0,000 cubic feet. It has reefer capacity of approximately 230 neasurement tons. The vessel can also accommodate 12 passen- ;ers. The passenger operation is limited primarily to the sum- ner months. The general cargo operation is conducted year round on a regular schedule with a 26-day turnaround. In addi- ;ion to its freight and passenger operations respondent maintains ı store on the *Expansion* selling merchandise at the various orts along the Aleutian Chain. Prior to use of the present *Ex- ansion* respondent had operated for seven years another *Ex- ansion*, about half the size of the present one, directly between Seward and the Aleutian Islands, not serving Seattle.

Respondent's general cargo operations are substantially unbal- anced. Outbound from Seattle the *Expansion* carries all types of general cargo and some Government cargo. Inbound there is ittle cargo available; most of it, during the summer months, be- .ng carried by Alaska Steamship Company (Alaska Steam). Re- spondent has attempted to attract frozen crab and other frozen seafood products as back-haul cargo with limited success, but nas averaged only about five tons of dry cargo per voyage south- bound.

Respondent operates under a mail contract with the Post Office Department in accordance with 39 U.S.C. 487(a) which authorizes the Postmaster General to enter into a contract for the carriage of mail between Seward and the Aleutians and which provides that the contractor shall "furnish and use in the service a safe seaworthy boat of sufficient size to provide adequate space for mail, passengers, and freight". Respondent carries mail between Seward, Kodiak Island, and the Aleutian Islands, Alaska. The current contract provides for an annual payment to respondent in the amount of $190,000, and expires on June 30, 1963. Carriage of the mail under the contract, while obviously essential to the area served, is not so extensive that the mail itself would physically constitute a substantial tonnage per voyage, the average per voyage for the past two years being a little more than three tons.

Table No. 1 below shows the amount of cargo carried by respondent during the calendar years of 1961 and 1962, in tons.

TABLE NO. 1		1961	1962
Seattle to Alaska and	general cargo	520	1649
Aleutian Islands	cold storage	108	175
Between Alaskan ports	general cargo	628	400
Aleutian Islands and	mail	42	34
Alaska to Seattle	general cargo	20	60
	cold storage	350	982
Totals		1668	3291

The rate increase

A comparison of the present tariff with the one it superseded shows that the commodity rate increases involved in this proceeding are between 10 and 13.6 percent, depending on the number of items compared, and including corresponding increases in the N.O.S. rates. As to the latter only a few items were changed. As to these, respondent does not generally carry an appreciable amount and the shift was primarily to simplify the tariff rather than to increase the rates.

Respondent based its rate increases on the inclusion of marine insurance coverage. Under its former rates the shipper purchased the marine insurance. Inclusion of the cost of such insurance now in the ocean freight results in lower overall charges to the shipping public because the shipper cannot acquire the insurance as cheaply as the carrier.

R. F. Dreitzler & Company (Dreitzler) which specializes in marine insurance and acts as the marine insurance broker for respondent explained that, because there are inadequate insurance facilities in Alaska, Alaskans allow shippers in Seattle to purchase cargo insurance and they in turn pass the charges on. Previously the available insurance coverage was not all-risk insurance although many Alaskans may not have understood this. There also exists the misconception on the part of Alaskans that when shipments are made there is an all-risk assumption by the carrier. According to Dreitzler, Alaska Steam, the principal carrier in the Alaska trade, recently adopted an all-risk assumption bill of lading which affected respondent directly, because Alaska Steam had all-risk coverage under its bills of lading, i.e. all-risk cargo insurance provided by the carrier and included as a part of the freight charges, but shippers utilizing respondent's vessel had to purchase insurance separately. Further, shippers patronizing both Alaska Steam and respondent also found that they had to pay a higher insurance premium on shipments via respondent's vessel than formerly because the volume of cargo that respondent's underwriters would be insuring had been diminished by the cargo moving under the Alaska Steam all-risk bill of lading and the insurance rates increase as the volume of cargo underwritten decreases.

Shippers also faced the problem that when they utilized respondent's vessel, they could not obtain all-risk insurance on cargo carried aboard a wooden hull vessel.

Dreitzler discussed these problems with respondent and various underwriters and successfully negotiated an all-risk cargo insurance policy which covered cargo carried by respondent at a premium approximately 50 percent of what it would cost the individual Alaskan shipper even though the all-risk policy was considerably broader in coverage. The initial annual premium of $22,000 for this all-risk policy was computed on the basis of the value of the estimated tonnage that would be carried in that period. At present the carrier pays a premium of $5.25 for each ton shipped.

Dreitzler informed respondent that, on the basis of projected tonnage, it would have to raise its freight rates 12-13 percent to meet the added cost of the premium on this insurance. This increase would also cover losses under a deductible feature of the policy, i.e. $1000 per voyage. Respondent did not desire to increase its rates by more than 10 percent. However, according to Dreitzler's calculations a 10 percent increase would just about cover the premium, but would not be sufficient to offset losses under the deductible. Rates in some cases were increased more than 10 percent. Without calculating the exact tonnage moved and revenues developed as a result of the increase, a fair inference may be drawn that the actual rate increases approximate that recommended by Dreitzler to cover respondent's insurance premiums and the losses under the deductible.

In 1962 respondent adopted a marine cargo insurance policy which provides shippers with all-risk cargo insurance under the bill of lading. The freight rate increases involved in this proceeding were instituted to cover the added cost of this insurance and the revenue developed from these increases corresponds within reasonable limits to the premium for this insurance plus losses that may reasonably be anticipated under the deductible provision of the policy. This new insurance program provides shippers with greater insurance coverage than they can obtain individually at a substantially lower cost. Therefore the benefits accruing to shippers are unquestionable; they receive greater insurance protection for substantially less money.

Reduction in wool rate

Although this proceeding primarily involves a general rate increase respondent has reduced its rate on wool since the proceeding was instituted. There are only two shippers of wool from the Aleutian Islands to Seattle via respondent's vessel. They each ship about 100 bags of wool a year, or a total for both shippers of approximately 40 short tons. Last summer respondent discussed the wool rate with one of the two shippers and it was agreed that the rate would be reduced about 50 percent if carried on deck under a canopy. This rate does not appear to be fully compensatory, but it covers out of pocket costs, including insurance coverage, with some contribution towards respondent's other expenses. Considering the value of the service to the wool shippers in the remote area involved, the infrequent shipments of wool, and the fact that respondent is making an over-all profit as later shown, the reduced rate on wool is not unreasonably low. *Investigation of Increased Rates on Sugar, Refined or Turbinated in Bags in the Atlantic/Gulf Puerto Rico Trade* 7 F.M.C. 404 (1962).

Rates and services of other carriers

Alaska Steam calls at three or four of the major ports served by respondent, during the summer months. Kimbrel Launch Transportation Company operates the *Western Pioneer* from Seattle to practically all the ports served by respondent. Neither carrier provides year round service comparable to that offered by respondent. Respondent is also the only water carrier carrying mail to the Aleutian Islands.

Alaska Steam's rates are lower in many instances than respondent's rates, but the two carriers are considerably different in size and operate different types and number of vessels and their operations in general are completely dissimilar. While the record furnishes little information about the operation and rates of other carriers in this trade, none is sufficiently similar to those of respondent to make a valid comparison of rates.

Respondent's future operations

Respondent believes its mail contract which expires June 30, 1963, will not be renewed, and that the mail will go by air carrier instead of water carrier. In this case respondent plans to discontinue its common carrier operations and convert the *Expansion* into a fishing vessel and use it in the crabbing and fishing industry in Alaska. If the mail contract is renewed, respondent nevertheless plans on going into the crab business in Alaska so as to create its own back-haul from Alaska to Seattle. Moreover, if the mail contract is renewed, respondent plans using a smaller vessel, the former South-East Alaska Mailboat *Fairbanks* under charter, in the mail service. This vessel is 59 feet long, has cargo carrying capacity of 40 tons, can carry 6 passengers, and is operated by a crew of two men. Respondent proposes, if awarded a mail contract, to operate the *Expansion* between Seattle and the Aleutian Islands as heretofore for a minimum of eight trips per year, and at least on a bi-monthly schedule during the winter months. Regular monthly sailings would be made from Seattle from May through September. The *Fairbanks* would make the other four trips of the Seward to Nikolski route whenever there is insufficient freight to justify the sailing of the *Expansion* from Seattle, and in cases of emergency should the *Expansion* be delayed in her schedule due to weather, necessary ship repairs or annual dry-docking.

Financial Results

The present *Expansion* was built in 1946. Respondent purchased it from the State of Alaska in March or April 1961 for $61,121.11 less towing engine sold for $1,600.00; or

Hull	$ 30,560.56
Engine	28,960.55
Outfitting and Improvements	153,047.77
Total	$212,568.88

Outfitting and improvements were necessary for the vessel to pass Coast Guard inspection. The hull as outfitted and improved may be depreciated on a 10-year basis, and the engine may be depreciated on a 5-year basis.

Respondent's fiscal year ends on September 30th. In its statement of earnings respondent shows income and expenses for fiscal 1961 and 1962 in summary (details in Exhibits 5 and 6) as follows in Table No. 2.

TABLE No. 2.—*Statement of Earnings*

1961		Income		1962
$238,711.58		Mail contract		$198,643.23
23,708.50		Passengers		40,654.49
40,252.22		Freight		164,612.40
1,653.36		Wharfage & Hauling		8,558.01
10,422.44	41,689.77	Barter sales	31,659.05	12,378.79
	31,267.33	Less Cost of sales	19,271.26	
$314,748.10		*Total Income*		$424,855.92
271,815.86		*Operating Expenses*		409,793.60
42,932.24				15,062.32
39,941.18		*General & Administrative Expenses*		43,394.36
2,991.06		*Operating Profit (loss)*		(28,332.04)
		Other Income		
468.76		Interest income		0
1,279.98		Gain on sale of bonds and equipment		0
199.15		Miscellaneous		1,067.37
0		Gain on sale of boat		20,531.13
4,938.95				(6,733.54)
		Other Charges		
5,107.53		Interest expense		12,826.41
1,199.45		Expense of idle equipment, including depreciation of $580.00 for 1961, and $1,019.45 for 1962		1,297.05
(1,368.03)		*Net Earnings (loss)*		(20,857.00)

Respondent has inappropriately included in operating expenses for 1962 an item in the amount of $85,998.57 for depreciation of vessel and amortization of outfitting costs of the present *Expansion* over the 2-year life of the present mail contract. The appropriate amount for this item is $24,152.78. That is, $3,056.00 for the vessel hull on a 10-year life basis, $15,304.78 for outfitting on a 10-year basis, and $5,792.00 for engine on a 5-year basis. The difference, therefore, in the amount applied by respondent and the appropriate amount is $61,845.79. This results in a write-off of $61,845.79 in 1962 and is directly related to the net loss shown by respondent for that year.

Respondent, however, was not in a loss position on September 30, 1962, as shown in Table No. 2. This loss, as before stated resulted from an extremely accelerated write-off of the outfitting costs of the present *Expansion.* While it may seem logical to respondent to depreciate these costs over the two-year life of the mail contract, these expenses, as before stated, were necessary to outfit the vessel and to meet Coast Guard inspection requirements which are not restricted to vessels carrying mail. An accurate and reasonable write-off of these costs would correspond to the life of the hull which is depreciated realistically at ten years. A reasonable life of the engine for depreciation allowance is five years.

Respondent also inappropriately lists a nonrecurring gain on the sale of a capital asset as part of its earnings for the year ended September 30, 1962. This was the gain on the prior *Expansion* and amounted to $20,531.13.

Under "other charges" in 1962, respondent inappropriately includes an item of "interest expense" in the amount of $12,826.41. *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges,* 7 F.M.C. 87, 113 (1962). Also under "other charges" in 1962, respondent inappropriately includes expense of idle equipment, including depreciation thereon, in the amount of $1,297.05.

Adjusting respondent's statement of earnings for 1962 to reflect the findings above, excluding, because not explained, an item under "other income" noted as "miscellaneous" in the amount of $1,067.37, respondent's operations in 1962 resulted in a gross profit of $33,513.75 instead of the losses claimed by respondent in Table No. 2.

The following table, No. 3, reflects the accurate financial results of respondent's 1962 operations.

TABLE NO. 3.—*Income Statement Year Ended September 30, 1962*

Revenue	$424,855.92	
Operating Expense	322,416.33	
Depreciation	25,531.48	
	347,947.81	
Administrative and General Expense	43,394.36	
	391,342.17	
Gross Profit	33,513.75	
Less: Federal Income Tax	11,927.00	(1)
Net Profit	21,586.75	
Rate Base	234,514.44	(2)
Rate of Return	9.20%	

(1) $33,513.75 @ 52% = $17,427 less 5,500 = 11,927.00

(2) see Table No. 4 below

Table No. 4 shows respondent's rate base in accordance with the prudent investment standard adopted by the Commission in *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.*

TABLE NO. 4.—*Rate Base September 30, 1962*

Vessel—Original Cost plus Betterments	$212,568.88	(a)
Less: Accumulated Depreciation	12,076.50	
Net	200,492.38	
Other Equipment Devoted to Trade	4,606.76	
Working Capital	29,415.30	(b)
Total Rate Base	234,514.44	

(a) see page 7.

(b) Average Voyage Expenses.

While operating revenues increased during fiscal 1962 to $424,-855.92 from $314,748.10 for the same period in fiscal 1961, wages and other operating expenses also increased substantially. An added expense for 1962 was the insurance premium for the recently instituted all-risk cargo insurance.

No separation or allocation is made of mail cargo revenues and expenses, for the mail tonnage moved is not in proportion to the amount paid under the mail contract. The statute authorizing the mail contract contemplates more than mail service to be furnished under the contract and in effect is a subsidy which helps to provide over-all common carrier service to the area involved. It is obvious that but for the revenue respondent derives from the mail contract the service here involved could not be profitably maintained.

Based upon the calculations shown in Tables 3 and 4 respondent's rate of return for fiscal 1962, after taxes, was 9.20 percent. It is found that such rate of return is not excessive.

ULTIMATE CONCLUSION

Upon consideration of the foregoing it is found and concluded that respondent's rates here under investigation from, to, and between Seattle, Washington and Alaska ports are just and reasonable. An order should be entered discontinuing the proceeding.

FEDERAL MARITIME COMMISSION

No. 1065

ALEUTIAN MARINE TRANSPORT COMPANY, INC. — RATES FROM, TO, AND BETWEEN SEATTLE, WASHINGTON AND PORTS IN ALASKA

NOTICE OF EFFECTIVE DATE OF DECISION AND ORDER DISCONTINUING INVESTIGATION

No exceptions having been filed to the Initial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on May 7, 1963.

It is ordered, That this proceeding be and it is hereby, discontinued.

By the Commission, May 7, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 265

LYKES BROS. STEAMSHIP CO., INC. APPLICATION FOR AUTHORITY TO REFUND IN PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA SS HARRY CULBREATH FROM DURBAN, SOUTH AFRICA, TO HOUSTON, TEXAS

Decided June 4, 1963

Application of Lykes Bros. Steamship Co. to refund certain overcharges pursuant to Rule 6(b) granted.

Terriberry, Rault, Carroll, Yancey & Farrell for applicant.

Charles E. Morgan, Hearing Examiner

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman;* ASHTON C. BARRETT, *Vice Chairman;* JOHN HARLLEE, JOHN S. PATTERSON, JAMES V. DAY, *Commissioners.*

BY THE COMMISSION:

Lykes Bros. Steamship Co., Inc. (Lykes) filed an application pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure for permission to make a partial refund of freight on a small shipment of water fosfatefedders from Durban, South Africa, to Houston, Texas, in October 1962.

The shipment consisted of five cartons, weighing 500 pounds and measuring 60 cubic feet (or 1.5 measurement tons). At the time there was no specific rate on water fosfatefeeders (or on agricultural implements) in Lykes' tariff covering the South Africa/Gulf Trade, and accordingly freight at the cargo N.O.S. rate of $66.00 per ton weight or measurement was collected from the shipper, Aero Marine, Ltd. (Aero). The total collected was $99.00.

Aero had made a previous shipment of water fosfatefeeders in March 1962, and was charged at the rate of $28.00 per ton, which was the rate listed in the applicable tariff covering the Gulf/South Africa (or outward) trade. Lykes' inward tariff at the time provided in effect for this same rate. It stated that the outward rate would be applied whenever a particular item was not shown, as was true of water fosfatefeeders. However, subsequent to March 1962, Lykes was advised by the Commission to file rates for the inward trade separate from those for the outward trade. The inward rates were filed but, because movements of fosfatefeeders and other agricultural implements were rare in the inward trade, these items were not listed. This omission led to the $99.00 N.O.S. rate being charged Aero, as aforesaid.

Lykes contends only $42.00 should have been charged, based on the $28.00 rate, and seeks permission to refund the $57.00 difference.

The application was denied by the Examiner on the grounds (1) that "applicant has not met its burden of proof . . . requiring that it show that the applicable tariff rate as charged was unlawful", and (2) that the application is technically defective under Rule 6(b), because the shipper failed to file a concurrence to the application.

We disagree with the Examiner and will grant the application for the partial refund. Aero's concurrence was filed May 23, 1963, after the Examiner's decision, and we can see no objection to accepting it despite the tardiness in complying with the requirement of Rule 6(b).

Turning to the merits of the application, Lykes states that except for its inadvertent omission in failing to cover agricultural implements when the separate inward rates were filed, it would have filed the same $28.00 rate that had theretofore existed. Since Aero had recently paid the $28.00 rate, it calculated the freight for the shipment in question on that basis. Whether or not this was a justified assumption, the shipper had no reason to expect freight to be charged at a rate more than 130 percent greater than it had recently paid to move the same item. Failure to file the proper rate was due solely to the error of the carrier, and under the circumstances we do not think the burden of this should fall on the shipper. No other shipment of fosfatefeeders was made during the relevant period (except for Aero's shipment in March 1962) and the granting of this application therefore will not result in any discrimination.

Contrary to the Examiner's theory of the case, the fact that the rate charged is not shown to be unjust, unreasonable or otherwise unlawful is not determinative of an application under Rule 6(b). *Martini & Rossi* v. *Lykes Steamship Co., Inc.*, 7 F.M.C. 453 (1962). As in that case, the relief sought here will relieve an innocent shipper of the consequences of the carrier's failure to file a proper rate.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 265

LYKES BROS. STEAMSHIP CO., INC. APPLICATION FOR AUTHORITY TO REFUND IN PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA SS HARRY CULBREATH FROM DURBAN, SOUTH AFRICA, TO HOUSTON, TEXAS

The Commission has this day made and entered a report stating its findings and conclusion herein which report is made a part hereof by reference. Accordingly,

It is ordered, That the application of Lykes Bros. Steamship Co., Inc., to refund certain overcharges is hereby granted.

By the Commission, June 4, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 884

UNAPPROVED SECTION 15 AGREEMENTS—JAPAN, KOREA, OKINAWA TRADE

DENIAL OF MOTION TO STRIKE STATEMENT OF HEARING COUNSEL

The Examiner has certified to the Commission his denial of a motion by respondent Maersk Line to strike a part of a "Statement of Issues and Contentions" submitted by Hearing Counsel during the course of these proceedings. It is the contention of Maersk, joined in by the other respondents, that the Statement of Issues and Contentions (the Statement) unduly broadens the issues in this proceeding as to Maersk Line. In certifying his ruling, the Examiner states the following questions are presented:

(1) Are Hearing Counsel precluded from subsequently raising issues not specifically raised by them at a prehearing conference, where all such issues are within the scope of the Commission's order of hearing and investigation?

(2) In this particular case, has the manner and circumstances in which Hearing Counsel have raised issues not specifically raised at the prehearing conference deprived Respondent of due process and a fair hearing?

The Statement in question consists of a list of contentions as to the activity of respondents during the period under investigation, and assertions that the activity constitutes certain violations of the Act. An Appendix to the Statement relates each exhibit in the proceeding to one or more of the contentions made in the Statement. The Statement was not required by any rule of procedure of the Commission, directed by the Examiner, nor was it requested by the respondents. In Hearing Counsel's words:

> The purpose of this statement is [among other things] * * * to apprise Respondents of the issues and contentions which Hearing Counsel shall argue on brief in order that Respondents may have fair opportunity to prepare and conduct their rebuttal case.

The gravamen of Maersk's motion is that the present statement "broadens the investigation or the issues as compared with contentions made by Hearing Counsel at the Prehearing Conference," and to that extent respondents argue that the Statement should be stricken. By his prehearing statements, Hearing Counsel attempted clarification of the specific areas he would explore under the Order of Investigation instituting this proceeding. We have had occasion to comment on such statements in the recent past. In Docket 882, *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962), the respondents made frequent demands for particularization of the "charges" against them, and in response to these demands, the Examiner required Hearing Counsel (then Public Counsel) to furnish on two separate occasions detailed statements of the "charges" or "violations" which Hearing Counsel intended to urge. Concerning these statements we said:

> It is apparent that in demanding the aforesaid statements from Public Counsel respondents were seeking to have him in effect modify the issues of fact and law stated in the Board's orders of investigation, whereas only the Board could have done so. Public Counsel neither initiated nor was responsible for the contents of the orders and he could not amend them. If respondents believed them lacking in any respect, their recourses were solely to the Board. 7 F.M.C. 159, at 166.

The Order of Investigation defines the scope of this proceeding and respondents are charged with notice of all issues within its scope. Any statements by Hearing Counsel regarding the issues in a proceeding of this kind are at best tentative assertions of the matters he intends to assert and prove. The issues and contentions raised by Hearing Counsel in the present statement, to whatever extent they depart from his prehearing statements, are clearly within the scope of the Order of Investigation initiating this proceeding, and if respondents believed the Order of Investigation defective they should have petitioned the Commission for its modification.

It is important to note that respondents have not put on their rebuttal case, indeed they even deferred cross-examination of Hearing Counsel's witnesses until the completion of his case. Coming as it did before respondents are called upon to present their side of the issues, we are unable to view Hearing Counsel's Statement as anything but an unexpected windfall to respondents. However, this is but another example of the confusion and misunderstanding which seems always to be the result of these statements and we remain of the view that they should be discontinued. See *Unapproved Section 15 Agreements—South African Trade*, *supra*, at 167.

If, as respondents contend, they now need additional time for the preparation of their defense, they should seek such additional time reasonable in the circumstances from the Examiner. We think it clear that respondents have in no way been prejudiced by the Statement, much less denied due process.

In view of the foregoing we answer both of the questions presented in the negative. The ruling of the Examiner is affirmed and respondents' motions are denied.

By the Commission, March 14, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Special Docket No. 264

Lykes Bros. Steamship Co., Inc.—Application for Authority To Refund in Part Freight Charges Collected on Shipment by the SS Charlotte Lykes from Houston, Texas to Le Havre, France

Permission granted Lykes Bros. Steamship Co., Inc. to refund freight charges on certain NATO shipments.

Walter Carroll of New Orleans for Applicant.

INITIAL DECISION OF E. ROBERT SEAVER, EXAMINER[1]

Lykes Bros. Steamship Co., Inc. (Lykes) applied on January 11, 1963 for an order authorizing the voluntary payment of reparation to A. G. Valcke and Co. as agent for NATO Maintenance, Services, and Supply Agency, NATO Supply Center Chateauroux, France (hereinafter referred to as Shipper). The application was amended on March 22, 1963 so as to supply additional data required by the Examiner. The Shipper concurs in the application. Applicant seeks to refund $2,982.20 to the Shipper, representing the excess freight charges on a shipment of combat vehicle repair parts from Houston, Texas to LeHavre, France on May 18, 1962, covered by a bill of lading dated May 18, 1962.

Until the shipment in question was made, equipment of the type involved here had not moved in this trade that was destined for the Bordeaux/Dunkirk range. It had been shipped, theretofore, to the Antwerp/Hamburg range. For this reason, the controlling tariff (Gulf/French Atlantic Hamburg Range Freight Conference Tariff No. 9) omitted, by inadvertence, a commodity rate on such equipment. The tariff contained an item for such equipment destined for the Antwerp/Hamburg range naming a rate of $33. per ton, W or M (40 cu. ft.). On July 18, 1962, the rate was extended to the Bordeaux/ Dunkirk range, after the discrepancy came to the attention of the conference.

In the absence of a commodity rate, Lykes was constrained, under Section 18(b) of the Shipping Act, 1916, to charge the general cargo

[1] This decision became the decision of the Commission on April 23, 1963, and an order was issued granting the application.

NOS rate of $1.75 per cu. ft., which brought the freight to $5,642. on the 3224 cu. ft. shipped, despite Lykes desire and its prior intent to charge the freight based on the $33. per ton (40 cu. ft.), rate. The latter rate would have brought the freight on the shipment to $2,659.80. Lykes seeks authority to refund the difference. Due to oversight and inadvertence in not having included the aforesaid commodity rate in the applicable tariff, Shipper was charged a rate greatly in excess of that which has been charged on prior shipments to nearby ports, and which it had a right to expect on this shipment.

In similar circumstances, the Commission has held that an innocent shipper should not be made to bear the consequences of a carrier's inadvertent failure to file the tariff that was intended to apply. *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, 7 F.M.C. 62 (1962). In that case and other recent cases, applications under Rule 6(b), such as the one in this proceeding, have been granted by the Commission, thus relieving the carrier of the risk of violating the Shipping Act, 1916, by making the refund without Commission approval.

No discrimination will result from granting the application because there were no other shippers of similar equipment on applicant's vessels, similarly situated, during the period in question.

An order will be entered granting the application.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

March 29, 1963

FEDERAL MARITIME COMMISSION

No. 977

PUGET SOUND TUG AND BARGE COMPANY

v.

FOSS LAUNCH AND TUG CO.,

WAGNER TUG BOAT COMPANY,

T. F. KOLLMAR, INC., D/B/A NORTHLAND FREIGHT LINES

Decided June 18, 1963

Tandem tow of Foss barge containing contract carrier cargo with Northland barge containing common carrier cargo does not violate principle that disfavors carrier acting as both common and contract carrier on the same voyage.

Wagner tariff rate on cement and asphalt based on high volume found to be prima facie discriminatory and preferential.

Respondents' rates not found to be unreasonably low.

Mark P. Schlefer and *T. S. L. Perlman* for complainant.

Stanley Sher for Foss Launch and Tug Co. and Wagner Tug Boat Company, respondents.

T. F. Kollmar, as president of T. F. Kollmar, Inc., respondent.

George N. Hayes, Attorney General, State of Alaska, for the State of Alaska, intervener.

E. Robert Seaver, Hearing Examiner.

REPORT

BY THE COMMISSION (Thos. E. Stakem, *Chairman*; Ashton C. Barrett, *Vice Chairman*; John Harllee, John S. Patterson, and James V. Day, *Commissioners*):

This proceeding arises out of a complaint filed by Puget Sound Tug and Barge Company (Puget Sound) charging that certain agreements between respondents and certain of the rates charged thereunder for the transportation of cargo by respondents in the Alaska trade are violative of the shipping statutes. The State of Alaska and the Port of Anchorage intervened in support of respondents.

This is the fourth of a series of proceedings before the Commission all of which involved the same parties and their operations in the Alaska trade. Before dealing with the issues raised in the complaint filed by Puget Sound in this proceeding, we shall briefly set forth the full chronology of events leading to its institution, including some discussion of our decisions in the three prior related cases. This is necessary because, in addition to placing the present complaint in its proper perspective, certain of the issues presented in this case have been rendered moot by our prior decisions.

Respondent Foss Launch & Tug Co. (Foss) has been engaged in the Alaska trade as a private or contract carrier since 1930 using tugs and barges which it either owns or operates as a bareboat charterer. Foss does not own any cargo containers, vans or boxes which are used extensively in the trade for the carriage of general cargo but which are not required by Foss in its contract carrier operations. Foss, as a contract carrier, does not have a tariff on file with the Commission.

T. F. Kollmar, Inc., doing business as Northland Freight Lines (Northland) is a non-vessel owning common carrier by water, and began operations in the Alaska trade as such in 1960 pursuant to an arrangement with Foss which is described in detail below. Northland has on file with the Commission a tariff naming class and commodity rates between Seattle and Anchorage. Northland owns a number of vans used as cargo containers in its common carrier operations.

Respondent Wagner Tug Boat Company has been a wholly-owned subsidiary of Foss since 1939, but its operations in the Alaska trade as a common carrier by water did not begin until early in 1960 when it filed its first tariff with the Commission. This tariff was replaced by a more detailed tariff in August, 1961. Wagner has no full-time personnel, offices or terminal facilities separate from those of Foss. It owns one ocean-going tug and one non-ocean-going tug and as necessary uses Foss equipment in its service under contracts, the terms of which are substantially similar to those of the arrangements between Foss and Northland described *infra.*

Complainant Puget Sound entered the Alaskan trade as a common carrier early in 1960 under a tariff filed late in 1959. Its common carrier operations are conducted in the name of one of its divisions, Puget Sound Alaska Van Lines. Puget Sound, like respondents, provides its service with tugs and barges which it either owns or bareboat charters. It offers mainly a container service and provides weekly sailings to Seward the year around. Puget Sound also operates as a contract carrier in the trade. It does not, however, carry contract cargo in the same barge or on the same tow with the cargo it transports as a common carrier. Since its entrance in the trade Puget Sound has been concerned with the competition offered by Foss through a series of arrangements or agreements between Foss, Northland and ultimately Wagner. The alleged unlawfulness of these arrangements, beginning with those between Foss and Northland in 1959 and culminating in Agreement 8492 between Foss, Northland and Wagner, approved by the Commission in February of this year, has been the basis of the various complaints filed by Puget Sound.

The first agreements were between Foss and Northland and were entered into in 1959 and 1960. Some of these agreements were written and at least one appeared to be oral. Under the terms of the agreements between Northland and Foss, each covering a single sailing, Foss agreed to transport cargo solicited and booked by Northland in Northland's capacity as a non-vessel owning common carrier, while Northland was given exclusive use of the barges necessary to transport the cargo. Foss provided the towing vessel and the master and crew thereof and gross revenues were divided approximately 50 percent to each party.

Shortly after entering the trade, Puget Sound filed the first in its series of complaints, Docket 904 *Puget Sound Tug and Barge Co.* v. *Foss Launch & Tug Co. et al.* The complaint charged that the arrangements between Foss and Northland were within the purview of section 15 of the Shipping Act, 1916, and that Commission approval of the arrangements was required before they could be effectuated.

While Docket 904 was pending, Foss brought Wagner into the trade as a common carirer by water and with this Puget Sound filed its second complaint, Docket 914, *Puget Sound Tug and Barge Co.* v. *Foss Launch & Tug Co. et al.* The complaint was intended to bring into the proceedings Wagner, now a participant in the allegedly unlawful arrangements between Foss and Northland. The two proceedings were consolidated and by its decision issued January 8, 1962, 7 F.M.C. 43, the Commission found that Foss was a common carrier by water with respect to cargo carried under its agreements with Northland and that the agreements were subject to section 15.

While Dockets 904 and 914 were pending Northland, Wagner and Foss (a party as Wagner's parent corporation) filed Agreement 8492 seeking Commission approval under section 15. The agreement provided that Northland would solicit and book cargo and issue its own bills of lading, and that Wagner would accomplish the physical transportation of the cargo by tug and barge. The agreement applied only to "such cargo as Northland tenders to Wagner", and there was no obligation on Northland's part to supply any minimum tonnage. Wagner was not obligated to furnish any minimum space or schedule of sailings for Northland cargo, its obligation being limited to furnishing "such barge or barges" as were actually being employed in its common carrier service. Certain charges were apportioned between the parties and gross revenue was to be divided according to division sheets which were to be furnished the Commission. The division then anticipated was 50 percent to each party. Puget Sound protested approval of the agreement, and the Commission instituted an investigation to determine whether the agreement should be approved, modified or disapproved, Docket 976, *Agreement 8492 Between T. F. Kollmar, Inc., d/b/a Northland Freight Lines and Wagner Tug Boat Company in the Alaska Trade*, 7 F.M.C. 511 (1963). The issues in Docket 976, as set forth in the order of investigation were only those relevant to the approvability of the agreement. The reasonableness of respondents' rates was not an issue in that proceeding, and Puget Sound's complaint in this proceeding was an attempt to raise that issue. Puget Sound filed simultaneously with its complaint a motion to consolidate this proceeding with Docket 976. The motion was denied.

In our decision in Docket 976 we approved Agreement 8492. In reaching that decision we disposed of a contention that the agreement was unapprovable because under its terms contract carrier cargo and common carrier cargo might be carried on the same barge or in the same tow. Such a mixture of contract and common cargo it was contended was unlawful *per se*. We said at 7 F.M.C. 519:

> We are unwilling, from our review of the cases * * * to accept [the] contention that the agreement must be disapproved because a mixture of common and contract carriage on one vessel (or barge tow) on the same voyage would, without more, be unlawful. We think the better approach is that such a mixture of cargoes may not be used to evade regulation and must not result in a carrier's avoidance of its common carrier obligations with respect to the fair, nonpreferential and nondiscriminatory treatment of shippers.

This issue of the so-called dual capacity operation was considered by the Examiner to have been raised, albeit inferentially, in the present proceeding. We now turn to a consideration of Puget Sound's complaint in this proceeding.

As we read the complaint it primarily concerns itself with charges that the rates in Wagner's Local Freight Tariff No. 2, F.M.C.-F. No. 2 and Northland's Local Freight Tariff No. 1, F.M.C.-F. No. 1, are unjust, unreasonable, and otherwise unlawful in that:

> (a) Said rates are noncompensatory in that they have failed and will fail to produce revenues sufficient to meet the expenses incurred in performing respondents' common carrier service, and therefore are unreasonably low and destructively competitive with complainant's service;
>
> (b) Wagner's Tariff No. 2 names rates on asphalt in bulk and on cement in bulk based on minimum weights so high as not to be available to more than one shipper of each such commodity while the same tariff names rates on asphalt

and cement based on minimum weights geared to the requirements of the other shippers thereof;

(c) The structure of the aforesaid rates and the arrangement between the parties affords them an assured bottom cargo which enables them to, and they thereby do, engage in destructive competition with complainant;

(d) The maintenance of two or more tariffs naming rates for the same service between the same ports constitutes failure plainly to show the rates, charges, classifications, rules and regulations in force for such service and constitutes and affords opportunity for discrimination between or among shippers.

The Examiner noted that counsel for complainant tried this proceeding primarily as a rate case, but shifted emphasis on brief to the dual capacity issue raised, but not then decided, in Docket 976. The respondents took the position that because Puget Sound litigated the question of the *per se* illegality of respondents' dual capacity operations in Docket 976, they should not be permitted to relitigate the issue in this proceeding. Respondents also contended that neither the complaint nor Puget Sound's counsel at the prehearing conference raised the dual capacity issue, and it would be unfair to entertain the question here in the absence of proper notice. The Examiner, however, decided that the dual capacity issue was properly before him.

In his initial decision, issued prior to our final decision in Docket 976, the Examiner found that the tandem tow of a Foss barge containing contract carrier cargo with a Northland (Kollmar) barge containing common carrier cargo did not violate the principle that disfavors a carrier acting as both a common and a contract carrier on the same voyage; that Wagner's tariff rates on cement and asphalt based as they were on a high minimum volume were discriminatory and preferential, but that the general level of respondent's rates was not unreasonably low. In addition, the Examiner was of the opinion that any dual capacity operation by Foss and its wholly-owned subsidiary Wagner would violate the principle disfavoring dual capacity operation on the same voyage.

Exceptions were filed and oral argument was held.

Puget Sound excepted to the initial decision "insofar as it holds lawful respondents' practice of combining Foss contract carrier cargo with Foss-Northland common-carrier cargo in the same tow on the same voyage." Respondents originally excepted to those portions of the initial decision wherein the Examiner expressed his opinion concerning the lawfulness of any future operation combining Foss contract cargo with common carrier cargo of Wagner, its wholly-owned subsidiary. Respondents excepted to the Examiner's expression of his opinion on this question on the ground that the issue was not properly before him. However, they now ask that we decide both aspects of the dual capacity issue, including the lawfulness of the Foss-Northland operation.

Wagner and Foss also excepted to the Examiner's conclusion that

Wagner's bulk asphalt and bulk cement rates were discriminatory and preferential and therefore unlawful.

We shall consider the issue of Foss-Northland dual capacity operation first. The Examiner in dealing with this issue treated the question of the *per se* illegality of such an operation at some length, and without the precedent of our decision in Docket 976 reached the same conclusion we did—that the particular operation in question was not illegal *per se*. Although we agree generally with the reasoning of the Examiner in reaching his conclusion, we consider our decision in Docket 976 to be dispositive of the question and do not feel that further extended discussion on the issue is warranted or necessary.

Our decision in Docket 976 mentioned the future possibility of unlawful discriminations or preferences to shippers, under Agreement 8492 and stated that the Shipping Act affords ample means for reaching any such results actually occurring in the subsequent operations of the parties under the agreement. The Examiner has found that no substantial evidence of such results is present in this record and we concur. We conclude that operations under Agreement 8492 have not thus far resulted in any undue preferences or unjust discriminations in the parties' treatment of shippers.

We further agree with the Examiner that Foss' practice of hauling contract cargo southbound rather than returning empty after its equipment is employed to transport common carrier cargo north does not constitute an unlawful dual capacity operation.

The testimony at the hearing of Mr. Paul E. Pearson, vice president and general manager of Foss and of Wagner, prompted some concern in the mind of the Examiner that in the future the common carrier operation of Wagner might be treated as a mere adjunct of the Foss contract carrier operation. His concern led him to consider the lawfulness of such a dual capacity operation should it be undertaken. We do not consider that the question of the legality of any future dual capacity operations by Foss and Wagner was an issue properly before the Examiner for decision. Other than the speculative testimony referred to above, there was no evidence to show the manner in which such operations would be conducted; nor did the complaint as we read it challenge any proposed Foss-Wagner dual capacity operation. Under the circumstances, we do not consider it appropriate to reach any conclusion regarding the possible unlawfulness of an operation which may or may not take place in the future. Foss and Wagner are of course charged with the responsibility of conducting their operations in conformity with the shipping statutes and no warning should be necessary to make them aware of this responsibility. Therefore, on the record before us we reach no conclusions as to the unlawfulness of such future operations.

Foss and Wagner except to the Examiner's finding that Wagner's bulk rates on cement and asphalt were preferential and discriminatory and therefore unlawful. On cement Wagner's rate is $9.25 per ton on minimum quantities of 3500 tons and on asphalt it is $16.50 per ton on minimum quantities of 1400 tons. Complainant contends that these rates are unlawful because (1) the minimum is so high that it is available to only one shipper and thereby violates section 14 Fourth as a discrimination based on volume of freight offered and violates section 16 First by giving an undue preference, and (2) the spread between the rates (46.25 cents/cwt. in lots of 3500 tons versus $2.10/cwt. in smaller lots on cement, and 82.5 cents versus $1.45 on asphalt) is so excessive as to be an undue preference under section 16 First. There is at present only one shipper of cement in the trade, Permanente, and the Examiner decided that it was not possible on the record to conclude that there was no forseeable prospect that other cement shippers would enter the field and that it may be that the high cement rate was keeping them out. He did however, conclude "that a volume rate which is five times as much as the general rate on the same commodity is, *prima facie*, discriminatory," and that the volume rates of Wagner on asphalt and cement should be canceled. He further concluded that Foss' contract with Permanente Cement calling for the same volume rates was lawful because sections 14 and 16 do not apply to contract carriers, and we decided in Dockets 904 and 914 that the multiple towing operation considered therein did not make Foss a common carrier.

We agree with the Examiner's conclusions as to the Foss contract; and we think the Examiner was correct when he found that Wagner's rates on cement and asphalt were *prima facie* discriminatory. We do not, however, agree that the rates should be canceled on the basis of the record before us. Accordingly we will grant respondents 30 days in which to petition for a limited remand of the proceedings for the purpose of submitting evidence in justification of the rates found to be *prima facie* discriminatory.

We agree generally with the Examiner's remaining findings and conclusions concerning the general level of respondents' rates and for the reasons set forth below we think the exceptions taken to these findings and conclusions are without merit.

Complainant's allegation, concerning the noncompensatory level of respondents' rates, raises two basic considerations in the light of the evidence that was adduced by both sides. One of these involves a comparison of respondents' rates with those of the other carriers in this trade. The other involves a review of respondents' operating experience to determine whether their rates have been noncompensatory. Much accounting data and testimony was introduced on the latter question, but it will be unnecessary to discuss these in detail here (including the many disputes over accounting details) because the theory employed by complainant in the computation of respondents' revenues and expenses is invalid for the reason that they are based on the mistaken belief that the Foss–Kollmar dual operation is illegal *per se.*

Northland made eleven voyages between Seattle and Anchorage using Foss' equipment in 1961, the year adopted by the parties to test the profitability of respondents operation. Relying on the alleged illegality of the Foss-Northland operation, complainant assumes a situation where all of the expenses of both Northland and Foss, both northbound and southbound, are charged against the voyage revenues, but the Foss revenues on contract cargo are excluded, with a minor adjustment to reflect greater speed if the contract cargo barge had not been included in the tows. Exhibits 1 to 15 and Exhibit 65, introduced by PSAVL, reflect a loss of $58,732.99 if the accounting is done on the theory advanced by complainant.

Exhibits 33 to 61 were introduced by respondents to reflect voyage profits and the cumulative profits to Foss arising out of the 1961 voyages. They establish the fact that a net profit of $46,334.91 was earned by Foss. Northland introduced Exhibit 28, a profit and loss statement (not prepared for the purpose of this proceeding) reflecting the Northland operating experience for a period covering the eleven voyages. It shows a profit of $27,327.01 before taking into account any expense for compensation for Mr. T. F. Kollmar, president, who spent most of his time managing the Northland operation and soliciting cargo during the six month operating season. This figure excludes an item for accounts receivable in the amount of $17,000 which Mr. Kollmar believed was due the company. These exhibits show that the Northland operation was profitable, although the record is somewhat uncertain as to the exact amount of profit.

Considerable question arose at the hearing concerning the accounting details incident to certain of the exhibits introduced by both sides, but it is unnecessary to treat these at length. Under the theory employed by complainant, the operation of respondents would have clearly been unprofitable; but the theory is invalid. Respondents' exhibits showing the profitability of the Northland operation are not precisely detailed as to the allocation of expenses between contract and common cargo. While problems might well arise as to the proper allocation of expenses in a proceeding under the Intercoastal Shipping Act, 1933, to determine the justness and reasonableness of a given rate, this is not such a proceeding. The question presented here is whether respondents' rates are so unreasonably low as to be unprofitable. On the record before us complainant has failed to show that respondents' rates are noncompensatory. It is found that Northland's operation is profitable. There is a lack of substantial evidence as to the operating experience of Wagner.

Before making the comparison of rates, an introductory word regarding PSAVL rates is necessary. The northern terminus of the PSAVL common carrier operation is Seward, Alaska. Very little cargo remains there, as this is merely a transshipment point. The Alaska Railroad picks up the cargo there and transships it on to Anchorage and other points on the railroad. PSAVL and the railroad are party to a traffic agreement under which the railroad publishes its Tariff 63–A showing the total freight charges for the through movement of traffic from Seattle to points in Alaska. PSAVL sets forth its proportion of the interline rate on the regular tariff filed with the Commission. The Alaska Railroad interline rate (including the PSAVL portion) to Anchorage includes wharfage and delivery expense, whereas the tariff rates of Kollmar and Wagner do not, according to the uncontradicted testimony of Mr. Kollmar.

Evidence was introduced of certain rates of Pacific Western Lines from Seattle to Anchorage. The service of this carrier is similar to that of the parties to this proceeding. For purposes of comparison, examples of these rates are included in the table set out below, together with those of PSAVL/ARR, Northland, and Wagner (from PSAVL Exhibit 19, and the Northland Exhibit 32B).

Comparison of rates per 100 pounds

(Quantity shown in parentheses)

Seattle to Anchorage

Commodity	PSAVL/ARR	Northland	Northland [1]	Wagner	P.W.L.
Anti-freeze	(30M) 3.16	(25M) 2.77	(25M) 3.05	(25M) 3.09	(50M) 2.70
Asphalt	(80M) 1.91	(80M) 1.45	(80M) 1.70	(80M) 1.45	(50M) 1.70
Cement	(40M) 2.05	(50M) 2.10	(50M) 2.31	(50M) 2.10	(40M) 1.92
Iron Articles	(24M) 2.97	(24M) 2.81	(24M) 3.09	(24M) 2.81	(30M) 2.98
Liquor	(20M) 3.47	(20M) 3.07	(20M) 3.34	(20M) 3.07	(20M) 3.06
Liquor (Malt)	(50M) 2.80	(50M) 2.20	(50M) 2.20	(50M) 2.47	(60M) 2.35
Lumber	(40M) 1.96	(40M) 1.76	(40M) 2.02	(40M) 2.10	(40M) 2.08

[1] Plus wharfage and delivery charges.

The tariff rates of Northland on all but one of these selected items average about 15 percent less than those of PSAVL/ARR. The Northland rate on cement is higher. However, when the wharfage and delivery charges are added these Northland rates are no lower, on the average, than those of PSAVL/ARR. On the basis of a comparison of rates, it cannot be said that respondents' rates are unreasonably low.

Proposed findings and exceptions not discussed or reflected by this report have been considered and found not justified.

775–794 O–65–41

FEDERAL MARITIME COMMISSION

No. 977

PUGET SOUND TUG AND BARGE COMPANY

v.

FOSS LAUNCH AND TUG CO.,

WAGNER TUG BOAT COMPANY,

T. F. KOLLMAR, INC., D/B/A NORTHLAND FREIGHT LINES

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on June 18, 1963, having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found (1) that the tandem tow of Foss Launch & Tug Co. barge containing contract carrier cargo with Northland Freight Lines barge containing common carrier cargo does not violate the principle disfavoring a carrier acting as both common and contract carrier on the same voyage; (2) that respondent's rates are not unreasonably low; and (3) that Wagner Tug Boat Company's rates on cement and asphalt based on high volume are *prima facie* discriminatory, but that complainant, Puget Sound Tug and Barge Company should be allowed 30 days from the date of service of this order within which to petition for a limited remand of the proceedings for the purpose of submitting evidence in justification of said rates;

It is ordered, That this proceeding is discontinued except as to the issue of whether the rates of Wagner Tug Boat Company on asphalt and cement are discriminatory; and the complainant is hereby granted 30 days from the date of service of this order within which to petition for remand on said issue.

By the Commission, June 18, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 726

Isbrandtsen Co., Inc.

v.

States Marine Corporation of Delaware, et al.

No. 732

H. Kempner

v.

Lykes Bros. Steamship Co., Inc., et al.

No. 733

H. Kempner

v.

Lykes Bros. Steamship Co., Inc., et al.

No. 734

Galveston Cotton Company

v.

Lykes Bros. Steamship Co., Inc., et al.

No. 735

Texas Cotton Industries

v.

Lykes Bros. Steamship Co., Inc., et al.

Amended Order Awarding Interest

Pursuant to the decision of the United States Court of Appeals for the District of Columbia Circuit in *States Marine Lines Inc.* v. *Federal Maritime Commission*, 313 F. 2d 906 (1963), cert. denied 374 U.S. 831 (1963), holding that interest to complainant should be granted from November 3, 1952, paragraph 1 of the order served by the Federal Maritime Board in the above proceedings on August 9, 1961, is hereby amended to read as follows:

1. That respondent, States Marine Corporation of Delaware, is hereby notified and directed to pay unto complainant, Isbrandtsen Co. Inc., on or before July 20, 1963, $5,455.00 plus interest on such amount at the rate of 6% per annum for the period from November 3, 1952 to the date of payment, as reparation for the injury caused by respondent's violation of Section 17 of the Shipping Act, 1916.

By the Commission, June 25, 1963.

(Signed) Thomas Lisi,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1102

PACIFIC COAST EUROPEAN CONFERENCE

PORT EQUALIZATION RULE

Decided July 17, 1963

1. An evidentiary hearing is not required where no factual issue is involved. Show-cause procedure may be used for the purpose of determining the questions of law presented in such a case. Respondents' motion to dismiss denied.

2. Rule 29 of respondents' Freight Tariff No. 13 instituting a plan of port equalization found to be without sanction in respondents' conference agreement and therefore unlawful. Respondents ordered to cease and desist from putting the rule into effect or from carrying it out, and to strike it from the tariff.

3. Absent provision therefor in their basic conference agreement, respondents are not authorized to institute a plan of port equalization. Such a plan is not conventional or routine rate-making but is a new arrangement for the regulation and control of competition which must be expressly approved pursuant to section 15 of the Shipping Act, 1916.

4. The provision which Public Law 87–346 added to section 15 of the Act, authorizing an approved conference to file and effectuate, without prior Commission approval, "tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof" (75 Stat. 762, 764) limits respondents strictly to the exercise of the rate-making power conferred by their basic conference agreement and prohibits them from effectuating a tariff rule embodying their unapproved port equalization plan.

Robert L. Harmon, for respondents.

J. Richard Townsend, for Stockton Port District, intervenor.

Timothy V. A. Dillon, for Sacramento-Yolo Port District, intervenor.

Frank W. Gormley, and *Robert J. Blackwell*, Hearing Counsel.

REPORT

BY THE COMMISSION (Thos. E. Stakem, *Chairman*, John Harllee, John S. Patterson and James V. Day, *Commissioners*):

I. FACTS

On February 20, 1963, the Pacific Coast European Conference filed with the Commission an amendment to its Freight Tariff No. 13, in the form of a new rule, Rule 29. This rule provides:

29. *PORT EQUALIZATION* Carriers may equalize a shipper's cost of delivering cargo to carriers' loading berths in accordance with the conditions herein set forth:

(a) Equalization is the absorption by a carrier of the difference between a shipper's cost of delivery to ship's tackle at the loading port nearest to the shipment's point of origin and the cost of delivery to ship's tackle at the loading port designated by the equalizing carrier.

(b) Equalization shall be restricted to transportation costs on shipments from points of origin in California to loading berths in either Stockton, Sacramento, or a San Francisco Bay Area port, viz. Alameda, Oakland, Richmond, or San Francisco.

(c) Equalization shall not be made between San Francisco Bay Area ports, nor between berths within any of the ports named in (b) above.

(d) The delivery costs shall be based upon the lowest available published rates.

(e) Equalization payments shall only be made upon shipper's invoices submitted to and approved by the Conference office. Invoices must be supported by copies of the covering ocean bills of lading and copies of the transportation bills showing applicable tariff authorities covering movement from shippers' points of origin.

Prior to this filing, the Commission received a letter from the Stockton Port District advising the Commission that the rule would be filed and requesting that the Commission reject the filing. The substance of this complaint was forwarded to the conference chairman for his views. He replied by requesting the name of the complainant and a full copy of the complaint. The Commission informed him that the gist of the complaint had been stated and that the name of the complainant was of little use in responding to the inquiry, and requested an anwser from the conference. No further correspondence was had.

On April 9, 1963, the Commission issued an order directing that the conference and its members lines show cause why Rule 29 should not be declared unlawful and stricken from the tariff, because the conference had failed to obtain Commission approval as required under Section 15 of the Shipping Act, 1916. The order to show cause provided for the filing of affidavits of fact and memoranda of law and oral argument. Affidavits and memoranda were to be filed by the close of business on April 30, 1963, with replies thereto due no later than May 10, 1963. Oral argument was set for May 17, 1963. Petitions to intervene were filed by the Stockton Port District (Stockton), the Sacramento-Yolo Port District, and by the Commission of Public Docks of the City of Portland, Oregon.

On April 26, 1963, respondents moved to dismiss the proceeding on the ground that "the order and the procedure therein contemplated are without a lawful, statutory basis and are, in fact, directly contrary to the minimum requirements of a fair hearing as set forth in the

Shipping Act and the Administrative Procedure Act." Replies in opposition to the motion were filed by hearing counsel and Stockton. Stockton also filed a memorandum of law, and hearing counsel filed a memorandum supporting Stockton's position on the merits.

In lieu of requesting allotment of time at oral argument, as authorized in a notice sent them by the Secretary of the Commission, respondents requested disposition of their motion to dismiss. When informed that the motion to dismiss would be argued at the same time as the merits, respondents claimed they had been given inadequate notice and did not have time in which to prepare their case. Accordingly, respondents chose to stand on their motion to dismiss and the memorandum in support thereof. Oral argument was held as scheduled on May 17, 1963, with hearing counsel and attorneys from Stockton Port District and Sacramento-Yolo participating therein. No one appeared for respondents, or the Commission of Public Docks of the City of Portland.

The issues before the Commission are (1) whether the Commission has authority to conduct a proceeding of this type pursuant to an order to show cause; and (2) whether Rule 29 of Freight Tariff No. 13 is an agreement within the scope of section 15 of the Shipping Act requiring Commission approval before it can be effectuated.

II. Authority for the Proceeding

Respondents in their motion to dismiss assert that they are entitled to an evidentiary hearing on the basis of the following language from section 15:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair * * *.

Respondents allege that "hearing" in this context means a "full hearing",[1] and that the Commission is denying them such a hearing. Respondents' reliance on the above portion of section 15 is misplaced and without merit.

Respondents filed Rule 29 with the Commission as a tariff amendment. They did not file it for approval under section 15, consequently there is no issue as to the approval, disapproval or modification of the rule under the section. The primary question in this proceeding is whether Rule 29 should have been submitted to the Commission for

[1] By "full hearing" respondents refer to the evidentiary hearing before an examiner provided for in sections 7 and 8 of the Administrative Procedure Act.

section 15 approval.[2] This involves no factual issue but simply an inquiry as to whether the rule is authorized by respondents' basic conference agreement and if not so authorized, whether it is a new agreement or a modification of an existing agreement which is subject to the Commission's approval under section 15. To resolve the questions of law thus presented, all that is necessary is an examination of Rule 29, the basic conference agreement, and section 15. We are not, as respondents claim, called upon to make "a finding of certain adverse effects." Indeed, to conduct an evidentiary hearing for the purpose of disposing of the questions actually at hand would be wasteful for all concerned.

Nor are respondents correct in contending that Rule 10(n) of the Commission's Rules of Practice and Procedure gives them the right to present evidence and cross-examine witnesses.[3] Rule 10(n) is not applicable to show cause proceedings. Rule 5(g) which governs such proceedings states:

> The Board may institute a proceeding against a person subject to its jurisdiction by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in rule 10(c), may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified.

Rule 5(g) allows for discretion in adapting the show cause procedure to the requirements of the particular case, as has been done here. If it had been intended that Rule 10(n) be applicable to show cause

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[2] The relevant portions of section 15 are as follows:

"That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. * * *

* * * * * * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt."

[3] Rule 10(n) provides:

Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

proceedings, a specific reference to that effect would have been included in Rule 5(g).

Respondents also cite *Trans-Pacific Freight Conference of Japan, et al.* v. *Federal Maritime Board and United States*, 302 F. 2d 875 (D.C. Cir., 1962) for the proposition that the Commission cannot declare anything "unlawful". That case involved the validity of an interim cease and desist order, which had been issued in an attempt to maintain the status quo pending the outcome of proceedings before the Commission. It did not involve any question of the Commission's authority to issue an order in the circumstances present here, where it has been determined in an appropriate proceeding that a conference proposes to exceed the scope of its approved section 15 agreement.[4]

In their supporting memorandum respondents further contend that in the case of *Sea-Land Service Inc., et al.* v. *Federal Maritime Commission and United States*, (9th Cir., No. 18377, filed January 8, 1963) the Commission took a position inconsistent with that taken here. We disagree. In Sea-Land the Commission moved for (and obtained) remand of the case because the petitioners sought to have reviewed, as a "final order" of the Commission, a letter which had been written by a staff member in response to the petitioners' informal request for advice as to whether certain proposed leases were within section 15. No hearing had been held and no reasons had been given for the determination made in the letter, and the Commission took the position that a remand was essential to permit such action before the court could properly undertake judicial review. It should be emphasized that in the Sea-Land case the informal determination was the result of the informal approach the petitioners there chose to employ. Furthermore, in the present case the respondents have been accorded opportunity for a hearing consonant with the issues to be determined.

Respondents further claim that they were not timely notified of the matters of fact and law asserted. A reading of the Commission's order is sufficient to dispel this notion; respondents were notified when they were served with a copy of the order, and they cannot possibly claim that the notice was not timely. Our rules 5(e) and 7(b), which are cited by respondents, are inapplicable in the present proceeding. They relate only to the filing of answers to complaints, and not to replies to orders to show cause. There is no provision in Rule 5(g) which specifies a time limit for replies to such orders. Likewise Rule

[4] Regarding our authority to issue a cease and desist order prohibiting the effectuation of such unapproved activity, the court said in the *Trans-Pacific* case, *supra*, footnote 8:

"In Pacific Coast European Conference, 5 F.M.B. 65 (1956), the Board asserted the authority to issue a cease and desist order prohibiting the parties from carrying out an unapproved agreement. We need not express a view as to whether such an order is within the Board's authority. But we do note that different considerations might well be involved in such a case."

10(o), cited by respondents, relates solely to a suspension proceeding under section 3 of the Intercoastal Shipping Act of 1933, and it in turn refers to Rule 5(h), not Rule 5(g). It should be noted that respondents made no application for an enlargement of time to file replies, nor did they assert why they were not able to reply to the order in the time alloted. Absent such an application or assertion, respondents' claims seem frivolous.

This same ground has been traveled with these respondents on several prior occasions. In *Pacific Coast European Conference*, 7 F.M.C. 27 (1961), we stated in language equally applicable here:

> * * * The complaint is that such a proceeding [evidentiary-type hearing] is necessary to provide proper notice and hearing, and an evidentiary record on which to base findings. Respondents also claim an order to show cause is unauthorized by the Act.
>
> This procedural argument is but a play on form and words. The order to show cause was expressly provided for by the Board's rules, it fully specified the charges against the conference and alleged that respondents' actions had prevented the Board from carrying out its statutory duties, and it was well within the powers vested in the Board by the Act.
>
> The order gave respondents notice of the issues involved and time to prepare to meet them. * * * The questions raised by the order * * * were purely legal. There was no factual issue and hence no occasion to compile an evidentiary record in a hearing. * * * the proceeding in our view quite adequately satisfied the requirements of due process. (7 F.M.C., at pp. 37–38.)

An earlier case, *Pacific Coast European Conference* (*Payment of Brokerage*), 4 F.M.B. 696 (1955), arose from respondents' attempt to effectuate without Board approval a tariff rule (Rule 21) and amendment thereto containing certain provisions respecting the payment of brokerage (hereinafter more fully discussed). Respondents contended the Board could find a violation of section 15 only after a full evidentiary hearing. Rejecting this position, the Board held that such a hearing is not required where the sole questions are of law. Upon an examination of the rule, respondents' basic conference agreement, and section 15—precisely as we have done here—the Board decided as a matter of law that the rule required section 15 approval and lacking same it was unlawful (4 F.M.B., at pp. 700–703).

Respondents petitioned for reconsideration, arguing that the Board was powerless to make such a declaration absent an evidentiary hearing. The Board in a detailed review of its authority in the premises again rejected respondents' position, *Pacific Coast European Conference* (*Payment of Brokerage*), 5 F.M.B. 65 (1956). The Board also stated:

> * * * It is inconceivable that Congress would have granted antitrust law immunity to agreements between carriers which might, in the absence of such immunity, offend those laws, and yet have denied the agency charged with supervision over those agreements the power to protect the public by declaring a

given agreement to be unlawful, as unapproved, and/or by requiring the carriers to cease and desist from effectuating the agreement prior to approval or after disapproval. None of these powers is specified in the Act, yet each has been vested implicitly in us as necessary to the "effective government supervision" contemplated by the Act. Section 22 of the Act, in permitting us to make such order as we deem proper, gives us that authority. * * * (5 F.M.B., at p. 68.)[5]

The Board supported the foregoing decisions by citing, *inter alia*, *Isbrandtsen Co., Inc.* v. *United States*, 211 F. 2d 51 (1954), cert. den. 347 U.S. 990 (1954) and *United States Navigation Co.* v. *Cunard Steamship Co.*, 50 F. 2d 83 (2nd Cir., 1931), aff'd 284 U.S. 474 (1932). In *Isbrandtsen* no hearing had been held but the court determined, as a matter of law, that the institution of a dual rate system without prior approval under section 15 was a violation of the Act. In the *Cunard* case the Second Circuit stated:

The Shipping Board may determine whether any agreement such as is described in the bill has actually been made, and, if it has, may order it filed and require the parties to cease from acting under it unless and until it is approved. (50 F. 2d, at p. 90.)

In affirming, the Supreme Court said:

* * * If there be a failure to file an agreement as required by section 15, the board, as in the case of other violations of the act, is fully authorized by section 22, *supra*, to afford relief upon complaint or upon its own motion. (284 U.S. at 486.)

Manifestly, therefore, it is well settled that we have the power to determine whether an agreement subject to our approval under section 15 exists and if so to take appropriate action. It is equally well settled that an evidentiary hearing is not required in making such determination where, as here, the only question is one of law.[6] Respondents motion to dismiss will be denied.

III. The Port Equalization Rule

We think it clear that Rule 29 is subject to section 15, and is not within the scope of respondents' basic conference agreement, Agreement No. 5200. The scope of that agreement is set out in section 1 thereof, which is the only provision relevant here and provides:

This agreement covers the establishment, regulation and maintenance of agreed rates and charges for or in connection with the transportation of all cargo in vessels owned, controlled, chartered and/or operated by the parties hereto in the trade covered by this agreement, and brokerage, tariffs and other matters directly relating thereto, members being bound to the maintenance as between themselves of uniform freight rates and practices as agreed from time to time.

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[5] A further decision in this case, rendered in 1957 upon completion of an evidentiary hearing to determine the merits of respondents' brokerage rule in light of the provisions of sections 15, 16 and 17 of the Act, is reported at 5 F.M.B. 225.

[6] See also *Producers Livestock Marketing Assn.* v. *United States*, 241 F. 2d 192 (10th Cir. 1957); *Riss & Co.* v. *United States*, 117 F. Supp. 296, 301–2, 304 (W.D. Mo. 1952), aff'd 346 U.S. 890 (1953); Davis, *Administrative Law Treatise* (1958), section 7.06.

Under this provision the parties are authorized to regulate competition among themselves by establishing uniform rates for the transportation of cargo. They are not authorized to create "new relationships which invade the areas of concerted action specified in section 15" without additional approval under that section. This was expressly held in the 1955 *Pacific Coast European Conference* case, 4 F.M.B. 696, *supra*. As before noted, in that case respondents had sought to effectuate, without Board approval, tariff Rule 21 and amendment thereto respecting brokerage. These directed that brokerage be paid only to brokers on the conference's approved list and provided for the exclusion from that list and the refusal of brokerage to any firm soliciting business for a nonconference carrier. The Board rejected respondents' contention that since their basic agreement mentioned "brokerage" they were authorized without more to put such a rule into effect. Using language equally pertinent here, the Board said:

Surely amended Rule 21 introduces a new scheme of regulation and control of competition and provides for an exclusive working arrangement not embodied in the basic agreement. * * * the authority granted in article 1 does not extend, without additional approval, to the creation of new relationships which invade the areas of concerted action specified in section 15 in a manner other than as a pure regulation of intraconference competition. (4 F.M.B. at 702–703.)

As is shown on its face, respondents' present rule, Rule 29, institutes a port equalization plan under which they absorb part of a shipper's inland freight expense equal to the difference between the cost he would incur in delivering the shipment at the loading port nearest the shipment's point of origin in the State of California, and the cost he incurs in delivering it to respondents at a more distant port (Stockton, Sacramento and specified San Francisco Bay Area ports). Respondents thus pay a portion of the shipper's expense in order to induce his cargo to their vessels at the indicated ports.

The adoption of a plan of this kind does not constitute conventional or routine rate-making among carriers. It is a new arrangement for the regulation and control of competition. Moreover, it affects third party interests such as the ports and facilities from which traffic is drawn and it obviously is not "a pure regulation of intraconference competition". Port equalization raises questions of possible unfairness, unjust discrimination, and detriment to commerce, all matters included in the standards for adjudging the approvability of agreements under section 15, and may bring into play the requirements of sections 16 and 17 of the Act. In other cases it appears the carriers have undertaken to comply with the Act by providing expressly for the plan in their agreements filed for section 15 approval.[7]

As far back as 1927 the Shipping Board, in *Section 15 Inquiry*, 1 U.S.S.B. 121, held that the words "every agreement" as used in section 15 (quoted in footnote 2, *infra*) require all agreements covering matters of the kind specified in the section to be filed for approval, and that only those activities which could be considered "routine" when measured by the standards of section 15 were excepted. It was indicated that "current rate changes" and other day-to-day conference transactions would be deemed "routine".[8] The *Isbrandtsen* decision, *supra*, which along with *Section 15 Inquiry* was cited by the Board in support of its decision in the *Pacific Coast European Conference* case, 4 F.M.B. 696, *supra*, held that the institution of a dual rate system was not routine activity. The court also declared that any "new scheme" for the regulation and control of competition must have section 15 approval, as follows:

> "Agreements" referred to in the Shipping Act are defined to include "understandings, conferences, and other arrangements." Clearly, a scheme of dual rates like that involved here is an "agreement" in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. In either case, § 15 requires that such agreements or modifications "shall be lawful only *when* and as long as *approved*" by the Board. Until such approval is obtained, the Shipping Act makes it illegal to institute the dual rate system. (211 F. 2d at 56.)

Apart from the case law, however, Congress has now erected a specific statutory barrier to the effectuation of Rule 29 in the absence of section 15 approval. Public Law 87–346, enacted in October 1961, added to section 15 of the Shipping Act a provision authorizing an approved conference to file and put into effect, without prior Commission approval, a tariff or change or amendment thereto which sets forth "rates, fares and charges and classifications, rules and regulations explanatory thereof" and which is "otherwise in accordance with law" (75 Stat. 762, 764; quoted in footnote 2, *infra*). Though worded as an "exception" to the approval requirements of section 15,

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[7] For example, see *City of Portland et al.* v. *Pacific Westbound Conference et al.*, 4 F.M.B. 664 (1955), 5 F.M.B. 118 (1956), aff'd. Sub. nom. *Pacific Far East Line* v. *United States*, 246 F. 2d 711 (D.C. Cir. 1957); *Pacific Westbound Conference Agmt. No. 7790*, 2 U.S.M.C. 775 (1946); *City of Mobile et al.* v. *Baltimore Insular Line et al.*, 2 U.S.M.C. 474 (1941).

[8] *Empire State Hwy. Transp. Assn. et al.* v. *American Export Lines et al.*, 5 F.M.B. 565 (1959) is a recent example of routine or conventional ratemaking authorized by the basic section 15 agreement. Involved there were tariffs of an association of ocean terminal operators which established rates, and certain regulations respecting their application, for the loading and unloading of vessels at piers in the port of New York area. A later tariff increasing the level of these rates and revising the rules, was held not to be a matter requiring separate section 15 approval in *Empire State Hwy. Transp. Assn. et al.* v. *Federal Maritime Board*, 291 F. 2d 336 (D.C. Cir. 1961), cert. den. 368 U.S. 931 (1961).

this language in no sense enlarges conference power. On the contrary, it is intended absent additional approval to limit conference authority, such as that contained in section 1 of respondents' basic agreement, strictly to the rate-making activity therein provided for.

H.R. 6775, 87th Congress, the bill that became Public Law 87–346, evolved from H.R. 4299, 87th Congress, its immediate predecessor in the legislative chain. In H.R. 4299 the exception covered "tariffs of rates, fares, and charges". The Department of Commerce and our predecessor, the Federal Maritime Board, questioned the words "tariffs of" because—

> * * * conferences may insert rules and regulations in their tariffs which have the effect of restricting competition in a manner not reasonably to be inferred from the basic agreement.[9]

Thereafter, the House Merchant Marine and Fisheries Committee redrafted H.R. 4299. Draft revision 2 thereof changed the exception to read "tariff rates, fares, charges, classifications, rules and regulations". Again the Board objected, its Chairman testifying as follows:

> We believe that this exemption is too broad. The purpose of this provision is to leave conferences free to adopt rates and to amend them from time to time without the need for formal Board approval of each rate action as a separate section 15 agreement. We agree with this purpose. The problem is that the rules and regulations inserted by conferences in their tariffs may go beyond mere rate matters, and instead set up new types of concerted activity not contemplated by the basic conference agreement. * * * To insure that the classifications, rules and regulations * * * are confined only to legitimate rate activities, we recommend the insertion * * * of the phrase "explanatory thereof" after the word "regulations".[10]

The Committee then introduced H.R. 6775 incorporating this change and others decided upon as a result of its hearings. H.R. 6775 was reported and passed the House with the exception reading "tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof". Before a subcommittee of the Senate Commerce Committee, the American Steamship Committee on Conference Studies consisting of 22 lines operating American-flag ships, requested deletion of the words "explanatory thereof" on the following grounds:

> We feel that that is much too confining. When you have a basic agreement, a basic conference agreement operating, it is intended to lay down within that conference structure, lay down the terms, conditions, rules, and regulations for competition among the members. But this confines the action of the members of the conference to be just a rate organization. There are many things which

[9] H. Rept. 498, 87th Cong., pp. 14, 19–20; Hearings on H.R. 4299 before the Special Subcommittee on Steamship Conferences, House Merchant Marine and Fisheries Committee, 87th Congress, March and April 1961, pp. 4, 8.

[10] House Hearings, id., pp. 460–61.

occur from day to day, from time to time, which conference has to take action on. With this language in there it wouldn't be able to take action on anything without the Board's prior approval, except perhaps a change in the tariff rate.

There are new concepts coming into this business, such as containers, and many conferences have found it necessary to lay down the rules and regulations for competing with one another on containers.

There are lots of other things, like demurrage rules and regulations which are not really encompassed in the original agreement but which occur as time goes on.[11]

Following this testimony, the words "explanatory thereof" were deleted in a draft revision of H.R. 6775 prepared by the subcommittee. However, notwithstanding the industry objection, the words were restored when the Senate Commerce Committee reported the bill.[12] As thus restored to the restrictive version which the Board had urged and the House had approved, the exception was enacted into law. Plainly, therefore, the statute itself now expressly prohibits respondents' Rule 29 unless specific Commission approval is obtained under the standards of section 15.

Respondents have not sought, much less obtained, section 15 approval of their port equalization plan. An order is attached denying their motion to dismiss, requiring them to cease and desist from putting Rule 29 into effect, and directing them to strike Rule 29 from Freight Tariff Number 13.

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[11] Hearings on H.R. 6775 before the Merchant Marine and Fisheries Subcommittee, Senate Commerce Committee, 87th Congress, Part 2, July and August 1961, pp. 539. 544, 556.

[12] In reporting H.R. 6775, the Senate Commerce Committee stated (S. Rept. 860, 87th Cong., p. 18):

"Agreements not approved by the Commission would be unlawful. Before approval or after disapproval it would be unlawful to carry out any agreement. However, approved conference tariff rates, * * *, if otherwise lawful, may take effect without prior approval by the Commission upon compliance with the tariff filing requirements of the Shipping Act, 1916, as amended."

FEDERAL MARITIME COMMISSION

No. 1102

PACIFIC COAST EUROPEAN CONFERENCE

ORDER REGARDING PORT EQUALIZATION RULE

This proceeding having been initiated by the Federal Maritime Commission pursuant to Rule 5(g) of its Rules of Practice and Procedure, and the Commission having fully considered the matter and having this day made and entered of record a Report containing its findings and conclusions, which Report is hereby referred to and made a part hereof;

It is ordered, That the motion to dismiss the proceeding filed by Pacific Coast European Conference and its member lines (respondents) be and it hereby is denied; that respondents cease and desist from putting into effect or carrying out Rule 29 of their Freight Tariff No. 13; and that respondents forthwith strike Rule 29 from their Freight Tariff No. 13.

By the Commission, July 17, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 827 (Sub. No. 1)

Philip R. Consolo

v.

Flota Mercante Grancolombiana, S.A.

Decided September 16, 1963

On rehearing on remand complainant found injured to the extent of $106,001.00 by respondent's refusal to allocate, between August 23, 1957 and July 12, 1959, refrigerated space on respondent's ships for the carriage of bananas and reparation in such amount awarded.

Robert N. Kharasch, *William H. Lippman* and *Amy Scupi* for complainant.

Odell Kominers and *J. Alton Boyer* for respondent.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*, Ashton C. Barrett, James V. Day, John S. Patterson, Thos. E. Stakem, *Commissioners*):

Pursuant to remand by the United States Court of Appeals for the District of Columbia Circuit,[1] this matter was reheard for the purpose of reconsidering the order of our predecessor, the Federal Maritime Board, directing respondent, Flota Mercante Grancolombiana, S.A. (Flota), to pay reparations to complainant, Philip R. Consolo (Consolo).

On June 22, 1959, the Board in Dockets 827, 835 and 841 [2] found that Flota had violated sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916, by excluding Consolo and another qualified banana shipper (Banana Distributors) from participation in the refrigerated space on its common carrier vessels in the trade between Ecuador and the United States and allocating all such space to a single

[1] *Flota Mercante Grancolombiana, S.A., et al.* v. *F.M.C.* and *U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962).

[2] *Philip R. Consolo* and *Banana Distributors, Inc.* v. *Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633 (1959).

shipper, Panama Ecuador. On March 30, 1961, the Board in Docket 827 (Sub. No. 1) entered on behalf of Consolo the reparation order here under consideration, in the amount of $143,370.98. No interest was allowed in this award but interest at 6 percent per annum was granted on any amount not paid by Flota 60 days after the Board's order. This supplanted an Examiner's decision which had awarded Consolo $259,812.26 as reparations.

On appeal, the Court had before it two petitions by Flota, one attacking the Board's finding that it had violated the Shipping Act, the other attacking the reparation order, as well as a petition by Consolo attacking the reparation order. The Court sustained the Board's finding of violations and upheld its denial of Consolo's claims for pre-award interest, for an earlier starting date for the reparation period, and for an upward revision in the amount of space he would have been allocated if permitted to ship on Flota's vessels. However, the Court set aside the Board's reparation order and remanded it to the Commission to consider—

* * * whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.

The Court prefaced this language with a discussion of Flota's argument that it would be "inequitable" to award reparations because of the following factors:

1. The then "unsettled nature of the law" as to whether a violation had occurred.
2. The possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace Line, the carrier in a recent case dealing with similar issues, due to factual differences, *i.e.*, the physical characteristics of Flota's vessels and difficulties and delays in loading if more than one shipper were to use its banana space.
3. The Board's delay in deciding a petition for declaratory order sought by Flota (Docket 835).
4. Flota's "possible liability" for breach of the exclusive contract which it had signed with Panama Ecuador, one of Consolo's competitors, for what Flota may have thought "a reasonable period of time" in light of the Board's decision in a prior banana case involving Grace Line.
5. Consolo's apparent failure to utilize all of the banana space already available to him on Grace Line vessels.

The Court stated that the Board "took up most of these points individually and disposed of them briefly", and went on to say—

But the essence of Flota's argument was that the cumulative weight of all of the circumstances, and not any one circumstance, rendered it inequitable to require reparations. We are not prepared, on appeal. to go this far; but we do consider * * * that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to

grant reparations once it found a violation of the Act, or (2) that all of the issues as to the reasonableness or equity of Flota's conduct were determined in the first phase of the proceeding.

Discussion and Conclusions

The Commission recognizes, and we think the Board did, that section 22 of the Shipping Act does not require the award of reparations when a violation has been found. The language of the section is that we "may" direct the payment of "full reparation" for injury caused by the violation. This is permissive, hence the mere fact that a violation of the Act has occurred does not in itself compel a grant of reparations. We believe, also, that in granting reparations the Board took account of all the circumstances. But in any case we have made our own thorough review of this matter and have concluded that Consolo is entitled to reparations, though in an amount smaller than the Board awarded. In so concluding, we have not only re-examined the record but have considered the contentions of the parties including the arguments set forth in their briefs submitted on remand, and have particularly weighed the individual and cumulative effect of the factors mentioned by the Court as they bear on the equities.

First, we discuss the "unsettled nature of the law" in May 1957, at the time Flota executed a renewal contract allocating all of its available banana space to Panama Ecuador for three years, thereby excluding Consolo (and others) from its vessels. Shortly prior to this, in April 1957, the Board in *Banana Distributors, Inc.* v. *Grace Line*, 5 F.M.B. 278, had held that Grace Line's practice of contracting all of its banana space to three shippers to the exclusion of other qualified shippers was unjustly discriminatory and unduly and unreasonably prejudicial in violation of sections 14 (Fourth) and 16 (First) of the Act. And four years earlier, in *Philip R. Consolo* v. *Grace Line, Inc.* 4 F.M.B. 293 (1953), the Board had held the same thing after a full review of the problems attendant upon the transportation of bananas and of Grace's contention that it was not subject to common carrier obligations with respect to this commodity.

Grace "satisfied" the complaint in the 1953 case but after the 1957 decision it appealed. The Board's order was reversed and remanded in 1959 by the Second Circuit Court of Appeals due to the Court's disagreement with a test—namely, that bananas "are susceptible to common carriage"—which the Board had advanced in dealing with Grace's argument that Grace was, and because of the special conditions involved in banana transportation, could only be a contract carrier of the fruit. The Court refused at that time to consider the

Board's contention that a common carrier for the public generally cannot also carry "a particular commodity on a contract basis".[3] On reconsideration pursuant to this remand, the Board eliminated any reference to the "susceptibility test" and reached the same result it had reached earlier. The Board held that Grace was a common carrier by water under the Shipping Act and could not evade the requirements of the Act as to any part of the goods it carried. On appeal the Second Circuit in 1960 affirmed this decision and the Supreme Court refused review.[4]

We must judge Flota's protestations of innocent intent in the context of the circumstances as they existed in May 1957 when it executed the three-year renewal of its exclusive contract with Panama Ecuador and it is evident from the foregoing that Flota executed that contract in contravention of two Board decisions directly in point. *In both instances the Board had held that Grace was a common carrier of bananas and had declared illegal its attempts to exclude qualified banana shippers from its vessels.* The Board had ruled, also, that forward booking arrangements for transportation of the fruit for a period not exceeding two years were reasonable provided the available space was prorated among all qualified banana shippers who desired it.[5] Of course, the courts could alter these decisions, and to that extent they did not "settle" the law. But they were authoritative pronouncements by the agency with prime responsibility in the field and we fail to see why shippers should be penalized because Flota chose to ignore them and sign a three-year exclusive contract. Moreover, while Grace appealed the Board's 1957 order, the order was not stayed and remained valid pending the outcome of the appeal which neither Flota nor anyone else knew would succeed—as it temporarily did in 1959.

Flota argues that if it accepted Consolo's demands for space it might have been faced with litigation for breaching its contract with Panama Ecuador. But a provision in that contract absolved Flota of any liability in the event the contract was declared illegal or unenforceable.

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[3] *Grace Line, Inc.* v. *Federal Maritime Board,* 263 F. 2d 709 (CA2, 1959).

[4] *Banana Distributors, Inc.* v. *Grace Line,* 5 F.M.B. 615 (1959), aff'd *Grace Line, Inc.* v. *Federal Maritime Board,* 280 F. 2d 790 (CA2, 1960), cert. denied 364 U.S. 933 (1961).

[5] Bananas are plentiful in Ecuador, and the amount of bananas a shipper can sell depends solely on the current market for the product and the amount of space he can acquire for transporting them. The fruit is, however, highly perishable and must be carried in refrigerated compartments to prevent rapid ripening. Through forward booking arrangements the shipper is able to contract for a fixed amount of carrier space for a specific period of time. Such an arrangement permits the shipper to purchase bananas with the knowledge that vessel space is available for carrying them. During the period of the forward booking contract, other shippers, not party to this arrangement, are foreclosed from any space. In the 1957 *Grace* case forward booking arrangements for a two-year period were approved but only if a reasonable proration of space was made to all qualified shippers who desired it and were prepared to meet the terms of the forward booking contract.

Although this provision might have put Flota in the position of having to defend the *Grace* decisions and assert their application to the Panama Ecuador contract, it is not unreasonable to think that one acting in good faith would choose such a course. Flota consciously chose the opposite course and we can only conclude that it did so because it preferred the advantages if its long-term, exclusive arrangement with Panama Ecuador.

In so acting, Flota violated its common carrier duty, as repeatedly declared by the Board, to carry goods for all qualified shippers. Even if Flota thought the Board would be reversed, one who acts in contravention of a statute, court or administrative ruling, in the belief that it will be declared invalid, assumes a calculated risk. If the law which he contravenes is upheld, he must face the consequences. Flota is not facing but is seeking to escape the consequences by passing the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity.

We next deal with the possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace. Flota argues that its ships were not adaptable for loading and unloading and points out that when in 1959 it did open its space to several shippers, they combined into a single corporation, the Continental Banana Company, to act as a single shipper in the stevedoring, importation and marketing of bananas. But this goes to refute Flota's argument rather than support it because it shows that means were available to solve the problem of accommodating several shippers. Instead of a good faith exploration of such means, Flota, we think, simply preferred its existing one-shipper arrangement.

It would be safe to assume that every vessel in the banana trade is not exactly the same, structurally. To rely upon their structural difference as an excuse to avoid common carrier obligations would go far toward eliminating such obligations. Thus, legal precepts based on activities of a similar carrier, a similar contract, the same commodities, and the same trade, could be overridden by claiming structural differences in the ship. Nor is a refusal to carry goods for many justified by fear that they cannot cooperate in using the available space. Whether shippers can cooperate will never be known unless they are offered space. It is the common carrier's duty to offer the space and give shippers the chance to devise cooperative means of using it. In the final analysis the possibility of cooperation is one to be assessed by the individual shippers, and not the carrier. If multiple utilization is truly impossible, we think shippers will recognize this and accept the fact that the space can only be utilized on an exclusive basis.

Regarding the question of the Board's delay in deciding Flota's petition for declaratory order, we first point out that Flota brought this petition only under threat of a formal complaint by Consolo, which complaint Consolo actually filed two weeks after the petition. Flota had already violated the Act as interpreted by the Board when it filed its petition, hence, it did not, in fact, seek the Board's assistance in governing its conduct. Its resort to the Board was under pressure of the troubles it had invited by executing a three-year renewal of its exclusive contract with Panama Ecuador, in complete disregard of everything the Board had said on the subject. Again, judging Flota's claim in proper context, we are unconvinced of its good faith.

More importantly, however, Consolo's complaint, unless satisfied, was required to be investigated and determined by the Board under section 22 of the Shipping Act, 1916, regardless of the disposition it made of Flota's petition. And in the exercise of its discretion under section 5(d) of the Administrative Procedure Act (A.P.A.), the declaratory order provision (5 U.S.C. 1004(d)), the Board not only did not have to accord Flota's petition priority of consideration, it did not have to consider the petition at all. It might well have adjudicated the matter on the basis of Consolo's complaint and the one later filed by Banana Distributors, as being the more appropriate and effective procedure for handling the issues involved. Thus, the Attorney General's Manual on the A.P.A. states at p. 60 that an agency need not issue declaratory orders—

> * * * where it appears the questions involved will be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances.

See also *Western Air Lines* v. *C.A.B.*, 184 F. 2d 545 (CA 9, 1950) with respect to the wide discretion an agency has in choosing the means to dispose of the business before it.

Even standing alone, Flota's petition would have offered no promise of a speedy resolution of the controversy. Under section 5 of the A.P.A., such a petition must be determined on the record after notice and opportunity for agency hearing.[6] In filing the petition Flota conceded nothing. It took the position that its vessels were different structurally from Grace's vessels and as a practical matter they could only accommodate a single banana shipper.[7] Flota's assertion of this position, which was sharply disputed by the aggrieved shippers, led to

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[6] 5 U.S.C. 1004; see also Attorney General's Manual on the A.P.A., p. 59 and Rule 10(l), FMC Rules of Practice and Procedure.

[7] Flota also contended during the course of the proceeding that it was not a common carrier of bananas, that even if it was it had not prejudiced or unjustly discriminated against shippers, and that it had not violated the Act.

a complex and lengthy hearing into the physical characteristics and utilization of its vessels so far as the banana trade was concerned. Flota made the contention notwithstanding the in-depth probing of the special conditions of banana carriage including multiple shipper problems, which had occurred in the *Grace* cases. It hoped somehow to avoid those cases. Flota had a right to attempt this but any possibility of a prompt disposition of the controversy was thereby precluded, no matter what form the adjudication took.

Clearly, there is no substance to Flota's argument that its petition should have been determined independently of the complaints filed by Consolo and Banana Distributors, or that this would have expedited resolution of the dispute. Flota suffered no prejudice through the consolidation of its petition with complaints involving the identical controversy. We think the Board was entirely reasonable in exercising its discretion in this respect.

Nor is there any support for the suggestion that there was Board delay in the actual handling of the controversy, for which Flota is being made to pay reparations. The consolidated proceeding took about two years to terminate, and Flota meanwhile continued its advantageous Panama Ecuador arrangement. Panama Ecuador itself participated in the case, arguing along with Flota that the physical limitations of the vessels foreclosed their use by more than one banana shipper.

The record of the proceeding reflects that numerous requests for postponements were made and that Flota either authored or favored most of these. If there was any disposition on its part for a prompt determination, this cannot be discerned. For example, Flota asked for and obtained delays in answering Consolo's complaint and in the time set for the first prehearing conference; it joined in putting the hearing off to a date four months after that prehearing; and it then moved for a further delay of over two months in the hearing date. The hearing thus did not begin until a year after the filing of Flota's petition and Consolo's complaint. Whatever else may be said in justification of these delays, they cannot be explained on the ground that Flota was seeking "prior action" on its petition. The delays were in no sense caused by the Board. Indeed, in rendering their decisions the Examiner and the Board acted with what may be termed unusual dispatch, considering the controversial nature and size of the record.[8]

Turning now to Flota's allegation that under the Board's decision in the *Grace* case it believed its forward booking contract with Panama

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[8] The Examiner's decision was rendered three weeks after he received the parties' briefs; the Board's six weeks after it heard the oral argument.

Ecuador was for a reasonable period of time, we find it impossible to understand how Flota could have held any such belief. The 1957 *Grace* decision authorized forward booking for not to exceed two years, whereupon Flota executed a renewal of the Panama Ecuador contract for three years. That decision also set forth the criteria for valid forward booking contracts, making it quite clear that such an arrangement must provide "a reasonable opportunity for prospective shippers to engage in the trade" and the available space must be fairly prorated among qualified shippers. The duration of the contract is not even relevant until this latter requirement has been satisfied. Flota made no attempt to prorate its available space among qualified shippers. Instead, the space was offered and contracted to one shipper on an exclusive basis and this was illegal, apart from the period of time which the contract covered.

The final point to which we were directed to give further consideration involves Flota's contention that Consolo's failure to use all of his available space on Grace Line ships should reduce the reparations assessed in his favor. In arriving at its reparations figure, however, the Board did take account of this factor, and its award reflects this consideration.

There are certain periods during the year when the market for bananas drops, importers reduce their purchases and shippers naturally reduce their shipments to reflect the declining market. This is an industry-wide condition, so that at the same time Consolo was not fully utilizing his space on Grace Line, Panama Ecuador was not filling Flota's vessels nor were other shippers in the trade making full use of their available space.

The Board's reparation award was computed as follows: For each voyage made by Flota during the reparation period (Panama Ecuador, of course, being the only banana shipper), there was figured, for the actual number of bananas carried, the price received by Panama Ecuador upon the sale of the bananas less its cost of purchasing them. From this figure was deducted shipping and handling expenses such as freight and stevedoring, to arrive at the net profit or loss for the bananas shipped on each voyage.

Not every voyage was profitable and during the slack periods referred to above, particular voyages resulted in a negative or loss figure. The Board took account of the losses by making appropriate deductions from the profits, thereby compensating for the periods when Consolo could not have used all of the space on Flota's vessels to which he was entitled. The relevant exhibits reflect the industry-wide lag in the market for bananas and show a very close correlation between the periods when Consolo was not using all of his space on Grace vessels and the periods when Panama Ecuador's shipments on Flota occasioned a loss.

The Board found (and the Court sustained its finding) that an equitable proration of space to Consolo during the reparation period would have been 18.46% of the total. Thus, to determine Consolo's reparations because of being denied its just proration of space, 18.46% of the net profit (adjusted for losses as above described), was taken and the resulting figure was awarded by the Board as reparations.

In mitigation of the Board's award Flota also urges upon us Consolo's failure to charter vessels and his failure to use space available on the Chilean Line. These points are not tenable. We agree with Consolo that it would have been a hardship for him to charter ships in order to ply his trade, and we think it unreasonable to contend he should have done so in the circumstances. Flota does not make clear what ships were available for charter; or that Consolo could have used them; and if he could, on what terms. As to the Chilean Line, it has been shown, to our satisfaction, that Consolo did exert efforts to ship thereon and did, in fact, make several such shipments late in 1958. This arrangement was terminated by the Chilean Line, however, and not by Consolo.

There are other factors and charges which were taken into account in determining the Board's award which we have re-examined and we agree that certain adjustments should be made as urged by Flota. In light of the evidence presented, the freight rate of $34 per ton of bananas charged by Flota to Consolo in 1959, when Consolo was one of several shippers via Flota, appears to be a fairer figure for computing the reparations than the rate of $30.23 per ton Flota had charged its exclusive shipper (Panama Ecuador) for all of the banana space during the reparation period. The Board used the $30.23 rate in its computation.[9] We think Flota would not have continued this rate when faced with the situation of accommodating multiple shippers because operational costs increase when more than one shipper uses the available space. It seems to us the rate of $34 per ton actually charged by Flota when allocating space to several shippers, is more representative of the figure it would have charged had it allocated space to more than one shipper during the reparation period. It may be noted, also, that during the reparation period Consolo was one of several banana shippers using Grace's vessels and Grace charged him $36 per ton.

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[9] In determining its reparation figure, the Board computed freight on the basis of $1.134 per stem of bananas, which was the rate charged by Flota to Panama Ecuador, its exclusive shipper, during the reparation period. Bananas average 75 pounds per stem, hence the freight rate per ton used by the Board was $30.23. Our use of the $34 per ton rate increases the amount attributable to freight charges and reduces the reparation figure.

Finally, while we agree with the Board that the stevedoring costs at Philadelphia rather than New York were proper, since Flota served Philadelphia and not New York, the Board inadvertently erred in not figuring an increase in stevedoring costs instituted September 25, 1958 in Philadelphia. This amounted to 9.95 cents per stem and is taken into account, along with the revised freight rate above-mentioned, in out computation of reparations.

Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959 yielding a total gross profit of $2,513,236.43 (after adjustment for negative or loss figures on some voyages), and the subtraction therefrom of total freight amounting to $1,353,139.65 and stevedoring and incidental expense amounting to $585,876.87,[10] the net profit for the 98 voyages is $574,219.91, of which Consolo is entitled to 18.46% or $106,001.00.

In our opinion this constitutes the legally and mathematically correct measure of damages in this case. We agree with the Board, as apparently did the Court, that no single "equitable" argument belatedly raised by Flota justifies departing therefrom. Flota, however, has stressed the cumulative weight of its arguments as the basis for equitable relief. Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith, and we have been unable, except as noted, to find any equity in its contentions whether viewed separately or together. But even if that were not so the question would arise as to how we could equitably recognize the cumulative circumstances urged by Flota.

Could we define the equities in dollars and cents? Could we say that equity dictates that a legally and mathematically correct reparation figure be reduced by some unknown and arbitrary percentage such as a third, half, or perhaps all? We think not. It is, in any event, clear to us that by this stage of this prolonged controversy Flota's position has received all possible recognition, as evidenced by the fact that the reparation figure has been successively reduced so that it is now substantially less than half the amount the Examiner awarded Consolo several years ago.

An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of $106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

[10] This figure is obtained by adding the amount of $53,641.94 for the increase in stevedoring costs at Philadelphia between September 25, 1958 and July 12, 1959 to the $532,234.93 which the Board determined for stevedoring and incidental expense (539,115 stems times 9.95 cents equals $53,641.94).

FEDERAL MARITIME COMMISSION

No. 827 (Sub. No. 1)

Philip R. Consolo

v.

Flota Mercante Grancolombiana, S.A.

Order Directing Payment of Reparations

This proceeding having been remanded by the United States Court of Appeals for the District of Columbia Circuit (*Flota Mercante Grancolombiana, S.A., et al.* v. *F.M.C.* and *U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962)), and the Commission having considered the Court's opinion and duly re-examined the entire record and the briefs of the parties submitted on remand, and having on the date hereof made and entered a Report setting forth its findings and conclusions on remand, which Report is hereby referred to and made a part hereof:

It is ordered, That respondent Flota Mercante Grancolombiana, S.A., be and it is hereby directed to pay to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, $106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission, September 16, 1963.

(Signed) Thomas Lisi,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1144

SEA-LAND SERVICE, INC.—DISCONTINUANCE OF JACKSONVILLE/PUERTO RICO SERVICE

Decided October 3, 1963

1. The discontinuance by embargo of Sea-Land's Jacksonville/Puerto Rico service found not to be lawful since no emergency exists which would justify such action.
2. Sea-Land ordered to comply with the tariff filing requirements of section 2 of the Intercoastal Shipping Act, 1933, in its discontinuance of its Jacksonville/Puerto Rico service.
3. Order of investigation in Docket 1143 modified so as to vacate suspension of rates.

Raymond W. Mitchell for Thatcher Glass Manufacturing Company, Inc.

C. H. Wheeler for Sea-Land Service, Inc.

Donald J. Brunner and *Robert J. Blackwell* as Hearing Counsel

REPORT

BY THE COMMISSION. (John Harllee, *Chairman*, Ashton C Barrett, *Vice Chairman*, James V. Day, *Commissioner*):

This proceeding was instituted by the Commission's order of September 19, 1963, giving notice of a hearing affording all interested parties an opportunity to present their positions to the Commission in connection with the discontinuance by Sea-Land Service, Inc. (Sea-Land) of its Jacksonville/Puerto Rico service.

Sea-Land is a common carrier by water engaged in the transportation of property between ports in the United States and ports in Puerto Rico and, as such, is subject to the provisions of the Intercoastal Shipping Act, 1933 ("Act").

From February, 1960, until about April, 1963, Sea-Land served the Jacksonville/Puerto Rico trade by providing an indirect service via Newark, New Jersey, with a minimum charge of $500 per dry-cargo container and $1000 per refrigerated container. In April, 1963, Sea-Land vessels began providing a direct service from Jacksonville, Florida, to Puerto Rico and the minimum charges were withdrawn. On approximately August 6, 1963, Sea-Land discontinued direct calls at Jacksonville; reinstituted its indirect service via Newark; and filed with the Commission tariff revisions which would have re-established the minimum charges. The minimum charges were protested by several shippers and, on September 5, 1963, were suspended by the Commission and placed under investigation in Docket No. 1143.

By an "Embargo Notice" of September 10, 1963, Sea-Land notified shippers that, effective September 18, 1963,[1] it would "embargo" Puerto Rican/Jacksonville cargo. The embargo was protested by a number of shippers who urged that the Commission take any action that may be necessary to the continuance of the Jacksonville/Puerto Rico service which, it appears, is vital to their business. Meanwhile, Sea-Land advised the Commission that the "embargo" would be suspended temporarily if an opportunity was granted for Sea-Land to present its position to the Commission. Accordingly, "in order better to inform itself in the premises," the Commission issued its order of September 19, 1963. Pursuant thereto, memoranda of law and statements of fact were filed by Sea-Land and by Hearing Counsel. Oral argument was heard before the Commission on October 1, 1963, with these parties and counsel for Thatcher Glass Manufacturing Company participating.

Sea-Land contends (1) that the "embargo" of September 10th is lawful and (2) that the Commission should vacate its suspension of the minimum charges.[2]

Hearing Counsel contends (1) that the embargo is unlawful because no emergency exists which would warrant its imposition and (2) that if Sea-Land desires to discontinue its Jacksonville/Puerto Rico service, it must comply with the requirements of section 2 of the Act. Hearing Counsel also urges that the Commission vacate its suspension.

Thatcher Glass Manufacturing Company takes the position that the embargo is unlawful and the rate minimums unjust and unreasonable.

The other shippers who protested the embargo urge that Sea-Land's embargo be lifted and its service continued, even though the minimum charges remain in effect.

Discussion and Conclusions

The issues presented are (1) whether the "embargo" is lawful and (2) whether the Commission should vacate its suspension of the minimum charges.

[1] The effective date was postponed to September 25, 1963, and then to October 8, 1963.
[2] Sea-Land's counsel orally withdrew its request that Docket 1143 be dismissed.

1. The right of a common carrier to impose an embargo under certain circumstances is well established in the law. *Order That A. H. Bull SS Co. Show Cause*, 7 FMC 133 (1962) and cases cited therein. However, the conditions which warrant an embargo are limited and must constitute an impossibility to transport. As pointed out in *Boston Wool Trade Assn.* v. *Merchants and Miners Trans. Co.*, 1 U.S.S.B. 32, 33 (1921):

* * * an embargo is an emergency measure to be resorted to only where there is congestion of traffic, or when it is impossible to transport the freight offered because of physical limitations of the carrier.

There is no evidence that Sea-Land is unable to continue its Jacksonville/Puerto Rico service because of physical limitations. There is evidence that certain mishaps, which occurred to two of Sea-Land's vessels, resulted in the discontinuance of its direct calls at Jacksonville in August, 1963, but indirect service has been provided via Newark. However, the two vessels involved in the mishaps have been redelivered to Sea-Land and are now back in service (though not in the Puerto Rican trade). Therefore, whatever physical limitations may have existed in August, 1963, are no longer present and it would seem to be clear that the primary reason for not continuing the service concerns considerations of financial gain or loss, not physical limitations. This is borne out by the "Embargo Notice" of September 10, 1963, which states:

Unfortunately, we have been unsuccessful in our efforts to establish these minimum charges and therefore, have been left with no alternative but to decline the acceptance of all future shipments for movement between Jacksonville, Florida and the Commonwealth of Puerto Rico.

While the vessel mishaps may have resulted in discontinuance of Sea-Land's direct service (which service did not involve the minimum charges under suspension), the discontinuance of its indirect service is directly attributable to its lack of success in reinstating its minimum charges. Financial loss, even if such would occur without the minimums, is not justification for the imposition of an embargo. *Bull SS Co., supra.*

In view of the above, we find that the action of Sea-Land taken pursuant to the "Embargo Notice" of September 10, 1963, does not constitute a lawful embargo. If Sea-Land desires to discontinue its Jacksonville/Puerto Rico common carrier service it must withdraw and cancel its "Embargo Notice" and file with the Commission, pursuant to section 2 of the Act, new tariff schedules. Such schedules must be filed at least thirty days prior to the effective date of the discontinuance.

2. By its order of September 5, 1963 (Docket 1143), the Commission in the exercise of its discretion suspended Sea-Land's minimum charges, and ordered an investigation thereof to determine whether they are unjust, unreasonable, or otherwise unlawful, in violation of the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act, 1933, as amended.

Upon further consideration of this action, we are of the opinion that continuation of the suspension, in the over-all, is not in the public interest. We base this determination primarily on the fact that a large number of shippers who will be injured if Sea-Land's Jacksonville/Puerto Rico service is discontinued urge the Commission to take action to maintain the service, whereas only one, Thatcher Glass Manufacturing Company, presently contends it will be damaged by the minimum charges in question. Thatcher is the complainant in Docket 1082, in which it alleges the minimum charges are unlawful and claims reparations. Its position is, therefore, fully protected in that case. We, of course, express no opinion here as to the lawfulness of the rates and will continue our investigation thereof in Docket 1143.

In view of the foregoing, our judgment is that the suspension of the minimum charges should be vacated. An appropriate order to that effect will be entered in Docket 1143.

COMMISSIONERS PATTERSON AND STAKEM, DISSENTING:

We dissent from the majority decision insofar as it revokes the Commission's order of September 5, 1963, in Docket No. 1143, suspending until January 6, 1964, Item 37 on the 13th Revised Page 30–F, Tariff FMC–F No. 3, and Item 3–A on 11th Revised Page 12, FMC–F No. 2. We agree that the respondent's embargo action, the subject of Docket No. 1144, is contrary to law.

First, we believe the revocation of the Commission's suspension order is not justified because (a) such action necessarily involves a judgment about the justness and reasonableness of the proposed rates under investigation in Docket No. 1143 which we are not prepared to make, and (b) no new facts have been shown to exist that did not exist when the suspension order was originally issued.

If we permit the respondent to increase its tariffs to cover its alleged increased costs of the newly revised indirect service from Jacksonville, Florida, to Newark, New Jersey, to Puerto Rico, when the justness and reasonableness of such service and rates are under suspension and investigation in Docket No. 1143, we impliedly say that there may be some justification for the increased rates before we have reviewed any record of facts showing their reasonableness, or have stated whether they are discriminatory as alleged in Docket No. 1082. All we know

now is that service has been changed with no revision of the tariffs and a termination of service is threatened because of a misleading representation that an embargo of direct common carrier service is justified by circumstances.

What facts are available show that nothing whatever has changed since the suspension order was issued.

In spite of the fact that small shippers affected by the proposed minimum rates are not represented in the proceeding (other than Thatcher Glass Co.), the Commission must consider their interests as part of the public interest. The newly proposed minimum charges (13th Revised Page 30–F effective September 7, 1963, cancelling 12th Revised Page 30–F originally effective July 4, 1963) may not affect the large shippers, but the new tariff does affect complainant Thatcher Glass Company and others similarly situated, and all are affected by the threatened loss of service which will come about if respondent does not get its way in increasing the minimum quantities and charges to cover the apparently abandoned direct service to Puerto Rico. Until the reasonableness and justness of the rates can be adjudicated, respondent, absent any changed facts, should continue the status quo at least for the period authorized by law for suspension. The order of suspension should not be vacated.

Second, respondent's tariffs show that Sea-Land Service, Inc., Puerto Rican Division, in FMC–F No. 3 (3rd Revised Page 7) under "ports and terminals from and to which rates herein apply" offers the public common carrier service from its established terminals at Jacksonville, Florida, to its established terminals at the ports of Mayaguez and Ponce in Puerto Rico. Nothing is stated in the tariffs about the routing, but in fact direct service to and from Puerto Rico was provided until about August 6, 1963. Approximately August 6, 1963, according to an "Embargo Notice" of September 10, 1963, Sea-Land "was caused to discontinue direct service between Jacksonville, Florida, and ports within the Commonwealth of Puerto Rico, due to the temporary withdrawal of two vessels from its service." The temporary withdrawal was caused by two separate marine casualties involving Sea-Land's vessels. but these vessels have since been repaired and the two ships were back in service by August 31 and September 21, 1963, as shown by sailing information in Journal of Commerce advertisements. Nevertheless, the embargo which is stated to be "effective September 18, 1963", deferred until September 25 by Supplemental Embargo Notice and to October 8, 1963, by a Second Supplemental Embargo Notice, remains "in effect until further notice." The Commission is not informed of any further notice. The deferrals were made to permit the Commission to hear Sea-Land's arguments.

It has been correctly pointed out that an embargo is an emergency measure of temporary duration justifying suspension of common carrier service because of physical limitations on the carrier's ability to provide service. This physical limitation has ended, but the embargo continues in spite of the offer of common carrier service in the tariffs.

The tariff rates covering direct service were still in effect during the suspension period, and even though the suspension is lifted the tariffs remain silent as to any change in the direct routing service. We consider that the so-called embargo (pursuant to the last paragraph of the September 10, 1963, embargo notice) of "the transportation of all commodities via its service between Jacksonville, Florida, on the one hand and ports within the Commonwealth of Puerto Rico on the other hand" is not a true embargo, but has been imposed for the convenience of the respondent for economic reasons. As the embargo states: "Unfortunately, we have been unsuccessful in our efforts to establish these minimum charges [the reference is to charges based on service via Newark, N.J.] and, therefore, have been left with no alternative but to decline the acceptance of all future shipments for movement between Jacksonville, Florida, and the Commonwealth of Puerto Rico." Furthermore, we consider that the tariffs do not correctly state the nature of Sea-Land service and that there has been a drastic change in service without any revision of the description of the service other than is implied by the proposed increase in rates. The improper use of the embargo, the failure properly to describe the service offered in the tariffs, and the proposed refusal to continue service by means of the embargo notice instead of a revision of the tariff are practices which in our opinion are unjust and unreasonable in violation of Section 4 of the Intercoastal Shipping Act, 1933. The foregoing constitute our reason for supporting the issue of a cease and desist order against the "embargo" in Docket No. 1144.

FEDERAL MARITIME COMMISSION

No. 1144

SEA-LAND SERVICE, INC.—DISCONTINUANCE OF JACKSONVILLE/PUERTO RICO SERVICE

ORDER

The Commission having fully considered the above matter and having this date made and entered of record a Report containing its conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That Sea-Land Service, Inc., withdraw and cancel the "embargo" imposed by its "Embargo Notice" of September 10, 1963 (and supplements thereto), in the same manner in which the "embargoes" were instituted.

By the Commission, October 3, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1095

AGREEMENT NO. 150–21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AND AGREEMENT NO. 3103–17, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

Decided October 30, 1963

1. Section 15 does not require, in the absence of a provision in the basic agreement to the contrary, that modification strengthening self-policing system of conference be adopted only upon unanimous vote of the parties to such approved agreements.
2. Agreement No. 150–21 and Agreement No. 3103–17, approved pursuant to section 15, Shipping Act, 1916.

Leonard G. James and *Charles F. Warren* for respondents.

George F. Galland and *Amy Scupi* for States Marine Lines.

Thomas K. Roche and *Sanford L. Miller* for A. P. Moller-Maersk Line, intervener.

Wm. Jarrel Smith, Jr., Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*, Ashton C. Barrett, James V. Day, Thos. E. Stakem, *Commissioners*):

This proceeding was instituted to hear protests against the approval under section 15, Shipping Act, 1916, of certain proposed modifications of two existing conference agreements. Agreement No. 150–21 is a proposed modification of the basic agreement of the respondent Trans-Pacific Freight Conference of Japan which seeks to strengthen the "neutral body" system presently employed by Trans-Pacific to police the obligations of its members under the basic agreement. States Marine Lines and Isthmian Lines, Inc., parties to Agreement No. 150, the basic agreement, have protested approval of the proposed modification on several grounds.

Agreement No. 3103–17 is a proposed modification of the basic agreement of the respondent Japan-Atlantic & Gulf Freight Conference which also seeks to strengthen the "neutral body" system presently employed by Japan-Atlantic to police the obligations of its members under the basic agreement. States Marine Lines, a party to Agreement

No. 3103, the basic agreement, has protested approval of this modification on the same grounds as its protests of Agreement No. 150–21.

Except for differences not relevant here both basic agreements and the proposed modifications thereto are identical in their terms and for the purposes of this report they shall be treated as one. The present self-policing systems of both respondent conferences are provided for in Article 25 of their respective basic agreements. (For the full text of present article 25 see Appendix A to this Report.)

Under their present systems, respondents select and appoint a neutral body from responsible accountants or other persons, but the person appointed may not be employed by nor financially interested in any party to the basic agreement. Once appointed, the neutral body is empowered to receive and investigate complaints in writing from members of the conference, and to engage agents, lawyers and other experts and receive evidence from members in the conduct of such investigations. In turn, the conference members are obligated to cooperate with the neutral body in the course of its investigations and must make available to it all records, correspondence and documents of every kind wherever located. When its investigation is completed, the neutral body has the sole discretion to determine whether or not there has been an infringement of the basic agreement and the conference has no right to question its decision. If an infringement is found, the neutral body fixes the amount of the fine[1] and reports, to the extent it deems appropriate, the results of its investigation to an "Ethics Committee." The Ethics Committee, composed of the conference chairman and three members selected by him, then informs the member lines through the chairman.

Under the proposed modifications the powers of the neutral body are somewhat enlarged and the procedures by which it conducts its investigations are set forth in greater detail. (The full text of the proposed modifications appears in Appendix B to this report.)

Under the proposed system a person would not be disqualified to act as the neutral body by virtue of employment by or interest in a party to the basic agreement if, prior to appointment, the person selected divulges such interest and the conference appoints him with knowledge thereof. The neutral body, in addition to investigating written complaints of "malpractices," would be empowered to institute such investigations on its own motion. "Malpractice" is defined in the proposed modification as "any direct or indirect favor or benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer or

[1] The maximum fines are specified in Article 25 as $10,000 for the first offense; $15,000 for the second offense; $20,000 for the third offense, and $30,000 for the fourth and subsequent offenses. These maxima are unchanged under the proposed modification.

other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members." While under the present Article 25 the member lines are obligated to make available all books, records, etc., the proposed modifications affirmatively grant the neutral body right of access to the books, records, etc. of the members "immediately and without prior screening by the member or its agents." In addition, the failure of a member to supply materials and cooperate with the neutral body in its investigations would constitute a breach of the basic agreement. Procedures to be followed by the neutral body in granting a "hearing for respondent" are set forth in the proposed modifications, and "the respondent is granted an opportunity to appear before the neutral body with his accountants or counsel or both and offer such explanations as he may have." The present Article 25 is silent as to any right of the respondent to a hearing.

The foregoing represent the major changes respondents seek to make in their present systems. There are other differences but these are primarily differences in language only and will be discussed only if and where germane to issues raised by the protests.

In addition to protesting specific provisions of the proposed modifications on their merits States Marine and Isthmian in their original protests contend that the modifications are invalid under section 15 because they were not adopted by unanimous vote. In our order instituting this proceeding we expressed our particular interest in receiving argument on the question of whether section 15 of the Shipping Act requires such unanimity. Respondents did not file any memorandum directed to the merits in this proceeding, taking the position in a motion to dismiss that a full evidentiary hearing was required before the Commission could disapprove an agreement under section 15. Memoranda, directed solely to the unanimity issue, were filed by States Marine; by A. P. Moller-Maersk Line, as intervener; and by Hearing Counsel. States Marine, of course, takes the position that unanimity is required while Hearing Counsel takes the opposing position. Moller-Maersk contends that the question is not susceptible of an unqualified answer but requires an *ad hoc* determination based upon specific modifications.

Section 15 provides in part:

"That every common carrier by water * * * shall file immediately with the Commission * * * every agreement with another such carrier * * * to which it may be a party or conform in whole or in part."

From the above quoted provision of section 15, States Marine argues that because it voted against the proposed modifications they are not agreements to which it is party or to which it conforms in whole or in part and thus they are not proper agreements under section 15.

Articles 18 and 19 of respondents' basic agreements set forth the voting procedure and requirements by which the respondents conduct their operations as conferences in our foreign commerce. Pursuant to Article 18, three-fourths of all parties entitled to vote constitute a quorum, except when changes in the basic agreement are being considered, when it requires four-fifths of those parties entitled to vote to make a quorum. Article 19(a) provides that once the four-fifths quorum is present, all parties agree to be bound by changes to the basic agreement made with the consent of two-thirds of all parties entitled to vote. Articles 18 and 19 were a part of the basic agreement when States Marine was admitted to membership.

States Marine contends that notwithstanding the language of Articles 18 and 19, a modification of the basic agreement without unanimous consent of the parties alters the contractual relations of the dissentient parties contrary to the principles of contract law and is thus invalid. States Marine argues, in an attempt to avoid its obligations under Articles 18 and 19, that because it was not among the original organizers of the respective conferences and had no part in the formulation of their basic agreements it remains free to attack those portions of the agreements which it considers improper. For States Marine to prevail, some provision of section 15 must render the voting requirements of Articles 18 and 19 invalid, for if they are valid States Marine as a subscriber to the agreement is bound thereby.

In attempting to show that the voting requirements are invalid States Marine attempts to draw analogies from the field of private contract law. We think these analogies improper. Private contracts, normally between two parties, cannot reasonably be equated with agreements approved under section 15. An agreement providing for the organization of a conference to operate in our foreign commerce is of necessity an agreement which attempts to reconcile a number of divergent interests insofar as is consistent with Congressional policy and the public interest in the free flow of our foreign commerce. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement.[2]

[2] This is by no means a novel relationship. Analogous situations pervade our political, economic and social structure. Just one example in the economic sphere is found in corporate organizations. A corporation can make fundamental changes in its charter, changing the very nature of the corporate business, and most states require only that the consent of two-thirds or three-fourths of the stockholders be given to this change. The dissenting stockholder must either bow to the will of the majority or sell his stock. The latter alternative is, in effect, resignation from the corporation.

This concept of majority rule is not uncommon in the ocean freight industry. A good many agreements on file with the Commission provide for the modification thereof by a stated majority. We do not consider it unreasonable for a conference to make such a provision in its basic agreement, provided it is not applied so as to contravene the standards of section 15. We find nothing in the concept of majority rule as applied to the proposed modifications here under consideration which renders it discriminatory as between carriers or shippers, detrimental to the commerce of the United States, contrary to the public interest or otherwise contrary to the requirements of section 15. States Marine in accepting membership in the respondent conferences has bound itself to the terms of the basic agreement, and so long as it chooses to remain a member it must conform to all modifications thereto which are regularly made and duly approved by the Commission.

Both States Marine and Isthmian object to the conferences' system of recording affirmative action on proposed modifications when they are filed with the Commission for approval under section 15. When the required majority has voted to amend the conference agreement, the approved amendment is subscribed in the following standard form:

"In witness whereof the Trans-Pacific Freight Conference of Japan [or the Japan-Atlantic & Gulf Freight Conference] the members of which are all hereinafter listed, has authorized the foregoing amendments by resolution passed at its Regular Conference Meeting held [date] in [place]."

This is followed by an alphabetical listing of all the members of the conference, including those who had voted against the proposal, and then by the signature of the conference chairman, who signs on behalf of all its members.

Protestants claim that the signature of the conference chairman on behalf of the entire membership falsely implies that the modification was carried unanimously.

We agree. The method used by respondents is misleading at best, and we are of the view that the respondents should adopt a signature form which removes any possibility of a false impression as to the unanimity of an action when in fact unanimity does not exist.

Protestants also challenge several of the substantive features of the proposed modifications. Basically they object to the following:

1. The provision allowing the neutral body to have an "interest" in a party to the basic agreement so long as that interest is divulged prior to appointment.
2. The asserted vagueness of the neutral body's jurisdiction under the proposed modification.
3. The provision making the failure of a member to report a suspected malpractice a breach of the basic agreement.

4. The unlimited investigatory power of the neutral body and the absence of a statute of limitations.
5. The failure to apprise the accused of the identity of his accuser and the lack of procedural safeguards.
6. The failure to inform the accused of the disposition of complaints other than those in which a violation is found.

In a recent amendment to section 15, Congress expressed its concern over past failures of steamship conferences operating in our foreign commerce to live up to the terms of their agreements when it directed this Commission to disapprove any agreement upon a finding of inadequate policing of the obligations under it.[3] Congress, however, left to the individual conferences the responsibility of selecting the method best suited for their particular trade and situation. In furtherance of this intent of Congress we have adopted a broad policy respecting self-policing systems of conferences operating in our foreign commerce.[4] While section 15 requires self-policing modifications to be approved under that section as comprising a part of the complete agreement of the parties, we are not inclined when considering approval to specify the procedures by which the parties seek to insure that each will fulfill its obligations to the others. It seems to us that the prime concern when considering whether to approve such an agreement is whether it is unjustly discriminatory as between the carriers party to it and whether it is reasonably probable that the agreement will insure adequate policing, thereby fostering the free flow of our commerce unhampered by malpractices.

The proposed modifications now before us are designed to strengthen the self-policing systems of the respondent conferences. The essence of protestants' argument against approval of these agreements is that the power vested in the neutral body is capable of abuse. The Commission must assume, however, that once the agreement is approved the conference will live up to its obligation to apply that agreement so that it does, in fact, adequately and without discrimination police conference obligations. We are of course under a continuing duty to maintain surveillance of these and all section 15 agreements, and should respondents fail to apply the agreements approved herein effectively and without discrimination, we shall take such steps as are necessary under the circumstances.

We have examined the proposed modifications and the protests thereto. We find nothing in the proposed modifications which war-

[3] Public Law 87–346 (75 Stat. 764) amended section 15 by including *inter alia* the following provision: "The Commission shall disapprove any such agreement, after notice and hearing on a finding of inadequate policing of the obligations under it * * *"

[4] See statement of the Commission upon promulgation of rules governing self-policing systems, 28 F.R. 9257, August 22, 1963.

rants their disapproval under section 15. Thus we conclude that Agreements No. 150-21 and 3103-17, are not discriminatory as between the carriers party thereto nor detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act, and they should be approved under section 15 of the Act.

In the light of this conclusion, we deem it unnecessary to rule on respondents' contention that we may deny approval of the modifications only after a full evidentiary hearing and respondents' motion to dismiss is hereby denied. An appropriate order will be issued.

COMMISSIONER PATTERSON, DISSENTING:

Based on the record before me in this proceeding, my conclusions are as follows:

First. I concur in the result reached in the preceding report as to the adequacy of all parts of Article 25 with the exception of sub-articles 25(a) and 25(f) proposed for approval by the Conference.

Second. I dissent from that part of the Commission's majority decision which approves sub-articles 25(a) and 25(f) of Appendix B.

As regards my dissent which is stated above as my second conclusion, I find inadequate policing of the obligations pursuant to section 15 of the Act as a result of sub-article 25(a), paragraphs (1) and (2), which provide for the appointment of an impartial, independent person or firm as a neutral body which shall not have any "interest" in the form of any material professional or business relationships, financial interests or service contracts in a Conference member. Paragraph (2) says that in case of such an interest it shall be divulged and will not thereafter affect the qualification of the neutral body, but such interested neutral body must disqualify itself "in the event of a complaint *against* a member with which it may have such an interest." (Underscoring added.) The provision in paragraph (2) which requires disqualification only in the event of a complaint against a member but not by a member in which the neutral body may have an interest belies the high standards of neutrality set up in paragraph (1).

The two conditions are incompatible. The second condition in paragraph (2), if it means anything, means that the neutral body is not independent and can not in fact be impartial. The effectiveness of this cancellation of the independent and impartial standard is reinforced by a further obligation that the Conference members "will not raise an objection, based on such grounds * * *" (i.e., employment by a complaining party). The effect of these provisions is to permit the neutral body to have a commercial bias through business relationships as long as the bias does not favor the accused. If the neutral body is the regular accountant or auditor of the complaining carrier and discloses such relationship, it is qualified to pass on alleged violations, but if it is the same thing for the accused it is powerless to act. Such a provision which creates and then contradicts the expressions of independence through such a distortion of the neutrality concept of favoring neither side in a dispute, by permitting a spurious neutrality or bias in favor of an accuser and against an accused, provides inadequate policing in my view.

This inadequacy through a defiance of the rules of fair play may be thought to have been invited by the Court in *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Commission*, 314 F. 2d 928 (9th Cir., 1963), when, in the course of an opinion holding valid and affirming our order in Docket No. 920 and 920 (sub. 1), the court remarked whether "a further amendment eliminating this requirement of true neutrality would have ultimately been approved by the Board is something on which we are not required to speculate." In Docket No. 920 and 920 (Sub. 1), the Commission reviewed the same Conference's Article 25 before the presently proposed amendment, which simply provided for the appointment of a neutral body policing unit and stated that the neutral body "could not be a party to nor employed by nor financially interested in any party to the Agreement." Because of the facts showing that the neutral body was an agent of a regular auditor of one of the members of the Conference, the Commission said: "If the person selected was not actually neutral or impartial, then unquestionably there was a departure from that which the Board had approved and to which the conference membership had agreed." It is my opinion that the Commissioners held that the facts showed non-conformity with the terms of the contract's neutral body provisions. The presence or absence of true neutrality is still the issue, in spite of the changed language, and on this issue the inconsistent provisions fall down just as the Conference's deeds failed to measure up to the true neutrality provisions of its contract in the case before the Court. Believing true neutrality to be the proper standard, then non-neutrality in the proposed Agreement involves inadequacy as regards this norm, and it is my opinion that the Commission should make a finding of inadequacy of the revised provisions.

My dissent from approval of sub-article 25(f) is not directed at any specific provision, but to the absence of any provision putting a time limit on how far back into the past a neutral body can go in investigating complaints. To the extent of the absence of a limit, such as two years, the policing provisions are inadequate.

Ideally, the hearing procedure provided for in sub-article (f) should provide a method for determining the full truth in connection with an alleged malpractice. An adequate provision will at least provide a rudimentary method for obtaining the truth so the neutral body can make a fair decision. If the neutral body is allowed to investigate complaints based on past occurrences where the evidence will be imprecise or nonexistent, where peoples' memories will be vague and documents will have been destroyed, the opportunity for obtaining the truth and a fair hearing is lost. When this lack of safeguard for the discovery of the true facts is coupled with the other provisions of sub-articles (e) and (f), denying the accused the right to know about the evidence against him, not providing a true hearing, with witnesses, and argument, but only the right to offer explanations; giving notice of charges only "after the Neutral Body has completed its investigation and arrived at a tentative decision that there was a breach * * *" determined in secret deliberations on a secret complaint of an unknown complainant, the absence of any provision to prevent stale complaints compels disapproval.

Unless Article 25 is further modified to prevent complaints based on events that occurred before the neutral body system is approved by the Commission and to forbid thereafter examination into stale occurrences, say over two years ago, the policing provision in (f) is inadequate.

APPENDIX A

Article 25 as approved provides:

25. *NEUTRAL BODY.* There shall be a Neutral Body selected and appointed by the conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement upon such terms as are agreed between the conference and the Neutral Body. The Neutral Body shall have the following powers, duties and responsibilities.

1. To receive complaints in writing from members of the conference pursuant to their obligations hereunder to report malpractices.
2. To investigate said complaints and receive evidence thereon from members of the conference or from the conference offices or otherwise.
3. To engage agents, lawyers or other experts in connection with its investigation and consideration of complaints and to pay on behalf of the conference all costs incidental to engagement and use of such agents, lawyers and other experts.
4. To have absolute discretion to decide whether or not an infringement has taken place and the conference shall have no right to question such decision, subject to the maximum fines set forth below.

   The maximum fines assessed by the Neutral Body shall be:

   (a) First offense up to a maximum of U.S. $10,000.00
   (b) Second offense up to a maximum of U.S. $15,000.00
   (c) Third offense up to a maximum of U.S. $20,000.00
   (d) Fourth offense and subsequent offenses up to a maximum of U.S. $30,000.00
5. To report to the extent appropriate the result of its investigation to Ethics Committee but without disclosing the names of complainants.

The Ethics Committee shall notify the member lines through the conference Chairman.

6. To give directions as to payment of fines after assessment and notification to the Ethics Committee.
7. The undersigned lines promise to report immediately to the Neutral Body directly any apparent or alleged deviation from the conference agreement of its rules and regulations of correct and ethical practices thereunder which come to their attention or knowledge.

   All lines agree to accept the decision(s) and any assessment(s) of fines thereof by the Neutral Body as final and binding.
8. To enable complaints to be investigated, the conference shall make available to the Neutral Body all records, correspondence and documents of every kind wherever located and give all assistance and information whatsoever verbal or otherwise which may be required by the Neutral Body at their absolute discretion. All the records of the freight conference at the secretary's office will also be available to the Neutral Body.
9. The conference members jointly and severally shall indemnify the Neutral Body against any liability to third parties including employees under any libel or other action which might be brought against the Neutral Body arising from the performance of its duties under this agreement. The conference members jointly and severally shall have no right to claim against the Neutral Body or their agents in any such libel or other action.
10. The retainer fee and other compensation for services of the Neutral Body shall be as agreed between the member lines and the Neutral Body.

APPENDIX B

The proposed modification of Article 25 is as follows:

Article 25. *NEUTRAL BODY*

(a) *Appointment and Qualifications of the Neutral Body:*

(1) The Conference shall appoint, upon terms to be fixed by separate contract, an impartial, independent person, firm or organization to be designated the Neutral Body which shall be authorized to receive written complaints reporting possible breaches of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice, and to investigate and decide upon such alleged breaches and, if such breaches are found, to assess damages, and in addition, to collect damages assessed, after payment thereof becomes delinquent.

(2) Appointment of the Neutral Body hereafter will be by vote of the Conference membership under Article 19 of the Conference Agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment, a candidate will be required to divulge to the Conference any material "professional or business relationships, financial interests or service contracts" (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, sub-agents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interest, and promise to obtain Conference approval thereof before accepting any such proposal. Such interest so divulged, if any, will not affect the qualification of the Neutral Body when appointed by the Conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this Article 25(f)(4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the Conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint.

(b) *Jurisdiction of the Neutral Body:*

(1) The Neutral Body shall have jurisdiction to handle, in accordance with the procedures of this Article all written complaints submitted to the Neutral Body by the Conference Chairman or a member alleging breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or, on its own motion, any breaches of this Article 25; provided, that nothing herein contained shall change the functions of the Misrating Committee.

(2) "Malpractice" as used in this Article shall mean any direct or indirect favor, benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer, or other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members.

(c) *Member Lines' Responsibility to Report Breaches and Assist Investigations:*

(1) The members and/or the Conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or any breach of this Article 25 by a member or its agents, and failure to report such information by any member will be a breach of this Article.

(d) *Investigation:*

(1) The Neutral Body and/or its agents, shall have the power, authority and responsibility to investigate written complaints and in investigating said complaints to call upon a member or its agents at any of their offices during office hours and inspect, copy and/or obtain "correspondence, records, documents, signed written statements or oral information and/or other materials" (hereinafter in this Article "materials"), which materials are deemed by the Neutral Body in its sole discretion to be relevant to the complaint. Upon making such a call the Neutral Body shall have the right to see and copy such materials immediately and without prior screening by the member or its agents.

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are located in the member's own

offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this Agreement by the member, and the member undertakes to thoroughly inform its agents of the member's liability for their conduct and obtain their commitment to comply with the Conference Agreement, Tariff Rates and Rules and Regulations. In addition the members undertake an affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

(3) The records of the Conference will be made available to the Neutral Body on request and the Conference Chairman and staff will render all assistance possible to the Neutral Body during investigations.

(e) *Confidential Information:*

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself deems appropriate.

(f) *Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof:*

(1) On concluding its investigation, the Neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the Agreement, Tariff Rates or Rules and Regulations, and if a breach is found which was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

(2) In deciding whether a breach exists based on the results of its investigation, the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead it will employ rules of common sense in determining breaches and assessing damages and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach probably occurred.

(3) After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanations as it may choose at such meeting.

(4) The Neutral Body will then make its final decision and either discharge the respondent or assess liquidated damages against him. In assessing said damages, the members recognize that breaches of the Conference Agreement, Tariff Rates or Rules and Regulations cause substantial damages, not only in lost freight but in consequent instability of the Conference rate structure. The members further recognize that the damages caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule:

(a) First breach: maximum of Ten Thousand Dollars ($10,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(b) Second breach: maximum of Fifteen Thousand Dollars ($15.000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(c) Third breach: maximum of Twenty Thousand Dollars ($20,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(d) Fourth breach and subsequent breaches: maximum of Thirty Thousand Dollars ($30,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damages assessed, if any. In addition the Neutral Body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to the absolute discretion of the Neutral Body, and in no event will the Neutral Body report the name of the complainant without consent, or report confidential information.

(5) The Ethics Committee will notify the members through the Chairman, of the decision and damages, if any, and will also at the same time instruct the Chairman to notify the respondent of the decision, but only if a breach is found, and in such case the respondent will be furnished with the Neutral Body report and a Conference debit note covering the liquidated damages assessed.

(g) *Unquestioned Recognition of Decisions of the Neutral Body:*

(1) The members agree to accept the decisions of the Neutral Body as valid, conclusive and unimpeachable, but it is understood between the members that decisions of the Neutral Body are not admissions or proof of guilt or liability under law.

(2) The members further agree that neither jointly or severally will they bring any action whatsoever against the Neutral Body or its agents for damages allegedly arising out of its acts, omissions and/or decisions as the Neutral Body. In addition, each member agrees to hold the other members of the Conference and the Neutral Body and its agents harmless from any claims which may be brought by its agents or employees against another member, the Conference or the Neutral Body or its agents for damages allegedly arising out the Neutral Body's acts or functions.

(h) *Payment of Damages:*

(1) The members will pay all damages duly assessed by the Neutral Body upon receipt of a debit note from the Chairman, and if not paid within thirty (30) days of receipt of the debit note, the damages will become delinquent under Article 28 of the Conference Agreement.

(2) The Neutral Body will have the power and responsibility immediately, without notice to or further authority from the Conference, to collect as agent for the Conference and by any measures recommended by legal counsel, any damages duly assessed, as soon as they become delinquent, from the deposit or substitute security submitted and maintained by the members under Article 12 of this Agreement. The Neutral Body will pay over to the Conference immediately all damages collected.

FEDERAL MARITIME COMMISSION

No. 1095

AGREEMENT NO. 150–21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AND AGREEMENT NO. 3103–17, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusion thereon, which report is hereby referred to and made a part hereof;

It is ordered, That Agreements No. 150–21 and 3103–17 are hereby approved.

By the Commission, October 30, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Special Docket No. 266

CORPORACION AUTONOMA REGIONAL DEL CAUCA, ET AL.

v.

DOVAR S.A. INTERNATIONAL SHIPPING & TRADING CO.

Application under Rule 6(b) for permission to waive undercharges is granted, and applicant is directed to refund an overcharge.

Andrew A. Normandeau, Donoghue, Ragan & Mason, for applicant.

INITIAL DECISION OF WALTER T. SOUTHWORTH, EXAMINER [1]

Dovar S.A. International Shipping & Trading Co. (Dovar) applies for permission under Rule 6(b) of the Commission's Rules of Practice and Procedure (1) to waive the collection from four shippers of undercharges aggregating over $31,000 on six commodities carried from Atlantic coast ports to ports in Colombia, Ecuador and Costa Rica at rates substantially below applicant's published tariffs in effect at the time of shipment; and (2) to refund to one of the same shippers an overcharge of $30.80 made on a shipmnet of household goods. The application involves a single southbound voyage of the M.V. *Adriana,* sailing from New York November 2, Norfolk November 6, and Savannah November 8, 1962. Details of the shipments, including names and addresses of the shippers (complainants), are shown in Schedule A attached. The application was originally filed April 8, 1963; a supplemental statement was filed July 22, 1963; and an amendment correcting certain errors was filed August 5, 1963. Certificates of complainants certifying as to amounts of freight paid and borne as such by each, as required by Rule 6(b), were not filed until September and October; the last two were filed October 23,

[1] This decision became the decision of the Commission on November 27, 1963, and an order was issued granting the application.

1963. Except as otherwise noted, the following facts appear from the application, as supplemented and amended:

Dovar is a small steamship line, engaged primarily in carrying explosives in berth service from United States ports to the Caribbean and South America. When space is available it also solicits general cargo. Apparently it has not made any effort to set up a comprehensive tariff for general cargo; it has filed N.O.S. ("Not Otherwise Specified") rates for some of its usual ports of call, but in general has filed rates for specific commodities only as the opportunity has arisen to carry such cargo. In the present instance, applicant claims to have prepared tariff amendments covering the shipments in question which were "typed, mimeographed and scheduled for mailing to the Commission", but inadvertently were not mailed. Tariffs were filed more than a month later, when the omission was "accidently" discovered. An exception was a tariff covering the shipment of household goods to Colombia, filed November 2, 1962 effective that date, which was the date the ship sailed from New York; and in this case the tariff filed was lower than the rate actually charged. This tariff was ignored; the shipper was charged $30.80 more than the filed rate would have produced, and the tariff was not mentioned in this application until the amendment of August 5, 1963. Even the amendment does not reveal that this tariff was filed November 2, 1962, the date of shipment; but this appears from the records of the Commission.

Tariffs purporting to cover the shipments in question were first filed in December marked "Issued December 7, 1962 Effective December 10, 1962." These tariffs omitted a surcharge of $5.40 per ton or 40 cu. ft. which had in fact been charged on certain items to Colombia, and a surcharge of $.56 per 40 cu. ft. which had been charged on the shipments to Ecuador; and corrected tariffs, adding the surcharges to all items (including some on which a surcharge had not been made) were issued December 18, 1962, effective January 17, 1963.

Also, the December 7, 1962 tariffs did not include a tariff for linerboard shipped to Costa Rica at $18.00 per 2,000 lbs. A linerboard tariff of $24.00 per 2,000 lbs. to Costa Rica had beeen in effect since February 1962. This earlier linerboard tariff was ignored in the original and first supplementary application, although it was mentioned in a letter to the Director of the Commission's Bureau of Foreign Regulation dated January 21, 1963, which was incorporated by reference in the first supplement. The same letter notes that the $18.00 rate was quoted to meet the identical rate offered by a competitor, and was "completely non-renumerative". It may be noted that the only new rate not filed with the first group issued

December 7, 1962, was this "non-renumerative" one; however, there have been so many errors and omissions in connection with the transactions here involved that this omission may not be significant.

Dovar has ascribed its failure to file seasonably to its being, administratively, a one-man organization, and has stated that steps have been taken to improve the situation. The series of errors which has attended its efforts—including the present application—to remedy the situation is not reassuring, but is not necessarily inconsistent with a sincere attempt by applicant to put its house in order; evidently it has, at least, sought the advice of counsel and employed a tariff service organization to try to straighten things out. It is concluded that the case is one of inadvertence, in the sense of carelessness and lack of heedfulness, as well as a mere mistake.

There is no basis for any finding of impropriety on the part of the undercharged shippers; at most it appears that they merely took advantage (as in the case of the linerboard) of a competitive situation. With the exception of the linerboard transaction, the only tariffs on file prior to the booking of shipments were N.O.S. rates more than twice the amount of the rates charged. "Ordinarily, N.O.S. rates are among the highest in the tariff * *." *S. H. Kress & Co.* v. *Baltimore Mail Steamship Co. et al.*, 2 U.S.M.C. 450, 452. The linerboard rate charged, while 25 percent less than the tariff on file, was available to the shipper from another carrier. Having in mind the nature of applicant's operation, the shippers were entitled to assume that applicant would make the minimal effort necessary to make its filed rates conform with its agreed charges.

Innocent shippers should not be made to bear the consequences of the carrier's neglect in filing a tariff rate that the parties, acting in good faith, had agreed would apply. *Martini & Rossi* v. *Lykes Steamship Co., Inc.*, Special Docket No. 244, decided November 13, 1962, citing *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, Special Docket 243, report served January 23, 1962. This is particularly so where, as in the present case, the carrier would receive a very substantial windfall at the expense of the innocent shippers, purely as a result of the carrier's own failure to make the filings that it could and should have made.

According to applicant's statement, there were no shippers, other than the named complainants, of the same or similar commodities on respondents' vessel during the period in question, including the period following the voyage until the correct rates were filed and became effective. Hence it is found that to grant the application will not result in discrimination.

In such circumstances, the Commission may exercise its discretion to remedy the situation, although such action cannot excuse a party from any statutory penalty to which it may be subject. *Martini & Rossi* v. *Lykes Steamship Co., Inc., supra; Lykes Bros. Steamship Co., Inc. Application for Authority to Refund*, etc., Special Docket No. 265, decided June 4, 1963.

Accordingly, the application for permission to waive collection from the four shippers of charges in excess of the amount paid with respect to each commodity where there was an undercharge, as shown in Schedule A attached, is granted, and applicant is directed to refund to the shipper of household goods the amount of the overcharge of $30.80, also as shown in Schedule A.

An appropriate order will be entered.

(Signed) WALTER T. SOUTHWORTH,
Presiding Examiner.

OCTOBER 30, 1963.

SCHEDULE A

Shipper—Perini Corporation, Framingham, Mass.

New York to Buenaventura, Colombia:		
865 cu. ft. rubber hose.		
411 cu. ft. tires.		
20,145 lbs. steel bars.		
Freight paid on all the above @ $21.30 per 2,000 lbs. or 40 cu. ft., plus "surcharge" of $5.40 on same basis	$1, 120. 42	
Freight @ N.O.S. rate on file—$60 per 2,000 lbs. or 40 cu. ft	*2, 518. 35	
Undercharge on above 3 commodities		$1, 397. 93
308 cu. ft. personal and household effects—freight paid @ 90¢ per cu. ft	277. 20	
Freight @ rate filed and effective November 2, 1962—$32.00 per 40 cu. ft	246. 40	
Overcharge on personal and household effects		(30. 80)

Shipper—Corporacion Autonoma Regional Del Cauca, Cali, Colombia

Norfolk to Buenaventura, Colombia:		
1,366,125 lbs. aluminum cable—freight paid @ $32 per 2,000 lbs. (including surcharge)	21, 858. 00	
Freight @ N.O.S. rate on file—$60 per 2,000 lbs	40, 983. 75	
Undercharge		19, 125. 75

Shipper—Blue Bird Sales Corp., Fort Valley, Ga.

Savannah to Buenaventura, Colombia:		
7,444 cu. ft. bus bodies and parts—freight paid @ $22.50 per 40 cu. ft. plus surcharge @ $5.40 per 40 cu. ft	5, 122. 44	
Freight @ N.O.S. rate on file—$60.00 per 40 cu. ft	*11, 166. 00	
Undercharge		6, 043. 56
Savannah to Guayaquil, Ecuador:		
1,555 cu. ft. bus bodies and parts—freight paid @ $22.50 per 40 cu. ft. plus surcharge @ $.56 per 40 cu. ft	896. 45	
Freight @ N.O.S. rate on file—$60.00 per 40 cu. ft	*2, 332. 50	
Undercharge		1, 436. 05
Total undercharge—this shipper		7, 479. 61

*The application shows a surcharge of $5.40 per 40 cu. ft. or 2,000 lbs. added to the N.O.S rate on items to Buenaventura marked with asterisk (but not in the case of the aluminum cable to the same port); and a surcharge of $.56 added to the N.O.S. rate on the item to Guayaquil. The tariffs on file with the Bureau of Foreign Regulation do not show any such surcharges on N.O S. items as of the time in question. Because of the inclusion of surcharges in amounts to be waived the application (as finally amended) shows a total of $31,447.61 in undercharges instead of $30,358.00.

SCHEDULE A—Continued

Shipper—Continental of Panama, Apartado 3344, Panama, Republic of Panama

Norfolk to Puerto Limon, Costa Rica:		
784,904 lbs. linerboard—freight paid @ $18.00 per 2,000 lbs	7, 064. 14	
Freight @ applicable tariff effective February 5, 1962—$1.20 per 100 lbs	9, 418. 85	
Undercharge		2, 354. 71
Summary of undercharges:		
Perini Corporation	1, 397. 93	
Corporacion Autonoma Regional Del Cauca	19, 125. 75	
Blue Bird Sales Corp	7, 479. 61	
Continental of Panama	2, 354. 71	
Total undercharges to be waived	30, 358. 00	
Overcharge to be refunded:		
Perini Corporation	30. 80	

FEDERAL MARITIME COMMISSION

No. 936

HELLENIC LINES, LTD.—VIOLATION OF SECTIONS 16 (FIRST) AND 17

Decided January 9, 1964

1. Respondent found to have violated sections 16 (First) and 17 of the Shipping Act, 1916, in charging different rates to similarly situated shippers for identical service.

2. Respondent's agent, who was empowered to solicit cargo and quote rates that would meet the competition, found to have been acting within the scope of his authority in charging different rates to similarly situated shippers for identical service.

3. Intent is not a prerequisite to a finding of violation of sections 16 (First) and 17 of the Act. It is enough that undue or unreasonable preference or advantage is given to any particular person, locality or traffic, or that any such person, locality or traffic is subjected to undue or unreasonable prejudice or disadvantage, or that a rate which is unjustly discriminatory between shippers is charged or collected.

4. The Act is primarily a regulatory and administrative statute. It evinces a strong policy of protecting the public. A carrier may not evade its responsibilities to the public thereunder by pleading ignorance of its agent's activities.

Edwin Longcope for respondent.

Roger A. McShea III, *Wm. Jarrel Smith, Jr.*, and *Robert J. Blackwell*, Hearing Counsel.

Edward C. Johnson, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman*; James V. Day, John S. Patterson, and Thos. E. Stakem, *Commissioners*):

This proceeding was instituted by our predecessor the Federal Maritime Board on its own motion pursuant to section 22, Shipping

Act, 1916, to determine whether respondent, Hellenic Lines, Ltd. (Hellenic), had made or given undue or unreasonable preference or advantage to particular persons, or subjected particular persons to any undue or unreasonable prejudice or disadvantage in violation of section 16 (First) of the Act, or had demanded, charged or collected rates or charges which were unjustly discriminatory between shippers in violation of section 17 of the Act.

The essential facts are few and are not disputed by respondent.

Hellenic is a common carrier by water engaged in the foreign commerce of the United States and is a member of the Red Sea and Gulf of Aden/United States Atlantic and Gulf Freight Conference. The conference serves ports in the range from Aden to Suez to United States Atlantic and Gulf ports. Prior to the shipments in question in this case conference rates had been declared "open" to meet outside competition and the member lines, including Hellenic, were free to quote rates individually.

On two of its voyages during 1960—one in late March, the other in mid-April—respondent carried several parcels of green Ethiopian coffee for various shippers from Djibouti, French Somaliland, to ports in the United States. The rates charged on these parcels varied between $20 and $36 per ton even though all of the coffee involved was subject to a single rate classification; the service rendered by respondent was identical; and the shippers were similarly situated. One shipper, for example, with parcels of coffee on both voyages, was overcharged $1,536.79 based on the difference between the $36 Hellenic charged it for some parcels, and the lowest rates Hellenic charged for other green coffee parcels carried on the same two voyages.

Compagnie Maritime Coloniale (later named Compagnie Maritime Est Africaine, Ltd.), with a person named Antypas in charge of its daily operations, was respondent's agent at Djibouti. Respondent advised this agent the rates were open and authorized it to quote rates that would meet the competition. Antypas booked the coffee shipments in question at the different rates.

The Examiner in his Initial Decision concluded that Hellenic Lines had violated sections 16 (First) and 17 of the Act. Respondent filed exceptions, Hearing Counsel replied, and we heard oral argument. For the reasons stated below, we agree with the Examiner's conclusion.

DISCUSSION AND CONCLUSIONS

The facts clearly show that sections 16 and 17 of the Act were violated. The coffee transported was subject to only one freight classification. The service rendered by respondent was identical. The shippers and consignees of the coffee were similarly situated and the record shows they were in keen competition with one another and vulnerable to even small differences in ocean freight rates. They were not afforded equal treatment and no justification for this is evident. A mere desire to book the cargo obviously is not justification. It has long been settled that such treatment of shippers violates sections 16 (First) and 17 of the Act. *Eden Mining Co.*, v. *Bluefields Fruit & Steamship Co.*, 1 U.S.S.B. 41, 45–46 (1922); *American Tobacco Co.* v. *Compagnie General Transatlantique*, 1 U.S.S.B. 53, 56–57 (1923).[1]

Respondent has made no attempt to deny that the foregoing circumstances depict the mentioned violations, but it attributes the responsibility to its Djibouti agent. Respondent disclaims all responsibility itself, arguing that sections 16 and 17 of the Act are penal provisions, *i.e.*, their violation is a misdemeanor punishable by fine; that it had no intent to violate these sections since it did not authorize, assent to or have any knowledge of its agent's conduct in charging the different rates; and that it cannot be held liable for the unauthorized "criminal" conduct of its agent.[2]

For a number of reasons this position must be rejected. The Shipping Act is primarily regulatory and administrative; it is not a criminal statute. True, the Act provides monetary penalties for violating its requirement, but these are particular remedies that may be sought in proper cases. Their presence does not transform the Act into a criminal or penal statute. The main purpose of the Act was to confer upon an administrative agency general regulatory and supervisory powers over the water-borne foreign commerce of the United States. Incidential to this purpose the Government was also given the right to seek monetary penalties in appropriate cases. The function of adjudicating such penalties, moreover, is confided to the courts, not the Commission. The Commission is empowed solely to regulate and its jurisdiction and functions are purely regulatory and administrative. *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 164–5 (1962).

Respondent is not here on trial for penalties, nor "charged" with a misdemeanor. Nor may it escape responsibility by contending that intent is a prerequisite to a finding of violation of sections 16 (First) and 17. These sections proscribe and make unlawful certain conduct, without regard to intent. The offense is committed by the mere doing

[1] See also *Armstrong Cork Co.* v. *American-Hawaiian S.S. Co.*, 1 U.S.M.C. 719, 723 (1938); *Rates from Japan to United States*, 2 U.S.M.C. 426, 435 (1940); *Rates of General Atlantic S.S. Corp.*, 2 U.S.M.C. 681, 686 (1943); *West Indies Fruit Co.* v. *Flota Mercante Grancolombiana*, 7 F.M.C. 66, 69 (1962).

[2] Respondent has served Djibouti since the early 1950's. The record indicates that it had some difficulty in selecting a suitable agent there and in supervising and communicating with the agent in question. Respondent ultimately discharged this agent, though for activities unrelated to the matter involved here.

of the Act, and the question of intent is not involved. *Interstate Commerce Commission* v. *C. & O. Ry. Co.*, 128 Fed. 59, 69–70 (1904), 200 U.S. 361, 398 (1905).

To adopt respondent's position would do much to frustrate the objectives of the Shipping Act. Respondent necessarily performs its far-flung transportation business by utilizing agents to solicit and book cargo and attend to various other requirements of the business. Under respondent's theory, however, it could immunize itself from the common carrier responsibilities placed upon it by the Act simply by dissociating itself from any of its agents' activities which are brought into question. This could take the form, as here, of a plea of ignorance of the agent's conduct and a claim that the carrier lacked any intent itself to violate the law. The Act does not permit of any such evasion. *United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 457 (1946). It is regulatory legislation which evinces a strong policy of protecting the public, and there is ample authority for the view that a principal is liable his agent's violation of such a statute, including a violation which is a misdemeanor.[3]

The agent involved here was empowered by respondent to solicit cargo and quote whatever rates would meet the competition. In booking the parcels of green coffee he was acting within the scope of that authority and on respondent's behalf. Certainly, it cannot be said that the agent was on some personal excursion or beyond the scope of his authority because he booked the coffee at differing rates. Respondent therefore must clearly answer for the agent's action in this regard.

We will add that we cannot agree with respondent's denial of any actual fault. Respondent knew that an intensely competitive situation or rate war existed, with the conference rates declared "open," but there is no evidence that it took any precautionary steps in light of these unstable conditions in granting the broad authority to its Djibouti agent to quote whatever rates would meet the competition. It seems to us respondent's claim that it had had some difficulty in supervising and communicating with this agent serves only to underscore that greater precaution was needed under the circumstances, particularly in the matter of instructing the agent that rates to shippers must be non-preferential and non-discriminatory. According to respondent it did take action of this kind, but this was after the shipments in question had been made.

We conclude that respondent in charging different rates to similarly situated shippers for identical service, as hereinabove set forth, vio-

[3] *Mechem on Agency* (1952), pp. 276–278 and cases there cited.

lated section 16 (First) of the Act by giving undue and unreasonable preference or advantage to certain shippers and subjecting certain other shippers to undue and unreasonable prejudice or disadvantage, and violated section 17 of the Act by charging and collecting rates which were unjustly discriminatory between shippers. The record indicates that respondent, after some delay, effected refunds to injured shippers. It was proper, of course, for respondent to make such adjustments. Since there is no evidence of any continuing violation by respondent in the respects noted, we have no occasion to issue an order against it and the proceeding will be discontinued. An appropriate order is attached.

FEDERAL MARITIME COMMISSION

No. 936

HELLENIC LINES, LTD.—VIOLATION OF SECTIONS 16 (FIRST) AND 17

ORDER DISCONTINUING PROCEEDING

This proceeding was instituted by our predecessor, the Federal Maritime Board, upon its own motion. Investigation of the matters involved having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, January 9, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1070

SELDEN & CO., INC.,

v.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES

Decided January 9, 1964

It is not unlawful *per se* for a terminal to increase demurrage charges on cargo already consigned to or received by the terminal. Complaint therefore dismissed.

Less than 30 days' notice of changes in terminal tariffs may constitute an unreasonable practice under certain circumstances. Where rate increases are involved, terminal operators under the Commission's jurisdiction would be well advised to give at least 30 days' notice.

Harry L. Selden for complainant.
F. G. Robinson for respondent.
C. W. Robinson, Hearing Examiner.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, John S. Patterson, Thos. E. Stakem, *Commissioners*)

This complaint proceeding was instituted by Selden & Co., Inc. (complainant), a New York corporation engaged in the import, export and sale of jute goods. Respondent is the Board of Trustees of the Galveston Wharves, a terminal operator "carrying on the business of . . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" within the meaning of section 1 of the Shipping Act, 1916.

Most of complainant's jute is imported from India and is consigned to various ports, including Galveston. No advance arrangement is made by complainant with respondent for jute routed to respondent's facilities. Between approximately July 1 and September 30, 1961, complainant instructed its suppliers to route certain shipments to the Port of Galveston. Pursuant to such instructions, approximately 4,842 bales of jute bagging were discharged into respondent's facilities. About 300 bales were removed soon after discharge and are not the subject of this complaint. The weight of the remaining bales was about 1,103 net tons.

By tariff supplement issued November 8, 1961, and filed with the Commission on November 9, 1961, respondent's demurrage rules and rates were changed effective November 25, 1961.[1]

These changes (as they pertained to complainant's cargo both on the pier and enroute thereto on and after November 25, 1961) resulted in demurrage charges against complainant's cargo in the amount of $9,165.07 for the period September 1961 through February 1962. Had the tariff not been changed, only $451.68 would have been due for demurrage. Neither amount has been paid by Selden. Complainant seeks an order prohibiting respondent from collecting any amount in excess of the charges at the old rate, contending that the action of respondent in increasing its charges after complainant's shipments "had already been received by or were irrevocably consigned to respondent's facilities" constitutes an unfair and unjust practice under section 17 of the Act.[2]

Complainant further contends that respondent's tariffs and invoices were ambiguous as to whether or not respondent provided storage at its facilities, pointing to certain statements in respondent's tariffs and correspondence which, Selden urges, indicate that the cargo in question was rightfully considered by Selden to be in storage, rather than under pier demurrage.

The Examiner in his Intial Decision found, *inter alia* that any notice by respondent of less than 30 days would be unreasonable, except where a shorter period is warranted by the circumstances; that the "irregularity and inconsistency" of respondent's tariff changes from 1959 through 1962 constitutes an unreasonable practice under section 17; but that "[n]o reason appears why complainant should not pay the higher storage charges". He thus denied complainant the relief it seeks. The Examiner states that the "failure to give adequate notice

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[1] The tariff provisions in effect on the pertinent dates are set forth in Appendix A and Appendix B, *infra*.

[2] Section 17 reads in pertinent part as follows:

> "Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine prescribe, and order enforced a just and reasonable regulation or practice."

of the increase did not, of itself, make the increase unlawful, especially since, as previously stated, complainant does not question the reasonableness of the increased rate." [3]

Complainant filed exceptions to the conclusions of the Examiner (1) that complainant should pay the higher charges and (2) that there is no need to consider whether respondent's tariffs are ambiguous as to the holding out of storage facilities. Specifically, complainant reargues its contention that respondent's tariffs, invoices and correspondence were reasonably construed by it, Selden, as indicating that its goods were in storage rather than subject to pier demurrage charges and alleges error in a decision which, complainant says, allows respondent to benefit by a practice which the Examiner found to be unreasonable. Respondent took no exception to the Initial Decision but did reply to complainant's exceptions. Oral argument was had before the Commission.

DISCUSSION AND CONCLUSIONS

There is no doubt that respondent as a terminal facility is an "other person subject to [the Shipping Act]" pursuant to section 1 of the Act and thus that the Commission can order respondent to observe reasonable practices pursuant to section 17.

The gravamen of the complaint is that "the action by respondent in increasing terminal charges in reliance upon a tariff provision which was filed after the shipments involved had already been received by or were irrevocably consigned to respondent's facilities, and of publishing conflicting and ambiguous rules and regulations and/or tariffs, constitutes an unfair and unjust practice, in violation of Section 17. . . . " In other words, complainant alleges that respondent could not have increased its charges, *regardless of the amount of notice given*, as to shipments enroute to or already on its facilities. Therefore, the question of whether the notice given was reasonable is not here in issue.

The position taken by complainant is untenable. A terminal operator must be free to change its tariffs when circumstances warrant. It would be unreasonable to hold that a terminal must continue in effect the rates and rules applicable when a cargo first landed, no matter how long that cargo might be left on the facility. This would mean that a terminal could only change its rates when its facility had no cargo at all (a condition which might never occur), or that a terminal could charge different rates for identical services depending on the date the

[3] The pleadings and record make clear that complainant is not attacking the rate itself as unreasonable, but merely the practice of increasing it as to complainant's shipments which were then on respondent's facilities or enroute thereto.

cargo happened to arrive at its facility. *A fortiori*, it would be unreasonable to attempt to apply such a principle to cargoes which have merely been routed to the facility but have not yet arrived at the time of a rate change.

Concerning the alleged ambiguity in respondent's tariffs and invoices, complainant states that respondent's invoices (issued with respect to the shipments in question) contain charges for "storage" instead of demurrage and that respondent's Local Tariff No. 27–D provides in Item 170 as follows:

> Galveston Wharves does not engage in the business of storage or warehousing of property on its wharves or piers. All property landed or received on any of its wharves or piers, not removed by the party entitled to receive it within a reasonable length of time, will be removed to, and stored in, a public or licensed warehouse at the place of delivery or other available space, at the cost of the owner and there held without liability on the part of Galveston Wharves, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

Complainant argues that Item 170 required respondent to place complainant's goods in a warehouse, subject only to a "reasonable charge for storage." In other words, as we understand complainant's argument, a shipper may leave its goods on the terminal facility for as long as it desires and rely upon the terminal operator to remove them to suitable storage. We do not read Item 170 that way. Rather, we construe Item 170 as (1) granting to the terminal the option of removing the goods to storage if it desires (when the owner does not remove them within a reasonable length of time) and (2) fixing the liability of the owner of the goods in connection with such removal and storage.[4] In any event, Local Tariff No. 27–D contains no charges for storage or pier demurrage and we think it clear that a user of respondent's facilities would have to look to Tariff Circular No. 4–B to ascertain the charges applicable to goods remaining on the terminal facility. A reasonable interpretation of Tariff Circular No. 4–B (Appendix A) is that cargo left on respondent's pier after the expiration of free time is subject to the charges set forth under Item 160 of that Tariff. The question of whether such charges are termed storage or demurrage is irrelevant to this proceeding. Moreover, we see no reason why complainant did not remove its goods when it received notice that the charges—whatever they might have been termed on the invoices—were increased.

[4] We note also that the last paragraph of Item 160 (see Appendix A) reserves the same right of removal to respondent. In this connection, the record is not clear as to whether or not there was "storage" space available either on or off the terminal facilities or what the cost of removing the goods and subsequent storage charges would have been.

We emphasize that this decision should not be construed as casting any doubt on prior decisions which have held that less than 30 days notice of changes in terminal tariffs may be unreasonable under certain circumstances. Further, where such changes involve rate increases, we think that terminal operators under the Commission's jurisdiction would be well advised to give at least 30 days' notice.[5] As was stated above, the reasonableness of the notice here given is not before us in this case. And, in any event, the record in this proceeding would appear inadequate upon which to base a determination as to the reasonableness of the notice given.

In view of the above, we can find no basis for granting the relief sought by complainant. An appropriate order will be entered dismissing the complaint..

APPENDIX A

Charges in effect prior to November 25, 1961, as contained in Galveston Wharves Tariff Circular No. 4–B.

Item No. 160 Pier Demurrage Rules and Charges

The waterfront warehouses, docks and piers of the Galveston Wharves are designed primarily for use in the handling of cargo interchanged between railroads, trucks and water carriers, on the one hand, and vessels and barges, on the other, and these waterfront facilities are not intended to be used for the storage of freight.

Cargo, except bulk crude sulphur, which is discharged into or onto the waterfront facilities of the Galveston Wharves from railroad cars, trucks and/or water carriers, shall be subject to the following pier storage and pier demurrage rules and charges:

(a) * * *

On inbound cargo, except bulk crude sulphur, 10 running days, Saturdays, Sundays and Holidays being included, will be allowed free when such cargo is discharged from vessels or barges. Free time will begin the next 7:00 a.m. after the day the vessel or barge completes discharging such inward cargo (See Exceptions 2 and 3). Cargo discharged from vessels and later reloaded aboard the same or other vessels, shall be subject to the free time rule applying on outbound cargo.

(b) After expiration of free time, the following pier demurrage charges will be assessed on cargo discharged into closed or shedded piers or warehouses:

(1) On cargo, except cotton and/or cotton linters, 10 cents per net ton for each 7 days or fraction thereof.

* * * * * * *

(3) On cargo assigned open space, 5 cents per net ton each 7 days or fraction thereof.

[5] In this same connection, while we agree with the Examiner's conclusion that inconsistency in giving the public notice of changes in terminal charges may constitute an unreasonable practice, that question was not an issue in this proceeding.

Pier demurrage charges cease running against the cargo the day that th vessel or barge actually starts loading such cargo and, in case of inbound ship ments to be forwarded beyond by either rail or truck, pier demurrage charge cease running against the cargo when same is removed from the facilities.

* * * * * * *

EXCEPTION 2. Fifteen (15) days free time (excluding Saturdays, Sundays an legal Holidays) will be allowed on inbound shipments of Pulp, Cellophan and/or Woodpulp. (Files 1492 and 495–4)

EXCEPTION 3. Cargo not susceptible to weather damage may be assigned ope space for a free time period of thirty (30) days, inclusive of Saturdays Sundays and holidays. The free time accorded under provision of thi exception will be subject to the availability of suitable open space and t the making of arrangements for the use thereof in advance of arrival o the cargo at this port. (File: 495–4)

Vessels, owners, or their agents, using the facilities of the Galveston Wharve beyond the free time herein described, thereby contract to pay, and are re sponsible for, the pier demurrage charges accruing on such cargo at the rate shown herein.

On all property landed or received in or on the wharves, piers and docks o the Galveston Wharves, which is not removed by the vessels, owners, or thei agents within a reasonable time, the Galveston Wharves reserves the right t remove such property to and store it in, a public or licensed warehouse or othe available place of delivery or storage at the expense of the vessels, owners, o their agents, without liability on the part of the Galveston Wharves, and subjec to a lien against such property for all charges accruing thereon.

APPENDIX B

Amended paragraph (b) of Item 160 (as it pertained to com plainant's shipments) effective November 25, 1961.

(b) After expiration of free time the following pier demurrag charges will be assessed on cargo discharged into closed or shedde piers or warehouses or in open space:

* * * * * * *

Item No. 160

Inbound:	*Charge per ne ton per day*
For each of the first 7 days or fraction thereof	5 cents
For each of the next 7 days or fraction thereof	10 cents
For the 15th day and each succeeding day thereafter until removed	15 cents

* * * * * * *

FEDERAL MARITIME COMMISSION

No. 1070

SELDEN & CO., INC

v.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES

ORDER DISMISSING COMPLAINT AND DISCONTINUING PROCEEDING

This proceeding having been duly heard and the Commission having considered the matters involved and having this date entered a report thereon containing its findings and conclusions, which report is made a part hereof by reference:

It is ordered, That the complaint of Selden & Co., Inc. be, and it is hereby, dismissed and this proceeding be, and it is hereby, discontinued.

By the Commission, January 9, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1090

GENERAL INVESTIGATION INTO COMMON CARRIER FREIGHT RATES AND PRACTICES IN THE FLORIDA/PUERTO RICO TRADE

Decided January 21, 1964

Tariffs and transportation practices of respondent TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee, not shown to be unlawful; no finding made that rates of South Atlantic and Caribbean Line, Inc., are "unjust, unreasonable, and otherwise unlawful" at present and said respondent ordered to clarify certain aspect of its tariffs, to file monthly financial reports, and to submit to certain audits of its books of entry; no findings made and this proceeding discontinued as to respondent Sea-Land Service, Inc., and as to respondent Motorships of Puerto Rico.

Donald Macleay and *Edward T. Cornell* for respondent, TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee.

John Mason and *Charles J. Colgan* for respondent, South Atlantic & Caribbean Line, Inc.

C. H. Wheeler for respondent, Sea-Land Service, Inc., Puerto Rican Division.

Alan F. Wohlstetter for respondent, Motorships of Puerto Rico.

John T. Rigby for the Commonwealth of Puerto Rico.

Donald J. Brunner and *Robert J. Blackwell* as Hearing Counsel.

Charles E. Morgan, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Thos. E. Stakem, *Vice Chairman;* Ashton C. Barrett, James V. Day, John S. Patterson, *Commissioners*)

PROCEEDINGS

Pursuant to sections 18(a) and 22 of the Shipping Act, 1916, and sections 2, 3, and 4 of the Intercoastal Act, 1933, the Commission upon its own motion, by its order served February 1, 1963, entered into this investigation to determine whether the present rates and practices of certain respondent water carriers in their operations in the Florida/

Puerto Rico trade (the trade) "are unjust, unreasonable, and otherwise unlawful" under the said Acts.

The four respondents, as named in the original order, the first supplemental order served March 6, 1963, and in the second supplemental order served April 18, 1963, are South Atlantic & Caribbean Line, Inc. (SACAL), TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee (TMT), Sea-Land Service, Inc., Puerto Rican Division (Sea-Land), and Motorships of Puerto Rico, Inc. (Motorships). The Commonwealth of Puerto Rico intervened in the proceeding.

Hearings before an Examiner were held in Washington, D.C. and Miami, Florida, commencing May 7, 1963. After recesses from time to time to permit the parties to compile certain statistical and cost data, the hearings were closed on July 25, 1963, subject to the late filing of further exhibits. A petition to reopen for further hearing was denied by the Examiner, but concurrently certain new facts contained in the petition, by agreement of the parties, were stipulated into the record. Opening and reply briefs were filed by SACAL, TMT and Hearing Counsel. The Examiner, on October 28, 1963, issued a Recommended Decision to which TMT and SACAL excepted. Replies to exceptions were filed by TMT, SACAL and Hearing Counsel. No oral argument was requested, and none was held.

FACTS

As no respondent carrier offered a regular service between Florida's Gulf ports and Puerto Rico, the investigation concerned operations from the Florida ports of Jacksonville and Miami only.

The cargo moving to Puerto Rico through the port of Miami is basically local cargo, originating in the Miami area, whereas cargo coming through the port of Jacksonville originates in areas as far away as the upper midwest. The single commodity moving in largest volume is sugar, transported northbound.

Motorships has never operated in the trade, and does not presently intend to do so. As soon as it learned of this proceeding, it took steps to cancel its rates between Florida and Puerto Rico. Motorships had nominal rates in effect in the trade on automobiles between April 15 and May 31, 1963, but no service.

Sea-Land stipulated through its counsel on the first day of the hearing that it was the high-cost carrier in the trade, and that its rates were the same as or higher than the rates of other carriers in the trade. At present Sea-Land offers only an indirect service between Florida ports and Puerto Rico with transshipment at Newark, New Jersey. This transshipment, necessitating as it does many extra miles of back haul in Sea-Land's indirect service betwen Florida and Puerto Rico as compared with direct service, is the reason it considers itself the high-cost carrier. The lawfulness of the rates of the indirect service is now under investigation in our Docket No. 1143.

The two principal respondents, therefore, are SACAL and TMT. While these respondents carry other cargoes, the principal competition between them is for the passanger automobiles transported southbound and much of the evidence herein relates to their automobile rates and practices. The issues so far as they concern automobiles are not whether the rates are too high but whether they are too low and whether the carriers engage in destructive competitive practices in connection with automobile rates.

Both SACAL and TMT had inauspicious beginnings in this Florida/Puerto Rico trade. Admittedly both have operated inefficiently in the past and have lost considerable monies. TMT is the older carrier in the trade, having acquired some of its vessels and started operations in 1956, whereas SACAL commenced operating in April 1962. TMT at first utilized converted LST barges under tow. Later it embarked upon a program of using self-propelled vessels, but this operation failed and TMT was forced into "trusteeship" in June 1957. The self-propelled vessels were repossessed, but TMT retained three barges. Under its trustee in 1958, TMT re-entered the trade with the three barges under tow. In November 1960, TMT extended its service to include Miami, as well as Jacksonville. Prior to that time, the shippers of autos from Miami were required to transport their autos overland from Miami to Jacksonville in order to ship them to Puerto Rico. The TMT service from Miami provided a savings of about $40 per car to the automobile shipper. TMT's operations are of a roll-on, roll-off nature. The only dock facilities required are a ramp to permit driving equipment on or off the weather deck of its vessels, and a piece of ground on which to drop the bow gate to allow roll-on, roll-off access below deck. TMT has no need for anything more than minimal terminal facilities, and does not need covered storage facilities.

Since October 1962, TMT has operated with four barges under tow. It has averaged from November 1962, through March 1963, about six sailings per month from Jacksonville. Bad weather has an adverse effect on barges under tow, necessitating some elasticity in TMT's performance. Generally TMT takes about 20 days on its present triangular service for a complete voyage, Miami-Jacksonville-San Juan-Miami. TMT's barges are unmanned, and towed by tugs under contract hire. TMT has found this type of operation considerably more economical than an operation with self-propelled vessels.

TMT's principal service to Puerto Rico has been from Jacksonville, and this has been true particularly in the handling of trailer-load cargo. TMT can load as many as 38 trailers on the weather decks of its barges, which have a maximum carrying capacity for an entire barge of 56 trailers, each 35 feet long, 100 standard size autos, and 1,568 cubic feet of space for other cargo. Autos are second to trailer-load cargo in producing revenues for TMT. Generally, TMT has handled more autos from Miami than from Jacksonville, but both ports have supplied TMT with substantial amounts of automobiles and of trailer-load cargoes.

From its operations prior to the trusteeship TMT suffered a total deficit of $4,753,092.88. Under the trustee's operations, using only towed barges, TMT through March 31, 1963 enjoyed an earned surplus of $1,696,134.40, including for the year 1962, profit from operations of $517,255.60 and including similar profits for the first quarter of 1963 of $124,919.96. There is some dispute as to the proper method of computing TMT's vessel depreciation and operating expenses. However, under any method suggested, it appears that although TMT still had a negative net worth, it has been recently and presently is operating at a substantial profit.

SACAL originally entered the trade as a break-bulk carrier carrying palletized cargo, but this in time proved most inefficient. At first, SACAL operated in a triangular service from Miami, to Savannah, Georgia, to San Juan, Puerto Rico, and back to Miami with irregular service at Ponce and Mayaguez, Puerto Rico. SACAL used two self-propelled vessels, the *Floridian* and the *New Yorker*, each originally designed to handle small containers, and each with underdeck cargo space consisting of a single hold, with access by a single ramp designed for roll-on, roll-off use at the stern of the ship. Each vessel was capable of carrying 73 autos on its upper (weather) deck.

In about September or October, 1962, SACAL changed its management, started to acquire trailers in numbers, and switched to a trailer-load cargo operation. SACAL carries refrigerated ("reefer") trailers, the only carrier in the trade providing a direct service for refrigerated commodities. While SACAL and TMT compete for cargo carried in "dry", i.e., nonrefrigerated trailers, they do not now compete for refrigerated cargo.

Commencing in October, 1962, SACAL abandoned its triangular service and operated one vessel on a shuttle service between Miami and San Juan, and the other vessel between Savannah and San Juan. The Savannah shuttle continued largely as a break-bulk operation, was very uneconomical, and finally was abandoned after a December 23, 1962 sailing, Voyage 23 of the *Floridian*. Following the abandonment of the Savannah service, SACAL began a shuttle service between Jacksonville and San Juan, commencing with a sailing from Jacksonville on January 22, 1963, Voyage 24 of the *Floridian*. On Voyage 23, the *Floridian* arrived in Jacksonville on January 2, 1963, but because of annual repairs and a strike, the *Floridian* did not leave Jacksonville on Voyage 24 until January 22, 1963. The Miami shuttle service remained intact.

On June 30, 1963, the *New Yorker* was redelivered to her owners, and SACAL subsequently maintained service from Miami and Jacksonville with one vessel, the *Floridian*. The itinerary then was Miami, Jacksonville, San Juan, Miami, i.e., the same as that of TMT. The transit time for this itinerary was faster for SACAL than TMT because of the latter's use of towed barges. The Examiner found "where other factors are equal from the shipper standpoint, the slower transit time is a service disadvantage." SACAL terminated its direct service at Jacksonville in July 1963. Its one vessel can now carry, due to a modification of its deck space, 106 automobiles and 30 trailers, including 24 reefer trailers. This modification has taken place subsequent to the close of the hearing, but is the subject of late filed exhibit 97, which was received in evidence by agreement of the parties. Of the 345 trailers carried by SACAL in the first quarter of 1963, 230 were reefer trailers. During that same period, 114 reefer trailers were handled from Miami on 11 voyages, or about 10 per voyage.

For the 9 months it operated in the Savannah-Miami-Puerto Rico trade (April to December 1962) SACAL suffered a total loss in excess of three quarters of a million dollars. For the first 3 months it operated in the Jacksonville-Miami-San Juan trade (January to March 1963), SACAL suffered losses from vessel operation in excess of $84,000. There is some dispute as to the amount of expenses of the 21 terminated voyages in the first quarter of 1963, the Examiner finding it to be $761,399 or an average of $36,257 per voyage.

The balance sheet of SACAL as of March 31, 1963, shows capital stock of only $10 for only one share authorized and outstanding, a deficit from operations of $844,248, and listed under current liabilities is $1,002,299 payable to affiliated companies.

SACAL, an American corporation, is a wholly owned subsidiary of the United Tanker Corp., also an American corporation. It, in turn, is practically wholly owned by The China International Foundation, Inc., an American charitable corporation. This company is the corporate parent of a complex of some 20 companies. The China International Foundation owns all of the voting common stock and 95 percent of the nonvoting preferred stock of United Tanker. United Maritime Corp., another American corporation, also is a wholly owned subsidiary of United Tanker. It is the principal stockholder in three other American corporations which own and operate through United Maritime, as agent, four American flag tankers. The China Foundation also owns directly or indirectly all of the stock of eight foreign corporations, five of which own or operate foreign flag vessels. The China Foundation also owns, directly or indirectly the controlling stock in five other foreign corporations presently inactive. All of the activities of these corporations are managed from offices at 250 Park Avenue, New York, N.Y. The allocation of overhead expense of these many related companies is a complex matter, and the Examiner concluded that no determination could be made on the present record as to whether or not a proper share of overhead was allocated to SACAL.

As noted, for the first quarter of 1963, SACAL suffered a loss from vessel operation of over $84,000. If there are eliminated certain voyages serving Jacksonville and San Juan only and one voyage which had no Miami revenue, as well as a voyage from Jacksonville to San Juan to Miami to Jacksonville, the total revenue on the remaining 11 Miami-Puerto Rico voyages is $399,107.18, or an average revenue per voyage of $36,282.47. This figure is approximately the same as the average expense per voyage as found by the Examiner.

The order of investigation brought into issue the tariff and transportation practices of the respondent carriers. SACAL maintains a rate of $300 on the movement of each empty trailer when SACAL uses the cargo space therein. Of 13 bills of lading showing transportation of trailers under the $300 rate, 8 were charged only that rate, 3 were charged the $300 rate plus the Miami handling charge of $10 each and Miami wharfage charges of $2 each, and 2 were charged the $300 rate plus the Miami wharfage and handling charges plus the Puerto Rican arrimo charge of 5 cents per 100 pounds. SACAL's tariff is silent with respect to charges on this type of movement.

SACAL formerly had a rate for trailer-load quantities of $700 per trailer for dry cargo and $1,000 per trailer for refrigerated cargo, plus Miami or Jacksonville wharfage and handling charges and Puerto Rican arrimo charges. Effective February 20, 1963, the SACAL tariff provided that the wharfage, handling and arrimo charges above would not apply, or in effect would be absorbed by SACAL. However, these accessorial charges never were assessed by SACAL prior to February 20, 1963, even though they were then applicable.

SACAL has carried a substantial number of automobiles in the trade with personal effects inside the trunks of the autos. A review of about 100 bills of lading showed that the applicable charges on these effects were fully assessed in some instances, partially in others, and not at all in others. These personal effects generally were in autos consigned to individuals rather than to used car dealers, and the reasons for the variety of treatment were mainly improper ratings by the rating clerks of SACAL's agent in Miami. SACAL's tariff is silent with respect to charges on this type of movement.

In Special Docket No. 268, SACAL seeks authority to waive collection of undercharges on certain shipments of automobiles from Florid to Puerto Rico, and the record in this special docket, by stipulation o the parties, was incorporated into the present proceeding. An Initia Decision has been issued by the Examiner in the special docket pro ceeding, and as detailed therein and acknowledged by SACAL, i billed and collected less than the applicable charges specified in it tariff on numerous shipments of autos from Florida to Puerto Ric made mainly in the last quarter of 1962. Generally, SACAL col lected only $156 for the average car, instead of about the $170 du under its applicable tariff. This practice by SACAL ceased abou January, 1963, and apparently has not been resumed.

Since the entry of SACAL into the trade, TMT's revenues from al ocean freights have increased over the corresponding periods of th preceding year. Also, for the 15-month period of January 1, 1962 through March 31, 1963, compared with the 15 months for January 1 1961, through March 31, 1962, TMT's revenues for ocean freight in creased to $4,707,310 from $3,713,837. There has been a decrease however, in Miami auto revenue for the first quarter of 1963 over th first quarter of 1962. An alleged error with respect to the amount o this is raised in TMT's exceptions, but at any rate TMT suffered substantial decrease in Miami auto revenues for the second half o 1962 compared with the first half of 1962, whereas SACAL sub stantially increased its Miami auto revenues in the same period.

The Examiner in his decision recommended that the investigatio be discontinued as to respondent Motorships of Puerto Rico and tha no findings be made in this proceeding as to respondent Sea-Lan Service, Inc. He found that the tariffs and transportation practice of respondent TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee have not been shown unlawful and that this record does not disclos whether the rates of respondent South Atlantic & Caribbean Line Inc., presently are compensatory and lawful. The Examiner als mentioned the desirability of several carriers in a trade where ther is sufficient traffic to support them. Finally, he recommended tha SACAL be required to amend its tariff to clarify the rates and charge on the movement of personal effects in autos and on the movement o trailers when the respondent carrier utilizes the inside cargo space and that SACAL be required to file a monthly financial report and t make available its book of entry upon which such financial report shal be based for the purposes of auditing by the Commission's staff t enable the Commission to make a determination as to the lawfulnes of its rates.

DISCUSSION AND CONCLUSIONS

SACAL urges generally that we accept the Examiner's decision an takes only two exceptions to it.

One exception deals with the Examiner's denial of SACAL's motions to strike certain matters in TMT's opening brief and reply brief. SACAL admits this is only made to "preserve its position" as the Recommended Decision of the Examiner does not rely upon any of the challenged matters. The challenged matters are likewise not used as a basis for our report.

SACAL's other exception is to the finding of the Examiner that TMT's slower transit time was a service disadvantage. This finding, however, did not affect the Examiner's decision and our view, as noted more fully below, is that this record does not support such a finding.

TMT takes three exceptions to the Recommended Decision. In the first of these it asserts the Examiner erred in not utilizing the finding that TMT was a disability carrier because of its slower transit time to grant it a rate differential under SACAL to offset this disability. The basis for this argument is the Examiner's finding that "where other factors are equal from the shipper standpoint, the slower transit time is a service disadvantage."

We are unable here to find that TMT's slower transit time is a disadvantage. SACAL argues that it is not, and to support its position marshals facts showing that TMT has made gains in revenues from freights over its revenues prior to SACAL's operation, that TMT outcarried SACAL on direct sailings to San Juan from Jacksonville on the same day, and that TMT has outcarried SACAL inbound 10 to 1. SACAL points out that TMT's general manager has testified that the trade is one in which frequency of service is more important than time in transit. SACAL further claims that any loss in revenue in Miami to San Juan traffic TMT may have suffered is due to shipper dissatisfaction with TMT's indirect Miami-San Juan service as compared with SACAL's direct service.

TMT, on the other hand, argues that the fact that it outcarried SACAL on sailings from Jacksonville on the same day is explained by the larger capacity of TMT's vessels. It says that TMT had not felt the full impact of SACAL's competition at Jacksonville because of the newness of SACAL's Jacksonville service and the backlog of Puerto Rico traffic built up by the strike, coupled with the Mother's Day rush. It contends that at Miami, where comparative results are of record for a 12-month period, SACAL greatly outcarried TMT on sailings on the same day. TMT says its general manager's statement merely explains why a triangular service is used rather than a direct service and is not intended to mean that a slower transit time is not a service disadvantage.

Although TMT did outcarry SACAL at Jacksonville on sailings leaving the same day, this fact may be due to a diversion of cargo by the strike, the size of TMT's vessels, the Mother's Day rush, or the newness of SACAL's Jacksonville service. At any rate, SACAL's direct Jacksonville service has now been discontinued and any conclusions with reference to it cannot be used for guidance with respect to SACAL's present service. As for the statement of TMT's general manager, its meaning as indicated is debatable. But aside from this the fact is that no witness was produced who testified to the necessity for rapid transit time in the trade.

The significance of a finding of a service disability is that it may be a reason for allowing a rate differential between the carriers offering the superior and inferior services. The granting of such differential, however, depends upon a finding that the rates of one of the carriers are unlawful and must be adjusted. TMT's present rates were not shown on this record to be unlawful and no change in them is proposed. Thus the granting of a differential to TMT must rest upon a showing that SACAL's rates are unlawful.

TMT in its second exception attempts to make such a showing. It argues that the Examiner erred in not finding that the rates of SACAL were, are, and for the future will be, noncompensatory. It says he failed to take into consideration (a) some $88,000 in deferred mortgage payments applicable to the first quarter of 1963, (b) an equitable allocation of the overhead of parent and related owning and operating companies, which it claims would increase costs for the first quarter of 1963 by at least $12,000, and (c) other items of overhead amounting to $22,000.

SACAL, on the other hand, contends that before its rates can be declared unlawful, even if found to be noncompensatory, there must be a showing that they are unjust and unreasonable. It is of course true that before we may hold rates to be unlawful under our statutes (Intercoastal Shipping Act, 1933, section 4, 46 USC 845(a) and Shipping Act, 1916, section 18(a), 46 USC 817), they must be found to be unjust or unreasonable. SACAL further contends that, even accepting the additional expenses brought out by TMT, the first quarter of 1963 shows an almost 80 percent improvement over the averaged quarterly results for the operations in 1962, and that it should have the opportunity TMT had to work out the kinks in its operation.

TMT is incorrect when it states that the Examiner failed to find that the rates of SACAL were noncompensatory. In fact, the Examiner found that the rates of SACAL were not compensatory, based on the total period on which evidence was presented at the hearings. This proceeding, however, is concerned primarily with whether the rates and practices presently used by the carriers are lawful. On this record, we are unable to state that the rate structure currently used by SACAL is unjust or unreasonable.

New carriers in a trade should be allowed a reasonable opportunity to develop their services, and the fact that immediate operating results may not show a profit, is not in our opinion a sufficient ground for declaring the rates unlawful.

The most accurate projected determination which can be made of the revenues and expenses of SACAL's current service is one which balances against the expenses for the most recent period of record the revenues for the service most nearly approximating the present service of SACAL. As noted above, such a determination (utilizing the expense figures used by the Examiner) shows that SACAL revenues are approximately equal to operating expenses. The additional expenses which TMT argues should be included in the weighing of expenses and revenues may raise some doubt about SACAL's future financial success, but there are other factors which suggest that the new operation of SACAL may in the long run prove profitable. SACAL has since the close of the hearing, as reported in late filed exhibit 97, modified its deck space to enable it to carry 33 more automobiles, a change in service which SACAL estimates will increase its outbound voyage revenues by $5,280 or almost 15 percent. Further, since October 1962, SACAL has made other potential improvements. It has changed its management, acquired trailers in numbers and switched to a trailer-load cargo operation. It provides the only direct service for the transportation of refrigerated cargoes from Florida to Puerto Rico, and in addition provides facilities for break-bulk non-trailerized cargo, which TMT does not.

In light of these activities and the limited evidence we have with which to make a projection, we cannot find that SACAL's rates will be noncompensatory in the future. Furthermore, TMT itself had a financially disastrous beginning in this trade, yet it was able thereafter to achieve a profitable position. Since entering the trade SACAL has increased its revenues. It should, we think, be given a reasonable opportunity similarly to achieve a profitable position without having its rates condemned as unlawful.

Lastly, TMT argues that the Examiner erred in not finding that the impact of SACAL's rates and "destructive competitive practices" has seriously endangered TMT's continued operations at Miami. It says the Examiner misunderstood the sailing dates of certain of TMT's southbound sailings from Miami and maintains that the fact that its overall revenue has not suffered in no way lessens the impact of lost traffic and revenue at Miami.

Because of confusion as to sailing dates of certain TMT vessels, the Examiner misstated by some $40,000 the loss to TMT in revenue at Miami in the first quarter of 1963 over the first quarter of 1962. This error, however, had no material effect upon the Examiner's ultimate conclusions, as he did realize that TMT's cargo carryings from Miami were appreciably less in the first quarter of 1963 as compared to the first quarter of 1962. There is no showing that this loss in TMT's traffic is due to SACAL's rate structure. The record shows, moreover that many shippers of automobiles were dissatisfied with TMT's indirect service.

TMT seems to feel that the Examiner's conclusion as to SACAL's rates was based upon the fact that TMT's overall revenue position was profitable, and had he considered the Miami situation alone, he would have made a different conclusion as to the lawfulness of SACAL's rates. The Examiner's conclusion, however, was based on the fact that the record does not show that SACAL's rates are noncompensatory at present. The newness of SACAL's present service, the possible improvements made in stowage space on SACAL's vessel after the hearing, and other matters mentioned above were all factors underlying this conclusion.

Regardless of what caused the loss in TMT's Miami traffic, there is no showing that the rate structure of SACAL at the present time damages TMT. Such a finding, as we have said, would depend on a determination that SACAL's present rates are unreasonably low, and this we are unable to make on this record.

SACAL has in the past engaged in unlawful practices. In part, these have ceased. But SACAL's practices with respect to the carriage of personal effects inside the trunks of autos and the assessment of accessorial charges on the transportation of trailers when it utilizes the inside cargo space, are apparently still continuing and its tariff remains silent with respect to charges on these types of movements. The Examiner recommended that SACAL be required to state clearly in its tariff the rates and charges applicable on these movements to remove the discrimination which can now take place with respect to them. We agree with the Examiner that the portions of SACAL's tariff relating to these movements must be modified to prevent these practices from occurring in the future, and we shall require that this be done.

While we are unable on the present record to find that SACAL's rates are "unjust, unreasonable and otherwise unlawful," we shall require that SACAL file with us for the 12-month period beginning with the month of January, 1964, monthly financial reports reflecting the results of operations during each month. Such reports shall contain a detailed statement of operating revenues and other income items, operating expenses (including a reasonable allocation of overhead of the related China Foundation Companies to SACAL), with balance transferred to profit and loss, and a detailed statement of revenues and expenses of individual voyages included in the accounts for the month, including data showing the number of tons of cargo carried and the number of voyage days. The books of entry upon which the financial reports are based shall be made available to our staff for the purpose of auditing said monthly reports, and SACAL shall furnish such additional information as the staff or the Commission deems necessary for a proper evaluation of the reports. At the end of this yearly period, we will be in a better position to make a determination as to the justness and reasonableness of SACAL's rates, and if any adjustment is warranted, it will be ordered at that time.

With respect to TMT, the facts as hereinbefore noted show that it recently has been and presently is operating profitably. There is no basis in this record for concluding that its rates are not compensatory or too low. We accordingly find that the rates and practices of TMT have not been shown to be unlawful.

The proceeding will be discontinued without findings (a) as to Motorships because of its lack of participation in the trade, and (b) as to Sea-Land because the lawfulness of the rates of its indirect Florida-Puerto Rico service is under investigation in Docket No. 1143.

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

No. 1099

General Investigation of Weighing Practices in Re Green Hide Shipments

Decided January 17, 1964

A rule is necessary requiring carriers of green hides in the foreign commerce of the United States to file with the Commission within 30 days tariff amendments setting forth certain provisions relating to computation of weight of such hides and furnishing of weighing certificates or dock receipts by shippers. Proposed rule for this purpose adopted and published.

Richard S. Harsh and *Robert J. Blackwell*, Hearing Counsel.

Boris H. Lakusta and *E. Myron Bull, Jr.*, for Marubeni-Iida (America) Inc., and James Loudon and Sons, Intervenors.

Benjamin A. Theeman, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*; Thos. E. Stakem, *Vice Chairman*; Ashton C. Barrett, James V. Day, John S. Patterson, *Commissioners*)

As a result of information indicating that weights of green salted hides exported from the United States are misstated on the ocean bills of lading and determined in a nonuniform manner by shippers, we ordered a general investigation to examine the weighing practices in green hide shipments and whether we should "promulgate appropriate rules, regulations or orders governing the practices to be employed in the weighing and certification of weights and the billed weights of green hides exported in the foreign commerce of the United States."

Pursuant to the above order, hearings were held in San Francisco from April 30–May 2, 1963, and in New York City from June 10–14, 1963. At these hearings testimony was received from several shippers and hide exporters, as well as certain carriers, conferences and freight forwarders. No respondents were named in the order of investigation.

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Each of the above witnesses appeared under subpoena. The only parties formally intervening in the proceeding were Marubeni-Iida (America), Inc. and James Loudon & Sons, a shipper-exporter and a freight-forwarder, respectively. Representatives of these intervenors testified as Hearing Counsel's witnesses under subpoena. Intervenors presented no witnesses of their own but cross-examined certain of Hearing Counsel's witnesses.

The record in the proceeding was certified by the Examiner to the Commission for decision.

FACTS

Hides, after being removed from the animal, are cured in order to preserve then from deterioration due principally to bacteria and moisture. In the curing process much but not all of the blood and moisture content in the hides is removed. In almost all cases hides are cured at slaughter houses.

The two principal methods of curing hides are the old and prevalent wet salt method, in which salt is added to hides stocked in cellars, and the newer brine method, in which hides are immersed in vats of brine and then drained. After curing some hides are "fleshed" (i.e., stripped of flesh and fat). Fleshing is not widely done on exported hides.

Hides which have been cured, but not "tanned," are called green hides. Hides destined for export are protected by adding a layer of safety salt to each hide at the place of purchase, usually the packing house. Thus cured hides which are exported are known as "green salted hides."

Most of the hides are exported by shippers who act as "brokers" and purchase lots of hides at packing houses from collectors of hides or from other brokers (hereafter, the supplier). A lot is purchased only after an order is received or a contract is made with the foreign buyer. Normally, these brokers do not physically handle the hides or even have facilities for their receipt or storage.

There are currently on file with the Commission 242 outbound tariffs containing commodity rates on green salted hides. Of this number 167 are silent as to what weight is to be employed in the assessment of ocean freight charges, but in practice are interpreted to mean that the shipping weight is considered as the gross weight of the shipment at the time the shipment is delivered to the water carrier. Sixty-four other tariffs contain a general rule adopting this method of determining the shipping weight. The remaining 11 tariffs require the weights to be those reflected on the dock receipts of the connecting rail or motor carriers, some giving the shipper the option of reweighing the goods before shipment and attaching a certified weight certificate to the bills of lading. It is significant that in practice the rail or truck delivery weights are based upon either the packing house scale weight or upon a reweighing of the shipments by the connecting carrier.

Overland tariffs do not contain provisions stating explicitly what weight is to be shown as the ocean shipping weight. They do, however, contain a provision that an inland bill of lading must be furnished to the water carrier. This latter provision has been interpreted by shippers and possibly some carriers as requiring the shipping weight to coincide with that shown on the inland bill of lading.

With the exception of the 11 tariffs containing special weight rules, and possibly the overland tariffs, all tariffs provide or are popularly interpreted as providing that the shipping weight shall be the gross weight at the time the hides are delivered to the water carrier. Ascertaining the gross weight of hides at the particular time of delivery to the water carrier constitutes the critical problem in this proceeding.

The difficulty of determining the gross weight of hides at the time of delivery to the water carrier is due principally to two factors: (1) The tendency of green hides to lose weight continuously from the time of curing at the packing house to the time of tanning and (2) the absence of reliable evidence as to the amount of weight loss from the time of curing to the time of delivery to the water carrier.

Weight loss characteristics of hides

Hides lose weight because of many varied factors—time, type of cure, presence or absence of "fleshing", temperature, amount of handling. In general it appears that hides which are fleshed, brine cured in winter, shipped quickly, and handled little, lose least weight. However, there was no evidence presented at the hearings which would in any way indicate the amount of weight loss which could be attributed to each or any one of the above-mentioned factors.

Present practices in weighing hides

Hides are weighed first at the packing house, usually by employees of the house. The weights are normally not "certified", i.e., made by a weighmaster licensed by the State who pays an annual fee for his certificate. Hides are reweighed by inland carriers to insure that the declared shipper weights are accurate. These weights are not certified. Rail cars and trucks are weighed loaded, and hide weights are determined by subtracting the weight of an empty rail car or truck from the resultant. Estimations of weight of empty inland transportation vehicles is somewhat arbitrary, allowances not being made for loss of weight due to wear or increase due to collection of waste materials. Usually land carriers employ (absent a sizable discrepancy between the two weight measurements) the scale weights taken at the packing house as supplied by the shipper. Hides are often reweighed at oversea port of discharge.

The only positive way of determining the gross weight of hides when they are tendered to the water carrier is to weigh them at that time. Hides are not weighed at the U.S. ports of loading. There are two possible methods of determining weight of hides at the time of delivery to the water carrier, neither of which is used, and each of which has disadvantages making it impracticable to use. The first alternative, that of weighing hides on individual pallets, is almost prohibitive in cost, while the second method, that of weighing the hides while loaded on the delivering truck or rail car, although less costly, has the disadvantage of inaccuracy in weight due to the need to subtract the weight of the vehicle, noted above in reference to weighing by the inland carrier upon receipt of the hides. There is the further disadvantage of an inaccuracy caused by the additional loss in weight during the time of transfer from inland carrier to water carrier, which may be considerable as the nearest truck scale is often miles across the city from the loading pier. With the exception of a few spot checks made by Bissinger, a shipper who testified at the hearing, all witnesses testified that they never had occasion to weigh hides at the ports. It must be concluded that there is no reliable and probative evidence concerning the amount of weight lost by green salted hides from the time that they are weighed at the packing house until the time when they are tendered to the ocean carrier.

Present methods of declaring shipping weight and their disadvantages

Several methods have been evolved by the shippers and carriers for declaring shipping weights:

1. *Gross weight* (*scale weight rule*)

This is the scale weight at the time of weighing at the packing house or receipt by inland carrier. (As noted above, the packing house weight is usually adopted by the inland carrier.) Shippers unanimously object to such a procedure as in practice, due to the weight loss characteristics of green hides, it requires them to pay shipping charges for weight which they do not ship.

2. *Scale-deduction procedure*

Perhaps because of the inequity to the shipper of forcing him to adopt a scale weight rule, many carriers have acquiesced in other methods by which weights may be declared to make some allowance for weight loss in transit from packing house to dockside.

(a) *Net weight*—One shipper on the West Coast, Marubeni-Iida (America) Inc., intervenor in this proceeding, employs the net weight shown on its suppliers' invoices as the declared shipping weight. The supplier net weight is the gross scale weight taken at the packing house from which allowances for tare and salt have been deducted. These allowances on the West Coast are normally two pounds for tare and 1½–2 pounds for salt per hide for salt cured hides and 1 pound for tare and 1 pound for salt per hide for brine cured hides.

(b) *Gross weight minus standard deduction*—The other West Coast shipper who testified in this proceeding, Bissinger & Co., utilizes the gross scale weight after curing, minus a standard deduction of 2 pounds for salt cured hides and 1 pound for brine cured hides made at dockside at the time of loading on the water carrier. Bissinger's deduction from scale weight is one-half that taken by its competitor, Marubeni. Bissinger not only exports hides but also is a major curer of hides, and at times acts as a supplier to Marubeni.

(c) *Sales contract weight*—Several of the major exporters on the Atlantic Coast utilize a method of declaring shipping weights which is based upon commercial considerations. A "commercial tolerance" of approximately 5% is allowed between the net weight shipped and the net weight received. Any greater discrepancy between these weights results in monetary adjustments between shippers and buyers. Thus weights are stated so as not to exceed the commercial tolerance. The stated weights bear no fixed relationship to scale weights or to the weights of the hides at the time they are tendered to the ocean carriers.

CONCLUSIONS

Our investigation shows that the present method of declaring shipping weights for export purposes on green salted hides is not sufficiently set forth in carrier tariffs nor uniformly applied as is necessary to comply with the Shipping Act, 1916:

(a) Only a minimal number of the tariffs contain rules or regulations sufficiently explicit as to the manner of declaring shipping weights on green salted hides. The need for correcting and clarifying this situation is obvious. As a minimum, all carriers should clearly and fully state in their tariffs the manner in which they require shipping weights to be declared.

(b) The present methods of stating weights vary from shipper to shipper. Clearly, all carriers should be required to treat equally all their shippers similarly situated by insuring a uniform method of declaring shipping weights. Fair and nondiscriminatory treatment is fundamental to common carriage and is required by the Shipping Act, 1916.

Proposed rule

It would, of course, be desirable for us to promulgate a shipping weight rule containing a formula for weight determination which would accurately reflect the "weight shipped," i.e., the weight of the hides at the time they are delivered to the ocean carrier. Each of the methods presently used to state shipping weights has its faults. The use of the scale weight rule results in the overstatement of weight and forces the shipper to pay for weight not shipped. Because we lack information as to the amount of weight loss between the time of weighing at the packing house and time of delivery to the water carrier, we are unable to adopt any of the scale deduction procedures used by the carriers. There is insufficient evidence in the record to permit an order in this respect.

Therefore, we propose the following rule, allowing carriers to adopt, as long as uniformly applied to all similarly situated shippers and clearly stated in their tariffs, at their election, a scale or a scale-deduction rule:

> In order to insure a uniform method of declaring shipping weights on greeen salted hides for export in the foreign commerce of the United States, all water carriers having commodity rates on green salted hides shall file with the Federal Maritime Commission within 30 days amendments to their tariffs setting forth tariff rules which require that the shipping weight for purposes of assessing transportation charges shall be either a scale weight or a scale weight minus a deduction whose amount and method of computation are specified in said tariff rule.

We do not mean to imply that shippers and carriers should forego attempts to discover the most accurate possible method of stating shipping weights. Weight rules may be revised at any time more clearly to reflect actual weights shipped and will, of course, be acceptable to us if they are uniformly applied to all shippers. The present situation in the green hides trade, however, requires that, in fairness to carriers and shippers alike, means be found clearly to set forth weight rules in a nondiscriminatory fashion.

Additional features of the proposed rule

Each of the alternative proposals discussed above depends upon the use of a weight shown on the scaling certificate or dock receipt in the determination of the shipping weight. The furnishing of a scaling certificate or dock receipt appears to be a logical, simple way for the carrier to verify that the proper weight is being used. Additionally, if the scaling certificate or dock receipt is attached to the bill of lading and remains in the carriers' files for a reasonable period of time, it would permit us to verify that uniformly determined and otherwise lawful weights are being employed as shipping weights.

An exception to a rule requiring that each shipment be backed by a scaling certificate or dock receipt showing the weight of such shipment, should be made in the case of purchase lots split by the shipper-exporter for separate shipment. In such case it appears reasonable to permit the furnishing of a scaling certificate showing the total weight of the lot purchased; the shipping weight would then be computed based on the average weight per hide of the total lot. (If the purchase lot is split by the supplier or at the supplier's plant on the order of the shipper-exporter, the split lot exception would not apply, and a separate weighing certificate would be required for each shipment.) The split lot exception is justified because it frees the shipper from the uneconomical cost of individual reweighing which would otherwise exist.

The principal problem with respect to furnishing a scaling certificate is whether it must be certified. Our proposed rule allows shippers to furnish either a certified or an uncertified scaling certificate, provided that the latter is attested to by the shippers' supplier.

The practical effect of this rule is to permit the use of the scaling certificate produced at the packing house, which, as noted above, is not usually certified. The cost of providing a certified weighmaster at the packing house is prohibited for either the packing house or the buyer-exporter. If a certification requirement were adopted which rendered the packing house weighing certificate unacceptable, the shipper-exporter would be charged the cost of having his shipment reweighed by a "certified weighmaster." The reliability of uncertified weight certificates is supported by the fact that they normally are prepared by a party not privy to the transportation of the hides (i.e., an employee of the packing house), and further they are normally accepted by rail and motor carriers as the basis for the assessment of transportation charges and the preparation of dock receipts. In addition, a refusal of the part of the carrier to accept uncertified certificates may possibly involve unjust discrimination. Those shipments which move via commercial carrier, except where the minimum carload or truckload rate precludes the use of actual shipping weights, would have a usable dock receipt. Shipments which are transported by private means would be placed at a disadvantage by the nonrecognition of noncertified packing scale weights. Privately conveyed shipments would be impressed with the expense of securing a certified weighing certificate which shipments conveyed by public carriers could avoid.

The following proposed rule will be published in the Federal Register, allowing all interested persons an opportunity to make comments thereon:

> In order to insure a uniform method of declaring shipping weights on green salted hides for export in the foreign commerce of the United States, all water carriers having commodity rates on green salted hides shall file with the Federal Maritime Commission within 30 days amendments to their tariffs setting forth tariff rules which require that the shipping weight for purposes of assessing transportation charges shall be either a scale weight or a scale weight minus a deduction whose amount and method of computation are specified in said tariff rule.
>
> The tariff rules shall further require that the shippers furnish to the carrier a weighing certificate or dock receipt from an inland carrier for each shipment of green salted hides at or before the time the shipment is tendered to the ocean carrier. The weighing certificate, if furnished, shall either be certified or attested by the signature of the shipper's supplier of the hides. For purchase lots which are split by the shipper after purchase into two or more shipments, a weighing certificate covering the entire purchase lot may be provided, and the shipping weight shall be determined from a computation of the average weight of the hides in said purchase lot.

FEDERAL MARITIME COMMISSION

No. 1090

GENERAL INVESTIGATION INTO COMMON CARRIER FREIGHT RATES AND PRACTICES IN THE FLORIDA/PUERTO RICO TRADE

ORDER

These proceedings having been instituted by the Commission upon its own motion, and the Commission having completed its investigation of the matters involved insofar as possible on the present record, and having this date made and entered a Report stating its findings and conclusions, which report is made a part hereof by reference:

It is ordered: That this proceeding be and it is hereby discontinued as to respondents Motorships of Puerto Rico, Inc., Sea-Land Service, Inc., Puerto Rican Division (without effect upon the investigation of Sea-Land's rates and practices in Docket 1143), and TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee;

It is further ordered, That respondent South Atlantic & Caribbean Line, Inc., shall amend promptly its tariff to clarify the rates and charges on the movement of personal effects in automobiles and on the movement of trailers when respondent utilizes the inside cargo space, that respondent conform its conduct to the tariff as so modified by assessing and collecting the tariff rates and charges;

It is further ordered, That respondent South Atlantic & Caribbean Line, Inc., shall file with the Commission for the 12-month period beginning with the month of January 1964, monthly financial reports reflecting the results of operations during each month, that such reports shall contain a detailed statement of operating revenues and other income items, operating expenses (including a reasonable allocation of overhead of the related China Foundation Companies to respondent), with balance transferred to profit and loss, and a detailed statement of revenues and expenses of individual voyages included in the accounts for the month, including data showing the number of tons of cargo carried and the number of voyage days, that the books of entry upon which the financial reports are based shall be made available to the Commission's staff for the purpose of auditing said monthly reports, and that said respondent shall furnish such additional information as the staff or the Commission deems necessary for a proper evaluation of the reports.

By the Commission, January 21, 1964.

(Signed) THOMAS LISI,

FEDERAL MARITIME COMMISSION

No. 1105

AGREEMENT 7700-6—PERSIAN GULF OUTWARD FREIGHT CONFERENCE

No. 1105 (SUB. 1)

AGREEMENT NO. 8900—RATE AGREEMENT

UNITED STATES/PERSIAN GULF TRADE

Proposed modifications to conference agreement approved under section 15, Shipping Act, 1916. Modifications include establishment of $2,500 fee for admission payable by new members; amendments to clause covering damages for breach; increase of security deposit from $15,000 to $25,000; and requirements for reporting violations.

Elmer C. Maddy and *Paul F. McGuire* for respondents in Docket 1105, interveners in Docket 1105 (Sub. 1).

Stanley O. Sher for Hellenic Lines, Nedlloyd Line, Hansa Line, and Crescent Line, respondents in Docket 1105 (Sub. 1).

Thomas K. Roche and *Sanford C. Miller* for Concordia Line, respondent in Docket 1105 (Sub. 1).

J. Scot Provan and *Robert J. Blackwell*, Hearing Counsel.

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER,[1] ON THE ISSUES IN DOCKET NO. 1105

The Persian Gulf Outward Freight Conference, consisting of Central Gulf Lines, Isthmian Lines, and Stevenson Lines, seeks approval of modifications to its basic conference agreement (Federal Maritime Commission Agreement No. 7700) pursuant to section 15 of the Shipping Act, 1916 (hereinafter called the Act). The proposed modifications, including certain changes made by the conference to the proposed modifications in the course of the hearing, are attached to this decision. Portions sought to be deleted from the existing Agreement 7700 are enclosed in brackets and the new portions are underscored. The proposed modifications have been assigned Federal Maritime Commission Agreement Number 7700-6.

[1] This decision became the decision of the Commission on February 11, 1964, and an order was entered on that date approving Modification 6 to Agreement 7700.

Docket No. 1105 was instituted by the Commission pursuant to sections 15 and 22 of the Act to determine whether the proposed modifications should be approved, disapproved, or modified.[2] Under the terms of section 15, the Commission shall disapprove, cancel or modify any agreement or modification thereof (such as those involved here) if it finds that they will be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or to be contrary to the public interest or in violation of the Act. The statute requires the Commission to approve all other agreements of this nature. The agreement under consideration is between common carriers by water, as defined by section 1 of the Act. Its purpose is to fix and regulate transportation rates and control or regulate competition in the outbound trade from United States Atlantic and Gulf ports to ports in the Persian Gulf. It is a typical conference agreement and is subject to section 15 and the jurisdiction of the Commission.

In the course of the hearing, respondents amended their proposals in two respects and thereby eliminated rather strenuous objections raised by Hearing Counsel and others. These will be mentioned briefly at the end of this report just to round out the picture. As matters now stand, there is no objection to the approval of the proposed modifications. Hearing Counsel advised the Examiner, after the hearing, that they recommend approval of the modifications. This absence of dispute does not eliminate the need for discussion and findings under section 15, of course, but these need not be extensive, in these circumstances.

Taking up the proposed modifications in the order in which they appear in the Agreement, the first would add a sentence at the end of Article 10(b) of the Agreement which requires the Secretary of the conferences to report to the conference the findings of any investigation of members conducted under the provisions of that Article. This amendment is intended to strengthen the self-policing system of the conference. It will undoubtedly assist in the accomplishment of this end. It is apparent that the conference should be furnished such reports.

The next amendment is that in Article 10(c), described on page 7, which makes the assessment of damages for breach mandatory rather

[2] On June 4, 1963, the Commission, in initiating Docket No. 1105 (Sub. 1), ordered that that Docket and Docket No. 1105 be consolidated for hearing and decision. The two Dockets were heard together. There being no controversy in Docket No. 1105, no briefs were filed. Briefs will not be filed in 1105 (Sub. 1) until the end of January. That case presents issues of much greater complexity. There is no need to hold up the decision in 1105 until 1105 (Sub. 1) is decided. The evidence revealed that the decisions in each Docket can be made independently of the other. The initial decision in Docket 1105

than permissive. Article 10(c) is also amended to change the measure and the amount of damages recoverable in the event of breach by a member. At present the Article merely provides for "a penalty of not more than $15,000 for each violation". The amendment will create a sliding scale of liquidated damages which increases for repeated violations; i.e., not more than: $5,000 for the first offense; $10,000 for the second; $15,000 for the third. This scale applies to breaches not involving a non-observance of the conference tariff. For such rate violations, the new provision provides for liquidated damages in a sum equal to four times the freight that the offending member would have earned had the proper conference rate been charged.

The General Secretary of the conference testified that these amendments to the damages clauses are intended "to augment and clarify and put on a proper and reasonable basis the self-policing by the conference of its members", and that the sliding scale will provide a more reasonable standard since the repeated offender should be subject to a greater assessment than the first offender. The graduated scale should be a deterrent to repeated violations. This conference has never assessed damages against a member. Reports or rumors of violations have been received by the conference but they were not substantiated. The conference Secretary, and apparently the members, feel that the indications that violations have occurred in the past are sufficiently strong to justify the strengthening of the sanctions. He felt that, "Where there is smoke there is fire." The conference hopes by these amendments, and by increased surveillance, to discourage violations and strengthen the self-policing system. Another persuasive reason given for the amendment to base the amount of damages for rate cutting on the amount of the freight is the fact that the damage to the conference varies proprotionately with the amount of the freight chargeable under the conference tariff. The revised provisions on the amount of and the measure of damages are not out of line with those employed by other conferences, as shown on an exhibit provided by Hearing Counsel.

Article 10(c) is further modified by the Conference to:

1. Increase the security deposit to guarantee the faithful performance of obligations under the agreement from $15,000 to $25,000.

2. Make this deposit available to the conference for payment of the member's share of the conference expenses for the current year if he resigns from the conference.

3. Require the Secretary to submit to the Federal Maritime Commission full and complete reports concerning "all complaints, disputes, and matters presented to, and all actions taken by, the Conference Secretary, the Member Lines and/or the Arbitrators."

> The last reference has to do with the arbitration clause which is contained in Agreement 7700.
>
> 4. Provide that the records of the Conference, the Secretary, and Arbitrators appointed under the terms of the Agreement shall be available for inspection by the Commission.
>
> 5. Provide that "Nothing contained in the Agreement shall interfere with the rights of a Member Line under the provisions of the Shipping Act, 1916, as amended, nor the jurisdiction of the Federal Maritime Commission * * *."

The last of the modifications (Article 14(a)) provides for an initiation or admission fee of $2,500 to be paid by new members, who "shall share in the expense of maintaining the conference as may be agreed." Agreement No. 7700 does not presently provide for payment of an initiation fee. This last amendment requires special comment because, at first blush, it might be considered to be at odds with the decision of the United States Maritime Commission in *Pacific Coast European Conference Agreement*, 3 U.S.M.C. 11 (1948), where the Commission disapproved a proposed increase in the admission fee from $250 to $5,000. The decision seems to be based in part on a conclusion that it would be unjustly discriminatory to charge new members a $5,000 admission fee where the old members paid only $250. In addition, the Commission found that the fee might be a deterrent to a small carrier "entering the trade" and would therefore be a detriment to the commerce of the United States. The deterrent factor was based on "official cognizance", the Commission said. Apparently the record contained no evidence on this point.

The testimony in the case at hand establishes that the $2,500 admission fee would not deter carriers from joining the conference. Considering the change in the value of the dollar since 1948, the fee is appreciably less than that disapproved by the U.S.M.C. The amendment cannot be found to be a detriment to commerce on this score. This case is also distinguishable on another ground. Public Law 87–346 amended section 15 in 1961 by adding a provision that no agreement shall be approved "which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership * * *." Thus we now have a new, or additional, statutory test directed specifically to this matter of admission to membership. The *Pacific Coast European Conference* decision was based on the general tests of unjust discrimination and detriment to commerce. What does the new test mean when it requires that new members be admitted on reasonable and equal terms and conditions?

The Committee on Merchant Marine and Fisheries of the House of Representatives attached to its report on the Bill that became Public Law 87–346 a letter from the Secretary of Commerce which states

(Report No. 498, 87th Congress, 1st Session, page 19; Page 130 of Index of Legislative History of the Steamship Conference/Dual Rate Law, Document No. 100, 87th Congress, 2nd Session):

> At page 5, line 2, we recommend that the phrase following the numeral 5 be stricken, and the following language substituted therefor: "fails to provide reasonable terms and conditions for the admission of all other qualified carriers in the trade." We are fully in accord with the intent of this provision that all conferences be open to all carriers; however, we believe that once a conference is established, the members should be permitted to impose some reasonable terms for the admission of *other* carriers, including, for example, the payment of a reasonable membership fee to help defray the costs of the conference.[3] (Italic added.)

The marked-up Bill attached to the Committee Report includes the language proposed by the Secretary of Commerce, with slight change.[4] It must be concluded that the Committee and Congress accepted this recommendation and that Congress therefore did not intend to prohibit the establishment of a reasonable membership fee to be paid by new members but not by existing members. The purpose of the conference in this case is precisely that cited by the Secretary of Commerce. The conference Secretary testified that a new member gets the pro rata benefit and ownership of an asset belonging to the conference which consists of the going concern value or "equity" that has been built up over the years by the conference members who paid their shares of the expenses of the organization. The amount here cannot be found to be unreasonable in all the circumstances. In 1962 alone, when there were only two members, the administrative costs were $20,398.04. A compilation submitted by Hearing Counsel at the Examiner's request shows that eleven other conferences charge admission fees in this same amount. None have higher admission fees; fifty-eight do not charge an admission fee; the remaining thirty-two have admission fees ranging from $100 to $1,250.

The same compilation also lends support to the proposed increase in the amount of the security deposit from $15,000 to $25,000. Five conferences require a deposit of $50,000 and six others provide for a $25,000 deposit. As in the case of the admission fee, the testimony established that the requirement of a $25,000 deposit (which can be made in currency, U.S. bonds, surety bond, or letter of credit) would not deter an ocean carrier from joining the conference. There was no evidence to the contrary. The testimony of the officials of the member lines makes it very clear that they do not wish to exclude from the conference the five independent carriers that operate in this trade

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[3] The phrase following numeral 5 on page 5, line 2, of H.R. 4299, referred to by the Secretary, would have required the admission of "every qualified carrier in the trade * * * on application." See p. 61 of Index to Legislative History.

[4] Apparently no significance should be attached to the Committee's addition of the word "equal" after "reasonable", in this context, because Agreement 7700–6 provides for equal treatment of all new members. See p. 151 of Index.

and who are seeking approval of a separate rate making agreement in Docket No. 1105 (Sub. 1). It appears that such an increase would do little more than keep pace with the decrease in the buying power of the dollar since 1945, when the Agreement was originally adopted. This provision, which is intended to strengthen the self-policing program of the conference, is quite in keeping with the Congressional policy expressed in the 1961 amendment to section 15 (P.L. 87–346), which requires that the Commission shall disapprove an agreement upon a finding of inadequate policing of the obligations under it. This same consideration lends support to most of the other proposed modifications, for they too are aimed at self-policing. The other modifications do not require special discussion as they are self-explanatory. There is nothing that suggests that any of them would violate the provisions of the Act.

As originally submitted, the proposed modifications would have included an amendment to the voting procedure of the conference whereby decisions of the conference would require unanimous agreement, rather than the vote of a majority of the members. This proposal was withdrawn by the conference prior to the hearing and, with this change, the only objection to the modifications voiced by shippers was eliminated. The non-conference carriers in this trade have also objected to the unanimous voting rule. With the withdrawal of the proposed rule, their objection to the proposed modifications has been satisfied.

Hearing Counsel questioned the legality of Article 10(c), as it was sought to be amended, insofar as it would leave to the discretion of the conference the assessment of damages if one of the members breached the agreement. The Article would have provided, "The Conference may assess against any party to this Agreement which it regards to have violated this Agreement damages as hereinafter provided for each violation of this Agreement by such party." The conference eliminated this problem by changing the word "may" to "shall", during the course of the hearing. This change makes the assessment of damages mandatory. It strengthens the self-policing element of the contract and diminishes the chance of discriminatory treatment of members. With this change, Hearing Counsel are satisfied with all the proposed modifications.

It is concluded that the proposed modifications will not violate any of the provisions of section 15 of the Shipping Act, 1916 and they are therefore approved in accordance with that section. An appropriate order will be entered.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

January 13, 1964.

APPENDIX

F.M.C. Agreement No. 7700–6

The undersigned parties to Agreement No. 7700, as amended, hereby agree that said Agreement shall be modified to read as follows:

1. Article 10(b) is amended to read:

The Secretary shall have access to such records in the offices and on the piers of the parties hereto, the inspection of which by him shall be reasonably necessary to enable him to determine that the members of the Conference are respectively abiding by the terms and provisions of this Agreement, and the right to make such copies of, and extracts and transcripts from, such records as he may determine advisable, and each of the parties hereto agrees to furnish to the Secretary, or to such persons as he may designate for said purpose, such access and such right; any information so acquired shall not be used in violation of Section 20 of the Shipping Act, 1916, as amended. *The Secretary shall report the finding of any investigation under this Article to the Conference.*

2. Article 10(c) is amended to read:

The Conference [may] *shall* assess against any party to this Agreement which it regards to have violated this Agreement [a penalty of not more than $15,000 for each violation of this Agreement by such party.] *damages as hereinafter provided for each violation of this Agreeemnt by such party.* Such assessment shall be by unanimous vote of Member Lines entitled to vote, except that the party charged with any violation shall not be entitled to vote thereon. The amounts assessed and collected hereunder shall be placed in the Conference treasury.

In view of the difficulty or impossibility of determining the damages, which may result from breach or violation of this Agreement, or any of the Rules, Regulations or Tariffs of the Conference, by any one of the members hereof, it is hereby agreed as follows:

Where the breach or violation is a non-observance of the tariffs of the Conference, or any of the Rates or Charges therein contained, such damage for such breach shall be and hereby is liquidated in a sum equal to four times the freight and other monies which the offending party shall or would have received had the applicable Tariff Rates for transportation of the cargo involved been applied; and

Where the breach or violation is a non-observance of this Agreement (including Rules and Regulations), such damage shall be the sum of not more than $5,000 for the first offense; $10,000 for the second offense; and $15,000 for the third or subsequent offense.

If any party against whom any such [*penalty had*] *damages have* been assessed is dissatisfied with the assessment of such [penalty] *damages*, it may refer the question of breach of this Agreement or the amount of [penalty] *damages* assessed to three arbitrators to be nominated within 30 days from the day on which the party charged gives written notice of its desire for arbitration but it shall have the burden of proof of its position. One arbitrator shall be nominated by a majority of the parties hereto (except the party or parties charged with the violation), one by the party charged, and the third to be appointed in agreement with the arbitrators so nominated and failing agreement by the American Arbitration Association. The arbitrators so chosen shall, after hearing both parties, make their award in writing and the decision of the arbitrators or any two of them shall be final and binding without right of appeal by either party.

As a guarantee of faithful performance of obligation under this Agreement and or prompt payment of any [penalties] *damages* against it hereunder or any judgment written against them hereunder, each of the parties hereto agrees to deposit with the Conference security in the sum of [Fifteen thousand dollars ($15,000)] *Twenty-five thousand dollars ($25,000)* in United States currency or in United States Government bonds or irrevocable Letter of Credit or a Surety Bond of like amount satisfactory to the Conference. Any interest accruing on funds or bonds deposited shall be for the account of the party making such deposit and shall be remitted promptly to such party when received by the Conference. Each of the parties further agrees to deposit additional cash or security as required so as to constantly maintain the deposit at the amount herein above specified. Such deposit or the proceeds thereof may be applied to the payment of any damages imposed under this Article 10 unless otherwise fully paid or previously satisfied. In the event of the termination of this Agreement or the termination of membership or withdrawal of any of the parties hereto, the deposit made by the parties concerned shall be returned to them together with any accrued interest in the possession of the Conference, but only after any indebtedness to the Conference has been fully satisfied, *including paying their share of Conference expenses for the current calendar year in which the resignation takes place.*

The Conference Secretary shall submit promptly to the Federal Maritime Commission full and complete reports, including all material facts relating thereto, of all complaints, disputes and matters presented to, and all actions taken by, the Conference Secretary, the Member Lines and/or the Arbitrators

All records of the Conference Secretary, the Conference, and Arbitrators with respect to the provisions of the above requirements, shall be available for inspection by the Commission or its representatives.

Nothing contained in the Agreement shall interfere with the rights of a Member Line under the provisions of the Shipping Act, 1916, as amended, nor the jurisdiction of the Federal Maritime Commission under said Act, or any other appropriate Federal Laws.

3. Article 14(a) is amended by adding the following sentence at the end thereof:

All new Members shall contribute to the general fund of the Conference office the sum of Two thousand five hundred dollars ($2,500) and shall share in the expense of maintaining the Conference as may be agreed.

This Agreement is subject to the approval of the Federal Maritime Commission in accordance with the provisions of the Shipping Act

1916, as amended, and shall not be carried out in whole or in part prior to such approval.

Dated at New York, New York, November 7, 1963.

CENTRAL GULF LINES, (As one member or party only.)
Central Gulf Steamship Corporation,
General Shipping & Trading Corporation,
Compania Maritima Unidas, S.A.
By /s/ N. W. JOHNSEN, *Vice President.*

ISTHMIAN LINES, INC.
By /s/ A. E. KING.

STEVENSON LINES, T. J. STEVENSON & Co., INC.
By /s/ MANUEL DIAZ, *Vice President.*

775-794 O-65-47

FEDERAL MARITIME COMMISSION

No. 1130

MARTIN BIRNBACH

v.

LA FLOR DE MAYO EXPRESS COMPANY

Respondent freight forwarder not shown to have violated section 17 or 18 of the Shipping Act, 1916, in connection with a shipment from Puerto Rico to Lincoln, Nebr.

Martin Birnbach for complainant.
Frank Hernandez for respondent.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER [1]

Complainant Martin Birnbach seeks to recover reparation from respondent La Flor de Mayo Express Co., for alleged violations of sections 17 and 18 of the Shipping Act, 1916 (the Act) in connection with a shipment of household goods from Puerto Rico to New York and thence to Lincoln, Nebr. Complainant further seeks the issuance of an order requiring respondent to cease and desist from violating said sections of the Act.

Complainant failed to appear at the Commission's Hearing Room in Washington, D.C. on November 19, 1963, the time and place set for the hearing, although due notice had been issued on October 28, 1963 and duly served on him. The parties are not represented by counsel and the pleadings are less than artful. To afford both parties full opportunity to present their case, and other good cause appearing, a ruling was served on both parties on December 18, 1963, which permitted either party to request further hearing, present written statements in lieu of oral testimony, or to file such additional pleadings as they might deem necessary or appropriate; that in the absence of further action by either party on or before January 6, 1963, the recitals of the complaint and answer not denied by the adverse party

[1] This decision became the decision of the Commission on February 13, 1964, and an order was entered dismissing the complaint.

would be considered as evidence.[2] Further action was not taken by either party and they have therefore acquiesced to the submission of the issues on the factual basis stated in the ruling.

The complaint and answer, together with the documents submitted by the parties as a part thereof, disclose the following facts:

1. Complainant is an individual, now residing at 996 Franquette Avenue, San Jose, Calif.

2. Respondent carries on the business of forwarding in connection with a common carrier by water and has offices at 1679 Calle Nueva, Santurce, Puerto Rico, and 571 Jackson Avenue, Bronx 55, N.Y.

3. Complainant engaged respondent to handle a shipment of household goods from Rio Pedras, Puerto Rico to New York and thence to Lincoln, Nebr.

4. On or about September 13, 1961, respondent went to complainant's home in Rio Piedras and in cartons furnished by it, packed the household goods which it delivered to the pier at San Jose, Puerto Rico. At San Jose, the shipment was consolidated in a steel van with other shipments being handled by respondent for carriage to New York via Bull Steamship Co. vessel. When the goods arrived in New York, respondent delivered complainant's household goods to Joy Van and Storage Co. (land carrier) for carriage to Lincoln, Nebraska.

5. In connection with its services, respondent billed complainant as follows:

Ocean freight, 80 cu. ft. at 0.66 per cu. ft.	$52.80
Landing charges	5.00
Pick up in Puerto Rico	24.00
Delivery to pier	10.00
Handling paper work in connection with shipment	3.20
Pier pick up in New York	20.00
Labor and handling shipment to express line	10.00
Insurance	20.00
	145.00

On September 29, 1961, complainant wrote respondent and enclosed a check for $75 with the advice that the balance "which is to be paid to you or to another company you name" would be paid upon receipt of the goods. Complainant further requested notification of the name of the "shipper who is to receive our goods in Lincoln"

[2] Rule 1(i) of the Commission's Rules of Practice and Procedure (46 CFR 502.9) provides: "Also, any rule may be waived by the Board or the presiding officer to prevent undue hardship in any particular case." The ruling, in affording complainant an opportunity to reply to the answer, was a waiver of Rule 5(f) (46 CFR 502.66) which provides that replies will not be permitted, and a further waiver of that portion of the rule which states that new matter in the answer will be deemed to be controverted.

and that the bills of lading and other documents needed to claim the goods be forwarded.

7. On October 20, 1961, complainant dispatched a telegram to respondent's Puerto Rican address stating: "Need baggage badly. Where is it."

8. On October 25, 1961, the shipment arrived at Lincoln, Nebr. and Joy Van and Storage Company notified complainant that the goods were available upon payment of charges. Complainant, although he had advised respondent of the need for prompt delivery, was unable to accept the goods as the charges turned out to be substantially greater than estimated by respondent.

9. Total charges for the shipment amounted to $338. In addition thereto, the land carrier assessed $65.88 in connection with the holding the goods pending complainant's ability to accept it.

10. Complainant consulted the Lincoln office of the Interstate Commerce Commission and was advised that such agency could take no action beyond requesting the land carrier to hold the money paid to it by complainant pending action by some other agency.

11. Respondent did not furnish complainant with an ocean freight bill or bill of lading.

In support of his claim for reparation in the amount of $129.13, complainant contends that the charge of $65.88 assessed by the land carrier in connection with the delay pending complainant's ability to receive the shipment, was unjust and unreasonable and the result of failure of respondent or the land carrier to give proper notice of arrival of the shipment; that the ocean freight charge of $52.80 was based on a measurement of 80 cubic feet although the shipment actually measured only 65 cubic feet; that the charges for landing fees, pick-up and delivery were not only unjust and unreasonable but duplicated each other. Respondent, in its answer, denies these allegations and further denies responsibility for charges in connection with the land shipment. Respondent's statement in its answer that its charges were "extremely reasonable in view of the services performed," is considered in the nature of a denial of complainant's allegations rather than presentation of new matter. Consideration of any portion of respondent's answer which may be deemed "new matter" is not essential to this decision.

Complainant has failed to present evidence to overcome respondent's denial of responsibility for charges in connection with the land shipments which charges, in the absence of proof to the contrary, are deemed to be the sole responsibility of the land carrier, a person not a party to this proceeding nor subject to the jurisdiction of the Federal Maritime Commission. The charges assessed by respondent in connection with the shipment from packing to delivery to the land carrier in New York, are not per se unjust or unreasonable or in violation of section 17 or 18 of the Act and complainant has failed to prove, although in view of the denial the burden is on him to do so, that such charges were unjust, unreasonable or duplicative. There is no evidence upon which to base a finding that complainant is entitled to reparation.

Complainant further alleges that respondent has not filed a tariff or schedule of rates approved by the Federal Maritime Commission "or any other agency." The Commission is asked to issue an order requiring respondent to cease and desist unlawful practices and "to put in force and apply in the future such other rates and charges as the Commission may determine to be lawful." Section 18 of the Act requires a common carrier by water to file its rates and charges in connection with transportation by water. Complainant does not allege that respondent is a common carrier by water, only that respondent is a forwarder in connection with a common carrier by water. To determine in this proceeding whether or not respondent is a common carrier by water subject to section 18 would be to extend this proceeding beyond the scope of complainant's allegations. Even assuming that respondent, at the time of complainant's shipment, had been required, but failed, to file a tariff as a common carrier by water, complainant has failed to prove he was damaged thereby or entitled to reparation. Moreover, evidence has not been produced in this proceeding to support the issuance of a cease and desist order. This report will serve to put the Commission on notice of the allegations relating to respondent's violations of the Act and it is presumed the Commission will make such investigation as may be considered necessary.

An order dismissing the complaint will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

JANUARY 16, 1964.

FEDERAL MARITIME COMMISSION

No. 805

PARSONS & WHITTEMORE, INC.

v.

REDERIAKTIEBOLAGET NORDSTJERNAN (JOHNSON LINE)

No. 809

PARSONS & WHITTEMORE, INC.

v.

COMPAGNIE GENERALE TRANSATLANTIQUE (FRENCH LINE)

No. 810

PARSONS & WHITTEMORE, INC.

v.

THE BLUE STAR LINE LTD. (BLUE STAR LINE)

No. 811

PARSONS & WHITTEMORE, INC.

v.

FURNESS WITHY & CO. LTD. (FURNESS LINE)

No. 812

PARSONS & WHITTEMORE, INC.

v.

WESTFAL-LARSEN & CO. A/S (INTEROCEAN LINE)

No. 813

PARSONS & WHITTEMORE, INC.

v.

FRED OLSEN & CO. (FRED OLSEN LINE)

Decided February 4, 1964

The Shippers' Rate Agreement of the Pacific Coast European Conference was never approved under section 15, Shipping Act, 1916, and therefore was unlawful at the time of the shipments involved here.

Complainant found to have evaded its obligations under the Shippers' Rate Agreement by using a subsidiary to ship cargo on nonconference vessels.

The authority to award reparations under section 22 of the Act is discretionary. Here the record shows that it would be inequitable under all the circumstances to grant reparations, and reparations are accordingly denied.

Francis T. Greene for complainant.
Leondard G. James and *Robert L. Harmon* for respondents.
E. Robert Seaver, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Thos. E. Stakem, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*):

These consolidated proceedings arise out of complaints filed by Parsons & Whittemore, Inc. (P & W) on December 14, 1956 and January 28, 1957,[1] seeking reparation for alleged violations of sections 14, 16, and 17 of the Shipping Act, 1916 (the Act) by respondents, all of whom are members of the Pacific Coast European Conference (the Conference). Respondents are alleged to have made unlawful overcharges with respect to certain lumber shipments of P & W.

FACTS

The basic factual situation out of which these proceedings arose was found to be substantially as follows by the Examiner.

P & W was signatory to the Conference's Shippers' Rate Agreement. Lyddon and Co. (America) Inc. (Lyddon), a wholly owned subsidiary

[1] Because these proceedings involved rights and obligations under a dual rate contract our predecessor, the Federal Maritime Board, on February 11, 1957, issued an order staying the proceedings pending decision of the United States Supreme Court in *Isbrandtsen Co., Inc.* v. *U.S.*, 239 F. 2d 933 (D. C. Cir 1956), aff'd. 356 U.S. 481 (1958).

of P & W, was not a signatory to a Shippers' Rate Agreement, and the agreement between P & W and the Conference did not cover any P & W subsidiaries. It did, however, provide that:

In agreeing to so confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper hereby promises and declares it is the intent and purpose to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or subsidiaries.

On September 3, 1954, 3300 short tons of woodpulp were shipped from Everett, Washington, to Glasgow, Scotland, on the *M.S. Ferm* of Paul Wilson Company, Bergen, Norway, a nonconference carrier. The bill of lading for the shipment shows the shipper as Lyddon. The export declaration and the cargo insurance policy also show Lyddon as shipper. On July 11, 1954, 962 short tons of woodpulp were shipped from Tacoma to London on the *Asakasan Maru* of the Mitsui Steamship Company, a carrier which at that time was not a member of the Conference. The bill of lading and export declaration show Massachusetts Trading Corporation as the shipper. The cargo insurance policy, however, showed Lyddon as the beneficiary. Massachusetts Trading Corporation was an inactive corporation all of whose shares were owned by the ex-wife of one Karl F. Landegger, President of both P & W and Lyddon. On August 17, 1954, 450 tons of woodpulp were shipped on the Mitsui vessel *Awobasan Maru* from Tacoma to Rotterdam. The shipping documents on this shipment were also in the name of Massachusetts Trading Corporation as shipper. The cargo insurance policy, however, showed Lyddon as the beneficiary. The woodpulp shipped on the nonconference vessels, as described above, was purchased in the name of Lyddon. Lyddon was named as the beneficiary of the bank letter-of-credit issued for the purchase price of the woodpulp. Collection from the consignees of the woodpulp was made through banking channels, in the name of Lyddon.

On August 10, 1954, the chairman of the Conference wrote P & W inquiring as to whether they had shipped woodpulp on nonconference vessels during July and August. P & W replied by telegram the following day stating, "Shipping arrangements were made outside our control." On August 16, 1954, the Conference chairman, pursuant to article 2 of the Shippers' Rate Agreement, requested that P & W furnish complete information in regard to the shipments carried aboard the *M.S. Ferm* and the *Asakasan Maru*. Again on September 3, the chairman advised Mr. Landegger that the Conference had received information regarding the third shipment of woodpulp on a nonconference vessel (the *Awobasan Maru*) and requested that P & W supply, with their reply to the previous conference letter, the shipping documents covering all three shipments. On September 8, 1954, Mr. Landegger wrote a letter of reply to the Conference inquiries stating that the business in question was transacted by Lyddon in conjunction with Massachusetts Trading Corporation. The Conference then made a demand for liquidated damages on September 25, 1955, which P & W did not pay. On October 26, 1954, the Conference wired P & W stating "Your right to conference's contract rates under your Shippers' Rate Agreement dated March 5, 1951 terminated effective today October 26, 1954 pursuant articles 1 and 2 of said agreement and all members notified accordingly." Thereafter, P & W made nine shipments from December 18, 1954, to July 31, 1955, at the higher noncontract rates which were paid by P & W under protest. The contract rates charged at that time to other shippers who were allegedly competitors of complainant in the trade for substantially similar transportation services were approximately $3.35 per ton less than the noncontract rates charged complainant. The record does not establish that the difference in the freight rate resulted in the loss of sales by complainant or other economic damage, other than the alleged overpayment of freight.

The Examiner in addition to the above found that the record clearly established the following: [2]

(1) The bales of woodpulp shipped on the nonconference vessels were all marked "P & W", with a stencil, which is the shipping mark of Parsons & Whittemore.

(2) Lyddon had an address which was the same as that of P & W, in Manhattan.

(3) Lyddon did not have its own staff, but its functions were carried out by employees of P & W.

(4) Mr. Karl Landegger was the sole stockholder of P & W, and P & W was the sole stockholder of Lyddon.

(5) Massachusetts Trading Corporation was admittedly used as a "dummy" in two of the transactions here in issue.

(6) Lyddon has not shipped woodpulp in this trade since 1955.

(7) Half of the six customers for woodpulp served by Lyddon in 1954 and 1955 were also customers of P & W during the same period. It therefore appears that they would be willing to accept delivery in the name of either corporation.

(8) The officials of P & W were not only in a position to transact this business and ship the cargo under the name of either corporation,

[2] The numerical categorization of these "findings of fact" does not appear in the Initial Decision. It is used herein for the purpose of highlighting the contentions of the parties on exceptions.

complainant admitted that they elected to use Lyddon or Massachusetts Trading Corporation to obtain the lower freight rates on nonconference carriers "because the woodpulp prices then prevailing in the United States west coast and in the European market as of July, August and September were such that Parsons & Whittemore could not have done the business except at an out-of-pocket loss."

(9) Other than the advantage of lower rates, there were no circumstances connected exclusively with the interest of Lyddon that motivated the use of its name.

(10) P & W had complete control over the shipments, and it follows from the above admission that P & W would have shipped in its own name if the Conference's rate on woodpulp had been lower than that obtainable from any nonconference carriers.

Based on the above findings the Examiner concluded that complainant had violated its Shippers' Rate Agreement by using a subsidiary to evade its contract obligations. He rejected as not persuasive as to the identity of the true shipper, certain evidence which complainant offered in an attempt to show that Lyddon had a separate corporate existence and identity and the shipments in question were in fact Lyddon's shipments.

Having concluded that the shipments were P & W shipments made through Lyddon and Massachusetts Trading Corporation as an "evasion" or "subterfuge" for the purpose of avoiding P & W's obligation under the Shippers' Rate Agreement, the Examiner found that P & W's right to contract rates was properly terminated by respondents and that, contrary to complainant's contention, respondents' requirement that P & W pay the higher noncontract rate was neither retaliation by a discriminatory or unfair means within the meaning of section 14, Third of the Act, nor undue and unreasonable prejudice or disadvantage in violation of section 16, First, nor unjust discrimination under section 17. The Examiner further concluded that neither the clause in the Shippers' Rate Agreement requiring arbitration of disputes between the parties, nor certain suits previously brought by P & W against one of the respondents, served to deprive the Commission of its jurisdiction in these proceedings.

Although there is no substantial dispute over the facts, complainant took exception to the conclusions drawn by the Examiner. Respondents did not file exceptions as such, but in their reply to complainant's exceptions they disagreed with the Examiner's conclusion regarding the effect of the arbitration clause in the Shippers' Rate Agreement. Complainant's exceptions can be placed in two categories. It says the Examiner erred in finding that P & W breached the Shippers' Rate

Agreement by evasion or subterfuge. In addition, it raises for the first time the question of the validity under section 15 of the Act of the Shippers' Rate Agreement. In urging consideration by the Commission of this latter question, P & W relies upon what it contends is a change in the applicable law which took place subsequent to filing of briefs to the Examiner but prior to the filing of exceptions to the Initial Decision. This change in the applicable law was, according to P & W, brought about by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Kempner, et al.* v. *F.M.C.*, 313 F. 2d 586 (1963), which reversed the decision of Federal Maritime Board in Dockets 732–735. In Dockets 732–735, the Board had held that where a dual rate system was in use by a conference and the conference had "filed transcripts of extracts from minutes of its meetings showing adoption of the practice of offering dual rates" and had "filed tariffs showing dual rates," approval of the system and the contract "has been tacit where no action was taken and no order was issued." Moreover, the Board took the position that any infirmities in existing dual rate systems had been cured by the so-called "Moratorium Legislation." [3] P & W contends that it relied upon the Board's decision in Dockets 732–735 in failing to challenge the validity of the Shippers' Rate Agreement in its complaint or before the Examiner.

In overruling the Board, the Court of Appeals in *Kempner*, *supra*, had the following to say in a per curiam opinion:

> The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal. We think too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment.

The Examiner took cognizance of this development in his Initial Decision and dealt with it as follows:

> The Examiner is not unmindful of the Court of Appeals decision in [*Kempner*], which was decided January 10, 1963, after briefs were submitted in this proceeding. The Court held that the so-called Moratorium Act, Public Law 85–626, 72 Stat. 574 did not protect carriers from liability arising out of actions under unlawful dual rate systems which accrued before the passage of that Act. It is unnecessary to consider this question in this proceeding because the complaint does not question the legality of the particular dual rate system involved here.

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[3] 72 Stat. 574. This statute amended section 14 of the Shipping Act, 1916, by stating that "* * * nothing in this section or elsewhere in this act, shall be construed or applied to forbid or make unlawful any dual rate contract arrangement in use by the members of a conference on May 19, 1958, which conference is organized under an agreement approved under section 15 of this Act by the regulatory body administering this Act, unless and until such regulatory body disapproves, cancels or modifies such arrangement in accordance with the standards set forth in section 15 of this Act."

DISCUSSION AND CONCLUSIONS

Respondents argue that consideration of the validity of the Shippers' Rate Agreement is time-barred under section 22 of the Act. That section provides for the filing of a complaint alleging any violation of the Act and states that we may award reparations for the violation "if the complaint is filed within two years after the cause of action accrued." Respondents cite no authority for their position. However, it is beyond dispute that the complaints in these proceedings were filed within the statutory period. Moreover, under the circumstances of this case, we do not think complainant should be foreclosed from urging an additional ground in support of its complaint. It should not be penalized for having relied upon the then applicable precedents of the very agency with which its complaint was filed.

As here presented, the issue over the validity of the Shippers' Rate Agreement resolves itself into the question whether the agreement has ever received the required approval under section 15. When the question was first raised by complainant the Commission requested memoranda from the parties on the following:

1. Prior to the enactment of Public Law 87–346 and for the purpose of the approval required under section 15, was there any valid distinction between approval of a *dual rate system* and approval of a *dual rate contract?*

2. Was the *dual rate system* of the Pacific Coast European Conference ever approved under section 15 by any agency charged with the administration of the Shipping Act, 1916? If so, when and under what circumstances?

3. Was the Shippers' Rate Agreement of the Pacific Coast European Conference ever approved under section 15 by any agency charged with the administration of the Shipping Act, 1916? If so, when and under what circumstances?

The respondents take the position that there is a distinction between a "dual rate system" and a "dual rate contract." They further maintain that although the dual rate system has always required approval by the Commission it was not until 1959 that there was any requirement that the dual rate contract be approved under section 15. It is respondents' position that although the specific contract (Shippers' Rate Agreement) here in question was never approved, approval was given to the system in Docket 648, *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948). Thus, if respondents' view that only the "system" need be approved under section 15 is correct, the Shippers' Rate Agreement itself would have been lawful for the period here in issue.

Complainant on the other hand contends that respondents are drawing a distinction without a difference, and that whatever the respondents wish to call it, the means by which they charged the allegedly discriminatory dual rates in question has never been approved under section 15.

Litigation involving the lawfulness of so-called dual rates can be traced back many years, but it was not until 1954 and the decision of the United States Court of Appeals for the District of Columbia Circuit in *Isbrandtsen Co., Inc.* v. *United States*, 211 F. 2d 51 (1954), *cert. den.* 347 U.S. 990 (1954) that the question was resolved as to what section 15 requires by way of approval before a system of dual rates may be instituted. In that case Isbrandtsen brought suit to set aside an order of the Board allowing the Japan-Atlantic & Gulf Conference to initiate a system of contract-noncontract rates within 48 hours of the issuance of the order. Although the basic agreement under which the conference operated, approved several years earlier, provided for the future establishment of a dual rate system, no system of dual rates had been approved, and no hearing had been held prior to the issuance of the Board's order. The Conference merely filed a statement of intention to institute such a system showing the reasons for its use and the amount of spread between contract and noncontract rates.[4] Isbrandtsen and the Attorney General petitioned the Board for an immediate hearing pending institution of the system. The Board, however, issued an order allowing the Conference to institute the system, and granted hearing at a date subsequent to the effectuation of the system. The Court of Appeals set aside the Board's order, holding that "dual rate system agreements" must be approved under section 15 before they become operative.

A careful reading of its opinion can leave no doubt that the Court in referring to the "dual rate system agreement" was speaking of the actual system and the contract between the Conference and the shipper.

Respondents' contention that approval of their Shippers' Rate Agreement was not required until 1959 is primarily grounded on the decision of the United States Court of Appeals for the Ninth Circuit in *Anglo-Canadian Shipping Co., Ltd.* v. *U.S. & F.M.B.*, 264 F. 2d 405 (1959) and an incorrect interpretation of that decision in the Recommended Decision of the Examiner in Commission Docket No. 870, *In the Matter of Pacific Coast European Conference—Exclusive Patronage Contract.* Respondents cite with approval the following statement appearing at page 24 of that Recommended Decision:

Approval of respondents' Section 15 rate agreements was not a matter before the Commission in 1948. It was not until the Ninth Circuit Court of Appeals decision in the Anglo-Canadian case that rate agreements or any modifications thereof required Section 15 approval, because at that time and until the decision in the Anglo-Canadian case in 1959, the interpretation placed upon Section 15 by the Commission was that rate agreements including modifications of rate agreements did not require Section 15 approval in addition to approval of the basic conference agreement.

There is a further extensive quote by respondents from pages 24–26 of the Recommended Decision wherein the Examiner reasons that a contract rate system must necessarily be preceded by (1) the establishment of a conference; (2) an agreement between the members to institute a contract rate system; and (3) relying on the 1954 *Isbrandtsen* decision, *supra*, that only the agreement between the carriers to institute the system needed approval prior to 1959. There are fatal flaws in these arguments.

First, the very proposition for which respondents contend the 1954 *Isbrandtsen* case stands was in fact argued to the Court. As the Court said:

> The Board's position here is that it may allow the agreement to go into effect in advance of formal approval because *the basic conference agreement* authorizes dual rate system agreements. It maintains that the basic conference agreement carries with it the "cover of authority" for subsequent changes of rates since the language of the basic agreement is as broad as that of the statute itself. *If this is so, no additional approval would be necessary to allow the dual rate system to go into effect.* (211 F. 2d, at 55.) (Emphasis supplied.)

Two things are beyond dispute from the statement of the Court. On the one hand it demonstrates that the position respondents are here contending for was considered by the Court and on the other that when the Court spoke of "dual rate system agreements" it meant something other than the basic conference agreement or any provision therein authorizing the future establishment of a contract rate system. In rejecting the "cover of authority" argument the Court said, at page 56:

> "Agreements" referred to in the Shipping Act are defined to include "understandings, conferences, and other arrangements." Clearly, a scheme of dual rates like that involved here is an "agreement" in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. But even if it were not a new agreement, it would certainly be classed as a "modification" of the existing basic agreement. In either case, § 15 requires that such agreements or modification "shall be lawful only when and as long as approved" by the Board. Until such approval is obtained, the Shipping Act makes it illegal to institute the dual rate system. And this

[4] This procedure was required under the Board's General Order 76 (46 CFR 236). General Order 76 was a direct outgrowth of the decision in *Isbrandtsen Co., Inc.* v. *U.S.*, 96 F. Supp. 883 (1951), *affd.* 342 U.S. 950 (1952), wherein the Court restricted its decision to a finding that the differential or spread between the contract and noncontract rates had admittedly been arbitrarily fixed and thus was unlawfully discriminatory. General Order 76, among other things, required conferences to file copies of their dual rate contracts, a statement of the reasons for the institution of the use of contract and noncontract rates in the particular trade and the basis for the spread or differential between such rates.

illegality cannot be spirited away by action which the Board labels "interlocutory * * * of a discretionary nature." (Footnotes omitted.)

Thus, it is patently clear that the *Isbrandtsen* decision does not stand for the proposition relied upon by respondents, for the Court expressly rejected the argument that approval of the agreement between the carriers (the basic conference agreement) to institute a "system" of dual rates was sufficient to allow the actual imposition of contract-noncontract rates. The Court in fact required approval of the actual dual rate scheme, of which the contract is an integral part.

Perhaps more serious than the misconstruction of the 1954 *Isbrandtsen* decision is the treatment accorded the *Anglo-Canadian* decision *supra.* At page 24 of the Recommended Decision in Docket 870, upon which respondents rely, the Examiner had the following to say concerning *Anglo-Canadian:*

> It was not until the Ninth Circuit Court of Appeals decision in the Anglo-Canadian case in 1959[13] that rate agreements or any modification thereof required Section 15 approval * * *

* * * * * * *

Immediately preceding the statement of the Court quoted by the Examiner in his footnote 13 there appears, on the same page as the quoted statement, the following:

> We understand *Isbrandtsen Co.* v. *United States* (D.C. Cir.) 211 F. 2d 51, to hold that proposals for agreements between shippers and conference lines must be approved by the Board under § 15 * * * before a dual rate system may be initiated. *River Plate & Brazil Conf.* v. *Pressed Steel Car Co.,* (2nd Cir.) 227 F. 2d 60, dealt with an attempted action by a common carrier steamship conference upon an alleged contract or agreement between a shipper and the conference for damages sought because of a claimed breach of the contract by the shipper. The action was held unenforceable because the agreement had not been approved by the Board as required by § 15 of the Shipping Code.

Thus, when not taken out of context the Court's holding in *Anglo-Canadian* was merely a restatement of the law as interpreted first in the 1954 *Isbrandtsen* decision and again in 1955 in the *River Plate & Brazil Conference* decision.

Manifestly, respondents' position that approval of the Shippers' Rate Agreement was not required until 1959 is not well taken.

Respondents themselves state that their Shippers' Rate Agreement has never been approved under section 15. That is correct, as is the Recommended Decision in Docket 870 insofar as it stated, at page 24, that approval of respondents' rate agreement was not a matter before the Commission in Docket 648. Such approval was not an issue in

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[13] Reported at 264 Fed. 2d at page 411 where the Court said "we hold therefore that the shippers rate agreement here involved is one subject to the provisions of section 15."

that case, and as we have seen the approval there given was not enough under section 15 to validate the institution of an actual dual rate scheme, nor the shippers' contract adopted as part thereof.

The Examiner properly rejected respondents' contention that this matter should first have been submitted to arbitration under paragraph 11 of the Shippers' Rate Agreement. Without considering what obligation P & W would have under a valid contract to submit the dispute to arbitration before seeking other relief, the arbitration clause could not oust the Commission of jurisdiction and the Examiner was correct in relying in this respect upon *Swift and Co.* v. *F.M.C.* 306 F. 2d 277 (D.C. Cir. 1962).

The complainant's remaining exceptions to the Examiner's decision are largely addressed to the argument that the shipments which led to the termination of its contract rates were in fact "bona fide" shipments of Lyddon, and hence were not covered by the rate agreement. Certain of complainant's contentions are either of doubtful materiality to the resolution of the issue or are subject to dual inferences. For example, the existence of Lyddon as a separate corporation prior to P & W's purchase of its stock in 1947 does nothing to negate the Examiner's finding that Lyddon was thereafter completely controlled by P & W. The claim that P & W derived no monies from Lyddon except dividends when declared, and reimbursement for out-of-pocket costs and salaries of P & W employees when working for Lyddon, means little. In the final analysis all monies went to President Landegger as sole owner of all the stock of both corporations.

Nor are we impressed by complainant's contention that Lyddon had separate bookkeeping accounts and records and a separate bank account out of which payment was made for the nonconference shipments, and further that the shipping documents and letter of credit were in Lyddon's name or that of its nominee, Massachusetts Trading Corporation. We agree with the Examiner that these contentions are not convincing in the light of the additional evidence of record. Complainant had the opportunity and machinery for making nonconference shipments in order to reduce freight costs. It admits it used Lyddon and Massachusetts Trading for this purpose. Once the decision was made to ship in this manner, the shipping papers would naturally be made out in the name of Lyddon or Massachusetts Trading. It is significant, moreover, that the woodpulp bales in question were all marked with complainant's "P & W" stencil. There were no reasons connected exclusively with Lyddon's interests for shipping them in Lyddon's name. But if not so shipped, complainant would have suffered an out-of-pocket loss. On the other hand, the record makes clear that complainant would have used its own name had the conference rates been lower.

We cannot give credence to the alleged separation of corporate entities in such circumstances. The sole and effective control of both corporations was vested in one of them and the alleged separation, at least so far as these shipments were concerned, appears to have been no more than a "paper" undertaking for the purpose of evading complainant's obligation under its Shippers' Rate Agreement with respondents.

Section 22 of the Shipping Act provides in relevant part:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, * * * and asking reparation for the injury, if any, caused thereby. * * * If the complaint is not satisfied the board shall, * * * investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, * * * of full reparation to the complainant for the injury caused by such violation.

The power thus vested in us is that we "may" award reparation for injury caused by violation of the Act. It is permissive and discretionary, and the mere fact that a violation has been found "does not in itself compel a grant of reparations." *Consolo* v. *Flota Mercante Grancolombiana*, Dkt. 827 (Sub. 1), Report served September 18, 1963. A similar construction was placed upon section 22 by the Court of Appeals for the District of Columbia Circuit in the same case. *Flota Mercante Grancolombiana* v. *F.M.C.*, 302 F. 2d 887 (1962). In *Flota* our predecessor, the Federal Maritime Board, had awarded reparations for violations of the Act. On judicial review Flota advanced numerous arguments as to why it was "inequitable" to require it to pay reparations. The Court, while agreeing with the Board's finding of violations, remanded the case to this Commission to consider "whether under all the circumstances, it is inequitable to force Flota to pay reparations." The Court explained it was taking this action because, *inter alia*, "The Board may have erroneously believed (1) that it was required to grant reparations once it found a violation of the Act."

Under the circumstances of this case, we are of the opinion that it would be inequitable to require the payment of reparations. While the court precedents leave us no choice but to hold that the Shippers' Rate Agreement was invalid for lack of section 15 approval, we are here concerned with equitable considerations and the fact is that complainant thought the agreement was valid at the time it attempted to evade its obligations thereunder by shipping in the name of a subsidiary.

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No question as to the lawfulness of the agreement was raised in this case until February 12, 1963, when complainant filed its exceptions to the Examiner's Initial Decision. Complainant therein stated, by way of explanation for belatedly raising the issue: "Prior to the Court's decision in the Kempner case [*Kempner, et al.* v. *F.M.C., supra*, decided January 10, 1963] it had been the law established by the former Board, * * * that any infirmity which may have existed in a pre-existing dual rate contract arrangement was cured by the Moratorium Act, and that 'tacit' approval of a dual rate system was adequate to make it lawful under Section 15." Of course, respondents considered that the Shippers' Rate Agreement was valid and the case, as the Examiner said, was tried before him with the parties in accord:

> * * * that the basic question in this proceeding is whether Parsons & Whittemore, in connection with the shipments on the nonconference vessels, violated its promise to confine the carriage of its shipments to the vessels of the conference lines and to do so "without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or subsidiaries."

It is a fact that the agency charged with the administration of the Shipping Act, the Federal Maritime Board, viewed as lawful not only respondents' Shippers' Rate Agreement but those of some 60-odd other conferences utilizing the contract-noncontract rate system, although no specific approval of the agreements had been given under section 15 of the Act. This was on the theory that approval of the basic conference agreement authorizing the future establishment of a dual rate system was all that was required. The Board imposed no requirement by order or otherwise after the 1954 *Isbrandtsen* decision, *supra*, that existing dual rate agreements be approved before continuing to apply them and the agreements remained in widespread use throughout the steamship industry.

Thus, it seems to us respondents were acting in good faith in enforcing the provisions of the Shippers' Rate Agreement whereas the complainant, from the record before us, was not acting in good faith but consciously sought to avoid its contractual obligations by shipping in the name of a subsidiary. Certainly, equity does not dictate that complainant be rewarded for this endeavor. In view thereof and after consideration of the alternatives open to us under the law, we choose to leave the parties as we found them. Complainant's claim for reparations in the form of alleged overcharges, *i.e.*, the difference between the contract and noncontract rates on some nine shipments made on respondents' vessels during the period from December, 1954, to July, 1955, will be denied. An appropriate order is attached.

Commissioner John S. Patterson, *Concurring:*

Based on the record before me in these proceedings, I deem it appropriate, based on the following reasons, to concur separately in the results reached in the preceding report.

The six proceedings covered by the preceding report involve substantially identical complaints that six common carriers by water in foreign commerce overcharged Parsons & Whittemore, Inc. (P & W) on several shipments of wood pulp. P & W claims a refund by way of a reparation action under section 22 of the Shipping Act, 1916 (Act), equal to the difference between the discount rate charged to shippers pursuant to an exclusive patronage contract called the Shippers' Rate Agreement (Agreement) with the Pacific Coast European Conference (Conference) and the higher rate shown in the tariffs as applicable to shippers who do not sign a Shippers' Rate Agreement.

The facts show that P & W as of the fifth day of March 1951, made an Agreement with the Conference and the several steamship lines named therein "to offer or cause to be offered for transportation on vessels of the Carriers from Pacific Coast ports of the United States and Canada to ports of call in Great Britain, Northern Ireland, Eire (Irish Free State), Continental Europe, Scandinavia, and French Morocco and on the Mediterranean Sea * * * all of its shipments by water on which said contract rates are applicable." The contract rates are those shown in the applicable tariffs. P & W's Agreement also provides: "In agreeing to so confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper hereby promises and declares it is the intent and purpose to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or subsidiaries." (Exhibit C–1–e.)

As a part of my finding as to the facts, I am also satisfied that the corporate relationships between P & W and Lyddon and Massachusetts Trading Corporation, whose names are shown in the bills of lading covering the shipments on lines not parties to the Agreement, are such that they are all the same as P & W and all of them were really the same shippers.

The facts as stated above establish to my satisfaction that when P & W made shipments of wood pulp on Paul Wilson Company and Mitsui Line ships, which are not named in the Agreement, and during a period when the Agreement was still in effect, P & W failed to perform its agreement properly. The Conference was justified in terminating this Agreement under the provisions which gave the Conference the right to do so on "Failure of the Shipper to pay liquidated damages" for shipments in violation of the Agreement "within thirty days after the receipt of notice" (second paragraph). Thereafter the Conference was justified in charging the complainant P & W a higher or non-contract rate, and complainant is not entitled to reparation, because there were no overcharges as claimed. In the absence of any wrongful charges, there were no violations of the Act either.

The preceding report contains a decision "to leave the parties as we found them" even though the Agreement is thought to be invalid as a result of developments in the law since 1954 and 1955 when the Agreement and the acts that are the subject of these proceedings occurred.

The developments in the law that are thought to control the decision all involved questions about the approvability under Sections 14 and 15 of the Act of dual rate arrangements, exclusive patronage trade practices, and conference agreements putting them into effect. None of the cases discussed involved comparable issues or facts as we have here, but involved inter-carrier competitive disputes about certain trade practices and the approvability of agreements under Section 15. Violation of Section 15 was not charged in the complaint herein.

We are concerned here solely with the 1951 Agreement between the complainant shipper and the respondent carrier and the performance thereof. Specific agreements with shippers such as this one were not subject to approval under Section 15, and permission to use them was not required by statute until Section 14b was added to the Act in 1961, about six years after the actions herein occurred. The arguments that the 1951 Agreement required approval under Section 15 and did not get such approval are not pertinent to my decision.

The preceding report contains no decision as to the violations of Section 14, Third, Section 16, First, or Section 17 charged in the complaints. I believe this was correct on the facts, because there was no violation of these sections.

FEDERAL MARITIME COMMISSION

No. 805

PARSONS & WHITTEMORE, INC.

v.

REDERIAKTIEBOLAGET NORDSTJERNAN (JOHNSON LINE)

No. 809

PARSONS & WHITTEMORE, INC.

v.

COMPAGNIE GENERALE TRANSATLANTIQUE (FRENCH LINE)

No. 810

PARSONS & WHITTEMORE, INC.

v.

THE BLUE STAR LINE LTD. (BLUE STAR LINE)

No. 811

PARSONS & WHITTEMORE, INC.

v.

FURNESS WITHY & CO. LTD. (FURNESS LINE)

No. 812

PARSONS & WHITTEMORE, INC.

v.

WESTFAL-LARSEN & CO. A/S (INTEROCEAN LINE)

No. 813

PARSONS & WHITTEMORE, INC.

v.

FRED OLSEN & CO. (FRED OLSEN LINE)

ORDER OF DISMISSAL

These proceedings having been instituted upon complaints filed under section 22 of the Shipping Act, 1916, and the Commission having this date made and entered its Report containing its findings and conclusions thereon, which Report is made a part hereof by reference:

It is ordered, That the complaints be, and they are hereby, dismissed.

By the Commission, February 4, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 873

INVESTIGATION OF PASSENGER STEAMSHIP CONFERENCES REGARDING TRAVEL AGENTS

Decided January 30, 1964

1. Agreements No. 7840 and No. 120 of Atlantic Passenger Steamship Conference and Trans-Atlantic Passenger Steamship Conference, respectively, and the rules adopted thereunder, as they relate to travel agents, found to violate section 15 of the Shipping Act, 1916, in certain respects and ordered modified in accordance with this decision which requires that the conferences:
   a. Establish, publish, and apply definite, objective standards for screening of applicants who apply for placement on the conference list of travel agents eligible for appointment by member lines, for the approval or disapproval of change of officers or sales or transfers of agencies, for cancellations of agencies from the list of eligibles, and for the imposition of penalties for violation of the conference rules.
   b. Provide notice of conference rules and practices to agents and prospective agents, and complete reasons for conference action in excluding applicants from the eligible list, refusing to approve a change of officers or the sale or transfer of the agency, cancellation of eligibility, and the imposition of fines and penalties against agencies.
   c. Afford a reasonable opportunity for hearing to agents before taking action to disapprove a change of officers or the sale or transfer of an agency, to cancel the eligibility of an agency, or to assess a fine or penalty against an agency.
   d. Discontinue the practice of (1) establishing quotas for the maximum number of agents that will be placed on the eligible lists, (2) requiring that an applicant be sponsored by a member line, (3) denying eligibility to applicants whose offices are south of Fulton Street in Manhattan or those who are in department stores or automobile clubs.
   e. Submit for Commission review the conference rule prohibiting the appointment of foreign freight forwarders as travel agents.
   f. Discontinue the prohibition against the sale by agents of transportation on nonconference lines.
   g. Discontinue the unanimity rule in voting on applicants for the eligible lists, change of officers or sales or transfer of agencies, and level of agents' commissions.

h. Discontinue certain practices of secrecy surrounding conference rules and activities regarding travel agents, and provide the Commission with detailed minutes of all matters coming before their meetings, which include the votes of the members on these matters.

2. The Commission has jurisdiction over the levels of commissions paid to travel agents. However, the record in this proceeding does not contain a sufficient showing that the present level is so low as to be detrimental to the commerce of the United States or otherwise unlawful under section 15 of the Act.

Edward R. Neaher, *Joseph Mayper*, and *Carl S. Rowe* for Trans-Atlantic Passenger Steamship Conference and Atlantic Passenger Steamship Conference, respondents.

Robert J. Sisk, *Richard A. Givens*, and *Rocco C. Siciliano* for American Society of Travel Agents, and *James F. McManus pro se* and for Mary R. McManus, doing business as Levittown Travel Center, interveners.

Wm. Jarrell Smith, Jr., and *Robert J. Blackwell*, Hearing Counsel.

E. Robert Seaver, Hearing Examiner.

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman;* THOS. E. STAKEM, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner*):

This proceeding is a general investigation of the agreements and practices of two interrelated passenger steamship conferences as those practices relate to travel agents. It is the first general investigation to be held by the Commission or its predecessors in this area, and all of the passenger lines engaged in the transatlantic trade and their travel agents are directly involved.

This proceeding was instituted as a result of a petition filed by the American Society of Travel Agents (ASTA). The purpose of the investigation is to determine whether Agreement 120, the organic agreement of the Trans-Atlantic Passenger Steamship Conference (TAPC), and Agreement 7840, the organic agreement of the Atlantic Passenger Steamship Conference (APC), should be disapproved, canceled, or modified, insofar as they relate to travel agents, in accordance with section 15 of the Shipping Act, 1916 (46 U.S.C. 814).

Extensive hearings were held in New York. The parties represented at the hearings included: The 2 conferences and their member lines, 3 of which are American flag and 23 foreign flag, as respondents; ASTA and certain individual travel agencies as interveners; and hearing counsel. ASTA, Hearing Counsel, and respondents filed briefs. The examiner issued an initial decision based upon the evidence adduced at the hearings. Hearing Counsel, ASTA, and respondents filed exceptions thereto and we heard oral argument.

FACTS

A. The Conferences

The two conferences whose activities are the subject of this investigation are the Trans-Atlantic Passenger Steamship Conference (TAPC) operating pursuant to Agreement No. 120 and the Atlantic Passenger Steamship Conference (APC) operating pursuant to Agreement No. 7840.

The TAPC and its predecessors have been in existence for at least 80 years. The TAPC consists of two American-flag carriers, American Export Lines and United States Lines, and 23 foreign-flag carriers. Agreement No. 120 was first approved February 12, 1929. It contains comprehensive provisions relating to the selection and control of travel agents, and requires that all conference action be unanimous (Unanimity Rule). It provides for a permanent conference committee known as the Committee on Control of Sub-Agencies [1] (Control Committee), which is vested with broad powers relating to agents in so-called "Metropolitan List Territories." The Control Committee decides which applicants will be placed upon the lists of "eligible" agents in the specified metropolitan areas; decides which agents holding appointment in those areas should be retained or canceled; and obtains from the lines or agents such information as the committee requires to carry out its functions. Agreement No. 120 governs all of the issues raised by the parties in this proceeding except the level of commissions.

The APC and its predecessors have been in operation for about the same length of time as the TAPC. The APC presently operates pursuant to Agreement No. 7840, approved by the Commission on August 29, 1946. The voting membership of the APC is the same as the TAPC, except that it includes one additional American-flag line, American President Lines, and does not include Spanish Line. APC is domiciled in Folkstone, England, and holds its meetings in Britain or on the Continent. Its records are located in Folkstone. APC establishes uniform fares and the maximum levels of commission payable to agents by the member lines. Like TAPC, APC operates pursuant to a unanimity rule. It has no function with respect to the

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[1] Travel agents are referred to in both conference agreements as subagents. They will be referred to hereinafter as travel agents or agents.

appointment, dismissal, or control of the agents in the United States, these matters being within the jurisdiction of the TAPC. TAPC has no jurisdiction over the level of commissions to be paid agents, but its views are sometimes requested by APC and sometimes treated as confidential. TAPC may be thought of as the agency-regulating arm of APC. APC does not take or record votes, and only a bobtailed report of final action taken is filed with the Commission. Neither the agenda of the meeting, a report of the discussion of the members, nor any reference to proposals discussed but not adopted is filed with the Commission. In general there appears to be a deliberate conference policy to avoid government review of conference action. One of the lines referred in its correspondence to the conference to "an understanding not to have too much official correspondence," and several references are made in the transcript of hearings to the statements by leading representatives of conference carriers that no minutes could be taken or published because of the existence of the U.S. antitrust laws.

B. The Travel Agents

There are about 4,000 travel agents in the United States who represent the carriers of the two conferences. Approximately one-third of these are members of ASTA. There are some 575 agencies in New York alone. In 1960, the 4,000-or-so travel agents were responsible for 80 percent of all trans-atlantic steamship passenger bookings made in the United States, exclusive of tours. The conferences and their member lines acknowledge that the travel agents constitute their principal sales force.

The conference action relative to the appointment and control of travel agents is confined, with the exception of agencies located in department stores and automobiles clubs, which require conference approval for appointment, to six so-called "Metropolitan Eligible List Territories." The Metropolitan List Territories are those including and immediately surrounding New York, Boston, Philadelphia, Chicago, Los Angeles, and San Francisco.

The agencies located in these Metropolitan List Territories are generally small in size, about 70 percent having five or fewer employees and half having yearly net earnings under $5,000. There are basically two types of agents—"wholesale" agents, who arrange, sponsor, and conduct package tours, and "retail" agents, who sell the packaged product. In addition to the 7-percent commission the retail agent receives from the TAPC, for the ocean passage, he is paid an additional 3-percent commission by the wholesaler on those items in the package other than steamship fare. Under a somewhat similar arrangement of the International Air Transportation Association, an association of airlines in foreign commerce, the airlines pay a 10-percent commission on the air transport segment of tours. The wholesaler does not receive any net remuneration from the shipline or airline in these circumstances. His revenue comes from commissions on the hotel and insurance facets of the tours. A large majority of agents in Metropolitan List Territories handle retail business exclusively. The agents who act as "wholesalers" may also act as "retailers." The great majority engage exclusively in the travel business and practically all agents represent airlines as well as steamship lines.

C. Specific Practices of TAPC Affecting Travel Agents

1. Appointment

Under the TAPC agreement the Control Committee is responsible for the screening of agents in the Metropolitan List Territories, and exercises final authority over all matters relating to the screening of agents including determination as to the placement of an applicant on the "Eligible List." Under the terms of the conference agreement, the member lines may appoint agents only from those appearing on the Eligible List for the particular metropolitan territory. The Control Committee has eight members who each serve for a term of 2 years. Two members are chosen to represent the lines whose vessels are registered in countries in each of the following areas:

The North Atlantic Group which includes Great Britain, the Scandinavian countries, and Canada;

The Mediterranean Group which includes countries bordering on the Mediterranean, Adriatic, and Black Seas (including Mediterranean France);

The U.S. Group which includes only the United States;

The Continental Group which includes any country on the Continent of Europe not classified above.

The members in each group are selected by the unanimous vote of the lines within the group. The committee meets informally about every 6 weeks. Votes are not ordinarily taken, and if a vote is taken it is not recorded. No minutes of meetings are kept. All actions of the committee must have the unanimous approval of the members.

In the Metropolitan List Territories other than New York, local subcommittees of the Control Committee preliminarily determine the qualifications of applicants and forward their recommendations for agency appointments to the Control Committee. Normally the Control Committee accepts these recommendations. The procedures of the several local committees are not uniform, even as to the Unanimity Rule, which under the conference rules they are all supposed to follow.

However, votes are taken and these are forwarded to the Control Committee. If a local committee refuses to recommend an applicant, the application itself is not forwarded to the Control Committee. Thus, in practical effect each local subcommittee exercises considerable power over an applicant in the Metropolitan List Territory under its jurisdiction.

a. The Sponsorship Rule

An applicant for appointment as a travel agent usually communicates with the secretary of the conference, who, in turn, sends the information relative to the applicant to all the member lines. The secretary places the name of the applicant on the agenda of the Control Committee only if one or more of the member lines show an interest in the particular applicant. If no member line shows any interest in the applicant, action on his application is "deferred," and the applicant, of course, may not be appointed an agent by any of the member lines. This requirement of a show of interest by a member line is referred to as the "sponsorship" practice (Sponsorship Rule). Although lines individually often interview prospective agents by the use of questionnaires or of "travelers," who are representatives of the various member lines and who personally visit applicants at their places of business, the conference as a body has no organized system for the uniform gathering of information concerning each applicant. It is left to the "sponsoring" line to bring forward such favorable information as the line deems necessary to secure favorable action on the applicant. The conference has never officially informed applicants of the Sponsorship Rule, some applicants learning of it through the lines, others through ASTA.

Once "sponsored," the applicant is then given consideration by the Control Committee. If the applicant is not voted favorably upon by the Control Committee, he is transferred to a "Preferred List," and his application is considered at subsequent meetings. No application is denied outright, but applicants must often spend several years on the Preferred List before securing the unanimous vote of the Control Committee necessary for placement on the Eligible List. Although the Control Committee supposedly determines whether or not to place applicants upon the Eligible List by the consideration of such factors as potential ability to produce business, financial stability, business character, location of business, and national origin of the applicant in relation to national origin of the members of the community in which the applicant's business is located, these factors are not spelled out in the conference agreement, rules, or elsewhere. Applicants are not officially informed by the conference as to the standards upon which they will be judged; however, in some instances they may obtain some idea of the standards employed by the members of the Control Committee from conversations with representatives of the lines or from the information requested on the questionnaires that some of the lines provide to some applicants. The Commission has never been informed of these standards. The record shows that the standards have not been applied uniformly, and agents often have had to wait long periods of time before learning of the standards.

Although anyone can book passage on common carriers, including agents not on the Eligible List, the lines are prohibited from appointing agents who have not been approved unanimously for the Eligible List by the Control Committee and commissions for bookings made may not be paid by the member lines to anyone but appointed agents. While under the terms of the conference agreement commissions may be paid retroactively from appointment for 1 year's bookings, retroactive payment is not mandatory and is left to the discretion of the individual line. Unappointed agents find it difficult to make bookings as, lacking prestige, they are not always able to obtain vessel space, nor do they have ready ticket supplies. The record indicates that these factors coupled with uncertainty of commissions tend to cause unappointed agents where possible to divert passengers from steamship travel to air travel.

b. The Quota System

The TAPC agreement provides that the number of agencies shall be limited, with due regard being given to the requirements of the traffic in various localities. The agreement places the responsibility for the establishment of these limitations with the Control Committee, and it has established quotas limiting the number of agents that can be placed upon the Eligible List for each Metropolitan List Territory. The effect of this provision is to prevent sponsored and otherwise eligible agents from being placed on the lists. Although agents are merely "deferred" to the so-called Preferred List rather than denied placement on the Eligible List, the deferral for extended periods is tantamount to a denial.

c. The Unanimity Rule

The requirement of a unanimous vote by the Control Committee has on many occasions prevented the placement of applicants on the "Eligible List." The record shows that as late as 1959, the local subcommittee for Philadelphia declined to recommend an appointment because of a single "nay" vote, despite eight votes cast in favor of the applicant. Similarly, the Los Angeles local subcommittee in 1951 declined four applications, of which three were approved by majorities of eight to two, and one was approved by a majority of nine to one. These actions caused the retiring chairman of the Los Angeles local subcommittee to record in the minutes of that committee:

> the one or two negative votes, resulting in the pending applications being declined under the * * * "unanimous agreement" clause, is extremely detrimental to the best interests of the majority lines. Further that such negative votes may be cast "on direct instructions" from principals or are actually mischievous rather than cooperative in intent. It is also obvious that the committee's negative action in these cases is being used to advantage to the fullest possible extent by the Trans-Atlantic Air services.

Although all final decisional authority for placement on the Eligible List rests with the Control Committee, and the local committees can merely recommend, it should be borne in mind, as noted above, that when local subcommittees reject applicants, the applications ordinarily do not even come to the attention of the Control Committee.

d. Other TAPC Selection Practices

Conference rules forbid the appointment of agents who are also freight forwarders, or whose places of business are in department stores and automobile clubs. In the Metropolitan List Territory of New York, appointment is prohibited to agencies located in the district south of Fulton Street in Manhattan (Fulton Street Rule). The record shows that these rules have not been uniformly applied. The rules regarding freight forwarders (Freight Forwarder Rule) and agencies located in department stores (Department Store Rule) are grounded on the contention that the agent's concentration on steamship bookings would be lessened by the agent's other activities. Under its authority to waive the rule, the Control Committee has approved about 100 agencies in department stores and 75 in automobile clubs. Also, the Fulton Street Rule may be waived in exceptional cases. There has been no uniformity of standard, however, in handling any of these supposedly exceptional cases.

2. *Control of Agencies After Appointment*

a. The Tieing Rule

Conference rules prohibit appointed agents from selling transportation on nonconference lines. All passenger lines operating in the transatlantic trade are members of TAPC. TAPC members carry 99 percent of the passengers moving by water in this trade. The only lines affected by the rule prohibiting sale of tickets via nonconference lines are those freighter services which carry a limited number of passengers on their cargo vessels. Such carriers, like the TAPC lines, must rely on travel agents for the sale of ocean transportation. A main economic threat to the conference lines is that of the air carriers, but the Tieing Rule does not prohibit the agents from booking transatlantic travel via air carriers.

b. Sale or Transfer of Agency or Change in Officers or in Address or Name

The official conference rules require only that approval of the appointing lines be obtained prior to the transfer, sale, or change of name or address of an agency. However, in practice, the Control Committee has exercised authority over these transactions. Again precise standards have not been adopted, and the vague standards which have been utilized have not been uniformly applied. At one time, at least, it seems to have been a matter of conference policy to deny sale or transfer without going through termination and reappointment, but this is uncertain. The record contains several examples of cases in which a majority of lines were unable to permit a sale or change in personnel either because of the vague standards or the existence of the Unanimity Rule. Under the Unanimity Rule it is possible for a member of the Control Committee representing a line which has not appointed the agency in question to block a sale or transfer.

c. Fines and Penalties

Fines and penalties, called "liquidated damages" by the conference, are levied for breaches of conference rules by a Special Committee, the membership of which is the same as that of the Control Committee. No formal procedure has been adopted for determination of the truth of alleged violations. While it appears that the accused agent is afforded the right to tell his side of the story, usually in writing, it does not appear from the record that the agent is afforded any kind of hearing, or any reconsideration of or appeal from the decision of the Control Committee. During the period from 1952 through 1960, the Special Committee assessed penalties against some 28 agents totaling $3,500.

d. Bonding and Canceled Voyages

TAPC requires that agents who are appointed in Metropolitan List Territories be covered by surety bonds in amounts based on the expected sales of the agent. A single bond covers one agent for the benefit of all appointing lines. The premium of the bond is paid by the conference, but the agents pay annual fees in amounts which vary in different cities. These fees help defray premium and other expenses of the conference in administering its agency program. The conference lines are not required to be bonded, and on at least one occasion a member line was unable to pay a commission because of financial difficulties. On other occasions, when sailings were canceled after bookings had been made, commissions were not paid to the agents even though they had fully performed the service of booking the passage and had nothing to do with the cancellation of the sailings. There appears to be no conference regulation relating to the payment of commissions on canceled voyages. However, some lines pay half commission, other full commission on canceled voyages.

e. Tenure and Cancellation of Eligibility

The conference rules provide that either an agent or its appointing line may terminate an agency at any time. In addition, the Control Committee may remove names from the Eligible List if it finds a breach of conference rules by the agent, unethical business standards, an inability on the part of the agent adequately to create and stimulate the sale of transportation, or failure of the agent to effect the sale of a sufficient number of bookings. In the years 1957 through 1960, 19 agencies were terminated due to an alleged insufficiency in the number of bookings produced by the agency and 17 for other reasons. Four of the latter were subsequently reinstated.

No precise standards relative to what might constitute a sufficient number of bookings by an agent have been set up. The local subcommittees have established minimum booking requirements for approved agents in their respective jurisdictions, but the standards were not considered absolute and the Control Committee has on occasion exercised an ad hoc judgment in the application of these requirements. In New York the minimum was set at 50 bookings per year within the city limits and 30 in the suburbs. Twenty-five was the minimum in Philadelphia and Chicago, 30 in San Francisco, 10 in Los Angeles, and no minimum was set for Boston. The agents were not informed of these standards. The Control Committee has exercised final authority in terminating the eligibility of agencies according to which, "Each case was handled on its own merits depending on the circumstances surrounding the case." Agents have not been afforded a hearing or a right to have the action of the Control Committee reviewed.

The standards of performance and other grounds for termination consist solely of the general norms quoted above.

D. Practices of APC With Respect to Level of Agents' Commissions

As noted above, the TAPC exercises authority over all agency relationships and practices at issue in this proceeding except the level of agents' commissions which is the province of the APC. Under the APC agreement, unanimous approval is required by the membership of the APC before the level of commissions paid to agents may be raised. Thus, an increase in the level of commissions requires the affirmative vote of the six member lines which serve only Canadian ports. Meetings of the APC are conducted on an informal basis and a vote of the members is neither taken, recorded, nor filed with the Commission. The conference records show that from about October 1950, all lines have shown a willingness in principle at least to increase the level of agency commissions. However, in 1950 and in 1951 subcommittees of the APC were unable, because of the conference's Unanimity Rule, to recommend a proposed increase in commissions, although the majority was prepared to increase the commission from 6 to 7½ percent on "all classes, all seasons." The 1951 subcommittee stated that "while there was a strong majority in favor of applying a 7½-percent commission to all classes throughout the year, it was not possible to reach unanimous agreement," and "it was, therefore, suggested that the matter be deferred for consideration at the statutory meeting in March 1952." The subcommittee did not have the power to take final action, but its function was to recommend action to the principals.

In 1951 the conference increased the commission to 7½ percent, except on passage booked during the high volume summer season where a 6-percent commission remained in effect. Proposals to increase commissions were taken up and action was deferred at meetings in 1952 and 1953. A 1952 subcommittee noted that "unanimity could not be reached on a proposal to extend the off-season commission basis (7½ percent) to bookings for seasonal sailings." The question was taken up again in 1956, when the present commission of 7 percent on all bookings was established. Since that time, representatives of travel agents have sought increases in the commission levels but have been told that commission levels have not been raised since 1956 because the APC has had difficulty in achieving unanimity.

Evidence adduced by the conference demonstrates that differences between members over agents' commissions are usually eliminated or compromised, the minority giving way eventually to the majority. Conference witnesses testified that neither a single member nor a small minority has ever vetoed proposed conference action on commissions.

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It is impossible to tell from the conference's sketchy minutes if this is true. However, it is certain that under the present Unanimity Rule a single member could veto an action to increase agents' commissions even though the action was desired by all the other members. The executives of the American-flag lines which are members of APC, and who testified at the hearing, stated that because the Americans were a minority in the conference, the Unanimity Rule was necessary to protect their interests. The record indicates, however, that the American lines have often been in the vanguard for commission increases and as near as can be determined have never blocked proposed increases. Under the conference agreements the decision to change the Unanimity Rule to a majority rule or some other rule that would require the consent of less than the full membership, would itself require the unanimous consent of all conference members.

E. Diversion of Passengers to Air Carriers

At present both air and ocean carriers pay 7 percent commissions on regular point-to-point bookings, and 10 percent on their respective portions of so-called foreign inclusive tours. It takes approximately three or four times as much of an agent's time to sell sea as compared with air space, and several years of experience are required to produce a really competent steamship passage salesman. Because of this, appointed agents tend to push air rather than sea travel. The record indicates that one of the primary factors in determining the level of commissions has been the competition of air travel.

THE EXAMINER'S DECISION

The parties agree that the initial decision of the examiner correctly disposes of most of the issues raised in this proceeding. We summarize below those portions of the decision to which no exception is taken:

After a brief discussion in which he approved of the exercise of some conference control over travel agents and noted that ASTA was also in favor of such control (Initial Decision, 49–50), the examiner adopted the following statement of Hearing Counsel as criteria for determining what constitutes a violation of section 15 of the Shipping Act, 1916:

Any provisions of TAPC Agreement No. 120 or APC Agreement No. 7840, or any regulations or rules promulgated thereunder, which prevent travel agencies in the United States from rendering complete and effective service both to passengers and to ocean carriers operate to the detriment of the commerce of the United States. All conference-imposed restraints which prevent the travel agent from properly performing his function of selling ocean transportation, for which no reasonable justification exists, should be eliminated by the Commission's disapproval, cancellation, or modification of the subject agreements * * *." (Initial decision, p. 52.)

In addition to the above, the examiner further concluded that "unreasonable restraints against qualified persons who seek to become travel agents would also be detrimental to commerce."

The examiner in light of these criteria then considered the areas of interaction between the conferences and the travel agents, discussed above in the factual statement, and reached the following conclusions:

A. TAPC Practices

1. *Appointment*

The conference (TAPC) has failed to adopt, publish, and promptly and consistently apply uniform standards of background and qualifications in its selection of applicants for placement on the list of eligible agents in Metropolitan List Territories. This failure is detrimental to commerce and contrary to the public interest, within the meaning of section 15, because it detracts from the ability and the willingness of the corps of agents, or potential agents, to foster and sell steamship travel. Thus, the conference must adopt, publish and apply a set of uniform, objective, standards in the screening of applicants that are sufficiently precise, and well defined to give adequate notice to applicants of the requirements. No other standards should or may be employed. The standards of eligibility must be published and made available to all applicants in order to give meaning and effect thereto and every applicant who meets them must be approved. Similarly, conference action on each application must be taken promptly and the applicant notified promptly of the decision and the reasons for whatever action is taken. These reasons should not be stated merely in general terms but must relate specifically to the adopted standards of eligibility.

Respondents have explicitly consented to revise their agreements so as to provide a set of uniform objective standards for screening applicants in the Metropolitan List Territories, sufficiently precise and well defined to give applicants adequate notice of the requirements they must meet. Respondents have further agreed to the publication of such standards and to prompt notification of the action taken with respect to all applicants for appointment as agents.

a. The Sponsorship Rule

The Sponsorship Rule must be discontinued as it has resulted in the exclusion from the Eligible Lists of qualified agents, to the detriment of commerce. Respondents have agreed to remove the Sponsorship Rule.

b. The Quota System

The Quota System must also be discontinued for the same reason that requires discontinuance of the Sponsorship Rule. The number of agents already on the Eligible List has no bearing on the question of the qualifications of a new applicant. If an individual line has all the agents it feels that it requires, it is of course not required to appoint an agent newly placed by the Control Committee on the Eligible List. Respondents have agreed to remove the Quota System.

c. Other TAPC Selection Practices

The Fulton Street Rule and the Department Store and Automobile Club Rules must be abolished, as they have resulted in the arbitrary exclusion of agents to the detriment of commerce. The Freight Forwarder Rule must be submitted to the Commission for approval. The Commission can then consider the proposal under its customary procedures and after obtaining the views of all interested parties make a determination as to its validity under section 15. The respondents have agreed to abolish the Fulton Street Rule, the Department Store and Automobile Club Rule, and they have further agreed to file the Freight Forwarder Rule with the Commission.

2. *Control of Agencies After Appointment*

a. Sale or Transfer of Agency or Change in Officers or in Address or Name

The same administrative fairness must be afforded when the conference considers an application for approval of the sale, transfer, or change of the officers of an agency that is required in reference to the consideration of original applicants and for the same reasons. The conference rules must provide reasonable standards in regard to the consideration of sales and transfers and changes of officers, including adequate notice of the standards to applicants, and an opportunity for the agent to be heard. The rules must further provide for prompt action in accordance with the standards adopted and for prompt notice to the agent of the action taken together with the reasons therefor. A system of arbitration for review of conference action will not be required as, in the case of the screening of applicants, relief from arbitrary conference action or other violations by the conference will be afforded upon complaint filed with the Commission.

The respondents have agreed to the adoption and application of reasonable standards regarding the consideration of sales and transfers, and of changes in name, address, or officers in appointed agencies, including procedures for notice thereof to applicants, for opportunity to be heard and for prompt action on such requests.

b. Fines and Penalties

The conference must adopt and apply definite standards for the assessment of liquidated damages, providing for adequate notice thereof and for opportunity of accused agents to be heard, and for prompt report to the Commission of any liquidated damages assessed. Respondents have agreed to adopt and apply definite standards for the assessment of liquidated damages, providing for adequate notice thereof and for opportunity for accused agents to be heard, and for prompt report to the Commission of any damages assessed.

c. Bonding

Bonding of carriers against loss of commissions caused by cancellation of voyages or line insolvency is not required. There is no evidence that suitable bonds are available, and instances of financial failure by the lines are very rare.

d. Tenure and Cancellation of Eligibility

The conference must adopt and apply definite objective standards for cancellation of the eligibility of agents. The agent against whom allegations are made should be notified of the delinquencies with which he is charged and afforded an opportunity to confront those who made the charge and to adduce evidence to refute it, or in the alternative a reasonable time to correct the delinquency. The rules should require that the conference secretary must be informed in writing of all cancellations by member lines individually including the reasons therefor, records of which must be kept for a reasonable time in order to permit the Commission to assure itself that multiple cancellations of a particular agent are not being employed to circumvent the restrictions on conference action. Respondents have agreed to adopt, publish, and apply a set of definite objective standards for the cancellation of the eligibility of agents, and to the provision of a reasonable time after warning to correct delinquencies or adduce evidence to refute them (except in the case of default by an agent or the cancellation of his surety bond).

B. Secrecy of Conference Action: Voting

Because of the public interest in the operations of the conferences, they should be required to take and record the votes of the members, keep detailed minutes of all matters coming before meetings, retain records of meetings for a reasonable time and provide copies to the Commission. (Initial Decision, 68–69.) Respondents have agreed to provide the Commission with full minutes of meetings indicating votes of the member lines.

DISCUSSION AND CONCLUSIONS

We agree that the examiner correctly disposed of the foregoing issues and we adopt his findings and conclusions thereon as our own. We now turn to the issues raised on review by the parties in their exceptions to the initial decision.

A. The Unanimity Rule as Applied to the Level of Agents' Commissions

The examiner found that there was no showing that the Unanimity Rule as applied to agents' commissions had operated to the detriment of the commerce of the United States, and that there was no showing that a different voting rule would have allowed increased commissions.

In addition, he found that "there exists at present a substantial equilibrium between the commissions paid by the air and ocean carriers in this trade in that both pay 7 percent on regular point-to-point bookings." He said it could not be concluded that the failure of the conference to increase commissions as requested by the agents has led to a competitive disadvantage of the conference lines relative to the airlines. In the examiner's view it was more logical to conclude that if the adoption of a majority rule resulted in an increase in commissions, the airlines might find it necessary to succumb to pressures from the travel agents and meet this new competition caused by the disparity in the commission rates by an increase of their own and thus begin leapfrogging the steamship commission rate. The examiner further conjectured that increases in fares would probably follow, to the prejudice of the traveling public and the detriment of commerce.

The record in this proceeding compels us to overrule the examiner on these findings and conclusions. The record shows many instances in which the existence of the Unanimity Rule has blocked or at least delayed the fruition of a desire on the part of a majority of the lines to increase the levels of agents' commissons.[2]

Respondents' arguments that the evidence refers only to the desires of a subcommittee which did not have the power to take final action is of doubtful value here. The determinations of the subcommittee may not have been of the kind dictating final action, but they are

[2] See sec. D of the Statement of Facts, supra.

apparently conditions precedent to any conference action with respect to the level of commissions. Although it is true that the principals on occasion took actions other than those recommended by the subcommittee, these appear to have been in the nature of a watering down of actions favored by at least a majority of the lines. There is no indication from the record that the principals ever instituted any action regarding agents' commission levels without the concurrence of at least a majority of the subcommittee. The record, moreover, affirmatively shows that a lack of unanimity on several occasions prevented the subcommittee from even reporting the positions of the member lines to the principals.

The effect of the Unanimity Rule on the actions of the principals is of course rendered less clear because of the conference's failure to keep complete minutes of its meetings and to file them with the Commission. By its own admission, the conference purposely adopted this practice because of its concern over the American antitrust laws. It is undeniable, however, that under present conference procedures a single vote could block a proposal on commission matters even though the proposal was favored by an overwhelming majority of the member lines.

The record clearly shows that agents tend to push air travel rather than sea travel, mainly because it takes considerably longer to handle the details of sea travel. Time is money and the fact that the travel agent is able to sell more air than sea bookings in a given time period means, as ASTA correctly contends, that the effective commission rate of the steamship lines is lower than that of the airlines. Under this reasoning the "substantial equilibrium" found by the examiner becomes superficial.

The record contains some evidence of instances in which the diversion from sea to air passage has taken place against the best interest of the prospective passengers. However, this evidence related solely to the activities of agents who were not appointed by the conference lines. While it cannot be said these agents owed any duty to those lines, the fact remains that the diversion was not in the interests of the conference lines themselves. They have realized this and have attempted to solve the diversion problem by proposals to increase the level of agents' commissions. But the proposals have been blocked, delayed, or weakened because of the existence of the Unanimity Rule. Perhaps for economic reasons it is not feasible for the lines to raise commission levels at the present time. Nevertheless they should at least be allowed to increase commissions unhampered by the veto power inherent in the Unanimity Rule should they desire to do so.

There is no evidence in the record indicating that the airlines could or would increase their commission level, or would in fact need to do so, if the steamship lines voted by majority rule or some other rule requiring less than unanimity to raise the commission level on sea passage.

We feel that the Unanimity Rule must be discontinued as it applies to the deliberations of the subcommittees and of the principals on the levels of agents' commissions. It is a regulation which prevents travel agents in the United States from rendering complete and effective service both to passengers and to ocean carriers. It has in some cases prevented the principals from even considering the question of commission levels and in others has defeated, or at least delayed or watered down the desires of the majority of the lines to raise commission levels, thus placing the steamship lines at a competitive disadvantage vis-a-vis the airlines. We think the Unanimity Rule plainly operates to the detriment of the commerce of the United States.

B. Jurisdiction Over the Level of Commissions Paid to Travel Agents

The examiner who presided at the hearings excluded evidence relating to commission levels. The precise reason for this is not certain, but it appears he either believed the issue was not meant to be included in the investigtion or that our jurisdiction does not extend to the level of agents' commissions. Subsequently, Examiner Seaver refused to rule on the jurisdictional question, as he found there was not in any event sufficient evidence in the record to support a finding that the present level of commissions is so low as to be detrimental to the commerce of the United States. The parties to this proceeding, however, have specifically raised the question of our jurisdiction in their exceptions and replies to exceptions and it seems to us it would be useful from a regulatory standpoint to deal with the question.

To begin with, it is clear that the order of investigation encompasses all activities in which the conferences engage affecting travel agents pursuant to the agreements here under consideration, and the fixing of the level of agents' commissions is one of such activities. We also think it is clear that we have jurisdiction over the level of agents' commissions set pursuant to conference agreements. We do not claim jurisdiction to set the specific level of compensation. Nor may we rule on the reasonableness of commissions fixed by individual carriers operating in our foreign commerce. What we are here concerned with is concerted activity which is permissible solely by virtue of an agreement approved under section 15. That section provides in relevant part:

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

Thus, the jurisdiction here involved is that which directs us to disapprove, cancel, or modify an agreement when the activities of the parties thereunder are incompatible with any of these standards. If we were to find that the respondents acting pursuant to their respective agreements had in concert fixed commission levels which were, for example, detrimental to the commerce of the United States or contrary to the public interest within the meaning of section 15, we would not only be authorized but would have the duty to withdraw or modify our approval of the agreements under that section.

Respondents argue that our jurisdiction does not extend to the level of commissions because the commissions are paid to persons not subject to the Act. Without considering whether under any circumstances travel agents may be subject to the act, respondents' argument misses the point. Our jurisdiction under section 15 is over agreements. Respondents' argument is necessarily grounded on the premise that the agreement regarding commission levels is between the agents and the carriers, which of course is not the fact. It is between common carriers by water all of whom are subject to the Act. Our jurisdiction extends to the entire agreement and all of the activities thereunder and it necessarily embraces the very act of fixing the level of agents' commissions. This conclusion is by no means novel. The Commission and its predecessors have repeatedly asserted jurisdiction under section 15 over the concerted establishment of the levels of brokerage paid to brokers by conferences operating pursuant to approved agreements. It has been repeatedly held, moreover, that the use of conference power to invade or affect third party interests is subject to regulation and control under section 15. *Agreements and Practices Pertaining to Brokerage*, 3 U.S.M.C. 170 (1949); *Pacific Coast European Conference (Payment of Brokerage)*, 4 F.M.B. 696 (1955); *Practices and Agreements of Common Carriers*, 7 F.M.C. 51 (1962); *Pacific Coast Port Equalization Rule* 7 F.M.C. 623 (1963).

C. The Present Levels of Agents' Commissions

ASTA requests that we hold that the present level of agents' commissions is so low as to be detrimental to the commerce of the United States. We are unable to make such a finding upon the present record. ASTA itself points out that before such a finding could be made, it would be necessary to determine that the present level of commissions is so low as to be "unremunerative, noncompensatory, or a burden on ASTA's other services" and hence detrimental to commerce. *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 773 (1946).

Although there are many general statements in the record by travel agents about the difficulty of operating at the present commission levels, we agree with hearing counsel and the examiner that the record in this proceeding does not support a finding that the level of commissions is unreasonably low. Hearing Counsel takes the position, with which the examiner agreed, that the record "contains no direct and reliable evidence" upon which to disapprove the present level. This is, we think, of particular significance when it is borne in mind that (except for one minor exhibit mentioned below, exhibit 106) the evidence upon which ASTA asks us to make a determination is that adduced by hearing counsel.

The record does show a decrease in the relative number of steamship bookings in relation to total bookings. But it is not established that the level of commissions is the primary reason for this. The problem of diversion of passengers from sea to air does exist, and it is a problem which the lines have attempted to solve by increasing the commission level. But it is undisputed that the enormous growth in air travel is largely attributable to factors unrelated to the steamship passenger industry, such as the increased seating capacity and speed provided by the new jet aircraft, and the introduction of many new foreign air carriers serving the United States.

Exhibit 106, the only one which ASTA presses in its brief which it claims is not covered by the evidence introduced by hearing counsel, merely shows the rapid expansion of the airlines. It does not show that the agents are being forced out of business or losing money through the sale of sea bookings.

We do not imply that we feel the present commission levels are necessarily proper. We hold only that on this record there is not a sufficient showing for us to declare that such levels are detrimental to the commerce of the United States or otherwise unlawful under section 15.

D. THE UNANIMITY RULE AS IT APPLIES TO SELECTING AGENT APPLICANTS FOR METROPOLITAN ELIGIBLE LISTS

The examiner in his initial decision found that the Unanimity Rule as applied to the selection of agent applicants for the Eligible Lists in the Metropolitan List Territories was so detrimental to the interests of agents, or prospective agents, as to be detrimental to the commerce of the United States. He therefore concluded that rule should be discontinued. Respondents except to this conclusion.

We feel that the examiner was correct. The Unanimity Rule has acted as an unreasonable restraint against qualified persons who seek to become travel agents. It has on several occasions prevented the Control Committee from even considering applicants for the Eligible Lists because of its use by local committees. It is capable of allowing one representative on the Control Committee to "blackball" any applicant and exclude him from appointment by the rest of the lines, though all of them may favor his selection. The rule has been denounced by a chairman of a local committee as "extremely detrimental to the best interests of the majority lines," and it has been used on at least one occasion in an attempt by lines to trade votes.

We hold that the Unanimity Rule must be discontinued in all actions by the conference, both by local subcommittees and the Control Committee, relating to the selection of agent applicants for the Eligible Lists. The rule, of course, is unnecessary to protect the freedom of individual lines in the actual appointment of their agents since the individual lines are free to appoint or not, as they see fit, any applicant placed on the Eligible Lists.

E. THE UNANIMITY RULE AS IT APPLIES TO VOTING ON AGENCY SALES, TRANSFERS OR CHANGES OF OFFICERS OR LOCATIONS

It is uncertain whether the examiner meant to outlaw the Unanimity Rule as its applies to agency sales, transfers, or changes of officers or locations. Hearing Counsel appear to feel that the examiner's conclusions against the Unanimity Rule extended to these matters. In the interest of clarity we think a specific ruling should be made.

Our opinion is that the Unanimity Rule must be discontinued with respect to sales, transfers, or changes of agency officers or locations. It has the same injurious effect in this area that it has in the selection of agents for the Eligible Lists. The record shows that the Unanimity Rule has been instrumental in allowing the veto of an agency transfer and makes it possible for a member of the Control Committee whose line has not appointed the agency in question to block a transfer or change in personnel. These consequences are unreasonable restraints which deprive travel agents of the ability freely to dispose of property rights and interfere unduly in the conduct of their business. In our view, the Unanimity Rule is contrary to the public interest. It also may possibly operate in some instances to the detriment of the commerce of the United States.

F. The Tieing Rule

The examiner held that the so-called "Tieing Rule," the conference procedure which prohibits appointed agents from selling transportation on nonconference lines, was unlawful as the record did not demonstrate that it was necessary to promote stability in rates or to combat destructive competition. Such tieing arrangements generally run counter to antitrust principles. *United States* v. *General Motors Corporation*, 121 F. 2d 376 (7th Cir. 1941), *cert. den.* 314 U.S. 618, and *Vitagraph, Inc.* v. *Perelman*, 95 F. 2d 142 (3d Cir. 1936), *cert. den.* 305 U.S. 610.

Respondents object to the examiner's conclusions, arguing that he applied strict antitrust principles in determining the validity of the Tieing Rule. We think respondents have misconstrued the examiner's conclusions. He applied traditional Shipping Act concepts in determining that the rule was invalid. Section 15 affords antitrust exemption to the parties to an anticompetitive agreement when that agreement is approved by the Commission. Particularly where the rights of third persons are affected, this exemption should not be granted unless the purposes and policies of the Shipping Act are thereby furthered. As the examiner stated, "the Commission must make sure that the conduct it legalizes under section 15 does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the act." *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954), *cert. den.* 347 U.S. 990 (1954). The examiner considered those factors which respondents argue are the proper ones, namely rate stability and destructive outside competition, and he weighed the restriction imposed on agents by the Tieing Rule against the possibilities were the rule abolished. He concluded, as we do, that no adverse consequences would flow from the abolition of the rule.

Respondents now admit that the Tieing Rule is not necessary to protect the conference from outside competition, but claim that it is necessary to maintain stability within the conference. They argue that without the Tieing Rule the conference would disintegrate. The record, however, contains no evidence demonstrating that anything of that sort will happen. We note that respondent lines operate Caribbean cruises without the benefit of a tieing rule and no adverse consequenses have resulted.

G. Payment of Commissions on Strike-Canceled Voyages

The examiner found that the conference, as a collective practice, refused the payment of commissions on voyages voluntarily canceled. Finding such collective action to run counter to the interests of our foreign commerce, he ruled that the practice should be discontinued. ASTA supports this ruling and also urges that it be extended to cover the case of voyages canceled because of a strike.

Respondents state, and we agree with them, that the examiner erred in finding that the refusal to pay commissions on canceled voyages was the result of conference action. There is nothing in the record which would indicate that collective action of the respondents dictates the payment or nonpayment of commissions on canceled voyages. There is testimony that some lines pay half commission, others full commission, on canceled voyages. Hearing Counsel, in the course of the hearings, admitted that it "may be a fact" that there is no conference action with respect to commissions on canceled voyages.

There is nothing in the conference agreement that can be disapproved with respect to these payments or nonpayments. If some lines refuse to pay the commissions, they may have reached individual understandings with agents covering the matter. But in any event, we cannot say on this record that the refusal is unlawful.

H. Voting by Lines Which Do Not Engage in the Foreign Commerce of the United States on the Level of Commissions Paid to Their Agents in the United States

The examiner found that "while unanimous approval of the membership of APC would be required to raise the rate of commission, at least seven of the members engage in little or no service to or from the United States." His difficulty with the voting by lines serving the contiguous Canadian trade was their power to exercise, through the Unanimity Rule, a veto over matters affecting travel agents in the United States. He ruled that "lines which do not engage in the foreign commerce of the United States should not be permitted to vote on the level of commissions because the compensation paid to agents here is none of their concern."

Respondents contend that the examiner erred in this ruling if it was thereby intended to exclude lines calling only at Canadian ports from voting on levels of commissions paid to their agents in the United States. Both ASTA and hearing counsel state that they have no objection to such lines voting on commission levels if the Unanimity

Rule is discontinued. Since we have ordered the rule eliminated as it applies to the level of commissions, the question reduces itself to one of whether the lines serving only Canadian ports should be denied any voice respecting the level of commissions paid to their agents in the United States.

It is sufficient for our purposes here merely to say that, with the Unanimity Rule having been eliminated, we have no objection to such lines having some voice in commission matters, and that proposed solutions to this problem may be submitted with the amended agreements. It may be noted, also, that at least one line serving only Canadian ports has indicated that it does not desire to vote on commission levels for agents in the United States.

Our ultimate conclusion is that Agreement No. 7840 of APC and Agreement No. 120 of TAPC and the rules adopted thereunder, insofar as they relate to travel agents, are contrary to section 15 of the Shipping Act in the respects and for the reasons noted above and must be modified in accordance with this decision.

Respondents shall within 60 days submit to us for review and approval proposed modifications of the agreements and rules consistent with this decision, as per our order attached. The views and comments of interested parties will be invited upon the specific language of the proposed modifications and the proceeding will be held open pending further order of the Commission.

COMMISSIONER PATTERSON, *concurring and dissenting:*

Based on the record before me in this proceeding, my conclusions are as follows:

First, I concur in the result reached in the preceding report as to—

(1) The majority's concurrence with the initial decision of the examiner as summarized in its report to show those portions as to which no exception is taken. It is understood that the respondents have agreed to revise many of the provisions objected to by the travel agents (first paragraph under "The Examiner's Decision").

(2) The majority's agreement with the examiner on the requirement of unanimous consent in selecting among applicants for travel agent status to be placed on a list of eligible applicants for ticket selling agencies (item (4) under "Discussion and Conclusions").

(3) The majority's agreement with the examiner on the requirement of unanimous consent in voting on agency sales, transfers of agency locations, or changes of officers (item (5) under "Discussion and Conclusions").

(4) The majority's decision that there is nothing in the record to indicate that collective action of the lines dictates the payment or nonpayment of commissions on canceled voyages (item (7) under "Discussion and Conclusions").

(5) The majority's decision not to "rule on the interest which we feel it is necessary for a line to have in the foreign commerce of the United States before it can vote on the level of compensation paid to its agents here" (item (8) under "Discussion and Conclusions").

Second, I dissent from the Commission's majority decisions as follows:

(1) Disapproving, unless modified, of the agreement to apply a unanimity rule to the level of agents' commissions (item (1) under "Discussion and Conclusions").

(2) Disapproving, unless modified, of the agreement to prohibit travel agents from selling transportation on nonconference or independent carriers (item (6) under "Discussion and Conclusions").

(3) Deciding that we have authority to regulate the level of commissions paid to travel agents and that we should take no action at this time on the level of commissions (items (2) and (3) under "Discussion and Conclusions").

As regards my "Second" conclusion as stated above, the reasons for my dissent are advanced as follows:

INTRODUCTION

We are concerned with the approvability under section 15 of the act of certain terms of the Trans-Atlantic Passenger Steamship Conference General Agreement adopted January 14, 1929, and as amended to the latest approved amendment on March 13, 1961, and with the Atlantic Passenger Steamship Conference Agreement dated London, February 12, 1946, approved by a predecessor agency on August 29, 1946. According to the numbering, Agreement No. 120 has been amended 76 times, and as of December 21, 1960, Amendment 120–76 shows 24 signatory members. No amendments are in the record for Agreement No. 7840, which has 15 signatory members. Headquarters of the former are in New York, and of the latter, in Folkestone, England, Great Britain.

The proceeding involving both agreements is called a "general investigation" and was started by a predecessor agency on November 2, 1959, after an informal complaint on October 22, 1958, by the American Society of Travel Agents, Inc., concerning certain practices of the Atlantic Passenger Steamship Conference.

As a result of this investigation, the majority has decided that certain provisions of these agreements now violate section 15 of the act, although before the date of its report these provisions have been lawful and predecessor agencies have been fully informed of all revisions of these agreements. The agreements relating to commissions which are now found to be illegal are:

(1) *Agreement No. 120.* Article D. "Passage fares and rates of commission and all conditions relating thereto, shall be in accordance with the provisions of the *Atlantic Passenger Steamship Conference* Agreement and the rules and regulations adopted thereunder" (exhibit 1, p. 9).

(Agreement No. 120 does not control commissions, but by this provision delegates the function to the body operating under Agreement No. 7840.)

(2) Article E. "*Agencies.* (a) The member lines shall confine the sale of their transportation to: (1) *Line's Own Offices.* * * * (2) *General Passenger Agencies*—i.e., agencies appointed by a Line on a commission basis to control a specified territory in which sub-agencies are appointed who must report to such agencies * * *" Paragraph (e) of Article E prohibits a sub-agency "* * * from selling passage tickets for any steamer not connected with the fleets of the member Lines for which it has been duly appointed * * * if such steamer is operating in any competitive trans-Atlantic trade * * *" The member Lines agree to use a uniform "Sub-Agency Appointment Agreement" (Rule E–2). The prescribed terms of such agreement obligate the agent "to adhere to and comply with * * * the annexed rules * * *" Rule 5 annexed, called the tying rule, provides that "the agent is prohibited from booking passengers for any steamer not connected with the fleets of any of the member lines" and otherwise closely follows the language quoted above from paragraph (e).

(3) *Agreement No. 7840.* Article 6. "(a) Rates of Commission and Handling Fees which Member Lines may pay to their General Agents or Sub-Agents shall be established by unanimous agreement of the Member Lines" (exhibit 2, p. 9).

DISSENT NUMBER (1)

The majority does not question the validity of establishing rates by majority agreement or, as far as I know, by some other ratio, but concludes that the "unanimous agreement" obligation (the expression "unanimity rule as it applies to agents' commissions" is used) is invalid under section 15.

I dissent from this conclusion and the disapproval of the agreement under section 15 that results therefrom. First, the reasons adduced do not support such a conclusion; and, second, there are other reasons which support the unanimous agreement obligation in article 6, paragraph (a), of Agreement No. 7840.

The two respondent conferences are successors of conferences in the transatlantic passenger steamship industry going back to 1879 or before. The North Atlantic Steam Traffic Conference met for the first time on March 5, 1868, in New York. This conference's agreement of 1879 provided in clause 19 that "all questions that may come before the Conference for action, must be decided by the unanimous vote of all members present, to be of any effect" (exhibit 119). Unanimous consent clauses of one sort or another are in conference agreements of 1885, 1894, 1921, 1928, and 1930 (exhibit 119). The record showed that commissions to subagents were originally fixed at fixed dollar amounts per passenger depending on destinations.

A Continental Conference meeting was first held in New York on May 4, 1885. The minutes of the meeting showed commissions to subagents were fixed.

The Atlantic Conference was re-formed in 1921 after the First World War. Eight years later, in 1929, the formerly separate conferences of Mediterranean, Continental, and North Atlantic lines joined in the one Trans-Atlantic Passenger Conference.

During all this time a unanimous consent was required with respect to decisions affecting each member's business affairs. One would think that such a long tradition behind an historically established business practice would require fairly compelling reasons of public policy to overturn it at this late date. A review of the majority's reasoning is enough to show this is far from the case.

The majority's significant reasoning opposing the unanimity rule (or regulation) is in the following discussion:

> It is a regulation which prevents travel agents in the United States from rendering complete and effective service both to passengers and to ocean carriers. It has in some cases prevented the principals from even considering the question of commission levels and in others has defeated, or at least delayed or watered down desires of the majority of the lines to raise commission levels, thus placing the steamship lines at a competitive disadvantage vis-a-vis the airlines. We think the Unanimity Rule plainly operates to the detriment of the commerce of the United States.

As I understand the reasoning, preventing or delaying consideration of commission levels, and delaying the desires of a majority to raise commission levels is thought to prevent complete and effective service and such a result is a detriment to commerce.

To me, this is tantamount to saying that the obligation has been effective in preventing increased commissions. The obligation has had a deterrent effect within the conference, as the majority recognizes. Effectiveness within the conference is not the issue. The effect of the obligation on the public and on our commerce is the relevant test. The majority seems to assume without the need to prove that if it can show the obligation allows "one single vote" to "block a proposal on commission matters even though the proposal was favored by an overwhelming majority of the member lines," then it has automatically shown public injury. This does not follow at all. Some connection between cause and effect has to be shown. The effect of a veto threat is to cause injury to carriers desiring a change, but not to commerce in general or to the public. Perhaps a causal link is thought to be provided when it is said the lines "should at least be allowed to increase commissions unhampered by the veto power inherent in the Unanimity Rule should they desire to do so." Significance is given to this statement only by the conclusion that such a regulation "prevents travel agencies in the United States from rendering complete and effective service both to passengers and ocean carriers * * *." One can only speculate that the twice-mentioned inability to increase, rather than reduce, rates has somehow prevented complete and effective service, but the way this happens as well as the effect it would have on the carriers and on the traveling public segment of our commerce should be clearly shown. It is doubtful much of a relation can be shown if it is based on increases, because the nonunanimity rule makes it equally easy to reduce commissions. At the moment, travel agents seem to be motivated by the apparent desire of many carriers to raise commission percentages. This is only a transitory economic factor. When we deal with a matter of principle such as this, or with a historically established general rule for conducting business, we ought to be governed by long-term economic factors. The closest we get to a relation to commerce and the public interest is the thought that steamship lines are "at a competitive disadvantage vis-a-vis the airlines." Even this is referred to only as "some evidence" and it "related solely to the activities of agents who were not appointed by conference lines * * *." Unfortunately, it is only a judgment that is not even supported by the most interested parties, the respondent carriers, much less the record herein.

Since the evidence of airline competition falls so short of conclusively proving the point, it is said there is diversion anyway and this is "not in the interests of the conference lines themselves." Changing choices as to the method of travel involve only speculation as to the reasons for diversion. What causes the diversion is only theory, is not supported, and is even denied by the conferences. The airline diversion reasoning is at best inconclusive.

To the extent economics are relevant, this record is devoid of data showing the effect of a change in commissions either up or down on the respective parties or on the public. Naturally, the travel agents want more money, but we would have to know a great deal more than we can learn from this record as to the effect of an increase on passenger fares and on the precarious competitive balance that now seems to exist between ocean and air transportation. Passenger choices would seem to be governed as much by convenience and pleasure as by economics or passenger agent activity.

The second point is that the better public-interest arguments, if anything, favor the validity of the obligation to not change commission rate levels without unanimous consent. The rule of group action by majority vote actually strengthens the power of the group, because it puts the full power and influence of all the members of the group behind an action affecting the public even though some of the individual members do not agree with the action. Less than all the members have the power to direct group action. A unanimity requirement, on the other hand, weakens the group's power to act by giving a power to prevent action by a veto over decisions. If antitrust law overtones are to be injected into our policy considerations, then anything which lessens the power of a group which makes dominating pricing decisions is to be favored. U.S.-flag lines are a minority in most conferences, and the rule enhances their power to influence group decisions or to protect themselves from oppression by the business needs of non-American lines. Generally the business needs of non-American member lines are dictated by more favorable cost considerations than our own. There is a serious question as to whether the undoubted loss of flexibility of action implicit in a unanimity rule is overcome by the detriments that may be caused by the economic power of a group dominated by majority votes of non-American lines.

DISSENT NUMBER (2)

The majority disapproves the so-called tieing rule of article E. I dissent from this disapproval.

Both article E of Agreement No. 120 and the related "rule" and prescribed terms of agency agreement, with minor revisions and with the approval of our predecessors, have existed since 1933. Other forms of the obligation have existed even before then. The so-called Alexander report, which preceded the enactment of the Shipping Act, acknowledged that agreements existing in 1913 provided that: "(11) Agents of the lines which are parties to the agreement shall not interest themselves in the booking of passengers for new outside competing lines." (*Investigation of Shipping Combinations Under House Resolution 587*, Hearings Before the House Committee on Merchant Marine and Fisheries, 62d Cong., 2d sess. (1913), vol. 4, pp. 31–34 at p. 33.) The obligation and rule were not shown to have been disapproved between 1916 and 1933, nor subsequently, so the tieing obligation also has long historic acquiescence behind it. One would expect new factors and compelling reasons to overturn such an obligation after at least 48 years of use in one form or another, but this is not the case here either.

Against this background the majority refers to the examiner's statements that (1) there is no need for the rule; and (2) "tieing arrangements generally run counter to antitrust principles." The majority says the respondents have misconstrued these statements. The further comment is made that the antitrust "exemption should not be granted unless the purposes and policies of the Shipping Act are thereby furthered."

On the first point, the need or necessity test is not expressly made a standard of approval or disapproval under section 15. Lack of competitive "need" or "necessity", or because the agreements can be characterized as "tieing" arrangements which "generally run counter to antitrust principles," may have been equated with detriment to commerce as being against the public interest, but the link is not revealed.

The competitive necessity problem was not explored nor developed in this record. Even assuming this to be a valid test, the absence of any demonstration in this record proves nothing; it simply is not a basis for decision. If competitive necessity is to be a test, some effort should have been made to develop the facts on the point. Without the facts, it is no wonder the record "did not demonstrate" anything. Since the burden is on the Commission to approve unless we can show detriment or contrariety with public interest, we may not invert the burden at the last minute and say the respondent did not prove enough. It is up to the Commission to do the proving and disproving on this issue.

The second point, that tieing agreements generally run counter to antitrust principles and are an anticompetitive practice, is not established. There was no exploration of what antitrust law might be applicable to the facts herein. Some tieing agreements may be contrary and some not, but it is necessary to establish what type this one is and what law applies to it. Section 15 exempts agreements from these laws unless we can bring the agreement within the expressly stated standards, which has not been done except for the majority's effort to interpret "detriment" or "public policy" using a partial statement in *Isbrandtsen Co., Inc.* v. *United States et al.*, 211 F. 2d 51 (D.C. Cir. 1951) at p. 57 (*cert. den.*, 347 U.S. 990). The full statement is: "The condition upon which such authority [to approve agreements under section 15 of the Act] is granted is that the agency entrusted with the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." The court equates consistency with an antitrust prohibition (itself difficult to determine) with a "public interest" standard. Such a standard was later put in section 15 in 1961 by Public Law 87–346 (75 Stat. 762). There is no way of telling which antitrust prohibition is to be used to test invasion, nor any way of balancing the prohibition against the purposes of the act.

Scrutinizing the intercarrier obligation alone, it is impossible to say that the record and briefing in this case establishes that this long-established and approved agreement clearly invades the prohibitions of the antitrust laws or to what extent. Absent such a demonstration by the Commission, section 15 compels approval.

The majority's comment establishes as a standard that approval of agreements under section 15 now involves a grant of an antitrust exemption privilege on condition that certain objectives are "furthered." A test, such as furthering "policies and purposes," is not expressly prescribed in section 15 or elsewhere. The agreement provision, as with any other intercarrier agreement, *must be approved unless* the Commission can show it is detrimental to commerce, unjustly discriminatory or unfair as between carriers or ports or contrary to the public interest or otherwise in violation of the Act. Detriment, contrariety, and violation, not furthering, are the tests.

The majority shows no connection between detriments to commerce or contrariety with public interest and the necessity to combat destructive carrier competition or furtherance of "regulatory purposes" or "purposes and policies" of the act. Perhaps the connection is implicit, but even with an implicit connection we need a statement of how to measure stifling of competition and of what the purposes and policies thus set up as measurements consist of, plus a few facts to be measured by the standard tests. The needed tests cannot be determined from this record, much less the facts. One party recognized as much by falling back on illegality under section 14, subparagraph "Third," as interpreted in *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958). Section 14 prohibits a carrier from retaliating against shippers by certain methods because of specified reasons. The *Isbrandtsen* interpretation of section 14 establishes as a violation a contract requirement that a shipper not patronize independent on nonconference member carriers when such a contract is demanded in a context of being a "necessary competitive measure to offset the effect of nonconference competition," because in such circumstance the demand becomes a "resort to other discriminating or unfair methods." Such a context of offsetting needs and demands does not exist here. All that has been done is, by some reverse logic of negatives, to argue that the absence of a showing of competitive necessity by the respondent conference carriers proves there is no need for the rule and without such need the rule is illegal, and besides tieing agreements are generally illegal. Whatever is relied on, we are again faced with the necessity of supporting the burden of disapproval and of not relying on deficiencies in the respondent's case to support our burden.

For these reasons, I dissent from the majority's disapproval of the conference's tieing agreement.

DISSENT NUMBER (3)

The majority has reversed the examiner's conclusion that no ruling should be made on the Commission's authority to regulate the levels of compensation paid to travel agents by the carriers. This issue is entirely outside the scope of the issues as defined by our predecessor agency, the Federal Maritime Board, in its order of November 2, 1959: "to determine whether the aforementioned Agreements 120 and 7840 should be disapproved, canceled, or modified, insofar as they relate to travel agents in accordance with section 15 of the Shipping Act, 1916." Neither agreement sets levels of compensation nor requires any disapproval, cancellation, or modification of compensation levels. The agreements only provide a procedure for deciding how much or what percentage of the passage fare the members are willing to allow agents as compensation for the sale of tickets. The issue of levels was first raised in the brief of the travel agents, which stated: "Contrary to sweeping assertions of Conference counsel, the Maritime Commission has both the right and the responsibility to approve or disapprove the commission level established by the collective action of the respondents." It is possible that the level so established might violate the Shipping Act, but such an issue is not before us and the record is totally inadequate for such a serious decision. Here we are asked to pass on the reasonableness of rate levels and the majority says it is unable to make a finding that the present level of commissions is so low as to be detrimental to the commerce of the United States. The most that is provided by the majority, therefore, is a volunteer legal opinion regarding what is thought to be our authority, but there is no realistic application of the power because no change is made in the existing levels. Absent an application of the power, vouchsafing the opinion is frivolous. Apparently, now that the decision as to our jurisdiction is out of the way, we are free to proceed later to decide on a satisfactory level of commissions set pursuant to conference agreements, in spite of the disclaimer of "jurisdiction to set the specific level of compensation," assuming a difference between these two types of jurisdiction. When this time comes I anticipate the issue will be just as present and unresolved as it is now and will necessitate a decision with more practical issues at stake. Nothing is accomplished by a decision at this time.

The examiner's decision not to pass on the question until more significant issues are at stake should be sustained.

In concurring as to the results in items (4) and (5) of the majority report, I do not necessarily approve the reasoning. The restraints imposed by the conference, whether by unanimity or any other percentage of votes, on the travel agents' freedom to enter business, sell their business, transfer ownership, or change officers or locations, were not justified by any corresponding advantage to the traveling public. I would decide without further proof that such freedom existed and that a restraint thereon by means of "control" committee clearances was against the public interest unless justified as an effective protection for the purchasers of tickets. These restraints can not be justified as reasonably related to the production of business or to an agent's capacity to perform his sales functions for the public. The respondents' carrier members may refuse to enter contracts or terminate contracts with agents they do not trust or consider to be improperly located for the generation of sales, but this is quite different from requiring prior consent to, or even consultation about, business decisions of travel agencies. The intrusion is against the public interest.

COMMISSIONER DAY, *concurring and dissenting:*

I concur with the results reached in the majority report in this proceeding as set forth under "First" in the preceding opinion of Commissioner John S. Patterson, and for reasons advanced by Commissioner Patterson I am in accord with the remainder of his opinion.

FEDERAL MARITIME COMMISSION

No. 873

INVESTIGATION OF PASSENGER STEAMSHIP CONFERENCES REGARDING TRAVEL AGENTS

ORDER

This proceeding having been instituted by the Commission to determine whether Agreement No. 120, Trans-Atlantic Passenger Steamship Conference, and Agreement No. 7840, Atlantic Passenger Steamship Conference, should be disapproved, canceled, or modified pursuant to section 15 of the Shipping Act, 1916, and the Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference, and having found that said agreements in certain respects violate section 15 and must be modified, as set forth in said report:

It is ordered, That the parties to Agreements Nos. 120 and 7840, being the member lines of the Trans-Atlantic Passenger Steamship Conference and the Atlantic Passenger Steamship Conference, respectively, shall within 60 days from the date of this order file with the Commission for its review and approval under section 15 of the act, modifications of said agreements and the rules thereunder consistent with the said report;

It is further ordered, That this proceeding shall be held open pending the Commission's further order following its consideration of the modifications so filed and the comments thereon which will be invited from interested parties.

By the Commission, January 30, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1123

MATSON NAVIGATION COMPANY PALLETS AND CONTAINERS PACIFIC COAST/HAWAII TRADE

Matson Navigation Company rates for transportation of pallets and containers from Pacific coast ports of the continental United States to Hawaii held just and reasonable.

Gordon E. Davis and *David F. Anderson* for respondent Matson Navigation Company.

Richard Sasaki, Special Deputy Attorney General for intervener State of Hawaii.

William W. Schwarzer for intervener Pineapple Growers Association of Hawaii.

William H. Sardo, Jr. for intervener National Wooden Pallet Manufacturers Association.

Norman D. Kline and *Robert J. Blackwell*, Hearing Counsel.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

The contested issue here is whether the rate of Matson Navigation Company (Matson) of $2.35 per pallet for the transportation of empty pallets from Pacific coast ports of the continental United States to Hawaii is just and reasonable. Matson has the burden of proving that it is just and reasonable, as it was suspended by the Commission, although it has since become effective (*Section 3, Intercoastal Shipping Act, 1933*).

A pallet is a wooden platform or bed upon which such comparatively small cargo units as cans or cartons are placed and held together for transportation as a unit. The use of pallets in the shipment of Hawaiian canned pineapple and pineapple juice to the mainland, which began in 1958, has proved directly beneficial to the carrier,

[1] This decision became the decision of the Commission on February 25, 1964, and an order was entered discontinuing the proceeding.

shipper, and receiver of cargo, and to pallet manufacturers, and indirectly to the State (then the Territory) of Hawaii where the pineapples are grown, and the states where pallets used in the pineapple trade are manufactured, predominantly in the Pacific Northwest.[2] Here, as in all such cases coming before this Commission, careful attention has been given to the representations of all parties affected by the rate increase. With respect to disapproving a rate however, the Commission's power is strictly limited. It can disapprove *only* if it finds that the rate exceeds a just and reasonable figure. A rate which yields the cost of loading, carrying, and delivering the cargo, plus the cargo's pro rata share of general expense, a moderate contribution to profit, *and no more*, is certainly a just and reasonable rate which the Commission is not authorized to disapprove in the circumstances of this case. With respect to cargo interests who are hard pressed by just and reasonable rates (and often some are) a regulatory body finds itself in the position of the Supreme Court in *Matthews* v. *Zane*, 7 Wheat. 164, 211 (1822) which caused Chief Justice Marshall to say: "The case of the plaintiff may be, and probably is, a hard one. But to relieve him is not within the power of this court."

The facts of this case preclude application of *B. & O. R.R. Co.* v. *United States*, 345 U.S. 146 (1953) and similar cases. There is not and there cannot be a finding here that the $2.35 rate must be adjusted to meet a public need.

It is probable that if in 1958 Matson had charged a compensatory rate for carrying pallets to Hawaii, pallets would not have begun moving in the trade. Initially, Matson carried them free, and subsequently and until November 27, 1963, when the $2.35 rate under investigation became effective it carried them for less than a compensatory charge. Palletization of cargo carried in conventional holds was immediately beneficial to the carrier as well as shippers and consignees.

As listed by the National Wooden Pallet Manufacturers Association (Pallets) the principal advantages of handling ocean cargo in pallets are: (1) more rapid loading and discharge; (2) decreased handling costs; (3) decrease in ship turn-around time; (4) fewer injuries to cargo handlers; (5) substantially less damage and pilferage; and (6) better cargo ventilation. These advantages exist when cargo is stowed in conventional holds. There would appear, however, to be minimal advantage to the ocean carrier in using pallets to carry cargo in containers now in use by Matson. No substantial decrease in the per-

[2] The world's largest producer of wooden pallets (D & M Products Company) is located in Portland, Oreg. Mr. Edward Lay testified that his Lay-Rite Lumber Co., located at McMinnville, Oreg., shipped more than 100,000 pallets in this trade from June to September, 1962.

missible rate can be predicated on money saved by the carrier by the use of pallets.[3]

It is presumably true, as contended by interveners, that as a result of the favorable 1958–1963 treatment accorded by Matson to shipment of pallets to Hawaii, pineapple shippers and receivers such as chain stores and supermarkets have geared their cargo handling operations to pallets at considerable cost, including the installation of automatic palletizers and pallet conveyors. It is suggested, if not explicitly argued, that this obligates Matson to continue its old noncompensatory rate for carrying empty pallets westbound to Hawaii. This argument does not hold water. Even if Matson had entered into explicit contracts with pallet and pineapple interests to maintain the 63 cent rate—which it has not—this would not invalidate the increased rate of \$2.35. As the Commission said in *Matson Navigation Company-Van Measurement/Heavy Cargo Rules*, 1 S.R.R. 769, 770e (1962): "changes in rates are not invalidated by a pre-existing contract of a carrier not to change its rates" citing *Com. Club, etc.* v. *Chicago & Northwestern Ry. Co.*, 71 I.C.C. 386, 401 (1897). The Commission's decision was affirmed *sub nom. Wilsey Bennett Company* v. *Federal Maritime Commission*, 315 F. 2d 374 (9th Cir., 1963).

As the issue then is whether the \$2.35 pallet rate is just and reasonable, comparison of carrier costs attributable to transporting a pallet with the \$2.35 it receives for performing the service is traditionally the best evidence, and Matson introduced such evidence which its brief correctly summarizes as follows:

Transportation cost of empty pallets

		Per pallet
1. Stevedoring and terminal service:		
Loading cost	\$0.67	
Discharging cost	.42	\$1.09
2. Vessel expense		.96
3. Administrative and general expense		.31
4. Total cost		2.36
5. Previous rate		.63
Net before taxes		(1.73)
6. Proposed rate		2.35
Net before taxes		(.01)

[3] It is contended that using pallets in containers speeds loading, which is, of course, beneficial to Matson. Matson shows, however, that any benefit from saving in loading a container (as estimated by pallets) would be more than offset by a loss in revenue of approximately \$96 per container.

The cost figures utilized by Matson are not disputed, and are sufficiently supported by expert testimony. The intervener Pineapple Growers Association of Hawaii (PGAH) objects to full allocation of vessel expense and of administrative and general expense to pallets upon the theory that Matson has in the past booked and will in the future book pallets only upon a "space available" basis. The fact that Matson has been disinclined in the past to carry pallets at a noncompensatory rate, and apparently has at times left pallets on the dock, does not mean that its tariff should be judged by actions unauthorized by tariff provisions. Past rates for pallets were not and the tariff provisions before us are not an excuse for treating pallets differently from other cargo, and full distribution of costs to pallets is not only authorized but required.

Only two possible adjustments in Matson's cost statement are perceptible. One would be in depreciation, which Matson includes in "vessel expense and overhead allowances" (Matson's Reply Brief, footnote on page 7). If, as customary with Matson, depreciation has been calculated on a 20-year life, it is possible that this may be changed to a 25-year life, in Docket No. 960, not yet decided. Although the record therefore does not support computation, such a correction should decrease the vessel expense figure by approximately 3¢ per pallet.

The other could be made if the second step of Matson's three-step allocation was taken on a vessel operating expense ratio rather than on a revenue prorate formula. This the Commission ruled against in Docket No. 941, but the question has arisen again in No. 960. It would decrease Matson's administrative and general expense figure by approximately 3¢ per pallet.

An item which must be considered is found in the savings effected by using as dunnage pallets being carried as cargo. On at least some voyages by Matson's C–3 vessels Matson effected a saving of $300, or 7¢ per pallet by this means. (There would also be minimal correction in stevedoring cost, as apparently stevedoring time spent in placing pallets as dunnage is allocated to pallets as cargo.)

If the foregoing adjustments are made (and in making them, doubtful points are resolved against the carrier) Matson's position on pallet cargo works out as follows:

Proposed freight rate—per pallet			$2. 35
Less: Stevedoring and terminal services		$1. 09	
Vessel expense	$0. 96		
Less: Excess depreciation	. 03	. 93	
Administrative and general expense	. 31		
Less: Excess expense	. 03	. 28	2. 30
			. 05
Add: Savings from dunnaging			[4] . 07
Net profit per pallet			. 12

[4] Upon this record only the 7 cent adjustment for dunnage can be made. The result of the other two adjustments has been shown in order that if the Commission authorizes them in Docket No. 960, it will be clear that such action does not invalidate this rate.

A profit of 12¢ per pallet is well within the permissible range, and Matson's evidence therefore sustains the burden of proving that the $2.35 rate is just and reasonable.

The representatives of PGAH and Pallets have done all that could be done to offset Matson's evidence, but it is not enough. PGAH argues that the impact of the increased cost of moving empty pallets to Hawaii by liner will be adverse and severe. Adverse it is, but even if its impact is "severe" that would not authorize the Commission to strike it down. And its severity is highly questionable.

First, it is wholly unreasonable to assume, as PGAH does in calculating increased costs, that all pallets will move to Hawaii by self-propelled vessel at the $2.35 rate. It seems practically certain that almost all will move by barge at rates of 95¢ per pallet (Olson) and $1.23 per pallet (Matson), and that only in unforeseeable emergency situations, which should be rare in the pineapple business, will pallets move otherwise. It also appears probable that barge service, which now leaves considerable to be desired in sailing frequency and port coverage, will expand and improve. PGAH has estimated that the increase in the rate for pallets carried on self-propelled vessels will represent a 3 percent increase in shipping costs to pineapple shippers, but this assumes (1) that the same number of pallets will be used, which is questionable, because it will be considerably cheaper to ship by containers without pallets, and (2) that all pallets will move at

$2.35 per pallet, and none by barge at 95¢ to $1.23 per pallet.[5] A more complete calculation made by Matson, and not controverted, indicates that the pineapple shippers could utilize the same number of pallets and ship the same amount of their product in 1964 as in 1963, at a cost more than half a million dollars less than the 1963 cost. This results from the advent of container service at lower rates than conventional service which it is replacing.

Certainly, no precise prediction can be made as to the net effect of the increased cost of moving pallets by self-propelled vessels. Pineapple growers may prefer, because of their investment in palletizing equipment and the desires of their customers, to continue using pallets in shipping to Pacific ports, and almost certainly will continue their use in shipping to Gulf and Atlantic ports, most of the pallets moving to Hawaii by barge. Probably the future is not as bright as pictured by Matson, and it seems sure that it is not as bleak as indicated by PGAH. If it were the latter, Matson would hardly name a rate which would kill the goose that lays the golden eggs, and the State of Hawaii, which is fully advised in the matter but takes no position, would undoubtedly be loud in opposition to the rate.

The pallet manufacturers are, of course, in worse position than the pineapple industry. The latter may prefer to drop palletization on shipments to Pacific ports, to use the cheaper (although apparently less desired) slipsheet, or to stimulate pallet production in Hawaii or Canada.[6] As heretofore indicated, it appears more probable that pallets will continue to move, although in reduced quantity, and by barge rather than by self-propelled vessels. To the extent that the use of pallets dwindles in the pineapple trade it will be the result of progress in transportation, the coming of the container, which has practically destroyed the value of pallets to this carrier. A pallet is now from the carrier's point of view, just cargo, which like all cargo, must pay its way,[7] and payment at the rate of $2.35 has been shown just and reasonable. The value of the pallet to shipper and consignee to a considerable extent continues, and its use may therefore continue also.

[5] Even at the 63¢ rate it was cheaper to ship by containers without pallets. But in the Hawaii-to-continental-U.S. Atlantic ports (where there is no container service), it was and should for some time at least, remain advantageous to use pallets, even at the liner rate of $2.35, and much more so with pallets moving at the 95¢–$1.23 barge rate.

[6] Past history indicates that the success of such an enterprise in Hawaii would be doubtful at best, and such a Canadian industry highly speculative.

[7] This is particularly true in view of the fact that many pallets have neither returned loaded to Pacific ports nor traveled to Gulf or Atlantic ports via the joint service in which Matson participates with Isthmian.

Matson's rates for knockdown vans and containers (westbound) and knockdown flour bulk pak bins (eastbound) were not opposed. Costs and rate comparisons based upon its evidence are accurately summarized by Matson in its brief as follows:

Transportation cost of knockdown vans and containers—westbouna

	Per measurement ton	
1. Stevedoring and terminal services		
Loading cost	$6. 50	
Discharging cost	4. 00	
		$10. 50
2. Vessel expense		6. 71
3. Administrative and general expense		2. 58
4. Total cost		$19. 79
5. Previous rate		$5. 53
Net before taxes		(14. 26)
6. Proposed rate		$16. 52
Net before taxes		(3. 27)

Transportation cost of knockdown flour bulk pak bins—eastbound

	Per measurement ton	
1. Stevedoring and terminal services		
Loading cost	$4. 52	
Discharging cost	4. 59	
		$9. 11
2. Vessel expense		6. 71
3. Administrative and general expense		2. 37
4. Total cost		$18. 19
5. Previous rate		$5. 53
Net before taxes		(12. 66)
6. Proposed rate		$16. 52
Net before taxes		(1. 67)

Even if adjustments similar to those discussed with reference to the pallet rate were made, it is clear that the increased rates would not exceed just and reasonable levels. It is also true that the uncontroverted evidence is that the commodity movement is very small, and is expected to disappear entirely as Matson's container service is extended to all the islands.

Matson has fully sustained its statutory burden of proof. There is nothing in the record which overcomes the force of Matson's testimony and exhibits. The rates under review are held just and reasonable, and the proceeding will be discontinued. Proposed findings and conclusions not reflected herein are denied as not supported by substantial evidence, contrary to the weight of the evidence, or irrelevant to the decision.

Both Pallets and PGAH understandably complain of cavalier treatment of pallet cargo by Matson in the past. Such treatment was not denied by Matson, but certainly under the increased rate it should disappear, and pallet cargo should receive first-class service at all times.

(Signed) PAUL D. PAGE, Jr.,
Presiding Examiner.

JANUARY 29, 1964.

FEDERAL MARITIME COMMISSION

No. 732

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734

GALVESTON COTTON COMPANY

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735

TEXAS COTTON INDUSTRIES

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

Complaints against respondent Lykes Bros. Steamship Co., Inc. dismissed with prejudice as result of settlement, between complainants and Lykes only, of claim for reparation on shipments of cotton from U.S. Gulf ports to ports in the Mediterranean and Far East areas.

Appearances as previously noted.

SECOND INITIAL DECISION ON REMAND OF GUS O. BASHAM, CHIEF EXAMINER, DETERMINING REPARATION DUE COMPLAINANTS [1]

The first initial decision on remand herein, issued on January 15, 1964, dismissed with prejudice the complaints against respondent

[1] See Notice and Order of the Commission, *infra*.

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Lykes Bros. Steamship Co., Inc. only, as the result of a settlement evidenced by Stipulation and Agreement by and between Lykes and complainants executed on December 18, 1963. Said report reduced the proposed settlement of $55,000 to $48,800 by eliminating reparation claimed on certain shipments found to be time barred.

As a result of the first decision, the parties involved have filed a revised Stipulation and Agreement executed on January 22, 1964, which eliminates the claims on the barred shipments, and computes reparation on the remaining shipments applying 6% interest from date of payment of freights through January 15, 1964, and arrives at an amount of $54,600 as reparation.[2] Except for this change the revised stipulation is substantially the same as the first one, which is set forth in the first decision.

The second or revised stipulation supersedes and is submitted in lieu of the first one which is expressly withdrawn by the parties, who request that the first decision issued on January 15, 1964, also be withdrawn.

[2] The detailed changes from the first stipulation and from the figures shown on pages 2 and 4 of the first decision are reflected in the table below.

Docket No.	Reparation claimed	Settlement	Distribution
732	$6,861.19	$11,689.50	$36,000, H. Kempner.
733	16,016.50	27,361.32	
734	8,043.31	13,707.80	13,700, Galveston Cotton.
735	1,139.30	1,931.77	1,900, Texas Cotton.
Total	32,060.30	54,690.39	54,600

The first decision will not be withdrawn since it contains the essential facts of the case except as modified and supplemented by this decision.[3] However, since the barred shipments have been eliminated, any discussion relating to them may be considered moot at this juncture of the proceeding.

Upon the facts recited in the first decision herein, as modified by this decision, it is found that the proposed settlement will not contravene the applicable provisions of the Shipping Act, 1916, or related Acts. An order will be entered dismissing the complaints as to Lykes only, with prejudice.

[3] Although the Commission has by notice of January 28, 1964, postponed indefinitely the time for filing exceptions to the first decision, exceptions may be filed to the combined decisions within the usual time after service of this decision.

As stated in the first decision, this action should not be construed as an approval of any particular amount of interest on the claims involved; and is without prejudice to any findings which may be made with reference to the remaining claims for reparation against the remaining respondents.

(Signed) GUS O. BASHAM,
Presiding Examiner.

January 29, 1964.

FEDERAL MARITIME COMMISSION

No. 732

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734

GALVESTON COTTON COMPANY

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735

TEXAS COTTON INDUSTRIES

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

NOTICE AND ORDER

No exceptions having been filed to the Examiner's Second Initial Decision and it appearing therefrom that the discussion of "time-barred" shipments in the Examiner's First Initial Decision is now moot, notice is hereby given that the Commission has determined not to review the Second Initial Decision and said decision (also the First Initial Decision to the extent it sets forth the essential facts) became the decision of the Commission on February 25, 1964, pursuant to Rule 13(d) of the Commission's Rules of Practice and Procedure.

It is ordered, That as to Lykes Bros. Steamship Co. the complaints be, and they are hereby, dismissed with prejudice.

By the Commission, February 25, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 1050

Exclusive Patronage (Dual Rate) Contract Interim Approval of Amendment to Exclusive Patronage (Dual Rate) System

Trans Pacific Freight Conference (Hong Kong) Agreement No. 14 has filed a request for permission under Section 14b of the Shipping Act, 1916, to increase the scope of its exclusive patronage (dual rate) system.

This conference amended its dual rate contract and filed such amended contract with the Commission pursuant to Section 3 of Public Law 87–346. Said Section 3 provides that such contract shall remain lawful for a period not beyond April 3, 1964, and that prior to such time the Commission shall approve, disapprove, cancel or modify such dual rate contract.

Notice of the filing of the request for permission to increase the scope of the contract rate system was published in the Federal Register on October 26, 1963, and interested persons were invited to comment thereon. No comments were received by the Commission pursuant to such publication. However, an issue has been raised in the docketed proceeding as to the propriety of including ports in Hawaii, Canada, and Alaska, as destination ports for this contract rate system.

Whereas, examination fails to show the modification insofar as it pertains to Pacific Coast ports in California, Oregon, and Washington to be unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest or violative of the Shipping Act, 1916;

Now therefore, by virtue of the authority vested in the Commission,

It is ordered, that pursuant to Section 14b of the Shipping Act, 1916, and without prejudice to the future action of the Commission pursuant to Section 3 of Public Law 87–346, as amended, permission is granted to extend the scope of the Conference dual rate system to include as destination ports the Pacific coast ports in California, Oregon, and Washington, and the conference request to include additional ports in Hawaii, Canada, and Alaska will be held in abeyance pending settlement of the issue raised in the docketed proceeding.

By the Commission, March 17, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Special Docket No. 282

Barr Shipping Company, Agent for Procter & Gamble A. G.

v.

Royal Netherlands Steamship Company

An application for voluntary payment of reparation filed pursuant to Rule 6(b) and based on rate mistake may be granted upon proof that a conference or carrier failed to effectuate an intended tariff filing through inadvertent omission or error, that discrimination will not result if relief is granted, and that equity and justice warrant the relief requested.

A shipper will not be relieved of the consequences of a conference's inadvertent omission or error in filing a rate in the absence of affirmative proof that the shipper and carrier acting in good faith agreed, or the shipper had otherwise been led to believe, that such rate would apply.

W. O'Hara for complainant.

J. R. Hooyberg for respondent.

SUPPLEMENTAL INITIAL DECISION OF HERBERT K. GREER, EXAMINER[1]

This proceeding was initiated by an application filed pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure whereby the respondent Royal Netherlands Steamship Company sought permission to pay reparation to the complainant Barr Shipping Company as agent for Procter & Gamble A.G., in the sum of $321.25 for alleged overcharges on shipments of soap powder and bleach from New York to Aruba and Curacao. The application disclosed that the U.S. Atlantic and Gulf-Venezuela and Netherlands Antilles Conference (the conference) of which respondent is a member, at a meeting held on February 6, 1963, adopted a resolution to lower the rates on soap powder and bleach effective February 18, 1963; and that the conference through error and omission

[1] This decision became the decision of the Commission on March 12, 1964. See order and dissenting opinion of Commissioner Patterson, *infra*.

failed to effecuate the reduction by a proper filing with the Commission. The Initial Decision authorized respondent to make payment to complainant in the sum of $264.66 as reparation, that amount being the difference between the rate charged and the reduced rate on the shipments made between February 18 and March 3, 1963 (the February shipments). On shipments made subsequent to March 4, 1963, the date the reduction in rates became effective in accordance with the erroneously filed tariff, respondent was directed to make refund of straight overcharges in the amount of $56.69

The proceeding was remanded for a determination of whether, as to the February shipments, the shipper paid more than it expected to pay or had any agreement or understanding with the carrier that the rates for soap powder and bleach were to be reduced before such shipments were made. The Initial Decision was based on the concept that it would be unjust and inequitable to permit a carrier to profit by virtue of its own error or omission at the expense of an innocent shipper regardless of whether the shipper had been misled as to the legal rate. The Order of Remand points out that in the past the Commission has relieved a shipper of the consequences of a carrier's inadvertence or oversight in filing a rate only "when the parties acting in good faith had agreed, or the shipper had otherwise been led to believe, that said rate would apply." The order refers to "the necessity of submitting affirmative proof on that point."

ADDITIONAL EVIDENCE

In compliance with the Order of Remand, evidence has been adduced that on February 7, 1963, the conference of which respondent is a member advised Procter & Gamble Manufacturing Company, which company handles all rate negotiations for complainant, that:

> we are amending our Tariff effective February 18, 1963, through June 30, 1963, to provide the rate of $22.00 per 2,000 pounds on Detergent and $20.00 per 2,000 pounds on Laundry Bleach to Aruba and Curacao.

On the basis of this evidence, it is found and determined that complainant had been led to believe the rates for soap powder and bleach were to be reduced before the two February shipments were made, and, that complainant paid more than it expected to pay.

DISCUSSION

The additional finding brings this case within the factual category of cases in which relief has been granted. In summary, the record now discloses that as to the two February shipments:

1. The conference of which respondent is a member resolved to reduce the rates on detergent (soap powder) and bleach effective February 18, 1963 and that respondent participated in the conference action reducing such rates.

2. Through error and omission, the reduction was not effectuated by proper filing with the Commission and that the error and omission were inadvertent.

3. Complainant was led to believe that its shipments made subsequent to February 18, 1963, would be subject to the reduced rates.

4. Complainant's shipments of soap powder and bleach via respondent's vessels were subjected to the rate of $25.00 per 2,000 pounds, which was the legal rate according to the tariff then on file with the Commission.

5. Had the carrier applied the rate the shipper had been led to believe would be applicable and which would have been the legal rate had not the conference neglected to effectuate the intended reduction, the charges would have been $264.66 less than the charges actually collected.

6. There were no shipments of others than complainant of the same or similar commodity which moved via respondent's vessels during the approximate period of time at the legal rate.

The Commission's authority to award relief is stated in *Martini & Rossi et al.* v. *Lykes Bros. S.S. Co.*, 7 F.M.C. 453 (1962), as follows:

We have the responsibility for administering that Act [Shipping Act, 1916] and also the Intercoastal Shipping Act, 1933, and empowered among other things to see that equity and justice are done in the matter of reparations.

The authority has been exercised only when:

1. There has been an error or omission whereby the Commission's records have not correctly reflected the actual intent of the party responsible for effectuating a proper filing;

2. Discrimination will not result if relief is granted; and

3. The principles of equity and justice warrant relief.

In addition to other facts addressed to the Commission's discretion in applying the principles of equity and justice, it is made clear by the Order of Remand that to warrant the relief of a shipper from the consequences of a carrier's oversight or inadvertence in filing a rate, there must be affirmative proof that the parties acting in good faith had agreed, or the shipper otherwise had been led to believe, such rate would apply. The additional evidence presented in this proceeding satisfies this requirement. Further facts relating to equitable considerations are that the shipper is an innocent party and that a conference member, by virtue of the conference's error, will receive more than it intended to receive at the expense of the shipper.

The essential facts warranting relief having been established respondent is authorized to pay complainant $264.66 as reparation on shipments of soap powder and bleach via respondent's vessels on February 21 and 24, 1963. The direction to make refund of straight overcharges in the amount of $56.59 on shipments made subsequent to March 4, 1963 was not subject to the Order of Remand and respondent will make such refund as ordered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

FEBRUARY 4, 1964.

FEDERAL MARITIME COMMISSION

Special Docket No. 282

Barr Shipping Company, Agent for Procter & Gamble, A.G.
v.
Royal Netherlands Steamship Company

NOTICE OF EFFECTIVE DATE OF DECISION AND ORDER AUTHORIZING REPAYMENT

No exceptions having been filed to the supplemental initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on March 12, 1964.

It is ordered, that the application of Royal Netherlands Company to repay to Barr Shipping Company, agent for Procter & Gamble, A.G., the sum of $321.25 as reparation and refund for overcharges be and is hereby granted.

COMMISSIONER PATTERSON, *dissenting:*

The Commission has ordered that the application of the Royal Netherlands Steamship Company to repay to a shipper certain overcharges should be granted. The Commission has determined not to review the Examiner's decision that the Royal Netherlands Steamship Company may refund to a shipper the amount of $321.25, because the shipper was required to pay freight on the basis of the rates and charges specified in the carrier's tariffs on file with the Commission and published and in effect at the time, instead of a rate established by the same carrier which "the conference through error and omission failed to effectuate by a proper filing with the Commission." The facts are clear that the rate the shipper is being required to pay is not based on the duly published effective tariffs.

Section 18(b)(3) of the Shipping Act, 1916, enacted by Congress in Public Law 87–346, approved October 3, 1961, provides as follows:

No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Whatever rights Rule 6(b) of the Commission's "Rules of Practice and Procedure", effective July 31, 1953, may give, the rule may not sanction disregard of the clear terms of the above Congressional enactment.

It is my opinion that the facts before me in this case, as disclosed by the Examiner's decision, show beyond any doubt that the carrier is refunding and remitting a portion of the rates or charges specified in its tariffs on file with the Commission and duly published and in effect at the time. The carrier is also collecting and receiving a less and different compensation for the transportation of property than the aforesaid filed tariffs. For these reasons I dissent from the determination of the majority of the Commission to not review and reverse the decision of the Examiner in this docket.

By the Commission, March 12, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1097

IN THE MATTER OF AGREEMENT NO. 8905

PORT OF SEATTLE—ALASKA STEAMSHIP CO.

Decided March 19, 1964

1. Respondent Port of Seattle found to be a person subject to the Shipping Act of 1916 with respect to Agreement No. 8905 between it and respondent Alaska Steamship Company, assignee of Alaska Terminal and Stevedoring Company, leasing the Port's Pier 42 and adjacent areas to Alaska Steamship Company.
2. Said agreement, under which the lessor has the right among others to regulate lessee's charges for terminal services and the lessee is granted special rates, accommodations, privileges or advantages, is subject to the filing and approval requirements of section 15 of the Shipping Act of 1916.
3. The temporary and interim agreements between the respondents effective from September 1, 1962, which incorporate substantially all of the provisions of Agreement No. 8905, are subject to the requirements of section 15 and were effectuated by the respondents in violation thereof.
4. Agreement No. 8905 is not unlawful merely because it fails to follow Port's tariff charges. It has not been shown to be unjustly discriminatory or unfair or otherwise violative of section 15 and is therefore approved.

Edward G. Dobrin and *Peter D. Byrnes*, for Alaska Steamship Company and the Port of Seattle, respondents.

Mark P. Schlefer, for Puget Sound Tug and Barge Company, Puget Sound-Alaska Van Lines Division, intervener.

Donald J. Brunner and *Robert J. Blackwell*, Hearing Counsel.

Herbert K. Greer, Hearing Examiner.

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman;* THOS. E. STAKEM, *Vice Chairman;* ASHTON C. BARRETT, JAMES V. DAY, JOHN S. PATTERSON, *Commissioners.*)

This proceeding was instituted by the Federal Maritime Commission (Commission), on its own motion, to determine whether a lease arrangement (Agreement No. 8905, hereinafter sometimes referred to as "8905") between the Port of Seattle (Port) and Alaska Terminal and Stevedoring Company (AT&S) should be approved, disapproved or modified pursuant to section 15, Shipping Act, 1916 (Act).

Port is a municipal corporation of the State of Washington and furnishes wharfage, dockage, warehouse and other terminal facilities in connection with common carriers by water. AT&S furnished terminal facilities at Seattle until, by corporate reorganization effective December 31, 1962, it became a division of Alaska Steamship Company (Alaska Steam), the latter a common carrier by water operating between Seattle and various ports in Alaska.

On August 28, 1962, Port and AT&S entered into the lease (8905) by which Port leased to AT&S a terminal facility known as Pier 42, together with certain adjacent land areas.[1] The lease is dated August 28, 1962, and covers the period September 1, 1962, through December 31, 1967, except that it is not effective until approved by the Commission, if approval is required. The agreement was filed with the Commission and, after public notice, Puget Sound-Alaska Van Lines (PSAVL), a common carrier by water competing with Alaska Steam between Seattle and Seward, Alaska, entered a protest and the Commission thereafter instituted this proceeding. Port, AT&S and Alaska Steam were made respondents and PSAVL intervened. (Alaska Freight Lines, also a competitor of Alaska Steam, intervened but did not participate in the proceedings.)

On May 28, 1963 the Commission amended its investigative order to include three amendments to 8905 filed in April and May, 1963.[2] In June, 1963, respondents filed with the Commission three "interim" agreements intended to govern their relations from September 1, 1962, until such time as 8905 would be approved by the Commission.[3] The Commission again amended its order of investigation to determine whether the parties were carrying out 8905 (or other agreements con-

[1] Rental is defined in para. 3(b) as,

"An annual sum equal to 100% of all dockage revenues * * * at Pier 42 in accordance with [Port's tariff] plus 100% of all revenues for Wharf Demurrage assessed in accordance with [Port's tariff]; plus 100% of all revenues for Wharfage assessed in accordance with [Alaska Steam's tariff] up to a maximum annual sum of $150,000 per lease year * * * [I]n no event shall the rental paid by Lessee for each lease year be less than the minimum annual rental of $100,000."

[2] 8905–1 is an assignment of the lease by AT&S to Alaska Steam effective December 31, 1963; 8905–2 provides for review by Port of Alaska Steam wharfage charges; and 8905–3 provides for the installation of a truck scale on the premises.

[3] The first interim agreement covered the period September 1, 1962 through December 31, 1962; the second covers the period from January 1, 1963 forward; and the third provides for rental payments on the truck scale. The terms of the interim agreements are discussed *infra*.

cerning the same subject matter) prior to approval by the Commission.

Respondents challenge the Commission's jurisdiction over the Port of Seattle in its capacity as lessor and further assert that neither 8905, its amendments, nor the interim agreements are within the scope of section 15 of the Act. PSAVL contends that the agreements are within the scope of section 15 and that they should be disapproved as unjustly discriminatory and otherwise violative of the Act. Hearing Counsel takes the position that the agreements are within the scope of section 15 and that 8905 as amended should be approved with a modification.

The Hearing Examiner held that,

1. The parties to Agreement 8905 and the interim agreements are persons subject to the Shipping Act of 1916, as amended.

2. Agreement 8905, as amended, and the interim agreements * * * are within the scope of section 15 * * *

3. The parties to the interim agreements have operated under such agreements since September 1, 1962, and prior to approval of the Commission in violation of the Shipping Act 1916, as amended.

4. Agreement 8905, as amended, is not unjustly discriminatory or unfair as between persons subject to the Act or otherwise in violation of the Shipping Act of 1916, and should be approved.

Exceptions were filed to the Examiner's decision and oral argument was heard by the Commission. For the reasons set forth below, we agree with the above conclusions of the Examiner. Exceptions not discussed herein nor reflected in our findings have been considered by us and are denied as unsupported by reliable and probative evidence or as irrelevant to this decision.

DISCUSSION AND CONCLUSIONS

The Port of Seattle is an "other person" subject to the Shipping Act, 1916.

Section 1 of the Act provides in part:

The term "other person subject to this act" means any person not included in the term "common carrier by water", carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

Respondents concede that Alaska Steam is subject to the Act and that, insofar as Port furnishes "wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water," Port also is a person subject to the Act. However, respondents deny that "furnishing" includes the leasing of terminal facilities and contend that the lessor of such property stands in the same position as a vendor of realty and is not subject to the Act.

This argument, as we understand it, is that, by virtue of the lease arrangement with Alaska Steam, Port has abdicated its position as a terminal operator at Pier 42 and that Alaska Steam has assumed that function. In the first place, this argument overlooks the fact that the provisions of 8905 permit Port to continue to control to a large extent the level of the rates to be charged at Pier 42. Para. 3(f) provides that,

As to all charges upon which rental payments are to be computed as provided in paragraph 3 (b) and (c) of this lease, the Lessee's applicable tariff provision shall be the same as the Port of Seattle's tariff provisions with respect to the same or similar terminal operations.

Furthermore, para. 3(b), as amended by 8905-2, provides that,

Inasmuch as the Lessee is required to pay to the Port as rental herein certain amounts based upon charges established in the Lessee's own terminal tariff * * * all such tariff charges shall be subject to review at all times on behalf of the Port. If, in the opinion of the Port, any rates or changes applicable to Pier 42, Seattle, named in the Lessee's tariff are considered detrimental to the interests of the Port, the Lessee agrees to change said rates and/or charges to a figure satisfactory to the Port, or in the event such figure is not satisfactory to the Lessee, Lessee may cancel this agreement * * *

Also, para. 4 reserves to Port "the right to order the berthing of vessels and the loading or discharging of cargo to or from such vessels at the leased premises, provided only that such operations shall not unreasonably interfere with the rights of the Lessee" at Pier 42.

We think it clear, therefore, that Port has not abandoned its function of furnishing terminal facilities at Pier 42.[4]

Respondents' argument also fails for a more fundamental reason. The leasing of a terminal facility in connection with a common carrier by water is a function—and a common one—of a terminal owner or operator which cannot be separated or distinguished from the "furnishing" of "wharfage, dock, warehouse, or other terminal facilities" within the meaning of section 1 of the Act.

The legislative history of the Shipping Act, 1916, makes clear that Congress was seriously concerned with terminal leases. The recommendations of the so-called "Alexander Committee" were followed in large part in framing the Act.[5] One of these recommendations

[4] This view is strengthened by a reading of the Port's current "leasing policy," which contains the statement that it is the Port's policy to retain a degree of control over its leased facilities, including the right "to establish the rates to be charged."

[5] House Report 659 on H.R. 15455 (64th Cong.), p. 27.

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was that terminal owners "be required to make their terminal facilities available to water carriers on equal terms * * *" [6]

Again, during the House debates and proceedings on the Shipping Act, Representative Alexander, in opposing a proposed amendment which would have deleted the words "wharfage, dock, warehouse, or other terminal facilities" from section 1, said,

Hence, if the board effectually regulates water carriers, it must also have supervision of all those incidental facilities connected with the main carriers.

The proposed amendment was rejected (53 Cong. Rec. 8276).

To hold that the Commission has no authority over a terminal operator who leases its facilities under terms and conditions similar to those embodied in 8905 would thus emasculate the very powers which Congress intended the Commission to have in order properly to supervise the shipping industry. Our conclusion is that the lease agreement was entered into between two persons subject to the Act. We turn next to the question of whether the agreement itself requires Commission approval under section 15 of the Act.

Agreement 8905, as amended, is an agreement which is subject to section 15 of the Act.

In order to be subject to section 15, an agreement must either, (1) fix or regulate transportation rates or fares; (2) give special rates, accommodations, or other sepcial privileges or advantages; (3) control, regulate, prevent or destroy competition; (4) pool or apportion earnings, losses or traffic; (5) allot ports or restrict or otherwise regulate the number and character of sailings between ports; (6) limit or regulate in any way the volume or character of freight or passenger traffic to be carried; or (7) in any manner provide for an exclusive, preferential, or cooperative working arrangement.[7]

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[6] Report of the House Committee on Merchant Marine and Fisheries (63d Cong.), Investigation of Shipping Combinations, vol. 4, p. 32.

[7] Section 15 reads in pertinent part as follows:

"That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

Respondents contend that 8905 contains no provisions which would render it subject to section 15. Their specific contentions will be discussed as pertinent to our findings.

Agreement 8095 regulates transportation rates.

Respondents argue that wharfage, dockage, and wharf demurrage are not "transportation rates" within the meaning of section 15 and that, in any event, 8905 in no way regulates or fixes such rates. This contention is contrary to past decisions of this agency and the courts.

As indicated above, paras. 3(b) and 3(f) of the agreement require that Alaska Steam's wharfage, dockage and wharf demurrage charges be the same as those assessed by Port for like services, and give to Port the right to review and change such charges. Such an agreement is clearly the fixing and regulating of those charges. In *Greater Baton Rouge Port Comm. et al.* v. *FMB*, 287 F. 2d 86 (CA 5, 1961), the Court cited with approval the Board's determination that a lease agreement between two persons subject to the Act, whereby the rates of the lessee would be competitive with rates for similar services at other Gulf ports, was a "regulation of rates" within the meaning of section 15. In addition, several dockets decided by this agency have involved terminal agreements fixing terminal charges [e.g. *Terminal Charges at Norfolk* 1 USSB 357 (1935); *Associated—Banning Co.* v. *Matson*, 5 FMB 336 (1957)], and there are presently on file with the Commission a number of approved agreements which cover the fixing of rates and charges by terminals. There has never been any question that the charges fixed pursuant to those agreements—charges similar to those before us in 8905—are "transportation" rates.[6]

Agreement 8905 gives special rates, accommodations, privileges or advantages.

Under the terms of the lease agreement, Alaska Steam pays to Port as rent an amount equal to 100% of the charges assessed for wharfage, dockage and wharf demurrage at Pier 42 up to a maximum of $150,000 per annum. It retains the overage, which the record indicates will be substantial. Even though additional risks and expenses for overhead and superintendence are imposed on Alaska Steam under the lease, it appears the net result of the lease's operation may be finan-

[6] Respondents contend that in any event they are merely acting in accordance with approved Terminal Conference Agreement No. 6785, to which they are signatories, which allows the parties thereto to "establish and maintain just and reasonable, and, so far as practicable, uniform tariff rates * * *." But 8905 goes farther. It requires that Alaska Steam's tariff will at all times be the same as Port's, whereas 6785 allows the parties the right to act independently without abrogating the agreement.

cially advantageous to Steam. It also appears that the parties believed the wharfage, dockage and wharf demurrage charges would likely exceed the $150,000 maximum, although the possibility that they might not was considered and a minimum rental of $100,000 annually was therefore provided. But whether or not Alaska Steam derives a dollar advantage from the lease, section 15 is not limited to such benefits. It extends as well to agreements giving special rates, accommodations or privileges and 8905 obviously does that.[9]

The provisions of the agreement which regulate rates and grant special rates, accommodations, privileges or advantages to the lessee amply bring it within the filing and approval provisions of section 15 of the Act. We therefore find it unnecessary to deal with the exceptions of the parties which relate to other provisions of 8905 which might also render it subject to section 15.

The interim agreements are subject to section 15 and have been effectuated prior to approval.

As indicated above, in June, 1963, respondents filed with the Commission three "interim" agreements intended by the parties to govern their relations from September 1, 1962, until such time as 8905 would be approved by the Commission.[10] Since it has been found that 8905 is subject to section 15, the interim agreements are also subject if they correspond in substance to 8905. We find that they do.

Under the interim agreements the premises are held by Alaska Steam—

> under a month-to-month tenancy; subject, however, to all of the terms and conditions [of 8905] except the provisions relating to the term of the lease and the provisions of paragraphs 4 and 5 relating to secondary berthing rights and the application of the U.S. Shipping Act.

The interim arrangement also provides that,

> in lieu of the rental provisions [in 8905], it is agreed that the rental provided in 3(a) and the minimum monthly rental of $12,500.00 as provided in 3(b) will apply without further restrictions.

It was further provided that, upon approval of 8905 by the Commission, the terms of 8905 would become operative and relate back to September 1, 1962.

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[9] The fact that the arrangement is termed a "rental formula" by the parties makes it no less a section 15 agreement.

[10] The agreements were assigned Agreement Numbers 8905–A, 8905–B and 8905–C. 8905–A and –B are substantially the same, the difference being that B was executed because of the assignment of the lease from AT&S to Alaska Steam. 8905–C deals only with an additional rental for a truck scale installed by Port pursuant to 8905–3. We are here concerned primarily with A and B and will treat them as one.

The Examiner found, and we agree, that the only difference between the interim agreements and 8905 was the exclusion of the Port's secondary berthing rights and that this variance did not remove the interim agreements from within the scope of section 15.

Respondents except to this finding, contending that the interim agreements are merely an ordinary lease of property for a flat monthly rental of $12,500. But the $12,500 monthly rental still relieves Alaska Steam from paying the tariff charges for wharfage, dockage and wharf demurrage and therefore represents a special rate, accommodation or advantage for the reasons set out above in our discussion of the basic lease. Also, while respondents deny that it was their intention that Alaska Steam would observe the same rates as Port under the interim agreements, we think it clear that paragraph 3(f) of the basic lease (8905), which is applicable under the interim arrangement, required just that and the interim agreements constitute a regulation of rates in the same manner as the basic lease.

Respondents admit that the terms of the interim agreements have been carried out by them since September 1, 1962. Therefore, we find that the respondents have carried out agreements subject to section 15 of the Act without approval, contrary to the requirements of said section.

Agreement 8905 does not violate section 15.

Section 15 of the Act empowers the Commission to approve an agreement unless, after notice and hearing, it finds *inter alia* that the agreement is unjustly discriminatory or unfair as between carriers, shippers, or ports, or that it operates to the detriment of the commerce of the United States, or is in violation of the Act. The Examiner found that Agreement 8905 should be approved pursuant to section 15 because it is not unjustly discriminatory or unfair or otherwise violative of the Act.

Hearing Counsel support the Examiner's finding but suggest modification of the agreement in one respect, as later noted. PSAVL excepts to the Examiner's finding. It alleges that it requested from the Port but was refused a lease similar to the one given Alaska Steam, and that the rental provisions of 8905 confer a financial advantage and undue preference on Alaska Steam and result in unjust discrimination and undue prejudice against PSAVL, in violation of sections 15 and 16 First of the Act. It further alleges that the Port's failure to charge Alaska Steam the Port's published tariff rates is an unjust and unreasonable practice violative of section 17 of the Act.[11]

An agreement for the use of a public terminal facility at a rental which deviates from the terminal's regular tariff provisions, may run afoul of the Shipping Act's proscriptions and is deserving of our scrutiny for any illegal discrimination or prejudice that may result. Such an agreement, however, is not unlawful or unreasonable merely because it does not follow the terminal's tariff charges. Nor can we condemn an arrangement like 8905 on the basis of mere allegation, as PSAVL in effect asks us to do here.

The record here is barren of proof that 8905 subjects PSAVL to unlawful discrimination or prejudice. It does show that a competitive relationship exists between PSAVL and Alaska Steam, but there is no evidence that PSAVL has been damaged by the agreement. There is no showing, for example, that cargo has been or will be diverted from PSAVL to Alaska Steam. Past decisions of the Commission and its predecessors make clear that the person claiming illegal prejudice or disadvantage must establish damage with respect to its ability to compete.[12] But here the facts at most reflect only that Alaska Steam may derive some monetary benefit from 8905, which obviously is not a sufficient basis for us to find that undue disadvantage, or indeed any disadvantage at all, will result to PSAVL.

The nature of PSAVL's position is further pointed up by reference to its own negotiations with the Port. In 1961 PSAVL undertook to obtain from the Port space for PSAVL's erection of a container crane on the Port's Pier 5, coupled with a reduced wharfage charge on PSAVL's containerized cargo. It later withdrew the crane proposal. Subsequently in 1961 PSAVL offered to lease from the Port for a

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[11] Section 16 of the Act reads in pertinent part:

"That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with an other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of tarffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 17 reads in pertinent part:

"Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

[12] *West Indies Fruit Co. et al.* v. *Flota Mercante Grancolombiana, S.A.*, 7 F.M.C. 66 (1962); *Port of New York Authority* v. *AB Svenska Amerika Linien, et al.*, 4 F.M.B. 202, 205 (1953); *The Paraffine Companies, Inc.* v. *American-Hawaiian Steamship Co., et al.*, 1 U.S.M.C. 628 (1936).

"lump sum rental," part of the dock frontage on Pier 5 and storage area adjacent thereto. However, the $1000 per month rental figure PSAVL finally named in connection with this offer was considered by the Port to be "quite unrealistic" in light of the property involved and the Port's investment therein. Meanwhile, PSAVL went ahead with plans to furnish its own facilities. It reconstructed terminal property belonging to one of its parent companies and located immediately adjacent to the Port's Pier 5, and has since conducted its operations from this facility. Thus PSAVL, although protesting the lease between the Port and Alaska Steam, apparently had ceased to have any interest itself in leasing from the Port.

At the time of the Port-PSAVL negotiations, Port had a policy of assessing 100% of wharfage, dockage and wharf demurrage in connection with its terminal rentals. This policy had been modified prior to the time of the Port's negotiations with Alaska Steam leading to Agreement 8905, and under the modification it was permissible to adopt a negotiated rental formula at less than full tariff charges in cases of inequity to the Port or its lessee. The Port had mentioned its previous 100% policy to PSAVL during the course of their negotiations, but whether it intended at all events to adhere to the policy is not clear. Even if it did, there is nothing in the subsequent policy change which suggests discrimination. Nor is there any evidence that the Port has refused to apply its new leasing policy to PSAVL or any other carrier, or indeed that the Port has been asked to do so.

Furthermore, it is clear, as the Examiner found, that the circumstances of the Port's negotiations with these two carriers "were entirely different." Different facilities and different cargo were involved. PSAVL at no time proposed to negotiate with the Port either for facilities or a rental formula similar to those covered by Agreement 8905. And for aught this record shows, what PSAVL did propose to the Port failed not because of any alleged discrimination but because PSAVL either withdrew its offer, tendered a rental figure which the Port considered grossly inadequate, and/or concluded that it would provide its own facilities.

Our conclusion is that Agreement 8905 should be approved. There has been no showing that the agreement is violative of any of the provisions of the Act. And, while we have nothing whatever to indicate that such will be the case, we point out that if during the approximately four years which remain of the agreement's life it can be shown to be having an unlawful impact or effect on a carrier or other interested person, we are authorized under section 15 to again review it.

Hearing Counsel request that in approving 8905 we order it modified so as to provide for a rental based upon a percentage of wharfage, dockage and wharf demurrage, and for a minimum rental "set at a point which takes into account maintenance costs and normal depreciation charges." Hearing Counsel believe Alaska Steam should pay a rental which bears a direct relationship to the amount of cargo moving over Pier 42, and they are concerned that the minimum rental may not in the future be sufficient to assure the Port a reasonable return because of rising costs.

Respondents contend we have no power to order such a modification and they also dispute the request on its merits. We need not pursue the question of our authority since we, like the Examiner, cannot subscribe to Hearing Counsel's view. This is essentially a section 15 proceeding. It is not a rate case where we could have a direct interest in the level of the Port's return on its terminal facilities. Beyond this, the Port of course is a public body, experienced in terminal management. We have no grounds for disputing its judgment in negotiating 8905 or for finding that it acted without prudent regard for the public's investment in Pier 42. We note, moreover, that both parties have in the agreement reserved the right to cancel on 90 days' notice, hence even if the Port should conclude that it has erred, it has an adequate recourse.

An appropriate order is attached approving Agreement 8905, as amended.

FEDERAL MARITIME COMMISSION

No. 1097

IN THE MATTER OF AGREEMENT NO. 8905

PORT OF SEATTLE—ALASKA STEAMSHIP CO.

ORDER

This proceeding having been instituted by the Commission to determine whether Agreement No. 8905, as amended, between the Port of Seattle and Alaska Steamship Co. should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916, and whether these parties were carrying out said Agreement or other agreements concerning the same subject matter without Commission approval, and the Commission having this date made and entered its Report stating its findings and conclusions, which Report is made a part hereof by reference, and the Commission having found that Agreement No. 8905, as amended, is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, nor detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916; therefore

It is ordered, That Agreement No. 8905, as amended, be and it is hereby approved effective this date, pursuant to section 15 of the Shipping Act, 1916.

By the Commission, March 19, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 312

THE DAYTON ART INSTITUTE

v.

AMERICAN EXPORT LINES, INC.

Application of American Export Lines for authority to refund the sum of $2,780.00 to Dayton Art Institute in connection with a shipment of paintings from Genoa to New York, denied.

T. Ravera, for applicant.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

American Export Lines, by application filed pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure, seeks authority to pay to Dayton Art Institute of Dayton, Ohio (the Institute), the sum of $2,780.00 as reparation in connection with the shipment of paintings from Genoa, Italy to New York City, U.S.A.

Applicant's vessel, the Constitution, sailed from Genoa on September 15, 1962, carrying a shipment of 27 paintings consigned to the Institute. The rate assessed and collected was in accordance with Freight Tariff No. 13 of the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference, of which applicant is a member and which tariff provides:

> VALUABLE GOODS—the term "ad valorem" indicates a rate of 1.75% of the value of the shipment, unless any other percentage is specified, and shall be on the value as per invoice.

The declared value of the paintings, Old Genoese Masters, was $278,000.00 and applying the above tariff, applicant charged and collected from the Institute the sum of $4,865.00. The application does not disclose any offer or agreement to ship at a lesser rate nor does there appear to be any misunderstanding that the rate charged was in accordance with the lawful rate. However, applicant now alleges and

[1] This decision became the decision of the Commission on January 7, 1964, and an order was issued denying the application.

the Institute agrees, as does the conference, that the rate charged was excessive. The reason for the allegation is that the valuation of $278,000.00 was declared for the sole purpose of insurance coverage whereas, in fact, the paintings had no "commercial" value; further, that the total volume of the shipment did not exceed 12 cubic meters.

No change in the declared value is proposed. It is proposed that since the paintings had no "commercial" value, a rate of 1.75% of the declared value is excessive although a rate of 0.75% would not be excessive. The method by which the parties computed the proposed rate is left to conjecture. It is evident, however, that the declared value was used for insurance purposes and that had the paintings been lost, the amount of $278,000.00 would have been demanded.

Applicant and its conference did not file with the Commission, nor disclose an intent to file, a change in the rates, charges or classifications, rules or regulations to decrease the cost to the shipper pursuant to section 18(b)(2) of the Shipping Act, 1916, as amended (the Act). Their proposal is that although section 18(b)(3) of the Act prohibits a carrier to "refund, rebate, or remit in any manner or by any device any portion of the rates or charges so specified (by the tariff filed) nor extend or deny to any person any privilege or facility, except in accordance with such tariffs", the Commission authorize in this isolated instance, a refund by applying a rate, not published or filed with the Commission.

The Commission has taken a broad view of its authority under Rule 6(b). It has held that the power to prescribe a substitute rate for one appearing in a tariff is not a prerequisite to granting relief, however, the authority was geared to cases of bona fide rate mistake or inadvertence. *Martini & Rossi et al. v. Lykes Bros. S. S. Co.*, 7 F.M.C. 453 (1962). It has permitted refunds and waiver of undercharges in several cases, the most recent of which was *Corporation Autonoma Regional Del Cauca, et al. v. Dovar S. A. International Shipping & Trading Co.*, Special Docket 266, decided October 30, 1963 by Examiner Southworth and adopted by the Commission. However, these cases have been limited to the proposition that innocent shippers should not be made to bear the consequences of a carrier's neglect in filing a tariff rate that the parties, acting in good faith, had agreed would apply. This case does not fall within the category of cases in which relief has been permitted. Here, it cannot be found that applicant erred in filing its tariff. There was no misunderstanding as to the legally applicable rate.

However, in the *Martini & Rossi* case, *supra*, the Commission held that if granting relief will not result in discrimination (and there would be no discrimination involved here) that:

> We have the responsibility for administering that Act [Shipping Act, 1916] and also the Intercoastal Shipping Act, 1933, and are empowered among other things to see that equity and justice are done in the matter of reparations.

Further, in *Lykes Bros. S. S. Co.—Refund of Freight Charges*, 7 F.M.C. 602, it was held that: "the fact the rate charged is not shown to be unjust, unreasonable or otherwise unlawful is not determinative of an application under Rule 6(b)."

Viewing the situation in the light of the Commission's authority to apply equity and justice under Rule 6(b), there is still no basis for permitting a refund. The parties originally based the freight rate and the insurance coverage on the same valuation. Freight charges were computed in accordance with the legally applicable tariff. If the parties had then considered the rate excessive, applicant had the option of filing a lower rate under section 18(b) (2) of the Act and the rate would have become effective immediately on filing. No attempt was made to provide a lower rate. More than a year subsequent to the shipment, they propose that the rate was excessive because the shipment consisted of valuable objects which had no "commercial" value although the published tariff makes no such distinction. They do not propose that the declared value reflect this distinction; only the rate. Thus, they avoid applying one valuation for insurance purposes and a different valuation for rate purposes. However, they seek to accomplish the same purpose by indirection. The basis proposed for a different rate on various valuable articles is that one class has no "commercial" value while the other does have a "commercial" value. There is no practical basis for the difference in the proposed rates. Many shipments of valuable objects occupy but little space and this fact has been recognized by applicant's conference in establishing a rate for such objects based on value rather than on volume or weight. There is no difference in the method of handling and shipping valuable articles of no "commercial" value and other valuable articles, insofar as the record discloses. It cannot be held that the paintings had no "commercial" value in relation to the purposes for which the declared value was applied. A contract of insurance and a contract of affreightment are equally commercial transactions and the application of the declared value to both contracts was not unjust or inequitable. There is no basis for a finding that the rate was excessive or that the shipper or consignee was treated unjustly.

The application is denied. An appropriate order will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

DECEMBER 18, 1963.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 313

NYDIA FOODS CORPORATION

v.

JAVA PACIFIC LINE, GENERAL AGENTS FOR NEDLLOYD LINE

Application of Java Pacific Line for authority to refund to Nydia Foods Corporation the sum of $192.58 in connection with a shipment from Lisbon, Portugal to New York, denied.

W. G. del Campo Hartman for applicant.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

Java Pacific Line, as general agent for Nedlloyd Line seeks authority to pay to Nydia Foods Corporation the sum of $192.58 as a partial refund for alleged overcharges in connection with a shipment of dry biscuits from Lisbon, Portugal to New York, U.S.A. The application is filed pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure.

F. A. Caido of Lisbon, Portugal, by bill of lading dated August 16, 1963, consigned a shipment of 16 cases of dry biscuits to Nydia Foods Corporation (Nydia). The shipment was carried on a Nedlloyd vessel and delivered on September 4, 1963. The shipper, prior to the shipment, made no effort to determine the applicable rate. Nedlloyd had no commodity rate for biscuits covering the trade from Lisbon to United States Atlantic and Gulf ports. Consequently, the N.O.S. rate of $75.00 per 1000 kilos was applied and the consignee, Nydia, was required to pay total freight charges of $356.63. Nydia, after paying the freight charges, petitioned Nedlloyd to establish the commodity rate for biscuits at $34.50 per 1000 kilos and Nedlloyd agreed to do so. Nedlloyd has taken steps to insert the new rate in its tariff but rec-

[1] This decision became the decision of the Commission on January 7, 1964, and an order was issued denying the application.

ognizing that the new rate may not be applied retroactively, seeks authority to refund to Nydia the difference between the Tariff N.O.S. rate of $75.00 per 1000 kilos and the proposed rate of $34.50 per 1000 kilos, the difference amounting to $192.58.

No other shipments of the commodity involved have been made on applicant's vessels at the legally applicable rate and discrimination will not result if permission to refund is granted. The issue is limited to the question of whether the facts disclosed warrant relief under the principles of equity and justice which the Commission, in its discretion, may apply to applications under Rule 6(b). *Martini and Rossi* v. *Lykes Bros. S. S. Co.*, 7 F.M.C. 453. In general, to apply the principles of justice is to seek that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the fact. *Words &Phrases*, Volume 23 at page 463. The principles of equity relate to a moral right, the sense of what is just and equal, and fair dealing. *Words & Phrases*, Volume 15 at page 129. The Commission has applied these principles in a series of cases involving rates, beginning with *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62. The most recent case, *Corporacion Autonoma Regional del Cauca, et al.* v. *Dovar S. A. International Shipping & Trading Company*, Special Docket No. 266, decided October 30, 1963, and adopted by the Commission, affirms the principle that innocent shippers should not be made to bear the consequences of the carrier's neglect in filing a tariff rate that the parties, acting in good faith, agreed would apply. In all of these rate cases,[2] the facts disclosed a valid reason for shipper reliance on a rate other than that specified in the tariff. Further, the carrier was found to have failed or neglected, through inadvertence or error, to file a tariff it intended should apply.

The facts here disclosed do not bring this case within the category of cases in which the Commission has deemed relief to be just and equitable. It does appear that the rate charged was double the rate the parties subsequently agreed would apply to future shipments, but this fact alone would not justify permission for a newly filed rate to become effective retroactively. The equitable basis for relief should be that an innocent party has been wronged by some act or omission of another party and that the principles of fair dealing have been

[2] In addition to cases above cited, see: *Uddo & Taormina Corp.* (and 11 other complainants) v. *Concordia Line, etc.*, 7 F.M.C. 473; *UNICEF* v. *Columbus Line*, 7 F.M.C. 543; *Lutcher S.A.* v. *Columbus Line*, 7 F.M.C. 588; *Lykes Bros. SS Co.—Refund of Freight Charges*, 7 F.M.C. 602; *Jondi Inc.* (and 3 other complainants) v. *Hellenic Lines Limited*, 7 F.M.C. 522.

offended. Here, the applicant alleges that "shipment of subject 16 cases dry biscuits was made by shippers without having ascertained what freight rates would be applicable". Business men engaged in the import and export trade are not innocent, but negligent, when they make no effort whatsoever to determine the cost of a shipping service they intend to utilize. The shipper and the consignee were not misled. There was no error or inadvertence relating to the tariff on file and no failure of the carrier to file a tariff intended to be applicable to this shipment. These facts mark the distinction between this case and the cases hereinabove cited. The carrier was not unfair, or even negligent, in its dealings with the shipper or consignee. There has been no inequity or injustice which merits correction.

The application is denied. An appropriate order will be entered.

DECEMBER 18, 1963.

(Signed) HERBERT K. GREER,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 290

AICHMANN & HUBER

v.

BLOOMFIELD STEAMSHIP COMPANY

Respondent's application for authority to pay reparation to complainant in connection with a shipment from New Orleans to Hamburg, denied.

Misquotation of contract rate to consignee, not a party to a dual-rate contract, does not entitle consignee to ship at the contract rate and charging consignee non-contract rate does not discriminate against him in relation to contract shipments carried at the lower contract rate.

G. E. Wieckhoff for Applicant.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

Bloomfield Steamship Company, by application filed pursuant to Rule 6(b) of the Rules of Practice and Procedure, seeks authority to pay Aichmann & Huber the sum of $494.93 as reparation for an alleged overcharge on a shipment of 264,930 pounds of canned green beans from New Orleans, La. to Hamburg, Germany.

The nominal complainant, Aichmann & Huber, a West German importer, purchased from R. D. Pringle of San Francisco, Calif., 8,831 cases of canned green beans on terms f.a.s., freight collect. Incidental to the transaction, complainant requested a rate quotation for the shipment from Maritime Cargo Agency of Bremen, Germany, respondent's agent. The agent quoted a rate of $23.50 per 2,400 pounds, which was the rate available to signatories of a dual-rate contract, but did not advise complainant of the necessity of executing such a contract in order to be eligible for the rate quoted.

R. D. Pringle booked the shipment on respondent's vessel. Since Pringle, the shipper, was not a signatory to a dual-rate contract, respondent offered him the opportunity to sign a contract. When Pringle refused to sign, respondent became aware that freight charges would be paid by complainant, however, there was insufficient time,

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[1] This decision became the decision of the Commission on March 12, 1964, and an order was issued denying the application.

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prior to the sailing date, to offer complainant an opportunity to execute a dual-rate contract. Respondent issued an order bill of lading to the shipper, Pringle, on February 23, 1963. Pringle was designated as the shipper, and the shipment was consigned to his order, with notice of arrival to be addressed to complainant. The bill of lading presented in evidence does not specify the rate or charges; however, when complainant's agent, Standard Uebersee Handels, G.m.b.H., received the shipment, the non-contract rate of $27.60 per 2,400 pounds had been applied and total freight charges of $3,264.31 were collected. Subsequently, when complainant was advised of the need to sign a dual-rate contract in order to obtain the lower rate, he immediately did so. Complainant mailed the contract to the Gulf/French Atlantic Hamburg Range Conference, of which respondent is a member, and requested that the contract be made effective as of January 1, 1963. The Conference executed the contract and returned it to complainant without action or comment as to the requested retroactive effective date. The contract became effective on March 18, 1963, subsequent to the shipments here involved.

Having calculated its transaction relating to the shipment of canned green beans on the basis of the lower contract rate and having been required to pay the higher non-contract rate, complainant will suffer a loss if required to remain liable for the freight collected. Respondent seeks to repair the loss on the following basis:

(a) Shipment (lbs)	(b) Legal rate (2,400 lbs)	(c) Charges collected	(d) Rate quoted (2,400 lbs)	(e) Charges at rate quoted	(f) Reparation (c) – (e)
264,930	$29.60	$3,264,31 [2]	$23.50	$2,779.39	$484.92

[2] Although the consignee (complainant) has not executed a concurrence on the application as set forth in form No. 5 of Appendix II of the Commission's Rules of Practice and Procedure, its concurrence is made evident by Exhibit 2 to the application which is a copy of its informal complaint to the Commission. The fact that payment was made is evidenced by Exhibit 5.

The application is submitted on the premise that respondent violated section 17 of the Shipping Act, 1916 (the Act) in charging and collecting the non-contract rate. Section 17 of the Act provides:

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice * * *

Respondent's position is stated as follows:

Since it appears that Complainant through no fault of his own was not accorded a reasonable opportunity to avail himself of the contract rate by signing a Conference contract agreement prior to shipment, further since he has subsequently signed such a contract, and since other competitive shipments moved on the same voyage at the proper contract rate, it appears that it would be unreasonable and would constitute unjust discrimination against Complainant contrary to the provisions of the Shipping Act of 1916, as amended, if Respondent were compelled to charge the non-Contract rate in the circumstances of this case.

Therefore the undersigned respondent carrier believes that the freight charges as collected may be unjustly discriminatory within the meaning of Section 17 of the Shipping Act, 1916, as amended.

Although respondent has not elaborated, its contention appears to be that a different rate as between contract and non-contract shippers or consignees is not *per se* unjustly discriminatory but that the rate differential becomes so when a non-contract consignee [3] is not afforded a reasonable opportunity to avail himself of the same rate which is available to his competitors.

The competitive shipments referred to in the application are by Jack Gomperts & Co., Inc., consigned to order of the shipper, arrival notice to be addressed to Edeka Import, Hamburg, Germany, The application further alleges that these shipments were accorded the contract rate since the shipper was a contract signatory. There is no basis for a finding of discrimination as between shippers for Pringle was the shipper and was afforded an opportunity to execute a conference contract. Nor does it appear that respondent discriminated against Complainant in relation to his competitor, Edeka Import. There is no basis for a conclusion that respondent offered, or did not offer, a contract to Edeka Import or did not accord Complainant any other opportunity it accorded Edeka Import. If there was a statutory obligation on respondent in relation to the consignees, it would arise from section 14b of the Act which provides that dual rate contracts must be available to all shippers and consignees on equal terms and conditions. In its common dictionary meaning "available" means "obtainable" and refers to something of which one may avail himself. There is no indication in the legislative history of section 14b which would contradict the application of the common

[3] Complainant, being the person to be notified under the terms of order bill of lading, is herein considered as the "actual" consignee. See *McDowell and Gibbs, Ocean Transportation,* 1954 Edition, at page 135.

meaning of the term. Respondent did not have the statutory duty to affirmatively offer Complainant an opportunity to execute a dual-rate contract as a condition precedent to charging the non-contract rate.

Discrimination in relation to other shipments is not found.

No violation of the Act is found. Although the parties rely on an alleged violation of the Act, the application has been submitted under Rule 6(b) and may be considered in relation to the Commission's policy in permitting voluntary reparations. It has been held the failure to show that a rate charged is unjust, unreasonable or otherwise unlawful is not determinative of an application under Rule 6(b). *Lykes Bros. S.S. Co.—Refund of Freight Charges*, 7 F.M.C. 602; and further that if discrimination will not result, the Commission is empowered to see that equity and justice are done in the matter of reparations. *Martini & Rossi et al* v. *Lykes Bros. S.S. Co.*, 7 F.M.C. 453. In applying these principles, refunds and waiver of undercharges have been permitted in several cases; however, relief has been limited to factual situations where innocent shippers would have borne the consequences of a carrier's neglect or error in filing a tariff rate which the carrier had intended to file and which rate the parties, acting in good faith, had agreed would apply to the contract of affreightment. *Y. Higa Enterprises, Ltd.*, v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62; *Uddo & Taormina Corp. et al* v. *Concordia Line*, 7 F.M.C. 473; *Jondi Inc. et al* v. *Hellenic Lines Limited*, 7 F.M.C. 522; *UNICEF* v. *Columbus Line*, 7 F.M.C. 542; *Lutcher S.A.* v. *Columbus Line*, 7 F.M.C. 588; *Corporation Autonoma Regional Del Cauca et al.* v. *Dovar S.A. International Shipping & Trading Co.*, Special Docket 266, decided October 30, 1963.

Rule 6(b) has not been utilized as a panacea to cure every wrong which may occur in the business relations between carriers and their customers nor permitted to become a loophole for escape from the prohibitions of section 18(b)(3) of the Act, which prohibits rebates, refunds, or remittances in any manner or by any device.

The facts adduced do not bring this case within the category of cases wherein relief will be granted. There is no implication of error, injustice, or inequity in relation to the contract of affreightment. The contract was between respondent and the shipper Pringle. Pringle, the shipper, was accorded the opportunity to sign a dual-rate agreement and thus make the lower rate applicable to the shipment. Pringle refused to sign. It cannot be found, as it has been in cases where relief has been granted, that the parties to the contract of affreightment agreed in good faith that the lower rate would apply.

An error in the Commission's records due to failure of a carrier to file, or to corectly file, a rate which it intended in good faith to make applicable to the shipment is not here involved. There is no basis for a finding that the carrier, at any time, intended to apply other than the $27.60 rate to non-contract shipments. That rate was then, and still is, applicable to such shipments. It has been established that the consignee (complainant) did rely on a misquoted rate, but ignorance or misquotation of a rate is not an excuse for paying or charging more or less than the rate filed. As held in *Silent Sioux Corporation* v. *Chicago & N.W. Ry. Co.*, 262 F. 2d 474 (1959), the rule is undeniably strict, and it obviously may work a hardship in some cases, but it embodies the policy which has been adopted by Congress in regulating commerce in order to prevent unjust discrimination.

The application is denied. An appropriate order will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner

FEBRUARY 13, 1964.

TABLE OF COMMODITIES

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

—In general

The section 15 criteria required to be applied by the Commission in deciding whether an agreement should be approved present questions for highly specialized judgment in the maritime transportation field, for what is "unjustly discriminatory" or "unfair", will "operate to the detriment of the commerce of the United States" or "be contrary to the public interest" in that area, depends in large measure upon considerations not elsewhere applicable. Agreement No. 8555 Between Isbrandtsen Steamship Co. et al., 15(18); 125(128).

There is no distinction between the Commission's authority regarding breaches of a conference agreement and its authority regarding violations of the Shipping Act. A conference agreement is not a sacrosanct private arrangement but a public contract, impressed with the public interest and permitted to exist only so long as it serves that interest. If a conference departs from the approved rules under which it could lawfully operate, it is violating the Act, and if individual members do, it is more than likely that they too are violating the Act. Even if a member's conduct happens to involve only a breach of the agreement, this would not justify the conference's refusal to furnish the Commission information. It is for the Commission to decide in all cases whether a given course of conduct under a section 15 agreement is violative of the Act, detrimental to commerce, or contrary to the public interest. The Commission cannot discharge its duties by allowing conferences to substitute their judgment for the Commission's in determining what activity violates the statute and what information they will furnish. Pacific Coast European Conference, 27 (37).

A provision in an agreement between carriers stipulating that a party may individually alter a rate subject to at least 48 hours' notice to other parties, does not reflect independence. It demonstrates anticompetitive agreement. Unapproved Section 15 Agreements—South African Trade, 159 (188).

To read out of section 15 oral, tacit or general agreements, understandings and arrangements would decimate the section. These are even more effective anticompetitive vehicles than formal, detailed and legally-binding agreements. Section 15 is not concerned with formality but with the actual effect of the arrangement. Congress granted antitrust exemption only because it envisioned that permitted activities would be subjected to constant and effective government control and regulation. Congress was also aware that its plan would be largely frustrated unless the Act were made broadly applicable to all agreements, understandings and arrangements including particularly a cooperative working arrangement for the joint fixing or regulating of rates. Id. (188–190).

Section 15 is an exception to the general philosophy of American jurisprudence as expressed in the antitrust laws that monopolistic or anticompetitive practices are per se contrary to the public interest. It grants antitrust immunity to certain agreements and actions authorized thereunder if the agency administering the Act approves such agreements. It follows that agreements authorized and approved under section 15 should be strictly construed, and the parties' actions must be limited to such conduct as is authorized under the agreement. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conference of Japan, 204 (210).

Agreement between a common carrier tug and barge operator and a non-vessel-operating common carrier, engaged in trade between Seattle and Anchorage, for transportation by the former of its own cargoes under its own tariffs, and for transportation by the former of the latter's common carriage cargoes at the latter's tariff rates, is not a section 15 arrangement providing for uniform rate action by the parties. While the parties would consult on amendments to the tug and barge operator's tariff which affect the income the other carrier would receive under a revenue division, this merely relates to the amounts to be charged for the combined service and such activity differs materially from rate-fixing among competitors offering the same service. The reasonableness of the rate to be charged under the combined service is not relevant to the question of approving the agreement. Agreement 8492 Between T. F. Kollmar, Inc., and Wagner Tug Boat Co., 511 (516).

Agreement by a port to lease terminal facilities to a carrier will not be required to be modified so as to provide for a rental based upon a percentage of wharfage, dockage and wharf demurrage, and for a minimum rental "set at a point which takes into account maintenance costs and normal depreciation charges." The proceeding is essentially a section 15 proceeding, and not a rate case. In any event, the port is a public body, experienced in terminal management, and there are no grounds for disputing its judgment in negotiating the lease. Moreover, the port may cancel the agreement on 90 days' notice. Agreement 8905—Port of Seattle—Alaska S.S. Co., 792 (802).

—Agreements required to be filed

Section 15 requires the filing of a copy, or if "oral" a true and complete memorandum, of "every agreement" covering any of the wide range of anticompetitive activities therein mentioned, "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The language of the section clearly embraces every agreement, understanding, or arrangement, whether formal or informal, written or oral, detailed or general. Unapproved Section 15 Agreements—South African Trade, 159 (190, 191).

The provision of section 15 which makes it unlawful "to carry out" agreements before approval or after disapproval does not affect the opening provision requiring agreements to be filed immediately. The final paragraph of the section imposes a penalty for violation of "any provision" thereof. The failure to file immediately an anticompetitive agreement was intended by Congress to be a distinct violation of section 15. Congress, apparently troubled by the language of certain Board decisions and the testimony of two Board officials before a Congressional committee, made this even plainer, if that is possible, by its recent revision of section 15 (P.L. 87–346). Id. (191, 192).

The routine provision in a subsidy contract requiring the operator to "coordinate the spacing, regularity and frequency of its sailings" in conjunction with other subsidized services on the trade route, and giving the government's consent to such prescribed coordination for the purpose of Article II–18(c) of the contract and any other contractual or statutory provision requiring that consent, does not justify a carrier's failing to file, pursuant to section 15 a cooperative working arrangement with other carriers regulating rates. The coordination clause does not mention rates. Id. (195, 196).

Subsidiary contracts awarded to two companies in 1938 which stipulated that they would "establish, publish, and maintain rates, charges," etc. on a basis "satisfactory to the [United States Maritime] Commission", which contracts were awarded following a decision of the Commission which referred to their cooperation "in competing against the foreign lines now carrying the bulk of the commerce in this trade", did not justify the failure of the carriers (and another carrier who subsequently received a subsidy contract and claimed that it was advised by Commission personnel to consult with other operators on rates) to file a cooperative working arrangement with respect to rates on their trade route. In no event was cooperation authorized to be undertaken without reference to section 15 requirements. One of the purposes of section 15 was to provide for competition against foreign lines. The carriers had the burden to file under section 15 and set forth the arrangement they had. In fact the arrangement which involved rate fixing among all the carriers in the trade, including foreign lines, was not at all in conformity with the provision of the subsidy contracts. The American carriers were not united to compete with foreign-flag lines, but were acting in concert with them to eliminate competition. It was for the agency administering the Act to decide such matters as whether the arrangement promoted stability, aided the subsidy program, was in the public interest, and was not objectionable under section 15. The section leaves little room for "technical" violations. The breadth and force of its language literally implore attention and obedience, or at the very least inquiry if any doubt exists as to the propriety of proposed conduct. Id. (195–197).

Even if a conference member knew that a Neutral Body selected by a committee of the conference was employed by another member, in violation of the terms of the conference agreement, the action of the committee would not be binding on it. Parties to agreements approved under section 15 are not empowered to alter their terms inter se. They must file an amendment and secure Commission approval. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conf. of Japan, 204 (215).

Carriers which failed immediately to file an agreement fixing the rate on coal to Korea breached section 15, even in the absence of any effectuation of the agreement. Failure to file is a separate and distinct violation. The amendment to section 15 contained in Public Law 87–346 making a future unfiled agreement itself unlawful, whether carried out or not, was simply a clarification or reinforcing of the existing law, and not a substantial change therein. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (301, 302).

Assuming that an agreement between Laly and Imica to create a berth operator in the Venezuelan trade provides for a cooperative working arrangement between them, the agreement is not subject to section 15. Laly and Imica were not and are not common carriers by water and were not and are not carrying on the business of forwarding or furnishing terminal facilities in connection with a common carrier by water. The fact that a carrier is engaged in common carriage by water does not make its owners common carriers by water within the meaning of section 15. Thus, the agreement was not required to be filed with or approved by the Commission. Grace Line, Inc. *v.* Skips A/S Viking Line, 432 (448, 499).

An agreement which requires that a carrier's wharfage, dockage and wharf demurrage charges be the same as those assessed by a port (which leases a pier to the carrier) for like services, and gives to the port the right to review and change such charges, is an agreement fixing and regulationg those charges. Charges fixed pursuant to such an agreement are "transportation" rates within the meaning of section 15. Agreement 8905—Port of Seattle—Alaska S.S. Co., 792 (797).

Provisions of an agreement between a port and a carrier for lease to the carrier of terminal facilities, which provisions regulate wharfage, dockage and wharf demurrage charges and grant special rates, accommodations, privileges or advantages to the lessee amply bring the agreement within the filing and approval provisions of section 15. Id. (797, 798).

Interim agreements for the lease of terminal facilities which, while excluding the lessor's secondary berthing rights, still relieved the lessee from paying tariff charges for wharfage, dockage and wharf demurrage and provided that the lessee should observe the same rates as the lessor, constituted a regulation of rates in the same manner as the basic lease, and require approval prior to effectuation. Id. (798, 799).

—Apportioning earnings

Oral and written agreements between two common carriers providing for a division between them of the charges paid by cargo owners for moving cargo from Seattle to Alaska by barge (one carrier furnishing and towing the barges, the other soliciting cargo from the public and acting technically as sole shipper), and any oral agreements supplementing them were, and similar agreements will be, agreements between common carriers apportioning earnings and providing for a cooperative working arrangement and subject to the provisions of section 15. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (48, 49).

—Approval of agreements

Based upon findings that an agreement between two carriers which would destroy competition between them on essential United States foreign trade routes, would result in increased economy and efficiency of operations; that the proportion of cargo carried by U.S.-flag ships has been steadily and substantially declining on one of the routes, but that the cargo-carryings of a U.S.-flag competitor protesting approval of the agreement have been rising percentage-wise on the route; and that there is no reasonable probability that the agreement will result in any substantial loss of revenue by the protesting carrier, or that it will be hampered in any wise in maintaining and improving its own service, or be otherwise injured, the agreement meets the section 15 criteria for Commission approval, will in fact operate to the advancement of the commerce of the United States and will be beneficial to the public interest. Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., et al. 15 (18–20); 125 (128–130).

Agreements providing for the sale of two containerized ships to a carrier for use in the Gulf/Puerto Rico trade, on condition that another carrier which had intended to use the vessels in its North Atlantic/Puerto Rico service would not compete for one year in the Gulf/Puerto Rico trade, would not be detrimental to the commerce of the United States, or contrary to the public interest. It would be distinctly beneficial to such commerce and public interest for shippers of both Gulf and North Atlantic areas to Puerto Rico to have container ships available, rather than to have container ships available from North Atlantic ports only, as at present. There was no indication that performance of the agreements would

Gulf/Puerto Rico service. Purchase of Vessels "Alicia" and "Dorothy", 199 (201).

Agreements for the sale to and use by a carrier of containerized vessels in the Gulf/Puerto Rico trade, conditioned on another carrier's refraining from competing in the trade for one year, are not unjustly discriminatory or unfair between carriers simply because at some future date the purchaser may put them into competition with vessels of another carrier operating on other routes, are not contrary to the public interest because this may happen, and will not operate to the detriment of the commerce of the United States if (and because) it does happen. Approval of the agreements will not be conditioned on the vendee's agreeing to operate the vessels in the United States/Puerto Rico trade for a period of years. Id. (201, 202).

Agreements within the scope of section 15 are approvable unless the Commission finds them to be contrary to the provisions of that section. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (358).

Agreement between carriers engaged in trade between Seattle and Anchorage is not unfair, detrimental to commerce, or contrary to the public interest because the carriers will operate only seasonally and other regular carriers may be deprived of summer traffic now flowing through Seward and thence to Anchorage by rail. Any harm resulting from the seasonal operation is due to the winter ice at Anchorage, a condition not reasonably within the control of the carriers. Other carriers are not entitled to be protected from competition. Anchorage urged approval of the agreement to provide additional direct water service during the months of heavy traffic. Agreement 8492 between T. F. Kollmar, Inc. and Wagner Tug Boat Co., 511 (517, 518).

The fact that the Department of Agriculture is the principal shipper of the commodities involved in an agreement between carriers to observe conference rates is irrelevant to any issue of approvability of the agreement where, although Agriculture was able to save $174,000 by securing bookings at less than the conference rate, the saving was accomplished by undercutting a conference rate which was barely compensatory and was admitted by Agriculture to be reasonable. Agreement 8765—Gulf-Mediterranean Trade, 495 (499).

—Arbitration

Arbitration clause in Shipper's Rate Agreement cannot oust the Commission of jurisdiction to hear and determine complaints of violations of the Shipping Act. In this respect the decision of the District of Columbia Circuit in Swift & Co. *v.* FMC is controlling. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (730).

—Burden of proof

Disapproval of agreement on the basis that proponents of the agreement had the burden under Rule 10(o) of proving that it was not violative of any of the statutory provisions specified in the order of the Commission instituting the investigation, and that proponents had failed to meet the burden of proving that the agreement was lawful, was an oversimplification of the problem, and a misconstruction of Rule 10(o) as applied to the proceeding. Since there was ample evidence on which to base a decision on the merits, the case did not turn on, and it was unnecessary to discuss, questions involving burden of proof. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (358).

—Controlling, regulating, preventing, and destroying competition

An agreement between two carriers, primary U.S.-flag liner operators on essential United States foreign trade routes, which agreement would result other, with the former agreeing not to compete in the services transferred without consent of the latter, constitutes an agreement controlling, regulating, preventing, and destroying competition. Such an agreement must be approved, disapproved, cancelled or modified pursuant to section 15 of the Shipping Act, 1916. To read the language of the section as authorizing and requiring such Commission action on every agreement controlling, regulating, preventing or destroying competition except agreements of the nature of the above agreement would constitute statutory amendment masquerading as statutory construction. Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., et al., 15 (16–18): 125 (127–129).

—Conference membership

Provision for admission fee of $2,500 for joining a conference was approved where the testimony established that a $2,500 admission fee would not deter carriers from joining the conference and considering the change in the value of the dollar since 1948, the fee was appreciably less than that disapproved by the USMC in 1948. While P.L. 87–346 amended section 15 by providing that no agreement shall be approved "which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership", the legislative history of the quoted provision indicates that Congress did not intend to prohibit establishment of a reasonable membership fee to be paid by new members. A new member obtains a pro rata ownership of an asset belonging to the conference which consists of the going concern value built up over the years. Persian Gulf Outward Freight Conf.—Agreement 7700–6, 707 (710, 711).

—Cooperative working arrangement

Oral and written agreements between two common carriers providing for a division between them of the charges paid by cargo owners for moving cargo from Seattle to Alaska by barge (one carrier furnishing and towing the barges, the other soliciting cargo from the public and acting technically as sole shipper), and any oral agreements supplementing them were, and similar agreements will be, agreements between common carriers apportioning earnings and providing for a cooperative working arrangement and subject to the provisions of section 15. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (48, 49).

Agreements between a port and a company owning and operating public grain elevators, which agreements gave the port the exclusive right to provide stevedoring services on vessels loading or unloading bulk grain and other bulk commodities at the elevators, are agreements subject to section 15. Every agreement between persons subject to the Act, if such agreement gives special privileges or advantages, or in any manner provides for an exclusive, preferential, or cooperative working arrangement is subject to section 15. California Stevedore & Ballast Co. *v.* Stockton Port District, 75 (80, 81).

A finding that respondents did not violate section 15 because they had "no meeting of the minds" and were not "legally obligated" before they all became signatories to an approved agreement, was insupportable where the record, built largely of highly incriminating evidence from the files of each respondent, clearly indicated the existence of a cooperative rate arrangement; respondents' officers repeatedly referred to an "agreement", "commitment", "concurrence" or "understanding" in their correspondence with competitors regarding rate levels; and respondents' discussions and conferences generally, but not always, resulted in the quotation of similar or identical rates. Unapproved Section 15 Agreements—South African Trade, 159 (186, 187).

Anticompetitive activity cannot be regarded as though it were normal business activity. The use of parallel rates following joint rate discussions cannot be just the result of business economics. Persons subject to the Shipping Act who expect the Commission to give credence to such claims should conduct their activities in a way consistent with the claims. Carriers, in their frequent communications regarding rates, were not simply keeping one another posted or exchanging reminiscences; they were engaged in a cooperative working arrangement for the joint fixing or regulating of rates, which was unauthorized and therefore improper. It was not material that their arrangements did not result in firm or complete accord in every instance. Even if no firm results had been reached, the agreement to cooperate would have been improper. Id. (187, 188).

—Cooperative working spirit

Evidence that two conferences exchanged information concerning rates prompted by requests from shippers for rate reductions or quotations, which requests referred in most instances to rates already independently adopted, although possibly not yet made effective, and that there were discussions of rates and rate considerations on a few occasions but not as an established practice, prior to the decision on the rate in question by either conference, established only the existence of a cooperative working spirit. A cooperative spirit does not quite achieve the status of an agreement or understanding or a cooperative working arrangements that would be included within the scope of section 15. However, it is a serious matter for parties subject to the Act to engage in exchanging rate information without knowledge of the Commission. The natural consequences of such activity can clearly be a step toward or the very basis of improper practices, and the activity should therefore be avoided. Unapproved Section 15 Agreements—West Coast South America Trade, 22 (24, 25).

—Effectuation of agreement

All parties to an unapproved agreement fixing rates for carrying coal are jointly responsible, under section 15, even though only one party carried the coal. A rate-fixing agreement is effectuated by presenting a united front, and participation by simply refusing to carry at less than the agreed rate quite effectively advances the cause of the parties. What is significant is that the parties jointly agreed to and did set a "floor" on the rate to which they adhered. Thus they restricted or eliminated competition. It is immaterial that some of the parties, though quoting the agreed rate, did not offer space, or did not have vessels in position, for the particular coal shipment. The rate agreement was not made for particular shipments but was generally applicable to Korean coal. Failure to file the agreement and carrying out of the agreement were violations of section 15. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (300, 301).

A carrier which participated in a meeting at which a coal rate agreement was reached and under the conference unanimity rule must have voted for or assented to the arrangement, was a party to the agreement. Its claim that it was "disinterested" in the subject of coal, allegedly proved by the fact that it did not quote coal rates since coal was not compatible with its "ordinary" cargoes, came too late. The carrier did not express its alleged disinterest at the time of the meeting. Persons subject to the Act who participate in anticompetitive activity must be held responsible absent timely and positive steps evidencing their disinterest or disassociation. Moreover, it was not essential that the carrier be shown to have actually quoted the agreed coal rates. It entered into the unauthorized agreement to limit competition. It is sufficient that one or more of its colleagues in the plan quoted the agreed rates or took other action to carry out the plan. Id. (301).

Evidence (interoffice memoranda and surrounding circumstances) established the existence of an agreement or understanding between a carrier and a conference and its members for the observance by the carrier of conference rates. The carrier, the conference, and its members violated section 15 both by failing to file their agreement or understanding and by carrying it out absent approval. Unapproved Section 15 Agreement—North Atlantic Spanish Trade, 337 (343, 344).

—Evidence of existence

A restricted or fragmented approach to the evidence in a section 15 investigation can defeat the purpose for which the investigation was instituted. The conduct proscribed by section 15 includes oral and informal agreements, understandings and arrangements which by their nature can be difficult to detect and prove and may well require the putting together of numerous individual evidentiary items so as to construct an integrated whole that will provide the basis for a conclusion. The respondents should not have been allowed to isolate and attempt to destroy the documentary proof link by link, in disregard of the interrelated and complimentary character of the various links as well as their cumulative delineation of respondents' common course of unapproved activity. Unapproved Section 15 Agreements—South African Trade, 159 (182, 183).

Exhibits relating to the question of whether respondents had entered into an agreement or understanding as to rates should have been admitted into evidence. They were authorized in the main by experienced, highly-placed officials. They were not expressions of legal opinion. The fact that the exhibits were intracompany communications in many cases enhanced rather than detracted from their evidentiary value because the communications contained completely candid utterances bearing directly on the subject of the inquiry. Id. (183).

Where a group of carriers was attempting to obtain a "commitment" from another carrier to use a certain rate [on tallow], and conversations were had on an agreement, and it was not clear that an agreement was reached, and the carrier had a record of disagreeing with the group rather than agreeing, the evidence was not sufficient to establish a violation of section 15. However, the carrier came close to potentially serious difficulty by failing to avoid questionable involvement with its competitors. Id. (194).

The language of a carrier's interoffice memoranda, referring to an "undertaking" to abide by a conference tariff and to a "verbal understanding" with the conference, together with surrounding circumstances such as the fact that the carrier after it had resigned from the conference continued to be consulted by the conference on rate changes, establishes the existence of an agreement or understanding between the carrier and the conference and its members within the meaning of section 15. Experienced and responsible corporate officials do not use terms like "undertaking" and "verbal understanding" especially when referring to their relations with competitors, without intending that the words convey their commonly accepted meaning. Unapproved Section 15 Agreement—North Atlantic Spanish Trade, 337 (341, 342).

Considering the penalty prescribed for illicit anticompetitive activity, it is not to be expected that proof of such activity will be obtained easily or in abundance. In such cases the solid evidence may consist of no more than a few contemporaneous memoranda or other documents. These are entitled to far greater weight than oral testimony given at a later date by those under investigation and whose "explanations" of the documents simply cannot be squared with their contents. Contemporaneous documents, particularly interoffice memoranda, are usually quite reliable evidence of the facts. Interoffice memoranda are entitled to the highest validity as evidence, and to the extent that oral testimony contradicts them, the contradiction only serves to affect the general credibility of the evidence. Testimony which is contradicted by contemporaneous documents

Interoffice memoranda of a carrier showing the existence of an agreement or understanding with a conference, although hearsay, were clearly admissible against the conference and its member lines and were reliable and substantial evidence in the light of the entire record. Id. (343).

—Extenuation of violations

Matters in extenuation of violations of section 15 may be material to the question of punishment for past violations but they are not relevant to anything within the jurisdiction or intent of an administrative investigation into such violations. Unapproved Section 15 Agreements—South African Trade, 159 (194).

Where respondents contended that even if they violated section 15, the infraction was "purely technical" in that they acted under a mistaken assumption and in good faith in using conference machinery to set coal rates, and that they could have accomplished the same agreement with no trouble had they employed the machinery of another conference, their testimony was not accepted, though it was uncontradicted. If respondents could have readily used the other conference to agree on rates, it was a fair question why they did not do so. In any event, the point is associated with an immaterial issue as to respondents' motives. While there might be an occasion where evidence of the parties' motive or intent is useful to the proper investigation by the Commission of unlawful conduct, where the objective is only to show a so-called "technical violation" which should not be punished, the subject is necessarily irrelevant. Id. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (302, 303).

It is not necessary under section 15 to impute an evil motive. Nonfeasance is as objectionable as malfeasance. There is little, if any, excuse for failure to file an agreement with the Commission, or at least make inquiry as to whether an agreement comes within the scope of the section and thus must be filed and approved. Id. (304).

—Pooling agreement

Testimony on behalf of third-flag carriers precluded finding that operations under an agreement between U.S.-flag carrier and Venezuelan-flag carrier were intended or reasonably likely to drive third-flag carriers out of the trade. Failure of such carriers to show that the agreement would have specific results requiring that it be disapproved was in itself strong evidence that such results could not reasonably be foreseen. Something more than a fear of increased competition is necessary to justify a finding than an agreement is unjustly discriminatory or unfair as between carriers, contrary to the public interest, or otherwise merits disapproval under section 15. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (360, 361).

The record, particularly in the light of the evidence with reference to traffic in the trade, did not show that there would be any unjust or unfair discrimination between carriers as a result of a pooling agreement between a United States and a Venezuelan carrier. Assuming the correctness of figures used by the Examiner on concluding that third-flag line carriers would be unjustly discriminated against, it did not follow that the revenues of these lines would shrink dangerously—they might well increase in view of the Alliance for Progress program and other factors. The carrier principally affected testified that it would not abandon its service. As to the possibility of further decrees by the Venezuelan government which would be advantageous to the parties to the agreement, the Commission has reserve powers under section 15 to reconsider and disapprove the agreement. Id. (362–364).

Agreement between U.S.-flag and Venezuelan-flag carrier providing, inter entered into to counteract the effects of the Venezuela decrees resulting in loss of cargo by the U.S. carrier, was found not to violate the Shipping Act and was approved pursuant to the provisions of section 15. Id. (365).

—Public interest

The fact that an agreement combining the operations of two U.S.-flag carriers on a trade route would result in substantial economies and improved operating results is not basis for a protest by another U.S.-flag carrier operating on the route. The protesting carrier may have an interest in preventing U.S.-flag competitors from increasing the economy and efficiency of their operations. If so, the private interest must yield to the public interest which demands that U.S.-flag carriers in foreign trade (especially, subsidized operations) operate as economically and efficiently as possible. Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., et al., 15 (19, 20); 125 (129, 130).

Public Law 87–346 did not write into section 15 a public convenience and necessity standard and the Commission has no authority to use the term "contrary to the public interest" in section 15 to require that a section 15 joint service agreement meet the prerequisites of a certificate of public convenience and necessity. Carriers individually may enter and serve a trade without establishing that their operation serves the public convenience and necessity. The fact that they propose a joint service in the same trade does not give the Commission a veto power on public convenience and necessity grounds. Agreement 8492 Between T. F. Kollmar, Inc. and Wagner Tug Boat Co., 511 (517).

—Rates and tariffs

Where carriers were authorized by their approved agreement to fix "open minima" rates and to maintain some control even though rates were "open"; tariffs on file with the Commission on commodities involved, during the years in question, showed rates as "open"; and the carriers insisted that they never agreed to open rates but that from the outset their decision was to open rates with minimums and that at all times the rates were in fact "open minima," the carriers did not agree to any action not authorized by the conference agreement or agree to relinquish their rate control. While their erroneous filings are to be condemned, the carriers were actually doing what they insist they had agreed to do, and the minimums were regularly publicized and quoted to all interested persons. Failure to apprise the Commission of the minimum rates where the fixing of such rates was within the authority of members under conference agreements, does not of itself render the action unlawful under section 15, and under the above circumstances, the carriers did not violate the section. They did violate General Order 83. Gulf/United Kingdom Conference, 536 (539–541).

—Reference to Justice Department

The Commission lacks the power to assess penalties and it manifestly cannot excuse their assessment, by omitting to refer to Justice or by any other means. Prosecution and the assessment or waiver of penalties are matters that rest within the province of the Attorney General and the courts. The Commission's policy is to refer violations to the Justice Department. Unapproved Section 15 Agreements—Coal to Japan/Korea, 295 (303).

—Scope of agreement

Where the first clause of a paragraph of an approved agreement provided for discussions and agreements on rates to be used as a basis for discussion with MSTS for the purpose of negotiating rates on cargo for MSTS and related services, a second clause making rates negotiated binding on all parties to the more. When the parties agreed to fix rates on coal to Korea which was not MSTS cargo, the agreement was beyond the scope of the approved agreement. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (299, 300).

Approval of agreement between carriers providing for exchange of manifests, and/or freight lists, and other pertinent shipping records, is not to be construed as permitting the parties to disclose or receive information in violation of section 20. The Commission lacks authority to permit such action. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (365).

Where a conference agreement permits members to open and to close rates, and provides that when rates have been declared open on any commodity "the extent, if any, to which the Conference relinquishes control over the booking and transportation thereof will be shown in the Conference Tariffs", the conference is authorized to fix "open minima" rates. Unapproved Section 15 Agreements—Gulf/United Kingdom Conference and Gulf/French Atlantic Hamburg Range Conference, 536 (539).

Approval in 1948 of conference agreement providing for institution of dual rate system was not enough under section 15 to validate the institution of an actual dual rate scheme, nor the shipper's contract adopted as part thereof. Ever since the 1954 Isbrandtsen court decision approval of the system and of the contract itself has been required. The 1959 Anglo-Canadian court decision was merely a restatement of the law and not a first time holding that particular dual rate contracts required Commission approval. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (727–729).

—Self-policing

A provision of a conference agreement authorizing levies of from $500 to $10,000 against an offending member as well as possible expulsion for breaches of the agreement, is an important provision, directly bearing upon a conference's vitality as an instrument whose continuance is in the public interest. The recent amendment to section 15 requiring the Commission to disapprove any agreement "on a finding of inadequate policing of the obligations under it" alone suffices to support the right of the Commission to be fully informed and continuously informed as to the concerted activities under a section 15 agreement. Pacific Coast European Conference, 27 (37, 38).

Inauguration and adoption of neutral body plan by members of a conference operating under an approved agreement amounts to an amendment or modification of the basic conference agreement, and must be approved under section 15 before it can lawfully be carried out. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conf. of Japan, 204 (210).

Where a conference agreement provided that a neutral body should be selected from "responsible accountants" not "employed by" any party to the agreement, an accounting firm regularly employed (on an independent contractor basis) by a member of the conference and its foreign correspondent or agent was clearly disqualified to act as a neutral body. The obvious purpose of the provision was to insure impartiality, and it would be inconsistent to construe the term "employed by" as applicable only to a master-servant situation, particularly since accountants are specifically named in the provision as persons who if appointed are to have no employment relationship with a conference member. The conference's attempt to interpret the provision as not applying to the foreign agent of the United States firm was in fact a modification or amendment of the provision and as such required agency approval before it could be lawfully effectuated. Id. (214).

Conference which appointed as a Neutral Body an accounting firm which was "employed by" a conference member, contrary to the neutral body provision of its agreement, was not required to amend the neutral body provision; it could appoint a Neutral Body which conformed to requirements of its existing agreement or it could modify its agreement (subject to approval) to permit use of the firm employed by a conference member or another international accounting firm, or adopt some other effective method of self-policing. Id. (215).

Commission ruling that a Neutral Body was not qualified to act as such was not intended to condemn the neutral body concept in general. Congress by its recent amendment to section 15 (P.L. 87–346) to require self-policing of conference agreements has indicated quite specifically that a proper self-policing system is not only desirable but necessary. Id. (215).

If it is the intent of a conference to have its neutral body or other self-policing system deal with past events, this intent should be specifically included in the agreement establishing the self-policing system when it is submitted for approval. Id. (216).

Investigations and findings made by a Neutral Body do not in any way preclude a separate hearing before the Commission nor are the findings of a Neutral Body binding upon the Commission. The functions and powers of the Commission remain the same and the mere fact that conference members have elected to discipline themselves does not and cannot bar or control appropriate proceedings before the Commission. The neutral body system does not deprive members of a conference of a fair hearing; does not involve delegation of the Commission's functions to the Neutral Body; and does not involve deprivation of any right to appeal in violation of the Shipping Act, the Hobbs Act, or the Administrative Procedure Act. Id. (216).

The Commission had jurisdiction even before the 1961 amendments to section 15, to approve neutral body agreements and to regulate their effectuation. Self-policing agreements are major amendments to section 15 conference agreements. The enforcement of conference agreements is of primary concern to the Commission and the effectuation of neutral body arrangements is part and parcel of that concern. Such an arrangement is a basic part of the section 15 agreement and not a severable provision thereof. Conference agreements are not private contracts to be interpreted as the parties please, but have significant public aspects. The Commission not only must be cognizant of them but must approve them before they can have any legal effect. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conf. of Japan, 257 (258, 259).

While section 15 requires self-policing modifications of agreements to be approved under that section as comprising part of the complete agreement of the parties, the Commission is not inclined when considering approval to specify the procedures by which the parties seek to insure that each will fulfill its obligations to the others. The prime concern is whether the agreement is unjustly discriminatory as between the carrier parties and whether it is reasonably probable that the agreement will insure adequate policing. Agreement No. 150–21, Trans-Pacific Freight Conference of Japan, 653 (658).

Self-policing provision of agreement will not be disapproved because the power vested in the neutral body is capable of abuse. The Commission must assume that the conference will live up to its obligation to apply the agreement so that it adequately and without discrimination polices conference obligations. Agreement No. 150–21, Trans-Pacific Freight Conference of Japan. Id. (658).

Proposed increase in the security deposit (from $15,000 to $25,000), required of conference members, was approved on a showing that it was not out of line with amounts required by other conferences; the deposit would not deter carriers from joining the conference; the increase would keep pace with the decrease in the buying power of the dollar since the time when the conference agreement was originally adopted; and the provision, which was intended to strengthen the self-policing program of the conference, was in keeping with the Congressional policy expressed in the 1961 amendment to section 15 (P.L. 87–346). Persian Gulf Outward Freight Conf.—Agreement 7700–6, 707 (711, 712).

Modification of conference agreement to provide for mandatory, rather than discretionary, assessment of damages for breach of the agreement would strengthen the self-policing element of the agreement and would diminish the chance of discriminatory treatment of members, and was, therefore, approved. Id. (712).

Modification of conference agreement to provide that secretary of the conferences report to the conference the findings of any investigation conducted under self-policing provisions is approved. The amendment will assist in accomplishing the end of strengthening the self-policing system. Id. (708).

Modification of conference agreement to make assessment of damages for breach mandatory rather than permissive, to include a sliding scale of liquidated damages for breaches not involving nonobservance of the conference tariff, and to provide for liquidated damages in a sum equal to four times the freight the offending member would have earned had the proper conference rate been charged, is approved. The sliding scale should discourage repeated violations and strengthen the self-policing system. The amount of and measure of damages for rate cutting are not out of line with those employed by other conferences. The mandatory provision strengthens the self-policing element of the agreement and diminishes the chance of discriminatory treatment of members. Id. (709, 712).

—Stability of rates

Agreement between U.S.-flag conference members and U.S.-flag nonconference carriers in the trade between U.S. Gulf ports and Mediterranean ports, under which the nonconference carriers agree to observe the rates of the conference on certain agricultural commodities, is not to be condemned merely because the more desirable solution to the rate cutting by the nonconference carriers on the commodities would have been full conference participation. Stability of rates is needed to assure continuity and regularity of service, which is in the public interest, the interest of the commerce of the United States and in the interests of both carriers and shippers. Agreement 8765—Gulf-Mediterranean Trade, 495 (499).

—Supervision of agreements

Section 15 of the Shipping Act does not confer upon steamship conferences and others subject thereto the right to conduct any of the concerted activities within its broad sweep, unless with the Commission's approval and under its continuing supervision and control. By the same token, it is clear that a conference and its members lines may not frustrate the Commission's right and its duty to be informed at all times as to the nature of their conference activities. Section 15 expressly confers on the Commission the power of disapproval "whether or not previously approved" and thus necessarily imposes a continuing duty upon the Commission to insure that parties to section 15 agreements are at all times complying with the Act and their approved agreement and that their operations are not detrimental to the commerce of the United States or contrary to the public interest. Pacific Coast European Conference, 27 (32–34).

The legislative history of section 15 makes plain that Congress granted an antitrust exemption only because it envisioned that the permitted activities would be subjected to constant and effective government control and regulation. The Alexander Report pointed out that Congress could either restore unrestricted competition or recognize anticompetitive agreements along lines which would eliminate the evils flowing therefrom. While admitting the advantages of allowing steamship agreements and conferences, the House Merchant Marine and

Fisheries Committee was not disposed to recognize them "unless the same are brought under some form of effective government supervision." By the enactment of P.L. 87–346, Congress has reasserted the original philosophy that exemptions from the antitrust laws must be accompanied by effective governmental supervision and control, and has provided new safeguards against the abuses which such activities make possible and has indicated that there is a need for even closer surveillance of the operations of conferences under their section 15 agreements. Id. (34, 35).

It is not sufficient under the language of section 15 that the Commission be apprised merely as to the terms of a conference agreement. It is essential also that the Commission know at all times the nature of the activities of the conference and its members, for otherwise it cannot determine whether the agreement is being complied with, and is not being carried out in a way that violates the Act, and is not detrimental to commerce, or incompatible with the public interest. Id. (35).

The requirements of section 15 for effective supervision and control are not satisfied for all time when an agreement is originally filed and approved, and immunity from Commission surveillance, as well as from the antitrust laws does not set in. Section 15 demands that the Commission constantly inspect and if necessary regulate the activities of persons subject thereto. It imposes the duty and authority of insuring that those who are permitted to engage in activities which would otherwise be unlawful, satisfy the statutory standards not only at the time they file for initial approval of their agreement but continuously thereafter. The section expressly does this by providing that the Commission shall "disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved" that the Commission finds to be contrary to the Act's provisions. Id. (35).

In conjunction with the grant of power to approve agreements that fall within the scope of section 15, Congress has imposed on the Commission the continuing responsibility of regulating and supervising action carrying out these agreements. It is vitally necessary that the Commission maintain a constant vigil over the operations of the parties under approved agreements to insure that their activities conform to the agreements as approved and warrant continued exemption from the antitrust laws. States Marine Lines, Inc., *v.* Trans-Pacific Freight Conference of Japan, 204 (210).

Where a neutral body plan as approved provided for an impartial individual or group independent of any conference member to serve as the Neutral Body, if the person selected was not actually neutral or impartial, there was a departure from that which the Board had approved. The agency was duty-bound to prevent such departure and any conference member was entitled to raise the same objection and could turn to the agency for relief. Whether or not a conference member protested or filed a complaint, section 22 empowered the ageucy to institute an investigation into the matter on its own motion. Id. (211, 212).

—Voting requirements

Analogies from the field of private contract law cannot be drawn to show that the majority voting requirements of a conference agreement are invalid, i.e., that a modification of the basic agreement to make changes in self-policing provisions could not be made without unanimous consent of the parties. An agreement providing for the organization of a conference to operate in our foreign commerce is necessarily an agreement which attempts to reconcile a number of divergent interests. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement. Agreement No. 150–21, Trans-Pacific Freight Conference of Japan, 653 (656).

The concept of majority rule is not uncommon in the ocean freight industry. A good many agreements on file provide for modification by majority rule. It is not unreasonable for a conference to make such a provision in its basic agreement, provided it is not applied so as to contravene the standards of section 15. There is nothing in the concept of majority rule as applied to proposed modifications to conferences' self-policing rules which renders it discriminatory as between carriers or shippers, detrimental to commerce, contrary to the public interest or otherwise contrary to section 15. A conference member is bound to the conference agreement, and so long as it chooses to remain a member it must conform to modifications which are regularly made and duly approved by the Commission. Id. (657).

Conferences' system of recording affirmative action on proposed modifications of agreement by indicating unanimous approval where, in fact, modification was not carried unanimously is misleading at best, and conferences should adopt a signature form to correct this situation. Id. (657).

ALASKA STATEHOOD ACT. See Jurisdiction.

ALEXANDER REPORT. See Agreements under Section 15.

ALLOWANCES. See Rate Making.

ARBITRATION. See Agreements Under Section 15.

AUTHORITY OF COMMISSION. See also Jurisdiction; Practice and Procedure.

Section 27, which gives the Commission subpoena power in complaint and violation proceedings, in no way impairs or relates to the Commission's power to demand information in other ways and for other purposes. The Commission has the right to require the submission of information simply because it wants to know whether the law is being complied with. The courts have upheld the power of the agency administering the Shipping Act to demand information on suspicion that the law is being violated or to assure itself that it is not, and have recognized the obligation to comply imposed on persons subject not only to section 15 but to the proscriptions embodied in the Act generally. Pacific Coast European Conference, 27 (36).

There is no distinction between the Commission's authority regarding breaches of a conference agreement and its authority regarding violations of the Shipping Act. If a conference departs from the approved rules under which it could lawfully operate, it is violating the Act, and if individual members do, it is more than likely that they too are violating the Act. Even if a member's conduct happens to involve only a breach of the agreement, this would not justify the conference's refusal to furnish the Commission information. It is for the Commission to decide in all cases whether a given course of conduct under a section 15 agreement is violative of the Act, detrimental to commerce, or contrary to the public interest. Id. (37).

An order to show cause why a conference and its members should not comply with requests for certain information made by the agency and its Office of Regulations, or in the alternative, why the conference agreement should not be disapproved, was expressly provided for by the agency's rules, fully specified the charges against the conference and alleged that the actions of the conference and its members had prevented the agency from carrying out its statutory duties, and was well within the powers vested in the agency by the Shipping Act. Id. (38).

Statutes of limitation in 18 USC § 3282 and 28 USC § 2462 relate to proceedings, criminal or otherwise, brought in court, and are no bar to the authority of the Commission to proceed with an investigation. Agreements of North Atlantic Westbound Freight Assn, 228 (237).

Trans-Pacific Freight Conference of Japan *v.* FMB and United States, 302 F. 2d 875, cited for the proposition that the Commission cannot declare anything "unlawful", involved the validity of an interim cease and desist order, which had been issued in an attempt to maintain the status quo pending the outcome of proceedings before the Commission. It did not involve any question of the Commission's authority to issue an order to show cause why a tariff rule should not be declared unlawful for failure to obtain Commission approval under section 15, in circumstances where it has been determined in an appropriate proceeding that a conference proposes to exceed the scope of its approved section 15 agreement. Pacific Coast European Conference Port Equalization Rule, 623 (627).

BERTHING SPACE. See Discrimination.

BROKERAGE.

With respect to the payment of brokerage, the freight forwarder law is permissive. Congress neither directed that brokerage be paid nor proscribed agreements among carriers not to pay it or to restrict it to less than 1¼%. Thus, it cannot be argued that such agreements, in their impact upon an individual member with contrary desires respecting brokerage, run counter to the statute. Practices and Agreements of Common Carriers Re Brokerage, 51 (55).

Basically P.L. 87–254 was designed to overcome the Maritime Board's regulations, which would have eliminated carrier payments of brokerage to freight forwarders in the export foreign commerce of the United States as being the source of much malpractice. Congress concluded that brokerage could be authorized if forwarder licensing and other safeguards were provided to take care of malpractices. It also found "most persuasive" testimony by carriers who were supporting the forwarders that the forwarders' services were in fact of value to them and they were willing and desired to continue to pay a reasonable fee therefor, if permitted to do so. Id. (55).

The interpretation forwarders seek to give the frieight forwarder law that carriers as a group cannot agree not to pay brokerage is mainifestly inconsistent with their concession that the language of the law permits an individual carrier to compensate a forwarder or not, and their admission that conferences may agree to pay brokerage, may agree to set an upper limit so long as it is at least 1¼% of the freight charge, and may agree to prohibit brokerage in the domestic offshore trades, although the law expressly applies to these trades. Id. (56).

Brokerage agreements among carriers regulate competition and are within the plain compass of section 15. Whether they should be disapproved, cancelled or modified, in accordance with the amendment made by P.L. 87–346, depends upon whether they are detrimental to the commerce of the United States. There is no occasion for determining what the "public interest" amendment may add to section 15. Throughout the long-standing brokerage controversy "detriment to the commerce" has been interpreted and applied in a manner to encompass the public interest. Id. (57).

In view of the Maritime Board's earlier findings in this proceeding that the forwarding industry makes a valuable contribution to foreign trade and that the industry's substantial revenue from brokerage is important, and in view of the fact that Congress thereafter provided its own remedy in the form of licensing, conditions precedent to payment, and increased regulatory authortiy for dealing with malpractices (which the Board had found and which heavily influenced its decision prohibiting brokerage and thereby upsetting prior holdings), any revision of the prior holdings must come in a future proceeding as the result of some new or compelling factors which can stand the test under the several requirements of section 15. Agreements between common carriers by water in the export foreign commerce which prohibit brokerage or limit the amount to less than 1¼% of freight charges, operate to the detriment of the commerce of the United Stats and are contrary to the public interest, in violation of section 15. Agreements respecting brokerage in the offshore trades are excluded from this ruling since conditions in those trades are materially different and brokerage is not normally paid. Id. (59, 60).

An investigation to determine whether certain U.S. Atlantic ports were being unduly preferred to other such ports, by reason of agreements or practices of foreign steamship lines in the inbound trade from the United Kingdom and Eire to regulate payments of commissions to forwarders abroad, was within the scope of the regulatory authority of the Maritime Board. The order of investigation was clearly limited to the practices of respondents as common carriers in the foreign commerce of the United States, as to which they are subject to the agency's jurisdiction. Congress in enacting the freight forwarder law (P.L. 87–254), designed to license and regulate the business activities of freight forwarders in the United States, and in re-enacting section 15 of the same session, did not intend to limit the scope of section 15 to agreements covering payments of brokerage solely in the outbound trades. The freight forwarder law has no bearing on the application of section 15 to an agreement between carriers to regulate the payment of commissions abroad in such a manner as to prefer shipments to one port to the disadvantage of another. Agreements of North Atlantic Westbound Freight Assn, 228 (236, 237).

Payment of excessive brokerage is a pernicious practice, inimical to the best interest of shipping in our foreign trade and oppressive to the shipper who must eventually bear the cost. The Commission will review the matter on an industry-wide scale. Grace Line, Inc. *v.* Skips A/S Viking Line, 432 (451).

BROKERS. See Brokerage.

CEASE AND DESIST ORDER.

Issuance of a cease and desist order was not required where respondent had stopped a discriminatory assessment of storage charges. International Trading Corp. of Virginia *v.* Fall River Line Pier, Inc., 219 (226).

COMMON CARRIERS.

—Who is common carrier

Where there is an obvious prearrangement that one will gather cargo, and another will actually carry it, the holding-out by the former that the cargo will move to its destination is attributable to the latter to the extent necessary to make the latter's operations pursuant to the arrangement common carrier operations. Thus, where two companies have established a service for all who care to ship general cargo in the Alaskan trade at tariff rates on file with the Commission; one (as technical shipper) solicits, secures and assembles the cargo belonging to the general public, and the other (ostensibly as a contract carrier) furnishes and tows the barges which carry the cargo from port to port; and each receives 50% of the charges made for carrying the cargo, the one who solicits the cargo is not an ordinary shipper but an intermediary agent through which the barge operator holds itself out to the general public as a common carrier. This conclusion is not weakened by the fact that common carrier classification does not have the same significance (results) under the Interstate Commerce Act and the

Shipping Acts, or that the ICC may have a more liberal attitude. Prior decisions of the U.S. Maritime Commission, to the extent contrary, are overruled. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (46, 47).

"Common carrier" is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers' burdens. Where the "holding out" is indirect (through an agent, acting technically as sole shipper under an arrangement with the carrier), this holding out will nevertheless be attributed to the carrier, and considered to bring it within the scope of the ancient phrase that a common carrier is a carrier which "holds itself out" as willing to carry for the public. Where the service is essentially the carriage of cargo for the general public, it is none the less common carriage because the carrier adopts a device to make it appear that vessels are serving one shipper, whereas they are actually serving many. *Id.* (48).

The fact that a carrier was required to make a special arrangement to secure the business of the sole shipper of sugar from Hawaii to Galveston did not convert the arrangement into one of contract carriage. While it was possible that in some instances a vessel would carry only sugar, it was equally possible under the tariff that others would carry general cargo. The tariff did not compel the carrier to exclude general cargo from vessels carrying the sugar. The carrier was faced with economical and practical problems necessitating the special arrangement. Pacific Coast/Hawaii and Atlantic-Gulf Hawaii (Rate Increases), 260 (279, 280).

Owner of power barge who chartered his vessel for use between Seattle and Alaska, operated it for the charterer under an informal agreement sometimes partaking of the nature of a joint venture, and did not conduct anything comparable to a recognized service, was not operating as a common carrier by water in the trade and was not required to file a tariff under section 2 of the Intercoastal Act. Investigation of Tariff Filing Practices of Carriers—U.S.-Alaska, 305 (306, 307).

Operator of tug and barge between Washington and Alaskan ports, who carried building materials, construction equipment, and used automobiles; who neither advertised nor solicited business; who utilized neither formal contracts of affreightment nor bills of lading; whose barge was unsuitable for carrying ordinary, dry cargo; who charged by the day and whose profits or losses depended on his estimates of the transportation time; and who operated on no fixed schedules or routes but would go at any time to any safe port in southeastern Alaska, was not operating as a common carrier by water in the trade and was not required to file tariffs under section 2 of the Intercoastal Act. Id. (307).

Operator of vessel between Seattle and certain ports in Alaska, carrying northbound any type of cargo; with northbound sailings dependent upon prior commitments from shippers for utilization of available cargo space on the return trip; with shipments covered by transportation agreements providing for hire of a stated amount of space for a specified sum of money and disclaimer by the operator of any responsibility for loss or damage to cargo; with no solicitation of cargo, advertisement of services or sailings, or sailings at regularly scheduled intervals; with shippers, nevertheless, knowing that on request the carrier would advise as to approximate sailing dates; with service provided at approximate monthly frequency; and with a weekly marine trade publication listing the carrier as sailing on a monthly schedule, is a common carrier in the trade and must file tariffs under section 2 of the Intercoastal Act. Id. (316–318).

It is not essential to common carrier status that the carrier haul or be willing to haul any type of cargo. A line may be a common carrier of certain commodities as long as it is willing to carry those commodities for any shipper. Id. (318).

Carrier operating between Seattle and ports in western Alaska would be a common carrier even it its sailings were considerably irregular. The carrier carried whatever cargo was offered northbound to the Alaska ports to be served on the voyage, and was assured on each voyage of cargo waiting in Alaska to be loaded for the return trip to Seattle. This is common carrier service. "One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, is a common carrier." Id. (319, 320).

A common carrier does not lose its status as such because it never advertises its services or solicits cargo, or publishes a sailing schedule, or has no regular routes or ports of call, or carries cargo only after it has initially secured a negotiated, written transportation agreement, or does not seek or assume an obligation to carry for others. Id. (320).

In view of other cargo carried by a carrier, it was of no significance on the question of common carrier, non-common carrier status, that its vessel was specially designed for carriage of frozen fish, and generally carried frozen fish and fishing industry supplies for a few fishing companies in Alaska. The carrier clearly was not a private or industrial carrier. Of even less importance was it that the carrier, operating under charter to one shipper, might make an occasional bona fide tramp sailing. It is not necessary to common carrier status for a carrier to have a freight agent, a particular place to load and unload cargo, or provide regular and complete terminal service. These are among the characteristics of liner, berth operators, but such operators are emphatically not the only common carriers. Id. (321).

A carrier may not avoid common carrier status by insisting on a transportation agreement with each shipper. All cargo carried for compensation moves on some form of transportation agreement, express or implied. Id. (321).

The fact that a carrier has not sought or willingly assumed common carrier status and obligations is unimportant, since such status and obligations are results of the carrier's operations, not its desires. Id. (321).

Carriage of cargo by an incorporated association for its membership, with the only restriction on membership that members shall be licensed to do business in Alaska and pay a nominal membership fee, is the carriage of cargo for the general public. A "private" as distinguished from a "common" carrier is essentially a carrier which carries for itself, as distinguished from a carrier which carries for others. Id. (326, 327).

The amendment of 46 USC § 404 by Public Law 85–739, which exempts vessels under 150 gross tons owned by cooperative or non-profit associations transporting cargo between southeastern Alaska and Seattle from common carrier status, specifically confines the exemption to the provisions of such section. It has no effect upon section 2 of the Intercoastal Act. The fact that associations are found to be common carriers under the Intercoastal Act does not deprive them of the exemption granted by Public Law 85–739. The exemption is not conditioned on non-common carrier status. Even if common carrier status would deprive them of the exemption, this fact would not determine that they are not common carriers. Id. (327–329).

Membership in an incorporated association, a carrier, which carries with it the right to ship, and pro-rata liability with respect to shipments by other members, is a reasonable condition of carriage, and so long as it is required of all shippers alike, will certainly not detract from common carrier status. Id. (329–330).

Failure of Commission personnel to advise that an organization which has furnished full operating details is a common carrier, and required to file tariffs, in no way militates against Commission decision that the organization is a common carrier, and required to file. Neither would a direct statement by the staff that the organization is not a common carrier. However, an inquiry by a carrier as to its status is not evidence that it is a common carrier and proof of such inquiry is not admissible for that purpose. Id. (330).

—Contract carrier

Carriage of filler cargo by means of such devices as purchasing the cargo from the shipper in Seattle and reselling to the shipper in Alaska at a "profit" calculated to yield the carrier the amount it would have received as payment for carrying the cargo, or multiple-towing of barges, or carriage for principal shippers under contract (even when filler cargo was carried) was contract carriage. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (48).

—Dual carriers

Agreement between carriers is not unlawful merely because of the possibility that a mixture of common and contract cargoes may be carried on one vessel, or barge tow, on the same voyage. The better approach is that such a mixture may not be used to evade regulation and must not result in a carrier's avoidance of its common carrier obligations with respect to the fair, nonpreferential and nondiscriminatory treatment of shippers. Agreement 8492 Between T. F. Kollmar, Inc. and Wagner Tug Boat Co., 511 (519).

Commission decision in Docket 976 [7 FMC 511] is a precedent for holding that tendem tow of Foss barge containing contract cargo with Northland barge containing common carrier cargo solicited by Northland, a non-vessel owning common carrier, is not illegal per se. Moreover, Foss' practice of hauling contract cargo southbound rather than returning empty after its equipment is employed to transport common carrier cargo north does not constitute an unlawful dual capacity operation. Puget Sound Tug and Barge Co. *v.* Foss Launch & Tug Co., 611 (616).

—Duty of common carrier

To rely upon structural differences in vessels in the banana trade as an excuse to avoid common carrier obligations would go far toward eliminating such obligations. Nor is a refusal to carry goods for many justified by fear that they cannot cooperate in using available space. It is the common carrier's duty to offer the space and give the shippers the chance to devise cooperative means of using it. If multiple utilization proves impossible, shippers will recognize this and accept the fact that the space can only be utilized on an exclusive basis. Consolo *v.* Flota Mercante Grancolombiana, S. A., 635 (639).

—Engaging in other activities

The Shipping Act does not preclude a common carrier by water from performing services other than "transportation by water . . . on the high seas," but contemplates and authorizes the performance by such carrier of so-called incidental services, including pickup and delivery service. The definition of "other persons" in section 1 of the Act was not intended to preclude common carriers from engaging in the other specified activities but simply to bring within the ambit of the Act those persons who do engage therein. Matson Navigation Co.—Container Freight Tariffs, 480 (490).

CONTRACT RATES. See Dual Rates.

DAMAGES. See Reparations.

DEMURRAGE. See also Preference or Prejudice.

Position that a terminal operator may not increase its demurrage charges, regardless of the amount of notice given, as to shipments consigned to or already on its facilities is untenable. It would be unreasonable to hold that a terminal must continue in effect the rates and rules applicable when a cargo first landed, no matter how long that cargo might be left on the facility. This would mean that a terminal could only change its rates when its facility had no cargo at all, or that a terminal could charge different rates for identical services depending on the date the cargo happened to arrive. A fortiori, it would be unreasonable to attempt to apply such a principle to cargoes merely routed to the facility but which have not arrived at the time of a rate change. Selden & Co. *v.* Galveston Wharves, 679 (681, 682).

Complainant could not escape liability for payment of increased demurrage charges for cargo left on respondent's terminal facility because of an alleged ambiguity in respondent's tariffs and invoices. Invoices referred to "storage" charges and a local tariff item provided for removal of cargo to storage without liability of the terminal and subject to a reasonable charge for storage, if the cargo was not removed by the owner within a reasonable time. The tariff item was to be construed as giving the terminal the option to remove goods to storage and as fixing liability, and the local tariff contained no charges for storage or pier demurrage. The terminal's tariff circular set forth the charges for cargo left on the pier after expiration of free time. Complainant could have removed its goods when it received notice that the charges, whatever they might have been termed on the invoices, were increased. Id. (682).

DEPARTMENT OF AGRICULTURE. See Agreements under Section 15; Discrimination.

DETRIMENT TO COMMERCE. See Agreements under Section 15; Brokerage; Rates; Stevedoring; Travel Agents.

DEVICES TO DEFEAT APPLICABLE RATES.

Where an officer of the shipper knew of an inspection report which showed that the rate applicable on a shipment of cotton was the rate originally charged by the carrier, and, nevertheless, the shipper continued to press for and eventually secured a lower rate, i.e., transportation "at less than the rates or charges that would otherwise be applicable", the shipper's successful campaign to compel the carrier to refund part of the original freight payment was conducted "knowingly and willfully", within the meaning of the first paragraph of section 16 of the Shipping Act. States Marine Lines—Hohenberg Brothers—Violation of Section 16, 1 (7).

A demand on a carrier for a lower rate unsupported by factual proof (or even attempted proof) that the cargo is entitled to carriage at the lower rate constitutes a device which is unjust, unfair, and forbidden by the first paragraph of section 16 of the Shipping Act. Id. (7).

Where the carrier charged and collected the proper tariff rate on cotton shipped abroad, the applicability of the rate having been established by weighing of the cotton by a Bureau engaged to assist in enforcing tariff rates and charges of the conference of which the carrier was a member, and, thereafter, the carrier yielded to requests of the shipper and revised its charges to apply rates which it knew were not applicable by revising the correct billing as shown on its bill of lading through the substitution of an incorrect billing, such a "corrected" billing constituted false billing within the meaning of the second paragraph of section 16 of the Shipping Act. The agreement to make a refund was an unfair or unjust means of obtaining less than the regular rates established and enforced by the carrier. Id. (9, 10).

By a preponderance of credible evidence a shipper was shown to have knowingly and willfully, directly, by an unjust or unfair means, obtained transportation by water of cotton, at less than the rates or charges which would otherwise be applicable, in violation of section 16 of the Shipping Act. Id. (13).

By a preponderance of credible evidence a common carrier by water was shown to have directly and, in conjunction with another person, knowingly to have allowed a person to obtain transportation of cotton at less than the regular rates or charges then established and enforced by the carrier by means of false billing and by unjust or unfair device or means, in violation of section 16 of the Shipping Act. Id. (13).

Pro rata return of payments for carrying cargo, in order to avoid profit-making, will not be considered a violation of the Shipping Act, 1916. Tariff Filing Practices of Carriers—United States and Alaska, 305 (330).

Prior requirement of filing rates in the export trade within 30 days after they became effective does not mean that a carrier may publish and file a rate, and then charge a different rate at will and without ever filing such different rate. It is not consistent for a carrier to publish and maintain one rate ad infinitum and yet contend that its regular rate was something else. Under such theory which ignores the rate actually published and any need to perfect changes therein, the principle of a "regular" rate would vanish and a violation of section 16 could seldom be shown. United States Lines—Gondrand Bros.—Section 16 Violation, 464 (469).

The command of section 16 Second is absolute that a carrier shall not by false means or by other unfair or unjust means directly or indirectly allow a person to obtain transportation at less than the regular rate. It is not necessary to show discrimination as between shippers of the commodity involved. Id. (470).

The fact that a carrier practiced no deception upon the person receiving a rebate did not mean that the arrangement was "above board" so that there was no violation of section 16 Second. The fact that a rebate was being received was not known even to all of the carrier's officials who should have been aware of it, and was not known to or ascertainable by the shipping public. The carrier violated section 16 Second by using an "unjust or unfair device or means." Id. (470, 471).

The words "any person" as used in section 16 Second are fully as broad as the words "shipper, consignor, consignee, forwarder, broker, or other person" used in the first paragraph of the section. While the first paragraph was added to the section some 20 years after section 16 Second was enacted, section 16 Second uses the broad and unqualified language "any person", and it is clear that in enacting the first paragraph Congress sought parity of penalities for allowing and obtaining unlawful rates. Id. (471, 472).

While an arrangement under which a carrier charged and collected the conference rate on a shipment of logs and later refunded to the forwarder and agent of the consignee an amount sufficient to adjust the freight charges to reflect lower non-conference rates, might be described as "false billing" in view of the submission and payment in the first instance of bills of lading and freight bills that both parties knew did not reflect the rates ultimately charged, the arrangement unquestionably constituted an unjust or unfair device or means prohibited by section 16. Id. (472).

Repayment of a portion of the sums received from a carrier as a rebate does not cure the illegality and has no bearing on that matter. Id. (472).

DISCONTINUANCE OF SERVICE. See also Embargoes; Preference and Prejudice.

The Commission has no power to require that common carrier service be inaugurated, and its authority under section 16 First relative to discontinuance of an established service is at best restricted. The Commission lacks power to prevent indefinitely a common carrier by water from abandoning service. There is a marked difference between the Commission's authority over discontinuance of service by water carriers, and the authority of agencies, such as the ICC, over carriers who hold certificates of public convenience and necessity and must secure permission to abandon service. San Diego Harbor Comm. *v.* Matson Navigation Co., 394 (400, 401).

DISCRIMINATION. See also Agreements under Section 15; Reparation; Preference and Prejudice; Surcharges; Volume Rates.

It is essential to establish an existing and effective competitive relationship in cases of port discrimination. The need for such a relationship is obvious, for the evil which Congress sought to correct when it included localities and ports in the prohibitions of sections 16 and 17 was the unnatural diversion of cargo from one port to another by common carriers through the medium of unjustly discriminatory rates or charges. Thus, to the extent that cargo is diverted from one port to another, the two ports occnpy a competitive relationship with respect to the diverted cargo. West Indies Fruit Co. *v.* Flota Mercante Grancolombiana, S.A., 66 (72).

Where all of a carrier's space suitable for the carriage of bananas to both Galveston and Baltimore was contracted for pursuant to two-year forward-booking contracts, so that admittedly there was no diversion of cargo from Galveston to Baltimore, there is no existing and effective competitive relationship between the ports, and hence no discrimination between ports in violation of sections 16 and 17. An allegation that diversion from Galveston was merely delayed and would take place in the future was not supported by any evidence that such diversion, should it occur, would be to Baltimore. Id. (73).

One instance of refusal by a pier operator to allocate berthing space on the ground that another vessel with a prior reservation was due to arrive, followed by allocation of the space requested when the operator was confronted by complainant with information that no vessel was due to arrive on or near the date involved, did not constitute proof of undue or unjust discrimination or undue disadvantage. International Trading Corp. of Virginia *v.* Fall River Line Pier, Inc., 219 (222, 225).

Where a pier operator allocated a maximum of 25.000 square feet of storage space to complainant but permitted complainant's competitor to use twice that much space, and the space allocated to complainant was adequate for its needs, although in one instance complainant, after the pier operator objected, was allowed to unload a cargo requiring 30,000 square feet, there was no showing of undue or unjust discriminaton or undue disadvantage. Id. (222, 223, 225).

Practice of pier operator in billing complainant and a subsidiary corporation for storage charges assessed under rates and free time allowances different from rates charged and allowances given to complainant's competitor, was unjustly discriminatory. Id. (225, 226).

The fact that the sole shipper of sugar from Hawaii to Galveston was the only shipper which could qualify under a sugar freighting agreement did not mean that the agreement was an unjustly discriminatory special contract. A non-existent shipper cannot be discriminated against and there was no foreseeable prospect of a change in the situation. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (280).

Testimony failed to show port discrimination in violation of the Act. In order to justify conclusions of port discrimination, it must be found that the preferred port is actually competitive with the complaining port, that the discrimination complained of is the proximate cause of injury to the complaining port, and that the discrimination is undue or unjust. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (364).

It is contended that the agreement, by eliminating the possibility of rate competition on specified commodities while nonconference competition exists as to other commodities, discriminates against Agriculture vis-a-vis shippers of other commodities. This contention, even if valid, overlooks the fact that Agriculture has a number of alternatives if it decides these conference rates are too high. It has the legal right under the cargo preference laws to use foreign-flag vessels in any case up to 50 percent of the cargo, and if no U.S.-flag vessels are available at fair and reasonable rates it may use foreign-flag vessels for all of the cargo. Or it may, as it has done in the past, ship via U.S.-flag tramp vessels. These choices, in addition to Agriculture's ability to ship over alternative routes, are sufficient to insure that the rates on the commodities in question are kept reasonable.

While Agriculture is the predominant shipper, it is not the sole shipper of certain commodities as to which carriers agreed to observe conference rates, and the agreement applies with equal effect and without discrimination to all shippers of such commodities. There can be no unjust discrimination against a shipper under the Shipping Act unless another similarly situated shipper with whom the complaining shipper competes is preferred. The fact that shippers of other than the agreement commodities are in the same position before and after the agreement cannot be said to be a preference in favor of those shippers. For the same reasons the agreement does not cause undue or unreasonable prejudice or disadvantage to Agriculture under section 17 of the Act because "fixed noncompetitive" rates on the agreement commodities prefer shippers of other commodities on which there are "variable competitive" rates. If actual unjust discrimination or unreasonable prejudice or disadvantage results in the future, the Act provides means for remedying the situation including the power to modify or withdraw approval. Id. (500).

Where a carrier charged and collected different rates from similarly situated shippers on green coffee from French Somaliland to New York for the identical transportation service, it violated section 16 (First) with respect to undue preference and prejudice, and section 17 with respect to unjust discrimination. Hellenic Lines—Sections 16 and 17 Violations, 673 (674, 675).

A carrier is bound by the acts of its agent who, having authority to quote rates, booked cargo at different rates to users of the carrier's services identically situated. The carrier was not on trial for penalties, nor "charged" with a misdemeanor, and it cannot escape responsibility by contending that intent is a prerequisite to a finding of violations of sections 16 (First) and 17. The offense is committed by the mere doing of the act, and the queston of intent is not involved. As to the carrier's denial of any actual fault, it knew that an intensely competitive situation or rate war existed, and it failed to take precautionary steps in granting authority to its agent to quote whatever rates would meet the competition. Id. (675, 676).

An agreement for the use of a public terminal facility at a rental which deviates from the terminal's regular tariff provisions, may run afoul of the Shipping Act's proscriptions and must be scrutinized for any illegal discrimination or prejudice that may result. Such an agreement, however, is not unlawful or unreasonable merely because it does not follow the terminal's tariff charges. Agreement 8905—Port of Seattle-Alaska S.S. Co., 792 (800).

Where, inter alia, there was no showing that cargo had been or would be diverted from a carrier to another carrier which was the lessee of terminal facilities under an agreement providing for a rental formula at less than full tariff charges, and the objecting carrier had not been refused a similar lease since the lessor modified its previous 100% policy, no unlawful discrimination or prejudice was shown. Id. (801).

Where respondent misquoted the contract rate to a shipper, not a party to a dual rate contract, and such rate was relied on by complainant consignee, also not a party to a dual rate contract, respondent did not violate section 17 in thereafter charging and collecting the non-contract rate. There was no discrimination as between shippers, since the shipper was afforded an opportunity to execute a conference contract. There was no discrimination as between consignees, since there was no evidence that respondent offered, or did not offer, a contract to complainant's competitor or did not accord complainant any other opportunity it accorded the competitor. As to a possible violation of section 14b which provides that dual rate contracts must be available to all shippers and consignees on equal terms and conditions, use by Congress of the term "available" did not require respondent to affirmatively offer complainant an opportunity to execute a dual rate contract as a condition precedent to charging the non-contract rate. Aichmann & Huber *v.* Bloomfield Steamship Co., 811 (813).

DUAL COMMON AND CONTRACT CARRIERS. See Common Carriers.

DUAL RATES. See also Discrimination.

Use of two rates on sugar from Hawaii to Galveston did not constitute a dual rate system. The carrier indicated its willingness to cancel the higher rate and the Commission would assume that it will do so. Therefore, the question of the existence of a dual rate system need not be considered. However, there was nothing in the tariff or in the sugar freighting agreement which required a shipper to ship all or any fixed portion of his sugar during the period of the agreement. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (280, 281).

Article of agreement which undertakes without qualification to bind nonconference lines to charge conference rates on certain commodities covered by the agreement must be clarified, in view of the fact that the commodities are covered by the conference's dual rate system and the nonconference lines cannot use such a system with the Commission's approval. Since the parties apparently intended that the nonconference lines adhere to one set of rates, the rates given by the conference to contract shippers, the agreement will be approved with a modification making clear that the rates quoted in the tariffs of the nonconference lines for agreement commodities are single rates and not an extension or application of the conference's dual rate system. Agreement 8765 Between U.S.-Flag Carriers in the Gulf/Mediterranean Trade, 495 (501).

Approval in 1948 of conference agreement providing for institution of dual rate system was not enough under section 15 to validate the institution of an actual dual rate scheme, nor the shipper's contract adopted as part thereof. Ever since the 1954 Isbrandtsen court decision, approval of the system and of the contract itself has been required. The 1959 Anglo-Canadian court decision was merely a restatement of the law and not a first time holding that particular dual rate contracts required Commission approval. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (727–729).

Permission granted to Trans-Pacific Freight Conference (Hong Kong) to extend the scope of its dual rate system to include as destination ports the Pacific Coast ports in California, Oregon, and Washington, holding in abeyance request to include ports in Hawaii, Canada and Alaska. Trans-Pacific Freight Conference (Hong Kong)—Dual Rate Contract, 784.

EMBARGOES.

Financial loss generally is not justification for the imposition of an embargo which is an emergency measure to be resorted to only where there is congestion of traffic, or when it is impossible to transport cargo offered because of physical limitations of the carrier. In the absence of a showing of emergency an off-shore carrier must comply with the filing and time requirements of section 2 of the Intercoastal Act in order to discontinue any part or all of its common carrier service. Carrier was required to withdraw and cancel "embargoes" and substitute therefor new schedules filed pursuant to section 2. A. H. Bull Steamship Co., 133 (135, 136).

The conditions that warrant an embargo are limited and must constitute an impossibility to transport. Financial loss does not justify imposition of an embargo. An embargo notice which stated that future shipments would not be accepted because of the carrier's failure to succeed in establishing minimum charges was illegal. In order to discontinue service the carrier must withdraw and cancel its notice and file with the Commission, pursuant to section 2 of the Intercoastal Act, new tariff schedules which must be filed at least thirty days prior to the effective date of discontinuance of service. Sea-Land Service, Inc.—Discontinuance of Jacksonville/Puerto Rico Service, 646 (648).

EVIDENCE. See also Agreements under Section 15; Devices to Defeat Applicable Rates; Practice and Procedure.

A report of the Cargo Inspection Division of the Pacific Cargo Inspection Bureau as to the density of bales of cotton involved, affecting the applicability of a tariff rate, was entitled to probative force. No objection was made to its receipt in evidence, its accuracy was never effectively challenged, its authenticity was corroborated by the conduct of the parties and there was no valid evidence to counteract its force. Dock receipts showing a different density were not conclusive in the absence of any showing that the information therein was based on inspection and measurement of bales. Measurement by longshoremen does not impeach the accuracy of measurements in the absence of proof that longshoremen are incapable of taking accurate measurements. States Marine Lines—Hohenberg Brothers—Violation of Section 16, 1 (10–12).

The technical evidentiary requirements, sometimes called the common law exclusionary rules, do not apply in proceedings before the Commission. The efficient performance of the Commission's regulatory functions demands that the Commission find the truth as expeditiously as possible. Strict evidentiary rules are not conducive to expedition if they are made the vehicle for innumerable objections which result in much delay and confusion. If upon consideration of the whole record it is found that some of the evidence admitted is not substantial and should be disregarded in formulating the proposed agency action, that can readily be done. The harm that may flow from ignoring evidentiary niceties and formalities is small in comparison with that occasioned by needless squabbles over strict evidentiary principles. Unapproved Section 15 Agreements—South African Trade, 159 (167, 168).

Neither the Administrative Procedure Act nor the Commission's Rules exclude hearsay evidence and the hearsay rule has been expressly held inapplicable in administrative proceedings. The weight to be accorded hearsay should not be confused with its admissibility. If competent under the criteria applicable in an administrative proceeding, the statement is receivable in evidence and may be used to support agency action if there is at least some other supporting proof in the record of a direct nature. Id. (169).

Testimony does not become sacrosanct when uncontradicted nor is self-serving testimony automatically to be discredited. These are factors to be considered in determining the validity and probative value of the testimony and the inferences that may properly be drawn therefrom in light of all the evidence. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (302).

EXCEPTIONS.

A "statement of facts" submitted as an exception to the Examiner's findings, which did not specify the findings excepted to, or the findings which the Examiner should have made, does not comply with Rule 13(h) which requires that exceptions "indicate with particularity alleged errors" in the initial decision. United States Lines and Gondrand Brothers—Violation of Section 16, 464 (468).

EXCLUSIVE PATRONAGE CONTRACTS. See Dual Rates.

FAIR RETURN. See Rate Making.

FALSE BILLING. See Devices to Defeat Applicable Rates.

FIGHTING SHIP.

Carriers which considered taking measures against another carrier, such as "blanketing" its sailings and which might have made threats to do so, in retaliation for the carrier's giving them a "hard time" by undercutting their rates and by refusing to join in an approved agreement unless given rate concessions, did not violate section 14, Second of the Shipping Act. Unapproved Section 15 Agreements—South African Trade, 159 (193).

Due regard to the intention of Congress makes the Commission hold that operating fighting ships on one hand, and cutting rates for cargo carried on vessels regularly employed on the other, are two different methods of competitive operation. The Alexander Committee's recommendation, which Congress followed in enacting section 14 Second, was intended to and does prohibit putting in steamers to fight the competition, but was not intended to and does not prohibit the cutting of rates on regular boats, even to an unremunerative level. Respondent did not increase sailings, change sailing dates, or in any way change its normal operating pattern. Skips A/S Viking Line *v.* Grace Line, Inc., 432 (449, 450).

FINDINGS IN FORMER CASES. See Brokerage; Common Carriers; Rate Making; Rates, Filing of; Reparation.

FORWARD BOOKING. See Discrimination.

FORWARDERS AND FORWARDING. See Brokerage.

FREIGHT FORWARDERS. See Brokerage.

GENERAL ORDER 83. See Agreements Under Section 15.

HEARINGS. See Practice and Procedure.

HOBBS ACT. See Agreements Under Section 15.

INITIAL OR RECOMMENDED DECISIONS. See Practice and Procedure.

INTERCOASTAL SHIPPING ACT, 1933. See Common Carriers; Embargoes; Jurisdiction; Rate Making; Rates, Filing of; Reparation; Terminal Areas.

INTERSTATE COMMERCE ACT. See Common Carriers; Discontinuance of Service; Jurisdiction; Rates, Filing of; Single Factor Rates.

JURISDICTION.

Section 303(e)(3) of the Interstate Commerce Act which provides that any common carrier by motor vehicle which was also engaged in operations between the United States and Alaska as a common carrier by water subject to regulation by the Commission under the Shipping Act of 1916 and the Intercoastal Shipping Act of 1933, prior to January 3, 1959, and has so operated since that time, shall as to such operations, remain subject to the jurisdiction of the Maritime Commission, does not change a non-vessel-owning common carrier in the Alaskan trade to a forwarder subject to ICC jurisdiction. The legislative history of the section together with the firmly-fixed Congressional policy evidenced by section 57 of the Alaska Statehood Act are conclusive as to the jurisdiction of the Maritime Commission. Puget Sound Tug & Barge Co. *v.* Foss Launch & Tug Co., 43 (49, 50).

A grain elevator carrying on the business of furnishing terminal facilities in connection with common carriers by water is a person subject to regulation by the Maritime Commission under the 1916 Act, although in its grain storage functions it can be regulated by the Secretary of Agriculture under the United States Warehouse Act. California Stevedore & Ballast Co. *v.* Stockton Port District, 75 (81).

Agreement between two carriers, operators on essential United States foreign trade routes, which agreement would result in the transfer of the liner fleet and the entire business of one carrier to the other, with the former agreeing not to compete in the services transferred without consent of the latter, is subject to the Commission's jurisdiction, must be filed with the Commission, may not be carried out until approved, may be approved by the Commission with modifications if required, and may be disapproved if found to operate to the detriment of commerce of the United States or contrary to the public interest. Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., Isbrandtsen Co., Inc., and American Export Lines, Inc., 125 (131).

Where a Neutral Body assessed fines against a conference member solely because it refused to grant the Neutral Body access to its records, and the member challenged the qualifications of the Neutral Body to act as a neutral body, thus raising as a principal issue the question of whether the conference had carried out its neutral body system in conformity with the agreement which the agency had approved, the Commission's jurisdiction over the issues was not defeated because the controversy had its inception in the Neutral Body's efforts to investigate alleged malpractices in a foreign-to-foreign trade. The conference agreement itself covered foreign-to-foreign trade and the United States commerce (which predominated in the trade) and the Neutral Body was set up to function in exactly the same manner in both trades. The agreement and its amendments (of which the neutral body system was one) therefore required the Agency's approval and continuing supervision. Having failed to establish a separate conference for the foreign-to-foreign trade, the members cannot persuasively or validly contend that the agreement must be treated as if it were really two agreements. States Marine Lines, Inc. *v.* Trans-Pacific Freight Conf. of Japan, 204 (212, 213).

A pier operator which held itself out as a modern terminal capable of servicing any type of ocean common carrier, which made no effort to restrict its services to contract carriers, and at whose pier some general cargo was discharged over a three year period is an "other person" subject to the Shipping Act. International Trading Corp. of Virginia *v.* Falls River Line Pier, Inc., 219 (225).

The second paragraph of section 17 referring to "other persons subject to this act," applies to domestic commerce insofar as terminal operators are concerned. J. M. Altieri *v.* Puerto Rico Ports Authority, 416 (418).

Maritime Commission finding that single factor rates of an ocean carrier, which include pickup and delivery service performed by motor carriers as agents, are valid, does not remove the motor carrier from ICC jurisdiction, and does not mean that the Maritime Commission is attempting to exercise concurrent jurisdiction over the motor carriers contrary to section 33 of the Shipping Act. The pickup and delivery service is subject to regulation by the Maritime Commission as a service authorized by the Shipping Act offered by a common carrier subject to that Act. The motor carrier remains subject to ICC regulation. Matson Navigation Co.—Container Freight Tariffs, 480 (491).

An investigation of possible violations of the Shipping Act is a regulatory and administrative proceeding. The Act is not a criminal statute. Provisions of the Act giving the Government the right to seek monetary penalties in appropriate cases does not transform the Act into a criminal or penal statute. The function of adjudicating such penalties is confided to the courts. The Commission is empowered solely to regulate and its jurisdiction and functions are purely regulatory and administrative. Hellenic Lines—Sections 16 and 17 Violations, 673 (675).

Arbitration clause in Shipper's Rate Agreement cannot oust the Commission of jurisdiction to hear and determine complaints of violations of the Shipping Act. In this respect the decision of the District of Columbia Circuit in Swift & Co. *v.* FMC is controlling. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (730).

The Commission has jurisdiction over the level of travel agents' commissions set pursuant to conference agreements. The Commission does not claim jurisdiction to set the specific level of compensation, nor may it rule on the reasonableness of commissions fixed by individual carriers operating in United States foreign commerce. The jurisdiction involved is that which directs the Commission to disapprove, cancel or modify an agreement when the activities of the parties thereunder are incompatible with any of the section 15 standards. The fact that commissions are paid to persons who may not be subject to the Act is beside the point, since the agreement regarding commission levels is between common carriers by water all of whom are subject to the Act. Investigation of Passenger Steamship Conferences Regarding Travel Agents, 737 (754, 755).

OTHER PERSONS. See Common Carriers; Jurisdiction.

OVERCHARGES. See Reparation.

PASSENGER STEAMSHIP CONFERENCES. See Travel Agents.

PICKUP AND DELIVERY SERVICE. See Rates, Filing Of; Terminal Areas.

POOLING AGREEMENTS. See Agreements Under Section 15.

PORT EQUALIZATION.

Provision in a conference agreement authorizing regulation of competition by the establishment of uniform rates for the transportation of cargo, does not authorize institution of a port equalization rule under which the conference members absorb part of a shipper's inland freight expense equal to the difference between the cost he would incur in delivering the shipment at the loading port nearest the shipment's point of origin and the cost in delivering at a more distant port. Such a plan is not conventional or routine rate making among carriers. It is a new arrangement for the regulation and control of competition. Port equalization raises questions of possible unfairness, unjust discrimination, and deteriment to commerce, all matters included in the standards for adjudging the approvability of agreements under section 15 and may bring into play the requirements of sections 16 and 17. Pacific Coast European Conference Port Equalization Rule, 623 (630).

Provisions of P.L. 87–346 added to section 15, authorizing a conference to effectuate, without prior Commission approval, "tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof," specifically bars effectuation of a port equalization plan in the absence of section 15 approval. Though worded as an "exception" to the approval requirements of section 15, the quoted lanuguage was intended by Congress, as shown by legislative history, to limit conference authority, absent additional approval, strictly to the ratemaking activity therein provided for. Id. (631–632).

PORTS. See Discrimination; Port Equalization; Preference and Prejudice.

PRACTICE AND PROCEDURE. See also Evidence.

—In general

The Commission will not hold (on motion of an opponent of a rate decrease, supported by Hearing Counsel and unopposed by the proponents of the rate) that a suspended but presently effective rate for the carriage of zinc from the United States to Puerto Rico is unjust and unreasonable when the record made was wholly unsatisfactory. To enter an order under such circumstances would be detrimental to the public interest and contravene sound regulatory principles. While the failure of the proponents of the rate decrease to sustain their burden of proof would normally result in cancellation of the rate and while the proponents were unconcerned about the consequences, the Commission is very much concerned with the merits of the matter and not with procedural technicalities. Considering the special dependence of Puerto Rico (and Alaska and Hawaii) on ocean shipping, coupled with the continuing regulatory responsibility placed upon the Commission by Congress, it is basic that just and reasonable rates and practices by carriers serving their ports must be assured to the full extent legally possible. Therefore, the matter must be remanded to the Examiner for further hearing, even though this will give proponents of the rate a second chance to meet their burden of proof. Rates and Practices in Atlantic Gulf/Puerto Rico Trade, 141 (142–148).

—Burden of proof

Disapproval of agreement on the basis that proponents of the agreement had the burden under Rule 10(o) of proving that it was not violative of any of the statutory provisions specified in the order of the Commission instituting the investigation, and that proponents had failed to meet the burden of proving that the agreement was lawful, was an oversimplification of the problem, and a misconstruction of Rule 10(o) as applied to the proceeding. Since there was ample evidence on which to base a decision on the merits, the case did not turn on, and it was unnecessary to discuss, questions involving burden of proof. Alcoa Steamship Co., Inc. *v.* CAVN, 345 (358).

Under section 7(c) of the Administrative Procedure Act and Rule 10(o) of the Commission's Rules, the burden of proving that a rate is unjust and unreasonable, is on complainant. Alaska Livestock & Trading Co., Inc., *v.* Aleutian Marine Transport Co., Inc., 387 (391).

—Complaints

Where the extent of injury suffered by complainant could not be determined because of the confusion in the record concerning the relationship of complainant and its alleged wholly-owned subsidiary (which should have been allowed to become a party complainant), the proceeding was remanded to the Examiner to authorize an amendment to the complaint to bring in the subsidiary and to determine the amount of reparation due. International Trading Corp. of Virginia *v.* Falls River Line Pier, Inc., 219 (225, 226).

To determine in complaint proceeding whether respondent, a forwarder in connection with a common carrier by water, was a common carrier by water subject to section 18 would extend the proceeding beyond the scope of complainant's allegations. Assuming that respondent had been required, but failed, to file a tariff as a common carrier by water complainant failed to prove he was damaged thereby or entitled to reparation. Birnbach *v.* La Flor De Mayo Express Co., 716 (719).

—Discovery and production of documents.

The Commission's Rule 12(k), relating to discovery and production of documents, is a valid exercise of authority under section 204(b) of the 1936 Act. The explicit grant by Congress of subpoena power to the Commission does not make needlessly duplicative any device for the discovery and production of documents, so that such device cannot be deemed "necessary" within the meaning of section 204(b) which authorizes the Commission "to adopt all necessary rules and regulations to carry out [its] powers, duties and functions". To attribute to Congress an intent to limit the Commission to the issuance of subpoenas in every investigation in which the Commission sought information would render nugatory the power granted in section 204(b). Moreover, Congress intended that "necessary" be given the meaning of convenient, useful, appropriate, suitable, proper or conducive to the end sought. Agreements, Etc. of North Atlantic Westbound Freight Assn., 228 (230, 231).

The power of the Commission to direct the production of documents in the manner prescribed by its Rule 12(k) is impliedly contained in the 1916 Act. Section 22 of that Act authorizes the Commission to investigate any alleged violation of the Act "in such manner and by such means, and make such order as it deems proper". The Rule is consistent with the regulatory system embodied in the Act. Id. (231, 232).

Failure of Congress, in enacting Public Law 87–346, to include (1) a proposed amendment to section 15 of the 1916 Act, which would have required that no agreement be approved unless it (a) designated a person for service of process within the United States, and (b) contained a provision that every signatory to the agreement would provide records wherever located in response to a proper section 21 order, and (2) a proposed amendment to section 21 to impose the same requirements upon "every common carrier engaged in the foreign commerce of the United States", did not declare the intent of Congress to deprive the Commission of the power to obtain documents overseas. The legislative history of the amendments clearly showed that Congress felt that the Commission already possessed the power sought, and chose to leave the law as it was. The use of the Commission's Rule 12(k) for the production of documents held overseas, far from being out of harmony with the Act, was in complete accord therewith. Id. (232, 233).

The Commission may require the production of documents held overseas by foreign steamship lines subject to its jurisdiction. Whether the documents are called for under section 21 of the 1916 Act or Rule 12(k) of the Commission's Rules is immaterial. There is no basis in law or reason for restricting the application of Rule 12(k) to the territorial confines of the United States. The courts have held that the Commission's powers under section 21 are not limited territorially. Id. (234, 235).

Good cause was shown for motion for production of documents held overseas when hearing counsel sought to secure the material requested by voluntary submission and the documents requested were specified with particularity and were prima facie relevant and material to the proper determination of the issues. Id. (237).

Production of documents located overseas will be required, notwithstanding the fact that the Government of the United Kingdom has forbidden respondent carriers to produce them. Should the documents not be forthcoming, the Commission will choose its course of action from several alternatives after careful consideration of the problem. Id. (237).

Motion of Japanese-flag carrier to vacate section 21 order requiring it to produce documents located overseas in connection with an investigation into the activities of the carrier relating to transportation aboard its ships of cargo moving from United States ports must be denied. The Commission has the duty to expend every effort compatible with sound regulation to obtain the information necessary to the determination that all who engage in our commerce do so in compliance with the law.

The carrier while admittedly obligated to obey the laws of Japan, chose to engage in the commerce of the United States, and is equally obligated to meet the terms and conditions imposed by Congress. The shipping laws must be administered impartially and this is impossible if their application is to turn on the incidental, or accidental, circumstance that needed information is not physically located within the United States. Mitsui Steamship Co., Ltd.—Alleged Rebates to A. Graf & Co., 248 (252, 253).

It cannot be emphasized too strongly that, as respects regulation of the competitive practices of water carriers, all carriers regardless of flag or nationality are placed on an equal footing under our laws. It is a prime concern of these laws to insure that competition among carriers for cargo moving in United States foreign commerce should be open and above board, with no curtain of secrecy preventing the disclosure of pertinent data to the Commission. Foreign flag carriers, although charged with the responsibilities imposed by our laws, are also the recipients of the benefits they confer. Id. (253).

There is no international custom or practice that would require the United States Government to resort to the courts of another country to obtain information needed in the exercise of its sovereign jurisdiction and functions. Moreover, the Japanese Government's aide memoire refers to such documents as might be found within the territorial jurisdiction of Japan, whereas the information sought here from a Japanese-flag carrier appears to be located in the United Kingdom. Other representations of the Japanese Government indicate that cooperation will be extended in those cases which do not prejudice the interests of Japan, but it is not indicated or shown how the interests of Japan are or can be prejudiced by the Commission's order for the Japanese carrier to produce documents located overseas, and such prejudice is certainly not self-evident. Even if the documents were located in Japan, the trade involved is not an import or export trade of Japan, but is the United States export trade from Pacific Coast ports to European ports. Id. (254).

While Japan has a legitimate interest in protecting its citizens from unjust or discriminatory treatment at the hands of a foreign government, where, in connection with a section 21 order requiring a Japanese-flag carrier to produce documents located overseas, there is no basis for any suggestion of such discrimination and, on the contrary, the sole purpose of the Commission's inquiry is to insure that the carrier as a participant in United States commerce is observing requirements of United States law which all other carriers operating in our foreign commerce must observe, it would be discriminatory in favor of the carrier and against all other carriers if the inquiry were not carried out. The Commission cannot believe that the purpose of the Japanese Government is to secure for its citizens either undue preference or unwarranted immunity under the laws of those countries in which they conduct their business. Id. (254).

—Hearing Counsel

Where respondents in an investigation of possible violations of the Shipping Act, 1916, were notified by the agency's orders of the possible proscribed activity, the areas of their operations, the periods of time to be investigated, and were given adequate opportunity to prepare, the Examiner was not warranted in requiring Public Counsel to furnish respondents on two separate occasions with detailed statements of "charges" or "violations" intended to be urged, or in postponing respondents' cross-examination until completion of Public Counsel's entire evidentiary presentation. The agency's orders clearly satisfied the requirements of subsection 5(a)(3) of the Administrative Procedure Act and the agency's Rule 10(c). In demanding statements from Public Counsel respondents were seeking to have them in effect modify the issues of law and facts. Only the agency has the power to amend its orders or to modify issues of law and facts stated in its orders. Unapproved Section 15 Agreements—South African Trade, 159 (166).

In a formal investigation ordered by the agency, Public Counsel has the duty to insure that relevant and probative evidence is developed to the fullest extent possible. His primary mission is to get the pertinent information, often from the persons least interested in giving it. Demands made on Public Counsel for statements particularizing "charges" or "violations" amounted to putting him on trial for the fact that an investigation had been ordered. The statements at best represented only estimates of possible findings, one being presented before and another during the hearings. Such statements are not provided for in the rules and the practice of requiring them should be discontinued. Id. (166, 167).

The exclusion of Hearing Counsel from an investigatory proceeding would leave respondents unopposed and free to state without fear of contradiction any and all contentions no matter how frivolous they may be. No cross-examination of witnesses, and no rebuttal testimony or evidence would be produced. Contentions for such a result cannot be taken seriously. Pacific Coast European Conference—Exclusive Patronage Contracts, 383 (384).

Section 22 of the Shipping Act 1916, authorizing the Commission to conduct investigations "in such manner and by such means, and make such order as it deems proper", clearly gives the Commission authority to allow participation of Hearing Counsel in an investigative proceeding. Decisions of the Commission relating to the practice of requiring from Hearing Counsel particularizations of "charges" against respondents to Commission orders of investigation are not inconsistent with Rule 3(b) and do not affect the "primary mission" of Hearing Counsel to obtain pertinent information in the discharge of his duty to the public interest to insure that all probative evidence relevant to matters under investigation is developed to the fullest possible extent. To argue that Hearing Counsel may not after developing a full and complete record take any position regarding what that record shows defies logic. Rule 3(b) provides that Hearing Counsel shall actively participate in any proceeding to which he is a party, to the extent required by the public interest. Hearing Counsel may file exceptions to the Recommended Decision in such a proceeding. Id. (384–386).

To whatever extent the issues and contentions made by Hearing Counsel in a statement made after completion of his case and before cross-examination or rebuttal, departed from his prehearing statements, they were clearly within the scope of the order of investigation and if respondents believed the order defective they should have petitioned the Commission for modification. The statement was an unexpected windfall to respondents which in no way prejudiced their case, or denied them due process. However, such statements should be discontinued. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 606 (607).

—Hearings

Where an order to show cause gave a conference and its members notice of the issues involved (refusal to supply information to the Commission) and time to prepare to meet them, and the questions raised by the order, and by the correspondence between the conference and the agency which preceded the order, were purely legal, there was no factual issue and hence there was no occasion to compile an evidentiary record in a hearing. The conference and its members were given ample opportunity to submit additional material, on both the facts and the law, but they at no time offered anything else and were content to stand on their position as advanced in oral argument and in prior letters to the agency. The proceeding quite adequately satisfied the requirements of due process. Pacific Coast European Conference, 27 (39).

The Commission would not make findings or conclusions as to the common carrier, non-common carrier status of a respondent if the evidentiary hearing was unfair, even if such "unfairness" was not serious enough to amount to a denial of due process. Where the Examiner refused to permit counsel for respondent to argue orally the merits of its case, exercising his discretion under Rule 10(x), any possible disadvantage to respondent was cured by its written brief and exceptions, and the opportunity was declined to argue the case orally before the Commission. The Commission does not simply affirm, reverse or modify an initial decision; it finds the facts and applies the law after full consideration of a party's arguments. As to the claim that the Examiner heard oral argument from an intervener, the counsel for intervener was allowed to make a statement which was in no sense an argument on the merits of the case, and respondent's counsel was given the same right but proceeded to attempt to make a detailed, legal argument on the common carrier, non-common carrier status of respondent. The Examiner was not guilty of any "impropriety", or much less, denial of due process of law when he refused, on objection of another intervener, to permit oral argument. A claim that the Examiner refused to receive further testimony from respondent unless it elected to recall a certain witness was plainly contrary to the facts. Tariff Filing Practices of Carriers Between Contiguous States of United States and Alaska, 305 (310–316).

Where a conference and its members fail to file for approval a port equalization rule, and the Commission issued a show cause order why the rule, which had been filed as a tariff amendment, should not be declared unlawful and stricken from the tariff, the conference and its members were not entitled to an evidentiary hearing. No factual issues were involved but simply an inquiry as to whether the rule was authorized by the basic conference agreement, and if not, whether it was a new agreement or modification of an existing agreement subject to approval under section 15. Pacific Coast European Conference Port Equalization Rule, 623 (625, 626).

Rule 10(n) does not give respondents the right to present evidence and cross-examine witnesses in show cause proceedings, since the rule is not applicable to such proceedings. Rule 5(g) which governs such proceedings allows for discretion in adapting the show cause procedure to the requirements of a particular case. If it had been intended that Rule 10(n) be applicable to show cause proceedings, a specific reference to that effect would have been included in Rule 5(g). Id. (626, 627).

Order to show cause why a conference tariff rule should not be declared unlawful and providing for filing of affidavits and memoranda of law and oral argument, but not for an evidentiary hearing, was not inconsistent with Commission position in asking court to remand a case where petitioners were seeking review of a staff letter as a "final order" of the Commission. No hearing had been held, respondents were accorded opportunity for a hearing consonant with the issues to be determined. Id. (627).

Rule 5(e) relating to answers to complaints, and Rule 7(b) relating to additional time to file documents, are not applicable to show cause proceedings. Rule 5(g) which governs such proceedings does not specify a time limit for replies to show cause orders. Thus, where respondents made no application for an enlargement of time to file replies, nor asserted why they were unable to reply to an order in the time allotted, their claims that they were not timely notified of matters of fact and law asserted in the order were frivolous. Id. (627, 628).

Motion to dismiss show cause proceeding on the ground that an evidentiary hearing was not provided was denied. The Federal Maritime Board had previously held that such a hearing was not required where the sole questions were of law. Court cases have affirmed the power of the agency to determine whether an agreement subject to section 15 approval exists and to take appropriate action. Id. (628, 629).

—Initial and recommended decisions

While entitled to weight, any recommended or initial decision which comes before the Commission for review remains only a recommendation. Upon review thereof the Commission must exercise all the powers it would have in making the initial decision including determinations of law, fact, policy and discretion. Where the Commission finds upon consideration of the entire record that substantial errors were committed, it must alter the Examiner's disposition of the case to whatever extent is necessary in its judgment to cure the errors and discharge its responsibility for insuring that the ultimate decision is correct. Unapproved Section 15 Agreement—South African Trade, 159 (162).

—Investigation; violations

An investigation by the Commission of possible violations of the Shipping Act, 1916, is an administrative proceeding and not a penal or criminal trial. The Commission has no power to punish past conduct. It cannot impose penalties, monetary or otherwise. for violating the Act's provisions. That may be done only in a penalty suit brought in a district court by the Department of Justice. Unapproved Section 15 Agreements—South African Trade, 159 (165).

Where the Commission is formally investigating possible violations of the Shipping Act, 1916, the essentials of a full and fair hearing can easily be observed without attempting to convert the proceeding into some sort of penal or criminal trial. The procedures and evidentiary rules which govern a criminal trial are wholly unnecessary to the objectives and proper conduct of the Commission's proceedings. An investigation is indispensable to the administrative regulatory function and may be undertaken "merely on suspicion that the law is being violated. or even just because [the agency] wants assurance that it is not." Id. (165).

Where an order of investigation admittedly raised questions as to whether there was an unfiled agreement and whether it had been carried out, and called for an investigation under section 15, any activity violative of that section, including failure to file, was necessarily put in issue. If the order was not as exact as it might have been, it must be remembered that it was an order for an administrative investigation. and not a statement of charges in a penal action. It constituted adequate notice of the matters of fact and law under inquiry which is all that is required in this type of proceeding. Unapproved Section 15 Agreement—Coal to Japan/Korea, 295 (302).

PRACTICES. See also Discrimination; Reparation; Stevedoring.

The unjust and unreasonable practices, "relating to or connected with the receiving, handling, storing, or delivery of property," intended to fall within the coverage of section 17 are shipping practices. A terminal operator's refusal to refund an admitted overpayment of demurrage charges and unilaterally offsetting the amount against a disputed claim of the operator against complainant does not warrant relief under section 17. By the time the operator refused to refund the money, the purely shipping aspects of the transaction had been completed. The matter is one for the courts. If the action of the terminal operator were one of a series of such occurrences, a practice might be spelled out that would invoke the coverage of section 17. One instance of such conduct cannot be found to be a "practice within the meaning of the last paragraph of section 17. J. M. Altieri *v.* Puerto Rico Ports Authority, 416 (419, 420).

In view of the fact that the present method of declaring shipping weights for export purposes on green salted hides is not sufficiently set forth in carrier tariffs nor uniformly applied, the Commission proposes a rule which will allow carriers to adopt a scale or a scale-deduction rule, and to require shippers to furnish a weighing certificate or dock receipt from an inland carrier, the certificate to be certified or attested by the signature of the shipper's supplier of the hides. For purchase lots which are split by the shipper after purchase into two or more shipments, a weighing certificate covering the entire purchase lot may be provided and the shipping weight shall be determined from a computation of the average weight of the hides in said purchase lot. Weighing Practices in re Green Hide Shipments, 699 (703–705).

PREFERENCE AND PREJUDICE. See also Brokerage; Discrimination; Surcharges.

The manifest purpose of sections 16 and 17 is to require common carriers subject to the Act to accord like treatment to all shippers who apply for and receive the same service. Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. There must be at least two interests involved in any case of preference, prejudice or discrimination, and it is essential that there be established an existing and effective competitive relationship between the two interests. This competitive relationship is necessary not only to show the extent to which the complaining shipper was damaged by the alleged preference, prejudice or discrimination; its establishment is also necessary to prove the violation itself. In order to prove a violation of sections 16 and 17, it is necessary first to establish the competitive relationship itself. Proof of the character, intensity and effect of the relationship is necessary to prove the amount of damages and to sustain an award of reparations. West Indies Fruit Co. *v.* Flota Mercante Grancolombiana, S.A., 66 (69, 70).

Where (1) respondent carrier charged the same rate for the carriage of bananas from Ecuador to Galveston as to Baltimore which is 400 miles farther, (2) complainants' (shippers-importers at Galveston) total sales in the so-called common market were 6% of their total imports through Galveston, but only 3% of the fruit carried on respondent's vessels went to the common market, and (3) only 18 of hundreds of buyers in the common market purchased bananas from complainants and North Atlantic importers, there was no substantial evidence to show that complainants' bananas compete with bananas imported into Baltimore. Complainants' principal witness had no conception of the percentage of fruit imported into Baltimore on respondents' vessels actually purchased by the 18 buyers in question. Complainants' burden under Rule 10(o) of proving the fact of the necessary competitive relationship cannot be satisfied by mere assertions of competition unsupported by substantial evidence of record. Id. (70).

Charges that a carrier discriminated against shippers-importers and the Port of Galveston and preferred banana importers into Baltimore and the Port of Baltimore are not sustained by evidence showing rates, cost of service, etc., to New York, Philadelphia, Charleston, or New Orleans. Id. (71, 72).

Carrier's van measurement rule based on the outside measurement of the van did not subject a shipper using insulated vans to undue and unreasonable prejudice and disadvantage in violation of section 16, or to any discrimination. Matson Navigation Co.—Van Measurement/Heavy Cargo Rules, 239 (246).

It was unnecessary for the Commission to define the action it might properly take under section 16 First where an established service was sought to be discontinued, because neither undue or unreasonable preference to Los Angeles, nor undue or unreasonable prejudice to San Diego, was shown as a result of a carrier's withdrawal from inbound service to San Diego from Hawaii. The carrier was motivated by its judgment regarding the economics of the situation, not by intent to prefer or prejudice one port or the other. In the carrier's opinion, there was a lack of San Diego-Hawaii tonnage to support even a limited regular service, and the evidence did not warrant an opposite view. San Diego Harbor Comm. *v.* Matson Navigation Co., 394 (401).

It did not follow from the fact that a carrier's past San Diego service was inefficient and uneconomical because largely one way and irregularly offered, and that the carrier made no special effort to develop the San Diego trade, that the carrier had unjustly prejudiced San Diego when it discontinued inbound service from San Diego and refused to inaugurate outbound service. There were good reasons for the primarily inbound service and little in the way of tonnage to justify the time and expense of furnishing outbound service. Moreover, a significant portion of the San Diego cargo potential was not new Hawaiian traffic, but traffic moving through Los Angeles which would have been diverted to San Diego. Id. (402).

Undue preference and prejudice under section 16 First must be established by clear and convincing proof. Further, similarity of transportation conditions is a necessary element of undue preference and prejudice. Conditions need not be identical but should at least be comparable. So far as concerned Hawaiian cargo, there was no similarity but a great disparity between transportation conditions at the ports alleged to be prejudiced and preferred, San Diego and Los Angeles, by a carrier's action in discontinuing inbound service to San Diego from Hawaii and refusing to provide outbound service. No violation of section 16 First could be found. Id. (402).

Refusal of terminal operator to refund overpayment of $40.17 for demurrage charges is not a violation of section 16 since complainant importer failed to show a disparity between the treatment accorded him and that accorded other importers. J. M. Altieri *v.* Puerto Rico Ports Authority, 416 (418).

Respondent's rate-cutting in the Venezuelan trade was not shown to have subjected complainant to unreasonable prejudice and disadvantage in violation of section 16. Respondent's cut rates, if not met by rates as low or lower, were effective equally to take cargo away from all other operators, not just complainant. Skips A/S Viking Line *v.* Grace Line, Inc., 432 (450).

The fact that under an agreement between two carriers, the rate on the same commodity moving on the same barge, operated by one of the carriers, might be different does not mean that preference or prejudice to shippers would result. The carriers publish their rates and file them with the Commission, and thus shippers are aware of any rate variance and can exercise their choice of carriers. Agreement 8492 Between T. F. Kollmar, Inc. and Wagner Tug Boat Co., 511 (519, 520).

A carrier is bound by the acts of its agent who, having authority to quote rates, booked cargo at different rates to users of the carrier's services identically situated. The carrier was not on trial for penalties, nor "charged" with a misdemeanor, and it cannot escape responsibility by contending that intent is a prerequisite to a finding of violations of sections 16 First and 17. The offense is committed by the mere doing of the act, and the question of intent is not involved. As to the carrier's denial of any actual fault, it knew that an intensely competitive situation or rate war existed, and it failed to take precautionary steps in granting authority to its agent to quote whatever rates would meet the competition. Hellenic Lines—Sections 16 and 17 Violations, 673 (675, 676).

Where a carrier charged and collected different rates from similarly situated shippers on green coffee from French Somaliland to New York for the identical transportation service, it violated section 16 First with respect to undue preference and prejudice, and section 17 with respect to unjust discrimination. Id. (676, 677).

An agreement for the use of a public terminal facility at a rental which deviates from the terminal's regular tariff provisions, may run afoul of the Shipping Act's proscriptions and must be scrutinized for any illegal discrimination or prejudice that may result. Such an agreement, however, is not unlawful or unreasonable merely because it does not follow the terminal's tariff charges. Agreement 8905—Port of Seattle & Alaska S.S. Co., 792 (800).

Where, inter alia, there was no showing that cargo had been or would be diverted from a carrier to another carrier which was the lessee of terminal facilities under an agreement providing for a rental formula at less than full tariff charges, and the objecting carrier had not been refused a similar lease since the lessor modified its previous 100% policy, no unlawful discrimination or prejudice was shown. Id. (801).

PUBLIC INTEREST. See Agreements Under Section 15; Brokerage; Stevedoring.

PUBLIC LAW 87-254. See Brokerage.

PUBLIC LAW 87-346. See Agreements Under Section 15; Port Equalization; Practice and Procedure.

RATE MAKING.

—In general

The facts regarding the Alaska trade are so similar to those in the Puerto Rico trade as to justify following the principles laid down in Atlantic & Gulf-Puerto Rico General Increases in Rates and Charges, 7 FMC 87, i.e., the cost of property used but not owned by the carriers should not be included in the rate base, the prudent investment standard to determine fair value of property being devoted to the service in the domestic off-shore trades should be used, and working capital should be an amount approximately equal to one round average voyage expense of each ship in the service. General Increases in Alaskan Rates and Charges, 563 (581, 582).

—Affiliates of carrier

The shipping public is entitled to protection from the siphoning-off of revenues by affiliates of the regulated carrier. Thus the profits derived by the carrier's principal stockholders for services rendered to the carrier were credited to the carrier's net profit after taxes. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (282).

Profits realized from terminal and management operations performed by affiliates of the regulated carrier should be credited to the regulated trade.

—Allocation of expenses

In rate-making proceedings, where allocation of voyage expenses was necessary as between the regulated and non-regulated trades to determine the adequacy of revenue in the regulated trade, allocation made principally on the basis of ton-mile prorate formulae was proper. The use of revenue prorate formulae in the case of joint operations in the trade to Puerto Rico and to the Dominican Republic would cause distortion of the operating results in the Puerto Rican trade since the revenue per ton in this trade was lower and the costs of discharge of cargo higher than in the Dominican trade. Atlantic & Gulf-Puerto Rico Conference General Increase in Rates and Charges, 87 (97–100).

Where the question was whether a carrier's charge for transporting insulated cargo-vans from California to Hawaii was just and reasonable, determination of vessel expense per revenue ton by dividing the average vessel expense of voyages terminated during the applicable period carrying insulated vans by the average revenue tons carried was proper. The method resulted in allocation of vessel expense attributable to westbound movement to loaded cargo vans, which move west. The carrier correctly excluded both revenue and cost data on eastbound vans from its cost study. Matson Navigation Co.—Van Measurement/Heavy Cargo Rules, 239 (243, 244).

Where the question was whether a carrier's charge for transporting insulated cargo-vans from California to Hawaii was just and reasonable, determination of unloading costs utilizing the expense of an outside-owned derrick barge rather than a whirly crane on the carrier's container-ship dock at Honolulu was proper. The carrier could use the whirly crane on occasion, but the container ships must have first call on the dock and its equipment. The accuracy of an assumption that the container-ship dock and crane could be used part time would be highly questionable. In any event, any reasonable foreseeable use of the carrier-owned shoreside equipment instead of the derrick crane would not decrease future cargo-handling cost enough to make the proposed charge per van more than is just and reasonable. Id. (244, 245).

Division of administrative and general expense between a carrier's shipping and nonshipping activities was proper in rate-making proceeding. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (287).

Prorating of administrative and general expense as between a carrier in an offshore trade and its wholly-owned subsidized subsidiary on a revenue basis pursuant to the subsidiary's subsidy contract was proper. There was no showing that amounts chargeable to the offshore carrier were unreasonable or excessive. Id. (287).

Where direct allocations are impossible or impracticable, expenses should be allocated between passenger and freight services on the basis of the relation that the expenses incurred in the passenger and freight operations separately bear to the total expenses incurred in the operation of both. Administrative expenses should follow the expenses to which they relate. If revenues were used as a basis of allocating expenses, the increase in revenue resulting from a freight rate increase would result in an increased allocation of expenses. A rate increase might be used as the basis for a further increase in rates. Accordingly, administrative expenses were allocated on a voyage expense basis between passenger and freight services. Id. (287, 288).

Adoption of an allocation formula for operatinng expenses, based upon a ratio of the cubic measurement of sugar to total cargo carried, was not unreasonable or inaccurate, particularly when a major part of the over-all calculations was based upon direct costs. It was not necessary for the carrier to submit a breakdown of actual cost figures for every operating expense or to take into account the factor of broken stowage. Increased Rates on Sugar—Atlantic/Gulf Puerto Rico Trade, 404 (410).

For rate-making purposes, it was necessary to separate the carrier's subsidized and unsubsidized voyages, and as to the unsubsidized voyages, the domestic operations to and from Guam and foreign operations, in order to determine the carrier's experience solely in the Guam trade. Since the unsubsidized operations were conducted with assigned ships, and separate voyage accounts were kept covering such operations, ship operating expenses and depreciation incurred relative to such ships were directly apportioned to that service. General Increases in Rates, Pacific-Atlantic/Guam Trade, 423 (425).

Income and expense of shipping operations not directly apportionable were divided between the subsidized and unsubsidized services in the ratio of terminated voyage expenses of the unsubsidized operations to terminated voyage expenses of all voyages terminating in the accounting period. The same ratio was used to apportion overhead expenses (less agency fees, commissions, and brokerage earned), and depreciation expense, other than ships. Overhead expenses were allocated on the basis of voyage expense. They should follow the expense to which they relate. Id. (425).

Allocation between the regulated (West Coast-Puerto Rico) and non-regulated (Round-the-World service) trades of vessel operating expenses, depreciation. overhead, vessel and other asset values on a modified revenue prorate basis was proper. Elimination of cargo expenses, which are higher in United States and Puerto Rican ports than in other ports served by the carrier, from both total revenues and West Coast-Puerto Rican revenues and determination of the revenue prorate from the remaining figures was reasonable since it resulted in an apportionment of expenses in a realistic manner. Pacific Coast/Puerto Rico General Increase in Rates, 525 (530).

Allocation of costs on an out-of-pocket basis to determine net income is improper. The carrier's Puerto Rican service is an integral part of its Round-the-World operation and each segment of the service should bear its proportionate share of the overall expenses of the carrier. Use unit method, under which voyage expenses on the West Coast-Puerto Rican leg would be allocated on the basis of days and then expenses on that leg allocated on the basis of Puerto Rican tonnage to total tonnage, fails to take into consideration the carrier's cost in repositioning vessels on the North Atlantic after calls at Puerto Rico, since it counts only the days consumed in the voyage from the West Coast to Puerto Rico, Id. (530, 531).

—Capital gains

Capital gains realized by the carrier from the sale of vessels used in the trade belong to investors, not to shippers. Depreciation expenses should not be diminished by a capital gain. There should be no deduction from the depreciation base of replacement ships by reason of such capital gains. Matson Navigation Co. (Hawaiian Rate Case), Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increase in Rates, 260 (287).

—Commodity rates

Application of Cleveland rates on commodities moving from Erie, Buffalo, Rochester, Oswego and Ogdensburg, whenever rates from those ports have not been established and in circumstances where carriers are receptive to requests for establishment of lower rates in advance of a prospective movement of a commodity not specifically described, is simply a refinement of the common and reasonable practice of carriers to publish a general cargo rate in their commodity tariffs, pending the development of some traffic movement. The fact that the distance from Cleveland to foreign destinations is farther than from the other ports is only one important consideration in formulating a reasonable rate, and only if other factors are relatively equal does distance control. The Cleveland Rate Rule is not detrimental to commerce or otherwise unlawful, particularly in the light of the carriers' willingness to establish departures therefrom upon reasonable request. Rate Practices of Conferences—Great Lakes to Europe, 118 (119–123).

Tariff rates from Toronto or Hamilton which are lower than those on the same commodities from Erie, Buffalo, Rochester, Oswego and Ogdensburg, and rates from the latter ports which are lower on some commodities than rates from the Canadian ports, are not inherently unlawful. Where rates from Toronto and Hamilton are not made in consideration of or in relation to rates from United States ports, the former rates must meet competitive rates of a Canadian conference which publishes dual rates from Canadian ports, no competition with or loss of traffic to Toronto or Hamilton was shown, transportation via Toronto or Hamilton is uneconomical for goods prodnced in the United States, and rates from Oswego must be related to rates from the port of New York, higher rates from the United States ports than from the Canadian ports on the same commodities were not shown to be detrimental to the commerce of the United States or otherwise unlawful. Id. (119–123).

The Commission will not hold (on motion of an opponent of a rate decrease, supported by Hearing Counsel and unopposed by the proponents of the rate) that a suspended but presently effective rate for the carriage of zinc from the United States to Puerto Rico is unjust and unreasonable when the record made was wholly unsatisfactory. To enter an order under such circumstances would be detrimental to the public interest and contravene sound regulatory principles. While the failure of the proponents of the rate decrease to sustain their burden of proof would normally result in cancellation of the rate and while the proponents were unconcerned about the consequences, the Commission is very much concerned with the merits of the matter and not with procedural technicalities. Considering the special dependence of Puerto Rico (and Alaska and Hawaii) on ocean shipping, coupled with the continuing regulatory responsibility placed upon the Commission by Congress, it is basic that just and reasonable rates and practices by carriers serving their ports must be assured to the full extent legally possible. Therefore, the matter must be remanded to the Examiner for further hearing, even though this will give proponents of the rate a second chance to meet their burden of proof. Rates and Practices in Atlantic-Gulf/Puerto Rico Trade, 141 (142–148).

A proposed 26% rate increase on fruit and vegetables from Kailua and Kawaihae to Honolulu was not unjust or unreasonable where the carrier had suffered losses on such service in 1960, it was doubtful that the service would be profitable even at the new rates, the rates were half or less than half of the regular class rates at which most other traffic moved, and the carrier's rate of return on all of its operations, even under increased tariffs, would remain low. Increased Rates within Hawaii, 151 (157).

Carrier's rule which provides that when rates are applied on a measurement basis to cargo vans, they shall apply to the outside dimensions of the van, is clearly just and reasonable on its face. Space on shipboard is what an ocean carrier has to sell. It is just and reasonable for a carrier to measure ship-space occupied by the shipper's cargo-carrying van, and charge the shipper for that space. Matson Navigation Co.—Van Measurement/Heavy Cargo Rules, 239 (241–242).

Where a carrier's rate rule provided that charges for carrying cargo by van (uninsulated) should be based, in effect, on the inside measurement of the van, later shippers began shipping cargo in insulated vans, the ratio of inside to outside measurement of which was approximately 71% compared to 91–94% for uninsulated vans, with the result that the carrier's revenue for carrying an insulated van declined considerably; and the carrier changed the rule to provide that charges should be based on the outside measurement of the van which had been the rule at the beginning of van movement, the carrier's charge for transporting cargo-vans, which was determined by application of the changed rule to the rate which had remained unchanged (except for general rate increases) was just and reasonable when supported by its study of cost and operating results made along conventional lines. Id. (241–243).

Contention that a carrier reduced its van-cargo rate below a fair and remunerative basis with the intent of driving out or otherwise injuring a competing carrier, and hence according to section 19 of the Shipping Act, 1916, cannot increase such rate unless after hearing the Commission finds that the preposed increase rests upon changed conditions other than the elimination of competition failed for complete lack of proof. Assuming that the carrier did reduce its rates below a fair and remunerative basis, the record established that the competing carrier amended its rate rule so as to decrease charges before the carrier made its similar move. Id. (246).

Even if a shipper had been able to show that a carrier had induced it to build vans by some character of express or implied assurance that charges would remain at a certain level, such showing would have availed the shipper nothing. Changes in rates are not invalidated by a pre-existing contract of a carrier not to change its rates. Id. (246).

Failure to raise rates on tinplate, molasses in bulk, dry fertilizer, and fuel oil, while raising rates generally, was justified to retain recaptured business as to tinplate, meet rates of island shippers in their own tanker as to molasses, meet Japanese and Canadian competition as to dry fertilizer, and meet rates of oil companies' vessels as to fuel oil. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (273, 274).

Where, although the nature of shipments of military household goods by the van lines and by MSTS is the same, the services performed are identical, and the cargoes move side by side in the same ship, the carrier is justified in charging MSTS a lower rate because of differences in the expense burdens. In the case of MSTS cargo, the carrier has no solicitation costs, and its administrative costs are reduced in that stevedoring, tallying, and manifesting are performed at the expense of the Government, abbreviated tariff categories eliminate the necessity of classification, and the history of MSTS shipments shows lower damage costs. Id. (274, 275).

The competitive position of Hawaiian pineapple vis-a-vis foreign pineapple and California fruits is not a basis for establishing rates, nor a reason for treating pineapple differently than other general cargo commodities in connection with a general rate increase. Molasses and sugar (on which rates were not raised) are not comparable cargoes simply on the basis of their being backhaul cargoes. To create an unreasonable or unjust discrimination, more significant similarities than the mere fact of a backhaul must be shown. Similarities in handling and facilities used must be present. Id. (275–277).

Where respondent showed that its present rate on sugar (65¢ per 100 pounds, any quantity), refined or turbinated, in bags, from ports in Puerto Rico to Atlantic ports of the United States is insufficient by a wide margin to pay the full cost of carrying sugar; based on operating and financial data for 1961, proposed increased rates are not fully compensatory; respondent estimates that average handling costs would be reduced because of required palletization, and that on shipments of 500 tons or more clerical and accounting costs would be lower, the proposed rates (65¢, minimum 500 short tons, and 75¢, any quantity) are found to be lower than just and reasonable maximum rates and are not otherwise shown to be unlawful. Accordingly, the proposed rates are just and reasonable. American Union Transport, Inc.—Rates on Sugar, 334 (335, 336).

Act of Congress (39 USC § 487a) authorizing the Postmaster General to enter into contracts for the carriage of mail between Seward and the Aleutians and providing that the contractor shall "furnish and use in the service a safe and seaworthy boat of sufficient size to provide adequate space for mail, passengers and freight", was not intended to amend the Shipping Act, 1916, by requiring the application of different standards as to the reasonableness of rates in the trade covered by the mail contract. Alaska Livestock & Trading Co., Inc. *v.* Aleutian Marine Transport Co., Inc., 387 (391, 392).

The fact that a carrier has operated at a loss in the service supports the view that the present rate on wool from Chernofski to Seattle is not too high. The fact that a carrier may lose money on its over-all operation is of some value in determining the reasonableness of the rate on a particular commodity, although it is not controlling Id. (392).

Where evidence as to the proper stowage factor to be used in determining the cubic measurement per gross ton of sugar varied from 43 cu. ft. to 56 cu. ft. per gross ton, it was reasonable to use a factor of 45 cu. ft. which was in conformity with an established reference manual. Increased Rates on Sugar in Atlantic/Gulf Puerto Rico Trade, 404 (410).

Cost finding is not an exact science. All that is required is that the results obtained represent a reasonably close approximation of the assignable costs Carriers' decision that a rate on sugar must reflect cargo handling costs and a proper allocation of vessel operating expense with some contribution toward overhead and depreciation and other expenses of operation is a decision within the province of the carrier's managerial discretion. Carrier is not required to base the rate for carrying sugar from Puerto Rico to North Atlantic ports on an added traffic theory because of the imbalance of the trade in favor of the southbound traffic. Id. (411, 412).

Carrier's tariffs contain a rate for the carriage of cement in bulk, which rate is available to all commercial shippers. The fact that it is carried in bulk and for only one shipper is not controlling in this proceeding. The controlling fact is that it is common carriage subject to tariff rates and available to any private shipper. While the carrier did not charge the proper tariff rate during 1959 and part of 1960, this does not warrant excluding it from consideration. An investigation into the lawfulness of rates is not a proper proceeding for an adjudication of alleged violations of law. Transportation of bulk cement is a part of the service covered by rates under investigation and the revenues and expenses therefrom will be considered in testing the reasonableness of the proposed rates. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (426).

The facts that increased rates on roofing and paint commodities would result in an almost complete cessation of traffic movement, are more than the traffic can bear and the carriers did not prove that existing rates were non-compensatory, and are not sufficient basis for holding that the increased rates will be unjust and unreasonable. A shipper's or a commodity's competitive position is not a basis for establishing rates nor a reason for treating them differently from other general cargo commodities, and where shippers fail to show that a commodity subsidizes other traffic or bears more than its fair share of carriers' expense, a justification for exemption from a general rate increase has not been established. Pacific Coast/Puerto Rico General Increase in Rates, 525 (534).

With respect to disapproving a rate, the Commission's power is strictly limited. It can disapprove a rate in domestic trade, but only if it finds that the rate exceeds a just and reasonable figure. A rate which yields the cost of loading, carrying, and delivering the cargo, plus the cargo's pro rata share of general expense, a moderate contribution to profit, and no more, is a just and reasonable rate. Matson Navigation Co. Pallets and Containers—Pacific Coast/Hawaii Trade, 771 (772).

Carrier's rate of $2.35 per pallet for the transportation of empty pallets from Pacific Coast ports to Hawaii is just and reasonable where it yields the cost of loading, carrying and delivering, plus the cargo's pro rata share of general expense, and a moderate contribution to profit. Allowing for adjustments in cost figures by calculating vessel depreciation on a 25-year-life basis, by allocation on a revenue prorate formula rather than a vessel operating expense ratio, and by considering savings effected by using as dunnage pallets carried as cargo, the resulting profit of 12¢ per pallet would be well within the permissible range. The fact that the impact of the increased cost of moving empty pallets would be adverse, and perhaps severe, does not authorize the Commission to strike down the increased rate. Id. (772, 774, 775).

—Comparison with rates of other carrier

While a comparison of a rate under study with rates of other carriers is an acceptable test of the reasonableness of the former, the persuasiveness of the test varies directly with the similarity of the circumstances surrounding the rates of the different carriers. The passage of eight years in times of progressive inflation weakens the probative value of the comparison to the point where it is of little value, particularly where it has little or no support based on other record evidence. Alaska Livestock & Trading Co., Inc. *v.* Aleutian Marine Transport Co., Inc., 387 (391).

The fact that the rate of another carrier on wool from Chernofski, Alaska, to Seattle was the equivalent of approximately eight dollars per hundredweight does not establish that respondent's rate, equivalent to about ten dollars, is unreasonably high. The services that gave rise to the eight dollar charge are not now available and the service involved carriage by respondent to Kodiak and by another carrier to Seattle. At the time there was no direct service. A comparison of rates in these two situations is of only limited value, if any. Id. (391).

While the existence of a rate on wool from Chernofski, Alaska, to Seward of 75 cents per cubic foot in 1954 does not prove the reasonableness of the present rate of $1.10 from Chernofski to Seattle, a much greater distance, it is of some value in support of the reasonableness of the present rate. Id. (392).

Where comparison of respondent's rates with other carriers' rates in the trade showed that they averaged 15 per cent less than those of complainant, but when wharfage and delivery charges were added they were comparable, respondent's rates were not unreasonably low. Puget Sound Tug and Barge Co. *v.* Foss Launch & Tug Co., 611 (619).

—Depreciation

Where vessels were transferred from A. H. Bull New Jersey to A. H. Bull Delaware in a transaction involving another corporation organized to facilitate consummation of the transaction, the values placed upon the vessels when they were acquired by A. H. Bull Delaware, which values were higher than those carried on the books of A. H. Bull New Jersey, were not a proper basis for allowing depreciation. Such a basis would disregard and eliminate from consideration 10 years of depreciation which shippers have already paid. The same assets continued to serve the trade after as before the transaction. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (107, 108).

Residual scrap values accord with the conventional longstanding practice of vessel owners, are the bases of depreciation allowable to compute income tax liability, are the only certain standard upon which the Commission can rely, and are not unreasonable for use in computing vessel depreciation in rate-making proceedings. Depreciation computed on the difference between original cost and the amount which it is estimated the carrier will realize at the end of the depreciation period would not be a proper basis since extreme fluctuations occur in market prices of vessels, and it would be impossible to forecast the probable disposal value of vessels at the end of the depreciation period. Id. (108).

Method of depreciation of vessels by using a residual value of 2½ per cent and an average useful life of 20 years is approved. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (283).

In constructing a rate base, carriers can charge annual vessel depreciation using a residual value equal to scrap value rather than an amount estimated to be realized when the vessels are disposed of. Id. (289).

Residual values utilized by carriers in accordance with the conventional long-standing practice of vessel owners are the most reasonable and equitable standards upon which to rely. Future depreciation charges will not be disallowed for rate purposes on the claimed basis that the vessels have already been depreciated below their value at the end of their useful service lives. Probable disposal value of vessels cannot be forecast even in the relatively near future. Pacific Coast/Puerto Rico General Increase in Rates, 525 (531).

Where vessels were shown to be durable for as much as 30 years with proper maintenance; the carrier had not indicated that it contemplated any vessel replacement for vessels nearing the end of a 20-year life; the carrier had assigned salvage values which appeared to represent minimum scrap values, and in some instances no salvage values; and in the case of two vessels it was taking depreciation on a 25-year life, the minimum vessel life reasonably attributable to the fleet was 25 years. Predictions of estimated useful life must meet the controlling test of experience, otherwise the amounts charged to operating expenses for depreciation are excessive, and to that extent users of the regulated service are required to provide, in effect, capital contributions, rather than amounts representing the consumption of capital on a cost basis. General Increases in Alaskan Rates and Charges, 563 (577, 578).

—Differentials

Where possible, it is desirable to maintain reasonable rate relationships. While a 10 percent rate increase would broaden the dollar differential between bulk grain and ingredients, on the one hand, and manufactured feed, feed ingredients and grain in bags or containers, on the other hand, a carrier generally is not required to equalize opportunities among shippers or nullify the advantage of a shipper whose plant is close to the market. The carrier's proposed rates were not shown to be unreasonable as a result of a percentage-across-the-board increase rather than a dollar-differential increase. The use of a percentage form of increase is presumptively fair because it apportions the increased revenue among all commodities in proportion to present participation in revenues. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (277–299).

A finding of a service disability may be a reason for allowing a rate differential between the carriers offering the superior and inferior services. The granting of such differential, however, depends upon a finding that the rates of one of the carriers are unlawful and must be adjusted. Where the rates of the carrier providing slower transit time were not shown to be unlawful, and the rates of the other carrier were non-compensatory, but it was a new carrier in the trade with prospects of achieving a profitable position, the rates of the new carrier could not be condemned as unlawful, i.e., unjust or unreasonable. Common Carrier Freight Rates and Practices in Florida/Puerto Rico Trade, 686 (694).

—Dominant carrier

Where there are five carriers serving the Puerto Rican trade, some from the Gulf and some from the North Atlantic, the rates are the same from North Atlantic and Gulf ports, and the alleged dominant carrier serves Puerto Rico only from the North Atlantic, findings based soley on operating results of such carrier would fail to give consideration to operations from the Gulf. If separate findings with regard to North Atlantic and Gulf rates might result in a disparity of rates disruptive of the trade and if such carrier did not overwhelmingly dominate the trade (its revenues for the first six months of 1958 were $11,682,207 vs. $10,806,796 for three other carriers combined), and if neither the strongest nor the weakest lines control rate determinations, the findings will be based on average conditions, confronted by the carriers as a group. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (105).

Where Matson carried 91.3 percent of the Pacific Coast/Hawaii cargo in 1957, 88 percent in 1958, and 90.1 percent in 1959, the lawfulness of proposed Pacific Coast/Hawaii rates will be determined on the results of Matson's operations. Shippers and consignees between the Pacific Coast and Hawaii are entitled to have the lawfulness of their rates determined on the basis of the results of Matson's operation in that particular trade. Carriers in the Atlantic-Gulf-Hawaii trade in the past have based rates in that trade on the competitive relationship between that trade and the Pacific Coast/Hawaii trade. Separate ships and separate solicitation services are needed and employed. There is no interdependence except in rate setting. In a proceeding to determine the lawfulness of rates, the shipping public on the Pacific Coast should have rates based on the cost of shipping their own commodities. Pacific Coast/Hawaii and Atlantic Gulf/Hawaii General Increases in Rates, 260 (262, 263).

The lawfulness of general increases in rates in the Pacific-Atlantic/Guam trade were to be determined in the light of traffic, operations, revenues and net profits and losses of the carrier which transported 87 percent of the revenue tons of non-military freight shipped from all ports in the United States to Guam, and 96 percent of such traffic from West Coast ports to Guam. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (424).

A 60–40 ratio of cargo lifted by two carriers is not such a sufficient differential as to justify the application of the dominant carrier theory. The projected revenues of one carrier would not exceed those of the other by an amount sufficient to justify adoption of the theory. Findings will be based on conditions confronted by the carriers as a group. Pacific Coast/Puerto Rico General Increase in Rates. 525 (533).

Past decisions affirming that the dominant carrier in a non-contiguous domestic trade will be taken as the rate-making line were not rules promulgated for use in the Alaskan trade, but were based on the facts of those proceedings. The difference in services offered by other carriers in the Alaskan trade and the lack of any dominance in the amount of tonnage carried in the areas where they are competitive justify the exclnsion of any rate-making carrier theory. General Increases in Alaskan Rates and Charges, 563 (585).

—Fair-return-on-fair-value standard

The fair-return-on-fair-value standard is proper in judging rates in the domestic offshore trades. The operating ratio theory will not be adopted. Atlantic & Gulf-Puerto Rico Geueral Increase in Rates and Charges, 87 (105).

The fair-return-on-fair-value standard is proper in determining the reasonableness of rates in domestic offshore trades. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (267).

On the record, fair-return-on-fair-value standard should be used in determining the reasonableness of rates in the Guam trade. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (427).

The fair-return-on-fair-value standard is proper in determining rates in the domestic offshore trade. Pacific Coast/Puerto Rico General Increase in Rates, 525 (533).

—Going concern value

Going concern value is not a proper item for inclusion in the rate base of a seasonal carrier. General Increases in Alaskan Rates and Charges, 563 (582).

—Noncompensatory rates

In evaluating a rate on sugar from Puerto Rico to North Atlantic ports, it was not necessary to give prime consideration to the value of the service because of the competitive predicament in which Puerto Rican sugar refiners find themselves, or the effects of the rate on Puerto Rico and the refinery workers. Value of service falls within the realm of public interest and may be the determining factor in resolving the question of reasonableness of a rate. However, the consideration and effect that must or should be given to the public interest is limited by the Due Process Clause of the 5th Amendment. Noncompensatory rates on some commodities are not barred if the carrier's rates as a whole afford it just compensation for its over-all services. It is not sound regulatory policy or in the public interest to require a carrier to sustain substantial losses on a large segment of the cargo it carries. Such a practice would result in either disproportionately high rates on other cargo or a substantial weakening of the carrier's economic position or both. Increased Rates on Sugar—Atlantic/Gulf Puerto Rico Trade, 404 (412, 413).

Reduced rate on wool is not unreasonably low in view of the value of the service to the wool shippers in the remote area of the Aleutian Islands, the infrequent shipments of wool, and the fact that the carrier is making an over-all profit. While the rate is not fully compensatory, it covers out-of-pocket costs, including insurance coverage, with some contribution toward other expenses. Aleutian Marine Transport Co., Inc.—Rates, Seattle and Ports in Alaska, 592 (596).

Where complainant's position that carriage of common and contract cargo on the same voyage (by means of tandem tow of barges) was illegal, was not sustained, it was not necessary to exclude revenues on contract cargo which exclusion would have made the operation unprofitable; and respondents engaging in the tandem operation each showed a profit, complainant failed to show that respondents' rates were noncompensatory. Puget Sound Tug and Barge Co. *v.* Foss Launch & Tug Co., 611 (618).

The fact that, as a result of past favorable treatment accorded by a carrier to shipment of pallets to Hawaii, pineapple shippers and receivers geared their cargo handling operations to pallets at considerable cost, did not obligate the carrier to continue a non-compensatory rate for carrying empty pallets westbound to Hawaii. Even if the carrier had entered into explicit contracts to maintain the old rate, this would not invalidate an increased rate. Matson Navigation Co. Pallets and Containers—Pacific Coast/Hawaii Trade, 771 (773).

—Operating expenses

In rate-making proceedings, general operating expenses, but not depreciation expenses, incurred by a carrier during a strike were to be excluded from expenses for the year in question since the strike was unrelated to the ordinary labor management controversies. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (112).

The expense of a carrier incurred as a result of actions brought in Puerto Rican courts for overtime wages by stevedore foremen were properly includable in operating expenses related to the carrier's Puerto Rican trade. The suits arose from a difference of opinion as to the carrier's liability for overtime payments and the resulting expense was not improperly included in operating expenses on the ground that it was attributable to a violation of law by the carrier. Id. (112, 113).

In rate-making proceedings the charter hire paid for a vessel not included in the rate base was properly included in operating expenses, but interest paid on a vessel mortgage was a cost of capital employed which must be borne out of profits earned. Id. (113).

A carrier may charge to the trade its expenses of laying up vessels while they are converted to container use, or pending sale. When ships are laid up for repairs or alterations for further use in the service it is reasonable tbat shippers should bear an expense for their benefit. Pending sale, sbippers may reasonably be required to pay for the intervening lay-up expenses because the lay-up stops further expense of operation. On the other hand, ships withdrawn from service altogether are laid up for the benefit of the carrier and investors and no lay-up expense is allowable. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (282, 283).

Losses suffered by a carrier on vessels taken out of a trade and chartered to others during periods when they are not required for the trade will be excluded as expenses in fixing the carrier's rates in the trade. Id. (283).

For rate-making purposes, container rental expenses, involving large payments in the early years and smaller payments later on, should be spread evenly against operating expense over the useful life of the containers. Only in such way can there be portrayed the true picture of the carrier's operation in the future. Special expenses should be spread over that period which reasonably represents the useful life of the asset. Id. (284, 285).

Military freight and military household goods are carried for the government at special contract rates. Neither private commercial shippers nor the people of Guam should pay any part of the carrier's expense for such service or for any return on the property the carrier devoted to such carriage. Accordingly, such service will be excluded in determining the reasonableness of rates under consideration. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (425, 426).

Examiner did not err in adjusting carrier's projected voyage expenses to reflect the substitution of three C–2's for two C–3's. Elimination of charter hire on a ton-mile prorate applicable to commercial cargo and substitution of operating expenses for the three C–2 ships, after allocation, and addition of estimated increases in expenses primarily for wages and fuel, was a correct method and does not result in giving effect to increased operating expenses twice. Id. (426).

Disallowance of interest on vessel mortgages as operating expenses was proper. General Increases in Alaskan Rates and Charges, 563 (575).

Contributions to a charitable trust for use by recognized charitable organizations are for the public good, and will be recognized as eligible expenses chargeable to the shipping public and allowable for rate-making purposes. Id. (576).

Expenses for unfunded liability portions of payments into a pension fund are includable as operating expenses. Pension payments are in the nature of wages and constitute a present benefit to employees. The use of a ten-year period of amortization for computation of unfunded liability, being allowed for tax purposes, is reasonable. Id. (576).

Allowance of inactive vessel expenses, incurred because of the need to lay-up some ships during winter months, or of the need to take ships out of service for other reasons, is proper. By chartering its vessels as charters became available during the off season, the carrier reduced the inactive vessel expense which would otherwise have accrued. To further reduce the remaining inactive vessel expense by an allocation to the charter operations would not be appropriate or in accordance with sound accounting practice. Id. (576).

Pre-inaugural expenses for newly acquired vessels required to fit them for the Alaskan service, and which were for maintenance and repair work, are properly includable in operating expenses. Id. (577).

Allowance of an expense of $20,000 to replenish the reserve for redelivery expenses which had been depleted by about $18,400 to defray redelivery expenses of a vessel chartered, is proper. Since the redelivery expense would be allowable, there is no abuse of discretion in first using reserve funds and then later restoring funds to the reserve which were used for this purpose. Id. (577).

—Operating ratio test

The operating ratio test of justness and reasonableness of rates is not applicable where the regulated carrier has a substantial investment in property used and useful in providing service. General Increases in Alaskan Rates and Charges, 563 (584).

—Operating results

In the usual rate increase case, determination of the lawfulness of the increases proposed is necessarily predicated upon projections of revenues and expenses expected in the future, and the property values for the purpose of calculating the expected rate of return are most readily obtainable as of the time the rate increases are proposed. Where operating results were available with regard to a 15 percent increase for the year 1957 and with regard to a further increase of 12 percent for the first six months of 1958, and extreme precision was not required, property values would be determined as of December 31, 1957, and the resulting rate bases applied to the actual operating results so far as they could be determined from the record for the year 1957, and the projected results for the year 1958. While this might have a tendency to lessen the values applicable to the year 1957 because of depreciation accrued during that year, the results would not be unreasonable. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (101).

Earnings of a carrier derived from interest on a mortgage on a terminal unrelated to earnings derived from a Puerto Rican service were to be excluded from revenues assigned to the service. Elimination of a carrier's expenses incurred during a strike required that revenues earned by an affiliate in carrying bagged raw sugar under contract terms, and profits earned by the carrier in conducting independent stevedoring operations for other carriers during the strike period, be excluded from revenues assigned to the service. Id. (112).

In rate-making proceedings, revenues of a carrier for the year preceding a further rate increase do not have to be restated so as to reflect actual operating results for that year during which an initial increase in rates was effective, where such operating results do not enter into projections for the future and thus would serve no useful purpose. Id. (112).

Consideration will be given to the future operations of a carrier in a trade, which although not a respondent in the rate-making proceeding, is an existing carrier in the trade, with rates identical to those under investigation, and has agreed to be bound by the Commission's findings. Id. (114).

In making findings as to the lawfulness of rate increases, evidence of actual results which become available during the hearings cannot be ignored. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (281, 282).

Carrier which credited to the Alaskan trade revenues equal to the normal tariff charges on items handled by it was not required to credit to the trade additional profits earned under a joint venture to provide transportation service (involving land, water, and barge services) for the Department of Defense to supply defense installations in Alaska. The profits were not a recurring item. The amount of revenue was unpredictable and inclusion of such amounts as profits or losses would distort common carrier tariff income in the revenue projections by unrelated operations in non-common carrier services. General Increases in Alaskan Rates and Charges, 563 (579).

Amounts received by the carrier from insurers representing amounts due in excess of actual expenses incurred in repairing a vessel from fire damage are properly excludable from revenue as a non-recurring item, the inclusion of which would distort results designed to project as near normal a year as possible for rate purposes. Id. (579).

—Property devoted to service

An item called claims pending in a rate base claimed by a carrier will be disallowed as not constituting a specific investment in property required in performing the sevrice. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (103).

The value of terminal facilities used but not owned by carriers should not be included in the rate base. Carriers are not devoting their capital to the public use insofar as such property is concerned. It is proper to include as expenses rentals paid and other expenses of carriers which arise by reason of the use of non-owned facilities. However, to include the value of non-owned property in the rate base and owners' expenses, instead of rentals as expenses, would result in a windfall to the carriers at the expense of the shipping public. Id. (110).

Rentals from a building located on property owned by a carrier and devoted to the trade will be credited to the carriers' service. Id. (110).

Where a carrier rents tugs from an affiliate, and it cannot be determined whether the rental is reasonable, it is proper to include in the carrier's rate base an allocated portion of the value of the tugs. Only the cost of service rendered by an affiliate of a regulated carrier should be allowed as operating expense, and the affiliate's profits should be excluded from the revenues and expenses of the carrier in rate determinations. While the rental charge for the tugs in the rate base will be disallowed as an expense, an allocable portion of the wage and other operating expenses will be included. Increased Rates Within Hawaii, 151 (156).

In addition to ships, other items properly included in the rate base of a domestic water carrier are the values of other floating equipment devoted in whole or in part to the service, other assets and working capital. A barge which is not in condition to be used in the Guam service cannot be considered as property used or useful in providing service to shippers. A house in Guam occupied by the carrier's representative should be included in the rate base. A house in Guam owned by the carrier and leased to a shipper will be excluded. General Increases in Rates—Pacific-Atlantic/Guam Trade. 423 (428).

Only property owned by the carrier will be included in the rate base. Expenses in the form of rent or charter hire of ships are allowable charges to shippers for non-owned property but shippers should not, in addition, pay for a return on such property where no investiment is at stake. General Increases in Alaskan Rates and Charges, 563 (582).

—Prudent investment standard

The prudent investment standard for measuring the rate base, widely used in the regulation of public utilities, is equally applicable in the determination of just and reasonable rates in the domestic offshore trades. Amounts invested prudently in ships, terminals, lands, other facilities and property as of the time they are first devoted to the particular trade, plus amounts prudently invested in betterments, all depreciated to the period for which the rates are being tested, will be included in determining the rate base. This method will contribute to speedier, less expensive disposition of rate cases, since data on original costs and capital improvements are readily available. Atlantic & Gulf—Puerto Rico General Increase in Rates and Charges, 87 (106, 107).

In the domestic offshore trade the prudent investment standard will be used to determine the fair value of property. The record did not warrant departing from that standard so as to permit valuation of rented tugs and certain land on the basis of fair market value. Increased Rates Within Hawaii, 151 (157).

The prudent investment standard will be used to determine the fair value of property used in domestic offshore trades. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (267).

The prudent investment standard should be used to arrive at the fair value of the property devoted to the Guam trade. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (427).

The prudent investment standard will be used to determine the fair value of property in the domestic offshore trade. Pacific Coast/Puerto Rico General Increase in Rates, 525 (533).

—Rate of return

Investors and carriers are entitled to enough revenue not only for operating expenses but also for capital costs, including service on debt and dividends. The equity owner's return should be sufficient to ensure confidence in the financial integrity of the carrier, so as to maintain its credit and attract capital. Fifteen and 12 percent increases in rates in the trade between North Atlantic and Gulf ports and Puerto Rico were found to be just and reasonable. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (166).

A reasonable rate of return is one that is sufficient to produce earnings that meet the carrier's present costs of capital, including fixed charges, such as interest on secured debt. and reasonable dividend requirements for holders of equity obligations; and adequate to attract capital in the future on favorable terms and to pay incidental costs of issuing securities. Protection of existing investors and protection of the carrier through capital attraction should provide returns commensurate with those of enterprises with comparable risks. Under these criteria and the record evidence showing that a rate of return for shipping companies must be higher than for industrial or utility companies to attract capital, rates of return of 8.32 percent for 1960 and 10.59 percent for 1961 are not excessive. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (290–292).

A rate of return of 6.4 percent on property valued on the basis of the prudent investment standard is not unreasonable. Tariffs under investigation are lawful, just and reasonable. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (429).

Just and reasonable rates should provide enough out of revenues from the regulated service to meet all allowable expenses of providing service, including the cost of acquiring or retaining the capital needed to provide service. An actual cost measure should be used as far as possible throughout the rate-fixing process, including the cost of capital. The level of earnings needed to pay interest on the carrier's notes and to pay dividends adequate to give stockholders a return comparable to other investments having a comparable risk should be allowable. One test of fairness of the rate of return is its ability to accomplish this capital attracting or retaining function. On the record, rates which produce a return of 9.07 percent are not unjust or unreasonable. General Increases in Alaskan Rates and Charges, 563 (583, 584).

Considering, inter alia, that a carrier's increased rates were based on the added cost of all-risk cargo insurance which was unquestionably of benefit to shippers, and that the carrier's rate of return, after taxes, was 9.20 percent, the increased rates are just and reasonable. Aleutian Marine Transport Co., Inc.—Rates, Seattle and Ports in Alaska, 592 (600).

—Relationship between carrier and shipper

Although a close relationship existed between Matson, the four principal stockholders of Matson and the sugar interests in Hawaii, the carrier's sugar rates were shown to have been negotiated in good faith and at arm's length, and the rates agreed upon were reasonable and compensatory. The carrier was faced with the choice of losing the sugar business or establishing a lower rate (which was not raised when rates on most other commodities were raised). Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (273).

—Statutory reserve funds

To the extent that statutory reserve funds maintained by a carrier in connection with its subsidized foreign operations represent depreciation on vessels, they are not allowable as part of the rate base property. Amounts other than depreciation cannot be said to be devoted to the Puerto Rican trade in light of the statutory provisions under which the funds are maintained. Therefore, they will not be included in the rate base. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (103, 104).

In computing net earnings on its freight operation, the carrier properly included depreciation on funds deposited in its construction-reserve fund pursuant to section 511 of the Merchant Marine Act, 1936. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (284).

—Vessel and other property values

A market value rate base would produce erratic rates which are in the interest of neither the shipping public nor the owning companies. More often than not in the case of ships, market value is based largely on opinions and predictions, and the same would be true of rates derived therefrom. Logically, market value should lead to an increase or a decrease in rates as vessel prices rise and fall, but obviously, such rate instability would not be practical. It would disrupt the trade to the detriment of the shippers, the carriers, and the general public. Atlantic & Gulf—Puerto Rico General Increase in Rates and Charges, 87 (106, 107).

Reproduction cost cannot be accepted as proper for rate-making purposes. Reproduction cost assumes that a carrier bas reproduced or will reproduce its vessels. Those devoting their property to the public service are entitled to a fair return on their actual investment, not on some speculative amount which they have not invested and may never invest. If and when a vessel is replaced, or amounts are expended for capital improvements, then the carrier is entitled to a fair return on the new vessel or the improvements. Until that is done the shipping public should not be forced to pay rates based to any extent on speculative vessel values. Id. (107).

—Working capital

Working capital in an amount equal to one round voyage expense of each vessel in the service is a fair and reasonable allowance as an element of the rate basis. Working capital is required to meet the need arising from a time lag between payment by the carrier of its expenses and receipt by the carrier of payments for service in respect of which the expenses were incurred. The conference tariff specifies prepayment of freight, thus there would be no substantial lag between payment of expenses and receipt of revenues, and the amount of working capital allowed is ample. Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 87 (109).

An amount equal to one round voyage expense of each ship in the service will be allowed as working capital. Since working capital is the fund from which voyage expenses are paid, such expenses are the most accurate measure of the employment of working capital. No allowance will be included in the rate base for "claims pending" or "other deferred charges and prepared expenses." Working capital based on average voyage expense itself provides for these items. General Increases in Rates—Pacific-Atlantic/Guam Trade, 423 (428, 429).

The measure of what a regulated carrier is entitled to for working capital in the rate base is an amount equal to one round average voyage expense of each ship in the service. General Increases in Alaskan Rates and Charges, 563 (582).

RATES, FILING OF. See also Common Carriers; Jurisdiction; Practice and Procedure; Surcharge; Volume Rates.

Where a carrier applied for and received permission to establish in its tariff on less than the required thirty days' notice a new classification covering vans, which otherwise would have had to be carried at a higher "cargo, NOS" rate, and the carrier published the new classification, charged and collected freight on the basis thereof, but failed to file the tariff, the carrier violated section 2 of the Intercoastal Act by charging and collecting less compensation than provided in its schedules filed with the Board and in effect at the time of transportation. Y. Higa Enterprises, Ltd. *v.* Pacific Far East Line, Inc., 62 (63, 64).

Where under an escalation clause of a freighting agreement, any increase in the rate is contingent upon an increase in the cost to the carrier of chartering a vessel to meet the requirements of the shipper; and, since the carrier must charter vessels in advance of shipment in order to meet the shipper's requirements, the carrier will know what increased costs are involved and will be able to compute the increase in rate in advance of actual shipment, the carrier will be able to file the actual rate to be charged under the tariff as the provisions of section 2 of the Intercoastal Act require. Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 260 (281).

Where a carrier was bound by conference agreement to observe conference rates and such rates were the only rates filed and published by it or on its behalf, the rates so reported and published were its regular or established rates which it was bound to charge and shippers were bound to pay. United States Lines—Gondrand Bros.—Section 16 Violation, 464 (469).

Where the agent which performs the pickup service is certificated as a common carrier by motor vehicle by the ICC, an ocean carrier's tariff which quotes single factor rates for containerized cargo, including pickup charges at port terminal areas and delivery charges at an off dock container freight station, is not contrary to section 2 of the Intercoastal Act. ICC decisions construing section 6(1) of the Interstate Commerce Act, which is almost identical with section 2, as prohibiting joint rates between carriers subject to the Act and those not subject to the Act were based on the fact that the unregulated carrier would be free to circumvent the purpose of the Act with impunity, and are not controlling, since here the motor carrier is subject to ICC regulation. Matson Navigation Co.—Container Freight Tariffs, 480 (485–487).

It is not jurisdiction but uniformity in the treatment of shippers which requires the separate statement of rates and charges by carriers subject to the

Intercoastal Act. Prior to enactment of the Act, carriers were required to file only their maximum rates and charges and were only prohibited from charging a greater compensation for services. Prior decisious requiring disclosure of rate components dealt with rules providing for absorptions and allowances and port equalization where actual rates charged for services could not be ascertained. Section 2 was not intended to require the separate statement of each and every terminal charge which is a component of the final rate for the service offered. The purpose of the "state separately" language of the section was to make the carrier, once it had fixed its charge for the service offered, specify anything else which would effect a change in the ultimate rate to be paid by the shipper. Id. (487–489).

Where the carrier states the complete service offered and the rate charged the service under a single-factor rate including pickup and delivery service, and provision is made in the tariff for the shipper to elect to use only a portion of the entire service, in which event the tariff states in specific amounts the "allowances" made, the tariff meets the provision of section 2 of the Intercoastal Act with respect to separate statement of charges. Id. (489).

Where the carrier offers single-factor rates for containerized cargo, including pickup and delivery service, an "allowance" to shippers who elect not to use the pickup and delivery service is valid under section 2 of the Intercoastal Act. The "allowance" is not an unlawful absorption but a reduction in the rate so that each shipper pays for the service he receives, and each is able to readily ascertain not only the charges he must pay but also those of his competitor. Id. (489, 490).

Single-factor through rates of common carrier by water from inland points in Puerto Rico to Port Newark must be filed with the Commission under section 2 of the 1933 Act. Tariff Practices of Sea-Land Service, Inc., 504 (506).

Single-factor rates including pickup and delivery service are valid. The shipper may easily determine what he is paying for and which service, i.e., through service or port-to-port for which the carrier also quotes a rate, he may most economically employ. The primary purpose of section 2 of the 1933 Act is achieved when the shipper is able to determine from the tariff the exact price of the transportation to him as well as to his competitor. Aleutian Homes, 5 FMB 602, does not preclude carriers from including proper terminal charges within single-factor rates. Intercoastal Investigation, 1935, 1 USSB 400, requires the separate statement of only those terminal charges, privileges or facilities not properly identified as included within the quoted rate. Id. (508, 509).

Whether or not the Intercoastal Act is a part of the Shipping Act, 1916, the provisions of the Intercoastal Act are applicable to the rates of common carriers by water in interstate commerce, and the Intercoastal Act affords the proper recourse for inquiry into the reasonableness of the rates of carriers engaged in trade between Seattle, Washington, and Anchorage, Alaska. The 1916 Act only authorizes as to the domestic trade the prescribing of a maximum reasonable rate after a finding of unreasonableness (section 18(a)), and this is inapplicable to a proceeding involving the question of whether an agreement between carriers in the said trade for carriage by one of cargoes generated by the other at the latter's tariff rates should be approved. The protesting carrier complained not as to maximum rates that might flow from the agreement bnt as to minimum rates. Agreement 8492 Between T. F. Kollmar, Inc. and Wagner Tug-Boat Co., 511 (517).

The filing requirements of section 2 of the Intercoastal Act are broader and more stringent than those of section 18(a) of the Shipping Act. Consequently, if section 2 does not prohibit a carrier's substituted service rule (land haul for a portion of water haul), no other provision of the Shipping Act or the Intercoastal Act would do so. Puget Sound Tug & Barge Co. *v.* Alaska Freight Lines, Inc., 550 (555).

While section 2 of the Intercoastal Act assumes that the rates to be filed will be rates for the common carriage of goods by water between points on the carrier's route, it does not expressly prohibit the filing of rates which include a substituted mode of carriage over a portion of the route, and such a prohibition will not be inferred. Id. (556).

The rationale of ICC decisions requiring that where substituted service is permitted, shippers must be given the option of nonsubstituted service if they desire, is not relevant to the case of a water carrier subject to Maritime Commission jurisdiction and substituting land haul for the Oakland-Seattle portion of its Oakland-Alaska service, without giving such an option. Provisions of the Interstate Commerce Act governing bills of lading are not found in the Intercoastal or the 1916 Shipping Act. While substitution "where the shipper otherwise directs" would probably break the contract of carriage, no breach of contract is involved here since the carrier's tariff informs the shipper that substituted service may be provided and if the shipper books his cargo with the carrier the contract is necessarily subject to that condition. In any case, mere failure to offer the right to select all-water service is not a breach of contract. Id. (556, 557).

Interstate Commerce Commission cases interpreting the language "points on its own route" in section 6(1) of the Interstate Commerce Act are inapplicable to the question of whether a water carrier's substituted service rule (land haul for the Oakland-Seattle portion of its Oakland-Alaska service) is lawful under section 2 of the Intercoastal Act. The ICC cases involved attempts by a rail carrier to publish and file rates on its own line to points on the line of another carrier without the booking carrier securing the concurrence of the latter. The ICC found that, without the concurrence of the second carrier, the tariff filed could not be designated a joint tariff, and the rates were not joint rates for a through route. No problem of joint rates was presented in the instant case. To the extent ICC decisions are governed by the necessity of prescribing the proper relationship between two carriers subject to the Interstate Commerce Act they are of little value to the Maritime Commission and are not binding precedents when the Commission adjudicates rights and responsibilities of water carriers subject to the Shipping Act and the Intercoastal Act. Id. (557, 558).

The decision in Intercoastal Investigation 1935, 1 USSB 400, does not preclude the lawful filing of a carrier's substituted service rule (land haul for a portion of water haul). The portion of the Intercoastal case relied on dealt with an improper attempt by several water carriers to establish joint intercoastal rates. The instant case was not one of joint rates. Id. (558).

Carrier's rates for substituted service for the Oakland-Seattle portion of its Oakland-Alaska service are not unlawful because allegedly they "fail to afford publicity, inflexibility, or unalterability to AFL's charges (i.e., share of revenue) for the only transportation actually performed by it—the barge transportation between Seattle and Alaska". The word "charges" as used in section 2 of the Intercoastal Act can hardly be equated with the carrier's share of revenue. This would ignore the plain meaning of the remainder of the statutory language. With respect to the suggestion that the carrier partially absorbs the transportation cost, resulting in an illegal rebate, there is no evidence of any rebate to shippers, nor explanation as to how any rebate is accomplished. Shippers similarly situated receive uniform treatment under the substituted service rule. Id. (559).

Carrier's substituted service rule meets the requirements of section 2 of the Intercoastal Act with respect to uniformity and equality of treatment of shippers.

riers performing the substituted portion of the service and the points between which they may be used. Id. (559).

Carrier which previously served Oakland by vessel discontinued service in 1959 because of its poor financial condition, resumed booking cargo at Oakland for Alaska in 1961, and hopes to resume direct service when cargo offerings permit, has a route between Oakland and Alaska destinations within the language "between points on its own route" in section 2 of the Intercoastal Act. The route remains essentially that of a water carrier, and the carrier's substituted service rule is lawfully on file with the Commission under the provisions of the Intercoastal and 1916 Shipping Acts. Id. (560, 561).

In view of the fact that continued suspension of a carrier's minimum charges would result in injury to a large number of shippers if the carrier discontinued its service, and the fact that only one shipper contended that it would be damaged by the minimum charges and that shipper's interest was fully protected, as it was complainant in another case against the carrier involving the lawfulness of the minimum charges, continuation of the suspension would not be in the public interest and the suspension will be vacated. Sea-Land Service, Inc.—Discontinuance of Jacksonville/Puerto Rico Service, 646 (649).

REBATES. See Devices to Defeat Applicable Rates; Rates, Filing Of.

REPARATION.

Refusal of terminal operator to refund overpayment of demurrage charge is not a violation of section 18 since that section applies only to carriers. J. M. Altieri *v.* Puerto Rico Ports Authority, 416 (418).

Every precaution will be taken to insure that discrimination does not result from the approval of Rule 6(b) applications. The requirements of the Rule must be fully complied with and Examiners should freely utilize their authority to obtain any additional information deemed necessary. Where the facts show that there will be no discrimination, and that the case is one of bona fide rate mistake or inadvertence, the Commission may exercise its discretion to remedy the situation. Martini & Rossi, S. p. A. *v.* Lykes Bros. Steamship Co., Inc., 453 (456).

Where a shipper was charged and paid the tariff rate on "film, vinyl, products" instead of the lower applicable rate on "clothing, dry goods," on shipments of baby pants from Puerto Rico to United States ports, the overcharges resulted in violation of section 2 of the Intercoastal Shipping Act. Since the carrier, after agreeing to satisfy the complaint by refunding the overcharges in installments, made only one payment, although frequent demands were made for further payments, the shipper is entitled to reparation in the amount of the balance unpaid. International Latex Corp. *v.* Bull Insular Line, Inc., 545 (547, 548).

An award of reparations, when a violation of the Shipping Act has been found, is permissive and not mandatory. Consolo *v.* Flota Mercante Grancolombiana, S.A., 635 (637).

Where the Maritime agency had twice held that a carrier's practice of contracting all of its banana space to certain shippers to the exclusion of other shippers was illegal, and the agency had also ruled that forward booking arrangements for a period not exceeding two years were reasonable if available space was prorated among all qualified banana shippers, action of another common carrier in renewing its exclusive banana contract for a three-year period could not be justified on the basis of the "unsettled nature of the law," thus making inequitable an award of reparations. While one of the former Board decisions had been appealed (and ultimately affirmed), the Board's order had not been years after the three-year renewal contract had been negotiated. As to the carrier's claim that it might have been faced with litigation for breaching its exclusive banana contract, a provision of the contract absolved the carrier of liability in the event the contract was declared illegal. While the carrier might have had to defend the Board decisions, it was not unreasonable to think that one acting in good faith would choose such a course. One who acts in contravention of a statute, court or administrative ruling, in the belief that it will be declared invalid, assumes a risk and must face the consequences if the law is upheld. Id. (638, 639).

Reparation in connection with a shipment of household goods from Puerto Rico to New York and thence to Lincoln, Nebraska, was denied where, as to the alleged unjust and unreasonable charges of the land carrier, complainant failed to show that respondent (a forwarder) was responsible for the charges which must be deemed to be the sole responsibility of the land carrier, a person not subject to Commission jurisdiction; and as to respondent's charges up to delivery to the land carrier, they were not per se unjust and unreasonable or in violation of sections 17 or 18 and complainant failed to carry its burden of proving that the charges were unjust, unreasonable or duplicative. Birnbach *v.* La Flor De Mayo Express Co., 716 (718, 719).

The power of the Commission to award reparation is permissive and discretionary. Where respondents were acting in good faith in enforcing provisions of the Shipper's Rate Agreement, which was invalid for lack of section 15 approval, whereas complainant thought the agreement was valid at the time it attempted to evade its obligations thereunder by shipping nonconference in the name of a subsidiary, equity does not dictate that complainant be rewarded. The parties will be left where the Commission found them, and complainant's claim for reparations in the form of alleged overcharges, i.e., the difference between the contract and non-contract rates charged after respondents terminated the rate agreement, will be denied. Parsons and Whittemore, Inc. *v.* Johnson Line, 720 (731, 732).

Upon the elimination of shipments found to be time-barred, settlement of claims for reparation on cotton shipments will be approved. Such approval is not to be construed as an approval of any particular amount of interest on the claims. H. Kempner *v.* Lykes Bros. Steamship Co., Inc., 779.

—Damages

In order to sustain an award of reparations for damages resulting from a discrimination, complainant must show specific pecuniary loss. Where respondent carrier charged the same rate for the carriage of bananas from Ecuador to Galveston as to Baltimore which is 400 miles farther, and complainants (shippers—importers at Galveston) relied upon the historical differential of $10 a ton between the market price of bananas at Gulf ports and at North Atlantic ports, with the Gulf price the lower, to show pecuniary loss, evidence that the cost of operating chartered ships to New Orleans was $10 a ton less than operating chartered ships to New York or Charleston did not support a charge of discrimination against common carrier vessels operating into Galveston and Baltimore, and such evidence did not support the assertion that the $10 a ton differential in market price was due to a corresponding differential in transportation cost. West Indies Fruit Co. *v.* Flota Mercante Grancolombiana, S.A. 66 (70, 71).

Section 22 makes recoverable as reparation only damages caused by a violation of the 1916 Act. No violations were proved and thus neither carrier was entitled to recover reparations from each other. Grace Line, Inc. *v.* Skips A/S Viking

Reparations award will be adjusted downward to reflect the freight rate per ton of bananas charged to the shipper when it was one of several shippers via the carrier involved, rather than the lower rate charged its exclusive shipper by the carrier for all of the banana space during the reparation period. The higher rate charged by the carrier when allocating space to several shippers was more representative of the figure it would have charged had it allocated space to more than one shipper during the reparation period. An inadvertent error in computing stevedoring costs was also corrected. Consolo *v.* Flota Mercante Grancolombiana, S.A., 635 (643).

—Mitigation

The fact that when a carrier opened its space to several shippers of bananas they combined to act as a single shipper, refuted the carrier's argument that its ships were not adaptable for use by more than one shipper and that it "in good faith believed" that its situation was distinguishable from that of another carrier which had been found guilty of violating the law in contracting all of its banana space to a single shipper. The alleged good faith belief was not a mitigating factor in an award of reparations resulting from the carrier's refusal to provide space to a qualified shipper of bananas. Consolo *v.* Flota Mercante Grancolombiana, S.A., 635 (639).

Where an excluded banana shipper had filed a complaint against a carrier two weeks after the carrier had filed a petition for a declaratory order that it was not required to cancel its exclusive contract to carry bananas for one shipper, the Maritime agency, in exercising its discretion under section 5(d) of the Administrative Procedure Act, not only did not have to give the petition priority of consideration, it did not have to consider it at all. It could have adjudicated the matter on the basis of the complaint as being the more appropriate and effective procedure for handling the issues involved. In any event the agency did not delay in deciding the petition or the controversy so as to make it inequitable to award reparations to the excluded shipper. Consideration of the petition independently of complaints with which it was consolidated for hearing would not have expedited resolution of the dispute. The carrier itself either authorized or favored most of the postponements during the course of the proceedings. Id. (640, 641).

Where shortly after an agency decision authorizing forward booking for not to exceed two years, a carrier renewed an exclusive contract for shipment of bananas for three years, it was not possible to find that the carrier believed its forward booking contract was for a reasonable period of time so as to justify mitigation of reparations awarded thereafter. The decision had made it clear that forward booking contracts would be valid only if available space were fairly prorated among qualified banana shippers. The carrier had made no attempt to so prorate its space. It offered and contracted its space to one shipper and this was illegal, apart from the period of time which the contract covered. Id. (641, 642).

Banana shipper's failure to use all of his available space on ships of another carrier was considered by the Board in arriving at an award of reparation for refusal of another carrier to allocate space on its vessels for complainant's bananas. Id. (642).

Shipper's failure to charter vessels or to use space on another line to carry his bananas was not a mitigating factor in award of reparations in connection with refusal of common carrier to transport his bananas. It would have been a hardship on the shipper to charter vessels; and the carrier did not make clear what ships were available or that the shipper could have used them and, if he could, on what terms. As to the other line, the shipper did make efforts to use the line, and several shipments were made, but the line terminated the arrangement. Id. (643).

Even if the Commission had been able to find any equity in a carrier's contentions, it would not be possible to equitably recognize the cumulative circumstances urged by the carrier in mitigation of an award of reparations. The Commission could not say that equity dictates that a legally and mathematically correct reparation figure be reduced by some unknown and arbitrary percentage or perhaps all. Id. (644).

—Overcharges.

Under circumstances which are the same as those set forth in Uddo & Taormina Corp. *v.* Concordia Line, 7 FMC 473, voluntary payment of reparation will be authorized to consignees who were charged a higher rate due to confusion in the filing of tariff changes by the conference. Jondi Inc. v. Hellenic Lines, Ltd., 522.

Carrier will be permitted to voluntarily pay reparation for freight overcharges which resulted from omission of a tariff rule through a stenographic error. The Commission affords a place of asylum to carriers who, because of an inadvertent misstep through the maze of tariff procedures, charged the wrong rate. No discrimination against other shippers was involved. Concurrence of complainant in the amount is deemed to be a waiver of interest, unless repayment is not promptly made. UNICEF *v.* Columbus Line, 542.

Where a carrier charged the applicable N.O.S. rate on a shipment of water fosfatefeeders from Durban, South Africa, to Houston; previously it had charged the same shipper of a similar item a rate then listed in the tariff covering the outward trade; and thereafter, on advice from the Commission to file rates for the inward trade separate from those for the outward trade, it filed inward rates but, because movements of fosfatefeeders were rare in the inward trade, the item was not listed, permission to make a partial refund on the basis of the previously charged rate was granted. Failure to file the proper rate was due solely to the error of the carrier and the burden of this should not fall on the shipper. The fact that the rate charged was not shown to be unjust, unreasonable, or otherwise unlawful is not determinative of an application under Rule 6(b). The shipper's concurrence will be accepted although filed after the Examiner's decision. Lykes Bros. Steamship Co., Inc.—Refund Application, S.S. Harry Culbreath, 602 (603, 604).

Carrier will be permitted to voluntarily pay reparation for excess freight charges arising out of its inadvertent failure to include a commodity rate in its tariff covering certain equipment transported for NATO. The shipper had the right to expect to be charged a lower rate charged on prior shipments and no discrimination against other shippers was involved. Lykes Bros. S.S. Co., Inc.—Refund Application, S.S. Charlotte Lykes, 609 (610).

Relief of a shipper from the consequences of a carrier's oversight or inadvertence in filing a rate is warranted only if the parties acting in good faith had agreed, or the shipper had been led to believe, that such rate would apply. Where the carrier gave notice to complainant, via a company handling all rate negotiations for complainant, that it was amending its tariff on the goods involved, complainant was led to believe that the rates were to be reduced prior to the shipments in question. Since other requirements warranting relief had been established, respondent was authorized to pay reparation. Barr Shipping Co. *v.* Royal Netherlands S.S. Co., 786 (787, 788).

Where the legally applicable rate was charged on a shipment of dry biscuits from Lisbon to New York, authority to refund alleged overcharges would not be granted on the basis that the rate charged was double the rate the parties agreed would apply to future shipments, or that the shipment was made by shippers who had failed to ascertain what rates would be applicable. Businessmen engaged in the import and export trade are not innocent, but negligent, when they make no effort to determine the cost of a shipping service. There was no error or inadvertence relating to the tariff on file and no failure of the carrier to file a tariff intended to be applicable to the shipment. Nydia Foods Corp. *v.* Java Pacific Line, 808 (809, 810).

Where the legally applicable rate was charged on a shipment of valuable oil paintings from Genoa to New York, reparation would not be authorized on the basis that the rate charged was excessive because the paintings had no "commercial" value. The freight rate and the insurance coverage were based on the same valuation. There is no practical basis for a difference in proposed rates based on a claim that one class of valuable objects has no "commercial" value. There is no difference in the method of handling and shipping valuable articles of no "commercial" value and other valuable objects. It cannot be held that the paintings had no "commercial" value in relation to the purposes for which the declared value was applied. A contract of insurance and a contract of affreightment are equally commercial transactions and the application of the declared value to both contracts was not unjust or inequitable. Dayton Art Institute *v.* American Export Lines, Inc., 804 (805–807).

Where the carrier misquoted the contract rate to a shipper, not a party to a dual rate contract, afforded the shipper the opportunity to sign a contract which the shipper declined, and charged and collected the non-contract rate, the carrier's application to pay reparation to complainant consignee which had relied on the misquoted rate was denied. The parties to the contract of affreightment had not agreed in good faith that the lower rate would apply. There was no basis for a finding that the carrier, at any time, intended to apply other than the non-contract rate to non-contract shipments. The consignee relied on a misquoted rate, but ignorance or misquotation of a rate is not an excuse for paying or charging more or less than the rate filed. Aichmann & Huber *v.* Bloomfield Steamship Co., 811 (814, 815).

—Undercharges.

Where a carrier published a tariff rate for vans, which rate was determined after discussions with shippers and in light of the fact that the legal effective rate was too high to economically warrant any movement of vans, failure of the carrier to file the rate with the Board (thereby making collection of the rate unlawful), prior to transporting vans for a shipper, was an unjust and unreasonable practice. However, results of this practice should not be placed upon a seemingly innocent shipper, and, accordingly, waiver of collection of undercharges was granted. Y. Higa Enterprises, Ltd. *v.* Pacific Far East Line, Inc., 62 (64).

The power to prescribe a substitute rate for one appearing in a tariff is not a prerequisite to the granting of relief in cases of bona fide rate mistake or inadvertence under Rule 6(b). The fact that foreign commerce is involved is not significant. Where a carrier charged a rate lower than the rate legally applicable as a result of an oversight and misunderstanding as to a statutory provision (section 18(b)) that had been in force approximately one month, and the parties were acting in good faith, the question whether relief should be granted depends on whether discrimination will result. The primary purpose of the new tariff filing provisions of the 1916 Act is to prevent discrimination. Since the record disclosed that no discrimination would result, waiver of collection of undercharges was granted. Such waiver cannot, however, excuse parties from any statutory penalties to which they may be subject. Martini & Rossi, S. p. A. *v.* Lykes Bros. Steamship Co., Inc., 453 (455, 456).

Where the carrier reduced its rate on peeled tomatoes from Italy to the United States advised the Commission by cablegram of such reduction, which method of advice was unacceptable thereafter properly filed the reduced rate, and in the interim had booked tomato products in good faith on the basis of the reduced rate, voluntary reparation to those shippers who paid the applicable rate and waiver of collection of undercharges from those who paid the reduced rate was authorized. The filing requirements of section 18(b) was new at the time of the transactions, the shippers were innocent, and no discrimination would result. Uddo & Taormina Corp. *v.* Concordia Line, 473 (476).

Permission will be granted to carrier to waive collection of undercharges of freight on shipments of paper pulp machinery from New York to Santos, Brazil, where the carrier through mere oversight, failed to file the page of the tariff covering the project rate on the machinery, due to the confusion incident to filing various tariff schedules under the then new section 18(b). Since shippers to nearby ports received the benefit of project rates, granting of the relief will tend to eliminate a possible discrimination, rather than cause one. Lutcher, S.A. *v.* Columbus Line, 588 (589, 590).

Where a carrier, a one-man organization, made many inadvertent errors in filing or neglecting to file tariffs, undercharged shippers were not guilty of any impropriety, and no unjust discrimination was involved, the carrier will be given permission to waive collection of undercharges and, with respect to one shipment, will be directed to refund the amount of an overcharge. Corporacion Autonoma Regional Del Cauca *v.* Dovar S.A. International Shipping & Trading Co., 667 (669).

RETALIATION.

Provision of sugar freighting agreement enjoining the shipper from moving sugar "in vessels owned or chartered from others by the shipper" unless it has been offered first to the carrier, does not violate section 14 Third of the 1916 Act. The shipper is free to utilize any other common carrier operating in the trade, and is even free to enter into a contract with a contract carrier. The obvious purpose of section 14, when read in its entirety, is to protect the independent common carrier from discriminatory retaliation against the shipper for patronizing another common carrier. Pacific Coast/Hawaii and Atlantic—Gulf/Hawaii General Increases in Rates, 260 (280).

SECTION 19, MERCHANT MARINE ACT 1920.

No rule can issue under section 19 of the 1920 Act, with respect to the payment of brokerage or "systematically undercutting" conference rates, unless and until the Commission finds that conditions unfavorable to shipping exist in the trade. Since the trade (Venezuelan) is now relatively stable, and the carriers' prospects are improving, such conditions do not now exist. Grace Line, Inc. *v.* Skips A/S Viking Line, 432 (450, 451).

SHOW CAUSE ORDERS. See Authority of Commission; Practice and Procedure.

SINGLE FACTOR RATES. See Rates, Filing Of.

STATUTES OF LIMITATION. See Authority of Commission.

STEVEDORING. See also Agreements under Section 15.

The Commission's action in condemning and preventing an unjust and unreasonable practice setting up a stevedoring monopoly does not constitute regulation of stevedoring. Claim that Commission lacks power to strike down such a practice because of lack of power to regulate the stevedoring business is a non sequitur. California Stevedore & Ballast Co. *v.* Stockton Port District, 75 (81).

Carrying out of arrangement and agreements between port and company operating grain elevators, which agreements give the port the exclusive right to provide stevedoring services on vessels loading or unloading bulk grain and other commodities at the elevators, constitutes an unjust and unreasonable practice. As such, it operates to the detriment of the commerce of the United States, and is contrary to the public interest. Such a practice runs counter to the anti-monoply tradition of the United States, upsets long-established custom by which carriers pick their own stevedoring companies, deprives stevedoring companies of an opportunity to compete, and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs. That such evils have not been proved to exist as yet is not significant. Id. (82, 83).

Practice setting up stevedoring monopoly at port is prima facie unjust and prima facie unreasonable, not only to stevedoring companies seeking work, but to carriers they might serve, and to the general public which is entitled to have the benefit of competition among stevedoring companies serving ships carrying goods in which the public is interested as shipper or consumer. While all monopolistic stevedoring agreements are not necessarily and inevitably unjust and unreasonable practices which must be prohibited at any cost, the burden of sustaining such practices as just and reasonable is a heavy one. "Benefits" such as, that the terminal facilities would be safer in hands selected by the parties setting up the monopoly, and that elimination of the practice would be detrimental to the investment of the parties, do not justify the practice. Moreover, the fact that the port selecting the stevedoring company would secure personnel, except for the superintendent, from the same hiring hall as would be used by any other stevedoring company is not a weighty argument in view of the importance of the superintendent, and even more, the importance of the master being able to choose a company in which he and his principals have confidence and whose charges are determined by free competition. Id. (83, 84).

Argument that Commission prohibition of stevedoring monoply as an unjust or unreasonable practice would take property of parties to monopoly without just compensation, in violation of the Fifth Amendment, is unsubstantial. The parties will not be prevented from making fair and non-discriminatory charges for the use of any of their terminal facilities. Id. (84).

STORAGE SPACE. See Discrimination.

SURCHARGES.

Where terminal costs were shown to be somewhat higher and stevedore efficiency somewhat lower at Buffalo than at some other Great Lakes ports, and terminal charges and loading time at some of the other ports were not shown to be significantly different from those at Buffalo, the record failed to support conference action in singling out Buffalo for the imposition of a surcharge on all commodities moving from Buffalo to Mediterranean ports, and the surcharge was therefore not justified. The conference presented no evidence on other elements which should be considered in determining whether a rate differential at a particular port may be upheld, such as volume of traffic, competition, distance, etc. The surcharge constitutes an unjust discrimination against the Port of Buffalo and the State of New York in violation of section 16 First. American Great Lakes—Mediterranean E/B Freight Conf.—Surcharge at Buffalo, N.Y., 458 (462).

Where the State of New York advanced money to the Port of Buffalo for the development of its terminal facilities, and for operating the port, and The Niagara Frontier Port Authority, which operates and owns the major facilities at Buffalo is an agency of the State whose members are appointed by the Governor and whose operations are financed by State funds, it follows that a discrimination against the Port (a surcharge) constitutes a discrimination against the State as well. Id. (462).

SUSPENSION OF RATES. See Rates, Filing Of.

TARIFFS. See also Rates, Filing Of; Common Carriers; Demurrage.

Less than 30 days' notice of changes in terminal tariffs may be unreasonable under certain circumstances. Where such changes involve rate increases, terminal operators would be well advised to give at least 30 days' notice. Selden & Co. *v.* Board of Trustees of Galveston Wharves, 679 (683).

Carrier operating in the Florida/Puerto Rico trade is required (1) to amend its tariff to clarify rates and charges on the movement of personal effects in automobiles and on the movement of trailers when the carrier utilizes the inside cargo space, (2) to file monthly financial reports reflecting the results of operations during each month, and (3) to make available books of entry upon which the financial reports are based for the purpose of audit of the reports by the Commission's staff. Common Carrier Freight Rates and Practices in Florida/Puerto Rico Trade, 686 (696–698).

TERMINAL AREAS.

Port or terminal areas designated by a carrier for San Francisco, Los Angeles and Stockton, for pickup service incidental to and an integral part of its line haul service, were reasonable in view of their relation to industrial areas surrounding the ports, the conceneration of the carrier's shippers in the areas and the length of the line haul (2,200 miles) compares with the maximum distance within any port area (40 miles). In the cases of Stockton and Los Angeles the areas were the same as those established by the ICC, and in the case of San Francisco, smaller than the area established by the ICC and the California Public Utilities Commission. Matson Navigation Co.—Container Freight Tariffs, 480 (493, 494).

TERMINAL FACILITIES. See also Demurrage; Discrimination; Stevedoring.

An elevator which contains grains going aboard ships, and which grains flow from the elevator to ships moored at the elevator's wharf, is in and of itself a terminal facility. The owner and operator of such an elevator and of facilities which are utilized by carriers, such as dock and wharfage facilities suitable for deep-draft vessels and storage facilities for bulk commodities, is an operator of terminal facilities. California Stevedore & Ballast Co. *v.* Stockton Port District, 75 (80).

A port which leases its terminal facilities, but continues to control to a large extent the level of rates to be charged and reserves the right to order the berthing of vessels and the loading or discharging of cargo subject to the rights of the lessee, has not abandoned its function of furnishing terminal facilities. Fundamentally, the leasing of a terminal facility in connection with a common carrier by water is a function of a terminal owner or operator which cannot be separated or distinguished from the "furnishing" of "wharfage, dock, warehouse, or other terminal facilities" within the meaning of section 1 of the Shipping Act. Agreement 8905—Port of Seattle & Alaska S.S. Co., 792 (795).

To hold that the Commission has no authority over a terminal operator which leases its facilities under terms and conditions similar to those in an agreement providing for continued control over the level of rates to be charged, and reservation of the right to order berthing of vessels and loading or discharging of cargo subject to the rights of the lessee, would emasculate the powers which

Congress intended the Commission to have in order to supervise the shipping industry. Id. (796).

TRAVEL AGENTS. See also Jurisdiction.

Passenger steamship conference failure to adopt, publish, and promptly and consistently apply standards of background and qualifications in its selection of applicants for placement on the list of eligible travel agents in Metropolitan List Territories is detrimental to commerce and contrary to the public interest, within the meaning of section 15, because it detracts from the willingness of the corps of agents, or potential agents, to foster and sell steamship travel. Conference must adopt a set of uniform, objective standards in screening applicants that are sufficiently precise to give adequate notice of requirements. No other standards may be employed. All applicants meeting eligibility requirements must be approved. Action on applications must be prompt and the applicant promptly notified of the decision and the specific reasons therefor. Passenger Steamship Conferences Regarding Travel Agents, 737 (749).

Passenger steamship conference Sponsorship Rule, under which an application is deferred unless a member line shows some interest in the particular applicant must be discontinued as it has resulted in the exclusion from the Eligible Lists of qualified travel agents, to the detriment of commerce. Id. (749, 750).

Passenger steamship conference Quota System for limiting the number of applicants on the Eligible Lists must be discontinued as it has resulted in exclusion from the Eligible Lists of qualified travel agents, to the detriment of commerce. The number of agents already on an Eligible List has no bearing on the question of the qualifications of a new applicant. Id. (750).

Prohibition by passenger steamship conference of appointment of travel agencies located south of Fulton Street in Manhattan (Fulton Street Rule) must be abolished as it has resulted in arbitrary exclusion of agents to the detriment of commerce. Id. (750).

Department Store Rule of passenger steamship conference, and Automobile Club Rule, forbidding appointment of travel agents whose places of business are in department stores and automobile clubs, must be abolished as they have resulted in arbitrary exclusion of agents to the detriment of commerce. Id. (750).

Freight Forwarder Rule of passenger steamship conference, under which freight forwarders may not be appointed travel agents, must be submitted to Commission for approval in accordance with section 15 criteria. Id. (750).

Passenger steamship conference rules must provide reasonable standards in regard to the consideration of sales and transfers and changes of name, address or officers of appointed travel agencies, including adequate notice of the standards to applicants, and an opportunity for the agent to be heard. The rules must further provide for prompt action in accordance with the standards adopted and for prompt notice to the agent of the action taken together with the reasons therefor. A system of arbitration will not be required as relief from arbitrary actions or other violations by the conference will be afforded on complaint to the Commission. Id. (750, 751).

Passenger steamship conference must adopt and apply definite standards for assessment of liquidated damages, providing for adequate notice thereof and for opportunity of accused travel agents to be heard, and for prompt report to the Commission of any liquidated damages assessed. Id. (751).

Passenger steamship conference need not provide for bonding of carriers against loss of commissions caused by cancellations of voyages or line insolvency. There is no evidence that suitable bonds are available, and instances of financial failure by the lines are very rare. Id. (751).

Passenger steamship conference must adopt and apply definite objective standards for cancellation of the eligibility of travel agents. Agent against whom allegations are made should be notified of the delinquencies with which he is charged and afforded an opportunity to confront those who made the charge and adduce evidence to refute it, or in the alternative a reasonable time to correct the delinquency. Conference secretary must be informed in writing of all cancellations by member lines individually and the reasons therefor, and records must be kept for a reasonable time to permit the Commission to assure itself that multiple cancellations are not being used to circumvent restrictions on conference action. Id. (751).

Because of the public interest in the operations of passenger steamship conferences, they should be required to take and record the votes of the members, keep detailed minutes, retain records for a reasonable time and provide copies to the Commission. Id. (751, 752).

Passenger steamship conference rule requiring unanimity as it pertains to the level of commissions payable to travel agents is detrimental to the commerce of the United States. Conference attempts to solve the problem of diversion from sea to air passage have been blocked by the rule and steamship lines have been placed at a competitive disadvantage vis-a-vis the airlines. Id. (752–754).

The present level of travel agents' commissions cannot be found to be so low as to be detrimental to United States commerce. While there has been a decrease in the relative number of steamship bookings in relation to total bookings, it was not established that this was due to the level of commissions, nor was it shown that agents were being forced out of business or were losing money through the sale of sea bookings. Id. (756).

Conference Unanimity Rule as it applies to the selection of agent applicants for the Eligible Lists in the Metropolitan List Territories must be discontinued as detrimental to the commerce of the United States. Under the rule, one representative on the control committee may "black-ball" any applicant and exclude him from appointment by the rest of the lines, though all of them may favor his selection. Id. (757).

Conference Unanimity Rule as it applies to agency sales, transfers or changes of officers or locations must be discontinued. The rule has been instrumental in allowing a veto of an agency transfer and makes it possible for a member of the control committee whose line has not appointed the agency in question to block a transfer or change in personnel. These consequences are unreasonable restraints which deprive travel agents of the ability freely to dispose of property rights and interfere unduly in the conduct of their business. The rule is contrary to the public interest and may operate in some instances to the detriment of the commerce of the United States. Id. (757, 758).

Conference Tieing Rule which prohibits appointed travel agents from selling transportation on nonconference lines must be discontinued. Particularly where the rights of third parties are affected, the section 15 antitrust exemption should not be granted unless the purposes and policies of the Shipping Act are thereby furthered. Weighing the factors of rate stability and destructive outside competition, and weighing the restriction imposed by the rule against the possibilities were the rule abolished, it must be concluded that no adverse consequences would flow from abolition of the rule. The rule is admittedly not necessary to protect the conference from outside competition and there was no evidence that the conference would disintegrate without the rule. Id. (758).

Refusal of some members of passenger steamship conference to pay commissions on cancelled voyages is not unlawful. There is nothing in the record which would indicate that collective action of the respondents dictates the payment