# DECISIONS OF THE

# FEDERAL MARITIME COMMISSION

## VOLUME 11

## JULY 1967 TO JUNE 1968

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

*June 30, 1968*

JOHN HARLLEE, *Chairman*

GEORGE H. HEARN, *Vice Chairman*

ASHTON C. BARRETT, *Member*

JAMES V. DAY, *Member*

JAMES F. FANSEEN, *Member*

THOMAS LISI, *Secretary*

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# FEDERAL MARITIME COMMISSION

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# FEDERAL MARITIME COMMISSION

DOCKET NO. 66–35

THE BOSTON SHIPPING ASSOCIATION, INC., ET AL.

*v.*

PORT OF BOSTON MARINE TERMINAL ASSOCIATION AND MASSACHUSETTS PORT AUTHORITY

*Decided July 24, 1967.*

A change in the terminal tariff rule governing the assessment of wharfage which shifted charge from cargo to vessel did not require prior approval by the Commission under section 15, Shipping Act, 1916; such change constituting neither a modification to the already approved basic agreement nor a new agreement within the meaning of section 15,

The assessment of a wharfage charge against the vessel has not been shown to be either unjustly discriminatory, unduly prejudicial or unreasonable in violation of either section 16 or 17 of the Shipping Act, 1916.

*Leo F. Glynn*, attorney for Complainant.

*Clarence I. Petterson* and *Edwin Amidon*, attorneys for Massachusetts Port Authority.

*John M. Reed*, Attorney for Port of Boston Marine Terminal Association.

*Donald J. Brunner* and *Samuel B. Nemirow*, Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman;* James V. Day, George H. Hearn, *Commissioners.*) : *

This proceeding arises out of a complaint filed on May 27, 1966, by the Boston Shipping Association (Complainant)[1] alleging that the

*Commissioner Fanseen did not participate.

[1] Complainant is a non-profit Massachusetts corporation, whose members are ocean steamship companies, agents for ocean steamship companies, or stevedores. Its function is to represent and protect the interests of all steamship owners, agents, operators and other

Port of Boston Marine Terminal Association and the Massachusetts Port Authority violated section 15 of the Shipping Act, 1916, by effectuating a tariff change in wharfage charges without prior approval of the Federal Maritime Commission; and that the aforementioned tariff change results in unjust discrimination and undue preference in violation of sections 16 and 17 of the Act.

Examiner Benjamin A. Theeman in his Initial Decision, served April 19, 1967, concluded that Complainant had failed to establish any of the alleged violations and, accordingly, recommended dismissal of the complaint. Exceptions and replies have been filed. Complainant's request for oral argument was denied.

## FACTS

On or about February 26, 1962, five terminal operators in Boston, including Respondent Massachusetts Port Authority (Port Authority),[2] entered into an agreement, approved by the Federal Maritime Commission as Agreement No. 8785, establishing the Port of Boston Marine Terminal Association (Terminal Association).[3] The agreement by its terms covers, among other things, "wharfage, dockage, free time, wharf demurrage, usage charges", and "all services, facilities, rates and charges incidental thereto" (Article Third), and requires the parties to file, *inter alia*, "their respective tariffs, rates, and charges", and any "changes therein", with the Commission (Article Sixth).

Pursuant to Agreement No. 8785, the Terminal Association issued, and filed with the Commission, Terminal Tariff No. 1, effective July 1, 1962, which contains the regulations and charges of the participating members. Under Item 2 of Tariff No. 1, a wharfage charge[4] of $1.75 per ton is assessed against all *cargo* except (1) line-haul cargo moving

allied fields of waterfront activities in the Port of Boston. Its members are: American Export Lines, Inc.; American President Lines, Ltd.; Boston Shipping Corp.; Farrel Lines, Inc.; Furness, Withy & Co., Ltd.; Moore-McCormack Lines, Inc.; J. F. Moran Co.; Moran Shipping Agencies, Inc.; Norton Lilly & Co., Inc.; C. Campbell Patterson, Jr. & John I. Wylde, d.b.a. Patterson Wylde & Company; Peabody & Lane, Inc.; C. H. Sprague & Son Co.; and United States Lines Company.

[2] Massachusetts Port Authority is an agency of the Commonwealth of Massachusetts. Among other things, it is charged with the duty of promoting and protecting the commerce of the Port of Boston. The Port Authority owns all the public marine terminals in the Port of Boston (except one pier which is owned and operated by Wiggin Terminal Company). As of December 15, 1966 (the time of the hearings herein), the Port Authority was the operator of Commonwealth Pier 5 and Hoosac Pier No. 1.

[3] The other members are: The Mystic Terminal Company; Port Terminals, Inc. (replacing Terminal Operator, Inc.); Wiggin Terminal, Inc.; and New York Central System (Boston & Albany Division).

[4] This tariff defines wharfage as a "charge assessed against all cargo passing or conveyed over, onto, or under wharves or between vessels or overside vessels when berthed at pier or wharf or when moored in slip adjacent to pier or wharf. Wharfage is solely the charge for use of pier or wharf and does not include charges for any other service."

to or from points outside the Boston Switching District, on which no wharfage is assessed, and (2) open-top cargo on which a charge of 87½ cents per ton is assessed if, but only if, such cargo moves by truck to or from the pier.

At a meeting of the Terminal Association, held on January 7, 1966, Mr. Thomas Soules, Director of the Port Authority, proposed changes in wharfage charges which would, *inter alia*, assess a wharfage charge of $1.00 per ton against the vessel for the use of the pier to unload its cargo. Mr. Soules stated that the Port Authority intended to adopt the tariff changes whether the other members of the Terminal Association did so or not and that the Port Authority would put the changes into effect pursuant to the authority given in the "independent action" clause of Agreement No. 8785. This clause, contained in Article Sixth, provides in relevant part that:

> . . . no changes in said tariffs, rates, charges, classifications, and rules and regulations shall be made without prior notice of such changes to members of the Association, who shall be afforded an opportunity for consultation and for the making of such exceptions as they may desire in the tariff rates, charges, classifications, and rules and regulations, with the understanding that the party proposing a change reserves the right to make it effective at its own wharves or piers regardless of the action of the other parties hereto, but not earlier than forty days after notice of the prior notice hereinabove referred to.

Subsequently, on January 13, 1966, at a meeting of the Terminal Association, the Port Authority distributed a draft of the proposed tariff changes. Mr. Soules reported that he had made it clear to the steamship companies in New York that this was an independent port authority proposal and that he had no knowledge as to the intention of the other Boston terminal operators. After discussion the Terminal Association voted:

> . . . that inasmuch as the Massachusetts Port Authority had fulfilled the requirements of the Agreement by presenting their proposal for consideration within the prescribed period, the Association waives its requirement of an additional 40 days' notice before the Port Authority could take independent action. This waiver is not to be construed as approval or disapproval of the proposal.[5]

Revisions to the Terminal Association's Tariff No. 1 were issued on February 28, 1966, and finally became effective on June 14, 1966. Item 2–A, as amended, of that tariff supersedes Item 2 at the piers operated by the Port Authority; namely, the Hoosac and Commonwealth Piers. It provides in substance that a wharfage charge of $1.00 per ton of 2,000 lbs. will be assessed against the vessel, except that a

[5] Minutes of meeting of the Port of Boston Marine Terminal Association, held Thursday, January 13, 1966, at 10 a.m., in the Conference Room of the Boston and Maine Railroad, 150 Causeway Street, Boston, Mass.

half-wharfage charge of 50 cents per ton will be assessed on cargo handled directly between vessel and truck or rail car and on woodpulp, newsprint, palletized, unitized, containerized or skidded cargoes.

The Port Authority's decision to adopt new tariff schedules was made in order to attain these three objectives:

1. To overcome the loss of truck traffic to the competing ports of New York, Philadelphia, and Baltimore, where no wharfage was assessed against cargo; [6]

2. To eliminate the possibility that truck traffic [7] at Boston may be discriminated against in favor of rail traffic by the continuation of the existing wharfage charge against cargo; [8] and

3. To assist some of the piers that were in financial difficulty and needed more revenue.[9]

In the first four months since the Port Authority revised its wharfage charges, tonnage handled over the Port Authority-operated piers has decreased. The record shows that the cargo lost by these piers has been diverted to other piers in the Port of Boston.

In its complaint, the Boston Shipping Association alleged in essence that: (1) Item 2–A constituted a "modification" of Agreement No. 8785 within the meaning of section 15 of the Act, and the effectuation of this wharfage charge without prior approval of the Commission was violative of section 15; (2) Item 2–A is unjustly discriminatory and unduly prejudical, in violation of section 16, in favor of those vessels using the Terminal Association piers where wharfage is not assessed against the vessel, but is assessed against the cargo; and (3) Item 2–A is an unjust and unreasonable practice within the meaning of section 17 of the Act in that it will prejudice development of traffic through the Port of Boston relative to that through other North Atlantic ports.

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[6] Wharfage charges at these North Atlantic ports are assessed against the vessel. Members of Complainant Association have, without objection, been paying wharfage at those ports since it was imposed. Although vessels have incurred charges for wharfage at North Atlantic Ports other than Boston, the ocean freight rate has been uniform. Thus, shippers and consignees in the ports of Boston, New York, Philadelphia or Baltimore pay the same ocean freight rates.

[7] Approximately 90% of Boston's traffic is import cargo, and about 90% of that cargo moves from Boston by truck.

[8] During 1965, of 5,000 rail cars handled by the terminals, other than East Boston Terminal, wharfage was assessed on no more than 166 cars. (Figures for the East Boston Terminal were not available.)

[9] For the period from 1959 through 1965, there has been a steady decline of general cargo ships calling at Boston. The figures follow: 1959—1424 vessels; 1960—1417 vessels; 1961—1395 vessels; 1962—1389 vessels; 1963—1290 vessels; 1964—1204 vessels; 1965—1150 vessels.

## DISCUSSION

In his Initial Decision, the Examiner found that the Complainant had failed to substantiate its allegations and, accordingly, dismissed the complaint. He concluded that the wharfage revision was a "routine" change, clearly within the intended scope of the basic agreement and required no approval by the Commission prior to effectuation. Furthermore, the Examiner found that Respondent's practice of assessing wharfage against the vessel was neither "prejudicial" nor "unreasonable" within the meaning of section 16 or 17 of the Act. Complainant excepted to the Examiner's findings and conclusions.[10] For reasons set forth below, we agree with the result reached by the Examiner.

*Section 15*

Complainant's contention that Item 2–A constitutes a "modification" of Agreement No. 8785 within the meaning of section 15 of the Act is wholly without merit. It is abundantly clear from a reading of pertinent provisions of the basic Terminal Association agreement and a review of the applicable case law that the tariff revision involved is one which requires no separate section 15 approval.

The Commission and its predecessors have uniformly held, as early as 1927, that the expression "every agreement" in section 15 does not include "routine operations" relating to current rate changes and other day-to-day transactions. *Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). "Routine operations" has consistently been interpreted by this Commission to include conventional rate changes. It is unnecessary to review this history at length. Suffice it here to reiterate what we stated in our decision in *Empire State H'w'y. Transp. Ass'n.* v. *American Export Lines*, 5 F.M.C. 565, 586 (1959), aff'd. *sub nom.*, *Empire State Highway Transp., Ass'n* v. *Federal Maritime Bd.*, 291 F. 2d 336 (D.C. Cir. 1961), that "modifications of uniformly applicable tariffs pursuant to an approved basic agreement are routine matters and are not new agreements or modifications of an agreement requiring prior section 15 approval."[11]

The issuance of the tariff revision, Item 2–A, was clearly authorized and contemplated by the approved basic agreement. In the first place, Agreement No. 8785 *specifically* authorizes the issuance of tariffs covering "wharfage" and provides for the filing of such tariffs and *any changes therein* with the Commission. Thus, the issuance of Item 2–A

[10] Generally, Complainant's exceptions and arguments in support thereof present but a recapitulation of contentions already advanced before the Examiner.

[11] See also: *International Packers, Ltd.* v. *F.M.C.*, 356 F. 2d 808 (C.A.D.C. 1966); *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement*, 8 F.M.C. 381 (1965).

was merely in implementation of the general ratemaking authority provided in the basic agreement. Very recently, in Docket No. 66–28—*The Boston Shipping Association, Inc., et al.* v. *Port of Boston Marine Terminal Association, et al.* 10 F.M.C. 409, a proceeding involving all of the parties to the present case, we ruled that a change in a terminal tariff rule, effectuated pursuant to this very same agreement, which shifted a "strike storage" charge from cargo to vessel, did not require prior approval by the Commission under section 15. In concluding that the change constituted conventional rate change, which required no prior approval, we stated that:

Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services. The authority granted under the agreement to jointly fix charges carried with it the continued authority to properly allocate those charges, and while a particular change in allocation may be an unreasonable practice under section 17 or some other section of the Act, it does not constitute a new agreement or a modification to the existing agreement calling for a new anticompetitive, monopolistic or rate-fixing scheme not contemplated in the original agreement. [Citations omitted]

This is dispositive of the Complainant's exception to the Examiner's finding that a shift in the wharfage charge was a "routine" change, within the terms of Agreement No. 8785.

Secondly, the action of the Port Authority with respect to a revision in the wharfage charges *only* at its piers is clearly sanctioned by the language of the agreement. Agreement No. 8785 contemplated that any of the parties might take independent action provided that party followed certain established procedures.[12] Article *Sixth* of that agreement *expressly* provides that "the party proposing a change reserves the right to make it effective at its own wharves or piers regardless of the action of the other [terminal operators]." The only limitation on this right of independent action is the requirement of adequate notice to the other members of the Terminal Association so that there might be an "opportunity for consultation." Here, the Port Authority complied with all the procedures embodied in the basic agreement and the wharfage change was effectuated at its terminals. The Port Authority's exercise of its right of independent action was taken pursuant to the provisions of Agreement No. 8785. Consequently, the Port Authority's action with regard to the issuance of Item 2–A, to the extent that it resulted from the exercise of a right

[12] As to the inclusion of the right of independent action in agreements of terminal conferences, we recently stated that: ". . . the right of independent action reserved by the parties provides a safety value to insure that the interest of each port area will be protected." *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, supra,* at p. 385.

afforded in the Terminal Association's basic agreement, is within the scope of that agreement.

On the basis of the foregoing, we conclude as the Examiner did, that complainant has failed to substantiate its claim that the effectuation, without prior approval, of Item 2–A violated section 15 of the Act.

*Section 16*

Complainant's contention that Item 2–A operates in a manner which is violative of section 16 is equally without substance or foundation. The thrust of its argument is that Item 2–A is "unjustly discriminatory" against carriers who have historically used the Port Authority piers and who must now pay a wharfage charge, and "unduly prejudicial" in favor of those carriers who serve *other piers* in the Port of Boston at which no such charge is assessed.

It is well settled that, unless a terminal operator controls both terminals at which the different charges are assessed, the terminal operator cannot be held to have illegally discriminated against or preferred a carrier. In *Terminal Charges at Norfolk*, 1 U.S.S.B.B. 357, 358 (1935), the contention was made that a section 15 agreement among terminal operators, imposing new and higher cargo charges, was "unjustly discriminatory or unfair as between carriers" because it resulted in the diversion of traffic to other terminals within the port to the detriment of a number of carriers. In specifically rejecting this contention, our predecessor, the Shipping Board Bureau, held that:

> As the . . . [terminal operators] are not in any way connected with and do not exercise any control over the terminals at which lower charges are assessed, no discrimination is attributable to them so long as they uniformly apply at their own terminals the charges covered by their agreement.

This rationale was reaffirmed in *Wharfage Charges and Practices at Boston*, 2 U.S.M.C. 245 (1940), where the Commission, in dismissing the contention that varying bases of wharfage charges at different piers resulted in unjust discrimination, noted that:

> . . . the rates of each respondent are the same to each class of shippers and that no individual respondent controls the rates assessed at any other pier. [2 U.S.M.C. 248]

Although the Port Authority owns all the public terminals in Boston, it operates none except those at Commonwealth and Hoosac. The record does not show that the Port Authority has any control over the wharfage charges assessed at those piers in the Port of Boston which it does not operate. It does not appear to have *any* connection whatsoever with those piers except as lessor. Therefore, the reasoning expressed in the aforementioned cases is equally applicable here. Under the present circumstances, the Port Authority's lack of control over the level, or method of assessment, of wharfage charges at piers not subject to its operation, precludes the existence of any unlawful discrimination or prejudice.

Neither can illegal discrimination or prejudice be attributed to Item 2–A with regard to its assessment at the Port Authority-operated piers. To constitute a violation of section 16, there must always be given unequal treatment of persons by the carrier *or other person subject to the Act. Huber Mfg. Co.* v. *N.V. Stoomvuart Maatschappij "Nederland,"* 4 F.M.B. 343, 347 (1953). The manifest purpose of this section is to require those subject to the statute to "accord like treatment to all shippers who apply for and receive the same service." *Am. Tobacco Co.* v. *Compagnie Generale Transatlantique*, 1 U.S.S.B. 53, 56 (1923). It is undisputed that the Port Authority has afforded equal treatment to all carriers since Item 2–A was put into effect. Item 2–A has been assessed equally against all users of Commonwealth and Hoosac. Moreover, there has been no showing of any competitive disadvantage injurious to any vessels using the Port Authority-operated piers. The Examiner was wholly justified in concluding on the basis of the present record that the effectuation of Item 2–A had not been shown to be unjustly discriminatory or unduly prejudicial in violation of section 16 of the Act.

*Section 17*

Finally, we consider the allegation that Item 2–A violates section 17. Complainant's position is that the shift of the wharfage charge to the vessel is "unreasonable" in that it will increase the cost of vessels calling at the Port of Boston, thereby driving ships away from that port. It concludes that "the charge is thereby detrimental to commerce and clearly against public interest as it contributes substantially to the destruction of the port." Complainant's position must be rejected. No evidence has been presented nor any showing been made to substantiate the claim that the tariff revision results in an unreasonable practice. Indeed, it would appear that Complainant is laboring under a serious misconception about just *what* constitutes *unreasonableness* within the meaning of section 17.[13]

[13] Even assuming, *arguendo*, that a showing that a terminal practice resulted in a diversion of traffic from a port, without more, was sufficient to substantiate a claim of "unreasonableness" under section 17, Complainant would not be in a better position. It has wholly failed to demonstrate on the basis of the present record that any cargo has been diverted from the Port of Boston as a result of Item 2–A. Quite to the contrary, it is undisputed that the cargo which was lost to Commonwealth and Hoosac Piers was diverted to and discharged at other piers in Boston. Moreover, the record shows that steamship lines remaining at the Port Authority-operated piers do not wish to leave them even though they are paying wharfage; further, that those lines that did leave and wished to continue calling at Boston were able to find piers elsewhere in the Port of Boston.

As used in section 17, and as applied to terminal practices, a "just and reasonable practice" means a practice *otherwise lawful*, but not excessive, and which is *fit and appropriate to the end in view. Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966). Manifestly, wharfage assessed against the vessel is a proper and "otherwise lawful charge." Part of a carrier's transportation obligation requires it "to unload cargo onto a dock . . . [and] put it at a place of rest on the pier so that it is accessible to the consignee." *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F. 2d 887, 888 (D.C. Cir. 1962). Incident to this obligation to "tender for delivery" is the duty to provide to the shipper *adequate terminal facilities* upon which cargo may be placed by the shipper and/or from which it may be picked up by the consignee. *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 539 (1966). Since the terminal provides a service which is in furtherance of the *carrier's* obligation, it follows that "wharfage" is an appropriate charge against the vessel. Indeed, the Commission's General Order 15 expressly sanctioned this method of assessment. Section 533.6(d) (2) of that Order defines "wharfage" as a "charge assessed against the cargo or *vessel* . . ." (Emphasis added). Moreover, the record shows that competing ports of New York, Philadelphia and Baltimore all assess wharfage against the vessel.[14] The assessment of wharfage against the vessel may nevertheless be unlawful if it contravenes the provisions of the Shipping Act, 1916. Thus, the question becomes whether the Port Authority's practice of assessing wharfage against the vessel was "fit and appropriate to the end in view." We believe that it clearly was.

The present Port Authority wharfage charge was instituted primarily as the result of losses which the Port Authority has suffered in its pier operations. Boston is considered a "high cost" port by the steamship companies, mainly because of high labor costs. Because of such high cost factors, the number of ship calls to Boston has been declining over the past five or six years. Steamship companies have been by-passing Boston and discharging Boston cargo at New York, where these companies have felt that it is more economical to truck the cargo from New York to the consigneee or to Boston. The determination to change the method of charging wharfage that culminated in Item 2–A was made not only with knowledge that it would increase

[14] Complainant excepted to the Examiner's failure to compare the level of the terminal charges at these other east coast ports with those at Boston. The reasonableness of the level of the wharfage charges was not raised in the complaint and is not an issue in this proceeding. Accordingly, Complainant's exception is beyond the scope of the proceeding and need not be considered.

vessel costs, but also in the belief that it would attract more cargo to the Port Authority piers and thereby increase terminal revenues.

The Port Authority views its method of assessment of wharfage as a possible step toward the attraction of truck traffic, which might otherwise be lost to competing East Coast ports. The wharfage charge formerly in effect at Commonwealth and Hoosac Piers and still in effect at the other Terminal Association piers was and is assessed primarily on truck traffic. As a matter of fact, during 1965, wharfage charges were paid on a little over 3 percent of the rail freight at Boston public piers in contrast with an across-the-board assessment of wharfage against all truck traffic. In the words of respondents:

> This situation has been a competitive handicap to the Port of Boston and has had the effect of diverting truck traffic from Boston because truck shippers and consignees pay no wharfage charge at the competing ports of New York, Philadelphia and Baltimore.

The Port Authority envisions that the lowering of costs to the truck shipper and consignee will increase the movement of cargo over its piers. Since the availability of cargo is an important factor in steamship routings, the Port Authority also expects that the increase in cargo will result in an increase in the number of ships calling at Boston.

Furthermore, the Port Authority anticipates that the introduction of a tariff change will encourage more efficient pier utilization by creating an incentive for shippers to use unitization, palletization,[15] and containerization. Under present Item 2–A, a half wharfage charge is assessed on palletized, unitized, and containerized cargoes.

The Port Authority is charged with the public duty of promoting and protecting the commerce of the Port of Boston; it is a public body experienced in port and terminal management. Its decision to revise its wharfage charge appears to be in keeping with American business initiative and competitive methods.

The Commission is fully aware that there was a drop in tonnage at Commonwealth and Hoosac Piers for the months of June, July, August, and September 1966, as compared with the same months of 1965. But, as the Examiner succintly stated:

> It is unimportant that the plan be a success or failure so long as is does not violate the statute. Similar weight applies to the intent, methods, and causes leading to the initiation of the change. It is the reasonableness of Item 2–A and the contemplated practice under it that must be considered, not the motivating factors. cf. *Lopez Trucking Inc. et al.* v. *Wiggin Terminals, Inc.*, 5 F.M.B. 3, 17 (1956)

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[15] The record shows that the Port of Boston is 10 to 15 years behind other world ports in the area of palletization.

We find and conclude that Complainant has failed to demonstrate that the assessment of a wharfage charge against the vessel by the Port Authority is an "unjust" or "unreasonable" practice within the meaning of section 17 of the Act.[16]

## Ultimate Conclusions

On the basis of all the foregoing, we find and conclude that:

(1) Item 2–A constituted a modification of Agreement No. 8785 and required no separate Commission approval under section 15 of the Act prior to effectuation; and

(2) Item 2–A has not been shown to be either unjustly discriminatory, unduly prejudicial or unreasonable in violation of either section 16 or 17 of the Act.

Accordingly, the complaint is dismissed.

By the Commission.

(Signed) Thomas Lisi,
*Secretary.*

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[16] In his Initial Decision, the Examiner found that the ocean rate paid by shippers and consignees at Boston contains a factor for wharfage and concluded that, therefore, a double charge for wharfage is being made against shippers and consignees using the Terminal Association piers where wharfage is a charge against the cargo. He determined that this assessment of a double charge is unjust and unreasonable. Complainant excepts to the Examiner's finding that the freight rate for Boston includes a wharfage factor as unsupported on the record. We agree with Complainant. We have thoroughly reviewed the record and find no concrete evidence therein which would support the Examiner's finding that the ocean freight rate at Boston contains a wharfage factor or that the assessment of wharfage against shippers and consignees at the public piers in Boston, other than Hoosac and Commonwealth, involves a duplication of charges. Accordingly, we overrule the Examiner's findings and conclusions in this respect.

# FEDERAL MARITIME COMMISSION

No. 66–9

IN THE MATTER OF AGREEMENT NO. T–1870: TERMINAL LEASE AGREEMENT AT LONG BEACH, CALIFORNIA

*Decided July 26, 1967*

Agreement No. T–1870 between the City of Long Beach, California and Sea-Land of California, Inc. (1) 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; (2) does not operate to the detriment of the commerce of the United States; (3) is not contrary to the public interest; and (4) does not violate the Shipping Act, 1916. It is therefore approved pursuant to the provisions of section 15 of the Shipping Act, 1916.

*Leslie E. Still Jr.*, and *Leonard Putnam* for the City of Long Beach, California, respondent.

*Sterling Stoudenmire* and *J. Scot Provan* for Sea-Land of California, Inc., respondent.

*Miriam E. Wolff* and *Thomas C. Lynch* for the San Francisco Port Authority, petitioner.

*Arthur W. Nordstrom*, *Walter C. Foster*, and *Roger Arnebergh* for the City of Los Angeles, California, petitioner.

*Robert Fremlin* and *Edward D. Ransom* for Encinal Terminals, petitioner.

*J. Kerwin Rooney* for the City of Oakland, California, intervenor.

*Donald J. Brunner* as Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners:**

### PROCEEDINGS

By order of investigation served February 25, 1966, the Commission instituted this proceeding to determine whether Agreement No. T–

*Commissioner Fanseen did not participate.

1870, a preferential assignment agreement between the City of Long Beach and Sea-Land of California (Sea-Land-Cal) should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act of 1916. Long Beach and Sea-Land appeared as respondents. The San Francisco Port Authority, City of Los Angeles, and Encinal Terminals appeared in opposition to approval.[1] The City of Oakland intervened in favor of approval. A hearing was held and briefs were submitted. An Initial Decision was issued by Examiner Paul D. Page, Jr. to which exceptions and replies have been filed. We have heard oral argument.

## THE PARTIES

Sea-Land-Cal is a wholly-owned subsidiary of McLean Industries, Inc., and is affiliated through McLean Industries with Sea-Land Service, a common carrier by water. The officers of Sea-Land-Cal are also officers of Sea-Land Service, and these same officers dictate the policies of both. Sea-Land-Cal serves as agent for Sea-Land Service and performs all husbanding for Sea-Land's vessels, receives and delivers cargo, performs the sales functions, and bills and collects for Sea-Land Service. These services are performed pursuant to an agency agreement.

Sea-Land Service is engaged as a common carrier in the Atlantic and Gulf Coastwise trades, the Intercoastal trade, the Puerto Rican offshore trade, the Alaskan trade, and North Atlantic European foreign trade, as well as trade with ports located in the Caribbean.

Sea-Land calls at the Port of Long Beach in its Intercoastal and Pacific Coast/Puerto Rico service. The vessel itinerary in that service is Elizabethport-Puerto Rico-Balboa-Long Beach-Oakland-Balboa-Puerto Rico-Elizabethport. Subsequent to the hearing, effective July 27, Sea-Land's intercoastal service was changed from one with a weekly sailing to one with a sailing every ten days. On June 14, 1966, the trailerships Elizabethport, San Francisco and Los Angeles began service between Oakland, California and Okinawa, carrying military cargo destined for Far Eastern trouble zones.

In excess of 1,200 shippers use Sea-Land's service to and from Long Beach, and except for the seasonal slump of the canned goods industry (mid-June to mid-August), the vessels sail full in both directions. The cargo destined to Long Beach is about three times greater than the cargo generated from Long Beach; it discharges 60 percent of its westbound containers at Long Beach and loads 20 percent of its eastbound containers there.

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[1] San Francisco, Los Angeles, and Encinal will be collectively referred to as petitioners.

Sea-Land has operated at Long Beach since September 1962 at charges listed in the applicable Long Beach tariff except for the 5 months that another agreement, approved by the Commission, was in effect.

The Long Beach Board of Harbor Commissioners is charged with the administration of the harbor district of the City of Long Beach, California. There are both private as well as publicly-owned facilities within the Harbor District. The port opened to deep draft vessels in 1925 and began its major construction program in 1937 which was interrupted by the war and consequently has done most of its construction since 1946. The port has numerous berths, transit sheds, warehouses, and other operational facilities (e.g. bulk loader, grain terminal, bulk oil terminal) presently available and additional facilities are yet to be developed in accordance with the port's master plan. Presently Long Beach has 40 berths each of which is approximately 600 feet in length. In addition to the facility described in T–1870, Long Beach has 14 berths presently available capable of accommodating a ship based crane containership operation.

Los Angeles owns terminal facilities adjacent to those operated by Long Beach and although Los Angeles is a nonoperating port, a full range of terminal services is available at that port. The competition between Los Angeles and Long Beach is quite severe.

The San Francisco Port Authority, a state agency, owns terminal facilities in the San Francisco Bay area consisting of approximately 80 berths. The Port of San Francisco is a nonoperating port which leases its facilities at rates specified in its tariff on a preferential basis to organizations that operate the facilities.

Encinal Terminals is a privately owned corporation engaged in the wharfinger, trucking, warehousing, and stevedoring businesses located at Alameda, California in the San Francisco Bay area.

## The Agreement

The preferential assignment agreement—FMC Agreement No. T–1870 is between Long Beach and Sea-Land-Cal for a term of 20 years. Sea-Land-Cal is granted a nonexclusive preferential assignment for the wharf and contiguous wharf premises together with two cranes and facilities located thereon described as berth 232. Sea-Land also has the option, during the term of Agreement T–1870, to another nonexclusive preferential assignment for the wharf and contiguous wharf premises described as Parcel 233 upon 90 days' written notice.

The use of the premises is limited to those activities associated with the loading and unloading of Sea-Land's vessels or vessels of an affiliate or subsidiary of Sea-Land. The General Manager of the port retains the right to make temporary assignment of any part of the premises which is not being used by Sea-Land provided that such assignment should not unreasonably interfere with the operations of Sea-Land.

Sea-Land shall pay to Long Beach all charges applicable under the Port of Long Beach tariff. If such charges do not total $303,000 for the 12-month period beginning with the commencement date of the agreement or for any succeeding 12-month period, Sea-Land must pay Long Beach an additional sum equal to the difference. For any such 12-month period that such charges shall exceed $346,000, no further compensation shall be paid. If the option for Parcel 233 is exercised, the minimum shall be $400,000 and the maximum $450,000.

The parties agree to renegotiate the compensation prior to the beginning of the fifth, tenth, and fifteenth year of the agreement and for each succeeding 5-year period.

The port computed the minimum compensation to equal the amount necessary to finance 4 percent bonds plus ½ percent to service these bonds amortized over a 30-year period. Four and one-half percent amortized over 30 years equals 6.14 percent to which was added 2.12 percent direct and pro-rated port costs equalling 8.26 percent. The 2.12 percent figure is a combination of 2 percent pro-rated costs and 0.12 percent direct costs.

The investment in Berth 232 was estimated as of August 12, 1965, at the time of the negotiations between Long Beach and Sea-Land of California to be as follows:

EXHIBIT 11.—*Sea-Land—Pier "Y," Berth 232*

| | | |
|---|---|---|
| A. Water (150′×725′) 108, 750 S.F. @ 50¢/S.F. | | $54, 375 |
| B. Land—438,255 S.F. @ $2/S.F. | | 876, 510 |
| C. Wharf—725 L.F. @ $1016/L.F.* | | 736, 600 |
| D. Cranes—$1,331,200 plus $147,770* | | 1, 474, 970 (sic.) |
| E. Office—$35,000* | $484,000 plus 10.8% ($52,272) | 536, 272 |
| F. Utilities—$219,000* | | |
| G. Dolly strips and bumpers—$23,000* | | |
| H. Paving—$200,000* | | |
| I. Fencing—$7,000* | | |
| Total investment (estimated) | | $3, 678, 727 |

*Harbor Department engineering cost (10.8%) included in these figures.

The total investment of $3,678,727 multiplied by 8.26% equals $303,862.85 rounded to the minimum of $303,000 contained in T–1870.

The maximum figure was computed so the port could realize a return based upon the cost of money at the time, i.e. 6% net instead of 4½% net. Thus, the maximum was computed as follows:



355-301 O - 69 - 3

*Maximum—one berth—based upon typical port calculations*

| | |
|---|---|
| A. Water area—$54,375 @ 7% equals | $3, 806. 25 |
| B. Land area—Includes direct and prorated port costs | 105, 181. 20 |
| C. Wharf—725′×1016/L.F.=$736,600×7.246% (7% 50 yrs.) | 53, 374. 03 |
| D. Cranes—$1,474,970×8.581% (7% 25 yrs.) equals | 126, 667. 18 |
| E. Special investment—$536,272 @ 8.581% (7% 25 yrs.) equals | 46, 017. 50 |
| | 335, 046. 16 |
| F. Investment in phase No. 2 at time phase No. 1 is built—*$135,000 @ 8.581% (7% 25 yrs.) $11,584.35 equals | 11, 584. 35 |
| | 346, 630. 51 |
| *Additional cost of wharf construction, Berth 233 | 69, 000. 00 |
| Additional cost of electrical system, Berth 233 | 66, 000. 00 |
| | 135, 000. 00 |

In the event the total actual cost of construction shall differ from the estimated costs, the minimum/maximum annual compensation figures shall be increased or decreased by 8.61 percent of the difference between actual and estimated costs. As of May 18, 1966, there have been changes in the actual and estimated costs resulting in an adjusted minimum annual compensation of $296,000.26 and an adjusted maximum annual compensation of $339,000.26.

## Background of this Proceeding

Marine terminals in California have conducted their operations by charging wharfage as early as the turn of the century, and dockage has been assessed on the Pacific Coast for the same period of time. California area terminals have operated under tariffs for 40 or 50 years. Apart from the proposed agreement, Long Beach has no agreements involving wharfinger facilities used for loading and unloading common carrier vessels, which have a maximum limit on the tariff charges assessed.[2]

The only general cargo marine terminal facilities in California at the present time which are furnished to a carrier on a flat rental basis or on a minimum/maximum arrangement are those which Sea-Land has obtained from the ports of Oakland and Long Beach.[3]

In 1963 Sea-Land entered into terminal lease agreements with both

[2] We take notice, however, that on August 23, 1966, Long Beach filed for approval of Agreement No. T–1985, a marine terminal lease with Evans Products Company whereby Evans will conduct a public wharfinger business at a rental based on Long Beach's tariff charges, but limited to a minimum-maximum payment.

[3] Matson Navigation Company has proposed, however, to transfer its container operations from Encinal terminals to Oakland where it has negotiated a flat-rent lease agreement.

Long Beach and Oakland. The agreements (T–4 and T–5) provided for payment at a flat yearly rental in lieu of tariff rates. The agreements were made subject of proceedings before the Commission.

In its Report and Order in Dockets No. 1128 and 1129—*Agreement No. T–4: Terminal Lease Agreement at Long Beach, California;* and *Agreement No. T–5: Terminal Lease Agreement at Oakland, California*, 8 F.M.C. 521 (1965), the Commission held that the agreements between Long Beach and Sea-Land and between Oakland and Sea-Land, covering terminal properties located at the port areas of the two ports (Long Beach and Oakland), were subject to section 15 of the Act. The agreements there under consideration granted to Sea-Land exclusive use of piers and adjacent areas at a flat yearly rental of approximately $147,000 in lieu of otherwise applicable tariff charges. The Commission approved the agreements over the protests of Encinal, San Francisco, and Los Angeles, who contended that the agreements granted "special rates" and thus were "unjustly discriminatory" because based on other than tariff rates, and on noncompensatory rentals, and were "contrary to the public interest" and "detrimental to the commerce of the United States" because their implementation would disrupt the allegedly traditional Pacific Coast system of assessment of terminal charges in accord with published tariffs. The Commission found the agreements not to be unjustly discriminatory, as the rentals prescribed therein provided adequate returns on the investments of the ports and no adverse effects were shown upon other carriers, other ports, or other terminals. The Commission was unable to find that approval of the agreement was likely to cause disruption of the traditional uniformity of terminal charges on the Pacific Coast.

Agreement No. T–5 between Sea-Land and Oakland was subsequently cancelled by the parties thereto who entered into a new agreement, T–1768, which provided for minimum and maximum payments based on Oakland's tariff. On April 9, 1965, the Commission instituted proceedings to determine whether Agreement T–1768 should be approved.

In its Report and Order in Docket No. 65–9—*Agreement No. T–1768—Terminal Lease Agreement*, 9 F.M.C. 202 (1966), the Commission held that a Preferential Assignment Agreement of marine terminal property from the City of Oakland to Sea-Land, providing for the payment of an annual minimum compensation based upon the Port of Oakland tariff, is subject to section 15 of the Act. The Commission held it was not shown to be unjustly discriminatory or unfair or otherwise violative of section 15. Agreement No. T–1768 was also approved by the Commission over the protests of Encinal, San Francisco, and Los Angeles, which were basically the same as the protests of the same parties in *Agreement Nos. T–4, T–5, supra.*

The agreement here before the Commission (T–1870 which supersedes Agreement No. T–4), with the exception of the dollar amounts required for the minimum and maximum payments follows the same format and principles embraced in the earlier approved Oakland-Sea-Land Agreement No. T–1768 in Docket No. 65–9, and all of the parties to this proceeding are also identical.

## Discussion

The Examiner concluded that Agreement T–1870 between the City of Long Beach and Sea-Land (1) 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; (2) does not operate to the detriment of the commerce of the United States; (3) is not contrary to the public interest; and (4) does not violate the Shipping Act, 1916; and it should therefore be approved, pursuant to section 15 of that Act. The Examiner's conclusions were based on his determination that there is no substantial competitor of Sea-Land at Long Beach and therefore neither Sea-Land nor its shippers are favored over competitive carriers or shippers. He also found that the maximum return under the agreements was compensatory and therefore would not burden other users of the Long Beach facility. He concludes that since no one is injured by the arrangement it cannot have the allegedly discriminatory or preferential effects.

The agreement may be regarded as one by which Long Beach furnishes terminal facilities to Sea-Land, which compensates Long Beach according to the agreement's terms. Briefly, it provides that if payments at tariff rates are less than $303,000 per year, Sea-Land will nevertheless pay Long Beach $303,000 per year, and if payments at tariff rates would total more than $346,000 per year, Sea-Land will nevertheless pay only $346,000. This agreement—as distinguished from the published tariffs of Long Beach, Oakland, and other major California terminals—was worked out between Long Beach and Sea-Land to secure terminal service for less than Sea-Land would pay at tariff rates. The result is that Sea-Land may use the terminal facilities more cheaply than other terminal users can.

The Sea-Land agreements with Long Beach and Oakland are an innovation in California, and a radical departure from a system of terminal ratemaking laboriously built up by California terminals (Long Beach and Oakland included) and the Commission's regulatory predecessors, its cornerstone being the assessment of dockage and wharfage (as well as storage and demurrage) as the measure of terminals' compensation for the use of their facilities.

In determining the minimum and maximum payment figures Long Beach sought to derive a return that would amortize its investment over thirty years with interest at 4½ percent for the minimum and 6 percent for the maximum. It was stated by Long Beach that they judged this to be a fair and reasonable return and would not place a burden upon Sea-Land.

Petitioners except to the Examiner's conclusions that Agreement T-1870 is not unjustly discriminatory or unfair between carriers or shippers, and that T-1870 does not give Sea-Land an undue and unreasonable preference and advantage in violation of section 16 First. Petitioners point out that no other user of the Long Beach facilities operates under a similar arrangement. All other users compensate Long Beach at tariff rates. Petitioners feel that this fact by itself is enough to constitute unjust discrimination or undue preference.

We have previously held that a terminal lease agreement is not unlawful or unreasonable merely because it does not follow the otherwise applicable tariff charges. *Agreement No. 8905, Port of Seattle & Alaska S.S. Co.*, 7 F.M.C. 792, 800 (1964).

Petitioners also seek to discount the importance of the Examiner's finding that it has not been shown who will be injured by this arrangement. They maintain the agreement should be disapproved in spite of the Examiners finding. They cite *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966) as supporting their view that discrimination can be found without a showing of injury.

Petitioners reliance on *San Diego* is misplaced. In that case we stated that it was not necessary to show a competitive relationship between shippers using a port to determine whether a free time practice met the standards of the Shipping Act. Because of the nature of the practice—granting excessive free time—we concluded that the cost of free storage would be shifted to nonusers of the service. Thus some injury would result.

Petitioners concede that Sea-Land has no competition at Long Beach for its intercoastal service. They seek on exception, however, to show that Sea-Land does face some competition at Long Beach. It is suggested that Sea-Land is soliciting cargo in Europe for transshipment at Elizabethport to the Pacific Ocean, that at least six carriers calling at Long Beach serve this same area, and that these carriers and their shippers do not enjoy an arrangement such as Sea-Land's. Petitioners also point out that Sea-Land has started a one-way MSTS service between Oakland and Okinawa, and suggest that if Sea-Land carries cargo on return voyages to the Pacific Coast it will be in competition with at least one carrier calling at Long Beach.

Even assuming the establishment of competition between Sea-Land and another carrier and between their respective customers, we would be unable to reach a conclusion of discrimination or preference inasmuch as Long Beach has expressed willingness to make similar arrangements available to other carriers.

Few other carriers have the financial resources necessary to take advantage of such an offer. More importantly, few other carriers have operations or facilities which would require or readily lend themselves to such an arrangement. Sea-Land, because of the size and character of its operations, is somewhat unique among the carriers serving Long Beach inasmuch as it is capable of operating under such a lease. This does not mean that Sea-Land is being preferred or that others are suffering from discrimination.

We turn then to a discussion of whether the return on the agreement to Long Beach is compensatory. It must be compensatory to support our conclusion that other users of facilities at Long Beach are not burdened by the Long Beach-Sea-Land arrangement.

There has been much discussion of what need be considered to determine whether the return is compensatory. Throughout the proceeding the opponents of the agreement have sought to establish a requirement that the rate of return be based upon the so-called Freas formula.

The Freas formula utilizes cost and expense of the whole terminal area including nonrevenue producing facilities such as roads, bridges, and administration buildings.

Long Beach and Sea-Land on the other hand have argued that they need only show that the return realized covers cost and expenses of the particular facility to be used by the carrier and in addition returns a reasonable profit.

It is quite true that in valuing the terminal property for the "ratemaking" which resulted in the maximum annual payment figure ($346,000) in the lease, Long Beach did not employ the Freas formula but it was not and is not compelled to do so. The Commission and its predecessors have sanctioned, but have never required its use. Long Beach used a method, now known as the "stand on its own feet method." The basic difference between "Freas" and "stand on its own feet" is that the former utilizes cost and expense of the whole terminal as its beginning point, whereas the latter uses the estimated cost and expense of the facility to be used by the carrier. Both methods have been approved, the former in *Terminal Rate Structure—California*

*Ports*, 3 U.S.M.C. 57 (1948), and the latter in *Agreement Nos. T–4, T–5*, as well as the *Oakland-Sea-Land* case, *Agreement No. T–1768*.

We have previously approved the approach advocated by Sea-Land and Long Beach, and feel that it is a proper approach here. The same method was used and approved by us most recently in *Agreement No. T–1768* which involved a virtually identical agreement.

Opponents of the agreement maintain that Long Beach failed to consider all required costs and that Long Beach's estimated rate of return was thereby exaggerated. Petitioners thereupon submitted a revised cost estimate which they felt contained a more realistic appraisal of the true costs which Long Beach would incur.

Long Beach's cost estimate, as revised by petitioners, contains an estimate of all direct costs for the particular facility, and also contains an estimate of a pro rata amount of indirect terminal operating costs, administrative costs, fire, safety, health and sanitation costs, streetlighting and maintenance, utilities, bad debts, public information and publicity, as well as related expenditures for bridges, freeway maintenance, harbor engineering and state lands, plus a return on the investments for all these items. Using petitioners' revised estimates, an additional $61,173.22 is added to Long Beach's cost estimate. The addition of this sum would reduce Long Beach's return on the investments from 6 percent to slightly more than 5 percent, a return which the Examiner found to be reasonable for Long Beach. Petitioners' expert witness who prepared the revised cost estimates was unable to cite a nonoperating California terminal that enjoys even a 5 percent return.

Petitioners point out that their revised cost estimates also include a showing of what effect the use of the straight line depreciation method would have on the cost study. Long Beach employed the capital recovery method. Using the straight line method, an additional $12,825.30 would be added to the cost for each of the 20 years of the term of the lease. This would reduce the return on Long Beach's investment to 4.9 percent.

We do not dispute Long Beach's decision to use the capital recovery method of depreciation. Long Beach's choice in this respect is a matter of business judgment with which we will not interfere. Nevertheless, a return of 4.9 percent which would result from the use of the straight line method, would also appear to be reasonable.

Petitioners also feel that the .0212 ratio of pro-rated costs used by Long Beach was too low, inasmuch as comparable ports used a higher figure. The basis of this contention is the opinion expressed by petitioners' witness that such was the case. Petitioners attempted to introduce an exhibit showing the comparison between the ratios used by Long Beach and other California ports. Petitioners could not produce any working papers to show how the comparative figures were reached and the exhibit, therefore, was withdrawn. We cannot conclude, on the basis of this opinion alone, that the ratio of pro-rated costs used by Long Beach was too low.

Petitioners seek to show on exception that neither Long Beach's cost estimate nor petitioners' revision made provision for a return on a portion of the nonrevenue producing wharf facilities, such as roads, bridges, and administration building. A review of the record, however, shows that it is not the roads, bridges, and administration building, but it is the *lands* which support these facilities for which no return was provided.

It does not appear that the failure to provide for a return on these lands will result in other users bearing costs which should have been allocated to Sea-Land. The lands in question were acquired by Long Beach by means of a grant from the State of California. Long Beach, therefore, has incurred no original cost in acquiring these lands. Furthermore, it is questionable whether any costs are incurred to maintain these lands considering the use to which they are put. The lands supporting bridges and the administration building would appear to require little or no maintenance. It might be said that the lands supporting the roads require maintenance, inasmuch as the roads themselves need to be maintained. However, the record shows that petitioners' cost revision did include an allocation of expenses for street and freeway maintenance. The record also shows that the cost revision provides for maintenance of the actual bridges and administration building.

In view of these circumstances, we conclude that there is no need to provide for a return on these lands and, therefore, the failure to provide for a return on such non-revenue producing lands will not result in a non-compensatory rate of return for the Long Beach-Sea-Land agreement. Neither will it cause other users of the Long Beach facilities to bear expenses which should have been allocated to Sea-Land.

Petitioners also maintain on exception that Long Beach did not provide sufficient data so that the actual rate of return on the investment can be determined. It may be that Long Beach did not provide enough information to determine what would be the rate of return under the Freas formula method. Nevertheless, we are satisfied that the information available supports our conclusion that the rate of return will provide a reasonable profit for the use of the particular facility. Such information has been supplied by Long Beach. Nothing more is required.

To summarize what has been said up to this point: our previous decision shows that Agreement T–1870 should not be condemned merely because it provides Sea-Land terminal charges at other than tariff rates; the return has been shown to be compensatory and places no burden on other users of the facility; there has been no showing that any competitor of Sea-Land or any other user of the Long Beach facilities has been denied a similar arrangement.

In view of all the foregoing we conclude that Agreement T–1870 will neither be unjustly discriminatory nor unduly or unreasonably preferential or prejudicial to any carrier or shipper.

Petitioners also maintain on exception that the Examiner erred in failing to find that the effects of this agreement will be contrary to the public interest and detrimental to the commerce of the United States.

The same arguments were made with respect to similar agreements in *Agreement Nos. T–4, T–5* and *Agreement No. T–1768*. We found the agreements in these proceedings to be in the public interest and not detrimental to the commerce of the United States. We said with respect to the agreement in *Agreement No. T–1768* that it has much to recommend it and that Oakland has acted to develop and improve its port. We concluded that Sea-Land as well as members of the Shipping public will benefit from such an agreement. We also found that petitioners' speculations as to the collapse of the stability of West Coast terminal operations were not substantiated by the record and as such could not form the basis of disapproval of the agreement.

Petitioners have maintained, however, that since approval in *Agreement No. T–1768*, there have been significant occurrences which substantiate their position. Petitioners point to the transfer by Matson Navigation Company of its container operations from Encinal terminals to Oakland. Matson has negotiated a flat-rent lease agreement with Oakland (Agreements T–1953 and T–1953-A). Matson's move will result in a decrease in revenue to Encinal of $845,316 per year. Petitioners feel that this is another of what will be a long line of similar arrangements resulting from the offer by terminals of promotional inducements of less than tariff rates. They feel the logical result will be that terminals will attempt to outbid each other at negotiated nontariff rates and terminal revenues will go downard to the detriment of the terminal operators.

We have long recognized the existence of competition between the various California terminals. Since there are uniform tariff rates, or an attempt to obtain uniform tariff rates, the methods of competition are solicitation and sales, plus providing specialized facilities when a need occurs. This is evidenced by the competition between San Francisco, Oakland and Encinal terminals in attempting to locate Sea-Land at their respective facilities, and in Matson's proposed move from Encinal to Oakland in which San Francisco bid to get Matson because it felt it had to compete.

We are not convinced that the new Matson arrangment or any other suggested developments which competition may breed are indicative that the predicted chaos will result. Since the appearance of the first such agreements at California ports in 1963 there has been only three other such agreements subject to proceeding before us for approval. These were T–1768 between Sea-Land and Oakland, the present agreement (T–1870), and Matson's new agreement with Oakland, T–1953.[4]

Moreover, only a few steamship companies are willing or able to assume the tremendous financial obligations inherent in such agreements. For this reason we do not share petitioner's apprehensions that a deluge of similar arrangements will be forthcoming.

With respect to whether such agreements will result in the disruption of the tariff system, it should be noted that Sea-Land's arrangement here with Long Beach, as well as its arrangement with Oakland (T–1768) are based on tariff rates at the respective ports. The minimum and maximum payments levels are determined according to charges paid pursuant to the respective tariffs. Tariff rates are employed to determine if and when the minimum payment level is reached. Charges at a level between the minimum and maximum are at actual tariff rates.

The Examiner saw much to recommend this type of arrangement and offered reason why it could exist alongside and be compatible with the traditional tariff arrangement. He said in his Initial Decision at 16:

> There is a benefit to both Sea-Land and Long Beach in the very thing that the opponents of approval make the foundation of their opposition—the possibility, which really seems a probability, that during a portion of certain years Sea-Land will pay less than tariff rates. What Long Beach loses thereby may well be a good investment for Long Beach. It may give Sea-Land help in expanding its service and doing bigger business with Long Beach, or keep it in service and doing business with Long Beach which might otherwise dwindle away. Not only is this advantageous to the parties to the agreement in particular; it is for that and other obvious reasons beneficial to the general public interest.

He further stated at 19–20:

> If the speedy and healthy development of first-class containerized operation in the intercoastal and foreign trade can be advanced by a modicum of price-

[4] We take official notice that a fourth such agreement has been filed for approval. It involves a lease of terminal property by Long Beach to Evans Products Company. Evans will conduct a public wharfinger business at a rental based on Long Beach's tariff charges, but limited to a minimum-maximum payment.

wise competition between terminals with respect to these expensive specialized facilities without devastating results, the public interest will be advanced, not hurt. The heavy-container concept coupled with door-to-door service constitutes an industrial revolution in ocean carriage. In operation it requires special facilities, as this record demonstrates, and changes, perhaps even major dislocations in terminal rate structures may result. There appears no good reason, however, why container berths for the new service under contracts such as this, which may eventually merge into container service tariffs, and other berths for break-bulk ships where tariff rates are charged, cannot exist side by side.

We think the Examiner's approach is proper and that his reasoning is sound. On the basis of all the foregoing we conclude that it has not been shown how Agreement T–1870 will operate contrary to the public interest or to the detriment of the commerce of the United States.

Petitioners further argue that the practice of furnishing terminal services at other than tariff rates is an unjust and unreasonable practice under section 17 of the Act and that the Examiner erred in finding to the contrary. Petitioners' rely on *Storage Practice of Longview, Washington*, 6 F.M.B. 178, 184 (1960) as authority for this proposition.

This case, however, merely stands for the proposition that a terminal which holds itself out to the public to offer services solely by tariff must abide by that tariff. It does not support the proposition that a port cannot offer terminal facilities pursuant to an agreement as well as a tariff.

As we stated in *Agreement No. 8905*, 7 F.M.C. 792 at 800:

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 * * *.

Petitioners also object to the Examiner's failure to find that Agreement T–1870 violates the California Association of Port Authorities' agreement No. 7345 pursuant to which the California terminals operrate. Petitioners claim Agreement 7345 requires that the Association members provide services only according to tariff rates. Our reading of the agreement is not so restrictive. As we previously said in *Agreement Nos. T–4, T–5*, 8 F.M.C. 521 at 533, "The agreement simply permits uniform, stable terminal rates as far as may be practicable. The agreement does not require uniformity." Furthermore, we read the agreement as requiring strict adherence to tariff rates only to the extent charges are proposed to be assessed by tariff. It does not prohibit an arrangement of the sort entered into here by Long Beach and Sea-Land.

Petitioners also except to the Examiner's failure to find Agreement T-1870 violative of the laws of the State of California. Petitioners are referring to the provision of the grant of the harbor to Long Beach by the State of California. The grant would prohibit Long Beach in the operation of the harbor from discriminating in rates, tolls, charges, or facilities.

We have already determined that Agreement T-1870 would not violate our standards which prohibit discrimination and have found it would not be contrary to the public interest. We answered the same argument of petitioners in *Agreement Nos. T-4, T-5*, 8 F.M.C. 521 at 533, and the same is applicable here:

> While we might consider State or local law in determining what the public interest may be, we cannot in this case disapprove the agreements on this basis. The record does not show that any adverse ramifications will ensue upon approval of the agreements. Since we cannot anticipate any consequences which might be contrary to the public interest, the legality of the terms of the leases under California law is a matter for the State, not for the Commission in a section 15 proceeding.

An appropriate order approving Agreement T-1870 will be entered.

By the Commission.

[SEAL]

THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 66–9

IN THE MATTER OF AGREEMENT NO. T–1870: TERMINAL LEASE AGREEMENT AT LONG BEACH, CALIFORNIA

## ORDER

The Commission has this date entered its Report in this proceeding, which is hereby made a part hereof by reference, and has found, *inter alia*, that Agreement No. T–1870 between the City of Long Beach, California, and Sea-Land of California, Inc., 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. T–1870 is hereby approved pursuant to section 15 of the Shipping Act, 1916.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 67–15

MADDOCK & MILLER, INC.

*v.*

UNITED STATES LINES COMPANY, MAYER CHINA COMPANY, FINE CHINA ASSOCIATES, INC., BART MILLER, WILLIAM P. C. ADAMS, SCHMID BROS., INC., PAUL A. SCHMID, LITTLEFIELD, INC.

*Adopted August 3, 1967*

The action of United States Lines Company in changing its supplier of china did not violate section 14 First of the Shipping Act, 1916. Complaint dismissed.

*W. Harvey Mayer* for complainant.

*Elmer C. Maddy* for respondent United States Lines Company.

*Lawrence M. McKenna* and *Walter J. Josiah, Jr.*, for respondents Fine China Associates, Inc., Schmid Bros., Inc., and Paul A. Schmid.

*Edward Brodsky* for respondent Littlefield, Inc.

*Patrick Owen Burns* for respondent Mayer China Company.

## INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER[1]

By amended complaint filed February 27, 1967, it is alleged that complainant is a New York corporation dealing in glassware and chinaware; that prior to June 1963, complainant supplied to respondent United States Lines Company (USL) the products manufactured by respondent Mayer China Company (Mayer), pursuant to an agreement giving complainant the exclusive right to sell Mayer products; that commencing in March 1961, respondents Fine China Associates, Inc. (FCA), and William P. C. Adams (Adams), endeavored to obtain the USL business although china manufactured by respondent Littlefield, Inc. (Littlefield), sought to be sold by USL by FCA and Adams, Adams, Schmid Bros., Inc., Paul A. Schmid, and Littlefield threatened USL that if it did not purchase its china through FCA, respondents would ship via other ocean carriers and would induce affiliated companies to do the same.

[1] This decision became the decision of the Commission on Aug. 3 1967.

The switching by USL of its purchases of china from complainant to FCA in the spring of 1963 is alleged to have been a deferred rebate, in violation of section 14 First of the Shipping Act, 1916 (the Act). The complaint also alleges that "By reason of the foregoing the respondents, other than United States Lines have received and still are receiving unduly and unreasonably preferential rates," but complainant's attorney, after a general discussion at the commencement of the hearing, rested his case as to those respondents solely upon section 14 First.

The complaint was withdrawn as to respondents Mayer and Littlefield. Respondents Miller and Adams did not file answers or participate in the hearing. Complainant filed no reply brief.

## Preliminary

The proceeding had its genesis in a civil antitrust suit brought by the present complainant in the U.S. District Court for the Southern District of New York.[2] Defendants in that suit (most of whom are respondents in the present proceeding) moved for an order dismissing the complaint on the ground that the court lacked jurisdiction of the subject matter. Under the "primary jurisdiction" rule, the court dismissed the complaint as to USL. The actions against the other defendants were stayed pending action by the Commission on any complaint filed with it by complainant. 241 F. Supp. 306 (1965). Appeal was taken by complainant to the Court of Appeals for the Second Circuit. Before that court rendered its decision, however, the Supreme Court decided *Carnation* v. *Pacific Westbound Conference*, 383 U.S. 218, 932 (1966), and on the basis of that ruling the Court of Appeals held that the District Court should have retained jurisdiction over USL "to ensure a full and adequate remedy if the Commission determines that the defendant did violate the Shipping Act." 365 F. 2d 98 (1966).

## The Facts

Complainant began to supply USL with Mayer china in 1952. In its letter of March 29, 1961, FCA offered to supply USL with Shenango china (manufactured by Littlefield) and requested some samples of Mayer china to enable FCA "to give you a very advantageous quotation." On September 29, 1961, FCA submitted to USL a quotation for a specified quantity of Shenango china for use on the vessels *United States* and *America*. This offer was $20,812.06 less than the then current prices of complainant. Later offers for other requirements were

[2] An earlier complaint had been filed in the Supreme Court of the State of New York but was dismissed at complainant's request.

lower by $6,814.56, $3,652.61, $1,127.65, and $9,217.24. A comparison of the prices of complainant and FCA for 1962, 1963, and 1964, shows an average differential in favor of FCA of $12,391.63, or 14¾ percent.

Samples of Shenango china were submitted by FCA to USL "at least four or five" times between 1961 and 1963, but they did not meet the standards of Mayer china. Furthermore, to switch suppliers would raise problems for USL in liquidating complainant's stock. Since a change in suppliers was not a step to be taken "lightly," the situation remained unchanged until early in 1963, when USL learned that FCA would supply it with Mayer china of the same quality previously purchased from complainant, but at a minimum saving of 7 percent. At that point, USL decided to transfer its purchases from complainant to FCA. Even after complainant learned of the switch it made no offer to meet the prices of FCA.

## Discussion and Conclusions

*Respondent USL.* Complainant contends, as already seen, that USL was forced to withdraw its china purchases from complainant because Schmid Bros. and its affiliates threatened to make their commercial shipments via ocean carriers other than USL, and that this group of shippers paid freight charges to USL of approximately $150,000 a year. It was stipulated, however, that the largest amount of freight monies received by USL from Schmid and FCA in any one of the years 1961, 1962, and 1963 was only $23,731.68. It must not be forgotten, too, that FCA was unsuccessful, between 1961 and 1963, in securing the china business from USL inasmuch as Shenango china handled by FCA did not meeet the quality of Mayer china, and that it was not until FCA secured a lower price from Mayer that it was able to offer USL the savings already referred to.

Although FCA, in its letter of March 29, 1961, informed USL's purchasing department that FCA and its affiliates (including Schmid Bros.) were substantial importers via USL ships, it is significant that between 1961 and 1963, the amount of freight paid annually by Schmid Bros. to USL remained fairly constant, which would seem to negative the idea that pressure was being brought to bear on USL.

The official of the purchasing department of USL who is supposed to have stated to complainant's president in 1963 that USL was pressured into buying china from FCA was unable to testify as he was critically ill. The sole USL witness was the director of the department of service and supply, which includes the former purchasing department. He was superintendent steward between 1962 and 1965, and worked closely with the purchasing department during those years.

This official testified that he had never heard of any pressure being put on USL to change its china supplier, and that during the period here involved "any contemplated changes in the procurement procedure would normally be discussed and our approval requested before any major change were [sic] placed in effect." Decisions of such magnitude as the changing of a supplier, with its attendant problem of assuring continuity of quality, would have required the consent of both the purchasing department and the superintendent steward.[3]

It is concluded and found that USL was not pressured into changing its china supplier, but this is really immaterial in view of the other conclusion which here follows. As previously stated, complainant's attorney grounded his case solely on section 14 First of the Act. To constitute a violation of that section the deferred rebate must be a "*return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.*" (Italics supplied.) Even if it were to be conceded by any stretch of the imagination that the action of USL here under consideration was a "deferred rebate," there is no proof whatever that such course of conduct was of the kind or description defined in section 14 First. The complaint is hereby dismissed as to USL.

*Respondents other than USL.* Miller was president of complainant when the company changed hands in early 1963. Adams was president of FCA during the same period. As earlier noted, neither of these individuals filed an answer or participated in the hearing. No attempt was made by complainant to make a case against them personally. The record is somewhat fuzzy as to the status of Schmid Bros. and Paul A. Schmid. The letter from FCA to the purchasing department of USL, dated March 29, 1961, refers to Schmid Bros. as one of its "associated companies." It is also mentioned therein that "Our hotel division would like to be your supplier of dinnerware," from which the Examiner assumes that the division referred to was Schmid Bros. A letter dated March 23, 1967, from the chairman of Schmid Bros. to the Examiner shows the company simply as "Importers"; it also appears from that letter that Paul A. Schmid is a brother of the chairman. A stipulation among counsel shows that in each of the years 1961,

[3] Complainant's president, who came with the company in early 1963 when ownership changed hands, testified that complainant's china and glass business with USL had amounted to about $250,000 a year.



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1962, and 1963, Schmid Bros. paid to USL considerably more freight monies than did FCA.

One thing is clear: None of the respondents mentioned in the preceding paragraph is a common carrier by water. As section 14 First of the Act, in its prohibitive terms, applies only to common carriers by water, the complaint as to such respondents is hereby dismissed.

## ULTIMATE CONCLUSION

There being no showing that any of the respondents has violated section 14 First of the Act, the complaint is hereby dismissed in its entirety.

C. W. ROBINSON
*Presiding Examiner.*

# FEDERAL MARITIME COMMISSION

No. 67-12

United States of America

*v.*

American-Oriental Lines, Inc.

*Decision adopted August 17, 1967*

Respondent found to have collected charges in excess of those applicable under its tariff on a shipment of two trucks from Baltimore, Md., to Dacca, East Pakistan, via the port of Chittagong. Refund of the overcharge ordered.

*Bertram E. Snyder* for complainant.
*W. A. Newcomb* for respondent.

## Initial Decision of Charles E. Morgan, Presiding Examiner [1]

The shortened procedure was followed. The United States of America, by the Department of Justice, filed the subject complaint on February 15, 1967, against American-Oriental Lines, Inc., seeking reparation of $530.39 because of alleged overcharges on a shipment of two trucks from Baltimore, Md., to Dacca, East Pakistan, via the port of Chittagong, made on March 10, 1965.

The respondent had gone out of business, but its president accepted service of the complaint on March 7, 1967. At his and his counsel's requests, the time to answer the complaint was enlarged on three occasions. The answer of respondent does not admit the allegations, but does not contest the complaint. The complainant's memorandum in support of the complaint was filed on June 14, 1967, and no answering memorandum has been filed. Thus, all the facts of record appear in complainant's memorandum.

The United States on March 10, 1965, delivered two trucks at Baltimore to the respondent for shipment aboard the SS *Whitehall*, a vessel owned, chartered, operated, managed, or otherwise controlled

[1] This decision became the decision of the Commission Aug. 17, 1967.

by the respondent, for shipment in accordance with respondent's bill of lading No. 3, dated March 9, 1965.

Respondent submitted its bill for ocean freight and related charges on these two trucks on March 17, 1965, and the bill was paid on or about March 26, 1965. Later, it was audited by the General Accounting Office of the United States, which determined in its view that there was an overcharge.

Under Freight Tariff No. 1 of the respondent, the applicable rate of $48.75 per 40 cubic feet resulted in charges of $3,232.13 for part of, but not all of, the services provided. There is no dispute about this portion of the charges, which were based on 2,652 cubic feet.

Also under the same tariff, there are rates for the so-called heavy-lift service. The heavy-lift charges were billed and collected at a rate of $12.50 per 40 cubic feet, or $828.75. Rule 4, of the tariff, effective April 22, 1964, provided heavy-lift charges on all pieces or packages weighing over 8,960 pounds. The two trucks in issue had a total weight of 22,800 pounds, and apparently were 11,400 pounds each. The $12.50 heavy-lift rate erroneously charged applied on a piece or a package weighing from 24,640 to 26,880 pounds. On a piece or a package weighing 22,400 to 24,640 pounds, a rate of $11.25 applied. On a piece or package from 11,200 to 12,320 pounds, the heavy-lift rate was $4.50 per 40 cubic feet. Thus, on two pieces or packages, each of 11,400 pounds, the applicable heavy-lift rate was $4.50, resulting in heavy lift charges of $298.35.

The total applicable [2] charges on the two trucks were $3,232.13 plus $298.35, or $3,530.48, whereas the total charges collected were $4,060.87.

It is concluded and found that the complaint was timely filed, and that the United States was overcharged in the amount of $530.39 on the shipment in issue. The respondent is ordered to refund $530.39 to the United States.

S/(Signed) CHARLES E. MORGAN,
*Presiding Examiner.*

[2] Under sec. 18(b)(3) of the Shipping Act, 1916, a common carrier by water in the foreign commerce shall charge and collect for its transportation services at the rates specified in its tariffs on file with the Commission.

# FEDERAL MARITIME COMMISSION

No. 67–18

AGREEMENTS NO. E–1985 AND T–1986: LEASE AGREEMENTS AT LONG BEACH, CALIFORNIA

*Decision Adopted September 6, 1967*

Amended Agreement No. T–1985, a marine terminal lease between the City of Long Beach and Evans Products Company, has not been shown to be unjustly discriminatory or unfair or otherwise unlawful under section 15 of the Shipping Act, 1916; Amended Agreement No. T–1985 is approved. Agreement No. T–1986, a warehouse lease to South Bay Warehouse Corporation, was terminated before it became effective.

*Leslie E. Still, Jr.* and *Leonard R. Putnam* for the City of Long Beach, California, respondent.

*Reed Williams* and *Amy Scupi* for Evans Products Company, respondent.

*Miriam E. Wolff* for the San Francisco Port Authority, petitioner.

*Walter C. Foster* and *Edward C. Farrell* for the City of Los Angeles, petitioner.

*Donald J. Brunner* and *Samuel Nemirow* as Hearing Counsel.

## INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER

By order of investigation served March 3, 1967, the Commission instituted this proceeding to determine whether Agreement No. T–1985, a marine terminal lease, between the City of Long Beach, California (Long Beach), and Evans Products Company (Evans), should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (the Act).

Also, this proceeding was intended to determine the lawfulness of Agreement No. T–1986, a warehouse lease between Long Beach and South Bay Warehouse Corporation, but this lease was terminated on July 10, 1967, before it became effective. Accordingly, there is no further need to consider Agreement No. T–1986.

The Commission's order of investigation referred to two protests, received from the City of Los Angeles and from the San Francisco Port Authority, against approval of the subject Agreements. Both of these petitioners appeared at the prehearing conference, and all the parties agreed on a July 11, 1967, hearing date. On June 29, 1967, Long Beach and South Bay Warehouse Corporation announced their intention to terminate Agreement No. T–1986. In view of that circumstance and because Long Beach and Evans had amended Agreement No. T–1985, the two petitioners decided, because of the expenses of litigation and for other reasons, not to appear at the hearing, which had been postponed to July 18, 1967.

By letter dated July 12, 1967, the City of Los Angeles withdrew its protest with reluctance "in view of recent decisions of the Commission approving this type of agreement * * *." Los Angeles stated in part:

We have asked the Court of Appeals to review the Commission's decision in Docket No. 65–9. We assume that in the event the Court ultimately holds that the Commission should not have approved Agreement No. T–1768 (the subject of Docket No. 65–9) * * *, the Commission will review all other similar agreements, including T–1985, in the light of the principles laid down by the Court. * * * The City of Los Angeles will continue to press for a judicial determination (1) that publicly owned and operated ports are required to be operated as public utilities pursuant to tariffs containing charges, rates, tolls and regulations equally applicable to all, and (2) that special "deals" for the privileged few such as contemplated by T–1985 are contrary to law.

By letter also dated July 12, 1967, the San Francisco Port Authority stated that it has no objection to T–1985 until the minimum payment is exceeded, but from that point on it believes that the arrangements, providing for the division of wharfage and dockage between Evans and Long Beach and the 100 percent accrual to Evans of storage and wharf demurrage charges, are improper. San Francisco also stated in part:

When the Commission made its decision in Sea Land it gave consideration to the fact that the matter under discussion was containerized cargo, a different kind of operation. We are now seeing an extension of the Sea Land doctrine into break-bulk operations. We would assume that in the event the Court reverses the Sea Land decisions this Commission will reopen the present proceeding and we withdraw from active participation on the assumption this will be done. * * * We hope that the Commission sees its way clear to re-establish the tariff system at the least for break-bulk operations where the terminal operator is a shipper-carrier of its own cargo.

Hearing Counsel and respondents participated in the hearing at Los Angeles. The respondents asked that the proceeding be expedited in view of the fact that the marine facilities which are to be leased under the subject agreement are under construction, and the construction may be completed sometime in September 1967. In lieu of omitting briefs as was suggested, early brief dates were set, thereby not foreclosing the filing of a brief by a petitioner.

The agreement in issue, No. T–1985, designated "Marine Terminal Lease," has been amended by another document, designated "First Amendment To Marine Terminal Lease." The lessor, Long Beach, is a municipal corporation and owner of land adjacent to the harbor area in Long Beach. The lessee, Evans, a Delaware corporation, is an importer, exporter, and manufacturer of plywood, and is a charterer of vessels in the foreign commerce, among other business enterprises. Evans currently has two vessels under charter, and four more vessels will come under charter to Evans by 1968. The operation of the two Evans' vessels is by Retla Steamship Company under an agency agreement on file with the Commission. Evans has a tariff on file with the Commission, and its vessels are in the Trans-Pacific trade between the Orient and ports on the U.S. West, Gulf, and East coasts. The principal commodities carried on Evans' vessels are steel, plywood, and general cargo. Evans' plywood imports are estimated by Evans to be less than 10 percent of the total tonnage which it anticipates would move across the docks of the premises to be leased. Steel and plywood would be the principal tonnage, with some general cargo. The handling of steel and general cargo would be for persons other than Evans. Plywood would be handled for Evans and other persons. The lease agreement is for 10 years, with a renewal option except as to the rental money which is to be renegotiated.

Under the amended agreement, Long Beach will lease to Evans certain premises in the harbor district of Long Beach situated on Pier F at Berths 204 and 205. The leased premises will include a transit shed, containing 90,000 square feet, now under construction and nearing completion. Berths 204 and 205 in total contain about 358,000 square feet.

The lease provides that Evans shall maintain and operate these premises as a public terminal for waterborne commerce for the accommodation of shipping by rail, truck, and water, including the handling of general cargo and packaged freight. Long Beach reserves the right to make secondary assignments to other persons when the premises are not required by Evans for its uses.

Charges are to conform as nearly as possible with like charges published in the tariff of Long Beach applying at municipal terminals of Long Beach. The latter is given the power to review and control the rates, charges, regulations and practices of Evans as lessee of this marine terminal. In fact, Evans intends to concur in Long Beach's tariff, and to assess charges uniformly to all shippers and consignees, including itself. Each of Evans' operations, including this marine terminal operation, is expected to sustain itself economically, and to reflect a profit, and it is not intended, for example, that Evans' marine terminal operation will subsidize Evans' operation as an importer of plywood.

The first amendment of the lease recites in its first paragraph that it was made and entered into on August 9, 1967, pursuant to an ordinance adopted by the Board of Harbor Commissioners of the City of Long Beach at its meeting of July 10, 1967. This first amendment has been signed by Evans as of July 3, 1967, but due to a formality in the Long Beach City Charter there is a 30-day referendum provision which necessitates that the first amendment be not signed and executed [1] by Long Beach until on or about August 9, 1967. The lease also provides that it shall not take effect until its approval by the Federal Maritime Commission, or a determination by this Commission that such approval is not required.

The compensation for the leased premises is set forth in Section 6 of the first amendment, which provides that Evans will pay to Long Beach a rental during each twelve-month period of the lease in the minimum sum of $188,000. All revenue from dockage, wharfage, wharf demurrage, wharf storage, and other applicable tariff charges accruing from Evans' operations upon the premises shall be paid to Long Beach, until the $188,000 minimum has been paid. After that minimum has been paid to Long Beach, the revenue earned in the balance of each twelve-month period for wharfage and dockage charges shall be divided, 25 percent to Long Beach, and 75 percent to Evans. All other tariff charges, such as for wharf demurrage and wharf storage, accruing during the balance of each twelve-month period shall accrue 100 percent to Evans, and are to be retained by Evans.

In its operation of the leased premises, Evans hopes to obtain yearly revenues in excess of the $188,000, but this minimum is payable to Long Beach whether or not the revenue received from the operation is less than, equal to, or in excess of this minimum.

After and in the event that the minimum is reached, Evans' share of revenues above the minimum will be utilized first to defray the expenses of operating the terminal, and thereafter any sums remaining will be considered as profit to Evans in its capacity as a marine terminal operator.

[1] Counsel for respondent, Long Beach, stated at the hearing that he would advise the Federal Maritime Commission later of the fact and time that the first amendment is actually signed and executed by Long Beach.

Under terms of the lease, Evans is required to pay the cost of water, fuel, electricity, gas and other utilities furnished to or used in or on the leased premises, the cost of maintenance and repair of the premises, the cost of certain liability insurance policies and certain property taxes, and the cost of tackle, gear, and labor for the docking or mooring of vessels at the premises. Evans is not responsible for reasonable wear and tear and the action of the elements on the premises, nor is it responsible for repairs to the fender system where damage is not caused by Evans.

The amended lease agreement also provides to Evans the option and right of first refusal to lease Berth 203 of the harbor district of Long Beach. Berth 203, which is adjacent to Berths 204 and 205, and also is on Pier F, contains about 161,000 square feet. The rental compensation for berth 203 for each twelve month period shall be not less than $38,640 or such sum as shall be equal to the annual rental provided in a bona fide offer from a third party, whichever sum shall be less, and which sum shall be added to the minimum obligation of $188,000 in connection with the lease of Berths 204 and 205, and which sum shall be used in the computation and apportionment of tariff charges for wharfage and dockage in like manner as in connection with the lease of Berths 204 and 205.

The agreement requires Evans to keep full and accurate books and accounts of its operations of the leased premises, with the said books and accounts subject to audit by Long Beach.

Long Beach estimated an investment of $2,242,571 in Berths 204 and 205, and $402,462 in Berth 203. On berths 204 and 205, the minimum rental would produce a gross return of 8.38 percent, and on Berth 203, its minimum rental would produce a gross return of 9.60 percent, or a composite of 8.57 percent for all three berths. At the time of the lease negotiations Long Beach could have sold revenue bonds at a gross cost of 4.5 percent including servicing. To return a net of 4.5 percent on its investment amortized over 30 years, Long Beach calculated that it required 6.14 percent per year income on its investment. In addition, Long Beach estimated prorated overhead port costs of 2.13 percent and direct costs of 0.16 percent, or a total of all factors of 8.43 percent. The record contains no contrary estimates and calculations of the return on investment of Long Beach on the premises to be leased, and Long Beach's estimates appear to be reasonable.

Hearing Counsel agree that the rental agreement apparently will yield an adequate return to Long Beach in consideration of its investment in the leased premises, and Hearing Counsel emphasize that the agreement will provide Long Beach with a guaranteed minimum income irrespective of tonnage handled over the facility.

Long Beach believes that this new facility is part of its progress in improving its total port facilities. The leased premises will have an extra wide area between the transit shed and wharf, for the easy handling of long steel beams, pipes, and plates, with more room for the mobile cranes than upon the standard apron wharf. The new facility is considered by Long Beach as a specialized facility for handling steel.

Section 15 of the Act provides that the Commission shall approve agreements such as No. T–1985, unless, after notice and hearing, it finds that the agreement is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors, or that the agreement operates to the detriment of the commerce of the United States, or that the agreement is contrary to the public interest, or otherwise in violation of the Act. In order to disapprove Agreement No. T–1985, it must be shown to be unlawful under section 15. This record contains no conclusive evidence of unlawfulness.

The proposed lease was well publicized, and no steamship company objected to this agreement, nor did any shipper. There was no suggestion that any cargo would be diverted from any port or terminal, or that any carrier would shift its operation to a different port or terminal. Nothing in the agreement suggests that operations by Evans will be performed in any unlawful manner. In any event, the Commission retains jurisdiction for the future should there be a complaint.

On brief no one opposes the lease agreement. Concerning the matter of whether the return to Long Beach is fair and reasonable for the rental of the leased premises, it may be said that this is not a rate case where we have a direct interest in the level of the Long Beach's return on its terminal facilities, and beyond this, Long Beach is a public body experienced in terminal management, and the record affords no grounds for disputing Long Beach's judgment in negotiating this lease agreement. See *Agreement No. T–1768—Terminal Lease Agreement*, 9 F.M.C. 202, 207 (1966).

Long Beach points out that in Docket No. 65–9 *Agreement No. T–1768—Terminal Lease Agreement*, *supra*, at page 205, it was stated:

> The record discloses no unlawful discrimination or prejudice against any carrier, shipper, port or terminal. No carrier testified against approval of the agreement, and the port of Oakland in fact has openly stated its willingness to assign other terminal properties in the same manner and under the same conditions offered to Sea-Land.

Long Beach reasons that the identical holding could be made in this proceeding substituting Long Beach for Oakland and Evans for Sea-Land.

It has been held that a terminal lease agreement is not unlawful or unreasonable merely because it does not follow the otherwise applicable tariff charges. *Agreement No. 8905—Port of Alaska and Seattle S. S. Co.*, 7 F.M.C. 792,800 (1964). Also, *Agreement No. T–1870—Terminal Lease Agreement At Long Beach, California*, 11 F.M.C. Approved July 26, 1967.

It is concluded and found that Agreement No. T–1985, as amended, has not been shown 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 the Shipping Act. An order will be entered approving Agreement No. T–1985 as amended herein. It further is concluded and found that Agreement No. T–1986 was terminated before it became effective, and that any issue as to that agreement is moot.

(Signed) CHARLES E. MORGAN,
*Presiding Examiner.*

WASHINGTON, D.C., *August 10, 1967.*

# FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

No. 67-18

IN THE MATTER OF: AGREEMENTS NO. T-1985 AND T-1986: LEASE AGREEMENTS AT LONG BEACH, CALIFORNIA

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER APPROVING AGREEMENT

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on September 6, 1967.

*It is ordered*, That Agreement T-1985, as amended by the document entitled "First Amendment to Marine Terminal Lease" and executed by Evans Products Company and City of Long Beach on August 9, 1967, is approved and this proceeding is discontinued.

By the Commission.

[SEAL] (Signed) FRANCIS C. HURNEY,
*Assistant Secretary.*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 67–33

CALCUTTA, EAST COAST OF INDIA
AND EAST PAKISTAN/U.S.A. CONFERENCE

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*Decided September 13, 1967*

Agreement No. 8650 canceled for failure of certain parties signatory thereto to comply with subpoenas lawfully issued pursuant to section 27 of the Shipping Act, 1916.

*Elmer C. Maddy* and *John Williams* for respondents, Calcutta, East Coast of India and East Pakistan/U.S.A. Conference.

*Burton H. White* and *Elliott B. Nixon* for intervener, North Atlantic Mediterranean Freight Conference.

*Edward D. Ransom* for intervener, Pacific Westbound Conference.

*Edward S. Bagley* for intervener, Gulf Conferences (Gulf/Mediterranean Ports Conference, Gulf/United Kingdom Conference, and Gulf/Scandinavian and Baltic Sea Ports Conference).

*J. M. Allen* for intervener, Textile Bag Manufacturers Association.

*Peter J. Nickles* and *H. Thomas Austern* for intervener, Ludlow Corporation.

*Donald F. Turner*, *Joseph J. Saunders*, and *Paul Ferber* for intervener, Department of Justice.

*Donald J. Brunner*, Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

By order of May 24, 1967, we directed the Calcutta, East Coast of India and East Pakistan/U.S.A. Conference and the member lines thereof to show cause why its agreement (No. 8650) should not be canceled as contrary to the public interest. The proceeding was restricted to the filing of affidavits of fact and memoranda of law and replies thereto. Several petitions to intervene were granted.[1] Oral argument before the Commission was held on July 19, 1967.

## FACTS

The Calcutta, East Coast of India and East Pakistan/U.S.A. Conference was established by approved Agreement No. 8650 which covers the trade from the East Coast of India and East Pakistan ports to United States Atlantic and Gulf of Mexico ports. The Conference members are all common carriers by water in the foreign commerce of the United States and, as such, they are subject to the provisions of the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*).[2]

The Conference has a dual rate contract system approved under section 14b of the Act. Ludlow is a signatory to a conference dual rate contract and is, therefore, subject to certain exceptions required to ship its cargoes on conference vessels.

On July 6, 1965, the Conference increased its rates on certain jute products and gave notice to Ludlow that the increase would become effective on November 11, 1965.

In August of 1965, Ludlow filed a complaint with the Commission alleging that the increased rates were in violation of sections 14b, 15 and 18(b)(5) of the Shipping Act.

In September of 1965, Ludlow sought the issuance of nine subpoenas duces tecum directed to each of the Conference members. The Presiding Examiner, over the opposition of respondents, issued the subpoenas requested, but insofar as they did not "require production of documents from any place not in the United States", the Examiner pointed out that application for subpoenas requiring production of documents located elsewhere may be made to the Commission itself.

Ludlow applied to the Commission for the issuance of additional subpoenas duces tecum covering documents not located in the United States. The Commission granted the application and the additional subpoenas were issued by Examiner Page. Certain respondents refused to comply with the subpoenas on the ground that they were invalidly issued in excess of the Commission's authority.

Ludlow then applied for and obtained an order to show cause in the Federal District Court for the Southern District of New York to compel respondents to comply with the subpoenas issued by the

[1] Interveners were North Atlantic Mediterranean Freight Conference, Pacific Westbound Conference, Gulf Conferences (Gulf/Mediterranean Ports Conference, Gulf/United Kingdom Conference, and Gulf/Scandinavian and Baltic Sea Ports Conference), Textile Bag Manufacturers Association, Ludlow Corporation, and Department of Justice.

[2] The members are American Export Lines, Inc.; Thos. & Jno. Brocklebank Ltd., Hellenic Lines, Ltd.; Isthmian Lines, Inc.; Nedlloyd Lines; Scindia Steam Navigation Co. Ltd.; Shipping Corporation of India Ltd.

Federal Maritime Commission. The District Court upheld the validity of the subpoenas but stayed their enforcement pending appeal to the Court of Appeals for the Second Circuit. This stay was later extended by the Court of Appeals.

The Court of Appeals affirmed the enforcement order of the District Court, and on December 8, 1966, the Supreme Court denied certiorari. The District Court issued an order directing the respondents to comply with the subpoenas on January 4, 1967.

On January 12, 1967, and January 20, 1967, Examiner Page issued notices of referral to the Commission of the asserted "failure" and "refusal" of the representatives of the Shipping Corporation of India, Ltd., the Scindia Steam Navigation Company, Ltd., Thos. & Jno. Brocklebank, Ltd. and N. V. Nedlloyd Linjen, Holland, "to produce documents, if any, located outside the United States." The Examiner noted that "The United States flag lines and Hellenic Lines (Greek) intend to comply fully" and, further, that "Counsel for Ludlow stated that he would not insist upon data from the lines stating their willingness to comply pending further proceedings against those not complying."

The District Court for the Southern District of New York denied the motion of the Commission to adjudge the members of the Conference which had refused compliance and their American-based agents in contempt. The present proceeding was then instituted.

## Discussion and Conclusions

The issue before us is simply whether we shall cancel, as no longer in the public interest, our previous approval of a conference agreement because a portion of the conference membership has failed to comply fully with the demands of an admittedly valid subpoena duces tecum. The question is, of course, fundamental to the effective regulation of our water-borne foreign commerce.

Agreement 8650 was approved under section 15 of the Shipping Act, 1916 (46 U.S.C. 814) as *inter alia* an agreement "fixing or regulating" ocean transportation rates and charges and upon our approval, it was exempted from the provisions of the antitrust laws. That same section requires us to cancel any agreement "whether or not previously approved" which we find to be "contrary to the public interest."

That conferences are, under ordinary circumstances and conditions, deemed by Congress and this Commission to be necessary and beneficial to the foreign commerce of the United States and thus in the public interest can no longer be doubted. But the conditions and circumstances attendant to this conference are at present extraordinary and, therefore, its continued existence must be re-examined to determine afresh whether continued approval of the agreement under which the conference operates remains in the public interest.

The antitrust exemption which results from the approval of agreements under section 15 was granted by Congress only on the assumption that the anticompetitive combinations thereby authorized would be effectively supervised and controlled by an agency of the government. This justification for immunizing certain activities of the shipping industry from the reach of the antitrust laws was first articulated in the now renowned Alexander Report (House Document No. 805, 63rd Cong., 2d Sess. (1914)), which concluded:

> While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action (p. 417).

The Committee further stated:

> * * * the purpose of the law should be to protect the shipper against any unreasonably high rate which the lines may have within their power, by virtue of their agreements and conference arrangements, arbitrarily to impose in the absence of governmental supervision and control.

The Alexander Report's pronouncements on the need for government regulation of the conference system have been continually reaffirmed. As recently as 1961, Congress, in enacting certain amendments to the Shipping Act, said:

> The Shipping Act of 1916 recognized the need for self-regulation of international shipping through steamship conferences and in an attempt to reconcile the concept of free competition, that act provided an exemption from the antitrust laws, provided that there was effective governmental supervision of conference activities (H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961), p. 2).

One of the 1961 amendments to the Shipping Act clearly expressed Congress' renewed concern with unreasonably high freight rates. Thus, section 18(b) (5) added to the Act by Public Law 87–346 authorizes us to disapprove any rate which we find is "so unreasonably high or low as to be detrimental to the commerce of the United States." The present controversy settles upon the efforts of a shipper, Ludlow Corporation, to secure information relevant to his charge that the rates of the respondent conference are in violation of section 18(b) (5). The relevance of the subpoenaed documents to the complaint of Ludlow is now settled. The courts have held the documents necessary to the proper determination of the validity of the disputed rates under that section. *Federal Maritime Commission* v. *DeSmedt*, 366 F 2d. 464, 468 (2d.

Cir.), *cert. denied*, 385 U.S. 974 (1967); *Ludlow Corporation v. DeSmedt*, 249 F. Supp. 496, 502 (S.D. N.Y. 1966). Without the information called for by the subpoenas, we cannot discharge our duty under section 22 of the Act to investigate all properly filed complaints, and if we conclude that there has been a violation of the statute, to provide appropriate relief. Thus, the failure to produce the information has prevented us from fulfilling our statutory responsibilities. Surely the public interest requires that we remove the aegis of section 15 from the concerted activities of an anticompetitive combination whose refusal to supply lawfully demanded information frustrates our efforts at effective supervision and control of those activities and deprives a shipper in our commerce of the necessary means to proscute his complaint under the Act. Our failure to cancel Agreement 8650 would grant the parties thereto that "unrestricted right of action" which Congress itself withheld in 1916. (See Alexander Report, p. 417, quoted *supra* at page 4.)

Our decision then would seem clear. Respondents and interveners, however, for a variety of reasons think otherwise. All of the arguments of these parties reduce themselves to two basic propositions. We are either without the power to cancel this agreement or we should withhold our exercise of that power in this case, although it is sometimes difficult to tell whether an argument goes to the former or the latter.[3]

In denying our power to cancel Agreement 8650, respondents and interveners point to two provisions proposed to Congress in 1961 when it had under consideration certain amendments to the Shipping Act. One proposal would have conditioned approval of any agreement under section 15 upon (1) the designation of a person up on whom service of process could be made within the United States, and (2) a provision in the agreement that every signatory would agree in advance to furnish records or other information, wherever located, required by any proper order of the Commission. A second proposal would have amended section 21 of the Act in much the same way, i.e. every carrier would be required to designate an agent and furnish records and information upon proper order. Neither of these proposals was enacted into law and this, argue respondents and interveners, demonstrates that Congress did not intend our power under section 15 to extend to the

[3] A somewhat obscure argument accuses us of incorporating into the concept of the "public interest" a "public convenience and necessity standard." Respondents simply state without specifying what language is concerned, that our order "clearly connotes employment of a test similar to that utilized in cases involving a certificate of public convenience and necessity." What we have already said should make clear just what we have found involved in our scrutiny of the agreement in the light of the public interest. That a certificate of public convenience and necessity is not involved should be equally clear.



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cancellation of conference agreements for the failure of its members to supply information.

Respondents quote extensively from the Senate Committee report explaining the failure to enact the proposed provisions (Sen. Rep. No. 860, 87th Cong., 1st Sess., pp. 24 and 25). The Committee pointed out that the proposals had evoked "a storm of protests" from friendly nations and from both foreign and U.S. flag carriers. The Committee deemed it wiser to delete the proposals. This same legislative history was before the court in *Federal Maritime Commission* v. *DeSmedt*, *supra*, and the court had the following to say:

We read this history as indicating only a desire by Congress to leave the agency's powers to require production of documents located abroad to extend however far the courts might decide under the existing statute, neither adding thereto nor subtracting therefrom; the lack of intention to renounce power to obtain documents from abroad is implicit in the recognition that the courts of appeal had already upheld the actions taken by the agency under § 21, *id.* at 224, and the refusal to overrule these decisions by amendment. The Supreme Court has warned against drawing an inference "that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47, modified 339 U.S. 908 (1950). This is a *fortiori* true when all that has happened is that, at the request of the Department of State to preserve the *status quo*, a committee of one house has rejected an amendment passed by the other which exceeded the clarification the agency had sought. *Id.* 473.

We obviously agree with the court's interpretation of this bit of legislative history and we find nothing that indicates any intent on the part of Congress to alter or withdraw our power of cancellation under section 15, but respondents would have us withhold the exercise of this power in this case.

First, it is urged that cancellation would be based upon the erroneous "fact" that some demand had been made upon the conference itself and not, as was actually done, upon the individual members. Second, cancellation would "punish" all members for circumstances beyond their control—the members offering full compliance for the actions of those refusing full compliance and those refusing full compliance for the actions of their respective governments. Finally, and perhaps not separately from the second argument, it is urged that cancellation would result in our interfering "in the internal activities and affairs of foreign nations, a course not permitted by the Shipping Act."

In arguing that dissolution of the conference is uncalled for since no demand was made upon the "conference," respondents attempt to draw a distinction which does not exist. The conference is and can only be its member lines. The "conference" does not fix rates; the members do and the "conference" does not grant or deny a shipper's rate request, the individual members according to their disposition, and by whatever vote controls, take the action. Respondents would convert a name or a convenient and traditional term of reference into a real entity within or behind which the individual members may remain free to operate as they choose and without regard to the law.

The fact that some of the members have offered full compliance with the subpoenas does not relieve the others of their obligations to comply, but it is to this that respondents' argument reduces itself. If we withhold cancellation in deference to those offering full compliance, the fact remains that the continued operations of the conference could or would be screened from our supervision insofar as that supervision is dependent upon full compliance with our lawful demands for information. Such a result is not to be contemplated lightly since, because of its nature, effective supervision is almost totally dependent upon our ready access to information of conference activities and actions.

It matters not that those members refusing compliance are doing so because of laws or decrees of their respective sovereigns and we do not "reproach" them for their failure to respond. But this does not alter the fact that effective government supervision and control, in a word regulation, is the *sine qua non* for antitrust exemption under the Shipping Act; and since regulation is directly dependent upon compliance with our lawful orders, we cannot, if we are to discharge our statutory responsibilities, continue an antitrust exemption for the concerted activities of any combination even a portion of whose members refuse compliance with such lawful demands whatever such refusal may be based upon.

This is not, contrary to respondents, interfering in the internal activities and affairs of foreign nations nor is it "punishment" for activity over which respondents have no control.

Foreign governments, of course, remain free to prohibit or allow their national flag carriers to produce documents located within those governments' borders. Our cancellation of an agreement can hardly be said to interfere with any internal matters of any foreign sovereign any more than our approval or refusal to approve any agreement would do so. It would be naive to suggest that no problems could arise from conflicting laws, but here we are confronted with a situation that permits of only one solution for it is the very integrity of the regulatory program of this country which is at stake. Since effective supervision and control of respondents' concerted activities is not possible in the present posture of the conference, the antitrust exemption which our approval granted respondents must be withdrawn. To do so is not to punish respondents in any sense of the word. All we are doing here is to restore the regulatory forces of free and open competition. We cannot do otherwise under the law and still protect shippers, both exporters and importers from the possibility of unreasonably high rates which could result from an unfettered freedom of concerted anticompetitive activity.

Our cancellation of the agreement is, of course, without prejudice to the rights of those carriers willing and able to comply with the subpoenas to file a new conference agreement and, if they desire a new dual rate agreement. The Commission could be expected to act with reasonable dispatch. Should this agreement be submitted and approved, the trade in question would continue to benefit from conference service.

There remains but one more argument which should be mentioned because of the apparent seriousness with which it is urged. Respondents seem to suggest that there is a lack of "substantial evidence" upon which to base our cancellation of Agreement 8650. Respondents do not indicate what evidence is lacking; rather, they draw a distinction between disapproving a newly filed agreement and cancelling an already approved agreement. The latter, it is urged, requires something more than the former. As Hearing Counsel and the Department of Justice point out, no such distinction exists, but even if it did, we think it clear that what we have already said shows that the agreement should be cancelled as contrary to the public interest within the meaning of section 15.

We have considered all the arguments of interveners and any which are not specifically dealt with are rejected as without merit or as immaterial to our decision. Accordingly, for the reasons set forth, an order cancelling Agreement No. 8650 will be issued.

*Vice Chairman* GEORGE H. HEARN, concurring:

I join with the other members of the Commission in withdrawing antitrust immunity from this conference, as presently constituted. I do so not reluctantly, but with a feeling of disappointment since I believe conference service in this trade is beneficial to the foreign water-borne commerce of the United States.

Admittedly, the conference system as currently operating in our foreign water-borne commerce is not perfect, due in part to its conflict with United States antitrust policy. Consequently, when a group of carriers act in concert, they do so not of right but by privilege granted by Congress through the regulatory body authorized to evaluate the grant in each case. Although the privilege is given without preference to carrier or flag, it can and must be withdrawn when a conference or its members refuse to abide by the lawful rules and orders of this Commission and the laws of this country.

This case is made more difficult because the failure of compliance was due to the acts of foreign governments acting in their sovereign capacity; thus creating an international impasse. It was not due to any managerial decision by the carriers independently or in conference.

This situation certainly in no way renders the refusal to honor our orders proper, and cannot be accepted in mitigation of the Commission's action herein. Another judgement, however, is warranted from these circumstances and the fact of the importance of conference service to the shipping public. I do not think the conditions of this case, created by acts of foreign governments, should result in the disruption or termination of conference service in the trade involved. This is even more so because a dual rate contract is in force between the conference and shippers in the trade.

In expressing our disapproval of the actions of some of the conference members, thereby removing the cloak of antitrust immunity from them, we are acting under the mandate of the Shipping Act of 1916. Conference agreement 8650, originally approved on March 31, 1964, has been beneficial to the shippers in the trade, absent any evidence to the contrary. Therefore, I think the Commission should do all it can to permit continuance of conference service under the existing agreement by the members of the conference who have indicated a willingness to comply with the Commission's subpoenas and orders. I would continue approval of conference service in the trade by the remaining members of the present conference who comply with Commission orders, subpoenas and rules. It is presumed that those members will continue to act under Agreement 8650. Such action would continue conference service in the trade.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 67-33

CALCUTTA, EAST COAST OF INDIA AND EAST PAKISTAN/U.S.A. CONFERENCE

## ORDER

This proceding having been instituted 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 conclusions thereon, which Report is hereby referred to and made a part hereof;

*It is ordered*, That Agreement 8650 be cancelled effective January 12, 1968.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

DOCKET No. 66–45

AGREEMENT FOR CONSOLIDATION OR MERGER BETWEEN AMERICAN MAIL LINE LTD., AMERICAN PRESIDENT LINES LTD., AND PACIFIC FAR EAST LINE, INC.

*Decided September 29, 1967**

The Federal Maritime Commission has jurisdiction pursuant to section 15 of the Shipping Act, 1916, over agreements to merge among competing carriers subject to said Act.

Prior approval of agreement among affiliated competing carriers, providing for purchasing and data processing to be performed by jointly owned corporations, continued in effect.

Proceeding remanded to Examiner for the taking of further evidence.

*Warner W. Gardner* and *Benjamin W. Boley* for respondents.

*Alvin J. Rockwell*, *John E. Sparks*, *Thomas A. Welch*, *Willis R. Deming* and *David F. Anderson* for Matson Navigation Company, intervener; *James L. Adams* and *R. Frederic Fisher* for States Steamship Company, intervener; *Donald F. Turner*, *Joseph J. Saunders* and *Miles Ryan, Jr.*, for the Department of Justice, intervener.

*Donald J. Brunner* and *Paul J. Fitzpatrick*, Hearing Counsel.

## REPORT

By the Commission: John Harllee, *Chairman*, and Ashton C. Barrett, *Commissioner*. George H. Hearn, *Vice Chairman*, Joining in part in his separate opinion. *Commissioner* James V. Day, dissenting and concurring. *Commissioner* James F. Fanseen, dissenting and concurring.

This proceeding was instituted by order of investigation dated August 3, 1966, to determine whether Agreement 9551, providing for the merger of American President Lines, Ltd., American Mail Lines, Ltd., and Pacific Far East Line, Inc.,[1] was subject to the requirements of section 15 (46 U.S.C. 814) and, if so, whether the agreement should be approved thereunder.

[1] The parties to the agreement, U.S.-flag carriers operating in the foreign commerce of the United States, are all subject to the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*).

*See Supplemental Report decided Dec. 21, 1967 at page 81.

States Steamship Company and Matson Navigation Company protested approval of the agreement and were made parties to the proceeding. The Portland (Oregon) Commission of Public Docks intervened but took no further part in the proceeding. The United States, through the Department of Justice, intervened for the sole purpose of submitting a brief on the question of jurisdiction. Hearing Counsel became a party to the proceeding pursuant to Rule 3(b) of the Commission's Rules of Practice and Procedure.

While the hearing was in progress, the Commission approved an agreement among the respondents, designated FMC Agreement No. 8485–C–3, which provides for purchasing and data processing services to be performed for the three companies by a jointly-owned subsidiary. This agreement, which amends and supplements earlier approved agreements (No. 8485 and supplements thereto) relating to cooperative working arrangements, had been protested by Matson. A supplemental order was entered in the present proceeding directing that Agreement No. 8485–C–3 be examined to determine whether the section 15 approval then given should be continued.[2]

In an initial decision served May 16, 1967, Examiner Walter T. Southworth concluded that Agreement 9551 was within the ambit of section 15 and that it should be approved thereunder. He further concluded that approval of Agreement 8485–C–3 should be continued.

Matson takes exceptions to all of the Examiner's conclusions while States excepts to the Examiner's conclusions concerning Agreement 9551. The Department of Justice excepts to the Examiner's conclusion that we have jurisdiction over Agreement 9551 but takes no position as to its approval under section 15. Hearing Counsel join the Justice Department in excepting to our jurisdiction over Agreement 9551 but urge that, should we agree with the Examiner and conclude that we do have jurisdiction, we should approve the agreement. Oral argument was held on July 24, 1967.

Basically, the agreement calls for the merger or consolidation of APL, AML, and PFEL with at least AML remaining a separate division for steamship operations; or, in the alternative to merge APL and PFEL into a single corporation with AML remaining a subsidiary. As preliminary steps to the actual merger or consolidation, the agreement calls for the establishment of an interim planning group and an interim operations group. The former will draft the actual plan of merger while the latter will develop and adopt procedures

[2] The merger agreement provides for the cancellation of Agreement 8485 upon accomplishment of the conditions precedent to the merger.

to achieve the "maximum degree of coordination of sailings and joint traffic solicitation" in the trades which are served by APL and PFEL and to the extent appropriate AML. The establishment of a planning group is not made contingent upon section 15 approval, but the operations group is, and while "informational" reports will be filed by the planning group, no further section 15 filing appears contemplated by the operations group. The actual plan of merger would not require approval under section 15 nor, it would appear, would the sailing arrangements and the joint solicitation agreements to be worked out prior to the actual merger.

The threshold issue is, of course, that of our jurisdiction over the agreement to merge. We agree with the Examiner's formulation of that issue:

> The sole question is whether an agreement to merge among carriers covered by the Act is an agreement with respect to a subject mentioned in section 15 of the Act,[3] which the statute authorizes and directs the Commission to approve or disapprove depending on its findings with respect to certain matters specified therein.

All parties agree and the facts demonstrate that there is substantial competition among at least two of the parties to the merger, APL and

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[3] Section 15, as amended, provides as far as pertinent:

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, 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 raffic 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 * * *.

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; * * *.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the [antitrust laws] * * *.

PFEL. With this fact in mind, the jurisdictional question can be disposed of upon an examination of the agreement and the statute.[4]

Section 15 requires the filing and approval of any agreement "controlling, regulating, preventing or destroying competition". Thus, an agreement to merge, since it eliminates all competition between the parties to the merger, is within the literal language of the Act. Respondents would have us stop here, having found that the "plain meaning" of the statute grants us the jurisdiction in question, *Browder* v. *United States*, 312 U.S. 335 (1941). *Terminal Lease Agreements—Oakland-Long Beach*, 8 FMC 521, 531 (1965). While the existence of the "plain meaning" rule of statutory construction is undisputed, its applicability today would seem at best doubtful, and its validity has been seriously challenged by the Supreme Court itself, *Employees* v. *Westinghouse Corp.*, 348 U.S. 437 (1955). In any event, the length and vigor of the arguments of both sides would indicate that to them at least the meaning of the language of section 15 is something less than plain.

What then did Congress intend when it drafted section 15? What types of anticompetitive agreements did Congress intend to subject first to the approval of our predecessors and later to our own? The protestants of jurisdiction[5] would say that section 15 would require approval of virtually all anticompetitive agreements except agreements to merge, which are perhaps the most anticompetitive of them all. The piece of legislative history relied upon for this assertion is the so-called Alexander Report[6] which in 1914 concluded an exhaustive investigation of the shipping industry by the House Merchant Marine

[4] The exceptions taken to the Examiner's subordinate findings and conclusions, as well as those taken to his ultimate conclusion that jurisdiction over Agreement 9551 is found in section 15 of the Shipping Act (46 U.S.C. 814), are all in the nature of a reargument of the original positions urged before the Examiner. They challenge in one way or another the Examiner's entire rationale. We do not specifically set forth each exception in the discussion which follows. All the arguments against jurisdiction are of course considered though not specifically labeled as exceptions. Any argument not specifically repeated has been considered and found to be either irrelevant or immaterial to our decision herein or without merit.

[5] As already noted, States, Matson, the Justice Department, and Hearing Counsel oppose jurisdiction. Each does not of course make all the arguments of the others nor do they all take the same exceptions to the Examiner's decision. While all arguments and exceptions, not deemed without merit or irrelevant, are dealt with herein, we have not, for the sake of brevity and clarity of discussion matched argument and exception to party. Though the Justice Department and Hearing Counsel were not actual "protestants" to the agreement, for the sake of convenience, the term as used herein will include them unless otherwise specified or indicated by the context.

[6] Report on Steamship Agreements in the American Foreign and Domestic Trade (House of Representatives: 63d Congress, Proceedings of the Committee on Merchant Marine and Fisheries in the Investigation of Shipping Combinations under H.R. 587). The report of the committee, of which Representative J. W. Alexander was chairman, was first submitted to the 63d Congress in 1914, and a bill to carry out its recommendations was introduced but not passed. Substantially the same bill was reintroduced in the 64th Congress and became the Shipping Act, 1916. See *Maritime Board* v. *Isbrandtsen*, 356 U.S. 481, 490, n. 11 (1958).

and Fisheries Committee. The investigation was launched under resolutions [7] which directed the Committee to, among other things, investigate whether the steamship lines had formed among various arrangements, "agreements for the purpose of preventing or destroying competition". The Committee concluded that it was the almost universal practice for carriers in the foreign commerce of the United States to operate under written agreements, conference arrangements, or gentleman's understanding which had as their purpose the regulation of competition through either:

(1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of nonconference lines. (Alexander Report, 415).

The Committee went on to say, and this is the portion of the report relied upon:

* * * To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle they would consolidate through common ownership. Neither result can be prevented by legislation and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.

From this the parties opposing jurisdiction would conclude that Congress never intended that section 15 would cover agreements for corporate consolidation or merger.

They urge that in 1914, Congress had passed the Clayton Act, section 7 of which dealt expressly with corporate consolidations, and had Congress desired to include such transactions within section 15, the appropriate language to do so was close at hand. Thus, the absence of Clayton Act language in section 15 coupled with the above-quoted excerpt from the Alexander Report, demonstrates that Congress was satisfied that existing law was adequate to deal with problems of steamship mergers and that it would be imprudent to grant the Commission merger jurisdiction, with its attendant antitrust immunity.

We quite agree with the proposition that the termination of the anticompetitive agreements then existing would probably bring about corporate consolidations or rate wars. But we do not see from the quoted excerpt that Congress intended to exclude merger agreements from a statute which by its language includes such agreements. That legalizing existing agreements would slow down the movement toward consolidations was recognized by the Committee:

In addition to the combinations by agreement there are numerous instances

[7] House Resolutions, 425 and 587, 62d Cong., 2d sess.

of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries. (The most notable examples of such consolidations are the International Mercantile Marine Co., the Royal Mail Steam Packet Co., the Hamburg-American Lines, and Furness, Withy & Co.). This movement toward actual consolidation by ownership, various witnesses have emphasized, would have taken place more rapidly and on a much larger scale if the making of steamship agreements and conferences had been impossible. In the absence of cooperation through written or oral agreements, according to these witnesses, only two alternatives present themselves, viz., consolidation by actual ownership or the elimination of the weaker lines through cut-throat competition. (Alexander Report 301).

But is it to be concluded from this that the Commission, which was to control all other anticompetitive combinations, was not to apply the same transportation expertise to the control of mergers or consolidations? We think not. Rather, it is clear that the Committee and Congress recognized that it could not legislatively control totally foreign mergers any more than it could effectively legislate against rate wars. And it would seem to us, that the same considerations which led Congress to grant this Commission the power to exempt anticompetitive rate fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge.

But, say the parties, therein lies the fatal flaw in our reasoning because the language of section 15 makes no distinction by flag or nationality among carriers subject to its requirements, and if we read into it such a distinction, we are doing violence to its very language and to our own principle that we regulate without regard to flag.

Section 17 from whence we draw our power to regulate the practices of terminals makes no distinction between domestic terminals and foreign terminals and a literal reading of the section would apply it to both. Yet, it has never been applied to a foreign terminal to exercise regulatory supervision over that terminal's practices. Nor is it likely that it would be. A reasonable construction of section 15 would normally exclude foreign mergers from the coverage of its provisions just as it would include domestic mergers.

In this same vein, Hearing Counsel have expressed grave concern that the assertion of merger jurisdiction would present the Commission with insurmountable difficulties in the case, for example, of a merger agreement between a U.S.-flag carrier and a foreign-flag carrier. Difficulties there may be, but no more than there would be under the antitrust laws were business entities other than common carriers by water involved in the hypothetical merger.

We have on many occasions stated our abiding concern with equality of treatment regardless of flag under the Shipping Act. Our concern, of course, has been that we do not let our natural desire to see the American merchant marine prosper influence our treatment of foreign-flag carriers under the Act to their detriment. But how is subjecting an agreement to merge between American-flag carriers to our scrutiny under section 15 going to operate to the detriment of foreign-flag carriers? It, of course, will not, and protestants are reaching when they make such an argument.

The protestants argue that when Congress intends to extend agency control and antitrust immunity to mergers, it has done so in clear and specific language. Specifically, they point to the Interstate Commerce and Federal Aviation Acts (49 U.S.C. 5(a) and 1378) in which the word "merger" appears, and it is urged that the absence of any reference to mergers in section 15 clearly demonstrates that Congress never intended mergers to be covered by that section. This argument ignores chronology and history.

While many of the provisions of the Shipping Act were copied from or patterned after the Interstate Commerce Act, there was in 1916, no provision comparable to section 15 in the Interstate Commerce Act. It went only so far as to prevent the pooling of traffic or revenues (24 Stat. 380). Section 15, of course, applies to these kinds of agreements but also extends to many many more. It is clear that section 15 was intended to expand the Shipping Board's jurisdiction over water carrier agreements beyond the then existing jurisdiction of the Interstate Commerce Commission over railroad agreements. Section 5b, the section which is now comparable to section 15 and which grants the Commerce Commission general jurisdiction over anticompetitive agreements, was not enacted until 1948. Again, in 1938, Congress enacted the Civil Aeronautics Act, section 412 (49 U.S.C. 1382) of which was admittedly patterned after section 15, and in addition to section 412, Congress included another provision, section 408 (49 U.S.C. 1378) which specifically dealt with mergers.

It follows from all this, say the protestants, that since section 15 does not specifically provide for the inclusion of merger agreements within its coverage, that merger agreements are not included. It seems to us that this argument would have merit if the chronology of the several statutes was reversed. If Congress, having once distinguished between merger agreements and other anticompetitive agreements and separately and specifically provided for both, failed to do so in a later statute to the exclusion of one or the other, it would make sense to construe this failure as an intention not to grant the excluded authority. But does the reverse of this follow? Having once granted the broadest possible authority over anticompetitive agreements in of course, has been that we do not let our natural desire to see the American merchant marine prosper influence our treatment of foreign-flag carriers under the Act to their detriment. But how is subjecting an agreement to merge between American-flag carriers to our scrutiny under section 15 going to operate to the detriment of foreign-flag carriers? It, of course, will not, and protestants are reaching when they make such an argument.

The protestants argue that when Congress intends to extend agency control and antitrust immunity to mergers, it has done so in clear and specific language. Specifically, they point to the Interstate Commerce and Federal Aviation Acts (49 U.S.C. 5(a) and 1378) in which the word "merger" appears, and it is urged that the absence of any reference to mergers in section 15 clearly demonstrates that Congress never intended mergers to be covered by that section. This argument ignores chronology and history.

While many of the provisions of the Shipping Act were copied from or patterned after the Interstate Commerce Act, there was in 1916, no provision comparable to section 15 in the Interstate Commerce Act. It went only so far as to prevent the pooling of traffic or revenues (24 Stat. 380). Section 15, of course, applies to these kinds of agreements but also extends to many many more. It is clear that section 15 was intended to expand the Shipping Board's jurisdiction over water carrier agreements beyond the then existing jurisdiction of the Interstate Commerce Commission over railroad agreements. Section 5b, the section which is now comparable to section 15 and which grants the Commerce Commission general jurisdiction over anticompetitive agreements, was not enacted until 1948. Again, in 1938, Congress enacted the Civil Aeronautics Act, section 412 (49 U.S.C. 1382) of which was admittedly patterned after section 15, and in addition to section 412, Congress included another provision, section 408 (49 U.S.C. 1378) which specifically dealt with mergers.

It follows from all this, say the protestants, that since section 15 does not specifically provide for the inclusion of merger agreements within its coverage, that merger agreements are not included. It seems to us that this argument would have merit if the chronology of the several statutes was reversed. If Congress, having once distinguished between merger agreements and other anticompetitive agreements and separately and specifically provided for both, failed to do so in a later statute to the exclusion of one or the other, it would make sense to construe this failure as an intention not to grant the excluded authority. But does the reverse of this follow? Having once granted the broadest possible authority over anticompetitive agreements in language virtually constitutional in its breadth and scope, can it be argued that subsequent specificity on the part of Congress in another statute diminished the previously granted authority? We think not. The subsequent specificity could well reflect nothing more than a later stylistic preference in legislative draftsmanship. Moreover, the merger sections of both the Interstate Commerce Act and the Federal Aviation Act extend to all corporate mergers and unifications whether by agreement or not, which could well explain the separation of those provisions from the sections dealing with other anticompetitive agreements. But it is argued that this is yet another indication that merger agreements are not within the intended coverage of section 15; i.e. the failure to grant authority over all mergers proves that Congress never intended to grant jurisdiction over any mergers and to hold otherwise, it is urged, would involve us in an inconsistency. We do not see the inconsistency.

The original section 7 of the Clayton Act, which was plainly designed to control corporate unifications and which itself did not mention mergers, left mergers by agreement (if they did not monopolize) subject to the provisions of section 1 of the Sherman Act. Like price-fixing agreements, merger agreements violated the antitrust laws only if they destroyed competition to the extent of being a contract or combination in restraint of trade. *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, 85–86 (1912). It may well be that this Commission should have the power to control all corporate unifications among U.S.-flag steamship lines, and assuming that this power has been withheld, it does not follow that agreements clearly covered by the plain language of the statute are or were intended to be excluded therefrom. Concerning this plain language of section 15, one other argument deserves treatment.

It is argued that section 15 extends only to those agreements over which we can exercise continuing jurisdiction, e.g., an agreement such as a conference agreement which preserves the separate identities of the parties. Thus, section 15 authorizes us to disapprove, cancel, or modify any agreement "whether or not previously approved", and after listing several types of agreements, the section provides for approval of agreements "in manner providing for an exclusive preferential or cooperative working arrangement" [8] which, it is argued, characterizes the other types of agreements. Granted, section 15 provides for con-

[8] One party urges that the prohibition, added by amendment in 1961, against approving agreements "between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive", unless the right of indpendent action were allowed shows that merger agreements are not within section 15. We think the Examiner's disposition of this argument was clear, well founded and proper, and we adopt it as our own.

tinuing supervision where it is called for—but we do not concede that the provision for continuing supervision of agreements requiring it limits our authority to only those agreements. The Examiner so concluded and we agree. We are necessarily given the power to stop or modify any continuing practice if we find that it has become detrimental to the commerce of the United States or contrary to the public interest even though we have previously approved the practice. But even here our disapproval or modification is only prospective; we cannot undo what has already been done. We are now concerned with the approval of a merger of three steamship lines, approval of which is to be granted unless we find that the merger would operate to the detriment of the commerce of the United States, be contrary to the public interest or unfair as between carriers, or otherwise in violation of the Shipping Act, 1916. It does not follow, of course, that our approval of the agreement once granted can never be withdrawn or that we cannot order the agreement modified. Just what the consequences of such an action would be are not before us now and speculation on the matter would be fruitless.

But protestants argue that our lack of power to order divestiture which power both the ICC and the CAB get from section 11 of the Clayton Act, is still further proof that we are without jurisdiction over mergers. We think the protestants have failed to distinguish between mergers by agreement and mergers which are accomplished without agreement. In the case of the former, the agreement must be filed for approval under section 15 and if the agreement is approved, the merger takes place. If the agreement is not filed and it is nevertheless carried out, the parties to it are at large under the antitrust laws and any remedy appropriate to those laws would be applicable, *Carnation Company* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966). Thus, we are concerned with what might be termed a pretransaction scrutiny. As to mergers accomplished without any agreement, it would appear that divestiture under the Clayton Act is ordered because the scrutiny is posttransaction, i.e. the particular acquisition of control, usually already accomplished, results in the proscribed lessening of competition or monopoly. In the case of agreements to merge under section 15, the need for orders of divestiture is substantially lessened if not eliminated.

From the foregoing, we think it clear that neither the language of section 15 nor its legislative history show that Congress did not intend section 15 to cover agreements to merge. Indeed, we have quite recently held directly to the contrary. In Docket No. 931—*Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., Isbrandtsen Company,* *Inc., and American Export Lines, Inc.*, 7 FMC 125 (1962), we found the agreement in question had:

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 percent 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. (Emphasis added).

Upon this finding, together with findings to the effect that both Export and Isbrandtsen operated as carriers of commercial cargo on Trade Routes 10 and 18, we concluded that Agreement No. 8555 "in its entirety" constituted an agreement "controlling, regulating, preventing and destroying competition", which it was required by the "clear, unqualified language of section 15" to approve, disapprove, cancel or modify (7 FMC at 128). All protestants purport to find some distinction between the instant situation and that in *AEIL*, and further contend that if the *AEIL* decision be deemed to control, it was wrong and should be overruled. The prime ground upon which *AEIL* would be distinguished is the existence in that agreement of a "covenant not to compete". It is urged that even after consummation of the transaction in *AEIL*, the Isbrandtsen Company remained a viable entity with vast resources and considerable knowledge of and experience in the steamship industry. Thus, it is argued, but for the covenant not to compete, Isbrandtsen Company could go out and acquire ships (which, it is offered, are readily available) and enter into competition with American Export-Isbrandtsen Lines. Whatever may be the practical feasibility of such an action by Isbrandtsen Company, the argument overlooks the most salient fact of all—the decision in *AEIL* does not base jurisdiction on the covenant not to compete. Concerning our jurisdiction, we said simply that:

* * * 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 any thing else), to emascu-

late the Act to the detriment of the public interest, and this (although it might make our task substantially easier) we will not do. (7 FMC at 128).[9]

But we are urged not to follow *AEIL* even if we find it applicable. Two considerations are offered. First, the case was decided before the Supreme Court's decision in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) and at a time when the Commission tended to view its jurisdiction over the shipping industry as all pervasive to the complete exclusion of the antitrust laws, and second, the decision was never subjected to review by the courts.

In *Carnation, supra*, the Supreme Court held that agreements which had not been filed for approval under section 15 remained subject to the antitrust laws. The decision had nothing to say about agreements which had been filed for approval and consequently nothing about the agreement in issue here. Whatever may then have been the view concerning the pervasiveness or exclusivity of jurisdiction under section 15, only speculative hindsight can say what part that view may or may not have played on the decision reached in *AEIL*. Such speculation has no place here. The fact that *AEIL* was never reviewed by the courts affords us no reason for departing from a precedent which we think so clearly right. Moreover, the *AEIL* decision is not just one isolated expression of the view that section 15 extends to agreements for consolidation or merger.

In 1949, Congress was taking steps to plug the loopholes in section 7 so as to bring within its scope the entire range of corporate amalgamations, including assets, acquistions, and mergers, as well as the stock acquisitions which alone had been covered. Between 1914, when the section was originally enacted, and 1949, several agencies had been created or given additional authority. These included the Civil Aeronautics Board, the Federal Communications Commission and the Federal Power Commision, as well as the Federal Martime Commission's predecessor; and the Interstate Commerce Act had been amended to cover mergers and acquisitions of control (49 U.S.C. 5). To make

[9] This fact notwithstanding, it is argued that testimony before a Congressional Subcommittee by Thomas E. Stakem, then Chairman of the Commission clearly demonstrates that the *AEIL* decision based jurisdiction upon the covenant not to compete. (See Progress Report—Federal Maritime Commission, Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 2d Sess. (1962) at 22). This testimony shows only what a single member of the Commission may have felt in casting his vote in the case and its course cannot change the literal language of the decision nor stand as evidence for some unexpressed legal rationale lurking behind the actual holding of the case.



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it clear that the amendment of section 7 would not affect the authority of these agencies over mergers, the following was added to section 7:

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

In the version first passed by the House, the amending bill (H.R. 2734) omitted reference to the Commission's predecessor. Under date of September 29, 1949, the Commission, by its Vice Chairman, called this omission to the attention of the Senate Committee. The letter is set forth in full in the margin.[10] After stating the Commission's understanding that the Clayton Act amendment would prohibit certain asset acquisitions, the letter described the provisions of section 15 of the Act with respect to the filing and approval or disapproval by the Commission of any agreement among carriers or other persons subject to the Act "if such agreement, among other things, is one 'controlling, regulating, preventing, or destroying competition' "; and noted that approved agreements were excepted from the antitrust laws. A copy of the pertinent provisions of section 15 was attached. The letter suggested that the Commission be included among the agencies specifically listed in H.R. 2734. It noted that H.R. 2734 did not appear to affect the section 15 exemption provision, but suggested that inclusion

[10] My dear Senator O'Conor: The attention of the Maritime Commission has been called to the provisons of the bill H.R. 2734, now under consideration by your subcommittee. Among other things, this bill would amend section 7 of the Act of October 15, 1914 (the Clayton Act), to prohibit certain corporations from acquiring the assets of competing corporations where in any section of the country the effect of such acquisition would be substantially to lessen competition or tend to create a monopoly. The bill would also add a new paragraph to section 7 to provide that nothing contained in such section shall apply to transactions duly consummated pursuant to authority given by certain specified Federal commissions and agencies under any statutory provision vesting such power in such commission or agency.

Section 15 of the Shipping Act, 1916, as amended, which is administered by the Maritime Commission, requires every common carrier by water or other person subject to the Act to file with the Commission any agreement with another such carrier or other person subject to the Act if such agreement, among other things, is one "controlling, regulating, preventing or destroying competition". The Commission has authority to disapprove any such 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 to the commerce of the United States, or to be in violation of this Act." Agreements approved by the Commission under this provision are "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" (commonly referred to as antitrust laws). A copy of the pertinent provisions of section 15 of the Shipping Act is submitted herewith for your reference.

of the Commission among the agencies mentioned would avoid controversy arising from any contention that failure to do so made approved section 15 agreements subject to the provisions of section 7 of the Clayton Act. Obviously such agreements could not be subject to section 7 unless they were merger agreements of one kind or another.

The Senate Committee thereupon amended H.R. 2734 to include the Commission among the agencies listed in the above-quoted paragraph of section 7. In its Report No. 1775 (81st Cong., 2d Sess., June 2, 1950), the Committee on the Judiciary noted (p. 2):

> The purpose of the amendments is to include in the bill the recommendations of the United States Maritime Commission and the Securities and Exchange Commission, which the committee believe to be justified * * *.

The Committee's Report also noted (p. 7):

> The Maritime Commission, at its request has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. In making this addition, however, it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess.

Of course, the amendment did not add to the Commission's jurisdiction nor, as the letter made clear, did the Commission expect it to. While we would hesitate to join the Examiner in characterizing the inclusion of the Commission in section 7 as an "unqualified acceptance of section 15 merger jurisdiction ," it nevertheless shows that Congress was aware that the Commission claimed such jurisdiction under section 15 in a carefully prepared and documented letter. Congress thought the inclusion of the Commission in section 7 to be "justified" and has not seen fit to change its position since then. But it is argued that any reliance on section 7 for merger jurisdiction is misplaced [11] and that Congress, in a least two instances, included agencies in section 7 which were later determined by the Supreme Court to have no such jurisdiction. See *Milk Producers Assn.* v. *U.S.*, 362 U.S. 169 (1961) and *Califronia* v. *Fed. Power Comm'n.*, 369 U.S. 482 (1962).

In *Milk Producers*, there was no statutory provision vesting power in the Secretary of Agriculture to approve the transaction in question and thus immunize it from the antitrust laws. In the *California* case, while the Power Commission had the statutory authority to approve the acquisition of one natural gas company by another, its approval did not exempt the transaction from the antitrust. The Supreme Court in that case simply held that the Commission should have stayed its hand and not acted during the pendency of an antitrust suit in the dis-

[11] We are, of course, not relying upon section 7 for merger jurisdiction. That jurisdiction comes to us from section 15.

trict court over the same transaction. Mergers, as agreements requiring approval under section 15 are, upon such approval, expressly exempted from the provisions of the antitrust by the language of that section. Consequently, we find nothing in the *Milk Producers* or *California* cases which alters our jurisdiction under section 15.

Again in 1956, our immediate predecessor the Federal Maritime Board, advised the Senate Subcommittee on Antitrust and Monopoly that "merger agreements approved by the Board * * * and the resulting mergers, are exempt from section 7." [12] Finally, in 1962, the Chairman of this Committee reported to Congressman Celler's subcommittee that "section 15 and our decision in the Isbrandtsen-Export merger case constitute notice that merger agreements must be filed with the Commission and that it is unlawful not to file such agreements promptly or to carry out such agreements prior to Commission approval." [13] It may be noted that the "Celler Report" issued in March 1962, referred to the *AEIL* transaction recently approved by the Federal Maritime Commission without questioning the Commission's jurisdiction.[14]

But it is argued that our construction of section 15 contravenes the longstanding principle that repeals of the antitrust laws by implication are disfavored. Agreements approved under section 15 are expressly exempted from the antitrust laws by the language of that section. We have concluded that the present agreement to merge is within the language of section 15 and to the extent that the section does not contain such words as "merger" or "corporate unifications" in describing the agreements covered therein, some implication is admittedly involved. But a great many other agreements are not by name expressly included within the coverage of section 15. Terminal leases, transshipment agreements and a host of agency agreements are but a few. We have already had a word to say about the scope and breadth of section 15's language. Agreements to merge are literally agreements "controlling, regulating, preventing, or destroying competition," and when approved, they are expressly exempted from the anti trust laws. We think the principle invoked is inapplicable here.

We find nothing inconsistent with the intent of Congress to include mergers by agreement within the scope of section 15 and our jurisdiction over Agreement 9551 under that section is clear.

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[12] Hearings on Legislation Affecting Corporate Mergers, Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, 84th Cong., 2d Sess. (1956) at 527.

[13] Progress Report, Federal Maritime Commission, Hearings before the Antitrust Subcommittee of the House Judiciary Committee, 87th Cong., 2d Sess. (1962) at 1.

[14] The Ocean Freight Industry; Report of the Antitrust Subcommittee, House Report No. 1419, 87th Cong., 2d Sess., p. 47.

While we consider that the record in this proceeding now affords a sufficient basis upon which to take action, we will nevertheless join Commissioner Hearn in remanding the proceeding to the Examiner for the taking of further evidence on the matters specified in Commissioner Hearn's concurring opinion.[15]

*Existing Cooperation Under Approved Agreement 8485 and Supplements*

In 1960, the Commission approved an agreement (FMC No. 8485) among APL, AML, and PFEL whose stated purpose was to eliminate "unnecessary expense" arising out of duplication of "offices, terminals, facilities and personnel" among themselves, and to eliminate "unnecessary or wasteful competition among themselves." For this purpose, it established a "Coordinating Committee" to consist of two representatives from each line plus a Chairman, not an employee of any line, to be elected by the six representatives. Any recommendations of the Committee were not to become operative until approved by the Commission.

The agreement directed the Coordinating Committee to study and make recommendations upon such matters as joint shoreside facilities, joint purchasing, coordination of sailings to avoid competing loadings, joint solicitation, and pooling arrangements—including money, cargo and sailings pools.

The Committee immediately engaged in a number of studies covering specific subjects with its broad franchise, and soon reported, among intangible benefits, that "much worthwhile information is being exchanged and put to good advantage." Its activity led to the following, all established under supplementary agreements approved by the Commission:

1. A limited joint purchasing program. In practice this has been confined in substance to the purchase of meat and janitorial supplies for APL and PFEL, but it is estimated to have saved them some $85,000 per year on annual joint purchases aggregating about $1,450,000.

2. Joint placement of Hull & Machinery and Protection and Indemnity insurance. The present annual rate of savings is estimated at $85,000 for the three companies on Hull & Machinery insurance alone, with additional though less substantial savings expected on Protection & Indemnity insurance.

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[15] We consider questions of the impact of the merger upon subsidy and its recapture to be matters within the jurisdiction of the Department of Commerce, Maritime Administration, but since the parties have injected the issues into the proceeding, we will join with Commissioner Hearn in seeking further clarification of these matters.

3. Joint Los Angeles terminal. A jointly owned corporation, Consolidated Marine, Inc. (hereinafter "CMI"), was set up to lease and operate terminal facilities at Los Angeles. The joint operation is estimated to save amounts equal to about 50 cents per revenue ton handled, in terminal and husbanding services.

*Agreement No. 8485-C-3; the Supplemental Order in this Proceeding.*

As noted, a further supplement to Agreement No. 8485, designated No. 8485-C-3, was approved while the hearing in this proceeding was in progress; and the Commission supplemented its order of investigation and hearing to direct that Agreement No. 8485-C-3 be examined to determine whether the said approval should be continued.

Agreement No. 8485-C-3 provides for enlargement of the approved activities of CMI (the jointly owned corporation formed to operate joint terminal facilities at Los Angeles) to include (1) the entire purchasing department function for each of the three lines, and (2) data processing for each of the three lines. CMI would maintain offices in San Francisco for these purposes, and its costs would be distributed to the three companies in accordance with "sound accounting principles." The agreement would enable the three companies to adopt joint procedures with respect to purchasing and data processing whether or not the merger is approved.

The record indicates that the joint data processing and joint purchasing programs under the agreement would produce savings somewhat comparable to, but probably less than, the savings to be expected in these areas upon merger. Neither Hearing Counsel nor States finds anything objectionable about Agreement No. 8485-C-3, but Matson contends that it should be disapproved as an anticompetitive arrangement for which no "compelling need" has been shown. The alleged anticompetitive effect, so far as pertinent here, is the expected ability of respondents to get better prices on quantity purchases than would be available to competitors. Matson does not say anything for or against the joint data processing arrangement.

Matson's claim of detriment from joint purchasing is considered below, following discussion of Matson's present and proposed business and the impact of the proposed merger upon it.

*Matson's Claim of Detriment from Agreement No. 8485-C-3.*

Matson objects to the continued approval of Agreement No. 8485-C-3 (which would permit respondents to have their purchasing and data processing done by CMI, a jointly owned corporation), on the general ground that it allows inherently anticompetitive arrangements for which no need has been shown.

Matson also alleges possible competitive damage, particularly through joint purchase of bunker fuel under the agreement. It seems that the sellers of fuel oil establish a public, posted price, from which everyone tries to get a discount; Matson is successful in its efforts, and presumably others are too, although there was no evidence beyond conjecture that the sellers' treat competing buyers differently. Respondents think they can get a better price through greater volume purchases and so does Matson.

Fuel oil is delivered to each vessel by the seller as required, regardless of the annual volume of purchases, so that any substantial cost justification for volume discounts seems a remote possibility. Under the Robinson-Patman Act (15 U.S.C. 13), price discrimination in the sale of like goods is unlawful without regard to quantity, unless price differentials can be justified as making no more than "due allowance" for cost differences in sales to different buyers. The statute also makes it unlawful "knowingly to induce or receive a discrimination in price which is prohibited by this section." See *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 64–65 (1953). Matson says it would therefore be unlawful for respondents to induce volume discounts; and so it would, if respondents knew or should have known that such discounts were not cost-justified (assuming also, as is probably the case, that the Robinson-Patman Act applies to commodities sold to U.S.-flag vessels for consumption on the high seas as well as in territorial waters).

But the same thing applies to Matson or any other person who thus induces unjustified volume discounts. And regardless of the buyer's liability, a vendor would expose itself to severe penalties under the antitrust laws if it charged unjustifiably different, discriminatory prices to competing vessel operators on identical goods such as fuel oil. It cannot be assumed that respondents would or could induce such illegal discrimination.

Under questioning by Matson's counsel, Mr. Dant of States agreed that *if* respondents were able to save "several million dollars a year" by the joint purchase of fuel oil, it would put States at a disadvantage; but, he candidly added, "I don't understand quite how they could do that." Neither does the Examiner; and there was no proof of any such possibility.

It may be assumed that there would be some price as well as administrative economies in joint purchasing of some supplies; it cannot, however, be assumed that they would be of the order suggested by Matson or that they would be discriminatory and unlawful to Matson's damage.

*Agreement No. 8485–C–3.*

This is the agreement providing for purchasing and data processing on behalf of respondents by a jointly owned corporation, which has been examined, pursuant to the supplemental order of the Commission, to determine whether in the light of the record established herein the approval heretofore given under section 15 should be continued.

This agreement would permit the respondents to realize a portion of the administrative efficiencies and economies which the proposed merger pursuant to Agreement No. 9551 would produce in due course. Standing alone, it could come under section 15 only as a cooperative working arrangement among carriers subject to the Act; but since it provides for cooperation with respect to practices which do not affect competition between the parties thereto in their dealing with the shipping public, it might not be subject to section 15 at all if it were not a modification of an approved section 15 agreement (No. 8485) having as its purpose the elimination of wasteful competition between the parties. *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals*, 9 FMC 77, 82 (1965). In any event, no evidence or argument adduced herein tends to establish that Agreement 8485–C–3 is, or modifies Agreement No. 8485 in such a way as to make that agreement unjustly discriminatory or unfair, detrimental to the foreign commerce of the United States, contrary to the public interest or in violation of the Act; and it is therefore found that the approval heretofore granted should be continued.

*Ultimate Conclusions*

Upon the record in this proceeding, it is concluded and found that:

1. The Federal Maritime Commission has jurisdiction over Agreement No. 9551 in its entirety.

2. Agreements 8485 and 8485–C–3 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, do not operate to the detriment of the commerce of the United States and are not contrary to the public interest or in violaion of said Act; and accordingly, the approval heretofore granted said Agreements 8485 and 8485–C–3, pursuant to section 15 of the Act, is continued in effect.

*By Vice Chairman* HEARN:

I join Chairman Harllee and Commissioner Barrett in their opinion and conclusion that the Commission has jurisdiction over Agreement 9551; however, concerning the approvability of the agreement, Matson and States contend that because the agreement does not (1) include the actual plan of merger; and (2) contains none of the terms and conditions which are to govern interim operations, the agreement is insufficiently detailed to warrant approval. I can make no determination as to approval of the agreement. In fact, I do not reach that question because I find the agreement deficient as a matter of law.

It is nothing more than an agreement to agree—insufficient as to scope and inadequate as to detail. The jurisdiction issue became, perhaps unfortunately, the main focus of this case with not enough attention given to the sufficiency of the agreement and its merits. That does not warrant the Commission giving less attention to what is the ultimate issue here; whether to approve Agreement 9551 as in the public interest.

Agreement 9551 is not of the same genre as most section 15 agreements. Its primary distinguishing characteristic is the relative finality of possible Commission approval. It would be very difficult for the Commission to subsequently dissolve a merged company or even to require changes in its structure in the same manner as it continually reevaluates other approved section 15 agreements. Nonetheless, the Commission has always required all section 15 agreements to include specifics sufficient for a thorough analysis of the agreement (see e.g., *Joint Agreement—Far East Conf. and Pac. W. B. Conf.*, 8 FMC 553, 558) and any lesser requirement is particularly undesirable in this case. Less should not be demanded of a merger agreement than of a pooling or dual rate agreement.

The agreement, as filed, says nothing more definite than that the parties agree "either to merge or consolidate". There is no commitment to a type of merger plan, final corporate structure or any of the other necessary components of a corporate agglomeration.

The parties not only do not say what the merger plan is, but they apparently do not know yet what it will be, in many respects. Agreement 9551 provides in part:

> AML, APL, and PFEL * * * hereby agree to merge or consolidate * * * in form and by the procedures as the directors and the stockholders of the three companies should approve.

This Commission cannot be expected to evaluate properly a section 15 agreement which evidently is in such an early embryonic stage that, seemingly, not even its creators know it final form or substance.

A further fault lies in the fact that the parties will submit *informational* reports to the Commission as to the progress of the merger and no additional section 15 approval is envisioned by the terms of the agreement. It is the Commission and not the parties who should decide what needs to be filed and presented for approval.

In order for me to reach the question of whether or not the agreement should be approved, I require additional information as outlined hereinafter. The items mentioned below are intended to be indicative of the type of aditional information I require. The statement of items is not exhaustive, and I hope the parties to the agreement will take this opportunity to make a complete divulgence of their contemplated activities.

I am aware that some of these matters may be subject to the jurisdiction of the Maritime Administration (and it is unfortunate that that agency did not intervene in this case); but it is a *non sequitur* that this Commission should therefore ignore their competitive consequences or their obvious effect upon the public good. Neither can we be concerned only with matters competitive. On the contrary, before this Commission can grant approval of any agreement which is subject to section 15 of the 1916 Act, that agreement must comport with the provisions which Congress has seen fit to specify in that section. Section 15 provides that agreements must not (1) be unjustly discriminatory or unfair, or (2) operate to the deteriment of the commerce of the United States, or (3) be contrary to the public interest, or (4) be otherwise in violation of the Act.

The Commission does not approve agreements simply because it has jurisdiction over them. It requires that the parties to such agreements furnish it with documentation of the need for such agreements. The desire of the parties to enter into agreements alone is not considered sufficient to warrant approval:

> [T]he kind of information necessary to this judgment is in the hands of those seeking approval of the agreement * * * and it is incumbent upon those in possession of such information to come forward with it. *Mediterranean Pools Investigation*, 9 FMC 264, 290.

Of the additional information there must be at least the final form of the merger or consolidation, including a determination of whether AML will be a division or a subsidiary; the operational procedure and the managerial structure; the procedures by which these ends will be reached and the economic effects of the former.

The Hearing Examiner and the applicants refer to a variety of transportation efficiencies which will be produced by the merger (I.D. 30–35 and 39–44, Respondent's Reply to Exception 43–50). The listing of benefits and efficiencies appears quite formidable but, in the main, represents hopeful surmises rather than supportable conclusions.

In addition, I would like the respondents to clarify as many of the other uncertainties as possible. The unclear areas include the following:

—What measures will the parties to the merger and the merged company take to prevent an adverse effect of the merger on subsidy recapture? This question cannot be avoided by saying the effect "would depend upon speculative factors." (I.D. 38.)

—Also, will the proposed merger result in greater value for the subsidy dollar?

—Will the obvious immediate benefits to the parties be paralleled by concommitant overall service benefits to the public?

—What adequate safeguards will be provided for affected employees and potential local labor problems?

—How will shippers be advantaged by greater berth coverage if at the same time their choice of carrier could be severely reduced by near blanketing? (Tr. 250–252.) It is no answer that there will be merely tougher competition.

—There should be greater exposition of benefits to container operations, especially as to acquisition of shore facilities. (Tr. 278–279).

—The service description of the merged company should be presented, especially as to the effect on itineraries due to LASH operations; and including for example, any proposed change in AML's "short-run" service. (Tr. 343–344, 346–347.)

—On what basis will the merged company have greater access to shore facilities in Japan? (Tr. 401–402.) Bigness of the new company does not seem enough.

—More particularity should be presented as to potentialities for integration with land transportation. (Tr. 424–426.)

—What specifically will be the benefits to commerce to be derived from decreased competition for MSTS cargo? (Tr. 789.) The record admittedly fails to prove this point. (I.D. 48.)

—How will the LASH operations be integrated into the merged company, and what will be the benefits therefrom? (Tr. 795.)

With the above additional information before it, the Commission can better evaluate the proposed merger. It is unrealistic to say that details of the merger plan can make no difference in determining approvability. The foundation of regulatory policy will be undermined unless the most complete disclosure of relevant information is required. Reasoned decisions can be reached only with all the facts at hand. *Mediterranean Pools Investigation*, *supra*.

Without such information, the Commission cannot determine, for example, whether the economies forecast cannot be attained by alternatives more readily revocable and of comparable effectiveness. Neither can we judge whether the benefits of the merger and its costs will be evident in benefits to the public.

For all the reasons stated, I would remand this case to the Examiner for the taking of further evidence in an expeditious manner.

I join with Chairman Harllee and Commissioner Barrett in continuing approval of Agreements 8485 and 8485–C–3.

*Dissenting and concurring opinion of Commissioner* James V. Day:

The Commission does not have jurisdiction over the agreement to merge.

The majority view is defective in several respects.

### *The language of Section 15*

Section 15 requires the filing and approval of agreements "controlling, regulating, preventing or destroying competition".

The majority admits that the meaning of this language is *less than plain* and that *implication* is admittedly involved if agreements to merge are to be considered as covered thereby.

The U.S. Supreme Court has taken the position that repeals of the anti-trust laws by *implication* are disfavored.[16]

This view would apply here and negates a claim of jurisdiction.[17]

### *The Intent of Congress*

The respondent states that the legislative history "bears no very clear reward for either side". I am not persuaded by the majority's merely saying that "it would seem to us, that the same considerations which led Congress to grant this Commission the power to exempt anticompetitive rate fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge".

The Alexander Report which Congress considered and relied upon in passing section 15 stated that rate fixing and pooling agreements should be regulated to deter mergers. Congress then would hardly have encouraged merger agreements by including them within those agreements which could be granted immunity from the antitrust laws, pursuant to section 15; especially not so through use of ambiguous language where it had previously passed the Clayton Act and the Sher-

[16] See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–220 (1966); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962); *United States* v. *Borden Co.*, 308 U.S. 188, 200–201 (1939).

[17] It is no answer to say that agreements such as terminal leases, transhipment agreements and agency agreements are also not specified and where these are recognized as subject to section 15 so should be agreements to merge. On their face these other arrangements are dissimilar to mergers—the parties thereto remain viable entities after consummation of such arrangements. A reasonable accommodation between section 15 and section 7 of the Clayton Act would, furthermore, suggest that we be particularly careful with respect to jurisdiction in the area of amalgamations such as the proposed arrangement before us which go to the very heart of the subject matter of the antitrust laws.

man Act dealing with consolidations.[18] The majority states it cannot see this rationale—to me it is more persuasive.

When Congress has meant to extend regulatory power to exempt merger agreements from antitrust laws it has done so not ambiguously, but expressly and precisely as witness the subsequent passage of the provisions of the Federal Aviation Act and the Interstate Commerce Act and also the listing of regulatory agencies, in section 11 of the Clayton Act, authorized to enforce section 7 thereof.[19] I do not attribute such preciseness to "nothing more than a later stylistic preference in legislative draftsmanship" or a lesser need for section 11 authority as would the majority.

*Other Transportation Agencies*

When Congress has intended to extend agency control it has shown this intent clearly and precisely. The CAB and the ICC have in their laws express language covering merger jurisdiction. We do not. The scope of CAB and ICC authority extends beyond the limited authority the majority claims here. With respect to mergers submitted for approval these other agencies have quite precise criteria or guidelines; more so than those of section 15.[20] The majority is guessing at guidelines.[21] Better that clear-cut direction from the Congress would be provided.[22] Under section 11 of the Clayton Act other agencies can order divestiture of mergers. We cannot. Inconsistency abounds when we compare the claimed jurisdiction of this agency and those agencies controlling the other modes of transportation.

*Commission Statements and Administrative Actions*

The majority make much of the AEIL decision which approved a transaction involving a covenant not to compete. This is not the situation here. The cursory and only rationale concerning jurisdiction in AEIL is contained in a footnote in that opinion. Let us also remember that AEIL was decided prior to the Supreme Court's pro-

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[18] See *U.S.* v. *Philadelphia Nat. Bank,* 374 U.S. 321 (1963) for further discussion.

[19] Other agencies regulating transportation, but not this Commission, have expressed power under section 11 to order divestitures.

[20] In addition to statutory language criteria, President Kennedy's message in 1962 before Congress asked that an interagency committee be established to prescribe additional criteria that CAB and ICC might utilize in merger cases. The Committee issued later a release specifying these additional criteria.

[21] The majority has specified certain information it desires but as Commissioner Hearn says, "The items mentioned below are intended to be indicative of the type of additional information I require. The statement of items is not exhaustive, and I hope the parties to the agreement will take this opportunity to make a complete divulgence of their contemplated activities."

[22] Cf. the Federal Aviation Act and the Interstate Commerce Act.

nouncement in Carnation where it found that Congress had granted to the shipping industry only a limited exemption from the antitrust laws. That decision also makes clear that the Shipping Act does not provide the only instrument for dealing with every phase of shipping arrangements. Were this judicial guidance given earlier the AEIL decision might well have been less cursory. Certainly, today, AEIL is of doubtful validity on the precise situation here before us.

A number of other instances of action and inaction by the Commission are cited by the majority or by respondents and the parties in opposition to jurisdiction as supporting or destroying jurisdiction. No attempt is here made to detail them and, at best, the totality of the examples offered can only demonstrate a tendency to vacillate between jurisdiction and no jurisdiction. They are certainly not a demonstration of that sufficiently consistent and traditional agency interpretation which the courts have said is entitled to great weight in construing the agency's statute.

In conclusion, it indeed may well be that this Commission with its inherent expertise should have the power to regulate U.S.-flag corporate unifications. But I can only state that in the absence of express guidance from the Congress, the language of section 15, the legislative history of section 15, and Congressional treatment of other transport regulatory agencies all lead to one result—no jurisdiction.

I join my brethren in continuing our approval of Agreement No. 8485 and its modification Agreement No. 8485–C–3.

*Dissenting and concurring opinion of Commissioner* JAMES F. FANSEEN:

The threshold issue with which we are confronted here, in my opinion, should be dispositive of the case. The question is:

> * * * whether an agreement to merge among carriers covered by the Act is an agreement with respect to a subject mentioned in section 15 of the Act, which the statute authorizes and directs the Commission to approve or disapprove depending on its findings with respect to certain matters specified therein.[23]

The agreement in question is Agreement No. 9551. The majority holds section 15 of the Shipping Act to be sufficiently definite to allow our jurisdiction to encompass this agreement.

I disagree as I see no basis for the majority decision either in the statute or in our prior decisions. Section 15 of the Shipping Act, 1916, is unclear as to whether agreements to merge among competing carriers are within the purview of our control. Unless it is clear and explicit that Congress intended to subject mergers to our regulation, we have no jurisdiction over such matters.

[23] See Initial Decision.

Congress had quite specific purposes in mind in enacting section 15. Section 15 was intended to deal with agreements to fix rates, allocate traffic, pool earnings, and jointly set the terms of competition against nonconference lines. It is clear that the purposes of section 15 were not intended to include regulation of corporate consolidations or immunizing corporate consolidations from the antitrust laws.

Section 15 does not expressly or impliedly refer to mergers. When all of section 15 is read together, it becomes clear that the phrase "controlling, regulating, preventing, or destroying competition" relates to continuous operations of separate entities subject to the Act.[24] There is at least one factor which inescapably points to this conclusion. The whole thrust of the first paragraph of section 15 is directed to working agreements among separate steamship companies. Therefore, the seventh phrase of the first paragraph of section 15, "or in any manner providing for an exclusive, preferential, or cooperative working arrangement", appears to characterize the first six phrases.

In the instances where Congress has wished a regulatory agency to exercise jurisdiction over mergers, it has done so in clear and specific language. The Interstate Commerce Commission (49 U.S.C. § 5(2)), the Civil Aeronautics Board (49 U.S.C. § 1378), and the Federal Communications Commission (47 U.S.C. § 222) are each authorized in clear and unambiguous language to approve the acquisition of one regulated carrier by another, by merger, stock acquisition, consolidation, or othewise. The Shipping Act, 1916, contains no such language. The care with which Congress has circumscribed the merger jurisdictions of the ICC, the CAB, and the FCC stands in stark contrast to the attempt of the majority to carve out an attenuated merger jurisdiction by implication where none is expressly provided.

Moreover, the legislative history of section 15 does not support an implied merger jurisdiction. The whole thrust of the Alexander Report (H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914)) was that the various operating arrangements which had grown up in the international shipping community were necessary to prevent the eruption of destructive competition and wholesale mergers. Any attempt to apply the full scope of the antitrust laws to the shipping industry would be disastrous. The solution suggested was government regulation of operating agreements and working arrangements among steamship companies, coupled with limited exemption from the antitrust laws.[25] While there was some discussion in the Report respecting the

[24] It is of course a fundamental rule of statutory construction that the various parts of a statute must be considered together. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949).

[25] For an illustration of this point, see the Alexander Report, pp. 415–416.

control of domestic water carriers, the Congress made no recommendations respecting regulation of mergers between water carriers.

The legislative history of the 1961 amendments reaffirms the Congressional intent of section 15 to head off the concentration of power in the industry by regulating working arrangements among existing companies, rather than seeking to regulate mergers as such among them. Nowhere in this legislative history is there any expressed intent to regulate mergers.

In many circumstances, it is appropriate to define the scope of a regulatory agency's jurisdiction by giving a very broad and inclusive interpretation to its statute. However, this approach is not proper when the statute must be accommodated with another Federal statute which has specific application to a class of transactions, and the extension of the regulatory agency's authority would result to abrogating the other statute with respect to those transactions approved by the agency. Congress has repeatedly so held with respect to regulatory schemes and the antitrust laws: the antitrust laws are not to be repealed by implication, and only clear and explicit authority given to a regulatory body may allow that body to immunize from the antitrust laws transactions otherwise subject to the reach of such laws. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–220 (1966); *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962); *United States* v. *Borden Co.*, 308 U.S. 188, 200–201 (1939).

The majority places substantial reliance upon *Agreement No. 8555 Between Isbrandtsen Steamship Company, Inc., Isbrandtsen Company, Inc., and American Export Lines, Inc.*, 7 FMC 125 (1962) (*AEIL*) for the proposition that we have already determined that we have merger jurisdiction as such, as well as the power to immunize such mergers from the antitrust laws.

I submit that the *AEIL* case is distinguishable from the instant case. It is conceded that we had jurisdiction over the covenant not to compete at least to some extent, and that our approval of that agreement was not nugatory. However, although we approved the Isbrandtsen-Export agreement, there is doubt whether we were acting only on the ancillary covenant not to compete or were purporting to exercise jurisdiction over the ultimate merger. The *AEIL* decision nowhere makes reference to an agreement to merge or to a merger as such.[26] Although the jurisdictional issue was clearly raised in the proceeding, we neither met nor articulated in detail the jurisdictional basis for our action. I believe that the *AEIL* case is not a persuassive

[26] We merely characterized Agreement No. 8555 as "such agreements," "No. 8555," or "agreements such as those before us." See *AEIL* case, *supra*, at 128–131.

precedent one way or another. None of the other "precedents" seem of sufficient significance to warrant further discussion here.[27]

Other Federal agencies are specifically charged with the duty of enforcing the laws regarding mergers. Neither the language nor the legislative history of the Shipping Act support a decision subjecting to our jurisdiction agreements for merger, consolidation, or acquisition of control as being within the class of agreements subject to section 15. No subsequent enactment has effectuated any change in our authority under the Shipping Act in this respect.

Although I do not think that the merger agreement before us now in any way offends the Shipping Act, I submit that if mergers of carriers should be subject to the Shipping Act and, upon our approval, immunized from the antitrust laws, Congress can enact legislation clearly directed to this end.

Since I believe that we do not have jurisdiction over Agreement No. 9551, I respectfully dissent.

I join my fellow Commissioners in continuing approval of Agreements No. 8485 and No. 8485–C–3.

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[27] These "precedents" take the form of case citations and presumed advices to Congress that section 15 applies to mergers.



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# FEDERAL MARITIME COMMISSION

DOCKET NO. 66–45

AGREEMENT FOR CONSOLIDATION OR MERGER BETWEEN AMERICAN MAIL LINE, LTD., AMERICAN PRESIDENT LINES, LTD., AND PACIFIC FAR EAST LINES, INC.

## ORDER

This proceeding having been instituted 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 conclusions thereon, which Report is hereby referred to and made a part hereof;

*It is ordered*, That this proceeding is remanded to the Examiner for the purpose of taking further evidence upon the completion of which the Examiner is to certify the record to the Commission for decision. Briefing dates will be fixed by the Commission upon certification of the record.

THOMAS LISI,
*Secretary*.

# FEDERAL MARITIME COMMISSION

Docket No. 66-45

Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc.

*Decision Adopted December 21, 1967*

Agreement to merge approved pursuant to section 15 of the Act where substantial administrative and operating economies and improved operational and transportation service will result, merger will not have destructive or stifling effect upon competition or competitors or lessen competition except for elimination of service competition among merging carriers, adequate competition will remain, and benefits of merger will outweigh any potential injury.

*Warner W. Gardner* and *Benjamin W. Boley* for respondents.

*Alvin J. Rockwell*, *John E. Sparks*, *Thomas A. Welch*, *Willis R. Deming* and *David F. Anderson* for Matson Navigation Company, intervener; *James L. Adams* and *R. Frederic Fisher* for States Steamship Company, intervener; *Donald F. Turner*, *Joseph J. Saunders* and *Miles Ryan, Jr.*, for the Department of Justice, intervener.

*Donald J. Brunner* and *Paul J. Fitzpatrick*, Hearing Counsel.

## SUPPLEMENTAL REPORT ON RECONSIDERATION

By John Harllee, *Chairman*, and Ashton C. Barrett, *Commissioner*.

This proceeding involves section 15 approval of Agreement 9551 under which respondents, American President Lines, Ltd., American Mail Line, Ltd., and Pacific Far East Line, Inc. would merge their respective companies. It is before us now on respondents' petition for reconsideration granted October 13, 1967. On October 3, 1967, we served our report in which we found jurisdiction over Agreement 9551, continued approval of Agreement 8485-C-3, and joined our brother, Vice Chairman Hearn in remanding the proceeding to Examiner Southworth for taking of further evidence on the matters set out in the Vice Chairman's separate opinion. In voting to remand, we said, "* * * we consider that the record in this proceeding now affords a sufficient basis upon which to take action * * *." We joined the Vice Chairman in the remand only to prevent this case from languishing in some administrative limbo for lack of a majority in favor of some action which would ultimately lead to final disposition of the proceeding on the merits. We remain convinced that the record before us is sufficient and think it unnecessary to remand this case for the additional evidence sought by the Vice Chairman.

Two areas with which the Vice Chairman is concerned are, in our opinion, without the scope of this proceeding—the impact of the merger upon subsidy and what, if any, safeguards will be provided for affected employees and potential local labor problems? How subsidy recapture will be affected by the merger and whether the merger will result in greater value for the subsidy dollar are, it seems to us, clearly and exclusively questions for resolution by the Maritime Administration under the specific provisions of the Merchant Marine Act of 1936. Employee protection and the prevention of local labor problems are peculiarly within that area of labor management relations which has, insofar as we are aware, been considered to be a part of managerial discretion beyond regulatory intervention by this Commission and its predecessors.

The remainder of the Vice Chairman's concerns are with service integration and other operational problems. As to these, we think the record is as complete as it need be.

Finally, we think Agreement 9551 is more than a mere agreement to agree. In our view, the agreement is sufficient for approval and should be approved.

No exceptions were taken to the findings of fact upon which the Examiner based his conclusion to approve Agreement 9551. Furthermore, a careful analysis and consideration of the exceptions of protestants Matson and States[1] to the conclusion that Agreement 9551 be approved reveals nothing not argued to and disposed of by the Examiner. We have reviewed the Examiner's disposition of these arguments and we are of the opinion that they are well founded and proper. Accordingly, we adopt the Examiner's findings and conclusions as our own only omitting quotation marks and renumbering footnotes. No other changes have been made and the Examiner's appendices have been retained.[2]

[1] The only other parties filing exceptions were the Department of Justice and Hearing Counsel. As we pointed out in our report of October 3, 1967, Justice excepted only to the conclusion that the Commission had jurisdiction over the agreement and that Hearing Council joined Justice in excepting to jurisdiction but urged that should we find jurisdiction, that Agreement 9551 be approved.

[2] The Examiner's ultimate conclusions concerning jurisdiction over Agreement 9551 and the continued approval of Agreement 8485—C-3 have been eliminated since they were dealt with in our report of October 3, 1967.

*The History and Corporate Relationships of Respondents*

APL was incorporated in 1929 under the laws of Delaware as Dollar Steamship Lines Inc., Ltd. Predecessors had operated steamship services under the Dollar name since 1895, including a trans-Pacific service started in 1901 and a round-the-world service started in 1923. In 1938, when the corporation was in financial difficulties, the Dollar interests were required to transfer their stock, representing over 90 percent of the voting shares outstanding, to the United States Maritime Commission, as a condition to the grant of subsidy under the Merchant Marine Act, 1936; and its name was changed to American President Lines, Ltd. Some years later, the Dollars sued to recover their stock. Under a compromise settlement in or about 1952, the stock was offered at public sale, the proceeds to be split between the Government and the Dollar interests. Ralph K. Davies, who was then a director of APL, formed a group which was incorporated under the name of APL Associates, Inc. (hereinafter "Associates") to bid for the stock in conjunction with Signal Oil and Gas Company. The bid was successful; Associates and Signal acquired over 90 percent of the voting stock of APL, and Davies, who had been an APL director since 1948,[3] was made Chairman of the Board of APL.

The Murchison interests of Texas had bid unsuccessfully for the APL stock. In 1954, they offered for sale their controlling interest in AML, a Delaware corporation incorporated in 1930 whose predecessors had been in the steamship business since 1850 and operated a trans-Pacific service begun in 1917. Davies negotiated the purchase of the Murchison's AML stock (about two-thirds of its outstanding shares) by APL, and APL has since continued to purchase additional shares as they became available. APL now owns 92.9 percent of the outstanding stock of AML. Its purchases required MARAD approval as substantial asset acquisitions by a subsidized carrier, and such approval was obtained as required.

In 1956, Associates transferred its APL stock to Natomas Company in return for stock of Natomas, a corporation which had not theretofore been connected with the shipping business. Associates was thereupon liquidated; it distributed its Natomas stock to its stockholders, and was dissolved. As a result of this transaction and subsequent acquisitions of APL stock by Natomas and Signal, the outstanding

[3] Mr. Davies was President of American Independent Oil Company from 1947 to 1962. Previously he had been Deputy Petroleum Administrator, under Secretary of the Interior Ickes, from 1942 to 1946, and before that Senior Vice President of Standard Oil Company of California.

voting stock of APL[4] (made up of 2,100,000 shares of Class B capital stock, 252,000 shares of Class A capital stock and 34,343 shares of 5-percent noncumulative preferred stock, par value $100 per share) is now owned beneficially as follows:

| | Shares | Percent |
|---|---|---|
| Natomas | 1, 219, 288 | 51. 096 |
| Signal Oil & Gas Co | 1, 151, 277 | 48. 246 |
| Others | 15, 678 | 658 |
| | 2, 386, 243 | 100. 000 |

Upon consummation of the Natomas-Associates transaction, Davies (who immediately prior thereto owned about 33 percent of the outstanding Associates stock and 5 percent of the outstanding Natomas stock) became the largest stockholder of Natomas, with about 25 percent of its outstanding shares; and he was then elected Chairman of its Board of Directors, a post which he still holds. He now owns about 28 percent of the outstanding stock of Natomas.

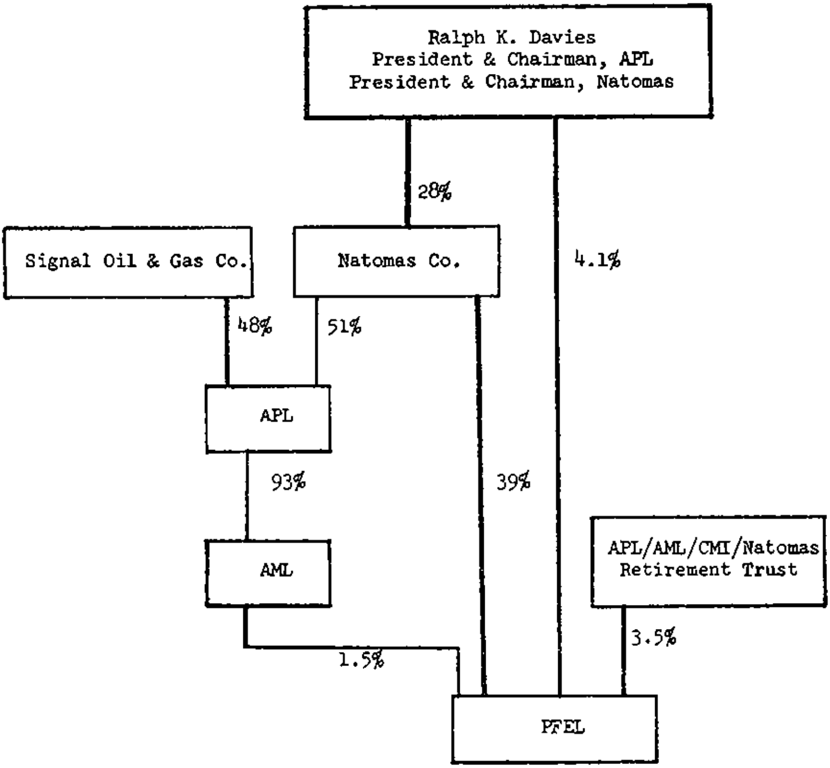
During the same year of 1956, Natomas purchased large blocks of PFEL stock owned by Chicago Corporation and Foremost Dairies. PFEL, a Delaware corporation organized in 1946, had conducted various trans-Pacific services, as well as other services which had been abandoned in 1952; the company was doing well and Natomas considered it an attractive investment. The two 1956 purchases aggregated about 29 percent of PFEL's outstanding shares. Subsequent purchases have brought the Natomas holdings up to 39.1 percent. In addition, Davies now owns 4.1 percent, and AML owns 1.5 percent, of PFEL's stock, giving an aggregate affiliated ownership of 44.7 percent. Ownership of the remaining 55.3 percent of PFEL's stock is distributed widely among some 1,700 stockholders; as far as Natomas knows, the only large stockholder among these is the APL/AML/CMI/Natomas Retirement Trust, which owns 32,571 shares, or about 3.5 percent of the total outstanding.

Prior to its acquisition of APL stock (which brought with it a majority interest in AML) and PFEL stock, the principal business of Natomas had been gold mining by the dredging process, in which

[4] Natomas owns 50 percent of the Class B, 56 percent of the Class A, and 45 percent of the 5 percent Preferred; Signal owns 50 percent of the Class B, 35 percent of the Class A, and 33 percent of the Preferred stock. Together they own all the Class B, 91 percent of the Class A, and 78 percent of the Preferred stock. The Class A shares are entitled to any common dividends declared, and to remaining assets on dissolution, at five times the rate per share paid on the Class B stock. Each share of each of the three classes of stock is entitled to one vote; in terms of voting control, therefore, they may be lumped together.

it had engaged since about 1850. The 1956 acquisition of APL and PFEL stock put into effect a policy, adopted by Natomas in 1955, to continue in business through the acquisition of other businesses, rather than to liquidate as its available mining ground became exhausted. Other Natomas enterprises include ownership and operation of a 22-story office building in San Francisco, land holdings in California and Colorado, oil refining and marketing abroad, and geothermal development in the Western United States.

The present affiliated interests in the stock of respondents may be shown graphically as follows:




Signal Oil & Gas Co. has entered into a "Stock Voting Agreement" with Bank of America, under which the Bank is appointed Signal's proxy to vote its APL stock in the Bank's sole discretion and judgment, subject to certain limitations. Neither the Bank nor Signal may vote the stock for the election of directors or officers of APL. The purpose of the agreement, which is revocable on 7 days' notice, is stated to be to assure MARAD that Signal "will not be able to exercise nor attempt to exercise any control or controlling influence over the management or the management policies of APL." Such assurance to MARAD is apparently required by reason of Signal's interests in an airline and in foreign flag tankers. Although Davies testified that he doesn't forget Signal's large interest in APL, consults Signal before selecting directors and keeps it informed as to important developments, and tries to make Signal's lack of representation on the board meaningless as a practical matter, he also testified that Signal has continued to rely on his recommendations. Signal has indicated to Davies that it favors the merger now proposed.

It is apparent from the foregoing that Natomas has the power to direct or cause the direction of the management and policies of APL and PFEL and, through APL, of AML. See *Willheim* v. *Murchison*, 231 F. Supp. 142, 145 (S.D.N.Y. 1964).

Under section 253 of the Delaware Corporation Law, APL, as a corporation owning 93 percent of the shares of stock of AML, may merge AML into itself by filing a certificate of ownership and merger setting forth, among other things, the securities, cash, or other consideration to be paid upon surrender of shares of the subsidiary. Under this "short merger" procedure, applicable where a corporation owns at least 90 percent of a subsidiary's stock, the right of the parent is unilateral in nature and in no sense dependent upon any action of the board of directors of the subsidiary; and while minority stockholders of the subsidiary may challenge the adequacy of the value put on their shares through an appraisal proceeding, they cannot sue to set aside the merger. *Stauffer* v. *Standard Brands Inc.*, 178 A. 2d 311, 312–316. Thus, Agreement No. 9551 is not essential to the merger of AML into APL, since the merger can be accomplished unilaterally without agreement or understanding between the two carriers.

*The Steamship Services of Respondents*

I. *APL Services*

APL operates four services, all of which are subsidized under the Merchant Marine Act, 1936. All the services touch at California ports and Far East ports; however, only one of these services, the trans-Pacific Freighter Service, is devoted exclusively to carrying cargo between California and the Far East in the relatively high-volume

Trade Route 29 [5] service. It is only upon this route that substantial port-to-port competition exists among respondents.

The four APL services are as follows:

1. Trans-Pacific Freighter Service: California to Japan, Korea, Taiwan, Okinawa, Hong Kong, the Philippines, Vietnam and Thailand, and return to California.

This service is maintained with five modern Mariners, built 1961–1966, and one C–3, built 1943. APL's operating-differential subsidy ("ODS") contract calls for 32 minimum and 37 maximum trans-Pacific sailings annually. APL has applied for construction differential subsidy ("CDS") funds to build four new LASH ("lighter-aboard-ship") vessels for use on this service. The application has not yet been granted. The LASH vessels are a new and untried type of vessel which would carry either lighters, loaded and off-loaded by shipboard equipment, or containers, in any desired proportion.

2. The Round-the-World ("RW") Service: Westbound from North Atlantic United States ports through the Panama Canal, calling at California ports (usually Los Angeles and San Francisco), Honolulu (occasionally), Japan, Okinawa, Taiwan, Hong Kong, South East Asia, Singapore, West Coast of India, to the Mediterranean via Suez Canal, Italy and (every other voyage) Spain, and on to the North Atlantic Coast of the United States.

The RW service is maintained with eight 20-knot Mariner vessels, built 1952–1954. The ODS contract calls for 24 minimum, 28 maximum sailings annually.

3. The Atlantic/Straits ("A/S") service: North Atlantic United States ports through Panama Canal, calling at California ports (principally San Francisco), Guam, the Philippines, Vietnam, Indonesia, Malaysia, and return via the Philippines, Hong Kong, Okinawa, and Japan to Los Angeles and back to the Atlantic Coast.

The A/S service now uses eight 16.5-knot C–3 vessels, built 1943–1946, but APL has five 23-knot C–4 "Seamasters" under construction for the service. The ODS contract calls for 24 minimum and 28 maximum sailings per annum.

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[5] Pursuant to section 211 of the Merchant Marine Act, 1936, the Maritime Administration has determined ocean routes ("Trade Routes") and services which are essential to the foreign commerce of the United States. Trade Route 29—U.S. Pacific/Far East—is defined as "Between U.S. Pacific ports (Alaska, Washington, Oregon, California, United States Islands lying between continental Pacific Coast United States and the Far East) and ports in the Far East (continent of Asia from the Union of Soviet Socialist Republics to Thailand, inclusive, Japan, Formosa, Philippines and other Pacific Islands lying between continental Pacific Coast United States and the continent of Asia as heretofore described)."

4. Trans-Pacific Passenger Service: California to Honolulu, Yokohama, Hong Kong, Manila, and return, via same ports.

This service is maintained with three P–2 combination passenger and freight vessels, built 1944–1947. The service carries relatively small amounts of cargo. The ODS contract requires 20 minimum and 27 maximum sailings per annum.

II. *AML Services*

AML operates under subsidy between Pacific Coast Northwest ports and Far East ports, with an extended service to Indonesia-Malaysia and Bay of Bengal ports; only the latter service touches at California ports, and that only inbound, with certain restrictions in the ODS contract as to commodities permitted to be carried to California, particularly from Japan.

The two services are described generally as follows:

1. The so-called "Short Run" service: Pacific Northwest (Washington, Oregon, British Columbia) to Japan, Korea, Okinawa, Taiwan, the Philippines, Hong Kong, and return via Japan to the Pacific Northwest.

This service uses five 20-knot Mariner-type vessels.

2. The "Bay of Bengal" service: Pacific Northwest to Japan (Yokohama) Singapore/Malaysia, West Coast of India, Bay of Bengal, back to Singapore, touching at Japan, to the Pacific Northwest via California.

This service uses four 16.5-knot C–3-type vessels. Three 20–21 knot vessels are under construction.

AML's ODS contract calls for minimum 36 and maximum 48 annual sailings, of which 12 are allotted to the Bay of Bengal service and the remaining 24–36 are in the "Short-Run" service.

III. *PFEL Services*

PFEL operates a subsidized trans-Pacific service between California and the Far East and an unsubsidized service to Guam, described generally as follows:

1. The Trans-Pacific Service: Between California and Japan, the Philippines, Hong Kong, Korea, Taiwan, Thailand, Vietnam and Okinawa.

This service is maintained with nine 20-knot C–4 Mariners, built 1952–1962, and a 17-knot Victory, built in 1945. The subsidy contract calls for 53–63 sailings annually. PFEL has been allocated subsidy funds for the construction of three 22½-knot LASH vessels, with an option to construct three additional vessels. The company estimates that six such vessels could take the place of the nine Mariners and one Victory now in the subsidized service. Under present arrangements, however, the first new vessel could not be delivered before the fall of 1969.

2. The Guam Service: Between the Pacific Coast and Guam, Wake and Kwajalein via Hawaii.

This unsubsidized service uses five C–2 vessels, built 1942–1945.

*Summary Comparison of Respondents' Services*

APL provides service in several essential trade routes,[6] as does AML to a lesser degree. Some of these trade routes are common to both carriers, but APL's calls at Pacific Coast ports are limited to California ports, while AML's services originate and terminate at Pacific Northwest ports, with only occasional calls, inbound in its Bay of Bengal service, at a California port. Except for these California calls, AML is competitive with the California-Far East services of APL (and PFEL) only to the extent that, under existing inland and ocean rate structures, inland shippers and consignees in certain parts of the country may use either California or Pacific Northwest ports; and it may be noted that Gulf or Atlantic Coast ports, or both, provide additional competitive services for many of these inland shippers and consignees. Where APL and AML both operate in a trade other than TR 29, there are additional differences in their services which further reduce such competition as exists between them. This appears from the above descriptions of APL's Round-the-World and Atlantic/Straits services, compared with AML's Bay of Bengal service. Thus, AML's service is primarily an extension of APL's service; AML's direct, port-to-port competition with either APL or PFEL is minimal.

PFEL service in foreign commerce is limited to TR 29, with all voyages originating and terminating at California ports and no calls at Pacific Northwest ports. It competes directly with APL's TR 29 services and indirectly with AML's to the same extent as does APL.

The only trade within which the proposed merger would have a direct and immediate effect upon competition among respondents is the portion of TR 29 between California and the Far East. Details concerning such competition in TR 29 and the California portion thereof are set forth in appendices D, E, and G; they will be considered subsequently in connection with discussion of the effect of the merger upon protestants and competition generally.

[6] APL's passenger service does not show a profit, after subsidy, over and above allocated overhead, although it contributes to overall profit through absorption of administrative overhead. The Atlantic/Straits service, after subsidy, overhead and depreciation, makes a net contribution to profit before taxes, but is closer to the break-even point than the Round-the-World service. The Trans-Pacific Freighter Service is the most profitable, on a per diem vessel earnings basis and overall; it makes more than any of the other three services, although there are fewer ships in the service.

*Management and Operating Relations Among Respondents*

Natomas, through Davies personally, regularly participates in major affairs of APL. AML's management is to a large degree autonomous, without outside control in operational matters. APL and Natomas each has a representative on AML's Board of Directors. Davies and Natomas have likewise refrained from taking any part in the operations and operational policies of PFEL. Following the death of PFEL's president in 1959, Davies arranged to have its affairs surveyed by an outside consultant and, in effect, by his long-time associate, Mr. Ickes, who eventually was made president of PFEL and continued as such until he was made president of APL in 1966. Notwithstanding the obvious fact of Mr. Davies' control over these top-level moves, the record does not suggest that Davies and Natomas had ever exercised their power of control to lessen competition among APL, AML, and PFEL; on the contrary, the operating managements have been left to compete with each other vigorously within the limits of their respective services. In the case of APL and PFEL, the area of such service competition covers the entire scope of PFEL's trans-Pacific operations. Pursuant to filed agreements approved by the Commission, however, the three lines have investigated the possibility of joint efforts to eliminate "wasteful competition", and have undertaken certain cooperative activities, as set forth *infra.*

*Financial Facts; the Effect of Merger upon Subsidy Recapture*

Appendix B sets forth income statements of APL, AML, and PFEL, consolidated income statement of APL and AML, and a combined income statement of the three lines, for the year 1965. Income statements of protestants States and Matson are also shown, in comparable detail, for the same year.

Appendix C contains balance sheets as of December 31, 1965, corresponding to the respective income statements in Appendix B.

Under applicable law and their ODS contracts, subsidized operators are required to deposit in statutory reserve funds certain amounts which include depreciation on subsidized vessels, proceeds of sale or other disposition of such vessels, and earnings in excess of 10 percent per annum of capital necessarily employed in contract operations. Earnings deposited or required to be deposited in the statutory reserve funds are not subject to Federal income taxes unless withdrawn for general purposes or unless contract operations are terminated. The balance sheets and income statements of APL, AML, and PFEL (and likewise of States and of Matson, whose consolidated subsidiary is a subsidized operator) do not reflect any provision for Federal income taxes to which reserve funds could thus become subject. Of the amounts on deposit or required to be deposited, as of December 31, 1965, the portion which could, under such circumstances, become subject to Federal income taxes was approximately $14 million in the case of APL and AML (consolidated; $3,925,000 in the case of AML alone) and $9,166,276 in the case of PFEL.

Of net income for 1965, the amount depositable in statutory funds was $4,129,000 for APL and AML (consolidated; $1,487,050 for AML alone) and $2,452,875 for PFEL.

Operating-differential subsidy is subject to recapture by MARAD to the extent of one-half of the amount by which earnings from contract operations during each 10-year accounting period under the agreement, exceeds 10 percent per annum of capital necessarily employed in such operations (as defined by MARAD). APL and AML have not incurred recapture in their current 10-year accounting periods, which began January 1, 1958, for APL and January 1, 1961, for AML/PFEL has accrued $3,465,000 for the first 3 years of its current 10-year accounting period, which began January 1, 1963.

Upon a simple combination of figures as of December 31, 1965, or as projected to December 31, 1966, a merger of the three companies would wash out any accrued recapture, since the aggregate amount by which APL and AML earnings fell short of recapture would exceed the amount of PFEL earnings subject to recapture. The overall effect which merger ultimately might have either to decrease or increase recapture from the three lines would depend upon speculative factors, such as the amount by which overall net earnings might increase by reason of the merger versus the relative earnings of the individual companies to the end of their respective accounting periods if they were not merged. Most important, however, would be the treatment of the three separate ODS contracts upon merger; and presumably MARAD would stipulate such terms as it deemed appropriate to protect the public interest against any forseeable adverse effect upon recapture. Protestants' contentions of probable detriment to the public interest in connection with the ODS contracts of respondents are without substantial merit.

*Benefits of the Merger*

As might have been expected in view of the inter-corporate relation described above, Natomas and particularly Mr. Davies, have from time to time considered merging the three companies. The possibility of savings through combined operations was obvious, but through

Commission approval of Agreement No. 8485, it was possible to effectuate some of these without the intramural upheaval which a merger involves. It became apparent, however, that this approach had its limitations, as long as there were diverse stock interests outstanding as well as separate managements each disinclined to subordinate itself to the others. A factor in the timing of the decision to merge was the departure in the spring of 1966 of APL's president, following which Mr. Ickes, who had been president of PFEL since 1962, was made president of APL.

Respondents list, as gains to be expected from the merger, strengthened management; administrative economies; more regular service and reduced turnaround time, with better vessel utilization through coordination of sailings; increased financial strength and flexibility; greater ability to meet and take advantage of imminent changes in ocean transport methods growing out of containerization; and increased ability to meet the impact of stronger Japanese competition resulting from recent combinations and mergers of Japanese-flag lines. It is found that, to a greater or lesser degree, such benefits will result; they will be discussed briefly *seriatim.*

1. *Management.*—In the opinion of an experienced management consultant who had surveyed the management structure of the three lines, a real benefit of the merger would be an improvement in the "managerial capacity" of the three companies. He was not specific, but it was not in the best interests of the companies to be specific under the circumstances. The record indicates that the three companies have been and are now well managed, although, as noted, APL's president was recently replaced by the former president of PFEL, whose place was taken by PFEL's financial vice president. The overall top management of all three companies is controlled by, or is subject to control by, Mr. Davies through Natomas. There is no evidence of any management problem which might be magnified by merger. A complete unification of the companies would permit optimum utilization of the best managerial talent of all three companies and thereby strengthen management.

2. *Administrative economies.*—Estimated administrative savings of about $1,700,000 per year are not seriously challenged by protestants and are accepted by the Examiner. The amount, it may be noted, is more than 10 percent of the combined earnings, before Federal income tax, of the three respondents in 1965, and more than 14 per cent of their combined after-tax earnings. These savings would result from such things as centralized electronic data processing making common use of more "sophisticated" equipment, streamlining of accounting proce-

dures, joint purchasing bringing about reduced aggregate inventories of supplies and some cost saving through volume purchasing, joint engineering and research staff, joint use of house counsel and consequent reduction of internal and outside legal expenses, and consolidation of branch office facilities. Substantial portions of the savings would come through payroll reduction. It was stipulated that the $1,700,000 does not include savings that might be achieved through combining the operations and freight traffic departments, as to which no evidence was submitted.

Of the estimated $1,700,000 annual savings, it was estimated that about $750,000 could be realized without merger through maximum theoretical use of the "coordinating committee" procedures.

3. *Sailing coordination; elimination of duplicated calls at minor ports.*—This would affect only the trans-Pacific services of APL and PFEL, except for the possibility of some improved flexibility in adjusting schedules of inbound Atlantic/Straits vessels. In the trans-Pacific services, the sailing schedules of the six APL vessels and 10 PFEL vessels would be coordinated to provide sailings at regular intervals and to avoid, as far as possible, having two APL–PFEL vessels on the same berth at the same time. Ninety sailings per year would be within the combined minimum-maximum ranges of the APL and PFEL subsidy contracts, and with 16 vessels would make it possible to have a vessel on the San Francisco and Los Angeles loading berths every day of the year. APL considers that this would be attractive to some shippers because they would be able to move their cargo directly to shipside at any time, although most cargo is booked for a particular sailing date before the ship comes to port. Alternating some of the minor ports among vessels of the combined fleet would, according to company estimates, eliminate as many as two ports per voyage with a consequent saving in turnaround time, while still giving adequate service to such ports.

With the flexibility provided by a larger fleet, schedules could be more readily and effectively adjusted to compensate for delays caused by wind and weather, port congestion, labor difficulties, breakdowns and the like. While the advantages of sailing coordination could theoretically be brought about through approved agreements, they could not be fully realized in practice, since that would often require that the earning power of a particular ship be sacrificed for the overall benefit of the entire enterprise. This would present practical difficulties in the absence of an integrated enterprise.

As Matson says, there can be no doubt that the merged company would gain considerable flexibility and would become in many ways a more formidable competitor as a result of the integration of the fleets. Such results are pro-competitive and therefore in the public interest, unless they may drive less efficient competitors out of business. Protestants' claim of resulting detriment to themselves will be discussed hereinafter.

4. *Financial strength and flexibility.*—The balance sheets in Appendix C show that each of the three respondents is in good financial condition, and they do not assert to the contrary; although, as mentioned in the discussion of financial data above, it should be noted that the statutory reserves of respondents would become, to a considerable extent, subject to Federal income tax if used for purposes other than new vessel construction.

Respondents point out that a large portion of their current assets, particularly in the case of APL, is represented by operating differential subsidy receivables; and that where payment thereof is held up, as has occurred, APL has had to borrow from banks. If all funds were in a common till, such exigencies affecting only a part of the enterprise could more readily be met without outside financing. Without subsidy receivables the combined balance sheets as of December 31, 1965, show a slightly better current ratio than APL alone.

Variations in annual earnings of the three companies have not been uniform in degree or direction so that the merger would tend to stabilize earnings.

With net current assets of over $21 million and shareholders' equity in excess of $113 million, the combined company would undoubtedly have greater financial strength and flexibility than the three companies separately. In this connection, it should be noted that the abnormal demands of Vietnam, which we may hope will not continue indefinitely, contribute to the present prosperity of respondents, and that respondents are no exception to the general rule that shipping companies historically have not been attractive to investors. That the three respondents separately are not in evident financial straits at the moment is not reason to discount the benefit of improved financial strength which the merger would produce.

5. *Enhanced ability to meet expected changes in ocean transport methods.*—The record demonstrates that containerization in one form or another is already at hand in the Pacific Coast/Far East trade, but opinions differ as to the timing and probable extent of its development and how to meet or take advantage of the trend. It will in any case require expenditures for equipment and facilities which a strengthened financial position would facilitate. It appears that there may be some advantage to a larger operator in acquiring, through lease or otherwise,

the necessary priority on use of shoreside facilities which is essential if full advantage of containerization is to be realized. Matson, which is planning a containership operation, apparently finds it desirable to enter into a joint venture arrangement with Japanese lines for this reason.

As a general proposition, the larger the fleet, the greater the flexibility and, therefore, the greater opportunity to develop specialized vessels (such as full containerships or LASH vessels) in the fleet.

6. *The Japanese mergers.*—In 1964 eleven major Japanese shipping lines were merged into six companies, each of which operates in TR 29; they are the six Japanese flag lines shown in Appendix D. As appears from Appendix I, each of these lines is larger in tonnage, and five of them are much larger in number of vessels, than APL, AML and PFEL together. Only parts of their respective fleets are employed on TR 29; however, a substantial part of respondents' combined fleet will also operate in other trades in addition to TR 29. The 1964 mergers were brought about by the Japanese government, which arranged for a moratorium on mortgage indebtedness and the reduction of mandatory interest payments as part of the plan of amalgamation.

Japanese shipping lines had been in financial difficulties, having overextended themselves in the postwar construction race to the extent that they were unable to discharge indebtedness incurred at high interest rates. In 1963, Japan enacted a law "for the reconstuction and reorganization of shipping enterprises," which provide for the amalgamation of the lines into prescribed groups, a moratorium on mortgage indebtedness, and reduction of mandatory interest payments. By the end of 1965, the financial condition of all the lines had improved very substantially, and most of them were well on the way of discharging overdue indebtedness and accrued depreciation. N.Y.K. had resumed dividend payments after a 13-year suspension.

Also, the Japanese Minister of Transportation caused the five companies operating between the Atlantic Coast and Japan to enter into an arrangement to "adjust the number of sailings and take various measures for rationalization of the services," through the New York Liner Administration Company, established in 1964.

The Japanese lines have been materially strengthened, as well as increased in size, as a result of the mergers, cooperative sailing arrangement and financial relief brought about by Japanese government action. The record does not indicate that any respondent or other American-flag carrier has been affected as a result, except perhaps as it may have failed to gain any advantage from what appears to have been the imminent financial collapse of Japanese competition; and that,



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under antitrust principles, could not be considered injury. The Japanese mergers were shown to be pro-competitive rather than anticompetitive in effect, and give promise of putting added pressures on respondents and other carriers to improve their economic performance. See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1328.

*Competition on TR 29*

Appendix D shows the sailings of all lines during 1964 on TR 29 between the Pacific Coast and the Far East and between California and the Far East. In the latter service there were, in addition to the 159 outbound and 133 inbound sailings of respondents, 692 outbound and 652 inbound sailings among 26 lines (including some with very few sailings, and some with sailings in only one direction).

Appendix E shows comparative volume (in tons and percentages) of cargo carried on TR 29 between the Pacific Coast and the Far East during 1964 by respondents, States, all other U.S-flag lines, and foreign flag lines, as well as by nonliners. Appendix G shows comparative volume (in percentages) on the California-Far East portion of TR 29 during 1964; it shows percentages of liner as well as nonliner liner totals, separately as to commercial and commercial plus military cargo. In order to show comparatively a greater number of pertinent percentages without unduly complicating the table, tonnage figures have been omitted in Appendix G. Overall tonnage figures for the California-Far East portion of TR 29 in 1964 are shown in Appendix F, broken down as to commercial bulk, commercial general and defense cargo, liner and nonliner.

*Opposition to the Merger*

There was no shipper or port testimony or argument for or against the merger. States, a major competitor on TR 29, alleges that it would be adversely affected. Matson, which is not now a competitor but expects to be one, also opposes the merger and alleges that it would have an adverse impact upon its planned TR 29 operation as well as its existing Pacific Coast-Hawaii service. There is no other opposition to the approval of Agreement No. 9551 other than the objections on jurisdictional grounds discussed above.

*The Business of Protestant States and the Impact of the Merger upon it*

States is a subsidized operator in the Pacific Coast/Far East trade (TR 29). Its corporate history is complicated, involving mergers and acquisitions among predecessors, one of which engaged in trans-Pacific operations as early as 1919. In 1954, it acquired the stock of Pacific Transport, a subsidized steamship line which was merged with States in 1957 with Federal Maritime Board approval.[7] In 1955, States operated five Victory ships and two C-2 vessels; Pacific Transport had five C-3's and a Victory. States now owns five C-3's, two Mariners and six California class vessels, which are considerably improved versions of the Mariner class ships. It has on order five 23-knot Colorado class vessels, which are of a new design, larger than the Mariners. These will replace the C-3's and give States a modern fleet of thirteen 20- and 23-knot vessels. Since 1958, it has operated four services, all subsidized:

*A* service—2 C-3's—Pacific Northwest/Japan-Korea-Okinawa-Formosa.

*B1 service*—3 C-3's—Pacific Northwest and California/Japan-Korea-Okinawa-Formosa.

*B2* service—3 Mariners—Pacific Northwest and California/southern area of TR 29: Hong Kong, Manila, Saigon, Bangkok.

*C* service—5 Mariners (California class)—California and Hawaii/Japan-Okinawa-Manila-Hong Kong.

Between California and the Far East, States thus competes directly with APL and PFEL; between the Pacific Northwest and the Far East, it competes directly with AML. States has incorporated special features in its vessels calculated to make them serviceable for a vessel life of 25 years, regardless of the rate of growth of containerization. Besides providing for increasing numbers of containers, including reefers, States has developed advanced methods of handling cargo in conventional stow. It is improving handling through such devices as unitization (e.g., combining eight or more separate packages into one large unit for handling by mechanical means), palletization, and the use of slings and other aids to rapid handling which stay with the cargo from loading until discharge. It believes that containerization is the coming thing, but will not develop as fast in the Far East as in other trades; and that it will not be desirable, in the foreseeable future at least, for all cargo or in all ports in TR 29. It is somewhat skeptical of the proposed LASH vessels.

States is in good financial condition (Appendices B and C contain 1965 income statement and balance sheet as of December 31, 1965).

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[7] At the request of States' attorneys, the Board by letter confirmed States' understanding "that on the same date, August 23, 1957, the Federal Maritime Board granted its prior or simultaneous approval, if necessary, under section 15 of the Shipping Act, 1916, as amended, in connection with the merger of Pacific Transport Lines, Inc., and the new States Steamship Company."

It is a family-owned corporation; its president, Mr. J. R. Dant, owns a beneficial interest of 84 percent and, together with his family, of more than 98 percent.

States carries more cargo than any one of respondents (or, apparently, any other carrier, U.S. or foreign flag) on TR 29, but less than either APL or PFEL in the California/Far East portion of the trade (Appendices E and G). It serves all areas of TR 29 between the Pacific Coast and the Far East, as do respondents in combination although none of them does so separately.

The record shows States to be a well-run, progressive, financially healthy ocean carrier. Owned and operated by United States citizens under the United States flag, with the best-equipped and most suitable types of modern vessels, constructed in the United States, it exemplifies the American merchant marine that the Merchant Marine Act, 1936, was designed to foster and encourage.[8] The Examiner adopts the proposed finding of States that it has an important competitive position as a U.S.-flag carrier on TR 29 and that its effectiveness as such a carrier should not be weakened or jeopardized.

States' claim of probable injury is concerned principally with the expected coordination of sailings of APL and PFEL in the California/Far East trade and consequent advantages to the merged company. It also alleges probable injury from "predatory pricing" in connection with MSTS cargo.

The "predatory pricing" prediction arose out of testimony adduced by respondents with the evident purpose of suggesting that the merger might save the government money in connection with a system of competitive bidding which it has inaugurated for MSTS cargo. This procurement program, as originally proposed, is described in *In the Matter of the Carriage of Military Cargo*, Docket No. 66–42 (10 FMC 69). It appears that sealed bids are solicited for the quotation of rates guaranteed for one year. The low bidder gets first refusal on each booking; if he does not offer suitable space and delivery schedule, the cargo is booked with the next highest bidder. Respondents' counsel undertook to show that the merged company's bids would tend to be lower, rather than higher, after the merger. The witness, an officer with traffic experience, said that in bidding for the merged company, he would take into account the circumstances prevailing at any given time, as would with any one of the separate companies, but that with the larger fleet his "responsibility would be towards being lower rather than higher" with the larger number of ships, because of the greater importance of a guarantee of available base cargo; he would "be inclined towards being a little tighter with my

[8] See Title I—Declaration of Policy—46 U.S.C. § 1101.

bidding, to do everything I could to assure myself to a reasonable degree without giving away too much money, without leaving too much on the table and to have as first thought the maximum amount of MSTS cargo." The latter procedure of course describes pretty well the normal action of any bidder who really wants an award, and the testimony fell somewhat short of showing that the merger would probably bring about lower rates on MSTS cargo. Protestant States, however, seized upon it as proof of a planned practice of "predatory pricing", which would be disastrous to States and contrary to the public interest as well as one of the "rankest forms of antitrust law violations". "Predatory pricing" may be defined as "selling at a lower price than customary profit-maximizing considerations would dictate, for the purpose of driving equally or more efficient competitors out of all or the greater part of the market." [9] The practice is indeed a plain violation of the Sherman Act, and would not be immunized by Commission approval of the merger, since it would not be any part of that transaction. But there is nothing in the record to indicate that predatory pricing is a reasonable probability, much less a planned practice, as a result of the proposed merger. The concept of predatory pricing is inconsistent with the sealed bid system described in Docket No. 66–42 *supra*, under which it would seem likely that no one would be hurt by attempted predatory pricing as much as the predator himself. Furthermore, as thereinafter mentioned, it appears that the government will continue to determine conditions of competition with respect to government cargoes beyond any power of the merged respondents to do so. It is concluded, upon the record, that there is no probability that States or any other competitors would be adversely affected by the proposed merger with respect to MSTS or other government cargo.

With respect to coordination of sailings of the PFEL and APL trans-Pacific fleets, the president of States confirmed respondents' testimony to the effect that it would permit the merged company to cover major and minor ports more frequently, while calling at fewer ports on each sailing. For example, States might call five minor ports on a sailing, while the merged company, with two sailings, could cover three of those ports on one sailing and the other two on one sailing, resulting in faster turnaround. With a larger fleet, it would have greater flexibility and better opportunity for specialized vessel operations. Apart from, or in connection with, these "efficiencies of scale," however, Mr. Dant was concerned over the "blanketing" [10] of States

[9] Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harvard Law Rev. 1313, 1340.

[10] Blanketing, as defined by Mr. Dant, means that "a competitor has sailings perhaps the day before you are sailing and the day after you are sailing. In other words, he practically puts a blanket over your sailing date."

sailings by the merged company. With a sailing every 4 days, any States sailing—from California—could not be more than 2 days away from a competitive sailing. Mr. Dant conceded that, under present conditions, there are often entire weeks when there is more than one competitive sailing every day; however, he considers that sort of thing "just competition."[11] As to whether it would make any difference whether States were "blanketed" by an APL ship on one side and a PFEL ship on the other, or by ships of the merged line, he reasoned that in the mind of the shipper they are now separate entities, "and we have been able to compete with them, but when they are one company I am not so sure that we will be as successful." Mr. Dant's concern is consistent with Mr. Ickes' testimony that for a single company to have a ship on berth at all times is attractive to shippers and a help to the company's freight solicitors—that is to say, a selling point. However, the net effect of Mr. Dant's testimony is simply that the merged company will present tougher competition, not that it will present any clear danger to States' ability to compete. Mr. Dant's attitude is perhaps summed up best in this statement of his:

> I would like to convey this thought, that I think the consolidation of the companies will affect States Steamship Company and take more cargo away from (it) than the companies are now taking away as a single entity. Now, just how they are going to do this is for them to design. I don't intend to let up, as far as we are concerned, in trying to develop cargo for States' ships, whether the companies are combined or not.[12]

States' concern comes down to the straightforward proposition that the merger will present it with stronger service competition in the California-Far East trade, as a result of which it might "lose" more cargo to respondents than it is now "losing". However, States' accomplishments of the past decade, its modern fleet and equipment, and its plans for the future suggest that it is not likely to lose much, if any, of its cargo expectancy to respondents, merged or not. Its

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[11] During the 18-month period January 1, 1965, to June 30, 1966, out of 31 States sailings from Yokohama to San Francisco, over 60 percent were on the same day, the day before, or the day after, a PFEL or APL sailing. Out of 55 States sailings westbound to Japan from San Francisco, the same was true as to 64 percent

[12] He also testified that the combined company might not be as aggressive in seeking cargo if the competition between them were eliminated, and that it might lose some cargo because some shippers allocate their cargo among American lines (so respondents might get one instead of two shares of such cargo). Also, States, in its brief, disparages the benefits of regularly spaced sailings on a 4-day headway, pointing out that respondents' vessels are now sailing full westbound, and arguing that free space eastbound is normal and not due to lack of coordinated sailings; that most cargo is booked in advance before the ship arrives, so it doesn't matter that the merged company might have a ship on berth at all times at San Francisco and Los Angeles; and that respondents' coordination plan is rudimentary at best and will be of short duration anyhow, because things will be changed when the new LASH ships are delivered. While these arguments and speculations run counter to States' conjectures about its loss of cargo, they do not detract from the proposition that improved operating efficiencies would result from fleet coordination.

opposition to the merger is understandable. Of course, it would prefer not to have to meet the stronger service competition which the merger may bring about; but opposition on that ground, however natural among businessmen, is not in the public interest. The record does not demonstrate any probability that the proposed merger would stifle or substantially attenuate the competition of States.

*The Business of Protestant Matson and the Impact of the Merger upon it*

Matson has served Hawaii since 1882 and is the predominant carrier in the domestic trade between Hawaii and the Pacific Coast. In 1964, it carried 98 percent westbound and 99 percent eastbound, of all cargo carried between California and Hawaii in dry cargo, self-propelled vessels. Of all cargo of every description between Hawaii and the Pacific Coast, including petroleum products carried in tankers and all other proprietary cargo, Matson carried about 48 percent westbound and 84 percent eastbound (tankers carried 43.6 percent westbound and 14.9 percent eastbound; the balances not carried by Matson were 8.5 percent westbound and 0.8 percent eastbound). It operates 14 cargo vessels, all 16- to 16½-knot vessels built 1944–1946; seven of them were converted, 1960–1965, into specialized container ships, combination container-bulk cargo ships, or automobile carriers. Matson pioneered in the development of containerization; after some years' research, it started a container service in August 1958, and now owns or leases 5,500 containers. It took about 7 years to get full shipper acceptance of the container principle. Although containers are used in other services, including Pacific Coast/Japan, Matson feels that there is still no container service comparable to its own. Matson has been able to maintain rates at or below 1961 levels.

Matson emphasizes that it receives no subsidy, construction, or operating, in its domestic Pacific Coast/Hawaii service. However, such subsidies, which are designed to compensate U.S.-flag operators for the additional cost of constructing and maintaining vessels in U.S. yards and of manning them with U.S. citizens, are not available to operators in the domestic trades for the logical reason that such operators are protected by our cabotage laws against the competition of low-cost foreign-flag operators. In addition to its domestic Hawaiian service, Matson operates, through a wholly owned subsidiary, a service from the Pacific Coast to New Zealand and Australia. That operation is subsidized. In 1965, the subsidiary received more operating differential subsidy than PFEL and nearly as much as AML, though only a sixth of the amount received by the three respondents combined (Appendix B).[13]

Matson is a 93.9 percent-owned subsidiary of Alexander & Baldwin, Inc., a conglomerate corporation with total assets, at December 31, 1965, of $192,420,000 and stockholders' equity of $116,394,000. Gross revenues of the parent in 1965 (including $122,155,000 from transportation and terminal services) were $193,370,000. Besides ocean transportation, its interests include majority interests in three Hawaiian sugar plantations and a pineapple grower and canner, and divisions and subsidiaries engaged in land development, insurance, trucking and terminal services, and merchandising in wholesale and retail fields. Its portfolio of investment securities (excluding stock of subsidiaries) had a market value of $30 million.

Matson alleges that it would be injured not only in its Pacific Coast/Hawaii service, but also in a new service which it proposes to inaugurate in October 1967, on TR 29.

The alleged injury to its domestic Hawaiian service is concerned with an agreement among APL, Isthmian Lines, Inc., and Castle & Cooke, Inc. (a conglomerate corporation whose interests include Hawaiian operations similar to some of Alexander & Baldwin's) to establish a new U.S.-flag steamship company, to be called Hawaiian Lines, Inc., to provide a service between the mainland and Hawaii. APL and Isthmian would each have a 40-percent stock interest, and Castle & Cooke a 20-percent stock interest, in the new company, which would compete directly with Matson's Hawaii service. The agreement has been filed for Commission approval and, upon Matson's petition, the Commission has (since the conclusion of the hearing herein) issued its Order of Investigation and Hearing, in Docket No. 67-25*, to determine whether the agreement should be approved. The merits of the agreement are not within the scope of this proceeding, although considerable evidence relating thereto was adduced upon Matson's claim of background relevancy. The only effect of the merger allegedly related to Matson's Hawaiian service, however, is the "adverse impact"—not otherwise specified—of the increased financial strength of the merged company, which would take APL's place as a 40-percent stockholder in the Hawaiian Lines ventures. There is no evidence that the combined available resources of the three stockholders, absent the merger, would not be adequate for that venture; in fact Castle &

[13] Although the subsidiary (acquired in 1925) has never paid a dividend to its parent, $15½ million of the $43 million retained earnings shown in Matson's consolidated balance sheets at December 31, 1965, were retained earnings of the subsidiary. Restrictions in loan agreements and the subsidiary's subsidy agreement left $6,650,000 of consolidated retained earnings available for dividends, of which $1,700,000 was the unrestricted portion of the subsidiary's retained earnings.

*Order of Discontinuance July 14, 1967.

Cooke is a stronger company than APL, AML, and PFEL combined, with net current assets of $57 million and stockholders' equity of $128 million, without any of the reservations applicable to the balance sheets of subsidized steamship operators. It is found that the merger is so remotely related to the Hawaiian Lines venture as not to be a material factor in whatever effect that venture might have upon Matson.

Matson's principal objection relates to its proposed TR 29 container service. For several years, Matson has discussed such a service between the West Coast and Japan, as the success of its pioneering container operations in the Hawaiian service became apparent. In September 1965, application was made to MARAD for approval of a nonsubsidized freight service carrying cargo in containers and in conventional stowage between the Pacific Coast or Hawaii and the Far East; such approval being required because of what Matson's controller realistically referred to as Matson's subsidized operations. MARAD approved the application in February 1966. Matson plans to start operations in October 1967, with a service between Los Angeles, San Francisco, and Seattle or Portland, and a Tokyo Bay port and Kobe in Japan. Using two vessels, there would be about 19 voyages annually on a 36-day turn. Matson is proceeding to have two of its C–3 vessels converted to full containerships, with the installation of new 52-foot midsections, in a Japanese yard. It plans also to have two new 24-knot 33,000-ton containerships built in Japan; after receipt of these, possibly in 1968, the 16-knot C–3's would be used in a feeder service between Japan and ports elsewhere in the Far East, and the trans-Pacific service performed by the two new foreign-built ships. Discussions with NYK, a Japanese line, are in progress looking toward the establishment of adequate container terminal and drayage facilities in Japan. Matson has made careful studies to ascertain the cargo potential for its containership service, applying its experience to data concerning the trade. It considers that the attractions of its container service should give it a proportionately greater share of available cargo than "simply a sailing basis". It expects to be able to fill as many containers eastbound as westbound. Its plans were formally announced while the hearing herein was in progress; it has been proceeding with its planning as fast as it could, and the planning has not been affected by the present merger proposal.

Matson asserts that the merger would be harmful to its proposed service because of the merged line's ability to schedule the 90 sailings of its trans-Pacific vessels so as to blanket Matson's sailings. Matson's approach to the asserted blanketing hazard was quite different from States'. Whereas States was concerned about a regular service on a 4-

day-headway which would inevitably put a sailing within 2 days of each of its own sailings, Matson bases its prediction of injury upon the merged lines' ability to meet particular competitive situations through scheduling of its vessels. Matson's executive vice president, Mr. Scott, defined "blanketing" as putting sailings ahead of or coincidental with competitive sailings; and while he asserted that blanketing would not necessarily be intentional, and that he was "not suggesting that it would be done or wouldn't," he made it clear that he was concerned about the combined respondents' ability to do it.

Deliberate "blanketing" as defined by Matson might very possibly violate the "fighting ship" prohibition of section 14 of the Act. Mr. Scott was probably right in his contention that the ability to blanket deliberately, while making it appear to be the result of normal scheduling, increases with the number of sailings under the scheduler's control. The suspicion that a company might resort to illegal activity because of the difficulty of detection does not, however, permit the conclusion that it would probably do so.[14] With the large number of sailings on TR 29—851 outbound and 785 inbound between California and the Far East in 1964 (Appendix D)—it cannot be assumed that respondents would find it worthwhile to compound their normal scheduling problems to give special attention to Matson. Assumption is no substitute for reasonable probability as a measure of illegality. *FTC* v. *Proctor & Gamble Co.*, 386 U.S. 568 (1967), concurring opinion of Mr. Justice Harlan, at 584; citing *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962).

The record shows that Matson's proposal to enter the TR 29 market with a container service has been planned carefully with due regard for competitive conditions in the trade and without any real anxiety by reason of the proposed merger. It will apparently be the only service designed to take full advantage of the containerization technique; to do so it will not attempt to provide an "across the board" service, but will depend on "containerizable" cargo in the concentrated United States-Japan portion of the trade route (with a "feeder service," later, from other areas), turning its vessels much faster than other operators. It foresees a proportionally greater share of the available containerizable cargo per sailing because of the special attractions of its operation. In undertaking what may be called a "specialty service", it will exploit its containership experience without committing itself to a "full line" service such as respondents and States offer. By using foreign-built

[14] See Turner, Conglomerate Mergers and section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1344; and *Cf. Stockton Port District* v. *Pacific Westbound Con.*, 9 FMC 12, 30 (1965).

ships, it will avoid the governmental control to which subsidized operations are subject, and so be able to serve only such ports and offer only such schedules as it deems profitable. As Matson says, it is a bold and far-sighted venture, although it does not exactly fulfill the purposes of the Merchant Marine Act, 1936, as contended. It will offer a special kind of competition whose success will quite clearly depend upon factors other than the proposed merger. Despite Matson's saturnine generalizations about the "potentiality for destructive competition" from "further consolidation of respondents' subsidized assets", the record does not establish any probability whatever that the proposed merger will have any injurious, much less crippling, impact upon the service Matson plans to inaugurate.

*The Standards for Decision; Discussion and Conclusions*

Section 15 of the Act authorizes carriers subject to the Act to enter into agreements of the kind described therein subject to the approval of the Commission.

When such an agreement is filed, the Commission must approve unless, after notice and hearing, it finds that it would be unjustly discriminatory or unfair, operate to the detriment of the foreign commerce of the United States, be contrary to the public interest or be in violation of the Act. *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement*, FMC Docket No. 66–29, 10 FMC 134; and see *Aktiebolaget Svenska Amerika L. v. Federal Maritime Com'n*, 351 F 2d 756, 758 (D.C. Cir. 1965).

States and Matson contend that respondents have the burden of "justifying" their proposed merger by showing that it is necessary to produce important public benefits and is based upon a serious transportation need; citing *Mediterranean Pools Investigation*, 9 FMC 264 (1966) and *Investigation of Passenger Steamship Conferences Regarding Travel Agents* (the "*Travel Agents*" case), Docket No. 873 (10 FMC 27). This is inconsistent with the plain words of section 15, as well as such Commission and court decisions as *Hong Kong Tonnage Ceiling Agreement*, quoted above, and *Aktiebologet Svenska Amerika* (which was the *Travel Agents* case on appeal from the Commission's original report). In *Mediterranean Pools* and *Travel Agents*, the Commission was talking about the burden of going forward which falls upon respondents who propose an agreement that is on its face a per se violation of the antitrust laws, in itself contrary to the public interest and detrimental to the commerce of the United States. Where such a prima facie case for disapproval is presented to the Commission, it is for the respondents to come forward with the necessary facts (which are "[a]lmost uniformly * * * in the hands of those seeking approval of the agreement," *Mediterranean Pools*, *supra* at 290), to show that, on balance, the agreement is not contrary to public policy or detrimental to commerce. What respondents may have to show to establish this depends, of course, upon the nature of the prima facie case which standing alone would require disapproval. *Mediterranean Pools* was concerned with revenue pools among the members of rate-setting conferences, comprising all or nearly all the carriers in a trade, with "rationalization" of sailings and penalties for overcarriage; such arrangements, substantially eliminating competition in an entire trade, are about as completely anticompetitive as one can readily imagine. The "tieing agreement" in the *Travel Agents* case, admittedly designed to eliminate outside competition, was of the same nature. In those cases, the Commission found that some serious transportation need or important public benefits must be shown to overcome the prima facie invasion of the public interest in competition. Those cases must not be read, however, to mean that such a showing is necessary where it does not appear that an agreement would otherwise be contrary to the public interest or detrimental to commerce. The latter standards (together with the others mentioned in section 15) are the ultimate and only bases for disapproval.

The Commission is not to measure proposed agreements by the standards of the antitrust laws, and in fact cannot decide definitely whether a contemplated transaction is forbidden under any of the ramifications of those laws; nevertheless, it may not ignore their policy. *Isbrandtsen Co.* v. *United States*, 211 F. 2d, 51, 57 (D.C. Cir. 1954); *McLean Trucking Co.* v. *U.S.*, 321 U.S. 68, 79, 85, 86 (1944); *Minneapolis & St. Louis R. Co.* v. *U.S.*, 361 U.S. 173, 186 (1959). The "public interest" within the meaning of section 15 includes the national policy embodied in the antitrust laws. The problem is one of accommodation of section 15 and the antitrust laws. *Mediterranean Pools, supra*, at 289, 290; and *Cf. Minneapolis & St. Louis R., supra*, at 186.

The policy of the antitrust laws concerning mergers is set forth in section 7 of the Clayton Act (15 U.S.C. 18). Under the Sherman Act of 1890, a merger violated the antitrust laws only if it constituted a substantial restraint of trade. The Clayton Act, enacted in 1914, sought to reach agreements and practices substantially lessening competition in their incipiency, when they merely "may" become substantial restraints. Section 7 was originally directed to acquisitions of the stock of competing corporations where the effect might be substantially to lessen competition between the competing corporations. In 1950, section 7 was amended to cover the entire range of corporate amalgamations, from pure stock acquisitions to pure asset acquisitions, including mergers although they are not specifically mentioned. *U.S.* v. *Phil-*

*adelphia Nat. Bank*, 374 U.S. 321, 342 (1963). Reference to the effect on competition between the acquiring and acquired firms was deleted lest it be "so construed as to prevent all acquisitions between competitors." Senate Report 1775, 81st Cong., 2d Sess., p. 4.

The present section 7, with some exceptions, prohibits the acquisition by a corporation, in interstate or foreign commerce, unless solely for investment of:

> The whole or any part of the stock or * * * assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Although it has been said that the dominant theme pervading congressional consideration of the 1950 amendments was "a fear of what was considered to be a rising tide of economic concentration in the American economy," section 7 is not an anticoncentration statute as such; concentration is to be viewed in the context of a particular industry in making a determination under the tests set forth in the statute: whether the merger substantially lessens competition or tends to create a monopoly. *Brown Shoe Co.*, v. *United States*, 370 U.S. 294, 315, 321–322, n. 36 (1962). Monopoly power is the power to control prices or exclude competition; and price and competition "are so intimately entwined that any discussion of theory must treat them as one." *United States* v. *du Pont & Co.*, 351 U.S. 377, 391–392 (1956). "Taken as a whole, the legislative history [of section 7] illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe*, *supra*, p. 320.

The courts have developed market analysis principles for determining the probable effect of a merger to lessen competition or tend to create a monopoly. Under the antitrust laws, this effect must be measured within a definite area of effective competition, or "relevant market," as to product or services, and also as to geographical boundaries—the "section of the country."

As to geographical market, the question:

> * * * is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger or competition will be direct and immediate. *United States* v. *Phila. Nat. Bank*, *supra*, at 357.

Thus, if this were an antitrust proceeding (as the parties' briefs would sometimes suggest), the relevant geographical market would appropriately be that portion of the United States which utilizes ocean transportation of freight between California and the Far East, that being the service upon which the effect of the merger would be direct and immediate.

As to the product or services market:

> * * * no more definite rule can be declared than that commodities [or services] reasonably interchangeable by consumers for the same purpose make up that "part of the trade or commerce," monopolization of which may be illegal. *United States* v. *du Pont & Co.*, *supra*, at 395.
>
> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes, *Brown Shoe*, *supra*, at 325; citing *du Pont*, *supra*, at 593–595.
>
> But the boundaries of the relevant market must be drawn with sufficient breadth to * * * recognize competition where, in fact, competition exists. *Brown Shoe*, at 326.

Under these principles, the outer boundary of the relevant service market would be transportation (between the Far East and California) in dry cargo vessels. The parties contend, variously, that the relevant service market should be further restricted to such transportation by liners only; or by U.S.-flag liners only; or even by subsidized U.S.-flag liners only. The last-mentioned subdivision is clearly artificial, arbitrarily tailored to the dimensions of respondents; it is not based upon the needs or settled consumer preferences of the market. *Cf.* *United States* v. *Grinnell Corp.*, 384 U.S. 563 (dissenting opinion of Mr. Justice Fortas), 590–591 (1966). The slightly broader classification of all U.S.-flag liners is subject to similar criticism. U.S.-flag liners on TR 29, subsidized or not, are in direct competition with foreign-flag liners. A division of types of service to exclude this competition would be unrealistic. *Cf.* *Brown Shoe*, *supra*, at 326.

In this connection, the argument is advanced that U.S.-flag liners are a relevant market because of the priority given by law to U.S.-flag vessels with respect to MSTS [15] and other government or "preference" cargo, which practically excludes the competition of foreign-flag lines. Most of such cargo moves or in future will move under MSTS auspices. This basis for designating U.S.-flag liners as the relevant market thus takes into account, in substantial effect, only one customer,[16] the U.S. Government; a customer not noted for its subservience to noncompetitive pricing or other attributes of monopoly. At the time of the hearing, a new system of competitive bidding—decreed by MSTS—had just been inaugurated for MSTS cargoes, to take the place of the former MSTS system of allocation based upon number of sailings; and it appears that the Government will continue to determine condi-

[15] Military Sea Transportation Service, Department of the Navy.

[16] *Cf. United States v Philadelphia Nat Bank*, *supra*, 374 U.S. 361.

tions of competition with respect to Government cargoes beyond any power of the merged respondents to do so. The record does not disclose a "settled consumer preference" for U.S.-flag liners among commercial customers sufficient to insulate such carriers from foreign-flag competition. As a "relevant market" for antitrust purposes, the market for U.S.-flag liners alone, in the California-Far East service, is not "sufficiently inclusive to be meaningful in terms of trade realities." *United States* v. *Phila. Nat. Bank*, *supra*, at 357; quoting *Crown Zellerbach Corporation* v. *FTC*, 296 F. 2d 800, 811 (9th Cir. 1961).

Perhaps the most important "relevant market" question is whether the services of nonliner vessels should be considered. Respondents do not urge that nonliners and liners are interchangeable vessels, nor do they deny that their liners are in closer competition with other liners than with nonliners. Nevertheless, the record indicates a substantial "cross-elasticity of demand" between liners and nonliners.

Appendix F shows that in 1964, in the California-Far East trade, nonliners carried about one-half as much commercial general cargo (package as opposed to bulk cargo) as did liners; inbound they carried over 80 percent of the amount carried by liners. Liners carried nearly 15 percent as much bulk cargo as did nonliners, the traditional bulk cargo carriers; inbound liners carried over 95 percent as much bulk cargo as nonliners. Nonliner rates are lower than liner rates as a rule, while liners provide greater speed, generally, with regularly scheduled service. The record shows that the services are interchangeable to a very substantial extent. The decrease since 1954 in the U.S.-flag share of all cargo from 56 to 10 percent versus a decrease from 74 to 43 percent in the case of liner cargo only, suggests that interchangeability has increased since 1954, since U.S.-flag liners, which are the principal U.S.-flag vessels, have evidently lost increasing amounts of cargo to nonliners (Appendix H).

Appendix G shows percentages of both markets—liner and nonliner in the California-Far East trade—carried by respondents in 1964. APL and PFEL together carried about 26.1 percent of liner commercial cargo and 7.8 percent of all (liner plus nonliner) cargo; AML's carryings were negligible. Appendix G also shows percentages of commercial and commercial plus defense cargo, liner and nonliner, carried by protestant States and by all other U.S.-flag liners, by Japanese and by other foreign-flag liners, and by U.S.-flag and foreign-flag nonliners (the figures for U.S.-flag nonliners being negligible).

An aggregate market share of 26.1 percent of the liner business represents a high degree of concentration, although the liner trades are basically oligopolistic market structures; i.e. there are, normally, relatively few liner operators in each trade.[17] A 7.8-percent share of the liner-plus-nonliner market is quite another matter; it gives no cause for concern, particularly in the light of the tremendous continuing decline in U.S.-flag participation in this market since 1954 (Appendix H). However, whether the "relevant market," for antitrust purposes, should be the liner market only, or liners plus nonliners, market share is by no means controlling as to the public interest, which is the ultimate test in this proceeding as in merger cases before the Interstate Commerce Commission ("ICC").[18] Thus, the ICC approved the merger of Seaboard Air Line Railway and Atlantic Coast Line Railroad as consistent with the public interest although it recognized that the merger would eliminate competition and create a rail monopoly in parts of Florida. *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 ICC 122 (1963). Upon review, the court remarked that "[a]ll too much time has been consumed in showing a violation of the antitrust laws and too little time devoted to assessing the 'public interest' as expressed in the Interstate Commerce Act." It noted that the market analysis techniques of the antitrust laws are useful to discover the "danger areas" where monopoly or substantial lessening of competition in a given line of commerce may be found; but that they do not tell us whether it is good or bad, since Congress has determined that not all restraints and monopolies which violate the antitrust laws are bad for the purposes of the national transportation policy.

> Our task is at an end when we satisfy ourselves that the (Interstate Commerce) Commission has * * * perceived the danger areas, and judging by the statutory standards has concluded that the public interest is best served by allowing the merger. *Florida East Coast Ry. Co. v. United States*, 259 F. Supp. 993, 1002 (M.D. Fla., 1966).

So, although the court had "absolutely no doubt that, judged by the standards of the antitrust laws, the instant merger would fail at least as to Florida," it sustained the merger, since the ICC had recognized and considered the "danger areas" in finding it consistent with the public interest. The ICC had found that sufficient outside competition (intermodal or intramodal) would remain, and that economies and efficiencies would result from combined administration, from the

[17] See Marx, *International Shipping Cartels* (1953), p. 10. "Oligopoly" is an economic term denoting a relatively small number of sellers. Id. p 10, n. 6.

[18] Section 5(2) of the Interstate Commerce Act directs the ICC to approve voluntary rail mergers which it finds to be "consistent with the public interest"; a test which is substantially the same as the public interest test applicable to agreements under section 15 of the Shipping Act, 1916. Like section 15, the Interstate Commerce Act does not expressly require that the antitrust laws be considered a factor in the public interest, but since it exempts parties to an approved merger from the antitrust laws, the ICC, like this Commission with respect to section 15 agreements, has long been required to give weight to the antitrust laws in approving mergers.

elimination of wasteful duplicative facilities, and from an overall improvement in operations. The fact that two healthy, stable railroads were involved was brushed aside, citing the merger approved in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, of "probably seven of the most healthy trucking companies in the United States." The Supreme Court affirmed. *Florida East Coast Ry. Co.* v. *United States*, 386 U.S. 544 (April 10, 1967).[19]

A merger must be functionally viewed in the context of its particular industry (*Brown Shoe*, *supra*, 321–322). The significance of respondents' aggregate share of the market is considerably diminished by the nature of the shipping industry. Although rates charged the public in the foreign commerce of the United States are not as strictly regulated and supervised as in domestic transportation, ocean carriers in our foreign commerce are subject to regulation by the Commission and the Act provides an effective safeguard against the evils attending monopoly. *Cf. McLean Trucking Co.* v. *United States*, *supra*, at 85. Concerted rate fixing exists, legally, through Commission-approved conference rate agreements, so that control of cargo rates and practices by a single carrier, no matter how large, is virtually impossible. No one has suggested the possibility here. Respondents are members of the conference covering each trade which they serve in common; and in the five conferences of which two or more of the respondents are members, there are 9, 19, 20, 23, and 30 members, respectively. In the small-

[19] Upon suit to enjoin the merger after it had been approved by the ICC, the District Court first set aside the ICC's order and remanded the case to the ICC, concluding that the ICC's analysis of the competitive effect of the merger was fatally defective because it had not determined whether the merger violated section 7 of the Clayton Act The Supreme Court vacated the District Court's order (*Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154), and remanded the case to the District Court for "a full review of the administrative order and findings pursuant to the standards enumerated by this Court," saying (pp. 156, 157):

We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959). As we said in *Minneapolis*, at 186

Although § 5(11) does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws." 321 U.S., at 85–86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service (and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy." 321 U.S. at 87.

The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be "consistent with the public interest." 49 U.S.C. § 5(2)(b) (1964 ed.).

Upon full review pursuant to the Supreme Court's order, the District Court sustained the ICC's order approving the merger and denied an injunction. *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993 (M.D. Fla., 1966); and the Supreme Court granted a motion to affirm. 386 U.S. 8 (1967).

est conference (Pacific/Straits Conference, outbound to Singapore and Malaysia), the merged company would have one out of seven memberships; in the smallest TR 29 conference, one out of 18 memberships. On bulk commodities, upon which rates are frequently "open" as opposed to conference-controlled, the nonliner competition (which is the cause of the open rates) controls rates and is clearly sufficient to prevent the merged respondents from ever attaining the power of rate control.

In its report dated August 31, 1961, on amendments to the Shipping Act, 1916, the Senate Committee on Commerce listed ease of market entry as the number one economic factor among those most often cited in support of the steamship conference system: [20]

> Freedom of the seas permits any ship to enter any trade at any time, subject only to minimal limitations imposed by certain nations as safety requirements or military precautions. In ocean shipping no certificate of convenience and necessity need be obtained. The mobility and interchangeability of dry-cargo vessels is of great competitive significance. A tramp carrying bulk grain today, may be on the liner berth the next day carrying many types of packaged cargo. Whereas it costs a great deal to set up and operate a regularly scheduled liner service, in comparison it costs very little to charter a vessel, advertise in the port's trade paper, hire a broker or agent on a commission basis and, when business is good, operate a regular service.

Add to such considerations the existence of interflag competition and it is apparent that for a single ocean carrier, even with what might be considered in some industries a disproportionate share of the market, to control prices or exclude competition, is not practically possible, at least in a trade such as TR 29.

No substantial increase in economic concentration will result from the merger of APL and its 93-percent-owned subsidiary, AML. The concentration resulting from the merger of PFEL is somewhat diluted by the affiliation, through common ownership of stock, which has existed for more than 10 years. In any event, "Congress has not mandated the [Interstate Commerce] Commission or the courts 'to campaign against super concentration in the absence of harm to competition.'" *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, April 11, 1967, concurring opinion of Mr. Justice Harlan, p. 3 of slip opinion, citing Turner, 78 Harv. L. Rev. 1313, at 1395.

Nevertheless, it is appropriate, in view of protestant Matson's stress on concentration, to point out that Congress's concern with concentration as such is directed to economic concentration *in the American economy*. *Brown Shoe*, *supra*, at 315; *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 274–277 (1966). U.S.-owned carriers in foreign com-

[20] 87th Cong., 1st Sess., Report No. 860, p. 5 (Reprinted at 200 of the Index to the Legislative History of the Steamship Conference/Dual Rate Law, 87th Congress 2d Sess., Senate Document No. 100).

merce are a part of the American economy but foreign-owned carriers are not. No application of our antitrust laws based upon our desire to avoid concentration in our economy could rationally be directed against foreign carriers; [21] they are free to pursue the efficiencies of concentration without regard to that, as witness the recent mergers of Japanese carriers under Japanese government pressure if not compulsion. This must be considered in weighing the merger of U.S.-flag carriers, which definitely are a part of the American economy and a substantial factor in our balance-of-payments position, since our carriers must compete directly with the foreign carriers.[22]

In this connection, the declining share of cargoes carried by U.S.-flag vessels on TR 29 cannot be ignored (Appendix H). From 1954 through 1964, the percentage of liner commercial cargo carried by U.S.-flag vessels between California and the foreign area of TR 29 decreased steadily from 74 to 43 percent outbound and from 60 of 37 percent inbound. Of total commercial cargo carried in dry cargo vessels between the same areas, the share carried by U.S.-flag vessels decreased steadily from 56 percent in 1954 to 10 percent in 1964, outbound and from 59 percent in 1954 to 20 percent in 1964, inbound. Under such circumstances, it would serve the public interest of the United States to permit a merger that would improve the efficiency and ability to compete of U.S.-flag vessels serving this as well as less profitable trades, without stifling or excluding either U.S.-flag or foreign-flag competition; just as the merger of the Japanese lines has evidently served the public interest of Japan. It is recognized that the Commission has no promotional responsibility under the law, and that its aim is and should be to administer the regulatory provisions of the Act without discrimination among carriers regardless of flag. The immediate discussion is not inconsistent with the scope of the Commission's responsibility, however; it is concerned solely with the weight to be given a facet of domestic antitrust policy which has been invoked against U.S.-flag carriers and would not logically apply to foreign carriers, in determining whether the merger of such U.S.-flag carriers is contrary to the public interest.

The record establishes that substantial economies and efficiencies of scale will result from the proposed merger, as they appear to have

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[21] This is not to suggest that the policy of the antitrust laws is not required to be considered by the Commission in matters involving foreign flag carriers to the same extent as in the case of U.S.-flag carriers.

[22] In number of vessels and deadweight tonnage, the merged line would rank 15th among major steamship lines of the world and 3d among U.S.-flag carriers (Appendix I). One or more of respondents compete on one trade route or more with all but one (Argentine Government Line) of the 11 foreign-flag lines all of which greatly exceed the combined respondents in number of vessels and tonnage.

resulted from the Japanese mergers. It is not material that the stockholders of the merging companies will benefit from such economies, as States and Matson ominously predict; that is what brings mergers about.[23] "In the view of the Supreme Court, 'The public interest is served by economy and efficiency in operation.'" *Florida East Coast Ry. Co.*, *supra*, 259 F. Supp. at 1008, quoting *N.Y. Central Securities Co.* v. *U.S.*, 287 U.S. 12, 23 (1932); and see the *AEIL* case, *supra*, p. 129, n. 8. The improvements to be expected here are discussed above under "Benefits of the Merger"; they include administrative economies, strengthened financial and management structures, improved operational efficiency and economy, and improved transportation service, to minor ports in particular, through coordination of sailings.

On the other hand, the merger will not tend to create a monopoly, or lessen competition except for the elimination of such service competition as exists among APL and PFEL and AML in the California-Far East portion of TR 29. Ample competition will remain in this service, however, as appears from Appendices D, F, and G. Liner competition in TR 29 is about to be increased by the entry of Matson with a new kind of operation which, as Matson proudly (and with some justification) says, "promises to be an inspiring example of the application of American know-how and resourcefulness to the hazardous business of ocean-borne commerce."

The presence of AML as a separate party to the merger agreement is of little practical significance under the Act. APL has owned a substantial majority for more than 12 years, and over 90 percent for more than 10 years, of AML's outstanding stock, all acquired by APL with prior MARAD approval. The minority interest is so small that under Delaware law it could be eliminated, by unilateral action of APL, at any time; therefore a section 15 agreement would not be necessary to accomplish a merger, between APL and AML alone. Competition between AML and PFEL, however, while not extensive is deemed sufficient to make AML a proper party to Agreement No. 9551 under section 15 of the Act, since AML is in fact a separate corporation and it is desired to consolidate the operations of the three corporations simultaneously. It is not necessary to decide whether, under certain circumstances, a merger agreement between a parent and its wholly-owned (or nearly so) subsidiary might be rejected by the Commission as not constituting a genuine section 15 agreement and, perhaps, stultifying the function of the Commission.

[23] The Federal Trade Commission spelled out this fact of life in its Report on Corporate Mergers and Acquisitions (May 1955), stating (p. 5): "The first step in a corporate acquisition is discovery by an enterpriser of an opportunity whereby an apparent advantage may be gained if one firm joins with or acquires all or part of another."

The proposed merger is in no sense discriminatory as between respondents and any other carriers, or, of course, shippers or any of the other classes referred to in section 15. Neither is it unfair as to any of these. The elimination of competition among respondents will have no injurious effect upon shippers or ports but on the contrary, they will be benefitted by improvements in service. The record does not establish the probability of any destructive or stifling effect upon competition or any competitor; at most there may be added pressure on other carriers to improve their competitive performance. Under the conference system such pressure will be limited to service improvement principally if not entirely, and will be neither unfair nor anti-competitive in nature. In this connection, it should be borne in mind that APL operates extensively outside TR 29, in services which are substantially less profitable than the trans-Pacific service and one of which operates at a loss.

The contractual and legal obligations of respondents as subsidized carriers, and resulting control through MARAD over respondents' maximum and minimum sailings and their trading areas, have been considered. It is not found necessary to rely upon these and thus to pass on to MARAD the responsibility for preventing any injurious effects of the merger; nevertheless, it is recognized that as among subsidized U.S.-flag carriers, the existing power of government control would make destructive competition impossible in practice, even if there were any theoretical probability thereof.

It is by no means certain that the proposed transaction, under all the circumstances set forth above, would violate the antitrust laws; but under the Supreme Court's decisions cited above, the Commission need not determine whether it would or not, and in fact cannot definitively do so. To the extent that it does touch upon the policy of the antitrust laws, however, it is found that the benefits of the merger will outweigh any potential injury. After giving full consideration to the policy of the antitrust laws, as well as the record herein, it is concluded that Agreement No. 9551 is not, and the consummation of the transactions contemplated thereby will not be contrary to the public interest, detrimental to the commerce of the United States, or in violation of any provision of the Act.

*Ultimate Conclusion*

Upon the record in this proceeding, it is concluded and found that:

Agreement No. 9551 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 would not operate to the detriment of the commerce of the United

States, and is not contrary to the public interest, or in violation of the said Act; and it is therefore approved pursuant to section 15 of said Act.

*Commissioner* JAMES F. FANSEEN, *concurring:*

The instant case presents two questions for decision, the first being:

> * * * whether an agreement to merge among carriers covered by the Act is an agreement with respect to a subject mentioned in section 15 of the Act, which the statute authorizes and directs the Commission to approve or disapprove depending on its findings with respect to certain matters specified therein.[24]

The second question, which reaches the merits of the case, is whether or not to approve the merger agreement.

In answer to the first question, the Commission by majority vote held section 15 of the Shipping Act to be sufficiently definite to allow our jurisdiction to encompass the subject agreement.

The question on the merits was considered in our initial Report by those Commissioners voting in the majority on the threshold question (Chairman Harllee, Vice Chairman Hearn, Commissioner Barrett).

Subsequent to the issuance of our decision, the Commission received a petition for reconsideration. Although there is no legal requirement to reconsider this case, the unusual posture of the decision compels my reexamination of the matter.

Preliminary indications point to a substantially more involved proceeding on remand than I had originally envisioned. My initial observation was that further taking of evidence would involve neither a great imposition on the parties nor an unreasonable length of time. However, this does not seem to be the case. Because of this change in circumstances, I am impelled to participate at this point in order to express my views.

This involves no retreat from or qualification of my position on the threshold question. My participation at this point is an expression of my opinion solely on the merits.

Since the Commission by majority vote has resolved the question of jurisdiction, thus placing the question on the merits before the Commission as an entity and not just those voting in the majority, my reconsideration and participation at this point is not improper. Moreover, my participation in a decision on the merits after the jurisdictional question has been affirmatively decided enhances the effectiveness of the administrative process.

In addition, Congress has charged me as a Commissioner with specific duties, and my participation in a case raising important questions

[24] Report of the Commission in Docket No. 66-45, 11 FMC 65.

such as the instant case is at least partial performance of these Congressionally delegated duties.

My reconsideration of the first Commission decision leads me now to the view that it would needlessly prolong the litigation. Extended litigation causes a tremendous expenditure of time, money, and effort.

Further evidentiary hearings could possibly uncover conduct contrary to the public interest. However, prior to the instigation of any such proceeding, there should be a substantial likelihood of such conduct.[25] It see no such likelihood here. Further delay in the instant proceeding is an unnecessary burden on the administrative process.

It is in the interest of maintaining the integrity of the administrative process that the litigation before us now be terminated. The initial Commission decision would not have produced such a result. Our reconsideration and resulting opinion will produce the best course of action.

Although Chairman Harllee and Commissioner Barrett joined in the remand decision, it was their stated position that "the record in this proceeding now affords a sufficient basis upon which to take action * * *".[26] I agree.[27]

Therefore, and for the reasons set forth in the foregoing opinion of Chairman Harllee and Commissioner Barrett, I would approve Agreement No. 9551.

*Commissioner* JAMES V. DAY *dissenting:*

I would deny the petition for reconsideration.

With reference to my prior opinion in this case wherein I decided that the Commission does not have jurisdiction, I noted that the Alexander Report which Congress considered and relied upon in passing section 15 stated that rate fixing and pooling agreements should be regulated to deter mergers. Congress then would hardly have encouraged merger agreements by including them within those agreements which could be granted immunity from the antitrust laws, pursuant to section 15. I further noted that Congress in granting

[25] In *In the Matter of Agreement No. 134–21, Gulf/Mediterranean Ports Conference*, 8 FMC 459, 460 (1965), which involved the question of *approval or disapproval* of a section 15 agreement, we said:

"Were possible contrariness to the statute alone sufficient reason for disapproval of an agreement under section 15, it would be hard to conceive of an approvable agreement. For as we said in Agreement 8492—*T. F. Kollmar, Inc.* and *Wagner Tug Boat Co.*, 7 FMC 511 (1963): 'We should not disapprove the agreement on the bare possibility that [the parties to it] could violate the Act. At least there ought to be a substantial likelihood of such conduct.' "

[26] Report of the Commission in Docket No. 66–45, 11 FMC 53.

[27] Although I stand firm on the issue of jurisdiction, I nevertheless have stated that "I do not think that the merger agreement before us now in any way offends the Shipping Act": Id. at p. 35.

merger jurisdiction to our sister agencies, the CAB and ICC, set forth specific criteria or guide lines to be followed by those agencies.[28]

Further I would note that the threshold question of jurisdiction has not been resolved. The administrative process provides for final court interpretation of the statutory directions of Congress. In observing the administrative process interpretation or discretion cannot fully be equated with desire.[29]

*Vice Chairman* GEORGE H. HEARN *dissenting:*

I dissent from the majority opinion in that I do not believe reconsideration of our prior report in this case is warranted. Little new evidence [30] has been brought to our attention, and no new light has been cast on the record already before us. Consequently, in my opinion no intelligent determination can be made on the merits of the merger.

I wish to emphasize that last point because I have not prejudged this case. The request for further evidence was not "the practical equivalent of a decision disapproving the merger agreement." [31] My request for additional information is not inspired by a wish to frustrate the merger by indecision. When a member of the Commission deems it necessary that the record be expanded, no motive should be imputed other than a desire for an adequate record from which to draw conclusions.

In this case the jurisdiction issue overshadowed that of the merits; consequently the record is not full enough on the merger issue. If, therefore, the respondents would wish to rest their case on the present record, the conclusion would be compelling that there is insufficient evidence to warrant approval. If, however, the respondents would be willing to present some further evidence and sufficient justification why more is unavailable or unnecessary, the Commission might then be able to give the merits of the case their deserved evaluation. I am, therefore, taken somewhat aback by the seeming equivocality of respondents' petition. At first we are told that of the evidence sought most is difficult or impossible to produce, irrelevant or immaterial; [32] yet in the next breath respondents seem to concur in my view that the

[28] The pertinence of this is underscored by President Kennedy's message in 1962 before Congress asked that an interagency committee be established to prescribe additional criteria that CAB and ICC might utilize in merger cases and the committee issued later a release specifying these additional criteria.

[29] While I cannot pass upon the merits of the subject merger agreement, it would not appear to violate the actual language of section 15 insofar as this is determined under present circumstances.

[30] The only new matter presented by respondents is the final status of AML (Petition, p. 8) and information as to subsidy (Petition, p. 7).

[31] Petition for Reconsideration, p. 1.

[32] *Ibid.*, pp. 5–6. It is not the parties, but the Commission which decides what needs to be filed; and it is for us to decide what can "reasonably be expected to influence * * * [our] decision one way or the other." (Petition, p. 5).

Commission is confronted with an agreement far more final in its results than those ordinarily considered by us; and they acknowledge my difficulty in giving probably "irreversible approval to a merger which has not been completely formulated and presented to the Commission."[33] This comment by respondents partakes of an admission that either the record is inadequate or the agreement was prematurely filed. This is fortified by the contents of petitioners' "Suggestion."[34] Prior to approving the merger the shareholders will receive extensive information via an SEC approved proxy statement; and this Commission should have at least as much information *prior* to its decision. It may be noted further that no corporate consolidation, acquisition or other large scale measure can be taken without exhaustive presentations to underwriters, banks, etc. Thus should it be in this case before the Federal Maritime Commission. The public interest in common carriage should receive no less attention than commercial or economic institutions.

Agreement 9551 is not of the same genre as most section 15 agreements. Its primary distinguishing characteristic is the relative finality of possible Commission approval. It would be very difficult for the Commission to subsequently dissolve a merged company or even to require changes in its structure in the same manner as it continually re-evaluates other approved section 15 agreements.

In view of the respondents' "startled" reply to our order of remand, I will make it plainer as to the type of record which should be developed in this case. It is well put by Hearing Counsel, in opposing reconsideration and supporting our remand order, that the Commission must "be able to fully determine the optimum effect of the proposed merger."[35] After the decision herein there will be little latitude for revaluation; and it is incumbent upon the parties to present the Commission with a completely formulated and thoroughly analyzed merger agreement. The Commission has always required all section 15 agreements to include specifics sufficient for a thorough analysis of the agreement and any lesser requirement is particularly undesirable in this case.[36]

We have before us an agreement the approval of which will immunize the respondents from the reach of the anti-trust laws. We also must consider that it is no ordinary agreement as is usually filed for approval. It is thus hardly fitting that we should demand a lesser production of supporting evidence than in other cases.[37] In fact it is a

[33] *Ibid.*, Petition, p. 11.
[34] *Ibid.*, Petition, pp. 11–12.
[35] Hearing Counsel's Reply to Petition for Reconsideration, p. 4.
[36] See, e.g., *Joint Agreement-Far East Conf. and Pacific W.B. Conf.*, 8 FMC 553, 558.
[37] *Ibid.*, 8 FMC 553.

derogation of our responsibilities not to demand more in this case. Yet in these circumstances the parties seek anti-trust immunity on the basis of a record giving little evidence helpful under anti-trust principles or which would be required by other agencies which pass upon similar problems.[38]

As to this, the majority injects comment on the ability of AML and APL to merge under Delaware law without further ado. The fact that a merger may be approvable in respect of intrastate commerce does not prevent the merger from being declared invalid under Federal antitrust laws; [39] and a state is barred from burdening or in any way interfering with interstate or foreign commerce.[40] Thus, under section 5(11) of the Interstate Commerce Act, the jurisdiction of the Interstate Commerce Commision with respect to combinations is exclusive and plenary.[41] Similarly, the Federal Maritime Commission cannot be ousted from its jurisdiction nor the exercise thereof usurped.

It is not sufficient for approval that the parties willingly and purposefully enter into an agreement; nor does it suffice that there will be great benefits to the parties. Proponents of an agreement must show more.[42]

More specifically, the parties decided to merge because, *inter alia*, "sizeable administrative economies could be realized"; sailing coordination could be achieved; "expensive terminals and shore facilities * * * are more effectively used by joint * * * operations"; [43] there are "economies inherent in large-scale operation"; [44] and, in sum, because the merging companies can do better through bigness.

Congress saw fit to permit one form of anti-competitive measure: the conference system, to forestall another: mergers.[45] It is not, then, for us to gainsay Congress by condoning restrictions on competition without sufficient reason.

True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, stimulated every possible demand. No doubt, that would be one way of dealing with the matter * * * [but] that was not the way Congress chose; it did not condone "good trusts" and condemn "bad" ones; it forbad all. *U.S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 427.

[38] See, e.g., 49 U.S.C. preceding § 1, § 5, 49 CFR §§ 52.2–52 3.

[39] *U.S.* v. *Food & Grocery Bureau of S. Calif*, 43 F. Supp. 974, aff'd. 139 F. 2d 973.

[40] *Sancho* v *Bacardi Corp. of America*, 109 F. 2d 57, rev'd on other grounds *Bacardi Corp. of America* v. *Domenech*, 342 U.S. 415.

[41] *Schwabcher* v. *U.S.*, 334 U.S. 182.

[42] *Mediterranean Pools Investigation*, 9 FMC 264, 290; *California Stevedore & Ballast Co., et al.* v *Stockton Port District, et al.*, 7 FMC 75, 84.

[43] A substantial number of such arrangements exist between port facilities and single carriers. See *Terminal Agreements Catalog*, March 1967, American Association of Port Authorities.

[44] Proposed Findings of Fact & Opening Brief for Respondents, pp. 29–31.

[45] H.R. Doc. 805, 63d Cong., 2d Sess., p. 416.

I say again that I am passing no judgement on the merits of this case, nor do I suggest that I might condemn the merger because of a concentration of power. What I do say is that this Commission cannot ignore our Nation's basic economic policy and must integrate it with the statutory pronouncements of the Shipping Act, 1916.[46]

Further as to benefits of the merger, respondents state, e.g., that correlation of APL's "California sailing dates with those of the trans-pacific service" would be almost impossible; that the same applies to APL's Atlantic/Straits service; that the APL and AML outbound/inbound trades of California/Ceylon-West Coast of India-West Pakistan "cannot feasibly be coordinated"; that APL and AML service from Malaysia and Singapore to California is impossible of coordination; and that "This leaves, as susceptible to close sailing coordination, only the trans-Pacific Freighter service of APL and PFEL."[47]

As to those services it is stated that PFEL and APL sail inbound with free space available, and that by coordinating the services more voyages can be made full and down. It is agreed to by States that their vessels also have free space available.[48] The conclusion suggested, therefore, is that all competition in a trade should be eliminated if the availability of free space can be prevented.

It cannot be overemphasized that the agreement was presented to us with no view as to its final form and substance.[49] There is no commitment to a type of merger plan, final corporate structure or any of the other necessary components of a corporate agglomeration. Certain events add force to this conclusion: as to LASH operations APL has now foregone its plans for new LASH ships; APL has decided to add a new liner service to the picture by resuming its monthly Indonesia service after a three-year lapse; and even respondents' Coordinating Committee was unable to propose anything in regard to containerization.[50] The doubts and fears of my previous opinion have materialized; and my queries have, for the most part, gone unanswered. They are:[51]

What measures will the parties to the merger and the merged company take to prevent an adverse effect of the merger on subsidy recapture? This question cannot be avoided by saying the effect "would depend upon speculative factors."[*]

Also, will the proposed merger result in greater value for the subsidy dollar?

[46] The Shipping Act was designed to do "a minimum of violence to the well-established American antitrust concept." H. Rep. No. 498, 87th Cong., 1st Sess.

[47] Proposed Findings of Fact and Opening Brief for Respondents, pp. 35–37.

[48] *Ibid.*, pp. 38–40.

[49] See footnote 4, *supra*.

[50] Exhibit 50.

[51] For an exposition of these points see my separate opinion in the Commission's prior report in this case 11 FMC 72–73.

[*] 11 FMC 91.

Will the obvious immediate benefits to the parties be paralleled by concomitant overall service benefits to the public?

What adequate safeguards will be provided for affected employees and potential local labor problems?

How will shippers be advantaged by greater berth coverage if at the same time their choice of carrier could be severely reduced by near blanketing? It is no answer that there will be merely tougher competition.

There should be greater exposition of benefits to container operations, especially as to acquisition of shore facilities.

The service description of the merged company should be presented, especially as to the effect on itineraries due to LASH operations; and including for example, any proposed change in AML's "short-run" service.

On what basis will the merged company have greater access to shore facilities in Japan? Bigness of the new company does not seem enough.

What specifically will be the benefits to commerce to be derived from decreased competition for MSTS cargo? The record admittedly fails to prove this point.

How will LASH operations be integrated into the merged company, and what will be the benefits therefrom?

In my opinion the Commission is no further along in seeing, e.g., the final form of the merger, the new operational structure or the procedures by which these and other ends will be reached.

As to the matter of the merger's effect on subsidy and recapture, I fail to understand the worry over conflicting jurisdiction. The parties went to no mean effort on this point to make it part of the record and must indeed have considered it relevant to the Commission's decision.[52] I, therefore, repeat that we are bound to consider the effect on our Shipping Act responsibilities of all the ramifications of the merger. I am also constrained to say again that it is for this commission to decide what is relevant to the issues posed for our decision; and it is within the realm of propriety to request those who we think possess such information to come forward with it.

There is no intended incursion on the jurisdiction of the Maritime Administration or possible conflict of policy. In fact it is unfortunate that the agency did not intervene in this case. The Commission would thus have been aided in considering the merger's effect on the subsidy issue. The Commission is well aware of the issues properly before it;

[52] See opinion of Chairman Harllee and Commissioner Barrett in the previous report in this case, 11 FMC 67, wherein my fellow Commissioners concurred in my view in this. They now consider the matter entirely beyond the scope of this proceeding.

and it is also well aware of its responsibilities under the Shipping Act. We will not blind ourselves to relevant considerations because we are jurisdictionally barred from making a decision as to them alone.

There is one further matter which warrants comment. I do not believe that our prior report was a meaningless action on the part of the Commission.[53] Our decision did not produce an extraordinary result or place the Commission in an unusual posture. The only result was that the Commission was in the posture of desiring the fullest possible record in a proceeding of great moment. I do not believe, therefore, in terminating a proceeding for the sake of abbreviation.[54] The integrity of the administrative process is not necessarily coincident with brevity; an unnecessary burden on the administrative process is not necessarily the result of delay. That a proceeding may become more involved or cause an imposition on the parties are not reasons for closing a case and avoiding our responsibility to reach decisions based on all the facts. Speedy action is no substitute for reasoned decisions.

Only with a more complete record in this case can the Commission decide whether the results forecast can be attained by alternatives more readily revocable and of comparable effectiveness; and only then could we judge whether the benefits of the merger and its cost will be evident in benefits to the public.

For the aforestated reasons I would not reconsider our original decision herein and would not alter our decision to remand the case to the Examiner.

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[53] Petition to Reconsider, p. 4: "* * * that the Court takes meaningful action, is applicable here with doubled force."

[54] See concurring opinion of Commissioner Fanseen herein.

# FEDERAL MARITIME COMMISSION

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DOCKET No. 66-45

AGREEMENT FOR CONSOLIDATION OR MERGER BETWEEN AMERICAN MAIL LINE, LTD., AMERICAN PRESIDENT LINES LTD., AND PACIFIC FAR EAST LINE, INC.

## ORDER

This proceeding having been instituted 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 conclusions thereon, which Report is hereby referred to and made a part hereof;

*It is ordered*, That Agreement No. 9551 is hereby approved, and this proceeding is hereby discontinued.

By the Commission.

(Signed) THOMAS LISI,
*Secretary*.

# APPENDIX A

## Agreement for Consolidation or Merger [FMC No. 9551]

(Matter in parentheses is condensation of text. Abbreviations of parties' names, as defined in recitals, are same as those used in initial decision.)

(Recitals: Each party operates two or more common carrier ocean services between U.S. Pacific Coast and the Far East; there is substantial common ownership of their stock; pressures of competition, especially from merged Japanese lines, have made integration and reduction of duplicated expense imperative; shipping industry is on threshold of major modernization, requiring maximum financial strength and operational flexibility; coordination contemplated by Agreement No. 8485 is not fully effective to eliminate unnecessary expense and wasteful competition; necessary that U.S.-flag lines in trans-Pacific trades do everything feasible to improve efficiency, etc.; this Agreement has been approved by parties' boards of directors).

*Now, therefore*, It is, as of May 20, 1966, agreed by and between AML, APL, and PFEL as follows:

*A. Agreements*

1. *Conditions.*—(Paragraphs 2, 5 and 6 are subject to conditions in Part B, and are of no force or effect if any applicable condition fails.)

2. *Merger or Consolidation.*—AML, APL and PFEL recognize that a large variety of corporate, financial and governmental issues remain to be resolved, but do not consider those to affect their basic conclusion that their steamship operations should be unified into a single operation of APL and PFEL with such integration of AML operations as is consistent with its separate routes. AML, APL and PFEL, accordingly, hereby agree either to merge or consolidate into a single corporation, of which at least AML would be a separate division for steamship operations, or to merge or consolidate APL and PFEL into a single corporation with AML as a subsidiary, in the form and by the procedures as the directors and stockholders of the three companies should approve. Simply for purposes of identification in this agreement, the merged or consolidated company, or such company and its subsidiary, shall herein be described as APFEML.

3. *Planning Group.*—(a) Mr. Raymond W. Ickes shall be director of interim planning. He shall designate a group or groups drawn from the three lines to consult with him in the development of organizational and operational plans for APFEML.

(b) Mr. Chandler Ide shall be director of interim corporate reorganization. He shall designate a group drawn from the three lines to consult with him in the development of reorganization and financial procedures for the formation of APFEML, which shall be consistent with the organizational and operational plans developed under subparagraph (a) above. He shall develop data indicating the book value and the earning records of the three companies and shall recommend to APL, PFEL and, if appropriate, to AML, the basis for the exchange of stock or assets involved in the formation of APFEML.

(c) Messrs. Ickes and Ide may engage counsel and other experts. Every agreement reorganization or operation of APFEML subject to completion of all conditions of part B.

4. *Reports and Submissions.*—(a) Messrs. Ickes and Ide shall propose any amendments to this agreement which they consider appropriate, and any change agreed by the three lines shall be filed with Commission to become effective on or after approval.

(b) Prompt reports shall be made for their information to the Federal Maritime Commission and/or Maritime Administration of all steps in the implementation of this agreement as they shall have been agreed by the directors or stockholders of AML, APL and PFEL and which are appropriate to the jurisdiction of and the issues before the respective agencies.

5. *Interim Operations.*—After approval of this Agreement by the Federal Maritime Commission and by the Maritime Administration under Article II–18 of the respective operating-differential subsidy contracts, the Presidents of AML, APL and PFEL or their designees shall meet and promptly develop procedures by which to accomplish the maximum degree of coordination of sailings and joint traffic solicitation which may immediately be feasible in the trades which are served by APL and PFEL and to the extent appropriate by AML. These procedures shall be put into effect upon their approval by each of the three lines and shall govern until the formation and activation of APFEML. If APFEML, should not, because of the failure of any of the conditions of Part B hereof, be formed and activated, the coordination of sailings and joint solicitation herein provided shall terminate within 90 days after the failure of such condition.

6. *Agreement No. 8485.*—The agreement of AML. APL and PFEL of April 11, 1960, approved as Agreement No. FMB 8485 on August 11, 1960, is upon the accomplishment of all the conditions specified in Part B hereof, thereupon cancelled.

*B. Conditions*

No part of Agreement shall be effective (except as noted) until after:

(Par. 7)—Section 15 approval by FMC (except par. 3. 4).

(Par. 8)—Stockholder approval of appropriate plan of merger (except par. 3, 4, 5).

(Par. 9)—MARAD approval (except par. 3. 4) under sec. 608 of Merchant Marine Act, 1936 and parties' subsidy contracts, including requisite permissions satisfactory assignment of subsidy rights to the surviving corporation. Par. 5 to be effective after approval under contracts and FMC approval.

(Par. 10)—Satisfactory arrangement of certain tax matters ("closing agreements") by Treasury Department (except par. 3, 4, 5).

(Par. 11)—Conditions may be accomplished in any sequence.

(Par. 12)—Agreement terminable after two years on 30 days' notice, if all conditions have not been accomplished.

(Par. 13)—Any amendment, supplement or cancellation to be filed immediately with FMC.

(Signed for each party by its president, attested by its secretary)

# APPENDIX B

*Income statements, 1965*

| | APL[1] (Exh. 16) | AML (Exh. 5) | APL and subsidiaries (including AML)[3] (Exh. 7) | PFEL (Exh. 6) | APL, AML, and PFEL combined[4] | States steamship Co. (Exh. 106b) | Matson Navigation Co. and subsidiaries (Exh. 160) |
|---|---|---|---|---|---|---|---|
| Voyage revenue | $72,639,962 | $24,705,314 | $97,345,276 | $45,976,778 | $143,322,054 | $36,408,598 | $122,284,684 |
| Vessel and cargo handling expense | 76,123,511 | 22,585,270 | 98,646,471 | 36,325,636 | 134,972,107 | 32,039,743 | [5] 106,101,566 |
| | (3,483,549) | 2,120,044 | (1,301,195) | 9,651,142 | 8,349,947 | 4,368,855 | 16,183,118 |
| Operating differential subsidy | 24,927,756 | 6,578,387 | 31,506,142 | 4,599,522 | 36,105,664 | 7,292,938 | 6,000,000 |
| Interest and other income—Net | [2] 1,019,029 | 443,884 | 952,059 | 490,759 | 1,442,818 | 295,052 | 1,060,642 |
| | 22,463,236 | 9,142,315 | 31,157,006 | 14,741,423 | 45,898,429 | 11,956,845 | 23,243,760 |
| Administrative and general and other expense—Net | 17,036,427 | 4,067,345 | 21,331,297 | 7,992,624 | 29,323,921 | 6,876,116 | [6] 8,808,024 |
| | 5,426,809 | 5,074,970 | 9,825,709 | 6,748,799 | 16,574,508 | 5,080,729 | 14,435,736 |
| Federal income tax | 1,247,087 | 1,599,726 | 2,866,642 | 2,130,575 | 4,997,217 | 1,841,862 | 7,200,000 |
| | 4,179,722 | 3,475,244 | 6,959,067 | 4,618,224 | 11,577,291 | 3,238,867 | 7,235,736 |
| Gain on disposition of vessels | 1,022,453 | ---------- | 1,022,453 | ---------- | 1,022,453 | ---------- | ---------- |
| Other | 269,012 | (256,103) | (222,811) | 224,482 | 1,671 | (84,722) | ---------- |
| Net income | 5,471,187 | 3,219,141 | 7,758,709 | 4,842,706 | 12,061,415 | 3,154,145 | 7,235,736 |

[1] Excludes wholly owned Magellan Corp. and Shanghai Wharf & Warehouse Co., as well as 93-percent-owned American Mail Line.
[2] Includes dividends of $717,379 paid by American Mail Lines, Ltd., to American President Lines, Ltd.
[3] Includes wholly owned Magellan Corp. and Shanghai Wharf & Warehouse Co., as well as 93-percent-owned American Mail Line.
[4] Combines income statement of American President Lines, Ltd., and subsidiaries (including American Mail Line) and income statement of Pacific Far East Line.
[5] Includes administrative and general expense.
[6] Other expense only—administrative and general included in vessel and cargo handling expense, above.

# APPENDIX C

*Balance sheets, December 31, 1965*

| | APL [1] (Exh. 16) | AML (Exh. 5) | APL and subsidiaries (including AML) [2] (Exh. 7) | PFEL (Exh. 6) | APL, AML, and PFEL combined [3] | States steamship Co. (Exh. 106a) | Matson Navigation Co. and subsidiaries (Exh. 160) |
|---|---|---|---|---|---|---|---|
| ASSETS | | | | | | | |
| Current assets: | | | | | | | |
| Cash | $2,113,443 | $2,290,080 | $4,406,329 | $1,200,138 | $5,606,467 | $7,093,356 | $3,562,491 |
| Operating differential subsidy | 19,791,119 | 4,566,385 | 24,357,504 | 3,130,201 | 27,487,705 | [4] 4,017,934 | 3,838,884 |
| Other | 12,972,315 | 6,123,155 | 19,097,479 | 12,844,639 | 31,942,118 | 6,807,365 | 30,324,620 |
| | 34,876,877 | 12,979,620 | 47,861,312 | 17,174,978 | 65,036,290 | 17,918,655 | 37,725,995 |
| Less deposits to be made in statutory reserve funds | 11,265,747 | 1,286,473 | 12,552,220 | 6,265,490 | 18,817,710 | 3,380,917 | 2,430,000 |
| Total current assets | 23,611,130 | 11,693,147 | 35,309,092 | 10,909,488 | 46,218,580 | 14,537,738 | 35,295,995 |
| Statutory reserve and related funds | 19,106,513 | 5,875,969 | 24,982,482 | 12,898,478 | 37,880,960 | 9,756,329 | 9,478,071 |
| Special funds and deposits | | | | | | | |
| Investments | 9,575,733 | | | | | 23,432 | |
| Property and equipment—net: | | | | | | | |
| Vessels—net | 57,486,147 | 27,590,833 | 87,459,204 | 38,741,627 | 126,200,831 | 40,160,528 | 46,697,194 |
| Other property and equipment—net | 3,977,461 | 456,634 | 2,928,938 | 862,121 | 3,791,059 | 1,045,309 | 17,508,587 |
| Construction in progress | 17,121,911 | 231,868 | 17,353,779 | | 17,353,779 | 275,714 | |
| | 78,585,519 | 28,279,335 | 107,741,921 | 39,603,748 | 147,345,669 | 41,481,551 | 64,205,781 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Contingent subsidy receivable (contra) | | | | 3, 465, 000 | 3, 465, 000 | 1, 268, 916 | |
| Other assets | 2, 624, 255 | 1, 033, 203 | 3, 526, 878 | 879, 825 | 4, 406, 703 | 674, 321 | 656, 025 |
| Total assets | 133, 503, 150 | 46, 881, 654 | 171, 560, 373 | 67, 756, 539 | 239, 316, 912 | 67, 742, 287 | 109, 635, 872 |
| LIABILITIES AND CAPITAL | | | | | | | |
| Current liabilities | 14, 240, 039 | 3, 933, 669 | 18, 297, 411 | 6, 300, 106 | 24, 597, 517 | 5, 447, 344 | 26, 917, 322 |
| Net unterminated voyage revenue | 5, 196, 506 | 2, 402, 174 | 7, 542, 760 | 2, 039, 077 | 9, 581, 837 | 2, 631, 001 | 2, 653, 679 |
| Debt secured by mortgage on vessels | 46, 783, 750 | 10, 600, 000 | 57, 383, 750 | 22, 874, 738 | 80, 258, 488 | 28, 949, 860 | 13, 334, 967 |
| Recapture of operating-differential subsidy (contra) | | | | 3, 465, 000 | 3, 465, 000 | 1, 268, 916 | |
| Other | 4, 967, 050 | 575, 587 | 4, 408, 679 | 1, 775, 813 | 6, 184, 492 | 746, 286 | 2, 454, 000 |
| Total liabilities | 71, 187, 345 | 17, 511, 430 | 87, 632, 600 | 36, 454, 734 | 124, 087, 334 | 39, 043, 407 | 45, 359, 968 |
| Minority interest in capital and retained earnings of subsidiary | | | 2, 093, 531 | | 2, 093, 531 | | |
| Stockholders' equity: | | | | | | | |
| Capital stock | 6, 784, 300 | 3, 614, 313 | 6, 784, 300 | 4, 631, 950 | 11, 416, 250 | 7, 675, 000 | 20, 255, 375 |
| Capital surplus | | 307, 315 | 6, 286, 093 | 3, 544, 471 | 9, 830, 564 | 1, 343, 156 | 1, 042, 266 |
| Retained earnings | 55, 531, 505 | 25, 448, 596 | 68, 763, 849 | 23, 125, 384 | 91, 889, 233 | 19, 680, 724 | 42, 978, 263 |
| | 62, 315, 805 | 29, 370, 224 | 81, 834, 242 | 31, 301, 805 | 113, 136, 047 | 28, 698, 880 | 64, 275, 904 |
| Total liabilities and capital | 133, 503, 150 | 46, 881, 654 | 171, 560, 373 | 67, 756, 539 | 239, 316, 912 | 67, 742, 287 | 109, 635, 872 |

[1] Excludes wholly owned Magellan Corp. and Shanghai Wharf and Warehouse Co., as well as 93-percent-owned American Mail Line.

[2] Includes wholly owned Magellan Corp. and Shanghai Wharf and Warehouse Co., as well as 93-percent-owned American Mail Line.

[3] Combines balance sheet of American President Lines and subsidiaries (including American Mail Line) and balance sheet of Pacfic Far East Line.

[4] Total amounts due from Maritime Administration; details not available.

# APPENDIX D

*Sailings by line in the Pacific/Far East (TR 29) trade—1964*

| | Between U.S. Pacific coast and Far East | | Between California and Far East [1] | |
|---|---|---|---|---|
| | Out | In | Out | In |
| U.S.-flag lines—total | 444 | 363 | 385 | 302 |
| American Mail Line, Ltd | 36 | 30 | | 4 |
| American President Lines, Ltd | 106 | 79 | 106 | 79 |
| Pacific Far East Line, Inc | 53 | 50 | 53 | 50 |
| American Export & Isbrandtsen Lines | | 25 | | 25 |
| Isthmian Lines | 24 | 1 | 24 | 1 |
| Pacific Navigation System | 5 | 6 | 4 | 5 |
| States Line | 66 | 68 | 53 | 46 |
| States Marine Lines [2] | 118 | 72 | 110 | 63 |
| Waterman Steamship Corp | 36 | 32 | 35 | 29 |
| Foreign-flag lines—total | 547 | 603 | 466 | 483 |
| Japanese-flag lines | 308 | 384 | 236 | 285 |
| Japan Line | 46 | 69 | 37 | 59 |
| "K" Line | 42 | 72 | 42 | 64 |
| Mitsui-O.S.K. Lines, Ltd | 81 | 88 | 61 | 56 |
| N.Y.K. Line | 64 | 72 | 57 | 59 |
| Showa Line | 12 | 12 | | |
| Yamashita-Shinnihon Line | 63 | 71 | 39 | 47 |
| Other foreign-flag Lines | 239 | 219 | 230 | 198 |
| Barber Line | 44 | | 44 | |
| Barber-Wilhelmsen Line | | 25 | | 25 |
| Fernville Line | 24 | 24 | 24 | 24 |
| China Merchants Steam Navigation Co | 9 | 1 | 9 | 1 |
| Klaveness Line | 12 | 12 | 12 | 12 |
| Knutsen Line | 18 | 20 | 18 | 7 |
| Maersk Line | 51 | 33 | 51 | 33 |
| Maritime Co of the Philippines | 21 | 19 | 20 | 19 |
| Nedlloyd & Hoegh Lines | 10 | 12 | 10 | 12 |
| P. & O. Orient Lines | 4 | 5 | 4 | 5 |
| Philippine National Lines | 7 | 7 | 7 | 7 |
| Scandia Pacific Line | 8 | 8 | 8 | 8 |
| United Philippine Lines | 31 | 32 | 23 | 32 |
| Splosna Plovba | | 12 | | 12 |
| Taiwan Navigation Co, Ltd | | 9 | | 1 |
| Total sailings | 991 | 966 | 851 | 785 |
| AML, APL, & PFEL sailings | 195 | 159 | 159 | 133 |
| AML, APL, & PFEL as percent U.S.-flag | 44 | 44 | 41 | 44 |
| AML, APL, & PFEL as percent total | 20 | 16 | 19 | 17 |

[1] Sailings in the California-Far East column are included in the Pacific Coast-Far East column.
[2] Used U S.- and foreign-flag ships.

NOTE. Includes APL passenger vessels (about 24 sailings), which averaged about 15 percent as much cargo per sailing as cargo vessels in APL trans-Pacific service; also sailings in round-the-world and Atlantic/Straits services, which averaged about 25 percent as much TR 29 cargo as cargo vessels in APL trans-Pacific service. Excludes ballast sailings.

# APPENDIX E

*Trade route 29: All cargo, including defense cargo, 1964*

| | Outbound tons | Percent of all outbound cargo | Inbound tons | Percent of all inbound cargo | Total outbound and inbound tons | Percent of total inbound and outbound cargo |
|---|---|---|---|---|---|---|
| Liner cargo: | | | | | | |
| U.S.-flag: | | | | | | |
| APL | 301, 492 | 2. 17 | 77, 316 | 2. 99 | 378, 808 | 2. 30 |
| PFEL | 272, 508 | 1. 96 | 196, 677 | 7. 61 | 469, 185 | 2 84 |
| AML | 257, 789 | 1 85 | 82, 068 | 3. 17 | 339, 857 | 2. 06 |
| States | 439, 127 | 3. 16 | 139, 795 | 5. 41 | 578, 922 | 3. 51 |
| Other | 602, 476 | 4. 33 | 62, 014 | 2. 40 | 664, 490 | 4. 03 |
| Total U.S.-flag liner | 1, 873, 392 | 13. 47 | 557, 870 | 21. 58 | 2, 431, 262 | 14. 74 |
| Foreign-flag: | | | | | | |
| Japanese | 715, 263 | 5. 14 | 495, 736 | 19. 17 | 1, 210, 999 | 7. 34 |
| Other | 439, 254 | 3. 16 | 445, 803 | 17. 24 | 885, 057 | 5. 37 |
| Total foreign-flag liner | 1, 154, 517 | 8. 30 | 941, 539 | 36. 41 | 2, 096, 056 | 12 71 |
| Total liner cargo | 3, 027, 909 | 21. 77 | 1, 490, 409 | 57. 99 | 4, 527, 318 | 27. 45 |
| Nonliner cargo: | | | | | | |
| U.S.-flag | 69, 754 | . 50 | 0 | 0 | 69, 754 | . 42 |
| Foreign flag | 10, 809, 495 | 77 73 | 1, 066, 350 | 42. 01 | 11, 895, 845 | 72. 13 |
| Total non-liner | 10, 879, 249 | 78. 23 | 1, 086, 350 | 42. 01 | 11, 965, 599 | 72. 55 |
| Total cargo | 13, 907, 158 | 100. 00 | 2, 585, 759 | 100. 00 | 16, 492, 917 | 100 00 |

# APPENDIX F

*Trade route 29: Between California and Far East only, long tons of general, bulk, and defense cargo carried by liners and nonliners, 1964*

| | Commercial general long tons | Commercial bulk long tons | Total commercial long tons | Total defense long tons | Total all cargo long tons |
|---|---|---|---|---|---|
| Liner outbound | 871, 943 | 595, 828 | 1, 467, 771 | 476, 742 | 1, 944, 513 |
| Liner inbound | 879, 238 | 161, 019 | 1, 040, 257 | 16, 021 | 1, 056, 278 |
| Total liner | 1, 751, 181 | 756, 847 | 2, 508, 028 | 492, 763 | 3, 000, 791 |
| Nonliner outbound | 159, 231 | 4, 848, 939 | 5, 008, 170 | | 5, 008, 170 |
| Nonliner inbound | 717, 172 | 166, 930 | 884, 102 | | 884, 102 |
| Total nonliner | 876, 403 | 5, 015, 869 | 5, 892, 272 | | 5, 892, 272 |
| Total liner and nonliner | 2, 627, 584 | 5, 772, 716 | 8, 400, 300 | 492, 863 | 8, 893, 063 |

# APPENDIX G

*Trade route 29: Between California and Far East only, percentage of cargo (long tons) in various classifications carried by Respondents, States Lines, other U.S.-flag carriers and by foreign-flag carriers, 1964*

| Carried by— | Percent of liner commercial cargo carried (excludes defense cargo) | | | Percent of all liner cargo carried (includes defense cargo) | | | Percent of all commercial cargo (liner and nonliner) carried (excludes defense cargo) | | | Percent of all cargo (liner and nonliner) carried (includes defense cargo) | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Outbound | Inbound | Total | Outbound | Inbound | Total | Outbound | Inbound | Total | Outbound | Inbound | Total |
| Liners: | | | | | | | | | | | | |
| U.S.-flag: | | | | | | | | | | | | |
| APL | 14.60 | 6.95 | 11.43 | 15.50 | 7.32 | 12.62 | 3.31 | 3.75 | 3.41 | 4.34 | 3.98 | 4.26 |
| AML | | .07 | .03 | | .07 | .03 | | .04 | .01 | | .04 | .01 |
| PFEL | 11.97 | 18.58 | 14.71 | 14.02 | 18.62 | 15.63 | 2.71 | 10.04 | 4.39 | 3.92 | 10.14 | 5.27 |
| All respondents | 26.57 | 25.60 | 26.17 | 29.52 | 26.01 | 28.28 | 6.02 | 13.83 | 7.81 | 8.26 | 14.16 | 9.54 |
| States | 7.40 | 5.95 | 6.80 | 9.62 | 6.08 | 8.38 | 1.68 | 3.22 | 2.03 | 2.69 | 3.31 | 2.83 |
| Others | 8.54 | 5.06 | 7.09 | 17.46 | 5.48 | 13.24 | 1.93 | 2.74 | 2.12 | 4.88 | 2.99 | 4.47 |
| All U.S.-flag liners | 42.51 | 36.61 | 40.06 | 56.60 | 37.57 | 49.90 | 9.63 | 19.79 | 11.96 | 15.83 | 20.46 | 16.84 |
| Foreign-flag: | | | | | | | | | | | | |
| Japanese | 38.48 | 34.00 | 36.63 | 29.05 | 33.49 | 30.61 | 8.72 | 18.38 | 10.94 | 8.13 | 18.23 | 10.32 |
| Other | 19.01 | 29.39 | 23.31 | 14.35 | 28.94 | 19.49 | 4.31 | 15.89 | 6.96 | 4.01 | 15.75 | 6.58 |
| All foreign-flag liners | 57.49 | 63.39 | 59.94 | 43.40 | 62.43 | 50.10 | 13.03 | 34.27 | 17.90 | 12.14 | 33.98 | 16.90 |
| All liners | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 22.66 | 54.06 | 29.86 | 27.97 | 54.44 | 33.74 |
| Nonliners: | | | | | | | | | | | | |
| U.S.-flag | | | | | | | .27 | | .21 | .25 | | .20 |
| Foreign-flag | | | | | | | 77.07 | 45.94 | 69.93 | 71.78 | 45.56 | 66.06 |
| All nonliners | | | | | | | 77.34 | 45.94 | 70.14 | 72.03 | 45.56 | 66.26 |
| All liners and nonliners | | | | | | | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |

# APPENDIX H

U.S.-FLAG CARRIAGE VS. ALL-FLAGS COMMERCIAL CARGO CARRIED IN DRY CARGO VESSELS BETWEEN CALIFORNIA AND FOREIGN AREA TR 29, YEARS 1954–1964 (IN THOUSANDS OF LONG TONS)

*I. Liner commercial cargo*

| Year | From California | | | To California | | |
|---|---|---|---|---|---|---|
| | Total tons | U.S.-flag tons | Percent | Total tons | U.S.-flag tons | Percent |
| 1954 | 1,265 | 032 | 74 | 591 | 354 | 60 |
| 1955 | 1,360 | 1,039 | 76 | 705 | 476 | 68 |
| 1956 | 1,663 | 1,228 | 74 | 801 | 518 | 65 |
| 1957 | 1,844 | 1,370 | 74 | 732 | 407 | 56 |
| 1958 | 1,610 | 921 | 61 | 892 | 437 | 49 |
| 1959 | 1,360 | 613 | 45 | 1,000 | 532 | 53 |
| 1960 | 1,648 | 723 | 44 | 960 | 464 | 48 |
| 1961 | 1,627 | 744 | 46 | 884 | 328 | 37 |
| 1962 | 1,464 | 502 | 34 | 1,105 | 365 | 33 |
| 1963 | 1,683 | 732 | 44 | 1,188 | 431 | 36 |
| 1964 | 1,468 | 624 | 43 | 1,040 | 381 | 37 |

*II. Total (liner plus nonliner) commercial cargo*

| Year | From California | | | To California | | |
|---|---|---|---|---|---|---|
| | Total tons | U.S.-flag tons | Percent | Total tons | U.S.-flag tons | Percent |
| 1954 | 1,735 | 964 | 56 | 599 | 356 | 59 |
| 1955 | 2,254 | 1,110 | 49 | 740 | 482 | 65 |
| 1956 | 3,561 | 1,550 | 44 | 840 | 518 | 62 |
| 1957 | 3,947 | 1,480 | 38 | 807 | 407 | 50 |
| 1958 | 2,690 | 970 | 36 | 967 | 437 | 45 |
| 1959 | 2,878 | 623 | 22 | 1,167 | 542 | 46 |
| 1960 | 4,341 | 723 | 17 | 1,155 | 474 | 41 |
| 1961 | 5,169 | 714 | 14 | 1,178 | 329 | 28 |
| 1962 | 4,033 | 502 | 12 | 1,502 | 365 | 24 |
| 1963 | 5,933 | 753 | 13 | 1,692 | 434 | 26 |
| 1964 | 6,476 | 642 | 10 | 1,924 | 381 | 20 |

# APPENDIX I

*Major steamship lines of the world*

| Line or group | Flag | Vessels | Deadweight tons |
|---|---|---|---|
| 1. P&O | British | 297 | 3,045,000 |
| 2. NYK | Japanese | 110 | 2,079,000 |
| 3. Barber | Norwegian | 130 | 1,754,000 |
| 4. Maersk | Danish | 88 | 1,732,000 |
| 5. Kawasaki | Japanese | 73 | 1,649,000 |
| 6. Japan | Japanese | 65 | 1,418,000 |
| 7. Nedlloyd & Hoegh | Dutch, Norwegian | 80 | 1,232,000 |
| 8. Mitsui-OSK | Japanese | 96 | 1,114,000 |
| 9. Yamashita-Shinnihon | Japanese | 56 | 1,102,000 |
| 10. Argentine Government | Argentine | 113 | 963,000 |
| 11. Showa | Japanese | 37 | 916,000 |
| 12. British & Commonwealth | British | 75 | 851,000 |
| 13. Lykes | United States | 56 | 650,000 |
| 14. States Marine and affiliates | United States | 53 | 642,000 |
| 15. APL-PFEL-AML (25-14-9) | United States | 48 | 622,000 |
| 16. United States Lines | United States | 46 | 560,000 |
| 17. American Export Isbrandtsen | United States | 46 | 504,000 |
| 18. Moore-McCormack | United States | 42 | 508,000 |

# FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 1 (I)

R. A. EASTMAN & COMPANY

*v.*

MATSON NAVIGATION COMPANY

N.O.S. rate on furniture in containers resulting in charge of $1,861.20 found unreasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, where the charges would only have been $1,430 had the shipper not brought the containers to the carrier's assembly point.

*David F. Anderson* appeared for respondent and claimant appeared *pro se.*

DECISION AND ORDER OF E. ROBERT SEAVER, HEARING EXAMINER [1]

R. A. Eastman and Company makes claim against Matson Navigation Company, employing the Commission's new Small Claims Procedure, Rule 19(a), (46 C.F.R. 502.301), under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, for excessive freight charges in the amount of $480.67 [2] arising out of the following transaction:

On or about April 28, 1967, Eastman caused two containers loaded with furniture to be delivered to Matson by rail to the latter's Container Freight Station (C.F.S.) at Los Angeles for ocean shipment to Hawaii. Matson is a common carrier by water subject to section 18(a) of the Shipping Act, 1916, and to the Intercoastal Shipping Act, 1933, as amended. It is engaged in the transportation of property between the United States mainland and the State of Hawaii. The said furniture was transported by Matson under bill of lading dated

[1] Both parties having consented to the informal procedure under Rule 19(a). (C.F.R. 502.301). notice is given that the Commission, on October 17, 1967, determined not to review the Decision and Order of the Examiner in this proceeding

[2] The claim includes an item of $49.47 for car unloading under the Matson tariff. It cannot be considered as part of the excess charge because it is payable on shipments such as claimant's.

April 28, 1967, at a freight charge of $1,861.20 based on a tariff rate of 72 cents per cubic foot.

The said rate was the Cargo, N.O.S. rate appearing in Matson's Tariff No. 14–A, F.M.C.-F. No. 137, published and filed so as to be effective March 30, 1967. The rate per container that would have applied to the Eastman shipment prior to that revision was $715. Matson concedes that in publishing the new tariff (14–A) it failed to anticipate that containerload shipments of furniture would be delivered to its C.F.S. by rail and that it inadvertently failed to include such shipments in the containerload rate, which remained at the $715 level. Therefore Matson applied the Cargo, N.O.S. rate of 72 cents per cubic foot to claimant's shipment.

A rate of $715 per container was applicable at the time of the Eastman shipment where Matson itself picked up the containers within a prescribed pick-up area. The charges for claimant's shipment would have been $1,430 at that rate, if Matson had been required to pick up the containers anywhere within the area. It is readily seen that the total carrier service is no greater when the shipper delivers the containers to the C.F.S. by rail than when Matson picks up the containers and brings them to the C.F.S. When it learned of this situation, Matson corrected its oversight by revising its tariff, on April 17, 1967 (effective May 20, 1967), so that the $715 container rate now applies when the shipper delivers the container by rail at the Matson C.F.S.

The circumstances of this case fall squarely within the rule of *Sea-Land Service, Inc.—Application to Waive Undercharges*, 8 F.M.C. 641, where relief in a situation like the present one was granted. As stated in the decision in that case, and cases cited therein, the longstanding rate of $715 per container must be presumed to be a reasonable rate. Similarly, the higher rate of 72 cents per cubic foot charged claimant is patently unreasonable within the meaning of section 18(a) of the Shipping Act and section 4 of the Intercoastal Shipping Act, 1933, because of the lesser service provided under that rate and for the further reason that the rate was deleted after being in effect for only a very short period of time. For these reasons the rate is hereby disapproved. It is further determined that the $715 per container rate would have been reasonable where the containers were delivered to the C.F.S. by rail, as was done by Eastman. The charge of $1,861.20 for the Eastman shipment resulted in an excessive charge of $431.20. Matson does not object to refunding the excess and even desires to do so if so directed or authorized. The decision in *Ludwig Mueller Co. v. Peralta Shipping Corp.*, 8 F.M.C. 361, does not require a different result. That case involved the foreign commerce and was governed by a different provision of the statute. The Commission stated expressly and pointedly that its decision therein, to no longer entertain applications for rate relief based on inadvertence or mistake, did not apply to the offshore domestic commerce. It recognized that where the rate charged in the domestic commerce is found to be unreasonable, relief can be granted.

The correction of this rate will not result in any discrimination between shippers because no other shippers are similarly situated. No other shipments such as claimant's were brought to the Matson C.F.S. by rail during the time the rate collected from claimant was in effect.

For the foregoing reasons it is hereby:

*ORDERED;* that Matson Navigation Company refund to R. A. Eastman and Company the sum of Four Hundred and Thirty One Dollars and Twenty Cents ($431.20), representing excess freight charges found herein to have been made for shipments covered by Matson's bill of lading number R4065268, dated April 28, 1967.

(Signed) E. ROBERT SEAVER,
*Hearing Examiner.*

WASHINGTON, D.C., *October 10, 1967.*

# FEDERAL MARITIME COMMISSION

Docket No. 67-43

Sea-Land Service, Inc.—Cancellation of FMC Port-to-Port Rates—West Coast/Alaska Trade

Decided October 20, 1967

**Under section 18(a) of the Shipping Act, 1916, and under the Intercoastal Shipping Act, 1933, Congress vested in the Federal Maritime Commission jurisdiction over common carriers by water in the Alaska trade. The Alaska Statehood Act specifically reserved this jurisdiction to the Federal Maritime Commission. Congress enacted an exception to this regulatory scheme in Public Law 87-595 in which it granted to the Interstate Commerce Commission jurisdiction over through routes and joint rates. Congress intended Public Law 87-595 to apply to a combination of line haul rates, not to a local pickup and delivery service included in a port-to-port rate.**

**Sea-Land Service, which has not changed the physical elements of its port-to-port service including local pickup and delivery but has merely changed certain tariff nomenclature, has not converted its service to a through route and joint rate arrangement contemplated by Public Law 87-595. Consequently, the service remains subject to the jurisdiction of the Federal Maritime Commission.**

*Hugh H. Shull, Jr.*, *J. Scot Provan*, and *Warren Price* for respondent Sea-Land Service, Inc.

*Stanley B. Long*, *Arthur G. Grunke*, and *John Robert Ewers* for intervener Alaska Steamship Co.

*Donald J. Brunner* and *Norman D. Kline*, Hearing Counsel.

## Report

By the Commission (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* James V. Day, James F. Fanseen, *Commissioners*):[1]

The Commission instituted this proceeding on July 21, 1967, in order to resolve the question of jurisdiction over the rates of Sea-Land's operation between west coast ports and Alaska. Since no factual is-

[1] Commissioner Barrett did not participate.

sues were involved, the Commission dispensed with an initial decision and limited the record to affidavits and legal memoranda filed by respondent Sea-Land Service, Inc., intervener Alaska Steamship Co., and Hearing Counsel. The Commission heard oral argument on September 6, 1967.

BACKGROUND

In April 1964, Sea-Land inaugurated a service between Seattle and Anchorage. The rates for this service included pickup and delivery of cargo within the Anchorage area. These rates were contained in Freight Tariff No. 116, FMC–F No. 5 and ICC No. 23. The format of this tariff has not changed substantially since initial publication. Item 101 of the tariff provides:

> * * * the rates between points in Oregon and Washington making reference to this Item and points in Alaska taking Rate Group A are port-to-port rates subject to the jurisdiction of the Federal Maritime Commission.

Item 102 provides that other rates, covering movements to and from interior points, are subject to the jurisdiction of the Interstate Commerce Commission.[2] Rate group A, referred to in item 101, contains single-factor rates between Seattle and Anchorage. These rates include store-door pickup and delivery service.[3] The remainder of the rates in Freight Tariff No. 116 are joint water and motor rates which are filed with the Interstate Commerce Commission.

In the past, Sea-Land filed the rates for the Seattle/Anchorage service with the Federal Maritime Commission on their assumption that these rates were under FMC jurisdiction even though store-door pickup and delivery service was included in the rates. This was in accordance with the official position of the FMC staff, as expressed in a notice circularized by the FMC Bureau of Domestic Regulation in February 1966 to all carriers in the domestic offshore trades.[4]

Sea-Land also assumed that FMC jurisdiction attached to local port-to-port rates applying between Seattle and other ports in Alaska served by Sea-Land's competitors in direct-vessel service. On this

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[2] Item 102 reads:

> Except as otherwise provided in Item 101 rates published in this tariff are joint rates subject to the jurisdiction of the Interstate Commerce Commission

[3] Rate group A also includes: Anchorage International Airport, Elmendorf Air Force Base, Ft. Richardson, Mountain View and Spenard, Alaska, Bellevue, Kirkland, Renton, Tukevila, Andover Industrial Park, and Tacoma, Wash., and Portland, Oreg (via direct water service of Sea-Land only).

[4] The notice provided in part.

> Water carriers may publish single-factor rates which include services (such as pickup and delivery services) in port terminal areas, even though the carrier performing such services is not subject to the shipping acts. Such tariffs, however, must be filed with the Federal Maritime Commission in accordance with the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

assumption, Sea-Land notified the FMC's Bureau of Domestic Regulation of the filing with the ICC of a rate which appeared to be subject to FMC jurisdiction. Sea-Land also submitted to the Interstate Commerce Commission a telegraphic objection to the acceptance for filing of the rate. This rate was published by the Alaska Railroad as a joint rate with Puget Sound Alaska Van Lines (PSAVL) in Alaska Railroad Tariff ICC No. F-34, which was filed with the Interstate Commerce Commission to become effective August 27, 1965. However, the ICC accepted the rate for filing. Subsequently, the joint rate of PSAVL and the Alaska Railroad to Valdez was transferred to Alaska Railroad Freight Tariff No. 67-A, ICC No. F-35. Again, Sea-Land wrote to the Interstate Commerce Commission on May 2, 1967, pointing out that the Alaska Railroad, in connection with PSAVL had filed with the ICC a rate from Seattle to Valdez, Alaska, which included no rail "line haul" movement but only rail switching limits at Valdez. However, the Interstate Commerce Commission again accepted the rate for filing and the reasons for this acceptance were explained in a letter to Sea-Land from the Director of the Bureau of Traffic.

The Interstate Commerce Commission had enunciated this position earlier, not only by their original acceptance of the PSAVL Valdez rate, but also by acceptance of Alaska R.R. Tariff No. 74, ICC No. F-40, which became effective March 1, 1966, over protest of Sea-Land. This tariff, covering Alaska Steam's Seattle-Alaska Van Express Service, publishes joint rates of Alaska Steam and the Alaska Railroad from Seattle to points in Alaska over joint routes via Whittier, Alaska. This tariff contains rates to the port of Whittier with delivery by the Alaska Railroad. Sea-Land argued that the rates to Whittier cover a port-to-port service and should be filed with the FMC. Nevertheless, the ICC accepted the entire tariff for filing.

Subsequently, upon review of the entire situation, Sea-Land decided to convert its pickup and delivery rates to and from Anchorage to joint through rates. Accordingly, Sea-Land filed a notice of cancellation of its pickup and delivery rates to become effective July 30, 1967. The Commission suspended the cancellation and instituted this proceeding to determine if the cancellation were lawful.

## THE ISSUES

In the order instituting this proceeding, the Commission sought to determine:

1. The lawfulness of the removal of port-to-port rates from FMC jurisdiction where such rates embody incidental pickup and delivery

services performed by or on behalf of a common carrier by water within the port area in which it holds itself out to perform such incidental pickup and delivery services in connection with its line-haul water carrier operation, according to its applicable tariffs; and

2. The lawfulness of Sea-Land's practices with respect to its application of its proposed tariff device which would permit a change in regulatory forum by redesignating a "local" port-to-port service as a "joint" port-to-port service.

CONTENTIONS OF THE PARTIES

Sea-Land argues that, as a matter of law, the rates in question are solely within the jurisdiction of the ICC. Although the Alaska Statehood Act (48 U.S.C. 21–488), July 7, 1958, reserved to the FMC the jurisdiction over Alaska trades which had existed before statehood, Congress subsequently granted jurisdiction over the establishment of through routes and joint rates to the ICC through Public Law 87–595 (49 U.S.C. 316(c)). Since Sea-Land has changed its pickup and delivery rates to joint rates, Sea-Land asserts that jurisdiction over such rates is vested in the ICC as provided in Public Law 87–595.

Alaska Steam which has on file with the ICC tariffs containing joint rates, some of which cover local store-door delivery as is the case of Sea-Land, supports the position of Sea-Land. Alaska Steam argues that the FMC jurisdiction in the Alaska trade is an exception to the general pattern established by Congress which provides for regulation of rail, motor, and water transportation in interstate commerce. When Alaska statehood was enacted, Congress reserved the question of jurisdiction over water carriers pending further study and legislation. Public Law 87–595 followed. In enacting Public Law 87–595, Congress intended to grant to shippers and consignees in Alaska the same transportation advantages available in the other States, and to restore jurisdiction which had been previously excepted. Therefore, Alaska Steam argues that joint rates comprising a line-haul movement and pickup and delivery were vested in the ICC.

Hearing Counsel argue that Public Law 87–595 was never intended to divorce the FMC from jurisdiction over the type of operation involved here. Hearing Counsel contend that the legislative history of Public Law 87–595 shows that the law was limited to a combination of motor line-haul and water line-haul routes. The statute was designed to allow shippers to deal with a single carrier, consult a single tariff, and enjoy the benefits of joint rates which are generally lower than a combination of local rates. Thus, Sea-Land, under the tariff rates it now wishes to cancel, was already achieving the benefits of the statute. Public Law 87–595 was not designed to alleviate any problem in this area. Thus, the statute should not be construed to extend to an area where it is not needed. In fact, the language of the Alaska Statehood Act, which reserved FMC jurisdiction, is still the paramount congressional pronouncement of how water transportation shall be regulated, i.e. by the FMC except where two line-haul services are combined.

DISCUSSION

The case turns upon the meaning of Public Law 87–595 which provides:

> Subsection (c) of section 216 of the Interstate Commerce Act, as amended (49 U.S.C. 316(c)), [dealing with intermodal through routes and joint rates] is amended by adding at the end thereof the following new sentence: "As used in this subsection, the term 'common carriers by water' includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this part."

Specifically, we must decide whether Sea-Land's service is a through route and joint rate within the meaning of the statute. We read the statute as not explicitly including, or excluding, the service in question. Consequently, it is necessary to examine the congressional purpose in enacting the section as well as the regulatory framework of which it is a part.

Under section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817), the FMC originally regulated common carriers by water in interstate commerce in the Alaska trade. This authority was expanded under the Intercoastal Shipping Act, 1933 (46 U.S.C. 843–48). With the admission of Alaska and Hawaii into the Union, jurisdiction over water transportation between those States and the contiguous 48 States would have automatically devolved upon the ICC but for a specific provision in the statehood acts which preserved jurisdiction in the FMC. Thus, section 27(b) of the Alaska Statehood Act provides:

> (b) Nothing contained in this or any other act shall be construed as depriving the Federal Maritime Board of the exclusive jurisdiction heretofore conferred on it over common carriers engaged in transportation by water between any port in the State of Alaska and other ports in the United States, its territories or possessions, or as conferring upon the Interstate Commerce Commission jurisdiction over transportation by water between any such ports.

Subsequently, a motor carrier, Consolidated Freightways, attempted to file a joint tariff between itself as a motor carrier and a water carrier regulated by the FMC. Consolidated Freightways' tariff named six participating carriers, five by motor vehicles, and one, a water carrier, Hawaiian Marine Freightways, Inc. The tariff named specific rates on commodities between points to Utah, Idaho, and Montana and Honolulu, Hawaii. Both the FMC and the ICC rejected the tariff.[5] The FMC rejected the tariff because neither the Shipping Act, 1916, nor the Intercoastal Shipping Act, 1933, granted the FMC authority to accept a rate publication naming single-factor joint motor-water freight rates from or to interior points in the United States and Hawaii. The long line-haul transportation overland was clearly subject to ICC jurisdiction. However, it was impossible to determine from the single-factor rates in the tariff where FMC or ICC jurisdiction began and ended.[6]

Following rejecting of its tariffs, Consolidated republished them in a form acceptable to the FMC. The carrier deleted the joint rates from inland points and replaced them with rates between the San Francisco Bay port area and points in Hawaiian port area, which rates included pickup and delivery service. The tariffs published in this fashion were kept on file with the Commission until the service was discontinued on November 24, 1961.

Meanwhile, Consolidated cited the rejection of its joint tariff to Congress as proof that remedial legislation was needed in order to establish the type of joint motor-water rates which the carrier had attempted to create originally. In pursuing this objective, the vice president of Consolidated testified before the House committee with respect to the rejection of the joint tariff and stated that the pending bills, which led to final enactment of Public Law 87–595, "would, if enacted into law, not only permit joint rates between points such as Seattle and points within Alaska, but would also permit joint rates between points within the contiguous 48 States and points within Alaska."[7] The proponents of Public Law 87–595 several times referred to Consolidated's dilemma.[8] Congress could not have contemplated the Sea-Land-type operation since Public Law 87–595 was designed to

[5] See hearing before a subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 7297 and H R 7343, 87th Congress, 2d sess, p 19 (1962).

[6] The position of the FMC in rejecting the tariff was sound. Although section 2 of the Intercoastal Shipping Act, 1933, requires carriers to file with the FMC all its rates in connection with the establishment of a through route, the provision applies only if the other carrier to the arrangement is a water carrier. There is no provision in the act giving the FMC jurisdiction over motor carriers such as Consolidated operating from inland U.S. points to Hawaii in conjunction with water carriers.

[7] See note 4, supra

[8] See H. Rept. No. 1769, 87th Cong., 2d sess. (1962) 2; 108 Cong. Rec., House, pp. 11419–21 (1962).

authorize a type of transportation which neither the FMC nor the ICC would permit. Congress did not intend to repeal section 27(b) of the Statehood Act or overturn the long-standing Commission practices in accepting Sea-Land-type tariffs. In this connection, we mention pertinent remarks of Congressman Rivers, the author of the legislation, who stated:

> This bill does not detract from the authority presently exercised by the Federal Maritime Commission over the Alaska waterborne carriers * * * only to the extent that through routes and joint rates are involved would the ICC attain any jurisdiction over the vessels plying in the Alaskan trade. 108 Cong. Rec., House, p. 11420 (1962).[9]

Thus, it is the Consolidated, not the Sea-Land type of operation which Public Law 87–595 contemplated. Moreover, Congressman Rivers corroborated this view, stating as follows on the floor of the House:

> * * * [This bill] * * * merely enables all surface carriers involved in the transportation of cargo *to Alaska from points of origin in the 48 States* to enter into the through route and joint rate agreements I have mentioned and only to the extent that through routes and joint rates are involved would the ICC attain any jurisdiction over the vessels plying in the Alaskan trade. (Emphasis added.) 108 Cong. Rec., House, p. 11420 (1962).

We, therefore, conclude that Congress intended Public Law 87–595 to apply to a combination of line-haul motor and water routes such as had appeared in the rejected Consolidated tariff and not to a pickup and delivery service included in a port-to-port rate such as Sea-Land's.

The purpose of the legislation was to confer the benefits of through routes and joint rates on the users of motor-water services between Alaska and Hawaii and the other 48 States. Under such a through route and joint rate, shippers would enjoy considerable benefits; shippers would be able to make one contract with the originating carrier, ascertain the rate by consulting a single tariff instead of many, and enjoy the economy of joint rates.[10] Sea-Land's customers presently enjoy these benefits.

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[9] Additional statements of Congressman Rivers show that he could not have had in mind the Sea-Land-type operation when proposing his bill because he again referred to the different situation such as Consolidated's where no agency would accept regulation. Thus, he stated:

"By virtue of the general rule carried out under existing law, common carriers subject to the jurisdiction of different Federal regulatory agencies, respectively, may not, in the absence of specific statutory authority, establish through routes and joint rates with each other." 108 Cong. Rec., House, p. 11420 (1962).

[10] As the House Report states:

The purpose of this bill is exceedingly simple; it is merely to clarify the Interstate Commerce Act so that the users of motor-water services between Alaska and Hawaii and the other 48 States may have the same benefits of through routes and joint rates which are enjoyed by users of motor-water services among the other 48 States, and by users of rail-water services or of any combinations of service with air services among all of the 50 States H. Rept. No. 1769, 87th Cong., 2d sess, p. 1. See also: S. Rept No. 1799, 87th Cong., 2d sess, p. 1 and H Rept. No. 1769 at 2, 3.

Even without these indications of limited congressional intent described above, it would be somewhat amazing to interpret Public Law 87–595 in the manner suggested by respondent and Alaska Steam. If the contentions of Sea-Land and Alaska Steam are correct, one would have to conclude that Congress intended to repeal section 27(b) of the Alaska Statehood Act, and to upset longstanding FMC interpretations of section 2 of the Intercoastal Act, 1933, although Congress made no mention of such intentions.

Under section 27(b) of the Alaska Statehood Act jurisdiction over water transportation between Alaska and the other States was explicitly preserved in the FMC. A principle of statutory construction directs that past legislation shall not be repealed by implication. Before such an intention can be imputed to the legislature, clear and manifest language indicating such an objective must appear. *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

But there is no "clear and manifest" language in Public Law 87–595 that serves to indicate an intention to repeal section 27(b) of the Alaska Statehood Act. Indeed, Public Law 87–595 is actually an amendment to two sections of the Interstate Commerce Act (secs. 216(c) and 305(b)), and makes no mention whatsoever of the Alaska Act.

Pursuant to section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844), the FMC has authority to accept filings of port-to-port rates which include incidental pickup and delivery services. Section 2 requires that tariffs to be 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 * * *." Under this provision, the FMC has long accepted tariffs which include pickup and delivery service which water carriers frequently provide and publish in their tariffs.

Thus, in *Bernhard Ulmann Co. Inc.* v. *Porto Rican Express Co.*, 3 F.M.B. 771 (1952), the Commission ordered the filing pursuant to section 2 of the 1933 act of rates, fares, and charges which included motor pickup and delivery service and in some instances, segments of rail transportation surrounding the line-haul ocean movement.[11] In *North Carolina Line—Rates to and From Charleston, S.C.*, 2 U.S.M.C. 83 (1939), *J. G. Boswell Co.* v. *American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95 (1939), and *Increased Rates, Kuskokwim River, Alaska*,

[11] This service was in contrast to the Consolidated-type tariff which established a combination of motor and water line-haul segments of transportation, each segment embracing long distances.

4 F.M.B. 124, 125 (1952); the Commission exercised its jurisdiction over single-factor rates which included pickup and delivery services covering varying distances from portside. Since enactment of Public Law 87–595, on August 27, 1962, the Commission has continued to accept tariffs containing single-factor rates which include pickup and delivery services. *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480, 491 (1963); *Certain Tariff Practices of Sea-Land Service*, 7 F.M.C. 504 (1963).[12]

We may presume that in the enactment of a statute, Congress was aware of prior applicable decisions of the courts or agencies, *Texaco, Inc.* v. *Federal Power Commission*, 317 F. 2d 796 (10th cir. 1963) *cert. denied*, 377 U.S. 922. Therefore, in the enactment of Public Law 87–595, Congress knew of the many FMC decisions under section 2 of the 1933 act whereby single-factor rates including pickup and delivery services such as provided by Sea-Land had been for many years filed with the FMC. We, therefore, conclude that Congress intended to leave the Sea-Land-type operation under the jurisdiction of the FMC, where it has always been, and apply Public Law 87–595 to a bona fide through route and joint rate situation such as that attempted by Consolidated Freightways.

The scheme of regulation which Sea-Land and Alaska Steam advocate in mistaken reliance on Public Law 87–595 is contrary to traditional principles of transportation regulation. If their contentions were correct, then Congress intended that transportation covering over 1,000 miles by water, in connection with an incidental motor portion in a port area, is no longer water transportation insofar as regulation is concerned. In other words, the relatively minute motor pickup and delivery service is the sole determinant in establishing regulatory jurisdiction. This amounts to the tail wagging the dog.

Congress and the courts, as well as regulatory agencies, have long considered incidental transportation service rendered in conjunction with the major line-haul to be part of the overall dominant service, even if the dominant service were provided by a different mode of conveyance. The ICC, for instance, regulated motor carrier pickup transportation as a terminal service rendered in conjunction with rail carriage, even before the Commission had been granted jurisdiction over motor carriers as such. *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 539 (1924). In that case, the ICC said:

> While motor-truck or wagon transfer companies are not common carriers subject to the Act, truck or wagon transfer services performed in connection with terminal services of a common carrier subject to the Act, or with transfer of

[12] We also take official notice of Consolidated Freightways Local and Joint Container Freight Tariff No. 1, FMC–F No. 2.

freight in transit at an intermediate point by such common carriers, are subject to our jurisdiction. Such service is a part of a transportation service by a carrier over which we have jurisdiction. The term terminal service may also include accessorial services in the nature of the collection and delivery of freight commonly referred to as store-door delivery. 91 I.C.C. at 547.

After the passage of the Motor Carrier Act of 1935, which gave the ICC specific jurisdiction over motor carriers, it nevertheless continued to regulate pickup and delivery services as part of the major rail line-haul carriage. *Scott Bros. Inc., Collection and Delivery Service*, 4 M.C.C. 551 (1938); *Pick-up and Delivery in Official Territory*, 218 I.C.C. 441 (1936).

The Transportation Act of 1940 further emphasized the congressional scheme to confer jurisdiction over incidental modes of transportation on the agency regulating the line-haul carriage to which the other mode is ancillary. Thus, section 202(c)(2) of the Interstate Commerce Act added by the 1940 act exempted certain terminal services, including pickup and delivery, from otherwise applicable regulation and directed that these incidental services should be regulated in conjunction with the regulation of the line-haul carrier.[13]

A similar pattern of congressional intent, that incidental motor services are to be regulated as part of the dominant line-haul transportation, appears in the Civil Aeronautics Act of 1938, 52 Stat. 973. Section 1107(j) of that act (49 U.S.C. 303(b)(7a)) amended the Interstate Commerce Act so as to oust the ICC from jurisdiction over motor transportation when incidental to air transportation. The Federal Aviation Act also authorizes air carriers to enter into joint rates with land carriers and defines air transport to include carriage partly by air and partly by some other mode (49 U.S.C. 1483). Pursuant to this legislative scheme and the analysis of incidental transportation segments on which it is based, the ICC has relinquished regulation of subsidiary motor carriage to the Civil Aeronautics Board which now exercises full economic regulation as an incidental service performed in conjunction with line-haul air carriage. See *Golembiewski Common Carrier Application*, 48 M.C.C. 1 (1948).

The fact that the motor segment incidental to the air transportation is itself sizable does not thereby change its incidental nature. In *City of Philadelphia v. Civil Aeronautics Board*, 289 F. 2d 770 (D.C. Cir., 1961), the court ruled that a pickup and delivery service between Philadelphia and Newark Airport, 90 miles away, in connection with a transcontinental air freight service, was air transportation within the

[13] The ICC considered sec. 202(c)(2) to be essentially a codification of its past jurisdictional policy with respect to regulation of incidental terminal operations. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 102 (1954).

meaning of the Federal Aviation Act and, consequently, was to be regulated by the CAB.

It is clear, then, that respondent's contention that its motor pickup and delivery service should cause a change in traditional regulatory jurisdiction is in drastic violation of the entire pattern of regulatory law in this area. Certainly, Congress has not manifested any intention of causing such a radical alteration in regulation by the enactment of Public Law 87–595.

Respondent contends that motor carriers servicing terminal areas may enter into through routes and joint rates with water carriers operating to and from Alaska and that the ICC has recognized that such arrangements fall under Public Law 87–595.[14] Likewise, Sea-Land points out that the ICC accepts for filing tariffs similar to its own.[15] Certainly, a motor carrier in Alaska may enter into a true through route and joint rate arrangement such as contemplated by Public Law 87–595. The cases cited by Sea-Land, especially the *Lindstrom* case, supra, relied upon so heavily, establish this, nothing more. These cases are not even pertinent to this inquiry: whether Sea-Land's port-to-port service with pickup and delivery is a through route and joint rate.

As the Interstate Commerce Commission said in *Lindstrom:*

> There is also the possibility that the port-to-port service of the Alaska State Ferry System, or of applicants [motor common carriers], or both, may be found by the Federal Maritime Commission, which is responsible for administering the Shipping Acts, to be those of a common carrier subject to the Shipping Act, 1916. Although such a finding might result in some duplication of regulation, we do not perceive any conflict arising therefrom. 98 M.C.C. at 653.

We conclude, therefore, that our interpretation of Public Law 87–595 and our decision here is not inconsistent with *Lindstrom.*

The ICC recognizes that through routes and joint rates could be established between motor and water carriers. However, prior to the time Sea-Land changed the nomenclature in its tariff and transmitted the newly styled document to the ICC, that Commission had specifically considered the Sea-Land operation not to be subject to its jurisdiction. Thus, on April 3, 1967, the ICC stated:

> On May 3, 1964, Sea-Land Service inaugurated a water carrier service between Seattle and Anchorage and Kodiak, Alaska, which is not an operation subject to this Commission's jurisdiction. *Sea-Land Freight Service, Inc.—Purchase—Alaska Freight Lines, Inc.*, 104 M.C.C. 28, 31 (1967).

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[14] Citing: *Trucking L.C.L. Freight in Lieu of Rail Service*, 185 I.C.C. 71 (1932); *Lindstrom Extension—Southeast Alaska*, 98 M.C.C. 647 (1965).

[15] According to Sea-Land, the ICC's construction is entitled to great weight, *I.C.C. v. Memphis Union Station Co.*, 360 F. 2d 44 (6th Cir. 1966).

## CONCLUSION

Respondent Sea-Land has not changed the physical elements of its service from the Seattle area to the Anchorage area. Sea-Land has merely changed certain nomenclature in its tariff. Such a change does not divest this Commission of jurisdiction because Sea-Land's service remains one contemplated by the Intercoastal Act, 1933, not a joint service as contemplated by Public Law 87–595. Accordingly, Sea-Land's tariff for this service must be filed with this Commission. An appropriate order accomplishing this will be entered.

## ORDER

This proceeding having been instituted 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 conclusions thereon, which report is hereby referred to and made a part hereof;

*Therefore, it is ordered*, That, pursuant to the Commission's authority under section 18(a) of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, respondent Sea-Land Service shall, within 30 days of the date of this order or November 30, 1967, whichever is sooner, strike from its tariff a publication designated Supplement No. 9 to Freight Tariff No. 116, FMC–No. 5.

*It is further ordered*, That respondent Sea-Land Service, Inc., shall continue to meet the requirements of section 18(a) and the Intercoastal Shipping Act with respect to the service which was found in the report herein to be subject to the jurisdiction of the Federal Maritime Commission.

*It is further ordered*, That the consecutively numbered supplement to the aforesaid tariff, filed by Sea-Land Service as required by our Order of Suspension and Investigation of July 21, 1967, may be removed from said tariff.

By the Commission.

(S) FRANCIS C. HURNEY,
*Assistant Secretary.*

# FEDERAL MARITIME COMMISSION

DOCKET No. 67–6

AMERICAN UNION TRANSPORT, INC.—INCREASED RATES AND CHARGES ON IRON AND STEEL, NEW YORK TO PUERTO RICO

DECIDED OCTOBER 23, 1967

The following rates and charges of American Union Transport, Inc. on iron and steel found just and reasonable:

1. Extra-length charge of $0.65 per foot, per ton, weight or measurement, justified because of difficulty and expense in loading extra-length steel.
2. Late-delivery charge of $5 a ton, weight or measurment, justified because it assures compliance with prearranged delivery time and partially compensates carrier for costs resulting from delay.
3. Rates of $26 a ton, weight or measurement, on piling shells, nested, and $30 a ton, weight or measurement, on iron and steel, N.O.S., fall within zone of reasonableness and no reason appears for requiring change in these rates.
4. Rate $3 above N.O.S. rate ($33 a ton, weight or measurement) on cast iron justified because frailty of commodity subjects it to higher claim potential.

Method of computation of "stevedoring extras" expense as a percentage of stevedoring contract rate on general cargo found not unreasonable.

*Amy Scupi* for respondent.

*Howard L. Cassard* for Raymond International, Inc., and *Paul V. Miller* for Bethlehem Steel Export Corporation, Steamship Service Corporation, interveners.

*Donald J. Brunner* and *Robert P. Watkins* as Hearing Counsel.

## REPORT

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* GEORGE H. HEARN, *Vice Chairman;* ASHTON C. BARRETT, JAMES V. DAY, JAMES F. FANSEEN, *Commissioners.*)

This proceeding was instituted on our own motion on January 20, 1967, to determine the lawfulness of "new rates and charges [of respondent American Union Transport, Inc. (AUT)], on iron and steel products and/or new rules, regulations, and practices affecting such rates and charges, to become effective January 19, 1967." Bethlehem Steel Export Corp., Steamship Service Corp. (Bethlehem), and Raymond International Corp. (Raymond), intervened, but Bethlehem did not participate further in the proceeding. Hearings were held before Examiner C. W. Robinson. Raymond participated in the hearings but thereafter withdrew from the proceeding. On August 8, 1967, the Examiner issued an initial decision. There was no oral argument.

## THE NEW RATES AND CHARGES

*In General*

Respondent has furnished the only regular breakbulk service from the North Atlantic to Puerto Rico since September 1966. Prior to the publication of the rates, rules, and regulations underlying this investigation, respondent's tariff contained 105 commodity rates for and 125 commodity descriptions of iron and steel products. The rates thereon ranged from 96 cents a 100 pounds for bolts to \$2.98 a 100 pounds for piling shells, most of the rates ranging between \$1.25 and \$1.61.

The tariff revision effective January 19, 1967, lumped all iron and steel into two classifications; namely, (1) cast iron, and (2) iron and steel, N.O.S. (Not Otherwise Specified). The rate for the former \$33 a ton, weight (2,000 pounds) or measurement (40 cubic feet), and the rate for the latter was \$30, weight or measurement (W/M).[1] Tied to the rates were two qualifications: first, heavy-lift cargoes were required to be delivered to respondent at a prearranged place and time and, if not, were subject to an extra charge of \$5 a ton, W/M, and second, pieces in excess of 30 feet long were to be charged an additional \$1 a foot per ton, W/M. Just before the hearing, the late-delivery charge was changed to make it applicable to all iron and steel instead of heavy-lift cargo only. In addition, instead of assessing the late-delivery charge where cargo was not loaded on the vessel for which it was booked, demurrage charges were to be assessed against the cargo pending arrival of the next vessel.

Effective in early June, the extra-length charge was reduced from \$1 to 65 cents a foot per ton, W/M, and a rate of \$26.00 a ton, W/M, was published for piling shells, nested, which had previously been included in the category of iron and steel, N.O.S.[2]

[1] Prior to this, iron and steel had moved on a weight basis of 2,240 pounds.

[2] The order of investigation provides that "In the event the matter hereby placed under investigation is changed or amended before this investigation has been concluded, such changed or amended matter will be included in this investigation."

According to respondent's exhibits, its fully distributed costs for handling general cargo in 1966 were $31.88 per payable ton or $28.46 a ton of 2,000 pounds. On this basis, only four iron and steel commodities yielded a profit; these four were rated at $1.61 per 100 pounds, or $36.06 a long ton. The new rate of $30 per short ton ($33.60 per long ton) is a reduction for those four commodities, although one of them is now rated on a measurement basis. The fully distributed costs for general cargo are expected by AUT to increase about 95 cents in 1967, raising the total costs to $32.83. It is anticipated by AUT that under the new rates there will be a loss of $2.83 on cargo shipped on a measurement basis and a profit of 69 cents where freighted on a weight basis.

AUT's tariff modification represents a rate increase on about 90 percent of all items that will continue to move on a weight basis, and the rates on over half of the iron and steel tonnage carried for the periods of record have been increased. Of the iron and steel commodities carried by AUT in the latter half of 1966, only four have stowage factors substantially in excess of 40 cubic feet (one measurement ton) and, of these, only one moved in a volume exceeding 500 tons.

*The Stevedoring Problem*

The contract rate for AUT's New York stevedores is $9.25 per payable ton. On December 8, 1966, AUT's New York stevedores wrote AUT that the rate of $9.25 received for handling steel products, freighted on a weight basis of 2,240 pounds, cost the stevedore $12.82 per ton for stevedoring only, and that expenses for wharfage and other items brought the total gross cost to $16.72 per weight ton.[3] Relief from this situation was requested. This letter was followed by another dated January 3, 1967, informing AUT that the stevedore could no longer continue to handle steel cargoes under the then present procedure as the loss "has been far too exorbitant for us to absorb"; it was agreed, however, to continue the existing rate on steel not over 30 feet in length, with the exception of hollow steel piling.

The contract rate for the stevedore in Puerto Rico is $4.50 per payable ton. A letter from AUT's Puerto Rican stevedores dated December 30, 1966, stated that they were losing $63.24 per hour on hollow steel pipe; they also agreed to handle steel in lengths not over 30 feet at the existing rate, with the exception of hollow steel pipe.

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[3] It is uncertain whether these figures relate to all iron and steel or just certain commodities. It is clear that they refer at least to extra-length steel and piling shells, nested.

## Discussion and Conclusions

No exceptions have been taken with respect to the Examiner's conclusions pertaining to the extra-length charge, the late-delivery charge, and the rate on piling shells, nested. We find these rates and charges to be just and reasonable for the following reasons:

1. *Extra-Length Charge*—The difficulty and expense involved in loading extra-length iron and steel aboard AUT's vessels justify this charge. The size of the hatch openings on AUT's vessels is either 29′ 3″ or 31′ 6″, which makes it difficult and expensive to load extra-length iron and steel. Inasmuch as, as noted above, the New York and the Puerto Rican stevedores served notice on AUT that they would no longer handle steel over 30 feet in length at the then current contract rates, stevedoring contract rates for all extra-length steel will be renegotiated. Respondent has been unable to verify its exact cost for handling extra-length iron and steel. It estimates, however, based upon evidence of the cost to the stevedores of handling extra-length steel and estimates of the revenue which would have been earned if the $0.65 charge had been in effect, that the $0.65 charge will be sufficient to enable AUT to compensate the stevedores for the cost of handling this cargo.

2. *Late-Delivery Charge*—Because steel must be loaded in the bottom of the ship for reasons of stability, failure to have it delivered on time would either hold up loading of other cargo or result in the shutting out of the steel after the other cargo is loaded. Steel comes to the terminal in rail cars and frequently does not arrive at the appointed time—between December 1966 and April 1967, 21 shipments (2,355,728 pounds) were late-delivered and loaded on subsequent ships; there were other late shipments which held up loading. The late-delivery charge is justified as it more nearly assures compliance by the shipper with prearranged delivery time and partially compensates AUT for costs resulting from the delay in delivery and loading. The reasonableness of the charge is further supported because it is not assessed if the ship is not held for cargo, but rather demurrage is assessed against the cargo pending arrival of the next ship.

3. *Piling Shells, Nested*—This commodity has a stowage factor of 90 (ratio of one weight ton to 2.18 measurement tons). For this reason, it is expensive to handle. The New York stevedore estimates loading at the rate of 12.3 long tons an hour. Of the iron and steel commodities handled by AUT in the second half of 1966, only piling shells exceeded 500 tons; furthermore, this commodity was one of only four whose stowage factors exceeded, to any great extent, 40 cubic feet to the ton. During that period, piling shells totaled about 42 percent of all steel

moving via AUT in the trade. Intervener Raymond has been the only shipper of the commodity, but there was no movement between early 1967 and the time of hearing. However, inasmuch as the stevedores are paid as the cargo is freighted, the shift to a W/M basis for this commodity should allow the stevedores to recover expenses should the commodity begin to move again, since they will earn 2.18 times their previous amount. The return to AUT is slightly less than the total of fully-distributed costs but well in excess of its total stevedoring costs on this commodity.[4]

The only ultimate conclusion of the Examiner to which Hearing Counsel except is his finding with respect to the justness and reasonableness of the $30 rate for iron and steel, N.O.S., contending that all iron and steel rates should be $26 per short ton. Hearing Counsel do not except to a $3 differential above these rates for cast iron because of the susceptibility of this commodity to breakage and increased claims.[5]

In support of its $26 figure, Hearing Counsel contend that fully distributed costs, when properly computed, should not exceed $30. AUT's costs, they contend, have been overstated because one of the items of expense, the so-called stevedoring "extras"[6] was improperly computed. AUT had computed this extra charge, which experience had shown to be 36.39 percent of the stevedoring contract in New York, and 99.97 percent of the stevedoring contract rate in San Juan, as a percentage of the stevedore contract rate on general cargo. Hearing Counsel contend that because the contract rate on general cargo is higher than the contract rate on vehicles, which are the highest revenue producers for AUT and account for its greatest tonnage,[7] the use of a percentage of the contract rate on general cargo to compute the extra charges inflates and distorts the dollar amount of extras. They contend that the proper method of determining the figure for extras per payable ton would be to divide the total dollar amount of extras by the

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[4] Hearing Counsel except to the Examiner's quotation from a letter from Raymond's counsel stating that Raymond was "constrained to withdraw from the proceedings, with regret that the applicable law does not lend support to our grounds for intervention", arguing that the letter was not subject to cross-examination and argument to discover the soundness of the basis for its opinion. The letter is a part of this proceeding, but only for the purpose of showing the opinion of its writer It appears that the Examiner's quotation was intended only for this purpose. At any rate, the letter is neither competent evidence nor testimony on the propriety of the rate on piling shells, nested, and no reliance is placed on it herein.

[5] The differential, of course, should establish a rate of $29 rather than $33, insofar as Hearing Counsel are concerned

[6] This item includes overtime, extra labor, detention, penalty time, carpentry and dunnage, lashing and unlashing in New York, and clerks, checkers and watchmen, in addition to the factors just enumerated at San Juan.

[7] Hearing Counsel ask the Commission to take official notice of these facts which are contained in AUT's General Order 11 submission for 1966.

total number of tons carried by AUT. The extras generally must be attributed evenly to all cargo and not only the general cargo, Hearing Counsel maintain, either because they do not relate directly to the commodity involved or there is no way to determine their relationship to the commodity. Although Hearing Counsel contend that a proper calculation of extra expense will reduce the dollar amount of respondent's fully-distributed costs substantially below $30 per ton, they admit that "the exact amount of the reduction cannot be calculated from the record," which lacks the figure for the total dollar amount of extras.[8]

We agree with the Examiner that the $30 rate on iron and steel, N.O.S., is just and reasonable. We cannot say that the method of calculating the "extras" employed by AUT is unreasonable. The computation of extras as a percentage of the stevedoring rate on the commodity under investigation is supported by the record in this proceeding, which indicates that at least some of the extra expense items have a relation to the commodities involved inasmuch as they are functions of productivity and the contract rate paid the stevedore depends upon his productivity.

Most iron and steel commodities transported at the lesser $26 rate contended for by Hearing Counsel would not realize a return above AUT's fully-distributed costs. Revenue on iron and steel stowing 40 cubic feet per ton would fall short of fully-distributed costs by $6.83. Nearly 58 percent of all iron and steel carried during the second half of 1966 was other than piling shells and, with the exception of three commodities, all stowed less than 40 cubic feet to the ton. There are no protests extant to the $30 rate, and no reason appears which would require a $26 rate. Indeed, as noted above, AUT anticipates that under its $30 rate, there will be a loss of $2.83 on cargo shipped on a measurement basis.

We concur with the Examiner and the parties that the rate on cast iron, $3 higher than the rate on iron and steel, N.O.S., is justified by the frailty of this commodity, which subjects it to a higher claim potential.

Hearing Counsel except to the Examiner's statement that, inasmuch as the subject rates and charges had not been suspended, the burden of

[8] A mathematical representation of the methods of computing extras is:

*Hearing Counsel*

$$\frac{\text{Total \$ amount of extras}}{\text{Total number of payable tons}} = \text{extras/per payable ton}$$

*AUT*

$$\frac{\text{Total extras}}{\text{Total straight time}} (\%) \times \text{stevedoring contract rate on general cargo} = \text{extras/per payable ton}$$

proof was upon Hearing Counsel to show that they are unjust or unreasonable rather than upon AUT to show that these rates and charges are just and reasonable. We agree with AUT that this question is not determinative of this proceeding inasmuch as AUT has justified its rates and charges on the basis of sufficient evidence of record.

This proceeding is discontinued.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 66–68

IN THE MATTER OF:

AGREEMENTS NOS. T–1953 AND T–1953–A:

TERMINAL LEASE AGREEMENTS BETWEEN THE CITY OF OAKLAND AND MATSON NAVIGATION COMPANY

INITIAL DECISION ADOPTED OCTOBER 27, 1967

A lease of land from a port for a marine terminal and freight station to a common carrier by water at a fixed term and rent may be approved without the inclusion of review provisions since section 15 of the Shipping Act, 1916, requires continuing agency scrutiny of such agreements.

*J. Kerwin Rooney* for the Port of Oakland.

*David F. Anderson* for Matson Navigation Co.

*Roger Arnebergh, Edward C. Farrell*, and *Walter C. Foster* for city of Los Angeles.

*Donald J. Brunner* and *Roger A. McShea III*, Hearing Counsel.

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman;* GEORGE H. HEARN, *Vice Chairman;* ASHTON C. BARRETT, JAMES V. DAY, JAMES F. FANSEEN, *Commissioners*) :

The Commission instituted this proceeding on December 14, 1966, to determine whether Agreement No. T–1953, a lease of land for use as a terminal from the city of Oakland to Matson Navigation Co., and agreement No. T–1953–A, a lease of land between the same parties for use as a freight station, should be approved pursuant to section 15 of the Shipping Act, 1916. Examiner Herbert K. Greer served an initial decision on July 24, 1967. We heard oral argument on October 11, 1967.

Only Hearing Counsel excepted to the Examiner's initial decision. Hearing Counsel argue that the Examiner erred in recommending approval of the terminal lease agreements without modifying them to incorporate rent review provisions under which the parties would periodically recalculate the amount of rent to assure that this amount would remain at a compensatory level. Hearing Counsel also contend that the Examiner should not have found that the proposed rent was compensatory, since the costs upon which the rent is based are estimated costs rather than costs which will actually be experienced. Hearing Counsel made these same arguments to the Examiner. Upon reviewing these exceptions, we concluded that the Examiner's findings and conclusions on the issues presented are correct. Accordingly, we hereby adopt the Examiner's decision, as amended (a copy of which is attached hereto and made a part hereof), as our own and for reasons set forth in the decision,

*It is ordered*, That agreements Nos. T–1953 and T–1953–A are hereby approved and this proceeding is discontinued.

By the Commission.

THOMAS LISI,
*Secretary*.

# FEDERAL MARITIME COMMISSION

No. 66–68

IN THE MATTER OF:

AGREEMENTS NOS. T–1953 AND T–1953–A:
TERMINAL LEASE AGREEMENTS BETWEEN THE CITY OF OAKLAND AND MATSON NAVIGATION COMPANY

**Agreement No. T–1953, a terminal lease, and Agreement No. T–1953–A, a lease of land for use as a freight station, between the Port of Oakland and Matson Navigation Co. for a period of 20 years at a fixed monthly rental found compensatory and not prejudicial to any particular port or terminal.**

*J. Kerwin Rooney* for the Port of Oakland.

*David F. Anderson* for Matson Navigation Company.

*Roger Arnebergh*, *Edward C. Farrell*, and *Walter C. Foster* for city of Los Angeles.

*Donald J. Brunner* and *Roger A. McShea III*, Hearing Counsel.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER[1]

The city of Oakland, acting by and through its board of port commissioners (hereinafter Oakland or the port) entered into two agreements whereby it leased to Matson Navigation Co. (hereinafter Matson) for a term of 20 years at a fixed rental, a marine terminal upon which the port is to construct a wharf and related facilities, and land for a freight station upon which Matson is to construct the buildings and facilities necessary to its operation. These lease agreements were filed with the Federal Maritime Commission pursuant to section 15 of the Shipping Act, 1916 (the act). Encinal Terminals and the city of Los Angeles protested approval thereof. After considering the protests which in part raised issued already decided by the Commission in its recent reports, the agreements were approved to avoid delay in the construction program then in progress, but this proceeding was instituted for the limited purpose of determining whether the rentals

[1] This decision, as amended, became the decision of the Commission on Oct. 27, 1967.

agreed upon by Oakland and Matson are noncompensatory resulting in prejudice to any particular port or terminal.

Encinal terminals did not participate in this proceeding.

## THE FACTS

1. Oakland, a municipal corporation of the State of California, owns port and terminal facilities as well as land and water areas capable of development for use as terminals and related activities.

2. Oakland and Matson, a carrier subject to the act, entered into negotiations for the lease of a terminal and a freight station. Various arrangements were considered including an arrangement whereby Oakland would construct all facilities necessary for the operation of the terminal and freight station and Maston would pay rental under a maximum-minimum provision. The arrangement ultimately agreed upon was that Oakland would construct the wharf and related terminal facilities and Matson would construct all the facilities necessary for the operation of the freight station. The parties agreed on a fixed monthly rental for a lease term of 20 years.

3. At the time negotiations were completed, 7.7 acres of the total of approximately 42 acres involved was filled land, the balance being submerged land.

4. On May 2, 1966, Oakland and Matson executed and filed with the Commission pursuant to section 15 of the Act a lease and agreement for the marine terminal, designated by the Commission as agreement No. T–1953, and simultaneously executed and filed a lease and agreement for land to be used for the freight station, designated by the Commission as agreement No. T–1953–A.

5. Agreement No. T–1953 grants to Matson a leasehold interest for a term of 20 years in 30.858 acres of wharf area and 2.324 acres of berth area to be used for docking and mooring vessels and for the receipt, handling, storage, delivery, and transportation of cargo and passengers and uses incidental thereto. Oakland is to bear the cost of constructing the wharf and related structures and the cost of filling the submerged land. Agreement No. T–1953–A grants to Matson a leasehold interest for a term of 20 years in 11.223 acres of land upon which Matson is to construct all facilities necessary for the operation of the freight station at a cost estimated to be $3,750,000. Oakland agrees to bear the cost of filling the submerged land involved in both leases and to bring utility lines and roads to the boundary of the tracts, the work mainly consisting of a short extension of a sewerline.

6. Agreement No. T–1953 provides for payment to Oakland of a monthly rental of $26,000 which is computed as one-twelfth of the sum of the following items:

(1) 7 percent of the value at $60,000 per acre of an area of 6.33 acres of filled land; the amount agreed to be $26,586.

(2) 7 percent of the value at 25 cents per square foot of an area of 1,068,400 square feet of submerged land; the amount agreed to be $18,697.

(3) 7 percent of the value at 25 cents per square foot of 101,250 square feet of berthing area; the amount agreed to be $1,772.

(4) $2,160, the agreed amount for maintenance dredging.

(5) 7 percent of the cost of improvements which are described in paragraph 6(a)I of the agreement as:

*Land development*

Fill all land area so that the average elevation at the top of the fill will be at least plus ten (10) feet above Mean Lower Low Water when the predicted fill settlement for the first twenty-five (25), years has occurred

plus annual charges for overhead at 0.5 percent of the cost of such improvements; the amount agreed to be $72,355.

(6) 7 percent of the cost of improvements which are described in paragraph 6(a)II of the agreement as:

*Wharf, Related Structures and Other Development*

A. Construct a concrete wharf one thousand two hundred eighty-two (1,282) feet long.

B. Structures for mooring lines at each end of the wharf.

C. Fender system suitable for Matson ships in service or under construction at the date of the execution of this lease and agreement.

D. Crane rails.

E. Mooring bitts and cleats.

F. Utility and other lines described in paragraph 5 as: Install sewerage, gas, water, telephone, electrical lines, and street and rail lines to a point on the boundary of the premises.

G. Dredging described in paragraph 12 as: Maintain berthing space alongside the wharf to a depth of 53 feet Mean Lower Low Water.

plus annual charges for overhead at 0.5 percent of such cost, for maintenance at 0.5 percent of such cost, and for depreciation at 2 percent of such cost; the amount agreed to be $157,430.

(7) An agreed amount of $33,000 representing a contingency to cover increased financing of the port.

Matson has an option to renew the lease for two 10-year periods, and in event the option is exercised the rental is to be:

(1) Seven percent of the appraised fair market value of the land and berthing space demised, and

(2) Seven and one-half percent of the original cost of the wharf and related improvements constructed by Oakland under paragraph 6(a) of the lease plus annual charges for depreciation, maintenance, maintenance dredging, and insurance.

7. Agreement No. T-1953-A grants to Matson a leasehold interest for a term of 20 years in 11.223 acres of land to be used by Matson for the receipt, handling, storage, delivery, and transportation of cargo and passengers and for uses incidental thereto. Matson agrees to pay Oakland a monthly rental of $3,333.33 which is computed as one-twelfth of the sum of the following items:

(1) Seven percent of the value at $60,000 per acre of an area of 59,500 square feet of filled land; the amount agreed to be $5,740.

(2) Seven percent of the value at 25 cents per square foot of an area of 429,370 square feet of submerged land; the amount agreed to be $7,514.

(3) Seven percent of the cost of improvements (fill) plus annual charges for overhead at 0.5 percent of such cost; the amount agreed to be $26,746.

Matson has the option to renew the lease for two 10-year periods at a rental based on seven percent of the then appraised market value of the land.

8. Both leases are to become effective upon approval by the Commission; however, rental is not payable until January 1, 1969, which is the date the 20-year terms commence. Should Matson use any portion of the premises before that date and proceed to install Matson improvements, an interim rent of $0.007 per square foot of the area used is to be paid.

9. To finance the improvements to the leased land for which Oakland is responsible, and for other improvements planned by Oakland but not concerned in these leases, revenue bonds in the total sum of $6 million were authorized by the port authorities. Of the total received from the sale of the bonds, approximately $3 million will be used for improvements and facilities involved in the Matson leases. The official statement issued by Oakland preliminary to the sale of the bonds contained the information that leases had been executed with Matson which assured the port a fixed return, which information contributed to the salability of the bonds.

10. Upon termination of the lease Oakland retains title to all improvements and facilities provided at its expense, and to improvements and facilities provided at Matson's expense if Matson does not remove them within 6 months after termination.

11. Oakland's appraisal of the land represents the fair value thereof as of the time the agreements were executed.

12. A substantial portion of the fill on submerged land has been completed at a cost below Oakland's estimate.

13. The estimate for the cost of constructing the wharf and related facilities was $1,442,250. The low bid received for performance of the construction was $1,750,612.

14. The relationship between Oakland and Matson is that of landlord and tenant; Oakland will have no operational responsibility relating to the premises leased.

## DISCUSSION

The issue is whether the leases are noncompensatory resulting in prejudice to any particular port or terminal. The term "compensatory" is given the connotation of fair and reasonable return on investment in accordance with that portion of the so-called Freas formula adopted by the Commission in *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948), and in other proceedings involving terminal rentals.

Los Angeles contends that the record is insufficient for a determination of whether the rental is compensatory. It seeks disapproval of the method used by Oakland in establishing a rent base, contending that the land should be appraised at its market value after fill has been completed rather than considering the value of submerged land plus the cost of the fill. Los Angeles further contends that the rental should include a factor for general and administrative port expense but that provision is made only for the expense of administering the leases.

Hearing Counsel consider the agreements as only theoretically compensatory because based on Oakland's estimates of its costs for improvements which may not be representative of actual costs. They advocate that actual costs determined after completion of improvements should be used. They also contend that the land should be appraised after fill is completed, such appraisal to be compared to Oakland's original appraisal plus the cost of fill, the greater being determinative. They deem it contrary to the public interest to give estimates the stature of established costs and recommend a requirement for review when fill and other improvements have been completed and a modification of the rent if actual costs exceed estimated costs. They join Los Angeles in recommending that approval be conditioned upon the inclusion in the leases of a provision for a periodic review of the rent during the lease term and modification of the rent based on the value of the land and improvements at the time of such review.

### *Estimates and actual costs*

Hearing Counsel's concern is that a determination of the compensatory nature of the lease on this record would establish a precedent that estimated costs have the stature of actual costs; that such a precedent would precipitate action by all ports competing for carrier patronage to lease terminals at rents based on estimates thus causing instability to the detriment of commerce. This would be a real concern if estimates were accepted without proof of a reasonable relationship to actual costs. The record in this proceeding supports the conclusion that the estimates were realistic.

The port engineer calculated the total cost of the wharf for the purpose of establishing a rent base at $1,442,250. Bids were solicited for this work and received on March 6, 1967. The low bid was $1,750,612, an increase over the estimate of approximately $308,362. Had actual cost been used as the rent base, the rental would have been approximately $2,100 per year more than provided for in the lease. As hereinafter discussed, the port officials were aware that such a situation might arise and included in the rent a contingency factor. As to the cost of the fill, testimony was adduced at the hearing that a substantial portion of the fill had been completed at less than estimated cost; and that the port engineer, experienced in such land improvement, was confident that the cost of the balance of the fill would be within his estimate.

This proceeding is not, as Los Angeles suggests and Hearing Counsel imply, premature. The significant portion of the rent base is land values, the cost of the fill, and the cost of wharf construction. The record provides sufficient evidence relating to all three of these major factors upon which to base a determination of whether the rental is noncompensatory.

*The basis for establishing land values*

Oakland's computation to establish a rent base includes valuation of the land in two categories: (1) $60,000 per acre for filled land and (2) $10,900 (approximately) per acre for submerged land plus the cost of the fill. Los Angeles contends that the proper land valuation should be $60,000 per acre for the entire tract for the reason that when Matson takes possession, all of the land will have equal value. In support of this concept, it cites the so-called Freas formula and its reference to "present market value." This does not support the argument that future values should be use, that is, values after the negotiations have been consummated. The circumstances existing at the time of the negotiations must be considered. The port owned unimproved land which was not producing a return. An expenditure of large sums was necessary to place the land in revenue producing condition. They deemed it beneficial to contract for an assured income from the land prior to spending the public's money for land improvement. To obtain this assured income, it was necessary to establish a fixed rental. Matson, agreeing to invest $3,750,000 in improvements on port property reasonably required a fixed rental so that it might determine the economic feasibility of its investment.

Los Angeles is protesting Oakland's factual computations. While Oakland's method of computing the value of the land is material to this investigation, the issue is whether the ultimate result of the computations provides for a fair return on the port's investment. As the Commission held in *Agreement T-4; Terminal Lease Agreement, Long Beach, California*, 8 F.M.C. 521, 532 (1965):

> While we believe that factual computations of the amount of rental in a terminal lease are material to the question of whether the agreement is approvable, a determination that the lease of one facility does not return as much as it might do ideally is not in itself determinative.

Further:

> The primary conclusion to be drawn here is that Sea-Land (the lessee) was able to negotiate a favorable rental, and that Oakland and Long Beach in their own judgment voluntarily entered into these arrangements. * * * Since the port as a public body experienced in terminal management was satisfied with the arrangement, the Commission would not dispute the judgment of the port in negotiating with prudent regard for the public's investment.

There is no inflexible rule applicable to establishing land values for the purpose of computing rental for future occupancy. It is a matter addressed to the judgment of the Oakland officials and is to be considered in the light of the circumstances existing. This proceeding is to be distinguished from a rate case; however, the principle announced by the Commission in *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57, 70 (1948), is applicable:

> It is realized that some basis must be used in computing carrying charges and respondents are not foreclosed from using any basis which they are prepared to justify as producing reasonable rates called for by their agreement.

Oakland's justification is that the rental will produce a 7 percent return on its investment in land. "Investment" is a term of varied meanings but it was not unreasonable for Oakland to consider its investment as the value of the land plus the cost of putting it in a productive condition. Whether they might have obtained a higher rental by using another method is speculative. It is noted that even had they employed the method advocated by Los Angeles and added $400,000 to the rent base established for the leases, the present rental would return 6½ percent, not a noncompensatory return. Also to be considered is the fact that the terminal lease includes a charge for depreciation but that the rental remains constant regardless of the depreciated value of the wharf and related structures.

The method of land valuation employed by the port was a reasonable exercise of good business judgment.

*Port overhead allocated to the leases*

Both leases include a charge of 0.5 percent of the cost of improvements for overhead. Los Angeles contends that this percentage does not include an allocation for indirect and general port costs and that other users of port facilities will be required to bear such costs. Oakland contends that it applies this percentage to all leases as to which it acts only as landlord and that the charge does include a contribution to general and administrative costs of the port.

The record does not clearly establish either contention. It does establish that the 0.5 percent covers the cost of servicing and billing a lease and provides for amortizing the cost of negotiating a lease. It is further established that Oakland has found this percentage fair and reasonable when applied to all landlord-tenant arrangements wherein the port acts solely as landlord. To conclude that the provision for overhead in these leases does not include a fair allocation of general and administrative expense would be to conclude that many other port leases fail to make adequate contribution, thus unfairly burdening operational activities in which the port is involved. Although a fair contribution to general and administrative expense should be included in the rentals, this issue has been over-stressed. A 0.5 percent of the cost of improvements involved in these leases is not an insubstantial amount. The record shows that the cost of servicing and billing the leases will be minor. In any event, the amount involved would not render these leases noncompensatory, that being the major issue to be determined. Also, consideration is to be given to the provision for contingencies included in the rental.

*The rental includes $33,000 per annum for contingencies*

Matson agreed to invest not less than $3,750,000 on Oakland property and negotiated for a fixed rental. As the negotiations were described by the port engineer:

> Matson requested a firm offer rather than a proposal which was contingent on costs, actual costs. The Port requested in turn that the Port was going to take the risk of the play of the marketplace, if you will; that we would have to have an additional rental to cover the contingencies for this risk, and we determined that an amount of $33,000 of additional rental per year would be an adequate contingency to cover any possible increased cost to the Port.

The record furnishes no basis for even speculation that Oakland's costs will be so far above estimates that the contingency amount will not serve to maintain a fair return on the port's investment. As above discussed, the major elements of port expense have been shown to be within reasonable range of the estimates. The contingency applies only to the terminal lease but Oakland has no obligation to improve the land to be used as a freight station other than to fill it, the cost of which has been determined to be within estimates. The $33,000 per annum is over and above the 7 percent return applied to land values, the cost of land development, the cost of the wharf and related facilities. It is in addition to the amounts provided for maintenance dredging, for general maintenance, for overhead, and for depreciation. It is payable regardless of whether or not costs actually increase. It is sufficient to cover any proven or forseeable increase in port costs and to contribute to the Port's general and administrative expense.

*Provision for periodic review and modification of rental*

Hearing Counsel and Los Angeles advocate that approval be conditioned upon modification of the leases to include a provision for periodic review and adjustment of the rental in accordance with the then value of land and improvements. Such a provision would not be objectionable had the parties included it in their agreements but mandatory review would require expenditures relating to appraisals and negotiations whether or not changed circumstances justified re-examination of the rental. Any section 15 agreement is subject to review if changed circumstances so require. Section 15 of the act provides in pertinent part:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, * * * or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest * * *.
>
> 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; * * *.

A provision for periodic review is not required.

## ULTIMATE CONCLUSIONS

The port's investment was properly calculated for the purpose of fixing the rental as the value of the submerged land and the value of the filled land at the time the lease agreements were entered into plus the estimated cost of all improvements to be made by the port.

The values used for the land, and the estimated cost of improvements, are found to have been reasonably accurate.

The rental agreed upon will provide a 7 percent return on the port's investment, which return is fair and reasonable.

The contingency allowance of $33,000 per annum included in the rental is sufficient to cover any foreseeable costs not included in the rental computation.

There is no evidence to support a finding that any particular port or terminal will be prejudiced as a result of the reserved rental.

"Continued approval should be and hereby is granted Agreements No. T–1953 and No. T–1953–A."

(Signed) HERBERT K. GREER,
*Presiding Examiner.*

JULY 24, 1967.

# FEDERAL MARITIME COMMISSION

Docket No. 1083[1]

## Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade

*Decided November 2, 1967*

Investigation of rate war in the inbound Hong Kong-United States Atlantic and Gulf trade to determine whether the rates were so unreasonably low as to be detrimental to the commerce of the United States under the criteria of section 18(b)(5) of the Shipping Act will be discontinued on the ground of mootness where more than 5 years have elapsed since the questioned rates were in effect and where relatively stable conditions have returned to the trade.

A tariff rule which by its own terms restricts the availability of a valuable service to shippers and consignees of Chinese descent is unjust or unreasonable in violation of the second paragraph of section 17 of the Shipping Act.

A group of carriers which did not operate in the Hong Kong-United States Atlantic and Gulf Trade and which had been named as respondents solely on account of the existence of a joint interconference agreement with the New York Freight Bureau (Hong Kong) will be dismissed as respondents where the record contains no evidence of any actual participation in the matters under investigation.

Where violations of section 18(b)(3) of the Shipping Act are found to have occurred the fact that the offenses were isolated incidents or inadvertent are pleas in mitigation and not a legal basis for dismissal of the charge.

Record establishes that Thai Lines, Ltd., engaged in the granting of illegal rebates in violation of sections 16 Second and 18(b)(3) of the Shipping Act.

*Thomas K. Roche*, *Sanford C. Miller*, and *William F. Faison* for respondents De La Rama Lines, Barber-Wilhelmsen Line, Kawasaki Kisen Kaisha, Ltd., Nippon Yusen Kaisha, Ltd., Yamashita-Shinnihon Line (Yamashita-Shinnihon Steamship Co., Ltd.), and A. P. Moller-Maersk Line.

[1] Docket No. 1122, a complaint proceeding instituted by American Export Lines, Inc., against Thai Lines, Ltd., and 90 special docket applications (Nos. 269–281, 283–289, 291–311, and 314–363) requesting that Thai Lines, Ltd., be authorized to pay reparations for certain overcharges and to waive the collection of certain undercharges, were consolidated with this investigation. Docket No. 1122 was subsequently dismissed by order of the Commission dated May 15, 1964, and the special docket applications were denied by Commission report and order served November 12, 1965.

*Seymour H. Kligler, Elkan Turk, Jr., Thomas A. Liese* and *Herman Goldman* for respondents Japan Line, Ltd. (formerly Daido Kaiun Kaisha, Ltd.); Lykes Bros. Steamship Co., Inc.; Maritime Co. of the Philippines, Inc.; Mitsui O.S.K. Lines Ltd. (formerly Mitsui Steamship Co., Ltd. (Mitsui Line), and Osaka Shosen Kaisha, Ltd.); States Marine Lines-Joint Service; United Philippine Lines, Inc.; and United States Lines Co. (American Pioneer Line).

*Warner W. Gardner* and *Robert T. Basseches* for respondents American President Lines, Ltd., and Waterman Steamship Corp.

*Stanley O. Sher, John G. Poles,* and *Michael Patestides* for respondent Marchessini Lines.

*Charles F. Warren* and *John P. Meade* for respondents American Mail Line, Ltd.; Java Pacific & Hoegh Lines, Klaveness Lines—Joint Service; Knutsen Line—Joint Service; National Development Co.; Nissan Kisen Kaisha, Ltd.; P. & O.-Orient Lines—Joint Service, Pacific Far East Line, Inc.; and States Steamship Co.

*Richard W. Kurrus, James N. Jacobi,* and *Donald L. Caldera* for respondent American Export Isbrandtsen Lines, Inc.

*George G. Platow* and *Edward F. Platow* for respondent China Union Lines, Ltd.

*Burton H. White, Elliott B. Nixon,* and *Henry F. Minnerop* for respondent Orient Overseas Line.

*Edwin Longcope, David I. Gilchrist,* and *Robert W. Mullen* for respondent Zim Israel Navigation Co., Ltd.

*Alan F. Wohlstetter* for respondent Thai Lines, Ltd., and Motorships, Inc.

*Leon Silverman, Max Kampleman,* and *Keith David, pro se,* for respondent Sabre Line.

*George A. Michel* and *Robert J. Lawton* for respondent Eddie Steamship Company, Ltd.

*Donald J. Brunner, Richard S. Harsh,* and *Robert J. Blackwell,* Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This investigation was instituted by order of the Commission served on December 10, 1962. The original purpose of the proceeding was to determine whether the Commission should disapprove any rate in the trade from Hong Kong to United States Atlantic and Gulf ports as being so low as to be detrimental to the commerce of the United States under the authority of section 18(b)(5) of the Shipping Act, 1916. The scope of the investigation was subsequently expanded by order served June 20, 1963, to include a *determination* of whether any respondents had violated sections 14, 16, 17, or 18(b)(3) of the act. Hearings were held before John Marshall, presiding examiner, in January 1963, April, May, June, and July 1964, and November 1966.[2] The examiner's initial decision was served on April 20, 1967. Oral argument on the parties' exceptions was held on August 2, 1967.

## FACTS

Prior to 1962, the inbound trade between Hong Kong and United States ports on the Atlantic and Gulf coasts was served by the members of the New York Freight Bureau (Hong Kong) and a single, nonconference carrier, Isbrandtsen Steamship Co.[3] Between 1955 and 1962, the rates in this trade were relatively stable. During this same period, however, the volume of cargo increased by 900 percent.

During 1962, four commodities constituted more than 70 percent of the cargo lifted at Hong Kong. These were: artificial flowers, footwear, toys, and cotton goods (generally classified for tariff purposes as either piece goods or manufactured goods). Most of the cargo in this trade was discharged at New York.

The conference employed an approved dual-rate system and the contract rate on the four commodities under consideration was generally about 15 percent below the noncontract rate. Isbrandtsen's rates were about 13 percent below the conference contract rates.

Late in 1961, Sabre Line entered the trade as an independent carrier and instituted rates which, with the exception of footwear, were equal to or less than Isbrandtsen. Soon thereafter, Zim Israel entered the trade and published rates on artificial flowers, toys, and footwear which were slightly below Sabre's. On January 15, 1962, Isbrandtsen lowered its rates on footwear and a month later on cotton goods.

In March 1962, Orient Overseas Line became the fourth independent line in the trade. It set its rates at about the same level as the other independents.

Successive rate decreases followed both by the independents and by the conference.

During the summer of 1962, three additional independent lines entered the trade. They were Eddie Steamship Co., Ltd., China Union Lines, Ltd., and Thai Lines, Ltd. Waterman Steamship Co. resigned

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[2] Conclusion of the hearings was delayed until November of 1966 pending court enforcement of certain subpenas duces tecum. *F.M.C.* v. *Caragher*, 364 F. 2d 709 (2d Cir. 1966).

[3] Isbrandtsen subsequently became a division of American Export Lines, Inc., which has since been renamed American Export Isbrandtsen Lines, Inc.

from the conference and began operations as an independent. (Later it rejoined the conference and several months thereafter withdrew entirely from the trade.)

Rates continued to be lowered successively by both the independent lines and the conference.

The following table shows these reductions for the year 1962 and some of the increases in rates since.

*Rate reductions in Hong Kong-United States Atlantic and Gulf trade*

| 1962 | Artificial flowers | | Cotton manufactured goods | | Cotton piece goods | | Footwear | | Toys | |
|---|---|---|---|---|---|---|---|---|---|---|
| | NYFB[1] | Independent[2] | NYFB | Independent | NYFB | Independent | NYFB | Independent | NYFB | Independent |
| January | 32.25 | 27.75 | 45.75 | 38.00 | 40.50 | 28.00 | 39.50 | 32.00 | 35.00 | 31.50 |
| February | 32.25 | 27.75 | 45.75 | 38.00 | 40.50 | 22.00 | 39.50 | 32.00 | 35.00 | 31.50 |
| March | 30.00 | 27.50 | 45.75 | 38.00 | 40.50 | 21.50 | 35.50 | 32.00 | 32.00 | 30.00 |
| April | 30.00 | 24.00 | 45.75 | 38.00 | 40.50 | 21.50 | 35.50 | 31.00 | 32.00 | 28.00 |
| May | 30.00 | 24.00 | 45.75 | 38.00 | 40.50 | 21.50 | 35.50 | 31.00 | 32.00 | 28.00 |
| June | 30.00 | 24.00 | 45.75 | 38.00 | 40.50 | 21.50 | 35.50 | 31.00 | 32.00 | 28.00 |
| July | 30.00 | 24.00 | 45.75 | 38.00 | 40.50 | 21.50 | 35.50 | 31.00 | 32.00 | 27.50 |
| August | 24.00 | 23.50 | 37.00 | 36.00 | 40.50 | 21.50 | 27.00 | 27.00 | 28.00 | 27.50 |
| September | 24.00 | 22.00 | 37.00 | 30.00 | 40.50 | 20.00 | 27.00 | 27.00 | 28.00 | 24.00 |
| October | 24.00 | 22.00 | 37.00 | 30.00 | 40.50 | 20.00 | 27.00 | 24.00 | 28.00 | 23.50 |
| November | 18.00 | 16.50 | 25.00 | 22.50 | 40.50 | 20.00 | 20.00 | 18.00 | 20.00 | 18.00 |
| December | 18.00 | 16.50 | 25.00 | 22.50 | 18.00 | 18.00 | 20.00 | 18.00 | 20.00 | 18.00 |
| January 1963 | 18.00 | 18.00 | 25.00 | 22.50 | 18.00 | 18.00 | 20.00 | 18.00 | 20.00 | 18.00 |
| January 1964 | 21.00 | 21.00 | 32.00 | 30.00 | 28.00 | 22.00 | 24.00 | 20.00 | 24.00 | 23.00 |
| January 1967 | 29.50 | 24.00 | 41.50 | 34.00 | 36.00 | 26.00 | 32.00 | 26.00 | 31.50 | 26.00 |

[1] New York Freight Bureau (Hong Kong).
[2] Independent Lines (lowest nonconference rate shown).

The conference generally attempted to maintain its rate levels through 1962, but as more and more of the cargo carried was lost to the independent lines—especially to Sabre (which at one point carried as much as 15 percent of the total cargo lifted)—it decided to reduce its rates drastically to meet competition.

In the minutes of a meeting of the conference held at Kyoto, Japan, November 1, 1962, the following is recorded:

> Having regard to the conditions of instability brought into the trade by the methods adopted by nonconference lines, and having regard to the obligation of the conference towards contract shippers, it was agreed that the conference rates on the more important commodities moving in the trade should be reduced to the levels quoted by the nonconference lines, due account being taken of the rebates being paid by such carriers.

Following this meeting the conference reduced its rates to a level several dollars below Sabre's rates and approaching the lowest of the published independent rates. Sabre immediately filed a telegraphic protest with the Commission alleging that the rates had become unreasonably low and detrimental to the commerce of the United States. This proceeding was initiated soon thereafter.

By the end of 1962, Sabre left the trade and by the middle of 1963, Eddie and Thai Lines did likewise. In the case of Eddie, it appears that it was motivated as much by an increase in the tramp market as by the reduction in rates in this trade.

Beginning in April 1963, the conference increased its rate on cotton piece goods from $18 to $25 and on January 1, 1964, there was a general increase on all of the commodities involved averaging approximately 21 percent. The remaining four nonconference lines followed suit and raised their respective rates shortly thereafter. By January 1967, the rates—both conference and nonconference—had increased substantially though in no instance to the levels they were in January 1962.

## Issues Presented

The primary issue in this case is the status of rates prevailing in 1962–63 under section 18(b)(5) or whether this issue has become moot.

Other issues include: whether a group of carriers whose only connection with the trade in question is through an interconference agreement should be dismissed as respondents, the legality of a tariff rule which provides for a valuable service exclusively to shippers and consignees of Chinese descent, and whether pleas of inadvertence or isolated incident are valid defenses to violations of section 18(b)(3).

## Discussion

In his initial decision, presiding Examiner John Marshall concluded that all of the respondent carriers except Sabre, charged rates which were so unreasonably low as to be detrimental to the commerce of the United States in violation of section 18(b)(5) of the Shipping Act, 1916.

He found that all respondent carriers in the trade have tariff provisions relating to "Chinese merchandise" or "Chinese provisions" which provide rates that are unjustly discriminatory to shippers not of Chinese descent and which grant an undue and unreasonable preference and advantage to particular persons and descriptions of traffic.

The examiner found Thai Lines, Ltd., to have granted rebates in violation of sections 16, 17, and 18(b)(3). The examiner also concluded that Thai Lines, Ltd., China Union Lines, Isbrandtsen Steamship Co. and Eddie Steamship Co. had charged and collected rates other than those lawfully on file with the Commission in violation of section 18(b)(3) of the act.

As remedial action, the examiner recommended the deletion of the offending language contained in the tariffs which would grant a preference to shippers and consignees of Chinese descent and directed the collection of undercharges by those found to have violated section 18(b)(3).

This case was the first to be brought under section 18(b)(5) of the act as amended in 1961.[4] It has continued now nearly five years, long since the cessation of the rate war in the Hong Kong-United States Atlantic and Gulf trade. The rate war, which was the occasion of this investigation in the first place, was over almost before this proceeding got underway. The facts of record, the costs, and competitive pressures all pertain to this formerly chaotic situation. The trade has long since regained an element of stability. Because of the protracted delay due in large measure to the necessity for subpena enforcement proceedings in the courts, we conclude that the investigation should be discontinued on the ground that it has become moot.[5]

This is not to say that in an appropriate case the Commission could not consider an 18(b)(5) case simply because the carrier or conference involved chose to increase (or decrease) its rates at the 11th hour. However, some useful purpose must be served before the Commission will undertake to examine a carrier's now-defunct rate structure. Similarly, the Commission will not consider out-dated economic evidence upon which the findings of unreasonableness and detriment to commerce must be based. However, being mindful of the futility in acting with dispatch to regulate the rates under investigation here, it is incumbent upon us to attempt to establish guidelines and procedures for handling such proceedings with dispatch in the future.

In two previous investigations, we have embarked upon a program to establish criteria for findings under section 18(b)(5). In *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180 (1965), we decided that:

> When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable. All facts pertaining to the reasonableness of the rates are uniquely in the possession of the carriers. Unless so interpreted, section 18(b)(5) becomes a nullity and we will not impute to the Congress the enactment of a meaningless statute. The mere existence of a disparity does not necessarily mean that the higher rate is "detrimental to the commerce of the United States." The Commission would still have the burden of proving that the rate has had a detrimental effect on commerce; e.g., that tonnage is handicapped in moving because

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[4] Public Law 87–346, act of Oct. 3, 1961, 75 Stat. 762.

[5] See, for example, the case of *Cargo to Adriatic, Black Sea and Levant Ports*, 2 U.S.M.C. 342 (1940), which the Commission dismissed for mootness after the offending low rates had been discontinued.

the rate is too high. The carrier would be required to justify the level of the rate by showing that the attendant transportation circumstances require that the rate be set at the level. Subjects of justification may include myriad rate-making factors which might differ between the inbound and outbound rates. These include competition, volume of movement, stowage, stevedoring costs, and others. 9 F.M.C. at 191–192.

In *Outbound Rates Affecting Export High Pressure Boilers*, 9 F.M.C. 441 (1966), we formulated similar reasoning with respect to another section 18(b) (5) situation.

Following these decisions, we will attempt to establish criteria for findings under section 18(b) (5) where one carrier or conference is alleging that the rates of another carrier or conference are so unreasonably low as to be detrimental to the commerce of the United States. The first principle which we will follow is that a rate which fails to meet out-of-pocket costs of the carrier quoting the rate is unreasonably low. By out-of-pocket costs, we mean cost of handling the cargo into and out of the vessel plus any directly assignable costs such as brokerage, etc. The problem is how a complaining carrier would establish the out-of-pocket costs of his competitor. A complaining carrier most certainly can demonstrate its own out-of-pocket costs incurred in carrying a particular commodity. We believe that such a showing establishes a presumption of the prevailing out-of-pocket costs on a particular commodity in a particular trade. It would then be incumbent upon the carrier whose rate has been challenged to rebut the presumption created by showing that his actual out-of-pocket costs and other rate factors vary materially from those developed by the complaining carrier.

This approach takes care of one aspect of such a proceeding. A complaining carrier in order to make out a case under section 18(b) (5) must also establish a prima facie showing of detriment to commerce. If the complaining carrier can demonstrate an adverse economic impact upon itself, the carrier has made out a prima facie case of detriment to commerce. Again, such proof would be subject to rebuttal by the carrier whose rates have been complained of.

In summary, a carrier may, by proving its own out-of-pocket costs, establish a rebuttable presumption of the out-of-pocket costs prevailing generally in the trade. Secondly, a carrier may show detriment to commerce by proof of some measurable adverse economic impact itself. In establishing these standards, we hopefully have avoided the pitfalls of protracted litigation which were demonstrated in this proceeding. This procedure should also place the burdens of proving facts upon those persons most capable and most readily able to prove such facts.

## Chinese Merchandise

The examiner concluded that the respondent carriers—both conference and nonconference—have tariff provisions concerning Chinese merchandise or Chinese provisions which provide "rates which are unjustly discriminatory to shippers not of Chinese descent and which grant undue and unreasonable preference and advantage to particular persons and descriptions of traffic, in violation of sections 16 First and 17 of the Act."

While it is possible that these tariff provisions could be construed in such a way as to permit the giving of a more favorable rate to shippers and consignees of Chinese descent, we find nothing in the record that such a construction was in fact made.

Although we do not hold that actual episodes of discrimination must be shown in all instances in order to find a violation of sections 16 and 17, it seems to us that where a tariff provision is only potentially capable of resulting in discrimination and where not even an allegation of actual resulting discrimination has been made, let alone any evidence of such discrimination presented, the role of the Commission should be remedial and not punitive.

The tariff rule referring to "Chinese merchandise" used by the New York Freight Bureau (Hong Kong) in 1962 provided as follows:

C3 Chinese Merchandise

(1) Chinese merchandise comprises all commodities essentially used by Chinese which are below ad valorem valuation and which are not specified in the tariff.

(2) On shipments of Chinese merchandise where a freight forwarding service is performed by a Chinese shipper for a Chinese consignee and the carrier is so advised by the shipper, the following fees will be applicable and will be shown on thhe carrier's bill of lading as a separate item:

> Payment of freight and freight forwarding fee will be collected by the carrier in accordance with tariff note B1(2). Payment of freight forwarding fee will be paid to the shipper in local currency at official rate of exchange in effect on date of shipment:
>
> On rates assessed on a tonnage basis—$2 per revenue ton.
>
> On rates assessed on a 100-pound basis on silk piecegoods and spun silk yarn, silk pongee, raw silk—10 cents per 100 pounds.
>
> On lumber and logs—$2 per 1,000 board feet.
>
> On rubber—$2 per 50 cubic feet.
>
> No such fees will be applicable on charges assessed on an ad valorem basis, or on rates assessed on a per package basis, or on minimum bill of lading charges.

Other respondent carriers had substantially similar provisions or rules in their respective tariffs with the exception of China Union Lines, Ltd., which never had such a rule.



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While we find that this rule does not lend itself to discrimination in rates, nevertheless, it is objectionable on the ground that it permits the performance of a special service to shippers and consignees of Chinese descent where such services are not available to non-Chinese shippers and consignees.

There is nothing wrong with a carrier accommodating its shippers and consignees by agreeing to perform extra services for them. A difficulty arises only when these services are not uniformly available to all shippers on an equal basis.

In the instant case the conferences and most of the independent carriers agreed to collect forwarding fees from the consignees for the account of the shipper who, according to time-honored custom among the Chinese, was generally a compradore. This compradore system, according to the somewhat scanty testimony, is used almost exclusively by persons of Chinese descent. Thus, it is not surprising that the rules in the respective tariffs of the parties governing the collection of these fees were written in such a way that the service is available only to Chinese shippers performing a freight forwarding service on behalf of a Chinese consignee. Nevertheless, any privilege, a facility or service which is available only to certain persons based solely upon their race, nationality or ethnic origin constitutes an unjust and unreasonable practice which is forbidden by section 17 of the act. Where such a practice is codified into a rule the existence of the rule itself constitutes the violation. There is no need to show any actual discriminations under it.

Section 17 of the Shipping Act provides in pertinent part that:

> * * * Every 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.

Several respondents argue that there must be a showing of an actual discrimination to support a finding of violation of section 17. The plain language of the second paragraph of section 17 dictates a contrary conclusion. This paragraph of the act is directed at unjust or unreasonable regulations as well as improper practices.

There is no substantial evidence of record to support any finding other than that the terms "Chinese merchandise" or "Chinese provisions" refer to a commodity grouping embracing Chinese-type foodstuffs.

It is a common practice to use a generic term as a commodity item where that term includes a number of related and similar commodities.

However, it was not until the publication of General Order 13 [6] on May 27, 1965, that it became mandatory to list the items included in the generic term.

Since the time of the hearings both the conference and nonconference carriers have amended their tariffs so as to enumerate the particular items which are included under the generic terms "Chinese merchandise" or "Chinese provisions." This is in complete harmony with section 536.5(g) of General Order 13, supra.

Zim Israel has completely deleted its rule relating to the collection of freight forwarding fees on behalf of Chinese shippers and Isbrandtsen has modified its rule by simply eliminating the word "Chinese" wherever it formerly appeared, thus making this service available to all shippers on an equal basis.

We find that rule 10 of the New York Freight Bureau (Hong Kong) and rule 28(a) of Orient Overseas Line are unjust or unreasonable in violation of the second paragraph of section 17 of the act in that they provide for the granting of a valuable service—viz, the collection of freight forwarding fees—only to shippers of Chinese descent when shipping to consignees of Chinese descent.

## The Associated Lines

Nine of the carriers which were named parties respondent in this proceeding [7] have never operated in the Hong Kong-United States Atlantic and Gulf trade. All of these carriers are members of the Trans-Pacific Freight Conference [8] which operates from Hong Kong to United States West Coast ports. This conference and the New York Freight Bureau (Hong Kong) are joint signatories to the Hong Kong/North Atlantic and Gulf Joint Agreement, FMB No. 4379. This joint agreement provided inter alia that one conference could veto a rate action of the other and provided for transshipment arrangements among themselves. These nine lines did not participate in the hearings nor were they asked to furnish any witnesses or documentary evidence. There is no record showing of any transactions involving these carriers in the Hong Kong-United States Atlantic and Gulf trade. Thus, while the initial determination to name these carriers as respondents was justified on the basis of their close working relationship through the interconference agreement, supra, clearly there is no reason now why they should not be dismissed as respondents.

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[6] 46 CFR 536.5(g), 30 Federal Register 7141, May 27, 1965.

[7] American Mail Line, Ltd.; Java Pacific & Hoegh Line; Klaveness Line—Joint Service; Knutsen Line—Joint Service; National Development Co.; Nissan Kisen Kaisha, Ltd.; P. & O.-Orient Lines—Joint Service; Pacific Far East Line, Inc.; and States Steamship Co.

[8] The conference itself was not joined as a party respondent.

SECTION 18(b)(3) VIOLATIONS

In the course of the hearings several instances of charging other than the rate specified in the carriers' tariff came to light. This violates section 18(b)(3) of the act which provides:

> 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.

Only two of the five lines found by the examiner to have violated this section excepted to the findings (Isbrandtsen and China Union Lines) and their exceptions are by way of confession and avoidance; i.e., that the incidents found to have violated section 18(b)(3) were isolated and inadvertent occurrences.

We have no authority under section 18(b)(3) to dismiss a charge simply because it may have been an isolated violation or an honest mistake though we may couple our finding of violation with such other factual determinations as may tend to mitigate the seriousness of the offense. We see no reason to disturb the examiner's finding with respect to the section 18(b)(3) violations and they are, therefore, incorporated below in substantially the same form as found in the examiner's initial decision.

*China Union Lines*

China Union charged rates less than those on file on three shipments loaded September 5, 1962. Each shipment involved rubber shoes which, due to language difficulties, the carrier misclassified as rubber products. The former was rated at $30 and the latter at $25. The total undercharges amounted to $256.50. While this was clearly an inadvertent mistake it was, nonetheless, a violation of section 18(b)(3) of the act and it is so found.

*Eddie Steamship Co.*

Eddie charged rates less than those on file with respect to four shipments loaded February 15, 1963. Undercharges totaled $177.17. It is found that these undercharges were in violation of section 18(b)(3) of the act.

*Isbrandtsen Steamship Co. (now American Export Isbrandtsen Lines, Inc.)*

Isbrandtsen charges rates less than those on file with respect to two shipments, one loaded March 27, 1962, and the other December 24, 1962. Here, again, these misratings were simply honest mistakes which were admitted by the carrier. They were caused by a mistaken interpretation of the carrier's Hong Kong agent as to what rate had been filed and the effective date of filing. Procedures to avoid future miscues of this nature have been adopted by this carrier. However, these must be found to be violations of section 18(b)(3).

*Thai Lines, Ltd.*

Evidence introduced by Hearing Counsel, not contested by Thai, shows that during the period July 17, 1962–May 27, 1963, Thai charged and collected rates less than those on file with the Commission on 265 shipments in the subject trade with total undercharges amounting to $24,130.31. It is accordingly found that Thai thus violated section 18(b)(3) of the act.

## Rebating by Thai Lines, Ltd.[9]

There is conclusive evidence that Thai, as a constant practice, granted rebates on shipments in this trade. On June 28, 1962, Oceanic Lloyd wrote Motorships Inc., Thai's general agent in the United States, requesting appointment as Thai's Hong Kong agent. It enclosed a list of its standard agency fees which included a fee on general cargo of 5 percent. The appointment was agreed to and Oceanic Lloyd prepared a written agreement and sent it to Motorships for execution. This provided that Oceanic Lloyd would receive an agency fee on general cargo of 10 percent. No explanation was offered and the agreement was not executed, but Oceanic Lloyd did thereafter receive a 10-percent fee on general cargo. However, subsequent correspondence from Oceanic Lloyd to Motorships leaves no question as to why the fee was increased. In a letter dated November 3, 1962, Oceanic Lloyd stated:

> To do this (get additional cargo for a lightly loaded vessel), we had to give away 7½ percent of our total commission in the form of rebates.
>
> * * * * * * *
>
> We have a much better canvassing organization and are therefore able to obtain between 800 and 1,000 tons of cargo comprising smaller shipments. We must point ont, however, that we cannot substantially exceed this figure with-

[9] This portion of the report substantially adopts the conclusions and language of the examiner's initial decision except as to the sec. 17 violation.

out giving about 10 percent to those shippers who have over 300 tons available for shipment.

From the above you will no doubt gather that under the present arrangements we can obtain about 1,000 tons per sailing, but this figure can be doubled if you are prepared to give us an additional 2-percent commission.

On April 29, 1963, Oceanic Lloyd wrote Motorships requesting that the rate on plastic flowers be increased from $16.50 to $17 and inquiring whether there would be any complications if the increase was put into effect on less than the 30 days' notice required by section 18(b)(2) of the act. The letter further states:

The reason for our requesting this increase at short notice is that other nonconference lines are no longer giving up to 15-percent rebates on this commodity but are only offering 10 percent. Their nett [*sic*] rate is now $16.20 ($18 less 10 percent) and $16.25 ($17 less 5 percent [sic]) is consequently practicable.

In a letter dated September 4, 1963, addressed to the residence of Nils O. Seim, president of Motorships Inc., Oceanic Lloyd stated:

As you probably know, there are a number of conference signatories who ship under names of convenience in order to take advantage of the nonconference rates. You probably also know that our freight agent Mr. L. C. Yew, has on many instances found it necessary to hand back certain percentages of the freight to the actual shipper. These rebates are untraceable and negotiations of this sort are made from hand to hand and there is no possibility of anything being proved as there is nothing in writing. This is the custom of the trade in Hong Kong and applies equally to ourselves as to conference members.

Seim testified as follows with regard to the general subject of rebating:

Q. Getting back to your belief as to what is practiced in the Far East, based upon your own experience, I take it, you made the observation that you would expect that rebates were paid over there as part of this squeeze system which is a way of life?

A. Yes.

Q. Based upon this observation, would it be reasonable to assume that a great many of the Thai Lines shipments had been charged for at a net rate which was less than the rate on file?

A. I think it is reasonable to assume that all shipments to Hong Kong are charged that way, whether it be Thai Lines or any other line. To this part of the world or any part of the world.

It is found that by granting rebates Thai violated sections 16 Second and 18(b)(3) of the act.

## CONCLUSIONS

In summary we conclude:

1. The nine carriers which are members of the Trans-Pacific Freight Conference and which did not operate in the Hong Kong-

United States Atlantic and Gulf trade should be dismissed as parties respondent.

2. That this proceeding, insofar as it relates to the question of whether certain rates in this trade were so unreasonably low as to be detrimental to the commerce of the United States has become moot and this proceeding, insofar as it relates to this issue, should be discontinued on this ground.

3. That all of the carriers in this trade with the exception of China Union Lines had regulations relating to so-called Chinese merchandise which made available special services to shippers and consignees of Chinese descent in violation of the second paragraph of section 17 of the Shipping Act, 1916.

4. That the members of the New York Freight Bureau (Hong Kong) and Orient Overseas Line still have rules in their respective tariffs which are unjust or unreasonable in violation of the second paragraph of section 17.

5. That the following carriers have violated section 18(b) (3) of the Shipping Act, 1916, by charging a rate less than that legally on file with the Commission: China Union Lines, Eddie Steamship Co., Isbrandtsen Steamship Co. (now American Export Isbrandtsen Lines) and Thai Lines, Ltd.

6. That Thai Lines, Ltd., has violated section 16 Second and 18(b) (3) of the act by making illegal rebates.

An appropriate order will be entered.

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## ORDER

The Federal Maritime Commission instituted this proceeding to determine whether certain rates in the Hong Kong-United States Atlantic and Gulf trade should be disapproved under the authority of section 18(b) (5) of the Shipping Act, 1916, on the ground that they were so unreasonably low as to be detrimental to the commerce of the United States. The investigation was subsequently expanded to determine whether any of the respondents had violated sections 14, 16, 17, or 18(b) (3) of said act. The Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference:

*Therefore, it is ordered,*

1. That respondents, American Mail Line, Ltd.; Java Pacific & Hoegh Lines; Klaveness Line-Joint Service; Knutsen Line-Joint Service; National Development Co.; Nissan Kisen Kaisha, Ltd.; P. &

O.-Orient Lines-Joint Service; Pacific Far East Line, Inc.; and States Steamship Co. be, and the same hereby are, dismissed as parties respondent.

2. That this proceeding, insofar as it relates to section 18(b)(5) of the Shipping Act, 1916, as amended, be and the same hereby is discontinued.

3. (*a*) That rule 10 of tariff No. 23–FMC–4 of the New York Freight Bureau (Hong Kong) be and the same hereby is modified by deleting the word "Chinese" each time it appears in the first two lines of said rule and that the name of this rule be changed to "Freight Forwarding Service."

(*b*) That rule 28(a) of tariff FMC–12 of Orient Overseas Line be and the same hereby is modified by deleting the word "Chinese" each time it appears in the second line of said rule.

(*c*) That respondents, the members of the New York Freight Bureau (Hong Kong) and Orient Overseas Line, cease and desist from establishing, observing, or enforcing any regulation or practice relating to or connected with the handling, storing, or receiving of property which grants or allows the granting of any preference to any person on the basis of such person's race, nationality, or ethnic origin.

By the Commission.

[SEAL] (Signed) THOMAS LISI,

*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 65–49

INTERCONFERENCE AGREEMENTS UNITED STATES-MEDITERRANEAN TRADES

*Initial Decision Adopted November 7, 1967*

Agreement No. 9413, between the Gulf/Mediterranean Conference and the North Atlantic/Mediterranean Freight Conference, permitting consultation between these Conferences, through their respective chairmen, with respect to freight rates and practices, not found to be unjustly discriminatory or unfair, or detrimental to the commerce of the United States, or contrary to the public interest, in violation of section 15 of the Shipping Act, 1916. Accordingly, Agreement No. 9413 is approved.

Uniformity of rate action by respondent Conferences is insufficient to establish the existence of an unfiled section 15 agreement, where there are 13 carrier lines which are common to both Conferences and which constitute a voting majority in both Conferences.

*Burton H. White* and *Elliott B. Nixon* for respondent North Atlantic/Mediterranean Freight Conference and its member lines; *Edward S. Bagley* for respondent Gulf/Mediterranean Ports Conference and its member lines.

*John A. McWilliam* for intervenor International Association of Great Lakes Ports; *Arthur W. Jacocks* for intervenor North Atlantic Ports Association; *Philip J. Kraemer* for intervenor Maryland Port Authority.

*Donald J. Brunner*, *R. Stanley Harsh*, and *Robert P. Watkins*, Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, James V. Day, and James F. Fanseen, *Commissioners*):

The Commission instituted this investigation on December 17, 1965, to determine: (1) Whether Agreement No. 9413 between the North Atlantic/Mediterranean Freight Conference and the Gulf/Mediterranean Ports Conference, permitting consultation between the two

Conferences with regard to freight rates and practices on common commodities, is a true and complete memorandum of the agreement of the parties, seasonably filed for approval; (2) whether said agreement should be approved, disapproved, or modified pursuant to the provisions of section 15 of the Shipping Act, 1916; or (3) whether there are any unfiled agreements as between the carriers involved, which have been or are being unlawfully carried out. Examiner Walter T. Southworth, in an initial decision served July 14, 1967, found that the evidence presented failed to establish the existence of any unfiled section 15 agreement between the Conferences. He further concluded that proposed Agreement No. 9413 should be approved since it was not unjustly discriminatory or unfair, and would not operate to the detriment of the commerce of the United States or be contrary to the public interest, in violation of section 15 of the Act. Hearing Counsel filed exceptions to the examiner's decision to which respondents replied. Oral argument was heard on October 18, 1967.

Hearing Counsel in their exceptions argued that the examiner erred in not concluding that the proponents of Agreement No. 9413 must demonstrate that the agreement will meet a serious transportation need or secure important public benefits; that he further erred in not finding that the proposed agreement will lessen competition between the competing conferences to the detriment of the commerce and contrary to the public interest; and, finally, that he erred in not finding the existence of an unfiled agreement between the respondents in violation of section 15 of the Act. Upon reviewing Hearing Counsel's exceptions, we conclude that they are but a restatement of the contentions already advanced before the examiner, and that the examiner's findings and conclusions on these contentions were proper and well founded. Accordingly, we hereby adopt the initial decision (a copy of which is attached hereto and made a part hereof) as our own.

*Therefore, it is ordered*, That Agreement No. 9413 is hereby approved and that this proceeding is hereby discontinued.

VICE CHAIRMAN GEORGE H. HEARN concurring and dissenting:

I concur in the finding of my colleagues that there was no unfiled agreement between the parties.

I dissent from the majority view in that I find approval of Agreement 9413 will be contrary to the public interest and detrimental to the commerce of the United States.

One of the basic pillars of our economy is "the promotion of competition and the fostering of market rivalry as a means of insuring economic freedom."[1] This principle is implemented through a policy which frowns upon undue restrictions on competition.

Section 15 of the Shipping Act, 1916, does not conflict with that policy but rather complements it. Congress authorized the approval of shipping conferences to forestall monopolistic movements that are more anticompetitive than the conference system itself. Thus a Federal court has said:

> The condition on 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.[2]

It is incumbent upon this Commission to evaluate every proposed agreement in the light of this standard; and it should not be forsaken even though only a simple and innocuous agreement is involved.[3] We are here presented with an agreement which does not qualify for approval under our congressional mandate or under the guidelines we have set heretofore.

The time an agreement is presented for initial approval is when we must evaluate it thoroughly and determine the anticompetitive scope it is to possess. We are not soothsayers. We cannot predict what in fact will happen as a result of approval. We can, however, predict the probable consequences of approval. That is our expertise. When approving an agreement we should understand the gamut of activity inherently concomitant to the specific conduct as set forth in the agreement. We should not grant antitrust immunity to agreements which are overbearing or unnecessary and which thereby might contain latitude for unauthorized actions within the approved area of conduct. It is an undesirable situation when we must call upon hindsight to uncover the pitfalls of an agreement which may trap a conference in violations of the law.

As I said in docket 66–45,[4] "[t]he desire of the parties to enter into agreements alone is not considered sufficient to warrant approval."

> For presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combinations seek to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purpose of the Shipping Act.[5]

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[1] *Mediterranean Pools Investigation,* 9 FMC 264 at 288.

[2] *Isbrandtsen Co., Inc.* v. *United States et al.,* 211 F. 2d 51 at 57.

[3] Transcript, Oral Argument, p. 20.

[4] *Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Lines, Inc.*

[5] *Mediterranean Pools Investigation,* 9 FMC 264, 290.

While approval of the agreement may redound to the benefit of respondents, they have failed to meet the burden of coming forward with sufficient evidence in support of the agreement.[6] This lack of evidence is fatal because "one prerequisite for approval of an agreement is the actual existence or immediate probability of transportation circumstances in the trade covered by the agreement which warrant approval." [7]

The stated purpose of Agreement 9413 "is to permit consultation between the two Conferences through their respective chairmen" [8] to "discuss transportation conditions and agree to recommend to their respective conference member lines the adoption of ocean freight rates and practices applicable to common commodities." [9]

Counsel for respondent Gulf/Mediterranean Ports Conference described the agreement as a "relatively simple agreement of quite limited scope which will do very little to change all the present facts in these trades and the general operations of the carriers or members of the conferences." [10] Counsel, nonetheless, contended that the need for the agreement lies in the necessity for "correlation of rate action in the two ranges" served by the parties.[11] Other than this—

> . . . 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.[12]

That 49 approved conference agreements include the United States Atlantic and Gulf ranges and the Mediterranean range [13] is no basis for concluding that two competing conferences [14] ought to join to further restrict competition. Of those 49 agreements, none is an interconference agreement between conferences serving only the two trades involved here.[15] In fact, there are 30 other conferences which include either the United States Atlantic or Gulf ranges,[16] and not one is party to an interconference agreement serving the two ranges.

In my opinion, this agreement should not be approved without at least a showing that the current conditions in the trade could not be equalized without implementing the anticompetitive and ultramono-

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[6] Ibid., at 290: " . . . it is incumbent upon those in possession of such information to come forward with it."

[7] *Agreement 8765—Order To Show Cause*, 9 FMC 333 at 335–336.

[8] *Brief on behalf of Gulf/Mediterranean Ports Conference*, pp. 1–2.

[9] Agreement 9413, par. 1.

[10] Transcript, Oral Argument, p. 20.

[11] Ibid., p. 21.

[12] *California Stevedore & Ballast Co., et al. v. Stockton Port District, et al.*, 7 FMC 75 at 84.

[13] Exhibit 20.

[14] The examiner found that there is competition as to "many commodities." Initial decision, p. 5.

[15] The only interconference agreement involved is dormant; i.e., Agreement 5080.

[16] Exhibit 21.

polistic characteristics of this agreement. There is no evidence of rate instability, deterioration of conditions in the trade, destructive or wasteful competition, or any other circumstances warranting approval of Agreement 9413.

The absence of such evidence is all the more significant in a case which involves an effort to cartelize cartels. Any benefits the respondents suggest are of value only to them and are too insignificant to justify the disadvantages to the public interest and the commerce of the United States.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 65–49

INTERCONFERENCE AGREEMENTS UNITED STATES-MEDITERRANEAN TRADES

Agreement between conference covering trade from North Atlantic ports to Mediterranean ports and conference covering trade from South Atlantic and Gulf ports to same destinations, providing that chairmen of the conferences may discuss transportation conditions and agree to recommend rates to their respective memberships, is an agreement "fixing or regulating" rates notwithstanding reservation of right of independent action by each conference.

Where majority of members of each respondent conference is made up of same carriers, 49 Commission-approved conferences each cover all three of the ranges of U.S. ports covered by the two respondent conferences and use same rates for all those ranges, and Commission has encouraged parity of rates for North Atlantic and South Atlantic ports, uniform rate action by respondent conferences is insufficient to establish existence of unfiled rate-fixing agreement.

Agreement between respondent conferences approved.

*Burton H. White* and *Elliott B. Nixon* for respondent North Atlantic/Mediterranean Freight Conference and its member lines; *Edward S. Bagley* for respondent Gulf/Mediterranean Ports Conference and its member lines.

*John A. McWilliam* for intervenor International Association of Great Lakes Ports; *Arthur W. Jacocks* for intervenor North Atlantic Ports Association; *Philip J. Kraemer* for intervenor Maryland Port Authority.

*Donald J. Brunner*, *R. Stanley Harsh*, and *Robert P. Watkins*, Hearing Counsel.

INITIAL DECISION OF WALTER T. SOUTHWORTH, PRESIDING EXAMINER [1]

By order of investigation and hearing served December 17, 1965, the Commission initiated this proceeding to determine whether an agreement filed for approval pursuant to section 15 of the Shipping Act, 1916 (hereinafter "the Act") by the respondents, two approved conferences of ocean carriers and their members, should be approved, disapproved, or modified.

[1] This decision became the decision of the Commission Nov. 7, 1967.

The respondent conferences are the North Atlantic Mediterranean Freight Conference (hereinafter the North Atlantic Conference), authorized by FMC Agreement No. 9548, and the Gulf/Mediterranean Ports Conference (hereinafter the Gulf Conference), authorized by FMC Agreement No. 134. Both are outbound Conferences to Mediterranean ports, the North Atlantic Conference covering the trade from United States North Atlantic ports (Hampton Roads/Eastport range) and the Gulf Conference covering the trade from U.S. Gulf and South Atlantic ports (Brownsville/Cape Hatteras range). The North Atlantic Conference excludes Spanish Mediterranean and Israeli ports but includes Sea of Marmora, Black Sea, and Moroccan ports; the Gulf Conference covers all Mediterranean ports and likewise includes Moroccan ports.

Following preliminary motions and the first hearing session, proceedings were postponed for several months while respondents substantially revised the subject agreement (No. 9413). The revised agreement, dated September 12, 1966, which by stipulation supersedes the agreement originally filed, does not change the basic purpose or effect of the filed agreement and is within the scope of the original inquiry. Unless otherwise indicated, all references hereinafter to the agreement, sometimes called Agreement No. 9413, are to the revised agreement, the text of which is set forth in appendix A.

The gist of the agreement is that the chairman of the two conferences may, by telephone or letter, discuss "transportation conditions" and "agree to recommend to their respective conference member lines the adoption of ocean freight rates and practices applicable to common commodities." Either conference may reject any recommendation and each retains the right to act independently of the other. A certified report describing all matters discussed and the action taken with respect to each shall be filed with the Commission within 30 days after any discussion within the scope of the agreement, and records shall be kept 2 years. Either conference may terminate the agreement upon 90 days' written notice.

In addition to the matter of approval, the Commission's order directed that the investigation determine whether the filed agreement was a true and complete memorandum of the parties' agreements and had been seasonably filed or had been carried out prior to approval, and whether it set out in adequate detail the procedure to be followed and provided sufficiently for the filing of reports.[2]

[2] The original inquiry also extended to an agreement (No. 9499) between the North Atlantic Conference and the American Great Lakes-Mediterranean Eastbound Freight Conference, substantially similar to the original No. 9413. During the postponement the parties to No. 9499 moved to withdraw that agreement and dismiss the proceeding insofar as it related thereto. The unopposed motion was granted, and the Great Lakes Conference dismissed as a party.

Hearing Counsel take the position, and the examiner finds, that the issues with respect to procedure and reporting provisions were eliminated with the filing of the revised agreement, which provides adequately for the procedure to be followed thereunder and for reports to the Commission.

Hearing Counsel contend, however, that respondents have been, and now are, parties to an unfiled "agreement, understanding, or arrangement which results in the restriction of competition and the joint fixing and regulating of rates, to the detriment of commerce of the United States and contrary to the public interest." They also contend that Agreement No. 9413 should not be approved because it will "further restrict" competition by allowing them to jointly fix and regulate rates (which they are allegedly doing at present), to the detriment of the commerce of the United States and contrary to the public interest. By "further," Hearing Counsel presumably mean that the unfiled understanding allegedly in effect now would be facilitated by the proposed agreement.

Respondents' contention also is to the effect that the agreement would merely facilitate present procedure by expediting the transmittal of information upon which the conferences act; the big difference, from the legal standpoint, being that Hearing Counsel assert that respondents now act illegally in concert, as proven by uniformity of rate action, while respondents contend that uniform action on identical problems is natural and to be expected under existing circumstances and eventuates without any interconference action as such. With the agreement, respondents say, substantially the same results will come about more speedily and, in the first instance at least, more precisely, to the benefit of all concerned, through direct, approved interconference exchange of information. There is nothing, they say, to support a finding that the agreement would be detrimental to commerce or contrary to the public interest, or would otherwise operate so as to require or permit disapproval under section 15 of the Act.

Three parties intervened: The International Association of Great Lakes Ports; the North Atlantic Ports Association; and the Maryland Port Authority, which is a member of the North Atlantic Ports Association. None of the intervenors filed proposed findings or a brief; however, the North Atlantic Ports Association and Maryland Port Authority offered the testimony, hereinafter referred to, of a common representative who opposed approval.

The two respondent Conferences serve the trade from ports in adjacent U.S. coastal areas to common Mediterranean destinations. There is a very substantial identity of membership; of the 20 members of the

Gulf Conference and 19 members of the North Atlantic Conference, 13 are the same carriers, representing 65 percent of the membership in one case and 68 percent in the other. More than half the common members customarily load in the Gulf and top off at North Atlantic ports, although some of them also have direct sailings from one area or the other. Some of the common members usually sail directly from both areas, but may occasionally top off at either area.

The conferences exchange published tariffs; there is a lag of 5 to 7 days between a rate action and time the tariff sheets come back from the printer, and the other conference gets them when the trade does. Actions of one conference are frequently (but not always) reported to the other conference by the representative of a common member before the tariff showing such action is published. Such reports are sometimes incomplete or otherwise inaccurate. If the common members are alert and efficient, they will normally see to it that their representatives in each conference are promptly informed as to actions of the other conference. Knowledge of action on shippers' requests may come from shippers, who sometimes indicate on their requests that copies are being transmitted to the other conference and sometimes base their requests upon what the other conference has done. A member carrier may likewise request conference action because of the other conference's action, which it has learned about as a common member.

The rate structures and tariff rules and regulations of the two conferences are substantially the same. Although most rates are identical, there are some differences, which may exist because of special circumstances relating to particular commodities. Each conference has a dual-rate contract system pursuant to section 14b of the Act.

Many commodities, referred to as "common commodities," move through both Atlantic and Gulf gateways, usually depending on the place of origin and inland transportation costs; where inland transportation costs are the same or substantially so, a commodity originating at a given point may move through either the Gulf or North Atlantic gateway. To that extent there is competition between the two conferences. Some important commodities (for example, cotton and carbon black) move predominantly or exclusively through only one of the gateways by reason of their point of origin and the resulting difference in inland transportation costs; however, each conference has a commodity rate on almost every item for which the other has such a rate.

Evidence of conference rate action on shipper or carrier requests in particular instances showed that usually, but not always, the conferences eventually reached the same result. There is no pattern of



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leadership; the rate eventually adopted may have been the one initiated by either conference. Sometimes the conferences finally adopted different rates, although the matters had been under discussion by both for some time. Where one conference was the predominant carrier of a commodity, the other conference waited to see what it would do before taking action on a rate request. A 15-percent general rate increase, effective June 10, 1965, was filed by both conferences on March 8, 1965; it had been voted by one conference at a meeting held February 26, 1965, and by the other at a meeting held after March 1, 1965.

There is no evidence of the transmittal of information concerning rates between the conferences by a member other than a common member, or by chairmen or other employees, except through tariffs transmitted at the same time that they were published to the trade.

There are 49 Commission-approved conferences each of which covers the combined United States Atlantic and Gulf ranges; of these 13 are two-way conferences, 15 outbound conferences, and 21 inbound conferences. Each of these conferences maintains the same rates for service to or from (as the case may be) the North Atlantic range as for the South Atlantic and Gulf ranges; a check of the six largest of the 49 conferences disclosed that all had exactly the same rates for all these areas, and the Chief of the Commission's Division of Carrier Agreements testified that he did not know of any instance of a conference covering the Atlantic and Gulf ranges which did not charge the same rates for all three ranges. Of 13 nonconference lines each serving the North Atlantic, South Atlantic, and Gulf ranges, 10 had identical rates from all the ranges.

This condition seems to have come about with the development of stable, nondiscriminatory rates (as between carriers, shippers, exporters, importers, or *ports*) under the Act.[3] Aggressive port competition among ports in different ranges and increasing industrialization of the Southern States (resulting in shipper competition among shippers in different ranges) are probably factors. Respondents call attention to a recent manifestation of current policy in the form of a 1964 news

[3] This has occurred with respect to ports in the North Atlantic range as well as between ranges. In 1877 ocean rates to Philadelphia and Baltimore were higher than to New York and other "northern tier" ports; between the early 1920's and 1935, ocean rates to and from the different ports gradually were equalized. *Boston & Maine RR* v. *United States*, 202 F. Supp. 830 (1962). Similarly, in a 1925 decision the Interstate Commerce Commission noted that "(o)ne of the serious disadvantages under which the southern ports are said to labor is that ocean rates are 7.5 cents higher from the South Atlantic ports and 15 cents higher from the Gulf ports than from the North Atlantic ports. They are in many other ways at a disadvantage as compared with the port of New York." *Maritime Assoc., Boston Chamber of Commerce* v. *Ann Arbor R.R. Co.*, 95 ICC 539, 562. See also, *New Orleans Bd. of Trade* v. *Illinois Central R.R. Co.*, 23 ICC 465, 467 (1912). The record herein shows that such differentials no longer exist.

release of the Commission, which reported that following complaints from the Governors of three Southern States, the Commission had confronted the South Atlantic Steamship Conference with the fact that its rates were generally higher than those of the North Atlantic Continental Freight Conference, and had urged consideration of the complaints. As a result of its efforts, the Commission noted with approbation, "rate equality in the area complained of (was) restored" when the South Atlantic Conference lowered most rates from South Atlantic ports "to a position of parity with the Northern ports."

The purpose of the instant agreement, according to respondents, is to facilitate the exchange of information concerning rates and practices—proposed as well as existing—and other matters of mutual concern relating to transportation conditions, while retaining each conference's right of independent action with respect to its own rates and practices. Hearing Counsel contend that the agreement will allow the conferences jointly to fix and regulate rates, and it obviously will. *Unapproved Section 15 Agreements—S. African Trade*, 7 FMC 159, 186–191 (1962); *Morton Salt Co.* v. *United States*, 235 F. 2d 573, p. 576 et seq. (10th Cir. 1956); *United States* v. *American Linseed Oil Co.*, 262 U.S. 371 (1923).[4] Respondents readily concede that the information to be exchanged will be used in ratemaking, and do not deny that similar rates for particular commodities, and similar practices, will usually result. But section 15 of the Act was of course enacted primarily for the purpose of permitting agreements fixing and regulating rates among competing carriers, through filing with and approval by the Commission unless, after notice and hearing, it finds that they would be unjustly discriminatory or unfair, operate to the detriment of the foreign commerce of the United States, be contrary to the public interest, or be in violation of the Act. Agreement No. 9431, *Hong Kong Tonnage Ceiling Agreement*, 10 FMC 134; *Aktiebolaget Svenska Amerika L.* v. *F.M.C.*, 351 F. 2d 756, 758 (D.C. Cir. 1965). If, as here, the agreement is between conferences of carriers serving different trades that would otherwise be naturally competitive, section 15 requires that each conference retain the right of independent action, as the instant agreement provides.

The conference system of fixing and regulating rates, when fairly and honestly conducted, was determined to be in the public interest

[4] At the prehearing conference respondents' counsel took the position (which they have never completely renounced) that the agreement is not one for joint conference agreement upon rates because the right of independent action is reserved. A rate-fixing agreement, understanding, or arrangment within the meaning of sec. 15 of the Act is not necessarily a legally binding contract, of course.

by a Congress fully aware, when it passed the Act, that such arrangements might run counter to the policy of the antitrust laws. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487–491. In connection with subsequent amendments, Congress considered and rejected contentions that no such arrangements should be permitted among conferences of carriers; the Senate committee stating: "your committee certainly cannot subscribe to such a blanket indictment of long-established, board-approved policy, founded apparently on the same sound economic base which underlies the conference system itself." [5] The 1961 amendment (Public Law 87–346) required retention of the right of independent action in agreements among competing conferences, but did not otherwise distinguish such agreements from conference agreements among carriers.

In the light of the surrounding circumstances, the proposed agreement is found not to be contrary to the public interest as reflected in the policy of the antitrust laws reconciled, as it must be, with the policy of the Act. There is no showing of any reasonable probability of detriment to the commerce of the United States. It appears, rather that the agreement will benefit commerce by assisting in the maintenance of nondiscriminatory rates applicable to ports in the different ranges. Uniformity with respect to such ports is the general rule today and is in accord with Commission policy as evidenced by its approval of many inclusive conference agreements and otherwise. The record herein contains nothing in derogation of that policy. In particular, it does not appear from the record that the maintenance of port differentials generally, between the relevant ranges of ports, is desirable, or even permissible under the Act in the case of carriers serving more than one range.

One of the two witnesses who testified in opposition to the agreement had no objection to uniformity of rates. A representative of the North Atlantic Ports Association and the Maryland Port Authority testified that in opposing the agreement he was not concerned with whether or not the rates from the three ranges were the same or different, although "because I work for the North Atlantic ports, naturally my own preference would be that the North Atlantic ports would have lower ocean rates than the South Atlantic and Gulf ports. But realizing that this is not practical or fair, and it would be preferential in many cases, I realize that we can't have that. So my preference thus would be that the ocean rates be identical or not, so long as there are no preferential situations created for the ports based on

[5] S. Rept. 860, 87th Cong. 1st sess., Aug. 31, 1961, p. 16; reprinted in "Index to the Legislative History of the Steamship Conference/Dual Rate Law" (S. Doc. 100, 87th Cong. 2d sess.), p. 200, 215.

the fact that inland rates and port charges have been considered by the ocean carriers in making rates." There is no reason, upon the record herein, to expect that the proposed agreement would have any tendency whatever to create "preferential situations" such as the witness professed to fear. The uniformity of rate action which the agreement would facilitate would tend rather to eliminate such situations—particularly the temporary preferences which may result when a shipper is able to induce one conference to confer a rate reduction without, or before, a corresponding adjustment by the other conference, to the obvious detriment of any competitive shippers located adjacent to a port covered by the latter conference.

The other opposing witness was an employee of the Commerce and Industry Association of New York, whose membership includes many firms located in New York State and the New York metropolitan area. He stated that the Association's opposition was based upon a policy established about 10 years ago through a survey of shippers, one of whose aspects was the range of ports which should be covered by a single conference or dual-rate agreement. The Association anticipated, he said, that "if uniform rates are established they will be based on the highest operating costs in both ranges and be influenced by the least efficient and highest cost operators. Uniform rates therefore would drastically affect established industries in the respective areas, especially in the Gulf area." Considering that rates are for the most part uniform today, that they were formerly higher in the Gulf, that no Gulf interest appeared in opposition to the agreement,[6] and that the memberships of the two conferences are largely congruent, the argument is not impressive. Upon the facts shown herein, it cannot fairly be concluded that the agreement would tend to increase the level of rates in the relevant trades.

Hearing Counsel argue that the agreement will eliminate "whipsawing" by shippers, which they state is the essence of competition and the only protection shippers have for the prevention of exorbitant rates. Whipsawing apparently means the process of playing one conference against the other by getting one to quote a lower rate, then trying to get the other to meet or beat that rate. There was no evidence that shippers have been successful in carrying this procedure beyond the first stage—i.e., getting a lower rate from one conference which was eventually matched by the other. With the existing flow of

[6] Hearing Counsel stated that the South Atlantic Ports Association was unwilling to testify, and that the Port of New Orleans (which has not intervened or otherwise taken any position) had planned to appear but was unable to do so because of the illness of its witness. There are many other organizations representating Gulf port interests, of course. The National Industrial Traffic League was approached by Hearing Counsel but did not desire to participate in the proceeding.

information among respondents—which Hearing Counsel concede is perfectly legal—one would not expect to find, and the record does not show, any proof of successful whipsawing, despite suggestions of the possibility thereof (as a justification for the agreement) on the part of the conference chairmen. There was no showing that any shippers' requests granted in the past would not have been granted but for the shippers' alleged ability to whipsaw the conferences. It is not claimed that the 49 conferences which cover all three ranges have imposed exorbitant rates, although there is no possibility of whipsawing against them in the manner apparently advocated by Hearing Counsel.

Hearing Counsel assert that the agreement would create a "super conference" which would "negate the geographical advantages of industry and eliminate competition." In the first place, the agreement would create no more of a super conference, in any meaningful sense of that rather imprecise expression, than any of the 49 all-inclusive conferences already existing. As for the negation of geographical advantages, the allegation is simply not supported by the record. That the agreement would permit the elimination of such rate competition as exists—and there is obviously not much—is a charge that can be made, with considerably more force, about any conference rate agreement. It is rather late to have to point out that Congress has seen fit to authorize the Commission to allow carriers to agree upon terms of rate competition among themselves, subject to limitations which are not established simply by the fact of their agreement to do so. *Isbrandtsen*, supra, p. 491. Once we accept, as we must, the proposition that agreements among carriers to fix and regulate rates (subject, of course, to the Act's protections against abuses) are not per se unapprovable under the Act, Hearing Counsel's main argument becomes untenable in the absence of proof of facts establishing actual or reasonably probable detriment to the commerce of the United States or the public interest. There is no such proof here.

Hearing Counsel's assertion of an existing unapproved agreement to fix rates is based entirely upon inferences from instances of identical or parallel rate actions of the two conferences following the conveyance of information from one to the other. Disregarding such actions as could result from merely following each other's published tariffs or from the transmittal of information by shippers, there would be sufficient evidence to support the finding proposed by Hearing Counsel if this were the classical case of identical action by competitors or by combinations of competitors, such as was found in *United States* v. *U.S. Steel Corp.*, 251 U.S. 417, 439. We have two conferences or "combinations," it is true; but each of them is legally authorized to fix and regulate rates under a Commission-approved section 15 agreement, and most of the individual carriers making up the Commission-approved combinations are common to both. A combination of groups with a predominating overlap of competitors legally authorized to agree upon rates in each group could exist only under a statute such as section 15 of the Act, of course, and tends to weaken if not destroy the usual inferences from mere uniformity of conduct.

The common members of each conference necessarily know everything that has occurred in the other conference, in theory and usually in practice; and it would be absurd to expect any one of them knowingly and intentionally to compete with itself. Add to these considerations the fact that transportation conditions as between the ranges do not appear to differ substantially (several carriers frequently or routinely serve both ranges of ports on the same voyage), the pressures of port and shipper competition, the fact that most conferences serving one of the relevant ranges serve all of them and use identical rates for all ranges, the statutory inhibition against unfair port discrimination and the Commission's expressed desire for rate parity, and it is not surprising that there is a notable correlation of action between the two conferences. Under the circumstances, it would be surprising to find anything else. Such correlation does not necessarily depend upon an agreement, arrangement, or understanding between two groups; it requires only consistency of action on the part of the individual carriers which are common members. The correlation may be immediate or not, as the record herein shows, depending on the speed and accuracy of intracompany communication (which communication is subject, of course, to no legal inhibition); but eventually it is inevitable in the absence of special circumstances applicable to particular commodities.

Hearing Counsel recognize the problem, at least in part. They state that in the absence of a common membership, any continuous flow of information, such as "naturally" occurs here, would be clear grounds for finding an unfiled agreement. That would be true if substantial rate identity or other coordination of activity followed, as in fact it has here. *Morton Salt*, supra, pp. 576, 577, and cases there cited. Such results are usually a "natural consequence" of the continuous or systematic exchange of rate information. *Unapproved Section 15 Agreement—S. African Trade*, supra, at p. 188. Hearing Counsel say that while the exchange of information is not "odious," the use to which it is put is. But under all the circumstances here, the use to which the information is put—whether it be received via published tariff, shippers' communications, or the equally innocuous route of the common members—is just as "natural" as the transmittal of the information.

The record shows that the respondent conferences have discreetly refrained from communication with each other as such, concerning rate matters, except for the exchanges of tariff pages at the same time that they are published to the trade. The manner in which they have acted upon the information received through this and other concededly proper channels is not sufficient in the premises to require a finding of an unapproved rate-fixing agreement, understanding, or arrangement; that is not, as Hearing Counsel contend, the "one realistic explanation" of the conferences' action, however compelling that conclusion might be but for the peculiar facts of the case.

It seems fair to say that if the facts herein were deemed to require a finding of an unfiled rate-fixing agreement, respondent carriers could not safely operate under two conferences without an approved agreement such as they proposed, unless they deliberately adopted arbitrarily different rates and practices as between the conferences—which might itself constitute a sort of section 15 arrangement as well as a discriminatory practice. Separate conferences local to the Gulf and Atlantic coasts presumably provide some extra benefit from the standpoint of shipper, port, and carrier. At any rate, the record herein does not support Commission action calculated to bring about consolidation of the respondent conferences, notwithstanding its approval of conferences of similar scope voluntarily established in other trades.

Findings and conclusions proposed by the parties have been incorporated herein to the extent that they are found to be material and supported by the record, and are otherwise denied.

Upon the record in this proceeding it is concluded and found that Agreement No. 9413, in the form attached as appendix A—

1. is a true copy of the agreement of the parties, has been seasonably filed for approval, and has not been carried out in whole or part, directly or indirectly, prior to approval;

2. sets out in adequate detail the procedures and arrangements under which the concerted activity authorized therein is to take place, and provides adequately for the filing of reports to the Commission;

3. 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 would not operate to the detriment of the commerce of the United States, or be contrary to the public interest, or be in violation of the Shipping Act, 1916; and

4. should be, and it hereby is, approved.

An appropriate order will be entered.

WALTER T. SOUTHWORTH,
*Presiding Examiner.*

WASHINGTON, D.C.
*July 14, 1967.*

# APPENDIX A

## Agreement Between the Member Lines of North Atlantic Mediterranean Freight Conference and of Gulf/Mediterranean Ports Conference

*Whereas* each of said Conferences operates under a separate agreement which has been duly approved pursuant to section 15 of the Shipping Act, 1916; and

*Whereas* the Conferences wish to provide machinery for discussing and coordinating their ocean freight rates and practices in respect of those commodities moving to common Mediterranean destination areas which, because of comparable inland transportation costs and other economic factors, are susceptible of being exported either through U.S. North Atlantic ports served by member lines of the North Atlantic Mediterranean Freight Conference or through U.S. South Atlantic and Gulf ports served by the member lines of the Gulf/Mediterranean Ports Conference (hereinafter referred to as common commodities);

*Now, therefore,* It is mutually agreed as follows:

1. The Chairmen of the two Conferences may, by written or telephonic communication between them, discuss transportation conditions and agree to recommend to their respective Conference member lines the adoption of ocean freight rates and practices applicable to common commodities. If, as the result of such discussions and recommendations, either Conference, voting and operating within the framework of its particular Conference Agreement, should adopt such recommendations, the action so taken shall be reflected in the tariffs of each such Conference, which shall be filed in accordance with the rules of the Federal Maritime Commission.

2. Nothing herein shall affect or prejudice the right of either Conference to reject any recommendation made by its Chairman or its right to act independently of the other in adopting ocean freight rates and practices applicable to common commodities.

3. Within 30 days after any discussions within the scope of this Agreement, a report, certified as to accuracy and completeness, describing all matters which were taken up or discussed on that occasion and specifying the action taken with respect to each such matter, shall be filed with the Federal Maritime Commission by one of the Chairmen participating therein. All correspondence and reports or circulars in whatever form relating to matters within the scope of this Agreement shall be retained for 2 years.

4. Any carrier which may hereafter become a member of either Conference shall automatically become a party to this Agreement for so long as its membership in such Conference shall continue.

5. Either Conference may withdraw from this Agreement by giving 90 days' prior written notice to the other and shall promptly advise the Federal Maritime Commission thereof.

6. This Agreement and any amendment or modification thereof are subject to, and shall not be carried out prior to, approval by the Federal Maritime Commission. When so approved, this Agreement shall supersede and cancel the Agreement between the parties filed with the Federal Maritime Commission on or about January 4, 1965.

Dated: September 12, 1966. (Executed by each of the Members of North Atlantic Mediterranean Freight Conference; and by Gulf/Mediterranean Ports Conference (and its member lines) by John T. Crook, *chairman.*)

# FEDERAL MARITIME COMMISSION

Docket No. 66-49

## North Atlantic Mediterranean Freight Conference—Rates on Household Goods

*Decided November 7, 1967*

Unjust discrimination under section 17 of the Shipping Act arises when two shippers of like traffic between the same ports over the same line under substantially similar circumstances and conditions are charged different rates and no competitive relationship between shippers is necessary in such a case.

Rates of American Export and Prudential on certain household goods shipments of the State Department found unjustly discriminatory in violation of section 17 but not unduly or unreasonably prejudicial or preferential under section 16 of the Shipping Act, 1916.

Conference found to have failed to promptly and fairly hear request for shipper for rate reduction contrary to requirements of section 15, but single instance in this case does not warrant disapproval of agreement.

Conference agreement which makes possible control over rates on cargo reserved to American-flag carriers by law found contrary to the public interest, conference ordered to relinquish such control.

Conference rate on household goods not found so unreasonably high as to be detrimental to the commerce of the United States under section 18(b) (5).

*Burton H. White* for respondents.

*Wilbur L. Morse*, *Howard A. Levy*, and *Milton W. Stickles*, for intervener, Military Sea Transportation Service.

*Donald J. Brunner* and *Samuel B. Nemirow*, Hearing Counsel.

## REPORT

By the Commission (John Harllee, *Chairman*, George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This proceeding was instituted by an order of investigation served August 23, 1966. Hearings were held before Examiner Benjamin A. Theeman in New York, December 19, 20, and 21, 1966, and an initial decision was issued June 30, 1967. The proceeding is before us on exceptions to that decision. We heard oral argument on the exceptions on October 2, 1967.

## FACTS

The North Atlantic Mediterranean Freight Conference (the Conference),[1] serves the trade from North Atlantic ports in the United States to ports in the Mediterranean (except Spanish and Israeli ports). The Conference, by published traiff, fixed the rate on household goods at $81.50 per ton (w/m) except for household goods shipped "to Italian base ports" where the rate is $1.50 per cubic foot or $60 per measurement ton.[2] The Conference tariff specifically excluded cargo shipped by the Military Sea Transportation Service (MSTS) on behalf of the U.S. military departments. These shipments are required to move on U.S.-flag carriers, where available, by section 901, Merchant Marine Act of 1936 (46 U.S.C. 1241) and the Cargo Preference Act (10 U.S.C. 2631). The military household goods rate was established by negotiations between U.S.-flag carriers and MSTS.[3] The negotiation of a separate household goods rate for the military departments was made possible by the exemption of military cargoes from the Conference tariff. The rates negotiated under this agreement are published in a separate tariff.[4]

During the period of record, the calendar year of 1965, and the first 6 months of 1966, American Export Isbrandtsen Line, Blue Sea Line, Prudential Lines, Concordia Line, Fresco Lines, and Thorm Lines all carried State Department household goods under the Conference tariff at $60 per ton to Italian ports and $81.50 to other Mediterranean ports. Of these lines, however, only American Export and Prudential carried military household goods to the same ports under the AGAFBO

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[1] The Conference and its members are respondents in this proceeding. Named respondents in the order were: American flag—American Export Isbrandtsen Lines Inc.; Isthmian Lines, Inc.; Prudential Lines, Inc.; States Marine Lines; and Foreign flag—Blue Sea Line; Concordia Line; Constellation Line; Fabre Line; Compagnie Generale Transatlantique; Fresco Line; Hansa Lines; Hellenic Lines, Ltd.; Hoegh Line; Italian Line; (Perusahaan Negara (P.N.)) "Djakarta" Lloyd; National Hellenic American Line, S.A.; Orient Mid-East Lines; Dampskibsselskabet Torm A/S; and Zim Israel Navigation Co., Ltd.

[2] This rate was established because of competition. Cargoes were being shipped from U.S. North Atlantic ports to Rotterdam, Antwerp, Amsterdam, and other European ports and then shipped overland to Italian consignees causing a diversion of traffic from the conference.

[3] These concerted negotiations were conducted under the aegis of Agreement No. 8086, establishing a group called the Atlantic and Gulf American Flag Berth Operators (AGAFBO) which operates inter alia between the same Mediterranean ports as the conference except that Spanish and Israeli ports are included.

[4] That particular rates in issue here were the result of negotiations in which MSTS at first refused the AGAFBO request for a general increase on all rates for the military departments because commercial rates had not been increased. Later, however, the rate on household goods was reduced and the rates on other military items increased.

tariff at $36.20 a ton. The record shows no carriage of military household goods by the foreign-flag members of the conference.

There is no essential difference in transportation characteristics between the shipment of household goods whether carried for the State Department or MSTS. Household goods of Government personnel are shipped abroad in containers and there were occasions where the same container had seen use in the transportation of household goods of both the Department of State and the military departments. There were instances where the household goods of both shippers were aboard the same vessel of Export or Prudential but different rates were assessed, and there were of course other times where household goods of both shippers moved on different vessels of these two lines but at different rates.

On March 10, 1966, the Department of State wrote the Chairman of the Conference requesting that its rate on household goods be reduced to $36.20 per measurement ton. While the Chairman acknowledged receipt of the request on March 15, 1966, no other action was taken execpt to continue the matter on the docket from meeting to meeting. Even discussion ceased after July 1966. The members of AGAFBO, including American Export and Prudential, who were also members of the Conference knew of State's request.

## Discussions and Conclusion

The issues presented are (1) whether the exaction of the higher rate on State Department shipments violated sections 16 or 17 of the Shipping Act, 1916, and (2) whether the conference had violated section 15 of the Shipping Act by its handling of the State Department's request for a rate reduction and by allowing foreign-flag lines to participate in the fixing of rates on U.S. Government cargoes; and (3) whether the rate on State Department household goods was so unreasonably high as to be detrimental to the commerce of the United States under section 18(b)(5) of the Shipping Act.

The examiner concluded that of the members of the Conference, only American-Export Isbrandtsen Lines and Prudential Lines had violated sections 16 and 17 of the act in that they were the only lines that had carried household goods for both the Department of State and the military departments. He found no violations of sections 15 or 18(b)(5). Export and Prudential excepted to the examiner's conclusions that they had violated sections 16 and 17, while Hearing Counsel excepted to the examiner's failure to find violations of sections 15 and 18(b)(5). The Military Sea Transportation Service was granted permission to intervene subsequent to the issuance of the initial decision for the purpose of excepting to the examiner's conclusion that the military departments had been granted an undue or unreasonable preference in violation of section 16 of the act.

Our conclusions differ somewhat from those of the examiner. Any exception not specifically treated or rejected by the context of our discussion and conclusions here has been considered and found not justified.

Respondents [5] raise a threshold objection to our jurisdiction in this case. It is their contention that the carriage of Government household goods is not that "commerce of the United States" which is regulated by the Shipping Act, since these cargoes are not commercial in nature. It seems to be respondents' position that we are without power under the Shipping Act to regulate the practices of carriers, no matter how unlawful, just so long as the shippers involved are Government agencies or for that matter, any noncommercial enterprise. Just why Congress would prohibit the evil of say "discrimination" as between "commercial" shippers and at the same time leave carriers free to treat noncommercial shippers in any way they may choose is not explained by respondents. We need not pause to speculate on any possibilities behind such an anomalous result since the statute itself dictates an opposite conclusion.

The relevant jurisdictional provisions are in section 1 of the act which defines a "common carrier by water in foreign commerce" as:

> A common carrier, except ferryboats running on regular routes, engaged in the *transportation by water of passengers or property* between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade * * *.[6] [Emphasis ours.]

while a "common carrier by water in interstate commerce" is defined as:

> * * * a common carrier engaged in the *transportation of persons or property* on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District or possession of the United States and any other State, Territory, District or possession of the United States, or between places in the same Territory, District or Possession.[7] [Emphasis ours.]

and finally, a "common carrier by water" means "a common carrier by water in foreign commerce or a common carrier by water in interstate commerce * * *."

[5] The only respondents taking exception to the initial decision are American Export-Isbrandtsen Lines and Prudential Lines, and unless otherwise specifically indicated or required by the context, "respondents" will refer to those two lines only.

[6] A proviso excludes "ocean tramps" from the definition of common carrier.

[7] The Transportation Act of 1940 placed common carriers by water in interstate commerce under the jurisdiction of the Interstate Commerce Commission except insofar as they engaged in the so-called offshore domestic commerce.

Thus, the act applies to any common carrier transporting property between ports in the United States and a foreign country and that carrier is by the terms of the statute itself engaged in the "commerce of the United States." It is not the type of the property transported by the act of transportation itself that subjects a common carrier to the act's jurisdiction.[8]

In contending the contrary, respondents confuse the jurisdictional scope of the act with criteria for finding violations of its provisions. Thus, they state:

> The intent of the Shipping Act in relation to commerce is abundantly clear from the Commission's own decisions * * *. In order to find discrimination or preference, it is necessary to show prejudice to the movement of goods (*a*) entering the stream of commerce; (*b*) shipped by *two* shippers and not *one;* (*c*) where the two shippers are in competition with one another and (*d*) whereby one of them is substantially injured. [Emphasis respondents.]

The scope of an entire statute is not measured by the circumstances or requirements necessary to a violation of one of its provisions. A violation of one provision of the Shipping Act for instance might require that the movement in question be commercial in nature and the shippers involved be in competition with each other, but it does not follow that these conditions must attend all other situations regulated by the act.[9] The transportation involved here is the "commerce of the United States" and, as such, is subject to the Shipping Act.[10]

Still, respondents urge that they have violated neither section 16 nor section 17. Again, it is the absence of any competitive relationship between shippers, which they contend is a prerequisite to finding any unlawful discrimination or prejudice under sections 16 and 17. Respondents refer us to *West Indies Fruit Co.* v. *Flota Mercante*, 7 F.M.C. 66 (1962); *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538 (1936); *Atl. Refining Co.* v. *Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B. 242 (1932); and *Boston Wool Trade Association* v. *M. and M. T. Co.*, 1 U.S.S.B. 24 (1921). To respondents, this doc-

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[8] That the application of the act to the transportation of Government cargoes is not a novel construction; see e.g., *Alaskan Rates*, 2 U.S.M.C. 558, 576 (1941); *Alaskan Rates*, 2 U.S.M.C. 639, 651 (1942); *General Increases in Rates (1961)*, 7 F.M.C. 260, 274 (1962); *In the Matter of the Carriage of Military Cargo*, 10 FMC 69 *American Export Isbrandtsen Lines* v. *F.M.C.*, 380 F. 2d 609 (1967).

[9] We do not read the initial decision in Rates on Government Cargoes, 11 FMC 263, or *Dept. of State, A.I.D.* v. *Lykes Bros. S.S. Co., Inc.*, 8 F.M.C. 153 (1964), as imposing any such qualification.

[10] Absent some such specific qualification, "commerce" as used in the Constitution and laws of the United States, is broad enough to encompass any type of movement of persons or things whether for profit or not. See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How 421 (1856); *County of Mobile* v. *Kimball*, 102 U.S. 691 (1880); *Covington &c. Bridge Co.* v. *Kentucky*, 154 U.S. 204 (1894); *Kelley* v. *Rhoads*, 188 U.S. 1 (1903); *Edwards* v. *California*, 314 U.S. 160 (1941). As we have said, the Shipping Act affords no ground for restricting its meaning when applied to ocean transportation.

trine of shipper competition is not, as they think the examiner "intimated," a "novel interpretation of the Commission's predecessors which the Commission is free to disown," but rather it derives from Supreme Court decisions construing the comparable provisions of section 3 of the Interstate Commerce Act. It is pointed out that shipper competition as a prerequisite to a violation was adopted in the first reported case of alleged preference and prejudice under the Shipping Act. *Boston Wool Trade Association* v. *M. and M. T. Co.*, 1 U.S.S.B. 24 (1921). This position that competition between shippers is necessary to a finding of a violation of both sections 16 and 17 has found expression in the *West Indies* case, supra, quoted from by respondents:

> 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.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. Stoomvaart 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 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 (7 F.M.C. at 69, 70).

Hearing Counsel, on the other hand, relying on *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), urge that a competitive relationship between shippers is not necessary to a finding of a violation of either section 16 or 17. Pointing out that the transportation services furnished by respondents to the Department of State and the military departments were identical, Hearing Counsel quote from page 45 of the *Eden* decision:

> It is evident that the purpose of Congress in enacting these provisions of the statute was to impose upon common carriers within the purview thereof the duty of charging uniform rates to all shippers receiving a similar transportation service. The duty of the respondent under these sections was to serve the public impartially, and we think the language used in *W. U. Tel. Co.* v. *Call Pub. Co.*, 181 U.S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: "All individuals have equal rights both in respect to service and charges. Of course such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. But that principle of equality does forbid any difference in charge which is not based upon

difference in service, and even when based upon difference of service must have some reasonable relation to the amount of difference and cannot be so great as to produce an unjust discrimination."

Hearing Counsel also find an analogy in cases of discrimination in passenger fares where no competitive relationship between passengers can or need be shown. See, e.g., *Hawaiian Common Fares Case*, 10 C.A.B. 921 (1949). Our attention is invited to the fact that "respondents' new standard would result in a holding that any commodity shipped by a nonmerchant private or public shipper could be subjected to the most severe preference, prejudice, or discrimination without the benefit of the safeguards of sections 16 or 17"; a result which Hearing Counsel decry.

Finally, the examiner himself would seem to encounter some difficulty with the absence of any competitive relationship shippers. His conclusion that sections 16 and 17 have been violated rests upon the "special circumstances in this case [which] do not require a finding of effective shipper competitive relationship as a prerequisite to a finding that a violation of sections 16 and 17 of the act has occurred." The "special circumstance" would appear to be the fact that no competitive relationship can possibly arise in this case because the shippers involved here are who they are—governmental agencies.[11] But this, it seems to us, begs the question. The impossibility of a competitive relationship arising between particular shippers may just as well be an indication that the act was not designed to protect those shippers, and this, as we understand it, is precisely the contention of respondents.[12] Finally, after finding a violation in the absence of shipper competition, the examiner suggests that in view of his findings, we "may wish to reconsider the question whether effective shipper competition is a prerequisite to a finding of a section 16 and 17 violation." [13]

We cannot agree that this case presents special circumstances which of themselves warrant the elimination of a competitive relationship between shippers under sections 16 and 17 of the act. The difficulties experienced by the parties in this case and the examiner are due to the fact that they have treated sections 16 and 17 as if the one or the other was the product of a meaningless redundancy on the part of Congress; i.e. that the two sections are different ways of saying pre-

[11] Presumably, the examiner would apply this rationale to any case involving shippers who, because they are not engaged in a commercial enterprise cannot give rise to a competitive relationship for he states: "It is immaterial for the purposes of the Shipping Act, that the shippers are governmental agencies and not private parties."

[12] The examiner admits that his study of the cases both before and after *West Indies* failed to produce a single case in which the goods transported "did not enter the market place," thereby making possible a competitive relationship.

[13] The examiner offers certain comments to assist us in this reconsideration which will be discussed wherever relevant to our decision herein.

cisely the same thing. To do so not only fills the statute with excess verbiage, but also ignores a considerable body of law on discrimination, preference, and prejudice laid down by the Supreme Court and the Interstate Commerce Commission under the Commerce Act.[14]

It is well settled that the provisions of the Shipping Act which confer upon the Commission authority over the rates and practices of water carriers and prescribe its mode of exercise closely parallel those of the Interstate Commerce Act establishing the corresponding relations of the Interstate Commerce Commission to carriers by rail. *Swayne & Hoyt, Ltd.* v. *U.S.*, 300 U.S. 297 (1937); *U.S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932); and where dissimilarities in the respective modes of transportation do not warrant a different construction, the Shipping Act should be construed in the light of the similar provisions of the Commerce Act. *Far East Conf.* v. *United States*, 342 U.S. 570 (1952). *Cf. Atl. Refining Co.* v. *Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B., 242, 243 (1932), and *J. G. Boswell Co.* v. *American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95, 102 (1939).

As respondents point out, "section 16 of the Shipping Act is substantially identical with section 3(1) of the Interstate Commerce Act * * *." *State of California* v. *United States*, 46 F. Supp. 474 (D.C.N.D. Cal. S.D. 1942) affd. 320 U.S. 577. At the time section 16 was passed, section 3(1) provided:

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic whatsoever or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

This prohibition against undue or unreasonable preference or prejudice is designed to deal with two or more competing shippers or localities receiving different treatment which is not justified by differences in competitive or transportation conditions. The classic case would be where the shippers at A and B are competitive in a common market at C, the line hauls from A and B to C are the same and the same competitive influences apply to both. *Liberty Cooperage & Lumber Co.* v. *Michigan Central R.R. Co.*, 109 I.C.C. 1 (1926). See also *Texas & Pac. Railway* v. *I.C.C.*, 162 U.S. 197 (1896). The section is aimed at that favoritism by carriers which enables a shipper to reach a market and

[14] This treatment is, however, understandable just on the basis of the Shipping Act precedents already referred to, but it is even more readily understood in view of even the Supreme Court's penchant for using discrimination on the one hand, and preference and prejudice on the other as if they were interchangeable when discussing them under the Commerce Act. See e.g. *Wight* v. *U.S.*, 167 U.S. 512 (1897); and *Texas & Pac. Railway* v. *ICC.*, 162 U.S. 197 (1896).

sell his goods therein at a lower rate than his competitors. *I.C.C.* v. *B. & O. Railroad*, 145 U.S. 263 (1892). Shippers are entitled to all the benefit to be derived from their natural or acquired advantages of geographical location and carriers may not by a difference in rates destroy those advantages unless the difference is justified by the cost of the respective services, by their values, or by other transportation conditions. *United States* v. *Illinois Central Railroad*, 263 U.S. 515 (1924). Since the section is intended to prevent unlawful favoritism among competitors in the same marketplace, the allegedly preferred shipper must ordinarily be in competition with the allegedly prejudiced shipper. *Texas & Pac. Railway* v. *I.C.C.*, supra; *New Haven R.R.* v. *I.C.C.*, 200 U.S. 361 (1906); *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515 (1924); *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21 (1957); *Rheem Mfg. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 273, I.C.C. 185 (1948).

Normally, and because the aim is at eliminating arbitrarily different treatment between competitors, a prejudice to one to be unlawful under section 3 must ordinarily be such that the preference arising out of it is a source of advantage to the other allegedly favored. *California Walnut Growers Asso.* v. *A. & R.R.R. Co.*, 50 I.C.C. 558 (1918); *Colgate & Co.* v. *T. & J. Ry. Co.*, 144 I.C.C. 253 (1928). All this, however, is not to say that a case of undue prejudice is made out by a mere showing of lower rates between competing shippers. Other factors may work to make a preference or prejudice reasonable or due. For instance, competition from another carrier at the allegedly preferred point of destination or of origin may justify the difference in rates. *Texas & Pac. Railway* v. *I.C.C.*, 162 U.S. 197 (1896); *East Tenn. &c. Ry. Co.* v. *I.C.C*, 181 U.S. 1 (1901).

Among the other factors to be considered are the convenience of the public, the fair interest of the carrier, the relative quantities of the traffic moved, the relative cost of the service and profit to the carrier, and the situation and circumstances of the respective customers, as competitive or otherwise. *I.C.C.* v. *Baltimore & O. R. Co.*, 43 Fed. 37, 53 (1890). Not only should relative distances and transportation conditions be considered, but so should all matters which carriers, apart from any question arising under the statute, would treat as calling for a preference or advantage. *American Sugar Refining Co.* v. *Chicago B. & Q. R. Co.*, 169 I.C.C. 557, 564–565 (1930); *Michigan Fertilizer Co.* v. *Louisville & N. R. Co.*, 214 I.C.C 585, 587 (1936). It is even said that there should be consideration of:

> * * * all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers,

and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act (*Texas & Pac. Railway* v. *I.C.C.*, 162 U.S. at 219).

Thus, if we apply the construction given section 3(1) of the Commerce Act to section 16 of the Shipping Act, we can agree with respondents that the presence of a competitive relationship is required to prove a case of undue preference or prejudice.

We have already said that the difficulty encountered by everyone in this case stemmed from their treating sections 16 and 17 as one and the same thing. Are we here again faced with the requirement of showing competition between shippers under section 17 of the act with its terse prohibition against unjust discrimination? That section simply declares it unlawful for "any common carrier by water" to "demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports * * *." The act offers no clue as to the meaning of the words "unjustly discriminatory," but again, the intent of Congress was to apply to common carriers by water those regulatory principles already applied to railroads under the Commerce Act. *Swayne & Hoyt* v. *U.S.*, supra; *State of California* v. *United States*, *supra*.[15] The Commerce Act counterpart of section 17 is section 2 which provides in relevant part:

> That if any common carrier subject to the provisions of this part shall * * * receive from any person * * * a greater or less compensation for any service rendered * * * in the transportation of passengers or property subject to the provisions of this part than it receives from any other person * * * for doing for him * * * a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions such common carrier shall be * * * guilty of unjust discrimination.

An early case under section 2, *Wight* v. *United States*, 167 U.S. 512 (1897), involved two consignees of beer shipments at the same terminal. The railroad absorbed the terminal to warehouse delivery charge for one consignee but not the other. The railroad pointed out that the favored consignee's warehouse was situated right on the line of a competing road which therefore had no delivery charge and that unless it [the defendant would] absorbed the delivery charge from its terminal to the favored consignee's warehouse, the business would be lost to the competing road. The presence of carrier competition, it was argued, made the circumstances and conditions surrounding the transportation service rendered such consignee dissimilar. The court declared that section 2 was designed "to enforce equality

[15] In fact, the recommendation of the Alexander report (House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the Foreign and Domestic Trades, 63d Cong., pp. 415–417) originally recommended that the ICC administer the shipping statute.

between shippers and it prohibits any rebate or other device by which two shippers shipping over the same line, the same distances, under the same circumstances of carriage, are compelled to pay different prices therefor," and rejected the argument that carrier competition rendered the circumstances and conditions dissimilar. The term "under substantially similar circumstances and conditions" refers to the matter of carriage and does not include competition.

In further describing the purpose of section 2, the court said:

> The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another (167 U.S. at 517).

Thus, under section 2 of the Commerce Act, discrimination arises when two shippers of like traffic, shipping over the same road between the same points under substantially similar circumstances and conditions, are charged different rates. *Wight* v. *United States*, supra; *I.C.C.* v. *Alabama Midland R'y.*, 168 U.S. 144 (1897); *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21 (1957); *Whiterock Quarries, Inc.* v. *Pittsburgh & L. E. R. Co.*, 280 I.C.C. 143 (1951).

While it is also the purpose of section 2 to insure against favoritism among competing shippers, unlike section 3, the equality required under section 2 is not dependent upon any showing that the shippers or consignees involved compete in the marketplace. *Union Tanning Co.* v. *S. Ry. Co.*, 25 I.C.C. 112 (1912); *Barber Asphalt Co.* v. *L. & N. R. R. Co.*, 88 I.C.C. 307 (1924); *Chamber of Commerce, Macon* v. *C., N. O. & T. P. Ry. Co.*, 27 I.C.C. 263 (1913). Where the conditions of section 2 are met, a carrier may not make a difference in rates because of differences in circumstances arising either before the service of the carrier began, or after it was terminated. *I.C.C.* v. *Del., L. & W. R. R.*, 220 U.S. 235 (1911); nor may a carrier make a difference in rates based upon the identity of the shippers and this is so whether the unfavored shipper is injured or not. *I.C.C.* v. *United States*, 289 U.S. 385 (1933); *Mitchell* v. *United States*, 313 U.S. 80, 94 (1941), and such discrimination may be restrained for the future. *I.C.C.* v. *Campbell*, supra.[16]

[16] For one statement of the possible reasons for such a sweeping prohibition even where no injury is shown, see "Lake, Discrimination by Railroads and Other Public Utilities" (1947), where the author speculates that (1) though the competing patron may not be hurt, it was thought the public, the consumers, might be; or (2) it was thought too difficult for the complainant to prove that he had been hurt; or (3) the legislature had a passion for equality. That discrimination even though it does not affect competition in the market should not throw the burden of cost from the favored shipper onto other consumers, see *Nor. Pac. Ry.* v. *North Dakota*, 236 U.S. 585 (1915).

This brief consideration of the law under the Commerce Act shows that a very real distinction exists between unjust discrimination on the one hand and undue or unreasonable preference or prejudice on the other. To constitute unjust discrimination, there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. In such a case, it is immaterial that the shippers are not in competition with each other. Where the service is different—e.g., different commodities—or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers involved must be competitors. But will we, by applying this construction of the terms to sections 16 and 17 of the Shipping Act, be engaging in a wholesale destruction of all Shipping Act precedent on the subject? We think not.

A number of the cases clearly indicate that our predecessors were aware of the difference between the two sections of the Shipping Act. Of course, the limitations of this opinion will not permit an exhaustive survey of all the cases and, even if such a piece of scholarship were material to our decision here, it would doubtless uncover some of the many anomalies which are bound to have crept into 50 years of administering the statute and this might further becloud rather than clarify the issue here. This task of reconciliation we will leave to academic scholarship and future cases. It is sufficient here to unravel a short length of the thread, admittedly thin, which runs through our cases on discrimination and preference or prejudice.

Setting aside the *West Indies* case for consideration later, we begin with *Boston Wool Trade Association* v. *M. and M. T. Co.*, 1 U.S.S.B. 24 (1921), the first reported case under section 16, where the complainant alleged only that the rates on wool were prejudicial as compared to the rates on boots and shoes, cotton piece goods, and iron and steel articles. No violation of section 17 was alleged.[17] In dismissing the charge, the Shipping Board said at page 30:

> It is manifest of record that no competition exists between wool and boots and shoes, cotton piece goods, and iron and steel articles. It is therefore recognized that the rates on wool cannot be prejudiced by the rates on the latter commodities. Prejudice to shippers and receivers of wool cannot be predicated upon the charges for transporting other products which differ essentially in character from wool and supply widely dissimilar demands.[18]

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[17] Sec. 17 is by its terms applicable only to common carriers by water in foreign commerce. Further, discrimination, it will be remembered, requires different rates on a like kind of traffic, a requirement not met in this case.

[18] As respondents note, the Shipping Board there merely echoed what the ICC had said that same year in *Pioneer Pole & Shaft Co.* v. *Director General*, 64 I.C.C. 744, 746 (1921), "to constitute undue prejudice under section 3 a competitive relationship between persons, localities, or discriptions of traffic * * * must * * * appear."

Although no precedent was cited, the above was clearly in harmony with the Supreme Court decisions interpreting preference and prejudice under section 3 of the Commerce Act where shipper competition was ordinarily a requirement for preference or prejudice but not discrimination. See for example, *Texas & Pac. Railway* v. *I.C.C.*, 162 U.S. 197 (1896).[19] In *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), the first reported case in which a violation of section 17 was alleged, the complainant charged that the exaction of higher rates from him than from those shippers who agreed to give respondent their exclusive patronage was not only unduly and unreasonably prejudicial but also unjustly discriminatory. The Shipping Board propounded the question presented as:

> Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise under like conditions to the same places than they charge to others because the complainants refuse to patronize the defendants exclusively, while other shippers do not? (p. 43)

The Shipping Board found that "from the facts of record * * * it is manifest that the transportation service furnished the complainants and contract shippers was in all respects identical." The Board then concluded and decided that "the exaction of higher rates from the complainants than from other shippers for like service under the circumstances involved in this case subjected the complainants to undue and unreasonable prejudice and disadvantage and constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the act."[20] Significantly, the opinion contains not a word concerning the presence or absence of a competitive relationship between shippers, nor need there have been since the services for which different rates were charged were identical and unjustly discriminatory.

In *Am. Tobacco Co.* v. *Compagnie Generale Transatlantique*, 1 U.S.S.B. 53 (1923), the shippers involved shipped like traffic over the same line between the same ports yet, because of respondents' regulations on collect freight and currency exchange, complainant paid a higher rate. The Shipping Board said at page 56:

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[19] See also *Boston Wool Trade Asso.* v. *Eastern Steamship Lines, Inc.*, 1 U.S.S.B. 36 (1922) where absorption of delivery charges on some traffic but not on other traffic was justified by carrier comeptition on the former but not the latter. Again, this was in line with the construction placed on section 3. *Texas & Pac. Railway* v. *I.C.C.*, *supra*; *East Tenn. &c. Ry. Co.* v. *I.C.C.*, *supra*.

[20] This, of course, raises the question of whether unjust discrimination under sec. 17 also constitutes undue or unreasonable preference or prejudice under sec. 16. We do not need to decide that question here. We note, however, that sec. 17 applies only to common carriers by water in foreign commerce and that if the circumstances and conditions constituting unjust discrimination under sec. 17 are not encompassed within the scope of sec. 16, then it may be possible to argue that unjust discrimination is not prohbited in our offshore domestic trades, a highly dubious construction of the act.

The evidence of record indicates that, from a transportation standpoint, the shipments of the complainant were similar in every respect to those of shippers of cigarette paper who prepaid their freight. Insofar as their actual physical handling and transportation were concerned, the record is conclusive that the service rendered by the respondent in connection with the consignments of each class of shippers was in every particular identical. It follows that unless conditions incident to the handling and transportation of the complainant's collect shipments existed which warranted the higher charges exacted, discrimination within the contemplation of the statute is established.

Again, there was no mention of competition between shippers.[21] The line of cases beginning with *Eden* and extending through *Isbrandtsen Co.* v. *U.S.*, 96 F. Supp. 883 (1951) aff'd. Sup. Ct. 342 U.S. 9 (1952) involving the validity of dual rate contracts do not turn upon the presence or absence of competition,[22] and this is consonant with a proper interpretation of the law since different rates would be applicable to shipments of the same commodity over the same line between the same ports under the same transportation conditions, depending on whether the shipper was a contract signatory or not. Thus, the cases involved unjust discrimination and no competitive relationship need be shown.[23] The *American Tobacco* case and *Rates, Charges, and Practices of L. & A. Garcia & Co.*, 2 U.S.M.C. 615 (1941) are yet other instances where discrimination was involved and no competitive relationship was found necessary.

On the other hand, the line of cases beginning with *Boston Wool* and culminating in the *West Indies* case, involved situations of preference or prejudice and not discrimination. The cases cited in *West Indies* involved situations in which either services were different or the rates between different points were involved or there was no evidence of prejudice or discrimination.[24] Thus, in *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U.S.S.B. 538 (1936), the rates compared were from a common origin to Philadelphia on the one hand and New York on the other, while *American Peanut Corp.* v. *M. & M. T. Co.*, 1 U.S.S.B. 78 (1925), involved different ports of ori-

[21] Competition was considered in the further hearing on reparations (see 1 U.S.S.B. 97).

[22] See e.g. *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524 (1936); *Contract Routing Restrictions*, 2 U.S.M.C. 220 (1939); *Contract Rates—Port of Redwood City*, 2 U.S.M.C. 727 (1945); *Secretary of Agriculture* v. *N. Atlantic Cont'l Frt. Conf.*, 5 F.M.B. 20 (1956).

[23] The question of whether an agreement to exclusively patronize a carrier is a transportation condition within the meaning of *Wight* v. *U.S.*, supra, which justifies discrimination has been mooted by Public Law 87–346 which added sec. 14b to the act. Compare the *Eden Mining* case, supra, with *Swayne & Hoyt*, supra

[24] Except, of course, the *American Tobacco* case, supra, which is omitted by respondents from the quotation as cited to us.

gin while *Boston Wool Trade Association* v. *M. and M. T. Co.*, 1 U.S.S.B. 24 (1921) involved unlike traffic.[25]

Thus, while the discussions in many precedents often use "preference or prejudice" and "discrimination" interchangeably, the actual conclusions in a great many, if not all of them, are based upon the distinction between the two. The failure to make the distinction does not, of course, make the actual holding in a case wrong. For example, in the *West Indies* case, the failure to find a violation of both sections 16 and 17 turned upon the lack of competition between shippers. This was proper for section 16 but not for section 17. However, no violation of section 17 could have been found anyway since the rates complained were not for transportation between the same points.

We are, of course, aware that section 17 also prohibits rates, fares, or charges which are unjustly discriminatory between ports; and that, in such a case, it is difficult to envision a situation where the transportation involved would be "between the same points." But whatever the criteria for measuring or judging unjust discrimination between ports may be, we find no differences in transportation conditions between land carriage under the Commerce Act and ocean carriage under the Shipping Act which would warrant the continuation of an unfortunate departure from the long-established principles governing unjust discrimination as between shippers. Indeed, these principles are such that a difference in the mode of carriage would of itself have little, if any, bearing upon them. We are unaware of any difference inherent in water carriage vis-a-vis land carriage which would justify the water carrier in charging different rates to two shippers of like traffic over the same line between the same points under substantially similar circumstances. Thus, under the doctrine of *California* v. *U.S.*, supra, and the related cases, the principles we have discussed above in connection with sections 2 and 3 of the Commerce Act are properly applicable generally to sections 17 and 16 of the Shipping Act, leaving specific departures to particular future cases.

It is clear then that what is involved here is discrimination and that section 17 has been violated if the discrimination is unjust. But respondents argue that there is no discrimination at all here, much less unjust discrimination. How can there be discrimination, ask respondents, when there is only one shipper involved—the U.S. Government—and you cannot have discrimination "between" a single shipper. *United*

[25] *Huber Mfg. Co.* v. *N. V. Stoomvart Maatschappij "Nederland"*, 4 F.M.B. 343 (1953) turned on the point that it had not been shown that anyone else ever paid the higher rate complained of, and in *Eagle-Ottawa Leather Co.* v. *Goodrich Transit Co.*, 1 U.S.S.B. 101 (1926), there was no violation of sec. 16 found, but nowhere in the opinion is this failure to find a violation expressly grounded on the lack of an effective competitive relationship.

*States* v. *Tozer*, 39 Fed. 369 (DCECMO 1889). We might be inclined to accept this argument if, among other things, respondents' past actions didn't speak louder than their present words. After a long history of in fact treating the Department of State and the military departments as separate shippers and thereby exacting different rates from each, respondents would now in theory merge the separate identities and justify the discriminatory exactions. Respondents have, at least since 1950, consistently conceived of and treated with the State Department on the one hand and the military departments on the other as distinct and separate entities each shipping cargoes in his own right. Thus, the rates applied to State were fixed by the Conference, while those applied to the military were negotiated by AGAFBO with MSTS. In cases of shipments for the military, the particular department appeared on the bill of lading as the shipper, while the State Department appeared on the bill of lading as shipper of its cargoes. Indeed, it was this treatment by respondents of State and the military as separate individual shippers that made possible the discrimination at issue here. Respondents' past conduct estops them from now arguing that the two shippers are one. Further, it seems to us that the very difference in rates establishes the individuality of the shippers, no single shipper would stand the exaction of such disparate rates on his shipments. We will not ignore the actualities of this case and substitute for them a conceptualistic argument which would allow respondents to perpetuate the discrimination clearly established on this record, and we conclude that on the facts of this record, that the Department of State and the military departments are not the same shipper.

Respondents charge that the examiner ignored "transportation conditions" which prompted the establishment of the lower rate to the military departments and which justify the discrimination, and they argue that, if these transportation conditions are considered and given their due weight, discrimination there may be, but it is not, unjust. It is respondents' contention that the lower rate on household goods was granted to MSTS in return for an increase in rates on other commodities which move in considerable volume, and that this volume movement justifies this discrimination. The difficulty here is that the record in no way gears the difference in rate to the difference in the two movements, even if volume would justify otherwise unjust discrimination.[26] Moreover, it would not seem the rate on one commodity, if discriminatory, can be justified by the volume of movement of other commodities.

[26] "That one shipper furnishes a much greater volume of traffic than another does not create dissimilarity of circumstances and conditions." *U.S.* v. *Tozer*, 39 Fed. 369 (D.C.E.D. Mo. N.D. 1889).

Finally, respondents argue that the discrimination if it exists and even if it is unjust, was beyond their control and therefore since they could not have corrected the discrimination by their own rate action, they cannot be held responsible. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627 (1933).[27] The Conference, on the other hand, in defense to another charge of unlawful conduct under the act, is quick to point that the vote on the State Department rate was unanimous, which means of course that Export and Prudential voted in favor of the discriminatory rate. Respondents' argument would have more appeal had they made just one attempt to alleviate the situation. But the record is devoid of such attempt. If the respondents anticipated difficulties with the Conference over the State Department, they gave no indication of it. They sought help neither from the Conference nor this Commission. Even after the complaint of the State Department, respondents made no move to bring the matter up for consideration; instead, the request was laid over at meeting after meeting.[28]

A plea of compulsion or lack of control over a discriminatory rate cannot rest upon an unbroken history of cooperation or acquiescence in the establishment and maintenance of that rate or the mere possibility that any attempt to correct the discrimination would be blocked by the foreign-flag lines of the Conference.[29] See *In the Matter of the Carriage of Military Cargo*, supra. This brings us to the question of whether the Conference has violated section 15. But before considering it, we shall state our conclusion respecting the charge of unjust discrimination. On the basis of the foregoing, we conclude that respondents Export and Prudential by charging different rates to the Department of State and the military departments for transporting the household goods of each over their lines, between the same ports under substantially identical circumstances and conditions have unjustly discriminated as between them in violation of section 17 of

[27] The court said at 650:

"A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under sec. 3 [of the Commerce Act] an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both * * *. The situation must be such that the carrier or carriers if given an option have an actual alternative."

[28] It is clear from the record that respondents' concern was not with the conference but rather with the new competitive bidding system for fixing rates then under consideration and the impact it would have on military rates. See *In the Matter of the Carriage of Military Cargo*, 10 FMC 69, affd. *American Export-Isbrandtsen Lines, Inc.* v. *Federal Maritime Commission*, 380 F. 2d 609 (1967).

[29] Respondents charge the examiner with yet another error, asserting that he improperly shifted the burden of proof onto them. A difference in rates for substantially identical services is prima facie discriminatory. *Contract Routing Restrictions*, supra. Hearing Counsel, having established this prima facie case, it was then up to respondents to go forward and show that the discrimination was justified by some bona fide transportation condition.

the act. Having found a violation of section 17, it is unnecessary to determine whether the same activity constitutes a violation of section 16. This disposes of the exceptions of the Military Sea Transportation Service.

Perhaps, had there not existed two ratemaking bodies with jurisdiction over the rates applicable (the Conference over the State Department rate and AGAFBO over the rate for the military), the discrimination would probably never have occurred. Though they voted for the higher State Department rate, respondents point out that even if they had been opposed to the rate, they could not have compelled the fixing of a lower rate since their numbers are insufficent to carry the vote. (As Hearing Counsel points out, ratio is about 4 to 1 in favor of the foreign-flag line.) While admittedly, no attempt of record was made by respondents Export, Prudential or, for that matter any American-flag line, to establish a lower rate, and there is no showing in the record that the foreign-flag lines would flatly oppose a lower rate, we nevertheless are of the opinion that the public interest demands that the Conference relinquish control over the rates on cargoes reserved by law for carriage aboard American-flag vessels. The rates on these cargoes should be fixed by the American carriers free from actual or potential veto by foreign-flag carriers who may only carry the cargo if and when space is not available on an American-flag vessel. What we said in *In the Matter of the Carriage of Military Cargo*, *supra*, is equally pertinent here:

> Whatever petitioners' precise position may be, the implications are quite clear: That the foreign-flag segment of the Conference may restrict or refuse to sanction a particular method by which its U.S.-flag member lines may deal with the U.S. Government on the terms under which cargo reserved by law to those U.S.-flag lines is to be carried. We think it patently clear that any agreement or any rule promulgated under it * * * would be contrary to the public interest within the meaning of section 15.

The examiner failed to find that the inclusion of Government cargoes within the scope of the Conference's ratemaking power was contrary to the public interest because Hearing Counsel "refers to no specific act of the foreign-flag operators that shows they have dictated or intend to dictate [Conference] action in this regard." This conclusion does not seem to square with a prior statement of the examiner that:

> The difficulty in this case stems from the fact that the U.S. lines are parties to two tariffs each containing an approved but different rate for household goods to be transported over the same range. In the future, the Commission may wish

to question the advisability of approving tariffs, or their underlying agreements, to avoid similar occurrences.[30]

The examiner does not indicate on what ground we should question the advisability of approving such agreements in the future and, since apparently some indication of actual or intended dictation or control is required in the examiner's view, we would appear without the means to accomplish what the examiner suggests.

However, we do not hold with the view that we must await actual, or an expression of intended, domination on the part of the foreign-flag segment before we can act.[31] We will not await an actual attempt by the foreign-flag segment of the Conference to block a rate desired by the American-flag carriers. For so long as a portion of the discriminatory rates remain under the potential control of the Conference, any attempt to remove the discrimination by Export and Prudential would be subject to the approval of the membership. And if, as respondents say, the rate for the military departments was fixed with an eye on the increase granted on other commodities which move in such volume, the foreign-flag lines who do not participate in this movement to the same extent as the American-flag carriers, may not with good reason see fit to go as low as the Americans. To prevent the forseeable conflict, we will grant the Conference a period within which they may choose one of two alternatives which are either the exclusion of Government cargoes reserved by law to carriage by American-flag lines from the coverage of the Conference tariff, or the opening of all rates on such cargoes.

The examiner concluded that the record was insufficient to establish that the Conference rate on household goods was so unreasonably high as to be detrimental to the commerce of the United States within the meaning of 18(b) (5) and we agree. The fact that the Conference rate may have been one of the factors which contributed to the State Department's decision to provide its overseas employees with furnished living quarters does not justify a conclusion that the rate is bad under section 18(b) (5), nor does the fact standing alone justify a conclusion that a lower rate is in force in a reciprocal trade. It is not entirely unlikely that a reduction in that rate will come about as a result of the removal of the discrimination found herein. An order will be issued directing respondents to comply with our conclusions in this proceeding.

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[30] While the two agreements under which the rates in question were fixed were approved under sec. 15, no approval of the rates themselves was granted. The requirement in sec. 18(b) that common carriers by water in foreign commerce file their rates with the Commission does not mean that each rate filed with the Commission is approved. The mere act of filing a rate raises no inference one way or the other concerning the lawfulness of that rate.

[31] It would have been further surprising if Hearing Counsel had been able to do so since the U.S.-flag lines were obviously in favor of the higher Conference rate.

## ORDER

This proceeding having been instituted 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 conclusions thereon, which report is hereby referred to and made a part hereof;

*It is ordered*, That respondents American Export Isbrandtsen Lines, Inc., and Prudential Lines, Inc., cease and desist from the violation of section 17 of the Shipping Act, 1916, found herein, and within 30 days from the date of service of this order notify the Commission whether they have complied herewith and, if so, the manner in which parity of rates between shipments of household goods by the State Department and by the military departments has been achieved; and

*It is further ordered*, That the North Atlantic Mediterranean Freight Conference relinquish control over the rates on cargoes, the carriage of which is reserved by law to U.S.-flag carriers, and notify the Commission within 30 days from the date of service of this order of the manner in which compliance herewith has been achieved.

(Signed) THOMAS LISI, *Secretary*.

# FEDERAL MARITIME COMMISSION

Docket No. 66–43

## Investigation of Minimum Charges and Terminal Delivery Services—Atlantic-Gulf/Puerto Rico Trades

*Decided December 1, 1967*

**In a nonsuspended rate increase investigation where hearing counsel has not shown the increase to be unreasonable, section 3 of the Intercoastal Shipping Act, 1933, and rule 10(o) of the Commission's rules of practice and procedure require a finding of reasonableness.**

**A tariff rule requiring mandatory store-door delivery by the carrier of minimum bill of lading shipments while not requiring same of other LTL shipments is not undue or unreasonable preference and prejudice in violation of section 16 first of the act.**

**A tariff rule requiring mandatory store-door delivery by the carrier of minimum bill of lading shipments while not requiring it of other LTL shipments is not unreasonable tariff rule in violation of section 18(a) of the act even though it may work a slight hardship on a small number of consignees.**

*Hugh H. Shull, Jr.*, *J. Scot Provan*, and *Warren Price, Jr.*, for Sea-Land Service, Inc., and Gulf-Puerto Rico Lines Inc., respondents.

*Donald J. Brunner*, *Thomas Christensen*, *E. Duncan Hamner, Jr.*, and *G. Edward Borst, Jr.*, as hearing counsel.

## REPORT

By the Commission (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This proceeding was instituted by order of investigation dated July 25, 1966, to determine the lawfulness of certain rates and regulations of respondents Sea-Land Service, Inc. (Sea-Land), and Gulf-Puerto Rico Lines, Inc. (GPRL).

The investigation featured two tariff changes of the respondent carriers. Sea-Land and GPRL increased their ocean freight charge on minimum shipments from $7.50 to $10, and also eliminated terminal delivery of minimum shipments by requiring consignees to accept store-door delivery provided by respondents.[1]

[1] Respondents also increased their minimum shipment store-door delivery rates in Puerto Rico, but this increase was not included in the investigation.

The Commission decided to investigate the reasonableness of the increased minimum rate in view of the fact that it constituted a 33⅓-percent increase. The mandatory delivery rule was ordered investigated because it was believed that to require store-door delivery for minimum shipments while allowing terminal delivery of other less than trailer load (LTL) shipments might be an unlawful practice in violation of sections 16 and 18 of the act.

Hearings were held before Examiner Paul D. Page, Jr., who issued his initial decision August 1, 1967. Oral argument was held September 27, 1967.

## FACTS

*Sea-Land's Operations*

Sea-Land is a fully containerized common carrier by water in the trade between the U.S. Atlantic coast ports and Puerto Rico ports for the transportation of cargo.

Sea-Land has LTL facilities at its General Cargo Terminal at the port authority piers, Elizabeth, N.J., and at its truck terminal at 19th Street, New York City. Nineteenth Street is primarily an LTL terminal, staffed by ILA labor. Twenty to twenty-five percent of the shipments passing through this terminal are minimum bill of lading shipments. Sea-Land receives about 25 trailer loads per week of LTL cargo at Port Elizabeth from the 19th Street terminal, and it handles approximately 275 trailers per week of LTL and volume cargo at Port Elizabeth.

Sea-Land carries about 800 shipments of minimum charge cargo a week in its Puerto Rican trade accounting for 29 percent of its LTL traffic. Minimum bill of lading shipments carried by Sea-Land have been increasing in proportion to its increased handling of freight.

Each minimum bill of lading shipment when received at 19th Street (New York City), or at Port Elizabeth, is placed on a single pallet and is either floored awaiting consignment to a particular LTL trailer or is taken directly across the terminal platform into an awaiting LTL trailer. The primary problems of planning and moving LTL cargo are space, stowage, and handling. Sea-Land must get the maximum cube out of its trailers, therefore, the loading of LTL cargo into these trailers is a time-consuming, exacting job.

At San Juan, P.R., Sea-Land has three facilities for unloading LTL cargo; i.e., the Buchanan Terminal, the Puerto Nuevo Truck Terminal, and shed D. At San Juan, Sea-Land has had as many as nine vessels arrive within 1 week, but the average is five vessels per week.

One of the circumstances which led Sea-Land to institute its required delivery rule on minimum bill of lading shipments was the space and truck congestion which occurred at the above-named terminals because of the volume of LTL cargo and minimum bill of lading cargo. This congestion problem was actually affecting Sea-Land's overall service.

There is a 5-day free time period in Puerto Rico, in order to give shippers time to pick up their cargo. As a result of the increased volume of cargo coming into Puerto Rico and the fact that these minimum bill of lading shipments are unloaded onto single pallets and placed in these LTL terminals, the minimum bill of lading shipments have taken up more and more internal terminal space. This growing use of space for the minimum bill of lading shipments has detrimentally affected the efficient and effective movement of cargo through the terminals to delivery trucks. It has also evolved into a massive external congestion problem due to the small pickup trucks which come to these terminals to receive the small LTL minimum bill of lading shipments.

Additional warehouse space in Puerto Rico is almost nonexistent. Therefore, there is a need by Sea-Land to move as much of its LTL cargo through these terminals as quickly as possible. Sea-Land strips all the LTL containers within 48 hours after the vessel has commenced stevedoring in San Juan.

The problem of congestion at San Juan is twofold; i.e., the limited amount of warehouse or terminal space and the congestion of the large number of trucks that come to pick up cargo at the three terminals of Sea-Land. Usually LTL cargo waits in the terminals for the fifth day.

Since the institution of the mandatory express delivery service of minimum bill of lading shipments in July 1966, there has been an improvement in the operations of the Puerto Rican terminals of Sea-Land and in its overall service to the trade. One basic improvement since the inauguration of the delivery rule has been Sea-Land's facility to strip the incoming containers from the vessels much faster because there is more space. The minimum bill of lading shipments are stripped at night and loaded into trucks and delivered the following day, thus leaving that space available the following day for stripping of other LTL cargo. There has also been an improvement in the rapidity with which Sea-Land is now able to move LTL shipments other than minimum shipments.

Sea-Land, in its constant review of its rate levels, determined that the rate levels on minimum bill of lading shipments were not compensatory and thus instituted the increased charges from $7.50 to $10.

As justification for the increase, Sea-Land points out that the cost of cutting a Puerto Rican waybill averages between $1 and $1.70 per waybill. However, not included in this cost is the expense of handling the paperwork in the General Cargo Terminal; the fringe benefit paid to documentation employees; capitalization of office equipment (e.g., billing machines, desks, typewriters, computers, etc.); rental; office supplies (e.g., waybill forms, bill of lading forms and container manifest forms); postage or mailing of freight bills; helicopter service; cost of Sea-Land's Customer Service Division; the cost of paperwork on the piers, paperwork for Customs, sales, interline, wharfage collection; handling of the delivery of the cargo destination; tax collector, etc. The cost of cutting a bill of lading on a minimum shipment is the same as it is for a trailer load shipment.

Sea-Land points out that minimum shippers cause certain other problems which produce greater costs for Sea-Land. These problems are attributed to the fact that minimum shippers, who only occasionally use Sea-Land's services, are ignorant of the paperwork connected with the movement. Types of problems are failure to have dock receipts, lack of measurement of the cargo, and tracing of the shipment for the shipper, all of which costs Sea-Land and additional amount of time, money, and labor.

The record shows that Sea-Land showed a profit for its operations in 1965 and for the first half of 1966. In the first half of 1966, Sea-Land realized a net profit in their Puerto Rican operations of $1,873,000.

*GPRL Operations*

GPRL, an affiliate of Sea-Land, is a breakbulk common carrier by water between ports in Puerto Rico and the U.S. gulf coast ports of New Orleans, La., and Mobile, Ala.

GPRL has only two vessels in operation, with one vessel arriving each week at the Port of San Juan. GPRL handles an average of 150 to 165 minimum shipments a vessel. GPRL berths at pier 11, Puerta de Tierra, and has preferential berthing rights on pier 12 extension. These facilities are located on the other side of the harbor from Sea-Land's berthing facilities. It takes GPRL 2 full days to normally discharge approximately 3,700 tons of cargo at San Juan and the vessel then proceeds to Ponce and Mayaguez.

GPRL has an agreement with truckers who deliver cargo from GPRL's pier. GPRL uses approximately 38 truckers for LTL delivery service in Puerto Rico and it has been the experience of GPRL that the rates charged in the delivery service by GPRL are less than a consignee would pay if he engaged a private trucker.

All shipments that move via GPRL are prepaid shipments and the payment for delivery service on delivery cargo (including minimum bill of lading shipments) is made in the United States.

Although congestion at the docks is definitely a problem, it is not the primary cause of instituting the express delivery rule. GPRL instituted its express delivery service to increase its LTL service and as a loss prevention method. It has been the experience of GPRL that the minimum ocean bills of lading shipments are high value commodities, and that GPRL's claim exposure was many times the freight moneys which it had earned for carrying cargo from the point of origin in the United States to its facilities in Puerto Rico.

Express delivery charges on the minimum charge shipments are paid directly to the truckers. GPRL does not make any revenue from the rates under this rule, yet the rule is a cost reducing action in that it cuts down on handling at the destination terminal, the shipments move faster, there is less congestion inside and outside the warehouse facilities and there is less exposure to theft and pilferage.

The reason given by GPRL for raising its minimum bill of lading charge from $7.50 to $10 was the fact that GPRL was losing money and seeking new revenue sources. GPRL's witness had no specific cost studies to indicate that GPRL lost money on a particular $7.50 minimum charge shipment.

GPRL did not show a net profit in 1965, and during the first 6 months of 1966, there was a loss of $360,000; and although the final figures for the 12 months of 1966 were not completed, it is estimated that the loss will be somewhere in the vicinity of $450,000.

The $10 figure was chosen because certain GPRL competitors in the trade (South Atlantic & Caribbean Line, Inc., TMT Trailer Ferry, Inc., and Alcoa Steamship Co.) have a similar $10 minimum charge. Other carriers in the trade, including AUT, Lykes Bros., Seatrain, and Motorships, have a minimum charge of $7.50.

GPRL asserts that its cost for handling the paperwork on a particular shipment is in the vicinity of $4 for each shipment. This includes the paper handling, both in the United States and in Puerto Rico.

Since 1962, when GPRL's minimum bill of lading of $7.50 was instituted, there has been a definite increase in the cost of doing business and in labor costs, both at the ports of Mobile and New Orleans, and in Puerto Rico.

In Puerto Rico, GPRL has received no protests in reference to the increased minimum bill of lading charge, but it has received some protests regarding its express delivery service and charges therefor. For instance, a department store might receive shipments via various lines and have a contract with a trucker to go to the docks and pick up whatever cargo was there. GPRL would not surrender minimum charge shipments to such truckers.

Hearing counsel attempted to develop shipper reaction to respondent's proposed tariff changes by sending a questionnaire to some 900 shippers, whose names were obtained from respondents' manifests evidencing shipments after the tariff changes went into effect. Approximately 325 responses were received of which approximately 50 indicated some sort of opposition to the changes. Fifty-two such letters were offered in evidence by hearing counsel and were received.

Respondents vigorously objected to the admission of these letters, but twice offered to stipulate that "50 out of 900 letters sent out and 325 responses expressed some opposition to the proposed minimum charge increase and/or mandatory delivery."

The remainder of the 325 responses not admitted into evidence were furnished to respondents, and it was agreed that further hearings would be held should respondents wish to rebut the 52 letters offered in evidence. By letter of March 7, 1967, respondents advised the examiner they had decided not to request a further hearing. By letter of March 9, 1967, the examiner allowed respondents, pursuant to their request, until March 17, 1967, to offer late filed exhibits compiled from the remaining letters. No such exhibit was offered.

## Discussion

There are two separate issues before us in this proceeding. We must decide whether respondents' increased rate on minimum shipments is just and reasonable, and we must decide whether respondents' mandatory delivery rule is unjust, unreasonable, or unduly or unreasonably preferential or prejudicial to any description of traffic.

*Increased Rate*

The examiner determined that respondents' rate increase from $7.50 to $10 on minimum shipments is not unjust, unreasonable, or otherwise in violation of the law. He determined that respondents have introduced relevant and substantial evidence requiring a finding that the increased rates are just and reasonable. On the basis of this finding, the examiner deemed it unnecessary to rule on the question of which party has the burden of proving the reasonablenes or unreasonableness of the rates. We reach the same result as the examiner that the rate increase must be adjudged to be reasonable. However, we feel compelled, on the basis of the record, to take a different route toward reaching that result.

Respondents have maintained that various facts of record support the proposition that the $10 minimum charge is at least no greater than the actual costs to respondents of handling minimum charge shipments. The examiner agreed that the rate was reasonable but did not specify which facts supported that proposition. Hearing counsel have excepted to this finding by the examiner and seek to show that the facts upon which respondents rely do not support a conclusion of reasonableness.

Respondents rely on the following facts of record to support their argument that the rate is reasonable:

1. Minimum charge shippers who ship only occasionally and who may be ignorant of the rules and regulations or the necessary paperwork with respect to the movement of their traffic to Puerto Rico tend to create three major problems:

*a.* Lack of dock receipts.
*b.* Lack of measurement of the cargo.
*c.* The tracing of the shipment for the shipper.

These problems produce costs to Sea-Land in time, money, and labor.

2. The loading and handling of LTL cargo (which includes minimum charge cargo) by Sea-Land is a time-consuming, exacting job.

3. Minimum charge shipments via both Sea-Land and GPRL are high value shipments.

4. LTL shipments, including minimum shipments, are subjected to more than normal surveillance by the Loss Prevention and Claims Department of GPRL. Additional paperwork for these type shipments is necessary.

5. GPRL and Sea-Land compete with South Atlantic & Caribbean Line, Inc., and TMT Trailer-Ferry, Inc., out of Florida, both of which maintain a minimum charge of $10. Alcoa, who was formerly in the trade from the gulf, also had a minimum charge of $10.

6. The freight forwarder charges in New Orleans for documentation alone are $15.

7. Freight forwarders who handle Sea-Land traffic charge for paperwork from $10 to $20 per shipment.

8. GPRL increased its minimum charge as a means of reducing its losses, which amounted to $360,000 in the first 6 months of 1966 and are estimated to be in the vicinity of $450,000 for the entire year.

9. GPRL has sought other ways to increase its revenues; as for example, an increase of $1 per thousand board feet on lumber.

10. The cost to GPRL for necessary processing of papers for each minimum shipment is approximately $4.

11. Sea-Land's cost of cutting a Puerto Rico waybill averages between $1 and $1.70, but this does not include expense of: the paperwork in the general cargo terminal, the fringe benefit paid to docu-

mentation employees, capitalization of office equipment, rental, office supplies, postage and mailing of freight bills, helicopter services, customer service division, paperwork on the piers, paperwork for Customs sales, interline, wharfage collection, handling of the delivery of the cargo at destination, tax collector, etc.

12. Since 1962, when GPRL minimum bill of lading charge of $7.50 was instituted, there has been a definite increase in the cost of doing business and in labor costs at the Ports of Mobile, New Orleans, and in Puerto Rico.

13. The revenue increase to GPRL represented by the increased minimum charge is estimated at $25,000 per year.

14. The average weight of Sea-Land's minimum shipments is 210 pounds, although this could range to as much as 800–900 pounds.

15. Shipping documents used by Sea-Land include: a 15-part waybill, a five-part container manifest, a short form or long form bill of lading, a standard dock receipt, a through bill of lading which is a combined inland/ocean bill of lading.

16. GPRL has received no protests in Puerto Rico in reference to the increased minimum bill of lading charge.

While respondents and the examiner feel that these facts conclusively support the finding of reasonableness of the rate, we are not so convinced. The only conclusion supported by the enumerated facts is that there are many factors and related expenses involved in carrying even a minimum shipment from the United States to Puerto Rico. However, none of the enumerated facts shows what it costs to ship any specified amount of cargo by either carrier. To conclude that the facts of record support a finding of reasonableness would be a mere gratuitous finding.

In view of our disagreement with the examiner's conclusion in this respect, we are required to deal with the burden of proof question raised by hearing counsel.

Hearing counsel are of the opinion that respondents should have the burden of proving the rate increases to be reasonable, and that respondents have failed to do so.

Respondents argue that the burden of proof is on the carrier only in suspension cases and since the rates in question were not suspended the burden of proof is not theirs.

Hearing counsel have not shown the rates to be unreasonable and they admit that if they have the burden of proving the increase unjust and unreasonable, a finding that it is just, reasonable, and lawful must be made.

Section 3 of the Intercoastal Shipping Act, 1933, provides for hearings concerning the lawfulness of new rates filed with the Commission.

The second paragraph of that section provides for the suspension of such rates pending such hearing and decision thereon. The second paragraph further provides:

> At any hearing under this paragraph the burden of proof to show that the rate, fare, charge, classification, regulation or practice is just and reasonable shall be upon the carrier or carriers.

While the "paragraph" referred to in the quoted sentence refers only to suspension rate cases, hearing counsel argue that Congress could not have intended to place the burden of proof on the carrier only in suspension cases.

Hearing counsel argue that nonsuspension rate cases were neither mentioned nor alluded to in the legislative history of section 3. Further, that no nonsuspension rate case was decided by the Commission's predecessors prior to the above-mentioned amendment. Hearing counsel feel that this compels a conclusion that Congress did not consider nonsuspension rate cases, and the only distinction they intended to make was between suspension cases and ordinary complaint cases, not between suspension and nonsuspension cases.

Hearing counsel quote legislative history passages [2] indicating that in suspension cases the carrier has the burden of proof for if the rule were otherwise, the carrier might remain mute and require the Commission to present evidence, the bulk of which may be in the possession of the carrier. Hearing counsel submit that the same logic should apply in nonsuspension cases, since Congress intended no distinction between the two.

Hearing counsel further state that rule 10(o) of the Commission's rules of practice and procedure, which also would place the burden

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[2] Hearing counsel quote the following passages:

(1) From the H. Rept. 824, of June 12, 1939, and the S. Rept. 724 of July 5, 1939, both titled "Amending Certain Provisions of the Merchant Marine and Shipping Acts":

"Section 2 clarifies section 3, Intercoastal Shipping Act, 1933, to establish in so many words the rule believed to be applicable under existing law, that in cases involving the suspension of rates the burden of proof is on the carrier to show that the rates, practices etc., are just and reasonable. If the rule were otherwise, the carrier might remain silent and require the complainant or the Maritime Commission to present evidence, though in most situations the bulk of such evidence is in the possession of the carrier. It is evident that Congress when it established the existing law, did not intend to permit such a result."

"Under the section as amended, the burden of proof will not be placed on the carrier in ordinary complaint proceedings, but only in suspension proceedings."

(2) From the H. Doc. 208, "Letter from the Chairman of the United States Maritime Commission Transmitting the Maritime Commission Recommendation for Legislation":

"It is suggested that section 3, Intercoastal Shipping Act, 1933, be amended to provide that in cases involving the suspension of rates the burden of proof is on the carrier. The Commission believes this to be the case under present law, as has been inferred in many decisions of the Commission's predecessors. If the rule was otherwise the carrier might remain mute and require the Commission or the complainant to present evidence, the bulk of which may be in the possession of the carrier, a situation evidently not intended by Congress when it established the law."

of proof on carriers only in suspension cases, is void inasmuch as it does not reflect the intention of section 3 of the Intercoastal Act.

Rule 10(o) reads:

(o) *Burden of proof (46 CFR 502.155)*. At any hearing in a suspension proceeding under section 3 of the Intercoastal Shipping Act, 1933 Rule 5(g), the burden of proof to show that the suspended rate, fare, charge, classification, regulation or parctice is just and reasonable shall be upon the respondent carrier or carriers. In all other cases, the burden shall be on the proponent of the rule or order.

Respondents feel that section 3 of the Intercoastal Act and rule 10(o) of the rules of practice and procedure are quite clear in requiring that the carrier sustain the burden of proof *only* in suspension rate cases. Respondents submit that it is absurd to think, as hearing counsel suggests, that Congress in 1939, envisioned that all investigated rates must be suspended.

Respondents submit that rule 10(o) cannot, as hearing counsel would wish, be altered in this proceeding and that the Commission would have to follow its normal rulemaking procedures to effect any such amendment.

Finally, respondents suggest that when the language of a statute expresses an intention that is reasonably intelligible and plain, it may not be modified by resort to construction or conjecture. Resort to extrinsic aids in construction of clear statutory language is unnecessary. Respondents feel that section 3 of the Intercoastal Act is as clear as any statutory language can be and does not permit a conclusion that the carrier has the burden of proof in nonsuspension cases.

As respondents have indicated, both section 3 of the Intercoastal Act and rule 10(o) of our rules of practice and procedure quite clearly place the burden of proof on the carriers only in suspension rate cases. The many arguments of hearing counsel as to how the rule should read or how it was meant to be interpreted do not change this fact. Neither are we convinced that the legislative history passages cited by hearing counsel support their position that section 3 is meant to apply to all rate cases, whether suspended or not. Both quoted passages specifically state that in cases involving *suspension* of rates the burden of proof is on the carrier. We cannot impute to Congress an intention which is not clearly established by a reading of the statute and its legislative history.

Hearing counsel also rely on our statements in docket 1182, *Rates from Jacksonville, Florida to Puerto Rico (10 FMC 376)*, to support their position that the carrier should have the burden of proof. In docket 1182, we required the carrier to show that cost or other transportation conditions justify a rate policy which on its face worked a preference to a particular port served by that carrier. The rate in question had not been suspended. In 1182, the rate policy was preferential on its face and therefore can be differentiated from the instant proceeding. In such a case we require the carrier to go forward and show why the prima facie preference should not be fatal to the approval of the rate policy in question.

The instant proceeding does not involve a rate change which is on its face preferential, prejudicial, or unreasonable. It involves a rate increase. The increased rate was investigated, but was not suspended. Section 3 of the Intercoastal Act and rule 10(o) of FMC rules of practice and procedure place the burden of proof on hearing counsel. Hearing counsel have not demonstrated the increase to be unreasonable. We can only conclude that it is not.

*Delivery Rule*

Respondents' mandatory delivery rule on minimum shipments provides that consignees must accept delivery at their store door. Respondents have an agreement with truckers in Puerto Rico who furnish delivery of the cargo. The rule does not permit consignees of minimum shipments to pick up cargo at the terminal.

Respondents feel the mandatory delivery is necessary and is justified because it relieves the congestion at the terminals and greatly adds to the general operating efficiency of the terminals.

Hearing counsel opposed the rule. They feel that the gain in operational efficiency does not justify violations of the Shipping Act. Hearing counsel maintained the rule was violative of sections 16 and 18 of the act in that it denies free time and an option to have terminal pickup on minimum shipments.

The examiner concluded that the mandatory delivery rule is an unjust and unreasonable practice in violation of section 18(a) of the act and subjects cargo moving at minimum rates to undue and unreasonable prejudice and disadvantage in violation of section 16 of the act. The examiner's conclusions are based on his finding that the rule strips minimum shipments of 5 days' free storage to which they are entitled, and also strips them of the option to pick up the cargo at the dock, while allowing other LTL shipments to continue to receive these two advantages. The examiner states that before the advent of this rule minimum shipments paid for these two items in their charges and that they continue to pay for them now in view of the tariff increase, but do not receive them.

Respondents have excepted to the examiners' findings, both that the mandatory delivery rules constitute unjust and unreasonable practices in violation of section 18(a) of the act, and that such rules violate section 16 of the act.

We are compelled to agree with respondents and reverse the examiner on these points.

The record is abundant with evidence indicating that congestion was a problem at the terminals in Puerto Rico and that the congestion was actually affecting Sea-Land's overall service. The congestion problems are largely due to the restricted space available at these terminals.

Respondents instituted the mandatory delivery rule in an attempt to alleviate the congestion. Under the rule, respondents effect store-door delivery of minimum shipments.

Minimum shipments were selected for the mandatory delivery rule for several reasons. Minimum shipments are loaded onto space-consuming, pallets and since the number of minimum shipments to Puerto Rico is quite large (800 per week for Sea-Land), they make a sizable contribution to congestion. Congestion is further caused by the large number of trucks required to pick up the minimum shipments. A large number of trucks is required, since an individual consignee is generally picking up either a single or just a few minimum shipment parcels. There is the further matter of loss and damage claims. Minimum shipments are generally relatively high-valued shipments, and are particularly susceptible to theft when stored in the terminals. The loss and damage problem was the primary reason GPRL instituted the delivery rule. While congestion is also a problem for GPRL, the extent of congestion at its terminals is not as great as at Sea-Land's.

Respondents have indicated that the reason all LTL consignees were not similarly made subject to these delivery rules was simply that there is not enough LTL equipment available to respondents to permit them to perform delivery for all this class of traffic.

The record also shows that the mandatory delivery rule has produced highly satisfactory results. This was conceded by hearing counsel and by the examiner.

It becomes apparent that respondents' reasons for instituting the rule are valid. The rule is shown to accomplish the purpose for which it was instituted. It will also be shown that the rule does not result in the violations of the Shipping Act, alleged by hearing counsel and found by the examiner.

The examiner found that the rule violated sections 16 and 18 of the act in that it denied minimum shipments a reasonable amount of free time which carriers have always been required to furnish to cargo.

It cannot be denied that respondents' rule deprives minimum shipments of free time. Nevertheless, it will be shown that the rule eliminates the need for free time and thereby results in no loss for minimum shipments.

Our predecessor and the courts have had occasion to consider free time and have, as the examiner here found, recognized that water carriers:

> * * * are required by their transportation obligation, absent a special contract, to unload the cargo onto the dock; segregate it by bill of lading and count, put it in a place of rest on the pier so it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it. *American President Lines Ltd.* v. *FMB*, 317 F. 2d 887 (D.C. Cir., 1962).

The purpose of free time, however, is to offer consignees a reasonable time to pick up cargo without being assessed demurrage charges. Free time is not designed to allow free storage of cargo. In *Storage of Import Property*, 1 U.S.M.C. 676 at 682 (1937), our predecessor stated that:

> As a proper part of their transportation service respondents should allow only such free time as may be reasonably required for the removal of import property from their premises, based on transportation necessity and not on commercial convenience.

Under respondents' mandatory delivery rule there is no need for free time. Delivery is made by respondents. They need allow no time for the removal of property when they take it upon themselves to make delivery. And as previously indicated, since free time is not designed to permit free storage, minimum shipments are denied nothing which the concept of free time typically includes. No finding of a violation of either sections 16 or 18 of the act can be based on this denial of free time.

The second basis for the examiner's finding of section 16 and section 18 violations is the fact that respondents' delivery rule does not afford minimum shipment consignees an option to pick up the cargo.

Hearing counsel suggest that the delivery rule is violative of the act for the same reason. Hearing counsel point out that a number of shippers have expressed a desire to perform their own pickup and aver that they could perform it at a cost less than that which respondents charge, and further that they often have to come to the terminal to make other LTL pick ups and could pick up the minimum shipments at the same time.[3] Hearing counsel feel it is unreasonable, therefore, to refuse a pickup option.

[3] The shipper sentiment was received by hearing counsel by means of a questionnaire sent by hearing counsel to approximately 900 shippers. Respondents have objected to the use of this evidence inasmuch as it is largely heresay and respondents could not cross

On its face, the rule appears to constitute a prejudice to minimum shipment cargo and a preference to all other LTL cargo inasmuch as other LTL cargo is afforded a pickup option and minimums are not. The examiner found that it did constitute a preference and was, therefore, violative of section 16 first of the act which forbids undue or unreasonable preference or prejudice to any description of traffic. The examiner also based his finding that the rule constituted an unreasonable tariff regulation under section 18(a) of the act on the same failure to afford a pickup option.

In reference to the section 16 violation, we have often held that all preference, prejudice, or discrimination is not necessarily undue, unjust, or unreasonable. In *Philadelphia Ocean Traffic Bureau* v. *Export Steamship Corp.*, 1 U.S.S.B. 538 at page 541 (1936), it was stated:

It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the *real disadvantage* of the complainant. [Emphasis added.]

Our closer scrutiny of the rule and its effects has disclosed that the apparent preference or prejudice here is not undue, unjust or unreasonable inasmuch as it does not operate to any real disadvantage to minimum shipments. We have shown how minimum cargo has lost nothing by being denied free time. It is also true that respondents' delivery service is performed at a rate less than a consignee would pay if he engaged a private trucker. The only disadvantage then is to those few consignees who choose to perform their own pickup. Only a very small number of those to whom the pickup option was denied have expressed dissatisfaction with the situation. Furthermore, not a single shipper or consignee appeared at the hearings to testify in opposition to the rule after the rule had been in operation for almost 9 months. Most importantly, any inconvenience or additional cost burden imposed on minimum shipment consignees will necessarily be slight and will be far outweighed by the attendant benefits of the rule which are manifested in the form of terminal operating efficiency and elimination of loss and damage claims.

The same reasoning is applicable to a determination of whether the delivery rule is an unreasonable tariff practice in violation of section 18(a) of the act.

xamine. An analysis of the replies to hearing counsel's questionnaire discloses that of 00 shippers contacted only 50 expressions of opposition, either to the increased minimum harge or the delivery rule were received. Of the 50 objections only 22 expressed disapproval vith the delivery rule. It is shown infra how the use of this evidence does not prejudice espondents.

Numerous ICC cases have recognized a carrier's right to make reasonable regulations as to points at which it will deliver various classes of property especially in the case of congested terminals. *Nutile Fruit Co.* v. *Boston & M.R.*, 155 I.C.C. 221 (1929); *Bahrenburg Br. & Co.* v. *A.C.L.R.R. Co.*, 24 I.C.C. 560 (1912); *Kriel* v. *B & O R.R. Co.*, 41 I.C.C. 434 (1916).

Hearing counsel have contended and the examiner has found, however, that this is not a reasonable regulation. As indicated above, we think it is a reasonable rule even though a very few may suffer a hardship therefrom. In *Blackman* v. *Southern R. Co.*, 10 I.C.C. Rep. 352 (1904), it was averred that a particular storage charge was unreasonable in that it was higher than the usual public warehouse charge in the same area. The charge was ultimately determined to be reasonable, and it was observed that:

> * * * any rule which in its general application is beneficial may in particular instances work a hardship, but this does not afford a sufficient reason for declaring the rule, in itself, unreasonable.

This principle is applicable here. Although respondents' delivery rule may work a slight hardship on a few who are denied their preference of performing their own pickup, the rule is nevertheless a reasonable one in that it goes a long way toward eliminating a problem of congestion and of eliminating loss and damage claims at respondents' various terminals in Puerto Rico.

For the above reasons, we feel the rule neither works an unreasonable preference or prejudice under section 16 of the act nor constitutes an unreasonable tariff rule under section 18(a) of the act.

s/ THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

Docket No. 66–43

INVESTIGATION OF MINIMUM CHARGES AND TERMINAL DELIVERY SERVICES—ATLANTIC-GULF/PUERTO RICO TRADES

## ORDER

Full investigation of the matters involved in this proceeding have been had, and the Commission on this date has made and entered on record a report stating its conclusions and decision thereon. Said report is hereby referred to and made a part hereof, in which it is found that the increased rates of respondents Sea-Land Service, Inc., and Gulf-Puerto Rico Lines, Inc., here under investigation are not unjust or unreasonable, and in which it is found that respondents' mandatory store door delivery rule on minimum shipments is neither unreasonable nor unduly or unreasonably preferential or prejudicial;

*It is ordered*, That this proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 65–14

IN THE MATTER OF FREE TIME AND DEMURRAGE PRACTICES ON INBOUND CARGO AT NEW YORK HARBOR

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Decided December 4, 1967

Free time and demurrage rules, regulations and practices on import cargo at the Port of New York found not shown to be unjust and unreasonable within the meaning of section 17, Shipping Act, 1916, or contrary to General Order 8, Part I. Such rules, regulations and practices will be unlawful in the future unless modified in certain respects and General Order 8, Part I is amended to provide for:

(1) Insertion of words "longshoremen's strikes" in section 526.1(d) as a factor preventing consignee's removal of cargo.

(2) Free time or first period demurrage as specified in the appropriate tariff, in case of carrier inability or refusal to tender cargo for delivery under section 526.1(c) arising after expiration of free time.

(3) Assessment of first period demurrage charges, after expiration of free time, when consignee is prevented from removing his cargo, within the meaning of section 526.1(d), by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area.

(4) A new section 526.1(f) requiring, following a longshoremen's strike of five days or more, extension of free time for a period not less than five days, exclusive of Saturdays, Sundays, and legal holidays, or first period demurrage for five calendar days beyond the time at which they would normally terminate, depending upon position of cargo at commencement of strike. Such extensions shall apply only if cargo is actually picked up within such extended time or, if an appointment system acceptable to both carriers and consignees is adopted, within 24 hours of advance notification that cargo is available for pickup and readily accessible; provided, however, that time not be extended more than 24 hours beyond the additional free time or demurrage period.

*Elkan Turk, Jr.* for respondents, parties to FMC Agreement No. 6015.

*Burton H. White*, *Elliott B. Nixon*, and *Henry F. Minnerop* for respondents, West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC), Continental North Atlantic Westbound Freight Conference, French North Atlantic Westbound

Freight Conference, Swiss North Atlantic Freight Conference, Marseilles/North Atlantic U.S.A. Freight Conference, member lines of these Conferences as named in the orders of investigation, and Hamburg-American Line, North German Lloyd, Scandinavian American Line, and Northeast Marine Terminal Co., Inc.

*John R. Mahoney*, *John G. McGarrahan*, *Richard Nicoletti*, and *Edmund C. Smith* for respondents, parties to Free Time and Demurrage agreement 7115 and East Coast South American/New York Free Time Agreement (FMC No. 7525).

*Ronald A. Capone* and *Robert H. Binder* for respondents, North Atlantic Westbound Freight Association and its member lines.

*Elmer C. Maddy* and *Baldvin Einarson* for respondents, Calcutta, East Coast of India & East Pakistan/U.S.A. Conference, FMC Agreement No. 7555, and the West Coast of India & Pakistan/U.S.A. Conference, and member lines as named in the orders of investigation.

*Joseph Hodgson, Jr.* and *Harvey M. Flitter* for respondent, Seatrain Lines, Inc.

*Seymour H. Kligler* for respondent, South African Marine Corp.

*Robert L. Dausend* for respondent, Sea-Land Service, Inc.

*Sterling Stoudenmire* for respondent, Waterman Steamship Corporation.

*Joseph A. Byrne* for respondents, New York Terminal Conference and constituent members.

*James A. Flynn* for Atlantic Cargo Inspection Corporation.

*Henry E. Foley* and *Chester H. Gourley* for intervener, the Massachusetts Port Authority.

*William L. Marbury*, *Frederick H. N. Heeman*, and *Philip G. Kraemer* for intervener, the Maryland Port Authority.

*Sidney Goldstein*, *F. A. Mulhern*, *Arthur L. Winn, Jr.*, *Samuel H. Moerman*, *J. Raymond Clark*, and *James M. Henderson* for intervener, the Port of New York Authority.

*Morris Duane*, *George F. Mohr*, and *Warren Price, Jr.* for intervener, the Delaware River Port Authority.

*Aaron H. Glickman* for intervener, the California Association of Port Authorities.

*Thomas L. Whipple* for intervener, the Boston Marine Terminal Association.

*Bryce Rea, Jr.* and *Thomas M. Knebel* for intervener, the Middle Atlantic Conference (of motor carriers certificated as common carriers by the Interstate Commerce Commission).

*Seymour Graubard* and *Michael H. Greenberg* for intervener, the American Institute for Imported Steel, Inc.



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*Thomas D. Wilcox* for interveners, Toyomenka, Inc. and CAP Sales Corporation.

*T. P. H. Aitken* for intervener, the Cocoa Merchants Association of America, Inc.

*J. Elliott Burt* for intervener, the Green Coffee Association of New York City, Inc.

*Gerald H. O'Brien* for intervener, the National Council of American Importers.

*Harold Bruce* for intervener, the Association of Food Distributors, Inc.

*Stephen E. Estroff* for intervener, the American Spice Trade Association, Inc.

*Donald J. Brunner*, *Norman D. Kline*, *David N. Nissenberg*, and *Samuel B. Nemirow*, as Hearing Counsel.

## REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners.*)*

We instituted this investigation, by orders served May 12, June 11, and August 18, 1965, to resolve certain free time and demurrage problems in the Port of New York on inbound cargo. One hundred and sixty-eight parties were made respondents to the proceeding, including ocean common carriers, both conference and independent, members of the Free Time and Demurrage Agreement, stevedoring and terminal companies, and a terminal conference operating in the Port of New York. Numerous parties intervened, including certain port authorities, a port terminal association, a motor common carrier conference and importers and import trade associations. Extensive hearings were held in New York City before Examiner Charles E. Morgan who, on October 17, 1966, issued an Initial Decision to which exceptions and replies to exceptions were filed. We heard oral argument on March 15, 1967.

### THE SITUATION AT NEW YORK

There was a strike of longshoremen commencing January 11, 1965, which rendered New York Harbor, among others on the East and Gulf Coasts, inoperative. At the end of this strike, an abnormally large number of ships discharged their cargoes quickly, and this, added to the inbound cargoes left on the piers prior to the strike, caused greater than normal congestion on the shore side of the piers in the Port of

*Commissioner Fanseen did not participate.

New York. Protests had been received by the Commission, from importers as to the demurrage charges applicable during and subsequent to this longshoremen's strike, and from truckers with respect to the shore-side congestion of the piers subsequent to the strike.

Free time on import cargo at the Port of New York in most trades is five days, but in some trades six days are allowed. This free time commences on the first day following that day on which a ship is fully discharged, and is based on working days, excluding Saturdays, Sundays, and holidays. The purpose of free time is to give a reasonable period during which an importer-consignee can pick up his cargo after it has been unloaded from the ship onto the dock.

Some importer-consignees may receive more than the usual five days of free time to pick up their cargoes even in normal times. This can occur when a particular consignee's cargo is available for pickup prior to the day that the ship is fully discharged, e.g., a ship might take four days to be fully discharged whereas some of its cargo may be available for pickup on the first day of discharge.

Demurrage on import cargo commences after free time expires. Demurrage is the charge assessed for the use of the pier facilities, for watchmen, fire protection, etc., on the cargo not picked up during free time. Demurrage is based on calendar days and includes Saturdays, Sundays and holidays. The daily rates of demurrage on import cargo apply for five-day periods, and increase with each succeeding period. Second and third period demurrage rates include penal elements which are designed to encourage the prompt movement of cargoes off the piers.[1]

Some consignees tend to wait until the last day of free time or until nearly the last day of free time to pick up their cargoes while other consignees will pick up their cargoes as soon as they are unloaded from the ships and are available for delivery. The latter often have paid for their goods before they left foreign ports, and are desirous of delivering their goods to the ultimate user as promptly as possible so as to recoup their invested monies.

Because some of the importer-consignees operate on small margins of profit, and because public warehouse charges are generally higher

[1] In 1960, at the Port of New York, a beneficial change was made in the rules for assessing demurrage charges, and demurrage was assessed on a daily basis, rather than in blocks of five days, as had been the earlier practice. In other words, if prior to 1960 a consignee picked up his cargo on the first day of the third demurrage period, for example, he would be charged for the full third period of five days. Since 1960, this same consignee in the same circumstances would pay demurrage for only the one day of the third period. This change gives the consignee an incentive to remove his cargo before the last day of any demurrage period, whereas prior to 1960, with no such incentive, many consignees were disposed to pick up their cargoes on the last day of a demurrage period.

than demurrage charges, some consignees tend to use the piers as warehouses.

The 1965 longshoremen's strike commenced on Monday, January 11, 1965, and terminated in the Port of New York on Friday, February 12, 1965. Some of the New York piers resumed work on Saturday, February 13, and continued to work on Sunday, February 14, 1965. The strike affected practically the entire East and Gulf Coasts of the United States, including all ports from Searsport, Maine, to Brownsville, Texas, with the exception of Panama City, Florida. Termination of the strike varied widely from February 12 at New Orleans, Louisiana, to March 13, at Miami, Florida. There have been numerous strikes at the ports since the end of World War II, but the 1965 strike was unusual inasmuch as the longshoremen's union negotiators had reached an agreement with the representatives of the terminal operators on December 16, 1964, and the longshoremen continued to work after December 20, 1964, the expiration date of the Taft-Hartley injunction issued in October 1964.

The agreement of the negotiators was rejected by the rank and file members of the longshoremen's union on Friday, January 8, 1965, and the strike commenced on the following Monday. As there had been no advance warning that the strike was a certainty, no general alert was given to the terminals, truckers and importers that they should make extra efforts to remove cargoes from the piers. On the occasions of strikes in the past there has been sufficient advance warning to allow the importers to pick up their cargoes before the strikes began.

The ocean carriers did not follow their usual course before a strike of minimizing cargo loaded in foreign ports and of scheduling their vessels so that at the end of the strike approximately half of their vessels would be in United States ports and half would be in foreign ports. The ocean carriers believed that the strike would terminate promptly because of the negotiators' agreement reached beforehand. As a result, ships continued to load and sail for the United States. Grace Line, for example, had its entire general cargo fleet in United States Atlantic ports at the end of the strike. The International Longshoremen's Association took the position even after the New York workmen had ratified the agreement that there would be no work in New York until there was work on the entire Atlantic and Gulf Coasts. The New York longshoremen returned to work only after the President of the United States used his persuasion. Because the longshoremen at South Atlantic and West Gulf ports did not return to work until three or four weeks after those at New York and other ports, cargo was diverted to New York, adding to the already heavy congestion.

Immediately after the January–February 1965 longshoremen's strike, certain piers in the Port of New York had opened on Saturday and Sunday and on evenings in an attempt to sort and make cargo available for delivery. Consignees were telephoned, but failed to pick up their cargo. Subsequently, additional vessels came into port and unloaded additional cargoes, with the result that piers became more congested and ran into problems of making cargoes available for delivery.

The Atlantic Cargo Inspection Corporation (ACIC), besides other duties, administers a demurrage collection service for most of the major steamship conferences in the import trade at the Port of New York. ACIC collects about $1,000,000 of demurrage charges a year, with the bulk of such charges under $50 per unit. ACIC does not insist always upon documentary evidence when a complaint is received of inability to pickup cargo because of pier congestion or other factors, and some complaints are received by telephone and acted upon by telephone, and a consignee is advised within a few hours that demurrage relief has been provided. Nevertheless, as a general rule some written proof is required of a truck's presence at a pier at the time of an unsuccessful attempt to pick up cargo. This proof could be a gate pass or logging-in at the pier. ACIC requires as a minimum in giving demurrage relief that it be given the description of the truck, its license number, and the cargo which the truckman has attempted to pick up.

A trucker may tell a consignee that he made an unsuccessful attempt or attempts on a certain date or dates to pick up the consignee's cargo, but when the written proof is lacking the demurrage relief claim generally is denied. ACIC insists that it cannot fairly administer the demurrage rules in any other manner.

The trucker serving the importer pays a truck-loading charge to the marine terminal or to the ocean carrier, whichever provides the labor for loading the trucks, and the loading of his truck is the trucker's responsibility. Nevertheless, the ocean carriers, through or with the marine terminals, have assumed the responsibility of providing sufficient labor to accomplish the truck loading, and use this responsibility as a determining factor in their ability or disability to make the cargo available for pickup, or in other words, in their (the ocean carriers') ability or disability to tender the cargo for delivery to the consignees during the free time period.

The principal dissatisfaction of the consignees and of their truckers results from the time required by the truckers in picking up cargo at the piers, particularly the time required on unsuccessful attempts to pick up cargo. ACIC believes that some truckers tell their consignees that they attempted to pick up the cargo when in fact the trucker did not go near the piers. The consignees and truckers believe that the method of obtaining proof of an attempted pickup is unduly onerous, because when a trucker makes an unsuccessful attempt to pick up cargo on one day, he can obtain proof only for that one day, and the truckman must come down to the piers on the next day, and the next day, if there is to be demurrage relief for each of the successive days. ACIC can offer no other administrative solution which is equally fair to the trucker who makes bona fide attempts to pick up cargo and to the trucker who fails to make such attempts. ACIC is firmly convinced that any relaxation of its rules will result in greater congestion at the piers.

Problems can vary from day to day at the piers, and problems can vary from pier to pier. One pier can be working with a minimum number of men in the morning, and when other piers finish their jobs in the morning making extra labor available for the afternoon, the first pier could obtain that extra labor in the afternoon and then handle more trucks than it handled in the morning. Therefore, the decision that one pier cannot handle a truck that arrives toward the end of a long line of trucks in the morning is not easy to make.

While some pier personnel will say off the record to a particular trucker that he will not be served on a particular day, officially these same pier personnel will not admit that a pier is congested. ACIC has field inspectors who are authorized to make the decisions which will waive demurrage in the event that these inspectors consider the pier or piers to be too congested to handle a trucker. It takes time for these inspectors to go to the piers where they must observe conditions and make their decisions. The truckers and consignees quarrel with this system because it is in their opinion too slow.

Generally a trucker in the New York Harbor area can make only one pickup and one delivery of cargo per day when utilizing one truck and its driver, principally because of the time which must be spent at the pier. One knowledgeable trucker, very familiar with the piers in the Port of New York, insists that a fair time for holding a truck outside of a dock waiting for a pickup is no more than one hour or two. On three occasions he telephoned the office of ACIC giving the truck number, cargo, pier, ship, etc., asking for extension of free time or relief from demurrage and was told that ACIC would send its field investigator to check out the problem of long lines of trucks and congestion at the piers. It took three or four hours of waiting in each instance before relief was granted, but after losing four hours of time there was "no place to go" for the truck, and the truck owner was "stuck" with the truckman's wages.

In other instances, both before and following the 1965 strike when a truck was "chased" from one pier as early as 10 a.m. because no loads could be made available to it, this truck would go to another pier. It was not unusual for a trucking company to have its trucks try two or three piers, and at the end of the day be unable to obtain any loads. The truckers consider it most unreasonable to have to go to a pier at 5 a.m. or 6 a.m. when the pier opens at 8 a.m., and then have to wait until 2 p.m., 3 p.m., or 4 p.m. to obtain cargo, and very often leave the pier without obtaining any cargo, or with only part of the cargo.

## The Issues for Resolution

In 1948, the Commission's predecessor, the United States Maritime Commission, pursuant to a similar investigation of conditions in 1947 in the Port of New York respecting free time and demurrage practices, promulgated the following regulations now contained in Commision General Order 8: [2]

1. Free time of five days (exclusive of Saturdays, Sundays, and legal holidays), computed from the start of business on the first day after complete discharge of the vessel, is adequate free time on import property at New York under present conditions.
2. Free time on import property at New York shall not be less than five days, except on property of such a special nature as to require earlier removal because of local ordinances or other governmental regulations, or because piers are not equipped to care for such property for such period, or except as the Commission may hereafter direct.
3. Where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal.
4. Where a consignee is prevented from removing his cargo by factors beyond his control (such as, but not limited to, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

The issues for resolution in this proceeding as framed by the Orders of Investigation are whether:

1. Free time and demurrage practices in the Port of New York applicable to periods when a strike of longshoremen is in progress or

[2] *Free Time and Demurrage Charges–New York*, 3 U.S.M.C. 89 (1948).

some other extraordinary circumstances interfere with the efforts of receivers of cargo to call for same at terminals and take delivery thereof, are unjust and unreasonable under section 17 of the Shipping Act, 1916;

2. General Order 8, Part I has been lawfully interpreted and enforced during the periods of abnormal shore-side pier congestion following the strike of longshoremen, terminating Februray 13, 1965;

3. General Order 8, Part I should be amended to deal more adequately in the future with periods of general pier congestion;

4. General Order 8, Part I should be amended to prescribe assessment of any pier demurrage against cargo during maritime strikes; and

5. General Order 8, Part I should be amended to delete the words "which affect an entire port area or a substantial portion thereof."

## THE INITIAL DECISION

The Examiner in his Initial Decision determined that the practices at the Port of New York respecting free time and demurrage during and immediately after the strike of 1965 were not unjust and unreasonable particularly in light of the fact that the strike appeared to have been settled in advance and the then existing free time and demurrage rules generally had worked well in the past including post-strike situations. He also found that the practices engaged in by the carriers during this period could not be said to have been unlawful under General Order 8, Part I. He did determine, however, that in the future, certain practices would, if engaged in by the carriers at the Port of New York, be unjust and unreasonable and that pursuant to section 17, General Order 8, Part I should be amended as follows:

1. Section 526.1(d), the paragraph dealing with those factors which prevent a consignee from removing his cargo because of conditions beyond his control, should be amended and clarified by adding the words "longshoremen's strikes." This modification did not result in a change in the present interpretation of the section, but would be merely a specific enumeration of a factor already acknowledge to be covered by section 526.1(d).

2. Section 526.1(c), the paragraph dealing with a carrier's refusal or inability to tender cargo for delivery, should be amended to read "free time must be *granted* for a period equal to the duration of a carrier's disability or refusal, including those situations where free time previously was granted and had expired." Section 526.1(c) now requires that free time be "extended" when a carrier is unable or refuses to tender cargo for delivery. As the Examiner correctly observed, the

word "extend" could be reasonably interpreted as requiring free time after the period when it would normally expire only when the inability or refusal arose during free time, or it could be interpreted as requiring the application of free time whenever the carrier's refusal or inability arose. Both interpretations have been followed by the conferences.[3] Thus, this suggested modification would involve a change for some conferences and would merely be a codification of present practices for other conferences. The Examiner grounded this proposed modification on the "obligation of the ocean carriers to continuously work to unblock blocked-in cargoes and their duties to tender such cargoes for delivery, that is, make them accessible for pickup." It should be noted, however, that inasmuch as the inability to tender cargo covered by this section refers only to inability which can be imputed to a carrier because of its failure to fulfill its obligation, the inability of a carrier to make cargo available for pickup for the duration of a longshoremen's strike is not one imputed to the carrier, if a carrier has completed his obligation of tendering cargo for delivery for the full free time period. If, however, a longshoremen's strike occurs while cargo is in a period of demurrage, and following the strike the carrier is unable to tender the cargo for delivery because of a mixup with other cargoes, this would, according to the Examiner, be a carrier disability to perform its obligation, and in such situation under the Examiner's recommendation for a revision of section 526.1 (c), free time would be granted.

3. Section 526.1(d) should be amended by providing that where consignee disability caused by a longshoremen's strike affects only one pier or less than a substantial portion of the entire port area of New York, demurrage charges for the duration of that strike shall be limited to the first-period rate of demurrage. This modification is a partial adoption of the removal of the port area limitation which paragraph 5 of the Order of Investigation suggested might be desirable. It applies, however, only in situations of a consignee disability caused by a longshoremen's strike. The Examiner felt that a wider adoption of a port area exclusion would involve the possibility "of discrimination as between consignee importers."

[3] For example, the tariff of *East Coast South Atlantic/New York Free Time Agreement*, FMC No. 7525, provides, "when a carrier is for any reason unable or refuses to tender import property for delivery, free time will be extended or if the cargo be on demurrage, no demurrage will be charged for a period equal to the duration of the carrier's disability or refusal to deliver", while the tariff of Agreement No. 6015 provides that when a carrier is unable to tender cargo for delivery, if application is made while cargo is in a period of demurrage, first period demurrage shall apply for a period equal to the duration of the carrier's inability to deliver. Demurrage is waived by all respondents during the duration of a longshoremen's strike with respect to cargo which was still on free time at the commencement of the strike and demurrage at the first period level is collected on other cargo for the duration of such strike by all respondents.

4. A change should be made in the section 526.1(d) situation, that is, the situation involving consignee disability, either by a modification of that section or the addition of a new section, providing that in any port-wide strike of longshoremen for 25 calendar days or more, the normal first period demurrage of five days will be changed to ten days. This provision would only apply to import cargo already unloaded on the piers prior to the strike or unloaded on the piers during the five days after termination of the strike. The Examiner felt this modification would have the advantage of helping to clear the piers after a strike while at the same time compensating carriers for the use of the pier. The importer who was diligent and removed his cargo promptly would not be subjected to penalty demurrage charges at as early a time as a consignee who was less diligent. The Examiner picked 25 days as the minimum time period for the application of his modification because he felt a strike of that length would cause serious congestion, and he picked five extra days as the amount for the extension of first-period demurrage because he felt consignees who made a sincere effort could remove their cargo during that extra time period. The Examiner excluded Seatrain Lines from his recommendations inasmuch as he found that Seatrain's container operations in the domestic offshore trades were not within the scope of this proceeding. The Examiner found that no special relief should be granted the importers of tea, spices, coffee, food and other products whose cargoes are subject to United States Government inspection, inasmuch as conditions had not changed since 1948, when these importers' special requests were considered and rejected in *Free Time and Demurrage Charges—New York*, *supra*. Finally, the Examiner stressed the need for cooperative efforts by all concerned and voluntary adoption of improved procedures relating to free time and demurrage practices on inbound cargo at New York.

## Discussion and Conclusions

1. *The Lawfulness of Free Time and Demurrage Practices During and Immediately After the Strike Under Section 17 and General Order 8, Part I.*

Only AIIS [4] excepts to the Examiner's conclusion that there has been no demonstration of unlawfulness with respect to the free time and demurrage practices during and after the strike. It asks that the Commission rule that the practices of the carriers during the period of abnormal pier congestion following the longshoremen's strike were unreasonable within the meaning of section 17 as unlawful interpretations or enforcements of General Order 8, Part I, to the extent they resulted in the assessment of penalty demurrage in situations in which



[4] American Institute for Imported Steel, Inc.

consignees were unable to pick up cargo because of factors beyond their control. It also asks that if such findings of unlawfulness are made, they be applied retroactively to allow cancellation of such penalty charges.

Although the record in this proceeding is replete with references to the difficulty truckers experienced in picking up cargo after termination of the strike, there are of record no instances of the assessment of penalty demurrage in situations in which proof was submitted to ACIC or the carriers that a trucker had appeared at a pier but was unsuccessful in attempting to pickup cargo. Furthermore, there is evidence of record that trucks were logged in as soon as they got in line at the piers. In other words, the record does not contain evidence that cargo was actually assessed penalty demurrage in situations in which a bona fide attempt was made to pick up cargo.

We agree with the Examiner that the practices engaged in at the Port of New York respecting free time and demurrage during and immediately after the strike of 1965 were not unjust and unreasonable within the meaning of section 17 in light of the facts that the strike appeared to have been settled in advance and the then existing free time practices had worked well in the past, including post-strike situations. We also agree that the various free time and demurrage practices were in compliance with reasonable interpretations of General Order 8, Part I, as it was then worded.

However, knowing through the benefit of hindsight of the difficulties experienced during and after longshoremen's strikes like the one involved in this proceeding, we are in accord with the Examiner that certain practices will be unjust and unreasonable (though we differ to some extent as to what those practices are) if engaged in in the future and that certain amendments are necessary to General Order 8, Part I, to insure that reasonable practices are observed.

2. *Amendments to General Order 8, Part I, Ordered for the Future.*

(a) *The inclusion of the words "longshoremen's strikes" in section 526.1(d).*

The parties to Calcutta, East Coast of India & East Pakistan/USA Conference, Agreement No. 7555, and the West Coast of India & Pakistan/USA Conference urge that the words "longshoremen's strikes" are "unnecessary" and should not be added, contending that "if General Order No. 8 is amended to include all events to which it is applicable it will soon resemble a laundry list rather than the *General* Order it is intended to be." No other party excepts to this suggested modification, and Hearing Counsel and Port of New York Authority maintain that it is a necessary clarification. As the Examiner found, this modification would not result in a change in the present interpretation of section 526.1(d), but would be merely a specific enumeration of a factor already acknowledged to be covered by that section. However, the addition of these words would not merely, as the exceptors contend, add another event to which 526.1(d) is applicable. It will add a factor which was not specifically considered at the time of the promulgation of General Order 8, Part I, which is, as the Examiner found, "the most common form of difficulty under which section 526.1(d) becomes applicable", and was, as indicated by the Orders of Investigation in this proceeding, the primary reason for the institution of this proceeding. We agree with the Examiner that the inclusion of the words "longshoremen's strikes" in section 526.1(d) as a factor beyond a consignee's control preventing the removal of his cargo is just and reasonable and should be made.

(b) *The problem under section 526.1(c) of the granting of free time with respect to cargo which a carrier refuses or is unable to tender for delivery after free time previously granted had expired.*

Some respondents object to the Examiner's recommendation that free time be granted to cargo on which such time has expired when the carrier is unable to make it available for pickup. To require the granting of free time in such a situation would, they maintain, penalize a carrier for the consignee's failure to pick up his cargo during the period when the carrier was performing his duty of making it available (i.e., the free time period). The Commission's predecessor has recognized the propriety of assessing first-period demurrage with respect to such cargo, they point out, citing *Free Time and Demurrage Charges—New York*, *supra*, at 106–7. The carriers allege that an attempt to force the granting of additional free time when carrier disability does not arise during free time would result in confiscation of property and be unconstitutional, citing *American President Lines et al.* v. *F.M.B.*, 317 F. 2d 887 (D.C. Cir. 1962). In addition to the legal difficulties inherent in the suggested modification, they suggest, as a practical matter, congestion is made worse in post-strike situations by the granting of free time after its expiration.

Other respondents have no objection to the Examiner's proposed modification because, as noted in footnote 2, *supra*, their practices under present tariffs provide for the granting of free time whenever cargo cannot be made available for pickup due to carrier disability.

Hearing Counsel agree with the Examiner that free time should be made available to cargo already on demurrage when it cannot be picked up because of carrier disability and propose language to accomplish this objective. They maintain that there is legal authority for requiring that free time be made available to cargo already on demurrage when it cannot be picked up because of carrier disability,[5] and contend that once free time has expired carriers become warehousemen with respect to property in their keeping and have a duty to make it available for delivery when demand is made within a reasonable time. The Interstate Commerce Commission, they point out, allows or prohibits demurrage on an individual case-by-case basis, denying it in cases where shippers had exercised due diligence and allowing it in cases where they had not.

Finally, Hearing Counsel contend that *American President Lines et al.* v. *F.M.B.*, *supra*, does not stand for the proposition that it would be confiscatory and unconstitutional to require free time when a carrier refusual or disability arose after the expiration of the normal free time period. In that case the Commission (then Board) had attempted by publication of an "interpretation", to amend what is now General Order 8, Part I, to forbid the assessment of any demurrage during pendency of a longshoremen's strike. That case, they maintain, merely held that the Commission could not amend General Order 8 without complying with certain procedural requirements, including a statement of the amendment's basis and purpose as required by the Administrative Procedure Act. Although the Court's opinion did contain language indicating that a carrier's duty with respect to cargo had been fulfilled after the expiration of free time and that to deny demurrage once free time had expired would be unlawful, this language they argue, is not relevant to the present proceeding because of the different applications of the proposed amendment in that proceeding and Hearing Counsel's suggested modification. In the *American President Lines* case, the Commission had amended the General Order to prohibit carriers from assessing any demurrage during a longshoremen's strike, regardless of whether cargo was in free time or a demurrage period at the commencement of the strike. Hearing Counsel point out that their proposal, on the other hand, does not deprive carriers of demurrage during a longshoremen's strike if free time has expired. The carrier is still entitled to first-period demurrage during that period with respect to cargo on which free time had expired at the commencement of the strike. The proposed modification in the *American President Line* case is also distinguishable, Hearing Counsel allege, from that suggested by them in the instant proceeding in that the free time extension in the *American President Line* case applied to all

[5] As noted above, a longshoremen's strike occurring after the expiration of free time is not viewed as a carrier disability.

cargo alike, whereas the proposed modification in this proceeding would allow the granting of additional free time once the obligatory period had expired only in those situations where cargo could not be made available because of carrier disability.

Hearing Counsel are correct insofar as they maintain that the *American President Line* case is not dispositive of the problem of the propriety of the collection of demurrage at first period (compensatory) rates when a carrier disability arises after termination of free time. As Hearing Counsel point out, the regulation involved in that case dealt with the assessment of demurrage during a consignee, rather than a carrier, disability, and would have forbidden just compensation to a carrier during a time when free time had expired and consignees, through no fault of the carrier, could not pick up their cargo. Hearing Counsel would require an extension of free time after it would normally have expired only during periods other than those of consignee disability, and only when in fact a carrier was unable to make the cargo available for pickup.

Here we are faced squarely with the problem of precisely what a carrier's duty is with respect to cargo once free time has expired, and it is in this regard that both Hearing Counsel and the Examiner appear to be in error. A carrier has certain obligations originating in his status as a carrier for the performance of which he may collect no greater compensation than that required by his contract of carriage. These obligations are correctly identified in *America President Lines et al.* v. *F.M.B.*, *supra*, at 888. The carrier must "unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it." The Court further observed (at 889) that the carrier "tenders for delivery; it does not deliver. It makes a valid and complete tender when it puts the cargo on the dock, reasonably accessible, properly segregated and marked, and leaves it there for five days; with notice, of course." The "reasonable opportunity" was translated into "five days" because the Commission, in General Order 8, Part I, had, as the Court observed, determined "that under conditions prevailing in New York, 'five days is the shortest time that affords to consignees a reasonable opportunity to take delivery of imports,' " and had "held a tariff which failed 'to assure to consignees a minimum of five days of free time' would be unjust and unreasonable."

A carrier has certain duties with respect to cargo not picked up within the free time period, such as the duty to exercise reasonable care, but, the Commission having defined the minimum period of reasonable time as five days, it cannot be said that a carrier has a duty, as a matter of law, to extend free time if his disability occurs after expiration of the free time period. A distinction must be made between the liability of a carrier arising after the expiration of free time because of a carrier's negligent treatment of cargo in his custody and the requirement that relief from demurrage be given whenever a carrier cannot tender cargo for delivery. The duty to treat cargo in one's custody with due care arises by status-the carrier is a bailee as long as the cargo is in its custody and as such must treat the cargo with reasonable care for the whole of such time. The carrier, as a bailee, also has a duty to tender cargo in his custody for delivery. The obligation to tender for delivery free of assessments of any demurrage, however, is as we have noted, one that ends after a "reasonable time", or under normal circumstances five days. This is not to say, as we will demonstrate later, that under some circumstances a carrier may not be required to tender cargo for delivery free of assessment of any demurrage for a time period exceeding five days.[6] Nor do we mean to imply a carrier may not grant free time whenever it can not tender cargo for delivery, as is the present practice of many of the carriers. Indeed, this appears to be the more equitable approach and should be encouraged inasmuch as an assessment of demurrage after the expiration of free time when the consignee does present himself for pickup of his cargo and the carrier refuses or is unable to tender it acts to require payment from a consignee for a service he no longer needs or desires.

Accordingly, we will allow carriers to retain their present practices with respect to free time after the time at which it would normally have terminated so long as these practices are clearly spelled out in the applicable tariffs so that consignees will be in a position to know the extent of the obligations assumed by respective carriers. Section 526.1(c) will be amended by adding a sentence to the section so that it will read as follows:

> 526.1(c) Where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal. If such condition arises after the expiration of free time, an additional period during which no demurrage is charged or first period demurrage shall be applicable, whichever is specified in the appropriate tariff.

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[6] Cf. "The question whether a consignee must start paying additional charges to the proprietor of the pier for allowing goods to remain there has nothing whatever to do with the question whether a carrier has used reasonable care in discharging goods from his ship." *North American Smelting Co.* v. *Moller S.S. Co.*, 204 F.2d 384, 386 (1953); see also *Calcot Ltd.* v. *Isbrandtsen Company*, 318 F.2d 669, 673 (1963): "Rules and customs concerning storage charges have no relevance to the question of what constitutes a proper delivery of the cargo."

(c) *The requirement that consignee disability under section 526.1 (d) be "port wide" or affect a "substantial portion of the entire port area" before demurrage is limited to first-period rate.*

The Examiner, as noted above, recommended that section 526.1(d) be revised to limit demurrage to first-period rates during longshoremen's strikes affecting one pier or less than a substantial portion of the entire port area. Some conferences contend that such strikes are rare and that no need has been demonstrated that present procedures cannot properly handle them. Hearing Counsel and AIIS contend that the Examiner was correct in his partial removal of the "port area requirement" but erred in not removing it altogether so that, at most, first-period demurrage would apply in any situation in which a consignee is prevented from removing his cargo by factors beyond his control. They would, however, require that the disability be one "affecting all consignees at any pier or piers" to prevent the possibility of discrimination by those administering demurrage charges, finding disability in some cases and denying it in others without the benefit of a definitive yardstick.

We agree with the Examiner that the "port area requirement" should be removed with reference to longshoremen's strikes. While it may be true that localized strikes are rather rare, there is, nevertheless, evidence of record that they do occur, and such strikes, like the strikes affecting a wider area, disable consignees from removing cargo from the struck piers. Generally, carriers waive demurrage, or at least penal demurrage, in all strike situations. To this extent, it is true that "present procedures can properly handle" all strike situations. However, under the present rule a simple tariff amendment could change such "procedures". Such result must not be allowed to happen. Strikes over which a consignee has no control are not limited to those affecting all or a substantial portion of the entire port area. During longshoremen's strikes affecting even a single pier, the penalty element of demurrage affords no incentive to remove cargo from the pier because the consignee cannot do so for reasons entirely beyond his control. Therefore, it would be an unreasonable practice to allow the assessment of penal demurrage during any longshoremen's strike affecting a consignee's ability to remove his cargo. We also agree, however, with the Examiner that the removal of the "port area requirement" should be limited to longshoremen's strikes inasmuch as the record is devoid of evidence of factors other than a longshoremen's strike which would effect less than a substantial portion of the port area and disable a consignee from removing his cargo.[7]

[7] The Delaware River Port Authority (Philadelphia) excepted to the "longshoremen's strike" exception to the "entire port area" requirement, alleging that it will result in

Therefore, section 526.1(d) should be amended to read as follows (new language in italic):

Where a consignee is prevented from removing his cargo by factors beyond his control (such as, but not limited to, *longshoremen's strikes*, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, *and when a consignee is prevented from removing his cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area*, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

(d) *The requirement of the extension of first-period demurrage following port-wide strikes of longshoremen for 25 calendar days or more.*

Most of the parties actively participating in this proceeding object to some extent to the Examiner's recommendation that first-period demurrage be automatically extended following longshoremen's strikes exceeding 24 days.

Generally, the conferences contend that any extension of first-period demurrage or free time following termination of a strike would only aggravate congestion by removing the incentive (penal demurrage) to remove cargo at a time when it is most urgently needed. Hearing Counsel and AIIS, on the other hand, also argue that the Examiner's recommendation is faulty because it fails to solve the post-strike congestion problem, but maintain that the proper solution would be to extend free time or first-period demurrage following a major strike (depending upon the position of the cargo when the strike began) and to couple such extension with a truck appointment system, the free time (but not first-period demurrage) to be tolled on the day that a carrier or terminal operator notifies a consignee or his agent of a specific time at which the cargo may be picked up if the cargo is actually available for pickup at the time specified.

Additionally, one conference maintains that if an extension is granted, the amendment to the General Order should be so worded as not to allow the application of first period demurrage to cargo already on penal demurrage when a strike begins and insure that the present

more liberal rules and regulations governing free time and demurrage at New York than at Philadelphia and thus unjustly discriminate against Philadelphia and increase its already present service disadvantage in its competition with the Port of New York. We have found that the failure to relieve consignees at New York from penalty demurrage during any strike is an unreasonable practice. The simple answer to Philadelphia's contention is that nothing prevents it from voluntarily adopting a rule removing the port area requirement with respect to longshoremen's strikes. As the Port of New York indicates on brief, there is no general Commission order respecting free time and demurrage practices at any port other than the Port of New York, yet no penal demurrage is assessed during any longshoremen's strikes at several North Atlantic ports.



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practice of free time running from the date of discharge of entire vessel rather than discharge of particular cargo from that vessel may be retained.

Hearing Counsel also criticize the Examiner's recommendation on grounds that the automatic extension of first period demurrage with respect to all cargo on the pier at the commencement of the strike would cause cargo that was still on free time when a strike ended to go directly into first-period demurrage even though the carrier had not fulfilled his obligation of tendering such cargo for delivery for the required free time period and might in fact refuse or be unable to tender for delivery.

The problem of what to do to encourage prompt and efficient removal of cargo following a major longshoremen's strike is not one that lends itself to a simple solution that will impress all parties with its undisputed fairness. The carriers understandably want the cargo off the piers as soon as possible to make way for new cargo. They consider the early application of penal demurrage a good way to accomplish this objective. Just as understandably, the consignees do not want to be assessed penal demurrage charges in situations in which, as we have noted in our review of the situation in the Port of New York, it is extremely difficult for consignees to pick up cargo. We wish to make it abundantly clear that we are not placing the blame for the post-strike congestion at the doorstep of any single interest. It is a problem which was caused in the first place by factors for which neither carriers nor consignees was directly responsible. However, all interests should utilize their best efforts to see that the public interest is served by prompt and efficient cargo removal so that the piers of the New York port area may return to normal as soon as possible following a major strike.

The solution suggested by the Examiner, although an important step in the right direction, does have its problems, some of which have been indicated by the parties. Any automatic extension of free time or nonpenalty demurrage may well tend to encourage consignees to leave cargo on piers for the duration of the extended periods and thus increase congestion. On the other hand, it seems unfair to assess penal demurrage against consignees who, through no fault of their own, have been unable to pick up their cargo.

At the outset one thing seems clear. As pointed out by one conference and noted above, if extensions of free time or first period demurrage are granted following a major longshoremen's strike, they should not be granted to cargo that was already on penal demurrage when the strike began. No one during the course of this proceeding has maintained such a position, and in fact, in oral argument counsel for AIIS stated that he did not contend that an extension following a strike should apply to cargo which was in a period of penal demurrage prior to the strike.[8] It seems indeed unfair to relieve one of penal demurrage who has contributed to the congestion by failing to pick up his cargo during the free time period or prior to the period when penal charges were levied to force its removal.

The solution seems to be an extension of free time or first period demurrage following a major longshoremen's strike that is conditioned upon the removal of the cargo within the extended period. The need for some extension of time following a major strike is plain. Although we have found no violations of the present regulations governing free time and demurrage, such regulations are just not realistic during such periods. Carriers experienced much difficulty in tendering cargo for delivery. As noted above, many of them worked their piers evenings and weekends to make cargo available for pickup and many consignees still experienced difficulty in obtaining their cargoes. There was a chronic labor shortage during this period due to the abnormally great volume of cargo that had to be handled by the same number of longshoremen normally available. Although the record does not indicate that penalty demurrage was actually assessed against consignees who were unable to pick up cargo, it does indicate that trucks were often forced to wait for many hours in long lines, often unsuccessfully, in attempts to pick up cargo and that periods of time running into three or four hours were necessary before waivers of penal demurrage could be obtained from the ACIC. In such instances it was often impossible for truckers to call at other less congested piers to pick up other cargo because of the lack of remaining work time.

There is nothing sacrosanct about the number "five." It is used to measure the minimum free time which must be granted under normal circumstances merely because it is a reasonable amount of time for carriers to tender and consignees to receive cargo.[9] In 1946, our predecessor promulgated rules to cover "the conditions currently prevailing in the Port of New York." These "conditions" included strikes of seafaring personnel and truck drivers; they do not appear to have included longshoremen's strikes, and the whole problem of pier congestion following, as distinguished from during, a strike was left unexplored. However, it was said that "reasonable time" was to be deter-

[8] AIIS would make an exception for cargo on penalty demurrage which a carrier is unable or refuses to tender for delivery. We have discussed this problem under "(b)" above.

[9] The fact that the number is not immutable is emphasized by the fact that prior to 1938, there were no requirements as to amount of free time, and that between 1938 and 1941, our predecessor had fixed ten days as the maximum free time period.

mined "with due regard . . . especially for the public interest, which requires that congestion of ports be minimized in the interest of efficient water transportation." *Free Time and Demurrage Charges—New York, supra,* at 103.

After a strike of major proportions, the prevailing free time and first period demurrage rules are not reasonable. Therefore, following a major strike, free time should be extended for five days, exclusive of Saturdays, Sundays, and legal holidays, coupled with a requirement that cargo actually be picked up within such extended period. Likewise, first period demurrage, which under normal circumstances is equal to five calendar days, should be extended for an additional five calendar-day period, with a smiliar requirement for actually picking up the cargo. For example, a consignee, whose cargo was on free time at the commencement of the strike, would not be assessed demurrage if he picked up his cargo within five days (excluding Saturdays, Sundays, and legal holidays) after the time free time would normally terminate, but if he picked it up on the sixth day, he would be assessed for six, rather than one day at the compensatory demurrage rate. If a consignee picked up his cargo on the fifth calendar day after first period demurrage would normally terminate, he would be assessed demurrage at the compensatory demurrage rate. However, if he picked it up on the sixth day, he would be assessed penal demurrage for the last six days. Of course, if cargo is not actually available for pickup during the extended free time period, free time must be extended until it is. If such cargo cannot be tendered for delivery during the extended first demurrage period, free time or first period demurrage would apply as specified in the applicable tariff. Such additional periods appear adequate to allow diligent consignees an opportunity to remove their cargo. They would also supply an incentive to remove such cargo, which an automatic extension would not, and will allow only diligent consignees to take advantage of their benefits.[10]

As suggested by some respondents, the modification will be worded to indicate that no departure from the present practice of starting the running of free time from discharge of the vessel rather than any particular cargo from the vessel is intended.

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[10] Hearing Counsel had formerly proposed an alternative plan whereby free time would be extended in all situations in which carriers could not tender for delivery and first period demurrage rates would apply after the expiration of free time, in all situations in which consignees as a class are unable to pick up their cargo at any pier. This plan presents difficulties in the post-strike situation. Questions of fact might arise as to whether particular post-strike congestion had actually made it impossible for consignees to pick up cargo while all the while congestion got worse. More important, however, the plan gives no incentive to consignees to remove their cargo.

It is regrettable that we are unable to adopt the suggestion of AIIS and Hearing Counsel that the extension of free time be coupled to a truck appointment system, free time terminating with the making of an appointment for a specific time at which a truck is to call for cargo. However, the difficulties in establishing a workable and fair truck appointment system are numerous indeed. The Examiner mentioned some of them: The possibility of discrimination in the granting of appointments, and the hardships which occur in individual cases even if a mechanical method for the fixing of appointments could be established. It is undeniable that the establishment of some sort of system for the orderly removal of cargo from the piers is a desirable, perhaps even necessary, objective, but at this juncture no one is able to state just what kind of procedure should be set up or how it should be administered. We can only hopefully provide that, if a workable appointment system acceptable to both carriers and consignees is adopted, the extension of free time or first period demurrage will terminate within 24 hours (a reasonable time for a consignee to arrange for pickup) of advance notification that cargo is available for pickup and readily accessible.[11]

In other words, General Order 8, Part I, is revised by the insertion of a new section, 526.1(f), providing as follows:

> Following a longshoremen's strike of five days or more,[12] free time or first period demurrage, depending upon the status of the cargo at the commencement of the strike, shall be extended for a period not less than 5 days (exclusive of Saturdays, Sundays, and legal holidays) and 5 calendar days, respectively, beyond the time at which they would normally terminate; *Provided, however*, that such extensions shall apply only if cargo is actually picked up within such extended time or, if an appointment system acceptable to both carriers and consignees is adopted, within 24 hours of advance notification that cargo is available for pickup and readily accessible, subject to the requirement that time not be extended more than 24 hours beyond the additional free time or demurrage period.

We agree with the Examiner's conclusion that carriers are entitled to compensation for the use of their piers during longshoremen's strikes by cargo on which free time had expired before commencement of the strike. We also agree that no special relief need be granted the importers of tea, coffee, spices, food and other products whose cargo is subject to United States Government inspection. As our predecessor indicated in *Free Time and Demurrage Charges—New York*, *supra*,

[11] In attempting to establishing such a system, attention might well be given to the expressed willingness of the New York Terminal Conference to participate in administering free time and demurrage regulations.

[12] Five days was chosen because congestion problems caused by strikes of less duration should be adequately handled by the tolling of free time and the first demurrage period for the duration of the strike and the consequent free time or first period demurrage days remaining after the strike. Strikes of less than five days have not appeared to cause major problems in the past.

inspection delays are occasioned by factors other than those relating to the obligation of the carrier. No party indicated that free time should be extended because of the delays occasioned by Government inspectors. Several conferences, moreover, grant six rather than the five days' free time to allow for delays occasioned by Governmental inspections.

Sea-Land Service, Inc. (Sea-Land) urges that all containerized operations be excluded from the effect of any order issued in the proceeding, alleging that with the exception of one witness of Seatrain no evidence or testimony was received relating to containerized operations. It further alleges that, inasmuch as the Examiner excluded Seatrain's operations from his Initial Decision, consistency requires that Sea-Land and other carriers be similarly excluded from any order or rule issued pursuant to this proceeding to the extent they utilize containerized operations. The record in this proceeding does not indicate that problems have arisen with respect to cargo shipped in containers. To the extent that carriers engage in the transportation and tendering for delivery of containerized freight, rather than breakbulk cargo, there appears no necessity to require changes in these carriers' practices pursuant to our amendments to General Order 8, Part I.

An appropriate order will be issued and General Order 8, Part I, as revised herein, will be published in the Federal Register.

By the Commission.

# FEDERAL MARITIME COMMISSION

IN THE MATTER OF FREE TIME AND DEMURRAGE PRACTICES ON INBOUND CARGO AT NEW YORK HARBOR

## ORDER

This proceeding was instituted by orders served upon respondents and published in the Federal Register and hearings were held before an Examiner pursuant to which briefs were filed and an Initial Decision issued. Exceptions and replies to this Initial Decision have been considered and oral argument held before and supplemental papers filed with the Commission. The Commission has this day issued its report in this proceeding, which is hereby incorporated herein by reference, in which it determined that certain practices of the respondents with respect to free time and demurrage on inbound cargo at New York Harbor would if continued in the future be unjust and unreasonable within the meaning of section 17 of the Shipping Act, and determined that its General Order 8, Part I, which regulates the free time and demurrage practices here under investigation should be amended in certain respects to insure just and reasonable practices in the future.

*Therefore, it is ordered*, That section 526.1(c) is amended by adding a new sentence at the end thereof. As amended, section 526.1(c) reads as follows:

(c) Where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal. If such condition arises after the expiration of free time, an additional period during which no demurrage is charged or first period demurrage shall be applicable, whichever is specified in the appropriate tariff.

*It is further ordered*, That section 526.1(d) is amended by inserting the words "longshoremen's strikes" before the words "trucking strikes" and inserting the clause "and when a consignee is prevented from removing his cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area", before the words "carriers shall". As thus amended, section 526.1(d) reads as follows:

(d) Where a consignee is prevented from removing his cargo by factors beyond his control (such as, but not limited to, longshoremen's strikes, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, and when a consignee is prevented from removing his cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

*It is further ordered*, That a new part (f) be added to 526.1 to read as follows:

(f) Following a longshoremen's strike of five days or more, free time or first period demurrage, depending upon the position of the cargo at the commencement of the strike, shall be extended for a period not less than five days (exclusive of Saturdays, Sundays and legal holidays) and five calendar days, respectively, beyond the time at which they would normally terminate: *Provided, however*, that such extensions shall apply only if cargo is actually picked up within such extended time or, if an appointment system acceptable to both carriers and consignees is adopted, within 24 hours of advance notification that cargo is available for pickup and readily accessible, subject to the requirement that time not be extended more than 24 hours beyond the additional free time or demurrage period.

*It is further ordered*, That such amendments shall be binding upon all common carriers of noncontainerized cargo by water in foreign commerce with respect to regulations and practices affecting free time and demurrage on import property at the Port of New York; and

*It is further ordered*, That on or before the effective date of this order, all tariffs of such carriers relative to free time and demurrage on import property at the Port of New York be conformed to the findings and rules herein set forth; and

*It is further ordered*, That this order become effective February 15, 1968.

By the Commission.

(Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

DOCKET No. 65-13

RATES ON U.S. GOVERNMENT CARGOES

*Decided December 8, 1967*

Rates which are admittedly noncompensatory and which are reduced in order to unfairly attempt to drive a competitor from the trade are contrary to section 18(b)(5).

Rates which are no longer effective and which were promulgated pursuant to an outdated system of rate negotiations are not amenable to section 18(b)(5).

A conference of carriers, by reducing its rates to an admittedly unreasonable and noncompensatory level in order to drive another carrier from a trade, violates section 15 and the terms of the conference agreement.

Failure of a carrier to abide by its tariff provisions is contrary to section 18(b)(1).

Under section 15, a dormant agreement may not remain approved but must be canceled or modified to reflect its present purpose.

*Elmer C. Maddy* and *John Williams* for respondent conference Atlantic & Gulf American-Flag Berth Operators and certain of its member lines.

*Warner W. Gardner*, *Robert T. Basseches*, and *James B. Goodbody* for respondent conferences West Coast American-Flag Berth Operators and Trans-Pacific American-Flag Berth Operators and certain of their member lines.

*George F. Galland*, *Robert N. Kharasch*, *Philip F. Hudock*, and *J. K. Adams*, *Jr.* for respondents States Marine Lines, Inc., Isthmian Lines, Inc., Global Bulk Transport, Inc., and Bloomfield Steamship Company.

*Sterling F. Stoudenmire*, *Jr.* for respondent Waterman Steamship Corporation.

*William B. Ewers* and *Ira L. Ewers* for respondent Moore-McCormack Lines, Inc.

*Joseph A. Klausner* and *Mitchell W. Rabbino* for respondent Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp.

*Wilbur L. Morse* and *Howard A. Levy* for Department of Defense; *Harry R. Van Cleve*, *Thomas J. O'Reilly*, and *Paul J. Fitzpatrick* for General Service Administration; *John A. McWilliam* for Toledo-Lucas County Port Authority; *Alan F. Wohlstetter* for Household Goods Forwarders Association of America, Inc.; *William L. Marbury* and *Philip G. Kraemer* for Maryland Port Authority; and *Chas. R. Seal* for Virginia State Ports Authority, interveners.

*Donald J. Brunner*, *R. Stanley Harsh*, and *Samuel B. Nemirow*, Hearing Counsel.

## REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*)*

### THE PROCEEDINGS

On May 6, 1965, the Commission, on its own motion, instituted this investigation of virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U.S. military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf American-Flag Berth Operators), TPAFBO (Trans-Pacific American-Flag Berth Operators), WCAFBO (West Coast American-Flag Berth Operators), their respective member lines and Sapphire Lines, Inc., Liberty-Pac International Corp., and Pioneer Sapphire Lines, Corp. The Military Sea Transportation Service (MSTS), General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C. W. Robinson held hearings totaling 61 days in Washington, San Francisco, and New York and served an initial decision on December 15, 1966. The Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

### THE RESPONDENTS

AGAFBO [1] and WCAFBO [2] are conferences or associations of U.S. flag carriers, which have been approved under section 15 of the Ship-

*Commissioner James F. Fanseen did not participate.

[1] FMC Agreement No. 8086–2, Atlantic and Gulf American-Flag Berth Operators (AGAFBO): Alcoa Steamship Company, Inc., American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., American Union Transport, Inc., Bloomfield Steamship Company, Central Gulf Steamship Corporation, Farrell Lines Incorporated, Grace Line Inc., Great Lakes Bengal Lines, Inc., Isthmian Lines, Inc., Lykes Bros Steamship Co., Inc., Matson Navigation Company, Moore-McCormack Lines, Inc., Pacific Seafarers, Inc., Prudential Steamship Corporation, States Marine Lines (joint service of States Marine Lines, Inc., and Global Bulk Transport, Inc.), T. J. Stevenson & Co., Inc. (Stevenson Lines), United States Lines Company, Waterman Steamship Corporation.

[2] FMC Agreement No. 8186, West Coast American-Flag Berth Operators (WCAFBO):

ping Act, 1916 (46 U.S.C. § 814). Through AGAFBO and WCAFBO, carriers may discuss and agree upon rates, terms, conditions, and related services to be used as a basis for discussion and negotiation with various military shipper services for the transportation of military cargoes. TPAFBO [3] is an approved conference of U.S. flag carriers designed to permit carriers to discuss and agree upon rates, terms, and conditions, principally credit arrangements between the ocean carrier and the van line, for cargoes moving on through Government bills of lading (TGBL) under rate and service tenders approved by the Department of Defense (DOD).

Sapphire Steamship Lines, Inc. operates a liner service between United States North Atlantic ports and ports in the United Kingdom and the Bordeaux-Hamburg range.

Liberty-Pac International Corp., a New York corporation formed in 1960, is a forwarder of household goods on TGBLs between points in the United States and points throughout the world and is an approved tender holder for the transportation of such goods. Liberty-Pac ceased activity on November 11, 1966.

Pioneer Overseas Service Corporation, a New York corporation formed in 1963 and wholly owned by Marshall P. Safir, chairman of Sapphire, is a traffic management agency which performs many if not all of the services, for a fee, of household-goods movers. Pioneer does not represent tender holders at present.

## Facts

*Movement of Defense Cargoes*

The Cargo Preference Act of 1904, provides as follows:

> Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons. (10 U.S.C. § 2631)

On October 20, 1954, DOD and the Department of Commerce in the Wilson-Weeks Agreement agreed that the merchant shipping required by DOD, exclusive of the MSTS nucleus fleet and consistent with military requirements and prudent management, would be obtained in the

American Export Isbrandtsen Lines, Inc., American Mail Line Ltd., American President Lines, Ltd., Isthmian Lines, Inc., Matson Navigation Company, Pacific Far East Line. Inc., States Marine Lines (joint service of States Marine Lines, Inc., and Global Bulk Transport, Inc.), States Steamship Company, Waterman Steamship Corporation.

[3] FMC Agreement No. 8493, Trans-Pacific American-Flag Berth Operators (TPAFBO): same membership as WCAFBO, note 2 *supra*.

following order: berth-line operators, time or voyage charters, vessels under general agency agreement with National Shipping Agency, and foreign-flag vessels.

After the termination of World War II, the Army and the Air Force secured ocean commercial transportation for their cargoes through Army Transportation Corps (ATC) contracts. The first contract was executed in October 1946. The rates and conditions for this transportation were the same for all lines in a given trade. The contracts were of a space-charter variety, and the rates were on a FAS basis.

The transportation of Navy cargoes during the same period was performed under Navy contracts, which were generally similar to those of ATC.

The procedure for obtaining ocean transportation for military cargoes was changed in 1950 when this responsiblity was given to MSTS. Inasmuch as the stevedoring of cargo at military terminals was performed by the military, the contract rate was quoted FIO, to be adjusted where the cargo might move over commercial terminals. Since the space-contract system employed by ATC had proved unsatisfactory in that there was a tendency toward poor stowage, the MSTS contract was revised so that the payment of freight would be on the basis of the measurement of cargo on dock, with allowance for broken stowage. MSTS allocated cargo among the U.S. flag carriers based on the number of liner sailings, a system which generally was satisfactory to the lines. Under this system, an effort was made to provide a balanced load for each vessel.

In their discussions with MSTS, as with ATC previously, the lines presented their costs and other data in support of rates. The rates could be revised upon demand by either party for renegotiation, and failure to agree within 60 days automatically canceled the contract. Subsequently, in 1957, MSTS prescribed a formula for the submission of requests for increases. The formula required the submission of cost data limited to wages, subsistance, repairs and maintenance, stores, supplies, insurance, and fuel. In due time MSTS would announce its decision as to the rate. If the lines were dissatisfied with the decision, they could present their objections; sometimes MSTS would agree to changes. MSTS had the final say in these matters. When negotiations were concluded, the rates were filed with the Commission. Although AGAFBO and WCAFBO acted collectively for their member lines during the negotiations, the contracts were executed by the individual lines. To areas not covered by shipping contracts, military cargoes moved on berth terms on Government bills of lading at commercial rates.

On April 4, 1966, the Deputy Assistant Secretary of Defense for Transportation and Logistics announced that DOD's practice of procuring ocean freight services would be altered so that procurement, to the maximum extent possible, would be obtained through price competition. The new policy was implemented by MSTS's Request for Proposals No. 100, issued on June 16, 1966.

Carriers of military household goods moving on TGBLS at through rates previously filed rate proposals with MTMTS,[3(a)] which coordinates the shipment of such goods. The ocean-rate segment, after having been negotiated by MSTS, was supplied to MTMTS, and was then transmitted by that agency to the carriers for inclusion in their tenders. The tenders were filed semiannually for periods of six months. The tenders submitted were made available to other carriers. Prior to the effective date of the rates, carriers were allowed to meet the lowest rates, but they could not go below such rates. This was known as the "me too" system. After the rates became effective there were three me-too cycles available in a given six-months' period; new carriers could come in for the first time in these subsequent cycles and file competitive rates. MTMTS divided the available tonnage among the carriers having comparable rates.

*Ocean Rates on Military Cargoes*

The original ATC contracts provided for payment to the lines of 44½ cents per cubic foot of space reserved, whether used or not. However, when MSTS took over in 1950, after making allowances for the FIO factors, the rate arrived at was about 15 percent lower than the commercial rate on similar commodities. This envisaged a broken-stowage allowance of 20 percent. In 1961, the difference between the berth and FIO rates was set at 22.5 cents.

The contracts contained a schedule of rates for certain general descriptions of cargo (depending to some extent upon the trade); e.g. general, household goods, unboxed vehicles, unusual size, unboxed guns, refrigerated, explosives, hazardous, bulk, lumber, poles and piling, and empty Conex containers (inbound). The first five categories had three kinds of rates: basic, reduced A, and reduced B, the latter two being applicable to cargo when shipped in larger volume. The rates for on-deck cargo were 10 percent lower. In the trans-Pacific trade in fiscal year 1965, about 78 percent of the MSTS cargo moved at the basic rates and about 11 percent each at the reduced rates; the corresponding figures for the AGAFBO lines do not appear of record. Between 1950 and 1964, the WCAFBO lines received five rate increases

[3(a)] Military Traffic Management and Terminal Service.

totaling 44.3 percent. Rate increases granted to the AGAFBO lines in the same period approximated 30 percent; increased costs of operation do not appear of record. Comparing six principal commercial commodities moving via WCAFBO lines with comparable MSTS commodities moving in volume, for the years 1950–1965, the rates on the former increased an average of 66 percent as compared with 44 percent for the latter; the corresponding figures for the AGAFBO lines do not appear of record.

As illustrative of the rate picture just prior to the advent of Sapphire upon the scene, the AGAFBO rates, FIO per cubic foot, on five representative commodities from Atlantic and Gulf Ports to Ports in the Bordeaux-Hamburg range, were as follows:

| | Basic | A | B |
|---|---|---|---|
| General cargo | 54½ | 43½ | 38 |
| Household goods | 58½ | 47 | 41 |
| Unboxed vehicles (up to 8,960 pounds) | 66½ | 53 | 46½ |
| Unusual size | 69 | 55 | 48½ |
| Unboxed guns | 87 | 69½ | 61 |

The rates of the WCAFBO lines, on the same commodities, were somewhat higher to basic Far East countries, and even higher to more distant trans-Pacific areas.

Sapphire's first tariff was issued on February 12, 1965, effective March 14, containing rates on "general cargo", and excepted MSTS cargoes and personal property of military personnel and Government employees. Effective March 14, the tariff was broadened slightly by adding specific rates on farm machinery and on household goods and personal effects NOS, the rate on the last-named being 81 cents per cubic foot. Effective March 31, Sapphire published a rate of $7 per net 100 pounds or 45½ cents per cubic foot on household goods shipped by any Government agency and moving on through Government bills of lading. The household-goods rates were effective for six months. Also effective March 31, Sapphire published an FIO rate of $16 a measurement ton (40 cents per cubic foot) on military cargo. There was no FIO rate for household goods shipped by MSTS, and any such goods would have moved at the 40-cent rate applicable to MSTS general cargo. Effective April 9, Sapphire extended the area coverage to Gulf ports. A westbound rate of 38 cents per cubic foot on POVs,[4] effective March 31, also was published, but just prior to the arrival in port of Sapphire's first vessel qualified to carry MSTS cargo from Europe, U.S. Lines filed a rate on POVs slightly lower than the Sapphire rates; Sapphire then filed a rate of 35 cents for foreign made

[4] Privately-owned vehicles.

POVs, effective April 19, which was lower than the rate of U.S. Lines, but retained the rate of 38 cents on other POVs.

Effective March 29, 1965, AGAFBO reduced its through-bill household goods rate from 81 cents (which it had negotiated with MSTS at the latter's request) to 45½ cents per cubic foot. The rate was quoted for a 30-day period unless further extended, and it eventually expired on March 1, 1966, and reverted to 81 cents. To maintain the 22½-cent stevedoring differential between its berth rate (45½ cents) and its FIO contract rate of 58½ cents, AGAFBO published an FIO rate of 23 cents per cubic foot on military household goods, effective March 29, for a period of 30 days, at which time it reverted to the 58½-cent level. By letter to MSTS of March 29, AGAFBO stated that it did not believe the reduced rates were fair, reasonable, or compensatory and that the reductions were made strictly as a temporary competitive action.

Waterman withdrew from AGAFBO on May 22, 1965, and immediately filed its own tariff containing negotiated military rates, generally comparable to those of AGAFBO. It also filed a tariff for military household goods moving under through Government bills of lading, naming a rate of 45½ cents per cubic foot. In addition, effective July 28, in its regular commercial tariff, Waterman published an FIO rate of 40 cents per cubic foot on MSTS general cargo NOS which would apply to household goods. Waterman rejoined AGAFBO in March 1966 and canceled these tariffs.

*Operating Margin of AGAFBO–WCAFBO*

AGAFBO and WCAFBO have made a comprehensive cost study of about $100,000,000 of steamship operations in the fourth quarter of 1964. The study shows that inbound cargoes were carried at a loss and this loss should be borne by outbound cargoes. Since MSTS accounted for 48 percent of all space used outbound, MSTS cargoes should bear 48 percent of all inbound losses. In the Atlantic Gulf/United Kingdom trade, MSTS cargo produced revenue of $8,500,000, a profit of $580,000 before replacement allowances, subsidy, and income tax. There was an operating loss on all incoming cargo of $3,000,000. Allocating 48 percent of the loss to MSTS cargo ($1,440,000), MSTS cargo shows an overall loss of $860,000.

As to the U.S. Pacific Coast/Far East trade, MSTS produced revenue of $11,000,000 and profit of $1,575,000 before replacement allowance, subsidy, and income tax. There was an operating loss on all incoming cargoes of $955,000. Allocating 48 percent of this loss to MSTS cargo, the operating profit is reduced to $1,135,000.

World-wide in this period, MSTS outbound cargo via AGAFBO and WCAFBO carriers occupied about 66,000,000 cubic feet, producing revenue of about $26,000,000. The operating profit before replacement allowance, subsidy, and income tax was about $2,900,000, or .044 per cubic foot. There was an operating loss of about $6,300,000 on all inbound cargo, or .93 per cubic foot. Allocating 48 percent of the incoming loss to MSTS cargo, the operating loss on MSTS cargo would be about $3,000,000. Subtracting this amount from the outbound profit of $2,900,000, the operating loss would be about $100,000.[5]

*Sapphire's Operating Margin*

Sapphire's principal interest from the beginning was the carriage of military household goods, with a build-up of commercial cargo, and it planned a shuttle berth liner service with three vessels, with a turn-around of 35 days, between Baltimore and Antwerp. At this time, Sapphire felt it had in hand about 32,000,000 pounds of household goods for its ships. The outbound rate was not to be so high as to support the costs of the round voyage, and two-way movement was necessary, with the anticipated profit to come from the inbound household goods movement.

The three vessels originally chartered were C–2's, each with a bale cubic capacity of 540,000 to 550,000 feet. After applying a broken-stowage factor for a combination of household goods and military and commerical cargo, it was estimated that there would be about 800,000 cubic feet of usable space of a round voyage for each vessel; about 300,000 cubic feet was allocated for household goods, the balance to be available for MSTS general cargo, on an allocation basis, and commercial cargo. The preponderance of the household-goods movement is inbound and the volume of MSTS general cargo is predominantly outbound.

Since the over-all costs of a round voyage exclusive of some administrative salaries were estimated at about $140,000, or about $4,000 a day, it was felt that a profit would be possible with a 40 percent utilization of space. Furthermore, with an ocean rate lower than the AGAFBO rate, it was anticipated that there would be a diversion of some cargo from New Orleans to Baltimore. About 65 percent of the household-goods movement at that time from the Atlantic and the Gulf used New Orleans because of its location and lower rates.

With a shipping contract and the receipt of cargo on an allocation basis, Sapphire believed that it would be entitled to 3/61 of the avail-

[5] Another study based on measurement tons showed that MSTS was receiving from WCAFBO a discount of about 21 percent of the commercial rate before any adjustment for broken stowage.

able traffic, or about 1,600 measurement tons, a sailing. Sapphire did not believe that AGAFBO would meet its rates since the volume to be carried by Sapphire would be quite small compared to the loss of revenue to the AGAFBO lines if they carried the remainder at reduced rates. This same feeling was held by some of the members of AGAFBO in the early stages.

The then-existing AGAFBO rate for the movement of military household goods from the United States to the Bordeaux-Hamburg range and the United Kingdom was 81¢ per cubic foot. However, Liberty-Pac had reduced the through rate, including the ocean freight, by $5 per net hundredweight. The reduction was to be absorbed by a reduction of the ocean freight increment from 81¢ per cubic foot to 45½ cents or the $7 per net hundredweight which Sapphire filed. It was anticipated that the difference in ocean freight would be so great that it would be feasible for the household goods carriers to divert much of their cargo to the port served by Sapphire, instead of using New Orleans, which traditionally handled 65 percent or more of the household goods traffic.

At the rate originally contemplated by Sapphire for household goods through Baltimore, it estimated a revenue yield of about $160,000 a voyage. Under the rate eventually filed, the results would be about $5,000 less per voyage.

When it became rather apparent that the anticipated volume of household goods was not to be realized and that all such goods would be taken out of the allocation system, Sapphire had to seek other cargo. New plans were formulated and it was decided not to pursue the matter of a shipping contract. Since the rates finally decided upon were to be lower than the AGAFBO rates and for a longer period of time than the AGAFBO rates, there would be a concentration on through-bill household goods. Instead of infrequent voyages out of the Gulf, eight voyages during the peak season would be serviced by two other chartered vessels calling only at New Orleans and Bremerhaven. About 21,000,000 pounds (3,000,000 cubic feet) of household goods were expected through the Gulf. With a turnaround of 40 days and at a rate of 45¢ per cubic foot, the Gulf revenue for eight round voyages would be about $400,000.

Three of the vessels chartered to Sapphire were purchased by the company around the first of 1966, at a total cost of $1,650,000.

In the first five months of its operation, Sapphire carried only 7.4 percent of the through-bill household goods on the Atlantic-Gulf/Bordeaux-Hamburg route.



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For the 15 completed voyages just referred to, the net loss to Sapphire was about $545,000, or about $36,000 a voyage, the inbound leg bearing the greater burden.

*Competition for Military Household Goods*

In September 1964, Liberty-Pac brought to the attention of DOD a new mode of moving household goods, by packing them in permanent twenty-and-forty foot aluminum containers. Household goods had been moved, and still are being moved, in smaller plywood containers, which by their nature were disposable. The new containers, unlike the plywood boxes, could be deck stowed and were believed to be less costly for the shipping companies to handle. At the start, it was considered that three dollars per net hundred-weight would be saved.

At the same time, Liberty-Pac approached certain American flag lines for a reduction in ocean freight for containers in the Bordeaux-Hamburg range, which was the area to be served initially by the new Liberty-Pac mode.

Liberty-Pac had made its proposal on the condition that it be permitted to charter its own ships, if necessary. In order to make this offer more effective, it was also requested that military household goods be removed from the allocation system when traveling under a through bill of lading.

The Liberty-Pac proposal would have given the van lines the right to negotiate individually for more advantageous freight rates from the ocean carriers. This would have completely overturned the traditional approach of negotiation with MSTS by AGAFBO on a group basis.

At the time of the original Liberty-Pac proposal to DOD, the AGAFBO carriers began to take action to protect their competitive position. As a result of an AGAFBO meeting of January 7, 1965, the AGAFBO secretary advised a President's committee of possible management level action with DOD, Maritime Administration, Federal Maritime Commission, Department of Commerce, and Congressional committees. When Liberty-Pac went forward with its plans, AGAFBO began to secure information on all phases of the new mode, including chartering attempts, agents, vessel itineraries, shippers, commercial cargoes, and military cargoes.

For some period of time, a large number of major van lines operating as movers of household goods in U.S. foreign commerce were deeply in debt to member lines of AGAFBO. For instance, 80 van lines owed AGAFBO a total of $5,083,826.40 in September 1964 and a total of $4,243,504.51 in October 1964. As AGAFBO itself reckoned, they had become bankers for much of the household moving industry. The build-up of such outstanding debts resulted from a practice of extending credit contrary to the AGAFBO tariff rules then in effect. Rules adopted December 20, 1963, provided that outbound freights were payable within 15 business days from date of arrival at vessel's port of discharge. The rules were amended on November 16, 1964, to provide for an additional 30 calendar days to make payment for shippers who furnished an indemnity bond of $100,000. There were provisions for shippers to be placed strictly on a cash basis in the event of delinquencies of payment.

There had been some limited AGAFBO action with respect to reducing the indebtedness of the van lines. On March 10, 1964, there was a meeting with the largest debtor van line concerning unpaid amounts. By mid-February 1965, AGAFBO had not, however, taken any strict measures to enforce its tariff rules as to payments nor to apply the sanctions provided by tariff against van lines delinquent in their payments.

On February 15, 1965, AGAFBO discussed at length the Liberty-Pac proposal and then passed the following motion:

> Since Liberty-Pac International has submitted a proposal to the Department of Defense for the carriage of all military household goods between the Atlantic Coast and the Bordeaux-Hamburg and United Kingdom ranges, which service will be exclusively available through the Sapphire Steamship Lines, Inc., for which service the Pioneer Overseas Corporation is the FMC filing agent, it was agreed that the new enterprise represented a highly speculative venture and since the participants were indebted to the member lines for a considerable sum of money, the Secretary should by wire notify them as the initial step in collecting delinquent accounts, that unless all amounts due member lines were paid within seven days from date of telegraphic notice, the Secretary should then immediately request MSTS to request * * * [MTMTS] to take agreed action to insure collection of such accounts or suspend the carrier's tender.

Following the meeting, AGAFBO telegraphed the Pioneer group that unless payment of delinquent charges was made within seven days, MSTS would be informed and would be requested to ask MTMTS to take appropriate steps either to insure prompt payment or to suspend the tenders of the lines. MSTS was so notified on March 2.

On March 5, 1965, MSTS passed on the complaint to MTMTS. On March 10, 1965, MTMTS refused to act. On February 15, 1965, at the same time that AGAFBO agreed to take strong action against the Pioneer Overseas Group to collect past debts, AGAFBO agreed that "On amounts delinquent subsequent to November 16, they [the Pioneer Overseas Group] were to be notified that they would be placed on a cash basis." It was further agreed that each member line would immediately issue instructions to make certain that all its offices strictly adhered to this cash basis requirement.

On February 18, 1965, AGAFBO notified the Pioneer Overseas Group that van lines which were delinquent in payment of amounts owed since November 16 "will on February 24 be placed on a cash basis".

On April 5, 1965, AGAFBO amended its cash requirements rule in a manner suggested by certain unnamed van lines whereby those which paid debts owed AGAFBO for services prior to November 16, 1964, would be taken off the cash list "whether or not current delinquencies remain unpaid".

At an AGAFBO meeting of April 13, the carriers agreed that court action should be started against members of the Pioneer group. Such suits were filed.

On February 24, 1965, AGAFBO filed a petition with the Commission requesting an investigation of the legality of the Sapphire/Liberty-Pac operation. The Commission did not act on the petition.

On March 31, the secretary of AGAFBO was instructed to explore with counsel the possibility of legal action to prevent the use of unreasonably low rates by Liberty-Pac. In fact, AGAFBO filed a petition with the Commission asking that Sapphire's tariff be rejected as illegal. No action was taken by the Commission.

On April 1, MSTS instructed its offices to book the maximum quantity to household goods with Sapphire. On the following day, AGAFBO requested MSTS to suspend Sapphire's bookings, referring to the Sapphire operation as "opportunist cut throat competition" and charging that the use of Sapphire was contrary to the Wilson-Weeks agreement and DOD's financial requirements. MSTS, as a result, suspended Sapphire for two days, but MSTS lifted the suspension upon concluding that Sapphire had shown sufficient proof of financial stability and otherwise had met all MSTS requirements.

Thereafter, AGAFBO complained of the MSTS policy of preferring Sapphire because Sapphire's rates had longer effective dates. In addition, AGAFBO communicated and had meetings with various officials of DOD, MSTS, and MTMTS concerning the proposed operations of Liberty-Pac and Sapphire.

On March 29, AGAFBO as a direct reaction to the rates of Sapphire reduced its through bill household goods rate from 81¢ (which it had negotiated with MSTS) to 45½¢ per cubic foot. The rate was quoted for a 30-day period and eventually expired on March 1, 1966. AGAFBO altered its FIO rate in a corresponding manner. AGAFBO notified MSTS that the rates were made as a strictly temporary competitive measure and were not fair, reasonable, or compensatory. AGAFBO also filed competitive rates on other goods in reaction to Sapphire's competition.

*Miscellaneous Facts*

U.S. Lines had the capacity to carry refrigerated beef for the military. MSTS had used these facilities on berth terms under Government bills of lading, with loading at commercial piers in New York. After MSTS had booked some of this cargo with U.S. Lines in June 1965, the carrier canceled the booking, advising MSTS that at:

> * * * present time in spite of rate equality on principal cargo categories MSTS is holding cargo for competitors with the avowed intent of filling such competitive vessels before considering those of United States Lines. Under circumstances feel unable to continue to perform long range special services to MSTS in this area while such discriminatory situation persists.

The same type of refrigerated facilities possessed by Moore-McCormack also had been used by MSTS. The carrier canceled a booking for refrigerated space in June 1965, advising that the sailing of the particular vessel had been withdrawn because of the limited commercial bookings and the pending maritime strike, plus the fact that MSTS was unable to give the carrier any general cargo, it being:

> * * * understood that very large scale MSTS dry cargo bookings were made with our competition [Sapphire] which did not offer conventional reefer space. * * * Withholding of a dry cargo booking to our ship which would have enabled us to sail on 18 June as scheduled and meet your total requirements is difficult to understand. Respectfully recmd serious reconsideration of present MSTS booking policy.

In May 1965, MSTS booked with Sapphire household goods for loading at St. Nazaire, at a rate of 40 cents per cubic foot. Waterman had a vessel available at that place at the same time and reduced its rate to 31½ cents. The cargo was unbooked in favor of Waterman, but Sapphire immediately filed a rate one/half cent below the Waterman rate, and was then given the cargo.

By letter to DOD of December 11, 1965, Liberty-Pac's attorney confirmed the oral commitment made by Liberty-Pac's representative the previous day, that Liberty-Pac would "move empty Conex boxes from Germany to the United States on its chartered vessels, as space and sailing schedules permit, without charge", if permitted to charter its own vessels. In its approval on December 29 of Liberty-Pac's new-mode proposal, DOD stated that "Any supplementary offer such as your client's offer of free transportation of empty conex containers from Europe to the U.S. should be embodied in the tender." Liberty-

Pac carried no empty Conex boxes from Germany, and it had no specific provision for this transportation in its tariff on file with the Commission.

In its letter of March 11, 1965, to various van lines, Sapphire stated that its tariff filed that day contained a rate of $7 per 100 pounds for through-bill military household goods, and that this rate was a direct saving to the van lines of approximately $1 per 100 pounds. The purpose of this saving was to induce the van lines to divert their shipments from New Orleans to Baltimore since the cost through the two ports would be equalized and transit time via Baltimore would be shorter than via New Orleans.

MSTS tendered 124 POVs to Sapphire at Philadelphia on May 22, 1965, for loading on one of its vessels. As this vessel did not have special gear for handling automobiles, the tender was revoked in favor of a vessel of an AGAFBO member which was available and did have such equipment. Sapphire thereupon agreed to pay the difference in loading costs (about $7.50 per vehicle), and this offer was accepted by MSTS; Sapphire was then billed for the costs. The Sapphire tariff provided at that time that where the cargo required special equipment not on the vessel or the handling of cargo involved other expenses, such equipment should be provided by MSTS, who should also pay the other expenses.

On a voyage in May 1965, one of the Sapphire vessels loaded 59 truck tractors for MSTS. These averaged six tons each, with none weighing less than two tons. Sapphire did not submit to MSTS a bill for heavy-lift charges although its tariff provided that such charges were applicable where the packages or pieces were in excess of two tons.

AGAFBO's rate reductions and later upward revisions were not made after negotiations with MSTS, who did not agree that the former rates should become effective when the temporary reductions expired.

Government civilian cargoes move under commercial tariff rates and not under special Government rates. The AGAFBO and TPAFBO berth rates on military household goods moving on through Government bills of lading are lower than the corresponding rates contained in the tariffs of the commercial conferences of which the AGAFBO and TPAFBO lines are members. This means that household goods shipped by civilian agencies of the Government are assessed rates higher than those paid for military household goods which may be shipped on the same vessel. Furthermore, the commercial conferences do not permit negotiation, by their American-flag member lines, of rates on cargo or property shipped by civilian agencies of the Government.

The AGAFBO and WCAFPO agreements require the carriers to furnish data to the Military Sea Transportation Service and such related Shipper Services as to cargo transportation costs, space availability, sailing schedules, and related matters.

WCAFBO has submitted all cost data requested by MSTS, but MSTS has not been satisfied with the data submitted by AGAFBO and takes the position that the data has been informative but not conclusive as to the reasonableness of AGAFBO's rates.

AGAFBO carried on negotiations with MSTS in several areas served by only one U.S. flag operator.

## The Issues

When the Commission instituted this proceeding, it specifically announced the legal questions to be resolved, as follows:

1. Whether the conference agreements have operated in a manner which is unjustly discriminatory or unfair to the U.S. Government or to any of its shipping agencies or between carriers or has operated to the detriment of the commerce of the United States, or is contrary to the public interest, or is in violation of the Shipping Act; and whether the agreements should be modified or canceled pursuant to the standards of section 15.
2. Whether the conferences or member lines have carried out an agreement before it has been filed and approved by the Commission in violation of section 15.
3. Whether the member lines have charged rates on nonmilitary household goods, which rates were not properly on file with the Commission, in violation of section 18(b) (3).
4. Whether any respondent has offered to a U.S. Government agency a rate which was not filed with the Commission as required by section 18(b) (1), and, if so, whether such unfiled rate is so unreasonably low as to be detrimental to the commerce of the United States in violation of section 18(b) (5).
5. Whether any respondent has charged rates which are unjustly discriminatory with respect to goods sponsored by the U.S. Government in violation of sections 16 First or 17.
6. Whether the rates on Government cargo filed by AGAFBO, Waterman, or Sapphire are so unreasonably high or low as to be detrimental to the commerce of the United States contrary to section 18(b) (5).
7. Whether the member lines of AGAFBO have individually or together with other lines acted to exclude any other carrier from the carriage of Government cargo in violation of section 14 Second.
8. Whether any respondent member of AGAFBO has violated section 14 Third by retaliating against any shipper (U.S. Government) by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminatory or unfair methods, because such shipper (U.S. Government) has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

9. Whether there exist unfiled agreements, subject to section 15, regarding the transportation of Government cargo between Sapphire, Liberty-Pac International Corporation, or Pioneer Overseas Corp.

## Discussion

In his initial decision, the examiner concluded generally that the question of rates had become moot, that the record disclosed no unfiled agreements or rates or other violations with the exception of a refusal of space to MSTS by U.S. Lines.[6] With respect to the organic agreements of AGAFBO and WCAFBO, the examiner recommended that the agreements be permitted to remain in force until MSTS certifies that it no longer has business with the groups, and at that time the agreements will be canceled or amended to show their present application.

The parties have excepted to numerous findings and conclusions of the examiner. Rather than consider the exceptions seriatim, we will attempt to group them into the following general categories: reasonableness of rates; actions taken against Sapphire; unfiled agreements, unfiled rates, or other violations; and continued approval of the agreements.

*Reasonableness of Rates*

Our findings as to the operating margin of AGAFBO-WCAFBO carriers are based upon a comprehensive study prepared by the member lines of the costs of carrying military cargo. The examiner, while admitting that the studies were not as accurate or complete as possible, found that the AGAFBO and WCAFBO rates pass muster under the Shipping Act. However, the examiner found that when AGAFBO reduced its rates to deprive Sapphire of cargo, AGAFBO's rates became so low as to be detrimental to commerce contrary to section 18(b)(5).[7] The examiner, although noting Sapphire losses, found this carrier entitled to a reasonable trial period to stabilize its rates. In spite of these findings, the examiner concluded that the rate issues were moot.

Hearing Counsel and DOD challenge the examiner's consideration of the reasonableness of rates at all; they aver simply that the cost

[6] The examiner stated that certain acts of AGAFBO were not authorized by any section 15 agreement, but he made no such ultimate conclusion. He also stated that AGAFBO unlawfully discriminated in pressing claims against some van lines but not others, but again he did not include this in his ultimate conclusions.

[7] Section 18(b)(5) (46 U.S.C. § 817(b)) provides:

(5) 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.

data, although not rebutted at the hearing, are unreliable. Both Hearing Counsel and DOD also submit that the entire issue is moot.

In response AGAFBO and WCAFBO assert that the studies were properly introduced with a host of supporting witnesses to attest to the methodology and comparative accuracy; since adverse parties could not impugn the validity of the studies, they must stand.

Granted that the studies are not as accurate or complete as might be, there is no justifiable reason not to accept them as a fair and honest attempt by the lines to come up with a meaningful story. The studies represent a reasonably close approximation of costs. *Increased Rates on Sugar*, 1962, 7 F.M.C. 404 (1962); *Alcoa Steamship Co., Inc.-General Increase in Rates*, 9 F.M.C. 220 (1966); *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180 (1965). Therefore, we agree with the examiner that there has been no showing on this record that the rates in effect prior to the competitive reductions were so unreasonably high as to be detrimental to the commerce of the United States, within the meaning of section 18(b) (5) of the Act.

We consider now the AGAFBO reduced rates which became effective March 29, 1965. As previously seen, MSTS was informed by AGAFBO that the reductions were temporary and for competitive purposes only, and that they were not believed to be fair, reasonable, or compensatory. There can be little doubt that the drastic reductions were designed for but one purpose: namely, the elimination of Sapphire from the carriage of military cargo. Since the rate reductions were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade, we agree with the examiner and, under the circumstances, conclude that the reduced rates were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b) (5) of the Act.

In the final analysis, the issue of whether the AGAFBO and WCAFBO rates met the standards of section 18(b) (5) is moot. Section 18(b) (5) permits the Commission to disapprove rates upon certain findings. Since the rates in question are no longer effective, they are no longer amenable to section 18(b) (5).

There has been no showing on this record that the rates of Waterman, during its nonmembership in AGAFBO, were so unreasonably high or low as to be contrary to section 18(b) (5) of the Act.

With respect to Sapphire's rates, the examiner, although noting losses on the first 15 voyages, held that Sapphire, being a new operator with attendant vicissitudes as evidenced by this record, was entitled to a fair chance to demonstrate whether it can operate in a sound financial manner.

AGAFBO argues that the examiner is logically inconsistent in finding that AGAFBO's rates were so low or unreasonably low as to be detrimental to the commerce of the United States contrary to section 18(b) (5) and yet exonerating Sapphire's identical rates. This, says AGAFBO, is illogical, particularly where Sapphire's losses at these rates were enormous and their expectations of cargo were naively optimistic.

The Commission has not found that Sapphire's rates were contrary to section 18(b) (5).

*Actions Taken Against Sapphire*

The examiner found that when AGAFBO learned of the Liberty-Pac proposal, AGAFBO generally acted with justification to protect itself; however, when AGAFBO pressed claims against some but not all van lines, AGAFBO violated sections 14 Third and 16 First. Likewise, the examiner found that AGAFBO's communication with various government agencies in an effort to impede Liberty-Pac/Sapphire was not authorized by its section 15 organic agreement and was, therefore, improper.

Hearing Counsel argue that the principal error and the cause of greatest regulatory concern in the initial decision is the failure to find that the joint acts of AGAFBO to eliminate Sapphire were unauthorized by the approved agreement and in violation of section 15. Sapphire, too, argues that the AGAFBO agreement does not include the right to attack a competitor collectively.

The premise of the contentions of Hearing Counsel and Sapphire are that joint actions taken by carriers to control or regulate competition must be authorized by section 15. Thus, Hearing Counsel argue that the examiner failed to recognize that the many actions taken by AGAFBO and its members to eliminate Sapphire from competition were evidence of a larger conspiracy which was in violation of section 15.

AGAFBO excepts to the examiner's decision to the extent of the finding that it acted unlawfully by pressing legal claims against some of the van lines. AGAFBO contends that it was justified in bringing suit on long overdue claims. AGAFBO argues that the lawsuits were based on valid claims and that facts do not show that the van lines were singled out for any reason other than their poor credit standing.

AGAFBO also contends that it was authorized by its agreement to meet with officials of DOD and MTMTS. In fact, there had been a long history of such discussions. Furthermore, petitioning a government agency should not be considered to be illegal under any circumstances. Finally, AGAFBO argues that its unilateral rate action was not beyond the terms of the agreement because it was logical for the AGAFBO lines to assume they had the freedom to meet competition. This worked to the benefit of MSTS. Accordingly, AGAFBO argues that its agreement should not be so narrowly interpreted, particularly in view of the past relationship between AGAFBO and DOD.

Although the secretary of AGAFBO, pursuant to instruction, advised the association's President's Committee of the developing facts for possible management level action with DOD, Maritime Administration, Federal Maritime Commission, Department of Commerce, and congressional and Senate committees, there is no proof that the committee took any positive action. There are other references in the record of meetings between AGAFBO and DOD, MSTS, and/or MTMTS concerning the new proposal, but it does not appear whether any of these were beyond the pale, unless it can be said that meetings with any Government agency other than MSTS were not within the scope or contemplation of AGAFBO's agreement. The agreement provides:

> 1. (a) 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 transportation and related services for such cargo, and as to matters relating thereto, which are to be used as a basis for discussion with Military Sea Transportation Service and said related "Shipper Services" for the purpose of negotiating rates, terms, and conditions for the transportation and related services for such cargo in common carriage; they may also negotiate as a body or through committees or selected representative or representatives, rates, terms, and conditions which shall become binding terms, and conditions which shall become binding on all parties hereto.

We find that this language authorized AGAFBO to meet with various DOD officials.

The petitions by AGAFBO requesting the Commission (1) to investigate possible unfiled rates by Sapphire, Liberty-Pac, or a related company, and whether they were unreasonably low, and (2) to reject Sapphire's first tariff because it did not conform to the statute and was the carrying out of an unfiled agreement with Liberty-Pac were also justified. Whereas it is true that the first petition was based on surmises and assumptions, and the association secretary testified that the beliefs turned out to be unfounded, the whole situation at that time was in such a state of turmoil that AGAFBO should not be penalized for filing the petition; good faith does not depend upon eventual results or hindsight. In the case of the petition to reject the tariff, moreover, it has been seen that Sapphire did amend the tariff to remove the objectionable features. Therefore, the filing of the petitions was not unlawful.

The Commission has not found that AGAFBO violated section 15 in requesting MSTS to suspend Sapphire or in complaining that MSTS preferred Sapphire; that AGAFBO, by a series of actions, conspired to drive Sapphire from the trade in violation of section 15; or that AGAFBO violated sections 14 Third and 16 First with respect to the collection of delinquent freight charges.

We consider now AGAFBO's ratemaking activities in reaction to Sapphire. AGAFBO reduced its rates to admittedly unreasonable levels with the sole purpose of mitigating any advantage to Sapphire. These rates were used as a predatory device to destroy competition and, as found above, were so unreasonably low as to be detrimental to the commerce of the United States contrary to section 18(b) (5).

Section 15 allows carriers to band together for the purposes of joint ratemaking in order to avoid the chaos which would result from wide-open competition. However, a conference is not permitted to engage in activity which is incompatible with the regulatory purposes of the Act. *States Marine Lines, Inc.* v. *Trans-Pacific Freight Conference*, 7 F.M.C. 204, 210, 215 (1962); aff'd. *sub nom. Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Com'n.*, 314 F.2d 928 (9th Cir. 1963). Furthermore, a conference, no matter what authority its organic agreement may contain, is not authorized to violate other provisions of the Shipping Act nor the general standards of section 15. *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 346–347 (1940).

With respect to rates set by a conference, the Commission has from time to time stated that it may disapprove or modify a conference agreement where a conference rate is so unreasonably high or low as to be detrimental to the commerce of the United States. *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180, 192–93 (1965). See also: *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28, 30 (1930); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 347 (1940). In *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441 (1966), the Commission said:

> Thus, section 15 does not limit the Commission to the formal terms of an organic conference to the exclusion of the viable implementations—joint rates—of approved agreements. Consequently, if circumstances warrant, the Commission can act against rates on boiler parts under section 15.* Such action could be

*Respondents contend that the Commission may scrutinize ratemaking activities only under sections 17 and 18(b) (5). These provisions permit limited rate regulation of ocean carriers, both independent lines and conferences. Section 15, however, has a different role; its impact is against collective action, including ratemaking. 9 F.M.C. at 453–54.

based upon a finding that a section 15 agreement operated in a manner contrary to the public interest or upon one of the other prohibitions of section 15.

Thus, we will consider whether the rate reductions offended the provisions of section 15. AGAFBO itself characterized its reduced rates as unreasonably low. The operating data submitted by AGAFBO show that this admission was accurate. The reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its ratemaking functions, operated in a manner which was knowingly at odds with the requirements of section 18(b) (5) and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire.[8] AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. *Isbrandtsen Co., Inc.* v. *United States*, 211 F.2d 51 (D.C. Cir. 1954) cert. denied, 347 U.S. 990 (1954).[9] We, therefore, conclude that the AGAFBO agreement operated in a manner which was in violation of section 15.

AGAFBO argues that its rate reductions were authorized by Agreement No. 8086-2. While we agree with the examiner that the rate reductions filed *ex parte* were contrary to the authorization of the agreement to *negotiate* rates with MSTS, we consider the crux of the issue to be that the rates were reduced to a level which was admittedly unreasonable and which was detrimental to commerce and contrary to the public interest. Therefore, while the agreement does not contemplate *ex parte* reductions, it certainly does not sanction rate reductions which were admittedly and knowingly contrary to section 18(b) (5) and which violated the standards of section 15 as well.

*Other Violations*

The examiner found no violations with regard to Sapphire's difficulty in obtaining and retaining overseas agents. We agree. The record shows only that the heat of the competitive struggle between AGAFBO

[8] Cf. *Investigation of Rates in the Hong Kong—United States Atlantic and Gulf Trade*, F.M.C. Docket 1083 11 F.M.C. 168.

[9] See also: *Pacific Coast European Conference*, 7 F.M.C. 27, 37 (1961); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 289–90 (1966); *California Stevedore & Ballast Co.* v. *Stockton Port District*, 7 F.M.C. 75 (1962).

and Sapphire was reflected in the acts of individual carriers and their agents.

The examiner stated that U.S. Lines in unbooking MSTS refrigerated cargo because of its dissatisfaction with MSTS's policy of distributing the carriage of general cargo, violated section 14 Third of the Act. AGAFBO argues that U.S. Lines did not retaliate; it canceled the sailing because of insufficient bookings. However, reference to the telegram in which U.S. Lines canceled the booking convinces us otherwise. It was clearly an unlawful retaliation against a shipper for patronizing a competitor. We sustain the examiner. It is immaterial that U.S. Lines was not in accord with the MSTS policy on general cargo.

Moore-McCormack is in a different position. Its particular vessel had limited commercial bookings, a maritime strike was pending, and MSTS did not provide general cargo in addition to the refrigerated cargo, hence cancellation of the sailing was necessary. The only way the sailing could have been made was to secure sufficient MSTS cargo, which would have made the sailing not subject to the strike. The fact that the carrier chose that time to remonstrate with MSTS on the latter's policy for the use of competitive vessels for general cargo is beside the point; it was not the retaliation proscribed by section 14 Third.

Sapphire contends that the calling of the Waterman vessel at St. Nazaire in an attempt to take household goods away from Sapphire when they already had been booked by MSTS, was a violation of section 14 Second of the Act (46 U.S.C. § 812) which makes it unlawful for a carrier to use a fighting ship for the purpose of excluding, preventing, or reducing competition by driving another carrier out of a trade. Waterman customarily served the various ports in the Bordeaux-Hamburg range, even though all ports were not served on every voyage. The act of putting the particular ship into St. Nazaire to load at rates below those of Sapphire was nothing more than run-of-the-mill competition for a parcel of cargo. There is no proof that the Waterman action was for the purpose of "driving another carrier out of a trade".[10]

The examiner found no unfiled section 15 agreement between Sapphire and Liberty-Pac or other van lines. AGAFBO excepted. We agree with the examiner that something more than a mere inference is needed to find such an agreement.

Sapphire's rates were available to all shippers alike, not just to Liberty-Pac. Mr. Safir testified that there were no agreements between

[10] See *Grace Line, Inc.* v. *Skips A/S Viking Line, et al.*, 7 F.M.C. 432 (1962).

Sapphire and the van lines—"just expressions of support, yes. Nothing else." His affidavit in reply to AGAFBO's petition for rejection of Sapphire's first tariff (referred to above) is to the same effect. As indicative of the absence of agreements, and as already seen, six of Pioneer's accounts left and other van lines which had promised support to the new operation did not give it.

Since the record shows only an association between Sapphire and its customers, we will not overrule the examiner. There is simply not enough evidence of an agreement contemplated by section 15.

AGAFBO charges that the offer of Liberty-Pac to DOD to carry empty Conex boxes without charge was in violation of sections 16 First and 17. The examiner, stating that our decision in *Carriage of Military Cargo*, Docket No. 66-42 10 F.M.C. 69 aff'd. *sub nom. American Export Isbrandtsen Lines* v. *Federal Mar. Com'n*, 380 F.2d 609 (D.C. Cir. 1967), made those sections inapplicable to the transportation of military cargo, refused to find such a violation. The examiner's reading of the case is in error; we found only that carriers could grant the government reduced rates, not available to private shippers, without violating the Shipping Act. This does not render the Shipping Act inapplicable to government cargo. Nevertheless, we agree with the examiner's conclusion. The offer was part of early negotiations between Sapphire and DOD. The final conditions of this offer were never formulated and we view the matter as tentative and incomplete.[11]

The examiner ruled that AGAFBO's allegation that Sapphire violated section 16 First by the absorption of railroad charges was beyond the order of investigation. While we believe the matter to be an issue, the record will not support a finding that Sapphire diverted cargo unlawfully from one port to another. The cargo attracted by Sapphire came by virtue of its low rates, not by any absorption.

AGAFBO has also alleged that Sapphire violated the Act by failing to abide by its tariff with respect to POV loading costs and heavy lift charges. The examiner found that section 18(b)(3), which prohibits a carrier from deviating from its tariff, was not an issue as to Sapphire. However, the record discloses that in these instances Sapphire did not follow the terms of its tariff. Accordingly, we find that Sapphire violated section 18(b)(1) by failure to file appropriate provisions in its tariff.[12]

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[11] Neither was the proposal violative of section 18(b)(1) since it was not necessary to file such a tentative proposal.

[12] In view of this finding, we do not here consider whether this conduct also was contrary to the provisions of section 18(b)(3).

Hearing Counsel contend that AGFABO was not authorized by the conference agreement to negotiate on behalf of a single member. A literal reading of the agreement shows to the contrary.

With respect to the submission of data by the conferences to MSTS, we find that the carriers complied with the established format in submitting cost information and complied with their agreement in this respect.

*The Continued Approval of the Agreements*

The examiner found that the predominant function of AGAFBO and WCAFBO terminated upon the commencement of the competitive bidding system of DOD. Rather than ruling that the agreements should be canceled outright, the examiner allowed the agreements to remain in effect pending the conclusion of outstanding business between the carrier groups and the government at which time the agreements would be canceled unless modified to reflect their new role.

Hearing Counsel assert that the agreements should be canceled immediately because of proof that the government has no further need for them. Hearing Counsel would allow no amendment. DOD contends that since it no longer desires to deal with the carrier groups, the groups should be found to be detrimental to commerce and contrary to the public interest and therefore disapproved. AGAFBO and WCAFBO argue that these agreements may be canceled only upon a finding that they are contrary to section 15. The changed attitude of DOD alone does not authorize disapproval. Likewise, the conferences argue that DOD may well have a future need for the carrier groups.

It is the policy of the Commission to withdraw the approval of conference agreements where the agreement has become dormant. This policy depends upon the wording of section 15 itself. Both initial and continued approval of an agreement are dependent upon a determination that the agreement is not contrary to section 15. *Agreement 8765—Order to Show Cause*, 9 F.M.C. 333 (1966). "Thus, one prerequisite for approval of an agreement is the actual existence or immediate probability of transportation circumstances in the trade covered by the agreement which warrant approval." 9 F.M.C. at 335–36.[13]

Where there is no need for or justification for a section 15 agreement the Commission feels that such an agreement remaining on the books to await some future event which was not contemplated by the original approval of the agreement tends to handicap the Commission's

[13] In *Cuban Agreements*, Docket No. 66–14 10 F.M.C. 92, the Commission allowed dormant agreements to remain approved because their dormancy was the result of governmental embargo.

responsibility to see that section 15 agreements operate in a manner consistent with the law. The Commission feels that it is far better to cancel inoperative agreements than to await a future need for an agreement so that that need may be measured against the requirements of section 15. We will follow that policy here.

The agreements under investigation have as their very core the negotiation of rates with MSTS. This fundamental activity cannot be implemented at present. Therefore, we direct that the agreements must be modified to delete authorization to negotiate rates with MSTS. The remainder of the activities contemplated by the agreements have not been completely made obsolete by the competitive bidding system. Therefore, we will allow the continued approval of these activities. In order to bring the agreements in line with the present functions of the carrier groups, we will order that the groups submit within 120 days, appropriate modifications which delete the dormant activities and show the present applicability of the agreements.

The TPAFBO agreement may remain in full force and effect as previously approved.

## Ultimate Conclusions

1. The rates of AGAFBO, prior to the entry of Sapphire into the trade, and the rates of WCAFBO were not contrary to section 18 (b)(5).

2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).

3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

4. AGAFBO did not otherwise violate the Shipping Act.

5. U.S. Lines, by canceling a booking because MSTS patronized Sapphire retaliated against MSTS in violation of section 14 Third. Moore-McCormack, however, simply remonstrated with MSTS about its policy and did not violate section 14 Third.

6. Waterman did not use a fighting ship in violation of section 14 Second.

7. Sapphire, Liberty-Pac, or other van lines did not enter into or carry out an unfiled agreement subject to section 15.



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8. Sapphire did not violate sections 16 First or 17 by offering to carry empty Conex without charge since the offer was part of early negotiations and never consummated.

9. Sapphire did not violate section 16 First by directing cargo from one port to another.

10. Sapphire violated section 18(b)(1) by failing to file appropriate tariff provisions regarding POV loading costs and heavy lift charges.

11. The agreements of AGAFBO and WCAFBO must be amended to delete authorization concerning dormant functions such as authority to negotiate rates with MSTS and these carrier groups must submit appropriate modifications within 120 days hereof to delete dormant activities and to show the present application of the agreements.

12. The TPAFBO agreement may remain approved.

*Chairman Harllee and Commission Barrett, Separate Opinion*

We wish to state for the record the following views on which we differ from those set forth above.

The Commission has absolved AGAFBO in the President's Committee episode, condoned the filing of petitions with the Commission, refused to condemn the right of AGAFBO to talk to DOD officials, and denounced AGAFBO's reduced rates. We agree.

However, we are convinced that AGAFBO violated section 15 by conspiring to destroy the competition of Sapphire. In our opinion, our fellow Commissioners, in ignoring the motives behind the AGAFBO intrigue, have failed to recognize that cumulatively all these acts, many with a gloss of legitimacy, were the effectuation of one agreement—to crush Sapphire.

At the time of the original Liberty-Pac proposal, the AGAFBO carriers began an exhaustive campaign to preserve their monopoly position. The first manifestation of this conspiracy was the advice from the AGAFBO secretary to a President's Committee regarding the Liberty-Pac proposal for possible action with Government agencies. Thereafter, AGAFBO began to secure information on all phases of the new mode, including chartering attempts, agents, vessel itineraries, shippers, and potential cargoes.

Following a series of half-hearted attempts to collect back freight charges from all van lines, AGAFBO commenced a series of retaliatory acts against the Pioneer group. These van lines were singled out and informed that unless they paid up in full AGAFBO would request MSTS to ask MTMTS to insure prompt payment or to suspend the tender of the van lines for lack of financial responsibility. AGAFBO followed through on this threat. Subsequently, AGAFBO rewarded those van lines that had left Pioneer under this pressure with renewed credit standing. Finally, the AGAFBO members brought suit against the remaining members of the Pioneer group, although other van lines still owed the AGAFBO carriers for back freight charges.

Also, in furtherance of the concerted campaign to defeat the new competition, AGAFBO filed several petitions with the Commission designed to handicap the Sapphire operation.

As Sapphire began to make progress in its new venture, AGAFBO sought to have MSTS suspend Sapphire from carrying Government cargo. AGAFBO requested MSTS to suspend Sapphire's bookings of through-bill household goods because of its "cut-throat competition and insufficient financial stability", plus the charge that the use of Sapphire by MSTS was contrary to the Wilson-Weeks agreement. AGAFBO also complained to MSTS that the latter was preferring carriers which filed rates which had longer effective dates. The record also reflects AGAFBO communications and meetings with various officials of DOD and MTMTS—in addition to MSTS—in an effort to block and impede the proposed operations of Liberty-Pac/Sapphire. Finally, AGAFBO used its ultimate weapon, cutting rates to rock bottom.

The various AGAFBO activities lead to but one conclusion, that the carriers agreed to take whatever steps were necessary to drive Sapphire from the trade.[14] The cumulative effect of all of these acts was decidedly one to destroy competition; that is, to end the threat of Sapphire and preserve the monopoly of AGAFBO. This concerted undertaking amounted to a new scheme or rate combination and discrimination not embodied in the AGAFBO agreement. Thus, there was no section 15 authorization for such conduct.[15]

It would appear that our fellow Commissioners were impressed by the fact that for the most part AGAFBO utilized legal means to combat Sapphire. However, the legality of the means is immaterial. Under the antitrust laws, the courts have frequently followed a general rule enunciated in *American Tobacco* v. *United States*, 328 U.S. 781 (1946) that:

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet, if they are part of the sum of the

[14] We drew a similar inference in *Oranje Line* v. *Anchor Line Ltd.*, 6 F.M.B. 199, 208 (1961).

[15] *N. Atlantic Mediterranean Frt. Conf. and United Arab Co.*, 9 F.M.C 431, 434 (1966); *Isbrandtsen Co., Inc.* v. *United States, supra; Empire State Highway Transp. Ass'n.* v. *F.M.C.*, 291 F. 2d 336 (D.C. Cir. 1961); *Swift & Co.* v. *Gulf and South Atl. Havana Conf.*, 6 F.M.B. 215 (1961), aff'd. *sub nom. Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962).

> acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibitions. 328 U.S. at 809.

We fail to see why the rule should not apply here.[16]

With regard to pressure that AGAFBO brought to bear against the van line customers of Pioneer for nonpayment of ocean freight, we would find that AGAFBO retaliated against unfaithful shippers in violation of section 14 Third. We also would hold that the pressing of the claims and the instituting of legal proceedings subjected the victims to undue and unreasonable prejudice and disadvantage in violation of section 16 First.

Finally, we believe the examiner correctly decided that Sapphire's rates were not contrary to section 18(b)(5). The record reflects the method by which Sapphire established its rates. We would find that Sapphire did not develop these rates capriciously but promulgated its tariff after a careful analysis of the anticipated cost of operation and consideration of the cargo that might reasonably be expected to be booked on Sapphire's ships. Thus, Sapphire's rates which originally might have proved to be compensatory turned out to be seriously below the cost of operation, principally because AGAFBO deprived it of the nucleus cargo which was indispensable to Sapphire's profitable operation.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

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[16] *Eastern R. Conference* v. *Noerr Motors*, 365 U.S. 127 (1961), which guarantees the right freely to engage in political activity, and *Mine Workers* v. *Pennington*, 381 U.S. 657 (1967), which preserves the right to petition the government to take valid governmental action, are exceptions to the rule of *American Tobacco*. Neither *Noerr* nor *Pennington* sanction a pervasive scheme by a group wielding its power in every direction to destroy a single competitor.

# FEDERAL MARITIME COMMISSION

No. 67–41

SPECIAL RATES TO ALEXANDRIA AND PORT SAID
NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE

*Decided December 20, 1967*

Arrangement between North Atlantic Mediterranean Freight Conference and United Arab Co. for Maritime Transport and Agencies (MARTRANS), whereby Martrans, upon execution of a dual rate contract, became entitled to rates of up to 28 percent lower than the ordinary rates otherwise applicable in the trade, found to be violative of the standards of section 14b of the Shipping Act, 1916.

No violations of section 15 or section 18 of the Shipping Act, 1916 have been found.

*Burton H. White* and *Elliot B. Nixon* for respondent North Atlantic Mediterranean Freight Conference.

*Edward S. Bagley* for intervener Gulf/Mediterranean Ports Conference.

*Donald J. Brunner* and *Samuel B. Nemirow*, Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*)

On December 30, 1966, the North Atlantic Mediterranean Freight Conference (Conference) revised its freight tariff No. 9, FMC–2, so as to provide a schedule of special rates applicable to shipments destined to Alexandria and Port Said, United Arab Republic, for the account of the United Arab Co. for Maritime Transport and Agencies (Martrans). Under the provisions of the newly filed item, Martrans, an agency of the United Arab Republic, would receive certain reductions from the "current tariff commodity rates" to be calculated as follows:

(*a*) Where the rate is over \$28 W/M as freighted, a 15-percent reduction shall be allowed therefrom;

(*b*) Where the rate is between \$28 W/M and \$25.25 W/M as freighted, the freight rate shall be $25.25 W/M as freighted, and a 5-percent reduction shall be allowed therefrom;

(*c*) Where the rate is less than $25.25 W/M as freighted, a 5-percent reduction shall be allowed therefrom;

(*d*) Reduction of 15-percent shall be allowed in respect of extra length and heavy lift charges, but no reduction shall be allowed in respect of any surcharges or rates on container cargoes; and

(*e*) Where the Conference tariff shows the rate for a particular commodity as "open," the rate for such commodity in the individual filing of the carrying line shall apply in the calculation of reductions.

Subsequently, on January 12, 1967, the day the tariff revisions discussed above became permanently filed, Martrans signed the Conference merchant's freight contract, whereby it became obligated "* * * to ship or cause to be shipped [on Conference vessels] all of its ocean shipments * * * moving in the trade."[1] In return for its exclusive patronage, the Conference, under the terms of the contract, agreed to charge Martrans freight rates "* * * 15 percent * * * below the noncontract rates shown in the Conference tariff, which would otherwise be applicable to such goods * * *."

Thereafter, in our order served on June 23, 1967, we directed the Conference to show cause—[2]

1. Why the parties to the Conference have not violated section 14b of the Shipping Act, 1916, by maintaining an unapproved dual-rate system, and/or implementing their presently approved dual-rate system in an unlawful manner.

2. Why the parties, in agreeing to and entering into the subject

[1] Respondents advised that the merchant's freight contract signed by Martrans is the standard contract form, "without deviation or change," approved for use by the Conference in docket No. 1111—*The Dual Rate Cases,* 8 F.M.C. 16 (1964).

[2] The charging portion of the Show Cause Order stated that:

In Docket 66–3, contract between the North Atlantic Mediterranean Freight Conference and the United Arab Co. for Maritime Transport (Martrans), the Commission found that an agreement between the Conference members to enter into a special rate contract with Martrans was not an interstitial or routine operation under Conference Agreement 7980 (now 9548). The subject tariff items seem to be but another method of accomplishing the same objective and may be indicative of the carrying out of an unapproved agreement in violation of sec. 15 of the Shipping Act, 1916. The fixing of special rates by the Conference on open-rated commodities may also be a rate-making action which resulted from an unfiled and unapproved agreement among the Conference members.

The special rates, together with the exclusivity features of the dual-rate contract signed by Martrans, may result in a dual-rate system, otherwise subject to the provisions of sec. 14b of the act, which has not been approved by the Commission and which may be inconsistent with and different from the approved dual-rate system available to all other contract shippers in the Conference trade, in violation of that portion of sec. 14b that requires dual-rate contracts to be "available to all shippers and consignees on equal terms and conditions."

> arrangement with Martrans, have not carried out an unfiled and unapproved agreement in violation of section 15 of the act.

Additionally, the Commission ordered the Conference to show cause why its freight tariff No. 9 should not be rejected as a device for giving rebate or a remission of charges otherwise applicable in violation of section 18(b)(3) of the act.

The Conference has filed its memorandum of law to which hearing counsel have replied. Gulf/Mediterranean Ports Conference has intervened in this proceeding but has filed neither memorandums nor affidavits. We heard oral argument.

## Discussion and Conclusion

At the outset, we note that there is some question in this proceeding as to just how the schedule of special rates, outlined in the Conference's freight tariff No. 9, FMC–2, are to be applied. Both respondents and hearing counsel have their own interpretation of the tariff revision and its relation to other tariff rates presently on file. Although it would at first appear that this basic disagreement presents a factual issue for which a show-cause proceeding is not the proper forum, further consideration of the matter convinces us that the interpretations placed on the tariff revision by the parties create distinctions without substantial difference. For, as we shall develop further later, the result is, as a matter of law, the same regardless of whose interpretation we accept.

Hearing counsel are of the impression that the reductions, afforded United Arab Republic shipments made through Martrans, are to be calculated from the contract rate applicable under respondent's tariff, and as such, would create a third level of rates.[3] This, hearing counsel argue, constitutes a violation of section 14b of the act since it places Martrans in the preferred position of being the only Conference shipper entitled to a reduction of up to 15 percent below the rate paid by all other signatories of the exact same contract. Moreover, they view the present arrangement established by the Conference as being violative of section 15 of the act in that it allegedly introduces a new system for the regulation and control of competition which is not embodied in the basic agreement.

[3] In arriving at this conclusion, hearing counsel reason as follows:

These tariff provisions [freight tariff No. 9, FMC–2] allow reductions in accordance with a certain schedule therein outlined from the "current tariff commodity rates." Since Martrans is an agency of the Government of the United Arab Republic it would, even without signing a merchant's freight contract, be entitled to the contract rates applicable under the respondents' tariff; therefore the special rates provided for by respondents actually set up a third tier of rates available under their one tariff. There now exists the noncontract rate, the contract rate, and finally the schedule of reductions from the contract rate available at Port Said and Alexandria on United Arab Republic shipments made through Martrans.

Respondents, on the other hand, deny having entered into any arrangement with Martrans which could be characterized as being violative of either section 14b or section 15 of the act. They explain that what they have done is merely to establish a different rate basis on shipments destined to the United Arab Republic. According to the Conference, there are but two levels of rates applicable to United Arab Republic cargoes under their tariff: the ordinary or noncontract rate which is calculated in accordance with the provisions of freight tariff No. 9, FMC–2, and the contract rate, which is 15 percent below the ordinary rate.

Whatever might have been respondents' intentions with regard to the revised tariff filing, the fact of the matter is that the schedule of special rates outlined in freight tariff No. 9, FMC–2, by their very terms are made applicable only to shipments made through Martrans. Freight tariff No. 9 makes it abundantly clear that the rate reductions from the "current commodity rates" are to be granted only to shipments to Alexandria and Port Said, United Arab Republic account United Arab Co. for Maritime Transport and Agencies (Martrans).

Accordingly, respondents' statement that the revised tariff merely establishes a new rate base on cargoes destined to the United Arab Republic is inaccurate. The United Arab Republic rate base remains unchanged. What does change, however, are the tariff rates to which Martrans becomes entitled by virtue of it being a contract signator. As hearing counsel have pointed out, Martrans is now in the preferred position of being the only Conference shipper receiving a reduction of up to 15 percent below the rate paid by other signatories of the admittedly exact same dual rate contract.[4] Therefore, as we have mentioned earlier, it matters not whether we adopt respondents' or hearing counsel's interpretation as to what rate is applicable to what traffic. The result is the same whether the contract rate forms the basis for the rate reductions or vice versa. In either case, we are left with an arrangement which violates the statutory standards of section 14b of the act.

In the first place, section 14b absolutely precludes approval of any contract which is not "* * * available to all shippers and consignees on equal terms and conditions." This being true, it follows that once a dual-rate contract ceases to be available "on equal terms and conditions," that contract becomes unlawful per se. One of the conditions that attaches to a dual-rate contract is that all signatories to that contract are to be afforded the same reduction from the ordinary rate

[4] Hearing counsel offer the following as illustrative of the mechanics of the new schedule:

Assuming arguendo that there is an ordinary rate in the Conference tariff on any commodity of $35 and that the usual contract reduction of 15 percent is applied, that rate would become $29.75, but for Martrans the applicable rate would be $25.29 or over 27 percent below the ordinary rate.

otherwise applicable in that trade. Article 3(a) of the Conference's contract plainly states that "the freight rates to be charged to the merchant * * * shall be 15 percent * * * below the noncontract rates shown in the Conference tariff * * *." In the circumstances of this case, however, Martrans upon execution of the contract became eligible for rate reductions of up to 28 percent below the ordinary or noncontract rate. This is a clear violation of the "equal terms and conditions" provision.

Likewise, to the extent that the spread between the ordinary rate, applicable in the trade, and the contract rate charged Martrans, by virtue of their arrangement with respondents, exceeds 15 percent of the ordinary rate, the present system is also violative of section 14b(7) of the act. That section provides that the spread between ordinary and contract rate "* * * shall in no event be more than 15 per centum of the ordinary rates." The new schedule of special rates, however, will enable Martrans to receive contract rates in some instances, of 28 percent. Consequently, it is patently evident that the effectuation of a dual rate contract in the manner contemplated by respondents is absolutely in violation of section 14b.

Respondents attempt to support their claim that there is nothing unlawful about their present arrangement with Martrans by directing our attention to a number of Commission decisions which allegedly stand for the proposition that reduced rates or special rates are not only unobjectionable, but in some cases, even desirable. We fail to see how these holdings are relevant here. There is an obvious and fundamental difference between the cases cited by respondents and the proceeding before us now. Here we are dealing with a scheme of rate reductions which is expressly tied to a dual-rate contract. Such an arrangement, if permitted, would circumvent the statutory requirements of section 14 of the act.

In enacting Public Law 87-346, which ultimately became section 14b—

> * * * Congress, in a sense, reaffirmed the earlier philosophy of section 15 of the Shipping Act which, by authorizing supervised competition-restricting agreements among carriers, recognizes that there is some justification in the waterborne foreign commerce for making exception to our normal antitrust policies (*The Dual Rate Cases*, 8 F.M.C. 16, 24 (1964)).

Public Law 87-346, however, permits the use of dual-rate contracts only if we find that certain enumerated safeguards have been met. As we have discussed earlier, the present arrangement fails to include two of these safeguards, namely that (1) the contract be available on equal terms and conditions, and (2) the spread between the ordinary rate and contract rate shall be no more than 15 percent. The statute simply will not permit approval of such an arrangement.

The foregoing also disposes of hearing counsel's contention that the present arrangement between respondents and Martrans is also violative of section 15 of the act. For, as we have already established, the question here is one of unlawful implementation of a dual rate contract under the standards laid down in section 14b and not one of authority, or lack thereof, under section 15.

The order in this proceeding also raised the question of whether the fixing of special rates by the Conference on open-rated commodities could be considered a ratemaking action resulting from an unfiled and unapproved agreement among the Conference members. There is nothing in this record which could warrant or justify such a finding. Quite to the contrary, agreement No. 9548, the Conference's basic agreement, expressly authorizes the Conference members to place "special conditions" on open-rated commodities.[5] Moreover, as respondents point out, its tariff specifically requires that all "tariff rules and regulations must be observed" with respect to open-rated items.[6] This would of necessity include those relating to the rate reductions provided in tariff No. 9, FMC–2. There is absolutely no evidence here of any unfiled section 15 agreement.

Finally, we consider the possibility that the Conference's revised tariff may be unlawful under section 18b(3) of the act. Respondents strongly maintain that there is no basis for such a charge. We agree.

Section 18(b)(3) prohibits a carrier from collecting any rate or charge other than that which is "specified in its tariffs on file with the Commission" and further provides that no carrier shall "rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified." Manifestly, the revised tariff filing is not, in and of itself, violative of section 18(b)(3). As to the possibility of rebates or remissions under the revised tariff, Respondents assure us that all rates are charged strictly in accordance with their tariff provisions, precisely as required by section 18(b)(3).[7] We see no reason to question respondents' assertions on this matter. Accordingly, we find that freight tariff No. 9, FMC–2, has not been shown to be violative of section 18(b)(3).

An appropriate order will be entered.

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[5] Article VI of agreement 9548 specifically provides that the Conference may: "Declare rates on specified commodities to be open, with or without agreed minimal or special conditions, and thereafter declare the rates on such commodities or any of them to be closed * * *."

[6] The Conference's tariff rule No. 8 states in relevant part that—

*Open rates.* Rates shown as open may be fixed by the individual carriers without consultation and without restriction as to rate or currency but are subject to shipping period per respective rule unless shown to be open indefinitely. All other tariff rules and regulations must be observed.

[7] Hearing counsel themselves concede that the lower tariff rate applicable to Martrans cargoes is specified in the tariff "and as such contemplates no further rebate, refund, or remittance."

# FEDERAL MARITIME COMMISSION

No. 67–41

SPECIAL RATES TO ALEXANDRIA AND PORT SAID
NORTH ATLANTIC MEDITERRANEAN 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 conclusions thereon, which report is hereby referred to and made a part hereof;

*It is ordered*, That respondents be, and they are hereby, notified and required to cease and desist from engaging in the violation of section 14b of the Shipping Act, 1916, as herein found.

By the Commission.

(Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 67–30

United States of America

*v.*

American Export Isbrandtsen Lines, Inc.

*Initial Decision Adopted February 1, 1968*

A conference rule providing that claims for adjustment of freight charges must be presented within six months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than six months but less than two years after the shipment date. Reparation awarded in the amount of $7,552.49.

*Terrence R. Murphy* and *Lawrence F. Ledebur* for the United States of America, complainant.

*Richard W. Kurrus* and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc., respondent.

Initial Decision of Paul D. Page, Jr., Presiding Examiner [1]

The facts in this complaint and answer proceeding were stipulated, and the essentials boil down to agreement that the respondent-carrier (Ex-Is) charged complainant-shipper (U.S.A.) $7,552.49 in excess of the rates and charges specified in the applicable tariffs in violation of section 18(b)(3) of the Shipping Act, 1916 (Act), and that U.S.A. is entitled to recover said amount from Ex-Is unless recovery in this action (which was filed more than six months but less than two years after the cause of action accrued) is barred by conference rules which read as follows:

"Claims for adjustment of freight charges must be presented in writing within six (6) months after date of shipment" (Rule 25 of the North Atlantic Mediterranean Freight Tariff (8) FMC–1, Rule 15 of the Atlantic and Gulf Red Sea and Gulf of Aden Agreement Freight

[1] This decision became the decision of the Commission on February 1, 1968.

Tariff No. 1, and Rule 18 of the Atlantic and Gulf American Flag Berth Operators Freight Tariff No. 1).

U.S.A. filed claims with Ex-Is for each of the over-charges agregating the $7,552.49 sought as reparation, after such overcharges were revealed by General Accounting office post-audits, not completed until more than six months after the dates of the shipments.

## Discussion and Conclusions

The complaint was brought under section 22 of the Act within the time allowed by the section (two years after the cause of action accrued) and the Commission (the violation of the Act being admitted) is specifically authorized to direct the payment of full reparation to complainant for the injury caused by the violation.

Respondent's only argument to the contrary is the existence of a rule which provides that:

> Claims for adjustment of freight charges must be presented in writing within six (6) months after date of shipment.

Unless the rule be construed to bar recovery here it is not relevant, and if it is so construed it is invalid; for it would deny to the regulatory body (the Commission) power expressly conferred upon it by the applicable statute, section 22 of the Act.

The Commission and the predecessor Federal Maritime Board (in rule making proceedings, it is true, but nevertheless clearly and powerfully) has analyzed the type of case cited by respondents, and conclusively refuted respondent's argument in this case.

*Carrier-Imposed Time Limits on Presentation of Claims for Freight Adjustments*, 4 F.M.B. 29, 33–34 (1952) really says all that need be said here, as follows:

> Section 22 provides for Board investigations of alleged violations of the Act, either on sworn complaint or on the Board's own motion, and provides for the issuing of orders to abate violations of the Act and also for the payment of reparation for injury caused by any such violations, if a complaint is filed within two years after the cause of action accrued.
>
> Petitioners draw the analogy between shippers' claims for freight adjustment and shippers' claims for cargo damage. The time for filing cargo damage claims against ocean carriers was not regulated by Federal statute until 1936. Before that date, carriers frequently inserted clauses in their bills of lading requiring (a) the filing of written notice of damage with the carrier within a fixed time limit, and (b) the institution of suit within a fixed time limit. Unless the time limits were unreasonably short, the validity of such clauses was generally upheld prior to 1936, and the shipper was required to comply with both requirements in order to make a recovery. *The Turret Crown,* 284 Fed. 434 at 443 (1922).

In 1936, the Carriage of Goods by Sea Act, 46 U.S.C. 1300, etc., became effective, providing in section 1303(b) that unless notice of damage in writing is given to the carrier before removal of the cargo, such removal is *prima facie* evidence of delivery in good order, unless damage is not apparent, in which case three days are allowed; and further, that one year only is allowed for the institution of suit, the carrier being discharged from all liability thereafter. The freedom of contract existing prior to 1936 was cut down, and clauses inconsistent with the Act are now invalid. *The Argentino*, 28 F. Supp. 440; see also *Knauth-Ocean Bills of Lading*, p. 228 *et seq.* Petitioners argue that their freedom to stipulate with shippers for short time limits for the presentation of claims for freight adjustment should not be limited since Congress has not passed an act in this field as it has done in the cargo damage field. Petitioners also point out that Congress has legislated on the question of time limits for the recovery of freight overcharges by railroads by the 1920 amendment to the Interstate Commerce Act, 49 U.S.C.A. 16(3), and that failure to legislate similarly for ocean carriers is a reason against jurisdiction here. We do not think those statutory provisions are conclusive on our power or jurisdiction in this case. They merely show a different treatment by Congress of different situations.

The matter was considered carefully by the Commission in *Proposed Rule Covering Time Limit on the Filing of Overcharge Claims*, Docket No. 65–5 (10 FMC 1). In this decision the Commission stated the strongest argument that can be made (as it is made) in support of respondent's position as follows:

Section 22 of the Shipping Act, 1916, is a pure statute of limitations and does not inhibit the contractual freedom of carriers and shippers to set a period of less than two years for the adjustment of freight claims, either through filing of claims with the carrier or in actions before the Commission or the courts. Support for this position is found in the actions of the ICC prior to the amendment of its statute specifically forbidding the shortening of the statutory times for filing claims and bringing actions by carrier rule. The Carriage of Goods by Sea Act (COGSA), unlike the Shipping Act, also specifically forbids parties from stipulating for a lesser period of time for bringing suit than that contained in the statute. Prior to the passage of COGSA, parties were free to stipulate as to the time for filing claims and bringing suit.

The Commission then destroyed claimed support for the argument, as follows:

We wish to make clear, * * * that our failure to promulgate a rule at this time is not to be interpreted to allow carriers in any way to limit the right of a shipper claiming injury under the 1916 Act or the 1933 Act to file a claim for reparation under section 22 of the Shipping Act with the Commission at any time within two years of accrual of the cause of action which is the basis of such injury and claim. We do not agree with the comments of the conferences and carriers which maintain that the two year statute of limitations contained in section 22 is a "pure statute of limitation" the purpose of which is merely to bar the bringing of stale claims, and which can be contracted away by agreement between shipper and carrier.

The practice of the ICC prior to the amendments of the statute under which it operates providing that claims against carriers and forwarders had to be made and that actions on such claims had to be brought within certain time limitations is not instructive for our purposes. Carriers and forwarders were allowed to stipulate as to the time within which actions could be brought at times when there were no time limitation provisions in the specific statutes under which they were regulated. Once Congress had spoken, however, and had indicated a period during which actions could be brought, either before the Commission or the courts, a public policy with the force of law was established and such stipulations no longer had the sanction of law. The *Schou-Gallis* case cited in footnote 2 is particularly instructive in this respect. In that case the issue was the lawfulness of an attempt by a freight forwarder to limit the time within which claims could be filed with it. The ICC, although striking down the particular tariff rule by which the forwarder imposed such limitation as unlawful as too indefinite in form, upheld the validity of the principle of a time limitation for the filing of claims with forwarders. After a discussion of the loss and damage cases noted above, the ICC observes that Part IV of the Interstate Commerce Act which regulates forwarders, unlike parts I and III regulating rail and water carriers respectively, "confers no specific authority upon this Commission to award damages as such in respect of either overcharges or unlawful rates charged shippers by freight forwarders. Also, * * * no periods of limitation are prescribed therein, and no reference is made of record specifically to any other statute which limits the time within which claims arising in respect of charges for services subject to part IV may be filed here or in the courts." (at 595) The ICC thus allowed the forwarder to modify the time-limitation rule to make it lawful. The instant proceeding, however, presents an entirely different situation. This Commission is empowered by Congress to great reparation for any violation of the statutes it administers. This was not the situation with respect to claims for forwarder overcharges before the ICC at the time of the *Schou-Gallis* case and has never been true with respect to claims for cargo damage. Such claims can only be brought in a court of law. There is also a statute of limitations governing the time within which such reparation may be sought embodied in our statute itself—no reference for the applicable time limitation need be made to principles of general law or state statutes of limitation as was necessary under ICC practice before the amendments to the Interstate Commerce Act discussed herein. No cases are advanced which hold that a common Carrier or other person subject to similar regulation may by contract change a time limitation for bringing a claim for reparation which is embodied in a statute of an administrative agency, nor will we permit it here.

At page 10 of its brief Ex-Is says that "complainant contends that the Commission has decided in *Time Limit on the Filing of Overcharge Claims* (Docket No. 65–5) *supra*, that such a conference rule cannot serve as a defense to a reparation claim under section 22 of the Act. We do not so read the Commission's decision."

The Examiner agrees with complainant, and does not see how the Commission's decision in Docket No. 65–5 can be read otherwise. The

Commission (1) points out that its failure to promulgate a rule in that case "is not to be interpreted to allow carriers in any way to limit the right of a shipper claiming injury under the 1916 Act or the 1933 Act to file a claim for reparation under section 22 of the Shipping Act with the Commission at any time within two years of accrual of the cause of action which is the basis of such injury and claim"; (2) decisively distinguishes reparation cases under the Shipping Act from cases arising under acts containing no statutory time limitation for complaint-filing such as that in section 22; and (3) states specifically that it *will not permit* a carrier by contract to change the time limitation in section 22. The foregoing Commission statements are wholly inconsistent with the ingenious construction of the decision hopefully proffered by respondent which seeks here to accomplish precisely what the Commission has said it will not permit.

In line with the Commission's statements and reasoning in the cited cases, and the absence of applicable and controlling authority to the contrary it is held that complainant U.S.A. is entitled to and is hereby awarded as full reparation the agreed amount of the admitted overcharge, $7,552.49, and respondent American Export Isbrandtsen Lines, Inc. is hereby directed to make such payment within thirty days after the Commission's final decision herein. To said amount respondent shall add interest at 6% per annum for the time (if any) elapsing between the date hereinabove set for payment and actual payment of the principal sum of $7,552.49.[2]

(Signed) Paul D. Page, Jr.,
*Presiding Examiner.*

[2] Various issues are raised by the parties which need not, and in the Examiner's opinion should not, in view of pending Docket No. 65–5 (which has been re-opened) be considered in this decision which is strictly limited to holding that the quoted rule is no bar to recovery in a complaint case brought under section 22 within the time allowed, and that complainant is entitled to reparation as stated herein.

# FEDERAL MARITIME COMMISSION

No. 67–45

UNITED STATES OF AMERICA

*v.*

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

*Initial Decision Adopted February 1, 1968*

**A conference rule providing that claims for adjustment of freight charges must be presented within six months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than six months but less than two years after the shipment date. Reparation awarded in the amount of $6,810.54.**

*Terrence R. Murphy* for the United States of America, complainant.

*Richard W. Kurrus* and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc., respondent.

## INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

The parties have stipulated with the Examiner's approval that the issues herein are identical with those in Docket No. 67–30 11 FMC 298, and have agreed that if American Export Isbrandtsen Lines (Ex-Is) should be ordered to pay reparation to the United States (U.S.A.) therein, as it was, then Ex-Is shall in this case pay U.S.A. as reparation, the sum of $6,810.51.

*Premises considered*, the Initial Decision in Docket No. 67–30 is incorporated herein by reference, and Ex-Is is hereby directed to pay U.S.A. as reparation, within thirty days after the Commission's final decision herein the sum of $6,810.54, and if payment is not made until more than thirty days after said decision to add to the principal sum interest at 6% per annum for time elapsing between thirty days after the decision date and the date of payment.

(Signed) PAUL D. PAGE, JR.,
*Presiding Examiner.*

[1] This decision became the decision of the Commission on February 1, 1968.

# FEDERAL MARITIME COMMISSION

No. 67–46

UNITED STATES OF AMERICA

*v.*

HELLENIC LINES LIMITED

*Initial Decision Adopted February 1, 1968*

**A conference rule providing that claims for adjustment of freight charges must be presented within 6 months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than 6 months but less than 2 years after the shipment date. Reparation awarded in the amount of $1,862.30.**

*Terrence R. Murphy* for the United States of America, complainant.
*Stanley O. Sher* for Hellenic Lines Limited, respondent.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

The parties have stipulated with the examiner's approval that the issues herein are identical with those in docket No. 67–30 11 FMC 298, and have agreed that if American Export Isbrandtsen Lines should be ordered to pay reparation to the United States (U.S.A.) therein, as it was, then Hellenic Lines Ltd. shall in this case pay U.S.A. as reparation, the sum of $1,862.30.

*Premises considered*, the initial decision in docket No. 67–30 is incorporated herein by reference, and Hellenic Lines Ltd. is hereby directed to pay U.S.A. as reparation, within 30 days after the Commission's final decision herein the sum of $1,862.30, and if payment is not made until more than 30 days after said decision to add to the principal sum interest at 6 percent per annum for time elapsing between 30 days after the decision date and the date of payment.

(Signed) PAUL D. PAGE, Jr.,
*Presiding Examiner.*

[1] This decision became the decision of the Commission on Feb. 1, 1968.

# FEDERAL MARITIME COMMISSION

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No. 67–51

UNITED STATES OF AMERICA

*v.*

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

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*Initial Decision Adopted February 1, 1968*

A conference rule providing that claims for adjustment of freight charges must be presented within 6 months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than 6 months but less than 2 years after the shipment date. Reparation awarded in the amount of $28.018.79.

*Terrence R. Murphy* for the United States of America, complainant.

*Richard W. Kurrus* and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc., respondent.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

The parties have stipulated with the examiner's approval that the issues herein are identical with those in Docket No. 67–30 11 FMC 298, and have agreed that if American Export Isbrandtsen Lines (Ex-Is) should be ordered to pay reparation to the United States (U.S.A.) therein, as it was, then Ex-Is shall in this case pay U.S.A. as reparation, the sum of $28,018.79.

*Premises considered*, the initial decision in docket No. 67–30 is incorporated herein by reference, and Ex-Is is hereby directed to pay U.S.A. as reparation, within 30 days after the Commission's final decision herein the sum of $28,018.79, and if payment is not made until more than 30 days after said decision to add to the principal sum interest at 6 percent per annum for time elapsing between 30 days after the decision date and the date of payment.

(*Signed*) PAUL D. PAGE, Jr.,
*Presiding Examiner.*

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[1] This decision became the decision of the Commission on February 1, 1968.

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 67–37

UNITED STATES OF AMERICA

*v.*

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.

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NOTICE OF EFFECTIVE DATE OF DECISION

*February 8, 1968*

No exceptions having been filed to the 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(g) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on February 8, 1968.

*It is ordered*, That Gulf & South American Steamship Company make payment to the United States of America in the amount and manner set forth in the decision of the Examiner.

By the Commission.

(Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 67–37

UNITED STATES OF AMERICA

*v.*

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.

*Initial Decision Adopted February 8, 1968*

A tariff item captioned "automobile parts" and containing the statement that "this caption includes * * * those items which are integral parts of automobiles * * * necessary for their operation" covers automobile engines. The fact that the tariff item includes certain "examples" of cargo, and automobile engines are not among such examples does not exclude automobile engines from the scope of the tariff. Reparation awarded.

*Terrence R. Murphy* and *Bertram E. Snyder* for the United States of America, complainant.

*Michael Joseph* for Gulf & South American Steamship Co., Inc., respondent.

## INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER[1]

Complainant, the United States of America (U.S.A.) seeks under section 22 of the Shipping Act, 1916 (the Act) to recover from respondent, Gulf & South American Steamship Co., Inc. (G. & S.A.) as reparation the sum of $1,344.09. In its answer G. & S.A. has admitted an overcharge of $683.02, leaving in dispute an alleged overcharge of $661.07. Under rule 10(v) of the Commission's Rules of Practice and Procedure the facts have been stipulated as follows:

1. Complainant's complaint against Respondent, dated June 6, 1967, alleges several instances of overcharges by Respondent in a total amount of $1,344.09. Respondent's answer admits that it inadvertently overcharged Complainant in the amount of $683.02 and that Complainant is entitled to recover that amount, leaving in dispute between the parties an alleged overcharge in the amount of $661.07.

2. The disputed overcharge of $661.07 relates to Complainant's shipment under Government Bill of Lading C-4048767 and ocean Bill of Lading SP-33 of cargo described therein by Complainant as 18

[1] This decision became the decision of the Commission on February 8, 1968.

Boxes "engines, internal combustion automobile" occupying 785 cubic feet and one box "engine diesel, auto" occupying 68 cubic feet.

3. Atlantic & Gulf/West Coast of South America Conference Freight Tariff No. SA-11 governed the freight charges applicable to the shipment of the 19 boxes in question. The following are certain provisions of that tariff which were in effect at the time of said shipment:

Item 2. Application of Rates.

* * * * * * *

(c) Rates published herein apply per ton of 40 cubic feet or 2,000 pounds, as indicated, whichever basis yields the greater revenue, except as otherwise specified.

(d) Commodity rates take precedence over class rates.

(e) The charge for a package containing different articles shall be at the rate, class or commodity, applicable to the highest rated article in the package. This rule does not apply to ingredients comprising a mixture.

| No. | Commodity | Per ton | Groups 1 | Groups 2 |
|---|---|---|---|---|
| Item 105 | Automobiles, viz:<br>Freight and Passenger, S.U. or K.D.; not identified elsewhere in this item, viz—<br>Passenger Cars<br>Buses/Trackless Trolleys<br>Motor Truck Tractors<br>Motor Trucks/Freight Trailers, empty<br>Also Chassis, Cabs, Bodies for above | Boxed W/M | $27.00 | $29.00 |
| | Also Automobile and truck Parts when shipped by Automobile and/or Truck Manufacturers for assembly into complete units when so declared on the bill of lading. | Unboxed W/M | 31.00 | 33.00 |
| * | * * * | * | * | * |
| | Freight and Passenger Automobiles and/or Trailers, specially equipped, viz (as further described in Original Page No. 16):<br>Automobile Parts (Not Spark Plugs (see Item 1000)) | W/M | 31.00 | 33.00 |
| | This caption includes and is limited to those items which are integral parts of automobiles and trucks necessary for their operation. Examples are parts for bodies, chassis, engines and power trains, engine cooling, electrical and ignition systems (not including spark plugs), brake and steering systems, and axles and wheels. Excluded from this caption are Automobile/Motor Truck Accessories, viz:<br>Air Conditioners. / Tire Chains.<br>Heaters. / Tools.<br>Radios, Television Sets, and/or Antennas for same. / Tire Repair Materials.<br>Hub Caps. / Windshield Defrosters and Fans.<br>Floor Mats. / Windshield Wipers, Motors, Arms and/or Blades.<br>Luggage Racks. / Cigar/Cigarette Lighters.<br>Horns. / Seat Covers and/or Cushions.<br>Mirrors (exterior).<br>This caption does not include storage batteries containing liquid or when shipped with liquid in the same container; nor articles taking a "D" rating in this tariff; or other items not within the definition of Automobile Parts as set forth herein.<br>All parts shipped under this caption must be prefixed by the word "Automobile." | | | |

* * * * * * *

Item 1000 Classification and Commodity Index

| *Article* | *Class* |
|---|---|
| * * * * * * * | |
| Engines, Caloric, Gas, Internal Combustion, Oil or Steam............. | 4 |
| * * * * * * * | |

4. Under Item 2(b) of the tariff, the port of destination of the shipment in question was a "Group 1" port. Under Item 999 the "Class 4" rate for "Group 1" ports was specified at $62. The symbol "W/M" is defined by the tariff as meaning "weight or measurement, whichever basis yields the greater revenue." With respect to the 19 boxes in question, measurement would have yielded the greater revenue.

5. Respondent applied the "Class 4" rate for "Engines, Caloric, Gas, Internal Combustion, Oil or Steam" as set forth in Item 1000 to the 19 boxes in question. Complainant believes that Respondent should have applied the rate for automobile parts, including engines as set forth in Item 105.

The primary question here is if automobile engines are "automobile parts" within the meaning of Tariff Item 105. If so, U.S.A. was entitled to the $31 rate therein provided, and has been overcharged $661.07 by G. & S.A.'s application of the $62 rate provided for "Engines, Caloric, Gas, Internal Combustion, Oil or Steam" in Item 1000.

G. & S.A.'s argument is, as it must be that Item 105 does not provide a rate for automobile engines. Whatever argument might be made by G. &. S.A. if Item 105 simply provided a rate for "automobile parts" and stopped, the decision here must turn upon the definition of "automobile parts" which follows, and reads:

> This caption (automobile parts) includes * * * those items which are integral parts of automobiles * * * necessary for their operation.

It simply cannot be validly asserted that automobile engines are *not* integral parts of automobiles, necessary for their operation, and as they are, they are entitled to the Item 105 $31.00 rate.

G. & S.A. necessarily overlooks the conclusive language just quoted, and relies upon arguing that only engine parts and not whole engines are included as "examples" of automobile parts. Assuming that this is true, which is by no means clear, for the language relied upon leaves something to be desired grammatically, it does not follow that because engines are not listed among the "examples" of automobile parts, they are not automobile parts, for the listing clearly does not purport to be exhaustive.

At most, as U.S.A. correctly contends, the contruction applied by G. & S.A. to the "example" language would make this tariff item ambiguous, and as such, it would be construed against the carrier.[2]

G. & S.A., with well-grounded suspicion of strength of its primary argument, argues further that recovery should be denied because the tariff requires that "parts * * * must be *prefixed* by the word 'Automobile'" (emphasis by G. & S.A.); whereas U.S.A. as shipper included the words "automobile" or "auto" in its description of shipments, but as a "suffix" rather than a "prefix." The argument falls of its own weight, for the shipper's description accurately described the cargo for the carrier's benefit, which is all that can reasonably be required.

*Premises considered*, it is held that U.S.A. is entitled to recover from G. & S.A. as reparation (in addition to the agreed item of $683.02) the sum of $661.07; a total of $1,344.09. G. & S.A. is hereby directed to pay U.S.A. said sum of $1,344.09 within thirty days after the Commission's final decision herein. If payment is not made within said thirty-day period, interest at 6% per annum for the time elapsing between the end of that period and the date of payment shall be added to the principal amount.

(Signed) PAUL D. PAGE, JR.,
*Presiding Examiner.*

[2] "*Bratti v. Prudential et al.*, 8 FMC 375, 379 (1965) and cases therein cited."

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 67-59

UNITED STATES OF AMERICA

*v.*

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

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NOTICE OF EFFECTIVE DATE OF DECISION

*February 8, 1968*

No exceptions having been filed to the 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(g) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on February 8, 1968.

*It is ordered*, That American Export Isbrandtsen Lines make payment to the United States of America in the amount and manner set forth in the decision of the Examiner.

By the Commission.

(Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 67–59

United States of America

*v.*

American Export Isbrandtsen Lines, Inc.

Initial Decision Adopted February 8, 1968

A conference rule providing that claims for adjustment of freight charges must be presented within six months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than six months but less than two years after the shipment date. Reparation awarded in the amount of $11,819.20.

*Terrence R. Murphy* for the United States of America, complainant.

*Richard W. Kurrus* and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc., respondent.

## INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER[1]

The parties have stipulated that the issues herein are identical with those in Docket No. 67–30, a complaint-and-answer case between the same parties, and that they will be bound in the present case by the decision of the Commission in Docket No. 67–30. If American Export Isbrandtsen Lines, Inc. (AEIL) is ordered to pay reparation in Docket No. 67–30, it is agreed that AEIL in the present proceeding shall pay to the United States of America the sum of $11,819.20 as reparations for freight overcharges.

*In Time Limit on the Filing of Overcharge Claims*, 10 F.M.C. 1 at page 6, is was stated that, no cases are advanced which hold that a common carrier * * * may by contract change a time limitation for bringing a claim for reparation which (time limitation) is embodied in a statute of an administrative agency, nor will we permit it here. The initial decision in Docket No. 67–30 directed that reparation be paid. Since the present proceeding by stipulation concerns the same issues, it is found that the complaint is entitled to reparation of $11,819.20 as sought in its complaint. In view of the stipulation of the

[1] This decision became the decision of the Commission on February 8, 1968.

parties no answer to the complaint was filed and an answer is not required.

AEIL hereby is directed to pay the United States of America within thirty days after the Commission's final decision herein the sum of $11,819.20 and if payment is not made until more than thirty days after said decision to add to the principal sum interest at 6% per annum for time elapsing between thirty days after the decision date and the date of payment.

(Signed) CHARLES E. MORGAN,
*Presiding Examiner.*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 67–52

ALASKA STEAMSHIP CO.—CANCELLATION OF FMC PORT-TO-PORT RATES—WEST COAST/ALASKA TRADE

*Decided February 8, 1968*

Service of Alaska Steamship Co. between Seattle, Wash., and various ports in the State of Alaska found subject to jurisdiction of Federal Maritime Commission.

Truck movement performed by wholly owned affiliate of Alaska Steamship Co. within Seattle commercial zone is local pickup-and-delivery service, rates for which may properly be included in port-to-port rates filed by ocean carrier.

The utilization of vessels of the Alaska Ferry System to effect transportation between Seattle and certain Alaskan ports involves only substitution of one carrier for another for part of service and does not deprive FMC of jurisdiction over entire movement. Alaska Ferry System is carrier by water, and Alaska Steamship Co.'s arrangement utilizing it for continuous carriage from originating point on line of Alaska Steamship Co. to destination on line of Alaska Ferry System is through route with another carrier by water within the meaning of section 18(a), Shipping Act, 1916, and section 2, Intercoastal Shipping Act, 1933, and rates for such movement must be filed with this Commission. Limited participation of Alaska Steamship Co. as motor carrier and other ICC-certificated motor carriers in this movement in driving containers on and off vessels of Alaska Ferry System is incidental to total through port-to-port movement and not of type envisaged by Public Law 87–595 as granting to ICC jurisdiction over entire movement.

*Stanley B. Long* and *Arthur G. Grunke*, for respondent, Alaska Steamship Co.

*H. H. Shull, Jr.*, and *Warren Price, Jr.*, for intervener, Sea-Land Service, Inc.

*Donald J. Brunner*, *Norman D. Kline*, and *E. Duncan Hamner, Jr.*, Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

The Commission instituted this proceeding on October 20, 1967, to resolve the question of the Federal Maritime Commission's (FMC) jurisdiction over the service provided by the Alaska Steamship Co. (Alaska Steam) between Seattle, Wash., and the Alaskan ports of Ketchikan, Juneau, Haines, Wrangell, Petersburg, Sitka, and Valdez. Alaska Steam filed tariff pages containing cancellation notices which would, with minor exceptions, have removed FMC jurisdiction over the carrier's service between these ports effective October 27, 1967, with respect to Valdez, and November 1, 1967, with respect to the other ports. Alaska Steam has filed rates covering movements to and from each of these Alaskan ports with the Interstate Commerce Commission (ICC) to be effective upon cancellation of its rates with us. A similar action by Alaska Steam canceling the carrier's rates between Seattle, Wash., and Seward, Alaska, effective December 11, 1967, was placed under investigation in this proceeding by a subsequent order served November 15, 1967.

Because the cancellation of the tariffs on file with FMC for the above-discussed movements might result in port-to-port transportation by Alaska Steam without rates on file with FMC in apparent violation of section 18(a) of the Shipping Act, 1916 (the Act), and section 2 of the Intercoastal Shipping Act, 1933 (the 1933 Act), we suspended the cancellations involved for the 4-month period provided for by section 3 of the 1933 Act.[1]

Since no factual issues were involved, the investigation has been conducted by means of affidavits and legal memorandums submitted by Alaska Steam and Hearing Counsel.[2] We heard oral argument on November 29, 1967.

*The Service of Alaska Steam*

Prior to the filing of the tariff cancellations which are the subject of this proceeding, Alaska Steam maintained three facilities for cargo tendered for delivery between Seattle and the Alaskan ports under consideration in this proceeding. The carrier's tariffs indicated that any cargo could be tendered at any of the three facilities. However, Alaska Steam generally received less-than-container-load shipments at the AAA Transfer, Inc. (AAA Transfer), terminal at 558 Occidental Avenue South, Seattle, Wash. In fact, in March 1966, Alaska Steam announced that the AAA Transfer vanning station was designed to

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[1] Sec. 3 of the 1933 Act provides in pertinent part that FMC may investigate the lawfulness of "any new individual or joint regulation or practice affecting any rate, fare, or charge," and may "suspend the operation of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than four months beyond the time when it would otherwise go into effect."

[2] Sea-Land Service, Inc., intervened but did not otherwise participate in this proceeding. Alaska Steam availed itself of the opportunity provided by FMC to file additional affidavits with respect to its Seward operation.

concentrate reception for all cargo suitable for vanning for all Alaskan ports served all year and that the facility would provide for fast reception and skillful, modern handling methods. Service rendered at this address included receiving, checking, assembling, loading of containers, and delivery to dock at no extra charge to the shipper. In the words of the carrier, "AAA Transfer * * * [is] * * * acting in the same capacity as are the 'container freight stations' referred to in Matson Navigation Company's Tariff 14-A (their FMC-F No. 137)." Cargoes loaded into containers at the vanning station were then transported to Alaska Steam's facilities at pier 46 for transportation by Alaska Steam to Alaskan ports.

Container-load shipments, on the other hand, in practice appear to have been received at Alaska Steam's facilities at pier 46, and cargo not suitable for vanning and certain other shipments were accepted at Alaska Steam's facility at pier 42, Seattle, Wash. Alaska Steam gave notice that operations at pier 42 would cease as of the end of calendar year 1967.

The service offered by Alaska Steam under its newly filed ICC tariffs is identical to this prior service with the following exceptions: Tender of less-than-container-load shipments may be made at Southwest Spokane Street and Colorado Avenue, Seattle, Wash., as well as at the Occidental Avenue facility,[3] and Alaska Steam provides for pickup and delivery (spotting) of fully loaded containers at any point within the commercial zone of Seattle, Wash.

In both the previous and present tariffs, shippers may obtain an allowance amounting to 26 cents per 100 pounds if they load and deliver the containers themselves to Alaska Steam's pier 46.

None of the subject rates of Alaska Steam appear to include pickup or delivery service at shippers' premises in Alaska. Spotting in Seattle is performed for Alaska Steam by AAA Transfer, complete control of which was acquired by Alaska Steam on July 20,1967, pursuant to ICC authorization of May 24, 1967. AAA Transfer is a duly certificated motor carrier under part II of the Interstate Commerce Act.

The only operational changes in Alaska involved herein reflect Alaska Steam's decision to serve certain ports in Alaska partially by means of vessels of the Alaska Ferry System (Alaska Ferry) rather than solely by Alaska Steam's own vessels. Wrangell and Sitka in southeastern Alaska will be served by Alaska Steam directly during certain weeks, while on alternating weeks Alaska Steam's con-

[3] There is no provision in the tariff for delivery of such shipments to shippers' premises except on some individual items and shippers must obtain their goods at the carrier's terminal.

tainerized cargo will be transferred in the manner described below to the Alaska Ferry's vessels at Ketchikan or Juneau for the remainder of the movement. Petersburg, also in southeastern Alaska, will be served by Alaska Steam only by employing Alaska Ferry's vessels for the transportation beyond the transfer point. Prior to the operational changes, Petersburg had been served directly by Alaska Steam's vessels. The port of Valdez similarly will be served only by means of Alaska Ferry's vessels which will be loaded at the port of Cordova. Previously, Alaska Steam operated in reverse order, calling directly at Valdez and transferring containers onto Alaska Ferry for carriage to Cordova.

For transferring cargo in containers from its own vessels to those of Alaska Ferry, a motor tractor must be utilized. Containers which have been transported aboard an Alaska Steam vessel are placed on a chassis at point of interchange. A tractor then drays the container-loaded chassis aboard an Alaska Ferry vessel, after which the tractor is disconnected and driven off. When the Alaska Ferry's vessel calls at the destination port, a tractor is again connected and the container and chassis are driven off the vessel.

Since ICC requires that any motor carrier transporting cargo moving in interstate commerce must obtain operating rights under part II of the Interstate Commerce Act, such rights are a necessary prerequisite to the use of a motor tractor for driving container-loaded chassis on and off vessels of Alaska Ferry.[4] In southeastern Alaska, Alaska Steam itself has obtained motor carrier operating rights. Alaska Steam does not, however, publish a local motor carrier tariff in Alaska, nor any motor tariff independent of its through service to and from Seattle. In the Cordova/Valdez trade, Weaver Bros., an independent motor carrier which has obtained extensive operating rights throughout Alaska and publishes local motor carrier tariffs, performs the drive-on, drive-off service. Hoover's Movers will also participate in the drive-on, drive-off service at Cordova.

There are no roads connecting any of the ports involved in this proceeding. The entire forward movement between Seattle and ports in Alaska is by water, including the employment of the Alaska Ferry System.

*Issue for Resolution*

The orders of investigation in this proceeding frame the following issue for resolution: Whether or not the Commission is deprived of

[4] Under sec. 204(a)(4a) of the Interstate Commerce Act, 49 U.S.C. 304(a)(4a), ICC may upon certain findings exempt motor carriers whose physical operations are solely within a single State.

jurisdiction over the rates applicable to the movements between Seattle and the Alaskan ports involved herein by reason of (1) the truck movement within the commercial zone of Seattle or (2) the substitution of one vessel for another to effect transportation between the involved ports with or without the participation of another carrier.

*Positions of the Parties*

*Alaska Steam*

Alaska Steam's main argument is that the rates which it has attempted to cancel here and refile with ICC cover a through route and are joint rates properly filed with ICC under section 216, part II, of the Interstate Commerce Act, 49 U.S.C. 316(c), as amended by Public Law 87–595.[5]

In support of this position, the carrier maintains that the service provided under its new rate filings is substantially different from the service previously offered because of the pickup-and-delivery service provided for full containers within the Seattle commercial area. Such service, it maintains, could not lawfully have been performed without certification by ICC. Alaska Steam is not certificated to perform such movement. AAA Transfer is so certificated.

Alaska Steam argues that the legislative history of Public Law 87–595 indicates that the rates covering the type of service here involved are to be filed with ICC. The Alaska Statehood Act, Alaska Steam argues, merely preserved FMC jurisdiction over transportation between the lower 48 States and Alaska until Congress had time to reconsider the matter. In enacting Public Law 87–595, Congress did reconsider the matter, and, in reconsidering, placed within ICC the jurisdiction over movements participated in in any way by ICC-certificated carriers.

Alaska Steam also specifically challenges FMC's jurisdiction over goods transported in part by way of Alaska Ferry. Alaska Steam indicates that ICC treats Alaska Ferry as a public way and that any carrier transporting goods over such public way must be certificated as a motor carrier under part II of the Interstate Commerce Act. In fact, Alaska Steam points out, ICC required that it be certificated as a motor carrier before it could lawfully use the ferry system.

[5] Section 316(c) as so amended provides:

"As used in this subsection, the term 'common carriers by water' includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classification, regulations, and practices in connection therewith shall be subject to the provisions of this part."

Finally, Alaska Steam contends that FMC lacked the authority to attack Alaska Steam's actions here under investigation by means of suspension and that these actions should have been challenged by way of a complaint filed with ICC.

*Hearing Counsel*

Hearing Counsel maintain that Alaska Steam's service continues to be subject to FMC jurisdiction since the carrier is providing a port-to-port service coupled with an efficient pickup-and-delivery service at Seattle and is merely substituting vessels to continue its service to certain Alaska ports.

Hearing Counsel maintain that the Seattle spotting operation is a pickup-and-delivery service within a geographic port area and, as such, is merely an incidental service which is part of Alaska Steam's port-to-port operation. The only change, Hearing Counsel contend, in Alaska Steam's service in the Seattle area is the institution of pickup and delivery for full-container-load shipments, and, while this service marks an improvement in Alaska Steam's operation, it is the same type service that has always been held subject to FMC jurisdiction. The fact that it is performed by a motor carrier subject to the jurisdiction of ICC does not deprive FMC of jurisdiction over the entire port-to-port service. Matson has utilized such motor carriers to perform pickup-and-delivery service as part of a total port-to-port service which has been held subject to FMC's jurisdiction (*Matson Navigation Co.—Container Freight Tariff's*, 7 FMC 480 (1963)).

Hearing Counsel argue that the necessity of obtaining certification from ICC before motor carrier transportation can lawfully be performed does not establish that when an arrangement is entered into with one who provides such motor transportation a joint rate or through route within the meaning of Public Law 87–595 has thus been established, nor does any conflict arise between this agency and ICC because of the necessity for such certification. Additionally, Hearing Counsel maintain that Public Law 87–595 was not designed to cover a pickup-and-delivery service because tariffs providing for such service would always have been accepted by FMC and, consequently, Congress did not intend it to apply to such service.

Finally, Hearing Counsel argue that the limited use of Alaska Ferry is nothing more nor less than the substitution of one vessel for another and that Alaska Steam's operation in conjunction with Alaska Ferry constitutes a through route with another carrier by water, and hence the rates covering this operation must be filed under section 18(a) of the Act and section 2 of the 1933 Act.



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## Discussions and Conclusions

Alaska Steam, in addition to the affidavits and legal memorandums provided for in the orders in this proceeding, also filed petitions and motions asking FMC to vacate the orders and to stay their effectiveness pending vacation. These petitions and motions were also argued orally at the same time Alaska Steam delivered its oral presentation on the merits. We have considered all the contentions made by Alaska Steam in our deliberations in this proceeding. However, inasmuch as the grounds raised in support of the petitions and motions are substantially the same as the arguments made in the memorandums and affidavits (indeed, the documents incorporate each other by reference), they are considered together herein.

### 1. *The Truck Movement Within the Seattle Commercial Zone*

In *Sea-Land Service, Inc., Cancellation of FMC Port-to-Port Rates—West Coast/Alaska Trade*, docket No. 67–43, 11 FMC 137, we held that a pickup-and-delivery service performed by an ICC-certificated motor carrier was an incidental part of a port-to-port service, and we retained jurisdiction over the entire port-to-port movement, which includes the pickup-and-delivery service performed in connection therewith.

The pickup-and-delivery service performed in the instant case is the same type as the motor services performed in connection with waterline hauls in the *Sea-Land* and *Matson* cases.[6] The propositions of law in the instant case with respect to the pickup-and-delivery service are the same as those presented to us in *Sea-Land*.

We here affirm the result reached in *Sea-Land*, and we conclude for the reasons stated therein that the entire service offered by Alaska Steam in connection with AAA Transfer in the Seattle commercial zone is subject to our jurisdiction as a port-to-port service, rates for which must be filed with us under sections 18(a) of the Act and 2 of the 1933 Act.[7]

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[6] In *Matson, Sea-Land,* and the instant case, containers are transported between shipper or consignee's premises and ocean carrier's pier, and the area involved is the commercial area of a port city—in the Sea-Land case, Anchorage, and in the Matson case, San Francisco, Stockton, and Los Angeles. In fact, in the *Matson* case, the Los Angeles and Stockton commercial areas were, like Alaska Steam's Seattle pickup-and-delivery area, the commercial zones prescribed by ICC, and the San Francisco and Los Angeles areas were considerably more extensive and included far more people than the Seattle commercial area. Matson has also filed, as a revision to the tariff under investigation in connection with its pickup-and-delivery service, a tariff covering a similar service in the Seattle area of a geographic scope at least as wide as the AAA Transfer operation.

[7] Alaska Steam refers to statements of former FMC Chairman Stakem and FMC's "Alaska Trade Study" as supporting the view that Congress intended to place in ICC the jurisdiction over movements participated in in any way by ICC-certificated carriers. Nothing in

Nothing herein, nor anything contained in our previous decision in *Sea-Land*, is intended to change or expand our holding in *Matson Navigation Co.—Container Freight Tariffs*, 7 FMC 480 (1963), nor is anything herein intended to impinge upon the jurisdiction of ICC with reference to motor carriers. It is only intended to reaffirm the jurisdiction of FMC over port-to-port rates and not over the motor carriers performing the pickup-and-delivery services in connection therewith.[8]

Chairman Stakem's statements on the effect of the joint rate bill or the "Alaska Trade Study" indicates that FMC does not have jurisdiction over a service of the type performed by Alaska Steam. Chairman Stakem merely asserted that if joint rates and through routes within the meaning of Public Law 87–595 were entered into between an FMC water carrier and an ICC motor carrier the FMC would lose jurisdiction over the water transportation involved in such movement. While the "Alaska Trade Study" does indicate that ICC requires certification of motor carriers performing pickup-and-delivery service for carriers subject to the Shipping Act, it does not indicate that when arrangements for such service are entered into the entire port-to-port service of the water carrier is removed from FMC jurisdiction. It does, in fact, say that "pickup and delivery services in the terminal area are not a divisible service but are part of the through movement performed by the line haul carrier." The "Alaska Trade Study," moreover, rather than suggesting the FMC has been stripped of jurisdiction over port-to-port services, suggests the desirability of securing legislation which would exempt motor carriers performing pickup-and-delivery services for FMC water carriers from ICC jurisdiction and placing such carriers under FMC jurisdiction ("Alaska Trade Study," ch. 1, p. 7).

Alaska Steam alludes to the facts that AAA Transfer makes out its own bill of lading and provides for the safe transfer of goods within its custody. As an ICC-regulated carrier it could do no less, and the fact that it transports cargo moving in interstate commerce requires that it be certificated by ICC. But this does not mean the service AAA Transfer performs somehow removes Alaska Steam's service from our jurisdiction. Nor does the asserted independence of AAA Transfer from the direction and control of Alaska Steam dictate a contrary result. The carriers performing the motor services for Sea-Land were. so far as it appears, independent of their direction and control. Moreover, contrary to the affidavit filed by AAA Transfer's President, the independence would appear to be largely a fiction inasmuch as Alaska Steam on July 20, 1967, acquired complete control of AAA Transfer by purchase of all the latter's outstanding capital stock pursuant to an order of ICC entered May 24, 1967.

[8] Counsel for Alaska Steam in oral argument appears to suggest that the failure of Congress to exempt terminal area or "incidental" services performed by an ICC-certificated carrier in connection with a service regulated by FMC meant that such incidental service when performed in connection with an FMC carrier converted the entire service into one subject to ICC jurisdiction. However, decisions of both the regulatory agencies and the courts have made clear that the question of exemption of incidental services and the question of jurisdiction over a complete transportation service performed in part by a carrier not subject to the jurisdiction of the agency regulating the dominant service are mutually exclusive. When an air carrier substituted a motor haul for a portion of its air carriage, the Civil Aeronautics Board (CAB), in *The Flying Tiger Line Air-Truck Service*, 30 CAB 242, 245 (1959), held that such motor movement was "air transportation" within the meaning of the Federal Aviation Act. In so doing, however, it made clear that whether or not the truck haul was to be considered incidental to air transportation and—

"exempt from economic regulation under that statute [the Interstate Commerce Act] 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 [ICC] should conclude under the standards normally applied by it that the truck operation is not exempt, the trucker must have or obtain the required authority in order for Flying Tiger Line [the air carrier] to operate in the manner it proposed."

The Court of Appeals for the District of Columbia Circuit in affirming the CAB's decision cited this language of the Board as "adequately and correctly" disposing of the contention that CAB could not assert jurisdiction over the truck movement as a part of the air carrier's through transportation since the motor carrier performing it had not been exempted by ICC. *City of Philadelphia* v. *Civil Aeronautics Board,* 289 F. 2d 770, 774–775 (D.C. Cir. 1961).

### 2. *Alaska Steam's Operation in Conjunction With Alaska Ferry and the Effect on FMC Jurisdiction, If Any*

Having determined that Alaska Steam's pickup-and-delivery operations in Seattle in no way deprive us of jurisdiction over the rates in question, we now reach the question of whether or not Alaska Steam's decision to serve certain ports in Alaska by substituting vessels of Alaska Ferry for its own vessels has any effect on our jurisdiction here.

The substitution of vessels of Alaska Ferry for those of Alaska Steam to furnish a portion of the latter's service does not remove the entire service from FMC jurisdiction. The substitution of another means of transportation for a portion of a water carrier's route is nothing new. Moreover, the substitution does not change the essential character of the transportation. In *City of Philadelphia*, *supra*, the Court of Appeals for the District of Columbia Circuit affirmed the Civil Aeronautics Board's (CAB) determination that the substitution of a motor haul of about 90 miles for a feeder-plane service previously provided did not alter the fact that the entire movement was air transport subject to regulation by CAB.[9] We have recognized the lawfulness under section 18(a) of the Act and section 2 of the 1933 Act of a substitution of another carrier (there motor) to perform a portion of the water carrier's Oakland, California, to Alaska service by means of an overland haul between Oakland and Seattle (*Puget Sound Tug & Barge Co.* v. *Alaska Freight Lines*, 7 FMC 550, 556–557 (1963)).

Alaska Steam indicates that it had a good reason for substituting the vessels of Alaska Ferry for its own—reasons of economy. We agree that these are good reasons. They are not, however, reasons of a type to convert what is essentially one type of movement into that of another transportation mode. In *Flying Tiger Line, Air-Truck Service*, 30 CAB 242, 257–258 (1959), the CAB decision affirmed in the *Philadelphia* case, supra, CAB stated that the substitution of motor carriage for a portion of the air transportation for reasons of economy and efficiency did not convert the substituted portion into motor transportation.

*A fortiori*, then, it should be clear that the substitution of another *vessel* (i.e., a vessel of Alaska Ferry) for economic reasons does not remove the service from the jurisdiction of this agency and the filing requirements of section 18(a) of the Act and section 2 of the 1933 Act.

Moreover, inasmuch as the substituted service herein involves the participation between certain ports by another water carrier, it con-

[9] Although, as noted in footnote 8, the motor carrier utilized by the airline may have required ICC certification.

stitutes a through route with another water carrier for which all rates, fares, and charges must be filed with us under section 18(a) of the Act and section 2 of the 1933 Act.[10] Alaska Steam marshals the fact that ICC treats a ferry as a public way and any carrier, including Alaska Steam, utilizing Alaska Ferry must be certificated as a motor carrier under part II of the Interstate Commerce Act as supporting its contention that this agency cannot assert jurisdiction over transportation utilizing Alaska Ferry. Both of these facts are irrelevant to the question of our jurisdiction.

We have already noted that any motor carrier transporting any cargo moving in interstate commerce must, unless exempted, be certificated by ICC. That agency, moreover, has indicated that carriage by water over the route traversed by Alaska Ferry is not within its jurisdiction.[11] Carriage performed by a motor carrier over a water route not within ICC's jurisdiction cannot, practically speaking, be called anything other than an operation over a public way or marine highway insofar as ICC is concerned.

The Interstate Commerce Commission has itself recognized:

> * * * the possibility that the port-to-port service of the Alaska Ferry System or of applicants [motor carriers using the Ferry], or both, may be found by the Federal Maritime Commission, which is responsible for administering the Shipping Acts, to be those of a common carrier subject to the Shipping Act, 1916. Although such a finding might result in some duplication of regulation, we do not perceive any conflict arising therefrom. *Lindstrom Extension—Southeast Alaska*, 98 M.C.C. 647, at 653 (1965).

Moreover, ICC itself has determined that even for its own regulatory purposes a ferry may have "a dual status, both as a ferry and as a carrier subject to part III [the water carrier part] of the [Interstate Commerce] Act." *Black Ball* v. *Acme*, 76 M.C.C. 5, 9 (1958).

The cases advanced by Alaska Steam in support of its contention that transportation utilizing Alaska Ferry is not subject to our jurisdiction[12] do not involve Alaska Ferry. To the extent they are relevant to our consideration here, however, they support the conclusion that Alaska Ferry is not a ferry. The *United* case merely held that to the extent a motor carrier wished to utilize a ferry it required a certificate from ICC. The *Black Ball* case, moreover, indicates that an operation like that of Alaska Ferry is not that of a ferryboat. "A

[10] Sec. 2 of the 1933 Act (46 U.S.C. 844) provides that "if a through route has been established, all the rates, fares, and charges for or in connection with transportation between * * * points on its [the FMC carrier's] own route and points on the route of *any other carrier by water*" must be filed here. [Emphasis supplied.] A similar provision is contained in sec. 18(a), Shipping Act, 1916.

[11] See *Alaska Steamship Co. Alaska "Grandfather" Application,* 325 ICC 196 (1965), and *Erickson and Wolf Alaska "Grandfather" Application,* 325 ICC 276, 278 (1965).

[12] *United Truck Lines* v. *United States,* 216 F. 2d 396: *Black Ball* v. *Acme, supra.*

The operation of Alaska Ferry under consideration in this proceeding constitutes what is readily seen; it is carriage by water on regular routes with fixed schedules for all who wish to avail themselves of the service. One who performs such service is obviously a carrier by water.[17]

The provisions of section 18(a) of the Act and section 2 of the 1933 Act, requiring the filing of "all the rates, fares, and charges for or in connection with transportation [by a water carrier subject to our jurisdiction] between * * * points on its own route and points on the route of any other carrier by water * * * if a through route has been established * * * ", require that the service of Alaska Ferry utilized by Alaska Steam for the continuous carriage from originating point on the line of Alaska Steam to destination on the line of Alaska Ferry be included in the tariffs filed with FMC. The facts that no express agreement has been entered into between Alaska Steam and Alaska Ferry for the carriage of the former's cargo and that Alaska Steam does not control Alaska Ferry's operation are irrelevant. Nor is the fact that no joint rates or any agreements upon rates have been entered

[17] Alaska Steam submitted a newspaper (Seattle Post Intelligencer) clipping dated Nov. 30, 1967 (1 day after oral argument herein) which has been received by us as a part of the record in an attempt to maintain as complete and fair a record as possible, even though no motion for reopening has been filed in accordance with rule 16 of our rules of practice and procedure and there has been no opportunity for cross-examination of the matter contained therein. To the extent the article is material to this proceeding, however, it is more damaging than helpful to Alaska Steam's position. The article indicates that Alaska Ferry will commence "30-hour, twice-weekly [passenger] service from Ketchikan to Puget Sound * * * Seattle or Bellingham will be the southern terminus of the service, which covers a magnificently scenic route. But, Alaska Governor Walter J. Hickel said yesterday: 'We'll listen to any other port on Puget Sound that wants to talk to us.'" The passenger operations of the Alaska Ferry are not within the scope of this investigation. However, expansion of Alaska Ferry to include regularly scheduled passenger service between the lower 48 and Seattle along a scenic route makes Alaska Ferry look even less like a true ferry than it did before. Alaska Steam argues that the fact that the Coast Guard will "designate the waters between Ketchikan and Puget Sound as 'lakes, bays and sounds'" to allow Alaska Ferry to operate over those waters because the ferries are not classified as deep-sea ships somehow deprives us of jurisdiction. Coast Guard designations are irrelevant insofar as the regulatory authority of the FMC is concerned. The reason for this designation is obvious. As the newspaper article itself notes, "This is a *device* to qualify Alaska Ferry's three largest ships, the Matanuska, the Malaspina and the Taku, to run with passengers between Puget Sound and southeastern Alaska." [Emphasis supplied.] This may be a perfectly reasonable action insofar as the Coast Guard is concerned, but as the Interstate Commerce Commission pointed out, "We think it clear that the navigational boundary line established by the Commandant of the Coast Guard with respect to the waters involved here would not fix, change, or limit the statutory jurisdiction of Federal regulatory agencies" (*Erickson and Wolf Alaska "Grandfather" Application, supra,* at 278). Similarly, the designation by the State of Alaska of the ferry as the "Alaska Marine Highway" and including its regulations for it in its "highway" statutes may have legitimate purposes (primarily as indicated by 19.15.010 to 19.15.040, the necessary governmental function of raising funds for the establishment of an adequate transportation system) but those purposes are unrelated to the regulation of common carriers by water provided for in our statutes. We also note, moreover, that while the definition of "highway" in the Alaska Statutes includes a "ferry system" [Alaska Statutes, 19.05.130], "ferry" itself is defined as "a vessel used in the common carriage of passengers and self-propelled vehicles * * *" [Alaska Statutes, 19.60.070].

into between Alaska Ferry and Alaska Steam important. Section 18(a) of the Act and section 2 of the 1933 Act, unlike Public Law 87–595, speak not of "joint rates" but only of "through routes." [18] As our predecessor has stated, a "through route" is "an arrangement, express or *implied*, between connecting carriers for the continuous carriage of goods from an originating point on the line of one carrier to destination on the line of another." [Emphasis supplied.] *In Re Inland Waterways Corporation and Mississippi Valley Barge Line*, 2 U.S.M.C. 458, 462–463 (1940), citing *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 445–446 (1935). The FMC predecessor went on to state:

> Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through rate," as where the "through rate" is the "sum of the locals" of the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. 1 U.S.S.B.B. at 446.[19]

The only motor portion of the entire movement from Seattle to final destination in Alaska (outside the pickup-and-delivery service already discussed) is the movement performed by certificated ICC motor carriers in transferring the container-loaded chassis of Alaska Steam on and off vessels of Alaska Ferry. There is no motor carriage resembling the Consolidated Freightways operation from Utah, Idaho, and Montana, which precipitated passage of Public Law 87–595. No line haul overland of any kind is involved.[20] There is not even a movement in Alaska of an extent as great as a pickup-and-delivery service. The incidental nature of this movement is clearly seen when it is borne in mind that only as much land is traversed as lies between the two vessels when positioned alongside the pier. This type of service is not a departure from the former operation of Alaska Steam in Alaska. Even prior to the filing of the tariff here under investigation, the same substituted service was performed, for a part of the movement, but in reverse; i.e., Alaska Steam called directly at Valdez and used Alaska Ferry for substituted service to Cordova.

The staff of ICC indicated that the transfer service could only be performed by a certificated carrier, and when rates are entered into

[18] See footnote 25, infra.

[19] Hearing Counsel argue that the decisions of this agency indicate that the Alaska Ferry is a common carrier by water within the meaning of the Shipping Acts. We need not resolve this matter in this proceeding. Inasmuch as section 18(a) of the Act and section 2 of the 1933 Act require the filing of "all rates" on a "through route" involving any "carrier by water," and we have determined that Alaska Ferry is such a carrier within the meaning of that statute and insofar as this proceeding is concerned, we need proceed no further in our examination of Alaska Ferry's service herein.

[20] As explained in the *Sea-Land* case, Public Law 87–595 was designed to enable carriers providing line hauls by different transportation modes to enter into joint rates and through routes and file with a single agency a tariff covering the through movement.

jointly with such carrier, the motor carrier's rates must be filed with ICC. We do not read the correspondence between the staff of ICC and Alaska Steam taken in its totality as indicating that any rate entered into between a line-haul water carrier subject to the Shipping Acts and an ICC-certificated motor carrier is a joint rate establishing a through route within the meaning of Public Law 87–595, but only rates involving at least two line hauls.[21] To the extent it can be so read, however, it would appear to be inconsistent with the statement of the full ICC in a docketed proceeding, the *Lindstrom* case, supra, indicating that port-to-port operations utilizing Alaska Ferry are within FMC jurisdiction.

That the framers of Public Law 87–595 could not have envisioned a drive-on, drive-off service of the type here involved as included within the provisions of that Act is attested to by the fact that tariffs for a service involving such an incidental movement have always been accepted by this agency and its predecessors and therefore did not present the dilemma faced by Consolidated in not being able to provide a through service because no single agency would or could accept the tariffs which it attempted to file. It is also buttressed by the observations that the operations of Alaska Ferry did not commence until 1963. Public Law 87–595 was, therefore, not designed to remedy any problems concerning operations in connection with Alaska Ferry.

Alaska Steam as a motor carrier exists only to drive its containers on and off Alaska Ferry, publishing no local Alaskan motor rates which would merge with water carrier rates to form the joint rate contemplated in Public Law 87–595. Moreover, the fact that Alaska Steam as a motor carrier, Weaver Bros., or any other motor carrier may be indicated as participating in the movement in the tariffs filed with ICC does not remove the through service from our jurisdiction. They may participate, but the participation is not of the kind intended by the framers of Public Law 87–595 as subjecting the entire water movement to ICC supervision.

Finally, some idea of the essential nature of the movement may be gleaned from the fact that Alaska Steam filed its ICC tariffs as if it were a certificated water carrier. By its own admission, as well as by an official docketed decision of ICC,[22] it is not such a carrier. There-

[21] Such reading of the ICC staff correspondence is supported, for example, by the correspondence from the staff with regard to Alaska Steam's service (not under investigation herein) between Alaska and Tacoma, Wash., involving a land haul between Seattle and Tacoma. In advising Alaska Steam that it was of the opinion that rates for such service are within ICC jurisdiction, the staff of that agency stated that "The motor service between Tacoma and Seattle is *line haul service*. The fact that motor haul is a minor segment of the total transportation to or from Alaska ports in no way removes application of section 216(c)." [Emphasis supplied.] (Letter to Alaska Steam from Grayson B. Robinson, Assistant Director, Bureau of Traffic, dated Dec. 15, 1964.)

[22] See *Alaska Steamship Co. Alaska "Grandfather" Application, supra.*

fore, the applicable provisions of Public Law 87–595 (amended sec. 216(c) of the Interstate Commerce Act) entitle only a part II motor carrier to file joint-rate tariffs with an FMC water carrier. However, Alaska Steam filed tariffs designated ICC Nos. 96, 98, and 99, which are part III water carrier designations. Motor carrier tariffs bear an MF No. designation. Only the name Alaska Steamship Co. appears on the title pages of the supposedly joint or motor carrier tariffs. Motor carriers such as AAA Transfer, Weaver Bros., and Hoover's Movers are listed elsewhere as participating carriers. These facts indicate that Alaska Steam itself visualizes the service provided as essentially a water service, and, moreover, essentially its own water service.

Alaska Steam alleges several factual inaccuracies in the Commission's orders of investigation. However, with one minor exception, these alleged factual inaccuracies are either semantic in nature or disputes as to what conclusions are to be reached with respect to Alaska Steam's service. In the former category are Alaska Steam's objections to the Commission's characterization of AAA's vanning station as a collecting point and its motor service as drayage, and a reference to one of its vessels as a shuttle barge. Such appellations have been omitted from this report. In the latter category are arguments, treated in the "Discussion and Conclusions" section of this report, about whether or not Alaska Steam's service is really port-to-port and whether or not the service it has entered into with motor carriers is really joint. The only material factual inaccuracy mentioned is that Petersburg will not be served directly but only via Alaska Ferry. Hearing Counsel do not dispute this fact, and it has been corrected in the factual discussion above. The Court of Appeals for the District of Columbia Circuit has recently affirmed the position that an evidentiary hearing is necessary only when material facts are in dispute (*The City of Los Angeles* v. *F.M.C. and U.S.A.*, CADC 388 F2nd 582 (1967)). Thus, there appears no need for the full hearing demanded by Alaska Steam.

### 3. *The Procedural Arguments*

Alaska Steam makes two arguments attacking the procedure through which FMC instituted this proceeding:

(1) Alaska Steam maintains that FMC is, by this proceeding, attacking collaterally the jurisdiction of ICC because we are challenging the validity of a tariff filing with ICC, and such a challenge may only lawfully be made by the filing of a complaint with ICC under section 216(e) of the Interstate Commerce Act. Such a complaint, Alaska Steam indicates, has not been filed.

(2) By suspending the cancellation of tariffs, FMC, Alaska Steam maintains, has unlawfully applied its suspension authority. FMC can only suspend new rates and rate schedules, and Alaska Steam has filed no new rates, but merely cancelled old ones. Moreover, Alaska Steam contends, to prevent the cancellation of rates is to require the carrier to continue service which FMC has no authority to do.

In response to Alaska Steam's first contention, we need only say that the failure to file a tariff subject to FMC jurisdiction with FMC is a violation of our statutes, not those of ICC. If FMC is of the opinion, as it was, that an action by one it regulates is of doubtful legality, it is under a duty to examine the matter and in a proper case investigate and suspend. To do less or other than this would be a breach of our statutory mandate. If Alaska Steam had a question as to whether or not its service was subject to FMC jurisdiction, it could have obtained the answer without resorting to procedures under the Interstate Commerce Act.[23] It might also be observed that the section in the Interstate Commerce Act providing for the filing of a complaint by a body politic (sec. 216(e)) uses the word "may" which indicates that the filing of such complaint is not mandatory, and section 216(j) indicates that "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith." Certainly, a proceeding before a regulatory agency which has reason to believe its statutes may be violated and the filing of a petition for declaratory order with an agency that has for many years asserted jurisdiction over a certain type of transportation are appropriate alternative remedies to the filing of a complaint under a provision providing only for a permissive filing.

As to the second argument attacking our procedure, Alaska Steam is incorrect that only new rates may be suspended. Section 2 of the 1933 Act provides that new "practices" may also be suspended. The attempt to remove a service of a type long held subject to FMC's jurisdiction is certainly a new practice within the meaning of this section. Furthermore, the carrying on of such service without a properly filed tariff with FMC is an apparent violation of that section which FMC is empowered to suspend.[24] The FMC is not, contrary to Alaska Steam's assertion, forcing it to continue its service. Here the service under investigation is being performed under tariffs filed with ICC and is precisely the type of service that FMC and its predecessors have always held subject to their jurisdiction.

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[23] It could, for example, have petitioned FMC for a declaratory order pursuant to rule 5(h) of FMC's rules of practice and procedure.

[24] See footnote 1, supra.

The cases cited by Alaska Steam in support of its position are inapposite. *Lucking* v. *Detroit Nav. Co.*, 265 U.S. 346 (1924) and *McCormick S.S. Co.* v. *United States*, 16 F. Supp. 45 (1936), do not involve any question of suspension power and merely stand for the position that a water carrier cannot be compelled to provide a certain service. In both of these cases, the carrier had clearly ceased to provide a service for which rates would have been required to be filed with the regulatory agency by ceasing to provide service to certain ports.[25] *Alaska Steamship Company* v. *Federal Maritime Commission*, 362 F. 2d 406 (1965) merely held that we had no authority to suspend rates which had already gone into effect. That case involved new rates rather than a new practice, and concerned suspension action which the court determined took place after the effective date of the new rates. Here the proposed tariffs have been suspended well in advance of their effective dates.

Alaska Steam is, of course, free to cancel its service at any time upon proper notice, but until it does so it must have lawfully filed tariffs covering such service.[26]

The suspended tariff publications under consideration herein if allowed to become effective would result in the carrying on by Alaska Steam of a service subject to our jurisdiction without having the tariffs on file as required by section 18(a) of the Act and section 2 of the 1933 Act.

The petitions and motions to vacate and stay our orders herein are denied, and an appropriate order will be entered requiring the cancellation of the suspended tariffs herein found to be unlawful.

By the Commission.

(Signed) THOMAS LISI,
*Secretary.*

[25] *McCormick S.S. Co.* v. *United States*, while not supporting Alaska Steam's position, does cite the provision of sec. 2 of the 1933 Act, requiring the filing of all rates, fares, and charges on a through route when one has been established with any other carrier by water and interprets it as referring to any arrangement for continuous carriage, whether by joint rates or otherwise. The carrier had discontinued a through service provided by means of joint rates with barge operators. The court observed:

"This through service cannot be continued unless there are filed with the Shipping Board Bureau of the Department of Commerce the schedules of rates not only if joint, but also the ship and the barge rates if the carriage to San Francisco and the on-carriage to Berkeley and Emeryville are by separate rates * * * the continuance of either form of through service without such filings [is] prohibited by the statute * * *."

Such a construction supports our determination that the arrangement whereby Alaska Ferry transports Alaska Steam's containers is a through route with another carrier by water within the meaning of our statutes.

[26] Generally speaking, a change in schedules in the domestic offshore trade may only be made upon 30 days' notice. See *Order That A. H. Bull S.S. Co. Show Cause*, 7 FMC 133 (1965) and cases there cited.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 67-52

ALASKA STEAMSHIP CO.—CANCELLATION OF FMC PORT-TO-PORT RATES—WEST COAST/ALASKA TRADE

## ORDER

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this day made and entered of record a report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof;

*Therefore, it is ordered*, That pursuant to the Commission's authority under section 18(a) of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, respondent Alaska Steamship Co. shall, within 30 days of the date of service of this order cancel 7th Revised Page No. 1 to FMC-F No. 127, Supplement 3 to FMC-F No. 114, and Supplement Nos. 2 and 3 to FMC-F No. 144.

*It is further ordered*, That Alaska Steamship Co. shall continue to comply with the tariff filing requirements of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, with respect to the service which was found in the report herein to be subject to the jurisdiction of the Federal Maritime Commission.

By the Commission.

(Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 67–48

INTER-AMERICAN FREIGHT CONFERENCE AGREEMENTS NOS. 9648 AND 9649 AND OTHER RELATED AGREEMENTS

*Decided February 15, 1968*

The Inter-American Freight Conference Agreement as amended, No. 9648–A approved under section 15, Shipping Act, 1916; such approval being limited in duration to a period of 18 months

*Donald Macleay* and *Harold A. Sakayan* for Delta Steamship Lines, Inc.

*Frank J. McConnell* and *Benjamin Haller* for Companhia de Navegacao Loide Brazileiro, Cómpanhia de Navegacao Maritima Netumar, and Navegacao Mercantile, S.A.

*B. G. Andrews* and *Frederick P. Kopp* for Georgia Steamship Corporation.

*Ira L. Ewers*, *J. R. Ewers*, *W. B. Ewers* and *James F. Dwyer* for Moore-McCormack Lines, Inc.

*Seymour H. Kligler* for Empresa Lineas Maritimas Argentinas.

*Harold E. Mesirow* for Booth Steamship Company, Ltd., and Lamport & Holt Line, Ltd.

*Elmer C. Maddy*, *Baldvin Einarson*, *Thomas K. Roche*, and *Sanford C. Miller* for Brazil/United States-Canada Freight Conference and its member lines.

*Thomas F. Kimball*, *Gilbert C. Wheat*, and *R. Frederic Fisher* for Westfal-Larsen and Company.

*Donald J. Mulvihill* and *Walter J. Kenney* for National Coffee Association.

*Elroy H. Wolff* and *Peter S. Craig* for the Department of Transportation.

*Donald J. Brunner*, *Paul J. Fitzpatrick*, *Arthur A. Park, Jr.*, and *Frank L. Bartak* as Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

By an initial decision served December 12, 1967, Examiner Paul D. Page, Jr., approved Agreement No. 9648–A establishing the Inter-American Freight Conference to cover transportation of cargo between U.S. Atlantic and Gulf and ports in Brazil, Uruguay, Argentina, and Paraguay.

Hearing Counsel and the Department of Transportation took exception to the initial decision and replies thereto were filed. These pleadings made it appear that the area of disagreement between the parties could be considerably narrowed if they were given the opportunity to negotiate a stipulation and clarification of issues. Accordingly, on January 17, 1968, we directed the parties to indicate, by appropriate motion or stipulation, those issues as to which there remained an insoluble difference between the parties. They were further directed to state whether an evidentiary hearing was desired and, if so, to further state those matters of disputed fact upon which they desired to adduce evidence and the relevance of those facts to the issues remaining in the proceeding. Responses to that order have been received and the case is now before us for decision.[1]

The issues remaining for decision, and our disposition of them, are best understood in the light of certain background events which culminated in the agreement presently before us for approval.[2]

The Inter-American Freight Conference can be said to have had its inception in Resolution No. 2995 issued by the Brazilian Merchant Marine Commission on May 30, 1967. This resolution, a broad pronouncement of Brazilian maritime policy, developed what has come to be known in this proceeding as the concept of Pan-Americanism. This concept seeks to establish the right of those lines flying the flag of the country of origin or the country of destination to "equality of participation" in the various Brazilian trades. The resolution would reserve to so-called third flag carriers (those flying any flag other than the importing or exporting country) "a percentual participation" to be agreed upon. The resolution further called upon Brazilian flag

[1] In their responses to our order, only two parties requested oral argument. In view of the restricted character of the issues remaining before us and of the completeness and thoroughness of the pleadings filed herein, we see no need for oral argument and we will not put the parties involved to the additional time and expense of holding it.

[2] This background material was largely taken from the exceptions of DOT, the factual accuracy of which was not challenged by any party. The various resolutions, decrees and documents referred to were filed as attachments to DOT's exceptions and again no challenge was made to their authenticity or the accuracy of the translations.

shipowners to convene the other lines in the trade to work out agreements in furtherance of the policy thus announced.

Shortly thereafter, a series of meetings were held among the lines operating between Brazil and the United States and Canada to arrive at an agreement for the pooling of coffee carryings. Agreement failed over a dispute as to the percentage to be allocated to the third flag lines. The national flag lines then resigned from the then-existing conferences and undertook to establish a new conference. About this same time, the President of Brazil issued Decree No. 60.994 which provided that all acts of the Brazilian Executive Power (e.g. the decrees and resolutions later discussed) having "the purpose to protect and regulate the maritime transportation of goods" would apply only to those conferences or agreements to which a Brazilian flag line was a member or a signatory.

Thus, under later decrees and resolutions of the Brazilian Government, any conference formed which did not have a Brazilian flag line as a member or any pooling agreement which did not have a Brazilian line as a signatory would be neither recognized nor sanctioned by the Government of Brazil.

Subsequently, the proposed Inter-American Freight Conference Agreement (No. 9648), a set of so-called Pooling Guidelines (No. 9649) and three pooling agreements covering coffee to U.S. Atlantic ports (9649–A), coffee to U.S. Gulf ports (9649–B), and cocoa to U.S. Atlantic ports (9649–C), were filed with us. A petition for interim approval was denied by us on August 26, 1967, and we issued our order instituting this proceeding on August 31, 1967.[3] A complaint against the signatories of Agreements 9648 and 9649 filed by the third flag lines not parties to the agreements was consolidated with this proceeding.[4]

The third flag lines also filed suit in the U.S. District Court for the Southern District of New York against the signatories of No. 9648 alleging violations of the antitrust laws. There ensued a series of meetings between the third flag lines and the Brazilian authorities the end result of which was, not necessarily in this order: (1) the withdrawal of Agreement 9649 and the related agreements, (2) the dismissal of the complaint in docket No. 67–47 and the substitution of an

[3] That order, among other things, set the proceeding down for hearing. One of the alleged errors of the Examiner was the failure to hold a hearing which, it is urged, violated our order of investigation. The order, of course, intended that such a hearing be held only if it was necessary. The Examiner concluded it was not and, as we shall discuss later, we agree.

[4] The third flag lines had, since August 10, 1967, been unable to carry any cargo from Brazil to this country because of a decree issued by the Brazilian Maritime Commission (No. 3023) which restricted the carriage of Brazilian exports destined to the United States to signatories of Agreement 9648. The complaint of the third flag lines was assigned docket No. 67–47.

amended conference agreement which the Examiner designated No. 9648–A and which the third flag lines all had signed.[5] At the same time, negotiations to establish pools governing the carriage of cargo in the trade continued.

On November 10, 1967, the Brazilian Merchant Marine Commission issued Resolution No. 3131 which *inter alia* establishes the minimum carryings by national flag lines at 65 percent, to be divided equally, and fixes the maximum participation of the third flag lines at 35 percent. Under the resolution, the failure of the lines to enter into agreements effectuating this policy will result in control of shipments by the Brazilian Merchant Marine Commission which then, by unilateral allocation of the cargoes, seeks to insure the minimum participation by the national lines.

Basically, Agreement 9648–A divides the trade into three sections: (*a*) From U.S. Atlantic and Gulf ports to ports in Brazil, Uruguay, Argentina, and Paraguay with headquarters in New York City; (*b*) from ports of Paraguay, Argentina, and Uruguay to U.S. Atlantic and Gulf ports with headquarters in Buenos Aires; and (*c*) from Brazilian ports to U.S. Atlantic and gulf ports with headquarters in Rio de Janeiro. Each section will file separate tariffs. An Executive Administrator is to be appointed for each section with managerial and ministerial duties and responsibilities. The agreement authorizes the fixing of rates, establishes procedures for the conduct of meetings, provides for the admission of new members and creates the machinery for self policing. It specifies an admission fee, provides for loss of voting rights upon cessation of service and allows withdrawal without penalty. Penalties are provided for violation of the agreement. With certain exceptions, discussed below, the agreement is typical of the basic conference agreements now on file with and approved by us.

## Discussion and Conclusions

The responses to our order for stipulation and clarification of the issues in this proceeding leave only three major areas of dispute: (1) the embodiment in the agreement of the concept of "Pan-Americanism", (2) the need to amend the agreement so as to grant each member the right to act independently of the conference upon 48 hours' advance notice, and (3) the need for an evidentiary hearing prior to approval of the agreement.

[5] It would also appear that the third flag lines agreed to seek dismissal of their court action. The Examiner granted the motion of complainants to dismiss docket No. 67–47 and no appeal from the Examiner's ruling under Rule 10(m) of our Rules of Practice and Procedure has been filed.



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*Pan-Americanism*

Article 1, Preamble (b) provides:

All parties to this Agreement recognize that the Pan-American Nations and the Lines of the Pan-American nations associated in this conference have a paramount interest in the development of the foreign commerce of their respective countries and intend to develop their respective merchant marines and services to carry a substantial portion of the foreign commerce of the countries served.

This preamble is objectionable to Hearing Comsel and DOT at least so long as Articles 23 and 24 remain in the agreement.[6] These provide:

ARTICLE 23

Signatories to this agreement acknowledge by affixing their signatures hereto their voluntary acceptance of all principles, terms and conditions of this Conference and understand and agree that membership in this Conference requires that all lines charge, assess and maintain Conference tariff rates in all sections in which they operate, otherwise failure in the part of a member to charge, assess and maintain Conference tariff rates, rules and regulations shall subject them to expulsion in accordance with Article 13.

ARTICLE 24

All parties hereto recognize the authority and regulating powers of the government authorities of the various countries served and will abide by the laws, statutes, regulations and rules of these countries including registration with government authorities where required.

In seeking the deletion of Articles 23 and 24,[7] Hearing Counsel express concern that these articles when tied to Article 1, Preamble (b), would provide an unacceptable precedent for our approval. He points out that we have never approved such a concept and to do so would constitute a dangerous guideline for future agreements. Hearing Counsel pose three questions as to the effect of the agreement should Articles 23 and 24 remain:

[6] In reality, DOT supports Hearing Counsel's proposal for "conditional approval" (discussed *infra*) only if all of Hearing Counsel's modifications to the agreement are adopted. DOT raises only two specific issues in its response to our order: (1) whether we may determine the legality of 9648-A by examining only the agreement itself or whether we must consider also "the facts and circumstances surrounding the agreement, including certain decrees and resolutions of the government of Brazil * * *"; and (2) whether the agreement violates section 15 because its interaction with those decrees and resolutions "precludes all outside competition" and "prevents free conference exit and entry". In a similar vein, Delta Steamship Lines, although it remains a signatory to 9648-A, and advocates in principle at least the need for a conference in the trade, nevertheless supports the proposal of Hearing Counsel. Thus, these parties object to the specific provisions of the agreement largely through their support of Hearing Counsel. For the sake of brevity, we shall, except where necessary for clarity, refer to the objections as being only those of Hearing Counsel.

[7] Hearing Counsel originally sought the deletion of Preamble (b) but would settle for the removal of Articles 23 and 24.

1. Would any member line be relinquishing its right to future negotiations to any terms and conditions of the agreement?

2. Would any member line be relinquishing its right to appeal any condition that might develop in the future on some action not considered when the agreement was executed?

3. Would any member be relinquishing its right to appeal any quota or condition set up by any pooling agreement?

First, our approval of the agreement with or without the preamble or Articles 23 and 24 is not intended as an expression of opinion on the concept of Pan-Americanism. The preamble is at most a neutral provision. It grants no authority, denies no rights and imposes no substantive duties. It merely calls upon the members, primarily it would appear, those flying "third flags", to recognize what could well be termed a fact of life. The Government of Brazil has made abundantly clear by the decrees and resolutions already referred to its intention to develop is foreign commerce and a merchant marine capable of carrying a substantial portion of it; and certainly, the United States has unequivocally stated as its policy that:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times * * *. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine. (Section 10., Merchant Marine Act 1936.)

Little difference can be found in the "policies" of the two countries. Hearing Counsel would differentiate between Preamble (b) and section 101 of the Merchant Marine Act of 1936 by pointing out that section 101, (a) is a statement of governmental policy and not an agreement between carriers; (b) has not been implemented by any discriminatory decrees or resolutions; and (c) is implemented by a construction and operating differential subsidy rather than through depriving competitors of cargo. We think it clear that Hearing Counsel's concern here is not with this agreement but with the actions of Brazil. As we shall discuss in detail later, the manner in which each country seeks to effectuate its policy may well be another matter and one which, in our view, is not properly in issue here. We are not cited to nor can we find anything in section 15 or any other provision of the Shipping Act which would render unlawful an agreement between carriers operating between two countries to "recognize" the publicly announced policies of those countries. Certainly, the deletion of the preamble or Articles 23 and 24 would not of itself alter or change the policies of the countries involved.

Secondly, we do not share Hearing Counsel's fears about Articles 23 and 24. We answer Hearing Counsel's queries concerning them in the negative. Article 23 pledges the signatories' voluntary acceptance of the principles, terms and conditions of the Conference, while Article 24 embodies the signatories' recognition of "the authority and regulating powers of the government authorities of the various countries served" and requires the parties to abide by the "laws, statutes, regulations and rules" of those countries.

Under Article 23, Hearing Counsel are obviously concerned with the voluntary acceptance of the "principle" of Pan-Americanism. We have just indicated our view on the impact of the preamble which injects Pan-Americanism into the agreement.

We do not read Article 23 as altering the provisions of Preamble (b) which merely calls for "recognition" of the interests of the Pan-American nations and their national flag lines. Article 23, as we construe and would approve it, does not bind the members to any positive action in futherance of Pan Americanism. It may be the duty of the national flag lines to foster this principle or concept but that duty does not arise from the provisions of Agreement 9648–A.

As for Article 24, we do not construe a naked agreement to abide by the laws of a country as any form of waiver of the right of a party to appeal or petition for redress. Such a construction would violate some very fundamental principles of notice, justice and fair play adhered to by all of the countries within the trades covered by the agreement. Should any such construction be attempted, this Commission has the continuing power under section 15 to alter or modify the agreement and would, of course, exercise it. We will not require the deletion of Articles 23 and 24 as a condition of our approval.

*The Right of Independent Action*

Article 5 of the Agreement now provides:

> Each section shall issue separate freight tariffs establishing and maintaining fair and reasonable rates which shall be fixed where conditions permit equally on the same commodities.

Hearing Counsel would amend the article by adding the following:

> The parties hereto agree, however, that each party has the right to alter for itself any rates, charges, classification, or related tariff matter previously agreed upon or theretofore in force which would result in a decreased cost to a shipper upon first giving the other parties at least forty-eight hours advance notice thereof. Any such altered rate, charge, classification, or related tariff matter resulting in a decreased cost to a shipper shall not become effective prior to publication and filing with the Federal Maritime Commission.

Hearing Counsel's purpose in urging the inclusion of an independent action clause is "to preserve a degree of competition within the conference where by virtue of Brazilian decrees, competition outside the conference is absolutely foreclosed." The opponents of the clause (all the parties to the agreement except Delta) urge that the inclusion of such a right of independent action would render the Conference a nullity. Hearing Counsel counter this argument by pointing to 19 other agreements which contain similar clauses. Hearing Counsel point out that out of these agreements, there has been in the last two years only one instance by one line of an exercise of the right of independent action.

Section 15 provides only that:

> No * * * agreement shall be approved * * * (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.

Here, it is clear that Hearing Counsel's basic reason for urging the independent action clause concerns not this agreement itself but rather the decrees and resolutions of the Brazilian Government, particularly No. 3023 which reserves Brazilian exports to members of the Conference thereby eliminating outside competition. Thus, it is the decree and not the agreement before us that brings about the condition deplored by Hearing Counsel. But just as Hearing Counsel urge that inclusion of their independent action clause would not create a novel situation, neither would the omission of such clause be a novelty in this trade.

On October 13, 1960, the Brazilian Government's Superintendent of money and credit issued a decree known as SUMOC 202 which provided in pertinent part:

> 1. Brazilian export products with destination United States of America or Canada will be transported exclusively by shipping companies which are members of the Brazil/United States Freight Conference.
>
> 2. In the case of products which transportation is regulated by specific accords or agreements between member lines of the conference signed under the auspices of the above conference and not rejected by the Brazilian authorities, loading of these products will be effected exclusively on vessels of those shipping companies that are signatories to said agreements.[8]

Thus, as early as 1960, competition outside the Conference in the Brazilian trade has been "precluded" by governmental decree. We are aware of no carrier which applied for entry into the Conference and

[8] See *Nopal* v. *Moore-McCormack Lines, Inc.*, 8 F.M.C. 213 (1964).

was denied; nor are we aware of any shipper complaints of lack of service.[9]

Inclusion of an independent action clause will not, of course, create any "outside" competition. As for competition within the Conference, Agreement 9648–A provides for as much as most other conference agreements. The agreement itself still allows for service competition within the Conference, for the agreement imposes no quotas and allocates no cargo. Should the agreement at some future time because of its "interaction" with the Brazilian Resolutions 3023 and 3131 or because of other agreements filed with us become the vehicle for distributing specific shares of the total Brazil-United States shipping trade among the members of the Inter-American Freight Conference, that will be the time to reexamine our approval in the light of any such developments. It is sufficient here to point out that no attempt at such a utilization of the conference is provided for in the agreement and thus is not before us now. When the air is cleared of these eventualities, there remains only Agreement 9648–A which is, as we have already pointed out, of a kind we have readily approved in the past, and we see no reason for withholding our approval here.

*The Need for an Evidentiary Hearing*

Hearing Counsel, DOT, and Delta all urge that an evidentiary hearing is required either before approval or after "conditional" approval of Agreement 9648A. The suggested "compromise" to outright approval under section 15 urged only on the condition that we approve the agreement, as Hearing Counsel would modify it, further urges that we have an evidentiary hearing after "conditional" approval.[10]

The areas into which Hearing Counsel, DOT, and Delta would have an evidentiary hearing to probe are:

1. The existence of malpractices in the trade covered by the agreement.
2. The effects of the various decrees and resolutions of the Brazilian Government upon the agreement; and
3. Whether the agreement represents the full and complete agreement of the parties.

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[9] This sets aside, of course, the situation dealt with in the *Nopal* case, *supra*.

[10] In approving any agreement under section 15, we must find that the agreement is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters of the United States and their foreign competitors; that it is not detrimental to the commerce of the United States or contrary to the public interest, and that it is not otherwise in violation of the Shipping Act. Either an evidentiary hearing is necessary to make these findings or it is not needed at all. The suggested compromise would appear to urge us to grant our approval to the agreement and then have a hearing to determine whether our approval was proper.

While it is clear that the parties desire to adduce evidence on these issues, it is less than clear what the parties consider the relevancy and materiality of this evidence to the only issue before us in this proceeding—the approval of Agreement 9648–A.

Whether or not actual malpractices in the trade can be proved in a hearing, the short summary of background to this agreement already given clearly indicates the need for the restoration of some form of order and stability in the trade. Indeed, Hearing Counsel, in suggesting the compromise of a "conditional" approval, urge that immediate approval may bring "stability to a trade beset by controversy".

Running throughout the arguments of Hearing Counsel, DOT, and Delta has been the consistent assertion that we may not approve Agreement 9648 without considering its interaction with the various decrees and resolutions, of the Brazilian Governments and any proposed pooling agreements which would further effectuate those decrees and resolutions. It is, of course, impossible to deny the existence of the decrees and resolutions and in granting our approval here, we have carefully considered the consequences of that approval in the light of them. This is quite different from accepting the assertion that the very existence of these decrees and resolutions preclude any approval under section 15. Resolution No. 3131 quite clearly provides that, absent a conference agreement, the Government of Brazil may, and undoubtedly would, unilaterally allocate the shipments in the trade to assure at least the minimum participation of the national flag lines. Our approval of the agreement here in no way affects the power of the Government of Brazil to do this. To withhold our approval under such circumstances would be to ignore the realities of the present posture of the trade. And again, we would point out that the agreement we are here approving of itself does not acomplish the deplored restrictions on competition and allegedly discriminatory allocations.

In a similar approach, DOT would have the Conference come forward with evidence as to whether there are in fact any malpractices in the trade. To DOT, this is necessary to show the agreement is necessary "to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act," citing our decision in the *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290 (1966). It is apparently DOT's position that, absent any showing of actual malpractices, there would be no justification for approval of the agreement and therefore to approve it, would be contrary to the public interest.

We are faced here with balancing the public interest in the fostering of free and open competition in furtherance of the antitrust policies with the interest of the public in stability and predictability of rates and the orderly conduct of our foreign commerce. Whatever may be necessary to "justify" approval of a pooling or other agreement, we think that the need for a conference in this trade is beyond dispute. Indeed, nobody seriously disputes that need. In this instance, competition, be it within or without the Conference, must give way to the restoration of order and stability. There is no necessity for an evidentiary hearing to establish the "need" for a conference in this trade and we will not order one. DOT urges that an evidentiary hearing is necessary to determine the "relationships between the unfiled October 28 agreements * * * and the conference agreement." The agreements referred to are attached as an exhibit to the exceptions filed by DOT. They consist of two pools to govern the carriage of green coffee in the trade and a number of individual agreements whereby each of the third flag lines agree to seek dismissal of their complaints here and in court. Evidence is needed here, we are told, to determine whether we have before us "in the conference agreement a true and complete memorandum of the agreement among the parties". The flaw in this argument is obvious but quite difficult to state.

DOT does not assert that the Conference agreement is not a self-contained document. Agreement 9648–A has all the provisions required by the Shipping Act and all the provisions generally considered advisable to establish a workable conference. To hold that the existence of other agreements, already filed or to be filed, renders the Conference agreement less than complete, implies at least that once having entered into one agreement, the parties thereto may never have another without placing themselves in violation of section 15 for having on file something less than a true and complete memorandum of their agreement, or that different matters may not be made the subject of separate agreements. Agreement 9648–A is, so far as we are aware, the true and complete agreement insofar as the establishment of a conference is concerned. As we have already indicated, if and when other agreements are filed, we shall take whatever action then becomes necessary.

In short, even assuming that no malpractices may be proved and recognizing the existence of the various decrees and resolutions and in admitting the possibility of further agreements in effectuation of Pan-Americanism, we do not agree that an evidentiary hearing would produce anything relevant or material to our decision here.

Finally, and at the risk of stating the obvious, we would make clear that by approving Agreement 9648, we are not in any respect relinquishing our regulatory control over the trade nor do we intend to relax our surveillance of future events occuring therein. Accordingly, and for these reasons set forth herein, we find and conclude that Agreement 9648–A as set forth in the Appendix hereto, meets the standards of section 15 and should be approved. However, because this trade is one in which relatively short periods of time can produce significant changes in circumstances, we will limit the approval we are granting here to a duration of 18 months from the date of service of this order. The purpose of this limitation is twofold, in addition to granting the parties an opportunity to restore order to the trade, it allows them to demonstrate that the conference, once established, will operate to the benefit of the shipping public. If the parties request continuation of the agreement beyond this period, we will at an appropriate time take whatever action is necessary. An appropriate order will be issued.

(SEAL) (Signed) THOMAS LISI,
*Secretary.*

## APPENDIX

### INTER-AMERICAN FREIGHT CONFERENCE AGREEMENT

ARTICLE 1

*Preamble (a)*

In consideration of the benefits, advantages and privileges to be severally and collectively derived from this Agreement, the parties hereto, common carriers by water, will co-operate in the promotion and development of the foreign commerce of the United States of America, Brazil, Argentina, Uruguay and Paraguay, through establishment of regular, dependable ocean transportation.

*Preamble (b)*

All parties to this Agreement recognize that the Pan-American Nations and the Lines of the Pan-American Nations associated in this Conference have a paramount interest in the development of the foregin commerce of their respective countries and intend to develop their respective merchant marines and services to carry a substantial portion of the foreign commerce of the countries served.

ARTICLE 2

*Scope*

This Agreement will govern the transportation of cargo between the Atlantic and Gulf of Mexico ports of the United States of Amercia and the ports of Brazil, Uruguay, Argentina and Paraguay.

ARTICLE 3

*Division of Conference*

To accomplish the aims and purposees of the Agreement the parties hereto associate themselves in an Agreement to be known as the Inter-American Freight Conference, which shall be divided into three (3) sections:

"A" U.S. Atlantic and Gulf, Brazil, Uruguay, Argentina, Paraguay Section.

"B" Paraguay, Argentina, Uruguay, U.S. Atlantic and Gulf Section.

"C" Brazil, U.S. Atlantic and Gulf Section.

ARTICLE 4

*Definition of Sections*

Under the terms of this Agreement, the following defines the Sections established:

*Section A.*—From U.S. Atlantic and Gulf ports to ports in Brazil, Uruguay, Argentina and Paraguay with headquarters in New York City.

*Section B.*—From ports of Paraguay, Argentina and Uruguay to U.S. Atlantic and Gulf ports with headquarters in Buenos Aires.

*Section C.*—From Brazilian ports to U.S. Atlantic and Gulf ports with headquarters in Rio de Janeiro.

Any member line of this Conference Agreement must be a member of the above Sections of the Conference in which it operates.

ARTICLE 5

*Separate Tariffs for Each Section*

Each Section shall issue separate freight tariffs establishing and maintaining fair and reasonable rates which shall be fixed where conditions permit equally on the same commodities.

ARTICLE 6(a)

*Board of Directors*

A Board of Directors shall be elected by two-thirds of the active member lines in each Section of the Conference to govern, direct and manage each Section through an Executive Administrator, appointed by the parties of each Section. The Executive Administrator shall not be financially interested in or employed by or in any way connected with any member line or agent or any representative thereof. The Executive Administrator will be subordinate to the Board of Directors of each Section and have duties and responsibilities as outlined in this Agreement.

The Board of Directors shall be composed of five members, of which at least three must be representatives of Pan-American Lines who are members of each Section of this Conference.

The Board of Directors shall elect a Chairman and Vice-Chairman from its members in each Section to serve for a period of one year.

The Board of Directors of each Section shall meet as circumstances and conditions warrant, but at least once a month.

The Board of Directors of each Section shall have authority to increase the number of Directors as circumstances warrant.

ARTICLE 6(b)

*Headquarters of the Conference Sections*

The office of the Executive Administrator of Section "A" shall be in New York.

The office of the Executive Administrator of Section "B" shall be in Buenos Aires.

The office of the Executive Administrator of Section "C" shall be in Rio de Janeiro.

ARTICLE 6(c)

*Responsibilities of the Executive Administrator*

The Executive Administrator will act in accordance with instructions of the Board of Directors and Conference members of his respective Section; his responsibilities and duties shall include but not be limited to the following:

(1) The Executive Administrator shall act at all times in the best interest of all lines in conformity with the principles of the Conference Agreement.

(2) Administer, manage and supervise all Conference matters and activities in his Section by direction.

(3) Act as reporting and filing agent with respective government authorities wherever required.

(4) Handle shipper and other complaints and report when required to proper government authorities.

(5) Act as liaison in all matters involving malpractices with the Screening Committee and Neutral Body.

(6) Represent his respective Section of the Conference when authorized in all matters as directed.

(7) Attend and act as secretary at all Board of Directors' and Principals' meetings.

(8) Prepare and submit for the approval of the Board of Directors an annual budget and a quarterly financial statement.

(9) Conduct and preside at all Conference meetings of his Section, except Principals' meetings.

(10) Supervise and maintain current status of Conference tariffs of his respective Section.

(11) The Executive Administrator shall be assigned other responsibilities and duties as directed by the Board of Directors and members of each respective Conference Section as circumstances or conditions warrant.

ARTICLE 6(d)

*Prinicpals' Meetings*

Principals shall meet as circumstances and conditions warrant, and shall elect one of their members to be chairman of their meetings. Principals are authorized to discuss and agree upon any matters within the scope of this Agreement.

ARTICLE 7

*Establishment of Rates*

Subject to applicable provisions of law of the countries served, each Section of the Conference is authorized to:

(1) Agree upon and establish rates and charges for the carriage of cargo. Rates and contract conditions established shall be made a part of the Section of the Conference records and filed with the respective Government authorities wherever required, provided that any contract/non-contract rate systems as may be adopted by the Section are subject to prior approval by the Government Agencies with jurisdiction and shall be made part of the respective tariffs.

(2) Declare rates for specified commodities to be "open" with or without agreed minimums, and thereafter declare the rates for such commodities to be "closed".

(3) Agree upon and establish tariffs, tariff amendments and supplements.

(4) Make rules and regulations for the handling and carriage of cargo.

(5) Provide for use of contract/non-contract rate systems.

(6) Agree on amounts of brokerage and conditions for payment of brokerage as permitted by applicable law and in accordance with applicable tariff provisions.

(7) Keep such records and statistics as may be required by the parties or deemed helpful to their interests.

ARTICLE 8

*Discounts, Refunds, Absorptions*

There shall be no discount, payment or return of any description directly or indirectly to any shipper, contractor, consignee, receiver of cargo or any other person or company, except brokerage or commission to duly authorized agents or representatives of member lines by any of the parties hereto, their agents, associates, subsidiary or parent companies. There shall be no payment, refund or absorption at loading or discharging ports of rail or coastal steamer freight, lighterage, trucking or other charges, directly or indirectly, by any of the parties hereto, except as may otherwise be agreed and shown in the respective Section tariff.

ARTICLE 9 (a)

*Voting*

The member lines of any Section shall consider and pass upon any matter or thing within the scope of this Agreement at any meeting of a Section provided that notice in writing, descriptive of the matter to be considered, has been given each party thereto by the respective Executive Administrator not later than 4 P.M. of the third working day prior to the date of meeting; however, if all Section members are in unanimous agreement, a meeting may be scheduled and held with less than three working days' notice. A meeting shall be called by the Executive Administrator at the request of any member line. If all of the parties thereto are present at any meeting and all agree to waive the notice, action may be taken on any matter within the scope of this Agreement without prior notice thereof. Any matter or thing properly brought before the meeting and agreed to by two-thirds (2/3) of the parties of the Section involved unless otherwise provided in this Agreement shall hereby become an agreement binding upon all the parties of that Section, with the same force and effect as if expressly made part of this Agreement, however, in no case shall the number of votes be less than one-half of the number of active Section members entitled to vote. A quorum in any Section of the Conference shall consist of two-thirds of the active members present and with voting rights.

ARTICLE 9 (b)

*Telephone Voting*

In addition to taking action at meetings, action may be taken by telephone poll of the members, conducted by the Executive Administrator. Any action voted on by telephone poll shall require, in order to be adopted, the unanimous affirmative vote of those members entitled to vote under the provisions of this article and if so adopted shall be binding on all members. The results of each telephone poll will be made known to all members. Any matter failing to receive unanimous affirmative vote by telephone poll shall be referred to the members at the next meeting for further consideration.

ARTICLE 10

*Sailing Requirements*

Failure to have a sailing to the territory within applicable sections of this Agreement for the period of ninety (90) days shall be regarded as suspension of service from that section and members whose services have been thus suspended shall have no right to vote on any matters within that section of the Conference Agreement until such service has been resumed; provided, however, that suspension of voting rights shall not be regarded as expulsion from the Conference, and the restoration of voting rights shall not be regarded as admission or re-admission to membership in the Conference. Notice of any suspension or reinstatement of a member line will be furnished promptly to the respective government authorities wherever required.

ARTICLE 11

*Admission*

Any common carrier by water, which has been regularly engaged as a common carrier in the trade covered by this Agreement, or which furnishes evidence of ability and intention in good faith to institute and maintain such a common carrier service between ports within the scope of this Agreement, and which recognizes and agrees in good faith to abide by all the terms and conditions of this Agreement, may hereafter become a party to this Agreement by affixing its signature thereto and shall pay two thousand five hundred dollars (US$2,500) as an admission fee which is not refundable. Every application for membership shall be acted upon promptly. No carrier which has complied with the conditions set forth in this paragraph shall be denied admission or re-admission to membership.

Prompt notice of admission to membership shall be furnished to the respective Government authorities of the countries served and no admission shall be effective prior to the postmark date of such notice. Advice of any denial of admission to membership, together with a complete statement of the reasons therefor, shall be furnished promptly to the respective Government authorities *of the countries* served.

ARTICLE 12

*Withdrawal*

Any member may withdraw from a Section of the Conference in which it is a member without penalty by giving the *Section* at least thirty (30) days' written notice of intention to withdraw; provided, however, that action taken by the *Section* to compel the payment of outstanding financial obligations by the resigning member shall not be construed as a penalty for withdrawal. Notice of withdrawal of any member shall be furnished promptly to the respective Government authorities of the countries served.

Any party hereto, who shall have given notice of withdrawal as provided above shall not, after such notice shall have been given, be entitled to vote on any matter within the scope of the *Section* which shall continue in effect after the date when such party's withdrawal shall have become effective.

ARTICLE 13

*Expulsion*

No member may be expelled against its will from *a Section*, except for failure to maintain a common carrier service between the ports within the scope of this Agreement or for failure to abide by the terms and conditions of this Agreement. No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished the expelled member and a copy of the statement submitted to the respective government authorities of the countries served.

ARTICLE 14

*Neutral Body Agreement—Self-Policing*

(a) Each Section, jointly or separately, shall promptly retain the services as a Neutral Body of such individual or firm as may be elected by a majority of all of the active members of the Section or Sections. The term "active member" is hereby defined to mean and include all of the parties hereto whose *voting* rights shall not, at the date when the respective vote is taken, be suspended pursuant to the provisions of Article 10 of this Agreement, and whose right to vote shall not, at the said date, have ended pursuant to the provisions of Article 12 of this Agreement. In the event that such a person or firm shall cease to act as the Neutral Body, the Section or Sections shall, by similar procedure, choose a successor or successors.

(b) In order to qualify to be elected and retained, the Neutral Body shall have no financial interest in any member line and shall not be in the employment of or under retainer thereto at the time of appointment as Neutral Body or at any time while acting in that capacity. Any person or firm who may be employed by the Neutral Body as authorized in Article 14(g) shall conform to the standards of neutrality applicable to the Neutral Body as defined in this Article and shall so certify to the Neutral Body. Each notice of a determination pursuant to Article 14(j) shall contain a certification by the Neutral Body that, throughout the period of investigation and determination, the Neutral Body qualified for election and retainer as aforesaid.

(c) The Neutral Body shall investigate all complaints made to it charging breach by any party of any term, condition, undertaking, or provision of this Agreement, and shall determine whether such breach has occurred; provided, however, that no complaint shall be considered and dealt with in accordance with this Agreement unless it shall have been delivered to the Neutral Body on or before (I) the date which shall be one year after the date of the occurrence of matters complained of, or (II) the effective date of the withdrawal of the party complained of *from this Agreement and membership in any Sections or section of the Conference, whichever of* said dates shall earlier occur.

(d) All complaints charging breach by any party of any term, condition, undertaking or provision of this Agreement shall be addressed to the Executive Administrator of the Section where the complaint originated, who shall refer such complaints to a Screening Committee composed of three member lines of that section of the Conference who shall be elected by the members of that section on a rotating basis for one (1) year; provided, however, if members of the screening committee shall be involved in a complaint, either as the party making the complaint, or accused therein of breach of the Conference Agreement, any such member or members shall be disqualified to consider such complaint, and in its or their stead, and for the purpose of considering the particular complaint only, there shall be elected to replace the disqualified line or lines by the Section on a rotating basis member line or lines not so involved. The Screening Committee shall, within thirty (30) days after receipt thereof, by a majority vote of its members, refer to the Neutral Body for investigation and determination complaints indicating a breach of the Conference Agreement. Complaints not referred to the Neutral Body by the Screening Committee shall through the Executive Administrator be returned to the complaining member, together with a statement of the reasons for their return.

(e) In no event shall the Executive Administrator, the Screening Committee or the Neutral Body disclose the fact that a complaint has been made or the identity of the complainant, the accused party or any other person involved, except in making the communications involved in this Article 14 or in response to legal process.

(f) All disbursements incurred by the Executive Administrator or the Screening

Committee in the performance of their functions under this Article shall be reimbursed by the *appropriate* Section.

(g) In making investigations and determinations herein above specified, the Neutral Body shall be authorized, at its discretion, to engage lawyers, experts, accountants and agents, and they or any of them shall be authorized, at any reasonable time or at any place in the world, to inspect and copy such documents, papers or records, or parts thereof, of any of the parties hereto, that at his or their discretion may be deemed relevant to the matter under investigation or determination; and the parties hereto agree that they will make their books, records and documents of the Sections, accessible to inspection and copying at all reasonable hours by the Neutral Body and any persons engaged by it in pursuance of its authority and in the performance of its duties hereunder. The member lines shall, within a reasonable time after the effective date of this Agreement or, in the case of lines which shall become members after said effective date, upon subscribing to a counterpart of the Conference Agreement, furnish to the appropriate Section commitments from their agents, sub-agents and/or companies affiliated with such agents and/or sub-agents, including stevedoring and forwarding affiliates, over which the respective signatories exercise control, authorizing the Neutral Body to investigate, inspect or copy any of their pertinent records or documents wherever located, required for the proper carrying out of any investigation provided for in this Agreement.

(h) The Neutral Body shall give to any party charged with a breach of the Conference Agreement reasonable notice of the charge and opportunity to adduce evidence and make arguments, orally or in writing, by itself or by counsel in its own behalf. Any party charged with such breach shall, before a determination that it has committed such breach, be given an opportunity to examine copies of documents received by the Neutral Body as evidence supporting the charge, and shall be informed of the substance of all testimony supporting the charge; provided that such examination and such information shall not disclose the identity of the complainant.

(i) The Neutral Body may, at its discretion, conduct a hearing on any charge of breach of the Conference Agreement, but, in conducting such a hearing, shall not be limited by the rules of procedure and evidence of any jurisdiction or court. The Neutral Body shall consider all evidence which it deems well founded, trustworthy and probative of the issue before it and, without any rules as to the burden of proof or the amount of proof necessary to reach a determination, shall determine whether or not the party charged has committed a breach of the Conference Agreement.

(j) Promptly upon determining whether or not there has been a breach of the Conference Agreement, the Neutral Body shall give written notice of its determination to each of the member lines; provided, however, that neither in such notice nor otherwise shall the Neutral Body disclose the identity of any complainants. In the event that the determination is that a party has committed such a breach, the notice shall set forth the sum to be paid by such party as liquidated damages for violation of the Conference Agreement computed as follows:

(i) For the first violation, either (a) if the transaction which constituted the violation did not involve the collection of freight money on ascertainable shipments by the party which committed the breach, an amount commensurate with the seriousness of the breach, to be determined by the Neutral Body, but in no event more than ten thousand dollars United States currency

(US$10,000), or (b) if the transaction which constituted the violation did involve the collection of freight money, the amount of such freight money, if such freight shall have been received in United States currency, otherwise the equivalent in United States currency at the date of receipt of the freight received.

(ii) For the second violation either (a) fifteen thousand dollars United States currency (US$15,000) or (b) the amount of freight money, if any, received by such party, if such freight shall have been received in United States currency, otherwise the equivalent in United States currency at the date of receipt of the freight received, whichever (a) or (b) shall be the greater sum;

(iii) For the third violation either (a) twenty thousand dollars United States currency (US$20,000) or (b) the amount of freight money, if any, received by such party, if such freight shall have been received in United States currency, otherwise the equivalent in United States currency at the date of receipt of the freight received, whichever (a) or (b) shall be the greater sum;

(iv) For the fourth violation, and each subsequent violation, either (a) twenty-five thousand dollars United States currency (US$25,000) or (b) the amount of freight money, if any, received by such party, if such freight shall have been received in United States currency, otherwise the equivalent in United States currency at the date of receipt of the freight received, whichever (a) or (b) shall be the greater sum.

Such notification shall also contain a statement of the fee of the Neutral Body for the conduct of the investigation and/or determination, and of all its disbursements incurred in connection therewith. If the determination is that such breach has been committed, the party which shall be determined to have committed same shall promptly pay to the Neutral Body the amount of its fee and disbursements, and also shall pay to the appropriate Section the amount assessed as herein above provided; but if the determination shall be that no such breach has been committed, the party which made the complaint shall promptly pay to the Neutral Body the amount of its fee and disbursements.

(k) In the event that the Neutral Body shall have determined that any party has committed a malpractice and shall assess liquidated damages, costs and expenses (hereinafter the "assessment") against the party and in the event that the party shall duly have promptly paid to the appropriate Section the amount of such assessment, the party shall have the right, by written notice delivered or mailed to the Executive Administrator at the time of making such payment, which shall state the name and address of the arbitrator selected by the party, to call for an arbitration, pursuant to the Arbitration Law of the State of New York and under the Rules of the American Arbitration Association, to determine whether the Neutral Body and its agents, lawyers, experts and others who shall have acted for it (hereinafter, "representatives") shall have been qualified to act as such pursuant to Article 14(b) hereof, shall have performed their duties with respect to the complaint and the assessment in accordance with the provisions of this Agreement and the regulations and resolutions adopted pursuant thereto and shall have accorded to the party all the rights and privileges with respect to the complaint and the prosecution thereof of which a party is assured by the terms of this Agreement and of any rules or regulations which the parties may adopt pursuant to this Agreement.

If a party makes such payment and calls for such arbitration, the Executive

Administrator shall hold the amount paid in a separate account to be disposed of as hereinafter set forth.

If the arbitration shall result in an award answering said questions in the affirmative, then the right of the party to challenge further the liquidated damages, costs and expenses assessed against it in accordance with the provisions of this Agreement shall cease and come to an end; and the Executive Administrator shall apply all sums received as prescribed by Article 14(j) after defraying therefrom the costs and expenses of investigation and adjudication by the Neutral Body.

If the award of the arbitrators shall answer said questions or any of them in the negative, then the arbitrators in their award shall specify the respects in which the Neutral Body or its representatives shall not have been qualified to act or in which the Neutral Body or its representatives shall have failed or omitted to act in accordance with the provisions of this Agreement and the regulations and resolutions adopted pursuant thereto and/or the respect in which they shall have failed or omitted to accord to the party all of the rights and privileges with respect to the complaint and the prosecution thereof of which the party is assured by the terms of this Agreement and of said regulations and resolutions. In such case the matter shall be remanded to the Neutral Body or its successor if the arbitrators shall have found that the Neutral Body did not throughout its investigation and determination possess the qualifications specified in Article 14(b) with instructions to pass upon the complaint anew in complete accordance with the provisions of this Agreement and said regulations and resolutions and in connection therewith to accord to the party all of the rights and privileges with respect to the complaint and the prosecution thereof of which the party was deprived as found by said award. If after the reconsideration by the Neutral Body pursuant to the award of the arbitrators the Neutral Body shall make against the party an assessment which is other than the amounts previously assessed, the party shall make such further payment to the Section or the Section shall make such refund to the party as shall adjust the amount of the assessment theretofore paid by the party to the amount ultimately determined by the Neutral Body.

After effect shall have been given to adjustment, if any, in the amount of Decided Liabilities in accordance with the foregoing provisions of this Article, the Executive Administrator shall apply all sums as prescribed in Article 14(j) which he shall not have been required by the foregoing terms to refund to the party after defraying therefrom the expenses of the investigation and adjudication by the Neutral Body.

If the party shall call for arbitration as aforesaid, the Executive Administrator shall promptly deliver a copy of said call to the Neutral Body and an arbitrator shall be chosen by the Neutral Body within ten days after the receipt by the Executive Administrator of the Call for arbitration. The Neutral Body shall promptly give notice in writing to the Executive Administrator and the party setting forth the name and address of the arbitrator thus chosen by the Neutral Body. The two arbitrators selected as aforesaid shall thereupon elect a third arbitrator, or if said two arbitrators are unable within ten days after their appointment to agree upon the selection of the third arbitrator, then the third arbitrator shall be such person as shall be selected by the American Arbitration Association. The award of said arbitrators shall be determined by a vote of a majority of the arbitrators. The parties agree to accept and abide by said award. If the award of the arbitrators shall answer the questions submitted to them



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in the affirmative, then the party shall pay all of the costs of arbitration. If the arbitrators shall answer some or all of the questions submitted to them in the negative, then the costs of the arbitration shall be borne equally by all parties other than the party against which the complaint is lodged.

(l) The Section shall apply all sums received as liquidated damages hereunder so as to reduce *pro tanto* the assessments for the maintenance of the Section levied upon all parties hereto, except the party which shall have paid the respective liquidated damages.

(m) The parties recognize that when any one of them shall by a breach of this Conference Agreement obtain any cargoes for transportation, such party so obtaining the cargo will inflict upon the other parties damages amounting to at least the amount of the freight collected by the party which shall have committed the breach and will, in addition, inflict further damages by the impairment of the stability of the Conference rate structure; and that successive breaches will inflict increasingly great damages because of the increasingly great impairment of such stability. The parties likewise recognize that in the case of breaches of the Conference Agreement which do not directly involve the transportation of cargoes, similar cumulative impairment and damage will occur. The parties agree that the amount of the damages resulting from such impairment will be difficult, if not impossible, of ascertainment, and accordingly they agree that the amounts to be assessed by the Neutral Body as aforesaid will be and shall be interpreted as liquidated damages and not as penalties.

ARTICLE 15

*Responsibility of Lines for Acts of Agents*

The act of any agent, sub-agent, subsidiary or associate company of any party hereto, or of any company which is a subsidiary of or affiliated with any such agent or sub-agent, or of any company furnishing stevedoring, lighterage, terminal or other kindred services to any of the foregoing, over which a party to this Agreement exercises control, which violates the Conference Agreement, shall be considered and dealt with pursuant to Article 14 hereof as a breach of said Agreement by said party, and such party shall be fully responsible for the payment of any liquidated damages and/or fees and/or disbursements of the Neutral Body in accordance therewith.

ARTICLE 16

*Tariff Committee*

Each Section of the Conference shall appoint from among its members a Tariff Committee. Each of such Committees shall consider and recommend for adoption and agreement by the members of the respective Section of the Conference schedules of tariff rates and charges to be charged and collected for the transportation of merchandise between the ports comprised in such section, brokerage and other transportation regulations; and provided that notice of the matter to be considered at any meeting has been given to the members of the Section concerned by the Executive Administrator, as provided in Article 9 hereof, the members of the Section concerned shall be bound by the agreement of two-thirds (⅔) of their number entitled to vote as to any tariff rate, rule or regulation, with the same force and effect as if expressly made a part hereof.

ARTICLE 17

*Posting of Bonds, Administration, Security, and Custody Thereof*

To secure the payment of any award which may be entered in any arbitration proceedings, as hereinafter provided, parties to this Agreement shall, at or before the time they sign this Agreement, deposit through the Executive Administrator in New York in such bank or trust company as may be designated by two-thirds of the parties hereto, the sum of ten thousand dollars (US$10,000) in cash or the equivalent at market value in government, state or municipal bonds or other bonds as may be approved by the Conference or deliver to the Executive Administrator an irrevocable letter of credit as a guaranty of prompt payment. Such bank or trust company shall undertake, if money be deposited, to issue and deliver to the Executive Administrator certificates of deposit therefore payable to the depositing party or order, and/or if bonds be deposited, to execute and deliver to the Executive Administrator and the depositing party trust receipts wherein said bank or trust company shall agree to hold said bonds to the depositing party on the conditions:

(a) That it will return said bonds to the depositing party on written order of the Executive Administrator;

(b) That it will, on the filing with it by the Executive Administrator of the certified copy of any judgment or award against the depositing party, sell in the open market the bonds deposited and will pay the money realized therefrom to the Executive Administrator provided, however, that if the judgment is less than the market value of the total of the bonds deposited, said bank or trust company shall sell only such part of said bonds as shall be necessary to realize the amount of such judgment.

The interest accruing on said bonds shall be collected by said bank or trust company as same becomes due, and with the interest accruing from the certificates of deposit, shall be paid direct to the depositing party, all of which interest shall be held by the depositing party for its own use free of trust. The certificates of deposit shall be held by the Executive Administrator as bailee representing the parties to this Agreement and subject to the provisions of this Agreement.

If the trust deposit of a party is depleted for any cause, failure of such party to restore its trust deposits to the amount and in the manner hereinbefore provided for the creation of its original trust deposit, within the ten (10) days after notice in writing of such depletion has been served upon it by the Executive Administrator shall constitute a breach of this Agreement.

In the event that any award or judgment is granted as hereinafter provided against any depositing party and said award or judgment is not paid within ten (10) days after it is granted, it shall be the duty of the Executive Administrator, and the Executive Administrator is hereby vested with full power and authority, to apply the proceeds of said trust deposit to the payment of said award or judgment.

It shall be the duty of the Executive Administrator, and the Executive Administrator is hereby vested with full power and authority, to redeliver to the depositing party any certificates of deposit, letters of credit or any bonds or the proceeds of bonds in his possession whenever the depositing party is entitled to receive same under the terms and conditions of this Agreement. In the event any member ceases to be a party to this Agreement, any certificate of deposit, letter of credit, or bonds deposited with the Executive Administrator, or bonds deposited with any bank or trust company shall be returned to the eliminated party, provided that there is not pending against him any undetermined charge of a breach of this Agreement, which *prima facie* may result in a judgment for damages. If there is such a charge pending, the trust shall not terminate, nor shall the certificate of deposit, the letter of credit or said bonds be returned to the eliminated party until such charge is dismissed or the award is satisfied. The elimination of any party hereto shall not release such party from any liability under this Agreement for any cause preceding the date of such elimination.

ARTICLE 18

*Shippers' Requests and Complaints*

The Executive Administrator of each Section will maintain files on shippers' requests and complaints. Reports of shippers' requests and complaints and disposition thereof shall be furnished periodically, not exceeding three (3) months, to the respective government authorities wherever required.

Each Section of the Conference may convene a special meeting to consider requests from shippers and/or consignees involving rates and conditions of carriage, at which meeting shippers and/or consignees may attend; attendance at all other Conference meetings in each Section shall be restricted to direct employees of member lines or their appointed agents.

ARTICLE 19

*Expenses of Administering and Maintaining Conference*

The expenses of administering and maintaining each Section of the Conference shall be borne equally by members within each Section of the Conference.

ARTICLE 20

*Record of Vote*

The record of the vote, except votes by secret ballot, of each individual member by name on each question voted on shall be retained by the Executive Administrator for a period of at least two (2) years from the date of the vote. In the event of a secret ballot, a record of the total number of votes indicating the number in favor and the number opposed to the action shall be retained by the Executive Administrator for a period of at least two (2) years from the date of the vote.

ARTICLE 21

*Furnishing Reports*

Full and complete Minutes and reports of all meetings, reports of telephone poll votes and records of action of committees certified by the Executive Administrator or Chairman as accurate and complete shall be furnished as soon as practicable to all members of respective Sections; and within thirty (30) days of the meeting or poll to governmental authorities having jurisdiction over this Agreement.

The Executive Administrator shall file with the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, a monthly report containing the following information: (i) a list of all complaints of rebates or any other malpractices received from Member Lines or any other person during each one-month period, but the parties involved need not be identified; and (ii) a description of all actions taken on each complaint, including the nature of the violation found and the penalty or other sanction imposed.

In the event that no complaints were received in the one-month period, a negative report so stating shall be filed. Such monthly reports are to be initialed by all member lines.

ARTICLE 22

*Effective Date of Agreement*

This Agreement and any modification thereof to become effective then approved by the respective Government authorities having jurisdiction over this Agreement.

ARTICLE 23

*Membership Pledge*

Signatories to this Agreement acknowledge by affixing their signatures hereto their voluntary acceptance of all principles, terms and conditions of this Conference and understand and agree that membership in this Conference requires that all lines charge, assess and maintain Conference tariff rates in all Sections in which they operate, otherwise failure on the part of a member to charge, assess and maintain Conference tariff rates, rules and regulations shall subject them to explusion in accordance with Article 13.

ARTICLE 24

*Adherence to Government Regulations and Legislation*

All parties hereto recognize the authority and regulating powers of the government authorities of the various countries served and will abide by the laws, statutes, regulations and rules of these countries, including registration with government authorities where required.

ARTICLE 25

*Amendments and/or Modifications*

This Agreement cannot be amended or modified except by unanimous consent of all members.

# FEDERAL MARITIME COMMISSION

DOCKET No. 67–48

INTER-AMERICAN FREIGHT CONFERENCE AGREEMENTS NOS. 9648 AND 9649 AND OTHER RELATED AGREEMENTS

## ORDER

The Commission has this day entered its Report in this proceeding which is hereby made a part hereof by reference, and has found that Agreement 9648–A, as set forth in the Appendix to said Report is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, 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, if the conditions set forth below are met.

*Therefore, it is ordered*, That Agreement 9648–A as set forth in the Appendix to the aforementioned Report is hereby approved except that Article 6(a) thereof is to remain inoperative until such time as the parties to this proceeding agree to a clarification of Article 6(a).

*It is further ordered*, That the approval herein granted shall be limited to a period not to exceed eighteen (18) months from the date of service of this order.

By the Commission:

(SEAL) (Signed) THOMAS LISI,
*Secretary*.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 65–41

PACIFIC FAR EAST LINES—ALLEGED REBATES TO FOREMOST DAIRIES, INC., CONNELL BROS. CO., LTD., AND ADVANCE MILL SUPPLY CORP.

*Decided February 28, 1968*

Undisclosed arrangement whereby a carrier purchases fuel oil at a premium from a favored shipper who is not regularly engaged in the oil business under an assignable contract whereby said shipper receives a commission of 10 cents per barrel from the actual supplier without performing any substantial services to earn said commission found to violate section 16, Second, of the Shipping Act, 1916.

Shipper who knowingly and wilfully enters into such an arrangement found to violate section 16, first paragraph.

Said arrangement constitutes violations of section 18(b)(3) of the Shipping Act and section 2 of the Intercoastal Shipping Act, each in its respective sphere of jurisdiction.

Absent a showing that commissions received were in direct proportion to the cargo offerings, said arrangement held not to be in violation of section 14, Fourth.

Absent a showing of actual injury to competitors, said arrangement held not to be in violation of section 16, First.

*Warner W. Gardner* and *Benjamin W. Boley* for respondent Pacific Far East Lines, Inc.

*Leonard G. James* and *F. Conger Fawcett* for respondent Foremost Dairies, Inc.

*Sanford D. Gilbert* for respondent Advance Mill Supply Corporation.

*William J. Ball* for respondent Connell Bros. Co., Ltd.

*Donald J. Brunner*, *Richard L. Abbott* and *G. Edward Borst, Jr.*, Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman*, George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James F. Fanseen, *Commissioners*):

The Commission instituted this proceeding on November 17, 1965, to determine whether PFEL's practice of purchasing bunker fuel oil from certain favored shippers violated sections 14 Fourth, 16 First, 16 Second or 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §§ 812, 815, 817(b)), or section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. § 844), and whether the shippers who furnished this oil thereby obtained transportation by water for property at less than the rates which would be otherwise applicable in violation of section 16, first paragraph, of the Shipping Act. Chief Examiner Gus O. Basham issued an initial decision on August 31, 1967. We heard oral argument on November 15, 1967.

In its order of investigation, the Commission named as respondents Pacific Far East Lines (PFEL), Foremost Dairies, Inc., Connell Bros. Co., Ltd. and Advance Mill Supply Corp.

### THE FACTS

PFEL is a common carrier by water in the foreign commerce and the domestic offshore commerce of the United States. The remaining three respondents are shippers utilizing PFEL's services to a substantial extent, both in the foreign and domestic offshore trades. During the period under consideration, these latter respondents also supplied a large portion of PFEL's bunker fuel oil needs.

PFEL purchases approximately 1.5 million barrels of fuel oil each year from a number of suppliers. In accordance with industry practice on the west coast, PFEL negotiates its oil contracts in the fall for deliveries the following year. PFEL considers several factors, such as price and whether the supplier is also a shipper, in deciding how much oil to purchase from each supplier. Several of the major oil companies ship various products overseas and utilize PFEL's services. These oil company/shippers supply a certain portion of PFEL's fuel oil needs. PFEL also awards oil contracts to brokers, such as Connell Bros., or commission agents like Advance Mill Supply. Both of these firms, who are substantial shippers with PFEL, are also engaged in the petroleum business. PFEL also buys some fuel oil from companies such as Signal Oil Co., which is not a shipper at all. Generally on purchases from nonshippers PFEL obtains the lowest prices.

Foremost Dairies has been a shipper with PFEL for many years and generally has shipped exclusively with them. Toward the end of 1960, Foremost led PFEL to believe that it might be considering the use of other carriers. Not wishing to risk the loss of the Foremost account, officials of PFEL and Foremost met in the latter part of 1960 to discuss the situation and come up with some plan whereby Foremost's continued patronage would be assured. John R. Wagner, senior vice president of PFEL, put it this way:

Naturally, with any big account like that you try to hold them * * * Foremost indicated, "Well, we are doing so well with you fellows but why should we keep all of our eggs in one basket."

We were always trying and looking for some way to maintain the account and keep as exclusive as we could because they had very good cargo.

So, somewhere around the end of 1960, * * * our then president and some of our staff met with some of the Foremost people, and from that came the idea that possibly one way of doing it was to have a fuel oil contract * * *.

As a result of this meeting, PFEL awarded a contract to Foremost to supply a minimum of 250,000 barrels of oil during 1961 at the lowest price per barrel posted [1] by the major oil companies in San Francisco. The parties entered into the contract with the understanding that Foremost would assign it to a bona fide oil company. Mr. Wagner testified that there was no problem getting suppliers and that he had at least three companies perfectly willing to take it on. It was further understood that the assignee would pay Foremost a commission on each barrel of oil which it delivered under the assignment. Foremost, of course, is not in the fuel oil business and does not hold itself out as such.

PFEL had no further dealings with Foremost regarding the oil except to recommend several oil suppliers which had expressed a willingness to act as assignee and to pay a commission of 10 cents per barrel to Foremost Dairies.

One of these, Advance Mill Supply Corp., obtained the assignment during the years 1961 through 1963. Foremost received commissions from Advance for deliveries during 1961 through 1963 totaling $23,425.20 in 1961, $26,361.70 in 1962, and $28,753.30 in 1963. These arrangements were made with the full knowledge of PFEL.

[1] The posted price is a maximum or list price which is charged for oil. This is published by the major oil suppliers for the various ports throughout the world. In addition, a so-called voluntary discount is normally allowed. Further discounts below the posted price and voluntary discount are frequently the subject of negotiation between oil users and suppliers depending on market price fluctuations. This latter practice has become so common during the past 8 years that PFEL's witness testified that by 1966 such discounts were involved in 78 percent of its bunker oil purchases. Thus, a supply contract at the lowest posted price on its face contains considerable latitude to allow the payment of commissions or further discounts.

Prior to 1964, Signal Oil Co. sold relatively small amounts of oil directly to PFEL at discount prices. (Signal was not a shipper and its discount price was the only selling point it had.) In the course of negotiating its 1964 contract with PFEL, Signal indicated that it would like to increase its bunker sales and expressed a willingness to become the actual supplier of oil under any PFEL oil contract. PFEL probably mentioned its Foremost contract and the possibility of Signal furnishing the oil under it. As a result, PFEL entered into a direct contract with Signal to furnish between 62,500 and 80,000 barrels during 1964 at $1.65 per parrel at Los Angeles.

The PFEL-Foremost contract for 1964 called for the delivery of between 287,000 and 300,000 barrels of oil at a price of $1.75 per barrel. This contract was immediately assigned to Signal under an agreement whereby Signal paid a commission of 10 cents per barrel to Foremost. This arrangement was repeated in 1965. Foremost received $28,369.10 in commissions in 1964 and $23,837.50 in 1965.

During the years 1961 to 1965, Foremost gave 50 to 75 percent of its cargo to PFEL for carrying goods in foreign and domestic commerce for total freight revenue of $2,778,555. During the same years, Foremost received $126,833.90 as commissions on the sale of fuel oil to PFEL. Since 1966, PFEL has discontinued purchasing oil through Foremost.

Foremost's total involvement in the fuel business was to sign a contract and an assignment in the fall of each year and to endorse commission checks. Foremost invested nothing, incurred no expenses, performed no services, and, as a practical matter, had no responsibility under its arrangement with PFEL.

No other shipper knew or could have learned about the existence of PFEL's oil purchase arrangements with Foremost. Only the assignee oil suppliers, a bank (which advanced some money on the strength of one of the contracts), and the Maritime Administration which, in response to its inquiry, was furnished with copies of the contracts in question in 1963, were advised of the contracts.

PFEL also purchased substantial quantities of oil from respondents, Connell Bros. Co., Ltd. and Advance Mill Supply Corp. These firms, unlike Foremost, are regularly engaged in the business of selling bunker fuel oil, among other commodities. They are also substantial shippers on PFEL's vessels. The prices paid for the oil to Connell and Advance were not excessive, and PFEL in all instances received its full tariff rate on commodities carried for these respondents. The commissions and profits received by Advance and Connell reflect bona fide business efforts and expenses on their part.

## THE INITIAL DECISION

The Initial Decision of Chief Examiner Gus O. Basham concluded that ordinary reciprocity (viz the mutual exchange of normal business patronage) is not at issue. Hence, he found that the reciprocal arrangements between Advance and Connell on the one hand and PFEL on the other were entirely proper and legal since both of these firms are in the oil business and the prices paid by PFEL for the oil purchased were fair. He, therefore, dismissed these two shippers as parties respondent.

He concluded, however, that the Foremost-PFEL relationship presented a different situation since Foremost was in the dairy business, not in the oil business. Having made this distinction, the examiner then reviewed the arrangement in the light of the various sections of the Shipping Act and Intercoastal Shipping Act which were allegedly violated.

He dismissed the section 14 Fourth charges on the ground that there was no showing that the oil commissions received by Foremost were based on the volume of freight it shipped. Similarly, he found no violation of Section 16 First, absent a record showing of actual competitive injury. He found that PFEL had violated sections 16 Second and 18(b)(3) of the Shipping Act and section 2 of the 1933 Act. The Chief Examiner exonerated Foremost of any violation of section 16, first paragraph.

## DISCUSSION

We are in general agreement with the examiner's conclusions with one important exception—his determination that Foremost Dairies, Inc., did not violate section 16, first paragraph.

This case presents a situation where a carrier and one of its major shippers entered into an arrangement the net effect of which was to reduce that shipper's costs of ocean transportation. While there is nothing intrinsically wrong with a carrier's purchasing goods or services from its shipper-customers—indeed, this is a perfectly normal business practice—it is, nevertheless, by its very nature, the kind of relationship which is susceptible of abuse. Thus, whenever a carrier enters into any financial dealings with one of its shippers, a very high standard of ethical conduct must prevail.

While the price paid by PFEL for the oil it obtained through the Foremost contracts was always fair when measured against the prevailing market price, this fact, standing alone, is somewhat misleading. The truth of the matter is that PFEL simultaneously paid 10 cents per barrel more for oil from Foremost's assignee, Signal Oil Co., than the price it was paying to the same Signal Oil Co. for oil which it was buying under a direct contract. It was no coincidence that the commission received by Foremost amounted to exactly 10 cents per barrel. The conclusion is inescapable that PFEL paid a premium price for this oil in order to allow Foremost to obtain a reduction in its ocean freight costs in clear violation of section 16 Second, of the act. It is equally clear that Foremost, knowingly and wilfully, obtained reduced rates for transportation by water in violation of section 16, first paragraph.

*The Secton 16 Violations*

The introductory paragraph of section 16 provides in pertinent part:

That it shall be unlawful for any shipper . . . 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 otherwise be applicable.

Similarly, section 16 Second makes it illegal for a carrier:

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.

These subsections are aimed at protecting competing shippers and carriers from shippers who attempt to obtain (or succeed in obtaining) transportation at reduced rates through devices or representations involving fraud, falsehood, or concealment. There is no question of carrier protection here since both PFEL and Foremost acted together—each with a full knowledge of what was transpiring.

The record leaves no room for speculation as to PFEL's motive in deciding to purchase a portion of its fuel oil from, or rather through, Foremost. It was to hold a big account as PFEL's executive vice president candidly admitted. The granting of rebates is one of the oldest devices in the shipping industry for the accomplishment of this purpose, and the arrangement involved here is but a slightly sophisticated variation of this ancient theme. PFEL knew very well that it was paying a premium price to Signal Oil Co. for every barrel of oil it was supplying under its assignment from Foremost. Signal was little more than the transmission belt over which the rebate was paid.

Foremost was no mere passive recipient of the oil commissions. It readily acquiesced in the scheme by signing the contracts and assigning them immediately to bona fide oil suppliers. Foremost knew that its successful venture into the oil business came about solely because of its economic leverage over a carrier which wanted to retain its business. It knew also that no real responsibility arose under the contracts. It would be hard to imagine that the responsible officials of Foremost were so naive as not to know that they were the beneficiaries of a rebating scheme.

Absent some extraordinary circumstances (of which there is no evidence in this case), a violation of section 16 Second by a carrier necessarily involves a violation of section 16, first paragraph, by the favored shipper where the shipper, knowingly and wilfully, acquiesces in the arrangement whereby the rebate is allowed.

If the scheme itself is illegal, the words "knowingly and wilfully" found in the first paragraph of section 16 mean simply that the shipper's participation was with knowledge of the benefits which would flow from the arrangement and an intent to enjoy such benefits. This case is quite a different situation from that presented in the *Continental Can* [2] and *Royal Netherlands* [3] cases. Each of those cases involved the misclassification of glass tumblers as "empty jars," thereby permitting the shipper to enjoy a lower than applicable rate. In the *Continental* case, the Second Circuit Court of Appeals found that there was an ambiguity in the classification terminology, and thus the shipper might not, knowingly and wilfully, have used the incorrect description. Resolving the doubt in the shipper's favor, the court held that there could have been an honest mistake as to correct classification. In the *Royal Netherlands* case, however, the U.S. Court of Appeals for the District of Columbia found that there was no possibility of honest mistake since the items shipped under the classification "empty jars" included such things as ash trays, stem wear, and other glass objects obviously not suitable for use as containers for packing of food.

Unlike the situation in *Continental*, *supra*, where the shipper might well have thought the classification he used was perfectly correct, there is nothing in this case which would lead us to believe that Foremost labored under any similar mistake of fact. To make the situation comparable, there would have to be a showing that Foremost performed actual and substantial services to earn its commissions. Foremost knew that it was getting something for nothing. Whether it had knowledge that this violated the Shipping Act is immaterial.

Foremost urges that we adopt the examiner's interpretation of the words "knowingly and wilfully" as meaning actual or constructive knowledge that the requirements of the statute were being disregarded. Such a construction would make ignorance of the law a valid defense

[2] *Continental Can Company* v. *United States*, 272 F. 2d 312 (2d Cir. 1959).

[3] *Royal Netherlands Steamship Co.* v. *Federal Maritime Bd.*, 304 F. 2d 938 (D.C. Cir. 1962).

and substitute some subjective standard whereby actual knowledge of statutory language by a shipper would have to be established before a violation under this section could be found. Congress did not intend to impose such a novel evidentiary requirement.

Foremost cites *Philippine Merchants Steamship Co. Inc.* v. *Cargill, Inc.*, 9 F.M.C. 155 (1965) to support its contention that an essential element of proof of a violation of section 16, first paragraph, is known illegality; i.e., that the shipper has done something or attempted to do something which it knew or should have known was unlawful. This reliance is misplaced. The essential element of proof to which that case is addressed is the "unfair device or means". These words have a restrictive meaning derived from their proximity to the words "false billing," etc. used in both the introductory paragraph to section 16 and section 16 Second. Applying the principles of *ejusdem generis*, the Commission and the courts have uniformly held that the act forbidden must be similar to those specifically proscribed in order to be an unjust or unfair device or means. In other words, the unjust or unfair device or means must partake of some element of falsification,[4] deception, fraud,[5] or concealment,[6] in order to satisfy the legal requirements of these subsections.

In the *Philippine Merchants* decision, *supra*, we said that the missing essential element of proof was the unfair device or means (9 F.M.C. at 165). However, Cargill's practice of imposing a service charge was open and aboveboard. Therefore, while it was found to be an unreasonable practice within the meaning of section 17, it simply did not and could not have come within the ambit of section 16, first paragraph, or section 16 Second. Judge Learned Hand articulated this distinction in *Prince Line, Ltd.* v. *American Paper Exports, Inc.*, *supra*,[7] where he said:

> The law did not forbid all concessions to a shipper; apparently it assumed that if these were above board, and known or ascertainable by competitors, the resulting jealousies and pressure upon the carrier would be corrective enough. But it did forbid the carrier to grant such favors, when accompanied by any concealment, and its command in that event was as absolute as though it had been unconditional.

Both Foremost and PFEL deny that there was any affirmative attempt at concealment or deception as to the existence of the contracts or

[4] *Hohenberg Bros. Co.* v. *Federal Maritime Commission*, 316 F. 2d 381 (1963).

[5] *U.S.* v. *Hanley*, 71 Fed. 672 (1896); *Armour Packing Co.* v. *U.S.*, 153 Fed. 1 (1907) aff'd. 209 U.S. 56 (1908).

[6] *Prince Line, Ltd.* v. *American Paper Exports, Inc.*, 55 F. 2d 1053 (1932); *Ambler* v. *Bloedel Donovan Lumber Mills*, 68 F. 2d 268 (1933).

[7] With the subsequent enactment of the Intercoastal Shipping Act, 1933, section 2, and the amendment of the Shipping Act, section 18(b)(3), any tariff deviations have been made illegal.

their content. They point out that disclosures were made to a bank and to the Maritime Administration, as well as to the oil suppliers. This does not constitute disclosure to an important class of persons that this section was designed to protect; namely, competing shippers. We agree with the examiner when he said in his initial decision that:

The fatal defect in the arrangement between PFEL and Foremost is the lack of any means whereby any actual or potential competitors of Foremost could find out what Foremost's actual transportation costs were. Absent such knowledge, and without an arrangement providing them with exactly the same benefits, they would be at an obviously undue disadvantage.

The present case is similar to two cases decided by our predecessor, the U.S. Maritime Commission. Concealment, in the sense of nondisclosure to competing shippers, was present in each of those cases just as in the instant case. In the *Payments to Shippers* case,[8] a dummy corporation was set up by the carrier to receive payments from it for soliciting cargoes of automobiles. The stock of this corporation was offered to automobile dealers in proportion to autos shipped. The Commission found that the arrangement was in violation of section 16, because the favored shippers were given rebates in the form of dividends. Similarly, a violation was found in the *Nicholson Universal* case,[9] where the carrier paid a shipper of automobiles to provide loading, unloading, and other services at fees in excess of the value of the services.

The PFEL-Foremost arrangement was unjust and unfair because "* * * 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." *Ibid.*

Unlike section 16 First, there is no requirement under sections 16, first paragraph, or 16 Second, that actual competitive injury be established. It is enough that the practice involved has the capacity or tendency to injure competition. *U.S. Lines and Gondrand Bros.—Sec. 16 Violation*, 7 F.M.C. 464, 470 (1962). We hold that the PFEL-Foremost scheme was such a practice because it lowered Foremost's ocean transportation costs.

*Section 18(b)(3) and Section 2*

Having found that Foremost obtained transportation at less than the rates which would otherwise be applicable and that PFEL allowed Foremost to obtain transportation at less than the regular rates or charges then established and enforced, it follows that PFEL violated

[8] *Payments to Shippers by Wis. & Mich. Steamship Co.*, 1 U.S.M.C. 744 (1938).
[9] *Agreements of Nicholson Universal Steamship Co.*, 2 U.S.M.C. 414 (1940).

section 18(b) (3) of the Shipping Act and section 2 of the Intercoastal Shipping Act, each in its respective areas of application. This is so because any deviation from the rates on file with this Commission violates these sections.

These sections prohibit the refunding, rebating, or remitting in any manner or by any device any portion of the rates or charges specified in the tariffs on file. The Foremost fuel oil contracts are essentially the same kind of scheme as that condemned in the *Nicholson Universal* case, *supra*, where a section 2 violation was found in addition to the section 16 violations.

*Section 16 First*

The examiner found that there was nothing in the record to show if anyone was an actual victim of discrimination as a result of the Foremost-PFEL fuel oil contracts and concluded that section 16 First was not violated. We agree. *West Indies Fruit Co.* v. *Flota Mercante Grancolombiana*, 7 F.M.C. 66, 69 (1962).[10]

*Section 14 Fourth*

Hearing Counsel contend that the fuel oil supply contracts entered into between PFEL and Foremost constitute a violation of section 14 Fourth of the Shipping Act. This section forbids any common carrier by water from making "any unfair or unjustly discriminatory contract with any shipper based on volume of freight offered."

PFEL points out that this section is aimed at the malpractice of granting volume discounts to large shippers on the basis of, or in proportion to, the volume of freight offered. Moreover, argues PFEL, this section historically has been applied only to those arrangements in which the carrier's published tariff itself contains the provisions for discounts geared to the volume of cargo offered by a favored shipper.

While we perceive no requirement that the particular kind of rebate arrangement forbidden by this section must be reflected in the carrier's published tariffs in order to be illegal, we do agree with the examiner when he stated that there would have to be a discernible relationship between the commissions paid to Foremost and the amount of its cargo offerings to PFEL before a violation could be established.

## CONCLUSIONS

Notwithstanding our conclusion that the practices engaged in by respondents amounted to violations of the Shipping Act, we see no

[10] But see our report in *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, Docket No. 66–49, 11 F.M.C. 202.

regulatory purpose to be served by issuance of an order to cease and desist.

We note that the PFEL-Foremost oil contracts were discontinued immediately upon the initiation of this case. While mere discontinuance of an illegal practice does not preclude our issuance of a corrective order, it furnishes a persuasive reason why an order is unnecessary especially where, as here, we perceive no probability that the illegal practices will be resumed.

In summary, we conclude that, in connection with the arrangement entered into between respondents Pacific Far East Lines and Foremost Dairies, Inc., whereby Foremost received commissions on the sale of substantial quantities of bunker fuel oil without performing commensurate services or incurring actual liability:

1. That PFEL violated section 16 Second of the Shipping Act in that it allowed Foremost to obtain transportation for property at less than the regular rates or charges then established by unjust or unfair means;

2. That PFEL violated section 18(b)(3) of the Shipping Act in that it utilized the said arrangement as a device to rebate, refund, or remit a portion of the rates or charges specified in its applicable tariffs then legally on file with this Commission;

3. That PFEL violated section 2 of the Intercoastal Shipping Act in that it utilized such arrangement as a device to refund or remit a portion of the rates or charges specified in its applicable tariffs then legally on file with this Commission;

4. That PFEL did not violate section 14 Fourth or section 16 First of the Shipping Act;

5. That Foremost violated section 16, first paragraph, in that it knowingly and wilfully, by an unjust or unfair device or means, obtained transportation by water for property at less than the rates or charges which would otherwise be applicable;

6. That no violations have been established in connection with PFEL's fuel oil transactions with respondents, Connell Bros. Co., Ltd., and Advance Mill Supply Corp.;

7. That the practices herein found to be illegal were promptly discontinued upon the initiation of this proceeding and there is no necessity for an order to cease and desist; and

8. That this proceeding is discontinued.



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COMMISSIONER JAMES V. DAY, CONCURRING AND DISSENTING:

I dissent in that I do not find that Foremost Dairies, Inc., violated section 16, first paragraph. Considering, as did the examiner, the custom of reciprocity, the fact that PFEL, after inquiry, concluded that the Foremost contract was proper, that Foremost also had reason to believe that its participation was likewise proper, and the lack of convincing proof of guilty knowledge on the part of either party: I conclude that Foremost cannot be charged with knowingly having by unjust or unfair device obtained transportation at less than otherwise applicable rates.[11] I concur with the other conclusions of the majority including discontinuance of this proceeding.

(Signed) THOMAS LISI,
*Secretary.*

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[11] See *U.S.* v. *Illinois Cent. R. Co.*, 303 U.S. 239 (1938).

# FEDERAL MARITIME COMMISSION

DOCKET NO. 66–48

RATES AND PRACTICES OF THE PACIFIC NORTHWEST TIDEWATER ELEVATORS ASSOCIATION

*Initial Decision Adopted March 6, 1968*

The rates, rules, and regulations, other than the overtime charge, contained in the tariffs of the respondent marine grain terminal operators do not constitute nor result from unjust or unreasonable practices under section 17 of the Shipping Act, 1916.

The use of the Freas formula, modified in minor respects to fit the circumstances at a grain terminal, is a reasonable method of developing and segregating terminal costs and allocating these as between vessel and cargo.

The institution of a services' and facilities' charge by respondent marine grain terminals, similar to such a charge included in the tariffs of most other terminals on the Pacific Coast, is not an unjust or unreasonable practice in violation of section 17.

Adding an increment to a terminal overtime loading charge as an alleged incentive factor to induce the terminal to work during overtime hours, is an unjust and unreasonable practice in violation of section 17 when the overtime loading is required by the terminal.

*Thomas J. White* and *Norman E. Sutherland* for respondents.

*George D. Rives* and *Gerard K. Drummond* for petitioners.

*Karl C. Grannan*, Office of the General Counsel, for the intervener, United States Department of Agriculture; *Joseph A. Ryan*, *John C. Kennedy*, and *Charles W. Bucy*, on the brief.

*Donald E. Leland* and *Robert W. Graham* for intervener, Northwest Marine Terminal Association, Inc.

*H. Stanton Orser* and *John C. Harley* for intervener, California Association of Terminal Elevators.

*Milton A. Mowat* for intervener, Portland Commission of Public Docks.

*Willard Walker* and *Thomas J. White* for intervener, Port of Longview.

*C. R. Nickerson* filed a brief for the intervener, California Association of Port Authorities.

*Donald J. Brunner* and *Roger A. McShea, III*, Hearing Counsel.

## REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This proceeding is before us on exceptions to the initial decision of E. Robert Seaver, presiding examiner, issued on August 11, 1967. Exceptions were filed and oral argument was held on December 6, 1967.

The investigation was prompted by a protest filed by the Portland Steamship Operators' Association (petitioner) in 1966 objecting to changes in the tariffs of the marine grain terminals in the Pacific Northwest which resulted, among other things, in sharply increased charges against the vessels.

The purpose of the investigation as specified in the order of investigation is "to determine whether the rates, rules and regulations contained in the tariffs of the elevator operators constitute unjust or unreasonable practices in violation of section 17." Named as respondents are the members of the Pacific Northwest Tidewater Elevators Association which operate grain terminals in question.

In his initial decision, the examiner concluded that the rates, rules and regulations contained in respondents' revised tariffs neither constitute nor result from unjust or unreasonable practices in violation of section 17 except as to the imposition of a flat overtime charge of $57 per hour for loading done at the terminal's behest, which he found to be excessive by $17 per hour.

The petitioner asssociation and Hearing Counsel excepted to the initial decision, while the respondent terminal operators supported the examiner's position.

These exceptions fall into two distinct categories. The first is a disagreement with the examiner's allocation of the costs of the wharf, the waterway and 50 percent of the shipping gallery to the vessel as well as the level of overtime rates charged the vessel. The second is directed at the cost accounting methods utilized by the terminal operators and approved by the examiner, whereby the overall annual revenue requirements of the terminals was calculated at 10.7 million dollars. Petitioners contend that this figure should not exceed 7.8 million dollars per year.

We find that the exceptions of petitioner and Hearing Counsel are essentially a reargument of contentions which were exhaustively briefed and considered by the examiner in his initial decision. Upon careful consideration of the record, the exceptions, briefs and argument of counsel, we conclude that the examiner's factual findings and his conclusions with respect thereto were well supported and correct. Accordingly, except as noted herein, we adopt the initial decision as our own and make it a part hereof.*

There is some language in the initial decision which, despite the examiner's careful disclaimer, might be interpreted to mean that we are attemping to subject terminals' overall rate structures and levels of return to the same kind of regulation which we exercise over carrier rates under the Intercoastal Act. We do not believe that the conclusion of the examiner with respect to the reasonableness of respondents' rate of return on investment or his conclusions concerning the inclusion of leased property in the rate base, and respondents' method of valuing land and plant facilities, were necessary or relevant to his conclusions under the second paragraph of section 17, which is addressed to unjust or unreasonable practices or regulations. Thus, in adopting his initial decision, we neither agree nor disagree with these conclusions or the reasoning supporting them.

An appropriate order will be entered.

By the Commission.

[SEAL] THOMAS LISI
*Secretary*

*Page one of the initial decision containing the headnotes and appearances has been omitted.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 66–48

RATES AND PRACTICES OF THE PACIFIC NORTHWEST TIDEWATER ELEVATORS ASSOCIATION

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether the rates, rules and regulations contained in the tariffs of the respondent elevator operators effective April 1, 1966 constitute unjust or unreasonable practices in violation of section 17 of the Shipping Act, 1916, and the Commission, having this date made and entered its Report adopting the examiner's initial decision, which Report and initial decision are made a part hereof by reference;

*Therefore, it is ordered*, That the overtime rate of $57 per hour contained in respondents' said tariffs be, and the same hereby is, approved provided that respondents modify and amend those portions of said tariffs by substituting a rate not to exceed $40 per hour in those instances where overtime loading is ordered or requested by the terminal, except that such approval shall become null and void unless the tariffs so modified are filed with the Commission not later than sixty (60) days from the date of service of this order.

By the Commission.

THOMAS LISI
*Secretary*

[SEAL]

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER [1]

I. BACKGROUND OF THE PROCEEDING

*Institution of the Investigation*

The Commission instituted this investigation under section 17 and section 22 of the Shipping Act, 1916 (46 U.S.C. 816, 821), to deter

[1] This decision became the decision of the Commission March 6, 1968.

mine the legality of the revisions in the tariff rates, rules, and practices that were put into effect on April 1, 1966, by the respondent marine grain terminals. The seven corporations named as respondents [2] operate ten marine grain terminals in the Pacific Northwest on the Willamette and Columbia Rivers and the Puget Sound in Portland, Oregon, and vicinity, and Vancouver, Tacoma, Kalama, Longview, and Seattle, Washington. The Louis Dreyfus Corp., Harbor Island Dock Co., North Pacific Grain Growers, Inc., and Peavy Co. each operate one elevator. Cargill, Inc. operates an elevator at Portland and one at Seattle, and Continental Grain Co. operates an elevator at Longview and another at Portland. The latter elevator is no longer in operation, but it was a going concern at the time of the cost study upon which the rate changes were based; therefore, its accounting data are included in the exhibits and will be considered in this decision. The accounts of Harbor Island Dock Co. were not included in the study because its geographical location and its method of operation make it unique, and the Cargill terminal at Seattle was not included in the study because the inclusion of one of the Cargill terminals was considered to be adequate. Thus, the accounting exhibits cover eight terminals. No objection was raised regarding the selection of these terminals and exclusion of the others.

All of the respondent terminals except Northern Pacific are operated by large, grain merchandising corporations that operate on a national and, in some cases, international scale. These corporations export 76.7% of the grain that moves through the terminals. All but 1.5% of the balance is exported by the United States Department of Agriculture (U.S.D.A.).

That portion of section 17 that is applicable to this proceeding provides:

> 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 delivery 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.

Respondents, in the operation of their grain terminal elevators are "other persons" within the meaning of section 17 and as that term is defined in section 1 of the Shipping Act. *California* v. *United States*, 320 U.S. 577 (1944).

The "regulations and practices" that are under investigation here

[2] The order of investigation included the Kerr Grain Corporation which operated a marine grain terminal at Portland, but before the hearing this facility was destroyed by fire and this respondent was dismissed from the proceeding.

consist of respondents' employment of certain accounting principles and formulas for the development and allocation of costs in connection with their April 1, 1966, rate adjustments which increased their overall charges by approximately four percent. A list of respondents' tariff charges paid by vessel owners and by grain exporters appears on page 399. The respondents are authorized to adopt uniform rates and tariff provisions, insofar as the charges assessed against ocean carriers are concerned, by virtue of an Agreement approved under section 15 of the Shipping Act, 1916, and their association is called The Pacific Northwest Tidewater Elevators Association (PNTEA). They file separate tariffs with the Commission, but their rates, rules, and other tariff provisions are almost identical and can be considered as one for the purpose of this decision.

The changes in the rate structure increase the charges paid by the vessels by about 45 percent, while it leaves unchanged those charges paid by "cargo," the term adopted by the parties to mean the grain exporters. Prior to the increase, the vessels paid 8.6 percent of the tariff charges of the respondents and the cargo paid the balance. After the change, the vessels pay about 12 percent of the total. The tariffs of the respondents were revised in the following respects:

1. A service and facilities charge was assessed for the first time against the vessels, ranging from 12 to 21 cents per ton of grain loaded on the vessel, depending upon the type of vessel. The charge was established on a sliding scale due to the variation in the ease of loading various types of vessels and the parties here do not object to the sliding scale, if there is to be a service and facilities charge at all.
2. An increase in 10 percent in the dockage charge in those instances where the dockage is collected by respondents. At other terminals, the dockage is collected by the public body that owns the terminal property. In all instances where the terminals are leased to one of the respondents the sums collected as dockage are paid over by the lessee-terminal to the public bodies that own the respective plants. More recently, the public bodies further increased the dockage charge on the average of 25 percent. This increase is not under investigation here, although it figures in the accounting schedules.
3. Elimination of the standby and deadtime charges that applied during periods of delay in loading caused by the vessel.
4. An increase in the rate for loading grain during penalty overtime hours, which varied from terminal to terminal between $69.30 and $85 per hour, to $94 per hour. Loading occurs very

infrequently during the penalty overtime period and the parties have not questioned the legality of this charge.

5. A reduction in the rate for loading grain during overtime hours under the union contracts from between $56.70 and $70 per hour to $57 per hour.

The amount of the resulting increases and decreases in the charges to the vessels over a year's time is shown on page 400.

The Portland Steamship Operators Association, Inc., filed with the Commission a protest against the revised tariff charges and petitioned for the institution of an investigation of the practices that led to the increase in the rates and charges of the respondents. The investigation was instituted at least in part as a result of that protest and petition and the Association was joined in the proceeding as petitioner in the order of investigation. The Association is comprised of persons holding executive positions with steamship companies or agents of steamship companies located in Portland, Oregon. About 95 percent of the vessels that load grain at the terminals are operated as tramp (irregular) carriers. Petitioners represent the tramp vessels as well as the few operators of vessels engaged as common carriers that load grain at the terminals.

The United States Department of Agriculture (U.S.D.A.) intervened in the proceeding as well as a number of associations of terminal operators, the California Association of Port Authorities, and the Port of Longview.

*The Hearing*

The hearing was held in Portland, Oregon, from February 7, 1967, to March 2, 1967, without interruption. The 109 exhibits admitted into the record include many voluminous accounting studies prepared by the expert witnesses who testified on behalf of respondents, petitioners, and Hearing Counsel. At the outset of the hearing, the Examiner, in the company of counsel for all the parties and the accounting witnesses, visited several of the terminals in order to become familiar with the physical layout of typical plants and to observe the loading operations.

In order to complete this resume of the background of the controversy it should be noted that the petitioner filed a complaint with the Commission on March 31, 1964, against some of the respondents, contending that various rates, charges, and practices were in violation of the Shipping Act. Docket No. 1177 was assigned to the complaint, but before any further proceedings were had in the action, the parties agreed to a settlement under the terms of which the respondents made certain reductions in the charges complained of, and the complaint was dismissed. Under the settlement agreement, the respondents were to proceed immediately to have a "cost analysis of their grain terminal operation—prepared by Philip Linnekin, under the principles of the Freas formula." The agreement further provided that upon completion and review of the results of the study, respondents would review their tariffs and make such changes therein as they deemed advisable, and, after such changes were filed with the Commission, the petitioners should be free to take any action with respect thereto as they deemed advisable.

The accountant mentioned in the settlement aggrement, Philip E. Linnekin of San Francisco, has had a great deal of experience in the analysis of marine terminal rate structures, having assisted Howard G. Freas in his cost and revenue analysis in connection with Docket No. 640, which involved the rate structures at the marine terminals in the San Francisco area,[3] and having conducted the accounting analysis on behalf of marine terminals in connection with several other proceedings before the Commission and its predecessors involving the practices of marine terminals.

The accounting studies conducted by Linnekin pursuant to the settlement agreement consumed an entire year, and their results caused him to conclude that there was a deficiency in the revenue received by the respondent terminals from the vessels and that in order to correct this deficiency a services and facilities charge should be instituted by respondents. Gilbert J. Parr, a transportation rate consultant, with long experience in rail rate matters, reviewed the Linnekin studies and testified in support of them.

James Laurie, who has had lengthy experience in the field of transportation accounting, devoted several months to an analysis of the financial experience of respondents and their rate adjustments and he testified as an expert witness for petitioners. William T. Gatlin, the Supervisory Auditor in the Commission's Bureau of Financial Analysis, also devoted a considerable period of time to a study of the accounts of respondents and the Linnekin accounting data and exhibits. Mr. Gatlin testified as an expert witness for Hearing Counsel and supplied accounting exhibits reflecting his conclusions. Although Mr. Gatlin and Mr. Laurie had not previously conducted a cost analysis based on the Freas formula, their testimony demonstrated that their experience in the field of transportation fully qualified them as experts in this proceeding.

[3] *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948). The Freas formula and its preparation are described more fully, *infra*.

II. PRELIMINARY ISSUES

*Jurisdiction*

Respondents contend that the Commission lacks jurisdiction over the subject matter of the present controversy on the ground that section 17 does not grant to the Commission authority to investigate or determine the reasonableness of rates of ocean terminals. Acknowledging, at least by inference, that *California* v. *United States*, *supra*, upholds the Commission's exercise of jurisdiction over marine terminals, respondents argue that the *California* case did not involve the reasonableness of rates. They apparently feel that the Commission can look into their practices so long as the inquiry doesn't get into the net, dollar effect of the practices. Their contention that this proceeding is an investigation of the reasonableness of rates is based on the statements in the brief by Hearing Counsel that this investigation is concerned with the question whether respondents' rates are just and reasonable "as to level" and that "This means that the Federal Maritime Commission is now subjecting marine terminals to the same species of regulation as it has for years domestic offshore carriers under the Intercoastal Shipping Act of 1933."

In its recent decision in *The Boston Shipping Association, Inc.* v. *Boston Marine Terminal Association, et al.*, June 28, 1967 (11 FMC 1), a contention like that of respondents was rejected and the Commission's reason is applicable here (11 FMC 4, footnote 7):

> Taking the position that this is a rate-making case, complainants also contended that we were without jurisdiction. They do not, however, challenge the level of the strike storage charge and their only concern is with its assessment against them. That the proper allocation of the costs of providing terminal services as between users of those services is a matter within our jurisdiction under Section 17 is too well settled to be disputed now. *Practices, etc., San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941), affirmed *California* v. *United States*, 320 U.S. 577 (1944); *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).

It is not necessary in the instant proceeding to determine whether the Commission has jurisdiction over a controversy where the issue is the reasonableness of rates of marine terminals, like the issues mentioned by Hearing Counsel as arising under the Intercoastal Act. This is simply not such a case. The question involved here is whether the practices of respondents in their determination and allocation of costs are reasonable. It was the respondents themselves who selected the general method for testing these practices; namely, the application of cost accounting as a means of determining whether there is a deficiency in terminal revenue or, stated in a different way, whether the charges provide a fair return on investment. The Examiner and the other parties to the proceeding accepted this as a proper method here, but the use of this system does not transform this proceding into a "rate case." The fact that that system resembles, in some respects, the system normally employed in a proceeding under thhe Intercoastal Act is of no moment. The approach employed in determining the reasonableness of rates differs from that used here in other respects.

The respondents introduced into evidence and relied upon the study and report made by Howard Freas in Docket No. 640, *supra*, and the same method of investigation was employed here as was employed in that proceeding. Mr. Freas pointed out in his report that his investigation was confined to a cost and revenue study and that it did not include any consideration of the other rate-making factors such as value of the service and other considerations that go into an investigation of the reasonableness of rates. Such considerations played little or no part in this proceeding either. The U.S.D.A., Hearing Counsel, and petitioners support the Commission's jurisdiction, stating that *California* v. *United States* clearly supports the authority of the Commission to proceed in this type of investigation. Respondent terminals are an inseparable link in the transportation system that serves our waterborne foreign commerce. The plan of the Shipping Act would be frustrated and the rate-payers would be left to the mercies of the terminals if, having authorized their collective rate-making through section 15, thus eliminating rate competition, their practices in making the rates were held to be exempt from regulation.

*Burden of Proof*

The respondents and the petitioners each contend that the burden of proof in this proceeding is on the other, each arguing that the other is the "proponent of a rule or order" within the meaning of Rule 10(o) of the Commission's Rules of Practice and Procedure (46 CFR 502.155) and section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006(c)). The A.P.A. and Rule 10(o) place the burden of proof upon the proponent of a rule or order. There is no failure of proof on any of the issues in this proceeding and the evidence does not preponderate equally between the antagonists on any issue. Therefore, there is no occasion to base any conclusion here on the failure of any party to sustain its burden of proof, *Alcoa S.S., Inc.* v. *Cia. Anonima Venezulana*, 7 F.M.C. 345, 358 (1962). This issue therefore is not in the case. The Examiner has devoted considerable attention to the question of burden of proof in such a proceeding, however, and has reached one conclusion with complete conviction. It is that much harm can be done by an attempt at generalities, by way of dicta, on the subject of burden of proof in administrative proceedings; and none will be attempted here.

The U.S.D.A. brief correctly points out that the various participants in a regulatory proceeding should see to it that the record is complete for decision and thus avoid having to reach conclusions on the basis of a failure to sustain a burden of proof. This has been adequately accomplished in this proceeding.

### III. THE SUBSTANTIVE ISSUES

There is no dispute with respect to the amount of respondents' revenues received during the cost study period, which was the year ending July 1, 1964, under the rates then in effect. Furthermore, there is no dispute concerning the amount of additional revenue or the total revenue which respondents would have received during the cost study period had the April 1, 1966, rates been in effect during that period. No question is raised as to respondents' combining together the financial experience of all eight elevators in conducting its cost study, and petitioner correctly states that this practice achieves a desirable uniformity of rates. The method has been followed in previous Commission cases where, as here, it is appropriate. *Pacific Coast/Puerto Rico General Increase in Rates*, 7 F.M.C. 525, 533 (1963). Since the parties did not contest this method, arguments based on differences in net revenues between the terminals are irrelevant.

The subsidiary issues in the proceeding can best be described by briefly enumerating the contentions of the petitioners:

1. Only 23.3 percent of respondents' terminal costs should be chargeable to their wharfinger operation, and the other 76.7 percent charged to the grain dealing operation.
2. Respondents' property should be included in the rate base at depreciated original cost, rather than the estimated and undepreciated cost of reproduction.
3. In the case of the five terminals that lease their plants from public bodies,[4] the value of these properties should not be included in the rate base for the purpose of testing the adequacy of the revenues.
4. Depreciation expense should be based on actual investment (original cost), rather than an estimated reproduction cost.
5. They question the rate of return as related to rate base.
6. They contend that none of the costs incident to the shipping gallery or the waterway should be charged to the vessel but that these costs should be charged to the cargo; and that only 50 percent of the costs incident to the wharf should be charged to the vessel. Hearing Counsel and U.S.D.A. take a different position

[4] Those operated by Continental (at Longview), A.D.M., N.P.G.G., and Cargill.

on this question, which is described, *infra*, where these issues are discussed.

7. They question the calculation of incremental costs in arriving at the overtime charge.
8. They object to the imposition of any service and facilities charge by the marine grain terminals.
9. They contend that placing charges on a volume basis is an unfair practice because it puts a premium on inefficiency.

In addition to some of the questions raised by petitioners, Hearing Counsel question certain tariff definitions of respondents covering their wharfinger charges. The U.S.D.A. objects to the rate increases on the basis of their alleged effect on Government aid programs, as well as raising some of the issues described above. The other interveners, all of whom operate marine terminals, came into the case primarily to support the services and facilities charge recently inaugurated by respondents.

## IV. RESPONDENTS' PRACTICES IN ESTABLISHING THE RATES IN QUESTION

### *Physical Characteristics of the Terminals and Method of Operation*

The function of a marine grain terminal, like any other terminal, is to provide waterfront facilities and perform various services to accomplish the interchange of cargo between inland carriers and ocean carriers. They are not operated for the purpose of storing grain. Grain is brought to the terminals from country elevators [4a] by means of rail cars, trucks, or river barges, and, by the use of automated unloading machinery, it is conveyed underground into the terminal then elevated into the bins. When the grain is to be loaded aboard a vessel for export, a gate or valve at the bottom of the particular bin containing the type of grain to be loaded is opened and a system of underground conveyor belts and an elevating device move the grain to the scale room in the *headhouse*,[5] where it is tested, graded, and weighed by state inspectors. The terminal has completed any cleaning, weighing, and other processing done for the owner of the grain and at this point the actual loading begins.

The grain is moved to the vessel by means of the *shipping gallery* which consists of a system of conveyor belts housed in enclosed ramps that extend from the *headhouse*, which contains the scale room, the elevating machinery, and other facilities, to a point high above the

[4a] Contentions of the parties based on charges and operations at country elevators are irrelevant. They are so unlike marine terminal elevators that such a comparion is unwarranted.

[5] The underscored words describe important component parts of the elevator that figure prominently in the issues. Most of them are labelled in the picture on the following page.

*wharf*. At that point it intersects the other portion of the *shipping gallery* which runs parallel to and above the *wharf* for a distance long enough to serve large, ocean-going vessels.

Six *spouts* protrude at equal intervals from the *shipping gallery*, through which the grain is fed into the holds of the vessel. Two *spouts* may be used at a time and they can be moved laterally, up and down, or telescoped in and out, so as to reach the various holds, and "trim" them, by means of electric winches that are a part of the spouts. The aiming of the spouts and of the flow of grain into the holds is controlled by stevedores who are stationed on the vessel and are employed by and paid by the vessel owners. The rate of flow of grain and the type of grain is controlled by terminal employees, stationed in the terminal, in response to bell signals transmitted to them by the stevedores.

The picture on the next page depicts the plant of the Northern Pacific Grain Growers at Kalama, Washington. The loading spouts could not be labelled in the accompanying picture, but they are readily seen extending from the shipping gallery to the vessel. While it is not apparent from the picture,* the structure of the shipping gallery is entirely separate from the wharf. The towers that support the shipping gallery extend down through the wharf but they are not part of the wharf nor are they attached to it, because the wharf is not a stable enough structure to support the gallery.

During the year ending June 30, 1964, which was the year selected for the accounting study, 615 vessels loaded a total of 4,684,700 short tons of grain at the eight terminal elevators.[5a] This was an average of 412 tons per hour during the time ships were at the terminals. The terminals are capable of loading 800 tons per hour if there are no interruptions. A multi-spout terminal such as those of respondents can load vessels just about twice as fast as a simple, single spout terminal could. Approximately six or seven days are required, at the longest, to load a 10,000 ton vessel at one of the respondent's elevators, while a single spout elevator would take 12 to 15 days. The cost to the owner of delaying a vessel of the type that calls at respondents' elevators for one day would vary from $1,500 to about $4,000 depending on the size and nationality of the vessel. At a simple, one spout elevator it would be necessary to shift the vessel about as the various holds are loaded. This would burden the owner with the expense of tugs and line handlers in addition to the expense caused by the delay occasioned.

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*The picture appearing in the initial decision is not reproduced here.

[5a] There was tacit agreement that the fiscal 1964 volume level will prevail in ensuing years and no evidence to the contrary was presented.

The economic life of the terminal structures is generally taken to be 50 years. The economic life of the machinery and equipment varies, but on the average it is about 20 years. Depreciation is taken by the elevators on a straight line basis and it was applied in this way in the cost studies here. No question has been raised as to the economic life of the property or to this method of taking depreciation.

A facility not identifiable in the accompanying picture is the barge dock which, at the various terminals, is either a unit separate from the wharf or a portion of the wharf used solely for berthing river barges bringing grain to the terminal. It is equipped with mechanical devices to discharge the grain onto the conveyor system that moves it to the terminal. The berthing facility for barges is used exclusively for this purpose and is not considered part of the wharf for this investigation.

*The Formula Employed in Establishing the Rates and Charges*

A general structure for a cost formula applicable to marine terminals was first prepared by Dr. Ford K. Edwards, at the time, in 1940, a transportation economist for the California Railroad Commission. This formula (called the Edwards-Differding formula) was introduced in evidence in Docket No. 555 before the United States Maritime Commission (U.S.M.C.).[6] In 1946, the Association of Marine Terminals in California requested the U.S.M.C. to conduct a study of its practices and formulas for establishing rates and charges. In connection with the formal investigation that ensued,[7] Docket No. 640, the Commission employed Howard G. Freas, a rate consultant who later became a member of the Interstate Commerce Commission, to conduct a financial study of the terminal operations and prepare a cost formula. Freas patterned his formula almost entirely after the Edwards-Differding formula.

Philip E. Linnekin, who conducted the cost study on behalf of respondents here, assisted Freas in the 1946 study. Linnekin employed the Freas and Edwards-Differding approach to the development of respondents' costs, the allocation thereof between vessel and cargo, and the designation of tariff charges. There is no dispute here as to the applicability of the Freas formula to a grain terminal operation, except that Hearing Counsel suggest that the "point of rest" concept, to be discussed later, is inappropriate for a grain terminal. The U.S.M.C. approved the application of Dr. Edwards' formula in Docket No. 555 and the Freas formula in Docket No. 640 and F.M.B. approved the application of the Freas formula to the terminals in the Pacific Northwest in *Terminal Rate Structure—Pacific N.W. Ports*,

[6] *Practices, etc. of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941).
[7] *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948).

5 F.M.B. 53 (1956), Docket No. 744. The handling of bulk cargoes was included in the operations under study in those cases but where grain was concerned the method of operation was somewhat different than that employed by the respondents here. At the time of the earlier studies grain was either loaded in bags or by means of a clamshell. More recently, the Federal Maritime Commission approved the application of the Freas formula to modern grain terminals, including respondents', in a proceeding where the terminal charge for wharfage was upheld. *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653 (1965).

The development or identification of the terminal costs is one of the two major goals of the formula, and is at least as valuable as the second goal, which is the allocation of the costs between vessel and cargo. The costs were collected by Linnekin, as they were in the Freas study, under three general headings; plant costs (or carrying charges), equipment costs, and labor costs including administrative expense, as shown in Schedule I, which is attached as an appendix. This is a report sample covering just one of the eight terminals. It will be noted that these costs are prorated between the various physical components of the terminal. Prorating was done on the basis of land area or relative value, as appropriate. Schedule II, also attached, demonstrates how the plant costs and other costs are distributed to the various tariff charges. It should be borne in mind that at the time of the study there was no services and facilities charge and therefore the plant and equipment costs charged against the vessel appear under "dockage." Schedule III in the attached report sample was compiled for the purpose of segregating the straight-time loading costs which are chargeable to the cargo and the overtime costs which are chargeable to the vessel. It will be noted that the total loading costs in the third column on Schedule II are the same as the total loading costs shown in Schedule III. These schedules are incorporated in this decision in order to portray the method employed. Some of the figures thereon must be revised in accordance with the conclusions reached herein on various issues.[7a]

The schedules following the report samples reflect the combined experience of the eight terminals in the cost study year ending June 30, 1964. In allocating the costs between vessel and cargo, Linnekin stated that it was his intention to use the same general standard employed by Freas; that is, to apportion them in the proportion that vessel and cargo respectively use the facilities and receive the services provided. This "use" concept is applied, in part at least, by holding the

[7a] Many additional Schedules are used to refine and explain the basic Schedules I, II, and III.



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vessel responsible to the wharfinger for all usages and services from the "point of rest" of the cargo. This standard is discussed in more detail herein under the discussion of the allocation of the costs of the shipping gallery. All costs that are not assigned to the vessel are charged against the cargo. The parties do not question the fact that all terminal expenses, including a reasonable return on investment, are to be collected in the rates and charges of the terminals either from vessel or cargo. Many questions are raised, however, as to the inclusion of certain costs as wharfinger costs.

Applying the principles of the Freas formula, as he related them to the grain terminals, Linnekin concluded that the vessel should be charged with an appropriate allocation of general and administrative expense, as shown in the attached schedules, certain direct labor costs, and the following plant and equipment costs: 100% of the waterway; 100% of the wharf; 50% of the shipping gallery.

*Wharf—Allocation of Costs Between Vessel and Cargo*

Relying on the Freas allocation of the apron portion of the wharf to the vessel and upon their view of the use made of the wharf at a grain terminal by the vessel, respondents allocate the costs incident to the wharf entirely to the vessel. At a general cargo terminal, that portion of the wharf where the cargo is deposited and picked up by the ship's tackle is described as the apron. Freas allocated this portion of the wharf to the vessel because, as between vessel and cargo, it is used exclusively by the vessel and it is on the vessel side of the "point of rest." The portion of the open docks adjacent to a storage shed at a general cargo terminal, including that portion containing rail tracks, were allocated in part to the cargo by Freas. At the grain terminals, the wharf is not adjacent to the storage space and frequently is only connected to the land by a ramp, as shown in the preceding picture, and it is therefore analogous to the apron wharf. It is used as a means of tying up the ships, for provisioning and repairs of ships, and for access to the ships by the ships' personnel and stevedores.

Hearing Counsel, U.S.D.A., and petitioners contend that 50% of the wharf should be assigned to cargo.[7b] They have not shown specific uses of the wharf to any appreciable extent on behalf of cargo, however. Hearing Counsel states, "Since respondents are primarily grain merchandisers even the vessel is for their benefit, and since the wharf is an adjunct to a vessel, berthing it is certainly of benefit to respondents." On such a theory, all terminal costs would be charged against

[7b] If petitioners intended to leave the impression in their brief that the Commission determined in Docket No. 1084, *supra,* that all wharf costs were allocable to cargo, they misread that decision.

respondents as grain merchandisers and no allocation would be made between vessel and cargo. Hearing Counsel's recognition that the wharf is an "adjunct to a vessel" demonstrates that its costs should be allocated entirely to the vessel under the Freas formula.

Apart from their position with respect to the allocation of the costs of the wharf, petitioners advance a theory somewhat like that quoted above from the brief of Hearing Counsel. They argue that since nearly 80% of the grain loaded at the respondents' terminals is exported by respondents in connection with the merchandising end of their business, 80% of the total costs should first be allocated to the respondents as grain dealers and only the remaining 20% should be allocated as between vessel and cargo under the Freas formula. This argument overlooks the fact that the revenues shown in the Linnekin schedules include an accounting charge made against the various respondents for all of the tariff charges assessable against the cargo exported by them as grain dealers. In some instances the books and records of the respondents' terminals reflect these charges against the merchandising divisions. In the other cases Linnekin properly included the equivalent of such charges as revenue. As an accounting matter, this places the merchandising operation of respondents in the position of a stranger to the wharfinger operation. Under a proper allocation of the costs between vessel and cargo, as found herein, the cargo is assessed over 87% of all terminal costs. Rsepondents will bear this large proportion of the costs in connection with their exports of grain. Their dual operation need not subject them to the payment of costs expended for the benefit of others any more than a steamship company that operates a wharf would have to provide facilities for cargo without making a charge.

Petitioners attempt to draw a parallel between this situation and the non-wharfinger costs excluded from consideration in the Freas formula. The latter consist of such non-terminal operations as stevedoring, public warehousing, and pilotage. There is no analogy between the exclusion of the costs incident to these activities and the treatment of truly wharfinger costs on the ground that a separate division of respondents, located far away from the terminal, ships grain from the terminal. *Intercoastal SS Freight Assn.* v. *N.W.M.T. Association*, 4 F.M.B. 387 (1953), does not require a different result, as contended by petitioners. The issue in that case was quite different. The question there was whether checking service performed by the terminal was done for the benefit of the ship or the cargo. The Board's decision on that question has no bearing on apportionment of terminal costs where the terminal is the exporter of cargo.

*Waterway—Allocation of Costs*

That portion of the former terminal charges (now services and facilities) that is attributed to the cost item described as "waterway" is assessed for the use by the vessel of an appropriate area of the river adjacent to the wharf necessary for berthing the vessel. The Freas formula fixes the extent of this area as a strip of water extending 75 feet out into the river for the length of the wharf. This represents the amount of area needed for berthing. Linnekin adopts this assumption and arrives at the value, as did Freas, by applying the ratio that this area bears to the total land area used in the operation of the terminal to the total value of the land. Neither the terminals that own their facilities nor the lessors, of those that do not, own the land under the waterway; but under the law of Oregon and Washington the riparian owner or his lessee has the privilege of erecting a wharf and bringing vessels into the wharf. For this reason, the land used by the terminals, being contiguous to navigable water, has an enhanced value. As between vessel and cargo, the vessel makes exclusive use of this enhanced value and the Linnekin method of establishing the amount of this enhancement is a reasonable means of doing so.

Petitioners resist the apportionment of this item of cost to the vessel on the ground that none of the respondents have any investment in the land under the waterway, as some of them did that were the subject of the Freas study. This was not the basis of the Freas allocation since he stated on page 100 of his study, which forms a part of the record here as Exhibit 1:

> The assumption then is that the water area described is necessary for the vessel's use, that this is so regardless of whether the waterway is owned by the terminal or by the Government, and that the value of the adjoining shoreland is proportionately enhanced thereby.

The U.S.D.A. recognizes that the vessel receives some benefit from the waterway and that part of its cost should be attributed to the vessel, but they argue that "the marine grain terminal would ship no grain out of its elevator if it were not for the waterway" and therefore the vessel "should not be charged with 100% of the waterway expense." This argument overlooks the underlying basis upon which the allocations are made under the Freas formula, which received the general approval of U.S.D.A. in this proceeding. It could as easily be argued that since no grain could be shipped unless the vessel were able to come in to the wharf, the costs should be charged to the grain. This sort of reasoning would never lead to a conclusion as to the proper allocation of the cost of any of the terminal facilities since it departs entirely from the user concept.

*Shipping Gallery—Allocation of Costs Between Vessel and Cargo*

The parties are in sharp conflict regarding the proper allocation of terminal costs related to the shipping gallery. Officials of the respondents who testified on the subject would assign these costs to the vessel on the theory that the gallery is there for the sole benefit of the vessel. They stated that a simple one-spout device or shoot leading from the terminal to the vessel would serve the interests of the terminal adequately and that the high speed conveyor and multiple spout system benefits the vessel by rapid loading and eliminates delays that would be occasioned if there were but a single spout requiring frequent shifting of the vessel, which saves the vessel from $1,500 to $4,000 for each day saved. Loading the average ship at a single spout elevator would take at least 6 or 7 days, while only 2½ or 3 days are required at a multiple spout elevator.

Linnekin agreed that the gallery serves the vessel in this way and in addition, believed that the Freas formula bears out the conclusion that the gallery benefits the vessel because it compares to the aisle space between the point of rest of the cargo and the vessel at a general cargo terminal. The point of rest concept will be discussed later. Freas assigned the cost of such aisle space to the vessel. Linnekin was markedly and admittedly more conservative in this regard than his principles, however, and saw some benefit flowing to the cargo in this part of the terminal facilities. He urged the allocation of the gallery 50% to vessel and 50% to cargo. The cargo, as well as the ship, benefits from the faster loading and greater efficiency made possible by the gallery. This enures to the benefit of the seller, ultimately, by lowering the loading expenses. As a matter of physical use, of course, the grain is transported by means of the gallery. While the advantages of the gallery to the cargo may not be as immediate nor as apparent as those to the vessel, the Linnekin position is chargeable to the respondents, particularly in view of their general statement at another point that the positions they were advancing herein on all issues were those expressed by Linnekin. This is not to say that the proper allocation of gallery would necessarily be found to be 100% to the vessel, in the absence of Mr. Linnekin's more conservative approach. It simply means that we are not required to strain and struggle with the question as to what minor amount, if any, the vessel should be charged beyond the 50%. The allocation of 50% to the vessel is a conservative and acceptable estimate of the vessel's obligation.

The other parties would allocate the gallery solely to cargo on the additional theory that the seller undertakes, in the uniform FOB sales contract, to "deliver the grain to the end of the spout" and they contend that the buyer would be charged twice for the use of this facility; first, as part of the purchase price of the grain and, second, if the cost is allocated to the vessel, when this charge is passed on to him as part of the charter hire or freight rate. This theory hinges on the argument made in the briefs that this cost "has in the past been borne by these grain traders." This latter argument is not conclusive because all costs borne by the grain traders in the past will continue to be borne by them in the future and not by the vessels. The terminals make no charges, directly, against buyer of the grain. Having found that there is a deficiency terminal revenue, as will be demonstrated later, the question here is: Who will bear the necessary *increase?* Whether it is vessel or cargo, this increase will only be paid and passed along to the consumer only once.

Furthermore, the grain sales contract between U.S.D.A. or one of the respondents, as grain seller, and a buyer of grain does not determine the propriety of any particular allocation of costs between vessel and cargo any more than does the provision of the charter party between the vessel and the grain buyer, who is the shipper. The standard charter is on a "free out" basis and, in addition, expressly obligates the vessel to pay the cost of loading the grain. These charter contracts do not govern the proper allocation of terminal costs between vessel and cargo. Freas stated:

Division of responsibility between shipper and carrier is of no consequence in a study of this nature. The concern is with the responsibilty of each to the wharfinger.

The sound logic of this axiom also applies to the contractual division of responsibility between the buyer and the seller of the grain and probably with stronger reason. First, the seller is not always the terminal, and, second, regardless of the identity of the seller, it is more difficult for the seller to include terminal charges in his sales price than it is for the vessel to pass such charges along to the shipper. Grain prices are determined by the world market, while charter rates are established by petitioners for this trade alone and can be increased to reflect rising cost.

The charter and the sales contract alike must be interpreted, for this purpose, to mean that the terminal charges will be borne by the vessel (under the charter) and the seller (under the sales contract) only insofar as such charges are assessed against either of them. Therefore, neither contract can form the basis for allocating costs between vessel and seller (cargo). However, the business practices of the respondents, as grain dealers, and the petitioner-carriers, as evidenced by their respective contracts, do provide a clue to the explanation of the extreme degree to which each party resists the allocation of costs that, ostensibly, would ultimately be borne by a third party (the buyer) anyway. This factor, understandably, hardly came to light in the evidence and the briefs. The incongruity of these contracts, if they are considered to be inconsistent, cannot be corrected in this proceeding, of course. However, the respective positions of respondents (as sellers of grain) and petitioners, in relation to their ability to recoup any increased charges from their customers, must be borne in mind.

The Freas formula is designed to develop the total costs of the terminal and then apportion them to vessel and cargo in proportion to the use made of the facilities provided and of the services rendered. The vessel is held responsible to the wharfinger for all usages and services from, but not including, the "point of rest" of the cargo. All other costs are assessed against the cargo. *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57, 59 (1948).

Taken in the context of his report, the "point of rest" criterion, which plays such an important role in such allocations, was used by Freas as a shorthand expression to define the traditional concept as to the respective duties of the carrier and shipper with respect to the transfer of cargo between them for the purpose of ocean transport. The shipper is traditionally obliged to bring cargo to a point where it can be reached by "ships tackle" and the ship has the responsibility to accept the cargo at that point—the "point of rest"—for loading aboard the vessel.

Unfortunately we do not have the benefit of a Freas view as to the point of rest of grain moving through a modern terminal elevator, for such facilities did not exist at the time he made his study. Freas fixed the point of rest for general cargo as a place on the pier where the ship can reach it, if there is no shed, or in the shed if there is one. In the latter event the aisle space is allocated to the vessel because the vessel has the duty to pick up the cargo in the shed and it uses the aisles in the process of loading. The apron of open wharves not having rail tracks are allocated to the ship for a certain distance (35 feet) back from the pier face that is deemed to be required for the lifting of cargo by the ship.

The parties are at odds over the location of the point of rest of the grain loaded at respondents' terminals. Petitioners say it is at the vessel end of the spout, as does Gatlin. Hearing Counsel departs, in a way, from the view of their accountant and discredits the point of rest concept as a factor to be considered in allocating the cost of the gallery. Respondents place the point of rest at the terminal end of the gallery, saying that it compares to the aisle space in a general cargo terminal.

The "point of rest" test is not entirely helpful with reference to the shipping gallery because of the physical difference between the grain-loading and the general-cargo-loading operations. The "end-of-ship's-hook" concept has no parallel in the case of a vessel loading grain.

If there is an analogy, the view of the respondents is more accurate because the grain is in continuous motion from the terminal end of the gallery until the loading process is completed. Also, the seller of the grain brings his grain to that point for loading. He employs the terminal for this purpose. Physically, there is no other place where he can make it available for the ship to load. Then the ship using stevedores jointly with the services and facilities of the terminal, receives the grain at that point for loading.

Elevator employees control the volume of flow of the grain and type of grain being loaded in response to signals from the stevedores. Thus the operation of the system is a joint undertaking between ship and elevator, the latter acting for cargo. The loading facility itself serves and benefits both ship and grain. It costs should be borne jointly and equally by vessel and cargo.

Petitioners argue that the gallery should be treated like Freas treated an oil pipeline on the piers in California, where none of its expense was allocated to the vessel. Linnekin correctly points out that there is little, if any, similarity between the two in cost, complexity, or operation. Even assuming that some degree of analogy exists, this comparison is outweighed by the other considerations described above.

For all the foregoing reasons, the practice of the respondents in allocating 50% of the expense of the gallery to the vessel is not unreasonable under section 17.

*Treatment of Leased Property*

In the accounting procedure incident to the application of the "fair return on investment" standard, the Linnekin study treats the 5 respondents that lease their plants from public bodies [7c] as though they own the property. These five lease their properties on long-term leases which obligate them for periods up to 35 years. The obligations of the respondents under their leases have constituted the security for the issuance of revenue bonds by the public body to defray the cost of improvements. The pledge of the faith and credit of these large trading corporations, who operate the terminals, has, in this way, contributed to capital improvements in the terminals and it demonstrates the degree of the lessees' commitment. The long-term leases impose a

[7c] NPGG as sublessee from a railroad company.

risk and a burden on these lessees that is somewhat comparable to an investment in fee ownership.

However, the other parties object to this treatment of leased property, even though the rental payments are excluded from expenses in arriving at the revenue requirements of respondents on the grounds that: (1) This method provides a windfall to respondents since it would give them a return on property they do not own; (2) The Commission, in *Atlantic and Gulf—Puerto Rico General Increase*, 7 F.M.C. 87 (1962), and its predecessor in *Atlantic—Gulf/Puerto Rico General Increase in Rates and Charges*, 6 F.M.B. 14 (1960), excluded certain rented property from the rate base of the carriers involved in those cases. Hearing Counsel argues, in addition, that to allow respondents a return on leased property would require the rate-payers to pay a double return on investment, once to the lessor and once to the lessee.

Respondents contend that it is necessary and proper to treat leased property as owned for the purpose of this test because: (1) The Freas study does so; (2) The respondents would be deprived of a profit if they were not allowed to use such property as a part of the base; and (3) It is desirable to have uniformity in the accounting methods and terminal rates of the respondents and this cannot be achieved without employing a uniform measure for the rate base. As to the latter point it can be noted that petitioners favor uniformity in the rates of the terminals.

That portion of the Freas study that developed the basic principles for the development of the costs incident to marine terminal operations is at least as valuable and informative as that portion of his system that treats with the allocation of these costs as between vessel and cargo. Freas found that it was desirable to treat leased property at though it were owned, where a substantial proportion of the terminals leased their property, and he conducted his cost accounting on that basis in the Docket No. 640 study. To reject this portion of his conclusions, or any other substantial element, and attempt to apply the remainder, would throw the result out of balance.

As Freas points out (page 28, Ex. 1), it is not unusual to treat rented property in this way. The Commission and its predecessor have done so where the prevailing circumstances were such that this treatment led to the fairest result. *Hawaiian Inter Island Rates*, 7 F.M.C. 151, 156 (1962); *General Increase in Alaskan Rates and Charges*, 5 F.M.B. 486, 498 (1958).

The Commission has uniformly employed the fair-return test in assessing the reasonableness of rate structures in the offshore domestic commerce. The only other means of determining whether alleged revenue requirements are developed by means of reasonable practices is to compare revenues and expenses under the "operating ratio" theory. The Commission and its predecessors have rejected the use of this test and the parties here generally agree that its application to these terminals would not be feasible. An insurmountable drawback is the absence of the body of historical data necessary to establish a norm for a reasonable operating ratio for this type of business. Such a test also places a premium on increased expenses.

If all eight terminals rented their plants, and these were excluded from the rate base, they would be required to operate without profit. A confiscation of their property would result. With five of the eight renting their facilities, their profits would be reduced *pro tanto* by the exclusion of this property from the base. The unfairness of this result is apparent, and this is what led Freas to conclude that where a large proportion of the property is leased it should be treated as owned for this purpose of testing the reasonableness of the net return actually realized. It must be so treated here for the same reason and, in addition, to prevent a distortion of the Freas system by a dismemberment of its parts. The fair-return and rate base exercise never constitutes actual costs, of course. They were developed in the case law merely as a convenient economic test of business operations. Treating rented property as owned is no less realistic than the test itself.

The cases cited by petitioners involved instances where the leased property was only a small portion of that used by the carriers whose rates were under study. The inclusion of the leased property here will not give respondents a "windfall," as contended, because the rental is excluded from expenses in the cost account.[7d] A contrary result would give the ratepayer a windfall and could very well put the terminals out of business. This treatment of leased property will not allow a double return, as contended by Hearing Counsel, since the lessor and lessee are treated as one in this method of accounting.

## V. RATE BASE AND RETURN ON INVESTMENT

### *Valuation Method—Original or Reproduction Cost*

Respondents urge that estimated reproduction cost is the proper standard for evaluating their terminal structures and equipment in arriving at the rate base to test the reasonableness of the profits they will experience under their increased charges. They do not depreciate these costs which, according to their expert testimony, come to a total of $39,846,636 for all eight terminals. This figure is used in the Linnekin accounting schedules.

[7d] Rent is treated here as including the dockage paid over to the lessor and the total for the year was $1,285,388.

Petitioner strenuously resist the use of undepreciated, estimated reproduction cost for inclusion in the rate base. They argue that this would provide a fictitious, swollen allowance of return on investment to respondents. The Freas formula recommends consideration of both original and reproduction cost in arriving at fair value, but this is the one issue as to which the Freas approach cannot be accepted. At the time of the Freas study that approach to valuation had the sanction of the Commission's predecessor agency, but more recently the Commission has adopted, and has since employed without exception, the "prudent investment" approach whereby property and betterments thereto are valued at original cost, depreciated to the period under consideration. *Atlantic and Gulf—Puerto Rico General Increase in Rates and Charges*, 7 F.M.C. 87 (1962); *Pacific Coast/Hawaii etc. Increases in Rates*, 7 F.M.C. 260 (1962); *General Increase in Alaska Rates and Charges*, 7 F.M.C. 563 (1963); *Alcoa SS Co., Inc.—General Increase*, 9 F.M.C. 220 (1966). Respondents have advanced no valid theory that would distinguish this principle where grain terminals are concerned and I know of none. As a matter of fact, terminal property was part of that under consideration in the first of the cases cited above. This departure from the Freas approach can be balanced by making an appropriate adjustment in the rate of return he used.

Respondents also contend that the data on the original cost of their property is unreliable and that therefore we must turn to the estimates of reproduction cost. While it is true that the original cost of these structures has not been ascertained with pinpoint accuracy, such precision is not necessary for the purposes of proceedings of this nature. *Increased Rates on Sugar*, 7 F.M.C. 404, 411 (1962). The fact is that the reproduction cost estimates contended for by respondents are at least as unreliable as the original cost data. In some cases the estimates submitted by respondents are those of their employees. Such an estimate is likely to lack the objectivity that must attend the evaluation of property. In addition, there was confusion among respondents' witnesses as to just what the replacement cost should be based upon. Linnekin based his accounting figures on "replacement" cost and, later on, in the course of the hearing, after cross-examination on the point, he testified that he really meant "reproduction" cost. Fortunately, it is unnecessary to distinguish the two here or to choose between them because neither is acceptable. It will suffice to say that the evidence relating to these two words was both cloudy and voluminous.

As to the valuation of the land itself, it is quite true, as respondents say, that the evidence of original cost is so scanty and uncertain that it should not be relied on. At the Examiner's request, an expert appraisal witness of respondents, S. M. Holbrook of Portland, did the best he could to estimate the value of the real estate as of the time the elevators were built, up to 50 years ago. He said that neither he nor anyone else could arrive at such estimates with confidence. Mr. Holbrook's background and experience are such that there probably would be no one better qualified to provide these historical values. The resulting figures, even if they were completely reliable, varied so erratically between elevators that this method is shown not to be the best valuation basis to employ. The tracts varied in estimated original cost from $250 per acre up to $40,000, as of the respective times the plants were built. In the Freas study this same problem was encountered and Freas therefore used current market value for the land. The parties, except petitioners, urge the use of this standard, and even petitioners used these figures in some of the accounting exhibits. The current market value of the land will be used here.

*Land Value*

The combined current market value of the land occupied by the terminals is reported as $1,076,677 by the respondents, through witness Linnekin. This comes very close to the $1,052,887 shown in witness Gatlin's exhibits. The original cost figures were either taken from their records by Gatlin or reported to him by the lessors. The Gatlin figures are a little low in that two of the tracts were shown at the conservative figure representing cost of acquisition, without any site preparation, and the Linnekin work papers indicate that two more also may have been so reported. The tabulations of both witnesses tend to inflate the value of the Terminal 7 property because they include the value of the entire 30 acre tract, while only 5.3 acres are devoted to the terminal operation. The riverfront land is substantially more valuable than the remainder, of course, so the Linnekin and Gatlin valuation of $113,860 for the terminal 7 land should be reduced, with the result that the combined current market value of the land of all the terminals will be rounded to $1,000,000 for the purpose of this decision, taking into account the Gatlin figure being a little low on at least two of the tracts. In arriving at this approximation of the value of the land, the question of the amount of land required for the terminal facilities has been taken into consideration, as urged by petitioners.

*Value of Structures and Equipment—Original Cost Depreciated*

Gatlin made a survey of the original cost depreciated of the structures and equipment used by respondents in their terminal elevator operations by inquiring of their officials, reviewing the records of the respective owners and the Linnekin work papers, and reported a total value of $22,712,427. Linnekin reported a value on the basis of depreciated original cost of $24,726,688 for this property. His figure reflects depreciation up to the date of the study, while Gatlin continued the depreciation to the beginning of fiscal 1966. Linnekin also shows a greater value for the Cargill Terminal than Gatlin by about $1.5 million. Colonel Alfred M. Eschbach, Chief Engineer for Portland Public Docks, a highly qualified expert on terminal construction and valuation, gave in detail the construction cost of that terminal and the cost of the betterments added through the years. Public Docks owns the Cargill Terminal. These betterment figures are too numerous to set out here, but it will suffice to note that his figures tend to bear out the Gatlin exhibit and since the Linnekin estimate for this terminal was based solely on a calculation of the ratio of original cost to replacement cost of the other terminals and applying that ratio to the replacement cost of the Cargill Terminal, the Gatlin figure is more acceptable. The Gatlin total will be rounded upward to $23,000,000, however, to reflect a modest increment to approximately place the depreciated value as of the date of the cost study, rather than 1966, so that it may be compared to the revenue figures for the earlier date.

*Working Capitol*

Following the Freas formula, the respondents included a return on working capital as an expense in their cost study. This is a legitimate item of expense, reflecting the need for funds to meet cash operating expenses disbursed ahead of the collection of revenues. The fund can be measured by two months operating expenses, according to Freas, and this norm was used by respondents. Petitioners do not question this as an item of expense, but they contend that taking two months expenses is excessive because under their tariffs respondents can collect interest on accounts after 30 days. This tariff provision was added after the period of the cost study, however. Conducting the cost study on the basis of the tariff provisions as they existed at the time cannot be said to be an unreasonable practice.

Petitioners and Hearing Counsel also contend and respondents concede that they erred in including depreciation at one of the elevators and rent, at some, in working capital. This error only increased the costs allocated to vessels by about $2,500 and it is therefore not sufficiently significant to justify a recomputation of the net revenue. The recomputation of costs to correct this error would not appreciably change the result of the cost study either as to the vessel charges or overall.

*Return on Investment*

An appropirate rate of return on investment has never been established in connection with a determination as to what accounting and price-fixing procedures employed by grain terminals would constitute a "reasonable practice" within the meaning of section 17. The rate that would be considered reasonable will vary, to a degree, depending upon the degree of liberality employed in arriving at the rate base. It is of little consequence whether the base is liberal and the rate of return scant, or whether the reverse is true, so long as the two are properly related. It is the end result of the base-rate determination that is to be judged in deciding the reasonableness of charges. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). Linnekin used the conservative figure of 5%[8] return in making his study, but he based this on a valuation of property at undepreciated reproduction cost. In his opinion the return should be 12% if original cost figures, depreciated, are used as a base. The respondent companies aspire to a 10% return in their various enterprises and will not undertake a proposed venture unless at least such a return can be reasonably anticipated. Freas proposed a 7% return in his study in Docket No. 640 but the U.S.M.C. did not decide the question of an appropriate rate of return in that case. It is important to note that Freas considered both original cost and reproduction cost in arriving at the amount of the owner's investment.[9] Here we are using the substantially lower original cost figures. Since his standard for determining the rate base would produce a higher investment figure his recommended rate of return would have to be adjusted upward in order to produce an equivalent dollar return.

The economic risk incident to the operation of a grain terminal is at least as great as that of a common carrier by water operating in the offshore domestic trade. Financial success depends upon a steady and heavy flow of a single commodity through the terminal. The risk is therefore greater than that of a general cargo terminal. The flow of grain is governed by ever varying circumstances outside the control of the terminal operator, such as the effect of weather on the crops, the influence of international relations and national policy on Government aid programs, the varying requirements for food among the people of the importing countries, and the myriad factors that affect their ability to obtain it.

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[8] All rates mentioned in this section refer to a net return after the payment of income taxes, which, including the 6% Oregon excise tax on corporate income, will be taken to be 50%, on the average.

[9] See p. 55 of his report, Ex. 1.

Petitioners concede that a 10% rate of return would be fair and Hearing Counsel urge that this rate be used. They contend that the base should include only the property to which respondents hold title, however, so this concession as to rate is not necessarily applicable to the base used here. In cases decided under the Intercoastal Shipping Act of 1933, 46 U.S.C. 845(a), the Commission has determined that rates of return of 10.59% and 8.32% [10] in the Hawaiian trade, a rate of 7.5% [11] and, in another case, 10% [12] in the Puerto Rico trade, and 9.07% in the Alaska trade [13] are not unreasonable. Varying circumstances, including the standards employed in arriving at the rate base, have required flexibility in the rate of return; but these precedents support the conclusion that a 10% return here is not beyond the area of reasonableness.

The public revenue bonds issued to finance the terminal improvements at the Kalama terminal bore a 4.81% interest rate. The rate would be 5.25% today. The elevators pay 5¾% interest on short term loans and up to 6¾% on 20 year loans. Linnekin properly excluded interest from expenses in his accounting schedules because this a factor included in the allowance of return on investment. The fact that interest rates are relatively high today must therefore be taken into account.

For all of these reasons, the employment of accounting and pricing practices for the establishment of charges that provide a return not in excess of 10% on the rate base employed here cannot be deemed to be an unreasonable practice within the meaning of section 17.

## VI. COSTS

### *Depreciation*

Petitioners and Hearing Counsel object to the use by respondents of depreciation, as an expense, that is based on the reproduction cost of facilities and equipment. They contend, correctly, that depreciation should be based on original cost. The purpose of allowing depreciation as an expense in arriving at net revenue is to compensate the regulated business enterprise for the depletion, wear and tear, and obsolescene of the property it devotes to public use. It would be inconsistent with this purpose to allow depreciation on an estimated cost of reproduction rather than the actual investment of the owner. Freas used original cost figures for depreciation and this will be done here, with the re-

[10] *Pacific Coast/Hawaii, etc., General Increase*, 7 F.M.C. 260 (1962).

[11] *Atlantic and Gulf Puerto Rico Conf.*, 6 F.M.B. 14 (1960); remanded on different grounds 288 F. 2d 419 (C.A.D.C. 1961) *sub nom. Commonwealth of Puerto Rico* v. *F.M.B.*

[12] *Alcoa SS Co., Inc., General Increase in Rates in the Atlantic Gulf Puerto Rico Trade*, 9 F.M.C. 220 (1966).

[13] *Alaska SS Co.* v. *F.M.C.*, 344 F. 2d 810 (C.A. 9, 1965); *General Increase in Alaskan Rates*, 8 F.M.C. 315, 334 (1964); also 7 F.M.C. 563, 583. In these cases and the others noted above, original cost depreciated was used as the rate base, as it is here.

sult that the combined costs of the eight terminals will be reduced by $315,799,[14] which is the amount of the excess depreciation allowed in the Linnekin accounting exhibits.

*Total Costs*

The $10,335,100 total elevator costs as reported by Linnekin includes a 10% return on undepreciated reproduction cost. This must be adjusted in accordance with the conclusions reached herein by first subtracting the $315,799 excess depreciation then adjusting the difference in order to reflect the valuation and return on investment found herein to reflect reasonable practices in these circumstances.

Under the method of accounting employed by the parties here, they include a reasonable return on investment as a cost item, in addition to taking depreciation as an expense, and come out with a figure representing an excess or deficiency in total revenue received. This is then compared with the amount of the increase in charges. In order to give effect to the conclusions reached herein relative to the proper standard of valuation and rate base, the Linnekin figure of $4,092,453,[15] representing a 10% return, before taxes, on the combined reproduction cost of the terminal properties and the land, is replaced by $4,800,000, which is a 20% return, before taxes, on the depreciated original cost of the property. As adjusted by this correction in the return and the excess depreciation, the total costs come to $10,726,848 for the year.

In apportioning these costs between vessel and cargo, it will be sufficiently accurate for our purpose to use the ratio that the vessel and cargo costs bear to one another in the Linnekin schedules. In the method employed by Linnekin in apportioning the costs, the values of the individual elements of the terminal were estimated separately and their depreciation figures were assigned to vessel or cargo as dictated by the application of the Freas allocations, modified to apply to a grain terminal. The values of the terminal components on the original cost basis are unavailable, but the above ratio will give a sufficiently accurate comparison. Vessel costs came to 12.8% of the total in the Linnekin schedules. Applying this ratio to the adjusted total cost ($10,726,848), the costs allocable to the vessel are $1,373,036 and the balance of $9,353,812 represents the costs allocable to cargo.

## VII. REVENUES

During the period covered by the accounting study, the respondent terminals earned revenues in the total amount of $9,343,841, as re-

[14] The parties reached agreement on this figure, after the hearing. See letter of July 13, 1967, from counsel for petitioners to the Presiding Examiner. The property being treated as owned, depreciation is allowable. No contention was made to the contrary.

[15] See Exhibit 58, line 11.

ported in the exhibits prepared by Linnekin. He took these figures from accounting schedules submitted to him by the several respondents and neither petitioners nor Hearing Counsel, whose accounting witness reviewed the reports of the respondents, question these revenue figures.

Of this total, $803,709 was received from vessels that loaded at the terminals and $8,540,132 was received from cargo. The payments were made under the following tariff categories in the amounts shown:

| | |
|---|---|
| Charges to Vessel: | |
| Dockage | $151,838 |
| Overtime flat charge | 348,706 |
| Standby and deadtime | 303,165 |
| Total | 803,709 |
| Charges to Cargo: | |
| Wharfage | 1,680,620 |
| Storage | 2,122,939 |
| Receiving | 2,949,896 |
| Loading | 1,659,179 |
| Miscellaneous | 127,498 |
| | 8,540,132 |
| Total revenue | 9,343,841 |

## VIII. REVENUE DEFICIENCY

It is seen from the foregoing figures that the total revenue fails to meet total costs by $1,383,007 which is about 14% of the total revenue.

The vessel revenue fails to meet vessel costs by $569,327, which is 70% of revenue received from the vessels.

The cargo revenue falls short of cargo costs by $813,716, or about 9% of the cargo revenue.

The total terminal charges of respondents were increased approximately 4% as a result of the rate adjustments under investigation. It is seen that this increase falls short of the percentage by which the total revenues were deficient to cover costs that include a reasonable return on investment. Therefore the increase, overall, cannot be said to constitute an unreasonable practice when judged by the revenue produced as related to costs.

The new rates applicable to the vessels results in a 45% increase in charges, taking into account the subsequent increase in dockage at an average increase of 25%. This increase in the charges assessed against the vessels is less than the 70% by which revenues from vessels were deficient to meet costs allocable to the vessels, so these increased charges cannot be said to result from unjust or unreasonable practices.



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Another method of stating or compiling the figures to demonstrate the effect of the increases, in terms of the reasonableness of the return, is shown in the following table. The figures showing the increase in dockage include the recent increases by the lessors, which averaged 25%:

| | Total | Vessel | Cargo |
|---|---|---|---|
| Actual revenues for the year: | | | |
| Dockage | $151,838 | 151,838 | |
| Overtime | 348,706 | 348,706 | |
| Standby and deadtime | 303,165 | 303,165 | |
| Cargo services | 8,540,132 | | 8,540,132 |
| Total | 9,343,841 | 803,709 | 8,540,132 |
| Revenue calculated to show increases or (decreases): | | | |
| Dockage | 37,959 | 37,959 | |
| Overtime | (68,811) | (68,811) | |
| Standby and deadtime | (303,165) | (303,165) | |
| Service and facilities | 702,705 | 702,705 | |
| Cargo services and facilities | | | No change |
| Net increase | 368,688 | 368,688 | No change |
| Percent increase | 3.9 | 45 | |
| Return on investment: | | | |
| Total costs, excluding return | [16] 5,926,848 | [17] 758,637 | 5,168,211 |
| Revenue | 9,343,841 | 803,709 | 8,540,132 |
| Net revenue excluding return on investment | 3,416,993 | 45,072 | 3,371,921 |
| Net increase | 368,688 | 368,688 | None |
| Adjusted return | 3,785,681 | 413,760 | 3,371,921 |
| Investment | 24,000,000 | [18] 2,132,000 | 21,868,000 |
| Return before taxes (percent) | 15.7 | 19 | 15 |
| Return after taxes (percent) | 7.85 | 9.5 | 7.5 |

The return on investment computed on the basis of original cost depreciated does not exceed a reasonable return of 10%. This computation confirms the conclusion that neither the overall effect of the rate adjustment nor the increase assigned to the vessels can be considered to be the result of an unjust or unreasonable practice.

This analysis of the financial results of the rate changes reflects an attempt to distill the accounting evidence down to its essentials and, together with the description of the methods and principles em-

[16] $10,726,848 total from page 398 less $4,800,000 return on investment.

[17] 12.8% of total, which is the relationship between the Linnekin total cost figure and his costs allocated to the vessel.

[18] The reproduction costs of plant and facility items allocated to the vessel in the Linnekin compilation is 8.8% of the total investment. This same ratio is employed here to obtain a break-down as between vessel and cargo of the total investment based on depreciated original cost. This method is sufficiently accurate for the purpose of this test and it is necessary to use a ratio because the original cost values of the various elements of the terminals was not provided.

ployed by the accounting witnesses, this will suffice. An attempt to set forth all the numbers that underlie these results or settle every disagreement on minor accounting details would unduly extend this decision and would only cloud the explanation of the real basis for the conclusions reached.

The briefs of petitioners and respondents argue at length over accounting details. Cost finding is not an exact science and any cost and revenue study, upon meticulous examination, may be criticized for lack of precision or inconsequential errors. All that is required in testing the accounting evidence is a reasonable approximation of assignable costs and revenues based on appropriate methods of apportionment. *Increased Rates on Sugar*, 7 F.M.C. 404, 411 (1962). Due consideration has been given to every aspect of the accounting studies of the parties and it would add nothing to belabor this report with detailed comparisons of one with another.

## IX TARIFF DESIGNATIONS

*Service and Facilities Charge* (S and F)

The respondents initiated the use of an S and F charge in connection with the general adjustment in their rates and as a direct result of the Linnekin cost study. At the same time, they discontinued the standby and deadtime charge which accounted for a total of $303,165 in revenue for the cost study year. The latter charge became absorbed in the S and F charge.

In addition, the S and F charge is designed to cover the elevator costs apportioned to vessel for a share of the wharf, and 50% of the shipping gallery. Also included in the charge are the relatively minor costs attributed to the use by vessel personnel of miscellaneous facilities furnished by the terminal such as lunchrooms, toilets, offices used by supercargo and other vessel personnel, parking areas, police and fire protection, plus electric power to the vessel and liaison services between the terminal and the vessel.

A substantial part of the evidence in this lengthy hearing was devoted to conflicting testimony over these latter, miscellaneous items. Petitioners spent much time resisting the liaison cost. In the absence of bookkeeping records that would permit a precise determination of the total amount of this cost, Linnekin estimated this cost at $72,000, representing the time of one $9,000 per year employee at each terminal. The services consist of answering telephone calls for the ship and concerning the ship, carrying messages and information to and from the ship, coordinating the loading operation, and the like. Officials of respondents testified that a more reasonable estimate would be twice that amount. It is concluded from all the evidence on the subject that the cost estimate of $9,000 per terminal for this item is not unreasonable.

The total costs which form the basis for the S and F charge are $773,972 [18a] after certain adjustments are made in depreciation, return on working capital and other items as urged by petitioners. The cost per ton (4,684,700 tons loaded) comes to 16.5 cents. It is seen, therefore, that the S and F charge, which averages .15 cents per ton, does not exceed the costs of providing the services and facilities. The S and F charge would have produced revenues in the total amount of $702,705 if it had been in force during the cost study year. The total increase in charges to the vessel amounts to a little under 8 cents per ton. It is of interest to note that the going charter rate from Portland to India has been varying around $30 per long ton on American flag vessels and $12 per ton foreign, both on a free out basis. (Official notice has been taken of wheat price and the freight rate on American flag ships.) Petitioners acknowledge that the increased rates have not caused a decline in the volume of grain exported through the PNTEA terminals. Wheat is selling for about $60 per short ton, FOB.

Starting nearly 30 years ago, practically every ocean terminal on the Pacific Coast has adopted the use of an S and F charge for bulk cargo as well as general cargo. The Portland Commission of Public Docks, the Northwest Marine Terminal Association, Inc., the California Association of Terminal Elevators, and the California Association of Port Authorities, representing most of the Pacific Coast terminals, intervened in the proceeding and their officials testified in support of the use of an S and F charge at respondents' terminals. Their argument is summed up in the statement, with which I agree, that the industry-wide practice on the Pacific Coast and the Commission's acceptance of the Freas formula would have to be overthrown to support a finding that an S and F charge is not supported by actual costs or only by costs duplicated by other charges, as contended by petitioners. The record demonstrates that a grain terminal does not differ from other terminals as regards the propriety of such a tariff charge.

Counsel for the Seattle terminals make the significant point that confusion sometimes exists because of the failure to recognize the fact that where the S and F charge is an integral part of the tariff structure the costs allocated to it necessarily must include items which, if there were no S and F charge, would be allocated on accepted cost accounting principles to other charges. An example of this is seen in the schedule of

[18a] See Appendix I, Resp. Reply Br. Recomputation of this figure to reflect the lower base and higher rate is unnecessary because the two factors so nearly balance each other that the result is not appreciably changed.

cost items compiled by respondents in their cost study. See Schedule II and III, attached. All vessel costs were collected under the heading "dockage," simply because they had no S and F charge at the time of the study.[19]

Petitioners seem to miss this point when they say that the transfer of the charges from the "dockage" column to the new S and F charge results in a recovery of a "deficiency in dockage charges" through an S and F charge, a practice which they say the F.M.B. condemned in Docket No. 744, *Terminal Rate Structure—Pacific Northwest Ports*, *supra*. That case has no bearing on respondents' S and F charge. It dealt with the inclusion in an S and F charge of the costs of an expensive, and sometimes unperformed checking operation. Obviously, where a major terminal service is performed only for, say, half of the vessels that call, the charge for it should be the subject of a separate tariff item. Unlike the charge involved there, the costs PNTEA allocated to the vessels, and which form the main basis for the S and F charge, reflect the use of facilities and services by every vessel that loads at the terminal. These are the costs connected with the terminal wharf and gallery. Every vessel also will use and be provided one or more of the minor services and facilities, mentioned above, such as liaison services, telephone, parking lot, lunchroom, etc.

The Commission's conclusion in *Investigation of Wharfage Charges at Pacific Coast Ports*, *supra*, is more pertinent to the contentions made here. The commission held there, page 665 of 8 F.M.C.:

> Agriculture contends that the conveyor and spout, also the berthing facilities are necessary to the operation of the elevator and to a degree are a part of the investment in the elevator. It also maintains that whatever benefit the ship receives from the use of the wharf is compensated for by dockage, and in some cases service charges paid to the marine terminal elevator. As seen hereinbefore, these contentions cannot be sustained under the principle of the Freas formula.

The financial effect on the vessels would be no different if all these costs were recovered under a charge called "dockage." It is more realistic to separate them, however. Under the present tariff designations, "dockage" is nothing more than a "parking fee" for vessels,[19a] as several witnesses expressed it, collected by the lessors at some of the leased terminals or paid over to them by the lessees in the case of other terminals. It is more orderly, in these tariffs, to earmark dockage for what it is and confine it to the parking fee in the terminal tariffs just as it is in the tariffs of those public bodies (the lessors) that collect it directly from the ship. The establishment of an S and F charge re-

[19] The schedule "Summary of Revenues" is also appended hereto, after Schedule III, to show the amount of revenue under the various tariff items at the eight terminals.

[19a] Dockage charge is based on the tonnage of the vessel.

sulted from a deficiency in the total revenues received by the terminals from the vessels and not from a deficiency in dockage.

Hearing Counsel and U.S.D.A.'s objection to the S and F charge stems mainly from their disagreement with the allocation of the cost of the shipping gallery and wharf as between vessel and cargo. These matters are discussed elsewhere in this decision. It should be recognized, incidentally, that Freas recommended that U.S.M.C. consider charging all terminal costs to vessel and none to cargo, since all such costs are passed along to the buyer ultimately, regardless of their initial apportionment. This would avoid the complicated apportionment of costs between vessel and cargo. The objection to such a course is the disturbing effect it would have on long established tariff, chartering, and grain-sales practices; and it probably could be accomplished only in a rule making proceeding of general applicability.

Hearing Counsel also argue that since the wharf is not included in the description of the property leased in three of the terminal leases, Linnekin incorrectly included these wharf costs in arriving at the S and F charge. The reasons for this omission of the word "wharf" in the leases was not explained since the matter was raised for the first time in the brief, but the terminals enjoy the exclusive possession of these wharves and the wharves must be considered to be part of the consideration for which the rental is paid. Therefore the costs related to the wharfs were properly included.

The tariffs of respondents define the S and F charge as follows:

Service and Facilities Charge is the charge assessed ocean vessels, their owners, operators, or agents which receive or discharge cargo at the terminals for the use of terminal working areas in the delivery of cargo to or from ocean vessels and for services in connection with the receipt, delivery, care, custody and control of cargo required in the transfer of cargo from shippers, their agents or connecting carriers, to or from ocean vessels.

(NOTE: Service and Facilities Charge does not include any cargo handling, loading or unloading operations, nor any labor other than that which is involved in performing the services, nor any services or facilities the charge for which is included in other individual charges.)

This definition is quite similar to that in use by other terminals on the Pacific Coast. The Chief of the Commission's Division of Terminals, Eugene P. Stakem, testified that he does not object to the generality of the terms in which this definition is phrased. Petitioners find fault with this aspect of the definition but they do not propose any substitute. The only alternative would be some definition that would attempt to itemize the services and facilities for which the charge is made. There would be some merit to this because it would tend to eliminate the possibility that the terminals could change the services and facilities that are provided without such change being disclosed in the tariff. Mr. Stakem believes this would be excessively cumbersome, however, and I agree. It would be something like the tariff of an ocean carrier attempting to enumerate every service performed and all the items of vessel equipment employed in connection with the transport of a parcel of cargo.

The adoption of the S and F charge by respondents and the tariff definition they have adopted are not unjust or unreasonable practices. Petitioners originally argued that since the S and F charge is on a volume basis, rather than a time basis, it promotes inefficiency on the part of the vessel. They appear to have abandoned this argument, at least in part, so it will be sufficient to observe that a rate on a time basis, such as the discarded standby and deadtime charge, might as easily promote inefficiency on the part of the elevator. Petitioners, in their brief, recognize that "a per-ton charge is objective and not susceptible to manipulation as a per-hour charge might be."

Petitioners introduced an exhibit showing that the change to a volume rate will cause a very substantial increase in the charges to some types of vessels, ranging up to a sixfold increase for certain types that require few interruptions for trimming. This results from the fact that such a ship incurred small standby charge in relating to its capacity under the old, hourly basis. The change to an S and F charge, based on tonnage loaded, hits such a vessel hardest. Other types of vessels will experience an increase less than the 45% average, of course. The replacement of the standby charge against the vessel (where loading is interrupted for shifting the vessel and the like) and deadtime charge (where the vessel arrives late or departs before the end of a shift) by the S and F charge has an important advantage for both shipowner and terminal. It will end the continuous friction caused between them by disagreements over the number of workmen whose time is to be charged, the cause of the delay, and over the question whether the vessel should pay the charge when the workmen idled by the departure of the ship before the end of a shift are not sent home but are set to work around the plant until the end of the shift.

Respondents conducted an extensive study of the relative costs in loading various types of ships such as tankers, self-trimming bulk carriers, non self-trimming bulk carriers, vessels with multiple decks, and others. This resulted in the sliding scale S and F charge which ranges from 10 cents per short ton for self-trimming vessels to 21 cents per short ton for three deck vessels. This sliding scale is an innovation in grain terminal tariffs and petitioners agree that it is more equitable than one rate for all vessels, if there must be an S and F charge.

The U.S.D.A. opposition to the increase in charges assessed against the vessel, directed primarily at the S and F charge, is based on their concern that this increase will result in increased freight rates, with an attendant diminution in the amount of grain that can be purchased by foreign governments under the P.L. 480 programs. This decrease in purchases was not shown to have materialized, but even if it has been the respondents could not be expected to subsidize the program by adhering to tariff rates that do not provide a reasonable return.

The United States Government at times provides a subsidy to American exporters of wheat in connection with the aid programs to permit them to compete successfully with foreign markets. At present, no subsidy of this kind is being paid. Even if it were, or if subsidy payments are required in the future, this will not result from the increased terminal rates because the increases are not paid by the exporter.

U.S.D.A. may be required to pay part of the increases because 50% of the grain is required to be shipped on United States flag vessels under P.L. 480, and U.S.D.A. pays the difference between the foreign flag freight rate and the American flag freight rate. Assuming the foreign flag vessel owners do not raise their rates as much as the Americans as a result of the terminal rate increase, which has not been proved, this would increase the Government's expenditures. However, the Government is not excepted from the rule that requires the user of the services of a regulated industry to pay a rate that provides a fair return.

*Wharfage*

Wharfage is the tariff item charged to cargo "for the use of grain facilities that is assessed on all grain received therein whether or not such grain is eventually delivered to the vessel." The U.S.D.A. witness testified that this definition was changed at the time the rates were revised on April 1, 1966, and he and Hearing Counsel raise various objections to the definition. The record does not bear out this testimony, for the earlier tariff of Continental Portland Elevators, replaced by the April 1, 1966, revision contains the same definition (Ex. 34).

The objection is primarily that the definition is so vague and uncertain that it does not disclose the services or usages covered by the charge. The definition of wharfage in Commission General Order 15, not mentioned by the parties, is not applicable because it covers charges assessed against both vessel and cargo. No proposal was advanced in this proceeding for a more precise definition. It is suggested that a definition for "wharfage," better suited to terminals that impose a services and facilities charge, be devised for general use by the Commission's staff if they do not consider the one presently in use at such terminals to be adequate. The use of the name "wharfage" comes from an ancient practice and the name itself is probably a misnomer, today, since it does not include the use of the wharf at such terminals.

*Overtime*

Petitioners and respondents are also in complete disagreement over the reasonable amount to be charged the vessel for overtime loading. This charge appears in the tariffs as the "overtime flat charge." Under the terminals' labor contract, overtime is paid to the workmen before 8:00 a.m. and after 3:00 p.m. weekdays and all day Saturday, Sunday, and holidays. Vessels loading during these periods are charged overtime at the rate of $57 per hour under the new rates. This constitutes a decrease, overall, from the previous rates that varied between the terminals from $56.70 at Peavey to $70 at Archer-Daniels-Midland. The average revenue per hour under the old rates was $68.52. For a total of 5,089 hours overtime loading in the study year, $348,706 was charged. This charge is assessed during overtime in addition to the normal straight time loading charges assessed against the cargo. Grain terminals on the Gulf Coast and on the Great Lakes assess overtime charges that are substantially higher than those of respondents.

The overtime work performed during the cost study year was requested by the vessels about 85% of the time and by the terminal about 15% of the time. Overtime charges at the grain terminals are less than the cost to the owner of an idle ship and, where the vessel is loading both grain and general cargo for a single voyage, less than overtime charges at general cargo terminals. When the terminals require overtime loading it is sometimes because of a backlog of rail cars awaiting unloading. This has, on occasion, resulted in a rail embargo at the terminals, but not frequently. At other times the terminal has required overtime loading because other vessels are waiting to load.

The terminals prefer not to load during overtime periods because they cannot find equally good workmen for employment during overtime hours, with a resulting slow-down in the rate of loading. They have also experienced casualty losses at night, in a few instances, through the loading of the wrong grade of grain, requiring them to unload the grain at their expense. The evidence in the record in regard to the percentage of the time there is a vessel at the wharves shows that terminal space is normally available during straight time loading periods.

The tariffs of respondents give the terminals the right to refuse to load during overtime hours. There is no evidence that this right has been exercised. An inference can be drawn that the reason for this is the fact that the rate for overtime loading includes an increment over cost in order to provide an incentive to the terminal to load grain during overtime hours and a discouraging factor to prevent the vessels from increasing their requests for overtime loading.

The Rules of the Port at Portland provide that if a terminal requests a ship to load overtime, and the ship refuses, the ship loses its turn and must vacate the berth in favor of the next vessel that is willing to load overtime. This rule has not been exercised by respondents and there is no evidence that ships have refused any requests.

The records of all of the respondents do not contain adequate data to permit a direct development of those items of cost assignable to overtime operations for (1) fringe benefits connected with the direct labor costs, (2) cost of indirect labor such as clerical, supervision, and clean-up crews, (3) fringe benefits for indirect labor, (4) administrative expense, and (5) "other elevator" expense. There is no regulation that requires the respondents to maintain such data and the absence of it therefore does not raise any presumption against respondents. Linnekin employed prorating methods that resulted in total overtime cost of $50.32 per hour and proposed the $57 rate so as to include the incentive described above. He also took into account the fact that no portion of the additional expense of overtime unloading of cars, made necessary by overtime ship loading, was charged to the vessel. Laurie disputes the Linnekin method of prorating various costs in arriving at the overtime factor and, using different methods, says the cost, without any administrative or "other elevator" costs, is $35.60 (Ex. 85). The Linnekin figure included $7.17 for administrative and "other elevator" costs. Laurie disputes the accuracy of this, too, but does not provide a different figure. Hearing Counsel state that they find the $57 rate to be a reasonable charge and U.S.D.A. does not raise any objection to it. The costs should include a prorated portion of administrative and "other elevator" expense, but the precise amount cannot be determined.

Considering all of the above factors, the method employed by respondents for fixing the amount of the overtime charge provides a sufficiently reasonable approximation of the costs for the purpose to be served here, and it cannot be said to be an unreasonable practice. It is unnecessary to go into a detailed analysis of the many disputes over the prorating methods employed by the respective accountants who prepared the cost studies. A careful review of their methods shows that even if mathematical precision were the goal, neither method could be said to be an unreasonable practice. Some element of incentive is desirable and the dollar amount of this cannot be measured by cost accounting. Furthermore, any reduction in overtime loading charges would have to be picked up by increasing other charges if the terminal is to avoid a revenue deficiency. At least a part of this would fall to the vessels.

However, it is manifestly unfair, as petitioners contend, for the terminal to receive an "incentive" increment in the overtime loading charge when the overtime loading is done at the request of the terminal. Indeed, it would seem more fair for the incentive factor to weigh in favor of the vessel. For this reason, the inclusion of this factor is found to be an unjust and unreasonable practice when the terminal requests overtime loading. In the Linnekin figures the incentive factor amounts to at least $7.00 per hour. It actually exceeds this, because the prorating done by Linnekin is questionable as to some items and respondents have been given the benefit of the doubt due to the incentive feature. In arriving at a reasonable charge where the terminal orders the overtime, the element of increased costs for unloading cars also cannot be taken into account. The charge should be further reduced in order to provide an incentive to the vessel. It is concluded, in the light of these considerations, that an overtime loading rate in excess of $40 per hour must be deemed to be the result of unjust and unreasonable practices in those instances where the terminal orders the overtime.

The form of charter parties often employed by petitioners places the cost of overtime loading on the charterer when it is ordered by the terminal. On occasion, the vessel owner, acting through his agent, has requested the terminal to require overtime loading so that the cost would be borne directly by the charterer; and the terminals have acceded to the request. It is hoped and expected that this highly questionable practice will cease. The reduction of the overtime loading charge to a cost basis, as provided above, should eliminate the temptation of the terminal people to go along with this practice, the legality of which, it should be noted, is not the subject of this proceeding.

Hearing Counsel urged with considerable emphasis, in connection with overtime and other charges, that direct charges of costs should be made, rather than charges based on the derivation of estimated costs through prorating and estimates. The point is a sound one, but it cannot be done when the books do not reveal the costs, in separate accounts, for all the different services and facilities provided. While the prorating is troublesome, this record will not support a conclusion that uniform systems of more detailed accounts would have to be required in order for the Commission to investigate the reasonableness of terminal practices. No other means suggests itself for accomplishing the end sought by Hearing Counsel.

*Billing Practices*

Hearing Counsel also object to billing practices of respondents in those instances where they bill self-trimming vessels 14 cents per ton for S and F, when the charge should have been 10 cents, merely because the vessels had slow-loading wing tanks. This departs from the tariff rate and is therefore unlawful. The practice is beyond the scope of this investigation, however. In the course of the hearing, when this practice came to light, reminding respondents of their duty to follow the precise terms of their tariffs, they expressed an intention to discontinue the practice.

## ULTIMATE CONCLUSION

For the foregoing reasons, after careful consideration of the record as a whole and based upon the material facts therein, it is concluded that that the rates, rules and regulations contained in the tariffs of the respondents do not constitute nor result from unjust or unreasonable practices in violation of section 17 except that the overtime flat charge of $57 per hour, in those instances where overtime loading is ordered or requested by the terminal, was adopted as a result of such practices. The rate for the overtime flat charge, when overtime loading is ordered or requested by the terminal, would not exceed $40 per hour if established in accordance with just and reasonable practices. The present rate of respondents for the overtime flat charge, when the terminal orders or requests the overtime loading, shall be canceled by respondents immediately when this decision becomes final and a new rate substituted therefor that shall not exceed $40 per hour, determined herein to be the maximum rate that could be adopted by virtue of just and reasonable practices within the meaning of section 17.

An appropriate order will be entered to carry out these conclusions and to discontinue this proceeding.

(Signed) E. ROBERT SEAVER
*Presiding Examiner*

## REPORT SAMPLE

*Schedule I—Plant Carrying Charge*

| Line No. | Cost item | Total cost | Waterway | Barge dock | Wharf | Storage | Headhouse | Trucks and roadways | Car-truck dumps | Rented space | Shipping gallery | Other |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Return on land | $13, 540 | $2, 695 | | $1, 462 | $3, 425 | $203 | $2, 911 | $271 | $108 | | $2, 465 |
| 2 | Return on structures | 603, 950 | | $31, 000 | 39, 000 | 346, 250 | 110, 000 | 4, 000 | 22, 700 | 3, 500 | $41, 000 | 6, 500 |
| 3 | Depreciation on structures | 128, 185 | | 7, 750 | 9, 750 | 70, 562 | 22, 000 | 1, 000 | 4, 660 | 700 | 10, 250 | 1, 513 |
| 4 | Maintenance of structures | 47, 020 | | 2, 398 | 3, 056 | 26, 942 | 8, 558 | 329 | 1, 787 | 283 | 3, 197 | 470 |
| 5 | Fire insurance | 10, 628 | | 542 | 691 | 6, 090 | 1, 934 | 74 | 404 | 64 | 723 | 106 |
| 6 | Property taxes | 73, 115 | 292 | 3, 656 | 4, 826 | 41, 383 | 13, 014 | 804 | 2, 705 | 439 | 4, 826 | 1, 170 |
| 7 | Total plant costs | 876, 438 | 2, 987 | 45, 346 | 58, 785 | 494, 652 | 155, 709 | 9, 118 | 32, 527 | 5, 094 | 59, 996 | 12, 224 |

## REPORT SAMPLE

*Schedule II—Costs Allocated to Services*

| Line No. | Cost item | Total cost | Dockage | Loading | Wharfage | Storage | Receiving | Standby | Deadtime | Rentals | Miscellaneous |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | Plant costs (From Schedule I): | | | | | | | | | | |
| 1 | Waterway | $2,987 | $2,987 | | | | | | | | |
| 2 | Barge dock | 45.346 | | | | | $45,346 | | | | |
| 3 | Wharf | 58,785 | 58,785 | | | | | | | | |
| 4 | Storage | 494,652 | | | $143,449 | $351,203 | | | | | |
| 5 | Headhouse | 155,709 | | $49,671 | 49,671 | 7,630 | 48,737 | | | | |
| 6 | Tracks and roadways | 9,118 | | | 9,118 | | | | | | |
| 7 | Car and truck dumps | 32,527 | | | | | 32,527 | | | | |
| 8 | Rented space | 5,094 | | | | | | | | $5,094 | |
| 9 | Shipping galleries | 59,996 | 29,998 | 29,998 | | | | | | | |
| 10 | Other | 12,224 | 1,296 | 1,125 | 2,860 | 5,073 | 1,797 | | | 73 | |
| 11 | Total plant costs | 876,438 | 93,066 | 80,794 | 205,098 | 363,906 | 128,407 | | | 5,167 | |
| | Equipment costs: | | | | | | | | | | |
| 12 | Barge unload | 26,700 | | | | | 26,700 | | | | |
| 13 | Shipping gallery | 32,035 | 16,017 | 16,018 | | | | | | | |
| 14 | Elevator legs | 42,000 | | 14,070 | 14,070 | | 13,860 | | | | |
| 15 | Conveyors | 56,000 | | 18,760 | 18,760 | | 18,480 | | | | |
| 16 | Car and truck dumps | 21,075 | | | | | 21,075 | | | | |
| 17 | Headhouse—General | 45,450 | | 14,499 | 14,498 | 2,227 | 14,226 | | | | |
| 18 | Storage—General | 20,100 | | | 5,829 | 14,271 | | | | | |
| 19 | Pollution control | 9,750 | 1,034 | 897 | 2,281 | 4,046 | 1,433 | | | 59 | |
| 20 | Automotive | 645 | 68 | 59 | 151 | 268 | 95 | | | 4 | |
| 21 | Total equipment costs | 253,755 | 17,119 | 64.303 | 55,589 | 20,812 | 95,869 | | | 63 | |
| | Labor costs (Including Labor Related Overhead): | | | | | | | | | | |
| 22 | Handling labor | 319,788 | | 160,890 | | 23,700 | 112,681 | $13,293 | $6,169 | | $3,055 |
| 23 | Maintenance—Non-Plant | 32,037 | 993 | 13,103 | 3,236 | 2,595 | 12,110 | | | | |
| 24 | Sanitation, etc | 25,323 | 1,950 | 5,419 | 4,634 | 7,242 | 5,976 | | | 102 | |
| 25 | Supervision | 46,849 | | 23,037 | | 4,216 | 19,395 | | | | 141 |
| 26 | Elevator clerical | 40,733 | 3,137 | 8,717 | 7,454 | 11,650 | 9,612 | | | 163 | |
| 27 | Total labor costs | 464,730 | 6,080 | 211,226 | 15,324 | 49,403 | 159,774 | 13,293 | 6,169 | 265 | 3,196 |
| 28 | Other elevator expense | 60,849 | 4,381 | 13,569 | 10,588 | 16,550 | 14,665 | 487 | 304 | 183 | 122 |
| 29 | Administrative expense | 188,271 | 13,556 | 41,984 | 32,759 | 51,210 | 45,373 | 1,506 | 941 | 565 | 377 |
| 30 | Total cost | 1,844,043 | 134,202 | 411,876 | 319,358 | 501,881 | 444,088 | 15,286 | 7,414 | 6,243 | 3,695 |

## REPORT SAMPLE

### *Schedule III—Loading Costs*

| Line No. | Cost item | Totals (From Schedule II) | Straight time | Overtime |
|---|---|---|---|---|
| | Plant Costs: | | | |
| 1 | Headhouse | $49,671 | $49,671 | |
| 2 | Shipping gallery | 29,998 | 29,998 | |
| 3 | Other | 1,125 | 1,125 | |
| 4 | Total plant cost | 80,794 | 80,794 | |
| | Equipment Costs: | | | |
| 5 | Shipping gallery | 16,018 | 16,018 | |
| 6 | Elevator legs | 14,070 | 14,070 | |
| 7 | Conveyors | 18,760 | 18,760 | |
| 8 | Headhouse | 14,499 | 14,499 | |
| 9 | Pollution control | 897 | 897 | |
| 10 | Automotive | 59 | 59 | |
| 11 | Total equipment cost | 64,303 | 64,303 | |
| 12 | Handling labor | 160,890 | 142,811 | $18,079 |
| 13 | Maintenance | 13,103 | 10,024 | 3,079 |
| 14 | Sanitation, etc | 5,419 | 4,146 | 1,273 |
| 15 | Supervision | 23,097 | 17,669 | 5,428 |
| 16 | Elevator clerical | 8,717 | 6,669 | 2,048 |
| 17 | Total labor cost | 211,226 | 181,319 | 29,907 |
| 18 | Other elevator expense | 13,569 | 12,212 | 1,357 |
| 19 | Administrative expense | 41,984 | 37,786 | 4,198 |
| 20 | Total costs | 411,876 | 376,414 | 35,462 |

PACIFIC NORTHWEST TIDEWATER ELEVATOR ASSOCIATION

*Summary of cost Allocations—Schedule I (Plant Costs)*

| Terminal No. | Total cost | Waterway | Barge dock | Wharf | Storage | Headhouse | Tracks and roadways | Car and truck dumps | Shipping gallery | Rented offices | Other |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | (a) | (b) | (c) | (d) | (e) | (f) | (g) | (h) | (i) | (j) | (k) |
| 1 | $289, 035 | $2, 167 | $8, 500 | $28, 190 | $172, 948 | $39, 694 | $6, 401 | $7, 398 | $19, 311 | | $4, 426 |
| 2 | 362, 154 | 1, 261 | 13, 337 | 22, 742 | 240, 878 | 51, 414 | 10, 808 | 12, 572 | 58 | $1, 512 | 7, 572 |
| 3 | 295, 434 | 11, 844 | 5, 488 | 26, 801 | 141, 958 | 79, 930 | 5, 479 | | 17, 192 | | 6, 742 |
| 4 | 876, 438 | 2, 987 | 45, 346 | 58, 785 | 494, 652 | 155, 709 | 9, 118 | 32, 527 | 59, 996 | 5, 094 | 12, 224 |
| 5 | 456, 248 | 1, 530 | | 53, 835 | 224, 179 | 78, 890 | 4, 480 | 32, 457 | 55, 749 | 997 | 4, 131 |
| 6 | 198, 715 | 4, 680 | 5, 139 | 8, 464 | 116, 057 | 17, 527 | 2, 712 | 25, 357 | 12, 091 | | 6, 688 |
| 7 | 492, 912 | 1, 860 | | 74, 911 | 256, 978 | 115, 888 | 30, 051 | 142 | | 6, 903 | 6, 179 |
| 8 | 1, 071, 454 | 2, 650 | 11, 791 | 25, 546 | 629, 880 | 265, 370 | 7, 025 | 79, 032 | 46, 989 | | 3, 171 |
| Total | 4, 042, 390 | 28, 979 | 89, 601 | 299, 274 | 2, 277, 530 | 804, 422 | 76, 074 | 189, 485 | 211, 386 | 14, 506 | 51, 133 |

## PACIFIC NORTHWEST TIDEWATER ELEVATOR ASSOCIATION

*Summary of Cost Allocations—Schedules II and III*

| Terminal No. | Total costs | Services performed for vessels | | | | | Services performed for cargo | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Total vessel | Dockage | Standby | Deadtime | Overtime loading | Total cargo | Wharfage | Storage | Receiving | Loading | Rentals and miscellaneous |
| | (a) | (b | (c) | (d) | (e) | (f) | (g) | (h) | (i) | (j) | (k) | (l) |
| Plant costs: | | | | | | | | | | | | |
| 1 | $289, 035 | $40, 264 | $40, 264 | | | | $248, 771 | $69, 502 | $126, 993 | $29, 370 | $22, 906 | |
| 2 | 362, 154 | 24, 548 | 24, 548 | | | | 337, 606 | 85, 900 | 191, 216 | 43, 578 | 15, 362 | $1, 550 |
| 3 | 295, 434 | 48, 347 | 48, 347 | | | | 247, 087 | 79, 170 | 98, 370 | 33, 186 | 36, 361 | |
| 4 | 876, 438 | 93, 066 | 93, 066 | | | | 783, 372 | 205, 098 | 363, 906 | 128, 407 | 80, 794 | 5, 167 |
| 5 | 456, 248 | 84, 000 | 84, 000 | | | | 372, 248 | 147, 489 | 112, 396 | 57, 669 | 53, 685 | 1, 009 |
| 6 | 198, 715 | 19, 858 | 19, 858 | | | | 178, 857 | 45, 155 | 84, 208 | 37, 396 | 12, 098 | |
| 7 | 492, 912 | 77, 747 | 77, 747 | | | | 415, 165 | 168, 154 | 164, 180 | 38, 050 | 37, 792 | 6, 989 |
| 8 | 1, 071, 454 | 51, 843 | 51, 843 | | | | 1, 019, 611 | 287, 260 | 446, 820 | 177, 595 | 107, 936 | |
| Total | 4, 042, 390 | 439, 673 | 439, 673 | | | | 3, 602, 717 | 1, 087, 728 | 1, 588, 089 | 545, 251 | 366, 934 | 14, 715 |
| Equipment costs: | | | | | | | | | | | | |
| 1 | 264, 921 | 4, 585 | 4, 585 | | | | 260, 336 | 67, 370 | 15, 874 | 115, 066 | 62, 026 | |
| 2 | 214, 804 | 7, 452 | 7, 452 | | | | 207, 352 | 48, 804 | 28, 627 | 93, 587 | 36, 264 | 70 |
| 3 | 105, 846 | 4, 384 | 4, 384 | | | | 101, 462 | 25, 388 | 9, 216 | 44, 739 | 22, 119 | |
| 4 | 253, 755 | 17, 119 | 17, 119 | | | | 236, 636 | 55, 589 | 20, 812 | 95, 869 | 64, 303 | 63 |
| 5 | 147, 977 | 12, 702 | 12, 702 | | | | 135, 275 | 37, 345 | 9, 770 | 48, 069 | 40, 082 | 9 |
| 6 | 147, 669 | 5, 740 | 5, 740 | | | | 141, 929 | 34, 540 | 24, 772 | 59, 090 | 23, 527 | |
| 7 | 270, 120 | 23, 772 | 23, 772 | | | | 246, 348 | 56, 272 | 2, 106 | 102, 837 | 85, 133 | |
| 8 | 361, 384 | 37, 053 | 37, 053 | | | | 324, 331 | 75, 405 | 28, 203 | 120, 081 | 100, 642 | |
| Total | 1, 766, 476 | 112, 807 | 112, 807 | | | | 1, 653, 669 | 400, 713 | 139, 380 | 679, 338 | 434, 096 | 142 |
| Labor costs: | | | | | | | | | | | | |
| 1 | 335, 021 | 57, 625 | 5, 073 | $24, 817 | $2, 839 | $24, 896 | 277, 396 | 20, 867 | 40, 861 | 136, 122 | 77, 746 | 1, 800 |
| 2 | 328, 224 | 58, 272 | 4, 771 | 18, 859 | | 34, 642 | 269, 952 | 21, 589 | 30, 968 | 133, 485 | 63, 314 | 20, 596 |
| 3 | 113, 448 | 25, 168 | 5, 513 | 5, 817 | | 13, 838 | 88, 280 | 11, 873 | 11, 264 | 46, 174 | 6, 579 | 12, 390 |
| 4 | 464, 730 | 55, 449 | 6, 080 | 13, 293 | 6, 169 | 29, 907 | 409, 281 | 15, 324 | 49, 403 | 159, 774 | 181, 319 | 3, 461 |
| 5 | 349, 451 | 42, 267 | 2, 443 | 13, 026 | 3, 271 | 23, 527 | 307, 184 | 5, 545 | 27, 751 | 127, 511 | 142, 186 | 4, 191 |
| 6 | 314, 025 | 79, 722 | 1, 692 | 46, 696 | 1, 838 | 29, 496 | 234, 303 | 5, 190 | 7, 146 | 113, 114 | 108, 609 | 244 |
| 7 | 229, 973 | 50, 881 | 3, 659 | 15, 965 | 14, 263 | 16, 994 | 179, 092 | 8, 415 | 2, 639 | 118, 756 | 46, 843 | 2, 439 |
| 8 | 569, 506 | 133, 886 | 13, 023 | 41, 352 | 6, 648 | 72, 863 | 435, 620 | 53, 813 | 82, 438 | 177, 230 | 75, 883 | 46, 256 |
| Total | 2, 704, 378 | 503, 270 | 42, 254 | 179, 825 | 35, 028 | 246, 163 | 2, 201, 108 | 142, 616 | 252, 470 | 1, 012, 166 | 702, 479 | 91, 377 |
| Liaison labor adjustment | | 75, 000 | 75, 000 | | | | (75, 000) | (14, 475) | (20, 475) | (26, 925) | (13, 050) | (75) |
| Total | 2, 704, 378 | 578, 270 | 117, 254 | 179, 825 | 35, 028 | 246, 163 | 2, 126, 108 | 128, 141 | 231, 995 | 985, 241 | 689, 429 | 91, 302 |



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PACIFIC NORTHWEST TIDEWATER ELEVATOR ASSOCIATION—Continued

*Summary of Cost Allocations—Schedules II and III—Continued*

| Terminal No. | Total costs | Services performed for vessels | | | | | Services performed for cargo | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Total vessel | Dockage | Standby | Deadtime | Overtime loading | Total cargo | Wharfage | Storage | Receiving | Loading | Rentals and miscellaneous |
| | (a) | (b) | (c) | (d) | (e) | (f) | (g) | (h) | (i) | (j) | (k) | (l) |
| Other elevator expense: | | | | | | | | | | | | |
| 1 | $73,002 | $7,253 | $3,793 | $1,896 | $135 | $1,429 | $65,749 | $12,056 | $19,293 | $21,403 | $12,862 | $135 |
| 2 | 70,010 | 4,904 | 2,561 | 1,312 | | 1,031 | 65,106 | 10,745 | 24,906 | 18,679 | 9,277 | 1,499 |
| 3 | 28,232 | 3,851 | 3,124 | 304 | | 423 | 24,381 | 6,248 | 6,972 | 6,663 | 3,807 | 691 |
| 4 | 60,849 | 6,529 | 4,381 | 487 | 304 | 1,357 | 54,320 | 10,588 | 16,550 | 14,665 | 12,212 | 305 |
| 5 | 43,129 | 6,372 | 4,589 | 615 | 123 | 1,045 | 36,757 | 8,808 | 8,837 | 9,505 | 9,402 | 205 |
| 6 | 107,714 | 14,686 | 4,292 | 7,327 | 314 | 2,753 | 93,028 | 13,503 | 21,463 | 33,181 | 24,776 | 105 |
| 7 | 50,008 | 7,272 | 4,979 | 752 | 658 | 883 | 42,736 | 10,991 | 11,163 | 12,259 | 7,947 | 376 |
| 8 | 84,375 | 7,830 | 4,303 | 1,772 | 253 | 1,502 | 76,545 | 17,550 | 23,456 | 20,081 | 13,517 | 1,941 |
| Total | 517,319 | 58,697 | 32,022 | 14,465 | 1,787 | 10,423 | 458,622 | 90,489 | 132,640 | 136,436 | 93,800 | 5,257 |
| Administrative expense: | | | | | | | | | | | | |
| 1 | 136,461 | 14,615 | 7,642 | 3,821 | 273 | 2,879 | 121,846 | 24,290 | 28,247 | 43,122 | 25,914 | 273 |
| 2 | 277,997 | 21,823 | 11,398 | 5,838 | | 4,587 | 256,174 | 47,815 | 77,283 | 83,121 | 41,283 | 6,672 |
| 3 | 70,888 | 10,710 | 8,688 | 846 | | 1,176 | 66,178 | 17,377 | 17,761 | 18,530 | 10,588 | 1,922 |
| 4 | 188,271 | 20,201 | 13,556 | 1,506 | 941 | 4,198 | 168,070 | 32,759 | 51,210 | 45,373 | 37,786 | 942 |
| 5 | 143,653 | 22,337 | 16,089 | 2,155 | 430 | 3,663 | 121,316 | 30,886 | 23,415 | 33,327 | 32,969 | 719 |
| 6 | 105,192 | 14,759 | 4,313 | 7,363 | 316 | 2,767 | 90,433 | 13,570 | 18,514 | 33,346 | 24,898 | 105 |
| 7 | 93,479 | 14,471 | 9,909 | 1,496 | 1,309 | 1,757 | 79,008 | 21,874 | 16,172 | 24,398 | 15,817 | 747 |
| 8 | 282,596 | 26,225 | 14,412 | 5,935 | 848 | 5,030 | 256,371 | 58,780 | 78,562 | 60,057 | 45,272 | 6,500 |
| Total | 1,304,537 | 145,141 | 86,007 | 28,960 | 4,117 | 26,057 | 1,159,396 | 247,351 | 311,164 | 348,074 | 234,527 | 17,880 |
| Total cost: | | | | | | | | | | | | |
| 1 | 1,098,440 | 124,342 | 61,357 | 30,534 | 3,247 | 29,204 | 974,098 | 194,085 | 231,268 | 345,083 | 201,454 | 2,208 |
| 2 | 1,253,189 | 116,999 | 50,730 | 26,009 | | 40,260 | 1,136,190 | 214,853 | 353,000 | 372,450 | 165,500 | 30,387 |
| 3 | 619,848 | 92,460 | 70,056 | 6,967 | | 15,437 | 527,388 | 140,056 | 143,583 | 149,292 | 79,454 | 15,003 |
| 4 | 1,844,043 | 192,364 | 134,202 | 15,286 | 7,414 | 35,462 | 1,651,679 | 319,358 | 501,881 | 444,088 | 376,414 | 9,938 |
| 5 | 1,140,458 | 167,678 | 119,823 | 15,796 | 3,824 | 28,235 | 972,780 | 230,073 | 182,169 | 276,081 | 278,324 | 6,133 |
| 6 | 873,315 | 134,765 | 35,895 | 61,386 | 2,468 | 35,016 | 738,550 | 111,958 | 156,103 | 276,127 | 193,908 | 454 |
| 7 | 1,136,492 | 174,143 | 120,066 | 18,213 | 16,230 | 19,634 | 962,349 | 265,706 | 196,260 | 296,300 | 193,532 | 10,551 |
| 8 | 2,369,315 | 256,837 | 120,634 | 49,059 | 7,749 | 79,395 | 2,112 478 | 492,808 | 659,479 | 562,244 | 343,250 | 54,697 |
| Total | 10,335,100 | 1,259,588 | 712,763 | 223,250 | 40,932 | 282,643 | 9,075,512 | 1,968,897 | 2,423,743 | 2,721,565 | 1,831,836 | 129,371 |
| Liaison labor adjustment | | 75,000 | 75,000 | | | | (75,000) | (14,475) | (20,475) | (26,925 | (13,050) | (75) |
| Total | 10,335,100 | 1,334,588 | 787,763 | 223,250 | 40,932 | 282,643 | 9,000,512 | 1,954,422 | 2,403,268 | 2,694,740 | 1,818,786 | 129,296 |

## PACIFIC NORTHWEST TIDEWATER ELEVATOR ASSOCIATION

*Summary of Revenues (Eight Elevators)*

| | Total | Terminal number 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|---|---|---|---|---|---|---|---|---|---|
| Vessel revenues: | | | | | | | | | |
| Dockage | $151,838 | $16,454 | $18,159 | $6,605 | $18,461 | $11,304 | $19,739 | $21,539 | $39,577 |
| Overtime | 348,706 | 38,967 | 35,181 | 16,445 | 45,185 | 28,792 | 63,864 | 26,740 | 93,532 |
| Standby/Deadtime | 303,165 | 39,162 | 26,694 | 8,550 | 27,375 | 21,783 | 76,202 | 38,532 | 64,867 |
| Total vessel | 803,709 | 94,583 | 80,034 | 31,600 | 91,021 | 61,879 | 159,805 | 86,811 | 197,976 |
| Cargo revenues: | | | | | | | | | |
| Wharfage | 1,680,620 | 202,847 | 238,110 | 60,730 | 213,135 | 147,212 | 189,560 | 202,666 | 426,360 |
| Storage | 2,122,939 | 198,078 | 396,140 | 54,667 | 379,324 | 300,471 | 104,098 | 244,572 | 445,589 |
| Receiving | 2,949,896 | 398,540 | 416,675 | 106,277 | 285,946 | 206,140 | 374,381 | 354,666 | 807,271 |
| Loading | 1,659,179 | 189,978 | 213,350 | 58,480 | 219,320 | 161,102 | 189,560 | 201,029 | 426,360 |
| Miscellaneous | 127,498 | 2,168 | 17,690 | 19,406 | 6,950 | 5,479 | 2,273 | 4,622 | 68,910 |
| Total cargo | 8,540,132 | 991,611 | 1,281,965 | 299,560 | 1,104,675 | 820,404 | 859,872 | 1,007,555 | 2,174,490 |
| Grand total | 9,343,841 | 1,086,194 | 1,361,999 | 331,160 | 1,195,696 | 882,283 | 1,019,677 | 1,094,366 | 2,372,466 |

# FEDERAL MARITIME COMMISSION

DOCKET NO. 65–34

IN THE MATTER OF DISCOUNTING CONTRACT/NONCONTRACT RATES PURSUANT TO THE PROVISIONS OF ITEM 735, NOTE 2, OF THE INDIA, PAKISTAN, CEYLON & BURMA OUTWARD FREIGHT CONFERENCE TARIFF NO. 10

*Decided March 18, 1968*

Conference's tariff provision permitting individual member lines to publish "discount dual rates" on certain iron and steel items, while attempting to bind contract signatories to exclusive patronage, found unlawful under section 14b of the Shipping Act, 1916.

Proceeding remanded to Examiner to obtain specific information on cost differentials between ports and existence and extent of carrier competition to enable determination of lawfulness under sections 16 and 17 of the Shipping Act, 1916, of discount rates restricted as to United States port of loading.

*Elmer C. Maddy* and *Baldvin Einarson* for the respondents.

*Sidney Goldstein*, *F. A. Mulhern*, *Arthur L. Winn, Jr.*, *Samuel H. Moerman*, *J. Raymond Clark*, *Robert E. Will*, and *James M. Henderson* for intervener, The Port of New York Authority.

*William L. Marbury* and *Philip G. Kraemer* for intervener, the Maryland Port Authority.

*Donald J. Brunner*, *Samuel B. Nemirow*, and *Roger A. McShea, III*, as Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This proceeding was instituted by order of investigation dated August 27, 1965. The purpose of the proceeding was to determine whether certain practices of the India, Pakistan, Ceylon and Burma Outward Freight Conference (conference) have been or are now in violation of sections 14b, 16, 17 and 18(b) of the Shipping Act, 1916 (Act). The practices involved in the investigation are those concerning the application of conference tariff provisions regarding the transportation of iron or steel in the trading area of the conference.

The investigation was instituted as a result of the practice begun in 1961 by the conference of permitting member lines individually to discount conference rates on iron and steel articles by as much as 30 percent.

Hearings were held before Examiner Charles E. Morgan, who issued his initial decision November 2, 1967. Oral argument was heard January 10, 1968.

## Facts

The conference in question is composed of both U.S. and foreign flag lines.[1] The competition faced by the conference is mainly liner rather than tramp.[2] The trading area of the conference is from United States Atlantic and Gulf ports (Searsport, Maine to Brownsville, Tex.) to ports in India, Ceylon, Burma and Pakistan. India and Pakistan are the principal destination areas.

*Tariff discount provision*

As mentioned above, the discount rate provision in question here was instituted in 1961.

Prior to the institution of the discount rates involved in this proceeding, the conference had negotiated with the Indian Government a general project-type contract granting goods consigned to the Indian Government a rate reduction of 30 percent. This percentage later was changed to 25 percent. The Indian contract excluded a number of items from the 30-percent discount. Iron and steel were among the excluded items. A similar contract was negotiated with the Pakistani Government, also with a 30-percent discount.

In April of 1961, the conference decided to allow those member lines which wished to compete for the iron and steel business to discount the conference's rate on iron and steel items up to 30 percent. This dis-

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[1] The members of the conference either at the time of the hearing or during the period in issue included American Export Isbrandtsen Lines. Inc. (American Export), American President Lines, Ltd., Central Gulf Steamship Corp. (Central Gulf) and Isthmian Lines (Isthmian), all United States-flag lines, and the foreign-flag lines, Hellenic Lines Ltd. (flag of Greece), Hoegh Lines (flag of Norway), Nedlloyd Line (flag of Netherlands), P. N. Djakarta Lloyd (flag of Indonesia), Scindia Steam Navigation Co., Ltd. (flag of India), and Shipping Corporation of India, Ltd. (flag of India). Other conference members, such as Stevenson Lines, were either in or out of the trade from time to time or did not play roles significant to the issues in this proceeding. Generally, all of the lines listed above provided service at New York, Baltimore, and New Orleans, with the exception of American Export which did not serve Gulf ports, Hoegh and Nedlloyd which did not serve Baltimore, and P. N. Djakarta Lloyd which served only New York. Several of these lines also served Philadelphia or Mobile or both.

[2] Nonconference lines serving this trade include Waterman Steamship Corp. (United States-flag), National Shipping Corporation of Pakistan, and Iranian Line. American Oriental Lines, Inc. at one time had United States-flag vessels on charter in this trade. The nonconference Pakistani-flag vessels seldom called at New York.

counting practice was later implemented by the addition to the conference tariff of a note which provided:

> Individual carriers may, at their discretion, discount these rates in an amount not exceeding 30%. All cargo carried at such discount pursuant to this rule shall be reported to the Conference Secretary for appropriate filing with the Federal Maritime Board.[3]

The 30-percent discount rule of the conference meant that the individual member lines of the conference would be authorized to quote rates on iron and steel moving to the destination areas of the conference with the conference rate discounted to a maximum of 30 percent. This meant that each individual line could, theoretically, have in effect a different rate on steel, and that the percentage of discount could vary from 0 to 30.

The conference explained that this method had been employed as a device to meet outside (independent) competition and that, according to the conference's view of the procedure, "discount" rates were preferable to "open" rates because under the former, the fidelity of contract signatories would be retained, whereas under the latter, the shipper would have to be released from his contract obligation during the period of "open" rates.

The conference also suggested that because of large prospective shipments under the Agency for International Development (AID) programs to India, the conference decided to allow its member lines which wished to compete for such shipments to discount the conference's rate on iron and steel items.

Prior to the institution of this discount rule, many of the rates on iron and steel had been open, but effective July 1, 1961, all iron and steel rates which had been open were closed, and reinstated at their original contract and noncontract rates.

Pursuant to the discount rule, conference member lines proceeded to publish their discounted rates. Consistent with the theory that such discounted rates were discounted conference dual rates, the member lines usually published both discounted contract and noncontract rates. However, no traffic moved on discounted noncontract rates.

This discounting practice continued in effect until shortly after the institution of this proceeding.

The institution of this proceeding was the subject of a discussion

[3] The items to which the discount provision applied were bars: plain, N.O.S., straight, not coils or rolls; bars, in coils, billet ends and billets; forgings; pig; plates, not curved or bent; plates, curved or bent; sheets in coils; sheets, plain, galvanized or corrugated; strip in coils; strip, flag, not coiled; tinplate and terneplate; waste-waste, tinplate or terneplate; wire, plain or galvanized; wire rods (except welding); wire shorts.

by the conference at its meeting on October 1, 1965. At this meeting, the conference approved a motion to delete its provision permitting discounting of rates on iron and steel articles by as much as 30 percent. On October 13, 1965, at another meeting, the conference agreed to open certain rates on iron and steel. The conference then sent a telegram to the Commission announcing that the rates on some 16 iron and steel commodities were now "open" to all ports effective October 15, 1965. By opening these rates, the conference apparently hoped to satisfy objections to its discount system and to obtain discontinuance of this proceeding. The telegram also noted that as of its date, the single open tariff rates of the individual lines for these 16 commodities in the conference's tariff would be shown at the same level as the former contract rates which had been on file currently for these lines.

In accordance with the telegram above, the individual lines, in lieu of their existing dual sets of rates on the 16 iron and steel articles, published new, single rates on each of these items. Simultaneously, on some of these 16 items, the individual lines published superseding lower rates, many of which were restricted by the United States-flag member lines to certain ports of origin in the United States. Many of the discount rates previously in effect likewise had been restricted to certain ports of origin.

The discount system as such was ended in October 1965 on the 16 iron and steel articles which constitute the heavy tonnage movements to India and Pakistan. Nevertheless, although the discount system under the 1961–65 *modus operandi* was gone, the rates to the extent which they had been discounted prior to October 15, 1965, on the 16 items, remained substantially in effect after that date under the new open-rate nomenclature. Not only the rates in dollars and cents, but also the port restrictions, remained substantially as before.

The conference filed a motion to dismiss this proceeding on the ground that the discount provision in issue was discontinued. We denied the motion to dismiss, and specifically stated in an amended order that we desired to determine the lawfulness of respondents' practices instituted since the commencement of the proceeding.

*Port-restricted rates*

As mentioned above, many of the conference members had discounted rates on iron and steel which discounts were restricted as to certain ports of origin in the United States. While American-flag lines in the trade, namely American Export, Central Gulf and Isthmian, adopted such restrictions, the foreign lines in the conference did not. Both American and foreign lines employed restricted rates as to ports of discharge on foreign soil.

Restricted discounts had been instituted both under the tariff discount provision and under the subsequent open rate provision.

The record shows many instances of port-restricted discounts to U.S. ports. Generally, the Port of New York has not been given discounts similar to those obtained by the so-called outports of Baltimore, Philadelphia, New Orleans and Mobile.

Among the three ports, Philadelphia, Baltimore and New York, conference tariff No. 11 shows that in 1965, discounted rates were granted for shipments of sheets, tinplate, billets, plates, bars, cuttings and strips, with the discounts limited to Baltimore only on seven occasions, Philadelphia on two occasions, Philadelphia and Baltimore on two occasions, and New York on one occasion. In addition, discounts were granted on Baltimore shipments, along with New Orleans and Mobile, on five occasions and on Baltimore and New Orleans shipments on one occasion.

In late 1965 and early 1966, discounts were granted on shipments from Baltimore alone on 21 occasions, Philadelphia alone on four occasions, Philadelphia and Baltimore on seven occasions, New Orleans and Baltimore on three occasions and New Orleans, Mobile and Baltimore on four occasions. The discounted rates were for billets, sheets, tinplate, terneplate, bars, plates, pig iron, and strips.

No discount rates from New York were offered during the *late* 1965 and early 1966 period. During 1962, however, several discount rates on various items were established for New York. In 1963, one such discount was established for New York. Again, however, Philadelphia and Baltimore received discount rates on many more occasions than did New York during these 2 years.

The Port of New York Authority (Port Authority), which intervened in this proceeding, has strongly objected to the port-restricted discount rates. The Port Authority suggests that the discount rates are the cause of the change of position of the Port of New York in respect to its percentage share of iron and steel shipments handled. The facts are that New York's position has deteriorated and the Port Authority would attribute it to the discount rates.

The record shows that in 1960, Baltimore and New York were about equal on a tonnage basis in iron and steel exports to India and Pakistan. The picture had changed by 1964, when Baltimore handled the largest tonnages generally, but other ports such as Mobile, New Orleans and Philadelphia were ahead of New York on export of certain iron and steel items. From 1960 to 1964, the Port of New York did not lose ground in terms of tons handled, but it did lose in the sense that it failed to gain the percentage of new tonnage that it would have liked to obtain.

It should be pointed out that most of the increased tonnage in the years 1960 to 1964 was generated by AID. Throughout this period, the United States, through AID, has been supporting the industrial development of India and Pakistan by grants and loans for the procurement of materials in the United States, conditioned on the utilization, at least in part, of American-flag vessels for the transportation of materials to the recipient countries.

There was an increase in exports of steel mill products from all ports in the United States to Pakistan and India between 1960 and 1964. The AID program was the predominant factor in the increases. AID financed between 90 and 100 percent of one large steel company's shipments to India and Pakistan. AID policy does not differentiate between any United States port, nor does it favor any particular port for the loading of AID cargo.

In its attempt to show that the port-restricted discounts were justified, the conference, through the manager of Central Gulf, sought to show that loading costs of steel are relatively higher at New York than at Baltimore, Mobile and New Orleans. The Port Authority objected to introduction in the record of specific cost estimates.in the form of stevedoring rates and loading costs, but the testimony was allowed.

The testimony was to the effect that the all-inclusive straight time stevedoring costs per ton of Central Gulf were $4.33 at New Orleans, $2.12 at Mobile, $6.07 at Baltimore, and $12.85 at New York. If overtime and extra labor were included, the all-inclusive costs per ton were $7.04 at New Orleans, $3.63 at Mobile, $6.59 at Baltimore, and $14.36 at New York.

Certain cost experts employed by the Port Authority for this proceeding were offered the particular invoices on which Central Gulf computed its costs for inspection, but they refused to inspect the invoices on the ground that in their view it would be meaningless.

The Port Authority asked that the stevedoring cost data be stricken from the record. The examiner refused, but he stated that objections of the Port Authority would be given consideration insofar as they affect the weight to be given the stevedoring cost data.

## Discussion

This proceeding involves two separate areas of consideration. We must consider the conference's "discount" tariff provision in relation to the requirements of sections 14b and 18(b) of the Shipping Act. We must also consider whether the practice of the member lines of the conference, whereby they restrict the applicability of discount rates on iron and steel items to certain United States ports of loading, is violative of section 16 or 17 of the Shipping Act.

*Discount tariff provision*

The examiner determined that the discount rates of the individual lines, established pursuant to the conference discount tariff provisions, were not conference rates because they only applied to the traffic of the individual lines. The examiner also determined they were not part of exclusive patronage dual rate contracts because, although they were published in dual form, the individual lines did not have exclusive patronage contracts.

The examiner then concluded that the dual rates of the individual lines and their attempt to retain the exclusive patronage of the shipper signatories to the conference's dual rate contract, by means of the discount tariff provision, were unlawful under section 14b of the act. The examiner further concluded that the discount rates under the tariff discount provision were really open rates with a 30-percent maximum discount. Open rates are not conference rates and do not bind contract signatories.

Because the discount tariff provision has been removed from the tariff, the conference and its member lines were found to no longer be in violation of section 14b.

On this issue, the conference argues that the use of the discount rate system was entirely proper. The conference feels that the discount rates on iron and steel items were regular conference contract and noncontract rates and were so published in the conference tariff just as any other conference contract commodity rates are published. In the conference's view, the discount rates differed from open rates inasmuch as there was in effect both a conference contract and noncontract rate for these commodities. That individual lines could discount up to 30 percent from these conference rates changes nothing in the view of the conference.

Hearing counsel on the other hand argue that the conference discount scheme amounts to a subversion of the intent of section 14b of the act as interpreted in the *Dual Rate Cases*, 8 F.M.C. 16 (1964). Hearing counsel's position is that the discount rates of the individual lines are nothing more than open rates inasmuch as the aim and implementation of both open and discount rates are identical. Being open rates the conference cannot bind contract signatories to exclusive patronage and the conference would have to give 90 days' notice of the return of the rate to the dual rate system (*Dual Rate Cases*, *supra*). Hearing counsel conclude that the use of the discount rate device to avoid the open rate requirements is a violation of section 14b and the *Dual Rate Cases, supra.*

Our conclusions are basically in agreement with the position of Hearing counsel and the decision of the examiner. However, we feel that further discussion of the matter is warranted with the hope that such discussion might provide ground rules for future conference conduct of this character.

The order of investigation specifically posed the question of whether the conference had suspended the application of the dual rate system on iron and steel items and thereby "opened" rates on these items as a result of its discount tariff provision.

Pursuant to the conference tariff provision, individual lines are free to discount rates on certain iron and steel items up to a maximum of 30 percent. The conference retains both a contract and noncontract rate which constitutes the rate from which the discount is computed.

By means of the discount provision, it is possible that each conference member will have a different rate on the iron and steel items. Such a result is totally inconsistent with the idea of dual rate exclusive patronage contracts as provided for in section 14b of the act. A conference dual rate system contemplates the existence of a contract rate and a noncontract rate which are identical for each member of the conference. The Commission has recognized that rates can be opened by a conference, but when opened contract signatories are not bound by the dual rate contract. *Dual Rate Cases, supra.*

The conference here has attempted to retain the exclusive patronage requirements while departing from the standard dual rate structure. It sought to do so through the device of the "discount" rate with a maximum subject to control by the conference. As hearing counsel and the examiner suggested, however, discount rates as maintained by the conference are no more or less than open rates with a 30-percent maximum discount.

In every respect, except that the discounted rates are posted on both a contract and noncontract basis, the aim and implementation of both open and this conference's discount rates are identical. Open rates are typically instituted to allow conference members to meet outside nonconference competition. The conference has stated such was the purpose of instituting their discount rate provision. The method used by a conference in effectuating discount rates is substantially the same used in effectuating open rates. Each individual member has the option of either discounting steel rates up to the 30-percent maximum or retaining conference rates on steel. When a conference declares rates "open", each individual member line has the option of setting its rates at whatever level it sees fit, including the preexisting conference rate.

We conclude that the conference's discount rate system is inconsistent with section 14b of the act, is equivalent to instituting open rates, and cannot be employed to retain the exclusive patronage of contract signatories. To conclude otherwise would destroy the concept of open rates as they are presently known inasmuch as any dual rate conference could accomplish the purpose of opening rates while not being subject to release of signatories and 90 days' reinstitution by simply permitting member lines the option of granting discounts subject to a maximum discount.

Some comments on specific exceptions by the conference to the examiner's decision are warranted.

The conference excepts to the examiner's finding that rates established pursuant to the discount tariff provision were not conference rates. The conference argues that they controlled the maximum discount and thereby controlled the rates subjecting them to the dual rate contract. We have already shown that such discount rates could result in a different rate for each individual member. The conference's position is completely inconsistent with this fact.

The conference likewise suggests the examiner erred in labeling the discount rates open rates since they retained the form of contract and noncontract rates. As mentioned above, the conference's discount system, like an open rate system, would permit a different rate for each member. The mere quotation of a rate in dual form neither changes this fact nor establishes a dual rate contract. Furthermore, we have shown how the same considerations that go into establishment of an open rate formed the basis of the conference establishment of its discount provision.

The conference also objects to the examiner's conclusions that the discount rule is unlawful under section 14b or that the filing of dual discount rates is not provided for under section 14b. The conference argues that section 14b refers to *contracts* and *modifications* thereof and does not apply to *tariff* rules or filing of *rates*.

Section 14b dual rate contracts are meaningless when considered apart from the tariff which establishes the dual rates. The statute in fact controls the time period within which rates under the contract may be increased as well as limiting the spread allowed between contract and noncontract rates. Furthermore, if the conference was convinced that section 14b did not affect their discount tariff rule, they could not maintain that the rates established pursuant to that rule were subject to the conference dual rate contract.

Finally, the conference excepts to the examiner's general conclusion that the conference's discount tariff provision quoting contract and noncontract discount rates and presuming to bind contract signatories to exclusive patronage was unlawful under section 14b. The conference argues that although the Commission in the *Dual Rate Cases* discussed open rates, it considered only the conventional open rate procedure when it determined that contract shippers would be released on open commodities. The conference argues that since this discount scheme is not a typical open rate procedure, the *Dual Rate Cases* does not preclude a conclusion permitting the contract shippers to be bound on the discount rates. The conference feels that no violation of section 14b, therefore, can be predicated on the conference's attempt to so bind the contract shippers.

The answer to this argument is that we thoroughly considered the question of dual rate contracts and departures therefrom in the form of open rates in the *Dual Rate Cases.* There we laid down the ground rules to be followed in the establishment and use of open rates by dual rate conferences. We did not there provide for the type of discount system advocated now by the conference. Neither can we now decide to permit the conference's use of their discount system while retaining exclusive patronage contracts over users since to do so would be inconsistent with our reasoning in the *Dual Rates Cases* and section 14b of the act.

The order of investigation also raised the specific question of whether the conference is complying with section 14b(7) of the act which declares that the spread between ordinary rates and contract rates shall in no event exceed 15 percent of the ordinary rates.

The examiner stated that since there were never any dual discount rates lawfully in effect during the period of the discount tariff rule in issue, the question of the 15-percent maximum spread between contract and noncontract rates is academic. He further stated that even if these discount dual rates had been lawful dual rates in other respects, there is no showing of a spread greater than 15 percent between the contract and noncontract rates on any specific iron and steel item.

In respect to the issue of the 15-percent spread, we would like to caution that the conference's discount tariff provision *could* in theory result in a violation of the Act. Assume one conference member takes full advantage of the 30-percent discount provision and another conference member chooses to effect no discount. In such a case the spread between the contract rate of the discounting member and the noncontract rate of the other member would exceed 15 percent. However, as the examiner found, there is no showing in this case of a spread greater than 15 percent between the contract and noncontract rates on any specific iron and steel item.

Other issues relating to the tariff discount provision were raised by the order of investigation and dealt with by the examiner with no exceptions being taken thereto. We endorse the examiner's findings on these points and briefly paraphrase them here:

1. The record does not show any violation of section 18(b) (2) and (3) which concern the publication of increased rates on due notice and the collection of rates other than those specified in tariffs.

2. The record does not show that the conference has failed to comply with section 14b(2) insofar as it provides that tariff rates under the contract be not increased until they have been in effect at least 90 days and insofar as it requires 90 days' notice on rate increases.

3. There was and is no unlawful section 15 agreement between the individual lines.

4. There has been no agreement in violation of section 205 of the Merchant Marine Act, 1936, to prevent or attempt to prevent any other carrier from serving any port at the same rates which it charges at the nearest port already regularly served by it.

*Port-restricted discount rates*

The examiner concluded that the differences in discount rates at specific ports were not the proximate cause of any disadvantage, but rather it was the preferences of the shippers for the outports, the location of the steel mills, difference in port facilities, character of cargo, and other factors such as loading costs which were the proximate cause of the disadvantage to the Port of New York. He concluded that the facts herein are inadequate proof of unjust discrimination or of other unlawfulness under sections 16 and 17 of the act, and that no violations of section 16 First and 17 of the act have been shown.

The Port Authority throughout has insisted that the Port of New York has been and is being subjected to unjust discrimination and undue prejudice, and that the competing ports of Baltimore, Philadelphia, New Orleans and Mobile have been unduly preferred by the use of port-restricted discount rates. In general, the Port Authority contends that reduced or discounted rates came first, and that cargoes were induced to follow these reduced rates at particular loading ports such as Baltimore to the detriment of the Port of New York.

The conference and Hearing Counsel have contended that there were other factors besides the ocean rates which attracted steel to the outports, that the cargoes came first to the outports, and that the reduced rates were induced to follow the cargoes.

We are unable, on the present basis of the record, to come to a determination of the section 16 and 17 issues in relation to the practice of restricting discounted rates on iron and steel to certain U.S. ports of loading.

The present record shows that the percentage volume of iron and steel moving through the Port of New York has decreased significantly since 1960. The Port Authority attributes this decrease to the conference member's practice of charging higher ocean rates on iron and steel items loading at the Port of New York than they charge on the same items loading at the Ports of Baltimore, Philadelphia, etc.

The respondents and hearing counsel, on the other hand, have offered several explanations for New York's lower proportion of the iron and steel business. These factors are offered to show that they, rather than the restricted discount rates, put New York in its current unfavorable position.

While the factors of shipper preference, steel mill location, character of cargo, and port facilities tend to show that the iron and steel would have moved away from New York even if there had been no discount, they do not in any way serve to justify the conference member's rate disparities.

Of all the factors considered by the examiner only two, comparative loading costs and carrier competition, can actually be justification for rate disparities.

When the conference adopted its rate policy, it chose to have uniform rates as to commodities from all U.S. ports of loading in the trade area. The conference members continued this policy from its inception until they adopted the subject port-restricted rates on iron and steel. The subject discounts on iron and steel are the only port-restricted rates on any commodity that the conference members have adopted.

Having established a policy of uniform rates from all U.S. ports of loading and continuing such policy for a considerable length of time, the conference members should be required to adequately explain any departure from such basic policy. This the conference has attempted to do. However, as mentioned above, the only factors offered in explanation for such departure, which are actually relevant to or can be offered in support of such departure, are that it was justified to meet competition or that it was justified on the basis of comparative loading costs at the various ports.

This is where the final determination of this case becomes troublesome on the basis of the present record.

In respect to comparative loading costs at the various ports, the record is not conclusive. The conference testimony on this subject indicates that such costs are higher in New York than in the other ports involved. However, the figures submitted were offered for a limited purpose, i.e. to show general cost relations and not to show any direct relationship between any difference in loading costs and difference in ocean rates at the various ports. Indeed, in view of the various objections to this testimony and the failure to include underlying data in the record, it cannot be concluded with certainty that such costs in New York are higher. More important, it cannot be concluded what sort of relationship exists between the difference in costs and the disparity in rates, and whether such cost differences might justify the disparity.

In reference to the issue of carrier competition and whether the discounts were justified to meet such competition, the evidence is likewise scant. The record shows the existence of nonconference carriers, but nowhere does it show any information as to specific rates of such carriers or whether such rates might justify the conference's restricted discount rates.

In view of the above-mentioned circumstances, we are remanding this proceeding for the purpose of obtaining evidence concerning cost differences incurred by conference carriers at the various ports in question and for the purpose of determining the actual existence of nonconference competition faced by the conference at the various ports in question, including evidence as to the rates of both conference and nonconference lines. Finally, we ask the examiner on remand to determine whether any of the information gained on remand will provide justification of the rate disparities in question.

An appropriate order will be entered.

*Vice Chairman Hearn, concurring and dissenting:*

I concur in the report of the majority in the finding of a violation of section 14b of the Shipping Act, 1916. I dissent from the decision of the majority to remand the case to obtain more evidence as to violations of sections 16 and 17 of the act. I believe the present record plainly indicates and sufficiently sets forth evidence of such violations.

The record in this case shows beyond doubt that since the initiation by the conference [4] in 1961 of the port-restricted discount, New York's position has deteriorated with respect to the handling of iron and steel exports. In 1961 New York was the country's leading port of export for iron and steel. In 1964 New York ranked second or third among such ports. The percentage of iron and steel moving through New York thus substantially decreased from 1960 to 1964 as a result of the conference quoting a higher rate out of New York.

[4] The practice has been continued by the conference members under open rates.

Shortly after this proceeding began and, in my opinion, as a result thereof, the conference claimed to have ended the discount system in 1965 and requested the Commission to discontinue the proceeding. The Commission declined to do so, and the record reveals that although the conference's procedures were changed in 1965, the substance of the discount system remained. The port-restricted discounts continued substantially as before, except that they were designated open rates. Thus, the conference and its members have not changed their practices since 1961 but only attempted to further disguise them in 1965. It should be noted here that until 1961 the conference and its members maintained uniform rates as to all commodities out of all United States ports in the trade area, and since 1961 this policy has continued as to all commodities except iron and steel.

There is no dispute as to these facts and they are acknowledged by the majority herein. In my opinion it is equally beyond dispute that the decrease in cargo carryings out of New York was the result of the conference member's practice of charging higher rates out of New York than out of other ports, such as Baltimore, Philadelphia and Mobile, and that the discounts on their face are discriminatory and prejudicial to the Port of New York.

The majority report finds, and I agree, that various factors[5] offered by the respondents in justification of the discounts are irrelevant to the question of violation of sections 16 and 17. Two other factors, however, are accepted by the majority as valid reasons for the discounts, if they can be supported by further evidence. They are comparative ports costs and nonconference competition. To raise these factors as possible justification is to raise a straw man. Even if further evidence in support of these factors could be adduced, the discounts would still be in violation of the Shipping Act. These facts are all here but the majority bypasses them.

The record shows that about 35 other conferences which encountered the same problems in New York as complained of by respondents maintained identical rates on iron and steel from U.S. ranges of ports.[6] New York dominated the ports handling certain iron and steel exports to European destinations in 1964;[7] but in the export of the same iron and steel articles to India and Pakistan, New York could not compete effectively despite the fact that the problems and costs of handling the iron and steel are the same regardless of destination.[8] Also, only the

[5] The factors are shipper preference, steel mill location, character of cargo, port facilities and volume of movement.

[6] Exhibit 9.

[7] Exhibits 17–23, 78, 88.

[8] Transcript, pp. 564, 601.



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American flag members of the respondent conference maintained the port-restricted discount rates. The foreign flag members did not offer discount rates favoring other ports but continued to treat all ports in the range equally.[9]

There cannot, therefore, be any substantial difference in the transportation conditions in regard to export iron and steel moving through New York to India and Pakistan than to such cargo moving through other ports. Thus, it is unjust discrimination in violation of section 17 where, as here, the same carriers charge different rates out of different ports for like cargo bound for a common destination under substantially similar circumstances and conditions.

There is no dispute that New York competes with the other ports for the iron and steel cargo. There is no dispute that New York is one of the leading ports of export for such cargo. There is no dispute that, since the discount rates became effective, the movement of export iron and steel through New York has decreased sharply by being diverted to ports where lesser rates are charged. With these preliminary findings, it is incomprehensible that the majority fails to conclude that the imposition of the port-restricted rates against New York was the cause of the decline in iron and steel exports through New York and a violation of section 16 First.[10] No factor in justification could exist which could countervail the undisputed facts. In fact, on oral argument, the respondents admitted that neither higher costs nor any other reasons compelled the port-restricted discounts.[11]

In accordance with the foregoing, I conclude that the respondents violated sections 16 and 17. No further evidence is required to find such violations since no regulatory purpose is served by remanding for the purpose of developing what is already so clearly spelled out on the record in this case.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

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[9] Initial Decision, p. 21.

[10] *Surcharge on Shipments from Buffalo, N.Y.*, 7 F.M.C. 458, 461 (1962).

[11] Transcript of Oral Argument, p. 86.

# FEDERAL MARITIME COMMISSION

DOCKET NO. 65–34

IN THE MATTER OF DISCOUNTING CONTRACT/NONCONTRACT RATES PURSUANT TO THE PROVISIONS OF ITEM 735, NOTE 2, OF THE INDIA, PAKISTAN, CEYLON & BURMA OUTWARD FREIGHT CONFERENCE TARIFF NO. 10

ORDER

This proceeding having been instituted 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 conclusions thereon, which report is hereby referred to and made a part hereof;

*It is ordered*, That this proceeding is remanded to the examiner for the purpose of taking further evidence on the matters described in the report.

By the Commission

(SEAL) (Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

Docket No. 1095

## IN THE MATTER OF THE MODIFICATION OF THE SELF-POLICING PROVISIONS OF AGREEMENTS NO. 150 AND 3103

*Decided March 19, 1968*

Determinations of a Neutral Body which, under the terms of its employment. combines both investigative and adjudicatory functions must be subject to a *de novo* review by an impartial and disinterested panel of arbitrators.

To give effect to the principle that an accused should not be subject to punishment on the basis of secret evidence, arbitrators must be furnished only with such evidence as has been disclosed to the accused line, and which the accused line has had an adequate opportunity to rebut or explain, and base their determinations solely thereon.

A review *de novo* by a panel of arbitrators does not require a new trial but merely a new evaluation of the record already established before the Neutral Body.

*John P. Meade* for the Trans-Pacific Freight Conference of Japan and the Japan Atlantic and Gulf Freight Conference.

*George F. Galland* and *Amy Scupi* for States Marine Lines, Inc.

*Donald J. Brunner* and *Roger A. McShea III*, Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This proceeding is before us on remand from the United States Court of Appeals for the District of Columbia Circuit in *States Marine Lines, Inc.* v. *Federal Maritime Com'n.*, 376 F. 2d 230 (1967). The case was returned to us for the resolution of certain difficulties encountered by the court in reviewing our approval of the self-policing systems established by the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference.[1] The

[1] The Trans-Pacific Freight Conference of Japan (Trans-Pacific), established under Agreement No. 150, serves the trade from Japan, Korea and Okinawa to United States and Canadian Pacific Coast ports, including Alaska and Hawaii. The Japan-Atlantic & Gulf Freight Conference (Japan-Atlantic), established under Agreement 3103, serves the trade from Japan, Korea and Okinawa to Atlantic and Gulf ports of North America. Both conferences are domiciled in Japan. The self-policing provisions are contained in Article 25 of these agreements and are identical in both.

Conferences, States Marine Lines (a member of both conferences) and Hearing Counsel have submitted comments and suggested amendments to the systems in response to our order of August 27, 1967. Replies were filed but, in view of the limited scope of the issues presented and the adequacy of the pleadings, we required no oral argument.

## Prior Proceedings

The present posture of this proceeding is the result of a prolonged controversy between the two conferences and States Marine Line. The dispute began in 1958 when, as a result of allegedly widespread malpractices, the Trans-Pacific Freight Conference of Japan, adopted a Neutral Body-type self-policing system which, in its original form, required that any Neutral Body selected be completely free of any affiliation with a conference member. States Marine complained that a fine which had been assessed against it for an alleged breach of the Conference agreement was invalid because of the Conference's failure to observe the strict neutrality requirement of the agreement in the selection of its Neutral Body. In Docket 920—*States-Marine Lines, Inc.* v. *Trans-Pac. Freight Conf.*, 7 F.M.C. 204 (1962), we found that the strict neutrality requirement of the Conference agreement had not been met and additionally that an attempted amendment to the agreement [2] was invalid because it had not received our approval under section 15 of the Shipping Act, 1916. Our decision was upheld in *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Commission*, 314 F. 2d 928 (9th Cir., 1963).

Prior to the issuance of our decision in Docket No. 920, both Trans-Pacific and Japan-Atlantic filed modifications to their basic agreements (150–21 and 3103–17, respectively) which provided that a neutral body must disclose its affiliations with any member line, but that such affiliation would not disqualify the neutral body from serving unless the relationship was with an accused line, in which event the neutral body must appoint an unaffiliated agent to conduct the investigation. States Marine protested these modifications and we instituted the present investigation. In our first Report and Order, we approved the modifications (7 F.M.C. 653 (1963)).

States Marine appealed the decision [3] and in its brief to the court placed heavy reliance on the then recent Supreme Court decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), which was decided after oral argument and had not been cited to or considered by us.

[2] Which would have permitted the Neutral Body to serve notwithstanding its connection with a member line if this fact were disclosed.

[3] *States Marine Lines, Inc.* v. *Federal Maritime Com'n.* Unreported. Remanded to FMC at FMC's request.

We asked the court to remand the case for reconsideration in the light of *Silver* and this unopposed request was granted. Hearings were held before a Hearing Examiner and on March 25, 1966, we issued our second Report and Order approving Agreements No. 150–21 (as modified by 150–29) and 3103–17 (as modified by 3103–26). States Marine again sought judicial review and the present remand resulted.

## The Present Neutral Body Systems and the Court's Opinion

In brief, the self-policing system, as presently set forth in Article 25 of both basic agreements provides for the following procedures. The Neutral Body is selected by a two-thirds vote of the Conference members. When selected, it must disclose any present or future financial interests it may have in any Conference member. Any such interest acts as a general disqualification. The Neutral Body must also disclose all business or professional relationships with members, but such relationships will be disqualifying only in those cases where the client is the accused. The Neutral Body is authorized to receive written complaints of malpractice, to investigate the charges, and to assess and collect fines. In conducting the investigation, the Neutral Body may, without prior notice, call upon the accused and demand to see whatever records or other material the Neutral Body considers relevant. All member lines are obligated to cooperate in the investigation and must produce the requested information. The identity of the complainant is to be kept secret, and any evidence that would tend to reveal the complainant's identity will be withheld from the accused; however, the substance of the withheld evidence must be disclosed so the accused can rebut it. Once the investigation is completed, the Neutral Body notifies the accused whether there are reasonable grounds to suspect malpractice, and the accused is given a specified time to prepare its defense. The accused is then entitled to a hearing before the Neutral Body, and has the right to counsel. The Neutral Body is not restricted by legal rules of evidence or the burden of proof required in criminal or civil cases; rather it will employ rules of common sense—that is, does the information developed persuade the Neutral Body that the malpractice occurred? Fines are assessed in accordance with a schedule setting forth certain maximum penalties, related to the number of times the member has been found guilty of malpractice—$10,000 maximum for a first offense, and so on up to $30,000 for fourth and subsequent offenses. Mitigating circumstances may be taken into account in fixing penalties. Finally, the members agree that the Neutral Body's decision is to be "valid, conclusive and unimpeachable * * *."

States Marine Lines attacked virtually all of the provisions of the systems, all of which were disposed of by the court except the contention that under the system as presently constituted, an accused could be convicted on the basis of undisclosed evidence, and any relationship existing between the Neutral Body and a member line could influence the Neutral Body's decision. The court's primary concern was that the Neutral Body, because it both investigated and adjudicated the case, would be forced into a position of being privy to evidence some of which it was forbidden to disclose to the accused line but which nevertheless might influence the Neutral Body's decision.

Applying the principles of *Silver*, the court concluded that Congress, in authorizing self-policing for conferences, did not intend to abandon the fundamental principle that the accused should be convicted only under fair procedures. The court felt that something other than the admittedly high ethical standards of the accounting profession [4] was needed to insure fair dealing in all Neutral Body investigations. The court's suggested solution was:

> Rather than urge that the Neutral Body system be scrapped * * * the Government [the Department of Justice] has come forward with a proposal which accepts the Commission's determination that effective self-regulation demands such a system but which at the same time seeks to accommodate the obvious need for some kind of institutional check on Neutral Body discretion. Building on the Conferences' own suggestion that undisclosed evidence be screened out of the ultimate decision-making process, the Government recommends that a Neutral Body's decision to penalize a member be subject to review by a panel of arbitrators who are free of any relationship with Conference members.
>
> Under such a system the Neutral Body would have to demonstrate the accused's guilt by using only the evidence made available to the accused. In addition, we presume, the arbitrators would take into account any rebutting evidence provided by the accused. This system would maintain the complainant's anonymity, yet substantially eliminate the danger of improper conviction on the basis of secret evidence, since the arbitrators would never see or be influenced by non-disclosable information.
>
> Such a proposal does not of course provide all the guarantees of actual confrontation [5] nor does it necessarily resolve all the potential problems that could arise from a Neutral Body's exercise of discretion. Nevertheless, providing an independent check of the disclosed evidence would largely neutralize any substantial abuse of discretion by the Neutral Body, and this, we think, is all that can reasonably be asked. Since the Government's proposal would provide article 25 this needed element of fairness, we accept it as a workable and desirable compromise between the realities of Conference self-regulation and the rights of an accused member. (376 F. 2d 240–41). (Footnote ours).

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[4] In both conferences, an international accounting firm acts as the Neutral Body.

[5] States Marine had argued that fairness required that the identity of the complainant be disclosed but the court rejected this contention.

In summarizing its conclusions and remanding the case for further proceedings, the court held that:

> * * * given the special characteristics of the shipping industry and the conference system the broad discretion granted a Neutral Body must be subject to some form of continuing internal review. That review must provide reasonable assurance that a member will be penalized only on the basis of evidence it has an adequate opportunity to rebut or explain—in other words that the accused will in fact be treated fairly. (376 F. 2d 242) .

## The Parties' Suggested Amendments

*States Marine Lines*

States Marine would modify Article 25 to require the accused line to pay any fine imposed within 30 days after it receives the adverse report of the Neutral Body unless review by arbitration is demanded. Review would be by a panel of three arbitrators, one to be named by the accused line, one by the Neutral Body, and the third to be selected by the first two. The proceedings would be held in a city to be mutually agreed upon. The Neutral Body and the accused line would be permitted to present such evidence and testimony as they desire to the arbitrators with the proviso that all evidence and testimony must be furnished to all parties who are to be given an opportunity to cross-examine and submit evidence and testimony in rebuttal, either directly or through counsel. The arbitrators would be given full authority (by majority vote) to affirm, set aside or modify any finding or conclusion which they deem erroneous. Moreover, the arbitrators would be allowed to cancel, reduce or increase any fine which they deem improper. A written decision with findings of fact and conclusions is called for.

The decision of the arbitrators would be conclusive except for a limited right of appeal to the Federal Maritime Commission on the sole ground that enforcement of the decision would constitute a violation of the Shipping Act, 1916. Costs of arbitration are to be borne by the Conference. Payment of any fine imposed by the arbitrators must be made within 30 days. Thereafter, if payment has not been made, the Conference may look to the security posted by the line under Article 12. The decisions of the Neutral Body or arbitrators would not constitute admissions or proof of guilt or liability under the law.

*The Conferences*

The Conferences suggested considerably more detailed amendments, a number of which bear only tangentially upon the issue [6] presented

[6] These proposals are identical to amendments which were filed with the Commission for approval under section 15 on June 30 and July 24, 1967. Publication of these amendments in the Federal Register has been held in abeyance pending resolution of the issues in this remand.

on remand. Basically, they would require the Neutral Body to consider only that evidence which it was actually able to disclose to the accused line in reaching its decision. The decision of the Neutral Body or arbitrators would be final unless an appeal from an adverse decision of the Neutral Body is noted within 10 days. The proceeding would be conducted by a panel of three arbitrators, one selected by the accused line within 15 days and one selected by the Conference by two-thirds vote, and one selected by the Japan Commercial Arbitration Association.

The Neutral Body is required to file its report (decision), together with the evidence (including statements of oral witnesses, if any) plus a certification that all of the evidence relied upon in reaching the decision was shown to the accused line, and that the accused line was given an adequate opportunity to explain or rebut the evidence adverse to it. The Neutral Body is also required to file with the arbitrators any explanation or material which the accused line may have submitted, whether relied upon or not, in reaching the decision. A copy of all of this material is to be furnished to the accused line at the time it is submitted to the arbitrators. The accused line may within 10 days "object" to any of the material thus furnished, but this objection is limited to whether it was shown the evidence so filed and whether it was given an adequate opportunity to explain or rebut it. The matter is then deemed to be submitted for decision. No other communication with the arbitration panel is allowed.

The arbitrators' scope of review is limited to: (1) whether the accused line actually saw the evidence upon which the Neutral Body decided the case; (2) whether the accused line was given an adequate opportunity to explain or rebut; (3) whether the Neutral Body, on the basis of the evidence filed with the arbitrators, could reasonably have reached the result they did on the basis of the standard of "common sense" and "persuasive information" that the breach "probably occurred." The arbitrators are forbidden to substitute their judgment for that of the Neutral Body and may not disturb the level of any fine assessed.

The arbitrators are to reach their decision within 30 days and serve the parties with copies. Fines must be paid within 10 days after receipt of notice of affirmance.

*Hearing Counsel*

Hearing Counsel would require the Neutral Body to disclose *all* evidence and material developed in the course of its investigation to the accused line, but would limit arbitration to an appellate type of review similar to that proposed by the Conferences. Thus, the arbitrators would be required to affirm the determination of the Neutral Body if supported by evidence, even though they might have decided the case differently.

## Discussion

Our task on remand is to insure that the self-policing provisions contained in Article 25 of the Conferences' basic agreements call for "some form of continuing internal review" which "* * * must provide reasonable assurance that a member will be penalized only on the basis of evidence it has an adequate opportunity to rebut or explain—in other words, that the accused will in fact be treated fairly."

In offering guidance to us on remand, the court considered the plan offered by the Justice Department a useful model upon which to build. Justice suggests that:

> One means of eliminating the unfairness of the system is to permit an accused member to appeal an adverse decision by the neutral body to a panel of arbiters free from any business relationship with any member line. Under such a system, the neutral body would have to demonstrate the member's guilt to the panel of arbiters by using only evidence which can be revealed without disclosing the complainant's identity. This would help eliminate the danger of improper conviction on the basis of secret evidence because under this proposal the panel of arbiters could never have such evidence before it. Furthermore, since the role of the neutral body would be changed from "judge" to "prosecutor" whenever an accused member chose to appeal to the panel, the potential harm of permitting an undisclosed professional relationship between the neutral body and the complaining member would, in our judgment, be minimized sufficiently for the system to meet the standard of fundamental fairness, especially in view of the admittedly high professional standards of the prospective neutral bodies.

Understandably, the amendments suggested by the Conferences and those proposed by States Marine approach the problem of internal review of the Neutral Body's decision from opposite poles. On the one hand, States Marine, by requiring a full trial *de novo* before the arbitrators, would virtually relegate the role of the Neutral Body to that of investigation only. The Conferences, on the other hand, would limit the role of the arbitrators to that of virtually a rubber-stamp affirmation unless some palpable procedural irregularities could be shown in the Neutral Body's trial of the case. The impracticability of the States Marine proposal is two-fold. It would call for cross-examination of witnesses which the court itself recognized was impractical under any self-policing system which is international in scope and without subpoena power; and it would inordinately prolong any proceedings by requiring a trial *de novo* before the arbitrators. The establishment of "fair procedures" requires neither.

The difficulty with the Conferences' suggestion is that it would render the arbitrators' review something less than meaningful. It would not remedy the basic concerns of the court with the present systems—that secret evidence or a conflict of interest might influence the decision. In a close case, either one or both of these considerations could well make the difference between a finding of guilt or innocence. Yet, under the Conferences' proposal, the arbitrators would be forced to affirm the decision of the Neutral Body unless it was utterly unsupported by the record furnished to it. This does not constitute an internal review which would effectively curb abuses of discretion by the Neutral Body.

Hearing Counsel's proposal is akin to that of the Conferences except that they would require the Neutral Body to submit all evidence uncovered in the course of the investigation whether relied on by the Neutral Body or not. Under Hearing Counsel's plea, it is unlikely that the name of the complainant could be successfully withheld—a feature upon which the effectiveness of the system is largely dependent. Moreover, this safeguard is somewhat illusory since it would be virtually impossible to determine whether the Neutral Body had in fact furnished the arbitrators *all* of the evidence it had uncovered.

At this point, it would seem clear that the assurance of fair procedures is best achieved by selecting the best from all the various proposals. Thus, while we will not require a trial *de novo* before the arbitrators as States Marine would have us do, neither will we, as the Conferences propose, limit the authority of the arbitrators to substitute their judgment for that of the Neutral Body. We will limit the review of the Neutral Body to the consideration by the arbitrators of the record of the Neutral Body's proceeding, together with pleadings to be submitted by the parties, but at the same time leaving the arbitrators free to reach their own decision, both on the question of guilt and the level of the fine to be assessed.

As for the other features of the various proposals such as time limits for appeal and payment of fines, selection of arbitrators, finality of decisions and liability of the Neutral Body and the arbitrators for their decisions, we have in the main adhered to the Conferences' proposal since these proposals have the approval of the majority of the members and are not contrary to the principles of section 15.

On the basis of the foregoing, we find that Article 25 as modified in Appendix A hereto 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 will not operate to the detriment of the commerce of the United States, and is not contrary to the public interest, or in violation of the Act. Accordingly, we will approve it. An appropriate order will be issued.

*Vice Chairman* Hearn, *concurring:*

I previously expressed serious reservations as to several aspects of the self-policing system originally approved by the Commission [7] and dissented from the majority opinion at that time. Although my objections are not entirely satisfied, I now concur in the system herein approved. Much of my concern arose then from the lack of complete neutrality in the system. With the establishment of an independent panel of arbitrators, I am confident that whatever shortcomings might still exist will thereby be ameliorated. As the Court of Appeals said: "* * * whether particular procedures are fair depends upon the particular institutional setting involved." [8]

In remanding this case to the Commission, the Court of Appeals said that in consideration of the complexities involved in the conference system:

> * * * the principle becomes obvious that this kind of self-regulatory process must provide specific, realistic guarantees against arbitrary and injurious action.[9]

The court then found that the Neutral Body self-policing system as approved by the Commission was inadequate to the attainment of that objective. The system, the court concluded, must provide assurances against abuse where "practicalities preclude strict neutrality." [10]

In accordance with these statements and further conclusions of the court,[11] the Commission now approves a self-policing system which includes an independent panel of arbitrators. I wholly support this system; and as I have previously stated,[12] I would support only a self-policing system in which the final review is by a body without any relationship to members of the conference. Such a requirement is indispensable for groups exercising economic power and for which economic gain is their *raison d'etre.*

There is another point worthy of emphasis in the Article 25 approved herein. Paragraph (i) provides that the conference shall bear the expenses of the self-policing system. All conference members share equally an obligation to the public which they serve to adhere to the regulations of government and the principle of fair play. The neutral

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[7] *Agreement No. 150–21, Trans-Pacific Freight Conf. of Japan and Agreement No. 3103–17, Japan-Atlantic and Gulf Freight Conference,* 9 F.M.C. 355, 386 (1966).

[8] *States Marine Lines, Inc. and Global Bulk Transport Corp.* v. *Federal Maritime Commission,* 376 F. 2d 230, 235 (1967).

[9] *Ibid.,* 236.

[10] *Ibid.,* 237.

[11] See the majority report herein at 11 FMC 438.

[12] 9 F.M.C. 355, 386.

body is both prosecutor and judge, and its discretion in conducting investigations should not be influenced by financial considerations.

On the basis of the foregoing, I fully concur in the decision of my fellow Commissioners.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

Docket No. 1095

IN THE MATTER OF THE MODIFICATION OF THE SELF-POLICING PROVISIONS OF AGREEMENTS NO. 150 AND 3103

## ORDER

The Commission has this day entered its Report in this proceeding which is hereby made a part hereof by reference, and has found that Article 25 of Agreements No. 150–29 and 3103–26 as set forth in the Appendix to said Report is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, 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 otherwise violative of the Shipping Act, 1916.

*Therefore, it is ordered*, That Article 25, Agreements 150–29 and 3103–26 as modified in the Appendix to the aforementioned Report, is hereby approved.

By the Commission:

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

# APPENDIX

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 "professional or business relationships or financial interests" (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, subagents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of the appointment, to divulge any future proposals it might receive to create such interests, and promise to obtain Conference approval thereof before accepting any such proposal. Such interests so divulged, if any, exclusive of financial interests, 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 of 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, although

they will not be disqualified because they may have an interest, exclusive of a financial interest, with any other member or its agents.

(4) For purposes of this paragraph (a), the words "financial interests" do not include professional or business relationships whereby the Neutral Body or its agents or experts are engaged as independent contractors for professional or business services.

(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 the terms of this Article 25.

(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.

(3) The Neutral Body shall have no authority to investigate any breach involving a malpractice which occurred more than two years before the filing of a written complaint pursuant to Article 25(b)(1), or more than two years before the discovery thereof under Article 25(f)(1).

(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 or 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, involving a malpractice, and if a breach involving a malpractice 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 in proceedings under this article, 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 occurred.

(3) After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the repondent of the nature of the alleged breach, bearing in mind basic precepts of fair play. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explations and/or rebutting evidence as it may deem proper and desirable. At such hearing, the Neutral Body shall consider only the evidence



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which it was able actually to disclose to the respondent, together with such explanations and/or rebutting evidence the respondent may have offered, and make its decision thereon in accordance with the standards set forth under Article 25(f)(2) hereof.

(4) On the basis of its decision, the respondent shall either be advised that a breach has not been found or, should a breach be determined to have been committed, assessed liquidated damages. 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.

Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed, the Neutral Body shall consider such mitigating circumstances as it may deem relevant.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damage 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 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, and in case of a breach the respondent will be furnished with the Neutral Body report and a Conference debit note covering the liquidated damages assessed.

(g) *Decisions of the Neutral Body:*

(1) The decisions of the Neutral Body shall be final and conclusive unless within thirty (30) days after the accused line receives the Neutral Body's report, it shall demand review by arbitration in accordance with the procedures set forth in paragraph (h) of this Article.

(2) Any fine imposed by the Neutral Body shall be paid to the Conference within thirty (30) days after the accused line receives the report of the Neutral Body unless review by arbitration is sought under paragraph (h) of this Article.

(h) *Review by Arbitration:*

(1) Notice of Intent to Seek Arbitration. Upon receiving actual notice of an adverse determination by the Neutral Body, the respondent shall have thirty (30) days within which to notify the Conference Chairman in writing of its intent to seek review of the Neutral Body's determination by arbitration. Failure to give such timely notice shall constitute a waiver of the right to review.

(2) Location of Arbitration. All parties hereto agree to arbitration in Japan by a panel free of any professional, business or financial relationship with any of them. Upon agreement of the parties, arbitration may be held in any other place.

(3) Selection of Arbitrators. Within fifteen (15) days after serving its notice of intent to seek review by arbitration, the respondent shall submit to the Chairman the name of one arbitrator, and within five (5) days thereafter, the Conference shall select one arbitrator by a two-thirds vote of all members present and entitled to vote (excluding respondent) with prompt notice to respondent of the selection made. The two arbitrators so named shall, within ten (10) days, select a third arbitrator except that if they are unable to agree upon the selection of a third arbitrator within said period, then and in that event, the Chairman shall immediately file the names and addresses of the first two arbitrators with the Japan Commercial Arbitration Association which shall promptly appoint the third arbitrator, who may be a national of any country.

(4) Arbitration Procedures. When the designation of the panel of arbitrators has been completed, it shall notify the respondent, the Conference Chairman and the Neutral Body of its composition. Within three (3) days after such notification, the Neutral Body shall file with the panel its report, together with all evidence or data which it relied upon (including statements of oral witnesses, if any) in its determination that a breach had occurred; its certification that all of the evidence and data relied upon in reaching its decision was shown to respondent, and that respondent was given an adequate opportunity to explain or rebut such evidence and data, during the hearing process; and any evidence, explanation or material the respondent may have submitted during the hearing process whether relied upon or not in reaching its decision. A copy of this material shall be served upon respondent at the same time it is filed with the arbitration panel. The material thus furnished shall constitute the record on review.

Within ten (10) days after receipt of the Neutral Body's Report and certified record, the respondent may file in writing its objections (if any) to the certification, and its exceptions and brief in opposition to the Neutral Body's Report. Within ten (10) days after respondent's submission, the Neutral Body may file its reply which is to be confined to matters raised or argued by respondent. In the event that respondent files nothing, the matter will be considered solely on the basis of the report and certified record as furnished by the Neutral Body.

(5) Arbitrators' Scope of Review. The arbitrators, by majority vote, may affirm the Neutral Body's determinations or set aside or modify any finding they deem erroneous, and may cancel, reduce or increase any fine which they deem improper (subject to the maxima specified in Article 25(f)(4) hereof). Their decision shall be in writing setting forth their findings of fact and conclusions and shall be made within 30 days after the matter is submitted. A copy thereof shall be served on respondent, the Neutral Body and the Ethics Committee.

(6) Finality of Arbitrators' Decision. The decisions of the arbitrators shall be final, binding and conclusive subject only to an appeal to the Federal Maritime Commission on the ground that the enforcement of the arbitration award constitutes a violation of the Shipping Act, 1916.

(7) Payment of Fines After Arbitration. Any fine imposed by the arbitrators shall be paid to the Conference within thirty (30) days after receipt of a debit note from the Chairman, following service of the arbitrators' decision in accordance with subparagraph (5). In default of a payment of a fine by the due date, the Conference may resort to the security posted by the line under Article 12 and the line shall be deemed delinquent under Article 28. It is understood between the members that decisions of the Neutral Body and/or the arbitrators are not an admission or proof of guilt or liability under law.

(i) *Payment of Fees and Expenses:*

The payment of the fees and the necessary expenses of the Neutral Body and the arbitrators incurred in the performance of their duties under this Article shall be borne by the Conference.

(j) *Legal Proceedings Involving Self-Policing Activity:*

The members agree that they will neither jointly nor severally bring any legal action whatsoever against the Neutral Body or its agents or the arbitrators for damages allegedly arising out of their decisions or for any act or omission occurring in the discharge of their functions under this Article. In addition, each member agrees to hold the other members of the Conference, the Neutral Body, and its agents and the arbitrators harmless from any claims which may be brought by its agents or employees against another member, the Conference, the Neutral Body or its agents, or the arbitrators for damages allegedly arising out of the acts, omissions or functions of the Neutral Body or the arbitrators.

# FEDERAL MARITIME COMMISSION

Docket No. 66–63

UNITED STATES BORAX & CHEMICAL CORPORATION

*v.*

PACIFIC COAST EUROPEAN CONFERENCE ET AL.

Docket No. 67–27

PACIFIC COAST EUROPEAN CONFERENCE ET AL.

*v.*

UNITED STATES BORAX & CHEMICAL CORPORATION

*Decided March 29, 1968*

The dual rate contract between Pacific Coast European Conference and United States Borax & Chemical Corporation, which was not amended to include provisions permitted or required by the Commission, became unlawful and unenforceable on April 4, 1964.

In charging United States Borax & Chemical Corporation a higher rate than charged other shippers of borax and borax products for similar services between April 4, 1964 and January 1, 1967, without the benefit of a valid dual rate contract. the Pacific Coast European Conference and its member lines violated section 14b, section 16 First, and section 17 of the Shipping Act, 1916.

In denying United States Borax & Chemical Corporation the use of a dual rate contract after January 1, 1967, the Pacific Coast European Conference and its member lines violated section 14b of the Shipping Act, 1916.

United States Borax & Chemical Corporation awarded reparation with interest against the member lines of Pacific Coast European Conference.

The complaint of Pacific Coast European Conference and member lines against United States Borax & Chemical Corporation dismissed because not filed within two years after the cause of action accrued.

*Lauren M. Wright* and *Edwin A. McDonald, Jr.*, *for* United States Borax & Chemical Corporation.

*Leonard G. James*, *F. Conger Fawcett*, and *Herbert Schepps* for Pacific Coast European Conference and member lines.

*Donald J. Brunner*, *Samuel B. Nemirow*, and *Arthur A. Park, Jr.*, Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This case was initiated by the complaint of United States Borax & Chemical Corporation (Borax), filed on November 21, 1966, in Docket No. 66–63, against the Pacific Coast European Conference (Conference) and its member lines.[1] That complaint requested the Commission to issue an order requiring the Conference to cease and desist from charging rates for the transportation of borax and borax products, which are allegedly unduly and unreasonably preferential, prejudicial, and disadvantageous in violation of section 16 of the Shipping Act, 1916, unjustly discriminatory and prejudicial in violation of section 17 of the Act, and illegal and excessive in violation of section 14b of the Act. As a result of being subjected to the above unlawful rates, Borax seeks reparation in the amount of $90,872.80, "* * * together with such additional amounts as * * * [it] may be damaged by respondents continuing to assess illegal and excessive rates * * *."

In Docket No. 67–27, the Conference, by cross-complaint filed April 10, 1967, alleges that Borax either breached its Conference dual rate contract and is liable for liquidated damages for such breach or received transportation at less than the applicable rate in violation of sections 16 and 18(b) of the Act for which the Commission should order the payment of undercharges. Since the issues in this proceeding arose out of the same factual situation, and were thus interrelated with those in Docket No. 66–63, the two proceedings were consolidated for hearing and decision by the Chief Examiner on April 12, 1967. Hearing Counsel have intervened and filed briefs.

Examiner Herbert K. Greer, in his Initial Decision served September 26, 1967, concluded that the Conference had violated sections 16, First and 17 of the Shipping Act, 1916, and awarded reparation to Borax for such violations. The Conference's cross-complaint against Borax was dismissed. Exceptions and replies to the Examiner's decision have been filed. Oral argument was neither requested nor heard.

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[1] The member lines of the Pacific Coast European Conference are: American Export Isbrandtsen Lines, d'Amico Mediterranean Pacific Line, East Asiatic Line, French Line, Furness Line, Hamburg-American Line, Hanseatic-Vaasa Line, Interocean Line, Italian Line, Italnavi Line (not after September 3, 1965), North German Lloyd, Fred Olsen Line, Splosna Provba, States Marine Lines, Holland-American Line, Johnson Line, Royal Mail Lines Limited, Zim Israel Navigation Co. Limited, Italpacific Line Incorporated.

## FACTS

On March 10, 1961, Borax and the Conference entered into a Shippers' Rate Agreement (dual rate contract) whereby Borax agreed to ship all of its products, transported between ports served by the Conference, via Conference vessels in return for the application of rates of 15% lower than the rates charged non-contract shippers. This agreement did not contain a "charter exclusion clause" which would permit Borax to ship its cargoes on vessels chartered by it without forfeiting its right to contract rates for other shipments made on Conference vessels.

Subsequently, on October 3, 1961, Congress enacted Public Law 87–346, 75 Stat. 762, which, *inter alia*, added a new section 14b to the Shipping Act, 1916. This section 14b authorized the Commission to permit the use of dual rate contracts under certain circumstances but imposed a number of specific requirements [14b(1)–14b(8)] which all such contracts must meet. In addition, section 14b(9) required that dual rate agreements shall contain "* * * such other provisions not inconsistent * * * [with section 14b] as the Commission shall require or permit."

In order to accomplish the transition from the old, unregulated contracts to the new, regulated contracts, section 3 of Public Law 87–346 provided for interim validity of existing dual rate contracts, and required the conferences to revise their contracts to comply with the provisions of section 14b and to file the revised contracts for approval within six months after enactment of the 1961 amendment [i.e. by April 3, 1962] after which their use was lawful until approved by the Commission or until April 3, 1963, whichever occurred sooner. Public Law 88–5, 77 Stat. 5, extended this period of interim validity to April 3, 1964.

On March 21, 1962, the Commission published an interpretative ruling on section 3 of Public Law 87–346 which provided that a merchant could continue as a contract shipper subsequent to April 3, 1962, by advising the Conference that:

> * * * he agrees to be bound by said contract rate agreement amended to the extent necessary to comply with the provisions of section 14b of the Shipping Act, 1916; Provided, That the conference has filed with the Federal Maritime Commission a proposed form of contract pursuant to section 3 of Public Law 87–346.

In accordance with the directives of the ruling quoted above, the Conference filed with the Commission a proposed form of contract which included the eight mandatory provisions. On March 29, 1962, Borax accepted the dual rate contract as amended and *until April 4,* *1964, such contract represented the relationship between the parties.* As a charter exclusion clause was not made mandatory by law, but was only later to be prescribed under the "other provisions" clause of section 14b(9), such a clause was not included in this contract.

In April 1963, the Commission entered an "Order of Investigation and Hearing" respecting the dual rate contracts of several conferences including the Pacific Coast European Conference. The Conference dual rate contract was made the subject of Docket No. 1007—*Pacific Coast European Conference Exclusive Patronage* (*Dual Rate*) *Contract*, and hearings before an examiner were held upon the proposed contract. Subsequently, on petition of various shippers and shipper associations, certain issues were severed from most of the proceedings, including Docket No. 1007, *supra*, and consolidated for hearing before a panel of five examiners in Docket No. 1111—*Dual Rate Contracts, 1963—Adjudication of Major Issues.*

On December 3, 1963, the panel of examiners rendered its decision in Docket No. 1111. Shortly thereafter, on December 5, 1963, the Examiner, in his Initial Decision in Docket No. 1007, approved the Conference's contract, if modified in certain respects not pertinent here, and the approval was made subject to "* * * the decision of the Commission in * * * Docket No. 1111, and [to] the inclusion of such other provisions as the Commission requires or permits."

On March 18, 1964, the Commission, recognizing the administrative burdens involved in executing contracts between conferences and shippers due to the limited time which would remain after its final review and decision in Docket No. 1111, issued its "Interpretation and Statement of Policy". It was provided therein that if a carrier or conference decides to use a dual rate contract subsequent to April 3, 1964, "* * * its agreement form must be approved or modified by the Commission," and pending submission and approval of such new agreements:

> * * * carriers may accept from shippers and consignees who desire to continue under the new agreement a writing stating merely that the shipper or consignee wishes to be bound by the new agreement and that he will execute a copy of the new agreement form upon one being tendered by the carriers. Shippers and consignees so indicating to the carrier or conference must be accorded contract rates.

On March 27, 1964, the Commission issued its Report in Docket No. 1111, (hereinafter referred to as *The Dual Rate Cases*),[2] and at the same time, approved the contract of the Conference in Docket No. 1007, subject to certain modifications and provided that the

[2] 8 F.M.C. 16.

attached form of order should become effective April 4, 1964, "* * * to the exclusion of any other terms and provisions." The form of contract attached to the order contained a charter exclusion clause which the Commission, pursuant to the "other provisions" clause (section 14b(9)), required to be included in all dual rate contracts.

Pursuant to the Commission's aforementioned "Interpretation and Statement of Policy" of March 18, 1964, Borax, on April 2, 1964, advised the Conference that it desired to be bound on and after April 4, 1964, by the form of dual rate contract as the same may be amended to conform to the decision and order of the Commission dated March 27, 1964, and requested the continuance of contract rates on its shipments via Conference vessels.[3] The Conference, however, did not accept the contract provisions prescribed by the Commission but rather notified its contract shippers on May 8, 1964, that an appeal of the Commission's decision in Docket No. 1111, ordering it to cancel existing rate agreements, had been filed with the United States Court of Appeals.[4]

From April 4, 1964 until November 16, 1964, Borax shipped via Conference vessels at "contract rates". On November 12, 1964, Borax was informed by the Conference that all Borax shipments on or after November 16, 1964, would be assessed non-contract rates. The Conference predicated its refusal to accord Borax contract rates upon the fact that Borax had breached the terms of its "existing" contract by making shipments of its product on the non-conference vessel MV *Johann Schulte*, which had been chartered to Borax for a period in excess of six months.[5]

After November 16, 1964, Borax was unable to find non-conference vessels (chartered vessels not considered) to carry its shipments over the routes served by the Conference although it had made reasonable attempts to find such vessels. Therefore, Borax continued to ship via the Conference paying the excess amount over contract rates under protest.

American Potash (Ampot) and Stauffer Chemical Company (Stauffer) have, at material times, competed with Borax in the European market. European customers have, at times, shifted from one supplier to the other then came back to the original supplier and have

[3] Borax further agreed to execute a copy of such a dual rate agreement and to consider it effective from April 4, 1964.

[4] The Conference motion for a stay of the operation of the Commission's order in Docket No. 1007 pending appeal was denied.

[5] On October 5, 1964, the Conference had advised Borax that such shipment was considered an evasion of the dual rate contract and demanded liquidated damages in the amount of $17,955.04 which amount was to be paid within 30 days, and if not paid, Borax's right to ship via Conference vessels at contract rates would be suspended.

also purchased a part of their requirements from all three suppliers, there being an effective competition between the suppliers. From April 4, 1964, to the present time, the Conference has carried shipments of borax and borax products for Ampot and Stauffer at the lower contract rates. There is testimony to show that, subsequent to April 4, 1964, Borax increased its European trade but it would probably have lost European customers after November 16, 1964, had it not absorbed the increased cost of transportation.

On January 1, 1967, the Conference put into effect a Commission approved form of dual rate contract meeting all the requirements of section 14b of the Act and criteria established by the Commission in its decision in *The Dual Rate Cases*, *supra*. The Conference has made this approved form of contract available to its contract shippers, including Ampot and Stauffer, but has refused to make it available to Borax until the "* * * liquidated damages due the Conference for breach of the existing contract by U.S. Borax in 1964 * * *" are paid.[6]

## Discussion and Conclusions

Borax, in its complaint, alleges that the dual rate contract between the parties prior to April 4, 1964, became unlawful after that date pursuant to Public Law 87–346; that since the lower "contract" rates remained in the Conference tariff and were not themselves rendered illegal after April 3, 1964, they became the rates lawfully applicable to all shipments of borax and borax products in question; that by reason of it being charged the higher "non-contract" rate while its competitors continued to ship at the lower "contract" rate, Complainant was subjected to the payment of rates for the transportation of borax and borax products which were when exacted and are presently unduly prejudicial in violation of section 16, First, of the Act, unjustly discriminatory in violation of section 17 of the Act, and illegal and excessive in violation of section 14b of the Act. As a result of all the foregoing, Complainant seeks an order requiring the Conference to cease and desist from these alleged violations of the Shipping Act, 1916, and to establish and put in force "contract rates" vis-a-vis Borax, and pay reparation to it in the amount of $90,872.80.

The Conference, on the other hand, seeks relief on alternative propositions. First, the complaint in Docket No. 67–27 alleges that the Conference's contract with Borax was in effect on April 4, 1964, and continued to bind the parties after that date. On the basis of this allegation, the Conference seeks to recover liquidated damages under the terms of

[6] Letter to Borax from Conference Chairman dated December 27, 1966.

that contract in the amount $17,955.04, contending that since the contract did not contain a charter exclusion clause, Borax was in violation thereof in shipping via a chartered vessel. In the alternative, and should it be determined that no lawful contract existed between the parties, the Conference prays for an award of undercharges in the amount of $130,070.19, taking the position that if no lawful dual rate contract was effective between the parties, the lawful rate was the higher non-contract rate, and having carried Borax's shipments from April 4 to November 16, 1964, at the lower contract rate, it should be reimbursed in the amount of the difference between the lawful rates and the rates applied.

In his Initial Decision, the Examiner, after denying the Conference's motion to stay this proceeding pending arbitration, found and concluded that: (1) subsequent to April 3, 1964, no dual rate contract lawful or enforceable under the Shipping Act, 1916, existed between the Conference and Borax; (2) the lower contract rate was the lawfully applicable rate to all of Borax's shipments in question; and (3) the Conference and its member lines, by virtue of their having charged Borax transportation rates higher than those charged Borax's competitors on the same commodities, have violated sections 16, First, and 17 of the Shipping Act, 1916. Borax was awarded reparation *without interest*, for shipments of record on Conference vessels in the amount of $90,872.80:

> * * * and additional amounts to be computed as the difference between the "non-contract" rate charged to and paid by Borax and the lower "contract" rate, on subsequent shipments made by Borax via conference vessels to be determined pursuant to rule 15(b) of the Commission's Rules of Practice and Procedure.[7]

Finally, the Examiner considered the Conference's complaint against Borax and recommended its dismissal on the grounds that (1) it was filed more than two years after the cause of action accrued and barred under section 22 of the Act; (2) the Conference failed to prove that Borax had violated section 16 of the Act, as alleged; and (3) the rate charged and collected by the Conference on shipments made by Borax

[7] Rule 15(b) of the Commission's Rules of Practice and Procedure provides:

(b) Reparation statements (46 CFR 502.252). When the Commission finds that reparation is due, but that the amount cannot be ascertained upon the record before it, the complainant shall immediately prepare a statement in accordance with the approved reparation statement in Appendix II(4), showing details of the shipments on which reparation is claimed. This statement shall not include any shipments not covered by the findings of the Commission. Complainant shall forward the statement, together with the paid freight bills on the shipments, or true copies thereof, to the carrier or other person who collected the charges for checking and certification as to accuracy. Statements so prepared and certified shall be filed with the Commission for consideration in determining the amount of reparation due. Disputes concerning the accuracy of amounts may be assigned for conference by the Commission, or in its discretion referred for further hearing.

via Conference vessels from April 4, 1964 to November 16, 1964, was the lawfully applicable rate. This proceeding is now before us on exceptions to the Initial Decision.

The Borax's exceptions to the Initial Decision are limited to but one objection; namely, the Examiner's denial of interest on damages. For reasons set forth herein, we are of the opinion that Borax is entitled to interest as part of its reparation.

Respondents take exception to each and every other finding and conclusion of the Examiner. For the most part, however, these exceptions present but a recapitulation of contentions already advanced to the Examiner. Except to the extent modified herein, we agree with the Examiner's findings and conclusions on these issues.[8]

I. *Contractual Relationship Between Borax and the Conference*

Respondents assert that the Examiner committed an error when he concluded that subsequent to April 3, 1964, no contract lawful or enforceable under the Shipping Act, 1916, existed between the parties. Respondents' contention is that section 3 of P.L. 87-346 cannot be interpreted "* * * to render all existing contracts invalid and 'nonexistent' at the stroke of midnight on April 3, 1964." While this is precisely the effect of section 3,[9] Respondents are concerning themselves with an irrelevancy. It was not section 3 itself which rendered Respondents' existing contract unlawful but our cancellation of it which was the inescapable result of our order in Docket No. 1007, 8 FMC 16, 267. That order approved and prescribed a form of a dual rate contract and made that contract the *only* contract that could be employed by the Conference after April 3, 1964. Thus, it was not section 3 which rendered Respondents' old contract unlawful, it was our

[8] Exceptions and proposed findings not specifically discussed in this Report nor reflected in our findings have been considered and found not justified by the facts, or not related to material issues in this proceeding.

[9] Section 3 of Public Law 87-346, as amended by Public Law 88-5, provides that:

Notwithstanding the provisions of sections 14, 14b, and 15, Shipping Act, 1916, as amended by this Act, all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, cancelled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* that all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act, such agreements so amended shall be lawful for a further period but not beyond April 3, 1964. Within such period the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.

The effect of section 3 of Public Law 87-346 was merely to give the carriers a period of time in which to amend their contracts and file them with the Commission, and to the Commission a period of time to review these contracts and finally determine the contract terms to be permitted. Contracts which had not been expressly approved within the definite date fixed by section 3 could not be continued.

approval of the new contract.[10] Respondents' approach to the question of just what, if any, contractual relationship existed between the parties here would seem dictated by the precise circumstances giving rise to the present dispute—the shipments by Borax on a chartered vessel. Respondents' only hope of prevailing here is to establish the proposition that if their contract was amended to comply with the first eight numbered requirements of section 14b, they were free to continue using their existing contract—which did not, of course, contain a charter exclusion clause. The successful establishment of this proposition is in turn dependent upon assigning our order of March 27 to some administrative limbo wherein it would languish without any force or effect. For if our order controls the resolution of the question of the contractual relationship, any such relationship between the parties would have as one of its elements the charter exclusion clause. Indeed, Respondents' attack on our inclusion of the clause in their contract would seem to indicate that they are not unaware of this.[11] However, this exercise of respondents, while ingenious, remains irrelevant since in fact and law, no contractual relationship of any kind existed between the parties after April 3, 1964. This absence of any contractual relationship was brought about by respondents themselves when they chose not to accept and use the contract we had approved for them. The path they chose was continued use of the old contract and judicial review of orders in Dockets Nos. 1007 and 1111. It is true that respondents sought a stay of the operation of our order in Docket No. 1007 pending appeal, but this was denied. It is also true that the court in *Pacific Coast European Conference* v. *United States*, 350 F. 2d 197 (9th Cir. 1965), *cert. denied* 382 U.S. 958 (1965), agreed with Respondents that during the course of the proceedings in *The Dual Rate Cases*, we had reverted to a rulemaking proceeding without complying with the requirements of section 4(b) of the Administrative Procedure Act, and remanded the proceeding to us. But that remand concerned only two provisions not material

[10] Section 14b expressly provides that:

* * * Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification * * *

[11] As for this somewhat belated attack, we agree with the Examiner who quite correctly concluded in his Initial Decision, at page 14:

Inasmuch as the parties did not execute a contract with a charter exclusion clause and as Borax could not rely on the Interpretation and Statements of Policy of March 18, 1964, as constituting a contractual relationship with the conference which included such a clause, the issue of the lawfulness of a charter exclusion clause is not material to a determination of whether either party is entitled to reparation. It is noted, however, that the conference has accepted a charter exclusion clause in the dual rate contract which it made effective on January 1, 1967.

herein and significantly, the court itself recognized that the Conference's *existing* forms of dual rate contracts were no longer lawfully in effect when it stated:

> The remedy, however, is not through judicial action to restore to the conferences their own forms of contract, but rather to restore to the conferences their opportunity to participate. 350 F. 2d 203.

Respondents' contention that their rights under their outstanding contracts constituted property rights protected by the 5th Amendment, and that Congress through enactment of section 14b and the Commission by imposing a mandatory agreement have deprived them of the right freely to contract about their business affairs, has been specifically litigated before the court in *Pacific Coast European Conference* v. *United States*, *supra*. The court, in rejecting this argument, advised that "* * * although in contract form what the Congress and the Commission have imposed upon the conferences is simply regulation."

Finally, Respondents argue that:

> * * * the Commission cannot reasonably interpret Section 3 of P.L. 87–346 to render the contracts of this Conference invalid on April 3, 1964, and those of other conferences valid for 180 days.

To Respondents, this is the result of our "Interpretation and Statement of Policy" of March 18, 1964, and July 2, 1964, hereinafter referred to as the Statements, which they contend "* * * arbitrarily extended the validity of existing contracts of some obedient conferences." Respondents, by distorting the clear meaning, purpose and effect of these statements seek to create an issue where none can genuinely exist.

The Statement of March 18, 1964, was promulgated "in recognition of the administrative burden imposed by the necessity of executing new agreement forms following Commission approval and/or modification of the new agreement," and merely allowed carriers and conferences to accord contract rates to shippers who agreed to be bound by the new agreement when it was tendered to them. The second Statement of June 26, 1964, merely allowed carriers and conferences who were according contract rates to shippers pursuant to the prior interpretative ruling to continue doing so until September 1, 1964.

Respondents advance the erroneous proposition that the Statements cancelled their contracts but allowed others to continue in effect. They, of course, had no such impact. The Statements in no way altered the fact that unapproved dual rate contracts would not be effective beyond April 3, 1964. The fact of the matter is that section 3 of P.L. 87–346 set a time limit on the legality of existing contracts. Pursuant to the provisions of section 3, existing contracts expired on April 4, 1964, unless these contracts were disapproved, cancelled or modified prior to that date.

The Statements did not, as Respondents clearly imply, extend the validity of existing dual rate contracts; rather they merely granted carriers or conferences of carriers the right to accept notices from shippers and consignees that they agree to be bound by the "new agreement" once approved. Only in this manner, could the shipper be accorded contract rates until such time as the carriers or conferences executed such new agreement in conformity with the Commission's decision in *The Dual Rate Cases.* As Hearing Counsel have so succinctly stated:

The Commission was not bound to issue these interpretations. It was done for the benefit of carriers to ease the administrative burden of executing new contract forms. No carrier or conference was forced to follow the suggested procedure.

Respondents' were equally free to adopt the procedures proposed and they have simply misconceived the effect of the Statements on them. There is no merit in their contentions.

II. *The motion to stay the proceedings pending arbitration*

Before we touch upon other aspects of this proceeding, it would be well at this juncture to consider the Examiner's denial of Respondents' motion to stay the proceedings pending arbitration.[12] In denying the Conference's motion, the Examiner stated:

The *existing* contract between the parties provided for arbitration and it having been found that such contract is unlawful and not enforceable in a proceeding brought under the provisions of the Act, it is not determinative of the motion unless, as the conference contends, "the validity of the contract itself is a proper question for arbitration" and that the question should be submitted to arbitrators for decision prior to the Commission's decision in this proceeding. A decision by a board of arbitration would not be conclusive of the question of the validity of the *existing* contract. In *Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277, 282 (1962), the Court held:

No private arbitration could negate the Board's statutory power to determine the validity of the dual rate agreement.

A stay of these proceedings pending submission of the question of the validity of the *existing* contract would serve no purpose except that of delay.

Respondents, in their exceptions, reargue the same contentions already advanced before the Examiner and rejected by him. We think the Examiner quite properly disposed of these issues, and we concur

[12] The Examiner denied the Respondents' earlier "Motion to Dismiss or Stay", made prior to the Prehearing Conference, without prejudice to Respondents' renewing it after all the evidence was in.

in his conclusions. His determination that Respondents cannot rely on the arbitration clause of an unlawful and unenforceable contract is fully supported by the authorities. In *Goldall Trading & Ship. Co. Etc.* v. *Caribbean Ship. Co.*, 56 F. Supp. 31, 32 (S.D. N.Y. 1944), the court held that before it could compel arbitration under a contract, it must:

> * * * first determine whether the contract in which the arbitration agreement is contained is valid. The reason for this is clear; if the contract is void, then the arbitration clause falls along with the remainder of the contract. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 2 Cir., 126 F. 2d 978.[13]

III. *The legally applicable rate subsequent to April 3, 1964*

A dual rate system, approved by the Commission under section 14b of the Shipping Act, 1916, is somewhat unique in transportation law in that it permits a carrier or group of carriers to publish and file two different but lawful rates applicable to the same transportation service. Absent a valid dual rate contract, however, there exists "* * * no lawful authority for a tariff provision, the effect of which is to establish two rates for the same transportation service * * *." *C. H. Algert Co.* v. *D. & R. G. R. R. Co.*, 20 I.C.C. 93, 94 (1911). It is firmly established to the contrary that generally "* * * there may be but *one* lawful rate for a particular service." (Emphasis added). *Marshfield Milling Co. Inc.*, v. *Chicago & N. W. Ry. Co.*, 216 I.C.C. 236, 239 (1936); Cf. *Boise Commercial Club* v. *Adams Express Co.*, 17 I.C.C. 115 (1909); *C. H. Algert Co.* v. *D. & R. G. R. R. Co., supra.*

At all times relevant to this proceeding, the Conference has published and filed with the Commission two rates applicable to shipments of borax and borax products, a "non-contract" and a "contract" rate.[14] We have heretofore determined, however, that between April 4, 1964 and January 1, 1967, the Conference had no valid and enforceable dual rate system. Accordingly, consistent with established principles, there could be but one lawfully applicable rate to any one particular commodity; it therefore now becomes necessary for us to determine which of the two rates appearing in the Conference's tariff was the lawfully applicable rate to shipments of borax and borax products made between April 4, 1964 and January 1, 1967.[15] The resolution of this

[13] Likewise, it has also been held that when part of a contract is illegal and in violation of a statute, the entire contract is illegal. *Regan* v. *Lenkowsky*, 137 F. Supp. 133 (D. N.Y. 1956), and that parties cannot agree in an invalid contract to arbitrate the validity of the contract. *Wrap-Vertiser Corp.* v. *Plotnick*, 143 N.E. 2d 366.

[14] At all material times, the "contract" rate has always been 15% below the "non-contract" rate.

[15] Although the effect of section 3 of P.L. 87–346, as amended by P.L. 88–5, was to render unlawful the granting of lower "contract" rates pursuant to *existing* dual rate contracts after April 3, 1964, without prior Commission approval, the lower rates themselves were not rendered *ipso facto* unlawful and they remained on file with the Commission.

question is an essential element not only of Borax's complaint but also, as shall be developed later, of the Conference's claim against Borax, as well.

Borax's claim for reparation is dependent upon the conclusion that of the two rates contained in the Conference's tariff, the lower or "contract" rate was the only lawfully applicable rate to its shipments during the period in question. The Conference, on the other hand, asserts that the legally applicable rate was the higher or "non-contract" rate and claims reparation for the period during which Borax was granted the "contract" rate.

The Examiner, applying the legal principle advanced in *United States* v. *Gulf Ref. Co.*, 268 U.S. 542, 546 (1925) that "* * * where two * * * tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates" concluded that the lower rate was the legally applicable rate on the shipments of borax and borax products in question. Respondents except to the Examiner's conclusion on the grounds that there can be "* * * no ambiguity in the meaning of tariff terms 'contract' and 'non-contract' rates" and where "* * * there is no ambiguity, there is no need for construction." They submit, therefore, that the doctrine relied on by the Examiner is inapplicable under the present circumstances.

The conference's position is clearly dependent upon a valid dual rate contract in effect at the time of Borax's shipments. The terms "contract" and "non-contract" rates could only have clear meaning when considered within the context of a viable dual rate system. In the absence of a valid dual rate contract, this distinction ceased to exist and there was immediately raised the question of which of the two rates should apply—in a word, an ambiguity was created.[16] Accordingly, we think it clear that the Examiner correctly disposed of this contention.

While we agree with the Examiner, there is yet another and perhaps equally important reason for rejecting the Conference's contentions as to the lawfully applicable rate. The exaction of the higher non-contract rate from Borax was predicated upon an asserted breach of a contract which was unlawful. Thus, were we to accept the higher non-contract rate as the applicable rate here, we would, in every practical effect, be allowing the Conference to enforce an unlawful contract. Moreover, acceptance of the Conference argument would result in

[16] Certainly, a shipper could not be required to assume, as Respondents have intimated, that the "non-contract" rate, being the higher of the two rates, formed the basis for the lower "contract" rate and accordingly was the applicable rate under the circumstances. Indeed, quite to the contrary, it has been our experience that in virtually every instance where a carrier or conference inaugurates a dual rate system, it merely establishes its existing rate as the contract rate and files a new "non-contract" rate 15 percent higher.

our sanctioning unjust discrimination in violation of the Shipping Act since Borax's competitors were granted the lower "contract" rate for the same transportation service. We will not construe the statute to produce such an anomalous result.

Respondents, in their Opening Brief, even challenged "* * * the Commission's authority to determine unilaterally, which transportation rate or rates on borax * * *" were the lawfully applicable rate or rates.[17] The Examiner, recognizing this argument for what it was, summarily disposed of it as follows:

> The question was not fully briefed and will not be discussed in detail. It is sufficient to repeat that the Commission's authority to determine the right to reparation emanates from the Act. In enacting the Shipping Act, 1916, Congress exercised its constitutional authority to regulate the foreign commerce of the United States. (See *Board of Trustees* v. *U.S.*, 289 U.S. 48 (1933)). Congress has placed with the Commission the duty and authority to administer the Act which, among other prohibitions. condemns discriminatory practices in the foreign commerce of the United States. The Commission will not recognize an indirect challenge to this duty and authority and must determine the matter of reparation in accordance with the provisions of the Act.

Since we are in full agreement with the Examiner's rulings on this point, it is unnecessary to discuss them in any further detail. We should just like to point out that the Examiner's discussion herein is wholly consistent with the opinion of the court in *Compagnie Generale Trans-Atlantique* v. *American Tobacco Co.*, 31 F. 2d 663, 665 (1929), *cert. den.* 280 U.S. 555 (1929), wherein it was stated that "A steamship company engaged in foreign commerce, with ships entering the United States ports in such commerce, is within the obligation of the Shipping Act, * * *."

IV. *Violations of the Shipping Act, 1916*

*Section 14b*[18]—The record in this proceeding establishes violations by Respondents of two separate provisions of section 14b. In the first place, the Conference's continued operations under an unapproved dual rate contract between April 4, 1964 and January 1, 1967, was clearly violative of that portion of section 14b, which specifically provides that "* * * any contract * * * not permitted by the Commission shall be unlawful * * *" and that "* * * *before permission is*

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[17] We note that Respondents, in effect, are challenging the Commission's authority to decide an issue which they themselves have raised in their complaint against Borax.

[18] The Examiner did not make any findings with regards to alleged violations of section 14b. However, an agency, in making a final decision upon review of a hearing officer's initial decision, is not limited to those sections of the Act upon which the Examiner chose to base his decision or which, for that matter, the Complainant specifically and formally referred to in the complaint. "But the allegations of the complaint in matters of fact were sufficient to authorize the Commission to consider the case under . . . [an other] provision as well. . . ." *Chicago, R. I. & P. Ry.* v. *U. S.*, 274 U.S. 29, 37 (1927).

*granted* or after permission is withdrawn, *it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract* * * *." (Emphasis added).

Another condition that attaches to a dual rate contract is that such contract be "* * * available to all shippers and consignees on equal terms and conditions * * *." Yet, since January 1, 1967, the effective date of the Conference's approved dual rate contract, Respondents have steadfastly denied Borax the use of such a contract. The reason given by the Conference for its continued refusal to accord Borax contract rates is that Borax has not paid the liquidated damages allegedly due under the terms of the existing contract. Since the existing contract, however, became unlawful on April 4, 1964, it obviously is not determinative of the rights of the parties after that date. For, as the court declared in *Hartman* v. *Lubar*, 133 F. 2d 44, 45 (1942), "The general rule is that an illegal contract, made in violation of a statutory prohibition designed for * * * regulatory purposes, is void and confers no right upon the wrongdoer." Borax was not required to comply with an unlawful contract in order to obtain contract rates.[19] By being a shipper in the trade served by the Conference and willing to execute a dual rate contract giving "* * * all or any fixed portion of * * * [its] patronage * * *" to the Conference, Borax has fulfilled all the requisite legal conditions imposed on a shipper seeking contract rates. Therefore, Respondents' refusal to execute a contract with Borax after January 1, 1967, was clearly contrary to the "equal terms and conditions" provision of section 14b.

*Sections 16, First and 17*—The Examiner's discussion in this regard is as follows:

Prior to the enactment of section 14b, dual rate arrangements were challenged as discriminatory practices as well as anticompetitive devices.[20] * * * Section 14b, regardless of the provisions of the Act prohibiting discrimination and prejudice, permits the charging of different rates for similar services but only if a dual rate contract is utilized which, together with provisions made mandatory therein, includes provisions permitted or required by the Commission. The conference applied different rates for similar services, utilizing a contract not permitted by the Commission. Consequently, the conference is not exempt from the provisions of the Act prohibiting discrimination, prejudice, or disadvantage. The determination of whether the conference violated sections 16, First and 17 of the Act, depends upon whether the record supports a finding that the discrimination, prejudice, and disadvantage to Borax in being required to pay higher rates than its competitors for similar services, was undue, unjust or

[19] The rule is well established that a shipper cannot be required to execute or be a party to an unlawful contract in order to obtain contract rates. *Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962).

[20] *Swayne & Hoyt, Ltd.* v. *U.S.*, 300 U.S. 297 (1937), and cases cited in *The Dual Rate Cases, supra*, at pages 22 and 23.

unreasonable. *Compagnie Generale Transatlantique* v. *American Tobacco Co., supra.*

The Examiner, after finding that the difference in rates assessed Borax vis-a-vis its competitors was unsupported in the record, concluded that the Conference's practice amounted to:

> * * * a discrimination against Borax and a preference to its competitors based upon the agreement of the competitors to abide by an unlawful contract and the refusal of Borax to do so. In a proceeding to be resolved under the terms of the Act, preference and discrimination based upon a contract unlawful under the Act is undue, unjust and unreasonable in violation of sections 16, First, and 17.

We concur fully in the Examiner's discussion. Although the inexorable logic of the Examiner's position most probably needs no authority to sustain it, we should like to direct attention to the similarity between the situation here and the one that existed in *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922). In that case, the complainants, as Borax did here, charged that the exaction of higher rates from them than from those shippers who agreed to give the Respondent their exclusive patronage was not only unduly and unreasonably prejudicial but also unjustly discriminatory. Our predecessor there concluded that the use of a dual rate contract was unlawful and:

> * * * that the exaction of higher rates from the complainants than from other shippers for like service under the circumstances involved * * * subjected the complainants to undue and unreasonable prejudice and disadvantage and constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the Act. [1 U.S.S.B. 48].

Although the *Eden* case was decided long before the advent of section 14b to the Shipping Act, 1916, which specifically authorized the use of dual rate contracts, nevertheless, the principle expressed therein, is still controlling; shippers receiving similar services should be charged the same rates and, absent a lawful dual rate contract, a differential in rates is violative of sections 16 and 17 of the Act.

V. *Reparation*

The duty of the Commission in regard to awarding reparation or damages is embraced in section 22 of the Act, which provides, in pertinent part, that the Commission "* * * may direct the payment, on or before a day named, of full reparation to complainant for the injury caused by [a] * * * violation [of the Act]." As a result of the aforementioned violations of the Act and "by way of reparation for the unlawful charges hereinabove described," Borax requests the Commission to order Respondents to pay to it "* * * the sum of $90,872.80, together with such additional amounts as complainant may be damaged by Respondents continuing to assess illegal and excessive rates * * *." Based on his finding that the charges assessed Borax were unduly prejudicial and unjustly discriminatory in violation of sections 16 and 17, the Examiner awarded reparation to Borax in exactly the amount claimed, without interest. Respondents now urge us to set aside the Examiner's award of reparation, arguing that Borax did not suffer any injury compensable by reparation under section 22 of the Act. Basically, their position is that since the Examiner grounded his award of reparation on violations of sections 16 and 17 of the Act:

> The burden of proof was upon U.S. Borax to prove actual damage and the precise amount. Borax has failed to prove any damages. All that Borax proved was that its shipments were assessed non-contract rates while others were assessed contract rates * * *.

Without deciding the validity of Respondents' claim that the instant record will not support an award of reparation based on a finding of discrimination, we find that what Borax admittedly did demonstrate—that "* * * its shipments were assessed non-contract rates while others were assessed contract rates * * *" is sufficient to support an award of reparation based on the established violations of section 14b.

The record is abundantly clear that since November 16, 1964, respondents have been assessing and collecting from Complainant, freight charges for shipments of borax and borax products which have been, and presently are in excess of those to which they were legally entitled. Between November 16, 1964 and January 1, 1967, pursuant to an unlawful dual rate contract, the Conference exacted from Borax rates some 15% higher than the legally applicable rate. During this period of time, Respondents admittedly were charging Borax the so-called "non-contract" rate, whereas, as we have heretofore determined, the lower "contract" rate was the only rate that could lawfully be applied to all shipments of borax and borax products in the trade. Furthermore, subsequent to January 1, 1967, and up to the present, as a result of it being unlawfully denied the use of a lawful dual rate contract, Borax has been required to pay transporation rates 15% higher than it would have paid, had not the approved contract been unlawfully withheld. It is quite obvious that both before and after January 1, 1967, the rates exacted from Borax were excessive in and of themselves, independent of the rates that were assessed other shippers in the trade. And as Justice Cardozo, speaking for the majority in *I.C.C.* v. *Unted States*, 289 U.S. 385, 390 (1933), declared in this regard:

> * * * When the rate exacted of a shipper is excessive * * * in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the

overcharge without other evidence of loss. "The carrier ought not to be allowed to retain his illegal profit and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum." *Southern Pac. Co.* v. *Darnell-Taenzer Co., supra.* [245 US 531, 534 (1918)].

The mere collection of the excessive rates, without more, constituted violations of section 14b of the Act. As a consequence thereof, Borax sustained, in each instance, a loss measured by the differential between two rates, the rate actually applied and the rate that should have been applied. We have been provided no valid reason why, under the circumstances, the measure of damages for the purpose of awarding reparation should not also be based on the difference between the two rates.

Respondents, pointing out the factual similarity between the present case and *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co., supra,* cite that decision as support for its proposition that "* * * a mere 'pecuniary loss to Borax' cannot be treated as 'damages' under Section 22 * * *." They refer specifically to that portion of our predecessors' opinion where it was stated:

We think it is clear that proof of unlawful discrimination within the meaning of the act, by showing the charging of different rates from shippers receiving the same service, does not, as a matter of course, establish the fact of injury and the amount of damage to which the complainants may be entitled by way of reparation.

The inapplicability of the cited passage is evident when it is realized that our award of reparation herein is *not* based on any "proof of unlawful discrimination within the meaning of the Act," but rather on a showing that Borax was assessed and paid an excessive rate.

The doctrine pronounced by the U.S. Shipping Board in the *Eden* case and relied on by the Respondents herein had its genesis in *Penna. R. R. Co.* v. *International Coal Co.*, 230 U.S. 184 (1913). There, the court explained that in cases arising out of unlawful discrimination, the "right to recover" reparation for injury incurred was "* * * limited to the pecuniary loss suffered and proved * * *." The opinion of the court, however, must not be extended to cover situations not intended.[21] In *ICC* v. *United States, supra,* the court was careful to limit the scope of its application to situations where "* * * discrimination and that alone is the gist of the offense." Although discrimination is a byproduct of the implementation of an unlawful dual rate contract or

[21] The Supreme Court itself realized the flexibility of the present rule on damages when it stated in *ICC* v. *United States,* 289 U.S. 385 (1933):

One has only to read the opinions in *Pennsylvania R. Co.* v. *International Coal Co., supra,* and the cases that have followed it, to see how much the rule of damages is beset by delicate distinctions, how pre-eminently in applying it there is a call upon the judge to think and act judicially, to use judgment and discretion * * * the denial of a lawful contract, nevertheless "the gist of the offense" here is clearly analogous to an overcharge—a charge over that which should have lawfully applied. It follows, therefore, that any reparation granted should be based on principles applicable to overcharges.

Respondent also make the argument that matters of equity must be considered and that equities here involved will not permit an award of reparation to Borax. We are of the opinion that the Examiner correctly disposed of this contention when he stated:

> * * * no equitable considerations appear which would warrant a denial of reparation. The fact that the conference carried Borax's shipments from April 4 to November 16, 1964, at the same rates applied to other shipments of borax and borax products would not warrant reduction or denial of reparation for subsequent discrimination and prejudice. The record will not support a finding that Borax accepted the benefits of the *existing* contract and should be required to accept the obligations imposed therein. Borax accepted the contract rates on the assumption that compliance with the Commission's Interpretations and Statements of Policy of March 18, 1964, entitled it to those rates, not because of the *existing* contract. It would not be equitable to credit the conference, thus charge Borax, any portion of the charges made at contract rates from April 4 to November 16, 1964, as during that period other shippers received the contract rates for similar services and any credit or charge would, in effect, be permitting discrimination. Moreover, as hereinafter discussed, Borax paid only the lawful rate on such shipments. As there was no lawful contract which prevented Borax from shipping via a chartered vessel, the fact that it did so was not an evasion of an obligation.

On the basis of the foregoing, we find and conclude, as the Examiner did, though not necessarily for the same reasons, that Borax is entitled to reparation from the Conference and its member lines,[22] in the amount of $90,872.80, and such additional amounts, on subsequent shipments, to be computed on the basis of the rate actually collected and the rate which we have determined herein to have been lawfully applicable. These additional amounts shall be determined pursuant to Rule 15(b) of the Commission's Rules of Practice and Procedure.[23]

Interest on the charges unlawfully exacted by the Conference was denied by the Examiner on the grounds that Borax's complaint did "* * * not specifically pray for interest * * *." In its only exception to the Initial Decision, Complainant characterizes this failure to award interest as "error as a matter of law" and urges the Commission to reverse the Examiner on this point. We find considerable merit in Borax's contentions.

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[22] Reparation awarded to be paid by the individual members as set forth in Exhibit B to the complaint and in the statements filed pursuant to Rule 15(b) of the Commission's Rules.

[23] See footnote 7, page 457.

While Borax did not expressly pray for interest in its complaint, it certainly cannot be said to have *waived* the collection thereof. A shipper, who is injured as a result of the assessment of an unlawful rate, may *specifically* elect to waive his right to interest by agreement or stipulation [24] or he may *effectively* waive interest by failure to make a timely request for it.[25] Manifestly, Borax did not enter into any agreement with Respondents to waive the interest on any amount of reparation that might be awarded. Nor, can it be seriously argued that Complainant's appeal for interest was unseasonable. Although Borax's complaint admittedly did not specifically request that interest be awarded, it did, as Complainant points out, "* * * pray for damages and also for 'Such other sum as the Commission may determine to be proper as an award of reparation'."

Although, absent a waiver, the allowance of interest remains a matter within the Commission's discretion [26] and may be denied where principles of equity and justice demand, the generally accepted practice governing the allowance of interest on liquidated sums, as expressed by the court in *L. & N.R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 239 (1925), is:

> . . . to recognize as an element of the damages loss of interest on charges unlawfully exacted; and, in ordering reparation . . . [to] include as a part of the damages such interest from the date of the payment.[27]

The rationale behind the court's opinion is that when a shipper has been charged an unlawful rate on his shipments, he is entitled to recover the overcharge as of the date it was collected and should be allowed interest from that date, not as interest strictly, but to give the shipper, on the date of his recovery, an amount equivalent to the amount of his damages at the time suffered, lapse of time being an element of damages. In this connection, see: *Gimisel Bros.* v. *Barrett*, 218 Fed. 880 (1914).

In view of all the foregoing, the Commission's award of reparation in this proceeding for the exaction of inapplicable rates will carry interest at the rate of six percent from the date they were wrongly collected by Respondents.[28]

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[24] See: *Rickert, Wessanen & Laan, Inc.* v. *Illinois Central R. Co.*, 306 I.C.C. 281 (1959); *Bartlett* v. *Missouri Pac. R. Co.*, 310 I.C.C. 755 (1960).

[25] *Clinton* v. *Joshua Hendy Corp.*, 264 F. 2d 329 (1959).

[26] *Louisville & N.R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 295 Fed. 53 (CA 5th, 1923), *George Allison & Co.* v. *Interstate Commerce Com'n.*, 107 F. 2d 180 (D.C. Cir. 1939).

[27] Or as it was explained in the court's earlier opinion in *Arkadelphia Co.* v. *St. Louis S. W. Ry Co.*, 249 U.S. 134, 147 (1919):

The damage was complete when the overcharges were made, and as they were wrongfully made and without consent of the shippers, interest ran from that date on general principles.

[28] It has been and is the Commission's general practice to allow interest at the rate of six percent in orders for payment of reparation. *Isbrandtsen Co., Inc.* v. *States Marine*, 6 F.M.B. 422 (1961).

VI. *The Conference's cross-complaint against Borax*

In Docket No. 67–27, the Conference seeks to recover from Borax liquidated damages alleged to be due under the terms of the existing dual rate contract for a shipment of borax made on the non-Conference vessel MV *Johann Schulte*, on October 4, 1964. In the alternative, and "* * * in the event the Commission determines that * * * there was no contract in force and effect after April 3, 1964 * * *," the Conference claims reparation from Borax for alleged violations of sections 16 and 18(b). The basis of Respondents' claim is that if the Commission finds that the existing contract became unlawful after April 3, 1964, Borax was thereafter not entitled to ship via Conference vessels at the contract rates, and having been charged the contract rates from April 4 to November 16, 1964, should be required to pay to the Conference the amount of the undercharges.

The Commission's jurisdiction to award reparation is set forth in section 22 of the Shipping Act, 1916, which provides, *inter alia*, that the Commission:

> * * * if the complaint is filed *within two years after the cause of action accrued*, may direct the payment, on or before the day named, of full reparation to the complainant for the injury caused by * * * [any] violation [of the Act].

Manifestly, any cause of action that the Conference might have against Borax based on the facts in this case would have had to accrue on or before November 16, 1964. Since the complaint in Docket No. 67–27 was not filed until April 10, 1967, some two and a half years after any cause of action could have accrued, it is obvious that Respondents' claim is barred by the express provisions of section 22. See *Aleutian Homes, Inc.* v. *Coastwise Line*, 5 F.M.B. 602, 612 (1959).

Respondents, however, in an attempt to confer jurisdiction on the Commission to hear their cross-complaint, argue that the "* * * applicable statute of limitations is not section 22 of the Shipping Act but the proper state statute of limitations covering suits on contract." According to Respondents, the "proper statute of limitations" is the California statute which allows four years after the cause of action accrues. The answer to this contention is, of course, obvious. As we stated earlier, the Commission's authority to award damages for a violation of the Shipping Act, 1916, emanates *solely* from that Act and under the plain terms of the Act, we are without authority to award reparation or damages when a complaint is filed more than two years after the cause of action accrued. It is well settled that if Congress explicitly puts a limit upon time for enforcing a right which it creates, the congressional statute of limitations is definitive. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). As the Supreme Court so succinctly explained in *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 343, 348–349 (1943):

Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Even were not their claim so barred by section 22 of the Act, Respondents would not fare any better on the merits of the action. With regards to the alleged breach of contract by Borax which occurred subsequent to April 3, 1964, the Examiner concluded that:

As it has been determined that the *existing* contract became unlawful after April 3, 1964, and that the Commission will not consider the provisions of a contract unlawful under the Act as determinative of rights of the parties in a proceeding concerning the Commission's authority to award damages, further discussion of this claim is deemed unnecessary.

Respondents' alternative arguments, based on alleged section 16 and section 18(b) violations, were dismissed by the Examiner as follows:

Section 18(b) of the Act is addressed to common carriers by water in foreign commerce and the conference has offered no enlightenment on the question of how a shipper could violate this section. Nor has the conference made clear in what manner the shipper, Borax, has violated section 16 of the Act, which insofar as it applies to shippers, provides:

That it shall be unlawful for any shipper, consignor * * * or other person * * * knowingly and wilfully, [sic] 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 transportation by water for property at less than the rates or charges which would otherwise be applicable.

Shipments by Borax from April 4 to November 16, 1964, were carried by conference vessels at rates above found to be the lawfully applicable rates, but aside from that fact, to hold that Borax obtained the lower contract rates by an unfair or unjust device would be a strained interpretation of the facts of record. Borax complied with the Commission's Interpretations and Statements of Policy of March 18, 1964, and advised the conference in writing that it desired to continue to ship at contract rates and would execute a contract in the form approved by the Commission. To be considered is the fact that the conference advised Borax that contract rates would be accorded only under the terms of the *existing* contract, however, Borax interpreted the Interpretations and Statements of Policy to mean that the conference "must" continue to accord contract rates to a shipper complying with the Rule. Although the interpretation was incorrect, it was not without foundation, and Borax acted in good faith. There is no basis for a finding that Borax knowingly and wilfully [sic] obtained the lower contract rates by any unjust or unfair device or means within the purview of the statute. It is found and concluded that Borax was not in violation of the Act.

Since we are in full agreement with the Examiner that, apart from the jurisdictional limitation, Respondents' complaint is wholly without merit and must be dismissed, we adopt as our own those portions of the Initial Decision referred to above.[29]

ULTIMATE CONCLUSIONS

On the basis of all the foregoing, we find and conclude that:

1. No lawful or enforceable contract under the provisions of the Shipping Act, 1916, existed between the parties subsequent to April 4, 1964.

2. The lower of the two rates on file for the transportation of borax and borax products was the legally applicable rate to all shipments made by Borax between April 4, 1964 and January 1, 1967.

3. Between November 16, 1964 and January 1, 1967, the Conference, and its member lines, violated sections 14b, 16 First, and 17 of the Act, by charging Borax a higher rate than charged other shippers of the same product for similar services although it had no valid dual rate contract in effect in the trade.

4. The Conference, and its member lines violated section 14b of the Act by denying Borax the use of its approved dual rate contract after January 1, 1967.

5. Reparation, to be paid by the individual members of the Conference, is awarded to Borax in the amount of $90,872.80, and such additional amounts to be computed on the basis of the difference between the rate actually assessed and the rate herein determined to be legally applicable, on subsequent shipments made by Borax on Conference vessels. This reparation award will carry interest at the rate of six percent.

6. The Conference's cross-complaint against Borax in Docket No. 67-27 is dismissed because not filed within two years after any cause of action could have accrued and for failure to state a claim for which relief can be granted.

7. The Conference's motion to stay these proceedings pending arbitration was properly dismissed.

An appropriate order will be entered.

(SEAL) (Signed) THOMAS LISI,
*Secretary.*

[29] While it is our opinion that the Examiner correctly disposed of those issues relating to the alleged violations by Borax of section 16 and section 18(b) of the Act, we take no position with regards to Hearing Counsel's suggestion that, even had such violations been found, the Commission, under the provisions of section 22 of the Act, would be without authority to grant reparation to the Conference. In view of the fact that this issue was not briefed by the other parties to the present proceeding and, further, that our decision here rests on other independent grounds, we need not at this time consider whether section 22 does or does not authorize the Commission to award damages or reparation to a carrier against a shipper.

# FEDERAL MARITIME COMMISSION

No. 66–63

UNITED STATES BORAX & CHEMICAL CORPORATION

*v.*

PACIFIC COAST EUROPEAN CONFERENCE ET AL.

No. 67–27

PACIFIC COAST EUROPEAN CONFERENCE ET AL.

*v.*

UNITED STATES BORAX & CHEMICAL CORPORATION

## ORDER

Full investigation of the matters and things involved in these consolidated proceedings has been had, and the Commission has this date made and entered its report stating its findings and conclusions which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia:*

1. That the Pacific Coast European Conference (Conference) and its member lines violated section 14b, section 16 First, and section 17 of the Shipping Act, 1916, in charging United States Borax and Chemical Corporation (Borax) a higher rate than charged to the shippers of borax and borax products for similar services, between April 4, 1964 and January 1, 1967, without the benefit of a valid dual rate contract;
2. That the Conference and its member lines, in denying Borax the use of a dual rate contract after January 1, 1967, violated section 14b of the Shipping Act, 1916;
3. That, as a result of these violations, Borax is entitled to reparation with interest from the member lines of the Conference;
4. That the Conference's complaint against Borax is time-barred under section 22 of the Shipping Act, 1916.

*Therefore, It is ordered,*

1. That the Conference and its member lines hereafter cease and desist from their refusal to grant Borax the use of their approved dual rate contract;

2. That the member lines of the Conference pay to Borax reparation, with interest at six percent, in the amount of $90,872.80 and such additional amounts on subsequent shipments to be computed on the basis of the rate actually collected and the rate which we have determined in our report in these proceedings to have been lawfully applicable;

3. That such additional amounts shall be determined pursuant to Rule 15(b) of the Commission's Rules of Practice and Procedure;

4. That the Conference's complaint in Docket No. 67-27 be, and hereby is, dismissed.

By the Commission.

(SEAL) (Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

DOCKET NO. 68–8

DISPOSITION OF CONTAINER MARINE LINES THROUGH INTERMODAL CONTAINER FREIGHT TARIFFS NOS. 1 AND 2, FMC NOS. 10 AND 11

*Decided April 18, 1968*

Tariffs of Container Marine Lines (CML) providing for a through transportation service comprised of port-to-port transportation between United States and United Kingdom and inland transportation in United Kingdom acceptable for filing under section 18(b), Shipping Act, 1916, if they: (1) clearly indicate ports or ranges of ports between which water transportation will be performed; (2) break out the charge for such water portion of the transportation; (3) identify inland points to and from which service is provided; and (4) include a specimen bill of lading all the articles of which provide for common carrier liability for the through movement consistent with the holding out in the remainder of the filing.

Proposed filing presently defective with respect to (4) and will be accepted when specimen bill of lading providing for common carrier liability throughout which in turn is consistent with holding out in remainder of filing is received.

Alleged conflict between port-to-port portion of rates and port-to-port rates in tariffs of conferences of which CML is a member and dual-rate contracts of the conferences nonexistent inasmuch as intermodal service provided by CML is not within scope of conference agreements or approved conference dual-rate contracts.

*Richard W. Kurrus* and *James M. Jacobi* for respondent Container Marine Lines.

*Burton H. White* and *Elliot B. Nixon* for interveners Anchor Line, Belgian Line, Bristol City Line, Cunard Steamship Co., Furness Warren Lines, Manchester Lines, Sea-Land Service, Inc., United States Lines, Inc. (member lines of North Atlantic United Kingdom Freight Conference other than Container Marine Lines).

*Ronald A. Capone*, *Robert Henri Binder* and *Stuart S. Dye*, Kirlin, Campbell & Keating for member lines of North Atlantic Westbound Freight Association, other than Container Marine Lines and Atlantic Container Line, interveners.

*George F. Galland*, *Amy Scupi* and *Robert N. Levin*, Galland, Kharasch, Calkins & Lippman for intervener Atlantic Container Line, Ltd.

*L. A. Parish* and *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corp., intervener.

*Martin A. Weissert* and *Terry G. Fewell* for North American Van Lines, Inc., intervener.

*Gregory M. Rebman* for United States Van Lines, Inc., intervener.

*Homer S. Carpenter* and *Richard R. Sigmon* for Household Goods Carriers' Bureau, intervener.

*Herbert B. Ruskin* for United Cargo Corp., intervener.

*Clarence William Vandegrift* for Universal Carloading & Distributing Co., Inc., intervener.

*Alan F. Wohlstetter*, Denning & Wohlstetter, for Household Goods Forwarders Association of America, Inc., intervener.

*Blair P. Wakefield* for Virginia State Ports Authority, intervener.

*Philip G. Kraemer* for Maryland Port Authority, intervener.

*Curtis L. Wagner, Jr.*, and *Carlton E. Crotty* for the Department of Defense, intervener.

*Peter S. Craig* and *Elroy H. Wolff* for Department of Transportation, intervener.

*Donald J. Brunner* and *Norman D. Kline*, Hearing Counsel.

## REPORT

BY THE COMMISSION (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*):

This proceeding was instituted by the Commission by order served February 1, 1968, to determine whether tariffs filed by Container Marine Lines (CML) naming rates for transportation from and to interior points, including port-to-port transportation, should be accepted or rejected by the Commission. Because the question of the tariff filing did not present any disputed issues of fact which necessitated an evidentiary hearing and a prompt determination was required, the proceeding was limited to the submission of affidavits, memoranda, and oral argument. Numerous parties intervened and submitted documents including the member lines of the two conferences of which CML is a member (North Atlantic Westbound Freight Association (NAWFA) and the North Atlantic United Kingdom Freight Conference (NAUKFC)), two State port authorities, the Department of Defense and vessel operating and nonvessel operating common carriers by water (NVO's). We heard oral argument on April 2, 1968.

*The CML Through Intermodal Contaner Freight Tariffs*

CML is a division of American Export Isbrandtsen Lines, Inc., a common carrier by water operating in the foreign commerce of the United States. On January 3, 1968, CML filed with the Commission a publication designated "Through Intermodal Container Freight Tariff No. 1," which established "Container Rates and Conditions from Points in the United Kingdom via the Port of Felixstowe to Points in the United States via the Port of New York." A second publication filed January 8, 1968, was designated "Through Intermodal Container Freight Tariff No. 2," and established similar rates in the opposite direction. Each of these tariffs originally scheduled to become effective February 7 and February 15, respectively, was postponed for 30 days. Both tariffs would have established single-factor intermodal container rates between the inland points as mentioned. Each provided for a cargo n.o.s. rate of $500 per ton on 2,240 pounds or 40 cubic feet, applicable to door-to-door movement if the container is loaded by the shipper at his inland point of origin and unloaded by the consignee at his inland point of destination, and a $250 cargo n.o.s. rate applicable to westbound door-to-terminal and eastbound terminal-to-door shipments. These $250 rates, unlike the $500 rates, did not include inland transportation in the United States.

CML withdrew these publications and replaced them with revised filings bearing F.M.C. Nos. 10 and 11 on February 23, 1968, which are now scheduled to become effective May 6, 1968. A revised bill of lading has also been submitted. These revised filings provide for single-factor intermodal container rates between the ports in the U.S. North Atlantic Eastport, Maine, to Hampton Roads Range and points in the United Kingdom via the Port of Felixstowe. Inland transportation in the United Kingdom between the Felixstowe terminal, on the one hand, and point of origin, where containers are loaded by the shippers, and point of destination, where containers are unloaded by consignees, on the other hand, is included in all rates. The rates do not include any inland transportation in the United States. With respect to the treatment of cargo within the United States, shippers and consignees have an option. Two rates are to be listed for each commodity in the tariffs, one called "door-to-pier," which applies when cargo is received by the carrier at the U.S. port terminal and the carrier loads the cargo into or unloads the cargo from its containers, and the other called "door-to-door," which applies when cargo is tendered to the carrier at its U.S. port terminal in carrier's containers or made available to consignee at the carrier's port terminal for unloading by consignee at inland point of destination. In the case of the so-called "door-to-door" rates, a 5-percent discount is to be allowed on the ocean portion of the through rates. The tariffs contain two specific commodity rates. Eastbound, there is a rate on tractor parts from New York to Tannochside, Scotland, of $36.90 W per ton of 2,240 pounds door-to-pier and $35.30 door-to-door subject to a per container minimum weight of 17.5 WT and the port-to-port portion of the rate included in the charge is stated to be $32. Westbound, there is a rate on wines and spirits bottled, in wooden cases or fibreboard cartons from Dumbarton, Scotland, to New York of $37.75 door-to-pier and $36.11 door-to-door (40 cubic feet).[1] This rate is subject to a per container minimum of 20 measurement tons, and the port-to-port portion of the rate included is said to be $32.75.

The tariffs also include cargo n.o.s. rates of $250 W/M door-to-pier and $246.46 doort-o-door eastbound (port-to-port portion $70.75 W/M) and $250 W/M door-to-pier and $247.31 door-to-door westbound (port-to-port portion $53.70 W/M).

CML has issued a bill of lading on the face of which it appears to assume common carrier liability for the entire through movement, although the bill of lading offers problems which are discussed below.

### *Positions of the Parties*

All of the *vessel operating common carrier interveners* and all but one of the *NVO's*[2] in this proceeding which have filed papers contended that CML's original proposed tariffs should be rejected.

In response to the objections of these parties, CML submitted its revised tariffs and bill of lading which:

1. Broke out port-to-port portions of the through rates;
2. Named specific commodity rates and charges;
3. Covered no inland U.S. movement;
4. Named specific inland U.K. points; and
5. Appeared to assume common carrier liability between inland U.K. point and U.S. port.*

There are, however, several objections to the proposed operation which CML did not attempt to meet with its second set of tariffs and

[1] Although the inland point of origin for the westbound movement was not originally identified in the proposed tariff, this omission has been corrected.

[2] Household Goods Forwarders Association of America, Inc., urged the Commission to accept the tariff on the basis that the publicity achieved by the publication with a single regulatory agency of the through rate would protect shippers from discrimination.

*See discussion below.



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subsequent submissions. The members of the conferences argue that to the extent CML is engaged in providing transportation between the United States and foreign ports within the scope of conference agreements of which it is a member, it must charge the rates set forth in the conference tariffs on file with the Commission and the failure to do so will result in a violation of section 18(b)(3) of the Shipping Act, 1916 (the Act), which requires that only the properly filed tariff rate be charged and various provisions of Commission General Order 13 prohibiting duplicative or contradictory tariff filings.

Several specific discrepancies are pointed out between the port-to-port portion of CML's through rate and the corresponding conference tariff provisions covering water transportation between the same ports. For example, absorptions by water carriers are specifically outlawed by the conference (NAWFA) tariff and to the extent CML may absorb inland costs, NAWFA alleges that it violates not only 18(b)(3) but also 18(b)(1) because its tariff does not specifically provide for such absorptions. Further examples of discrepancies between the tariffs of the conferences and CML's tariffs are: wine and spirits are computed on a different revenue basis, no shipper allowance is allowed on wines and spirits in the conferences' tariffs, CML's tariffs do not include heavy lift charges unlike the conference tariffs, and CML's tariffs do not contain, as do the conference tariffs, brokerage and container demurrage rules. Moreover, NAWFA additionally maintains that CML's tariffs would breach NAWFA's dual-rate contracts in violation of the Commission's order of approval if cargo of NAWFA's dual-rate signatory merchants were carried by CML at the port-to-port portion of its rate inasmuch as this rate level differs from the conference port-to-port contract rate because of these discrepancies.

The revised bill of lading filed by CML, while purporting on its face to assume common carrier liability for the whole of the movement covered by the revised tariffs, nevertheless contains several clauses on the back thereof which appear to be inconsistent with this responsibility. Portions of paragraphs 1, 3, 4, 6, 7, 8, 11, 13, and 18 appear to enable CML to limit its liability to just the water portion of its movement.

Additional arguments are made by the conference lines that the NOS rates are unlawfully high and unjustly prejudicial to British exporters from all places other than Dumbarton, Scotland.

*The NVO's* which had originally opposed CML's tariffs had done so mainly because of an alleged conflict with the ICC which would have been caused by the inclusion of inland U.S. transportation. With the revision of the tariffs, these carriers' objections now seem to be confined largely to possible discriminations caused by the application of the rates to and from only certain inland points and the possibility of unreasonably high n.o.s. rates.

*The Department of Defense* supports the concept embodied in CML's amended tariffs as the initial step in the direction of providing a single through transportation service for shippers. *The Virginia State Ports Authority* and the *Maryland Port Authority* express concern over problems of preference and prejudice as between shippers or ports caused by the application of CML's tariffs.

*Hearing Counsel*. while recognizing the difficulties with and the deficiencies in CML's tariffs and bill of lading noted in the filings of the carriers, argue that the Commission should accept them upon condition that certain changes are made. Specifically, they would require:

1. If modification of the conference agreements is not possible to permit CML's rates as now filed, withdrawal of CML from the conferences in accordance with the terms and conditions of the Commission's General Order 9 and the conference agreements.

2. Modification of the bill of lading to eliminate sections which appear to be inconsistent with CML's common carrier liability with respect to its inland U.K. movement as specified in its tariff and on the face of the bill of lading itself.

3. The updating of the free time and demurrage rules contained in CML's tariff to conform with the rules to be issued in the Commission's Docket No. 65–14 when such rules become effective.

These actions, Hearing Counsel maintain, will remove all of the problems with CML's filings which are properly within the scope of this proceeding. The decision of a carrier to limit services with respect to shippers or ports, or to make inland absorptions is not improper as a matter of law; nor are n.o.s. rates unlawful per se. Questions of preference and prejudice and the unreasonably high level of the n.o.s. rates are questions of fact not determinable in the proceeding, which is designed to determine only whether or not CML may lawfully file its proposed tariffs.

*CML* maintains that its tariffs are not contradictory to those of the conferences or violative of section 18(b) or General Order 13 because they involve a service not covered by the conference agreements. For the same reason, it claims that it may charge any water rate specified in its tariffs to either dual rate contract signatories or nondual rate contract signatories, whether it is the same as or different from the conference contract rate. Moreover, to allow the conference agreements to be expanded to apply to inland as well as ocean transportation would, it contends, be contrary to the public interest if it had the effect of preventing CML from performing a through service.

Lastly, CML contends that the action of the members of NAWFA other than CML in filing papers in this proceeding in the name of the conference constitutes an unapproved section 15 agreement inasmuch as CML did not authorize the filing and the conference agreement requires unanimous vote on such conference action.

## Discussion and Conclusions

In waterborne transportation today the primary factor relied upon by a shipper when selecting a carrier, after an evaluation of the transportation available, is the service provided by the carriers in the trade. Conversely, to insure a successful operation a carrier must acquire as much cargo as he can profitably carry by providing transportation services in accordance with the needs of the shipper. Where there is conference service and the rate level is no longer a determining factor for the shipper in making his choice, the conference members must compete with each other in promoting better service. The conferences as herein involved cannot be satisfied merely to provide stability of rates and regularity of service. The conferences, as the dominant commercial units in this trade, in our opinion, should be at the forefront in stimulating and encouraging improvements in transportation. They cannot impede additional transportation service becoming available to shippers, whether offered by an outsider or one of their own members, especially when it involves an advancement in the state of the art.

Such disputes as here involved are better handled through the managerial decisionmaking processes of conferences and carriers. Conferences and carriers have an obligation to conduct themselves in a manner commensurate with their responsibilities as transporters of the foreign waterborne commerce of the United States. There is no doubt that conferences are beneficial to the maritime industry and that conferences well serve their own ends. There comes a point, however, when self-interest must yield to the public interest, and carriers and conferences must conduct their business decisional processes accordingly.

The fact is, nonetheless, that the Commission must resolve this case and settle the matter of CML's tariff filings. In doing so the Commission need be ever mindful of its responsibilities as a body to which Congress has delegated certain responsibilities. The exercise of that delegated authority was intended by Congress, and must be interpreted by us, to be performed in the most judicious manner in our quasi-judicial capacity and in our best discretion. The administration of the Commission's duties requires flexibility of action and purpose when necessary and possible.

The determination of the issues in this proceeding will have far-reaching importance. Traditional methods of transporting cargo are rapidly being replaced by the growth of new techniques and transportation systems. The Federal Maritime Commission has not been unmindful of these developments and has sought to facilitate, wherever possible, the implementation of improved shipping systems. In the Order of Investigation in this proceeding the Commission stated that it "does not wish to discourage the inauguration of any transportation services which might be of great benefit to shippers." It is in accordance with that injunction that the Commission must arrive at its decision herein.

In its present posture, this proceeding presents substantially fewer issues than it did when it was instituted. The submissions of the parties and the subsequent revisions by CML of its tariffs and bill of lading have removed most of the original problems. Firstly, CML has broken out the ocean portion of its rates. We hold that this "breaking out" is the proper course of action and find that the provision of section 18 (b) (1) requiring the filing of "all the rates and charges of [common carriers by water in foreign commerce] [3] for transportation to and from United States ports and foreign ports * * *" dictates that such break-out be made. The provision of section 18(b) (1) requiring that "tariffs shall plainly show the places between which freight will be carried" further makes mandatory the clear indication of the ports or ranges of ports between which water transportation will be performed.

While we are inclined to agree with those interveners which have maintained that the word "places" in section 18(b) (1) is not intended to include inland points because the jurisdiction of the Commission is only port-to-port (including services in terminal areas provided for in sections 18(a) and 18(b)), we are convinced that inland points to and from which transportation is provided by a carrier subject to our regulatory statutes must be identified. This is the case, not because we can assert jurisdiction over the reasonableness of the level of the charges assessed by CML for the services performed by the inland line haul carriers, but because the statute (section 18(b) (1)) requires that "tariffs * * * shall * * * state separately * * * any rules or regulations which in anywise change, affect, or determine any part or the aggregate of [the carrier's] rates, or charges * * *." The identity of

[3] A common carrier by water in foreign commerce is defined by the first section of the Shipping Act, 1916, as "a common carrier, * * * engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade * * *"

the inland points is certainly a critical factor in CML's tariff regulation providing for inland transportation. The Commission must insure that it retains effective regulatory jurisdiction over those activities which are within the scope of its authority, and the failure to disclose the inland points to and from which the carrier's service applies and thus indicate the purported charge for the inland movement would make it impossible for the Commission to determine whether or not the ocean portion of a rate is one which a carrier lawfully may charge.[4] Moreover, the failure to disclose inland transportation points would enable the carrier to treat similarly situated shippers differently in possible violation of sections 16 and 17 of the Shipping Act, 1916, and without the Commission's knowledge.[5]

The inland points in the United Kingdom for the specific commodity rates have been identified in CML's revised tariff filing. No specific inland points have been indicated for the application of the n.o.s. rates, however, and CML has stated that the level of these rates is "unrealistic" and that they will be "reduced on short notice for the purpose of effecting specific commodity rates." The validity of n.o.s. rates not intended for use but utilized as a device to effectuate rate reductions on short notice [6] raises a problem outside the scope of this proceeding which is directed solely to the sufficiency of CML's tariff under sections 18(b) (1) and (3) of the Shipping Act, 1916. Moreover, any questions relating to the level of CML's n.o.s. rates or specific commodity rates or the possibility of their unlawfully preferential or discriminatory effect are of necessity questions of fact which cannot be resolved in a proceeding of this type.

There are, as noted above, several clauses on the back of CML's proposed bill of lading which are inconsistent with the carrier's through responsibility with respect to the total movement between U.S. port and inland point in the United Kingdom. The principle that tariffs (and the bills of lading filed with them) be clear and unambiguous [7] requires that revisions be made in those paragraphs (1, 3, 4, 6, 7, 8, 13, and 18) which appear to enable CML to limit its liability to just the water por-

[4] For example, no realistic determination could be made as to whether an ocean rate is "so unreasonably high or low as to be detrimental to the commerce of the United States" and thus subject to disapproval under section 18(b)(5) of the Shipping Act, 1916.

[5] Cf. *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 447, 449 (1935), discussing the need for publication of all privileges, absorptions or discounts in a carrier's tariff to prevent unlawful preferences and discriminations, and statements in *Grace Line, Inc.* v. *Federal Maritime Board*, 280 F. 2d 790 (2d Cir. 1960) affirming *Banana Distributors, Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 615 (1959), suggesting that any services provided by a common carrier must be offered on an equal and fair basis to all similarly situated shippers.

[6] Section 18(b)(2) requires 30 days' advance notice (absent special permission) prior to the effective date only of changes which result in increased costs to the shipper; decreases may become effective upon publication and filing.

[7] See, e.g., *In the Matter of Intercoastal Charters*, 2 U.S.M.C. 154, 156, 157 (1939).

tion of the movement. Those paragraphs must be conformed to the carrier's intent as expressed on the face of the bill of lading and in the tariffs themselves to accept common carrier responsibility for the through movement.

These technical deficiences in CML's bill of lading can easily be cured. CML acknowledges their existence and is apparently willing to eliminate them prior to the tariffs' going into effect. As noted by CML also, the Commission's staff is authorized to reject the tariffs until such deficiencies are remedied.[8]

There remain for resolution only those problems caused by the alleged conflict between the port-to-port portion of CML's rates and the port-to-port rates in the tariffs of the conferences of which CML is a member. CML admits that as long as it operates as a common carrier by water between ocean ports, it must separately publish the ocean portion of the through rates. It further admits it must charge the conferences' rates for its port-to-port as distinct from its intermodal service. Inasmuch as the conference agreements involved herein cover all rates and charges for a port-to-port transportation service, it logically follows that as long as CML remains a member of the conferences, it must charge the conference rates for its solely port-to-port service. These rates are the rates "on file with the Commission and duly published and in effect at the time" within the meaning of section 18 (b) (3) of the Shipping Act, 1916.[9]

However, the organic conference agreements pursuant to which NAUKFC and NAWFA are authorized to operate plainly are intended to apply only to cargo shipped under tariffs which are applicable to a port-to-port service. The NAUKFC agreement states in its introductory paragraph that it covers "transportation of goods *by sea from* United States North Atlantic *Ports* in the Eastport, Maine/

[8] The free time and demurrage rules contained in CML's tariff must of course conform with the rules to be issued in the Commission's Docket No. 65–14 when such rules become effective.

[9] Counsel for CML made some statements in oral argument which suggested that there is some doubt in his mind as to whether one performing through services between inland points (including a water movement) in the foreign commerce of the United States and not offering a separate port-to-port service would have to file a break-out corresponding to the charge for the port-to-port portion of its service. There is no such corresponding doubt in our minds. Neither the first section nor section 18(b) of the Act stipulates that the common carrier by water in foreign commerce subject to the jurisdiction of this Commission and which must file tariffs with us can evade regulation by offering more than a port-to-port service. The definition of such carriers in the first section applies to all "engaged in the transportation by water of passengers or property between the United States * * * and a foreign country", and 18(b) requires that they file tariffs indicating "all the rates and charges * * * for transportation to and from United States ports and foreign ports." These sections do not say that when one offers more than such transportation it need not file anything with us. Such a result would not only be contrary to the plain language of the statute but would defeat the Congressional intent that we exercise our authority to protect the public against unlawful discriminations and preferences and to disapprove rates detrimental to our commerce.

Hampton Roads range *to ports* in the United Kingdom and Eire * * *" (emphasis supplied), and the NAWFA agreement limits the trade over which it applies to movements "from Great Britain and Northern Ireland and Erie to the North Atlantic and South Atlantic ports of the United States of America." Both agreements, moreover, limit their membership to those persons operating vessels or evidencing ability and a good faith intention to institute and maintain "*a regular service between the ports* within the scope of this agreement * * *" (emphasis supplied). Both agreements restrict their application to the "trade covered by this agreement." The NAWFA agreement further specifically characterizes the lines operating within the scope of the agreement as "operating *from* [a] port." (article 10) (emphasis supplied).

The inescapable conclusion to be drawn from a consistent reading of these provisions can only be that the member lines of the two agreements are subject to their terms (1) only to the extent they operate a service involving the ports within the scope of the agreements, and (2) only to the extent the service they operate is a regular service between these ports, beginning and terminating at a port.

The same observations are of course true with respect to the dual-rate agreements of the member lines of the conferences inasmuch as they specifically limit their application to vessels operating in the trade. Furthermore, any attempt to broaden the scope of the dual-rate agreements beyond the operations authorized by the conference agreements would of course be a nullity in the absence of an appropriate modification of the conference agreements with approval by this Commission.

The case of *Swift & Co., et al.*, v. *Gulf and South Atl. Havana Conf.*, 6 F.M.B. 215 (1961), aff'd in relevant part sub. nom. *Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962), provides a comprehensive case study of the problems involved in determining the scope of a conference agreement and the effect of attempting to broaden the scope of a dual-rate agreement beyond the authorization provided for in the conference agreement. Analysis of that case supports our determination with respect to the conference and dual-rate agreements here under consideration and leads inevitably to the conclusion that the through sea and land transportation service which will be provided by CML is outside the scope of these agreements. Thus, the conferences as now constituted are prohibited from applying these agreements to such CML operation because such application would amount to the effectuation of unapproved agreements in violation of section 14b and 15 of the Shipping Act, 1916.

In the *Swift* case, the conference operating in the trade from Gulf and South Atlantic ports to Cuba attempted to apply its dual-rate agreements to through shipments by Swift, a dual-rate contract signatory, from St. Louis down the Mississippi River to New Orleans by barge towed by a river tug and then on to Havana after transferring an ocean-going tug to the barge.[10] The dual-rate agreement there involved applied to all goods "shipped directly or indirectly from Gulf and South Atlantic ports of the United States" to Cuba. The conference had argued that the word "indirectly" covered cargo originating at any inland port as long as it passed through a Gulf port named in its agreement. This interpretation was rejected by the Federal Maritime Board, and the Court of Appeals later affirmed the Board (then Federal Maritime Commission) in its holding that the attempt to apply the dual-rate agreement to a through-water movement from St. Louis to Cuba via New Orleans constituted a "modification" of the dual-rate agreement unauthorized by, and hence unlawful under, section 15.[11] Nor was the conference in a better position legally to control cargo moving on through routes from St. Louis after it specifically modified the dual-rate agreement to include cargo moving from inland ports or places and flowing through any Gulf or South Atlantic port because its basic conference agreement did not name St. Louis as a port or place subject to the conference agreement and further contained a clause limiting the scope of the agreements to the ports and territories named therein. As the Board observed, "the scope of any freighting agreement is necessarily limited by the agreements between common carriers by water, or other persons subject to the Act, which are filed and approved as required by the first sentence of Sec. 15 of the Act." (6 F.M.B. 215, at 223).

The Board considered the arrangements whereby the conference attempted to control cargo "originating at any inland port or place" which had not been approved by the Board and which required approval before they could be effectuated and found them unlawful under various provisions of the Shipping Act. They subjected to undue and unreasonable prejudice or disadvantage (1) shippers, by preventing them from using economical transportation alternatives; and (2) river port cities, by preventing them from obtaining cargo, and were unjustly discriminatory and unfair to these ports and shippers by fore-

[10] Swift had formerly shipped cargo to Cuba by transporting it by rail to Florida and from there to Cuba via the ships of one of the conference's member lines.

[11] "We think that the Board acted reasonably in finding that the conference interpretation and its effectuation constituted a 'modification' and was the kind of agreement condemned by Section 15, unless approved by the Board." *Swift & Company* v. *Federal Maritime Commission, supra,* at 281.

closing transportation alternatives such as through movements. The Board observed generally:

The interests and needs of shippers in foreign commerce should dominate where competing methods and new techniques of water transportation are involved. An arrangement would seem to operate to the detriment of the commerce of the United States or be unfair as between shippers and exporters from the United States and their foreign competitors which prevents the former from having a free choice among competing methods of transportation for cost advantages. Anything which impedes such free choice among constantly changing alternatives provided by technical changes, in traffic and transportation methods is a detriment to commerce in the long run. (6 F.M.B. at 226)

The conference agreements of the two conferences of which CML is a member in the United Kingdom-United States trade, like the conference agreement in the *Swift* case, limit their application to the trade as defined by the range of ports included therein. They, therefore, cannot apply to through transportation from "inland port or place" anymore than the agreements in the *Swift* case did. In fact, a stronger case exists here for not so applying the agreements because St. Louis is at least a port and the conference agreement in the *Swift* case applied to ports, while the places in the United Kingdom to and from which the through transportation moves are inland points, and not ports. As noted above, the Board said in *Swift* that the unauthorized restriction applied to cargo "originating at any inland port or *place*." (emphasis supplied) (6 F.M.B. 215. at 234).

The approved dual-rate contracts here involved limit their application to the trade as defined by the conference agreements.[12] Even if the conferences attempted to broaden their scope, however, such broadened interpretations would constitute a modification of the conference agreements and would require approval by the Commission, as noted in the *Swift* case, before they could be effectuated.

The "new technique of water transportation" involved in the *Swift* case was, like the one here, a through movement from an inland location, and the Board wanted to preserve the shipper's ability to choose to utilize this form of shipment rather than a combination of separate inland and port-to-port movements, pointing out possible cost advantages. It is important to note, moreover, that the transportation system to which the shipper's right was preserved in *Swift* was a traditional, if not old fashioned, system, i.e., a tug and barge operation, rather than the modern self-propelled conference carrier serv-

[12] Approval of dual-rate contracts is now granted or denied pursuant to section 14b, which was enacted, after the events which were the subject of the *Swift* case (effective Oct. 3, 1961), to apply specifically to dual-rate contracts rather than pursuant to the more general section 15 authority which had applied at the time of the decision in *Swift*.

ice. Thus this Commission now has a stronger reason than its predecessor for preserving the shipper's right to avail himself of competing services where, as here, a modern container service is involved in the through movement. In fact the Federal Maritime Commission can and must play an important role in encouraging improved services for shippers. As was said in the Order of Investigation, the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlightened regulation is the key to effective regulation; no regulatory agency can permit regulation to be outstripped by new techniques in the industry. Progressive regulation is required in the interest of encouraging the modernization of shipping services. Outmoded principles and rules will surely stifle advancements in all fields, and especially transportation where developments have followed so quickly upon each other.

The Supreme Court has recently espoused this idea in a case involving the Interstate Commerce Commission:

> * * * flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and fair and prudent administraition, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday. *American Trucking Assns., Inc.*, v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967).

It is indisputable, therefore, that the Federal Maritime Commission must assume a flexible posture and must view broadly, when necessary, its regulatory purposes and governing laws and rules.

The language quoted from the *Swift* case also suggests the difficulty in attempting to extend the obligations of conference agreements and dual rate contracts to inland transportation. The further inland such conference arrangements are extended the greater the danger of unlawful prejudice or discrimination against persons or localities not provided a direct conference service. For example, such persons or localities may be foreclosed from utilizing transportation services which do provide such direct service.

The danger from such extensions may be mitigated somewhat by the adoption by the conference carriers of through liability from and to inland points which may result in savings to the shipper; but the shipper nevertheless may still be faced with the foreclosure of alternate methods of transportation if he elects to be bound by dual-rate contracts.

We do not mean to imply that the conferences could not obtain our approval to extend their operations inland. In fact we assume that the conferences have the expertise to develop modern shipper services in the interest of improving transportation systems. Problems of discrimination and prejudice are always matters of fact which can be solved only upon the presentation of sufficient evidence. Moreover, the lawfulness of the conference arrangements is not in issue here. We merely wish to indicate as an aid to the conferences some of the problems which may be involved should they desire to expand the scope of their present operations. We are of course not in any way prejudging any arrangements which may be presented to us for our approval.[13]

To summarize, then, upon the filing of a tariff in accordance with this decision, (1) to the extent CML will transport cargo in a through movement between inland points and ocean ports it will engage in activities beyond the scope of the approved conference agreements and dual rate contracts and thus not subject to their provisions; [14] (2) as a corollary of (1), CML will not be free to utilize a system of dual or contract-noncontract rates for any portion of its through movements as distinguished from its port-to-port movements unless it obtains authorization, apart from that which now covers its port-to-port activities as a conference member, to institute a dual-rate system. Such system would be required to be submitted for our approval and approved by us before it could lawfully be effectuated by CML, and our observations with respect to the factual problems involved in such approval would of course be applicable to CML as well as the conferences; [15] (3) to the extent CML will engage in a port-to-port, rather

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[13] The fact that some of the matters included within the scope of such expanded agreements (e.g., reasonableness of the level of the rates charged by the water carriers for the inland portion of the transportation) may be outside the jurisdiction of the agency would not prevent approval of such agreements providing they were otherwise lawful. Cf. *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245, 257 (1961); *Approved Scope of Trades Covered by Agreement 7840*, 10 F.M.C. 9 (1966).

[14] Likewise, the provisions of CML's tariff are not "duplicating" or "conflicting" within the meaning of our General Order 13 inasmuch as they do not refer to or cover the same service as that for which rates are published in the conferences' tariffs.

[15] One of the contentions of the conferences is that CML may under its through intermodal tariff absorb inland transportation costs in violation of the conference agreements. The answer to this contention is that because CML's service does not fall within the scope of the conference agreements, there can be no violations thereof. However, assuming *arguendo*, that it did, CML's activities insofar as they resulted in a decrease in the effective amount paid for ocean transportation would not constitute absorptions of inland transportation costs within the meaning of the conference tariff rules prohibiting absorptions. NAWFA's rule states that conference members "will not be responsible directly or indirectly for any expenses incurred in the inland movement of containers, by whatever means, beyond vessels loading or discharging terminals * * *" (a similar rule is contained in NAUKFC's tariff). CML is not, however, making itself "responsible for expenses" for inland transportation. That would be the case if it paid the shipper for all or a part of the expenses a shipper incurred in transporting his property inland, or if it acted as shipper's agent for such transportation and reimbursed the shipper for all or a part of his expenses for such movement. CML, on the other hand, is itself providing the transportation; it publishes a through rate and all shippers must pay this rate—there are no "absorptions" involved.

than a through movement, CML will still be subject to all of its conference obligations (including those under its dual rate contracts); and (4) to the extent the conferences attempt to apply their arrangements to cargo involved in other than port-to-port movements, their conduct is unlawful as unauthorized by their presently approved arrangements (of course the conferences may wish to amend their arrangements accordingly).

One last general observation flows from what we have said with respect to the scope of the conference arrangements involved herein, and it follows logically from the conclusion that CML's through movements are beyond the scope of the conference arrangements. If such activities by CML are not covered by the conference arrangements, *a fortiori* through movements from and to inland points by any carriers (including NVO's) not members of the conference would also not be included within such conference arrangements. Dual-rate contract signatories would be free to transport cargo by nonconference carriers, but only to the extent such carriers provide a through service with through liability as distinguished from port-to-port service within the scope of the conference arrangements.

One might be tempted to maintain that, even if the through service of CML is not included within the scope of the conference activities, insofar as the water portion of CML's rates is concerned, the charge should be the same as the port-to-port rates in the conference tariffs inasmuch as the same transportation is involved. The simple answer to this contention, however, is that the same transportation is not involved. The Interstate Commerce Commission has long held that rates between inland points published in conjunction with water transportation in our export or import trade need not be the same as local rates between the same inland points.[16] The lawfulness of such a difference in rates, the ICC holds, must be determined by considering whether the circumstances and conditions controlling the import and export rates are the same as or different from those surrounding the domestic rates, including the circumstances affecting the movement of foreign commerce before reaching the United States. *Tex. & Pac.*

It is of course essential that CML accept responsibility for the total transportation under a through bill of lading, for, if it did not it would be performing merely a port-to-port service with additional arrangements made as agent for the shipper. The consequence of this is that its service would be subject to the conference tariff, and any allowances it may make to the shipper for inland transportation would be absorptions in violation of the conference's tariff rule. The conferences themselves acknowledge that there is nothing in the conference agreements or rules which would prohibit a member from assuming "responsibility" as distinguished from "expenses" for the movement beyond ocean ports, and the reason why this is so is plain—such activities are, as we have seen, outside the scope of the approved conference arrangements.

[16] We have no reason to believe that British law or practice is different from ours in this respect.

*Railway* v. *Interstate Com. Com.*, 162 U.S. 197 (1896); *Texas & Pacific Ry Co.* v. *U.S.*, 289 U.S. 627 (1933). Likewise, the question of whether the ocean portion of a through rate is unjustly discriminatory or unreasonably prejudicial because it differs from a conference port-to-port rate is a question of fact to be determined after a thorough consideration of all the circumstances and conditions, including the circumstances affecting the inland transportation.

We cannot say that the minor discrepanices between the rate for the water portion of CML's through rate and the rate it is bound as a conference member to assess for its port-to-port service are on their face so discriminatory or prejudicial as to be unlawful per se.[17]

## Conclusion

Tariffs of CML providing for a through transportation service including inland transportation in the United Kingdom and port-to-port transportation between United States and United Kingdom are acceptable for filing under section 18(b) of the Act if they: (1) clearly indicate ports or ranges of ports between which water transportation will be performed; (2) break out the charge for such water portion of the transportation; (3) identify inland points to and from which service is provided; and (4) include a specimen bill of lading all the articles of which provide for common carrier liability for the through movement consistent with the holding out in the remainder of the filing.

CML's proposed tariff is at present unacceptable for filing because of the inconsistencies in the bill of lading incorporated therein with respect to CML's liability. The tariff is therefore rejected unless prior to its intended effective date CML files amendments curative of these defects.

[17] CML's contention that the filing of papers in this proceeding by the members of NAWFA other than CML in the conference name constitutes an unapproved section 15 agreement inasmuch as CML did not authorize the filing and the conference agreement requires unanimous vote is completely without merit. Such an interpretation of the conference agreement would have the effect of thwarting a conference from bringing an action against one of its members for any violation of the Shipping Act if the allegedly wrongdoing member did not consent. Such an effect would plainly be contrary to the public interest and we have not and could not approve any agreement authorizing such an effect. As noted by the Court of Appeals for the District of Columbia Circuit in affirming our decision with respect to our findings as to which agreements had been approved in the *Swift* case, since an agreement subject to our jurisdiction "is not simply a private contract between private parties. the intent of the parties is only one relevant factor, and the Board not only can, but must weigh such consideration as the effect of the interpretation on commerce and the public. Moreover, the agreement exist[s] legally only because approved by the Board. The Board must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval." *Swift & Company* v. *Federal Maritime Commission*, *supra*, at 281.

COMMISSIONER JAMES F. FANSEEN, dissenting:

I would reject the tariffs filed by Container Marine Lines. The majority has accepted the tariff filing provided certain conditions are fulfilled by CML. One of these conditions for acceptance is that CML break out the charge for the water portion of the transportation.

Assuming that CML meets all of these conditions, however, the tariff remains unlawful.

Our General Order 13 (46 CFR § 536.2(c)) provides that:

> No carrier or conference shall publish and file any tariff or modification thereto which duplicates or conflicts with any other tariff on file with the Commission to which such carrier is a party whether filed by such carrier or by an authorized agent.

The broken-out charge (or the port-to-port rate) for CML's water portion of the transportation represents a conflict with the conference tariff.[18] This conflict clearly violates General Order 13 and is enough in itself to warrant rejection of the CML tariff.

The conference agreement requires that carriers, as a condition precedent to admission to the conference and to gaining its advantages, agree to abide by the conference rules and regulations. Since we have given our sanction to these rules by approving the conference agreement, we must enforce the rules in a proceeding before this Commission.

The tariffs of CML conflict with its commitments to the conference agreement. Affidavits have been submitted by members of the conferences herein involved which set forth a number of instances of conflict.

With CML having violated the conference agreement, additional grounds for rejection of the tariffs are also present.

I think further defects could be cited, but the foregoing are more than sufficient for rejection of the CML tariffs.

CML's proposed intermodal tariff might well be a needed innovation in the transportation industry. However, the CML filing is not acceptable under the presently existing regulatory statutes.

To the extent that the present law is inadequate to the process of evolution in the shipping industry, the regulatory rules must be changed to fit current needs. As long as the present law stands, however, it must be abided by the rules enforced.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

[18] For instance, see NAWFA's tariff (F.M.C. No. 26).

# FEDERAL MARITIME COMMISSION

Docket No. 66-65

Ballmill Lumber & Sales Corp.

*v.*

The Port of New York Authority, Weyerhaeuser Co., Atlantic Terminals, Inc., and Maher Lumber Terminal Corp.

*Decided April 24, 1968*

The lease between the Port of New York Authority and Weyerhaeuser Co. in connection with the handling of lumber at Port Newark results in undue and unreasonable preference and advantage to Weyerhaeuser and undue and unreasonable prejudice and disadvantage to complainant, in violation of section 16 First of the Act, and constitutes an unjust and unreasonable regulation and practice, in violation of section 17 of the Act.

That portion of the tariff of Maher Lumber Terminal Corp. which provides a volume discount for the handling of lumber at Port Newark, N.J. subjects complainant to undue and unreasonable disadvantage, in violation of section 16 First of the Shipping Act, 1916, and constitutes an unjust and unreasonable regulation and practice, in violation of section 17 of the Act.

No violation by Weyerhaeuser or Atlantic Terminals, Inc., of either section 16 First or section 17 of the Act has been shown in connection with the handling of lumber at Port Newark.

It has not been shown that complaintant has suffered pecuniary damages which are the proximate result of the violations herein found to exist, and the request for reparation is denied.

The complaint is dismissed.

*Baldvin Einarson* for complainant.

*James M. Henderson*, *Arthur T. Winn, Jr.*, *Samuel H. Moerman*, *J. Raymond Clark*, *Sidney Goldstein*, and *Francis A. Mulhern* for respondent the Port of New York Authority.

*William Warner* and *Erma Knef* for respondents Weyerhaeuser Co. and Atlantic Terminals, Inc.

*John Mason* and *Gerald A. Malia* for respondent Maher Lumber Terminal Corp.

## REPORT

By The Commission (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This proceeding was instituted by a complaint filed by Ballmill Lumber and Sales Corp. (Ballmill) on December 2, 1966, against the Port of New York Authority (Port Authority), Weyerhaeuser Co. (Weyerhaeuser), Atlantic Terminals Inc. (Atlantic), and Maher Lumber Terminal Corp. (Maher). The complaint charged violations of sections 16 and 17 of the Shipping Act, 1916, and requested reparation in the amount of $1 million.

Hearings were held before Examiner C. W. Robinson, who issued his initial decision November 28, 1967. Exceptions and replies have been filed. Oral argument was heard by the Commission on February 14, 1968.

## FACTS

Complainant, Ballmill, is a wholesaler of Pacific coast forest products. Ballmill's lumber business is located at Port Newark, N.J. Ballmill leases waterfront property at Port Newark from the Port Authority for use in its lumber business.

At the time of the hearing in this proceeding, there were four wholesale lumber dealers with leases for space at Port Newark. Ten other lumber wholesale dealers operated out of Port Newark, but they did not lease space from the Port Authority.

The controversy in this proceeding concerns the use of terminal property and terminal services at Port Newark and stems partly from the leasing arrangements between the lumber wholesalers and the Port Authority, which is charged with the administration of Port Newark.

Pursuant to its lease with the Port Authority, Ballmill pays a fixed rental for certain waterfront property which is used in the operation of its lumber business. The first such lease was entered into on December 1, 1950. A provision in the lease required Ballmill to use the Port Authority or its agent or its approved contractor for all backhandling of lumber received by water transportation by Ballmill at the marine terminal.[1] This is the controversial provision of the lease.

When the Port Authority took over the administration of Port Newark in 1948, it made the decision that no new lease would issue which gave the lessee the privilege of performing the backhandling. All lessees were to use the services of the Port Authority, its agent, or designated independent contractor. For this reason, the abovementioned provision was included in the Ballmill lease.

However, when Weyerhaeuser (the largest lumber wholesaler at Port Newark) negotiated a new lease with the Port Authority in 1953, it was successful in retaining the right to backhandle its own

[1] Backhandling is the delivery of lumber from ship's tackle to a place of rest on the tenant's premises or to a place of rest on the public terminal in the case of nontenants or of those tenants using the public terminal.



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lumber. Weyerhaeuser, pursuant to its earlier lease, has been operating a public terminal at Port Newark through its wholly owned subsidiary, Atlantic. Atlantic not only performed terminal services for its parent, Weyerhaeuser, but for other receivers of lumber and for water carriers. Under its renewed lease in 1953, Weyerhaeuser retained the right to operate its public terminal through Atlantic. No other tenant or lessee of the Port Authority was successful in acquiring a similar lease provision.

In addition to the question of preferential leasing arrangements, the proceeding also involves a controversy over rates and services offered by the two public lumber terminals and their effect on the various lumber wholesalers.

As mentioned above, Ballmill and all other lessees except Weyerhaeuser are required to use the services of the Port Authority, its agent, or designated independent contractor. Maher is the present operator of the Port Authority terminal, and it is Maher's services which the lessees are required to use. Other lumber wholesalers who do not have leases (nontenants) also use Maher's services.

The only other public terminal operator at Port Newark besides Maher is Atlantic, the subsidiary of Weyerhaeuser. Atlantic's services are used by Weyerhaeuser and other lumber wholesalers who do not have leases with the Port Authority.

Maher contracted with the Port Authority for the privilege of operating its public lumber terminal at Port Newark in 1963. The size and location of the terminal are subject to change by the Port Authority without notice. The location of the present terminal is immediately adjacent to the transit area at berths 34 and 36.

Originally, Maher's terminal was directly across the street from Ballmill's leased area, then it was moved several blocks away, and at the time of the hearing, it was about 1.8 miles from Ballmill. These shifts were made by the Port Authority in accordance with the right to do so reserved in its contract with Maher.

Maher pays to the Port Authority a charge of $1.25 per 1,000 bd. ft. for lumber backhandled each month and collects for and pays to the Port Authority wharfage charges assessed by the latter under its tariff on file with the Commission. Maher has on file with the Commission a tariff for the services it performs. The services for tenants are different from those for nontenants, as will be elaborated.

Ballmill's lumber handled by Maher usually is discharged at berths 34 and 36.[2] It is already strapped in bundles and unloaded in lots by

[2] Ballmill has not been interested in relocating its leased area to be closer to the discharge point.

the stevedore and placed on the dock, in accordance with Maher's tariff. The stevedore is neither employed by nor controlled by Maher. Forklift trucks of Maher carry the bundles to the transit area behind the berths. There the bundles are stacked six or seven high and picked up by lorries and hauled to Ballmill's premises, where they are dropped in designated areas.

The final step is taken by Ballmill's own forklift trucks, which move the lumber to areas assigned to particular sizes and types; this may be as far away as 400 yards.

The lumber of nontenants who use Maher's terminal is picked up by forklift trucks at the end of ship's tackle, by lot, and taken to the transit area and deposited where instructed. If the lumber is not removed at the end of free time, it is taken by forklift trucks to Maher's area adjacent to the transit area, becoming a part of the nontenant's inventory.

Maher provides free time of 7 days, but this is not applicable to lumber handled to open areas leased from the Port Authority (such as Ballmill's premises).

Maher also provides storage and truck loading services which are used by the nontenant lumber dealers. Ballmill has never used these services since Ballmill has its own leased premises for storage purposes and has its own equipment and personnel, which it uses to load trucks which remove lumber from its premises.

Atlantic furnishes various terminal services to receivers of lumber and to water carriers, at rates published in its own tariff on file with the Commission. Ballmill has used these facilities, but only when the lumber mill loaded small quantities on a ship to be discharged at Atlantic's terminal or when lumber in transit was purchased by Ballmill from a competitor. A Port Authority representative, in a trip to the Pacific Northwest, endeavored to correct this situation inasmuch as Ballmill is required by its lease to use Maher.

When unloaded at Atlantic's terminal, Ballmill's bundles are picked up by straddle trucks at the end of ship's tackle and taken direct to Ballmill's premises across the street. The straddle truck carries to the proper area two bundles of the same size and grade of lumber. Thereafter, Ballmill's forklift trucks position them in proper piles.

The controversy about rates for the various services stems partly from the fact that Ballmill is forced to use Maher, while many of its competitors can use either Maher or Atlantic, and partly from the fact that because of its lease, Ballmill cannot practically avail itself of Maher's storage and truck loading services.

Ballmill renewed its lease with the Port Authority in 1960 for 10 more years. Its decision to renew was based on its determination that at then current rates, it would be cheaper to rent its premises and use only Maher's backhandling services rather than to use all of Maher's services of backhandling storage and truckloading.

From 1960 to 1962, Maher's rates remained constant. However, Atlantic's rates, available to nontenants and Weyerhaeuser, were lower. Nontenants took advantage of the lower rates at Atlantic. Ballmill was bound by the terms of its lease and could not. By 1962, only a small volume of nontenant lumber passed through Maher's terminal.

Ballmill asked for lower rates from Maher to enable him to compete with competitors who could use Atlantic's lower rates. Ballmill's protestations had little effect until in 1965 Maher secured a reduction from $1.25 to $1.00 per 1,000 bd. ft. of its required payment to the Port Authority for lumber it backhandled. This was followed by a new Maher tariff effective December 6, 1965. The new tariff did little to appease Ballmill, however.

Maher's charges for backhandling from shipside to terminal were reduced from $3.30 to $3.15/1,000 net board feet. The rate of $2.80 applicable to backhandling to leased areas (Ballmill's rate) was not changed.

Maher's new tariff also contained a volume discount provision which is the basis for much of Ballmill's complaint in this proceeding. The discount provision is applicable to the combined "services of backhandling to the terminal, truckloading, and wharf usage."[3] The ap-

[3] Maher's discount provision reads as follows:

VOLUME DISCOUNT

The following volume discount is applicable to the services of backhandling to the Terminal, truckloading and wharf usage, as such terms are described in this tariff. To be eligible for volume discount the consignee must move more than three million board feet pursuant to this tariff within twelve consecutive months, commencing no earlier than Jan. 1, 1966. In calculating the number of board feet moved pursuant to this rule, lumber movements under Paragraph 1(B) shall be included insofar as the total does not exceed fifty percent of the consignee's total lumber movement for the year. The discount shall apply only to the volume that moved to Terminal under Paragraph 1(A). Lumber which qualified for volume discount under the service provided for herein above shall also be accorded a volume discount on the storage charges set forth in Paragraph 6.

| | Backhandling, truckloading and wharf usage per 1,000 b.m.f. net* | Storage per month per 1,000 b m.f., gross |
|---|---|---|
| Up to 3 million board measure feet net | None | None |
| Over 3 to 6 million board measure feet net | $0.30 | $0.20 |
| Over 6 to 10 million board measure feet net | .40 | .25 |
| Over 10 to 15 million board measure feet net | .50 | .30 |
| Over 15 to 20 million board measure feet net | .70 | .35 |
| Over 20 to 25 million board measure feet net | .90 | .40 |
| Over 25 to 30 million board measure feet net | 1.10 | .45 |
| 30 million board measure feet net | 1.30 | .50 |

*B.m.f =board measure foot, 1 inch thick by 12 inches wide.

plied discount rate would be based on the total volume of lumber which moved through the terminal by a particular dealer, both to the public yard and to the leased area, but this discount was not applicable to the portion that moved to the leased area. Lumber moved through the leased area could not be included if it exceeds 50 percent of the consignee's total movement for the year. In other words, if the total movement was 17 million b.m.f. of which nine went to the public yard, the discount on the 9 million feet only would be in the 15 to 20 million b.m.f. rate but there would be no discount at all on the 8 million b.m.f. that went into the leased area. If 8 million of the 17 million moved through the public yard and 9 million to the leased area, the discount was figured at the 6 to 10 million b.m.f. rate on the 8 million with no discount at all on the 9 million b.m.f. moving to the leased area. This meant that Ballmill could not practically avail itself of the volume discount unless it chose to use the package of services and to use the public terminal rather than its own leased premises. No discount was offered on the single service of backhandling.

On January 1, 1967, Maher's backhandling rate, to apply both to the terminal and to leased areas, was increased to $3.30/1,000 net board feet. The package discount provision was retained.

Atlantic reduced its rates following the steps taken by Maher. As of the time of the hearing, Atlantic's rates for backhandling to truck delivery area and to storage were: up to 5,000 feet, $2.85 per 1,000 feet; from 5,001 to 10,000 feet, $2.55; and over 10,001 feet, $2.20. For backhandling and transportation, without interruption, to designated terminal areas other than its own, the rates are: up to 10,000 feet, $2.50 within ½ mile and $4.50 for over ½ mile; for $10,000 and over, $2.25 and $4.25 respectively.

Facts relevant to the question of the Port Authority's control over Maher and its rates and to the question of reparation as well as other relevant facts will appear in the "discussion" portion of this report.

## Discussion

Ballmill's complaint alleges violations of sections 16 and 17 of the Act by the Port Authority and the other respondents. Ballmill requests an award of reparation in the amount of $1 million.

Four areas of controversy arise from Ballmill's complaint:

1. Whether the lease between the Port Authority and Weyerhaeuser results in undue and unreasonable prejudice and disadvantage to Ballmill, in violation of section 16 First of the Act, and constitutes and unjust and unreasonable regulation and practice, in violation of section 17 of the Act;

2. Whether that portion of Maher's tariff pertaining to discount rates applicable to the handling of lumber at Port Newark subjects Ballmill to undue and unreasonable disadvantage, in violation of section 16 First of the Act, and constitutes an unjust and unreasonable regulation and practice, in violation of section 17 of the Act. A determination of the second question will involve a consideration of what control the Port Authority exercised over Maher's rate policies at Port Newark;

3. Whether Weyerhaeuser or Atlantic have violated sections 16 First or 17 of the Act; and

4. Whether Ballmill is entitled to an award of reparation as a result of any of the above-alleged violations.

*Weyerhaeuser Lease*

The Examiner concluded that the action of the Port Authority in permitting Weyerheauser to backhandle lumber for itself and for other receivers of lumber at Port Newark while requiring other tenants to use the public terminal (Maher), is an undue and unreasonable preference and advantage to Weyerhaeuser and an undue and unreasonable prejudice and disadvantage to other tenant-receivers of lumber, including, of course, Ballmill, and constitutes an unjust and unreasonable regulation and practice, in violation of section 16 First and 17, respectively, of the Act. The Examiner's conclusion is based on his finding that Weyerhaeuser is placed in a favored position competitively as a result of its lease with the Port Authority. We agree with the Examiner.

In excepting to the Examiner's conclusion, the Port Authority argues that the difference in treatment of the two lumber dealers is necessitated and justified by differences in characteristics of the two lumber dealers and by various circumstances and conditions existing at Port Newark. It is contended by the authority that the difference in the leases negotiated by Ballmill and by Weyerhaeuser does not give Weyerhaeuser any competitive advantage over Ballmill, because the service of backhandling, which Weyerhaeuser is permitted to perform through its subsidiary, and which Ballmill is not permitted to perform, is of relatively little importance in the overall scheme of lumber operations. Accordingly, any difference in backhandling services should not be accepted as proof that Weyerhaeuser's superior financial or competitive position is caused by the comparative leases concerning backhandling.

Therefore, the Port Authority argues, Ballmill has not shown that any difference in treatment in backhandling actually operates to the real disadvantage of complainant. It is the authority's position that for Ballmill to prevail on this point, it is essential for Ballmill to reveal the specific effect of the difference in treatment on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities. Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause of the disadvantage. Citing *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936). The authority contends that Weyerhaeuser and Ballmill are not similarly situated and therefore do not require similar services, and further that each of the leases is reasonably adapted to the respective requirements of Ballmill and Weyerhaeuser and therefore the difference in treatment does not result in any violations of the Shipping Act.

Finally, the Port Authority suggests that the Examiner failed to recognize other considerations underlying the Port Authority-Weyerhaeuser negotiations which place the resulting lease in an entirely different light such as the long-established equities which had accrued to Weyerhaeuser during original long term lease as a result of the heavy investment made by it. This refers to the fact that in 1953, when negotiations ensued with Weyerhaeuser for renewal of its lease, Atlantic had been at Port Newark for 22 years and was performing backhandling and other services incidental to the storage and distribution of lumber. At that time, Atlantic was handling about 140 million board feet of lumber per year, or about 50 percent of the total moving through Port Newark. The Port Authority feels that Weyerhaeuser, through its subsidiary Atlantic, had such a heavy investment and had built up such a decisive equity that it would be unreasonable to deny them of their right to perform backhandling and to operate the Atlantic terminal. It is pointed out that Weyerhaeuser was ready to leave Port Newark if it did not retain these rights. Weyerhaeuser had negotiated with Port Elizabeth for terminal facilities there.

These contentions afford no ground for rejecting the Examiner's conclusion with which we agree.

The Port Authority would play down the importance of backhandling in relation to any competitive advantage Weyerhaeuser holds over Ballmill. While we feel the difference in backhandling treatment does give Weyerhaeuser a competitive advantage, we do not suggest that Weyerhaeuser's dominant position in the lumber business results only from that difference in treatment. Weyerhaeuser was No. 1 even before the difference in backhandling treatment was instituted. We do think it clear, however, that Weyerhaeuser gains an additional advantage over Ballmill and the other tenants at Port Newark by virtue of its freedom to perform its own services. Indeed, Weyerhaeuser was also free to use the services of Maher should it choose to do so. Ballmill and the other tenants had no such freedom or choice—they could neither perform their own backhandling, nor use the services of Atlantic. They were forced to use Maher's services.

At various times during the period of the lease, it would have been financially advantageous for Ballmill to avail itself of Atlantic's backhandling rates. This is clear from the record inasmuch as Ballmill frequently complained to the Port Authority and to Maher that its competitors were getting a better deal at Atlantic. Between 1960 and 1964, Atlantic's backhandling rates were lower than the rates Ballmill was paying to Maher. As a result, most of the nontenant lumber dealers moved their lumber through Atlantic. Weyerhaeuser did likewise. Ballmill could not. Since January 1, 1967, it would again be more advantageous for Ballmill to use Atlantic.

In addition to the right to perform its own backhandling, Weyerhaeuser retained the right to operate its public terminal (Atlantic). No other tenant at Port Newark was given a similar right. Through its Atlantic operation, Weyerhaeuser was able to gain a substantial advantage over the other tenants, both in terms of profits and in terms of large scale lumber operations. While it is not at all clear that Ballmill or other tenants would have the necessary resources or even the desire to operate a public terminal, the denial of such a right by the terms of their lease coupled with the grant of such a right to Weyerhaeuser results in undue preference and prejudice and is an unreasonable practice within the meaning of the Act.

In reaching this conclusion, we have considered the situation with which the Port Authority was faced in its 1953 negotiations with Weyerhaeuser. They had been successful in retaining control over the backhandling operations at Port Newark in negotiating leases with Ballmill and other tenants, but Weyerhaeuser presented a different set of circumstances. Weyerhaeuser wanted to retain its long established and sizable operation at Port Newark in the name of its subsidiary Atlantic and was able to influence the Port Authority to retreat from its policy of trying to regain full control over all the backhandling at Port Newark.

No blame attaches to Weyerhaeuser or the Port Authority solely because of the bargain they struck. However, when the Port Authority decided to retreat from its policy of retaining control in the case of Weyerhaeuser, it became incumbent upon them to treat its other tenants in a similar fashion. This it failed to do and as a result the Port Authority is found to have unjustly preferred Weyerhaeuser over its other tenants at Port Newark.

The Port Authority argues that a difference in operations between Weyerhaeuser and Ballmill justifies the difference in treatment and that Ballmill and Weyerhaeuser are not competitive and therefore do not require similar treatment. Both Weyerhaeuser and Ballmill are dealers of Pacific coast lumber. The record demonstrates that they compete at Port Newark for the same customers but Ballmill's efforts to compete are hindered and prejudiced by the differences in its lease vis-a-vis Weyerhaeuser. Additionally, we find that Ballmill's present disadvantage is the proximate result of the prejudicial arrangement. Any differences between the operations of Ballmill and Weyerhaeuser are largely a result of the special privileges gained by Weyerhaeuser and cannot therefore be offered as justification for recovering such special privileges.

Additionally, the authority's leasing practice is unreasonable under section 17 inasmuch as it unfairly disadvantages Ballmill and other tenants.

*Maher's Rates*

The Examiner concluded that, as now constructed, Maher's tariff subjects Ballmill to undue and unreasonable disadvantage, in violation of section 16 First of the Act, and furthermore that the regulations and practices complained of are unjust and unreasonable in violation of section 17 of the Act. These conclusions are based on the fact that Maher's volume discount rates are not practically available to Ballmill or other tenants while they are available to nontenants. The disadvantage was considered significant because of the highly competitive nature of the lumber business where differences in cost often determine the ability to make sales. While the Examiner recognized some differences in circumstances between Ballmill and regular users (nontenants) of the terminal, he did not feel such differences justified the difference in treatment flowing from the discount rate provisions.

The discount rate provision applies only to the complete package of truckloading, wharfage, and backhandling. Since Ballmill performs its own truckloading and uses its own premises for storage, it does not qualify for the discount. Accordingly, Ballmill receives no discount on the single service of backhandling and this it considers prejudices in its efforts to compete for business. Maher counters this with the assertion that the discount provision is available to all who wish to use the package of services and because it is thus available to all the tariff provision, is not unduly preferential, prejudicial, or unreasonable.

Here again, we agree with the Examiner. Maher, however, urges that the Examiner failed to take into account the fact that prior to January 1, 1967, Ballmill enjoyed a rate advantage which because of changed circumstances was no longer justified. Maher points out that until December 1965, Ballmill enjoyed a $0.50 per m.b.f.[4] more favorable backhandling rate than did users of the public terminal, and that from December 1965 to January 1967, Ballmill enjoyed a $0.35 per m.b.f. more favorable rate. Also Maher points to the fact that Ballmill's leased premises were moved from a point adjacent to the public terminal to a point 1.8 miles away. To Maher, it is only reasonable to conclude that because of the change in location of Ballmill's leased premises, Ballmill's rate advantage was no longer justified and accordingly, it was removed in January 1967. While the greater distance to Ballmill's premises might justify removal of Ballmill's former rate level advantage or, as the Examiner suggested, might justify a higher rate for Ballmill related to the greater distance traveled, the discount here in issue is not related in any way to distance. Maher ignores the actual objectionable feature of Maher's tariff, i.e., that it provides a *volume* discount for some users of Maher's backhandling service while it fails to provide a similar *volume* discount for other users. It is irrelevant to the question of the propriety of volume discounts whether a difference in rates might be justified because one customer uses the public terminal and another customer uses a leased area 1.8 miles away from the public terminal. Each customer is entitled to similar treatment in respect to whether a discount based on volume of lumber backhandled is to be granted.

Maher further argues that the basic rate paid by Ballmill for backhandling involves neither a disadvantage nor unreasonable treatment even though Ballmill may at some point pay more for backhandling to its facilities than users of the public terminal pay for backhandling at the terminal. Again Maher urges that different characteristics warrant such a higher charge to Ballmill. As we have already said, Maher might be justified in charging Ballmill a higher rate than it charges users of the public terminal if the difference is related to differences in backhandling characteristics. Here again, it is only necessary to point out that this discount system is not geared to differences in backhandling characteristics—in this case the distance the lumber is hauled. The "characteristics" of the backhandling service for each

[4] Thousand board feet.

lumber dealer using Maher's services are identical. We wish to make it clear that we are not saying that the idea of a volume discount is objectionable per se. We see nothing wrong with such a technique if it is to apply equally to all users of the service.

Maher also suggests that since Ballmill is not a user of the public terminal, Maher owes Ballmill no duty as to services performed at that terminal, and also that Maher was compelled for competitive reasons to induce lumber dealers to use the public terminal.

Here, it is sufficient to say that having held itself out to perform the single service of backhandling, Maher must perform that service in a nondiscriminatory and reasonable manner. Moreover, the record does not show that for Maher to provide Ballmill and other lessees a similar volume discount on the single service of backhandling would in any way affect Maher's ability to compete for lumber dealers at the terminal.

Maher also suggests that the justification for the volume discount scale rests on the premise that as to fixed plant, including the permanent labor force and equipment, the greater the volume the lower the unit cost. Maher states that since the same equipment is used at the public terminal for backhandling and truckloading and since its operation at the terminal is in a relatively compact physical area, and since the combined services are spread out over the free time period, a package discount based on volume is feasible at its public terminal. Maher feels, however, that characteristics of backhandling to Ballmill's leased premises do not support a volume discount inasmuch as in their opinion to carry 10 loads of lumber will run to 10 times the cost of transporting one load and so on.

This is but another variation on Maher's "different characteristics" argument and need not be further dealt with except to add that even were Ballmill's premises immediately adjacent to those of Maher, they would still not be entitled to the discount.

Finally, Maher suggests that the Examiner should have found that Ballmill's loss of sales to competitors, if any such loss occurred, was not proximately caused by Maher's tariff structure. Maher's argument is that Ballmill's competitors are not enabled, by reason of tariff conditions, to sell lumber on better or more favorable terms than Ballmill for the reason that Ballmill's competitors are offered no facility by Maher that is not equally available to Ballmill. In other words, Maher claims its tariff is equally available to Ballmill. Thus, Maher alleges that any loss of sales suffered by Ballmill is not proximately caused by Maher's tariff.

Maher has offered these arguments in an attempt to explain that the Examiner missed the point when he said:

> Complainant is engaged in a highly competitive business, where significant differences in cost often determine the ability to make sales. It is no answer merely to say that complainant *can* or *could* put itself in a more favorable business climate by using all of Maher's services and thus availing itself of the discount rates provided for those tenants and nontenants who do so. This would mean that complainant would have to forego the use of its leased premises, its equipment, and its personnel, even though its rent to the Port Authority would continue.

We feel that the Examiner was right on point. Having been effectively precluded from availing itself of Maher's volume discount rates, Ballmill is placed in a disadvantageous cost position in relation to its competitors and, as the Examiner recognized, this could be rather damaging in a business where significant differences in cost often determine ability to make sales.

For the reasons advanced in the preceding discussion, we find that Maher's volume discount rate provision results in undue preference to users of the public terminal and undue prejudice to Ballmill and other lessees of property at Port Newark in violation of section 16 First of the Act, and also results in an unreasonable practice under section 17 of the Act.

On this same point, Ballmill alleges that the Port Authority is also in violation of the Act inasmuch as the Port Authority controlled the actions of Maher in establishing rates applicable at Port Newark.

The Examiner has concluded that at least from September 30, 1963, Maher was not the agent of the Port Authority in its dealings with lumber receivers at the public lumber terminal, and that the rates for services performed were those of Maher only and not of the Port Authority.

The Examiner accurately stated the following facts which relate to the issue of control over Maher by the Port Authority: (1) after the takeover of Port Newark from the City of Newark by the Port Authority in 1948, the rates for backhandling were prescribed by the Port Authority itself but assessed and collected by its agents; (2) in 1958, the Port Authority contracted with Lehigh Warehouse and Terminal Co. (Lehigh) for the latter to operate the public lumber terminal, and Lehigh issued its own tariff, whereupon the Port Authority resigned as a member of North Atlantic Marine Terminal Lumber Conference and membership therein was obtained by Lehigh and its successors. Maher is the present successor; (3) the Port Authority, by letter of September 5, 1958, advised everyone on its tariff mailing list, including Ballmill, that the current Port Authority tariff schedule for the handling and storage of lumber would be replaced by a schedule of Lehigh, but that assignment of berths to vessels remained with the Port Authority; (4) the contractor-form of operation has continued from 1958 to the time of the hearing; (5) the contract with Lehigh had required Lehigh to assess fair, reasonable, and nondiscriminatory rates; (6) Maher's contract originally provided that services were to be fair, equal, and without discrimination, that there must be reasonable rules and regulations under the direction of the Port Authority, and that there be fair, reasonable, and nondiscriminatory rates for all services; (7) the Maher contract was amended to remove all control by the Port Authority over the rules, regulations, and rates of Maher; and (8) Ballmill's leases with the Port Authority have required all backhandling services to be performed by the Port Authority or its agent, or by an independent contractor approved by the Port Authority, "at reasonable rates *to be fixed by the Port Authority*." (Italics supplied.)

Ballmill has excepted to the Examiner's conclusion regarding the question of control and in so doing seeks to show that documents between Ballmill and the Port Authority, the interoffice correspondence of the Port Authority and testimony as to meetings between Ballmill and Port Authority indicate that Port Authority participated in matters dealing with setting and control of Maher's rates. Ballmill further argues that the contracts between the Port Authority and Maher indicate that Maher was the agent of the Port Authority in respect to rules, regulations, and rates. Ballmill then suggests that a principal-agent relationship exists notwithstanding a denial by the principal and whether the parties understood it to be agency or not; and further that the fact of agency may be established by proof of circumstances, apparent relations, and the conduct of the parties.

Ballmill's position, upon the extraction of self-serving statements, rests upon the facts that the Port Authority (1) controls the physical location of the public lumber terminal; (2) has a contractual right to terminate their agreement with Maher; and (3) has extracted from Maher a contractual undertaking to do what the Shipping Act, 1916, in any event compels Maher to do, i.e., to offer their services on a fair and equal basis without unjust discrimination to all persons entitled thereto.

None of these things, either singly or when combined, evidence that the Port Authority has the contractual right to control, or in fact controls, the setting of rates for services performed by Maher in backhandling lumber either to the public terminal or to leased areas or for other services of Maher.

The contention that the Port Authority was in every way asserting overall control over lumber handling practices at Port Newark is contrary to fact, and contradicated by Ballmill's own actions. The Port Authority did not control rates at the public lumber terminal. Ballmill was unequivocally informed that it did not. Ballmill consistently went to Maher with its complaints about rates, and went to the Port Authority for relief in other matters only after failing to obtain changes in Maher's rates.

The Examiner's conclusion was well founded, proper and supported by the evidence and testimony of record, namely, that the Port Authority did not control the rates established and maintained by Maher and, further, that Ballmill did not rely upon such control and, in fact, took actions which clearly revealed that he believed the rates were established by Maher.

*Weyerhaeuser and Atlantic*

The Examiner found no violation by either Atlantic or Weyerhaeuser. Atlantic's tariff was found to apply equally to all receivers, including Weyerhaeuser and therefore was not violative of the Act. While Weyerhaeuser was found to have *received* an unduly advantageous position as a result of its lease with the Port Authority, the Examiner recognized that it is no violation to be on the receiving end of such a preference or advantage.

We agree with the Examiner's conclusions. There is absolutely no showing that Atlantic preferred any users of its services. Its parent Weyerhaeuser was charged the same rates as other users. We are not disturbed by the fact that Atlantic paid more rent to Weyerhaeuser than Weyerhaeuser paid to the Port Authority for its lease. Weyerhaeuser is entitled to receive the profits from its wholly owned subsidiary. The fact that Weyerhaeuser's ability to operate Atlantic has been granted by a preferential lease clause is not relevant to a determination of any violations by Atlantic.

Neither is Weyerhaeuser in violation. The fact that Weyerhaeuser applied some pressure to the Port Authority to obtain its preferential lease is not relevant. The Port Authority is the party that granted the preference and the Act specifically provides that it shall be unlawful to *make* or *give* a preference or prejudice. The Act says nothing about being a recipient of such preference or prejudice.

*Reparation*

The Examiner concludes that the violations of Maher and the Port Authority are not of sufficient significance to warrant an award of reparation. The Examiner suggests that the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation and that to justify an award of reparation, any damage must be the proximate result of violations of the statute. Furthermore, he suggests that the awarding of reparation is a matter of discretion by the Commission.

On the specifics of Ballmill's claim, the Examiner states that in the present proceeding a series of estimates, conjectures, speculations, and assumptions are put forward as a base for alleged damage, and there is no real and tangible proof that any pecuniary losses which Ballmill may have suffered are the proximate result of the violations. Accordingly, the Examiner recommends against the award of reparation. The basis of Ballmill's reparation claim of $1 million is summarized below.

Ballmill suggests that because of Maher's and the Port Authority's violations of the Shipping Act, Ballmill has been damaged in that it has been forced to give up a substantial portion of its profit margins because of unjust and discriminatory cost reductions in favor of its nontenant competitors, and excess costs and expenses particularly in comparison to Weyerhaeuser, as well as lost sales and profits.

When Ballmill signed its lease in 1959, its cost of terminal operation was $4.39/b.m.f. and its nontenant competitors at the public lumber terminal had costs of $7.54. This was a differential of $3.15. Considering the rapid development of Port Newark as a container port and the consequent increase in the value of space, and the nationwide trend toward rising prices, Ballmill had every reason to expect that this differential would increase by 15 percent (instead of decreasing). In that event, the $7.54 total of costs for the nontenant would have been $8.67, and even if Ballmill's costs for 1965 were the same as for 1966, or $4.71, the differential would have been $3.96. Multiplied by Ballmill's volume for 1965 (Ex. 80 net volume of 25,382 m.b.f., or 34,300,000 bd. ft. gross), Ballmill figures its damages in 1965 to be $135,828. Based on 1966 volume, Ballmill figures its damages in 1966 to be $123,658.

Ballmill also lost profits based on lost sales because nontenants, with cost advantages, were able to underbid Ballmill and capture the business. Ballmill says it could confidently expect to have received 20 to 25 percent of the volume at Port Newark, but even if only 17 percent of the volume in 1965 and 1966 had been Ballmill's, the following would have been true. In 1965, net volume was 220,612,000 bd. ft. at Port Newark. Seventeen percent would have been 37,504,040 bd. ft. and, subtracting actual volume of 25,882,000 bd. ft., lost sales are computed to be 12,122,000 bd. ft. net, or 16,381,000 bd. ft. gross measurement (74 percent). Similarly, in 1966, net volume was 223,003,000 bd. ft. Seventeen percent would have been 37,910,510 bd. ft., and subtracting actual volume of 22,976,000 bd. ft. gives a difference of 14,934,000 bd. ft. net, or 20,181,000 bd. ft. gross measurement which represents total lost sales.

Furthermore, based on sales of $3,882,530 and volume of 35,506,884 bd. ft. gross measurement in 1966, Ballmill's sales price was $96.43 b.m.f. Lost sales in dollars for 1965 on 16,381,000 bd. ft. were thus $1,579,619, and for 1966 on 20,181,000 bd. ft. were $1,946,053. Applying the profit margin of 11.3 percent, lost profits in 1965 amounted to $178,496.94. Even assuming overhead was increased by 10 percent (warehouse operating charges of $103,914, selling and administrative expenses, $225,323), lost profits were $145,573.94. For 1966, gross profit of 11.3 percent on lost sales of $1,946,053 amounted to $219,903.98, and even assuming overhead increased by 10 percent (warehouse, $96,411, selling and administrative, $216,931), lost profits amounted to $188,570.93.

Finally, loss in market value of the business as a prospect for sale, merger, or acquisition because of reduced earnings and the end to its pattern of steady growth should be considered. Ballmill says it was approached with such an offer, but when the interested firm, Boise-Cascade, examined the profit and loss and balance statements of Ballmill, negotiations were terminated. Ballmill suggests that it stands to reason that when a company with a net worth of $1,200,000 has profits of 2 percent, it is not a candidate for sale or merger and that based on this record, the just compensation for this diminution in market value is $406,371.

From all of the above, Ballmill feels it should be awarded damages of $1 million.

As the Examiner correctly pointed out the awarding of reparation is a matter of discretion by the Commission. Section 22 of the Act states that we "may" direct the payment of reparation. The language is permissive and hence the mere fact of a violation of the statute does not necessitate the grant of a reparation award. *Consolo* v. *Federal Maritime Comm'n.*, 383 U.S. 607, 621 (1966).

In the instant proceeding, we feel that a reparation award is unwarranted. We have recognized that Ballmill has been disadvantaged by means of the leases of the Port Authority and the discount rates of Maher. However, we are not convinced that the nature of the violations is such as would warrant the requested reparation award. Furthermore, we are not satisfied that the damages alleged by Ballmill are real or whether the alleged damages are sufficiently related to the violations of the Act.

We have previously stated in *Waterman* v. *Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 253 (1950) that:

> * * * to award damages alleged to have been incurred by reason of unjust discrimination, there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Board as would be deemed necessary under the well-established principles of law in such cases as a basis for judgment in court.

Ballmill's argument relating to loss of cost advantage relies on the assumption that its 1959 favorable cost differential would increase by 15 percent. There appears to be no real basis for this assumption. The reasons offered to support the assumption (i.e., rapid development of Port Newark and consequent increase in value of space and the nationwide trend toward rising prices), could just as well be offered by Maher or the Port Authority to support the proposition that nontenants could expect to better their position by 15 percent.

We recognize that Ballmill's 1959 cost advantage has decreased, but it is not totally clear from the record as to what extent this decrease is due to the objectionable aspect of Maher's tariff, namely the preferential volume discount, or as to what extent the decrease is due to Maher's changes in backhandling rates which have not been found to be in violation of the Act, or to what extent it is due to Ballmill's increased operating costs at its leased area, or even to what extent it is due to Maher's decreased truckloading rate, applicable to nontenants.

We should also point out that Ballmill requests reparation for the year 1965 while the objectionable aspect of the tariff, which is claimed to have resulted in higher costs to Ballmill for 1965, was instituted on December 6, 1965, hardly in time to affect the cost differential for that year.

Ballmill's second point is that it lost profits based on lost sales. Ballmill speculates that it could have expected to receive 20 to 25 percent of the volume at Port Newark but then settles on a 17 percent figure to be used to determine its lost profits. To show how speculative even the 17 percent figure is, we need only point out that in 1959, when Ballmill had the favorable cost advantage, its percent of lumber volume at Port Newark was 8.1 percent. How Ballmill determined it would have received 17 percent in 1965 or 1966 is not explained. Also, once again in figuring lost profits, Ballmill has used the year 1965 while the discount rate provision which allegedly caused the lost profits was not instituted until December of that year.

Finally, Ballmill claims a loss of $406,371 for diminution in market value for failure to sell or merge its company. Nowhere does Ballmill explain how it arrives at such a figure and neither is the connection



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between failure to sell or merge and the violations in question adequately established.

We conclude that reparation is not warranted in this proceeding.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

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## ORDER

This proceeding was initiated by complaint of Ballmill Lumber & Sales Corp. The Commission has fully considered the matter and has this date made and entered of record a report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof.

*It is ordered*, That respondents be, and they are hereby, notified and required to cease and desist from engaging in the violations of section 16 First and section 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816), herein found to have been committed by respondents; and

*It is further ordered*, That Respondent Maher Lumber Terminal Corp. be, and hereby is, required within 30 days after the date of service of this order to modify the provisions of its tariff in a manner consistent with our Report herein, and that respondent Port of New York Authority be, and hereby is, required within 30 days after the date of service of this order to notify the Commission of the manner in which it is complying with our decision herein with respect to the Port Authority's leasing arrangements with lumber wholesalers at Port Newark.

*It is further ordered*, That the complaint in Docket No. 66–65 is hereby dismissed.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

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No. 67–26

## U.S. Great Lakes/South and East Africa Rate Agreement Exclusive Patronage (Dual Rate) System

*Decided May 9, 1968*

Proposed dual-rate contract of the U.S. Great Lakes/South and East Africa Rate Agreement found not to be detrimental to the commerce of the United States, contrary to the public interest or unjustly discriminatory or unfair as between shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, within the meaning of section 14b of the Shipping Act, 1916, as amended.

Proposed spread of 15 percent between contract rates and noncontract or ordinary rates found to be reasonable in all circumstances.

Application by U.S. Great Lakes/South and East Africa Rate Agreement for permission to institute dual rate system, granted.

*Elmer C. Maddy* and *Baldvin Einarson* for respondents.

*John Paul Kennedy* and *A. A. Diamond*, for Seaport of Chicago Traffic Development Council, intervener.

*Daniel K. Schlorf* and *Warren A. Jackman* for Federal Commerce & Navigation Co., intervener.

*Donald J. Brunner* and *Arthur A. Park, Jr.*, Hearing Counsel.

## REPORT

By the Commission: (John Harllee, *Chairman;* George H. Hearn; *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners.*)

By Order of Investigation and Hearing served April 10, 1967, the Commission instituted this proceeding to determine (1) whether the proposed dual-rate contract system of the U.S. Great Lakes/South and East Africa Rate Agreement meets the requirements of section 14b of Shipping Act, 1916, or if it will be detrimental to the commerce of the United States, contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, or ports, or between exporters from the United States and their foreign competitors, in violation of section 14b; (2) whether the application of the

Conference to institute the proposed system should be granted; and if so, (3) whether the proposed spread of 15 percent between contract and noncontract rates is reasonable under the circumstances. Seaport of Chicago Traffic Development Council and Federal Commerce and Navigation, Ltd., intervened. Examiner Benjamin A. Theeman issued an initial decision on January 8, 1968, to which exceptions and replies have been filed. We heard oral argument on March 6, 1968.

## FACTS

The U.S. Great Lakes/South and East Africa Rate Agreement (hereinafter referred to as the Conference) was approved by the Commission on November 30, 1965. Its membership includes Christensen Canadian African Lines (Christensen), Farrell Lines, Inc. (Farrell), Moore-McCormack Lines, Inc. (Mormac), and South African Marine Corp., Ltd. (S. A. Marine).

Farrell and Mormac are American flag lines that received operating differential subsidies from the Maritime Administration (MA) and operate in the Great Lakes trade on a privilege basis. To date, however, no minimum sailing requirement has been imposed on these lines by MA. During 1966 and 1967, Farrell curtailed its services because three of its vessels were on charter to the Military Sea Transportation Service (MSTS). The future expansion of Farrell's service in this trade depends on the release of these three vessels from MSTS obligations.

Christensen, a service of A/S Thor Dahl of Sandefjord, Norway, is tied to an overall transportation program involving commitments to Canadian ports.[1] However, as the majority of the commodities moving in this trade constitutes U.S. Government relief cargo which must first be offered to American ships, Christensen's vessels are poorly loaded in the Lakes and St. Lawrence River. Tallow, consigned by Universal Transport Corp., is the largest single commodity moved by Christensen.

S. A. Marine is the national carrier of the Union of South Africa. The stated policy of S. A. Marine is that as "the national flag of South Africa, it will follow the trade between the United States and South Africa wherever it exists." S. A. Marine expected that since the September 1967 sailing was the maiden effort, the vessel would be loaded only to one-fifth or one-sixth of its capacity. Nevertheless, the 1968 sailing will be made and the line will remain a member of the Conference.

[1] These commitments are expected to continue even after the institution of a dual-rate contract system should it be approved.

The Great Lakes season extends from sometime in April through the latter part of November, a period of some 7 months. The Conference offered five sailings from Great Lakes ports during the 1966 navigation season and as of July 11, 1967, the Conference had 14 sailings scheduled for 1967: Farrell had one sailing scheduled for July; Mormac, with two sailings in different stages of completion, had four ships scheduled for four sailings; Christensen, in accord with its printed schedules, had eight sailings scheduled, three of which had already been made; S. A. Marine's first sailing was scheduled for September 1967. For 1968, the Conference planned sailings as follows: Farrell, one sailing; Mormac, using the four ships used in 1967, four or six sailings; Christensen, a repeat of eight sailings; S. A. Marine, at least one sailing. There is no indication in the record that the Conference lines did not complete their scheduled sailings in 1967 or that they will not complete those scheduled for 1968.

Nippon Yusen Kaisha (NYK), a Japanese flag line, is the only steamship line competing with the Conference in the trade to South and East Africa.[2] NYK, who pioneered this trade with a sailing in November 1965,[3] completed eight sailings in 1966.[4] Although it expected to carry more cargo in 1967, it only scheduled seven sailings for that year, three of which had been completed as of July 1967. There is no reason to believe that NYK did not complete all of its scheduled sailings.

The Conference lines and NYK have been actively competing for cargo in this trade by solicitation of Great Lakes shippers either through the mails, by personal call of their respective Great Lakes agents, or by advertising in trade journals. The scheduled sailings of the competing lines are generally out of the same Great Lakes ports and any of the lines will go to a nonscheduled port if cargo is available. Twice NYK has been invited to join the Conference, but to date no conclusion has been reached.

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[2] NYK has no service from the U.S. East Coast to South and East Africa. Therefore, NYK does not stop at North Atlantic ports upon leaving the St. Lawrence Seaway but sails directly for Africa.

[3] In 1965, to save the cost of inland transportation from Detroit to the East Coast on automotive parts and KD (knocked down) automobiles, Chrysler Corporation approached the South and East Africa Homebound Conference serving South Africa out of the U.S. Atlantic and Gulf Coasts and requested a service out of the Great Lakes at a rate approximating the East Coast rate; the Conference showed no interest. Farrell, Mormac, and S. A. Marine were members of the Homebound Conference. At that time, after dealing unsuccessfully, with other East Coast carriers, Chrysler entered into an agreement with NYK on a yearly basis for the desired service and rate. NYK agreed to charge Chrysler at Detroit the same rate as is assessed from the East Coast to South and East Africa and to guarantee the rate on an annual basis. The rate was thus subject to negotiations at the end of the year.

[4] In 1966, the eighth sailing was an extra chartered vessel used for cargo for which there was no space on a regular sailing.

During the 1966 season, the Conference made approximately 55 downward revisions of an equal number of items in its tariff allegedly to meet "competitive conditions" due to the operation of NYK. In some instances, the Conference tariff carried a rate for the specific item, while in others, the item had been rated NOS. In any event, the revision was downward. As of July 11, 1967, the Conference had made some 27 more downward revisions of an equal number of items in its tariff. In order to meet competition in the trade, Christensen resigned from the Conference at the end of the 1966 season. However, Christensen did rejoin the Conference in early 1967, expressing the hope that the proposed dual rate contract would result in more cargo for all the lines.

In December 1966, the Conference filed the proposed dual-rate system for Commission approval. This contract, among other things, provided for contract rates 15 percent lower than the ordinary rates set forth in the carrier's tariffs. Seaport of Chicago Traffic Development Council, a project of the Chicago Association of Commerce and Industry, intervened in support of the application. During the hearing, however, the Development Council changed its position to one of neutrality. Federal Commerce & Navigation Company (Federal), a corporation with its principal office in Montreal, Canada, intervened in opposition. Federal is engaged in the business of ocean transportation, to and from the Great Lakes, with no present commercial interest in the Great Lakes/South and East African trade. It asserts, however, it has vital interest in the continued growth and expansion of the Great Lakes trade via the St. Lawrence Seaway. It took no active part in the hearing but filed a brief.

## Discussion and Conclusion

The Examiner, in his Initial Decision, found that the Conference's proposed dual-rate contract met all the specific requirements of section 14b of the Shipping Act, 1916, and concluded that:

> No showing ha[d] been made that the institution of the proposed dual rate contract will result in any of the consequences listed in section 14(b) that would require the Commission to deny the use of the contract as set forth in section 14(b).

Moreover, the Examiner found the proposed spread of 15 percent between contract and ordinary rates in the proposed dual-rate contract to be reasonable in all the circumstances. Accordingly, he approved the Conference's application.

Hearing Counsel except generally to the Examiner's approval of the proposed dual-rate contract. While they concede that the proposed contract conforms to all of the specific requirements of 14(b)(*1*) through 14b(9), they challenge the Examiner's findings that:

a. The proposed spread between the non-contract rates and the rates charged contract shippers of 15% the ordinary rates is reasonable in all the circumstances; and,

b. The proposed contract will not be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors.

For the most part, Hearing Counsel's arguments in support of their exceptions are but a recapitulation of contentions already advanced to the Examiner. For reasons hereinafter stated, we find that the Examiner's conclusions with regard to these issues were proper and well founded.

A. *Reasonableness of the 15 Percent Spread between Contract and Noncontract Rates*

In his Initial Decision, the Examiner made the following findings with respect to the reasonableness of the differential between contract and noncontract rates in the proposed contract:

2. The Chairman of the Rate Agreement testified that based on his experience with other contract systems: (a) anything less than a 15 percentum spread would be insufficient inducement to major shippers to sign a dual rate system; (b) the operation of a dual rate system assures the carrier of basic cargoes and at the same time assures a regular carrier service.

3. The Chairman of the Rate Agreement testified further: he is chairman also of the S/E Africa Conference out of the U.S. east coast; the dual rate system of that conference has a 15% spread; a number of the 2500 shippers who are signers of the coast conference, are prospective shippers and signatories of the proposed dual rate contract out of the Great Lakes; the probabilities of their signing the Great Lakes dual rate contract would be greatly diminished if the level were less than 15%, for "They would [not] be too happy about taking a lesser spread in one area on world wide trade."

4. * * * [no shippers] opposed the proposed 15% spread even though the order of the Commission stated specifically that the reasonability of the 15% spread would be in issue.

5. The Congress in passing section 14(b) of the Act, decided that a 15% spread was reasonable * * *

* * * * *

6. Accordingly, it is found that the spread of 15% between contract rates and ordinary rates in the proposed dual rate contract is reasonable in all circumstances. [Footnotes omitted].

Hearing Council's objection to the Examiner's approval of the proposed spread boils down to the basic contention that Respondents, as proponents of the present contract, "* * * had the burden to show that a spread of 15% was reasonable * * * and this they have not done." They characterize the testimony of record relied on by the

Examiner as "opinion or attempted justification" and submit that it falls short of providing the requisite justification for the proposed 15-percent spread. Respondents, on the other hand, reply that the testimony of record was "uncontroverted and unshaken" and that, in any event, to suggest that they "* * * have the burden of proof on this issue is incorrect and without support in law." A review of the legislative history of section 14b of the Act and our decision in *The Dual Rate Cases*, 8 FMC 16 (1964), should serve to cast this dispute in its proper light.

Prior to the enactment of section 14b of the Act, and particularly section 14b(7), carriers and conferences initiating dual-rate systems were virtually free of restraint in determining the amount of differential between contract and noncontract rates.[5] As an inducement to attract shipper customers, proposers of dual rate systems could establish any differential that they felt was commercially expedient, so long as it was not unjustly discriminatory.[6] Even under these circumstances, however, the concept of the differential was, generally, acknowledged to be a matter of business judgment as to what was practical and fair.[7] For example, in *Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F.M.B. 355, 365 (1954), our predecessor, the Federal Maritime Board, concluded that:

> * * * the determination of the differential in this case was made after considerable deliberation and with expert advice, and the 10-percent differential was selected by the conference, based on the business judgment of its members, as being (1) no larger than was necessary to induce shippers to sign and abide by contracts for stabilized rates; (2) not so great as to be coercive to shippers to prevent them from patronizing nonconference lines if they so desired, * * *; and (3) not so great as to cause loss of revenue to conference carriers which would be crippling to their business operations.

Based on criteria such as the above, conferences inaugurating dual-rate systems prior to 1961 and the advent of section 14b of the Act, put into effect differentials between contract and noncontract rates which ranged from a low of 10 percent, which was "about as low as * * * [would] be effective to attract shippers,"[8] to a high of 20 percent.[9]

Congress, in formulating section 14b(7) in terms of a 15 percent

[5] Section 14b of the Shipping Act, 1916, provides, *inter alia*, that:

> * * * the Federal Maritime Commission * * * shall * * * permit the use by any * * * conference * * * of any contract * * * provided the contract * * * expressly * * * (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates;

[6] *Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F.M.B. 98 (1952).

[7] *Contract Rates—North Atlantic Cont'l Frt. Conf.*, 4 F.M.B. 355, 365 (1954).

[8] *Id.* at 373.

[9] In *Contract Rates-Japan/Atlantic-Gulf Freight Conf.*, 4 F.M.B. 706, 716 (1955), the Board approved a 9½ percent spread after recognizing that:

> Many of the conference lines favored a differential of 12½ percent to 15 percent as reasonable and more satisfactory than 9½ percent, but considered the conference limited, under Japanese law, to 9½ percent. * * *

differential, took full cognizance of the foregoing. As Senator Engel stated during debate on the bill which ultimately added section 14b to the Shipping Act, 1916:

> * * * The spread provided by this measure is 15 percent. Some may argue that it should be 10 percent; some may argue that it should be 20 percent. But the committee examined the entire situation, and arrived at the 15-percent figure on the basis of the information which appears on page 14 of the report, as follows:
>
> > Of the 62 dual-rate conferences serving U.S. ports in 1959, 21 expressed their spread between contract and noncontract rates in percentage figures (showing the percentage above the contract rate of the noncontract rate). Of the 21, 18 were using a 20-percent spread; 1, 15 percent; and 2, 10 percent. [See Hearings Before Antitrust Subcommittee of Committee on the Judiciary, House of Representatives, on Monopoly Problems in Regulated Industries; Ocean Freight Industry, 86th Cong., 2d sess., pt. 1, vol. 1, at 740–741 (1959).]

Another example of the reasoning behind the 15-percent spread is found in this statement of the Committee on Merchant Marine and Fisheries:

> *The provision authorizing a maximum spread between the rate charged the casual shipper and the exclusive patronage contract signer of 15 percent appeared to the committee, in the light of its experience, as reasonable.* The problem was to find a figure that would not act as a penalty upon the shipper who did not choose to limit his shipments to conferences and at the same time would provide sufficient inducement to others to execute such agreements. As stated, it is the belief of the committee, which was shared by carrier and shipper witnesses alike, that the dual rate conference system provides definite advantages in assuring a nucleus of cargo to established carriers, thus enabling them to provide the equipment and service required by the majority of shippers. The *contract/noncontract spread is the best practical device to assure these aims and the 15-percent difference in rates is, in the judgment of the committee, fair and reasonable to achieve this end without imposing a penalty on, or discriminating against the nonsigner.* [H.R. Rep. No. 498, 87th Cong., 1st Sess. 1961]. [Emphasis added].

Therefore, in arriving at the 15-percent spread found in section 14b(7), Congress was not acting arbitrarily. On the contrary, there was, as expressed by the Senate Commerce Committee,[10] a "general satisfaction with the 15-percent spread".[11]

[10] S. Rep. No. 860, 87th Cong., 1st Sess. p. 14.

[11] Hearing Counsel, misinterpreting the Examiner's decision with respect to his discussion of the legislative history of section 14b(7), contend that:

> Nowhere can this legislative history be seen to justify a conclusion that Congress intended that in all circumstances the differential should or *must* be 15%.

The Examiner has not, as Hearing Counsel allege, made any finding that the differential between contract and ordinary rates *must* be 15 percent but merely has determined that on the basis of the present record and the legislative history of section 14b(7) the 15-percent spread in the proposed dual rate contract is reasonable in all the circumstances. The reports of both Houses of Congress make it clear that what Congress did was merely to find that, based on its study of existing dual rate systems, a maximum spread of 15 percent was reasonable, so far as they were concerned, but left it to the Commission, applying its expertise, to determine, under the provisions of section 14b(7), "* * * a spread between ordinary rates and rates charged contract shippers which * * * [is] reasonable in all circumstances * * *"

In *The Dual Rate Cases*, the Commission, in reviewing some 60 existing dual-rate contracts, had an opportunity to interpret and implement the statutory provisions of section 14b. In so doing, the Commission, mindful of the legislative history of section 14b(7) and Congress' general desire that insofar as possible, dual-rate contracts should be standard or uniform,[12] confirmed the "general satisfaction with the 15-percent spread" and concluded that "* * * the 15-percent spread as provided for in the majority of the proposed contracts is reasonable." Thus, consistent with the mandates of section 14b(7), the Commission, calling upon its experience in the field, determined that a spread between "ordinary rates and rates charged contract shippers" of 15 percent, as proposed by Respondents here, was "reasonable in all circumstances." The effect of the legislative history of 14b and our decision in *The Dual Rate Cases* was to establish a presumption that a spread of 15 percent is reasonable within the meaning of section 14b of the Shipping Act, 1916, unless shown to the contrary. This presumption, together with Respondents' testimony of record, formed Respondents' case for the approval of 15 percent. Hearing Counsel, being opposed to the institution of a 15-percent differential, then had the obligation of going forward with sufficient evidence to demonstrate the unreasonableness of the spread in this trade. However, Hearing Counsel merely attack the evidence and testimony submitted by Respondents as "opinion or justification." Just what type of evidence Hearing Counsel would require to establish the reasonableness of the spread is not suggested; nor does Hearing Counsel offer any evidence to show that the proposed spread is unreasonable. In light of all the foregoing, we conclude that the 15-percent spread between ordinary rates and noncontract rates in the Conference's proposed dual rate contract is reasonable.

*B. Approvability of Proposed Contract Under Standards Set Forth in Section 14b of the Shipping Act, 1916*

Hearing Counsel admittedly have "no quarrel" with the Examiner's finding that "* * * the proposed contract meets the eight specific requirements of section 14(b)(1) through 14(b)(8);" they do, however, oppose approval of the contract predicating their opposition " * * *

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[12] The express, detailed requirements which were imposed for all dual-rate contracts are fair indication that the intent of the statute was, at least as to these requirements, that uniformity would be the rule and the legislative history makes clear that this was the intention of Congress. As the Committee on Merchant Marine and Fisheries advised:

> It is the expectation of the Committee that a standard form of contract to be utilized by all conferences will be approved by the Board [now Commission] with such riders as may be required to suit the needs of a particular trade. This will greatly simplify the problem of shippers, who of necessity must be members of a number of conferences, with respect to interpretation and application of differing provisions. (H.R. Rep. No. 498, 87th Cong., 1st sess., p. 9 (1961).)

upon the fact that the system would be violative of section 14b, as detrimental to commerce, contrary to the public interest and unjustly discriminatory and unfair as between Great Lakes shippers and ports and their domestic and foreign competitors." The thrust of Hearing Counsel's argument is that the Great Lakes is a unique and developing area and the institution of a dual rate system in this trade will inhibit the natural competition necessary to the establishment of the proper level of rates.[13]

In support of this position, Hearing Counsel develop at some length the facts and conclusions of other cases which involve the Great Lakes and which purportedly stand for the following propositions:

(1) Vast sums of money have been expended in developing the Lakes as a trading area;

(2) That it is a unique and still developing area;

(3) That utilization of Great Lakes ports has allowed local shippers to obtain a competitive position in foreign markets;

(4) That the short navigation season, the differential in rates with North Atlantic/Gulf ports and the institution of a dual-rate system can cause a drain off of cargo from Lake ports; and

(5) That carriers serving Atlantic and Gulf ports can benefit from this drainoff of cargo from the Lakes.[14]

Of these principles elicited by Hearing Counsel from the cases cited, the only one which is in any way related to the issue here is that "* * * the institution of a dual-rate system can cause a drain off of cargo from the Lake ports." This proposition, drawn from the Examiner's decision in Docket No. 1043,[15] served December 30, 1963, was directed to a situation where the contract system involved included "Great Lakes ports in addition to United States Atlantic and Gulf ports." Indeed, as Respondents have been quick to point out, all of the

[13] A consideration of Hearing Counsel's position lends considerable support 'to Respondents' proposition that:

> The main thrust of Hearing Counsel's Exception on this point * * * is not that this particular dual rate contract should be disapproved but that all *dual* rate contracts from Great Lakes should be disapproved * * *

However, neither Congress, in enacting section 14b of the Act, nor the Commission, in its interpretative pronouncements on that section, have excluded from its coverage dual rate contracts involving the Great Lakes. Accordingly, the approvability of such a contract must be determined in the light of the clearly stated standards of section 14b as would proposed contracts from any other trade area. Simply stated, the development of the Great Lakes as a trading area, does not authorize the Commission to disapprove *all* dual rate contracts proposed for that area, but only if such contracts contravene the mandates of section 14b.

[14] The cases cited by Hearing Counsel are: *River Plate and Brazil Conferences Exclusive Patronage (Dual Rate) Contract,* Docket No. 1043, *8 FMC 16, 267,* affirmed, *The Dual Rate Cases,* 8 F.M.C. 16, 44 (1964) and *Agreement-U.S. Atlantic & Gulf/Australia-N. Zealand Con.,* 9 F.M.C. 1 (1965); *Contract Routing Restrictions,* 2 U.S.M.C. 220 (1939).

[15] The Examiner's decision was affirmed by the Commission in *The Dual Rate Cases, supra,* p. 44.

cases cited by Hearing Counsel involved situations where one conference dual rate contract covered *both* the Atlantic and Great Lakes trade, whereas, in the instant proceeding, the two trades served by the Conference are not combined under one dual rate system. Moreover, in *Agreement-U.S. Atlantic & Gulf/Australia-N. Zealand Con.*, *supra*, a case cited by Hearing Counsel, we found that a situation where a dual rate contract covers "both the Atlantic and Gulf as well as the Lakes" could be "* * * harmful not only to the shipper, but to the development of the Great Lakes as a trading area;" we also recognized "* * * that one of the fundamental purposes of the dual rate law was to allow the steamship conference to compete effectively with the independent carrier," and concluded that all interests could best be served "* * * by the institution of a separate dual rate contract for the Great Lakes section, independent of the dual rate contract from the Atlantic and Gulf."

The Examiner himself has already considered and rejected the theory that the proposed dual-rate contract will divert cargo from the Lakes to the Atlantic Coast. On the basis of the present record, we see no compelling reason, nor has any been proposed to us why we should disagree with the Examiner on this point. Our conclusion here also serves to dispose of Hearing Counsel's suggestion that the Examiner erred because he "* * * chose not to discuss cases in which the Commission has reviewed the developing or exploratory stage of waterborne commerce from the Great Lakes."

Finally, in support of their position that the proposed contract should not be approved because it will be detrimental to the development of Great Lakes ports,[16] Hearing Counsel place great reliance on the following statement offered by Federal Commerce & Navigation Co.:

> 1. A dual rate system in this trade is not warranted at this time because the trade is in its formative growth years and requires stimulation in the

[16] In contending that the institution of the proposed dual rate system will destroy the natural competition necessary to the establishment of a proper level of rates and the development of Great Lakes, it would appear that Hearing Counsel are failing to take into consideration the position that the independent NYK holds in the trade, which position Hearing Counsel themselves have summarized as follows:

> The conference competitor, Nippon Yusen Kaisha Ltd., is not a periodic, undependable intruder but rather a carrier offering regularly scheduled service. Indeed, in 1966, NYK had eight sailings in the trade, three more than did the entire conference. NYK maintains an advertising program, regularly solicits cargo and visualizes a similar number of sailings in the future covering the same ports and carrying a similar volume of cargo. NYK would be willing and capable of serving other ports on the Lakes and in 1966 was the only carrier in the trade to serve the Port of Duluth. (Transcript references omitted.)

We have been provided no reasons why such a firmly established independent is not in a position to provide competitive freight rates.

form of maximum steamship service providing frequent sailing opportunities to shippers to encourage their use of United States Great Lakes gateway ports.

2. The trade requires competitive ocean freight rates in order to make possible the use of Great Lakes shipping services by the shipping public and thereby induce the trade to develop its cargo potential.

3. The institution of a dual rate system by the United States Great Lakes/South and East African Conference will, in the judgment of Federal Commerce and Navigation Company, Limited, inhibit the growth of competitive berth line services in this trade, which is believed vital for the future growth and development of the trade. (Ex. 29).

No facts are offered in support of these conclusions. In addition, Hearing Counsel speculate that "* * * if NYK were forced out of this trade, Chrysler would have little success in inducing other independent lines to enter the trade * * *" although there is absolutely no evidence in the present record which would in any way indicate that NYK is being "forced" out of the trade. On the contrary, the record bears out the fact that NYK's competitive position in this trade is equally as strong, if not stronger, than the Conference's.

In brief, all that we have been offered in opposition to the proposed contract are speculative conclusions unsupported by any evidence of record. Such is not ground for disapproval. Hearing Counsel themselves concede that their position is based on something less than "detailed factual evidence" but urge us to take into consideration the "newness of the trade" and depart from the "*Alcoa* rule."[17] Actually, what Hearing Counsel refer to as the "*Alcoa* rule" was first formulated some 17 years ago by the Federal Maritime Board in *West Coast Line, Inc.* v. *Grace Line*, 3 F.M.B. 586, 595 (1951), wherein the Board advised 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." Even were we of a mind to depart from this long-standing rule, nothing offered by Hearing Counsel suggests that this is the proper case in which to do so.

In the light of all the foregoing, we are wholly unable to conclude, on the basis of the evidence of record, that the proposed dual-rate contract will be detrimental to the commerce of the United States,

[17] See *Alcoa S.S. Inc.* v *CIA. Anonima Venezolana*, 7 F.M.C. 345, 361–364 (1962), affd. *sub. nom Alcoa Steamship Company* v. *Federal Maritime Com.*, 321 F 2d 756, 760 (D.C. Cir. 1963). The Commission has long held that it does not decide cases on speculative possibilities. We have also stated that the mere possibility that a conference agreement may result in a violation of the Act is insufficient reason to disapprove the agreement. *Agreement 8492—Alaskan Trade*, 7 F.M.C. 511, 519 (1963); *Agreement 134–24–Gulf/Mediterranean Ports Conference*, 8 F.M.C. 459 (1965). This doctrine has been extended to cover situations involving section 14b dual rate contracts as well as section 15 agreements. *Pacific Westbound Conference*, 9 F.M.C. 403 (1966). Should it appear in the future, however, that any of the consequences enumerated in section 14b occur, the Commission is specifically authorized by section 14b to withdraw its permission after notice and hearing.

contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, and ports, as well as between exporters from the Great Lakes and their foreign competitors, as alleged.

An appropriate order will be entered.

(Signed) THOMAS LISI,
*Secretary.*

No. 67-26

U.S. GREAT LAKES/SOUTH AND EAST AFRICA RATE AGREEMENT EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM

## ORDER

Full investigation in this proceeding having been had and the Commission on this day having made and entered of record a Report stating the findings and conclusions thereon, which Report is hereby referred to and made a part hereof, and having found that the Exclusive Patronage (Dual Rate) contract of the U.S. Great Lakes/South and East Africa Rate Agreement submitted to the Commission should be approved pursuant to section 14b of the Shipping Act, 1916.

*Now therefore, it is ordered*, That the aforesaid contract of the U.S. Great Lakes/South and East Africa Rate Agreement is permitted for use by said Rate Agreement.

By the Commission.

(Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 65-11

INTERNATIONAL PACKERS LIMITED

*v.*

NORTH PIER TERMINAL CO., ET AL.

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*Decided May 10, 1968*

Respondents' tariff provisions relating to "overtime charges" and "extra service charges" result in unreasonable practices under section 17 of the Shipping Act, 1916, inasmuch as they provide no standard by which prospective users of those services can determine applicable charges.

Respondents' tariff provisions which exclude refrigerator cargo from free time and from the benefits of the "three o'clock" rule found not unlawful due to characteristics of refrigerator cargo and Respondents' facilities for handling such cargo.

Respondents' tariff provision on wharf demurrage not shown to result in assessment of charges to importer for delays not due to fault of the importer.

Respondents' tariff provision establishing truck and railroad car loading and unloading rates not shown to be unlawful under the standards of the Shipping Act, 1916.

*Frederick W. Smart* for complainants International Packers, Ltd.

*Joseph E. Wyse*, *Abraham A. Diamond* and *John P. Kennedy* for respondents North Pier Terminal Co., *et al.*

## REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*)

This proceeding was instituted by a complaint filed by International Packers Limited (Complainant) against six Chicago terminal companies and wharf operators who comprise the Port of Chicago Marine Terminal Association (Respondents). The Complainant charges that certain of Respondents' terminal tariff rates and regulations are violative of sections 15, 16, 17, and 18 of the Shipping Act, 1916 (Act). Reparation is sought.

Hearings were held before Examiner Edward C. Johnson who issued his initial decision February 7, 1968. In the absence of exceptions, we decided to review the Initial Decision on our own motion.

## Facts

Complainant is an importer and exporter of packing house products, byproducts, and other foodstuffs, operating at the Port of Chicago.

The Respondents in this proceeding are terminal operators engaged in the business of stevedoring and marine terminal operations.[1] As stevedores, they load and discharge cargo from water carriers. As marine terminal operators, they provide a waterfront facility and perform various services to accomplish the interchange of cargo between inland carriers and water carriers.

Prior to March 1965, it had been the practice of steamship lines serving the Port of Chicago in the foreign trades to include railroad car and truck loading and unloading within their ocean linehaul rates. However, in March 1965, the terminal operators were notified by the steamship lines that the latter would no longer absorb the car and truck loading and unloading charges. The notice advised the Respondents that they would have to file a tariff immediately.

Respondents, thereupon, prepared a tariff and on March 24, 1965, mailed it to the Commission. The tariff was designated Port of Chicago Marine Terminal Association Tariff No. 1, FMC No. T-12, FMC-T No. 1 and was effective April 1, 1965. This tariff was the first ever published by the Respondents and the first ever published in the Port of Chicago.

Prior to publication of this tariff, and in anticipation that such publication might be necessary, Respondents conducted a simple cost study covering the period October 28 to November 8, 1963, in an effort to determine specific railroad car and truck loading and unloading costs. Respondents realized that the study was inadequate as a basis for a permanent rate structure, and they then retained Mr. Philip E. Linnekin, an authority in the field of cost accounting with extensive experience as a consultant on marine terminal rate matters. On October 26, 1964, he issued a preliminary report, which was followed on February 18, 1965, by a preliminary study limited to the cost of loading

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[1] The Respondents are North Pier Terminal, Calumet Harbor Terminals, Inc., Great Lakes Storage and Contracting Co., Maritime Services, Ltd., Rogers Terminal and Shipping Corporation, and Trans-Oceanic Terminal Corp., and the Port of Chicago Marine Terminal Association.

and unloading inland carriers. This study was based on information supplied by some four of the respondent terminals and covered operations during the months of October and November 1964. Mr. Linnekin concluded, and so advised the terminal operators, that these studies, together with the published rates of other terminals, should provide a reasonable basis for their initial tariff. He urged, however, that a more substantive cost study be made by all operators during the 1965 season.

After the opening of the 1965 season, Respondents retained Mr. Linnekin to conduct the further, more definitive, study he had recommended. This study covered the three-month period of August, September and October 1965, considered reasonably normal months representing about 40 percent of the shipping season, and included the operating results of five of the then operating members of the Port of Chicago Marine Terminal Association. Data was submitted to Mr. Linnekin by the terminal operators on the forms which he prepared, which included separate reports for each rail car and truck loading and unloading operation. These reports totaled some 19,244 in all. Tonnages, man-hours and direct costs were determined for truck labor, lift trucks, cranes, checkers, foremen, and overhead. Ten percent was added to commodity totals as provision for profit before federal income taxes. In summary, the study disclosed the following:

| | *Short Tons* | *Total Cost* | *Total Cost and Profit* | *Cost per 100 lbs.* |
|---|---|---|---|---|
| All Commodities | 242, 169 | $635, 350 | $698, 885 | 14. 4¢ |
| Prepalletized Cargo | 8, 388 | 11, 923 | 13, 115 | 7. 8¢ |
| Containerized Cargo | 1, 533 | 2, 199 | 2, 419 | 7. 9¢ |

These costs did not include the facility cost factor. The addition of that factor of 5.4¢ per 100 pounds made the total cost for each category respectively 19.8¢, 13.2¢ and 13.3¢ per 100 pounds.

These studies prepared by Witness Linnekin appeared to be in accordance with principles underlying the so-called Freas Formula. They are, however, limited to cost analyses and are not concerned with such other ratemaking factors as competition, value and ability to pay.

## Discussion

Complainant has objected to several provisions of Respondents' terminal, Tariff FMC–T No. 1, alleging violations of the Act and seeking reparation. The Examiner found no merit in Complainant's allegations and recommended against reparation. We agree that reparation is unwarranted, but we find certain provisions of Respondents' tariff to result in unreasonable practices under section 17.



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At the outset, in reference to certain allegations of Complainant, it is unclear from the pleadings or from the record in what respects Complainant's objections are related to violations of the Act. Complainant has offered statements of dissatisfaction with certain tariff provisions but has in some instances failed to specify if or in what sense any provisions of the Act are contravened. However, we have considered Complainant's general allegations of unlawfulness and have attempted to relate them to each of Complainant's specific objections.

*Definitions*

Complainant objects that no provision is made in the "definitions" section of Respondents' tariff for palletized goods, containerized cargo, or other types of normal freight requiring less handling costs. It was later stipulated by the parties that this portion of the complaint has been satisfied by an amendment to Respondents' Tariff No. 2 effective September 1, 1966.

*Overtime Charge*

Section 3 of Respondents' tariff reads in pertinent part:

> The rates provided herein are for work performed during normal working hours, i.e., 8:00 A.M. to 12:00 Noon and 1:00 P.M. to 5:00 P.M., Monday through Friday, inclusive; all holidays specified in the collective bargaining agreement in effect being excepted.
>
> Overtime work, i.e., work performed outside of normal working hours, specified in the collective bargaining agreement in effect, except as specifically set forth in the immediately preceding paragraph, shall be performed only by mutual agreement.

Complainant suggests that to avoid discrimination, the tariff should specify exact holidays and that overtime rates of various classes of labor should be spelled out to enable verification of charges. Complainant also objects to the reference to the "collective bargaining agreement" since that agreement is neither public information nor filed with the Commission.

The Examiner stated that Complainant has made no allegation of unlawfulness but has merely expressed dissatisfaction with the provision. The Examiner concludes there is nothing unlawful about the provision.

The record is scant on this point. However, we feel that the language of the tariff speaks for itself and we find it to be objectionable inasmuch as it provides for overtime work to be performed only by mutual agreement and does not specify any standard for determining rates for such overtime work. In *Empire State H'w'y Transp. Ass'n* v. *American Export Lines*, 5 F.M.B. 565, 590 (1959), we considered a terminal conference tariff provision which provided for an extra charge for loading or unloading cargo weighing 6,000 pounds per piece. Such charge was to be determined by negotiation. The tariff provided no standards by which individual member terminals were to be guided in determining the special charge. We stated that:

> The provisions of respondents' tariff should be reasonably clear and precise in order that its application will be understood by the terminals, the truckers, and the general public, and so that charges will be uniform as between shippers similarly situated. We consider a tariff provision such as this one, under which it is impossible to know that a charge will be or how it will be determined, to be an unjust and unreasonable practice in violation of section 17 of the Act. We will insist that this provision be modified by the inclusion of reasonable standards by which the individual terminals will determine this extra handling charge uniformly.

In *Truck and Lighter Loading and Unloading*, 9 F.M.C. 505, 517 (1966), we were faced with the situation in which a terminal conference was performing certain lighter loading and unloading services without a tariff on a negotiated basis. We stated:

> . . . that to the extent such services are performed respondents are required to have a published tariff to inform potential recipients of such services of the exact charges to be expected. Negotiated rates are unsatisfactory . . . .

The principle of the above-mentioned cases is equally applicable here. Respondents hold themselves out to perform overtime services. The tariff does not specify rates for such services. Neither does it give any indication, other than the "mutual agreement" language, as to what criteria will be used to determine such rates. This is unsatisfactory and is found to be an unjust and unreasonable practice under section 17 of the Act inasmuch as there is no guarantee that Respondents' overtime charges will be uniform for similarly situated users of Respondents' services. However, since the record contains no evidence that Complainant has ever been injured by this practice, it will not support an award of reparation.

We think the above applies with equal force to the listing of specific holidays instead of referring to those specified in the collective bargaining agreement, and we conclude that Respondents' failure to do so is an unreasonable practice under section 17.

*Three O'Clock Rule*

The last paragraph of the "overtime charges" section of Respondents' tariff reads:

> Any carrier in line to receive or discharge cargo by 3:00 P.M. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, shall be worked at the straight time tariff rates, until loading or discharging is completed, with the exception of refrigerated cargo.

Complainant charges that the exclusion of refrigerated cargo from the applicability of this provision results in discrimination and prejudice. On the face of the provision, it is apparent that general cargo is preferred over refrigerated cargo in respect to the three o'clock rule. We conclude, however, that such preference is not so undue as to result in a violation of the Act.

Respondents have offered testimony, undisputed in the record, which serves to explain the difference in treatment. Respondents explained that refrigerated cargo is excluded from the application of the three o'clock rule because Respondents are unable to predict when rain, mechanical breakdown, labor disputes, or other factors might cause the cessation of loading or unloading of the vessel. Respondents state that unloading of refrigerated cargo from the truck would cease in that event because, unlike general cargo, refrigerated cargo cannot be set just anywhere in the warehouse or on the dock for sustained periods of delay awaiting resumption of vessel loading. Respondents feel they should not be required to guarantee the completion of truck unloading because to do so would place them in the position of being responsible for refrigerated cargo on their premises when they do not have adequate storage facilities to protect refrigerated cargo.

For the reasons advanced by Respondents, which were undisputed by Complainant, we find that Respondents' practice of exempting refrigerated cargo from the benefit of the three o'clock rule results in no violation of the Act.

*Extra Service Charge*

Respondents' tariff has a provision entitled "Extra Service Charges" which reads as follows:

> When loading or unloading is in other than the ocean bill of lading lots requiring special stowage, split deliveries, handling, sorting, grading or otherwise selecting the cargo, for the convenience of the carrier, shipper or consignee, the Terminal Operator shall make an extra charge for each such service to the party ordering the service.

Complainant alleges that this provision allows a charge which is too broad and indefinite and which should be restricted to actual labor used in extra service. Complainant states that the actual man-hour rates in effect should be shown in the tariff to enable the exporter or importer to accurately check the charges and to avoid discrimination between shippers.

The Examiner found that there is insufficient record testimony to show that this provision is in violation of any statutory provisions.

We disagree with the Examiner's conclusion since, as in the case of the "overtime charge" provision, this provision contains no standard of determining rates to be applied on such extra services. For the same reasons advanced in respect to the "overtime charge" provision, we find the extra service charge provision to be an unreasonable practice under section 17 of the Act. Respondents will be required to include in their tariff some reasonable standard to enable users of the services to determine applicable charges.

Complainant admits that he has had no shipments to which this provision applies and that he was never billed for extra charges. For these reasons, Complainant is not entitled to reparation on account of the unreasonable practice.

*Free Time*

Respondents' rule regarding free time provides five days for import cargo and ten days for export cargo, but states that no free time shall be allowed on refrigerator cargo. Complainant is of the opinion that failure to allow free time on refrigerator cargo is unreasonable and discriminatory. Complainant argues that Respondents could allow free time on refrigerator cargo and still protect themselves by including in their tariff a clause which relieves the terminal operator of liability for deterioration of refrigerator cargo left during free time periods.

The Examiner concludes that there was insufficient record evidence to support the allegation that lack of free time on refrigerator cargo is unreasonable and discriminatory. We agree.

In *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 539 (1966), we considered certain free time practices and stated:

> Thus the establishment of the minimum amount of free time which under the law must be granted by carriers is a relatively simple proposition—the period must be realistically designed to allow the consignee sufficient time to pick up his cargo, taking into account physical limitations of the facilities, other delays, etc., i.e., the so-called transportation necessities of the particular port or terminal.

In determining whether Respondents are justified in denying free time to refrigerator cargo, we must take into account the physical limitations of Respondents' facilities and the necessities of Respondents' terminal. The record shows that Respondents have very little storage space for refrigerator cargo and in those terminals in which it does exist, storage is provided for the benefit of the vessel operators and is not offered to shippers as a public service. Consequently, Respondents generally attempt to handle refrigerated products in coordination with the loading of the vessel thereby precluding any storage or placing on the dock for sustained periods of time. It is apparent that Respondents do not have the facilities to provide free time on refrigerator cargo and therefore their failure to so provide is neither unreasonable nor unduly prejudicial.

Furthermore, the record shows that various other terminal operators throughout the country have similar rules denying free time on refrigerator cargo.

Complainant's suggestion that Respondents provide free time on refrigerator cargo while disclaiming liability for deterioration is likewise objectionable. As pointed out by Respondents, it would be unwise for them to attempt such a procedure inasmuch as their insurance underwriters were of the opinion that, as a public terminal, Respondents could not contract away their liability.

*Wharf Demurrage*

Respondents' tariff provides for a demurrage charge against the owner of import cargo if the cargo remains on the pier after expiration of free time. Complainant states that cargo is frequently held up on the pier while awaiting Government inspection and that to assess demurrage charges when the cargo is held up due to no fault of the importer is unreasonable.

The only evidence to support Complainant's allegation that Government inspection officials have held up cargo beyond free time periods is Complainant's testimony to the effect that it is "fairly common" that the Department of Agriculture is unable to make a complete inspection during the five-day free time period. Complainant's witness, however, admitted that their company has never been assessed demurrage charges under this provision of the tariff. While we agree with Complainant that an importer should not be assessed demurrage charges when cargo is held up due to no fault of his own, the record before us does not sufficiently establish that such does occur at Respondents' terminals. Accordingly, we find no illegality in Respondents' demurrage charge provision.

*Loading and Unloading Charge*

Respondents' tariff assesses a charge of nine cents per 100 pounds for the service of loading and unloading cargo to and from railroad cars and trucks.

Complainant suggests that the nine-cent rate is unreasonable inasmuch as it greatly exceeds the actual costs of loading and unloading trucks in the Chicago area. Complainant has offered certain testimony from a compilation made by the Interstate Commerce Commission, which is said to support the proposition that truck loading or unloading charges in excess of three or four cents per 100 pounds would be excessive and unreasonable.

The Examiner correctly recognized that this same tariff charge was given full consideration by us in Docket 65–12—*Crown Steel Sales, Inc.* v. *Port of Chicago Marine Terminal Association*, 7 S.R.R. 1015 (January 27, 1967) (adopted Initial Decision). We there found that the nine-cent rate was not an unjust or unreasonable practice, did not unduly or unreasonably prejudice shippers using the Port of Chicago, did not operate in a manner detrimental to the commerce of the United States, and was not contrary to the public interest.

Nothing has been offered in this proceeding which would cause us to change our conclusion reached in Docket 65–12. The testimony offered by Complainant is of questionable relevance or probative value inasmuch as the cost figures which are said by Compainant to demonstrate loading costs at Chicago did not include allowances for supervision, billing and clerical expense, cost of facilities or overhead. On the other hand, the cost figures offered by Respondents in Docket 65–12 and again in this proceeding are significantly more thorough and reliable. Weighing Complainant's evidence here against our conclusion in Docket 65–12 that Respondents' expense of truck loading *exceeds* its charge of nine cents per 100 pounds, we cannot conclude, as Complainant would wish, that the nine-cent charge is excessive.

Complainant further charges that Respondents' loading and unloading rate is objectionable in that it fails to classify charges as to commodities and handling characteristics, thereby resulting in discrimination against easier handled cargo. Complainant is particularly disturbed by Respondents' failure to publish a lower charge for palletized and container cargo.

A similar challenge of the same tariff provision was made in Docket 65–12, *supra*. There we found no violations but we stated that the prolonged continuance of the across-the-board nine-cent charge may be subject to question. We pointed out that while Respondents acted in good faith in the first instance in initiating the disputed rate, they would subsequently gain sufficient experience to enable them to determine a rate structure under which the charges will be compensatory and will be borne by those for whom the services are rendered. We warned that prompt action to this end is expected.

Since the same tariff is in question here, our previous findings and conclusions are applicable. The Examiner observed that in a subsequent reissuance of their tariff, Respondents in fact published a lower charge for palletized and container cargo (FMC–T No. 2). We have examined Respondents' latest reissuance of their tariff on file here, FMC–T No. 4, effective April 8, 1968, and have found that Respondents have in certain respects published rates related to commodities and handling characteristics.

Consistent with our conclusions in Docket 65–12, *supra*, we find nothing unlawful in Respondents' failure to classify charges as to handling characteristics of commodities in its tariff, FMC–T No. 1. Our examination of Respondents' subsequent tariffs demonstrates continuing good faith on their part.

Complainant also objects to Respondents' truck loading and unloading rate provision because it fails to provide for a "partial loading or unloading" charge on truck deliveries. The term "partial loading or unloading" refers to the practice of moving cargo between a place on the dock and the tail gate of the truck, but involves no movement of cargo on the truck. Complainant states that many truck tariffs provide that the driver and sometimes a helper will move the cargo on the truck to and from an area directly accessible to the tail gate. Under Respondents' tariff, this is not permitted since Respondents' tariff does not provide for partial loading or unloading.

Respondents point out that they are unable to provide partial loading and unloading services because the union contract between Local 19 of the International Longshoremen's Association and the individual Respondents states that the trucker shall at no time handle any cargo. Respondents fear that to allow partial services would result in immediate labor trouble and most likely a strike.

We have previously considered the failure of a terminal operator to provide a partial loading and unloading and found it to be justified. In *Empire State H'w'y Transp. Ass'n*, *supra*, at p. 589, we stated that the elimination of partial service would relieve congestion at the piers, reduce costs, and would remove an important area of friction and dispute between truckers and terminals.

We find that Respondents' failure here to provide a partial loading and unloading serivce has not been shown to result in violation of the Act.

## Conclusion

We have considered the complaint in its entirety and have found Respondents' tariff provisions regarding "overtime charges" and "extra service charges" to result in unreasonable practice in violation of section 17 of the Act. The record shows that Complainant has suffered no injury as a result of such practices and accordingly, the requested reparation is denied.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 65–11

INTERNATIONAL PACKERS LIMITED

*v.*

NORTH PIER TERMINAL CO., ET AL.

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## ORDER

This proceeding having been initiated by complaint of International Packers Limited, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof;

*It is ordered*, That respondents be, and they are hereby, notified and required to cease and desist from engaging in the practices found herein to be unreasonable under section 17 of the Shipping Act, 1916 (46 U.S.C. 816); and

*It is further ordered*, That respondents be, and they are hereby, required within 30 days after the date of service of this order to modify the provisions of their tariff in a manner consistent with our Report herein; and

*It is further ordered*, That the complaint in Docket No. 65–11 is hereby dismissed.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
*Secretary.*

## TABLE OF COMMODITIES

*Furniture.* Los Angeles to Hawaii. 134.
*General.* Hong Kong-United States Atlantic and Gulf. 168.
*Household goods.* North Atlantic to Mediterranean. 202.
*Iron and steel.* New York to Puerto Rico. 149.

# INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered] unjust discrimination, unfairness, detriment to commerce, or any violation of the Act. It could not be assumed that the carriers were attempting to induce illegal price discrimination (unjustified volume discounts on purchases of fuel oil). Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Line, Inc., 53 (68–70).

An agreement between a conference in the North Atlantic-Mediterranean outbound trade and a conference in the South Atlantic and Gulf-Mediterranean outbound trade, providing that the chairmen of the conferences may discuss "transportation conditions" and "agree to recommend to their respective conference member lines the adoption of ocean freight rates and practices applicable to common commodities" is an agreement allowing the conferences jointly to fix and regulate rates. The agreement is not contrary to the public interest and there is no showing of any reasonable probability of detriment to commerce of the United States. The agreement should be approved since, inter alia, it would benefit commerce by assisting in maintenance of non-discriminatory rates applicable to ports in the different ranges. Uniformity of rate action would tend to eliminate preferences between ports. Inter-Conference Agreements United States/Mediterranean Trades, 183 (189, 193–195).

Conference agreement governing trade between certain United States ports and ports in several South American countries is approved. Provisions of the agreement which recognize the policies of the United States and Brazil with respect to their foreign commerce and merchant marines were not objectionable under section 15. The agreement does not bind conference members to any positive action in furtherance of Pan-Americanism (national flag lines vis-a-vis third flag carriers), and does not require members to relinquish their rights to future negotiations on any terms and conditions of the agreement, or their rights to appeal any condition that might develop in the future, or their rights to appeal any quota or condition set up by any pooling agreement. Inter-American Freight Conference Agreements Nos. 9648 and 9649 and Other Related Agreements, 332 (336–338).

An evidentiary hearing is not required before approval of a conference agreement in a trade to permit exploration of alleged malpractices in the trade, of the effects of decrees of a foreign country whose commerce was involved in the trade, or whether the agreement represents the full agreement of the parties. There is need to restore some form of stability and order in the trade whether or not actual malpractices exist. Absent an agreement the foreign government may unilaterally allocate shipments to assure minimum participation of national flag lines, and approval will not affect the power of the government to take such action. Existence of other agreements, already filed or to be filed, does not render the subject agreement less than complete. The conference agreement is a self-contained agreement and does not prevent the parties from entering into other agreements which can be acted on when filed with the Commission. Id. (340–342).

Approval of conference agreement does not mean that the Commission is relinquishing control over the trade. The agreement is approved for a period of 18 months. The trade is one in which relatively short periods of time can produce significant changes in circumstances. The limitation will give the parties an opportunity to restore order in the trade and allow them to demonstrate that the conference will operate to the benefit of the shipping public. Id. (342–343).

*—Cancellation*

Conference agreement is cancelled for failure of certain members to comply with subpoenas lawfully issued pursuant to section 27 of the Shipping Act.

The public interest requires that the Commission remove the aegis of section 15 from the concerted activities of an anti-competitive combination whose refusal to supply lawfully demanded information frustrates the Commission's efforts at effective supervision and control of those activities and deprives a shipper in our commerce of the necessary means to prosecute his complaint (of unlawful rates) under the Shipping Act. Failure to cancel would grant the parties that "unrestricted right of action" which Congress withheld in 1916. Calcutta, East Coast of India and East Pakistan/U.S.A. Conference, 43 (47).

Failure of Congress to enact Commission proposals to condition approval of agreements under section 15 upon designation of a person on whom service of process could be made within the United States, and upon a provision in the agreement for advance agreement for submission of information, wherever located, if required by proper Commission order, did not mean that the Commission lacked the power to cancel an approved agreement for failure of conference members to produce documents under subpoena. The legislative history showed that, at the request of the State Department, a committee of one house rejected an amendment passed by the other. Congress left the agency's powers to require production of documents located abroad as they were under existing law. Id. (47–48).

Exercise of the Commission's power to cancel a conference agreement for failure of some members to comply with subpoenas would not be withheld because the demands had not been made on the conference itself. The conference is only its member lines. Id. (48–49).

Cancellation of conference agreement for failure of some conference members to comply with subpoenas for production of documents located abroad would not be withheld because other members offered full compliance. Continued operations of the conference could or would be screened from Commission supervision insofar as that supervision was dependent on full compliance with lawful demands for information. Such a result was not to be contemplated lightly since, because of its nature, effective supervision was almost totally dependent upon the Commission's ready access to information on conference activities and actions. Id. (49).

In determining to cancel a conference agreement for failure of some members to comply with subpoenas for production of documents located abroad, it did not matter that members refusing compliance were doing so because of laws or decrees of their respective sovereigns. Effective regulation is the *sine qua non* for antitrust exemption under the Shipping Act; and since regulation is directly dependent upon compliance with the Commission's lawful orders, the Commission cannot, if it is to discharge its statutory responsibilities, continue an exemption for the concerted activities of any combination even a portion of whose members refuse compliance. This is not interference with the internal affairs of foreign nations nor "punishment" for activity over which conference members have no control. Carriers willing to comply with the subpoenas were free to file a new conference agreement. Id. (49–50).

The Commission did not lack "substantial evidence" upon which to base cancellation of a conference agreement for failure of some conference members to comply with subpoenas for production of documents located abroad. No distinction exists between disapproving a newly filed agreement and cancelling an already approved agreement. Even if it did, the agreement should be cancelled as contrary to the pubic interest within the meaning of section 15. Id. (50).

An agreement between competing carriers to merge, since it eliminates all competition between the parties, is within the literal language of section 15 as an agreement "controlling, regulating, preventing or destroying competition". Under the "plain meaning" rule of statutory construction, the Commission would have jurisdiction over the agreement. However, the applicability of the rule today would seem at best doubtful, and its validity has been seriously challenged by the Supreme Court. Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd. and Pacific Far East Line, Inc., 53 (56).

Neither the language of section 15 nor its legislative history shows that Congress did not intend section 15 to cover agreements between carriers to merge. Congress recognized that it could not legislatively control foreign mergers. A reasonable construction of section 15 would normally exclude foreign mergers from its coverage just as it would include domestic mergers. As to a merger between a U.S.-flag and a foreign flag carrier, there might be difficulties, but no more than there would be under the antitrust laws were business entities other than common carriers by water involved in the hypothetical merger. The Commission is concerned with equality of treatment regardless of flag under the Shipping Act. Subjecting an agreement between U.S.-flag carriers to merge to Commission scrutiny under section 15 will not operate to the detriment of foreign-flag carriers. Provisions of the Interstate Commerce and Federal Aviation Acts referring to mergers were enacted after section 15, and the subsequent specificity on the part of Congress in those Acts does not diminish the broad authority given in section 15 over anticompetitive agreements. Provision in section 15 for continuing supervision over agreements where it is called for does not limit the Commission's authority to only those agreements. Approval of an agreement to merge might be withdrawn or the agreement ordered to be modified. Just what the consequences would be were not before the Commission and speculations would be fruitless. Id. (56–61).

Commission lack of power to order divestiture, which power both the ICC and CAB get from section 11 of the Clayton Act, does not mean that the Commission lacks jurisdiction over mergers between carriers. If there is a merger by agreement, the agreement must be filed for approval under section 15 and if the agreement is approved, the merger takes place. If the agreement is not filed and is nevertheless carried out, the parties are at large under the antitrust laws and any remedy appropriate to those laws would be applicable. Id. (61).

The inclusion of the Commission in section 7 of the Clayton Act, while perhaps not "an unqualified acceptance of section 15 merger jurisdiction", showed that Congress was aware that the Commission claimed such jurisdiction. The Commission has on several occasions notified Congress that it has such jurisdiction. Id. (65–66).

Agreement among competing carriers to merge is subject to section 15 and to the extent that the section does not contain such words as "merger" or "corporate unifications" in describing the agreements covered therein, some implication is admittedly involved. But a great number of the agreements, such as terminal leases, transshipment agreements and a host of agency agreements, are not by name expressly included in section 15. Agreements to merge are literally agreements "controlling, regulating, preventing, or destroying competition", and when approved are expressly exempted from section 15. The principle that repeals of the antitrust laws by implication are disfavored, is not applicable. Id. (66).

Merger agreement among competing carriers is approved on the basis of the findings and conclusions in the Initial Decision. Question of the impact of the merger on subsidy is a matter for the Maritime Administration. Employee protection and prevention of local labor problems are peculiarly within that area of labor management relations which has been considered to be a part of managerial discretion beyond regulatory intervention by the Commission and its predecessors. The agreement is more than a mere agreement to agree and is sufficient for approval. Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines Ltd., and Pacific Far East Line, Inc., Id. 81 (82).

Carriers seeking approval of a merger agreement were not required to justify the merger by showing that it was necessary to produce important public benefits and was based on a serious transportation need. This is inconsistent with the plain words of section 15, as well as prior Commission and court decisions. Such showing is not necessary where it does not appear that an agreement would otherwise be contrary to the public interest or detrimental to commerce. The standards of section 15 are the ultimate and only bases for disapproval. Id. (105–106).

The Commission is not to measure proposed agreements by the standards of the antitrust laws, and in fact cannot decide definitely whether a contemplated transaction is forbidden under any of the ramifications of those laws; nevertheless, it may not ignore their policy. The "public interest" within the meaning of sections 15 includes the national policy embodied in the antitrust laws. Id. (106).

Section 7 of the Clayton Act sets forth the policy of the antitrust laws concerning mergers. Mergers are restrained to the extent that such combinations may tend to lessen competition or tend to create a monopoly. Id. (106–107).

The courts have developed market analysis principles to determine the probable effect of a merger to lessen competition or tend to create a monopoly. Under the antitrust laws, this effect must be measured within a definite area of effective competition, or "relevant market", as to product or services, and as to geographical boundaries. The relevant geographical market, in connection with a proposed merger of carriers would be that portion of the United States which utilizes ocean transportation of freight between California and the Far East. The outer boundary of the relevant service market would be transportation between the Far East and California in dry cargo vessels. Id. (107–108).

The relevant service market, in connection with a proposed merger of subsidized carriers, would be transportation between California and the Far East in dry cargo vessels. A further restriction to subsidized U.S.-flag liners only was clearly artificial. The slightly broader classification of all U.S.-flag liners was subject to similar criticism. U.S.-flag liners were in direct competition with foreign-flag liners. The most important "relevant market" question was whether the services of nonliner vessels should be considered. Whether the "relevant market", for antitrust purposes, should be the liner market only, or liners plus nonliners, market share was by no means controlling as to the public interest which was the ultimate test. Id. (108–110).

A merger must be functionally viewed in the context of its particular industry. The significance of merging carriers' aggregate share of the market was considerably diminished by the nature of the shipping industry. Ocean carriers in our foreign commerce are subject to some rate regulation by the Commission and the Shipping Act provides an effective safeguard against the evils attending monopoly. Control of cargo rates and practices by a single carrier, no matter how large, is virtually impossible. Id. (111).

Ease of market entry and the existence of interflag competition makes it apparent that for a single ocean carrier, even with what would be considered in some industries a disproportionate share of the market, to control prices or exclude competition is not practically possible, at least in the trade served by three carriers proposing to merge. Id. (112).

No substantial increase in economic concentration will result from the merger of American President Lines and its 93-percent-owned subsidiary, American Mail Line. The concentration resulting from the merger of Pacific Far East Line is somewhat diluted by the affiliation, through common ownership of stock, which has existed for more than 10 years. Congress' concern with concentration as such is directed to economic concentration in the American economy. U.S.-owned carriers in foreign commerce are a part of the American economy but foreign-owned carriers are not. Foreign carriers are free to concentrate and have done so. This must be considered in weighing the merger of U.S.-flag carriers in the same trade areas. Id. (112–113).

Under circumstances where U.S.-flag participation in cargoes inbound and outbound between California and Japan had been decreasing steadily, it would serve the public interest to permit a merger of three carriers serving the trade, which would improve the efficiency and ability to compete of U.S.-flag vessels serving the trade as well as less profitable trades, without stifling or excluding either U.S.-flag or foreign-flag competition. Id. (113).

The record establishes that substantial economies and efficiencies of scale will result from proposed merger of three carriers serving trade between California and Japan. It is not material that the stockholders of the merging companies will benefit. In the view of the Supreme Court, "the public interest is served by economy and efficiency in operation". Id. (113–114).

Merger between three carriers serving the California-Far East trade will not tend to create a monopoly, or lessen competition except for elimination of such service competition as exists among the merging carriers in a portion of trade route 29. Ample competition will remain as another carrier is about to enter this trade. Id. (114).

Proposed merger between competing carrier is not discriminatory or unfair as between other carriers or shippers or other classes referred to in section 15. Shippers and ports will be benefitted by improvements in service. The record does not establish the probability of any destructive or stifling effect upon competition or any competitor. Id. (115).

Contractual and legal obligations of carriers (proposing to merge) as subsidized carriers, and resulting control through MarAd over their maximum and minimum sailings and their trading areas, have been considered. It is not necessary to rely on these and thus to pass on to MarAd responsibility for preventing any injurious effects of the merger; nevertheless, it is recognized that as among subsidized U.S.-flag carriers, the existing power of government control would make destructive competition impossible in practice. Id. (115).

It is not certain whether proposal of carriers to merge would violate the antitrust laws, but the Commission need not determine this, and in fact cannot definitively do so. To the extent that it does touch upon the policy of the antitrust laws, the benefits of the merger will outweigh any potential injury. It is concluded that the merger will not be contrary to the public interest, detrimental to commerce of the United States, or in violation of any provision of the Shipping Act. Id. (115).

***—Modification***

The Commission may disapprove or modify a conference agreement where a conference rate is so unreasonably high or low as to be detrimental to commerce of the United States. Rates on U.S. Government Cargoes, 263 (282).

It is the policy of the Commission to withdraw approval of agreements where they have become dormant. Where there is no need for a section 15 agreement, leaving such agreement on the books to await a future event which was contemplated by original approval tends to handicap Commission responsibility to see that section 15 agreements operate in a manner consistent with law. Conference agreements having as their very core the negotiation of rates with MSTS, an activity which cannot be implemented at present, must be modified to delete authorization to negotiate rates with MSTS. Id. (286–287).

***—Rates***

The Commission and its predecessors have uniformly held that the expression "every agreement" in section 15 does not include "routine operations" relating to current rate changes and other day-to-day transactions. "Routine operations" has consistently been interpreted by the Commission to include conventional rate changes. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (5).

Section 15 allows carriers to band together for joint ratemaking purposes. However, a conference is not permitted to engage in activity which is incompatible with the regulatory purposes of the Act. A conference, no matter what authority its organic agreement may contain, is not authorized to violate other provisions of the Shipping Act nor the general standards of section 15. Rates on U.S. Government Cargoes, 263 (282).

Conference agreement, under which rates on military cargoes were reduced so that they were noncompensatory, with the design of driving a competitor out of the trade, had operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) and which was detrimental to commerce and contrary to the public interest. The agreement, therefore, operated in a manner which was in violation of section 15. Id. (283).

Fixing of special reduced rates by a conference on open-rated commodities was not a ratemaking action resulting from an unfiled and unapproved agreement. The conference agreement expressly authorized conference members to place "special conditions" on open-rated commodities. Moreover, the tariff specifically required that all "tariff-rules and regulations must be observed" with respect to open-rated items. This would of necessity include those relating to the rate reductions provided in the tariff. Special Rates to Alexandria and Port Said—North Atlantic Mediterranean Freight Conference, 291 (296).

***—Right of independent action***

Revision of terminal tariff by one member of terminal association, acting under the right of independent action of the basic agreement, was within the scope of the basic agreement. The agreement expressly provided that "the party proposing a change reserves the right to make it effective at its own wharves or piers regardless of the action of the other [terminal operators]". The only limitation on the right was adequate notice to the others and such notice was given. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (6–7).

Conference agreement does not have to provide for the right of members to act independently on rates, etc. because of decrees and resolutions of a foreign country involved in the trade, which decrees reserved exports of the foreign

Where a rate increase was not suspended, Hearing Counsel had the burden of proof under section 3 of the Intercoastal Act and Rule 10(o) of the Commission's rules to show that the increase was unreasonable. Since the burden was not met, the increase was not unreasonable. Id. (232).

**DEFERRED REBATES.**

Action of a carrier in changing its supplier of chinaware did not violate section 14 First. It was immaterial whether the carrier was pressured into the change by threats of loss of commercial shipments. If by any stretch of the imagination the carrier's action was a "deferred rebate", it was not the kind or description defined in section 14 First. Maddock & Miller, Inc., *v.* United States Lines Co., 28 (31).

Section 14 First applies only to common carriers. Thus a complaint charging deferred rebates by persons other than common carriers was dismissed as to such persons. Id. (32).

**DEMURRAGE.** See Free Time.

**DISCRIMINATION.** See also Dual Rates; Free Time; Rates.

Revision of terminal tariff to assess wharfage against the vessel rather than the cargo was not a violation of section 16, as being "unjustly discriminatory" against the carriers who had historically used the terminal's piers, and "unduly prejudicial" in favor of carriers who used other piers in the port involved at which no such charge was assessed. Unless a terminal operator controls both terminals at which the different charges are assessed, the terminal operator cannot be held to have illegally discriminated against or preferred a carrier. The tariff involved was that of the Port Authority which owned all of the public terminals, but which controlled the wharfage charges only at the piers which it operated. The wharfage charge had been assessed against all carriers which used the Port-operated piers. The Port Authority's lack of control over the level, or method of assessment of wharfage charges at piers not subject to its operation precluded the existence of any unlawful discrimination or prejudice. Boston Shipping Assn. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (7–8).

No illegal discrimination or prejudice could be attributed to a Port Authority terminal tariff revision to assess wharfage against vessel rather than cargo at piers operated by Port Authority (leaving the charge against cargo at the piers of other terminal operators who were lessees of the Port Authority). To constitute a violation of section 16, there must always be given unequal treatment of persons by the carrier or other person subject to the Act. The manifest purpose of the section is to require those subject to the Act to "accord like treatment to all shippers who apply for and receive the same service". The Port Authority had afforded equal treatment to all carriers since the tariff revision was put into effect and the charge had been assessed equally against users of the Port-Authority-operated piers. There had been no showing of any competitive disadvantage injurious to any vessels using the Port Authority-operated piers. Id. (8).

Under section 2 of the Interstate Commerce Act (the counterpart of section 17 of the Shipping Act), discrimination arises when two shippers of like traffic, shipping over the same road between the same points under substantially similar circumstances and conditions, are charged different rates. Unlike section 3 (the counterpart of section 16), the equality required under section 2 is not dependent upon any showing that the shippers or consignees involved compete in the marketplace. Where the conditions of section 2 are met, a carrier may not make a difference in rates because of differences in circumstances arising either before the service of the carrier began, or after it was terminated; nor may a carrier make a difference in rates based upon the identity of the shippers and this is so whether the unfavored shipper is injured or not. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (212).

Under the Interstate Commerce Act, to constitute unjust discrimination there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. In such a case it is immaterial that the shippers are not in competition with each other. Where the service is different or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers involved must be competitors. Applying this construction of the terms of sections 16 and 17 of the Shipping Act will not result in wholesale destruction of Shipping Act precedent. Id. (213).

Whether unjust discrimination under section 17 also constitutes undue or unreasonable preference or prejudice under section 16 is not decided. Section 17 applies only to common carriers by water in foreign commerce and if the circumstances and conditions constituting unjust discrimination under section 17 are not encompassed within the scope of section 16, it may be possible to argue that unjust discrimination is not prohibited in offshore domestic trades, a highly dubious constructon of the Act. Id. (214–footnote 20).

A number of cases clearly indicate that predecessor agencies of the Commission were aware of the difference between sections 16 and 17 of the Shipping Act (i. e. the distinction between unjust discrimination on the one hand and undue or unreasonable preference on the other, as between shippers). While discussions in many precedents often use "preference or prejudice" and "discrimination" interchangeably, the actual conclusions in a great many, if not all, are based upon the distinction between the two. Id. (213–216).

Whatever the criteria for measuring or judging unjust discrimination between ports may be (transportation would not be "between the same points"), there are no differences in transportation conditions between land carriage under the Interstate Commerce Act and ocean carriage under the Shipping Act which would warrant continuation of an unfortunate departure from long-established principles governing unjust discrimination as between shippers. There is no difference inherent in water carriage vis-à-vis land carriage which would justify the water carrier in charging different rates to two shippers of like traffic over the same line between the same points under substantially similar circumstances. Thus, the principles applicable in connection with sections 2 and 3 of the Interstate Commerce Act are properly applicable generally to sections 17 and 16 of the Shipping Act. Id. (216).

Carriers discriminated between shippers by charging the Department of State a higher rate to transport household goods than charged U.S. military departments. The carriers had, at least since 1950, treated the State Department and the military departments as distinct and separate entities each shipping cargoes in its own right, and the carriers were estopped from now arguing that the two shippers were one, i.e. the U.S. government. Further, the very difference in rates established the individuality of the shippers since no single shipper would stand the exaction of disparate rates on his shipments. Id. (216–217).

Discriminatory rates on shipments of household goods by the State Department and the military were not justified because the lower rate granted to MSTS was in return for an increase in rates on other commodities which moved in considerable volume. The difference was not geared to the difference in the two movements, even if volume would justify otherwise unjust discrimination. The rate on one commodity, if discriminatory, could not be justified by the volume of movement of other commodities. Id. (217).

A difference in rates for substantially identical services is prima facie discriminatory. Hearing Counsel having established a prima facie case, it was then up to respondent carriers to go forward and show that the discrimination was justified by some *bona fide* transportation condition. Id. (218).

Conference members could not avoid their responsibility for discriminatory rates as between two shippers, the military and the State Department, by asserting that the rates were beyond their control. The vote on the State Department rate was unanimous and the members involved (U.S.-flag carriers) made no attempt to seek help from the Commission or the conference. A plea of compulsion or lack of control cannot rest upon an unbroken history of cooperation or acquiescence in the establishment and maintenance of that rate or the mere possibility that any attempt to correct the discrimination would be blocked by the foreign-flag lines of the conference. Id. (218).

U.S.-flag carrier members of a conference by charging different rates to the Department of State and the military departments for transporting the household goods of each over their lines, between the same ports under substantially identical circumstances and conditions, unjustly discriminated as between them in violation of section 17 of the Shipping Act. It was unnecessary to determine whether the same activity constituted a violation of section 16. Id. (218–219).

The public interest within the meaning of section 15 requires that a foreign-flag dominated conference relinquish control over the rates on cargoes reserved by law for carriage aboard American-flag vessels. The rates on these cargoes should be fixed by the American carriers free from any actual or potential veto by foreign-flag carriers. The Commission need not wait for an actual attempt by the foreign-flag segment of the conference to block a rate desired by the American-flag carirers. For as long as a portion of the discriminatory rates (rates on household goods as between State Department and military departments) remain under the potential control of the conference, any attempt to remove the discrimination by the U.S.-flag carriers would be subject to approval of the membership. Conference must either exclude Government cargoes reserved by law to carriage by U.S.-flag lines from the coverage of the conference tariff, or open all rates on such cargoes. Id. (219–220).

**DUAL RATES.** See also Reparation.

Arrangement under which a particular shipper to particular ports became entitled to special rates set forth in a tariff, on signing a dual rate contract with a 15 percent spread, and thus to rates of up to 28 percent lower than the ordinary rates applicable in the trade, violated the standards of section 14b. The dual rate contract was not "available to all shippers and consignees on equal terms", and the spread between the ordinary rate and the "contract" rate charged the shipper exceeded 15 percent of the ordinary rate. The arrangement was not, however, violative of section 15, nor was the tariff setting forth the special rates unlawful under section 18(b)(3) as a method of rebating. The question was one of unlawful implementation of a dual rate contract under 14b standards, not one of authority, or lack thereof, under section 15. Special Rates to Alexandria and Port Said—North Atlantic Mediterranean Freight Conference, 291 (294–296).

Conference discount rate system, under which individual members could discount contract and noncontract rates on certain iron and steel items up to 30 percent, was inconsistent with section 14b, was equivalent to instituting open rates, and could not be employed to retain the exclusive patronage of contract signatories. To conclude otherwise would destroy the concept of open rates inasmuch as any dual rate conference could accomplish the purpose of opening rates while not being subject to release of signatories and 90 days' reinstitution by simply permitting member lines the option of granting discounts subject to a maximum discount. Discounting Contract/Non-Contract Rates Pursuant to the Provisions of Item 735, Note 2, of the India, Pakistan, Ceylon & Burma Outward Freight Conference Tariff No. 10, 418 (425–426).

Fact that conference controlled the maximum discount under a discount rate system did not mean that the rates established were conference rates. Such discount rates could result in a different rate for each individual member. Id. (426).

Conference discount rate system, like an open rate system, would permit a different rate for each member. The mere quotation of a rate in dual form neither changes this fact nor establishes a dual rate contract. Id. (426).

Section 14b dual rate contracts are meaningless when considered apart from the tariff which establishes the dual rates. The statute in fact controls the time period within which rates under the contract may be increased as well as limiting the spread allowed between contract and noncontract rates. Id. (426).

The Commission thoroughly considered the question of dual rate contracts and departures therefrom in the form of open rates in the *Dual Rate Cases*. The Commission did not provide for the type of system under which conference members could discount contract/noncontract rates up to a maximum of 30 percent. Use of such system while retaining exclusive patronage contracts over users cannot be permitted since to do so would be inconsistent with the reasoning in the *Dual Rate Cases* and section 14b of the Act. Id. (427).

Conference discount tariff provision (discounting contract/noncontract rates up to 30 percent) could in theory result in a violation of section 14b(7). If one conference member took full advantage of the 30 percent-discount provision and another chose to effect no discount, the result would be a spread between the contract rate of the discounting member and the noncontract rate of the other member in excess of 15 percent. Id. (427).

A dual rate contract, which was not amended to include provisions required by the Commission, became unlawful and unenforceable on April 4, 1964. The Commission's cancellation of the existing contract made it unlawful. No contractual relationship of any kind existed between the parties after April 3, 1964. The Commission's Interpretations and Statements of Policy did not extend the validity of existing dual rate contracts; rather they merely granted carriers or conferences the right to accept notices from shippers and consignees that they agree to be bound by the "new agreement" once approved. United States Borax & Chemical Corp. *v.* Pacific Coast European Conference, 451 (458–461).

The Examiner properly denied a stay of proceedings to permit arbitration under an unlawful dual rate contract. The conference could not rely on the arbitration clause of an unlawful and unenforceable contract. Id. (461–462).

Where a conference which had no valid and enforceable dual rate system published "contract" and "noncontract" rates, a rate ambiguity was created and the shipper was entitled to the lower rate. The exaction of the higher rate in the instant case was predicated on an asserted breach of a contract which was unlawful. If the Commission were to accept the higher rate as the applicable rate, it would in practical effect be allowing the conference to enforce an unlawful contract. Unjust discrimination would be sanctioned in violation of the Shipping Act. The Commission clearly had authority to decide the issue. Id. (463–464).

Continued operations under an unapproved dual rate contract between April 4, 1964 and January 1, 1967, was a violation of section 14b. Refusal of the conference to execute a contract with a shipper after January 1, 1967 (the date on which the conference put into effect an approved form of dual rate contract) was also a violation of section 14b. The refusal was not justified because the shipper had not paid liquidated damages allegedly due under an existing contract. Since the existing contract became unlawful on April 4, 1964, it was not determinative of the rights of the parties after that date. Refusal to execute a contract after January 1, 1967 was clearly contrary to the "equal terms and conditions" provision of section 14b. Id. (464–465).

Where a conference charged a shipper noncontract rates and the shipper's competitors contract rates, under a contract which was not permitted by the Commission and was unlawful, the conference had violated sections 16, First and 17. Preference and discrimination based on a contract unlawful under the Act is undue, unjust and unreasonable. Shippers receiving similar services should be charged the same rates and, absent a lawful dual rate contract, a difference in rates is violative of sections 16 and 17. Id. (465–466).

Shipper did not violate section 16 of the Shipping Act when it advised a conference that it desired to continue to ship at contract rates and would execute a contract in the form approved by the Commission. The conference had advised the shipper that contract rates would be accorded only under terms of the existing contract, and the shipper had misinterpreted the Commission's Interpretations and Statements of Policy to mean that the conference was required to continue to accord contract rates to a shipper complying with the rule. The misinterpretation was not without foundation, and the shipper acted in good faith. There was no basis for a finding that the shipper knowingly and wilfully obtained the lower contract rates by an unjust or unfair device or means. Id. (472–473).

Spread of 15 percent between contract and noncontracts rates in the Great Lakes/South and East Africa Trade was reasonable. The effect of the legislative history of section 14b(7) and the Commission's decision in the *Dual Rate Cases* was to establish a presumption that a spread of 15 percent is reasonable. The presumption, together with the testimony, formed the case for approval. It was then Hearing Counsel's obligation to go forward with sufficient evidence to demonstrate the unreasonableness of the spread. This Hearing Counsel failed to do. U.S. Great Lakes/South and East Africa Dual Rate Agreement, 513 (520).

Proposed dual rate contract in the Great Lakes/South and East Africa Trade would not be detrimental to commerce, contrary to the public interest and unjustly discriminatory and unfair as between Great Lakes shippers and ports, or between exporters and their foreign competitors. The development of the Great Lakes area as a trading area does not authorize the Commission to disapprove all dual rate contracts for that area, but only those which would contravene the mandates of section 14b. Other cases involved situations where one conference dual rate contract covered both the Atlantic and Great Lakes trade. On the basis of the record, the proposed contract would not divert cargo from the Great Lakes to the Atlantic Coast. Speculative conclusions unsupported by the evidence were not grounds for disapproval. Id. (521–523).

## FIGHTING SHIP.

Where the carrier customarily served the various ports in a certain range, although not all ports on every voyage, the carrier's action in putting a ship into a port to load MSTS cargo at rates below those of another carrier did not constitute use of a fighting ship; the act was nothing more than run-of-the-mill competition for a parcel of cargo. Rates on U.S. Government Cargoes, 263 (284).

**FREAS FORMULA.** See Terminal Operators.

**FREE TIME.**

The purpose of free time is to offer consignees a reasonable time to pick up cargo without being assessed demurrage charges. Free time is not designed to allow free storage of cargo. Investigation of Minimum Charges and Terminal Delivery Services—Atlantic-Gulf/Puerto Rico Trades, 222 (234).

Practices engaged in at the Port of New York respecting free time and demurrage during and immediately after the 1965 longshoremen's strike were not unjust and unreasonable under section 17 in the light of the facts that the strike appeared to have been settled in advance and the then existing free time practices had worked well in the past, including post-strike situations. Various free time and demurrage practices were in compliance with reasonable interpretations of General Order 8, Part I, as then worded. Free Time and Demurrage Practices on Inbound Cargo at New York Harbor, 238 (249).

General Order 8, Part I, with respect to free time and demurrage charges at the Port of New York is amended to enumerate "longshoremen's strikes" as a factor beyond a consignee's control preventing removal of cargo by a consignee. The change would be merely a specific enumeration of a factor already acknowledged to be covered. Id. (249–250).

The *American President Lines* case, 317 F 2d 887, is not dispositive of the problem of the propriety of the collection of demurrage at first period (compensatory) rates when a carrier disability arises after termination of free time. The regulation involved in that case dealt with assessment during a consignee, rather than a carrier, disability, and would have forbidden just compensation to a carrier during a time when free time had expired and consignees, through no fault of the carrier, could not pick up their cargo. Id. (252).

A carrier has certain duties with respect to cargo not picked up within the free time period, but, the Commission having defined the minimum period of reasonable time as five days, it cannot be said that a carrier has a duty, as a matter of law, to extend free time if his disability occurs after expiration of free time. Under some circumstances a carrier may be required to tender cargo for delivery free of assessment of any demurrage for a time period exceeding five days. A carrier may grant free time whenever it cannot tender cargo for delivery, as is the present practice of many carriers. This is the more equitable approach and should be encouraged. General Order 8, Part I, is amended to provide for free time or first period demurrage as specified in the appropriate tariff, in case of carrier inability or refusal to tender cargo for delivery arising after expiration of free time. Id. (252–253).

Removal of "port area requirement" at New York with reference to longshoremen's strikes and consequent disability of consignees to pick up cargo, will not unjustly discriminate against Philadelphia. Philadelphia may do the same. Id. 254–255).

It would be an unreasonable practice to allow the assessment of penal demurrage during any longshoremen's strike affecting a consignee's ability to remove his cargo. General Order 8, Part I, respecting free time and demurrage charges at the Port of New York is amended to provide that when a consignee is prevented from removing his cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area, carriers shall (after free time) assess demurrage at the rate applicable to the first demurrage period. Id. (254–255).

Any automatic extension of free time or nonpenalty demurrage following a longshoremen's strike may tend to encourage consignees to leave cargo on piers for the duration of the extended periods and thus increase congestion. On the other hand, it seems unfair to assess penal demurrage against consignees who, through no fault of their own, have been unable to pick up cargo. Id. (256).

Any extensions of free time or first period demurrage granted after a longshoremen's strike should not be granted to cargo that was already on penal demurrage when the strike began. Id. (256).

Following a longshoremen's strike of five days or more, free time (five days) should be extended for five days, exclusive of Saturdays, Sundays and legal holidays, coupled with a requirement that cargo actually be picked up within the extended period. First-period demurrage, normally five calendar days, should be extended for an additional five calendar-day period, with a similar requirement for picking up the cargo. If cargo is not in fact available for pickup during the extended free time period, free time must be extended until it is. If such cargo cannot be tendered for delivery during the extended first demurrage period, free times or first demurrage would apply as specified in the applicable tariff. No departure from the present practice of starting the running of free time from discharge of the vessel rather than any particular cargo from the vessel is intended. If a workable truck appointment system acceptable to carriers and consignees is adopted, extension of free time or first period demurrage will terminate within 24 hours of advance notification that cargo is available for pickup and readily accessible. General Order 8, Part I, is amended accordingly. Id. (258–259).

Carriers are entitled to compensation for use of their piers during longshoremen's strikes by cargo on which free time had expired before start of the strike. No special relief need be granted importers of tea, coffee, spices, food and other products whose cargo is subject to U.S. government inspection. Inspection delays are caused by factors other than those relating to the obligation of the carrier. Id. (259–260).

To the extent that carriers engage in the transportation and tendering for delivery of containerized freight, rather than breakbulk cargo, there appears no necessity to require changes in these carriers' practices pursuant to amendments to General Order 8, Part I. Id. (260).

Lack of free time on refrigerated cargo is not unreasonable and discriminatory. The terminals have very little storage space for such cargo and in those terminals where it exists, storage is provided for the benefit of the vessel operators and is not offered to the shippers as a public service. Various other terminal operators throughout the country have similar rules. Disclaimer of liability for deterioration would not solve the problem, inasmuch as insurance underwriters were of the opinion that, as a public terminal, respondents could not contract away their liability. International Packers Ltd. *v.* North Pier Terminal Co., 525 (531–532).

Tariff provision for a demurrage charge against the owner of import cargo if the cargo remains on the pier after expiration of free time is not unreasonable. The record fails to establish that any importer was assessed demurrage charges when cargo was held up due to no fault of his own. Id. (532).

**GENERAL ORDER 8,** Part I. See Free Time.

**JOINT RATES.** See Rates.

**JURISDICTION OF COMMISSION.** See also Rates.

Carriage of government household goods is "commerce of the United States" which is regulated by the Shipping Act. The cargo transported need not be commercial in character. It is the act of transportation itself that subjects a common carrier to the Act's jurisdiction. A violation of one provision of the Act might require that the movement in question be commercial in nature and the shippers involved be in competition with each other, but it does not follow that these conditions must attend all other situations regulated by the Act. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (205–206).

The provisions of the Shipping Act which confer upon the Commission authority over rates and practices of water carriers and prescribe its mode of exercise closely parallel those of the Interstate Commerce Act establishing the corresponding relations of the ICC to carriers by rail; and where dissimilarities in the respective modes of transportation do not warrant a different construction, the Shipping Act should be construed in the light of the similar provisions of the Commerce Act. Id. (209).

**OVERCHARGES.** See Reparation.

**PICKUP AND DELIVERY SERVICE.** See Rates.

**PORTS.**

Assuming, *arguendo*, that a showing that a terminal practice resulted in a diversion of traffic from a port, without more, was sufficient to substantiate a claim of "unreasonableness" under section 17, carriers complaining about revision of a terminal tariff to assess wharfage against vessel rather than cargo had not made their case. There was no showing of diversion of cargo from the port involved, although cargo had been lost to the piers operated by the Port Authority which had made the tariff revision effective only at its own operated piers. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (8).

Record would not support a finding that a carrier diverted cargo unlawfully from one port to another. The cargo attracted came by virtue of its low rates, not by any absorption. Rates on U.S. Government Cargoes, 263 (285).

Conference practice of restricting discounted rates on iron and steel to outports such as Baltimore, Philadelphia, New Orleans and Mobile and not extending such rates to New York, could not be found to violate or not violate sections 16 or 17 on the basis of the record. Factors of shipper preference, steel mill location, character of cargo, and port facilities tended to show that iron and steel would have moved away from New York even if there had been no discount, but they did not serve to justify the rate disparities. Comparative loading costs and non-conference carrier competition could justify the disparities, and the case was remanded to the Examiner to obtain evidence on costs and competition. Discounting Contract/Non-Contract Rates Pursuant to the Provisions of Item 735, Note 2, of the India, Pakistan, Ceylon & Burma Outward Freight Conference Tariff No. 10, 418 (428–430).

**PRACTICE AND PROCEDURE.** See also Burden of Proof.

Carriers which did not participate in a trade under investigation, and which were named as respondents on the basis of their close working relationship through an interconference agreement, were dismissed as respondents. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (177).

The Administrative Procedure Act and Rule 10(o) of the Commission's Rules of Practice and Procedure place the burden of proof upon the proponent of a rule or order. There is no failure of proof on any of the issues and the evidence does not preponderate equally between the antagonists on any issue. Therefore, there is no occasion to base any conclusion on the failure of any party, to sustain its burden of proof. Rates and Practices of the Pacific Northwest Tidewater Elevators Assn., 369 (378).

An agency, in making a final decision upon review of a hearing officer's initial decision, is not limited to those sections of the Act upon which the Examiner chose to base his decision or which the complainant specifically and formally referred to in the complaint. United States Borax & Chemical Corp. *v.* Pacific Coast European Conference, 451 (464).

**PRACTICES.** See also Free Time; Terminal Operators.

Assuming, *arguendo*, that a showing that a terminal practice resulted in a diversion of traffic from a port, without more, was sufficient to substantiate a claim of "unreasonableness" under section 17, carriers complaining about revision of a terminal tariff to assess wharfage against vessel rather than cargo had not made their case. There was no showing of diversion of cargo from the port involved, although cargo had been lost to the piers operated by the Port Authority which had made the tariff revision effective only at its own operated piers. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (8).

As used in section 17, and as applied to terminal practices, a "just and reasonable practice" means a practice otherwise lawful, but not excessive, and which is fit and appropriate to the end in view. Wharfage assessed against the vessel is a proper and "otherwise lawful charge". Incident to the carrier's duty to tender for delivery is the duty to provide the shipper with adequate terminal facilities upon which cargo may be placed by the shipper and/or from which it may be picked up by the consignee. Since the terminal provides a service which is in furtherance of the carrier's obligation, it follows that "wharfage" is an appropriate charge against the vessel. Commission General Order 15 expressely sanctions this method of assessment. Id. (9).

Revision of terminal tariff by Port Authority to assess wharfage against the vessel rather than the cargo at Port Authority-operated piers was not an unreasonable practice under section 17. As applied to terminal practices, a "just and reasonable practice" means a practice otherwise lawful, but not excessive, and which is fit and appropriate to the end in view. Wharfage assessed against the vessel was clearly a proper and "otherwise lawful charge". As to its fitness and appropriateness to the end in view, the Port Authority had suffered losses in its pier operations and the revision was made in the belief that more cargo would be attracted to Port Authority piers and thus increase revenues. It was not important that there was a drop in tonnage for several months as compared with the same months in the prior year. Id. (8–11).

Practice of furnishing terminal services at other than tariff rates is not an unjust or unreasonable practice under section 17. A port may offer terminal facilities pursuant to an agreement as well as a tariff. *Storage Practice at Longview, Washington* (6 FMB 178), merely stands for the prepositon that a terminal which holds itself out to offer services solely by tariff must abide by that tariff. Agreement No. T–1870: Terminal Lease Agreement at Long Beach, California, 12 (25).

The plain language of the second paragraph of section 17 of the Shipping Act dictates the conclusion that a showing of actual discrimination is not needed to support a finding of violation of the section. This paragraph is directed at unjust or unreasonable regulations as well as improper practices. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (176).

The Commission may suspend a new "practice", as well as a new "rate", under section 2 of the 1933 Act. The attempt of a carrier to remove a service of a type long held subject to FMC jurisdiction was a new practice within the meaning of section 2. The carrying on of such service without a properly filed tariff with FMC was an apparent violation of section 2 which the FMC was empowered to suspend. The carrier was free to suspend its service at any time on proper notice, but until it did so it must have lawfully filed tariffs covering the service. Alaska Steamship Co.—Cancellation of FMC Port-to-Port Rates—West Coast/Alaskan Trade, 314 (329–330).

**PREFERENCE AND PREJUDICE.** See also Dual Rates; Terminal Operators.

Revision of terminal tariff to assess wharfage against the vessel rather than the cargo was not a violation of section 16, as being "unjustly discriminatory" against the carriers who had historically used the terminal's piers, and, "unduly prejudical" in favor of carriers who served other piers in the port involved at which no such charge was assessed. Unless a terminal operator controls both terminals at which the different charges are assessed, the terminal operator cannot be held to have illegally discriminated against or preferred a carrier. The tariff involved was that of the Port Authority which owned all of the public terminals, but which controlled the wharfage charges only at the piers which it operated. The wharfage charge had been assessed against all carriers which used the Port-operated piers. The Port Authority's lack of control over the level or method of assessment of wharfage charges at piers not subject to its operation precluded the existence of any unlawful discrimination or prejudice. Boston Shipping Assn. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (7–8).

No illegal discrimination or prejudice could be attributed to a Port Authority terminal tariff revision to assess wharfage against vessel rather than cargo (leaving the charge against cargo at the piers of other terminal operators who were lessees of the Port Authority), with regard to its assessment at the Port Authority-operated piers. To constitute a violation of section 16, there must always be given unequal treatment of persons by the carrier or other person subject to the Act. The manifest purpose of the section is to require those subject to the Act to "accord like treatment to all shippers who apply for and receive the same service". The Port Authority had afforded equal treatment to all carriers since the tariff revision was put into effect and the charge had been assessed equally against users of the Port Authority-operated piers. There had been no showing of any competitive disadvantage injurious to any vessels using the Port Authority-operated piers. Id. (8).

Section 16 of the Shipping Act is substantially identical with section 3(1) of the Interstate Commerce Act. The prohibition in section 3(1) against undue or unreasonable preference or prejudice is designed to deal with two or more competing shippers or localities receiving different treatment, not justified by differences in competitive or transportation conditions. Since the section is intended to prevent unlawful favortism among competitors in the same marketplace, the allegedly preferred shipper must ordinarily be in competition with the allegedly prejudiced shipper. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (209–210).

Normally, and because the aim is to eliminate arbitrarily different treatment between competitors, a prejudice to one to be unlawful under section 3(1) of the Interstate Commerce Act (substantially identical with section 16 of the Shipping Act) must ordinarily be such that the preference arising out of it is a source of advantage to the other allegedly favored. A case of undue prejudice is not made out, however, by a mere showing of lower rates between competing shippers. Other factors may make a preference or prejudice reasonable or due. Id. (210).

Under section 2 of the Interstate Commerce Act (the counterpart of section 17 of the Shipping Act), discrimination arises when two shippers of like traffic, shipping over the same road between the same points under substantially similar circumstances and conditions, are charged different rates. Unlike section 3 (the counterpart of section 16), the equality required under section 2 is not dependent upon any showing that the shippers or consignees involved compete in the marketplace. Where the conditions of section 2 are met, a carrier may not make a difference in rates because of differences in circumstances arising either before the service of the carrier began, or after it was terminated; nor may a carrier make a difference in rates based upon the identity of the shippers and this is so whether the unfavored shipper is injured or not. Id. (212).

Under the Interstate Commerce Act, to constitute unjust discrimination there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. In such a case it is immaterial that the shippers are not in competition with each other. Where the service is different or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers involved must be competitors. Applying this construction of the terms of sections 16 and 17 of the Shipping Act will not result in wholesale destruction of Shipping Act precedent. Id. (213).

Whether unjust discrimination under section 17 also constitutes undue or unreasonable preference or prejudice under section 16 is not decided. Section 17 applies only to common carriers by water in foreign commerce and if the circumstances and conditions constituting unjust discrimination under section 17 are not encompassed within the scope of section 16, it may be possible to argue that unjust discrimination is not prohibited in offshore domestic trades, a highly dubious construction of the Act. Id. (214, footnote 20).

A number of cases clearly indicate that predecessor agencies of the Commission were aware of the difference between sections 16 and 17 of the Shipping Act (i.e. the distinction between unjust discrimination on the one hand and undue or unreasonable preference on the other, as between shippers). While discussions in many precedents often use "preference or prejudice" and "discrimination" interchangeably, the actual conclusion in a great many, if not all, are based upon the distinction between the two. Id. (213–216).

Whatever the criteria for measuring or judging unjust discrimination between ports may be (transportation would not be "between the same points"), there are no differences in transportation conditions between land carriage under the Interstate Commerce Act and ocean carriage under the Shipping Act which would warrant continuation of an unfortunate departure from long-established principles governing unjust discrimination as between shippers. There is no difference inherent in water carriage vis-a-vis land carriage which would justify the water carrier in charging different rates to two shippers of like traffic over the same line between the same points under substantially similar circumstances. Thus, the principles applicable in connection with sections 2 and 3 of the Interstate

Commerce Act are properly applicable generally to sections 17 and 16 of the Shipping Act. Id. (216).

U.S.-flag carrier members of a conference by charging different rates to the Department of State and the military departments for transporting the household goods of each over their lines, between the same ports under substantially identical circumstances and conditions, unjustly discriminated as between them in violation of section 17 of the Shipping Act. It was unnecessary to determine whether the same activity constituted a violation of section 16. Id. (218–219).

A tariff rule requiring consignees to accept store-door delivery by the carrier of minimum bill of lading shipments while not requiring the same of other less than trailerload shipments was not violative of sections 16 or 18(a) because minimum shipment consignees were not afforded an option to pick up the cargo. The apparent preference or prejudice was not undue, unjust or unreasonable inasmuch as it did not operate to any real disadvantage to minimum shipments. Any inconvenience or additional cost burden imposed on minimum shipment consignees would necessarily be slight and would be far outweighted by the attendant benefits in the form of terminal operating efficiency and elimination of loss and damage claims. Investigation of Minimum Charges and Terminal Delivery Services—Atlantic-Gulf/Puerto Rico Trades, 222 (234–236).

An offer to transport military cargo free of charge was not in violation of the Shipping Act, since the offer was part of early negotiations between the carrier and the government and the final conditions of the offer were never formulated. However, this is not to say that sections of the Act are not applicable to transportation of military cargo. Rates on U.S. Government Cargoes, 263 (285).

**RATES.** See also Agreements Under Section 15; Burden of Proof; Discrimination; Dual Rates; Practices; Preference and Prejudice; Tariffs.

***—In general***

Investigation to determine whether rates in the inbound trade from Hong Kong to United States Atlantic and Gulf ports were so low (in 1961–62) as to be detrimental to commerce under section 18(b)(5) of the Shipping Act will be discontinued on the ground of mootness. The rate war was over and the trade had regained an element of stability. There had been protracted delay due in large measure to the need for subpoena enforcement proceedings. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (173).

In an appropriate case the Commission could consider a section 18(b)(5) case, even though the carrier or conference involved had increased or decreased rates at the 11th hour. However, some useful purpose must be served. The Commission will not consider out-dated economic evidence upon which findings of unreasonableness and detriment to commerce must be based. Id. (173).

***—Filing***

The requirement in section 18(b) that common carriers by water in foreign commerce file their rates with the Commission does not mean that each rate filed is approved. The mere act of filing a rate raises no inference on way or the other concerning the lawfulness of the rate. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (220, footnote 30).

***—Other than tariff***

Where carriers have violated section 18(b)(3) by charging rates other than those specified in their tariffs, the offenses cannot be ignored because they may have been isolated instances or inadvertent, although the finding of violation may be coupled with other factual determinations tending to mitigate the seriousness of the offenses. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (178).

Where a shipper obtained transportation at less than rates otherwise applicable and the carrier allowed the shipper to obtain transportation at less than regular rates on charges, the carrier violated section 18(b)(3) of the 1916 Act and section 2 of the Intercoastal Act, each in its respective areas of application. Any deviation from rates on file with the Commissioner violates these sections. Pacific Far East Lines—Alleged Rebates to Foremost Dairies, Inc., Connell Bros. Co., Ltd., and Advance Mill Supply Corp., 357 (365–366).

***—Reasonableness***

Extra-length charge of 65¢ per foot, per ton, W/M on iron and steel from New York to Puerto Rico was just and reasonable because of the difficulty and expense involved in loading extra-length iron and steel aboard the carrier's vessels. American Union Transport, Inc.—Increased Rates and Charges on Iron and Steel, New York to Puerto Rico, 149 (152).

Late-delivery charge of $5 per ton, W/M, on iron and steel from New York to Puerto Rico was just and reasonable because it more nearly assured compliance by the shipper with prearranged delivery time and partially compensated the carrier for costs resulting from delay in delivery and loading. The reasonableness of the charge was further supported because it was not assessed if the ship was not held for cargo, but rather demurrage was assessed against the cargo pending arrival of the next ship. Id. (152).

Rate of $26 per ton, W/M, on piling sheets, nested, from New York to Puerto Rico, was just and reasonable. The return to the carrier was slightly less than the total of fully distributed costs but well in excess of total stevedoring costs on the commodity. Id. (152–153).

Rate of $26 per ton, W/M, on iron and steel, N.O.S., from New York to Puerto Rico, was just and reasonable. It could not be said that the method of calculating stevedoring "extra" used by the carrier was unreasonable. The computation of extras as a percentage of the stevedoring rate on the commodity was supported by the record, which indicated that at least some of the extra expense items had a relation to the commodities involved inasmuch as they were functions of productivity and the contract rate paid the stevedore depends upon his productivity. Most iron and steel commodities transported at the rate contended for by Hearing Counsel would not realize a return above the carrier's fully distributed costs. Id. (153–154).

Rate on cast iron, $3 higher than rate on iron and steel, N.O.S., from New York to Puerto Rico was justified by the frailty of the commodity, which subjects it to a higher claim potential. Id. (154).

Where one carrier or conference is alleging that the rates of another carrier or conference are so unreasonably low as to be detrimental to the commerce of the United States, the criteria for findings under section 18(b)(5) are: A rate which fails to meet out-of-pocket costs is unreasonably low. Out-of-pocket costs mean cost of handling cargo into and out of the vessel plus any directly assignable costs such as brokerage. A showing by a complaining carrier of its own out-of-pocket costs establishes a presumption of the prevailing costs on a particular commodity in a particular trade. A complaining carrier must also establish a prima facie showing of detriment to commerce. A showing by the complaining carrier of adverse economic impact upon itself establishes such a prima facie case. These showings would be subject to rebuttal. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (174).

The fact that the conference rate on household goods may have been a factor which contributed to the State Department's decision to provide its overseas employees with furnished living quarters did not justify a conclusion that the rate was unreasonably high so as to be detrimental to United States commerce. North Atlantic Mediterranean Freight Conference—Rates on Household Goods, 202 (220).

While studies of the cost of carrying military cargoes were not as accurate or complete as they might be, there was no justifiable reason not to accept them as a fair and honest attempt by carriers to come up with a meaningful story. The studies represented a reasonably close approximation of costs. Therefore, there was no showing on the record that the rates in effect prior to competitive reductions were so unreasonably high as to be detrimental to commerce within the meaning of section 18(b)(5). Rates on U.S. Government Cargoes, 263 (279).

Issue of whether rates met the standards of section 18(b)(5) is moot. That section permits the Commission to disapprove rates upon certain findings. Since the rates are no longer effective, they are no longer amenable to 18(b)(5). Id. (279).

Rate reductions designed to eliminate a carrier from the carriage of military cargo, and which were admittedly unreasonable and noncompensatory, were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, were contrary to section 18(b)(5). The rates of the carrier against which the rate reductions were issued were not found to be contrary to 18(b)(5). Id. (279–280).

***—Through routes and joint rates***

Although section 2 of the Intercoastal Shipping Act, 1933, requires carriers to file with the Federal Maritime Commission all their rates in connection with establishment of a through route, the provision applies only if the other carrier to the arrangement is a water carrier. Sea-Land Service, Inc.—Cancellation of FMC Port-to-Port Rates—West Coast/Alaska Trade, 137 (142).

Public Law 87–595 (which, inter alia, gave the ICC jurisdiction over through routes and joint rates between Alaska and other states) was designed to authorize a type of transportation which neither the FMC nor the ICC would permit. Congress did not intend to repeal section 27(b) of the Alaska Statehood Act or overturn long-standing FMC practice in accepting port-to-port tariffs of a water carrier operating between West Coast and Alaska, which tariffs included pickup and delivery service in port areas. The law was intended to cover the type of operation where joint rates were established between a motor carrier and a water carrier to cover service from interior points in the United States to Alaska (or Hawaii). Id. (142–143).

The purpose of Public Law 87–595 was to confer the benefits of through routes and joint rates on the users of motor-water services between Alaska and Hawaii and the other 48 states. Under such a through route and joint rate, shippers would be able to make one contract with the originating carrier, ascertain the rate by consulting a single tariff, and enjoy the economy of joint rates. Id. (143).

Under section 27(b) of the Alaska Statehood Act jurisdiction over water transportation between Alaska and the other states was explicitly preserved in the FMC. A principle of statutory construction directs that past legislation shall not be repealed by implication. Clear and manifest language indicating such an objective must appear. There is no such language in Public Law 87–595 which amends two sections of the Interstate Commerce Act and makes no mention of the Alaska Act. Id. (144).

Pursuant to section 2 of the Intercoastal Act, 1933, the FMC has authority to accept filings of port-to-port rates which include incidental pickup and delivery services. The FMC has long accepted such tariffs. Id. (144).

In enacting Public Law 87–595, Congress knew of the many FMC decisions under section 2 of the 1933 Act whereby single-factor rates including pickup and delivery services had been for many years filed with the FMC. Congress intended to leave jurisdiction of the FMC where it had always been and apply Public Law 87–595 to a *bona fide* through route and joint rate situation such as one involving movement from interior points of the mainland to Hawaii or Alaska. Id. (145).

Congress, the courts and regulatory agencies have long considered incidental transportation service rendered in conjunction with the major line-haul to be part of the overall dominant service, even if the dominant service were provided by a different mode of conveyance. Examples are found in past actions of the ICC, and the Congress in enacting the Transportation Act of 1940 and the Civil Aeronautics Act of 1938. Id. (145).

A motor carrier in Alaska may enter into a true through route and a joint rate arrangement with a water carrier as contemplated by Public Law 87–595. The ICC cases establish this and nothing more. The cases are not pertinent to the inquiry as to whether a port-to-port service between Seattle and Anchorage with pickup and delivery is a through route and joint rate. It is not. Id. (147).

Where a carrier had not changed the physical elements of its service from Seattle to Anchorage (port-to-port with pickup and delivery service), but merely changed the nomenclature to describe the service as joint with a motor carrier, the change did not divest the FMC of jurisdiction. The service remained one contemplated by the Intercoastal Act, 1933, not a joint service as contemplated by Public Law 87–595. Accordingly the tariff for the service must be filed with the FMC. Id. (148).

The Commission was not deprived of jurisdiction over the rates of a carrier between Seattle and Alaska ports because of a pickup and delivery service provided within the Seattle commercial area by a motor carrier which was required to obtain ICC certification. The pickup and delivery service was an incidental part of a port-to-port service, subject to FMC jurisdiction. Rates for the service had to be filed under section 18(a) of the 1916 Act and section 2 of the 1933 Act. Jurisdiction over the motor carriers performing the pickup and delivery services is not claimed. Alaska Steamship Co.—Cancellation of FMC Port-to-Port Rates—West Coast/Alaskan Trade, 314 (320–321).

Use (for economic reasons) by a carrier in the West Coast/Alaska Trade of a vessel of Alaska Ferry to transport cargo over a portion of a route did not deprive the Maritime Commission of jurisdiction over the carrier's rates in the trade. Inasmuch as the substituted service involved participation between certain ports by another water carrier, it constituted a through route with another water carrier for which all rates, fares, and charges had to be filed with the Commission under section 18(a) of the 1916 Act and section 2 of the 1933 Act. Id. (322–323).

The fact that ICC treats a ferry as a public way and any carrier utilizing Alaska Ferry must be certificated as a motor carrier was not relevant to the question of FMC jurisdiction over rates of Alaska Steam which used Alaska Ferry to transport cargo over a portion of a route from Seattle to Alaska. Any motor carrier transporting any cargo in interstate commerce must, unless exempted, be certificated by the ICC. That agency, moreover, has indicated that carriage by water over the route traversed by Alaska Ferry is not within its jurisdiction. Alaska Ferry was not a true ferry, in light of the large distances traversed, the length of time elapsed, and the lavishness of service provided. Id. (323–324).

The operation of Alaska Ferry is carriage by water on regular routes with fixed schedules for all who wish to avail themselves of the service. One who performs such service is obviously a carrier by water. Id. (325).

The service of Alaska Ferry utilized by Alaska Steam for the continuous carriage from originating point on the line of Alaska Steam to destination on the line of Alaska Ferry must be included in tariffs filed with the FMC, pursuant to the provisions of section 18(a) of the 1916 Act and section 2 of the 1933 Act. The facts that there was no express agreement between Alaska Steam and Alaska Ferry for the carriage of the former's cargo and that Alaska Steam did not control Alaska Ferry's operation were irrelevant. Nor was the fact that no joint rates or any agreement upon rates existed important. The sections of the Acts speak not of "joint rates" but only of "through routes". A "through route" is "an arrangement, express or *implied*, between connecting carriers for the continuous carriage of goods from an originating point on the line of one carrier to destination on the line of another". Id. (325–326).

Participation of Alaska Steam as a motor carrier and of other ICC-certificated motor carriers, in driving containers on and off vessels of Alaska Ferry, in connection with carriage of cargo by Alaska Steam between Seattle and Alaska ports, was incidental to port-to-port movement and was not of the type envisaged by Public Law 87–595 as granting to ICC jurisdiction over the entire water movement. Alaska Steam itself visualized the service as essentially a water service, and as its own water service. Id. (326–328).

Inasmuch as conference agreements involved cover all rates and charges for a port-to-port service, it follows that as long as a carrier is a member of the conference, it must charge the conference rates for its solely port-to-port service. These rates are "on file with the Commission and duly published and in effect at the time" within the meaning of section 18(b)(3) of the Shipping Act. Container Marine Lines through Intermodal Container Tariffs Nos. 1 and 2, FMC Nos. 10 and 11, 476 (485).

One performing through services between inland points (including a water movement) in the foreign commerce of the United States and not offering a separate port-to-port service must file a break-out corresponding to the charge for the port-to-port portion of the service. Regulation by the Commission cannot be evaded by offering more than a port-to-port service. Id. (485).

***—Volume rates***

Where a carrier contracted to purchase bunker fuel oil from a shipper in order to hold the shipper's patronage; and the shipper, not being in the fuel oil business, assigned the contract and received a commission from the assignee on each barrel of oil supplied to the carrier, there was no violation of section 14 Fourth. There was no discernible relation between the commission paid to the shipper and the amount of its cargo offering to the carrier. Pacific Far East Lines—Alleged Rebates to Foremost Dairies, Inc., Connell Bros. Co., Ltd., and Advance Mill Supply Corp., 357 (366).

Public lumber terminal operator's tariff which provided for a volume discount for the handling of lumber at Port Newark subjected the lessee of a lumber terminal to undue and unreasonable disadvantage, in violation of section 16 First, and constituted an unjust and unreasonable regulation and practice, in violation of section 17. The public terminal operator's volume discount rates were not practically available to complainant or other tenants while they were available to nontenants. The discount rate provision applied only to the complete package of truckloading, wharfage, and backhandling. Since complainant performed its own truckloading and used its own premises for storage, it did not qualify for the discount. It is irrelevant to propriety of volume discounts whether a difference in rates might be justified because one customer uses the public terminal and another uses a leased area 1.8 miles away from the public terminal. Each customer is entitled to similar treatment in respect to whether a discount based on volume of lumber backhandled is to be granted. Ballmill Lumber & Sales Corp *v.* Port of New York Authority, Weyerhaeuser Co., Atlantic Terminals, Inc., and Maher Lumber Terminal Corp., 494 (503–504, 506).

**REBATES.** See also Deferred Rebates.

Carrier which granted illegal rebates violated sections 16 Second and 18(b) (3) of the Shipping Act. Evidence was clear that rebates were granted as a constant practice. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (179–180).

Where a carrier purchased bunker fuel oil from a shipper who was not regularly engaged in the oil business; and the contract covering the purchase was assigned to an oil company, with the shipper receiving a commission of 10 cents per barrel from the supplier without performing any substantial services to earn the commission, the carrier violated section 16 Second and the shipper violated section 16, first paragraph. The carrier knew that it was paying a premium price for the oil supplied under the assignment. The supplier was the conduit for the rebate. Absent an extraordinary circumstance, not present in the case, a violation of section 16 Second by a carrier necessarily involves a violation of section 16, first paragraph, by the favored shipper where the shipper "knowingly and wilfully" acquiesces in the arrangement whereby the rebate is allowed. If the scheme itself is illegal, the words "knowingly and wilfully" in the first paragraph mean simply that the shipper's participation was with knowledge of the benefits which would flow from the arrangement and an intent to enjoy such benefits. The fatal defect in the arrangement was the lack of any means whereby any actual or potential competitiors of the shipper could find out what the shipper's actual transportation costs were. Pacific Far East Lines—Alleged Rebates to Foremost Dairies, Inc., Connell Bros. Co., Ltd., and Advance Mill Supply Corp., 357 (361–365).

The words "knowingly and wilfully" in section 16, first paragraph, cannot be interpreted as meaning actual or constructive knowledge that the requirements of the statute are being disregarded. Such a construction would make ignorance of the law a valid defense and substitute some subjective standard whereby actual knowledge of statutory language would have to be established before a violation could be found. Id. (363–364).

Known illegality is not an essential element of proof of a violation of section 16, first paragraph. The essential element of proof to which the *Philippine Merchants* case, 9 FMC 155, was addressed was the "unfair device or means" and in that case the missing element of proof was the unfair device or means. The practice involved there was open and aboveboard. Id. (364).

Disclosure of bunker fuel oil contract between a carrier and a shipper to a bank and to the Maritime Administration, as well as to the oil suppliers, did not constitute disclosure to an important class of persons that section 16 was designed to protect, namely, competing shippers. Id. (364–365).

Unlike section 16, First, there is no requirement under sections 16, first paragraph, or 16 Second, that actual competitive injury be established. It is enough that the practice involved has the capacity or tendency to injure competition. Id. (365).

**REPARATION.**

Carrier is ordered to refund $530.39 to the United States on account of overcharges on a shipment of two trucks overseas. The carrier applied the wrong heavy-lift rate. United States *v.* American-Oriental Lines, Inc., 33 (34).

Shipper was entitled to refund of excess freight charges where the carrier charged the N.O.S. rate on shipment of furniture in containers to Hawaii because, in publishing a new tariff, the carrier failed to anticipate that container-load shipments of furniture would be delivered to its container freight station by rail and inadvertently failed to include such shipments in the lower container-load rate for shipments picked up by the carrier within a prescribed pick-up area. The long standing container rate was a reasonable rate. The higher rate charged was unreasonable because of the lesser service provided thereunder and because it was deleted after being in effect only a short time. R. A. Eastman & Co. *v.* Matson Navigation Co., 134 (135).

Conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the 1916 Act more than six months but less than two years after the shipment date. The Commission has stated that its failure to promulgate a rule was not to be interpreted to allow carriers to limit the rights of shippers under section 22 and that it will not permit carriers by contract to change the time limitation in section 22. United States *v.* American Export Isbrandtsen Lines, Inc., 298 (302).

Reparation in the amount of $6,810.54 is ordered to be paid in accordance with the decision in Docket 67–30 (11 FMC 298), the case involving a conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment. The claim was presented more than six months but less than two years after date of shipment. United States *v.* American Export Isbrandtsen Lines, Inc., 303.

Reparation in the amount of $1,862.30 is awarded in accordance with the decision in Docket 67–30 (11 FMC 298), the case involving a conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment. The claim was presented more than six months but less than two years after date of shipment. United States *v.* Hellenic Lines, Ltd., 304.

Reparation in the amount of $28,018.79 is awarded in accordance with the decision in Docket 67–30 (11 FMC 298), the case involving a conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment. The claim was presented more than six months but less than two years after shipment. United States *v.* American Export Isbrandtsen Lines, Inc., 305.

Reparation in the amount of $11,819.20 is ordered to be paid in accordance with the Commission decision in Docket 67–30 (11 FMC 298), the case involving a conference rule providing that claims for adjustment of freight charges must be presented within six months after date of shipment. The claim was presented more than six months but less than two years after shipment. United States *v.* American Export Isbrandtsen Lines, Inc., 312.

Where a shipper demonstrated that its shipments were assessed noncontract rates while others were assessed contract rates, an award of reparation was warranted based on established violations of section 14b. The mere collections of the excessive rates, without more, constituted violations of sections 14b. The measure of damages for the purpose of awarding reparation was to be based on the difference between the two rates. The award is not based on any proof of unlawful discrimination within the meaning of the Act, but rather on a showing that the shipper was assessed and paid an excessive rate. United States Borax & Chemical Corp. *v.* Pacific Coast European Conference, 451 (467–468).

In cases arising out of unlawful discrimination, the right to recover reparation for injury incurred is limited to pecuniary loss suffered and proved. Although discrimination is a byproduct of the implementation of an unlawful dual rate contract or the denial of a lawful contract, the gist of the offense is clearly analogous to an overcharge. Thus any reparation granted should be based on principles application to overcharges. Id. (468–469).

Failure of a shipper to expressly pray for interest in its complaint seeking reparations was not a waiver of the collection of interest. The complaint did pray for damages and also for such sum as the Commission might determine to be proper as an award of reparation. Exercising its discretion, interest at the rate of six percent from the date inapplicable rates were exacted was allowed. Id. (470).

The Commission has no authority to award reparation when a complaint is filed more than two years after the cause of action accrues. The time limitation in section 22, and not state law, governs. In any event, the complaint was based on an alleged breach of a dual rate contract which had become unlawful, and the Commission will not consider provisions of a contract unlawful under the Act as determinative of the rights of the parties in a proceeding concerning the Commission's authority to award damages. Id. (471–472).

In view of the fact that the issue was not briefed by parties other than Hearing Counsel, and that the decision in the case rested on other grounds, the Commission would not consider at this time whether section 22 does or does not authorize an award of damages or reparation to a carrier against a shipper. Id. (473).

Awarding of reparation is a matter of discretion with the Commission. Reparation was not warranted where there was no real and tangible proof that any pecuniary losses which complainant may have suffered were the proximate result of violations of the Act. Ballmill Lumber & Sales Corp. *v.* Port of New York Authority, Weyerhauser Co., Atlantic Terminals, Inc., and Maher Lumber Terminal Corp., 494 (510).

**RETALIATION.**

Carrier which unbooked MSTS refrigerated cargo because of its dissatisfaction with MSTS's policy of distributing the carriage of general cargo violated section 14 Third. Rates on U.S. Government Cargoes, 263 (284).

Carrier which unbooked refrigerated MSTS cargo, at the same time remonstrating with MSTS on the latter's policy for use of competitive vessels for general cargo, was not retaliating in violation of section 14 Third. The particular vessel had limited commercial bookings, a maritime strike was pending, and MSTS did not provide general cargo in addition to the refrigerated cargo, hence cancellation of the sailing was necessary. Id. (284).

**SELF-POLICING.** See Agreements Under Section 15.

**TARIFFS.** See also Rates; Terminal Operators.

Tariff rule providing for certain services on commodities to shippers and consignees of Chinese descent did not lend itself to discrimination in rates, but was objectionable on the ground that it permitted performance of a special service to Chinese shippers and consignees where such service was not available to others. The rule was an unjust and unreasonable regulation under section 17 which prohibits making available any privilege, facility or service only to certain persons based solely on their race, nationality or ethnic origin. Where such a practice is codified into a rule, the existence of the rule itself constitutes the violation. No showing of actual discrimination is needed. Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade, 168 (175–176).

A carrier which failed to follow the terms of its tariff with respect to POV loading costs and heavy lift charges violated section 18(b)(1) by failure to file appropriate provisions in its tariff. Rates on U.S. Government Cargoes, 263 (285).

Where a tariff item provided a rate for "automobile parts" defined as including "those items which are integral parts of automobiles . . . necessary for their operation", and another tariff item provided a higher rate for "engines, caloric, gas, internal combustion, oil or steam", complainant which shipped cargo described as "engines, internal combustion automobile" and "engine diesel, auto" was entitled to the automobile parts rate. Automobile engines were integral parts of automobiles. The fact that engines were not listed among the examples given in the tariff of automobile parts did not mean that they were not automobile parts. If the tariff item could be considered ambiguous, it had to be construed against the carrier. Fact that shipper used the words "automobile" or "auto" as a "suffix" rather than a "prefix" was not determinative. The description by the shipper accurately described the cargo for the carrier's benefit. Complainant, having been charged the wrong rate, was entitled to reparation. United States *v.* Gulf & South American Steamship Co., Inc., 306 (309–310).

Failure to file a tariff subject to FMC jurisdiction with FMC is a violation of the statutes administered by FMC, not those of ICC. The FMC has a duty to investigate and suspend in a proper case. Water carrier seeking to come under jurisdiction of ICC, rather than FMC, could have sought a declaratory order from the FMC, rather than cancelling its FMC tariffs. The Commission, in taking action on the matter, was not required to file a complaint with the ICC. Alaska Steamship Co.—Cancellation of FMC Port-to-Port Rates—West Coast/Alaska Trade, 314(329).

Where a carrier provides a through transportation service consisting of port-to-port transportation between the United States and the United Kingdom and inland transportation in the United Kingdom, the tariffs must break out the charge for the water portion of the transportation. The provision of section 18(b)(1) requiring that "tariffs shall plainly show the places between which freight will be carried" further makes mandatory the clear indication of the ports or ranges of ports between which water transportation will be performed. While "places" is not intended to include inland points because the jurisdiction of the Commission is only port-to-port, inland points must be identified because section 18(b)(1) requires that "tariffs . . . shall . . . state separately . . . any rules or regulations which in anywise change, affect, or determine any part or the aggregate of rates, or charges". Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11, 476 (483).

The Commission must insure that it retains effective regulatory authority over those activities which are within the scope of its authority, and failure of a carrier to disclose the inland points to and from which its service applies and thus indicate the purported charge for the inland movement would make it impossible to determine whether or not the ocean portion of a rate is one which a carrier may lawfully charge. Failure to disclose inland points would enable the carrier to treat similarly situated shippers differently in possible violation of sections 16 and 17 of the Shipping Act. Id. (484).

**TERMINAL LEASES.**

Terminal lease agreement, with a minimum-maximum payable per year, was not unjustly discriminatory or unfair between carriers or shippers and did not give the lessee an undue and unreasonable preference and advantage in violation of section 16. First because no other user of the facilities operated under a similar arrangement, and all other users paid tariff rates. A terminal lease agreement is not unlawful or unreasonable merely because it does not follow otherwise applicable tariff charges. Agreement No. T-1870: Terminal Lease Agreement at Long Beach, California, 12 (19).

Return on minimum-maximum payment terminal lease agreement must be compensatory to support a conclusion that other users of facilities at the port are not burdened by the arrangement. Id. (20).

Rate of return on terminal lease agreement was not required to be based on the Freas formula. Use of "stand on its own feet method", which uses the estimated cost and expense of the facility to be leased to the carrier, was proper. Id. (20).

Use of capital recovery method of depreciation in determining cost of terminal facility to be leased to a carrier was a matter of business judgment with which the Commission would not interfere. Id. (21).

Failure of terminal, in connection with determination of return on terminal lease agreement, to provide for a return on lands which supported roads, bridges and an administration building, did not result in other users bearing costs which should have been allocated to the lessee. The lessor had acquired the lands without original cost. It was questionable whether any costs were incurred to maintain the lands considering that the bridges and administration building appeared to require little or no maintenance. As to the roads, opponents of the lease included an allocation of expenses for streets and freeway maintenance, as well as for maintenance of the bridges and administration building. In view of these circumstances, there was no need to provide for a return on these lands and, therefore, failure to provide for a return on such non-revenue producing lands would not result in a noncompensatory rate of return on the lease agreement. Id. (22).

Terminal provided sufficient information to support the conclusion that the rate of return on a terminal lease agreement would provide a reasonable profit for the use of the particular facility involved. Id. (22).

Lease agreement between an agent and affiliate of a carrier and a terminal for use of the terminal's facilities providing for compensation at tariff rates, but with a minimum-maximum amount payable per year, was not unjustly discriminatory or unfair as between carriers or shippers, and did not give the carrier an undue and unreasonable preference and advantage in violation of section 16 First. Assuming competition between the carrier and another carrier and between their respective customers, there was no discrimination or preference inasmuch as the terminal was willing to make similar arrangements with other carriers. The fact that few other carriers had the financial resouces necessary to take advantage of such offer did not mean that the carrier was being preferred or that others were suffering from discrimination. Id. (19–20, 23).

Terminal lease agreement was not to be condemned merely because it provided for terminal charges at other than tariff rates; the return had been shown to be compensatory and placed no burden on other users of the facility; and there had been no showing that any competitor of the lessee had been denied a similar arrangement. Id. (23).

The record did not show that a minimum-maximum payment terminal lease agreement at Long Beach, Calif., would operate contrary to the public interest or to the detriment of the commerce of the United States. Chaos had not resulted from approval of several such agreements at California ports. Only a few carriers were willing or able to assume the tremendous financial obligations inherent in such agreements. Even if the carrier paid less than tariff rates during some years, the terminal would benefit by keeping business which might otherwise dwindle away. The public interest would also be advanced if the speedy and healthy development of first-class containerized operation in the intercoastal and foreign trade were advanced by a modicum of price-wise competition between terminals. Id. (23–25).

Terminal lease agreement at Long Beach, California, does not violate the California Association of Port Authorities' Agreement pursuant to which California terminals operate. The Association agreement does not require that its members provide services only according to tariff rates. The agreement requires strict adherence to tariff rates only to the extent charges are proposed to be assessed by tariff. Id. (25).

Where a terminal lease agreement has been found to be approvable under section 15, the legality of the terms of the lease under state law is a matter for the state, not for the Commission. Id. (26).

Terminal lease agreement between a municipal corporation and an importer, exporter, manufacturer and charterer of vessels in foreign commerce, under which the lessee would operate the premises as a public terminal, concurring in the lessor's tariff, and would pay a minimum sum during each 12-month period of the lease; thereafter the revenue earned in the balance of each 12-month period for wharfage and dockage charges would be divided, 25 percent to the lessor and 75 percent to the lessee, with all other tariff charges accruing to the lessee; and under which the lessor would receive an adequate return on its investment in the leased premises, was approved. There was no conclusive evidence of unlawfulness under section 15. No carrier or shipper objected. No diversion of cargo was alleged. Agreements No. T–1985 and T–1986: Lease Agreements at Long Beach, California, 35 (37–40).

The term "compensatory" is given the connotation of fair and reasonable return on investment (in connection with determination of whether terminal lease is compensatory). Agreements Nos. T–1953 and T–1953–A: Terminal Lease Agreements Between the City of Oakland and Matson Navigation Co., 156 (162).

Determination of the compensatory nature of a terminal lease on the basis of estimated costs, rather than actual costs, of filling land and constructing a wharf would be a matter of concern if estimates were accepted without proof of a reasonable relationship to actual costs. The record supported the conclusion that the estimates were reasonable where the cost of the wharf was calculated as $1,442,250; the low bid was $1,750,612; the rent included a contingency factor; a substantial portion of the fill had been completed at less than estimated cost; and the port engineer was confident that the cost of the balance of the fill would be within his estimate. Id. (163).

Method of land valuation employed by a port, in connection with establishing a rent base for lease of land for a marine terminal and freight station was a reasonable exercise of good judgment, where submerged land was valued as such plus cost of fill, rather than valued as filled. The circumstances existing at the time of negotiations for the lease had to be considered. While factual computations of the amount of rental were material to the approvability of the lease, the issue was whether the ultimate result provided a fair return on investment.

There is no inflexible rule for establishing land values for the purpose of computing rental for future occupancy. The rental would produce a 7 percent return on investment in land. It was not unreasonable for the port to consider its investment as the value of the land plus the cost of putting it in a productive condition. Id. (163–165).

A fair contribution to general and administrative expense should be included in the rentals for terminal leases. A 0.5 percent of the cost of improvements involved in leases is not an unsubstantial amount. The record shows that the cost of servicing and billing of the leases will be minor. In any event, the amount involved would not render the leases noncompensatory, which is the major issue. Id. (1965).

Terminal leases at a fixed term and rent could be approved although they did not include provisions for periodic review and adjustment of the rent, since section 15 requires continuing agency scrutiny of such agreements. Id. (166).

**TERMINAL OPERATORS.** See also Free Time; Practices; Preference and Prejudice; Terminal Leases; Wharfage.

A tariff rule requiring consignees to accept store-door delivery by the carrier of minimum bill of lading shipments while not requiring the same of other less than trailerload shipments was not violative of section 16 or 18(a) because minimum shipments were deprived of five days' free storage. The rule was instituted to alleviate congestion at the terminals and had been successful. The rule eliminated the need for free time and thus resulted in no loss for minimum shipments. Investigation of Minimum Charges and Terminal Delivery Services—Atlantic-Gulf/Puerto Rico Trades, 222 (233–234).

Initial decision is adopted, except that the Commission neither agrees nor disagrees with the conclusions, or reasoning supporting them with respect to the reasonableness of respondent's rate of return on investment or the inclusion of leased property in the rate base and respondent's method of valuing land and plant facilities. Rates and Practices of the Pacific Northwest Tidewater Elevators Assn., 369 (371).

Marine grain terminals are an inseparable link in the transportation system serving our waterborne foreign commerce. The plan of the Shipping Act would be frustrated and rate-payers would be left to the mercies of the terminals if, having authorized their collective rate-making through section 15, thus eliminating rate competition, their practices in making the rates were held to be exempt from regulation. Id. (378).

The Commission had jurisdiction in a proceeding to determine the legality of revisions in the traiff rates, rules, and practices of marine grain terminals. The question was not the reasonableness of rates, but whether the practices of respondents in their determination and allocation of costs were reasonable. Id. (377).

As between vessel and cargo, it was proper for marine grain terminals to allocate the cost of the wharf (connected to the land by a ramp and analogous to the apron wharf at a general cargo terminal) to the vessel. The wharf was not used for the benefit of cargo to any appreciable extent. Under a proper allocation of costs between vessel and cargo, the cargo is assessed over 87 percent of all terminal costs. Respondents will bear this large porportion of costs in connection with their exports of grain. Their dual operation need not subject them to payment of costs expended for the benefit of others. Id. (384–385).

As between vessel and cargo, marine grain terminals properly allocated the cost of the waterway to the vessel. Id. (386).

Grain sales contract between the Department of Agriculture or a marine grain terminal, as seller, and a buyer of grain does not determine the propriety of any particular allocation of costs between vessel and cargo any more than does the provision of the charter party between the vessel and the grain buyer, who is the shipper. Id. (388).

The Freas formula is designed to develop the total costs of the terminal and then apportion them to vessel and cargo in proportion to the use made of the facilities provided and of the services rendered. The vessel is held responsible to the wharfinger for all usages and services from, but not including, the "point of rest" of the cargo. Id. (389).

The "point of rest" criterion was used by Freas as a shorthand expression to define the tradition concept as to the respective duties of the carrier and shipper with respect to transfer of cargo between them for the purpose of ocean transport. The shipper is traditionally obliged to bring cargo to a point where it can be reached by "ship's tackle" and the ship has the responsibility to accept the cargo at the point—the "point of rest"—for loading aboard the vessel. Id. (389.)

Practice of marine grain terminals in allocating 50 percent of the expense of the shipping gallery (a high speed conveyor and multiple spout system) to the vessel was not unreasonable under section 17. Allocation of 50 percent to the vessel was a conservative and acceptable estimate of the vessel's obligation. Id. (387–390).

The "point of rest" test is not entirely helpful with reference to the shipping gallery (a high speed conveyor and multiple spout system for grain) because of the physical difference between grain-loading and general cargo operations. The "end-of-ship's hook" concept has no parallel in the case of a vessel loading grain. Id. (390).

Elevator employees control the volume of flow of the grain and type of grain being loaded on vessels in response to signals from the stevedores. Thus the operation of the system is a joint undertaking between ship and elevator, the latter acting for cargo. The loading facility itself serves and benefits both ship and grain. Its costs should be borne jointly and equally by vessel and cargo. Id. (390).

Depreciation of facilities and equipment of marine grain terminals should be based on original cost, not an estimated cost of reproduction. Id. (390).

Marine grain terminals properly included a return on working capital in their cost studies, with the fund measured by two months operating expenses. Id. (395).

Institution of a services and facilities charge by marine grain terminals, similar to that in use by other terminals on the Pacific Coast, was not an unjust and unreasonable practice under section 17. Id. (401–406).

Overtime loading charge of $57 per hour by marine grain terminals, which charge included an incentive factor to induce the terminal to work during overtime hours was not an unjust or unreasonable practice under section 17 when the overtime loading was required by the vessel. However, inclusion of the incentive factor was an unjust and unreasonable practice when the terminal requested overtime loading. In such a situation a rate in excess of $40 per hour would be the result of unjust and unreasonable practices. Id. (407–409).

Action of port authority in permitting a lumber dealer to backhandle lumber for itself and for other receivers of lumber at Port Newark under a lease agreement while requiring other tenants to use the public terminal was an undue and unreasonable preference and advantage to the former and an undue and unreasonable prejudice and disadvantage to the other tenant-receivers of lumber, and constituted an unjust and unreasonable regulation and practice, in violation of sections 16 First and 17. Ballmill Lumber & Sales Corp. *v.* Port of New York Authority, Weyerhaeuser Co., Atlantic Terminals, Inc., and Maher Lumber Terminal Corp., 494 (500).

Contentions, inter alia, of Port Authority that different treatment of two lumber dealers was necessitated and justified by differences in characteristics of the dealers and by other circumstances; that one lumber dealer did not have a competitive advantage over the other dealer because the service of backhandling which one was permitted to perform through its subsidiary while the other could not, was of little importance; that complainant dealer had not shown any real disadvantage to itself; and that the dealers were not similarly situated and therefore did not require similar services, did not affect the conclusion that the Port Authority violated section 16 First and section 17. Id. (500–503).

Public lumber terminal operator's tariff which provided for a volume discount for the handling of lumber at Port Newark subjected the lessee of a lumber terminal to undue and unreasonable disadvantage, in violation of section 16 First, and constituted an unjust and unreasonable regulation and practice, in violation of section 17. The public terminal operator's volume discount rates were not practically available to complainant or other tenants while they were available to nontenants. The discount rate provision applied only to the complete package of truckloading, wharfage, and backhandling. Since complainant performed its own truckloading and used its own premises for storage, it did not qualify for the discount. It is irrelevant to the propriety of volume discounts whether a difference in rates might be justified because one customer uses the public terminal and another uses a leased area 1.8 miles away from the public terminal. Each customer is entitled to similar treatment in respect to whether a discount based on volume of lumber backhandled is to be granted. Id. (503–504, 506).

Tariff of terminal operators relating to overtime charges and holiday rates is an unjust and unreasonable practice insofar as it fails to set forth the criteria used to determine the overtime charges and fails to specify holidays. Reparation is not awarded since the record contains no evidence of injury to complainant. International Packers Ltd. *v.* North Pier Terminal Co., 525 (528–529).

Exclusion of refrigerated cargo from a terminal's three o'clock rule gives a preference to general cargo but the preference is not so undue as to result in a violation of the Shipping Act. The difference is warranted by such matters as the unpredictability of the weather, mechanical breakdowns, labor disputes, etc., and inadequacy of storage facilities to protect refrigerated cargo. Id. (529–530).

Tariff of terminal operators relating to extra services charges for certain services is an unreasonable practice in violation of section 17, since it did not contain a standard for determining rates to be applied on such extra services. No reparation is awarded since complainant had no shipments to which the charges applied and was never billed for extra charges. Id. (530–531).

Truck loading and unloading charge of 9¢ per 100 lbs. by terminal operators at the port of Chicago is not excessive or unreasonable. As to failure to classify charges as to commodities and handling characteristics, respondents were expected, after they gained experience to publish rates relating to commodities and handling characteristics, and they had in certain respects done so. Failure to provide partial loading and unloading charge (moving cargo between a place on the dock and the tail gate of the truck) on truck deliveries is justified. Elimination of partial service relieves congestion at the piers, reduces costs and removes an important area of dispute between truckers and terminals. Id. (532–534).

Revision of terminal tariff to assess wharfage charge against the vessel rather than the cargo was clearly authorized and contemplated by the approved basic agreement between terminal operators. The agreement specifically authorized the issuance of tariffs covering "wharfage" and provided for the filing of such tariffs and any changes therein with the Commission. Thus the revision was merely an implementation of the general ratemaking authority provided in the basic agreement. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn. and Massachusetts Port Authority, 1 (5–6).

Revision of terminal tariff to assess wharfage against the vessel rather than the cargo did not require prior approval of the Commission under section 15. The action was routine and was authorized and contemplated by the approved basic agreement. Id. (5–7).

As used in section 17, and as applied to terminal practices, a "just and reasonable practice" means a practice otherwise lawful, but not excessive, and which is fit and appropriate to the end in view. Wharfage assessed against the vessel is a proper and "otherwise lawful charge". Incident to the carrier's duty to tender for delivery is the duty to provide the shipper with adequate terminal facilities upon which cargo may be placed by the shipper and/or from which it may be picked up by the consignee. Since the terminal provides a service which is in furtherance of the carrier's obligation, it follows that "wharfage" is an appropriate charge against the vessel. Commission General Order 15 expressly sanctions this method of assessment. Id. (9).

Revision of terminal tariff by Port Authority to assess wharfage against the vessel rather than the cargo at Port Authority-operated piers was not an unreasonable practice under section 17. As applied to terminal practices, a "just and reasonable practice" means a practice otherwise lawful, but not excessive, and which is fit and appropriate to the end in view. Wharfage assessed against the vessel was clearly a proper and "otherwise lawful charge". As to its fitness and appropriateness to the end in view, the Port Authority had suffered losses in its pier operations and the revision was made in the belief that more cargo would be attracted to Port Authority piers and thus increase revenues. It was not important that there was a drop in tonnage for several months as compared with the same months in the prior year. Id. (8–11).

As to whether Port Authority practice of assessing wharfage against the vessel (rather than cargo) was "fit and appropriate to the end in view", it clearly was. The charge was instituted primarily as a result of losses in pier operations. The Port Authority hoped to attract truck traffic, which might otherwise be lost to competing ports. The Authority also anticipated that more efficient pier utilization would be encouraged by creating an incentive for shippers to use unitization, palletization and containerization. A drop in tonnage for several months as compared with the same months in the prior year was not important. Id. (9–10).

Examiner's finding that the ocean freight rate at Boston contains a wharfage factor or that assessment of wharfage against shippers and consignees at the public piers in Boston, other than those operated by the Port Authority, involved a duplication of charges, was not supported by the record. There was no basis for a determination that assessment of a double charge was unjust and unreasonable. Id. (11 footnote 16).

nomic freedom."[1] This principle is implemented through a policy which frowns upon undue restrictions on competition.

Section 15 of the Shipping Act, 1916, does not conflict with that policy but rather complements it. Congress authorized the approval of shipping conferences to forestall monopolistic movements that are more anticompetitive than the conference system itself. Thus a Federal court has said:

> The condition on 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.[2]

It is incumbent upon this Commission to evaluate every proposed agreement in the light of this standard; and it should not be forsaken even though only a simple and innocuous agreement is involved.[3] We are here presented with an agreement which does not qualify for approval under our congressional mandate or under the guidelines we have set heretofore.

The time an agreement is presented for initial approval is when we must evaluate it thoroughly and determine the anticompetitive scope it is to possess. We are not soothsayers. We cannot predict what in fact will happen as a result of approval. We can, however, predict the probable consequences of approval. That is our expertise. When approving an agreement we should understand the gamut of activity inherently concomitant to the specific conduct as set forth in the agreement. We should not grant antitrust immunity to agreements which are overbearing or unnecessary and which thereby might contain latitude for unauthorized actions within the approved area of conduct. It is an undesirable situation when we must call upon hindsight to uncover the pitfalls of an agreement which may trap a conference in violations of the law.

As I said in docket 66–45,[4] "[t]he desire of the parties to enter into agreements alone is not considered sufficient to warrant approval."

> For presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combinations seek to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purpose of the Shipping Act.[5]

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[1] *Mediterranean Pools Investigation*, 9 FMC 264 at 288.

[2] *Isbrandtsen Co., Inc.* v. *United States et al.*, 211 F. 2d 51 at 57.

[3] Transcript, Oral Argument, p. 20.

[4] *Agreement for Consolidation or Merger Between American Mail Line, Ltd., American President Lines, Ltd., and Pacific Far East Lines, Inc.*

[5] *Mediterranean Pools Investigation*, 9 FMC 264, 290.