DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

July 31, 1978

Richard J. Daschbach, Chairman
Thomas F. Moakley, Vice Chairman
Karl E. Bakke, Member
James V. Day, Member
Leslie Kanuk, Member

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FEDERAL MARITIME COMMISSION

(46 CFR Part 536)

General Order 13; Docket No. 75–28

June 8, 1977

SUBMISSION OF REVENUE AND COST DATA, CONCERNING GENERAL RATE INCREASES AND CERTAIN SURCHARGES FILED BY COMMON CARRIERS, CONFERENCES, AND MEMBER CARRIERS OF RATE AGREEMENTS

NOTICE OF WITHDRAWAL OF PROPOSED RULE

AGENCY: Federal Maritime Commission

ACTION: Withdrawal of Proposed Rule

SUMMARY: This notice withdraws proposed rule requiring common carriers by water, conferences of such carriers and member carriers of such conferences operating in the foreign commerce of the United States to submit revenue and cost data to the Federal Maritime Commission in connection with general rate increases and certain surcharges filed with the Commission by such carriers or conferences. The Commission has determined to withdraw this rule at this time. The effect of such action is to refrain from imposing the proposed filing requirements.

EFFECTIVE DATE: Upon publication in the *Federal Register.*

FOR FURTHER INFORMATION CONTACT:

Joseph C. Polking, Acting Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D. C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

The rule proposed in this proceeding was published for public procedure on August 11, 1975 (40 F.R. 33688). As proposed, the rule required submission to this Commission of certain cost and revenue data by common carriers by water in the foreign commerce of the United States under the provisions of section 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 817, as amended). In response to the proposed rule, over 80 parties filed comments. Commission Hearing Counsel filed their Reply to those Comments, and Answers were thereafter received.

Opposition to the proposed rule by ocean carriers and conferences of carriers was premised largely upon alleged inadequacy of statutory authorization in the Commission to permit it to exercise general routine surveillance over the cost bases of rates in the foreign commerce of the United States. Shippers generally endorsed the proposed rule.

Upon consideration of the comments filed and reexamination of the rule proposed, its purpose and objectives, the Commission has decided to withdraw such rule at this time and discontinue the proceeding.

THEREFORE, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

AND, IT IS FURTHER ORDERED, That the rule proposed on August 11, 1975 and published on that date in the *Federal Register* (40 F.R. 33688) be, and hereby is withdrawn.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

Part 549—Regulations Governing Level of Military Rates

[GENERAL ORDER 29, AMDT. 2, DOCKET NO. 72–43]

June 10, 1977

Miscellaneous Amendments

AGENCY: Federal Maritime Commission

ACTION: Discontinuance of Proceeding/Revocation of Certain Rules

SUMMARY: Paragraph 549.5(b) of Part 549 is amended by revoking certain provisions pertaining to the use of a Uniform Capacity Utilization Factor (UCUF) in determining cargo unit costs in connection with carrier bids for the carriage of military cargo. Deletion of these provisions is necessary in light of evidence that UCUF has rarely affected bidding and the burden of UCUF reporting is extreme in comparison to its utility. Paragraph 549.5(b), as amended, will relieve carriers from the UCUF reporting requirements. The proceeding in No. Docket 72–43 is discontinued.

EFFECTIVE DATE: June 1, 1977

FOR FURTHER INFORMATION CONTACT:

Joseph C. Polking, Acting Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

Upon remand from the United States Court of Appeals for the District of Columbia, the Commission referred this proceeding to an Administrative Law Judge to determine whether the Uniform Capacity Utilization Factor "specified in Section 549.5(b) of the Commission's Rules should be amended or revoked as an arbitrary, unreasonable and discriminatory device for allocating per unit costs for military cargo bidding purposes; . . ."

Hearing Counsel have now filed a Motion to Dismiss this proceeding, seeking the elimination of UCUF on the grounds that UCUF has affected rate bidding only in the rarest instances and that the burden of carrier compliance with the UCUF reporting requirements is extreme by comparison to UCUF's utility. By Order served April 20, 1977, Administrative Law Judge Stanley M. Levy granted Hearing Counsel's motion and recommended "that the Commission issue an appropriate order revoking Section 549.5(b) of its rules," and dismiss the proceeding. We determined to review the Presiding Officer's ruling.

Upon consideration of Hearing Counsel's motion; the replies filed by American President Lines, Ltd., the Military Sealift Command, and Sea-Land Services, Inc., in support thereof; and the Presiding Officer's ruling; it is our opinion that there exists a sufficient and proper basis for discontinuing the proceeding and revoking the UCUF provisions.

We are not, however, revoking paragraph 549.5(b) in its entirety, as the Presiding Officer has recommended, albeit apparently unintentionally, but only those provisions relating directly to UCUF. Thus, subparagraphs (1), (3), and everything following the first sentence in subparagraph (2) relates to the implementation of UCUF and will be revoked. However, the first sentence in subparagraph (2), with the exception of the limitation to RFP "700, Second Cycle, only," and subparagraph (4) remain applicable and operative notwithstanding the elimination of the UCUF provisions and will accordingly be retained.*

THEREFORE, IT IS ORDERED, That, except as indicated above, the Presiding Officer's April 20, 1977 Order issued in this proceeding is hereby adopted.

FURTHER, IT IS ORDERED, That pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 503) and section 43 of the Shipping Act, 1916 (46 U.S.C. § 841a), Part 549 of Title 46, Code of Federal Regulations, is amended.*

FINALLY, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

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*The first sentence in subparagraph (2) established that for purposes of tendering bids in response to RFPs a carrier's cargo unit costs will be determined on the basis of the actual number of cargo units carried. Subparagraph (4) applies to a carrier entering a bid for a route not presently served by it, and the 75 percent utilization factor provides a basis for the calculation of cargo unit costs for that *initial* bid.

*The text of the amendment is reprinted in 46 C.F.R. 549.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 403(I)

GUITERMAN COMPANY, INC.

v.

PRUDENTIAL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

June 9, 1977

Notice is hereby given that the Commission on June 9, 1977, determined not to review the decision of the Settlement Officer in this proceeding served May 25, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 403(I)

GUITERMAN COMPANY, INC.

v.

PRUDENTIAL LINES, INC.

May 25, 1977

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed April 7, 1977, Guiterman Company, Inc., (complainant) alleges that Prudential Lines, Inc., (carrier) applied an incorrect measurement to a shipment of "Auto Parts" weighing 5,477 pounds, resulting in an overcharge of $2,118.69. While a violation of Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier allegedly denied the claim solely on the basis of Rule 11 of its tariff[2] which prohibits the payment of overcharge claims based upon alleged incorrect measurement unless such claims are presented to the carrier in writing before the cargo leaves its possession.

According to the complainant, the carrier, under Bill of Lading No. 2, dated July 23, 1976, transported a shipment of 24 packages of "Auto Parts" weighing 5,477 pounds from New York to Maracaibo, Venezuela. The carrier billed, and the complainant paid, freight charges based upon a measurement rate of $51.25 for 2,340 cubic feet or 58.5 measurement tons, plus a bunker surcharge and a tollage charge,[3] for a total of $3,279.20. The measurement of the packages were not shown on the bill of lading.

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301-304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] United States Atlantic and Gulf—Venezuela and Netherlands Antilles Conference Freight Tariff FMC No. 2.

[3] The rate is published on 9th Revised Page 27A in Item 135 of the Conference tariff (see Footnote 2); and the Bunker Surcharge and Tollage Charge are provided in Item 9, 10th Revised Page 11A. The correctness of these rates and charges is not contested.

The complainant alleges that the shipment actually measured only 826.2 cubic feet, and in support of its allegation furnished copies of the invoice of the Chrysler Corporation from whom the complainant purchased the auto parts. Based upon the "actual" measurement, the shipment should have been rated as follows:

826.2 cubic feet—20.7 M/T @$51.25	=	$1,060.88
bunker surcharge—20.7 M/T @$4.80	=	99.36
tollage charge @10 cents per 2,000 lbs	=	.27
		$1,160.51

The complainant seeks reparation in the amount of $2,118.69. ($3,379.20 − $1,160.51 = $2,118.69)

In response to the served complaint, the carrier admits an overcharge based upon the Chrysler Corporation invoice, but states that a copy the corporation invoice did not accompany the cargo to the pier. Since it is no longer possible to remeasure the cargo in accordance with its tariff, the carrier requests that the complaint be dismissed.

In connection with the above, the carrier submitted with its response, a copy of a memorandum dated February 4, 1977, signed by the Vice Chairman, Associated Latin American Freight Conferences. The stated purpose of this memorandum is to insure that all members interpret the rules concerning the "Time Limit on Filing of Overcharge Claims" in a uniform manner. In pertinent part, this memorandum states " . . . member lines *must not* consider claims, regardless of merit, for errors in weight, measurement, or description of contents once the cargo has left the carriers' possessions."

There is no question that the carrier was correct in denying the claim under its tariff, and in fact, was required to. The alleged error in measurement was not brought to the carrier's attention in sufficient time for it to varify the shipper's figures.

However, in resolving disputes of this nature, the Commission has established, and consistently held, that the determining factor is what the complainant can prove based upon all the evidence as to what was actually shipped. Informal Docket No. 256(I), *Union Carbide Inter-America v. Venezuelan Line,* Order on Review of Initial Decision, November 12, 1973; *Western Publishing Co., Inc. v. Hapag Lloyd A.G.,* 13 SRR 16 (1972). Where the shipment has left the custody of the carrier, however, and the carrier is thereby prevented from personally verifying the complainant's contentions, the Commission has held that the complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, cited above; *Johnson & Johnson International v. Venezuelan Lines*, 13 SRR 536 (1973); *United States v. Farrell Lines, Inc.*, 13 SRR 199, 202 (1973); *Colgate Palmolive Peet Co. v. United Fruit Co.*, 11 SRR 979, 981 (1970).

The documents submitted in support of the claim are sufficiently cross referenced so as to leave no doubt that the Chrysler Corporation invoice is a true representation of the actual weight and measurement of *each* piece or package of the shipment transported under the carrier's Bill of Lading No. 2 dated July 23, 1976. Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under its applicable tariff. The complainant has sustained the necessary heavy burden of proof required for the award of reparation in the amount of $1,160.51; and it is hereby awarded.

(S) WALDO R. PUTNAM,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–8

CAPITAL CITY STEVEDORES, INC.

v.

GREATER BATON ROUGE PORT COMMISSION

NOTICE OF DETERMINATION NOT TO REVIEW

June 8, 1977

Notice is hereby given that the Commission on June 8, 1977, determined not to review the order of dismissal served in this proceeding May 13, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 76–8

CAPITAL CITY STEVEDORES, INC.

v.

GREATER BATON ROUGE PORT COMMISSION

May 13, 1977

ORDER DISMISSING PROCEEDING WITHOUT PREJUDICE

Background

Hearing in this complaint case was scheduled to commence on August 10, 1976, in Baton Rouge, Louisiana. Upon confirmation that the complainant and respondent had reached a settlement agreement the said commencement of hearing was cancelled (memorandum dated August 9, 1976). The parties submitted to the presiding Administrative Law Judge their August 23, 1976, stipulation and agreement of settlement. The presiding Judge in an order dated September 3, 1976, suggested the parties reconsider, modify and resubmit the stipulation and agreement of settlement. Subsequently, the parties submitted their September 30, 1976, stipulation and agreement of settlement containing amendments.

Under date of October 15, 1976, the proceeding was stayed, at the request of the complainant, and referred to the Commission for its determination as to the agreement's subjectivity to section 15 of the Shipping Act of 1916.

The Commission on April 27, 1977, served its Order on Remand in the proceeding, finding, *inter alia,* the agreement not to be subject to section 15, and remanding the proceeding to the presiding Administrative Law Judge for any further action deemed necessary.

On April 28, 1977, the presiding Judge served a directive to the parties to submit within ten (10) days written suggestions or form of order to dispose of this proceeding.

DISCUSSION

One of the purposes behind the April 28, 1977, directive was to continue to give all parties full opportunity to be heard in this proceeding and to participate fully in its resolution. All parties to this proceeding, the complainant Capitol City Stevedores, Inc., the respondent Greater Baton Rouge Port Commission, and intervenor Hearing Counsel, responded.

The complainant in a letter dated May 6, 1977 (received May 9, 1977), submitted a suggested form of "Order Dismissing Proceeding Without Prejudice," but requested that matters be held in abeyance for a period of thirty days, because the complainants have "recently learned there has continued a pattern of acts on the part of the Port Director, presumably with the respondent's authorization . . . which . . . might well constitute acts of non-compliance with the terms of the agreement." At the end of the thirty days complainant proposes to advise whether it agrees to an entry of an order dismissing the proceeding without prejudice or to amend its complaint.

The respondent in a letter dated May 9, 1977 (received May 12, 1977), submitted a proposed Order Dismissing Proceeding Without Prejudice, which is word for word, similar to that proposed by the complainant.

Intervenor Hearing Counsel in a letter dated and received May 9, 1977, recommends "that the instant proceeding be discontinued subject to the agreed terms of settlement being properly implemented."

There has been in this proceeding an answer filed to the complaint, and a stipulation and agreement of settlement the full text of which is attached as Appendix A to the October 15, 1976, Order Staying the Proceeding Pending Commission Action. Under the order proposed by complainant and respondent the proceeding may be renewed upon a showing of non-compliance with the stipulation and agreement of settlement. Such a provision is deemed sufficient protection for the parties. Complainant's request to hold this proceeding in abeyance for thirty days for the complainant then to decide it agrees with the order of dismissal or to file an amended complaint seems to seek an unwarranted advantage. To grant such request would sanction giving an unwarranted advantage, as well as tacitly approving the filing of an amended complaint, so should not be granted. And, further holding in abeyance of this proceeding beyond that provided in the following order serves no regulatory purpose beneficial to all concerned.

Wherefore, upon consideration of the above (using specifically the language of the complainant and respondent submitted separately, in the proposed form of order) and whereas the

"Complainant and respondent having entered into a Stipulation and Agreement of Settlement dated August 23, 1976, as amended September 30, 1976, disposing of the issues presented by the complainant, and the Commission having determined by Order served April 27, 1977, that said Stipulation and Agreement is not subject to Section 15 of the Shipping

Act, 1916, as amended, and that approval thereof under said setion 15 is not required it is, therefore, in accordance with the terms of said Stipulation and Agreement, hereby,

"*Ordered,* that the above-captioned proceeding be and it is hereby dismissed without prejudice to the renewal of said proceeding upon a showing of non-compliance with any of the terms and conditions of the aforesaid Stipulation and Agreement of Settlement, as amended."

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

No. 75–48

SEA-LAND SERVICE, INC.

v.

THE CITY OF ANCHORAGE, ALASKA AND TOTEM OCEAN TRAILER EXPRESS, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

June 15, 1977

Notice is hereby given that the Commission on June 15, 1977, determined not to review the order of dismissal of complaint and discontinuance of proceeding served in this matter May 19, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 75–48

SEA-LAND SERVICE, INC.

v.

THE CITY OF ANCHORAGE, ALASKA AND TOTEM OCEAN TRAILER EXPRESS, INC.

May 19, 1977

DISMISSAL OF COMPLAINT AND DISCONTINUANCE OF PROCEEDING

Complainant, Sea-Land Service, Inc. (Sea-Land), complained that its vessel *S.S. Mobile* was improperly evicted from Terminal No. 1 at the Anchorage City Dock in order that a vessel of respondent Totem Ocean Trailer Express, Inc. (Totem) could be berthed. Sea-Land further complained that the Totem vessel did cause a break in the bus bar conductor system which had the effect of precluding the movement of container cranes at Terminal No. 3 of the Anchorage City Dock so that Sea-Land's vessels could not utilize dockside space at Terminal No. 3. Sea-Land sought reparations for the acts of Totem.

Sea-Land in its complaint joined the City of Anchorage as a respondent but by order dated February 11, 1977, the City of Anchorage was dismissed as a respondent.

The parties have now entered into a statement of satisfaction and settlement agreement whereby Totem has agreed to pay ten thousand dollars ($10,000.00) in satisfaction of the alleged claims upon dismissal of the complaint with prejudice.

The parties further agree that the settlement agreement shall not prevent either party from alleging or contending in any court that any conduct or acts alleged in any complaint or action before the Federal Maritime Commission constituted, or were part of, or were evidence of violation of any federal or state laws, provided, however, Sea-Land is precluded from seeking further relief in any action for the specific matters in its complaint in FMC Docket No. 75–48.

The parties have jointly requested that the complaint in Docket No. 75–48 be dismissed with prejudice and that the proceeding be discontinued.

Good cause appearing, the parties have settled the issue between them, and because no useful regulatory purpose would be served by continuing this complaint proceeding, it is hereby:

Orderd: The complaint herein is dismissed with prejudice and this proceeding is discontinued.

(S) STANLEY M. LEVY,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–10

FREIGHT FORWARDER BIDS ON GOVERNMENT SHIPMENTS AT UNITED STATES PORTS—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916, AND GENERAL ORDER 4

ORDER DENYING RECONSIDERATION

June 24, 1977

By Report and Order served March 18, 1977, the Commission held that four independent ocean freight forwarders had violated section 16 First of the Shipping Act, 1916, and section 510.24(b) of the Commission's Rules by providing freight forwarding fees to the General Services Administration (GSA) at nominal, noncompensatory fees with the intention of recouping their losses out of the brokerage fees generated by such relatively large shipments.

The National Customers Brokers & Forwarders Association of America, Inc., and the New York Foreign Freight Forwarders &Brokers Association, Inc. (Petitioners), have filed a "Petition for Reconsideration in Part" (Petition) requesting the Commission to adopt a specific rule[1] which would set a "rate floor" on amounts licensed forwarders could bid for GSA forwarding services contracts different from that applicable to commercial shipments.

According to Petitioners, this rule is necessary to (1) curtail future section 510.24(b) violations on government shipments and (2) eliminate "the morass of indecision" caused by the absence of firm standards limiting the extent to which licensed forwarders may vary the forwarding fees they assess different shippers. No factual support for either proposition was tendered.

The Commission's choice of enforcement procedures is largely discretionary and we believe our decision in Docket No. 74–10 establishes reasonable boundaries of permissible conduct which are discernible to conscientious licensees. At least for the present, we prefer to handle the problem—and nothing identifies it as a major problem—of preferential

[1] Petitioners want the following language added to present section 510.24(b) of the Rules:

Provided, however, That with respect to shipments handled for a government agency the forwarding fee shall not be less than the average freight forwarding fee recovered by the licensee on commercial accounts in the preceding fiscal year.

forwarding fees on government shipments by an *ad hoc* process of investigation and adjudication and not by the adoption of regulations directed only to government shipments.

Contrary to the stated impression of Petitioners, our March 19, 1977 Report does not generally condone variations between commercial and government forwarding fees. Only variations grounded upon demonstrable economies of scale in providing the forwarding services in question are permitted. It is true that enforcement of this standard requires a case-by-case determination of a forwarder's operating costs, but such specific inquiries are typical in instances of section 16 preference and would be no less necessary under the standard proposed by Petitioners.[2] THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration in Part" of National Customers Brokers & Forwarders Association of America, Inc., and New York Foreign Freight Forwarders & Brokers Association, Inc., is denied.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

[2] *I.e.*, "the average fee charged commercial shippers during the preceding fiscal year." Such information is not systematically and publically maintained at the Commission or elsewhere; it would have to be developed in an appropriate hearing.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 357(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

PRUDENTIAL-GRACE LINES, INC.

ADOPTION OF DECISION

June 27, 1977

The Commission by notice served May 31, 1977, determined to review the decision of the Settlement Officer in this proceeding served May 12, 1977. Upon completion of review it has been decided that the decision of the Settlement Officer be adopted as the decision of the Commission.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 357(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

PRUDENTIAL-GRACE LINES, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Pan American Health Organization (complainant) claims $279.39 from Prudential Grace Lines, Inc., now Prudential Lines, Inc. (respondent) for alleged freight overcharge based on commodity classification as well as measurement tons on a shipment described as Lab Apparatus from New York, New York to Lima, Peru via the SANTA CRUZ on bill of lading No. 14 dated October 11, 1974. Complainant alleges a violation of Section 18(b)(3) of the Shipping Act, 1916.

On May 12, 1976, respondent advised the complainant that its complaint had been declined. The main reason was that it was an "old shipment which took place from New York *October 18, 1974.*" The complaint was filed with the Commission on July 9, 1976, well within two years after the cause of action accrued, and is in conformity with the filing requirements of Section 22 of the Shipping Act, 1916.

The shipment was made by Wheaton Glass Company, a division of Wheaton Industries which utilized a freight forwarder located in New York. The bill of lading was made out for 85 cartons of Lab Apparatus measuring 179 cubic feet. The complainant was billed and paid for 85 cartons measuring 180 cubic feet (4.5 measurement tons) at a rate of $169.75, which is in the Atlantic and Gulf/West Coast of South America Conference S.B., SA–12 Freight Tariff F.M.C. No. 1 at 8th Revised Page 81, and is a contract rate applying on Laboratory Apparatus, Testing (Item 508) and also Laboratory Equipment or Supplies, N.O.S. (Item 509) which amounted to $763.88. Neither party has questioned the bunker surcharge of $8.25 per ton as freighted which was assessed, i.e., $8.25

[1] This decision became the decision of the Commission June 27, 1977.

(4.5) = \$37.13. The total of the freight charges and bunker surcharge paid by complainant was \$763.88 + 37.13 = \$801.01.

Complainant's computation of the overcharge follows:

"Paid by Complainant	\$801.01
should be: 146 11/12 cu. ft. at \$125.50/40 cu. ft.	461.21
14 8/12 cu. ft. at \$72/40 cu. ft.	27.00
16 7/12 cu. ft. B.S.C. at \$8.25/40 cu. ft.	33.41
Total should be	\$521.62
Overpaid:	\$279.39"

Complainant asserts:

"This shipment actually consisted of 79 cartons of Glass Bottles measuring 146 11/12cubic feet and 6 cartons of Stoppers and Seals measuring 14 8/12cubic feet. The bottles were valued at over \$700 per 2000 pounds. Item 150 on 9th Rev. Page 42 of Atlantic and Gulf/West Coast of South America Conference Freight Tariff F.M.C. No. 1, to which respondent is a party, publishes a rate of \$125.50 w/m for 'Bottles, Glass, Empty, N.O.S. in tight packages: N.O.S.' On 11th Rev. Page 152 of said tariff, respondent publishes a Class 25 rating for 'Closures: Barrel, Bottle, Can, Drum, Jar, Pail of Tube and Accessories.' 7th Rev. Page 138 of that tariff shows the Class 25 rate to be \$72 w/m."

I have verified the contents of the above paragraph which I find to be correct with the exception of the cubic measurement of the shipment which I compute to be slightly higher. Said cubic measurement will be covered in detail later herein.

The claim is accompanied by Invoice No. X74–450 submitted by Wheaton Glass Company to complainant covering the commodities shipped on the SANTA CRUZ which plainly shows that the shipment consisted of 79 cartons of glass bottles, 3 cartons of stoppers and 3 cartons of seals. The invoice also shows the cubic measurement per carton, weight per carton, price per carton and the total number of cartons of each commodity shipped. Also submitted with the claim is a letter with a Wheaton International letterhead, the subject of which is:

"Your #2681
Our Invoice X74–450 of Sept. 30, 1974
Pan American Health Division Order #9366–2
Prudential Bill of Lading #14 of 10/8/74
85 Cartons Bottles, Stoppers & Seals"

The letter refers to the shipment containing the chronological numbers of the cartons, the total number of cartons of each product, the contents of each group of cartons, *the dimensions of each carton,* the cubic feet size of each carton, *the total cubic feet of each group of cartons*, and *the total cubic feet of all cartons in the shipment*. The information in this letter which is not contained in the invoice is the dimensions of each carton, the total cubic feet of each group of cartons, and the total cubic feet of all cartons in the shipment as underscored above.

Respondent states that with the exception of the bill of lading, the attachments to the complaint were not provided respondent at the time of shipment and should receive no consideration in passing on the validity of the claim. Respondent further denies any overpayment was made to it and refers to Item 2 (*q*) of the conference tariff which provides:

> "Wherever this tariff provides different rates on a commodity dependent upon type or kind and adequate description is not stated in the bill of lading, it will be assumed that it is of a type or kind subject to the highest of the rates provided on the commodity and freight will be assessed accordingly."

Respondent alleges that since *no* specifics, other than "85 CARTONS: LAB APPARATUS" were on the bill of lading the cargo was subject to the rate assessed.

With respect to respondent's defense, reference is made to Informal Docket No. 321(I) *Abbott Laboratories* v. *Alcoa Steamship Company* served April 8, 1975, in adopting the decision of a Settlement Officer which awarded reparations the Commission held:

> "This Commission also has previously considered the argument that one's tariff requires that inadequate cargo description on the bill lading be assessed the highest tariff rates. In *Western Publishing Company, Inc.* v. *Hapag-Lloyd A.G.* we determined that, notwithstanding the description in the bill of lading what actually moves as shown by all the evidence determines the applicable rate and have since upheld that rationale."

In addition reference is made to Informal Docket No. 256(I) *Union Carbide Inter-American* v. *Venezuelan Line,* 17 F.M.C. 181 (1973) wherein the Commission in its order on review of initial decision held at page 182:

> "The Examiner would also deny the claim on the basis of lack of proof as to what was actually shipped. Claimant has submitted a commercial invoice dated April 16, 1969 in its attempt to show that the shipment consisted of Polyvinyl Chloride Resin. Marks and numbers on the bill of lading are identical to those on the invoice. Union Carbide's order number 184599–2 appears on both documents. Each document lists the quantity as 440 bags. The Examiner found that the weight on the invoice differed from that on the bill of lading 22,000 lbs v. 22,880 lbs.). However, our examination shows that while the 22,000 lbs. figure does appear on the invoice as the net weight the same invoice also shows a gross weight of 22,880 lbs. the same as on the bill of lading.
>
> "It must therefore be concluded that the invoice and bill of lading refer to the same shipment.
>
> "The invoice describes the commodity as 'Union Carbide Vinyl Resin QAHR'. Claimant correctly points out that the Commission in Informal Docket 93(I) determined that a Union Carbide Vinyl Resin, Q series, qualified to be rated as 'Polyvinyl Chloride Resin', the rating sought here by claimant.
>
> "Under these circumstances we conclude that the burden of proof has been met and the claim should be awarded. ($147.57). It is so ordered."

The complainant has submitted the subject invoice covering the shipment as well as a letter from his supplier interrelating the bill of lading, invoice and letter.

Following is a submittal by complainant of what was moved:

NUMBERED CARTON	QUAN. OF CARTONS	CONTENTS	MEASUREMENTS[2]	CU. FT. EACH	TOTAL CU. FT.
#1/9	9	S-205 bottles	16"x13½"x12"	1-5 (1.543)	12-9 (13.887)
#10/79	70	S-18B1 bottles	22"x13¾"x10"	1-11 (1.910)	134-2 (133.700)
#80	1	224154 Stprs.	19⅛"x14⅛"x12"	1-10 (1.847)	1-10 (1.847)
#81/82	2	224154 Stprs.	21"x15"x15"	2-9 (2.734)	5-6 (5.468)
#83	1	224183 Seals	19⅛"x14⅛"x12"	1-10 (1.847)	1-10 (1.847)
#84/85	2	224183 Seals	21"x15"x15"	2-9 (2.734)	5-6 (5.468)
85 CARTONS			EXACT TOTAL CUBIC FEET		161-7 (162.217)

Complainant paid for the movement of 180 cubic feet, alleging that only 161–7 cubic feet moved. I have carefully reviewed these computations and have arrived at a slightly higher figure of 162.217 cubic feet (see the above computations in parenthesis), which I will use in computing this claim.

As developed by complainant, supported by documentation submitted with the claim the movement did consist of bottles, stoppers and seals. The 79 cartons of bottles weighed 3,183 pounds, or 1.59 short tons. Dividing this weight ton figure into the invoice value of the bottles of $2,476.70, a valuation figure of $1,557.61 per ton of 2,000 pounds is arrived at. As complainant alleges, Item 150 on 9th Revised Page 42 of the conference tariff contains a contract rate of $125.50 per weight or measurement ton on Bottles, Glass, Empty, N.O.S. in tight packages: N.O.S. actual value over $700.00 per 2,000 pounds to Group 4 ports. Callao, Peru (a Group 4 port) was the port of discharge for this shipment consigned to Lima, Peru.

Also, as complainant alleges, on 11th Revised Page 152 of the conference tariff a Class 25 rating is given to Closures: Barrel, Bottle, Can, Drum, Jar, Pail or Tube, and Accessories which is a class rate of $72.00 per weight or measurement ton to Group 4 ports.

The invoice, and letter, part of the latter appearing above clearly indicate that the bottles, stoppers and seals were all shipped in separate cartons.

Following is a computation of the charges that properly apply on the subject shipment.

Paid by Complainant		$801.01
Correct charges per computations herein:		
79 cartons of bottles—147.587-3.689 MT	($125.50)	462.97
6 cartons of bottle closures—14.630/40-.366 MT	($72.00)	26.35
Bunker surcharge 162.217/40-4.055 MT	($8.25)	33.45
		$522.77
Due Complainant		$278.24

[2] Per Item 2 of the conference tariff. All fractions under ½" shall be dropped. Where a fraction of exactly ½" occurs in one dimemsion, it shall be taken to the next full inch.

This claim, as submitted by complainant with the supporting documentation of the bill of lading, invoice, and letter from the seller of the subject goods is adequately substantiated.

Total reparation of $278.24 is awarded complainant with interest at the rate of six percent per annum if not paid within 30 days of the date hereof.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 75–4 and 75–5

DEPARTMENT OF DEFENSE AND MILITARY SEALIFT COMMAND

v.

MATSON NAVIGATION COMPANY

DENIAL OF PETITION FOR RECONSIDERATION

June 30, 1977

The Military Sealift Command (MSC) has filed a Petition for Reconsideration of the Commission's Order on Appeal of Dismissal served February 2, 1977 in this proceeding. Upon reconsideration, the Commission is requested "to reverse the dismissal of these proceedings and remand them to the Presiding Administrative Law Judge for further hearings and decision. . . ." Matson Navigation Company (Matson) and Commission Hearing Counsel have filed replies opposing MSC's Petition.[1]

MSC sets forth six "errors" in our Order which allegedly warrant a reversal of the dismissal of these proceedings. While generally the matters raised by these alleged errors have either been properly disposed of previously in our February 2 Order or are immaterial to a final disposition of these proceedings, additional discussion of some of these matters may be warranted to ensure that MSC and any "reviewing court" fully understand the basis for our dismissal of these proceedings.

Reduced to its essentials, MSC's Petition raises two fundamental issues, *i.e.:* (1) whether the Commission's Order upholding the Presiding Officer's Supplemental Order itself meets the requirements of the Administrative Procedure Act (APA) and the Commission's Rules of Practice and Procedure, (2) whether under *any theory* MSC could be said to have met its burden of proving that Matson's "departure from a long standing practice of separate, simplified rates is an unreasonable practice" in violation of section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933.[2]

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[1] Because this proceeding was instituted prior to May 19, 1976, the effective date of a recent amendment to section 502.62 of the Commission's Rules which allows for the filing of replies to Petitions for Reconsideration, the filing of replies by Matson and Hearing Counsel is technically improper. However, under the circumstances, and pursuant to the waiver authority of section 502.10 of our Rules, we will accept and consider the replies submitted.

[2] Underlying this issue is, of course, the basic legal question of whether the repeal of section 6 of the Intercoastal Shipping Act of 1933 precludes the establishment of class rates for MSC.

Each of these issues and the positions of the parties thereon will now be considered and discussed *seriatim.*

Compliance With APA

MSC contends that the Presiding Officer and the Commission erred in failing to make adequate findings and conclusions as required by the APA and our own Rules of Practice and Procedure. It is MSC's position that our February 2 Order fails to sufficiently indicate the grounds for its affirmance of the Presiding Officer's Supplemental Order dismissing MSC's complaint in this proceeding; that the Supplemental Order itself did not correct the deficiencies present in the first dismissal, and that the Supplemental Order fails to meet the requirements of the APA and our Rules in deciding *all* material issues presented on the record or raised by the parties in their motions on dismissal.

Matson, on the other hand, argues that our Order was in effect a ruling *de novo* on the motions to dismiss and, in view of the fact that the Commission made its own findings and conclusions which disposed of this matter, the contentions of MSC with respect to alleged deficiencies in the Presiding Officer's Supplemental Order are not relevant. Matson concludes that our dismissal of the proceeding was entirely proper given the absence of any justification for the imposition of class rates.

Hearing Counsel takes the position that the Commission did decide those issues "material" to a dismissal of these proceedings noting that the Commission need not resolve every issue raised in a proceeding, *Union Mechling Corporation v. United States,* 390 F. Supp. 411.[3] In this regard, Hearing Counsel submit that MSC has failed to meet its burden of proof with respect to the two primary arguments upon which it bases the alleged violations of section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act, 1933. In response to MSC's assertion that Matson is obligated to continue offering military class rates because such rates have been available for a long period of time, Hearing Counsel contends that such a view has no support in law. Hearing Counsel also asserts that MSC's second argument relating to its alleged inability to comply with MILSTAMP (Military Standard Transportation Movement Procedures) was properly disposed of by the Commission in its finding that "MSC's problems in complying with MILSTAMP do not, in and of themselves, provide a proper basis for finding Matson's present rate structure in violation of section 18."

We find little support for MSC's allegations of procedural defects in our February 2, Order. Under the APA, an agency which issues opinions in narrative and expository form may do so without making separate findings of fact and conclusions of law, provided that the agency's findings and conclusions on material issues of fact, law, or discretion, are indicated with such specificity as to advise the parties and any reviewing

[3] MSC itself concedes "that a reviewing court would not remand a case for failure to pass on all issues raised on the record if sufficient of those issues have been decided correctly to dispose of the case."

court of their record and legal basis.[4] Further, an agency need treat only *material* issues of fact, law, or discretion, and is not required to make findings and conclusions, and give reasons therefor, on collateral issues or issues not relevant to its decision.[5]

The Presiding Officer concluded in his Supplemental Order that MSC had failed to meet its burden of proving that Matson's failure and refusal to file appropriate military class rates is an unjust and unreasonable practice within the meaning of section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933. In so doing, the Presiding Officer rejected MSC's argument that Matson's present "practice" of not using class rates constitutes a violation of the Shipping Acts. We agreed with his conclusion on this point. In addition, we considered the Presiding Officer's specific endorsement and adoption of the reasoning of Matson, Hearing Counsel, HGFAA, Hawaii and Guam and the positions taken by them as set forth in their briefs, as well as a statement of his own reasoning and conclusions, as sufficient to comply with the APA and our own Rules. The Presiding Officer's Order adequately and sufficiently apprised the parties, and any potential reviewing court, of the basis for the determinations reached therein. MSC's assertion notwithstanding, the Presiding Officer's Supplemental Order goes far beyond his initial order of dismissal, which we remanded for insufficiency. As we noted in our remand order, the Presiding Officer's initial order failed to supply any reasons or basis whatsoever for his conclusions in dismissing the complaints. His subsequent order did, in our opinion, resolve those inadequacies.

However, whatever the merits of the Presiding Officer's Supplemental Order, our February 2, Order, in effect addresses and disposes of the relevant issues raised *de novo* and, to that extent, cures any procedural or substantive failings that may be argued to exist in the Presiding Officer's ruling. We took great pains in our February 2, Order to explain in detail the reasons for the decisions made on each material issue of fact, law, or discretion, presented so as to leave no doubt as to the bases of our action. We amplified the Presiding Officer's dismissal in order to resolve what we considered to be the critical legal issue in this proceeding; *i.e.*, the availability of class rates for MSC subsequent to the repeal of section 6 of the Intercoastal Shipping Act, 1933. Our determination that class rates could be established was, in turn, predicated upon a showing that the parties seeking such rates could justify them on valid transportation factors. Also, class rates for government cargoes must be related to the commercial rate structure to ensure that commercial rates do not subsidize government rates. These factors are important, inasmuch as they relate to MSC's burden of proof and our dismissal which was based

[4] Attorney General's Manual on the Administrative Procedure Act, p. 86 (1947).

[5] *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173; *Deep South Broadcasting v. FCC*, 278 F.2d 264 (C.A.D.C.); *Stauffer Laboratories, Inc. v. FTC*, 343 F.2d 75 (CA 9); *Brotherhood of Maintenance of Way Employees v. United States*, 221 F. Supp. 19 (ED Mich.), aff'd 375 U.S. 216; *Union Mechling, supra.*

on the absence of any proper justification in the record to support a finding that Matson's failure and refusal to file appropriate military class rates violated the Shipping Acts.

MSC's Burden of Proof

The next point raised by MSC is significant because it goes directly to the proof presented by it in support of its case against Matson. MSC cites as "error" the Commission's conclusion that MSC has failed to establish "demonstrable cost savings" or "transportation factors" necessary to support a simplified rate system.

MSC contends that Congress, in repealing section 6 of the Intercoastal Shipping Act of 1933, only intended to limit rate reductions on government cargo to situations where cost savings could be shown. According to MSC, there was no intention to allow class rates only when cost savings could be realized. MSC is of the opinion that the continuation of separate, simplified rate systems for purposes such as a solution of documentary problems is allowable, and that such systems are legally permissible even in the absence of cost savings. According to MSC, as long as rates on government cargo cover the fully allocated costs of its transportation plus a fair share of the carrier's profit, such rates could be different and indeed, lower than commercial rates. However, in the event that it is determined that a simplified rate system must be tied to demonstrable costs savings, MSC believes that these proceedings presently include sufficient data to support such rates. Specifically, MSC cites certain General and Administrative expenses as inappropriate to MSC cargo and argues that these expenses should not be allocated to that cargo. MSC alleges that the Commission overlooked evidence relating to the exclusion of these costs and expenses.

It is next urged by MSC that transportation factors such as cost of service, competition and value of service are all relevant in finding that military rates that neither burden nor subsidize commercial cargo are valid. However, MSC is vague as to how these factors should be applied to the subject proceeding, stating only that cost of service is "concededly important" and is covered in the record of this proceeding.

Matson, in rebuttal, takes the position that MSC:

> . . . incorrectly assumes that rates which are reduced to a level lower than those paid by commercial shippers for the same cargo under the same conditions do not involve any element of subsidizing or discrimination, unless they are non-compensatory.

According to Matson there is nothing in the legislative history of Public Law 93–487 which supports MSC's proposition of reduced military rates without adequate justification.

Matson argues that those "demonstrable cost savings" cited by MSC in its petition amount to no more than $6,520.00 (entertainment expenses) and that this figure is *de minimis* in light of Matson's operating expenses of well over $100,000,000 per year. Other expenses such as costs for stuffing and unstuffing containers and store door pick-up and delivery are allegedly already excluded from MSC costs because it does not use these services.

Hearing Counsel argue that the record clearly supports the Commission's determination that MSC's justification is insufficient to establish class rates and that MSC has failed to prove that Matson's current practices are unlawful. Hearing Counsel see little merit in MSC's argument that rates for military cargo be set at a level that will provide Matson "a return equivalent to the fully allocated costs of transporting those classes of cargo plus an appropriate return on its investment in the trade" in light of Congressional intent that government cargo rates be established on the same basis as commercial rates.

The burden of proof in a proceeding commenced by the filing of a formal complaint is upon the complainants as the proponents of the order requested of the Commission. (46 C.F.R. 502.155). In this proceeding MSC challenged Matson's decision not to reestablish special class rates for government cargoes subsequent to the repeal of section 6 of the Intercoastal Shipping Act, 1933. MSC contended, *inter alia,* that:

> Matson's failure to continue a long standing practice of a separate, simplified rate system for application to cargo shipped by MSC is a violation of Section 18(a).

The Presiding Officer, in his dismissal concluded that MSC had not met its burden. We affirmed his ruling in our February 2, Order. MSC's primary and indeed, only justification for finding Matson's current practices unlawful was the problems encountered by MSC in complying with MILSTAMP in rating military cargoes under the commercial rate structure. This allegedly results in MSC paying a higher rate than is appropriate because it cannot furnish an adequate description of the cargo to permit selection at the lowest proper commodity rate in Matson's tariff. We found that the justification and proof advanced by MSC was insufficient to support a determination that Matson was in violation of section 18(a).

Arguments by MSC that the record contains evidence of cost savings are without merit. Certain of the cost elements which MSC believes should be excluded, such as costs for stuffing and unstuffing containers, store door pick-up and delivery are not assessed against MSC because it does not use these services. Other costs are either insignificant or are applicable to MSC on the same basis as any other shipper of westbound commodities. MSC's own witness testified that while there "would *probably* be some differences between these costs [*i.e.*, actual costs of shipping a military container from Matson's container yard on the west coast to its Honolulu container yard] for military containers and costs for commercial containers, . . . the difference probably would not be great." (emphasis added) (Exhibit 12, p. 6–7)

Simply stated, under any theory advanced in this proceeding, MSC failed to establish sufficient justification (*i.e.*, transportation factors including cost of service considerations) to warrant a conclusion that

Matson's practice of assessing military cargoes the commercial rate structure is unlawful. This is the critical determination reached by the Presiding Officer in his Supplemental Order of Dismissal and reaffirmed by the Commission in its Order on Appeal of Dismissal and again in this Denial of Petition for Reconsideration.

Having determined that MSC has failed to support its claim that Matson's refusal to file military class rates is an unjust and unreasonable practice, it is unnecessary to consider the appropriate *level* of any class rates that might be established. Any confusion that may have arisen from our earlier discussion regarding the *level* of the class rates, as opposed to the *form* of such rates, stems from MSC's insistence that class rates be established at a level significantly lower than Matson's existing container rates.

The remaining two alleged errors raised by MSC have little or no bearing on our dismissal of these proceedings. First, the Presiding Officer's reliance upon MSC's noncompliance with MILSTAMP requirements as a ground for dismissal is not significant in view of our determination that MSC's problems in complying with MILSTAMP do not, in and of themselves, provide a proper basis for finding that Matson's current practices are unlawful. Secondly and similarly, MSC's allegation of error in the matter of the Commission's authority to order Matson to establish a separate, simplified rate structure for MSC's use, is mooted by MSC's failure to prove a violation of the Shipping Acts requiring some form of correction. Section 4 of the Intercoastal Shipping Act of 1933 allows the Commission to "determine, prescribe and order enforced a just and reasonable . . . practice" only upon a finding by the Commission that an existing practice is unjust and unreasonable. Such is not the case here.[6]

THEREFORE, IT IS ORDERED, That the Military Sealift Command's Petition for Reconsideration of our Order on Appeal of Dismissal is denied.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

[6] MSCconsiders these last two points; *i.e.* lack of authority in the Commission to order Matson to grant the relief requested and MSC's failure to comply with the MILSTAMP requirements to describe its cargo by full noun nomenclature as the only two grounds raised by the Presiding Officer which provide a basis for dismissing the proceeding. Further, it is contended by MSC that the Commission did not consider these two bases in its Order on Appeal of Dismissal. MSC is mistaken on both counts. We discussed both points in our Order (p. 6) and *specifically* rejected each as we do herein, as necessary to the proper disposition of these proceedings given the other findings made.

FEDERAL MARITIME COMMISSION

No. 74–27

CARTON- PRINT, INC.

v.

THE AUSTASIA CONTAINER EXPRESS STEAMSHIP COMPANY

NOTICE OF DETERMINATION NOT TO REVIEW

July 6, 1977

Notice is hereby given that the Commission on July 6, 1977, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served June 8, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 74–27

Carton-Print, Inc.

v.

The Austasia Container Express Steamship Company

June 8, 1977

Complainant, a shipper of paperboard, filed a complaint alleging that respondent ACE, a common carrier by water, through its agent, quoted a rate on a shipment of paperboard but later revised the rate assessed upon the shipment, causing an increase in freight of $2,716.65, for which complainant seeks reparation. The consignee in Australia, however, paid the freight, not complainant. Complainant further alleges that the rate paid was unjust, unfair, and unreasonable and appears to allege violations of sections 18(b)(1), 18(b)(3), and section 15 of the Shipping Act, 1916. Upon consideration of respondent's motion to dismiss, it is found as follows:

(1) Even under the most favorable reading of the complaint together with furnished materials, complainant fails to state a cause of action primarily because it has not paid the freight and cannot show that any alleged violation was the proximate cause of injury to itself;

(2) The essence of the complaint, an alleged overcharge by respondent, would normally raise a valid issue under section 18(b)(3) of the Act but for the fact that no rates were on file, but even if a valid allegation were made, the consignee would have standing to seek reparation, not the complainant;

(3) The section 15 allegation must be dismissed since the complainant does not even allege that there was an agreement between carriers or even name a second carrier;

(4) A section 18(b)(1) allegation would be sustainable but the Commission has already found ACE to have violated that law in another case; but even so, failure to file a tariff cannot be shown to have been the proximate cause of any injury to complainant based uionconsignee's payment of an additional $2,716.65 in freight;

(5) Complainant should have obtained a valid assignment of the consignee's claim to confer standing on itself or the consignee could have filed the complaint itself. Not having done these things, it is too late for complainant to obtain an assignment or for the consignee to file a complaint in view of the two-year statute of limitations in section 22 of the Act.

Since complainant is not represented by counsel, it is advised that it has an automatic right to appeal these rulings to the Commission.

COMPLAINT DISMISSED

NORMAN D. KLINE, Administrative Law Judge.

Respondent Austasia Container Express (ACE) has filed a motion to dismiss the complaint. ACE contends that it is not a common carrier by water subject to the Commission's jurisdiction[1] and that complainant has no standing to bring this action because complainant suffered no pecuniary or real injury in connection with the sole shipment which is the subject of the complaint.

In support of its motion ACE states that the shipment moved on a freight collect basis, meaning that the consignee in Australia, not complainant, paid the freight and that according to Commission decisions, complainant has no standing to recover reparation, having suffered no specific injury or pecuniary harm. ACE contends that the only way in which complainant could seek reparation because of an alleged overcharge would be by means of a valid assignment of the consignee's claim. Even were such an assignment to be made now, however, ACE contends that under applicable case law, the assignment would have to be treated as a new claim and therefore would be barred because it would fall beyond the two-year statute of limitations set forth in section 22 of the Shipping Act, 1916, 46 U.S.C. 821. This fact does not prejudice complainant because complainant never suffered injury or had any rights to be prejudiced in the first place, ACE argues.

Following the filing of the motion, I sent complainant a letter explaining its rights to file a reply and granted a short extension of time in consideration of the fact that complainant has no attorney representing it and has expressed unfamiliarity and confusion with regard to the Commission's rules in the past. See my letter dated March 25, 1977. Even prior to this time, after the Commission has decided that ACE fell under the jurisdiction of the Shipping Act, 1916 (the Act), and had failed to file its tariff with the Commission in violation of section 18(b)(1) of the Act, I advised complainant of the problem concerning its standing. See Procedural Notice, February 25, 1977.

In response to the motion to dismiss, complainant has filed a letter written by its President, Mr. M. R. Hatch, Jr., dated April 23, 1977, together with documents. The letter does not show that a copy was served on respondent.[2] In the letter Mr. Hatch states that the motion

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[1] Actually, the motion states that "complainant" is not a common carrier by water subject to the Commission's jurisdiction. This is obvious typographical error. In any event the Commission has decided that ACE is a carrier subject to its jurisdiction in Docket No. 73–66, *Austasia Container Express, etc.—Possible Violations of Section 18(b)(1)and General Order 13*, February 7, 1977. This decision is under appeal before the U. S. Court of Appeals for the District of Columbia Circuit. (*Austasia Intermodal Lines, Ltd. dba Austasia Container Express et al. v. F.M.C.*, Civil No. 77–1236.). There has been no stay of the Commission's decision and order therein issued by the Court. Accordingly, I am bound to reject respondent's argument on this matter and will not discuss it further.

[2] By transmitting this letter and the attached documents to me without sending a copy to ACE, complainant has violated the Commission's rules against *ex parte* communications. See 46 CFR 502.11, recently issued by the Commission in Docket No. 76–66, *Extraneous and Ex Parte Communications*, March 11, 1977. For the benefit of complainant who is not represented by counsel, I advise Mr. Hatch that it is forbidden for a party to a proceeding to send me or the Commission documents without sending copies to ACE if the documents concern the merits of the case rather than purely procedural questions. So serious is a breach of the rule that I am even authorized to dismiss

"completely ignores the complaint of the actual consignee whereby he paid more than double for freight on same commodity that we shipped to him on Conference steamers; and further attempts to dismiss the rate originally quoted on a steamer contract that they simply do not honor or refer to in this case. It is quite certain that the consignee was hurt terribly by the exorbitant charge assessed and we acted to aid him in this instance." Mr. Hatch states furthermore that "we acted to aid him [i.e., the consignee] in this instance" and that the consignee "expected us to secure a refund of overpaid freight based on what we were advised and in turn advised him, and we have suffered damage in that was the last order he placed with us and more than means a loss of business through him in Australia."

DISCUSSION AND CONCLUSIONS

According to applicable principles of law, motions to dismiss are to be construed against the moving party and in the light most favorable to complainant. Movants for dismissal must accept facts alleged by complainant as true for the purposes of ruling on the motion and the motion will not be granted unless it appears beyond doubt that complainant can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41 (1957), *Schenley Industries, Inc. v. N.J. Wine & Spirit Whole. Ass'n.,* 272 F. Supp. 872, 875–76 (D.N.J. 1967); *Continental Collieries v. Shober,* 130 F. 2d 631, 635 (10 Cir. 1942); *Dewitt Motor Company v. Chrysler Motor Corporation,* 391 F. 2d 912 (6 Cir. 1968). Motions to dismiss are granted sparingly in order to make sure that a complainant is not improperly denied an opportunity to prove his case and have his claim adjudicated on the merits. 5 Wright & Miller, *Federal Practice and Procedure,* § 1357, p. 598; *Hospital Building Company v. Trustees of Rex Hospital,* 511 F. 2d 678, 680 (4 Cir. 1975). Even if it appears unlikely that a complainant can prove his case, he is nevertheless entitled to try. *Continental Collieries v. Shobert,* cited above, 130 F. 2d at p. 635.

Although the complaint is not entirely clear in its language, the attached documents furnish some explanation as to the origin of the controversy. It appears that complainant was under the impression that the rate on a shipment of 34 rolls of paperboard to Australia in January 1974 would be $114 per 200 lbs. plus a 10.67 percent surcharge, as quoted by ACE's agent. However, ACE later remeasured the shipment, claimed it discovered a larger cubic measurement than complainant had indicated, and rated it on a measurement basis. ACE informed complainant later that all ACE's rates were on a weight/measurement basis, not weight only, and

the complaint because of it. 46 CFR 502.11(6) and (7). However, bearing in mind complainant's lack of counsel, I will do no more than transmit the letter and documents to the Commission's Secretary for inclusion in the official file and will furnish a copy to ACE. I must strongly urge complainant to make sure that in the future, any correspondence with the Commission must be made known to ACE. Furthermore, as I later note, if complainant appeals my rulings, it must file an original and 15 copies with the Commission as well as furnish ACE one copy of the appeal. 46 CFR 502.114; 502.118.

that, as remeasured, the shipment qualified for the measurement basis. The result was an increase in total freight of $2,716.65, which complainant seeks to recover.[3] Complainant had prior to booking the shipment, however, advised its buyer in Australia, the subsequent consignee, that the rate would be $114 per 2,000 lbs. plus surcharge.[4] Again, judging from the documents which complainant has submitted, it appears that the consignee was unable to pass on the additional freight costs to his customer and as a result lost money on the sale.[5] Furthermore, the consignee still expects recovery of the additional freight either from complainant or from ACE. At one point this consignee (McCormack International Pty. Ltd.) informed complainant that the consignee did not wish to adopt complainant's suggestions as to how to recover his loss (by approaching "various companies and Government offices") and expected complainant to obtain recovery, stating that complainant was "the only real access we have to obtaining the freight refund."[6]

Complainant is actively pursuing this matter. In a letter dated April 9, 1977, from Mr. Hatch, complainant's president, to the consignee, Mr. Hatch advised the consignee of recent developments including the subject motion to dismiss. Mr. Hatch informed the consignee that complainant's attorney did not feel qualified to handle the type of case involved and requested advice as to whether complainant "should seek counsel for you in Washington, D. C. . . ." Significantly, Mr. Hatch states that "we [i.e., complainant] were acting only as shipper and did not suffer any loss. "

If we assume that the complaint raises a valid issue under section 18(b)(3) of the Act because of an overcharge by ACE and further assume that complainant could prove that the shipment should have been rated on a weight basis,[7] it is apparent that respondent is correct in asserting that complainant would have no standing to seek reparation. In order to seek reparation in a section 18(b)(3) overcharge case, complainant must either show that he has paid the freight or has a valid assignment of the claim from the person who did pay the freight. *Trane Co. v. South African Marine Corp.*, 16 SRR 1497, 1501 (1976); *Ocean Freight Consultants, Inc. v. The Bank Line, Ltd.*, 9 F.M.C. 211, 212–213 (1966);

[3] See letter of G. W. Scherkenbach, President of ACE, April 22, 1974, sent under cover of Mr. Hatch's letter to the Commission, attention of Mr. John E. Cograve, August 6, 1974.

[4] See letter from John G. McCormack, Managing Director, McCormack International Pty Ltd., May 27, 1974.

[5] See letter from John G. McCormack, dated March 30, 1974.

[6] See letter from Mr. John C. McCormack, May 27, 1974. Complainant had suggested to the consignee that he lodge a protest with the U.S. Embassy, commercial attache, in Australia, and also contact two conferences, the Australia-New Zealand Conference, and the Pacific Coast-Australasian Tariff Bureau. See Letter from Mr. Hatch to Mr. McCormack, May 21, 1974. The letter does not explain in what way these conferences could give relief to Mr. McCormack in connection with the alleged overcharge in question.

[7] Even on the facts submitted by complainant, however, it appears that complainant's contentions regarding the correct measurement of the shipment may not be sustainable if the case were to go to hearing. In one of his letters, Mr. Hatch admitted to the consignee that complainant "had no idea of the diameter of these rolls," that is, that it came as a surprise to complainant when ACE measured the rolls, found them to measure differently than complainant had believed, and rated them on the basis of that measurement. See letter of Mr. Hatch to McCormack International, May 21, 1974.

Oakland Motor Car Co. v. Great Lakes Transit Corp., 1 U.S.S.B.B. 308, 311 (1934); cf. *Pennsylvania RR Co. v. International Coal Min. Co.,* 230 U.S. 184, 203 (1913). Here complainant not only shows no assignment of the claim from the consignee but admits it did not pay the freight or suffer any loss. See letter of Mr. Hatch, April 9, 1977, cited above. Had this case merely been one arising under section 18(b)(3), this fact might end the matter and the portion of the complaint relating to the claim for reparation could be dismissed. However, there are interesting complications.

The complaint is drafted in a confusing manner. In its own words, it alleges as follows:

> IV. That by reason of the facts stated in the foregoing paragraphs complainant has been subjected to the payment of rates (3) unjust and unreasonable in violation of section 18(b)(1) of the shipping act; or
>
> V. That the agreement, modification, or cancellation is unjustly discriminatory or unfair as between carriers, etc. (as provided in section 15).
>
> VI. That complainant has been injured in the following manner: To his damage in the sum of $2716.65.
>
> VII. Wherefore complainant prays that respondent be required to answer the charges herein; that after due hearing and investigation an order be made commanding said respondent (and each of them) to cease and desist from the aforesaid violations of said act, as amended, and establish and put in force and apply in future such other rates (fares or charges, etc.) as the Board may determine to be lawful (and also pay to said complainant by way of reparation for the unlawful charges hereinabove described the sum of $2716.25 plus reasonable interest costs, for loss incurred by non-use this money, or other such sum as the Board determines to be proper as an award of reparation); and that such other and further order or orders be made as the Board determines to be proper in the premises.

This draftsmanship shows obvious unfamiliarity with the Shipping Act. The repeated reference to the "Board" is of no consequence. However, under the Administrative Procedure Act (APA) and pertinent case law, respondents are entitled to reasonable notice of the matters of fact and law asserted so that they may be able to prepare their defense.[8] I am constantly bearing in mind that complainant is not represented by counsel and that this Commission is not a court but an administrative agency which is not bound by hard and fast technical rules. See *Oakland Motor Car Company v. Great Lakes Transit Corp.,* cited above, 1 U.S.S.B.B. at 311 (1934). However, there are limits to the indulgence even of an administrative agency toward one who pleads a case before it. See *Ace Machinery Company v. Hapag Lloyd Aktiengesellschaft,* Docket No. 76–5, Order, October 7, 1976, p. 5. As already seen, complainant has conceded in its own correspondence that it suffered no loss and that it was the consignee who paid the alleged overcharge of $2,716.65. This contradicts the allegation in paragraph VI. of the complaint and undermines paragraph VII. as well. As for paragraph V. which invokes section 15 of the Act, there are no allegations of fact which even mention that

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[8] 5 U.S.C. 554(b)(3); *Imposition of Surcharge by the Far East Conference,* 9 F.M.C. 129, 141 (1965); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

there is more than one carrier or that there is an agreement between carriers which should be modified or cancelled.[9] That leaves paragraph IV.

Paragraph IV. refers to section 18(b)(1) of the Act and read in the light most favorable to complainant, section 18(b)(3) as well, although the text refers merely to "(3)." Furthermore the nature of the violation is described as relating to rates which were "unjust and unreasonable." However, section 18(b)(1) refers to the requirement that tariffs be filed and section 18(b)(3) to the requirement that carriers in the foreign commerce of the United States adhere to the rates specified in their tariffs.[10] Neither of these provisions of law refers to "unjust or unreasonable rates." The only provision of section 18(b) which has to do with unreasonable rates is section 18(b)(5), which authorizes the Commission to disapprove any rate on file which it finds to be "so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. 817(b)(5). However, even if I could amend the complaint for the benefit of complainant and specify that section 18(b)(5) was properly invoked, there can be no award of reparation retroactively under that law and the statute requires the disapproved rate to have been on file, which rate was not on file. See *Commodity Credit Corporation v. American Export Lines, Inc.*, 15 F.M.C. 171, 191 (1972); *Federal Maritime Commission v. Caragher*, 364 F. 2d 709, 717 (2 Cir. 1966).

If one reads the various letters and materials submitted by complainant, one can reasonably interpret the complaint as intending to raise an issue under section 18(b)(3). Respondents address themselves to this issue in their motion as well as other matters. However, section 18(b)(3) is based on the premise that a rate is on file with the Commission. The statute is violated if the carrier charges "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 the tariffs *on file with the Commission*. . . ." 46 U.S.C. 817(b)(3). (Emphasis added.) Technically, then, there could have been no violation of section 18(b)(3) of the Act by ACE since, as the Commission found in Docket No. 73–66, cited above, ACE had no tariff on file with the Commission during the relevant period of time.[11]

I now turn to the fact that the complaint can be interpreted to mean that ACE violated section 18(b)(1) by failure to file its tariff, although the complaint does not state this fact in such words. Again, this is a

[9] In paragraph VII., furthermore, the complainant asks for a cease and desist order against "said respondent (and each of them)" etc. but does not identify who these other respondents are supposed to be. Perhaps complainant meant to name Nauticus Shipping Corporation as a respondent. However, the information furnished by complainant identifies Nauticus merely as an agent of ACE and there is no allegation that ACE and its agent have entered into a section 15 agreement, much less whether such an agreement would fall under section 15 in the first place. It is questionable whether the agent would be subject to the Act at all. See *Trane Co. v. South African Marine Corp.*, cited above, 16 SRR at p. 1506, and *Cont. Distrib'g Co., Inc. v. Cia. Nacional de Nav.*, 2 U.S.M.C. 724, 725 (1945).

[10] See 46 U.S.C. 817(b)(1) and (b)(3).

[11] This does not mean that a carrier can therefore benefit by not filing its tariff as required by law. The carrier is, of course, subject to civil penalties for failure to file and, as I will discuss, is still subject to a reparation action for violation of section 18(b)(1).

construction most favorable to complainant and is based not only on the complaint itself but the information furnished by complainant and the Commission's decision in Docket No. 73–66, cited above. As respondents point out, however, complainant must show that the violation, i.e., failure to file, was the *proximate* cause of *specific* injury to complainant. See *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, cited above 1 U.S.S.B. 308 at 310–311; *Waterman v. Stockholms,* 3 F.M.B. 248, 249 (1950); *West Indies Fruit Co. v. Flota Mercante Grancolombiana,* 7 F.M.C. 66, 70 (1962); *Ballmill Lumber and Sales Corp. v. Port of New York, et al.*, 11 F.M.C. 494, 510–511; *Trane Co. v. South African Marine Corp.*, cited above, 16 SRR at page 1501, footnote 9; *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 47–48(1922). In the *Eden Mining Co.* case, the Commission stated:

> It cannot be inferred from the language used [i.e. section 22] that compensation for other than the actual damage incurred is to be granted . . . While . . . the fact of discrimination . . . may be proved and the board find accordingly, in respect to awarding reparation under section 22 of the act for injury alleged to have been caused by such discrimination, the fact of injury and the exact amount of pecuniary damage must be shown by further and other proof before the board may extend relief . . . Inasmuch as these violations have been discontinued, and no *specific injury to complainants* was proved, the complaint is dismissed. (Emphasis added.)

In *Waterman v. Stockholms,* cited above, the Commission stated:

> It has long been established by the courts and Government agencies having jurisdiction in such matters that (a) *damages must be the proximate result of violations* of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss does not afford a basis for reparation. 3 F.M.B. at pp. 248–249. (Emphasis added.)

In *Ballmill Lumber and Sales Corp. v. Port of New York,* cited above, the Commission found violations of sections 16 and 17 of the Act but refused to award reparation, stating:

> 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 Commission,* 383 U.S. 607, 621 (1966). . . . 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.* 11 F.M.C. at p. 510. (Emphasis added.)

Failure to file a tariff does not automatically result in an award of reparation. In *J. G. Boswell Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95, 104–105 (1939), the Commission held that complainants were not entitled to reparation in such a case "unless the sum *paid by complainants* amounted to an unjust or unreasonable exaction for the service rendered." (Emphasis added.)

Here, complainant alleges injury in the amount of $2,716.65, the amount of the alleged overcharge which complainant did not pay. Complainant furthermore states in response to the motion to dismiss that it suffered damage because it has not had any more orders from the consignee in Australia and has consequently lost business in Australia. It is, of course, not established or even alleged that ACE's failure to file its tariff caused complainant's consignee never to place another order with complainant. The correspondence from the consignee suggests other reasons for this development related to the alleged overcharge and perhaps to high costs of transportation to Australia or other costs of complainant's merchandise. See letter of Mr. McCormack, March 10, 1977. Elsewhere it appears that the Australian consignees may have discontinued doing business with complainant because of complainant's refusal to give the consignee a credit for the alleged freight overcharge. See letter of Mr. McCormack, May 27, 1974; also letter of Mr. McCormack dated March 30, 1974.

Again, interpreting all of the proffered information in the light most favorable to complainant, at best one could perhaps say that the alleged overcharge by ACE injured the consignee directly but only indirectly injured complainant. But was this injury or any injury caused by the failure of ACE to file its tariff in violation of section 18(b)(1)? Even had ACE filed its tariff, the same controversy most certainly would have arisen after ACE remeasured the shipment in question and increased the freight paid by the consignee. The remeasuring by ACE had nothing to do with the fact that ACE had not filed its tariff with the Commission. As the Commission is well aware from innumerable complaints alleging overcharges in violation of section 18(b)(3) in connection with tariffs which are filed, the filing of a tariff does not eliminate disputes over the correct measurement or nature of the commodity shipped. Therefore, the failure of ACE to file its tariff could not reasonably be construed to be the proximate cause of injury to complainant even under the most favorable reading of the complaint and all the information furnished by complainant in support thereof. Indeed, the complaint does not even allege that ACE failed to file its tariff or that such failure was the cause of injury to anyone.

What, then, if anything, can be done to salvage this complaint or to remedy an injury, if indeed ACE caused any injury? Regrettably for the consignee and complainant, even if ACE's failure to file a tariff in violation of section 18(b)(1) had been alleged and could be found to be the proximate cause of injury to the consignee,[12] the consignee, as the information furnished indicates, chose not to file its own complaint but to relay upon the efforts of the shipper-complainant who has admitted to the consignee that it has been acting only "as an intermediary and it may be

[12] In the realm of theory, one could perhaps argue that failure to file a tariff in violation of section 18(b)(1)is the proximate cause of loss of all rights which would have been established had the tariffs been lawfully filed, for example, the right to seek recovery for an overcharge under section 18(b)(3) or the right to seek disapproval of a rate under section 18(b)(5). Although one case seemed to hold that the measure of damages in cases involving failure to file tariffs depends upon a showing of payment *in excess of an unjust or unreasonable* amount, as noted above, perhaps another measure of damages could be the value of the party's right to file an overcharge claim under section 18(b)(3), which right could be measured by the amount of the overcharge. However, if the alleged overcharge occurred more than two years ago, as in the instant case, this measure of damages might be improper since it would circumvent the policy underlying the two-year period of limitations.

that the statute of limitations has run out." See letter from Mr. Hatch to McCormack International Pty Ltd., April 9, 1977. To save the cause of action under an overcharge theory, i.e., assuming that the complaint has validly alleged a violation of section 18(b)(3) even though no rates were on file, a simple solution would have been for the shipper-complainant to have obtained a valid assignment of the claim for consideration.[13] In other words, complainant could have bought the claim from the consignee, thereby satisfying the consignee and perhaps eliminating any strained relationships between shipper and consignee that may have ensued as a result of the remeasuring episode. Indeed, as certain correspondence discussed above indicates, the consignee had itself suggested to the complainant that complainant ought to make good on the overcharge if ACE did not. Complainant, however, chose to continue as a self-styled "intermediary" for the consignee and the consignee chose not to file its own complaint. Both parties therefore assumed certain risks. The former risked possible dismissal for lack of standing and violation of the Commission's rule prohibiting practice before the Commission by firms or corporations on behalf of others (46 CFR 502.28). The latter risked loss of its right to seek recovery by not filing its complaint within the prescribed two year period of limitation.

APPLICATION OF THE STATUTE OF LIMITATIONS

If, as respondent contends, and as case law seems to hold, an assignment of the consignee's claim to the shipper-complainant at this date would be treated as a new complaint and thus be time barred,[14] the result may be regrettable from complainant's standpoint but delay in filing a sustainable complaint beyond a permissible period of time established by law is not excusable on the ground that a person did not know the law or understand its procedures.

The two-year period of limitation prescribed in section 22 is a non-waivable jurisdictional prerequisite for the filing of a complaint seeking

[13] Even if the only valid cause of action is that arising under a section 18(b)(1) theory, i.e., failure of ACE to file its tariff (but the complaint does not even allege either a failure to file or that failure to file caused injury to complainant), complainant could have obtained an assignment from the consignee and perhaps conferred standing on itself to recover pecuniary injury suffered by the consignee, assuming that failure to file the tariff was the proximate cause of injury to the consignee. Of course, anyone can file a complaint alleging violation of the Shipping Act even without showing injury, i.e., without a claim for reparation. See *Trane Co. v. South African Marine Corp.*, cited above, 16 SRR at p. 1501 and cases cited therein. In this instance, however, there is no need to litigate the issue of ACE's failure to file under section 18(b)(1) since that violation has already been found by the Commission in Docket No. 73–66, cited above, assuming complainant wishes to refile a new complaint, which, unlike the present complaint, clearly alleges such violation.

[14] See *Trane Co. v. South African Marine Corp.*, cited above, 16 SRR at p. 1508, footnote 17, and cases cite therein, especially *Ocean Freight Consultants, Inc. v. The Bank Line Ltd.*, 5 SRR 609 and 829, where this Commission treated the filing of an assignment as starting a new complaint even though there was no change in complainants. This is not a case in which the complaint clearly states a cause of action and shows standing to recover reparation so that an amendment to the measure of damages portion of the complaint would be permissible even at this late date. See *Heterochemical Corp. v. Port Line, Ltd.*, 12 SRR 223 (1971). Nor is this a case in which the complainant was at all times the agent or "manager" of the principal's vessel, which had been placed at a disadvantage in violation of section 16 First of the Act, so that a clarification to the complaint could be permitted despite the passage of more than two years. See *Chr. Salvesen Ltd. v. West Michigan Dock & Market Corp.*, 9 SRR 1154 (1968); 12 F.M.C. 135, 141 (1966). Here, complainant has itself stated that "we were acting only as shipper" and "we have been acting as an intermediary." See Letter from Mr. Hatch to the consignee, April 9, 1977.

reparation. *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471–472 (1968), *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959). Although in some cases hardships may result for failure to comply with such a statute of limitations, the general rule is that the period of time contained in these statutes cannot be extended except under unusual circumstances not present here.

As stated in 51 American Jurisprudence (Am Jur) 2d, Limitation of Actions, § 138,p.708:

> While most courts give recognition to certain implied exceptions arising from necessity, it is now conceded that they will not, as a general rule, read into statutes of limitation an exception which has not been embodied therein, however reasonable such exception may seem and even though the exception would be an equitable one. . . . Undoubtedly a hardship will result in many cases under this rule, but the court may construe only the clear words of the statute, and if its scope is to be enlarged, the remedy should be legislative rather than judicial. (Footnotes and citations therein omitted.)

There are certain recognized exceptions to this strict rule, such as when a party is prevented from bringing an action by a supervening paramount force, legal injunction or other proceeding, by war, duress, fraudulent concealment, and the like. See 51 Am Jur 2d, cited above, § 140, p. 711; § 170 et seq. But there is no extension of time beyond the statutory limitation because of a party's inability to bring suit, absence or nonresidence of a party, or evasion of process, *Id.*, § 138, p. 709. A party's ignorance of his right to sue or lack of knowledge of the facts does not extend the statutory time either. *Id.*, § 146, p. 715. Even courts of equity will apply a statute of limitations "if the cause of action was known or might have been known by the exercise of vigilance in the use of means within reach." *Id.*, § 146, p. 716. Cf. also *Gruca v. United States Steel Corporation*, 495 F. 2d 1252, 1259 (3 Cir. 1974) (uncertainty of the law is no excuse);[15] *Marrerro Morales v. Bull Steamship Co.*, 279 F. 2d 299, 301 (1 Cir. 1960) (principle applicable not only to ignorance of substantive legal rights but also to ignorance of the procedures of law).

If an original complaint fails to state a cause of action, a later amendment falling beyond the statutory period will be time barred. *Id.*, § 218, p. 777. Nor can a later amendment name new parties or a new cause of action without being time barred if filed beyond the period of limitation. *Id.*, § 218, p. 777. However a later amendment curing defects in an earlier complaint may be considered as merely perfecting the same cause of action and be allowed even if falling beyond the time period. *Id.*, § 223, p. 780. Under certain circumstances, furthermore, if an original complaint is not defective and is brought by one party having standing on

[15] Certain comments of the Court bear repeating in this case. Thus, the Court stated:

> Clarity of the violation or uncertainty of the law are not factors which operate to excuse a party's delay. . . . The promptness which is demanded is not a naked assertion of a claim but the commencement of an action by the filing of a complaint. One cannot sit back, wait years for someone else to act as his stalking horse, and then ride the coattails of a favorable judicial decision irrespective of the delay involved. 495 F. 2d at p. 1259.

The analogy especially to the consignee's behavior in this case is obvious.

behalf of himself and others similarly situated in class-type suits, the naming of other plaintiffs at a later date is permitted even if done beyond the statutory period. See *Culver v. Bell & Loffland,* 146 F. 2d 29, 31 (9 Cir. 1945); *Marsh v. United States,* 97 F. 2d 327, 330 (4 Cir. 1938); *Wright v. United States Rubber Co.,* 69 F. Supp. 621, 624–625 (S.D. Iowa 1946); *Kam Koon Wan v. E. E. Black, Limited,* 75 F. Supp. 553, 564–565 (D. Hawaii 1948), affirmed, 188 F. 2d 558, cert. denied 342 U.S. 826.

I can find no circumstances in the present case which could permit the two-year period of limitation prescribed in section 22 of the Act to be extended under any of the foregoing doctrines, assuming the shipper-complainant were to obtain an assignment from the consignee at this late date or that the consignee itself would choose to file a complaint. As mentioned above, the fact that the consignee was in Australia and may not have been familiar with its rights does not constitute reason to extend the statutory period. Nor does the fact that my initial decision found no jurisdiction over ACE constitute a valid excuse for the parties' failure to exercise whatever rights to sue they possessed. My initial decision, as it states explicitly, and as is known in the law, did not constitute the agency's final decision on the matter and nothing prevented complainant from obtaining a valid assignment of the consignee's claim or the consignee from filing its own complaint during the pendency of the "appeal" from my decision. An action is deemed to be pending until its final disposition on appeal. 1 am Jur 2d, Actions, § 91.[16] As already noted, furthermore, an assignment of a claim has been treated by this Commission as well as the I.C.C. as a new complaint and would be time barred if filed now. As I have mentioned above, both complainant and the consignee have chosen to pursue the course taken, namely, that complainant will act as "intermediary" for the party having the real claim, i.e. the consignees, and they have accordingly run certain risks considering the fact that complainant, not paying the freight, had no standing to recover the alleged overcharge and made no efforts to obtain a valid assignment of the claim, and consignee chose not to file its own complaint. In addition, the complaint suffers from deficient draftsmanship and failure to make necessary allegations of fact. Under all these circumstances, I can find no reason in law or equity why the statute of limitations does not apply. However, as I mention below, the parties have an automatic right to appeal to the Commission to seek reversal of any or all of my rulings herein if the Commission disagrees with me.

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[16] The complaint case was held in abeyance pending the Commission's decision in Docket No. 73–66 at respondent's request. See letter dated October 8, 1974, from then presiding Judge John Marshall to Mr. Hatch. However, the letter merely stated that "further action will be withheld pending decision" of the other case. It did not prevent the filing of a complaint by the consignee or by complainant as assignee of the claim. There is some authority holding that the statutory period may be extended while a matter of general or governmental concern supporting the claim is being determined. However, even in these rare instances, there is no extension allowed if the party could have filed its claim in timely fashion during the pendency of the other determintaion. See 51 Am Jur 2d, § 140, p. 712, note 5.

ULTIMATE CONCLUSION

Even under the most favorable reading of the complaint, the complaint does not allege either a violation of law or compensable injury and the materials furnished by complainant, even if accepted as true, despite factual disputes, fail to show that complainant has suffered injury which was proximately caused by a violation of law by respondent.

The basis for the complaint, which is seriously deficient in its draftsmanship, appears to be that respondent ACE remeasured a shipment, arriving at a different result than that indicated by the shipper complainant, and billed the consignee accordingly. Had respondent maintained a tariff on file with the Commission and if complainant could prove that ACE's measurement was incorrect, this would not confer standing on complainant to recover reparation since the consignee, not complainant, paid the freight and complainant had never received a valid assignment of the claim from the consignee. However, respondent's tariff was not on file and the only violation of law which can be found is that arising under section 18(b)(1) of the Act. However, even then, complainant must allege and show that the failure to file a tariff was the proximate cause of injury to complainant. Yet the complaint does not even allege these facts and the supporting information furnished by complainant gives absolutely no indication that consignee's injury, which allegedly resulted from an overcharge of $2,716.65, was caused proximately or even remotely by ACE's failure to file its tariff. Complainant has admitted it suffered no loss and has acted only as an "intermediary" although suggesting elsewhere that it has lost business in Australia presumably because of the overcharge episode. Supporting information suggests other reasons for lost business but even if there were no such contrary information, the complaint does not allege that ACE's failure to file its tariff caused complainant's loss of business in Australia. Even on the most favorable reading of all complainant's information, it cannot rationally be argued that this controversy arising out of ACE's remeasurement of the shipment and consequent freight increase was caused by ACE's failure to file a tariff. Despite counless tariffs on file with the Commission, disputes over measurements or the nature of the commodities shipped, i.e., overcharge claims, continue to flow into the Commission.

Having chosen not to obtain a valid assignment of the consignee's claim and not having paid the freight itself, complainant ran the risk of being unable to show standing to seek reparation. The consignee similarly chose not to file its own complaint and ran the risk of losing its rights to do so with the passage of two years after the alleged overcharge occurred. Although perhaps regrettable that possible injury may not be remediable, claims of unfamiliarity with the law or its procedures are not accepted as reasons to extend a statute of limitations.

Since complainant is not represented by counsel, I am advising complainant that it has the right to file an appeal with the Commission asking the Commission to reverse my rulings herein and reinstate its complain. See 46 CFR 502.153. If complainant wishes to appeal, it must normally file such appeal within 10 days of date of service of these rulings and must serve 15 copies of its appeal with the Commission and one copy on respondent's counsel. 46 CFR 502.114. I also advise complainant that it may request the Commission for permission to file an appeal beyond the 10-day period (which, for other cases filed after this complaint, was changed to 15 days). Such requests should be directed to Mr. Joseph C. Polking, Acting Secretary, Federal Maritime Commission, Washington, D. C. 20573, Tel. (202)–523–5725. If complainant files no appeal, the Commission may nevertheless review my rulings, in which event the Commission will notify the parties. Otherwise, absent appeal or review, my rulings will become final within 30 days. 46 CFR 502.227(c).

(S) NORMAN D. KLINE,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 545; DOCKET NO. 71–75]

RULES GOVERNING THE FILING OF AGREEMENTS BETWEEN COMMON CARRIERS BY WATER AND/OR "OTHER PERSONS" SUBJECT TO THE SHIPPING ACT, 1916

July 7, 1977

NOTICE OF WITHDRAWAL OF PROPOSED RULE

AGENCY: Federal Maritime Commission

ACTION: Withdrawal of Proposed Rule.

SUMMARY: This notice withdraws a proposed rule providing guidelines relating to the filing of certain types of agreements for scrutiny pursuant to section 15 of the Shipping Act, 1916. The Commission has determined that various issues raised in the course of the proceeding require further analysis requiring the withdrawal of the proposed rule at this time. The effect of this action is to permit the currently effective guidelines of 46 C.F.R. § 530.5 to remain in effect.

EFFECTIVE DATE: Upon publication in the *Federal Register*

FOR FURTHER INFORMATION CONTACT:

Joseph C. Polking, Acting Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by a Notice of Proposed Rulemaking published August 13, 1971, (36 F.R. 15128) with the intention of establishing rules governing the filing of agreements covering the lease, license, assignment or use of marine terminal property or facilities or other agreements of a similar nature between common carriers by water and/or "other persons" subject to the Shipping Act, 1916. Upon the request of various interested parties and good cause appearing, the proceeding was postponed until further notice on October 14, 1971 (36 F.R. 19982).

A number of parties had filed comments in response to our Notice of Proposed Rulemaking. Many of these comments reflected concern and confusion over the rules proposed in this proceeding as they relate to agreements involving stevedores and stevedoring contracts.

Considering the time lapse since the institution of this proceeding and the technological changes which have occurred in the operation of terminals, the Commission has decided to withdraw the proposed rule, discontinue the present proceeding, and to review the entire matter of terminal agreements in order to determine what further action should be taken.

THEREFORE, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

AND IT IS FURTHER ORDERED, That the rule proposed on August 13, 1971 and published on that date in the *Federal Register* (36 F.R. 15127) be, and hereby is withdrawn.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 501

U. S. DESPATCH AGENCY

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

July 6, 1977

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 6, 1977.

It is Ordered, That applicant is authorized to waive collection of $875.00 of the charges previously assessed U. S. Despatch Agency.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 501 that effective June 14, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period June 14, 1976, through August 17, 1976, the U. S. State Department Project Rate on 'Office Supplies, Paper, Soaps, Typewriters and Accessories and Furniture', minimum 1600 ft. per container is $187.50 M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 501

U. S. DESPATCH AGENCY

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

By application filed December 6, 1976, Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment of office supplies consigned to the American Ambassador, Tehran, weighing 22,414 pounds and measuring 2,000 cubic feet from Elizabeth, New Jersey, to Tehran, Iran, on June 10, 1976. The applicable rate at the time of shipment was $205 per ton of 40 cubic feet, minimum 1,600 cubic feet per container.[2] This rate resulted in aggregate freight charges of $10,250.00. The rate sought to be applied is $187.50 per ton of 40 cubic feet, minimum 1,600 cubic feet per container.[3] This rate would have resulted in total freight charges of $9,375.00. Permission to waive collection of $875 is requested.

Approximately June 7, 1976, Sea-Land's sales personnel made a verbal commitment with the complainant to reduce its existing through Project rate of $205.00 M on the involved articles from Elizabeth, N. J., to Tehran, Iran, to $187.50 M. Based on this commitment, a booking for one containerload was made, to move within about one week's time. The agreed rate was required to be competitive with an identical rate already in effect via a competitive carrier, American Export Lines. Instructions were given to the tariff publication department on June 7 to file the reduced rate to become effective June 14 so that it would be in effect if the shipment moved on Sea-Land's weekly sailing scheduled for June 16. Through clerical error, compounded by misunderstanding between sales and pricing personnel, the request for publication was restricted to the

[1] This decision became the decision of the Commission July 6, 1977.

[2] Sea-Land Service, Inc., Tariff 251, FMC No. 124, Original page 22–B.

[3] Sea-Land Service, Inc., Tariff 251, FMC No. 124, 2nd Revised Page 22–B.

single entry for "Furniture, Office" instead of to all entries with the exception of "Effects, personal" in the Project Rate item. The request was received by tariff publications on June 9 and telegraphic filing was made on June 11 as reflected on 1st revised page 22–B of the applicable tariff. Unknown to pricing and tariff publication personnel, the shipment was delivered to Sea-Land's terminal in time for loading on its weekly sailing which departed on June 10, the *SS Sea-Land Market*. Bill of lading, dated June 10, was issued on that sailing. Freight charges were assessed in the amount of $10,250.00 at the then applicable rate of $205.00 M on original page 22–B of the tariff. The shipper entered the rate of $187.50 M that he had been promised on the face of the bill of lading and reduced the billed freight charges to that basis when paying his freight bill.

When the error in tariff publication was brought to the attention of pricing personnel, it was corrected to the agreed basis by telegraphic filing effective August 17, 1976, as reflected on 2nd revised page 22–B.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 92, *Special Docket Applications,* Rules of Practice and procedure, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

The Senate Report[5] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

Through clerical error Sea-Land failed to file and publish the intended rate. This is the type of error that section 18(b)(3) was fashioned for.

It is therefore found:

1. There was an inadvertent failure to file and publish the intended rate;
2. The waiver will not result in discrimination among shippers;
3. Prior to requesting permission to waive collection of a portion of the freight charges Sea-Land filed a new tariff setting forth the rate upon which the waiver would be based; and
4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land will be permitted to waive collection of $875 from the U. S. Despatch Agency on the June 10, 1976, shipment.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 9, 1977.

[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 500

SADAGEH TRADING INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

July 6, 1977

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 6, 1977.

It is Ordered, That applicant is authorized to waive collection of $4,059.38 of the charges previously assessed Sadageh Trading Inc.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 500 that effective October 6, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 6, 1976 through October 27, 1976, the rate on 'Automobile, Parts', minimum 20 WT per container is $375.00 per 2,240 lbs, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 500

SADAGEH TRADING INC.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

By application filed December 1, 1976, Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment of automobile parts (head lamps, nuts, and bolts) consigned to Order of Bank Sepah, Tehran, Iran, aggregating 41,755 pounds (shipped as 44,800 pounds) from New York to Tehran, Iran, on October 3, 1976. The rate applicable at the time of shipment as $375.00 W/M, Min. 20 tons of 40 cu. ft. or 2,240 pounds. The rate sought to be applied is $375.00 per 2,240 pounds, Min. 20 W.T. or 44,800 pounds. This rate would have resulted in total freight charges of $7,500.00. Therefore permission to waive collection of $4,059.38 is requested.

Sadageh Trading, through its freight forwarder, Trans-International Forwarders, Inc., called Sea-Land for a rate quotation on automobile parts from Elizabeth, New Jersey, to Tehran, Iran. Sea-Land quoted but did not publish $375.00 per 2,240 pounds, minimum 44,800 pounds per container on September 24, 1976. On September 29, 1976, a review of cargo bookings for the Sea-Land *Resource* scheduled to sail October 6, 1976, revealed a container of automobile parts for which no rate was published. In a subsequent telephone discussion with the forwarder it was disclosed that negotiations between the shipper, forwarder and consignee were consummated on the basis of the firm telephone quotation made by Sea-Land on September 24 as the forwarder was led to believe the rate quote would be published. A telex filing was made by Sea-Land to cover the movement. The filing was made on September 30, 1976, to become effective October 6, 1976. The rate was inadvertently filed on the basis of

[1] This decision became the decision of the Commission July 6, 1977.

40 cubic feet or 2,240 pounds, whichever resulted in the greater freight charge. When the discrepancy was noted, a telex rate filing was made correcting the filing by including a minimum weight per container of 20 weight tons. A corrected publication was made following disclosure of the initial erroneous publication.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 92, *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was clerical error due to an incorrect filing of a new rate.
2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to waive collection of a portion of the

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

freight charges, Sea-Land filed a new tariff which sets forth the rate on which such waiver would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, represented by $4,059.38.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 9, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 510

IDECO RIGS AND EQUIPMENT OPERATIONS

v.

LYKES BROS. STEAMSHIP COMPANY, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

July 6, 1977

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 6, 1977.

It is Ordered, That applicant is authorized to waive collection of $7,443.09 of the charges previously assessed Ideco Rigs and Equipment Operations.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

> "Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 510 that effective September 8, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from September 8, 1976, through February 4, 1977, the rate on 'Oil Well Supplies, 1 Rig weighing 64.36 LT and measuring 11,787 cu. ft. Port Arthur/Rotterdam' is $20,000 lumpsum, subject to all applicable rules, regulations, terms and conditions of said rate and tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 510

IDECO RIGS AND EQUIPMENT OPERATIONS

v.

LYKES BROS. STEAMSHIP COMPANY, INC.

Application granted.

INITIAL DECISION[1] OF JOHN E COGRAVE, ADMINISTRATIVE LAW JUDGE

By application filed March 1, 1977, Lykes Bros. Steamship Company, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment of oil well supplies consigned to IDECO Rigs and Equipment Operations, weighing 114,300 pounds and measuring 11,786.71 cubic feet from Port Arthur, Texas, to Rotterdam on September 8, 1976. The rate applicable at the time of shipment was Oil Well Supplies NOS \$87.75 per 2,240 pounds or 40 cubic feet, plus \$50.75 per 2,240 pounds or 40 cubic feet heavy lift.[2] The rate sought to be applied is Oil Well Supplies Lumpsum \$20,000.00.[3] Therefore, permission to waive collection of \$7,443.09 is requested.

In August 1976, Lykes Bros. Steamship Co., Inc. and IDECO Rig & Equipment Operations negotiated a lumpsum rate of \$20,000 Berth Terms, Beaumont/Rotterdam to cover the movement of one rig weighing 64.36 long tons and measuring 11,787 cubic feet. Lykes requested the Gulf European Freight Association's secretary to conduct a poll on September 1, 1976, asking the conference members for their concurrence by September 7, 1976. The concurrence was forthcoming September 7, and the secretary issued instructions for a tariff filing effective September 8, 1976, for a thirty day period in the GEFA Tariff No. 2 (FMC–2). Due to GEFA's tariff clerk's inadvertence in failing to file the \$20,000 lumpsum rate, that rate was not filed until September 16, 1976, and even then a clerical error was made by filing the rate as effective September 20, 1976, expiring October 19, 1976. Moreover although the rig was originally

[1] This decision became the decision of the Commission July 6, 1977.

[2] Gulf European Freight Association Tariff No. 2 (FMC–2).

[3] Same tariff of rates, Thirty-first revised page 94.

booked to move Beaumont, Texas/Rotterdam, it was necessary to shift the barge from Beaumont to Port Arthur because the Beaumont gantry was out of service, and this fact was not communicated to the CEFA tariff clerk to permit correction of the rate. Consequently, at the time the shipment was loaded on September 8, 1976, there was no tariff entry to cover this shipment other than the NOS rate on oil well supplies.[4]

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 92, *Special Docket Applications*, Rules of Practice and procedure, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[5] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[6] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was an error due to an inadvertence in failing to file a new rate.

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[4] The shift from Beaumont to Port Arthur was due to the carrier's inability to perform at the original port of origin and in no way affects the original error which gives rise to the grant of this application.

[5] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[6] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Lykes filed a new tariff which sets forth the rate on which such waiver would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Lykes Bros. Steamship Company, Inc., to waive collection of a portion of the freight charges represented by $7,443.09.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 10, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 520

RIVIANA INT'L., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

July 6, 1977

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 6, 1977.

It is Ordered, That applicant is authorized to waive collection of $10,819.59 of the charges previously assessed Riviana Int'l., Inc.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket 520 that effective November 26, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from November 26, 1976, through December 16, 1976, the rate on 'Rice, packed' minimum 500 LT for shipment, Houston/Rotterdam was $49.00 W FO, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 520

RIVIANA INT'L., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Lykes Bros. Steamship Co., Inc. (Lykes Bros. or Applicant), has applied for permission to waive collection of a portion of the freight charges on a shipment of American milled rice, which moved from Houston, Texas, to Rotterdam, Netherlands, under Lykes Bros. bill of lading dated November 26, 1976. The application was filed May 24, 1977.

The subject shipment moved under Gulf European Freight Association (GEFA) Agreement No. 9360–3 Tariff No. 2, FMC–2, 13th revised page 112, effective November 15, 1976, for the item "Rice, brewers, broken, milled, clean, packed." The aggregate weight of the shipment was 1,127,250 pounds. The rate applicable at the time of shipment was $70.50 per long ton (weight only). The rate sought to be applied is a negotiated rate of $49 per long ton, free out, with a minimum of 500 long tons per shipment (also weight only), pursuant to GEFA Tariff No. 2, FMC–2, 14th revised page 112, effective December 16, 1976, for the item "Rice, packed—a/c Combi, Lykes and Sealand only . . . Houston/Rotterdam—thru January 16, 1976."

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $35,478.18. Aggregate freight charges at the rate sought to be applied amount to $24,658.59. The difference sought to be waived is $10,819.59. The applicant is not aware of any other

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[1] This decision became the decision of the Commission July 6, 1977.

[2] 46 U.S.C. 817, as amended.

shipment of the same commodity which moved via Lykes Bros. during the same time period at the rates involved in this shipment.

Lykes Bros. offers the following as grounds for granting the application:

> In November 1976, Lykes Bros. Steamship Co., Inc., negotiated with *Riviana International, Inc.* of Houston an ocean rate of $49.00/2240 lbs. free-out min. 500 LT (long ton) per shipment covering a shipment of 503 LT of bagged rice, to move on TILLIE LYKES, Position 1816, Voyage 33, from Houston to Rotterdam. (See attachment #1, telex exchanges reflecting negotiated and agreed rate of $49.00/2240# F.O. min 500 LT per shipment.)
>
> Cargo was loaded on November 26, 1976, B/L (bill of lading) dated accordingly and cargo rated at the negotiated rate of $49.00/2240 lbs. free out min. 500 LT per shipment (See attachment #2 B/L 15 covering shipment of Riviana Int'l., Inc.) and shipper paid ocean freight of $24,658.59 basis the negotiated rate (See attachment #3, invoice reflecting billing/payment by shipper).
>
> Due to a clerical error, Lykes Bros. Steamship Co., Inc. inadvertently failed to file the agreed rate covering the above shipment and this rate was not filed in the Gulf European Freight Association Tariff No. 2 (FMC-2) until December 16, 1976 for a 30 day period.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to timely file the negotiated rate for shipments of the subject commodity weighing a minimum of 500 long tons, as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Lykes Bros. filed a new tariff which set forth the rate on which such waiver would be based.

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[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

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

Accordingly, permission is granted to Lykes Bros. Steamship Co., Inc., to waive collection of a portion of the freight charges, specifically the amount of $10,819.59. An appropriate notice will be published in Lykes Bros. tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
June 9, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–56

MCALLISTER BROTHERS, INC.

v.

NORFOLK & WESTERN RAILWAY COMPANY

NOTICE OF DETERMINATION NOT TO REVIEW

July 13, 1977

Notice is hereby given that the Commission on July 13, 1977, determined not to review the order of dismissal in this proceeding served June 15, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 76–56

McAllister Brothers, Inc.

v.

NorfolkWestern Railway Company

June 15, 1977

MOTION TO DISMISS GRANTED

Complainant McAllister Brothers, Inc., has charged respondent the Norfolk & Western Railway Co. with violations of sections 16 and 17 of the Shipping Act, 1916.

McAllister, a New York corporation, operates tugboats engaged in docking and undocking operations at the Port of Norfolk. In charging N&W with violations of section 16 and 17 McAllister alleged that N&W either itself or through wholly owned subsidiaries operated marine terminals at Norfolk and furnished wharfage, dock, warehouse or other terminal facilities in connection with common carriers by water which conduct made N&W an other person subject to the Shipping Act, 1916, and subject to the Commission's jurisdiction.

In the operation of these terminal facilities N&W was alleged to have entered into an exclusive agreement with a tugboat operator for the performance of docking and undocking services at those Norfolk facilities, and that the use of N&W terminals was conditioned on the assessment of a charge by N&W for tug services even though docking and undocking would be performed by an operator other than the one under contract to N&W.

McAllister alleges that this places him at decided disadvantage and effectively precluded him from competing for tug business at N&W terminals, i.e., carriers could only employ McAllister at severe penalty—double charges for tugboat services. These alleged actions of N&W were said to be unduly prejudicial to McAllister in violation of section 16 First and to constitute an unreasonable practice under section 17 of the Shipping Act.

N&W in its answer denied that it was an "other person" subject to the Shipping Act and that it violated the Shipping Act.

In answering the complaint N&W clarified its terminal operations at the Port of Norfolk. N&W itself operates coal piers at Norfolk and through a wholly owned subsidiary it operates piers at Norfolk "over which merchandise other than coal are transferred to and from vessels." These are called by N&W "merchandise piers." According to N&W it has not entered into any exclusive arrangement with a tug operator for docking and undocking at any of the merchandise piers. It has, however, entered into such an arrangement for operations at the coal piers—in fact this practice goes back some 50 years. Finally N&W denies that it has ever assessed or threatened to assess double charges for tug services at its coal piers, and argues that the exclusive tug arrangement is made necessary by conditions existing at the coal piers and by competitive circumstances.

At the prehearing conference it began to appear that an evidentiary hearing might not be necessary in this case. A procedural schedule was set up whereby after discovery was completed, complainant would advise me whether it wished to continue the proceeding. In response to this schedule counsel for complainant advised that McAllister did not "intend to pursue its complaint to the point of obtaining adjudication of its substantive allegations." McAllister did, however, wish to obtain "an adjudication on the record that the Commission does not have jurisdiction over the activities described in McAllister's complaint." To this end McAllister & N&W were to enter into a stipulation and on the basis of that stipulation N&W was to file a motion to dismiss the proceedings and McAllister would not oppose the motion. The stipulation and motion have now been filed. The stipulation is set for in full below:

STIPULATION

Pursuant to Rule 10(v) of the Federal Maritime Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, it is hereby stipulated by and between the Norfolk & Western Railway Company ("N&W") and McAllister Brothers, Inc. ("McAllister") that the following statements of fact are accurate:

(1) McAllister is an operator of tugboats used for the docking and undocking of vessels in Norfolk and other United States East Coast ports.

(2) The N&W owns and operates the Lamberts Point Coal Piers ("LPCP"), located at Norfolk, Virginia, which is used to load coal transported over the Norfolk & Western's railroad system, upon vessels for transportation to ports in the United States and foreign countries.

(3) No commodity other than coal is loaded at LPCP, and no commodities of any kind are unloaded at LPCP.

(4) Lamberts' Point Docks, Incorporated, a wholly-owned subsidiary of the N&W, operates merchandise piers at Norfolk which are utilized to load and unload general merchandise cargo between N&W railroad cars and vessels.

(5) No coal is loaded upon vessels at the merchandise piers.

(6) The vessels that call upon LPCP carry shiploads of coal and are engaged on the

basis of a charter or contract of affreightment between the vessel owner or operator and the purchaser or the seller of the coal.

(7) The vessels calling upon LPCP do not hold themselves out to carry coal for any person other than the person that contracts for their services.

(8) The vessels calling upon LPCP do not solicit any cargo other than the coal transported under contract, they do not advertise a sailing schedule, they do not publish a tariff or the carriage of coal from Norfolk, nor have they filed a tariff at the Commission for such carriage.

(9) The N&W has entered into an operating agreement dated February 10, 1968 with Coal Terminal Towing Corporation ("Coal Terminal") to provide docking and undocking assistance at LPCP.

(10) The Coal Terminal agreement does not apply to docking and undocking assistance provided at the merchandise piers, and there is no other agreement between the N&W, or any of its subsidiaries, and any other tugboat operator for the provision of docking and undocking assistance at the N&W's merchandise piers.

On the basis of the foregoing facts, N&W moves to dismiss the complaint for lack of jurisdiction in the Commission. N&W correctly notes that McAllisters complaint turns upon the existence or application of an exclusive agreement for tugboat operations at piers owned or operated by N&W or its subsidiary. Since no such agreement exists at any of the merchandise piers, the complaint is concerned only with operations at N&W's coal piers (LDCP).

Since N&W is not a common carrier by water Commission jurisdiction of N&W is dependent upon the finding that N&W is an "other person" subject to the Shipping Act. Such a person is defined as:

> . . . any person not included in the term "common carrier by water," carrying on the business of . . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. 46 U.S.C. § 801.

A terminal operator is not an "other person" if the only vessels calling at its piers are not common carriers. *New Orleans Steamship Ass'n v. Bunge Corp.*, 6 SRR 336 (1965), and *Agreement No. T–2719,* 13 SRR 800 (1973). (See also *Fall River Line Pier, Inc. v. International Trading Corp. of Virginia,* 399 F. 2d 413 (1st Cir. 1968)). Thus, if the vessels calling at LPCP are not common carriers, the Commission does not have jurisdiction of McAllister's complaint.

Although the Shipping Act does not define the term common carrier, the Commission has consistently held that Congress intended the Shipping Act to apply to common carriers at common law. *Carrier Status of Containerships, Inc.*, 6 SRR 483, 489 (1965), *Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293, 300 (1953), *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 615, 620 (1959), and *Galveston Chamber of Com. v. Saguenay Terminals, Ltd.*, 4 F.M.B. 375, 377-378 (1954). The common law definition of common carrier most frequently cited in Commission precedent is the statement in *The Wildenfels,* 161 F. 864, 866 (2d Cir. 1908), where the court said:

> According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generall, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public

profession of his employment to be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.

Another definition, cited with almost equal frequency, is:

> A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in genral, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. *Propeller Niagra v. Cords*, 62 U.S. 41, 46 (1858).

At common law, therefore, a carrier is a common carrier if it holds itself out to carry goods for anyone. In adopting the common law definition the Commission stated in *Carrier Status of Containerships, Inc., supra,* at 489, that:

> The Commission has examined the indicia of "common carrier at common law" on numerous occasions. The most frequently mentioned characteristic is that a common carrier by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry.

The vessels calling at LPCP do not hold themselves out as common carriers. Rather, the vessels carry coal under contract or charter only for either the purchaser or the seller of the coal. The vessels calling at LPCP do not even hold themselves out to carry *coal* for all persons indifferently. They do not advertise a sailing schedule, they have not published a tariff for the carriage of coal, nor have they filed a tariff for such carriage at the Commission. No vessels other than the coal carriers call at LPCP.

From the foregoing it is clear that the vessels calling at LPCP are not common carriers, and thus the N&W does not provide terminal services "in connection with a common carrier by water." The N&W is not an "other person" with respect to its operations at LPCP and, consequently, the Commission does not have jurisdiction of LPCP's operations.

Accordingly, the complaint should be dismissed.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–2

SUN COMPANY, INCORPORATED

v.

LYKES BROS. STEAMSHIP COMPANY, INCORPORATED

NOTICE OF ADOPTION OF INITIAL DECISION

July 13, 1977

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding served June 16, 1977, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 13, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–2

SUN COMPANY, INCORPORATED

v.

LYKES BROS. STEAMSHIP COMPANY, INCORPORATED

Through a combination of commodity misdescriptions and improper billing under a Standard Contract Rate rather than an Industrial Contract Rate, the complainant was overcharged for a shipment of oil well drilling supplies. Reparation awarded.

J. B. Como, Jr., International Transportation Manager of complainant corporation, for Sun Company, Inc., complainant.

Edward S. Bagley, of Terriberry, Carroll, Yancey & Farrell, for Lykes Bros. Steamship Co., Inc., respondent.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

By complaint filed February 17, 1977, the Sun Co., Inc. (Sun or the complainant), alleges that in violation of section 18(b)(3) of the Shipping Act, 1916,[2] inapplicable rates were charged by the Lykes Bros. Steamship Co., Inc. (Lykes, the carrier or respondent) on a shipment of oil well drilling supplies, i.e., 265 boxes of drilling mud compound, 43 boxes of caustic soda, and 23 pallets of chemical products, which was shipped from New Orleans, Louisiana, to Antofagasta, Chile, in transit to Bolivia. The bill of lading was dated February 12, 1975; however, the shipment did not arrive in Antofagasta until March 7, 1975, and payment of the freight charges was made on March 10, 1975. Total freight charges paid amounted to $46,504.85, including bunker surcharge and tolls. The complainant alleges that, after correcting for cargo misdescriptions and applying the Industrial Contract Rate, the proper aggregate freight charges should have totalled $38,103.30.

By consent of the parties and with the approval of the presiding officer, this proceeding has been conducted under the shortened procedure provided in Rules 181–187 of the Commission's Rules of Practice and Procedure (Subpart K, 46 CFR 502.181–187).

[1] This decision became the decision of the Commission July 13, 1977.

[2] 46 U.S.C. 817(b)(3), as amended.

The facts, figures and assertions are as set forth in Paragraphs I through IV of the complaint, and they are admitted[3] by the respondent, except for subparagraph III(m) wherein complainant claims that the respondent's "sole basis" for declining to refund the overcharge was the six-month rule in the tariff.[4] Respondent claims that, due to the descriptions submitted by complainant on the bill of lading and the complainant's failure to include the required proprietary clause[5] for the Industrial Contract Rate, the respondent had no alternative but to charge the higher rates assessed, as required by the conference rules (filed tariffs of the Atlantic & Gulf/West Coast of South America Conference). However, under the circumstances, respondent has no objection to adjusting the charges here involved and repaying the complainant the $8,401.55 demanded in the complaint, based on the cargo misdescription and inappropriate contract rate, if the Commission is satisfied "that complainant has met the 'heavy burden of proof' required" in such cases.

Discussion

A cursory reading of the complaint and attached documentation generates an initial impression that the action is barred[6] by the two-year statute of limitations (§ 22 Shipping Act, 1916, 46 U.S.C. 821). However, supplemental documentation, including the check sent in payment of the freight charge, establishes that payment was actually made on or about March 10, 1975, thus bringing the claim well within the required two-year period.[7]

The carrier's "six month rule" in the tariff (Tariff Item 7(b), *supra*, note 4) is likewise of no effect in barring this claim. *Kraft Foods v. FMC*, 538 F. 2d 445 (1976); *Polychrome Corp. v. Hamburg-America Line*, 15 F.M.C. 221, adopted by the Commission 15 F.M.C. 220 (1972).

With regard to cargo misdescription, past Commission policy and judicial precedent have unquestionably declared that a shipper's misdescription of cargo can still afford a basis for later reparation relief, and that in cases involving alleged overcharges under section 18(b)(3) of the Act the controlling test is what the complainant shipper actually shipped, and is not limited to how the cargo was described on the bill of lading. *Union Carbide Inter-America v. Venezuela Line*, 17 F.M.C. 181, 182 (1973);

[3] The answer does not expressly use the term "admit"; however, rather than strike this form of answer as constituting an improper pleading, thus exalting form over substance, I find the phrase "We are in basic agreement with the facts and contentions . . . in Paragraphs I thru IV" to be the legal equivalent of "We admit. . . ."

[4] Tariff Item 7(b) requires all claims for overcharge to be submitted to the carrier within six months after shipment.

[5] The missing proprietary cargo clause was supplied later, by sworn affidavit dated December 28, 1976; copy attached to complaint.

[6] Bill of lading is dated February 12, 1975; complaint was filed (received) at the FMC on February 17, 1977.

[7] Section 22, Shipping Act, 1916, provides that reparation claims must be filed "within two years after the cause of action accrued." See also 46 CFR 502.63. By judicial decision and Commission rulings, the two year period starts either upon delivery of the cargo to the carrier or *upon payment* of the freight charges, whichever is later. *Southern Pacific v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918); *Commercial Solvents Corp. v. Moore-McCormack Lines, Inc.*, 16 SRR 1631, 1632, fn. 3 (Jan. 4, 1977).

Abbott Laboratories v. Moore-McCormack Lines, Inc., 17 F.M.C. 191, 192 (1973); *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973). With regard to a shipper being charged a higher rate when he is already entitled to be assessed under a special contract rate, section 18(b)(3) also makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. "This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates themselves." *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 322 (1974), rev'd. on other grds. 538 F. 2d 445; see also *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *Boston & Maine RR v. Hooker*, 233 U.S. 97, 112 (1914).

In cargo misdescription cases, where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant shipper's (new) description, the Commission has held that the complainant has a "heavy burden of proof" and must establish, with reasonable certainty and definiteness, the validity of the claim. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973); *Johnson & Johnson Intl. v. Venezuelan Lines*, 16 F.M.C. 87, 94 (1973); *Colgate Palmolive Peet v. United Fruit Co.*, 11 SRR 979, 981 (1970). It is usually the case, as it is here, that the carrier in classifying and rating a shipment must look to the information supplied him by the shipper or freight forwarder. Accordingly, we cannot "fault" the carrier for relying on descriptions set forth on the subject bill of lading. However, in determining whether reparation should be awarded in a given case, i.e., whether section 18(b)(3) has been violated vis-a-vis the filed tariffs, "a tariff is a tariff" and the controlling test is finally what the complainant shipper can prove was actually shipped.[8]

In applying the foregoing principles to the facts of the instant case, I find that the respondent is a common carrier engaged in transportation by water from ports in the United States to ports in Chile, and, as such, is subject to the provisions of the Shipping Act, 1916, as amended; that respondent is a member of the Atlantic & Gulf/West Coast of South America Conference, S.B.SA-12,Freight Tariff, FMC-1, and, as such member, is required to charge freight rates in accordance with such filed tariff; that under bill of lading dated February 12, 1975, the respondent transported aboard its vessel *Stella Lykes* from New Orleans to Antofagasta, Chile, the commodities described in the first paragraph of this decision; and that the respondent charged and the complainant paid aggregate freight charges totalling $46,504.85, including bunker surcharge and tolls.

The complainant freely admits that its foreign freight forwarder

[8] "Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, rules and regulations in the carrier's filed tariff." *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 323 fn. 4 (1974); *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181, 182 (1973).

incorrectly described the shipment for rating purposes, i.e., the bill of lading description for drilling mud compounds should have indicated value per freight ton, some products were described by trade names, and a proprietary clause required by tariff rules[9] for the activation of the Industrial Contract Rate was inadvertently omitted.

The complainant qualifies for the "Industrial Contract Rates" by virtue of Contract No. 514 in effect with the Conference since January 30, 1975; and the missing proprietary clause was submitted with sworn affidavit on December 28, 1976. Accordingly, I find that the complainant was entitled to have its shipment rated on the basis of the "Industrial Contract Rates" in the filed tariff, and its total freight charges must be adjusted downward to reflect that rate basis. See also *Cities Service Intl. Inc. v. Lykes Bros.*, 16 SRR 847 (1976).

The complainant's freight forwarder also mistakenly used the trade names "Bit Lube," "Drilling Detergent" and "Pipe Lax" in the descriptions on the bill of lading, thus resulting in the respondent rating all such items as "Cargo, N.O.S.," a higher freight rate category than was appropriate, due to the carrier's reliance on Tariff Item 2(r) which allowed this procedure in just such circumstances. However, such trade name rules govern the rating of cargo by carriers only at the time of shipment, and cannot be invoked as a bar to a later showing in a proper proceeding before the Commission as to the exact nature of the commodity shipped. *Carborundum Co. v. Royal Netherlands Steamship Co.*, 16 SRR 1634, 1637–38 (Jan. 5, 1977). Furthermore, rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Co. v. Hamburg-Amerika Lines,* 10 F.M.C. 388 (1967).

Relying on the shipper's description on the bill of lading, the carrier assessed the following charges on the subject shipment:

265 boxes, drilling mud compounds, 708,000 pounds & 16,727 cubic feet, $35,754 based on $101/2000 pounds, per 12th revised page 154;

43 boxes, caustic soda, 81,450 pounds & 2,082 cubic feet, $2,416.96 based on $59.25/2000 pounds, per 34th revised page 123;

23 pallets, chemical products (bit lube, drilling detergent & pipe lax), rated as "Cargo, N.O.S.", 43,075 pounds & 1,193 cubic feet, $4,585.59 based on $153.75/40 cubic feet, per 5th revised page 149.

The bunker surcharge and tolls bring the total aggregate freight charge to $46,504.85. Although the tolls remain the same, the bunker surcharge amount changes when the shipment is assessed according to the revised cargo descriptions; thus, applying the Industrial Contract Rates and the new descriptions the revised freight charges would be as follows:

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[9] Tariff Item 1050, page 218, conference tariff referred to above (text).

Tariff Page & Item #	Commodity		Freight Charges
10th rev. p. 40, #140	Macogel, as Bentonite 415,900# at $70.75/2000#	$14,712.46	
8th rev. p. 218, #1050	Less 5%	735.62	$13,976.84
6th rev. p. 217, #1050	Caustic Soda, 81,450# at $52.75/2000#		2,148.24
1st rev. p. 192, #15 & *8th rev. p. 212	Aluminum Stearate, 54 cft at $76.00/40 cft		102.60
7th rev. p. 215, #1050	Spersene, as Drilling Mud Compound, Value over $500 but not over $700/2000#, 162,900# at 95.50/2000#		7,778.48
7th rev. p. 215, #1050	Resinex, as Drilling Mud Compound, Value over $1000/2000# 70,500# at $129.25/$2000#		4,556.06**
7th rev. p. 215, #1050	Magcophas, as Drilling Mud Compound, Value over $700 but not over $1000/2000# 20,990# at $112.25/2000#		1,178.06**
7th rev. p. 215, #1050	Stabil-Hole, as Drilling Mud Compound, Value over $300 but not over $500/2000# 13,550# at $85.50/2000#		579.26
7th rev. p. 215, #1050	Kwik Seal, Medium & Fine, as Drilling Mud Compound, Value over $700 but not over $1000/2000# 23,300# at $112.25/2000#		1,307.71
7th rev. p. 215, #1050	Bit-Lube, as Driling Mud Compound, Value over $1000/2000# 26,850# at $129.25/2000#		1,735.18**
7th rev. p. 215, #1050	Drilling Detergent, as Drilling Mud Compound, Value over $1000/2000# 13,675# at $129.25/2000#		883.75
7th rev. p. 215, #1050	Pipe Lax, as Drilling Mud Compound, Value over $1000/2000# 2,550# at $129.25/2000#		164.79
	Ocean Freight Total		$34,410.97**
	Bunker Surcharge		
	54 cft at $8.25/40 cft		11.14
	831,575# at $8.25/2000#		3,430.25
	Tolls		249.76
	Total		$38,102.12**

*The complaint specifies "9th rev." but this is an obvious tyographical error.
**After correction of minor computational errors in complaint.

As can be seen from the above list, the eight items from "Spersene" down to "Pipe Lax" have all been treated as simply different forms of drilling mud compound. The respondent carrier was not provided with a statement of value for drilling mud compounds nor was value indicated on the bill of lading. The carrier therefore arbitrarily rated drilling mud compounds at "actual value not over $300 per freight ton but not exceeding $500 per freight ton." Complainant shipper maintains that four[10] of such items should have been rated at "actual value over *$1,000 per freight ton*" as required by tariff page 8, item 2(h), to which class rates for drilling mud compounds are made subject. As indicated in the above list, the other four[11] drilling mud items should have varying minimum values of over $300, over $500 and over $700, as appropriate. Documentation attached to the complaint establishes that the eight items referred to above should, more properly, have been classified as drilling mud compounds, although the carrier's confusion on the point is understandable. As admitted in the complaint, "drilling mud compounds and drilling mud additives are elusive terms." Other than for transportation rating purposes, the petroleum industry considers the two terms synonymous. There is, however, a specific description published in the tariff for "oil well drilling muds" (tariff page 215, item #1050) and the Customs Export Schedule B provides a description for drilling mud under the subcategory "clays and other refractory minerals." The confusion is compounded by the fact that drilling mud does not really exist, as such, until the materials making it are mixed at the job site; thus, the term "drilling mud" is somewhat of a fiction when used for cargo rating or Customs export purposes. Accordingly, it seems that the term "drilling mud compounds," for commodity rating purposes, can only be applied to those products which become a composite part of the compound at the oil well drilling site. (Otherwise there can be *no* single commodity item which could ever come under this specifically named item in the tariff.) Of course, this would still exclude any component product for which there is already a more specific description and freight rate in the filed tariff.

CONCLUSIONS

I find that the complainant shipper has sustained its heavy burden of proof with regard to the alleged cargo misdescription and has established, with reasonable certainty and definiteness, the validity of its claim. I also find, as mentioned earlier, that the complainant was entitled to have its shipment rated on the basis of the Industrial Contract Rates. By application of these revisions to the original charges assessed by the carrier, I find that section 18(b)(3) of the Act was violated to the extent that the freight charges exceeded the revised amount calculated in the Complaint (repeated *supra*—totalling $38,102.12) after correction of minor computational errors.

The complainant was overcharged $8,402.73 and reparation is awarded in that amount. Because of the confusion caused by the complainant's improper description in the bill of lading and the complainant's own failure to submit the required proprietary clause at that time, no interest is awarded. Respondent will make repayment to the complainant within

[10] Resinex, Bit Lube, Drilling Detergent and Pipe Lax.

[11] Spersene, Magcophas, Stabil-Hole and Kwik Seal.

thirty (30) days from the issue date of this decision, or in such time as the Commission may later direct.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
June 16, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 512

CORNING GLASS WORKS

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

July 13, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 13, 1977.

It is Ordered, That applicant is authorized to refund $3,165.00 of the charges previously assessed Philips Gloelampen-fabrieken.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 512 that effective September 20, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from September 20, 1976, through September 29, 1976, the service one rate on 'Lamps, Semi-Finished Sealed Beam, other than Auto,' minimum 800 cft. per container is $52.75 WM, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 512

CORNING GLASS WORKS

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), the North Atlantic Continental Freight Conference (the Conference or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of lamps, which moved from Baltimore, Maryland, to Amsterdam, The Netherlands, under Atlantic Container Line bill of lading dated September 22, 1976. The application was filed March 17, 1977.

The subject shipment moved under North Atlantic Continental Freight (NACF) Conference Tariff No. 29, FMC–4, 12th revised page 250, item 812.4316.565, effective September 20, 1976 ("Lamps, semi-finished, sealed beam, other than auto"). The aggregate weight of the shipment was 95,370 pounds and measured 1551 cubic feet. The rate applicable at time of shipment was $52.75 per long ton or 40 cubic feet, whichever is greater (W/M), and with a minimum of *1600* cubic feet per container. The rate sought to be applied is the same $52.75 W/M but with a minimum of *800* cubic feet per container. (Each of the three containers here involved had *less* than 800 cubic feet per container.) This latter rate with the reduced minimum was pursuant to prior negotiation and was reflected in NACF Conference Tariff No. 29, FMC–4, 13th revised page 250, item 812.4316.555, effective September 29, 1976.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $6,330. Aggregate freight charges at the rate sought to be applied amount to $3,165. The difference sought to be

[1] This decision became the decision of the Commission July 13, 1977.

[2] 46 U.S.C. 817, as amended.

refunded is $3,165. The applicant is not aware of any other shipment of the same commodity which moved via Atlantic Container Line or the same conference (NACF) during the same time period at the rates involved in this shipment.

The Applicant offers the following as grounds for granting the application:

> We omitted to note in complainant's application (to the Conference) for waiver of September 20, 1976 general rate increase, a request to also reduce minimum requirement to 800 cft per container in order to cover movements in 20 ft. containers. When complainant was advised of rate action (by the Conference) the omission was pointed out to conference chairman and promptly handled at next NACFC meeting as evidenced by change shown on 13th rev. page 250 which was eff. September 29, 1976. By this time the shipment herein referred to had been transported.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Although the nominal "complainant" in this proceeding is the shipper, Corning Glass Works, the documentary evidence discloses that the freight charge on this "Freight Collect" shipment was paid by Incotrans, as agent for the consignee, Philips Gloelampen-fabrieken of Einhoven, The Netherlands. Accordingly, any refund of freight charges must go to Incotrans, for the benefit of Philips Gloelampen-fabrieken, the party that ultimately bore the freight charges.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to timely file the new rate (new minimum) for shipments of the subject commodity, as had been promised the shipper.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

2. Such a refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to refund a portion of the freight charges, the Applicant filed a new tariff which set forth the rate on which such refund would be based.

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

Accordingly, permission is granted to Atlantic Container Line to refund a portion of the freight charges, specifically the amount of $3,165. An appropriate notice will be published in the tariff of the North Atlantic Continental Freight Conference.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
June 20, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–8

HAWAIIAN MARINE LINES, INC. PROPORTIONAL RATES ON LUMBER BETWEEN OREGON AND HAWAII

ORDER OF DISCONTINUANCE

July 22, 1977

The tariff matter subject of this investigation has been cancelled effective June 30, 1977. Accordingly, no further purpose would be served by continuation of this investigation and the proceeding is hereby discontinued.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[DOCKET 77–24; GENERAL ORDER 37]

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

Part 543—Financial Responsibility for Oil Pollution, Alaska Pipeline

July 26, 2977

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission hereby issues regulations which will enable vessel operators to comply with subsection (c) of section 204 of the Trans-Alaska Pipeline Authorization Act. That subsection makes the owners and operators of vessels which carry oil which has been transported through the trans-Alaska pipeline, jointly, severally, and strictly liable for damages resulting from the discharge of oil from such vessels. That subsection further requires that financial responsibility for $14 million be demonstrated before such oil may be loaded aboard a vessel. This rule is to provide the manner by which that financial responsibility can be demonstrated to the Federal Maritime Commission, and to provide for the issuance of Certificates attesting to that demonstration.

EFFECTIVE DATE: This rule is effective upon publication in the *Federal Register.*

FOR FURTHER INFORMATION CONTACT:

Leroy F. Fuller, Director
Bureau of Certification and Licensing
Federal Maritime Commission
1100 L Street, N.W.
Washington, D. C. 20573
(202) 523-5840

SUPPLEMENTARY INFORMATION:

By publication in the *Federal Register* of June 15, 1977, the Commission proposed to promulgate a new Part 543 of Title 46 of the Code of Federal Regulations implementing the financial responsibility provisions of the Trans-Alaska Pipeline Authorization Act (the Act). Comments from the public were invited with respect to those proposed rules. Because the Commission was informed that oil from the North Slope of Alaska was to be pumped through the pipeline commencing in June of 1977, with the loading of that oil aboard vessels at Valdez, Alaska, to commence in late July or early August of 1977, the Commission provided that comments were to be filed on or before July 5, 1977. Upon the request of the Water Quality Insurance Syndicate, which asserted that it is the leading pollution liability insurer in the United States, the deadline for the submission of comments was extended to July 8, 1977.

Comments with respect to the proposed rules were received from (1) Atlantic Richfield Company (Arco), (2) Exxon Company, U.S.A., (3) the Standard Oil Company (Sohio), (4) International Ocean Transport Corporation (International), (5) the International Group of Mutual Shipowners Protection and Indemnity Associations, and the International Tanker Indemnity Association, Limited (Group), (6) the Water Quality Insurance Syndicate (Syndicate), (7) the United States Department of the Interior, and (8) the State of Alaska. The comments fall into two main categories: those dealing with procedural matters, and those dealing with the substance of the regulations.

In the first category, Exxon and Sohio informed the Commission that they intend to load oil at Valdez, Alaska on July 28, and July 15, respectively, and requested a waiver of the requirement that applications for certificates be filed 45 days in advance of the loading date.[1] International asserted that a new certificate for liability under the Act is an unnecessary duplication of certificates; that the Commission should not require that the original of the certificate be carried aboard the vessel, but that it be maintained at the home office of the certificant, with a copy aboard the vessel; and that the requirement that the certificates be renewed every two years is an unnecessary burden upon the certificants. The State of Alaska urged that underwriters should be specifically amenable to suit in Alaska, British Columbia, and the three states adjacent to the Pacific Ocean; that the Commission's insurance form and guaranty form should explicitly provide that the termination of insurance or guaranty does not affect the liability of the insurer or guarantor for incidents occurring prior to the date of termination; and that the insurance form appended to the proposed rules should be made the policy of insurance issued by the insurer to the vessel operator, instead of it being only a representation to the Commission that there is such insurance in force.

In the second category, several commentators urged the Commission

[1] Due to the recent disruption of the operation of the pipeline, Sohio's loading has been delayed until July 26, 1977.

to require that, in addition to those vessels actually loading oil at the terminal facilities of the pipeline at Valdez, Alaska, any vessels carrying such oil, whether by transshipment, lighterage, or other reason, prior to the time that the oil is first brought ashore at a port under the jurisdiction of the United States, also be required to evidence their financial responsibility in accordance with these regulations. Several commentators also urged that the United States and the Trans-Alaska Pipeline Liability Fund should be the only ones afforded the right of direct action against underwriters, thereby denying any other potential claimant the right of direct action. The Group would go further, and would permit the right of direct action, only if the underwriter shall have the same defenses in an action brought by a claimant against the underwriter, as the underwriter would have in an action brought by the assured against the underwriter, such as, the defense of wilful misconduct on the part of the vessel operator. Arco asserted that the "quick assets" test for a self-insurer, found in section 543.6(a)(3) of the proposed rules, is impossible for it or any other oil company to meet. The Group echoed that sentiment, but the State of Alaska favored the quick assets test. The Water Quality Insurance Syndicate, which is comprised of 28 insurance companies selling marine insurance in the United States, stated that it will not provide insurance to cover the liabilities imposed by the Act, but asserted that the Act does not permit a direct action by a claimant against an underwriter.

The most extensive comments were provided by the Group. The International Group of Mutual Shipowners Protection and Indemnity Associations is comprised of 16 mutual protection and indemnity associations, which are each comprised of several shipowning companies. By means of assessments upon each member, insurance is provided to each member. The risks of the Group are further underwritten by the underwriters at Lloyds. The International Tanker Indemnity Association, Limited (ITIA) is the insurance arm of the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP). As its name implies, TOVALOP is an association of companies owning oil tankers, which, among other purposes, was constituted to provide insurance to its members covering the risk of liability for oil pollution. The underwriters at Lloyds also provide excess insurance to ITIA.

In addition to some comments already mentioned above, the Group asserted that the liability of an operator, of an insurer, for both Federal Water Pollution Control Act (FWPCA) liability and Trans-Alaska Pipeline Authorization Act liability, does not exceed $14 million in the aggregate. The Group wished to indicate its insurance of a particular vessel by the issuance of an addendum or amendment to the Commission's existing insurance form FMC–225, which deals with the insurance of the liability of vessels under the FWPCA (46 C.F.R. 542). The Group also wished to change the definition of "operator", so as to expressly include therein an owner and any owner *pro hac vice*, even if not technically a demise charterer. Lastly, the Group asserted that the insurer should be permitted to cancel its insurance upon 30 days' notice to the Commission.

Oil is currently flowing through the trans-Alaska pipeline enroute to the port of Valdez, Alaska. The Commission is informed that, within the next week, the oil will have reached the port, ready for loading aboard vessels for transportation to other places in the United States. Vessels are not permitted to load oil, unless the owner or operator of that vessel has established its financial responsibility to meet its liability under the Act. These regulations provide the methods by which that financial responsibility may be established, and for the issuance of certificates attesting to that financial responsibility. Without those certificates, the oil may not be loaded aboard the vessels at Valdez. Consequently, the Commission finds that, in order not to delay the transportation of oil from Alaska to other parts of the United States, the public interest requires that these rules be made effective immediately upon their publication in the *Federal Register;* and hereby does so provide.

The broad purposes of the Trans-Alaska Pipeline Authorization Act, as gleaned from its text and legislative history, are to provide for the construction of the trans-Alaska pipeline without further environmental challenge; to extract the petroleum located in the reserves of the North Slope of Alaska, so as to make available that petroleum to meet the energy needs of the United States; to protect the environment, property, and persons from injury resulting from the extraction and movement of that petroleum, including injury resulting from its ocean transportation; and to provide for the repair of or compensation for any injury sustained as a result of that extraction and transportation.

The purpose of these regulations is to assure that adequate funds will be available within reach of the courts of the United States, to pay all persons suffering injury as the result of oil pollution occasioned by the transportation of North Slope oil to other parts of the United States. The term "persons" is intended to refer to any individual or entity permitted to make a claim under the provisions of the Act. These regulations are designed to provide the maximum protection to the public, without being unduly burdensome. Any ambiguity in these regulations should be resolved in a manner most likely to provide the maximum protection to the public.

There follows hereafter a section by section analysis of these final rules. The comments received with regard to the proposed rules are discussed in connection with the sections of the rules to which they are applicable.

Section 543.1, Scope. The proposed rules required demonstration of financial responsibility only with respect to vessels which actually load oil at terminal facilities of the trans-Alaska pipeline. Comments urged that the requirement to demonstrate financial responsibility be extended to the operators of all vessels, whether or not actually loading oil at the terminal facilities of the pipeline, if those vessels carry North Slope oil during any segment of the journey between the terminal facilities of the pipeline and the point where that North Slope oil is first brought ashore at a port under the jurisdiction of the United States. Paragraph (1) of subsection (c) of section 204 of the Act provides:

> Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on *a vessel at the terminal facilities of the pipeline,* the owner and operator of *the vessel* (jointly and severally). . .shall be strictly liable without regard to fault. . .for all damages. . .sustained by any person or entity. . .as the result of discharges of oil *from such vessel.* (Emphasis supplied)

Thus, the first paragraph of the subsection clearly indicates that the owner and operator of the vessel which actually loads oil at the terminal facilities of the pipeline are liable for the discharges of oil from that vessel, but would appear to exclude any on carrying vessel from that strict liability.

However, the seventh paragraph of the subsection provides, that "[s]trict liability under this subsection shall cease when the oil has first been brought ashore at a port under the jurisdiction of the United States." Thus, that seventh paragraph casts doubt whether the first paragraph of the subsection was intended to apply only to the vessel originally loading the oil, for if strict liability does not cease until the oil has been first brought ashore, and if the oil is transshipped from the vessel which loaded it in Alaska, to another vessel for on carriage to a U.S. port, the strict liability does not cease, but the vessel which loaded it in Alaska can no longer discharge that oil, and, consequently, cannot be liable for a discharge.

It could be argued that the Congress determined that the greatest risk was to be found in vessels which actually loaded the oil in Alaska, and that discharges from only those vessels were to be protected by the Act, leaving the liability for discharges from any on carrying vessel to be determined under other applicable laws, including the Federal Water Pollution Control Act, and the several state statutes imposing liability for oil pollution. The report of the Committee of Conference, wherein the differences between the House and Senate versions of the Act were resolved, contains language supporting an interpretation that the Act is limited to vessels which originally load the oil in Alaska.[2] There, the conferees stated that:

> It is expected that tankers as large as 250,000 deadweight tons will transport North Slope crude to ports on the West Coast of the United States and elsewhere. Oil discharges from vessels of this size could result in extremely high damages to property and natural resources, including fisheries and amenities, especially if the mishap occurred close to a populated shoreline area.
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> . . .
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> The Conferees concluded that existing maritime law would not provide adequate compensation to all victims, including residents of Canada, in the event of the kind of *catastrophe which might occur.* (Emphasis supplied)

[2] Conference Report, H.R. Rep. No. 93–624, 93d Cong., 1st Sess. (1973).

Conference Report, p. 28. Thus, it can be argued that the Congress, anticipating that supertankers would be loading the oil in Alaska, sought to protect against discharges from those large vessels, and not from the smaller vessels which might be involved in the on carriage of the oil.

However, it can also be argued that the Congress intended that any vessel carrying North Slope crude should be subjected to the strict liability imposed by the Act. It can be argued, as the Department of the Interior does argue, that the specific language in paragraph (7) of subsection (c) of section 204 of the Act, dealing with the cessation of strict liability, should govern the more general imposition of liability contained in paragraph (1) of that subsection. Language can also be found in the Conference Report to support that interpretation. Thus, the Conference Report stated, that "[s]ubsection (c) imposes on the owner or operator of a vessel that is loaded with *any oil* from the trans-Alaska pipeline strict liability without regard to fault for damages sustained by any person as the result of discharges of oil from such vessel." (Emphasis supplied) Conference Report, p. 24. Again, the Conference Report states, that "[s]ection 204(c) provides, for vessels that transport North Slope oil in the coastal trade, liability standards that are much stricter than those that apply to vessels that transport *other oil in the coastal or foreign trade.*" (Emphasis supplied). Conference Report, p. 28. Lastly, the conferees stated, "[c]onsequently, the Conferees established a rule of strict liability for damages from discharges of the oil *transported through the trans-Alaska Pipeline* up to $100,000,000." (Emphasis supplied). Conference Report, p. 28.

The Department of the Interior, in its comments to the Commission regarding the proposed rules, stated that it is the agency charged with the implementation and interpretation of the Act, and that it interpreted the Act so as to impose strict liability upon all vessels engaged in any segment of the transportation of North Slope oil, until such time as that oil is first brought ashore at a port under the jurisdiction of the United States. The Department of the Interior, in its rules implementing the Act, provided that strict liability applied to all such vessels. 43 C.F.R. 29.7

When the broad purposes of the Act are considered, to wit: to push ahead with the construction and operation of the trans-Alaska pipeline without permitting further environmental challenge, and to provide compensation for injuries sustained as a result of the production and transportation of Alaskan oil; and in view of the position taken by the Department of the Interior in its final rules regarding this subject, the Commission concludes that the sounder interpretation of the Act is that its financial responsibility provisions apply to all vessels engaged in any segment of the transportation of trans-Alaska pipeline oil between the terminal facilities of the pipeline and the port under the jurisdiction of the United States where that oil is first brought ashore.

Accordingly, the Commission intends these regulations to apply to any vessel which has on board, oil which has been transported through the trans-Alaska pipeline, at any time between the time the oil is originally loaded at the terminal facilities of the trans-Alaska pipeline and the time it is first brought ashore at a Port under the jurisdictional United States, regardless of the purpose for which the oil is aboard the vessel. These rules shall apply to vessels which originally load the oil in Alaska, as well as to those vessels which receive such oil from any source and for any purpose, until such time as it is first brought ashore at a port under the jurisdiction of the United States. By the words "brought ashore" the Commission means that point where the oil is physically located on or above dry land, inland of the mean high tide mark, and at rest in such manner as to preclude the movement of the oil seaward again without the intervention of an intentional act by some person.

Section 543.2, Definitions. Most of the definitions contained in this section are self-explanatory. The definition of oil (543.2(h)) is to be given an expansive meaning. The definition of operator (543.2(i)), as it appeared in the proposed rules, was as follows:

> 'Operator' or "Vessel Operator' means any person, including a demise charterer, who conducts or who is responsible for the operation of a vessel.

The Group requested that the definition be amended, so as to expressly include within its terms, an owner of a vessel, and any owner *pro hac vice,* whether or not technically a demise charterer. The Commission has not amended the definition in precisely the manner requested by the Group. Any person who conducts or who is responsible for the operation of a vessel is an operator within the meaning of the rule. The Commission has, in these final rules, made express reference to an owner or demise charterer to make it clear that he is to be considered as the operator, only if he is the person who conducts or is responsible for the operation of a vessel. In other words, so long as the person operates the vessel or is responsible for its operation, the person is an operator within the definition, whether or not the person is the titled owner of the vessel, a demise charterer of the vessel, any other owner *pro hac vice* of the vessel, or any other class of person. This definition of operator ties in with the reference in paragraph (g) of section 543.4 wherein it is stated that only an operator of a vessel may apply for a certificate. The Commission intends to exclude from participation in this certification program persons who do not actually operate a vessel and who are not responsible for its operation.

Section 543.3, General. The provisions of this section have been substantially expanded in these final rules. The expansion is in line with, and necessitated by, the expanded scope of the rules. By this section, the Commission intends to prohibit any vessel to receive oil that has been transported through the trans-Alaska pipeline, prior to the time that oil is first brought ashore at a port under the jurisdiction of the United States, unless the vessel actually has on board the original copy of the certificate required by the rules, and can produce that certificate to enforcement officials upon demand. Thus, the section applies to the original loading of *that oil in Alaska, the subsequent loading of that oil at any other place,* the transportation of that oil, the transfer of that oil from one vessel to another, and merely having the oil on board a vessel whether or not the vessel is transporting the oil, or merely storing it.

In paragraph (b) of section 543.3, the Commission makes reference to "Deepwater Port". That term is not intended to refer to any port with a deep harbor but only to a facility within the scope of the Deepwater Port Act of 1974, Public Law 93–627, as defined in paragraph (10) of section 3 of that Act.

Section 543.4, Certificates, How Obtained. In this section the Commission sets forth the procedure which persons shall follow in order to obtain an initial certificate or a renewal certificate. The applications may be filed only with the Commission in Washington, D. C., but the appropriate forms may be obtained at any of the Commission's offices. The rules require that the application be completely filled in. Applications with blank spaces will not be accepted for filing. In line with section 543.9, Fees, paragraph (c) of section 543.4 requires only that the application and the evidence of financial responsibility be filed at least 45 days prior to the date upon which the vessel to be certificated will need the certificate.[3] Fees may be paid at any time, but certificates will not be issued until the required fees have been paid. Because an individual may bind himself, and a partner may bind a partnership, and an officer of a corporation may bind the corporation, the Commission does not require any additional authority to be shown if such a person signs the application. However, if anyone else signs the application, the application must be accompanied with documentation of the authority of the signer to sign the application, which documentation must itself be signed by a person authorized to confer the authority.

Only persons who actually conduct or are responsible for the operation of a vessel may apply for a certificate. Owners of vessels may apply for a certificate, but only if the owner also operates the vessel.

The procedure for obtaining a renewal certificate has been moved from section 543.7, Certificates, Issuance, to this section 543.4. The Commission will not accept requests for renewal certificates which are filed more than 60 days prior to the expiration date of the existing certificate.

[3] Because there is insufficient time between the promulgation of these final rules and the date upon which trans-Alaska pipeline oil will be available for loading at Valdez, Alaska, for vessel operators to file application for certificates in accordance with the time requirements of section 543.4(c) of these rules, and because that lack of time was not caused by those operators, and because one of the purposes of the Act is to expedite the movement of oil from the North Slope of Alaska to other parts of the United States, the Commission finds that the public interest requires that the time period set forth in section 543.4(c) of the rules be waived. Accordingly, that paragraph is waived to the extent necessary to permit operators of vessels which are to load oil on or before September 5, 1977, to file an application for certificates covering those vessels any time during the months of July and August 1977, but, in any event, prior to the loading of oil aboard those vessels. This special waiver of the 45 day filing requirement is not to be construed as a waiver of any of the other requirements in section 543.3 of the rules. Thus, the fact that an application may be filed less than 45 days prior to the anticipated loading date does not mean that it will be possible for the Commission to issue certificates in time to permit the vessel to load as anticipated. Accordingly, operators are urged to file their applications for certificates as soon as possible.

However, requests for renewal certificates must be filed no later than 45 days before the expiration date of the existing certificate. Failure to comply with those time periods might well result in the existing certificate expiring prior to the date a renewal certificate is issued. The request for a renewal certificate must be complete at the time it is filed with the Commission. That is, all information required by the rule must be in the request at the time it is filed with the Commission. For the purposes of this rule, a request shall not be considered to have been filed unless it is complete.

All applicants and certificants have a continuing duty to keep the Commission informed of any change in facts having a bearing upon financial responsibility of the applicant or certificant. In the case of applicants, that duty is specified in paragraph (i) of section 543.4. That paragraph applies to both initial and renewal applications. It is the Commission's intention that the Commission shall be informed of any change in the facts contained in the application or supporting documentation, whether favorable or unfavorable to the applicant, before the Commission issues the certificate for which application has been made. Thus, the applicant should not wait the five days technically permitted by the rule, hoping that a certificate will be issued in the interim, for if such a certificate is issued, it might well be revoked immediately thereafter. Further, if the applicants shall fail to notify the Commission of the change within the five days, the Commission might well deny the application for the certificate. The denial would proceed pursuant to subparagraph (3) of paragraph (a) of section 543.8 of the rules.

Section 543.5, Financial Responsibility, Amount. The rules provide that the financial responsibility established under these rules (Part 543) shall be separate from, and in addition to, the financial responsibility, if any, required of a vessel operator by the Federal Water Pollution Control Act (FWPCA) and the Commission's Rules implemented pursuant to that statute (Part 542). Sohio and the Group asserted that the Act establishes a new scheme of liability for vessels carrying North Slope oil, replacing the scheme of liability established by the FWPCA, so long as those vessels are carrying North Slope oil, and that, consequently, vessels should only be required to evidence their financial responsibility in the aggregate amount of $14,000,000, rather than in the amount of $14,000,000 plus whatever amount would be required by the tonnage of the vessel under the FWPCA.

The Act may be interpreted in three different ways. First, it can be argued, as the commentators do, that the Act completely supplants the FWPCA, so long as the vessel is carrying trans-Alaska pipeline oil. Second, it can be argued that the Act provides additional liability for the benefit of substantially different claimants, and for substantially different injuries, so that, in the event of an oil spill, the vessel operator could be liable to all claimants, including the United States, under the Act, and also be liable to the United States under the FWPCA. Thus, the United

States would be able to recover its cleanup costs from the vessel operator under the provisions of the FWPCA to the limit of liability provided in that statute, and the United States could also recover any additional cleanup costs, and other claimants could recover their damages, against the vessel under the Trans-Alaska Pipeline Authorization Act, up to the $14,000,000 limit of that Act, even though the claims arose out of the same incident. Third, it could be argued that the strict liability for $14,000,000 imposed upon the vessel operator by the Act is an initial substitute for the strict liability imposed upon the operator under the FWPCA, but that the operator would still be liable under the FWPCA, up to the limits of liability imposed by that statute, for any cleanup costs which exceeded the proportional share of the United States of the $100,000,000 maximum liability under the Act, if the total claims arising out of one incident exceeded that $100,000,000.

Paragraph (3) of subsection (c) of section 204 of the Act provides:

> Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed.. . .The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

Paragraph (9) of that subsection provides, that "[t]his subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements."

The Conference Report contains language which would tend to support the first argument, that the Act entirely supplants the FWPCA. In the report the conferees stated:

> Strict liability is primarily a question of insurance. The fundamental reason for the limits placed on liability in the Federal Water Quality Improvement Act [$14,000,000] stemmed from the availability, or nonavailability, of marine insurance. Without a readily available commercial source of insurance, liability without a dollar limitation would be meaningless and many independent owners could not operate their vessels. Since the world-wide maritime insurance industry claimed $14 million was the limit of the risk they would assume, this was the limit provided for in the Federal Water Quality Improvement Act. There has been no indication that this level has since increased.
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> Accordingly, the Conferees adopted a liability plan which would make the owner or operator strictly liable for all claims *(for both clean-up costs and damages to public and private parties)* up to $14 million. This limit would provide an incentive to the owner or operator to operate the vessel with due care and would not create too heavy an insurance burden for independent vessel owners lacking the means to self-insure.
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> . . .[The financial responsibility section of the FWPCA] would be used to the extent it is consistent with the purposes of this Act; for example, references to tonnage limitations would not apply. Claims for clean-up costs would take precedence over other claims thereby preserving the provisions of the Federal Water Quality Improvement Act.
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> . . .
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> The States are expressly not precluded from setting higher limits or from legislating in any manner not inconsistent with the provisions of this Act. (Emphasis supplied)

Conference Report, pp. 28–29. Thus, it can be argued that the language contained in paragraph (9) of subsection (c) of section 204 of the Act, dealing with preemption of the field of strict liability, was not intended to diminish the preemption effected by the Act with regard to strict liability under federal law, but was only to provide that the Act did not preempt the field with regard to state legislation. It can be argued that the Congress recognized that $14,000,000 was the dollar limit which the maritime insurance industry was willing to underwrite. Consequently, the Congress substituted a flat $14,000,000 liability in the Act for the variable $100 per gross ton liability in the FWPCA. Under this interpretation the liability of a vessel under the Act would attach when the vessel loads trans-Alaska pipeline oil, with the liability of vessel under the FWPCA terminating at that point. The liability of the vessel under the Act would continue until such time as the trans-Alaska pipeline oil was offloaded from that vessel, with the FWPCA liability again attaching to the vessel at that point of unloading.

However, that language in the Conference Report is also susceptible of a slightly different interpretation. Thus, according to the second argument, the Congress intended the Act to open strict liability up to claimants other than the United States and for damages other than clean-up. Because of the expanded number of claimants and damages, the Congress increased the liability of the vessel from $100 per gross ton to $14 million. The Congress realized that strict liability was an unrealistic standard unless a dollar limitation was applied to that liability. The emphasis there is on some limitation, not the amount. Because $14 million was the figure used as the maximum liability in the FWPCA, the Congress carried that dollar amount over into this Act. Further, the conferees,

> expected that tankers as large as 250,000 deadweight tons will transport North Slope crude to ports on the West Coast on the United States and elsewhere. Oil discharges from vessels of this size could result in extremely high damages to property and natural resources, including fisheries and amenities, especially if the mishap occurred close to a populated shoreline area.

Conference Report, p. 28. Thus, it can be argued that the Congress recognized that the damage which might ensue from the transportation of trans-Alaska pipeline oil, including the volume of oil which would have to be cleaned up by the United States, in the event of a discharge from a large tanker, would be much greater than the damage against which the FWPCA was intended to protect. To the extent that the United States was limited to recovery under the Act, other claimants will have a reduced pool of money from which to recover their damages. Consequently, it can be argued that the Congress intended the liability provisions of the Act to be in addition to the liability provisions already existing under the FWPCA.

For purposes of the third interpretation, we have hypothesized a tanker of 40,000 gross tons, which is involved in an incident which results in damages totalling $120 million, including $20 million in clean-up costs to the United States and $100 million in damages, for clean-up or otherwise, to persons other than the United States. Paragraph (3) of subsection (c) of section 204 of the Act provides that the first $14 million of that $120 million liability shall be apportioned to the vessel operator. $86 million of that $120 million liability would be apportioned to the Fund. Because the total claims are $120 million, the Act requires payment to each claimant to be reduced proportionately. As a result, the United States would receive only $16 million for its $20 million clean-up claim. The other claimants would receive only $84 million of their $100 million in claims. The remaining $20 million in claims, consisting of $4 million in claims by the United States for clean-up, and $16 million in claims by other claimants, may, under the Act, "be asserted and adjudicated under other clapplicable Federal or state law." The Federal Water Pollution Control Act is another Federal law, arguably applicable to the incident. Thus, the United States could proceed against the vessel operator under the FWPCA for an additional $4 million in clean-up costs. Because the vessel was of a size of 40,000 gross tons, the vessel operator would be liable for $100 per gross ton, or $4 million. Thus, it can be argued that, while the Act is intended to supplant the FWPCA so long as the total claims arising out of any one incident do not exceed $100 million, the Act allows the United States to recover for its clean-up costs under the FWPCA is the total damages arising out of any one incident exceed the $100 million limitation of the Trans-Alaska Pipeline Authorization Act.

The Group, being uncertain of the interrelation between the FWPCA and the Trans-Alaska Pipeline Authorization Act, would have the Commission interpret the Act in such a manner so as to conclude that vessel operators are not liable under the FWPCA in any incident covered by the Act. But, in these rules it is not necessary for the Commission to decide the question of liability. The Commission is charged with administering the financial responsibility provisions of both the FWPCA and the Trans-Alaska Pipeline Authorization Act. The Commission does not determine the liability of the vessel operator, but only makes certain that the vessel operator has sufficient assets to pay any liability to which it might be subjected by the FWPCA and/or the Act. Since reasonable arguments can be made that liability would attach to a vessel operator under both the FWPCA and the Trans-Alaska Pipeline Authorization Act for damages arising out of the same incident, the Commission must require that financial responsibility for both of those potential liabilities be evidenced, before certificates of financial responsibility are issued. If the Commission does not require evidence of financial responsibility for both potential liabilities, and the Act is later construed as holding an operator liable under both statutes, there might well be insufficient assets to meet that liability.

Thus, section 543.5 requires that an applicant for a certificate under these rules (Part 543) must demonstrate to the Commission that it will be able to pay claimants proceeding under the Act, the $14,000,000 for which the operator is made strictly liable under the Act, and, as a separate and distinct matter, that it will be able to pay claimants proceeding under the FWPCA the amount of money for which the FWPCA makes the applicant strictly liable, which amount is calculated in accordance with Part 542 of the Commission's rules. The evidence of insurance, bond, guaranty, self-insurance, or other method of establishing financial responsibility provided under Part 542 of the Commission's Rules, may NOT be used as evidence of financial responsibility for any portion of the $14,000,000 required to be demonstrated by these rules. However, the Commission does not express thereby any view as to whether the liability of an operator in any one incident shall be greater than $14,000,000.

Section 543.6, Financial Responsibility, How Established. This section sets forth the methods whereby the financial responsibility of applicants and certificants may be established and maintained, including reporting requirements and the forms to be used in the various methods. While the Commission will issue a certificate based on a properly completed application, accompanied by the required fees, and supported by evidence of financial responsibility complying strictly with *any one of the first four methods* set forth in paragraph (a) of this section, resort to a combination of methods will only be permitted, in the discretion of the Commission, if the Commission is satisfied that the public will be adequately protected by such combination. If an applicant seeks to establish its financial responsibility by a combination of methods, the applicant may, in the Commission's discretion, be required to furnish additional undertakings.

The methods of establishing financial responsibility are: insurance, bond, guaranty, self-insurance, and any other method, but the last only if it is specially justified to, and found acceptable by, the Commission. The first three methods are demonstrated by the applicant by the filing with the Commission of Forms FMC–225P, FMC–226P, and FMC–227P, respectively. The fourth method, self-insurance, has very extensive and detailed requirements, but drew only brief, albeit blunt, comment. The proposed rules contained the requirement that a vessel operator, wishing to self-insure, maintain, in the United States, quick assets $14 million in excess of current liabilities, and net worth also in the amount of $14 million. Such assets were defined as those which could be converted into United States currency within 30 days. Arco asserted that neither it, nor any other oil company, could meet that test. However, no reasons were given for that assertion. The Group merely echoed that sentiment, also failing to give any reason.

The Commission originally proposed the quick assets test for two purposes. First, the Commission wished to assure that self-insurers would have funds available to pay claims of injured persons expeditiously, without having to delay such payments during an extended period of time to liquidate sufficient assets. Second, the experience of the Commission with self-insurers under the Safety of Life at Sea Act, revealed that the working capital of a certificant can dissipate virtually overnight, and, in any event, well before the Commission would have notice of that change in the financial condition of the certificant. The Commission was of the view that, by requiring that a certificant maintain quick assets in the amount of $14 million, which would only be a portion of the certificant's working capital, a substantial buffer was interposed to alleviate the risk presented by the rapid dissipation of working capital. In line with that second purpose, the proposed rules required more frequent reporting of assets by certificants than is required in the present water pollution certification and passenger vessel certification programs.

However, the precise wording of the self-insurance requirement in the proposed rules, to wit: "quick assets $14 million in excess of current liabilities," went beyond the intent of the Commission. That requirement would impose an unreasonable burden upon applicants. For example, the annual financial reports of two of the largest oil companies in the United States show that these companies each had current assets of approximately $6 billion and current liabilities of approximately $4 billion. That would result in working capital of $2 billion. The precise wording of the proposed rules would require quick assets in the amount of $14 million in excess of the current liabilities. In the case of these two oil companies, this would require their maintaining quick assets of $4,014,000,000, so that their quick assets would exceed current liabilities of $14 million. That was not the intent of the Commission. It was intended that the self-insurer maintain at least $14 million of working capital, and, that at least $14 million of those current assets would be "quick assets".

The Commission has reconsidered the quick assets test altogether, and has determined to abandon that test in favor of a modified working capital test. Very few of the claims arising under the Act will be of the type which may be settled within a period of one month from the date of claim. Unlike the nonperformance of passenger transportation, where the amount of the claim of the passenger left stranded on the pier is quickly determined, and provable, by the receipts for the passage monies paid, the validity of a claim of a beach front property owner for damages resulting from oil pollution might well be open to dispute both as to the existence of damage and as to the dollar cost of that damage. Consequently, the Commission no longer perceives the settlement of claims within 30 days as a realistic goal, so one of the bases for its adopting a quick assets requirement in the proposed rules is no longer valid.

Further, the Congress intended that self insurance be a viable alternative method of establishing financial responsibility. The Act makes reference to subsection (p) of section 311 of the Federal Water Pollution Control Act as the mechanism for evidencing financial responsibility under the Act. Paragraph (1) of that subsection specifically provides for self-insurance as a method of evidencing financial responsibility. In the Conference Report on the Act, the conferees stated that, "[t]his limit [$14 million] would provide an incentive to the owner or operator to operate the vessel with due care and would not create too heavy an insurance burden for independent vessel owners *lacking the means to self-insure.*"

(Emphasis supplied) Conference Report, p. 29. Lastly, "quick assets" is not a commonly recognized term in accounting. The Commission foresees a virtually unlimited number of disputes as to which assets might properly be included within the term "quick assets." The Commission does not wish to impose a heavy burden upon applicants for certificates, unless that burden is required by, or contributes significantly to, the purposes of the Act. Because of the burden imposed by the quick assets test, and the perceived difficulties in its implementation, the Commission has determined that the financial responsibility of self-insuring applicants should be measured by reference to their working capital and net worth.

While the more frequent reporting requirements imposed by the rules will alleviate in some measure the risk of dissipation of the working capital of a self-insurer, prior to the time when the Commission could take action to revoke a certificate, those reporting requirements do not, alone, adequately balance that risk. One of the goals sought to be achieved by the quick assets test, to wit: a buffer sufficient to permit the Commission to perceive diminishing assets in time to require substitute evidence of financial responsibility before the public is injured, is still an essential concern of the Commission. So as to assure that an applicant is and will continue to be financially able to pay $14,000,000 in damages under the Act, the Commission is now requiring in these rules that the applicant/certificant demonstrate that it has working capital and net worth each in the amount of $19,000,000 in order to obtain a certificate for only one vessel.

Because the vessel operator is strictly liable for $14,000,000 in damages arising out of each incident, and because the likelihood that an operator will be involved in more than one incident increases with the increase in the number of vessels operated by a particular certificant at any given time, the Commission has required applicants wishing to be issued certificates for more than one vessel to establish that they have additional assets available to pay the damages arising out of multiple incidents. However, because the dollar amount of the probable damages to which an operator may be exposed by reason of the operation of more than one vessel at any given time is not directly proportional to the number of vessels operated, the increase in assets required for self-insured operators of more than one vessel progressively decreases for each additional vessel. Thus, the self-insured operator of more than one vessel is required to have only $5,000,000 in additional assets for the second vessel, $4,000,000 for the third vessel, $3,000,000 for the fourth vessel $2,000,000 for the fifth vessel, and $1,000,000 for the sixth vessel. No additional assets will be required for the seventh and subsequent vessels. Thus, the maximum amount of working capital and net worth which will be required from a self-insurer is $34,000,000, respectively.

Because one of the purposes of the Act is to provide to claimants a ready source of funds to compensate them for any injuries for which they may be entitled to recover under the Act, the Commission requires that the assets of a self-insurer, which may be included in computing the required working capital and net worth, must be located in the United States. Thus, working capital, acceptable for the purposes of these rules, is calculated by determining the amount of the current assets of the applicant which are located in the United States, and deducting from those current assets all of the current liabilities of the applicant, *wherever they are owed.* Similarly, net worth is calculated by determining the amount of the total assets of the applicant which are located in the United States and deducting from those assets the amount of all liabilities of the applicant, *wherever those liabilities are owed.*

Lastly, the amount required of a self-insurer under these rules is in addition to the amount required of the applicant under Part 542 of the Commission's rules, if the applicant holds a certificate under that Part 542 *as a self-insurer.* For example, an applicant who is required to show $4,000,000 under Part 542, must show the Commission $23,000,000 in working capital and net worth to get a certificate for one vessel under these rules. The requirement of additional assets imposed by subparagraph (3) of paragraph (a) of section 543.6 is different from the general requirement for separate and distinct financial responsibility imposed by section 543.5 of these rules, in that it is limited to applicants and certificants under these rules (Part 543) who are also self-insurers under Part 542 of the Commission's rules. In the event a self-insuring applicant or certificant under these rules (Part 543) holds a certificate under Part 542 of the Commission's rules by reason of insurance, bond, or guaranty, the applicant or certificant under this Part 543 is required only to demonstrate working capital and net worth in the amounts required under section 543.6(a)(3), that is $19,000,000 for one vessel, plus $5,000,000 for the second vessel, etc., so long as the insurance, bond, or guaranty under Part 542 remains in force.

Subparagraph (3) of paragraph (a) of section 543.6 requires an applicant to submit, with its application, its annual financial reports for its last fiscal year preceding the date of application. The Commission recognizes that an application for a certificate might be filed between the end of the applicant's fiscal year and receipt by the applicant of the certified financial reports for that fiscal year. In such an eventuality, it is the intention of the Commission that the applicant shall file, with the application, the certified financial reports for the last fiscal year for which certified reports have been received by the applicant. The applicant would then file with the Commission the certified financial reports for the fiscal year just ending, immediately upon receipt of those reports by the applicant.

The rules provide, in subdivision (iv) of subparagraph (3) of paragraph (a) of section 543.6, that self-insurers shall notify the Commission within five days of the date the self-insurer knew, or had reason to believe, that the amounts of working capital or net worth had fallen below the amounts required by subparagraph (3) of paragraph (a) of section 543.6. That requirement is but a specific example of the general continuing duty imposed upon all applicants and certificants to keep the Commission informed of changes which affect the financial condition of the applicant or certificant. The self-insurer is permitted only five days to make this notification because, in the case of self-insurers, time is of the essence. Similarly, the annual financial reports, the six-month financial reports, and the quarterly affidavits must be filed with the Commission at the stated times. Because the financial condition of a certificant can change drastically with little warning, the Commission intends that the deadlines for these reporting requirements be strictly complied with. The importance of these requirements is forcefully brought home by the provision that the certificates of a self-insurer who fails to timely file the reports required by subdivisions (i) and (ii) will be revoked by the Commission, on short notice to the certificant, *merely because the reports were not timely filed,* whether or not the reports are actually filed later and evidence a satisfactory financial condition. The Commission wants to stress that it expects these reports will be filed on time, and that self-insurers, faced with a deteriorating financial condition, will not delay the filing of their reports in the hope that their financial condition will improve, or in an attempt to load just one more vessel before the deteriorating financial condition is brought to the attention of the Commission. It is to guard against those risks that the revocation of certificates for failure to timely file the reports has been included in these rules and will be strictly enforced.

Because there may exist methods of establishing a vessel operator's financial responsibility other than those specifically set forth in these rules, the Commission has added as a fifth method, a catch-all provision to paragraph (a) of section 543.6. The catch-all method, newly incorporated into the rules, does not extend to modifications of the other four methods of establishing financial responsibility provided for in the rules. Specifically, the catch-all provision does not permit waivers of the amounts of assets required of a self-insurer, or to the reporting requirements imposed upon self-insurers. Rather, the catch-all method is intended to apply to a new method, for example, a letter of credit, or a rider or endorsement to an insurance policy, or some other form of financial responsibility heretofore unexamined by the Commission if, upon examination, the Commission finds it acceptable. The Commission does not intend the catch-all provision to be used with any frequency, and will require that an applicant who wishes to establish his financial responsibility by some other means other than those incorporated its graphs (1) through (4) of paragraph (a) of section 543.6 demonstrate that the new method is in the public interest by reference to identifiable and provable factors.

Subparagraph (4) of paragraph (a) of this section permits the filing of a guaranty as evidence of financial responsibility. In this method, one person (the guarantor) promises to stand for the debt of another (the guarantee). Often the guarantor is a parent or other corporate affiliate of the guarantee. By this subparagraph the Commission requires the guarantor to establish that it has the resources to make good on its guaranty. Thus, a guarantor must meet the same requirements as to working capital and net worth and the same reporting requirements as a self-insurer under these rules. Because a guarantor under these rules could also be a self-insurer in its own right under these rules, and/or under Part 542, and/or a guarantor under Part 542, these rules require a guarantor to demonstrate and maintain working capital and net worth each equal to the total of the obligations of the guarantor, as a guarantor and as a self-insurer. When calculating the amount of assets required of a guarantor, the amount shall not be calculated by reference to the total number of vessels which it guarantees or self-insures, rather, separate calculations shall be made for each operator which it guarantees and for its own self-insured vessels.

In paragraph (b) of section 543.6 the Commission permits the insurance form or the surety bond form to be signed by more than one insurer or surety, respectively. However, that permission is granted only if those underwriters undertake joint and several liability for the risks evidenced by the documents signed. Because the joint liability undertaken by the underwriters, when executing an insurance form or surety form jointly, will make each of the underwriters liable for the full $14,000,000 evidenced by the document, each underwriter signing must be financially able to carry that $14,000,000 risk, without regard to the specific division of risk agreed to among them.

The proposed rules provided, in section 543.6(c), that any insurance form, guaranty, or bond provided as evidence of financial responsibility under the rules, shall expressly permit direct action by the claimant against the underwriter; and further provided that, in any such direct action, the underwriter will be entitled to invoke only those rights and defenses permitted by the Act. The forms appended to the rules contained a consent to direct action and that limitation on the rights and defenses. The Group and the Water Quality Insurance Syndicate vigorously asserted that direct action is not permitted by the Act. The Syndicate took the position that no direct action is permitted, while the Group would permit a direct action only by the United States and the Trans-Alaska Pipeline Liability Fund, excluding direct action by any other claimant.

The Act provides, in paragraph (3) of subsection (c) of section 204, that the owner and operator of the vessel shall be jointly and severally liable for the first $14 million of claims that are allowable under the Act, and further provides that, "[f]inancial responsibility for $14,000,000 shall be demonstrated in accordance with the provisions of section 311(p) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321(p)) before the oil is loaded." Paragraph (3) of subsection (p) of section 311 of the Federal Water Pollution Control Act provides:

> Any claim for costs incurred by such vessel [a vessel subject to the Federal Water Pollution Control Act] may be brought directly against the insurer or other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

Paragraph (1) of that subsection (p) of section 311 requires certain vessels to evidence their financial responsibility in the amount of the lesser of $100 per gross ton or $14 million, to meet the liability to the United States to which such vessel could be subjected under section 311. Subsections (f) and (g) of that section make vessels, and third parties, liable to the United States for the costs the United States has incurred in cleaning up the discharges of oil or hazardous substances from vessels subject to the Federal Water Pollution Control Act. Thus, paragraph (3) of subsection (p) of section 311 of the FWPCA gives to all claimants under that statute, a right of direct action against an underwriter, but permits that underwriter to assert, in any such direct action, any defenses which the vessel operator would have been entitled to assert against the claimant, and any defenses which the underwriter would have been able to assert against the vessel operator, if the claim had been brought against the underwriter by the vessel operator instead of by the claimant.

There is no provision in the Trans-Alaska Pipeline Authorization Act which expressly grants a right of direct action against the underwriter by any claimant. The Act only refers to the FWPCA as the controlling statute with regard to the demonstration of financial responsibility under the Act. In the Conference Report, the House and Senate conferees stated:

> Since the Federal Water Quality Improvement Act has an existing mechanism for establishing proof of financial responsibility, reference was made to the appropriate provision (13 U.S.C. 1321(p)). Such provision would be used *to the extent it is consistent with the purposes of this Act;* for example, references to tonnage limitations would not apply. (Emphasis supplied).

Conference Report, p. 29. Thus, the Congress intended that the financial responsibility provisions of the FWPCA should be used when establishing financial responsibility under the Act, but only to the extent that those provisions are consistent with the purposes of the Act, apparently recognizing that the purposes of the Trans-Alaska Pipeline Authorization Act were different from those of the FWPCA.

The Water Quality Insurance Syndicate asserted that:

> The Act does not grant, nor does it even suggest, the right of a claimant to make claim directly against the insurer. Section 543.6(c) of the proposed regulations purports to grant to claimants the right to institute claims directly against the insurer. This constitutes an attempt to create a new cause of action against the insurer,—this can be done only by the legislature. In the absence of a statute to the contrary, there is no privity between an injured party and a liability insurer and the injured party cannot bring a direct action against the insurer.

It certainly cannot be said that Congress was unmindful of the possibility of direct action against an insurer. Direct action was permitted in the Water Quality Improvement Act of 1970, then was continued by the 1972 amendments. The omission of direct action must be taken as a deliberate act of Congress. On these facts, we feel that your Commission should not deviate from the provisions of the Act.

The concept of privity of contract, generally, would not prevent a cause of action by a person other than the contracting parties, here the insurer and its assured, merely because the other person was not expressly made a party to the contract. The concept of third party beneficiary recognizes that a third person might have been intended to benefit from the contract between two parties, thereby permitting the third party to rely on undertakings in the contract in a claim against the promisor, here the insurer. While the concept of third party beneficiary has not been applied to liability insurers, it has been applied to life insurance companies. Consequently, the concept of an insurer being held to answer directly to one not expressly party to the contract of insurance is not totally alien to the common law. Even so, the Commission, by these rules, does not create a new cause of action against the insurer, rather, the Commission, as a condition of accepting insurance as adequate evidence of financial responsibility under the Trans-Alaska Pipeline Authorization Act, requires the insurers to *consent* to be sued by claimants. It is, among other reasons, that consent of the insurer which would give rise to the cause of action by the claimant against the insurer, not the regulations of the Commission.

While it can be argued, as the Syndicate has, that the failure of the Congress to mention direct action in the Act was a conscious act precluding direct action, the better interpretation is that the Congress intended all of the provisions of section 311(p) of the FWPCA to apply to the establishment of financial responsibility under the Act, insofar as those provisions are consistent with the purposes of the Act. A grant of direct action by the claimant against the insurer, expressly contained in the FWPCA, is decidedly consistent with the purposes of the Act, for one of its purposes was to provide expeditious and easy compensation to claimants suffering injury as a result of discharges of oil. Consequently, the Commission concludes that the claimant has a right of direct action against the underwriter under the Trans-Alaska Pipeline Authorization Act.

However, the Group, while not denying the right of direct action generally, asserted that it is available only to the United States and the Trans-Alaska Pipeline Liability Fund. The Group presented no arguments as to why that should be the case. An argument can be made that, while the right of direct action against the underwriter is included within the Act by reason of the specific provision therefor in the FWPCA, that specific provision only runs to the United States in the FWPCA. Consequently, the argument would go, only the United States has a right of direct action against the underwriter under the Act. It could be further argued that, since the Fund, although established as a nonprofit corporate entity, is actually an instrumentality of the United States, the Fund should enjoy the same rights of direct action as does the United States.

However, the Congress did not use the words "United States" in that paragraph of the FWPCA which provides a right of direct action against the underwriter. The Congress used the word "claimant." Thus, the FWPCA granted a right of direct action by all claimants under that statute. When that provision was included within the Trans-Alaska Pipeline Authorization Act by reference, the Congress intended, similarly, to grant a right of direct action to all claimants under the latter Act as well. The Commission concludes that the more expansive interpretation is more consistent with the purposes of the Act, and, adopts it in these rules.

There remains the question of what defenses are available to the underwriter in such a direct action. The Group asserted that it should have all the defenses which it would have under the FWPCA. No reasons were given for that assertion. It can be argued that, if a right of direct action against the underwriter is found in the Trans-Alaska Pipeline Authorization Act by reason of its reference to the FWPCA, then the defenses which are permitted to that direct action in the FWPCA must follow the grant of the right of direct action.

Contrarily, the House and Senate conferees stated that the FWPCA's financial responsibility provisions were to be used only to the extent they were consistent with the purposes of the Trans-Alaska Pipeline Authorization Act. The FWPCA granted the vessel operator several defenses not permitted to the vessel operator under the Trans-Alaska Pipeline Authorization Act. Under the Act, the vessel operator may escape strict liability, only if it can prove that the damages were caused (a) by an act of war, (b) by the negligence of the United States or other governmental agency, or (c), with respect to a particular claimant, by the negligence of that claimant. The Trans-Alaska Pipeline Authorization Act did not include the defenses of act of God, and causation in a third party without regard to whether or not that third party was negligent, both of which defenses are available under the FWPCA. Thus, it can be argued that the Congress intended that persons injured by discharges of trans-Alaska pipeline oil should bear a substantially smaller portion of the risk of loss than they do under the FWPCA. If the underwriters are permitted to assert against the claimant all of the defenses they would be permitted to assert against their assured, that shifting of the risk of loss would be diminished.

Thus, on balance, the Commission concludes that, to the same extent that the Act includes the right of a direct action by all claimants against the insured by its reference to section 311(p) of the FWPCA, the Act also includes the defenses to such a direct action which the underwriter would have under the FWPCA, but only to the extent that those defenses are consistent with the purposes of the Trans-Alaska Pipeline Authorization Act, and these final rules so provide. Clearly, the defenses of act of God, and causation in a third party without regard to the negligence of that third party, and causation in any third party other than the United States or other governmental entity, are not consistent with the purposes of the Act, and would not be available to an underwriter in any action brought pursuant to the Act. Further, while certain defenses which an underwriter would have against its assured in an action brought by the assured against the underwriter, which go to the very existence of a contract of insurance, such as, fraud in the execution, might be available to an underwriter in an action brought against the underwriter by a claimant under the Act, not all defenses which an underwriter might have against its assured in an ordinary contract of insurance would be available to the underwriter under the Trans-Alaska Pipeline Authorization Act. For example, the defense of wilful misconduct on the part of the vessel operator is inconsistent with the purposes of the Act. While public policy might favor a defense of wilful misconduct on the part of the vessel operator in an action by the operator against its insurer pursuant to a contract of hull insurance, the policy considerations in the hull insurance situation do not obtain in this situation involving injury to third parties and their property resulting from oil pollution. In the hull insurance situation, public policy dictates that the vessel operator, who wilfully and wrongfully scuttles the vessel in deep water, should bear the full extent of the loss which that wrongful act occasioned, so as to deter others from engaging in similar wrongful acts. If the insurer may escape paying its assured for the scuttled vessel, only the assured will suffer. But, in the oil pollution situation, aside from the loss of the vessel, the wilfully wrongful operator might well not suffer at all, while the injured claimant would bear the full burden of the injuries resulting from the oil which escaped from the scuttled vessel. This is particularly true in the case where the vessel operator is one of those corporations whose sole assets are the vessel operated by the corporation, which vessel is heavily mortgaged. In such a situation, although the vessel operator would be liable up to $14 million to the person injured as a result of the escaping oil, that vessel operator would have no assets, other than insurance, to pay the claimant, because the vessel would no longer exist or, even if it were not a total loss, the mortgagee would recover all or most of the proceeds from the sale of the vessel. Thus, the claimant would receive no monies from the operator, and, if the underwriter was permitted to interpose the defense of wilful misconduct on the part of the vessel operator, no monies from the underwriter either. But, one of the purposes of the Act was to assure that the individual claimant would be compensated, and that the risk of that compensation be borne by those transporting the oil, either as self-insurers, or through the premiums paid to an underwriter. A particular vessel is permitted to carry trans-Alaska pipeline oil only after the United States is informed that the operator of that vessel has sufficient funds, by insurance or otherwise, to pay the damages for which the operator is made liable under the Act. The Commission will issue a certificate attesting to the world that a particular vessel operator, operating a particular vessel, has sufficient funds to pay those damages. The Commission does so, upon the representation of an insurer that the liability of the operator is insured. If the insurer is then permitted to assert, by reason of some act over which the Commission has no control, that the protection of the insurance is no longer there, the purposes of the Act will be soundly defeated. Consequently, the Commission concludes that the Act should not be interpreted so as to include the defense of wilful misconduct on the part of the operator.

In paragraph (f) of this section 543.6 is found another example of the continuing duty of certificants to keep the Commission informed of changes in data relevant to the financial responsibility of those certificants. To the extent the reporting requirements set forth in paragraph (f) are different from the reporting requirements set forth in subdivision (iv) of subparagraph (3) of paragraph (a) of this section, self-insurers must also comply with this paragraph (f).

Section 543.7, Certificates, Issuance. This section, amng other things, requires that the original copy of the certificate issued pursuant to these rules be carried on board the vessel, provides that the certificate will expire at a date certain, not more than two years from the date of issue, and provides that the certificate will be void if there are any erasures on or alterations of the certificate, or if the certificant is not the operator of the vessel named on the certificate. Those provisions are largely enforcement tools designed to prevent the unlawful use of certificates, and to facilitate a regular check on the validity of certificates. The ultimate purpose of these enforcement tools is to assure that the public is adequately protected.

International Ocean Transport Corporation asserted that it was unnecessary to require a new certificate under these rules, in addition to the existing certificate under Part 542 of the Commission's rules, that the Commission ought to allow any copy rather than the original of the certificate to be carried aboard the vessel, and that the renewal of certificates is an unnecessary burden upon certificants. Because the two statutes, the Act and the FWPCA, cover separate and distinct liabilities, different defenses, and different dollar limitations, and because of the practical problems involved in the revocation of certificates when the insurance covering the liability under one statute is cancelled, but the insurance under the other statute is not cancelled, the Commission concludes that two distinct certificates, one under Part 542 and one under Part 543, is the least burdensome method of carrying out its duties under the two statutes.

By requiring that the original certificate be kept on board the vessel, and that all certificates be returned to the Commission every two years, the Commission will be able to prevent the unlawful use of certificates. If the certificant were permitted to have on board the vessel a copy of the original certificate, enforcement officials would not be in a position to know whether the certificate had been returned to the Commission for revocation. Further, permitting the certificant to keep the original at its office, rather than aboard the vessel, would facilitate the deception of enforcement officials, for the certificate could be altered, and a copy of the altered certificate, whereon the alteration would be more difficult to detect, could be kept aboard the vessel. In like manner, expiring certificates will permit the Commission to weed out unused certificates, and will facilitate the enforcement of Commission revocation. Even if the certificant does not return the certificate, eventually, it will be invalid on its face.

Paragraph (b) of section 543.7 provides the procedure to be followed when the certificant ceases to be the operator of the vessel named on the certificate. The certificant is required to return the certificate to the Commission, and, by completing the reverse side of the certificate, inform the Commission of the nature of the change. In the event the certificant is unable to return the certificate, the certificant is required to provide the same information to the Commission by letter or other written means.

Section 543.8, Certificates, Denial or Revocation. In this section, the Commission sets forth the five reasons for denying an application for a certificate, or revoking one already issued. Subparagraph (1) of paragraph (a) of that section is intended to have broad effect. Thus, if an applicant or a certificant, or anyone acting on their behalf, shall wilfully make any false statement to the Commission in connection with the certificate being applied for, or the certificate held, the Commission may revoke the certificate or deny the application for a certificate, even though the applicant or certificant has demonstrated that it has the assets required by these rules. Although the subparagraph speaks in terms of applications or requests for certificates and the retention of certificates, the subparagraph applies to all dealings between the Commission and applicants or certificants with regard to the certification process.

Similarly, subparagraph (3) of paragraph (a) of this section would permit the Commission to deny or revoke a certificate for failure to comply with the Commission's inquiries, regulations, or orders, without regard to whether the applicant or certificant has demonstrated that it has the assets required by these rules. Subparagraph (4) of paragraph (a) of the section relates only to the annual financial reports, the six-month financial reports, and the quarterly affidavits required of self-insurers by subdivisions (i) and (ii) of subparagraph (3) of paragraph (a) of section 543.6 of these rules. The emphasis here is upon the timely filing of those required documents, and reflects the Commission's intention to closely police self-insurers. Even if the required statements are filed, if they are not filed on time, the certificate may be denied or revoked by the Commission.

Subparagraph (5) of paragraph (a) of this section extends to the cancellation or termination of any undertaking, even if the undertaking were filed as a portion of the evidence of financial responsibility where an applicant or certificant establishes its financial responsibility by a combination of methods, as permitted by paragraph (a) of section 543.6 of these rules. Thus, if an applicant or certificant were to establish its financial responsibility by maintaining in the United States only a portion of the working capital and net worth required by subparagraph (3) of paragraph (a) of section 543.6, with the balance of the assets being evidenced by a surety bond, the certificate would be revoked, if the bond were cancelled or terminated, even though there were no change in the working capital or net worth of the certificant.

Before denying an application for a certificate or revoking a certificate which it has issued, the Commission will inform the applicant or certificant of its intention, and will afford the applicant or certificant a period of time to show the Commission that the basis for its intended denial or revocation is not true. However, the period of time afforded varies according to the urgency of the action. Thus, where the Commission intends to revoke a certificate because an undertaking is to be cancelled or terminated, the Commission will revoke the certificate effective either with that cancellation or termination, or ten days after the date of the Commission's notice of intention to revoke, whichever is later. Similarly, if the reason for the intended revocation is the failure of a self-insurer to timely file the annual financial report, or the six-month financial report, or the quarterly affidavits, required by subdivisions (i) and (ii) of subparagraph (3) of paragraph (a) of section 543.6 of the rules, the revocation shall be effective 10 days after the date of the Commission's notice of intention to revoke. In both those situations the certificant shall be afforded the opportunity of a hearing, but that hearing shall be brief and circumscribed. The hearing shall be limited to permitting the certificant to show that, in the first case, the undertaking has not been cancelled or terminated, or to produce other evidence of financial responsibility in accordance with these rules, and, in the second situation, that the required financial statements were filed on time. Thus, in both those situations the issues are very limited, and would not require an evidentiary hearing. Indeed, only the briefest of hearings would be required. In both those situations the risk to the public attendant upon permitting a certificant to retain a certificate is so great that expedited resolution of the questions is mandatory.

Before effecting denials of applications or revocations of certificates on any other grounds, the applicant or certificant will be afforded 30 days after the date of the notice of intention to deny or revoke to request a hearing. If a timely request for a hearing is submitted to the Commission, the Commission will grant a hearing. However, the nature of the hearing will depend upon the context of the particular case. For example, the Commission will not order a full scale evidentiary hearing, unless there are disputes as to material facts. Since the Commission, in its notice of intention to deny or revoke, will state the reasons for the intended action, there will not be any disputes as to material facts unless the applicant or certificant, in its request for a hearing, disputes specific facts. A general denial, or vague assertions, will not be sufficient to precipitate lengthy hearings.

In its comments, the Group asserted, with respect to this section, that an insurer should be permitted to cancel an insurance certificate upon 30 days' notice to the Commission. That comment appears to proceed from a misunderstanding of this section. The Group appears to confuse its "certificates of insurance" with the certificates issued by the Commission after an applicant has established its financial responsibility. This section refers to the certificates issued by the Commission, not "certificates of insurance." The cancellation or termination of those latter certificates is provided for in the insurance form appended to, and incorporated within, these rules.

The four forms to be used in complying with these rules have been incorporated within the rules by reference. The forms are to be interpreted so as to be consistent with the rules, and with the purpose of the Act which these rules implement, to wit: the maximum protection of the public. Form FMC–224P, Application for Certificate of Financial Responsibility (Alaska Pipeline), is intended to provide the Commission with information as to identity, organization, location and vessels of each applicant. The form must be submitted to the Commission when an applicant applies for its first certificate under these rules. Thereafter, so long as the applicant holds at least one certificate, addition of vessels, changes in names of vessels, and deletion of vessels may be accomplished by letter, telegraph, or other writing. The application form is not required for those subsequent changes. Similarly, a certificant applying for a renewal of its existing certificate may do so by letter, telegraph, or other writing. However, when the application form is first submitted it must be complete. That is, all spaces on the application form must be filled in.

Forms FMC–225P, FMC–226P, and FMC–227P are the forms for insurance, surety bond, or guaranty. Each of those forms is an undertaking by an underwriter to provide sufficient monies to compensate persons making claims under the Act. Those undertakings are of indefinite duration, and may be terminated only in accordance with the provisions contained in the undertaking. Specifically, those undertakings may be terminated only by written notice to the Commission and to the vessel operator, received by the Commission at least 30 days prior to the effective date of the termination. However, even though notice of termination might be given to the Commission and the vessel operator, the vessel operator might, prior to the effective date of that termination, load trans-Alaska pipeline oil for a voyage which would continue beyond the stated effective date of termination. Consequently, the forms provide that, notwithstanding the notice given, the undertaking shall not terminate until the voyage, begun prior to the stated termination date, has been completed, and all of the oil off-loaded from the vessel. That provision will assure that there are assets available to pay claims which might arise out of that voyage in progress. The forms designate an agent in the

United States empowered to receive process relating to the Act or these rules, and further provide that the Secretary of the Commission will be that agent, in the event the designated agent cannot be served.

The State of Alaska urged that underwriters should be specifically amenable to suit in Alaska, British Columbia, Washington, Oregon and California. Alaska argued that the greatest amount of vessel traffic will occur within, or adjacent to, those five jurisdictions, thereby subjecting those jurisdictions to an increased likelihood of injury. According to Alaska, direct action against an underwriter is of little value to an Alaskan native, when the agent for service of process is located in New York City. The comment of Alaska has some merit, however, its implementation would raise practical difficulties. If the Commission were to require an agent for service of process in those five jurisdictions, it would appear necessary to also require an agent for service of process in other states, such as Georgia and Louisiana, where Deepwater Ports are likely to be constructed, and virtually any other State of the United States perceiving a substantial likelihood of oil pollution injury.

The Department of the Interior's rules regarding claims settlement specifically provide that a claimant may present its claim to the Trans-Alaska Pipeline Liability Fund, in lieu of suing the operator or its underwriter, if the operator or its underwriter does not timely settle the claim of the claimant.[4] Thus, the Alaskan native would be able to receive compensation for injury without leaving the State. The Fund would then proceed against the underwriter wherever the underwriter might be found. Further, while certain operators might make only one call at a given port, it is likely that most of the operators transporting trans-Alaska pipeline oil will return to the various ports on several occasions, thereby permitting the local residents to obtain jurisdiction over the operator in the local courts. Lastly, if the claim exceeds $10,000, jurisdiction would lie in United States district court, either under the federal question rule or, arguably, under subsection (n) of section 311 of the FWPCA, which grants jurisdiction to the district courts for any action arising under that section. In the district courts, venue will lie, among other places, in the district where the cause of action arose, which would include the district where the claimant sustained the injury. Since the jurisdiction of the several district courts extends throughout the United States, the district court for the District of Alaska would have jurisdiction over the agent located in New York City. In the view of the Commission, the increased burden upon underwriters which would result from maintaining agents in the several States, outweighs the benefits to the public which would result from imposing that requirement.

The form of bond, FMC-226P, provides that, "termination [of the bond] shall not affect the liability of the Surety in connection with an

[4] In any event, the Interior rules provide that *all* claims are to be physically delivered to the Fund, which has an office in Alaska, which will then send the claims on to the owner, operator, and underwriter.

incident occurring prior to the date such termination becomes effective." The insurance form, 225P, and the guaranty form, 227P, as proposed, provided that the insurance, or guaranty, are applicable only in relation to incidents giving rise to claims occurring between the effective date of the document and its termination. The insurance and guaranty forms do not contain the specific language, as to liability for incidents prior to termination, which is contained in the bond. Alaska urged the Commission to insert that specific language in the insurance and guaranty forms so as to preclude any argument that the liability is somehow different. As the State of Alaska concedes, the same result is obtained by the language presently contained in the insurance and guaranty forms. However, the addition of the specific language requested by Alaska would make more certain the liability of the insurer or guarantor for incidents occurring prior to the termination of the insurance policy or guaranty, and that language has been incorporated into Forms FMC–225P and FMC–227P.

The insurance form, FMC–225P, is a representation from the insurer to the Commission, that it has insured a particular vessel operator for the liabilities to which the vessel operator might be subjected pursuant to the Act. The form is not the actual insurance policy issued by the insurer to its assured. Alaska urged the Commission to require the insurer to file with the Commission a uniform endorsement to existing insurance policies, which would contain the actual language of the policies. Alaska was concerned that the actual policy of the insurer might differ from that represented by the insurer to the Commission.

The Commission's rules on the FWPCA (Part 542) provide that an applicant may evidence its financial responsibility by providing to the Commission a duplicate original of its insurance policy. If the applicant does so, to be acceptable to the Commission, that policy must contain a uniform endorsement incorporating into the policy, the liability imposed by the FWPCA. Alternatively, the applicant may submit to the Commission a certificate of insurance, wherein the insurer represents to the Commission that the applicant is insured by it against the liabilities imposed by the FWPCA. The latter method is that which is incorporated into these rules dealing with trans-Alaska pipeline oil pollution liability (Part 543). Of the more than 25,000 vessels certificated by the Commission under the FWPCA, the Commission has received only one insurance policy containing the uniform endorsement. All other applicants for certificates, relying upon insurance as the evidence of financial responsibility, have submitted the representation of the insurer that the applicant is insured by it. That method has worked well, and has not impaired the claims of the United States against vessel operators and their insurers under the FWPCA. Consequently, the Commission did not include the optional uniform endorsement method within the proposed rules regarding trans-Alaska pipeline oil. In the view of the Commission, the fear of Alaska, that claimants might be injured, if the policy of insurance differed from the representation made to the Commission, is not well founded.

Having represented to the Commission, for the purposes of causing the Commission to issue a certificate of financial responsibility, that a policy of insurance containing certain liabilities existed, an insurer is estopped from asserting that such a policy does not exist, or that the policy which does exist has terms and conditions different from those represented to the Commission. Consequently, that comment of Alaska has not been adopted.

The insurance form, FMC–225P, provides insurance to the limit of $14 million per incident. Similarly, the guaranty, Form FMC–227P, has a limit of liability of $14 million per incident. However, the bond is in a definite penal sum, without regard to the number, if any, of incidents in which vessels operated by the principal of the bond are involved. The bond is a schedule bond, and, in accord with the Commission's decision on self-insurance, the penal sum varies with the number of vessels listed in the schedule. For one vessel, the penal sum is $14 million. That sum differs from the $19 million required of a self-insurer for one vessel because the extra $5 million in working capital and net worth required of a self-insurer is intended to be a buffer as protection against the rapid dissipation of the assets of the self-insurer. That protection against dissipation is not required in the case of a bond, as the ability of the surety company to pay, is policed by other governmental agencies. Notwithstanding the maximum penal sum of $29 million, where there are six or more vessels listed in the schedule of the bond, the surety would not be liable for more than $14 million in any one incident, as the vessel operator is not liable for more than that amount. Because the bond is in an inflexible amount, the bond provides that the surety is not discharged of its obligation to pay the penal sum unless the principal shall pay, or the surety shall keep the Commission informed of all suits filed, judgments rendered, and payments made by the surety under the bond. This requirement is to permit the Commission to require a certificant to obtain additional evidence of financial responsibility where the surety has paid a portion, or all, of its obligation under the bond. If this requirement were not present, the Commission would not know when a surety had paid all that it was obligated to pay under the bond, thereby leaving a certificant without the assets required by the Act.

Accordingly, Subchapter B of Chapter IV of Title 46 of the Code of Federal Regulations is amended by the addition of a new Part 543.*

*The text of the amendment is reprinted in 46 C.F.R. 543.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–3

STATE OF ALASKA ON BEHALF OF TLINGIT-HAIDA PURCHASING ASSOCIATION AND ALL OTHERS SIMILARLY SITUATED

v.

PELICAN COLD STORAGE, INC., AND ALASKA OUTPORTS TRANSPORTATION ASSOCIATION, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

August 3, 1977

Notice is hereby given that the Commission on August 3, 1977, determined not to review the order of dismissal served by the Administrative Law Judge in this proceeding July 11, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–3

STATE OF ALASKA ON BEHALF OF TLINGIT-HAIDA PURCHASING ASSOCIATION AND ALL OTHERS SIMILARLY SITUATED

v.

PELICAN COLD STORAGE, INC., AND ALASKA OUTPORTS TRANSPORTATION ASSOCIATION, INC.

July 11, 1977

ORDER DISMISSING COMPLAINT

By joint motion dated June 23, 1977, the above-captioned complainant (State of Alaska) and both respondents (Pelican and Alaska Outports) have requested that the subject complaint be dismissed and the proceeding terminated, including as part of the motion papers a "Notification of Satisfaction of Complaint" setting forth the precise terms and conditions of settlement. The motion is unopposed.[1]

In its complaint filed with the Commission on February 22, 1977, the State of Alaska, by its Attorney General, alleged certain violations of sections 15 and 16 of the Shipping Act, 1916, charging the respondents with unlawfully discriminating against the Tlingit-Haida Purchasing Association (THPA) and other similarly situated shippers. The complaint requested that the Commission issue a cease and desist order against the discriminatory practices, an order that the respondents make their facilities available to all AOTA members on an equal basis, and that reparations be awarded in favor of THPA pursuant to section 22 of the ACT.

In addition to the terms and conditions of the settlement, the "Notice of Satisfaction of Complaint" also contains a recitation of certain stipulated facts (mainly jurisdictional and conceding, for purposes of this proceeding, that both respondents are subject to the requirements of the Act) and stipulated agreements for the payment of damages and counsel

[1] In order to facilitate reception and consideration of Hearing Counsel's views on the subject motion, Hearing Counsel's March 17 Petition to Intervene has been granted effective immediately prior to their filing response to the Motion to Dismiss.

fees (by Pelican to THPA), as well as a reservation of rights for the State of Alaska to proceed further and separately in the courts under State or Federal antitrust laws, should it later choose to do so.

The factual basis for the complaint mainly revolved around the denial of cargo space to THPA shipments by Alaska Outports (AOTA) ships from the freight terminal in Seattle to Pelican Cold Storage (PCS) docks in Pelican, Alaska, allegedly because the groceries, bait and fishing gear shipments would compete directly with the same items sold in the PCS company store. PCS is the dominant shipper in the AOTA membership organization and PCS and AOTA have an interlocking directorate, as well as sharing the same building in Seattle as their general offices. Although THPA was also a member of AOTA, it was the only member denied cargo space on AOTA ships.

The complainant agrees that, for purposes of this proceeding, its complaint has been satisfied by the respondents, and joins with the respondents requesting dismissal of the action. Both the law and Commission policy favor settlement. *Consolidated International Corp. v. Concordia Line,* 14 SRR 1259 (1975); *Merck, Sharp & Dohme, Intl. v. Atlantic Lines,* 14 SRR 232 (1974); Rules of Practice and Procedure, Rule 91, 46 CFR 502.91. I see no useful regulatory purpose to be served in continuing this proceeding, nor any public interest benefit in doing so. Accordingly, the Motion to Dismiss the Complaint is *GRANTED* and the proceeding is terminated.

Pursuant to the terms of the stipulation, payment of the agreed liquidated damages and counsel fees is to be made within thirty (30) days of the date of this Order, and the Commission is to be notified within seven (7) days thereafter that payment has been made.

(S) THOMAS W. REILLY,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–32

ARTIC LIGHTERAGE COMPANY-PROPOSED INITIAL TARIFF IN THE WESTERN ALASKA TRADE

NOTICE OF DETERMINATION NOT TO REVIEW

August 3, 1977

Notice is hereby given that the Commission on August 3, 1977, determined not to review the order of discontinuance of the Administrative Law Judge in this proceeding served July 7, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 76–32

ARCTIC LIGHTERAGE COMPANY — PROPOSED INITIAL TARIFF IN THE WESTERN ALASKA TRADE

July 7, 1977

PRESIDING ADMINISTRATIVE LAW JUDGE ORDER (1) FINDING INITIAL TARIFF NOT UNREASONABLE, (2) DISCONTINUING PROCEEDING

Joseph H. Delehant and *Mark P. Schlefer* for Respondent Arctic Lighterage Company
Edward A. Ryan and *Alan F. Wohlstetter* for Complainants (22 named in Order of Investigation and Hearing; Teller Commercial Company added by Amendment (see November 9, 1976 prehearing conference transcript, page 9). (In a letter dated February 22, 1977, signed by Attorney Wohlstetter, it is stated, *inter alia,* ". . . received notification from complainants of their inability to incur further expenses in the proceeding because additional funds were no longer available. Despite the lack of financial support, we did not formally withdraw our representation of the complainants, because in view of our past efforts on their behalf we have maintained an interest in the proceeding. . . ."
Charna J. Swedarsky and *John Robert Ewers,* Director of Bureau of Hearing Counsel for Commission's Bureau of Hearing Counsel.
Arrum M. Gross, Attorney General State of Alaska, *Joseph K. Donohue,* Assistant Attorney General, and *Bruce M. Botelko,* Assistant Attorney General, for Intervener State of Alaska.

The Commission, pursuant to sections 18(a) and 22 of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Act, 1933, directed by its June 11, 1976 Order of Investigation and Hearing (published in the *Federal Register June 16, 1976, Vol. 41, Number 117), this investigation into the lawfulness of Arctic Lighterage Company's (Arctic) initial Tariff FMC–F No. 1. And, whether said tariff is unreasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.*

Background

On May 12, 1976, Arctic filed an initial joint FMC/ICC Tariff (ICC Case No. 36362) to become effective June 15, 1976. The FMC portion of

Arctic's Tariff FMC–F No. 1 provides lighterage rates between ships and anchorage and shore at Nome and Kotzebue, Alaska, and commodity rates between ships anchorage and shore at Nome and Kotzebue and various coastal points in Alaska on the Bering Sea and Arctic Ocean. Arctic's proposed tariff sets forth the seasonal operation commencing on June 1 and terminating on September 15.

A prehearing conference was held herein on November 9, 1976. Hearings began on March 29, 1977. Hearing Counsel stated, *inter alia,* it had ". . . made a careful analysis based on the information supplied . . . by Arctic. We were not able to determine the actual rate of return, but after making certain adjustments to their asset values and changing some of the methods of allocation that we had disagreement with, the result that we reached was still what we consider to be not an unreasonable rate of return, which was 17.35 percent with an operating ratio of 88.05 percent." (Tr. 8, 9.) (See Exh. 2, p. 2.)

The parties present at the hearing agreed to continue discussions and to file a status report on or before April 29, 1977.

Also at the hearing, certain exhibits were identified, namely Exh. No. 1 for Identification, the direct testimony of Mr. William P. O'Shea, and Exh. No. 2 for Identification, the direct testimony of Thomas T. Morris, which included the General Order 11 Report of Arctic for 1976. (Tr. 28–30.) These identified exhibits were subsequently replaced by Exh. No. 1 (See Arctic Letter dated May 27, 1977 to Presiding Judge). Hearing Counsel in a letter to the Presiding Judge dated May 24, 1977, objected to receipt of Exhs. Nos. 1 and 2 for identification into evidence.

Under date of April 18, 1977, respondent Arctic served (received April 19, 1977) its Status Report after Conference with FMC Bureau of Hearing Counsel and Bureau of Industry Economics on April 12 and 13, 1977. The said status report asserted, in part, that after two days of dialogue among the participants, they came to substantial agreement on the financial data and analysis concerning the operations of Arctic as contained in Arctic's General Order 11 Report for the 1976 operating season. It was agreed to adjust FMC Vessel Operating Expense from 26.21% to 25.37%. Other changes of classification and amount were also agreed upon. As a result of the adjustments, Total Net *Loss* of Arctic FMC operations for the 1976 season is $169,764 (down from $229,694). Agreed to by Mr. Carey (See Exh. No. 2).

On April 29, 1977, Hearing Counsel served and filed its Status Report in which it is recognized that Arctic had already filed a status report providing a summary of the conference held on April 12 and 13, 1977; that Hearing Counsel had received the additional General Order 11 Report supporting workpapers Hearing Counsel requested be provided by Arctic; that Hearing Counsel intended to prepare a revised written statement reflecting its position based on the analysis and changes agreed upon at the conference.

Hearing Counsel submitted the analysis under date of May 24, 1977, as the revised Direct Testimony of James F. Carey, Staff Accountant, Federal Maritime Commission. This shall be identified as Exh. No. 2 for identification in this proceeding, and as such received in evidence as Exh. No. 2. Mr. Carey asserts in his notarized statement that he has made a careful and comprehensive analysis of the financial and operating data submitted by Arctic in the proceeding during the operation results for the period January 1, 1976 through December 31, 1976.

Respondent Arctic on June 1, 1977, served its comments on the revised direct testimony of Mr. Carey, and closed "With these qualifications and suggestions, respondent Arctic Lighterage Company has no objection to the marking for identification as an exhibit of the revised direct testimony of James F. Carey with supporting attachments."

The Intervener, State of Alaska, although not attending the hearing in this proceeding on March 18, 1977, served (received in the Office of the Secretary of the Commission on March 24, 1977) "Intervener's Brief."

DISCUSSION

The respondent Arctic, after discussion with Hearing Counsel and technician, issued its statement of position (Exh. No. 1) presenting its case in chief to show the lawfulness of the Tariff, supported by Arctic's General Order 11 Reports. Both sides finally had come to agreement with regard to the figures in Arctic's General Order 11 Report for 1976, the underlying data and allocation methods, and the specific findings requested in the Commission's original Order of Investigation.

Arctic and Hearing Counsel came to agreement on various adjustments to Arctic's actual General Order 11 Report for 1976, such as

1. $62,021 of administrative payroll taxes were reclassified from Account 485 to become 486.

2. Maintenance expenses—repairs of floating equipment, Account 402, increased from $330,218 to $414,077 an $83,859 increase. A corresponding decrease was made to accounts 404, 405, and 406.

3. Because of the adjustments made under 1 and 2 above, the Vessel Operating Expense total charged to the trade was reduced from $622,383 to $607,914. As a result, the Vessel Operating Expense ratio was reduced from 26.21% to 25.37%.

Arctic is a wholly-owned subsidiary of Puget Sound Tug and Barge Company, is how Arctic explains in part its equity capital (Exh. No. 1, p. 19) and further explains (*Ibid*, p. 20):

Arctic's revenues in the trade for the 1976 operating season was $921,373 and the total expense $1,126,554. The $1,126,554 ÷ $921,373 = 122.26% as the Operating Ratio.

All of the exhibits identified above have been considered and are received as exhibits herein. The transcript of testimony and exhibits, together with all papers and requests filed in this proceeding, constitute the exclusive record for decision. 46 CFR 502.169. All have been closely examined by the Presiding Administrative Law Judge. It is shown that Arctic operations take place in extremely cold temperature, in broken ice and in very shallow rivers—a rugged environment—all of which give rise to elevated expenses. No computation made with respect to the revenues and expenses shows them to be improper. All of the pertinent material to this case is on file for scrutiny by the public.

Upon consideration of the above and the entire record herein, the Presiding Administrative Law Judge *finds* and *concludes* that Arctic Lighterage Company's Initial Tariff in the Western Alaska Trade is not unreasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933. The Tariff withstands the test of operating ratio, which Hearing Counsel's Staff Accountant Carey agrees is 122.26% (Exh. No. 2, p. 13), as does Arctic (Exh. No. 1, p. 21).

Arctic sustained a loss of $169,764 in the FMC Regulated Trade for the 1976 operating season. In view of that fact says Staff Accountant Carey, Arctic did not realize a Net Profit, there can be no rate of return on equity or rate of return on rate base. (Exh. No. 2, p. 13.)

The Tariff is not unlawful or unreasonable and should be permitted to remain in effect.

Undoubtedly, cooperation and willingness of counsel to engage in the production and exchange of materials in this proceeding to make a record containing supporting and underlying records and accounts by which to test the accuracy, sufficiency, probativeness and reliableness of material, or finding as to the lawfulness of the tariff under section 18 of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, without the necessity for lengthy oral hearings enures to the benefit of all concerned, especially their clients.

It is *ordered,*

(A) The Tariff in this investigation and hearing be and is found not to be unlawful or unreasonable and such Tariff shall continue in effect, until or unless otherwise changed or ordered.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–28

INTERNATIONAL PAPER COMPANY

v.

LYKES BROS. STEAMSHIP CO., INC.

DOCKET NO. 74–39

PETITION OF LYKES BROS. STEAMSHIP CO., INC. FOR DECLARATORY ORDER

NOTICE OF DETERMINATION NOT TO REVIEW

August 3, 1977

Notice is hereby given that the Commission on August 3, 1977, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served July 5, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 74–28

INTERNATIONAL PAPER COMPANY

v.

LYKES BROS. STEAMSHIP CO., INC.

NO. 74–39

PETITION OF LYKES BROS. STEAMSHIP CO., INC. FOR DECLARATORY ORDER

July 5, 1977

MOTION TO DISMISS GRANTED

International Paper Company and Lykes Bros. Steamship Co., Inc., have filed a joint motion to dismiss these proceedings.

In 74–28, the complaint proceeding, International charges Lykes with violations of sections 16, 17, and 18(b)(3) of the Shipping Act, 1916, on the grounds that Lykes, a common carrier by water, refused to enter into an agreement with International which would have afforded special volume rates on certain commodities shipped by International. Subsequently, Lykes filed a petition for declaratory order (No. 74–39) which sought resolution of the controversy which arose by virtue of International's complaint.

Hearings were held and a briefing schedule adopted. Subsequently counsel for International requested that the briefing schedule be rescinded because Lykes and International were engaged in an earnest effort to find a basis upon which to settle the proceedings.

The present motion to dismiss is the result of that earnest, and as it turns out, somewhat lengthy effort. The joint motion is based upon certain tariff revisions by Lykes[1] which have "rendered moot and eliminated those tariff filing practices to which the original complaint of International Paper Company had been directed."

[1] See Attachment.

Both International and Lykes take the position "that there is no further reason to allow the proceedings to remain pending or to proceed further with the litigation . . . ."

Hearing Counsel perceive no further regulatory purpose to be served in continuing the proceedings. While Hearing Counsel have no objection to the dismissal of these proceedings, they are of the opinion that the allegations of past violations alleged in the complaint should be examined by the Commission's staff to determine if further action is necessary. Accordingly Hearing Counsel urge that I dismiss these proceedings and "recommend" that the Commission refer the record to the staff for evaluation.

I am in complete accord with the proposition that there is no further regulatory purpose to be served by the continuation of these proceedings. International no longer desires to pursue its complaint and Lykes wishes to withdraw its petition for declaratory order. No cease and desist order need be issued since the practices giving rise to these cases have already ceased. Any further consideration of the record in these cases with the view toward further proceedings on alleged past violations is singularly within the province of the Commission, and no recommendation from me seems either desirable or appropriate.

Accordingly, the motion to dismiss is granted.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC.—
PROPOSED RULES ON CONTAINERS

DOCKET NO. 74–40

PUERTO RICO MARITIME SHIPPING AUTHORITY—PROPOSED ILA RULES
ON CONTAINERS

ORDER OF DISCONTINUANCE

August 10, 1977

Docket No. 73–17 was originally instituted to determine whether the so-called "50 mile container rules" proposed by Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. violated section 14 Fourth, 16 First, and 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933. Subsequent to the institution of this proceeding Sea-Land proposed a revision to its tariff rules which it claimed would cure the infirmities leading to the investigation. However, these revisions were likewise placed under investigation by the Commission.

During the period in which this investigation progressed Sea-Land and Gulf Puerto Rico Lines withdrew from the Puerto Rican trade and the Puerto Rico Maritime Shipping Authority (PRMSA) superseded them as an ocean common carrier in that trade. Preparatory to its entrance in the trade, PRMSA filed its tariff which set forth provisions identical to those already under investigation. Therefore, the Commission placed PRMSA's proposed tariff rules under investigation; consolidated the new investigation (Docket No. 74–40) with the existing Docket No. 73–17; and ordered that the record already adduced in the earlier docket be used to the fullest extent possible to develop the issues in the new proceeding.[1]

The tariff rules at issue in this proceeding were a direct outgrowth of certain collective bargaining provisions negotiated between multi-employer bargaining units and the International Longshoremen's Association (ILA). Of the three multi-employer bargaining units which might have had

[1] Subsequent amendments to the PRMSA tariff were also incorporated within the ongoing investigation.

an interest in these proceedings only the Council of North Atlantic Shipping Associations (CONASA) intervened and took and active role in the proceeding. CONASA argued the validity of these tariff rules as pure collective bargaining provisions and their consequent immunity to the authority of the Shipping Act or this Commission.

The PRMSA tariff rules at issue in this proceeding in general provided as follows: (1) Containers owned, leased or used by a carrier which contains consolidated loads coming from or going to any point within a 50-mile radius of the port involved; or (2) containers which come from a single shipper, which is not the manufacturer, into which the cargo has been consolidated by other than the shipper's own employees and which containers come from any point within the 50-mile radius; or (3) containers designated for a single consignee, from which the cargo is deconsolidated by other than the consignee's own employees within the 50-mile radius and which is not warehoused in accordance with other rules shall be loaded or unloaded or transfered by ILA labor. Failing the use of ILA labor the shipper or consignee was subject to a penalty of $1,000 per container.

This proceeding progressed over the course of numerous months of hearing before an Administrative Law Judge. Following these months of hearing, an Initial Decision was issued, exceptions to that decision were filed, replies were submitted and the case was heard by the Commission on oral argument.

Simultaneously with the investigation by this Commission of the lawfulness of PRMSA's tariff rules, the lawfulness of the underlying collective bargaining provisions was also being challenged both in the federal courts and before the National Labor Relations Board (NLRB).

The NLRB concluded that the Respondent ILA, *et al.*, had in fact violated the National Labor Relations Act as alleged. The Board concluded:

> We find that by maintaining, giving effect to, and enforcing the contract and agreements known as the rules on containers . . . respondent[s] . . . violated section 8(e) of the Act. We also find that by threatening to assess and by assessing liquidated damages as provided in the above described agreements, thereby threatening, restraining, and coercing, . . . [other parties] with an object to force those persons engaged in commerce to cease doing business with [the consolidators] Respondent ILA violated . . . the Act.

Thereafter, Respondents petitioned the United States Court of Appeals for the Second Circuit for review of the order of the National Labor Relations Board. The Board cross-filed for enforcement of its order. The Court of Appeals for the Second Circuit found that the Board order was based on substantial evidence and sound analysis and its enforcement was justified as prayed by the NLRB.

Respondents sought review of the decision of the Court of Appeals on certiorari before the Supreme Court. However, the Supreme Court denied certiorari, allowing the decision of the Second Circuit to stand.

During the course of the various appeals on the decision of the NLRB, PRMSA filed a note in its tariff, effective February 29, 1976, which provides in pertinent part as follows:

> The determination . . . by the NLRB . . . affects the continued validity of the Rules on Containers as set forth herein. Such decision has been appealed to the U.S. Court of Appeals for the Second Circuit.
>
> In the meantime, the New York Shipping Association, Inc. as management's representative, has informed PRMSA that the NYSA "have been advised by the International Longshoremen's Association, AFL-CIO that they will take no action against the NYSA or its members requiring them to enforce such rule."
>
> Therefore, the Rule set forth herein shall not be enforced until a determination of the validity of the Rule is made by the proper court of law or further advice is given from the parties of the Collective Bargaining Agreement.

In the light of this tariff provision, the decision of the Court of Appeals for the Second Circuit, and the denial of certiorari by the Supreme Court, the proposed rules of the Puerto Rico Maritime Shipping Authority which form the basis for this proceeding have been effectively withdrawn. Since these rules are not to be enforced by PRMSA, it is the decision of the Commission that no action by this Commission is required with respect to findings as to the lawfulness of the proposed tariff rules.

Our determination not to take action on the proposed rule in light of their effective withdrawal should not be construed in any sense to indicate a conclusion by this Commission with respect to its authority over these rules were they attempted to be enforced at any time. We decide here, simply, that there are no rules before us which require any determination by us as to their validity under the Shipping Act.

THEREFORE, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

By the Commission.*

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

*Vice Chairman Morse opposes discontinuance of the proceedings.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 490

FOOTNER AND COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

August 12, 1977

The Commission by notice served April 20, 1977, determined to review the Initial Decision of the Administrative Law Judge in this proceeding served April 5, 1977. Upon completion of review it has been decided that the Initial Decision of the Administrative Law Judge be adopted as the decision of the Commission.

THEREFORE, IT IS ORDERED, That applicant, Sea-Land Service, Inc., is authorized to waive collection of $525.00 of the charges previously assessed Footner and Company, Inc.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

> "Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 490 that effective August 28, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 28, 1976, through September 18, 1976, the rate on 'ventilators, roof (non-mechanical)' minimum 22.5 m.t., for shipment, Elizabeth, New Jersey to Riyadh, Saudi Arabia was $210.00 w/m subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 490

FOOTNER AND COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

April 5, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to waive collection of a portion of the freight charges on a shipment of roof ventilators, which moved from Elizabeth, New Jersey, to Riyadh, Saudi Arabia, under a Sea-Land bill of lading dated August 28, 1976. The application was filed October 20, 1976.

The subject shipment moved under Sea-Land Service, Inc., Tariff 256–A, FMC–136, 4th revised page 81, item 755, effective August 31, 1976. The shipment measured 790 cubic feet (19.75 measurement tons of 40 cubic feet). The rate applicable at time of shipment was \$210 W/M, with a minimum of 25 measurement tons per container. The rate sought to be applied is \$210 W/M, with a minimum of *22.5* measurement tons per container. (Same tariff as cited above, except that the latter rate was published on 5th revised page 81, item 755, effective September 18, 1976.)

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to \$5,250. Aggregate freight charges at the rate sought to be applied amount to \$4,725. The difference sought to be waived is \$525. The Applicant is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

[1] This decision became the decision of the Commission August 12, 1977.

[2] 46 U.S.C. 817, as amended.

Sea-Land offers the following as grounds for granting the application:

(4) Sea-Land negotiated with Footner and Company for a rate to cover a movement of Ventilators, Roof, Nonmotorized from Elizabeth, New Jersey. The negotiations were handled by Footner and Company, a freight forwarder, on behalf of Herschman and Poole. A rate of $210.00 W/M minimum weight 22.5 measurement tons was agreed upon (Attachment No. 1, page 6).

In passing the information to the rate analyst (Attachment No. 2) the minimum weight was incorrectly transcribed as 25 measurement tons and the publication request (Attachment Nos. 3 and 4) reflects the incorrect minimum weight.

The forwarder realized the error and in his telex of September 15, 1976 (Attachment No. 5) informed our account representative Mr. Beilin that the charges billed were different from the charges as negotiated.

On September 17, 1976 the error in minimum weight was corrected by telex filing message 180 (Attachment Nos. 6 and 7).

Clerical error on Sea-Land's part in transmitting the wrong minimum weight to the tariff publications section was the cause of the erroneous publication effective August 31, 1976. A corrected publication was made promptly following disclosure of the initial erroneous publication.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFT 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . .(and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in the tariff of a clerical or administrative nature, resulting from the inadvertent failure to file the negotiated rate with the proper minimum of 22.5 M.T. per container, as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

[3] For the other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

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

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $525. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 5, 1977.

FEDERAL MARITIME COMMISSION

No. 77–10

AGREEMENTS NOS. 10072 AND 10072–1

NOTICE OF DETERMINATION NOT TO REVIEW

August 10, 1977

Notice is hereby given that the Commission on August 10, 1977, determined not to review the order of discontinuance in this proceeding served July 12, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–10

AGREEMENTS NOS. 10072 AND 10072–1

ORDER DISCONTINUING PROCEEDING

July 12, 1977

By motion dated June 16, 1977, Cruise Lines International Association (CLIA or proponent) gave notice that it was withdrawing its request for approval of the subject agreements and requested that the proceeding be discontinued. Hearing Counsel's reply[1] to CLIA's motion supported dismissal. The replies of the Association of Retail Travel Agents (ARTA)[2] and the American Society of Travel Agents, Inc. (ASTA)[3] both opposed discontinuing the proceeding, although for somewhat different reasons.

As indicated in the Commission's April 26, 1977 Order of Investigation and Hearing, Agreements #10072 and #10072–1 were filed for approval by CLIA pursuant to section 15 of the Shipping Act, 1916. #10072 provided for a conference of passenger lines in the passenger and cruise line trade in North America. CLIA sought approval for the Conference members to meet, develop and agree on activities designed to promote shipboard holidays on voyages marketed in North America. #10072 also sought authority for the Conference to represent member lines in dealing with industry conferences, associations, and governmental agencies, and also to represent member lines in matters relating to the qualifications and appointment of travel agents. #10072–1, known as "Administrative Rules," provided for the internal administration of the Conference (Article A) and rules governing travel agents (Article E).

The Commission's April 26 Order named four organizations as protestants in this proceeding—the American Automobile Association (AAA), ARTA, ASTA and the U.S. Department of Justice (DOJ). All four had earlier filed objections to all or parts of the subject Agreements.[4]

The two Agreements would have provided, *inter alia*, for a $100 agency

[1] Dated July 5, 1977.

[2] ARTA's "Answer" is dated June 21, 1977.

[3] ASTA's "Answer" is dated July 7, 1977.

[4] The Department of Justice had asserted that the entire process of joint regulation of the travel industry—from the appointment of agents, to setting the agents' commissions, to power to terminate the agent's appointment—would be a *per se* violation of the antitrust laws, constituting a group boycott in violation of Section 1 of the Sherman Antitrust Act, and also horizontal price fixing in violation of Section 1.

fee to be collected by the Conference from each travel agent, for the Conference to set commission levels and specific maximums to be paid to travel agents, that only travel agents qualified and appointed by the Confefence may receive remuneration, that all appointed travel agents be bonded by a bonding agency acceptable to the Conference, and that in consultation and cooperation meetings with other conferences and organizations there was no provision for participation by the travel agents themselves or their representatives.

CLIA's Motion to Discontinue Proceedings and withdrawal of their request for approval of the two Agreements states that "this withdrawal does not constitute any expression or concession by CLIA on the merits of the Agreements but is based solely upon the unwillingness of the CLIA lines to bear the burdens and expenses of litigation of these matters at this time."

ARTA's reply in opposition to discontinuing the proceeding argues that while it does not question CLIA's right to withdraw the subject two Agreements, "(t)here are still questions to be answered." ARTA then goes on to assert that because CLIA has stated in a news report (clipping attached to ARTA reply) that CLIA will "continue to function as an organization dealing solely with the promotion of cruising and education of travel agents," that, therefore, its documents of organization, by-laws and other pertinent agreements are subject to approval of the Commission and "are an issue to be disposed of in this proceeding." ARTA argues that the proceeding should continue and merely shift its focus from the subject Agreements "to the underlying agreements serving as the foundation for the International Passenger Steamship Association and the Pacific Cruise Conference."

I find nothing in the Commission's April 26 Order[5] or in Commission precedent that would authorize me to disregard the proponent's voluntary withdrawal of the very Agreements that are specified to be the precise subject of investigation and hearing, and to unilaterally "shift the focus" (i.e., change the subject) of the proceeding to another area that is of great interest to a designated protestant. This is not to say that the Commission lacks power to, *sua sponte,* initiate a new investigation into any area it believes may be violative of the Shipping Act, 1916.[6] Nor does it mean that an aggrieved party is totally without remedy if one believes he is being injured by a clear violation of the Act, for there are provisions for

[5] The Commission's April 26 Order, *inter alia,* states specifically as follows:

(T)he Commission is of the opinion that Agreements Nos. 10072 and 10072–1 should be made the subject of a public hearing and investigation to determine whether *these Agreements* should be approved, disapproved, or modified under the standards set by Section 15 of the Shipping Act, 1916.

NOW, THEREFORE, IT IS ORDERED, That the Commission commence an investigation and hearing pursuant to Section 22 of the Shipping Act, 1916, to *determine whether Agreements Nos. 10072 and 10072–1* should be approved, disapproved, or modified. . . .

IT IS FURTHER ORDERED, That in the event there is any modification of *these Agreements,* such modification shall be filed with the Commission, and shall be made subject to this investigation. . . .(Emphasis added.)

[6] The Commission has broad investigatory powers. Shipping Act, 1916, §§22, 27, 29; see also *Federal Maritime Commission v. Port of Seattle* (9 Cir. 1975) 521 F.2d 431, 432.

complainants to bring actions pursuant to the Act,[7] as well as for the FMC staff, acting on complaints, to investigate alleged violations outside the framework of the instant proceeding. As Hearing Counsel point out in their reply to the motion, any protest or criticism that ARTA or any other party may have about the authority still retained by CLIA under its other existing and Commission-approved section 15 agreements[8] should be specifically directed to those agreements, and any allegation of improper concerted activities not covered by an approved section 15 agreement should be investigated by the staff independent of this particular docketed proceeding.

ASTA also opposed the Motion to Dismiss, although it supports the general concept of the Agreements—the concept of a unified cruise line conference with a uniform system of fitness requirements for travel agents. ASTA opposed the severe qualification requirements for travel agents in the subject CLIA Agreements, lack of a voice by the travel agents in proposed conference activities, and the establishment of agents' commission levels. However, ASTA argued that this proceeding is an appropriate forum for the Commission to make a public interest examination of the conditions common to much of the passenger steamship industry, and asserts that "(b)ecause of the similarities between the objectionable provisions of CLIA's Agreements and those of other cruise conference agreements, the Commission should make its examination broad, so as to inquire into such industry-wide practices."

For the reasons set forth above in disposing of ARTA's opposition to discontinuance and, again, without intimating any limitation on the Commission's authority to broaden an investigation or initiate an entirely new one on a related subject area, I must reject ASTA's request to continue this proceeding in the face of a voluntary withdrawal by the proponent of the very Agreements that formed the sole basis, and *sina qua non,* for this investigation and hearing.

Accordingly, the Motion to Discontinue the Proceeding is *GRANTED.*

(S) THOMAS W. REILLY,
Administrative Law Judge.

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[7] See section 22, Shipping Act, 1916, 47 U.S.C. 821.

[8] Agreement No. 131 (Pacific Cruise Conference), Agreement No. 9856 (International Passenger Association), and Agreement No. 10071 (Cruise Line International Association Cooperative Working Arrangement).

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–15

THOMAS P. GONZALEZ CORPORATION

v.

WESTFAL-LARSEN & CO. A/S

ORDER

August 15, 1977

This proceeding is before the Commission on exceptions by Westfal-Larsen & Co. A/S (WL) to a ruling by Chief Administrative Law Judge John E. Cograve dismissing a joint Petition for Declaratory Order filed by Westfal-Larsen and Thomas P. Gonzalez (Gonzalez). The subject Petition requested the Commission to determine whether the tariff of the Latin America/Pacific Coast Steamship Conference (Conference) applied to a shipment of beans from Ensenada, Mexico to Wilmington, (Los Angeles) California.

The essential facts are as follows:

Gonzalez and WL entered a charter party FIO contract for the transportation of a shipment of beans from Puntarenas, Costa Rica to Ensenada, Mexico[1] When WL's vessel with the shipment aboard arrived at Ensenada, Gonzalez was unable to take possession of the cargo. As a result, WL, at Gonzalez's instructions, discharged the shipment at Wilmington, California.

A controversy arose over WL's request for the payment of additional charges for the transportation from Ensenada to Wilmington. The additional amount allegedly due, computed according to the Conference tariff[2] on the Ensenada-Wilmington movement, was some $60,000. Upon WL's refusal to deliver the cargo, Gonzalez executed a letter agreement on May 15, 1975 and gave WL a check for $44,188.27[3] and a letter of credit for $60,000.

Thereafter, Gonzalez filed a complaint with the Commission in Docket

[1] The charter party provided for a negotiated rate of $25.00 per metric ton. Demurrage, stevedoring, storage and other charges were assessable against Gonzalez.

[2] WL maintained that as a member of the Conference, it was bound to apply the Conference tariff on a route covered by that tariff.

[3] This represented monies due under the charter party agreement.

No. 75–39, later amended, charging that WL's assessment of additional charges was unjust and unreasonable in violation of section 18(b) of the Shipping Act, 1916 and asking that WL be ordered to relinquish the letter of credit.[4]

Subsequently, in an attempt to resolve their differences, the parties filed the joint Petition for Declaratory Order asking the Commission to determine whether the Conference tariff applied to the Ensenada-Wilmington movement, and, if so, the amounts due under the tariff. The Conference was granted leave to intervene. Before a hearing could be held Gonzalez withdrew the complaint in Docket No. 75–39 and moved for leave to withdraw as joint petitioner and for dismissal of the Petition for Declaratory Order.

The Presiding Officer dismissed the proceeding. He found, in essence, that the issuance of a declaratory order was not likely to terminate the controversy, for even were WL to prevail on the merits, the Commission could not order a distribution of monies and WL would have to seek redress in the courts to collect any charges from Gonzalez. The Presiding Officer concluded, therefore, that a court would be a more suitable forum for the resolution of the controversy. Without addressing the merits of the Presiding Officer's findings and conclusions, we are denying the issuance of the requested declaratory order on a more fundamental ground.

The Petition before us raises the question of the applicability of the Conference tariff to the carriage from Ensenada to Wilmington. The Commission's Order referring the Petition to hearing likewise limits the inquiry to the Ensenada-Wilmington movement, as does the Presiding Officer's order granting the Conference leave to intervene. The fact, however, is that the shipment of beans at issue actually moved from Puntarenas, Costa Rica to Wilmington, California. As a result, and inasmuch as all parties to this proceeding have suggested in their pleadings that the Conference tariff might well be applicable to the entire carriage from Puntarenas to Wilmington, we are declining the requested issuance of a declaratory order within the framework of this proceeding.[5]

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order filed by Westfal-Larsen & Co. A/S and Thomas P. Gonzalez in this proceeding is hereby denied.

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

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

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[4] The amended complaint alleged violation of section 18(b)(2) and (3) for WL's attempt to impose common carriers rates to a charter party carriage in the absence of any provision in the tariff to that effect.

[5] The purpose of a declaratory order is to terminate a controversy or remove uncertainty and its issuance is completely discretionary with the Commission. 5 U.S.C. 554(e); 46 C.F.R. 502.68.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–5

AGREEMENT NO. 9973–3 AGREEMENT NO. 9863

ORDER DECLARING AVAILABILITY OF DISCOVERY, MODIFYING PROCEDURAL EVENTS AND DATES, AND DENYING STAY OF DISCOVERY

August 18, 1977

On March 31, 1977 the Commission instituted this proceeding in order to determine whether Article 1 of Agreement No. 9973 and Article 1 of Agreement No. 9863, whereby the parties to those agreements would have separate votes in conferences and other agreements to which they may be party, should be disapproved or modified pursuant to section 15 of the Shipping Act, 1916.

Agreement No. 9863 is between Blue Star Line, Ltd. and East Asiatic Company, Ltd., whereby those two carriers operate as a joint service in the trade between ports on the United States Pacific Coast and ports in the United Kingdom, the Republic of Ireland, and the Northern European Continent, including Scandinavia and Finland.

Agreement No. 9973 is among Johnson Line, and the aforementioned Blue Star Line, Ltd., and East Asiatic Company, Ltd., whereby those three carriers operate as a joint service in the trade between United States Pacific Coast ports, including Alaska and Hawaii, and ports and places in the United Kingdom, Republic of Ireland, and the European Continent, including Scandinavia and Finland, but excluding Mediterranean ports.

The question to be answered in this proceeding is whether or not the three aforementioned carriers should be permitted to vote separately, as compared to having only a single vote as a joint service, in any conference or other agreement to which they may be party.

The aforementioned three carriers were named Proponents in the Order of Investigation and Hearing herein; and United States Lines, Inc. and Sea-Land Service, Inc. were made Protestants in the proceeding. Hearing Counsel is party to the proceeding by rule. In the Order, the Commission limited this proceeding to the receipt of affidavits of fact and memoranda of law, until such time, if ever, that the Commission determined that a trial type evidentiary hearing or oral argument was necessary. Proponents were directed to file their affidavits and memoranda on or before May 1, 1977, and Protestants, and all other parties to the proceeding, were directed to file their affidavits and memoranda on or before May 31, 1977. Requests for a trial type evidentiary hearing were to be filed on or before May 1, 1977.

On April 14, 1977, Proponents petitioned the Commission to modify the Order of Investigation and Hearing so as to change the dates upon which affidavits of fact and memoranda of law were due to be filed with the Commission from May 1 for Proponents, and May 31, for all other parties to the proceeding, to June 1 and June 30, respectively. The asserted basis for the petition was counsel's inability to confer with Proponents' primary affiants until mid-May. Protestants and Hearing Counsel had no objection to the petition. On May 2, 1977, the Commission issued an order modifying its Order of Investigation and Hearing in this proceeding so as to alter the dates upon which, and the order in which, the parties to this proceeding would file affidavits and memoranda of law. As changed by the May 2, 1977 order, this schedule is as follows:

DATE	EVENT
May 20, 1977	Request for trial type evidentiary hearing.
May 31, 1977	Affidavits of Protestants and those interveners opposing the approval of the agreements.
June 14, 1977	Affidavits of Proponents and those interveners favoring the approval of the agreements.
June 21, 1977	Rebuttal affidavits of Protestants and those interveners opposing the approval of the agreements.
July 19, 1977	Opening memoranda of law by all parties.
August 2, 1977	Reply memoranda of law by all parties.

On May 12, 1977, Proponents, Protestants, and Hearing Counsel filed a Joint Motion for Modification of Procedural Events and Dates (Joint Motion), whereby the presently established dates would be delayed two months in each event. There are no interveners in this proceeding. The bases for the Joint Motion, as enunciated therein, follow verbatim:

> On May 2, 1977, the Commission served its Modification of Order of Investigation and Hearing (Modification) herein. That Modification substantially revised the procedural events as previously established. Protestants are currently re-evaluating the need to use discovery in this proceeding in light of the changes set out in the Modification. A dispute amongst the parties may develop in respect of whether there may be discovery in this proceeding. Such a dispute might have to be resolved by the Commission, and this will take some time.[1]
>
> Secondly, all parties have agreed to use the additional time which will be available to them as a result of the proposed revisions sought herein to determine what factual matters can be stipulated to by all parties in furtherance of limiting factual disputes.

On May 18, 1977, Proponents moved the Commission to issue an order declaring that discovery is not available in this proceeding (Declaratory

[1] Hearing Counsel — having been of the view that discovery did apply to this proceeding — commenced discovery in the form of interrogatories to the other parties within 30 days of the Original Order of Investigation. Protestants are of the view that discovery applies to this proceeding, and that the 30 days should be construed to run from the Commission's Modification. Proponents are of the view that discovery does not apply to this proceeding.

Motion). According to Proponents, discovery is not available in this proceeding: (1) because discovery is not always available in section 22 proceedings, for example, it is not available in rulemaking proceedings; (2) because this proceeding is essentially a section 15 proceeding, notwithstanding the reference to section 22 in the Order of Investigation and Hearing; and (3) because the Commission, in that Order of Investigation and Hearing, limited the proceeding to the submission of affidavits of fact and memoranda of law.

Also on May 18, 1977, Proponents filed a motion for stay of discovery, asserting that there is a strong likelihood that the motion for declaratory order will not be decided prior to the date on which responses to the discovery requests of Hearing Counsel and Protestants will be due. Proponents request the Commission to stay all discovery and responses until 15 days after the Commission's decision on the motion for declaratory order.

Central to each of the three motions is the question of whether discovery is available in this proceeding. Upon the resolution of that question depends the decisions on all three motions. Consequently, they are decided together.

A. Declaratory Motion

Section 27 of the Shipping Act, 1916, provides that in *all* proceedings under section 22 of the Act, discovery proceedings shall be available under rules and regulations issued by the Commission. The Senate Report accompanying Public Law 90–177, whereby section 27 of the Act was amended so as to permit discovery, stated that the discovery procedures "would be applicable only in adjudicatory proceedings arising under Section 22 of the Shipping Act, 1916. To the extent any proceeding under Section 22 of that Act is not adjudicatory in nature then the procedures. . .[for discovery] would not be available." S. Rep. No. 472, 90th Cong., 1st Sess., 2 (1967).

Proponents argue that discovery procedures are not available in every section 22 proceeding, citing *Uniform Rules and Regulations Covering Free Time on Import Containerized Cargo at the Port of New York,* 14 S.R.R. 1520 (ALJ 1975), as authority for the proposition that discovery is not available in rulemaking proceedings, even if conducted pursuant to section 22 of the Shipping Act. The case cited by Proponents was an interlocutory order of a Commission Administrative Law Judge, wherein the Presiding Officer ordered the commencement of oral hearings without further delay, and in doing so, ruled that discovery was not available in a true rulemaking proceeding with no adjudicatory aspects. Whatever the validity of the reasoning in that case, it is inapplicable here because this case is not a rulemaking proceeding.

The Senate Report indicates that the discovery procedures would be available in adjudicatory proceedings. The Administrative Procedure Act defines "adjudication" as the "agency process for the formulation of an order.. . ." 5 U.S.C. 551(7). "Order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making.. . ." 5 U.S.C. 551(6). Section 15 of the Shipping Act provides that the Commission shall approve, modify, or disapprove agreements by order. Hence, this proceeding is an adjudicatory proceeding. Under the actual words of section 27, and its legislative history, discovery is available, under rules and regulations promulgated by the Commission, in adjudicatory proceedings conducted pursuant to section 22.

The Commission did promulgate discovery rules under the authority of section 27 of the Shipping Act. Rule 201 provides that discovery is available in *all* proceedings under section 22 of the Shipping Act. 46 C.F.R. 502.201.

Proponents argue, however, that, notwithstanding the reference to section 22 in the Order of Investigation and Hearing, the instant proceeding is essentially a section 15 proceeding. Although not specifically stated, the inference which Proponents apparently wish the Commission to draw from that statement is that discovery is not available in a proceeding concerning the approval or disapproval of a section 15 agreement because such a proceeding is not a section 22 proceeding. Section 22 of the Act authorizes the Commission to conduct investigations into "any violation of" the Shipping Act. The phrase "any violation of" the Shipping Act includes inquiries concerning the approval or disapproval of agreements pursuant to section 15, as well as "violations" of the proscriptive provisions of the Shipping Act, *e.g.*, sections 14, 16, or 17. *Federal Maritime Commission v. Carragher, et al.*, 364 F. 2d 709 (2nd Cir. 1966); *Federal Maritime Commission and Ludlow Corp. v. DeSmedt*, 366 F.2d 464 (2nd Cir. 1966). Thus, it follows that discovery is available in proceedings instituted to determine the approvability, pursuant to section 15, of agreements, and the Commission has expressly so held. *Agreement 9813—Conference Agreement Transatlantic Freight Conference*, Docket No. 69–58, 11 S.R.R. 628 (1970).

Proponents also argue that, in this proceeding, and by extension, in all proceedings of this class, that is, affidavits and memoranda proceedings, the Commission has waived the applicability of the discovery rules.[1] The argument for waiver of discovery in this proceeding is founded upon the Order of Investigation and Hearing where the Commission provided:

> That this proceeding shall be limited to the submission of affidavits of fact and memoranda of law, replies thereto, and oral argument, if requested and/or deemed necessary by the Commission.

The argument is that the order instituting this proceeding, by its terms, limits it to only affidavits and memoranda, and, possibly, oral argument; that that specific limitation is inconsistent with the use of any other

[1] Rule 10 permits the Commission to waive any of the Rules of Practice and Procedure, with the exception of two rules not relevant here, in any particular case "to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." 46 C.F.R. 502.10.

processes; and that the use of discovery is contrary to the purpose of such a shortened procedure, to wit: the expeditious conclusion of the proceeding. This argument also fails, for the limitation in this proceeding is upon the method whereby evidence and argument will be presented to the Commission, that is, affidavits and memoranda, vice oral testimony and cross-examination, but not upon the method whereby that evidence will be acquired by the parties to the proceeding, that is, by the use of discovery. Further, the Commission's waiver of rules is not to be implied, but is found only when express. Lastly, the use of discovery is not inconsistent with the expeditious resolution of this proceeding because the discovery rules provide that the parties may be ordered to commence the "hearing" prior to the completion of discovery.[2]

After considering all of the arguments for and against, the Commission concludes that discovery is and has been available in this proceeding, and that it is available in all section 15 proceedings conducted pursuant to section 22, except those in which the Commission expressly precludes discovery. This is so because: section 27 of the Shipping Act provides that discovery is available in all adjudicatory proceedings under rules promulgated by the Commission; the Commission has promulgated rules making discovery available in all section 22 proceedings; this is a section 22 adjudicatory proceeding; and the Commission has not waived the use of the discovery procedures in this proceeding.

B. Joint Motion

The effect of the Joint Motion, if granted, would have been to delay the receipt of the first affidavit in this proceeding from May 31, 1977 until July 31, 1977. Because of the delay engendered by the several motions filed in this proceeding, and the Commission's consideration of those motions, the Joint Motion has become moot.

However, the Commission will further delay the procedural events and dates so as to permit commencement and completion of discovery and the filing of the affidavits and memoranda required in this proceeding within a reasonable period of time from the date of this order. In this regard, the Commission concludes that the parties to this proceeding should have taken the opportunity presented by the delay caused by the instant motions to gather the data necessary to respond to discovery requests already made, and to have researched and formulated proper objections, if any, to those discovery requests, and to have determined what questions should be asked during the discovery phase of this proceeding.[3] Because the agreements which are the subject of this proceeding have been approved until the final order of the Commission in

[2] "Nothing herein shall be construed to preclude the Presiding Officer from ordering a hearing to commence before the completion of discovery and inspection procedures conducted pursuant to Subpart L." 46 C.F.R. 502.201(b)(2).

[3] Indeed, the parties represented to the Commission in the Joint Motion that they would use the time productively. Further, the Commission gave the parties notice in its order of May 31, 1977 that this proceeding would be resumed upon short notice.

this proceeding, it is desirable that the lawfulness of those agreements be determined at the earliest practicable date.

The schedule which the Commission shall hereinafter provide is the result of a balancing of the desire for expedition and for a full and adequate record relevant to the issues in this proceeding. In the absence of delay engendered by frivolous pleadings or unreasonable discovery requests or unfounded refusals to comply with proper discovery requests, that schedule will permit the achievement of both of those goals.[4]

C. Motion for Stay

The apparent purpose for the motion for a stay of discovery until 15 days after the Commission decides the Declaratory Motion seems to have been to protect Proponents from being subjected to discovery until after the Commission decided that question. Since the Commission has now determined that discovery is available in this proceeding, there is no longer any need to prevent Proponents from being subjected to discovery. Consequently, the motion for stay of discovery is moot, and it will be denied.

D. Suitability of the Affidavits and Memoranda Procedure

Having determined that discovery is available in this proceeding, the Commission is compelled to consider whether the proceeding, as presently constituted, is suitable to the purposes of this investigation. That procedure was adopted by the Commission for this case so as to provide for the expeditious resolution of this dispute. Unfortunately, the Commission is not constituted to handle, with the degree of expedition desired, the interlocutory matters relating to discovery. No collegial body may act as quickly as a single presiding officer. While the Commission could assign to one of its number the task of overseeing the discovery phase of this proceeding, because of the breadth of the responsibilities of the Commissioners, greater expedition would be achieved if one of the Commission's Administrative Law Judges were to perform that function. Consequently, the Order of Investigation and Hearing herein will be further modified so as to provide that this proceeding is referred to an Administrative Law Judge to oversee the discovery phase of this proceeding.

As referred, the Presiding Administrative Law Judge will rule on all discovery matters, and any other interlocutory matter within the scope of this proceeding up to the filing of the first affidavits required in this proceeding. The Presiding Administrative Law Judge will be authorized to delay the schedule of affidavits and memoranda, but only if that officer makes written findings of facts which that officer concludes constitute good cause for the delay, with due regard for the Commission's desire for expedition in this proceeding. Similarly, any waivers of rules, or enlarge-

[4] A request for a trial type evidentiary hearing shall not operate to delay any other date.

ments of time, which the Presiding Officer is authorized, by the Rules of Practice and Procedure, to grant, shall be supported by written findings of facts, which the Presiding Officer concludes constitute good cause for the delay or enlargement, with due regard for the Commission's desire for expedition in this proceeding.

On the date upon which Protestants are required to file their affidavits, as delayed, if the Presiding Officer does so, the jurisdiction of the Administrative Law Judge to which this proceeding is referred shall terminate, and those affidavits, and all subsequent documents filed in this proceeding shall be filed with the Commission. By this reference to an Administrative Law Judge, the Commission intends to permit orderly discovery, but to otherwise preserve the affidavits and memoranda character of this proceeding, and the expedition permitted by that character.

In line with that expedition, and because the parties to this proceeding have had sufficient time to determine what matters they wish to discover, and any proper objections thereto, and because this proceeding has been delayed too long as it is, the time within which a party may commence discovery, respond to discovery requests, interpose objections to discovery, seek protective orders regarding discovery, seek to compel compliance with discovery, reply to motions to compel discovery, and do any other act with regard to discovery, will be shortened to the date 15 days after the date of this order, or half the time prescribed by the Commission's Rules of Practice and Procedure, whichever is later.[5] While the Commission here shortens the time allowed for discovery matters, this general shortening is not to be construed so as to limit the authority of the Presiding Administrative Law Judge to further shorten or enlarge those times pursuant to the Rules of Practice and Procedure should good cause therefor, within the context of this order, appear to that officer.

In summary, the Commission concludes that discovery is available in this proceeding; that the Joint Motion should be denied in part; and that the Motion for Stay of Discovery should be denied.

THEREFORE, IT IS ORDERED, That the order of the Federal Maritime Commission, entitled, *Agreement No. 9973-3 and Agreement No. 9863*, "Order of Investigation and Hearing and Order of Approval of Agreement No. 9973-3 *Pendente Lite*", dated March 31, 1977, is further modified:

(a) By the addition of a new ordering paragraph therein, as follows:

> IT IS FURTHER ORDERED, That this proceeding is referred to the Commission's Office of Administrative Law Judges for the sole purpose of overseeing the discovery phase of this proceeding; the Presiding Administrative Law Judge to have all the rights, powers, and duties in this proceeding as may be had by a Presiding Administrative Law Judge in any proceeding referred to that office; *Provided, however,* that the jurisdiction

[5] The shortened times apply to outstanding discovery requests as well as those to follow hereafter. Further, since the Commission has established a new schedule for discovery, affidavits, and memoranda, it is unnecessary to rule upon Protestants' assertion that the time within which discovery may be commenced should be construed to run from the Commission's order of May 2, 1977.

of the Office of Administrative Law Judges over this proceeding shall terminate on the date the affidavits of Protestants are due, as that date may from time to time be determined; and *Provided further*, that the Presiding Administrative Law Judge may enlarge the time within which requests for a trial type evidentiary hearing, affidavits, or memoranda shall be filed in this proceeding, only upon written findings of facts which constitute good cause, with due consideration for the expedition mandated in this proceeding; and *Provided further*, that any waivers of rules, or enlargements of time, which the Presiding Administrative Law Judge is authorized, by the Commission's Rules of Practice and Procedure, to grant shall be effected only upon the Presiding Administrative Law Judge's written findings of facts which constitute good cause, with due consideration for the expedition mandated in this proceeding.

and

(b) By deleting, in the fifth ordering paragraph thereof, as modified by the Commission's Order of May 2, 1977, the following dates: May 20, 1977, May 31, 1977, June 14, 1977, June 21, 1977, July 19, 1977, and August 2, 1977; and substituting therefor the following dates: December 9, 1977, December 27, 1977, January 10, 1978, January 17, 1978, February 7, 1978, and February 21, 1978, respectively.

IT IS FURTHER ORDERED, That the times provided in Rules 132(c) and 201 through 211 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.132(c), 502.201–502.211, are shortened to, in each instance, half the time prescribed in those rules, or to the date 15 days from the date of this order, whichever is later.

IT IS FURTHER ORDERED, That, except to the extent herein expressly granted, the May 12, 1977 Joint Motion for Modification of Procedural Events and Dates is denied.

IT IS FURTHER ORDERED, That the May 18, 1977 Motion for Stay of Discovery, filed by Johnson Line, Blue Star Line, Ltd., and East Asiatic Company, Ltd., is denied.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 370(I)

CONE MILLS CORPORATION

v.

TRAILER MARINE TRANSPORT CORPORATION (TMT)

ADOPTION OF DECISION OF SETTLEMENT OFFICER

January 30, 1978

The Commission, by notice served September 2, 1977, determined to review the decision of the Settlement Officer served August 10, 1977 in this proceeding. Upon review, the Commission finds the decision of the Settlement Officer denying reparation to be proper and well-founded and adopts it as its own.

Rule 230 of TMT's Tariff FMC–F No. 2 provides that the carrier may load other freight in the free space available in a container, while Rule 20–F provides for the assessment of rates based upon one hundred percent of the cubic capacity of the container if the shipper fails to furnish the cubic measurements of cargo rated on a cubic foot basis. Complainant here delivered the containers sealed thereby effectively preventing the carrier from utilizing whatever space might otherwise have been available. This, coupled with Complainant's failure to apprise TMT of the actual measurements of the cargo, as required by the carrier's tariff, warranted the assessment of freight charges based on the full cubic capacity of the container. By its actions and inactions, Complainant in effect leased and moved entire containers.

Our decision today is in full accord with the Commission's holding in *Borden v. Venezuelan Line,* Docket No. 76–2, Report served January 10, 1977, where we reiterated the principle set forth in *Kraft Foods v. Federal Maritime Commission,* 538 F.2d 445 (D.C. Cir. 1976) that no tariff rule may lessen the statutory period for seeking reparation provided in section 22 of the Shipping Act, 1916, as well as the Commission's policy of allowing recovery under the proper circumstances where due to inaccuracies in the shipping documents the carrier was led into assessing higher charges than provided in its tariff for what actually moved. In this case, what actually moved, and what Complainant was properly assessed for, were entire containers.

Vice Chairman Morse, concurring. I concur in the result. See my concurrence in *Cone Mills Corporation v. Trailer Marine Transport Corporation,* Informal Docket No. 369(I).

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 370(I)

CONE MILLS CORPORATION

v.

TRAILER MARINE TRANSPORT CORPORATION (TMT)

August 19, 1977

Reparation denied.

DECISION OF L. MERRILL SIMPSON, SETTLEMENT OFFICER*

Complainant seeks reparation in the amount of $4,217.91, claiming a freight overcharge on six shipments of cargo moving between October 27, 1975, and January 13, 1976, in trailer of Ryder Truck Lines, Inc., loaded by the shipper. The overcharge alleged was occasioned by the application of Rule 20F of TMT's Tariff FMC-F No. 2 which provides for assessment of rates based upon 100 percent of the cubic capacity of the trailer, if the shipper fails to furnish the cubic measurement of the cargo, on cargo which is rated on a per cubic foot basis. Rule 450B of the tariff prohibits a change in the cubic measurement after the cargo leaves the possession of the carrier. While no violation of the statute is alleged by Complainant it appears that the complaint is based upon a violation of Section 18(a), Shipping Act, 1916, 46 USC 817(a).

Respondent, TMT, in a letter dated March 6, 1976, encouraged the complainant to file a claim with the Commission and on March 17, 1976, in a letter addressed to the Commission indicated its support for the claim. This support by the carrier of the shipper's claim is misplaced. TMT is the maker of the tariff. It has and has had the ability to amend its rule so that no shipper would be placed in the position of paying for more space than was utilized caused by the failure to state the cubic measurements if the proper application of rates is its only concern. TMT has not altered Rule 20F and it continues to have application.

After this complaint was filed, the carrier consented to the informal

*This decision became the decision of the Commission January 30, 1978.

procedure of Rule 19, 46 CFR 502.301–304 but failed to include any response regarding the allegations therein.

I requested all of the documents received from the shipper and the bills of lading and invoices issued together with the cubic measurement of each container. Respondent complied. The documents furnished by TMT included:

(1) Ocean Bill of Lading covering each shipment and prepared by the respondent;
(2) Trailer receipt and inspection report;
(3) Ryder Truck Lines waybill;
(4) Complainant's shipping order.

Also furnished for some of the shipments was a usually incompleted form titled Shippers Export Shipping Instructions.

Respondent further advised that the interior cubic measurement of each container was 3200 cubic feet.

From the documents supplied, it is clear that TMT had knowledge of the description of the goods, the number of cartons and the total weight of each shipment. *None* of the documents furnished to the carrier reflected the cubic measurement of the cargo nor the inside cubic capacity of the trailer. The shipping order prepared by complainant, and supplied to the respondent listed carton numbers and the contents of each expressed in yards of material and the total *weight* of each shipment.

TMT received no documents which stated the cubic measurement of the cargo. The containers received were sealed and the seal numbers were recorded by both the motor carrier and respondent.

Containerized shipping had brought with it benefits and some problems for shipper and carrier alike. Shipments loaded by the shipper and/or unloaded by the consignee result in savings in handling costs to carriers. In this instance, these savings are translated into the carrier's rate structure through the publication of a truckload rate which is substantially less than the rate for goods moving loose across respondent's facility. This loading of the cargo by the shipper removes the practical ability of the carrier to determine what the measurements of the cargo are, without destroying those savings contemplated in the truckload rate assessed.

Furthermore, rule 230 of respondent's tariff provides in part that the carrier has the unrestricted right to load other freight in the trailer. This right is preempted if the carrier does not have knowledge of the amount of space available to it.

Rule 450B, taken alone would not be a basis for denying the reparations sought.

However, rule 20F places a reasonable duty upon the shipper necessary for both the proper application of rates and efficient carrier operation. It does not appear to be unjust or unreasonable.

The failure of the complainant to comply with mandatory provisions of a lawfully filed applicable tariff provision in and of itself is sufficient to require dismissal of its complaint. Accordingly, the claim of complainant for reparation is denied; and its complaint dismissed.

(S) L. MERRILL SIMPSON,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 369(I)

CONE MILLS CORPORATION

v.

TRAILER MARINE TRANSPORT CORPORATION (TMT)

ADOPTION OF DECISION OF SETTLEMENT OFFICER

January 30, 1978

The Commission, by notice served September 2, 1977, determined to review the decision of the Settlement Officer served August 10, 1977 in this proceeding. Upon review, the Commission finds the decision of the Settlement Officer denying reparation to be proper and well-founded and adopts it as its own.

Rule 230 of TMT's Tariff FMC–F No. 2 provides that the carrier may load other freight in the free space available in a container, while Rule 20–F provides for the assessment of rates based upon one hundred percent of the cubic capacity of the container if the shipper fails to furnish the cubic measurements of cargo rated on a cubic foot basis. Complainant here delivered the containers sealed thereby effectively preventing the carrier from utilizing whatever space might otherwise have been available. This, coupled with Complainant's failure to apprise TMT of the actual measurements of the cargo, as required by the carrier's tariff, warranted the assessment of freight charges based on the full cubic capacity of the container. By its actions and inactions, Complainant in effect leased and moved entire containers.

Our decision today is in full accord with the Commission's holding in *Borden v. Venezuelan Line,* Docket No. 76–2, Report served January 10, 1977, where we reiterated the principle set forth in *Kraft Foods v. Federal Maritime Commission,* 538 F.2d 445 (D.C. Cir. 1976) that no tariff rule may lessen the statutory period for seeking reparation provided in section 22 of the Shipping Act, 1916, as well as the Commission's policy of allowing recovery under the proper circumstances where due to inaccuracies in the shipping documents the carrier was led into assessing higher charges than provided in its tariff for what actually moved. In this case, what actually moved, and what Complainant was properly assessed for, were entire containers.

Vice Chairman Clarence Morse, concurring. I concur in the result but disapprove the basis used by the majority.

The Settlement Officer Held:

> The failure of the complainant to comply with mandatory provisions of a lawfully filed applicable tariff provision in and of itself is sufficient to require dismissal of its complaint. Accordingly, the claim of complainant for reparation is denied; and its complaint dismissed."

This quoted language is the only stated basis for the Settlement Officer's decision. I concur in that basis. However, upon review of the decision of the Settlement Officer, the Commission in its Adoption of Decision of Settlement Officer "finds the decision of the Settlement Officer denying reparation to be proper and well-founded and adopts it as its own." In so doing the Commission takes an action which is diametrically opposed to its decision in *Borden Inc. v. Venezuelan Line,* Docket No. 76–2 (1977), 17 S.R.R. 497, wherein the Commission held:

> The tariff rule construed in *Kraft* provided that: claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier. By analogy to the weight or measurement situation, we hold that Complainant's failure to state the value at the time of shipment cannot deprive it of its statutory right to subsequently bring forth evidence on the issue of the value of the goods it actually shipped. *Nalco Chemical Co. v. Alcoa Steamship Co., supra, Colgate Palmolive Co. v. Grace Line, supra,* and other Commission decisions applying tariff rules similar to that found in this proceeding so as to deny shippers an opportunity to obtain reparations within the two-year limitation period of section 22 are overruled."

A duly filed and published tariff has the force of law. *State of Israel v. Metropolitan Dade,* 431 F.2d 925 at 928. *Valley Evaporating Co. v. Grade Line,* Inc., 14 F.M.C. 16 at 19–20 (1970).

A duly filed and published tariff rule may be found to be unlawful by this Commission only if the finding of unlawfulness is made after notice and opportunity to be heard on that issue. *Administrative Procedure Act,* 5 U.S.C. 551 *et seq.;* Sections 18(a) and 22, *Shipping Act,* 1916; and Section 2, *Intercoastal Shipping Act,* 1933. Neither such a finding nor such an issue, notice, and opportunity to be heard thereon are present in this case.

The following cases uphold the validity of and apply a tariff rule the same as, or similar in principle to, Tariff Rules 20D and 20F: *Davis v. Henderson,* 266 U.S. 92 (1924). *State of Israel, supra. Glama Dress Co. v. Mid-South Transports,* 335 I.C.C. 586 at 593 (1969). *Campbell, Wyant & Cannon Foundry Co. v. Interstate,* 346 I.C.C. 572, 574–575 (1974).

Strict compliance with Tariff Rule 20D is a condition precedent to the goods being rated at less than 100% utilization as provided in Tariff Rule 20F.

The principles of *Kraft Foods v. F.M.C.,* 538 F.2d 445 (D.C. Cir.,

1976) are not applicable. That case holds that any tariff rule or regulation which purports to lessen the two-year period specified in Section 22, Shipping Act, 1916, is void. The tariff rules here under consideration are rules which "... affect, or determine any part or the aggregate of such aforesaid rates ...". The inclusion of any such rules in the tariff is mandated by Section 18(b)(1), Shipping Act, 1916. That rule is no different in principle than other tariff rules which condition the granting of rates based on special packing or value, etc.; for example, for palletized cargo a requirement that the pallets be of specified dimensions and material or that high valued cargo must be declared on the bill of lading if a carrier's liability in excess of $500 per package is to apply; or having one rate for boxed automobiles and a higher rate for unboxed automobiles. It is Hornbook law that such must be strictly applied in rating shipments.

The majority states "Our decision today is in full accord with ... the Commission's policy of allowing recovery under the proper circumstances where due to inaccuracies in the shipping documents the carrier was led into assessing higher charges than provided in its tariff for what actually moved." In my opinion that statement is an oversimplification and imprecise statement of past decisions and disregards the mandate of sections 18(b)(1) and 18(b)(3), Shipping Act, 1916.

See also my dissent in *Borden Inc. v. Venezuelan Line, supra. Borden* should be reversed and tariff rules and regulations should be respected and applied except where a rule or regulation is void on its face or is duly found to be unlawful.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 369(I)

CONE MILLS CORPORATION

v.

TRAILER MARINE TRANSPORT CORPORATION (TMT)

August 19, 1977

Reparation Denied.

DECISION OF L. MERRILL SIMPSON, SETTLEMENT OFFICER*

Complainant seeks reparation in the amount of $4,444.11, claiming a freight overcharge on four shipments of cargo moving between July 27, 1975 and September 25, 1975, in trailer of Ryder Truck Lines, Inc., loaded by the shipper. The overcharge alleged was occasioned by the application of Rule 20F of TMT's Tariff FMC-F No. 2 which provides for assessment of rates based upon 100 percent of the cubic capacity of the trailer, if the shipper fails to furnish the cubic measurement of the cargo, on cargo which is rated on a per cubic foot basis. Rule 450B of the tariff prohibits a change in the cubic measurement after the cargo leaves the possession of the carrier. While no violation of the statute is alleged by Complainant it appears that the complaint is based upon a violation of Section 18(a), Shipping Act, 1916, 46 USC 817(a).

Respondent, TMT, in a letter dated March 6, 1976, encouraged the complainant to file a claim with the Commission and on March 17, 1976, in a letter addressed to the Commission indicated its support for the claim. This support by the carrier of the shipper's claim is misplaced. TMT is the maker of the tariff. It has and has had the ability to amend its rule so that no shipper would be placed in the position of paying for more space than was utilized caused by the failure to state the cubic measurements if the proper application of rates is its only concern. TMT has not altered Rule 20F and it continues to have application.

After this complaint was filed, the carrier consented to the informal

*This decision became the decision of the Commission January 30, 1978.

procedure of Rule 19, 46 CFR 502.301–304 but failed to include any response regarding the allegations therein.

I requested all of the documents received from the shipper and the bills of lading and invoices issued together with the cubic measurement of each container. Respondent complied. The documents furnished by TMT included:

(1) Ocean Bill of Lading covering each shipment and prepared by the respondent;
(2) Trailer receipt and inspection report;
(3) Ryder Truck Lines waybill;
(4) Complainant's shipping order.

Also furnished for some of the shipments was a usually incompleted form titled Shippers Export Shipping Instructions.

Respondent further advised that the interior cubic measurement of each container was 3200 cubic feet.

From the documents supplied, it is clear that TMT had knowledge of the description of the goods, the number of cartons and the total weight of each shipment. *None* of the documents furnished to the carrier reflected the cubic measurement of the cargo nor the inside cubic capacity of the trailer. The shipping order prepared by complainant, and supplied to the respondent listed carton numbers and the contents of each expressed in yards of material and the total *weight* of each shipment.

TMT received no documents which stated the cubic measurement of the cargo. The containers received were sealed and the seal numbers were recorded by both the motor carrier and respondent.

Containerized shipping had brought with it benefits and some problems for shipper and carrier alike. Shipments loaded by the shipper and/or unloaded by the consignee result in savings in handling costs to carriers. In this instance, these savings are translated into the carrier's rate structure through the publication of a truckload rate which is substantially less than the rate for goods moving loose across respondent's facility. This loading of the cargo by the shipper removes the practical ability of the carrier to determine what the measurements of the cargo are, without destroying those savings contemplated in the truckload rate assessed.

Furthermore, rule 230 of respondent's tariff provides in part that the carrier has the unrestricted right to load other freight in the trailer. This right is preempted if the carrier does not have knowledge of the amount of space available to it.

Rule 450B, taken alone would not be a basis for denying the reparations sought.

However, rule 20F places a reasonable duty upon the shipper necessary for both the proper application of rates and efficient carrier operation. It does not appear to be unjust or unreasonable.

The failure of the complainant to comply with mandatory provisions of a lawfully filed applicable tariff provision in and of itself is sufficient to require dismissal of its complaint. Accordingly, the claim of complainant *for reparation is denied; and its complaint dismissed.*

(S) L. MERRILL SIMPSON,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 491

MUNOZ Y CABRERO

v.

SEA-LAND SERVICE, INC.

Authority to waive collection of a portion of freight charges denied.

REPORT

August 23, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

To meet competition, Sea-Land Service, Inc. (Sea-Land) agreed to carry a shipment of common glassware from New York, New York to Bilbao, Spain, at a rate of $44.00 w/m in lieu of the $59.50 provided in its tariff. Due to an administrative error, Sea-Land failed to timely file the rate agreed upon. When the error was discovered, after the shipment was delivered to the carrier, Sea-Land filed a corrected tariff which, due to a subsequent clerical error, showed a rate of $40.00 w/m.

Sea-Land now seeks permission to collect freight charges at the $40.00 w/m rate, and to waive collection of the balance due under the rate of $59.50 applicable at the time of shipment.

Conceding that the $40.00 rate was not the rate agreed upon or the rate originally intended to be filed, Administrative Law Judge Thomas W. Reilly nevertheless found that: (1) there was an error in the tariff in effect at the time of shipment caused by Sea-Land's inadvertent failure to timely file the intended rate, and; (2) Sea-Land had met the other requirements of section 18(b)(3) of the Shipping Act, 1916. He accordingly granted Sea-Land permission to compute charges on the basis of the $40.00 w/m rate. We cannot agree.

The legislative history of the amendment to section 18(b) of the Shipping Act (Public Law 90–298)[1] which gave the Commission authority

[1] 46U.S.C. 817(b)(3).

to permit a carrier subject to its jurisdiction to make a voluntary refund or *to waive the collection* of a portion of the freight charges, clearly indicates that such waiver or refund was to be allowed where, as a result of a bona fide mistake, the carrier failed to file an "intended rate." Thus, the House Report accompanying the Bill which ultimately added the refund/waiver authority to section 18(b) states:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[2]

Likewise, the Senate Report[3] in setting forth the *Purpose of the Bill,* explains

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to *file a tariff reflecting an intended rate.* (Emphasis added)

Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which "such refund or waiver will be based." When read in conjunction with the statements in the House and Senate reports, it is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.

While we recognize that should the application be denied the consequences of the carrier's consecutive errors would fall upon the shipper, nevertheless the authority granted by P.L. 90–298 to depart from the rigid requirements of section 18(b)(3) of the Act and to make a rate applicable retroactively is strictly limited and in our opinion would not extend to approve a rate which was never agreed upon or intended to be filed.

THEREFORE, IT IS ORDERED, That the Initial Decision of the Administrative Law Judge issued in this proceeding is reversed and permission to waive collection of a portion of the freight charges is denied.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

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[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473, 90th Congress 1st Sess. (1967)].

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* 90th Cong., 2d Sess. (1968).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 513

VELSICOL CHEMICAL CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING PARTIAL REFUND OF CHARGES

August 25, 1977

Sea-Land Service, Inc. has submitted the statement of concurrence duly executed by the shipper Velsicol Chemical Corporation, as directed by the Commission's Order on review, served in this proceeding on July 29, 1977.

The requirement of Rule 92, Appendix II(7) having thus been met, the Initial Decision of the Administrative Law Judge in this proceeding is hereby adopted as the decision of the Commission.

THEREFORE, IT IS ORDERED, That applicant Sea-Land Service, Inc. is authorized to refund $1,748.25 of the charges collected from Velsicol Chemical Corporation.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 513, that effective October 17, 1976 for purposes of refund of freight charges on any shipments which may have been shipped during the period from October 17, 1976 through October 21, 1976, the rate on herbicides from Houston, Texas to Bilbao, Spain was $82.00 per ton at 2240 pounds, minimum 18 tons per container, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 513

VELSICOL CHEMICAL CORPORATION

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of herbicides, which moved from Houston, Texas to Bilbao, Spain under a Sea-Land bill of lading dated October 17, 1976. The application was filed March 21, 1977.

The subject shipment moved under Sea-Land Tariff No. 233, FMC–105, item #10720, 3d revised page 153 (effective June 16, 1976) and 7th revised page 171 (effective May 24, 1976), which was a cross-reference to "Chemicals, Non-Hazardous, N.O.S." This tariff covered shipments from U.S. Gulf ports to certain ports in Spain. The aggregate weight of the shipment was 14,640 pounds and it measured 777 cubic feet. The rate applicable at time of shipment was $166 W/M (per ton of 2,240 pounds or 40 cubic feet). The rate sought to be applied is $82 W (per 2,240 pounds), with a minimum of 18 WT per container, pursuant to Sea-Land Tariff No. 233, FMC–105, item 13160, 2d revised page 172, effective November 8, 1976 but telegraphically filed on October 21, 1976.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $3,224.25 ocean freight plus wharfage and transfer charges, making a total of $3,291.96. Aggregate freight charges at the rate sought to be applied amount to $1,476 ocean freight plus the same identical wharfage and transfer charges, making a total of $1,543.71. The difference sought to be refunded is $1,748.25. The Applicant is not

[1] This decision became the decision of the Commission August 25, 1977.

[2] 46 U.S.C. 817, as amended.

aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

Sea-Land offers the following as ground for granting the application:

(4) Approximately October 12, 1976, Sea-Land's sales personnel made a verbal commitment with the complainant to reduce its existing through rates on Herbicides (rated as Chemicals, non-hazardous, N.O.S. per 7th Revised Page 171 and 3rd Revised Page 153) from Houston, Texas to Bilbao, Spain by amending the existing Item 13160 covering Insecticide to include Herbicides and Weed Killer Compounds (Attachment No. 1). Based on this commitment, a booking for one containerload was made to move on the S.S. Sea-Land *Producer* V.28 sailing Houston on October 17, 1976.

Instructions were given to the tariff publication department to file the reduced rate to become effective on the date of shipment. Through clerical error, compounded by misunderstanding between sales and pricing personnel, telegraphic filing was not made until October 21 (Attachment No. 2) as reflected on 2nd Revised Page 172 of the applicable tariff (Attachment No. 3).

When the shipment moved, the freight bill dated October 20 (Attachment No. 4) was issued and ocean freight charges were assessed in the amount of $3,224.55 at the then applicable rate of $166.00 per ton of 2,240 lbs. or 40 cu. ft. in Item 10720 on 3rd Revised Page 153 of the tariff (Attachment No. 5).

Complainant paid the charges through his freight forwarder and has claimed against respondent for refund of the excess charges he paid.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to timely file the new rate for shipments of the subject commodity destined for Bilbao, Spain and having a minimum of 18 WT per container, as had been promised for shipper.

[3] For other provisions and requirements, *see* § *18(b)(3) and* § *502.92* of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

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2. Such a refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such refund would be based.

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

Accordingly, permission is granted to Sea-Land Service, Inc. to refund a portion of the freight charges, specifically the amount of $1,748.25. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
May 19, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL KOCKET NO. 509

VAN MUNCHING & COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING PARTIAL REFUND OF CHARGES

August 25, 1977

Sea-Land Service, Inc. has submitted the statement of concurrence duly executed by the shipper Van Munching & Company, Inc., as directed by the Commission's Order on review, served in this proceeding on July 29, 1977.

The requirement of Rule 92, Appendix II(7) having thus been met, the Initial Decision of the Administrative Law Judge in this proceeding is hereby adopted as the decision of the Commission.

THEREFORE, IT IS ORDERED, That applicant Sea-Land Service, Inc. is authorized to refund $1,471.50 of the charges collected from Van Munching & Company, Inc.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 509, that effective September 1, 1976 for purposes of refund of freight charges on any shipments which may have been shipped during the period from September 1 and 2, 1976, through March 19, 1976, the rate on beer kegs from Tampa, Florida to Rotterdam, Holland was $3.15 each, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 509

VAN MUNCHING & COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

By application filed February 25, 1977, Sea-Land Service, Inc., seeks permission to refund a portion of the freight charges on two shipments of beer kegs consigned to Van Munching & Company, Inc. aggregating 22,638 pounds from Tampa, Florida to Rotterdam, Holland, on September 1 and 2, 1976. The rate applicable at the time of shipment was $5.40 each.[2] This rate resulted in aggregate freight charges of $3,540.09. The rate sought to be applied is $3.15 each.[3] This rate would have resulted in total freight charges of $2,068.59. Therefore, permission to refund $1,471.50 is sought.

Sea-Land Service, Inc., is a participating carrier in the Gulf European Freight Association (GEFA) Tariff No. 2 (FMC–2), which names all-water rates from U.S. Gulf ports, including Tampa, Florida, to continental European ports in the Bordeaux/Hamburg range. Gulf ports at which Sea-Land vessels regularly call direct are Houston, Texas and New Orleans, Louisiana. Vessels also call direct at Jacksonville, Florida in the South Atlantic. To compete with carriers in the trade calling direct at other Gulf ports, Sea-Land published and filed its mini-landbridge Tariff No. 259, FMC No. 133 and ICC No. 104, naming joint through rail-water and motor-water rates from Tampa and other Gulf ports, effective June 20, 1976. The rates in Tariff No. 259 were published at the same level as the existing all-water rates in GEFA Tariff No. 2 (FMC–2). The all-water rate on the involved commodity in effect at the time Tariff No. 259 was being

[1] This decision became the decision of the Commission August 25, 1977.

[2] Sea-Land Service, Inc. Eastbound U.S. Gulf of Mexico/Europe Joint Container Freight Tariff No. 259, FMC No. 133 and ICC 1 No. 104, Item 40, Original Page 52.

[3] Same tariffs of rates. 1st Revised Page 52.

compiled was $3.15 each on Page 48 of GEFA Tariff No. 2 (FMC–2), having been reduced from $5.40 each by telegraphic filing effective March 19, 1976 per 3rd Revised Page 48. Through clerical error, Sea-Land's tariff publishing department failed to pick up 3rd Revised Page 48 and instead copied the rates appearing on 2nd Revised Page 48 on which the rate was $5.40 each. All three rates on Empty Beer Barrels and Casks appearing on 2nd Revised Page 48 of GEFA Tariff No. 2 were copied into Item 40 on Original Page 52 of Sea-Land Tariff No. 259, which became effective June 20, 1976. Sea-Land's shippers, including complainant, were advised that its mini-landbridge rates from Tampa and other Gulf ports in Tariff No. 259 were the same as the all-water rates published in the GEFA tariff. It was not until after the shipments that are the subject of this complaint had moved that the error in failing to publish the correct measure of rates in Item 40 on Original Page 52 of Sea-Land's Tariff No. 259 was discovered. The freight on each shipment was calculated at the erroneous but applicable rate of $5.40 each and was subsequently paid by the shipper. The rates in Item 40 were then promptly reduced to the GEFA level on 1st Revised Page 52 effective September 26, 1976. The rates actually published on 1st Revised Page 52 included an 8½ percent general increase that had become effective September 23, 1976 per 1st Revised Title Page of Tariff No. 259 which followed an identical general rate increase in GEFA Tariff No. 2 effective September 20, 1976, on Original Page Title 1.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 92, *Special Docket Applications,* Rules of Practice and Procedure, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[5] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an amended rate.

It is therefore found that:

1. There was an error due to an inadvertence in failing to file a new rate.
2. Such refund of a portion of the freight charge will not result in discrimination among shippers.
3. Prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff which sets forth the rate on which such refund would be based.
4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to refund a portion of the freight charges represented by $1,471.50.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,

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[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill*.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–53

AGREEMENTS NOS. 10040–2 AND 10153—AGREEMENTS IN THE UNITED STATES/GUATEMALA TRADE

NOTICE OF DETERMINATION NOT TO REVIEW

August 24, 1977

Notice is hereby given that the Commission on August 24, 1977 determined not to review the order of discontinuance served August 1, 1977 in this proceeding.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 76–53

AGREEMENTS NOS. 10040–2 AND 10153—AGREEMENTS IN THE UNITED STATES/GUATEMALA TRADE

August 1, 1977

PROCEEDING DISCONTINUED

By Order of Investigation and Hearing served September 22, 1976, the Commission instituted an investigation to determine whether Agreements Nos. 10040–2 and 10153 are unjustly discriminatory or unfair as between carriers, shippers, exporters or importers of the United States, are contrary to the public interest, or are in violation of the Shipping Act, 1916, 46 U.S.C. 801 et seq., and therefore, whether those agreements should be disapproved, canceled, modified or granted continued approval.

Flota Mercante Gran Centroamericana, S.A. (Flomerca), Coordinated Caribbean Transport, Inc. (CCT), and Pan American Mail Line, Inc. (PANAM), were made respondents. Hearing Counsel became a party pursuant to Rule 502.42 of the Commission's Rules of Practice and Procedure, 46 CFR 502.42.

Agreement No. 10153 is an arrangement between Flomerca and CCT whereby those respondents became associated for the transportation of cargo from Miami, Florida, to Guatemala.

Agreement No. 10040–2 is an extension of Agreement No. 10040, a cooperative working arrangement between Flomerca and Panam establishing Flomerca Trailer Service, a through trailer service in the trade between ports of Florida and ports of Santo Thomas de Castilla, Guatemala, and Puerto Cortez, Honduras, and via those ports to and from points in Guatemala, El Salvador and Honduras.

Agreement No. 10153 became effective August 13, 1975, and by its terms was to continue in operation until July 9, 1977. Agreement No. 10040–2 was approved pending the outcome of this investigation or until it expired under its terms on May 31, 1977.

On November 26, 1976, the Commission ordered the postponement of the procedural and discovery schedule, hearing and decision in this proceeding pending the final outcome of certain discussions with representatives of Flomerca.

On June 23, 1977, Hearing Counsel filed a Petition for Partial Dismissal and Discontinuance of the Proceeding, seeking to dismiss Panam, as a respondent, and to discontinue the proceeding as to Agreement No. 10040-2 because that agreement had expired. On July 15, 1977, Hearing Counsel filed a Motion for Dismissal and Discontinuance, urging dismissal of CCT and Flomerca, as respondents, and discontinuance of the proceeding as to Agreement No. 10153, as well as to Agreement No. 10040-2 because both agreements had expired.

Hearing Counsel also noted in its second pleading that there has not been filed any request to extend the life of either agreement.

On July 7, 1977, Panam replied to Hearing Counsel's Petition, stating that it agreed that the proceeding should be discontinued as to Agreement No. 10040-2 and that Panam should be dismissed as a respondent. By telephone, on July 18, 1977, counsel for CCT advised me that neither CCT nor Flomerca objected to nor opposed Hearing Counsel's Motion.

Since the agreements which are the subject of this investigation are no longer in effect, and in the absence of any request to extend the life of those agreements, the issues in this proceeding are moot. No useful regulatory purpose would be served by continuing this proceeding. Therefore, Hearing Counsel's Petition and Motion are granted. The proceeding is ordered discontinued.

One further matter needs comment.

In its Reply to Hearing Counsel's Petition, Panam incorporated a response, dated May 20, 1977, from its president to an earlier inquiry from the Commission's Chief, Office of Agreements, Bureau of Compliance. That response, among other things, pointed out that Panam "[dba] Pan Atlantic Lines elsewhere in its trade routes has elected to adopt the trade name, Flomerca Trailer Service for the Miami/Guatemala/Salvador/Honduras Trade, since the trade name shall become available on June 1st and since it shall certainly prove useful to the marketing efforts of [Panam] in that service."

By virtue of having been incorporated in the Reply, the May 20th letter came to the attention of Delta Steamship Lines, Inc. (Delta), an intervenor in the proceeding. Delta's president thereupon communicated certain comments to the Chairman of the Commission, by letter dated July 13, 1973, a copy of which was sent to me. Delta's letter included, among other things, a request that the Commission undertake a new investigation "into the relationship under which [Panam] has continued operation as Flomerca Trailer Service following the purported severance of its relationship with Flomerca. . . . As the Commission is aware, the name 'Flomerca' has long been utilized by and associated with the Guatemalan National flag carrier which, in turn, continues to operate as Flomerca Line between the U.S. Gulf and Guatemala."

However, Delta's letter makes no mention of Hearing Counsel's

Petition to discontinue the proceeding as to Agreement No. 10040–2. Neither in form nor in substance is it a proper pleading under the Rules of Practice and Procedure. Since Delta did not reply to the Petition within the 15 day time period prescribed by the Commission's Rules of Practice and Procedure, Rule 502.74(b), 46 CFR 502.74(b), Delta will be deemed not to have objected to nor opposed the relief sought by that Petition. In any event, the matters referred to in Delta's letter are beyond the scope of the order instituting this proceeding and need not be considered further by me.

Delta did not reply to the second pleading.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–51

PACIFIC COAST EUROPEAN CONFERENCE

v.

SOUTHERN PACIFIC MARINE TRANSPORT, INC., AND THE SOUTHERN PACIFIC COMPANY

PARTIAL ADOPTION OF INITIAL DECISION

August 25, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, James V. Day and Bob Casey, *Commissioners*)

This proceeding was commenced with the filing of a complaint by the Pacific Coast European Conference (PCEC) against Southern Pacific Marine Transport, Inc. (SPMT) and the Southern Pacific Company[1] alleging violations of sections 14b, 14 Fourth, 16, 17, 18(b)(5) and 44(c) of the Shipping Act, 1916.

While PCEC's original complaint presented various allegations concerning the activities of SPMT, Administrative Law Judge John E. Cograve (Presiding Officer), subsequently found that PCEC on brief "appears to have abandoned all but the 18(b) and 44(c) allegations" of its complaint. Accordingly, the Presiding Officer concluded that the only issues remaining to be resolved involved whether SPMT is a common carrier by water under the Shipping Act and/or whether its activities are those of a freight forwarder as defined in section 1 of that Act.

In his Initial Decision the Presiding Officer found that (1) SPMT was a non-vessel owning common carrier by water (NVOCC) and (2) SPMT was not carrying on the business of forwarding without a license. Exceptions to that decision were filed by PCEC and replies submitted by SPMT. The Commission heard oral argument.

In its exceptions, PCEC concentrates on the "initial and basic issue for determining prior to reparations," *i.e.*, the legal issue of SPMT's common carrier status. It is contended by PCEC that the Presiding Officer did not

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[1] The complaint was later amended to substitute the Southern Pacific Transportation Company for Southern Pacific Company.

decide this "primary issue." According to PCEC, the Initial Decision "does not forthrightly hold SPMT to be a 'common carrier by water' within the meaning of the Act but to be 'a non-vessel owning common carrier by water within the meaning of the Shipping Act.' " PCEC not only takes issue with the Presiding Officer's conclusion that SPMT is an NVOCC, but, in addition, attacks his alleged failure to *specifically* find that:

> SPMT is not a common carrier by water under the Shipping Act.
>
> SPMT has not engaged in the transportation by water of passengers or property between the United States and a foreign country on the high seas on regular routes from port to port.[2]

In attacking SPMT's status as an NVOCC, PCEC argues that the Presiding Officer's decision effectively overrules the Commission's decision in Docket No. 815, *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-vessel Carriers,* 6 F.M.B. 245 (1961), which established the concept of an NVOCC. According to PCEC, the facts in Docket No. 815 are distinguishable on the basis that SPMT, unlike the carriers in Docket No. 815, does not claim to assume liability for the entire journey, both land and sea. PCEC relies on the fact that SPMT "admits that it disclaims 'responsibility and liability' to its cargo," which, PCEC views as the "essence of the so called 'non-vessel owning common carriage by water' enacted by this Commission." According to PCEC, the Presiding Officer's decision, if allowed to stand, will introduce:

> ". . . a new 'concept of nonvessel owning common carrier by water' that is neither a carrier itself nor one who 'assumes the responsibility of a carrier' by issuing its own bill-of-lading accepting 'actual liability over the entire journey.' It will be, like SPMT itself, a 'person' that submits a schedule of port-to-port freight rates to the FMC in which it expressly disclaims any responsibility or liability for the transportation services that it pretends to offer to the shipping public. This novel concept of a common carrier by water is one whose 'tariff' claims to be a common carrier and whose bill-of-lading says 'not me.' "

SPMT supports all findings and conclusions set forth in the Initial Decision, including the Presiding Officer's determination that SPMT's statement of liability for port to port movements should be restated and clarified. SPMT argues that its operations fit squarely within the definition established by the Commission in Docket No. 815, and in General Order 4. (46 C.F.R. 510 *et seq.*)

The threshold issue in this proceeding is the interpretation to be applied to the definition of an NVOCC set forth in Docket No. 815, *supra.* PCEC contends that under the criteria outlined in that proceeding, an entity, in order to be considered an NVOCC, is required to assume liability for the

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[2] In light of the Presiding Officer's determination that SPMT is an NVOCC we do not consider it necessary to address this aspect of PCEC's exceptions. Suffice to say that an NVOCC is a "common carrier by water under the Shipping Act" (see footnote 3) *albeit* in a manner which differs from the historical concept of an ocean water carrier. As an NVOCC, SPMT is engaged in the transportation by water of property between the United States and foreign countries.

entire through movement including the land portion.[3] In so doing, PCEC relies primarily on the statement at p. 256 of the Commission's Report in Docket No. 815 that: "Actual liability as a common carrier over the entire journey including the water portion is essential."

The Presiding Officer, after much discussion of the Commission's decision in Docket No. 815, concluded that the Commission did not intend to require that an NVOCC's liability extend to the land portion of the movement for NVOCC status to attach. Inasmuch as we are adopting the Presiding Officer's initial decision which contains a comprehensive analysis of this matter we need not reiterate all the details contained therein. Suffice it to say that our review of Docket No. 815 fully supports the determination of the Presiding Officer on this point.

In Docket No. 815 we determined that a person or business association:

> . . . may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, as defined in the Shipping Act, 1916; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act, 1916. At pages 256–257.

As can be seen, liability for the inland movement was not included within the definition and is immaterial to the Commission's exercise of jurisdiction over the water portion of the movement. While it is true that the parties involved in Docket No. 815 were all "initial carriers" who assumed liability for the inland movement, the fact remains that nowhere in the decision in Docket No. 815 did we impose *any* requirement that the NVOCC assume liability for the inland movement.

That being so, we find that the Presiding Officer's findings and conclusions regarding the status of SPMT as an NVOCC are proper and supported fully by the record. SPMT's activities fall generally within the concept of an NVOCC discussed in Docket No. 815 and SPMT is therefore, for all intents and purposes, an NVOCC.

PCEC next excepts to the Presiding Officer's finding that SPMT is not engaged in the business of forwarding. According to PCEC, the Presiding Officer erroneously reasoned that "(1) SPMT is an 'NVOCC' because SPMT is not a forwarder; (2) SPMT is not a forwarder because SPMT is an 'NVOCC.' " PCEC submits that the Presiding Officer should have found that SPMT performs forwarding service "*as a matter of fact.*" PCEC maintains that SPMT's testimony of record indicates that SPMT's activities encompass all of those services normally attributed to an ocean freight forwarder and the Presiding Officer "simply ignored" the proof presented in this regard. SPMT counters PCEC's contention that SPMT

[3] PCEC's alternative challenge to the NVOCC concept and the Commission's establishment thereof is without merit. The concept of an NVOCC has been firmly established and approved by the courts. *IML SeaTransit Limited v. United States*, 343 F. Supp. 32 (N.D. Cal. 1972) aff'd 409 U.S. 1002 (1972), rehearing denied 409 U.S. 1118 (1973).

acts as a forwarder citing testimony in the record to the effect that other freight forwarders did not consider SPMT to be a forwarder.

We have closely examined the activities of SPMT and find no evidence that freight forwarding services were performed on shipments not handled by SPMT in its capacity as an NVOCC. It is not a question of determining whether SPMT performs "forwarding services *as a matter of fact*" as PCEC contends, but whether these services are rendered on shipments not carried under SPMT's own bill of lading. Provided SPMT only performs freight forwarding services in connection with its own shipments it need not be licensed by this Commission (46 C.F.R. 510.22). The record in this proceeding does not indicate otherwise.

PCEC also attacks the Presiding Officer's reliance on Docket No. 74–14, *Possible Violations of Section 18(a) of the Shipping Act, 1916, etc.*, 16 F.M.C. 425 (1975) for the proposition that:

> . . . if a person in fact performs as an NVOCC any assumption of liability on the part of that person is unnecessary because liability will be imposed upon him by law.

PCEC would distinguish that case on the grounds that the party in Docket No. 74–14, unlike SPMT here, was expressly disclaiming any kind of NVOCC status; that the trade involved in that proceeding was domestic commerce—not foreign commerce; and, that the instant proceeding was instituted pursuant to section 22 in contrast to Docket No. 74–14 which "appears to involve some sort of personal 'rulemaking' activity" of the Presiding Officer and Hearing Counsel. PCEC also takes issue with the Presiding Officer's reliance on Docket No. 74–14 for "precedential value" because "the Commission's 'Notice of Adoption of Initial Decision' recites that it was adopted upon 'the Commission's having determined not to review the same.' "

PCEC's challenge of the Presiding Officer's reliance on Docket No. 74–14, *supra,* is without foundation. PCEC's attempt to draw distinctions between Docket No. 74–14 and the instant proceeding ignores the fact that the imposition of liability upon an NVOCC referred to in the former proceeding and relied on by the Presiding Officer is a rule of general applicability and does not necessarily turn on the particular facts of each case. Thus, distinctions drawn on the basis of the trade or type of proceeding involved or the position taken by the parties as to their status are all irrelevant. Liability will be imposed by law regardless of these considerations if, as the Commission noted, "a person in fact performs as an NVOCC."

Further, there is no basis for PCEC's suggestion that the decision in Docket No. 74–14 is of questionable "precedential value." Upon adoption of an initial decision, that decision becomes *the decision of the Commission* regardless of the procedure used to effect that adoption. Until modified or overturned by subsequent Commission or court decisions the general rule regarding NVOCC liability expressed in Docket No. 74–14 is applicable to all such carriers.

Finally, PCEC denies that it "abandoned" issues raised under sections 18(b)(5), 16, 17, 18(b), 14b and 14 Fourth. PCEC explains:

> On the contrary, we stated in our 'Opening Brief' clearly and unequivocally that the allegations of the Complaint upon which Complainants claimed reparations would—under the Commission's Rule No. 15—be subject to separate proceedings. . . .

While admitting that it did not brief the allegations of SPMT's violations, PCEC contends that the record is complete for briefing under Rule 251.[4]

SPMT nevertheless contends that PCEC's rights have been foreclosed by its failure to introduce any evidence whatsoever concerning its operations and its claim of damages in the proceeding. SPMT notes that at the prehearing conference PCEC did not express any interest in severing the reparation issues for later consideration and raised no objection at that time to a full and complete trial of all issues on the date suggested by the Presiding Officer. SPMT argues that had PCEC seriously advanced the reparations issue at any stage of the proceeding SPMT would have presented shipper witnesses and would have been prepared to try any and all issues which PCEC might have raised. SPMT views PCEC's failures to do so as an abandonment of the reparation issue together with a number of other issues not pressed during the proceeding.

We believe that Complainant has misconstrued the language in Rule 251. This rule states in relevant part that in any proceeding in which reparation is sought,

> . . . the Commission will determine in its decision the issues as to violations, the injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given the opportunity to agree or make proof respecting the shipment and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered.

There is no basis for PCEC's assumption that the reparation issues would be considered in a *separate* proceeding. Rule 251 contemplates a two-tier procedure within the *same* proceeding with the reparation phase following a determination that a right to reparation exists; *i.e.*, upon a showing that a violation has occurred. The record here does not support any finding of the violations alleged let alone that reparations for such violation should be awarded.

While certain aspects of the allegations raised by PCEC are discussed in the record, the focus of attention was, for the most part, devoted to SPMT's carrier status. In its opening brief PCEC advised that it was seeking "the Commission's decision on the legal issue of SPMT's pretended 'ocean carrier' status." Again, on exception, PCEC saw the case as presenting "the claim to 'common carrier by water' status of SPMT, Inc." In its exceptions, PCEC advised that if SPMT were a *bona fide* common carrier it could not complain except with respect to the absorptions of drayage charges at the Gulf ports contrary to the tariff and the question of deferred rebate contracts. PCEC has had ample opportu-

[4] Since the filing of exceptions the Commission has redesignated the rules found in Part 502 of Title 46, Code of Federal Regulations. Rule 15 cited by PCEC is now designated as Rule 251.

nity to introduce evidence in support of these alleged violations, but refused to do so.[5] In light of PCEC's failure to furnish a full and complete record on these matters we do not believe that due process requires that this proceeding be remanded for further hearing without some additional assurance by PCEC that it is interested in actively litigating the alleged violations. In any event, and in view of our decision, PCEC might now wish to reconsider its legal options and pursue any further action against SPMT based on its NVOCC status.

Therefore, we are dismissing this complaint. PCEC is free to file a new complaint directed at those alleged violations of the Shipping Act, 1916, not addressed herein.

While this disposes of the pertinent exceptions raised by PCEC, there are some additional determinations made by this Presiding Officer which warrant further discussion.

The Presiding Officer found that the bill of lading issued by SPMT should be amended to clarify the contractual relationship between the actual shipper and SPMT as "carrier." We agree that such a clarification is necessary and are requiring that it be made.[6] We are also requiring that SPMT amend the title page in its tariff to delete the statement that the tariff is applicable to cargo moving on "Through Bill of Lading issued by the Carrier." SPMT has admitted that it does not issue a through bill of lading and reference to such on the title page is misleading.

The Presiding Officer also determined that while SPMT's bill of lading provides that all shipments are carried pursuant to the provisions of the Carriage of Goods by Sea Act (COGSA), SPMT's operations do not fit within the definition of a "carrier" as defined in COGSA. Because COGSA allegedly does not apply to SPMT the Presiding Officer concluded that SPMT's assumption of liability is "meaningless." Notwithstanding this finding, the Presiding Officer nevertheless determined that SPMT is liable for the water portion of the movement. In so doing, he relied on the Commission's decision in Docket No. 74–14, discussed earlier.

While we agree with the general proposition outlined in Docket No. 74–14 and its application to NVOCC's disclaiming any liability we do not consider it necessary or proper to decide whether NVOCC's are subject to the COGSA provisions. The applicability of COGSA to NVOCC's would appear to be a matter for the courts to decide.

It is well recognized that in the absence of any *statutory* or *contractural* provision to the contrary, and subject to several well-recognized exceptions, the liability of a common carrier by water for the loss of or injury to goods received by it for transportation is generally held to be that of an

[5] The Presiding Officer scheduled a hearing in San Francisco but was advised at the hearing that Complainants would present no witnesses and did not wish to cross-examine any of Respondent's witnesses. As a result, the testimony of these witnesses was entered into evidence without being subject to cross-examination.

[6] SPMT has already indicated its willingness to comply with this clarification.

insurer.[7] This carrier liability may be limited by special or express contract provided the agreed limitation is such as the law can recognize as just and reasonable and not inconsistent with sound public policy.[8] Finally, it has been held that a shipper may, consonant with public policy, assent to a limitation of liability by the acceptance of terms covering the contract of carriage contained in a bill of lading or tariff.[9]

Thus, if it is determined that an NVOCC is not a "carrier" under COGSA, liability would probably be imposed by law in conformance with the principles discussed above. The important consideration is that liability, in some form, will be imposed on an NVOCC as a "common carrier." The Presiding Officer so found and we agree. However, a determination as to whether an NVOCC's liability should be limited through application of COGSA is not only unnecessary to our ultimate resolution of the central issue raised in this proceeding *i.e.*, the matter of SPMT's status, but would also appear to be beyond the scope of the proceeding. Therefore, we are vacating that portion of the Presiding Officer's decision pertaining to the applicability of COGSA to SPMT.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is adopted in its entirety except that portion pertaining to the applicability of the Carriage of Goods by Sea Act to the operations of a non-vessel owning common carrier which portion is hereby vacated.

FURTHER, IT IS ORDERED, That SPMT will amend the title page in its tariff (Local Freight Tariff No. 2, FMC-2) to delete the statement that the tariff is applicable to cargo moving on "Through Bill of Lading issued by the Carrier."

FINALLY, IT IS ORDERED, That the complaint in this proceeding is, dismissed.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

[7] 70 AM JUR 2d § 513, 516.
[8] 14 AM JUR 2d § 537.
[9] 14 AM JUR 2d § 548, 549.

FEDERAL MARITIME COMMISSION

No. 74-51

PACIFIC COAST EUROPEAN CONFERENCE

v.

SOUTHERN PACIFIC MARINE TRANSPORT, INC., AND THE SOUTHERN PACIFIC COMPANY

April 7, 1976

Southern Pacific Marine Transport found to be a nonvessel-owing common carrier by water.

Southern Pacific Marine Transport found not to be carrying on the business of forwarding without a license.

Leonard G. James and *David C. Nolan* for complainant.

John MacDonald Smith and *Robert J. Corber* for respondents.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

The Pacific Coast European Conference (PCEC), by its complaint in this case charges respondents Southern Pacific Marine Transport, Inc., and the Southern Pacific Company with violations of sections 14(b), 14 Fourth, 16, 17, 18(b)(5) and 44(c) of the Shipping Act, 1916. The charges stem from the operations of the respondent Southern Pacific Marine Transport, Inc. (SPMT).

A preliminary word concerning the record in this proceeding is needed. Although a hearing was scheduled in San Francisco, complainant chose not to call any witnesses or offer any testimony. Instead complainant chose to rest his case on a package of documents designated Exhibits 1A through 1G. Respondent offered certain shipper testimony but complainant did not desire to cross-examine the witnesses and their written direct testimony was admitted without objection (Exhibits 2-8). The foregoing together with two other documents—the deposition of Jack D. Burnett and the statement of B. R. Johnson constitute the entire record for decision in this case.

[1] This decision became the decision of the Commission August 25, 1977.

SPMT is the wholly-owned subsidiary of the Southern Pacific Company which latter also owns the Southern Pacific Railway system.

SPMT purports to operate as a "non-vessel owning common carrier" (NVOCC). It was created in 1967 to take advantage of the "non-vessel operating carrier" entity as created or recognized by a series of decisions by the Commission. SPMT has engaged in a variety of activities but the one which the Conference is complaining about is the "Gulf-to-Atlantic" shipping program inaugurated in 1973.

SPMT found after canvassing West Coast Shippers for "intermodal" opportunities for SPMT, that a number of shippers with cargo moving to North Atlantic and United Kingdom ports would be interested in the availability of alternate services through the Gulf.

SPMT found that on a "substantial" number of commodities the allwater rates on PCEC lines were more than the sum of the water rates from the Gulf plus the rail or motor carrier rates from California to the Gulf. The rate levels, as SPMT found them, appeared to offer California shippers savings if they would move their cargo through Gulf ports rather than through California ports.

However, SPMT's experience led them to realize that "a rate spread alone was not enough to generate cargo," primarily because "of the complications involved in the intermodal service." In the words of SPMT's president:

> It is not enough to load the traffic on the railroad in California in sufficient time to arrive at the port, and hope that everything works well . . . In practice, quite frequently it doesn't. Unless there is continual monitoring of the rail shipment until it arrives at the port city and is tendered to the ocean carrier there, there is always the possibility of delay, missed connections, detention charges, disputes with the steamship line over missed bookings, obtaining space, etc.

SPMT found in short that it was "not possible to put a through service together without monitoring the shipment from the time it is loaded on the train until the time it is tendered to the steamship carrier."

In the words of SPMT's president the "basic marketing strategy of the service has been to make available to West Coast Shippers a coordinated usable alternative service via Gulf ports which are [sic] competitive with the cost of all-water service from the Pacific Coast ports. . . ."

As described by its President SPMT's function is to act under its tariff as "shipper's agent," to monitor shipments made, for example, from California, while on the railroad until "received" by SPMT as an ocean carrier at a Gulf port. SPMT does not undertake responsibility for the actual transportation of the goods by inland carrier to the port city. SPMT only "monitors" the shipment through daily calls to the railroad.[2]

All of SPMT's business to date has been conducted under the existing rate structures, i.e., all of the traffic handled by SPMT has moved at the

[2] Not all SPMT's cargoes involve the "monitoring" of the inland movement. About 5 percent of SPMT's shippers arrange their own inland transportation and tender the cargo to SPMT at Houston, Texas.

rail, motor or water rates specified in the "underlying" carrier's respective tariffs.

SPMT offers a "volume incentive allowance" under which a shipper "agreeing to ship certain specified minimum tonnages of certain specified commodities during a period of 12 consecutive months," receives a discount from the applicable rate. Some examples from SPMT's current tariff are:

Commodities	*Annual Volume S/T*	*Allowance Per S/T*
Dried Fruit	9,000 tons and over	$6.00
	8,000 tons	5.00
	7,500 tons	4.00
Walnuts	2,000 tons and over	6.00
	1,500 tons	5.00
	1,000 tons	4.00
Dehydrated Onions-Garlic	200 tons and over	6.00
	150 tons	5.00

To quality for the volume incentive allowance a shipper must give SPMT notice that it agrees and commits itself to ship during 12 consecutive months commencing not earlier than one week from the date of the notice the required aggregate amount of the particular commodity. According to respondents' tariff, volume discounts are available only on some 7 or 8 commodities.

The following is the sequence of events involved in the handling of an SPMT shipment as described by J. D. Burnett, Manager-Marketing of SPMT.

The intending shipper files a letter of commitment to ship under the volume incentive rates.[3]

The shipper (or his forwarder) notifies SPMT generally by telephone, or an impending shipment to be made to a European port in the North Atlantic, and requests SPMT to secure appropriate space. SPMT then telephones the steamship line which will be used as its underlying carrier for the shipment and obtains a booking for space.

Next SPMT calls the shipper (or forwarder) and advises of the departure date. In about 5 percent of the cases, involving traffic originating at storage points in midwestern states, the shipper will make all arrangements to direct cargo to the port. In most cases, however, SPMT will be asked to coordinate the movement from the interior shipping point in California to the Gulf port. In the case of shipments which SPMT coordinates SPMT will suggest an approximate shipping date to meet the ship sailing from the Gulf port.

Some shippers will place their equipment orders with the railroad; others ask SPMT to do so. If SPMT is asked to do so, it will place the equipment order with the railroad on the "shippers behalf." In that event

[3] Since January 1, 1973, two shippers have used SPMT, and each used volume incentive, filing appropriate letters of commitment before doing so.

SPMT will ask the shipper whether he prefers to load rail cars or highway trailers.

On shipments for which rail equipment orders are placed by SPMT, SPMT will ask the rail carriers to place cars at the shipper's spur or, if trailers are used, to "spot" the trailers on a given date.

At this point an exchange of documents takes place. A rail bill of lading is given to the "shipper" and the local rail carrier employee signs for the cargo and handles the movement.

It is not clear who appears as shipper on the rail bill of lading. In a deposition taken of J. D. Burnett by complainant's counsel the following colloquy took place:

Q. Who is shown on that rail bill of lading?

A. The rail bill of lading shows the shipper SPMT—the firm involved.

Q. The actual importer of the goods or PACE? [PACE is the acronym for the Pacific Agricultural Cooperative for Export.]

A. It would be PACE.

In all instances the rail bill of lading shows SPMT as the consignee.[4]

SPMT's tariff while showing that all shipments handled under it will be "transported from origin port to destination port under carrier's[5] bill of lading," goes on to provide:

If carrier is requested to arrange transportation of the shipment between an interior point in the United States and a United States port, carrier will undertake to do so as Agent for the shipper, and shall use its best efforts to engage a competent domestic carrier to undertake such transportation. (Page 7 Item (e).)

SPMT's tariff further attempts to restrict its undertaking by the following clause:

When shipper requests SPMT to act as its agent for arranging transportation from an interior point in the United States to United States Ports and requests SPMT to take possession of the goods at an interior point for such purpose, the point at which SPMT takes possession of the goods shall be shown on the bill of lading as the point of receipt, but it shall be understood that receipt at such point is solely for the purpose of enabling SPMT as a shipper's agent to arrange for transportation by domestic inland carrier to the port at which SPMT shall take custody of the goods as carrier.

Thus, by its tariff SPMT denies common carrier liability for the inland portion of the through movement, i.e., from California (or some other inland point) to the Gulf ports whence it ships.

Additionally, SPMT's tariff goes on to provide:

In conjunction with such transportation [inland portion] SPMT shall accept and execute on behalf of the shipper, as shipper's agent, appropriate domestic inland bills of lading issued by the inland carrier to cover the transportation of the goods from point of actual receipt by SPMT to the United States port at which SPMT's undertaking as carrier under this tariff shall commence.

The rail movements to Houston/Galveston are made under boxcar rates, but the California railroads have a Plan VII piggyback service in

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[4] See page 6 of SPMT's tariff for the provision under which SPMT will "execute" inland bills of lading.

[5] "Carrier" is defined in the tariff as SPMT (Page 4 Definition (b) of the tariff).

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which highway trailers are furnished in substitution for boxcars on eastbound movements from California.

Under Plan VII, if the shipper agrees, two highway trailers are substituted for one boxcar. The railroad arranges for the spotting of the trailers and for the picking up and ramping of them as part of its service under the boxcar rates filed with the Interstate Commerce Commission. When SPMT coordinates the interior shipment, it will check with the inland carrier, generally daily, to trace the progress of the shipment in order to insure its going through on schedule.

SPMT alerts the ocean carrier or SPMT's transfer agent of the projected arrival of the rail shipment so that a timely transfer of the cargo to containers can be planned.

Some shipments are consigned directly to the ocean carrier who undertakes, under its ocean tariff, to transfer the cargo to containers at the Gulf port. In most cases, however, the cargo is transferred into containers for SPMT's account by its transfer agent. The transfer agent is Southern Pacific Transport Company of Texas and Louisiana, a motor carrier with a terminal at Houston, Texas, and with extensive operations in and about the Port of Houston.[6]

For shipments handled by the transfer agent, the agent will unload the trailers or rail cars, load the shipment into containers and dray the containers to the ocean carrier. The motor carrier or agent charges 15 cents per hundred pounds for palletized or unitized cargo and 25 cents per hundred pounds for loose cargo. Late in 1974 the motor carrier requested that it be paid an additional $25.00 per container where drayage was also required, and this amount is currently being paid in addition to the 15-cent—25-cent transfer charges.

Once loaded into containers, the cargo is tendered to the ocean carrier as a shipment moving for the "account" of SPMT. The ocean carrier issues a "memorandum" bill of lading to SPMT and bills SPMT, generally on a separate invoice, for the amount of freight owing under the ocean carrier's tariff.

SPMT prepares its bill of lading when the goods are loaded.[7] It is executed as an "on-board" bill of lading when the ocean carrier receipts for and acknowledges responsibility for the containers by the issuance of its "memorandum" bill of lading to SPMT.

The railroad issues its freight bill to SPMT as agent for the shipper. The ocean carrier issues its bill to SPMT for ocean transportation charges due, and the motor carrier at Houston issues its bill for just transfer or for transfer and drayage charges. SPMT then bills the shipper for (a) the

[6] Apparently all SPMT's shipments have moved only through the Port of Houston. It further appears that all shipments are actually currently being handled by the transfer agent.

[7] Although SPMT contends that it "assumes" full liability for the port-to-port movement, the bill of lading issued by SPMT contains the clause, "The terms of this bill of lading constitute the contract of carriage, which is between the shipper and the owner of the vessel designated to carry the goods." More about the purported assumptions of liability will be said later.

amount of the ocean transportation accruing under SPMT's tariff, (b) wharfage charges, and (c) rail charges.

Discussion and Conclusions

As already noted complainant has charged respondents with violations of sections 14(b), 14 Fourth, 16, 17, 18(b) and 44(c) of the Shipping Act, 1916. However complainant appears to have abandoned all but the 18(b) and 44(c) allegations, since on brief the only findings requested are that: [8]

(1) SPMT is not a Common Carrier by Water under the Shipping Act.

(2) SPMT's activities are those of a freight forwarder as defined in 46 U.S.C. 801.

(3) SPMT has not engaged in the transportation by water of passengers or property between the United States and a foreign country on the high seas on regular routes from port-to-port. [9]

Accordingly, the threshold determination to be made is that of the "status" of SPMT under the Shipping Act. SPMT of course claims to be a nonvessel-owning common carrier by water within the meaning of past Commission precedent interpreting the "definition" of common carrier by water contained in section 1 of the Act. SPMT purports to restrict its common carrier status to the port-to-port movement from ports in the U. S. Gulf to ports in the European North Atlantic.

A common carrier by water in foreign commerce is defined:

> . . . 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. . . . [10]

Of course the above does not define as such the term "common carrier." However, the common carrier to be regulated under the Shipping Act is the common carrier at common law. See *Tariff Filing Practices of Containerships*, 9 F.M.C. 56, 62 (1962).

Originally it would appear that the common law restricted common carrier status to one who actually carried. *Railway Company v. Lockwood*, 84 U.S.351 (1873). However, "ownership" of a vessel was not for long a prerequisite of common carrier status. Thus, early on, persons contracting for space in common carriers were themselves held to be common carriers. *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174 (1876). Thus a time charterer of a vessel undertaking to carry for the public generally was held to be a common carrier even though it did not own the vessel. *Pendleton v. Benner Line*, 246 U.S. 353 (1918).

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[8] As already noted, at the hearing in this case complainant offered no witnesses of its own and did not choose to cross-examine those witnesses offered by respondent. Complainant was content to rely on certain exhibits introduced into evidence, none of which afford the basis for any findings on the violations alleged in the complaint but abandoned on brief.

[9] In the complaint the conference requests that SPMT's tariff be stricken from the Commission's files and that SPMT be ordered to cease and desist from the publication of the tariff and the solicitation of and participation in the services described under it.

[10] So-called ocean tramps are excluded.

This decided trend away from actual ownership of the vessel or other mode of carriage was recognized by the Commission[11] as early as 1939 in *Agreement 6210,* 2 U.S.M.C. 166 (1939), wherein the so-called Consolidated Olympic Line was found to be a common carrier by water even though it owned no vessels. The line of cases[12] developing the concept of the nonvessel-owning common carrier culminated in Docket 815, *Determination of Common Carrier Status, 6 F.M.B. 245 (1961) wherein the Commission, on the basis of past precedent and common law principles spelled out the criteria for determining NVOCC status under the Shipping Act, saying at pages 256–257:*

. . . a person or business association may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act 1916; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected is a common carrier by water as defined in the Shipping Act, 1916. (6 F.M.B. at 256–257).

Complainant's first quarrel with respondents' position in this case is that their reliance on Docket 815 is misplaced because Docket 815 "was not an agency 'decision or agency rule' . . ." According to complainant it was announced "loosely" as a "general rule or interpretation" and was "offered merely to serve as a 'guideline'."[13] There follows some rather obscure references to the fact that "guidelines" are not "appealable" and are not "legally binding" and are not *"stare decisis"*.

If by this complainant means to argue that a person whose operations fall within the criteria established in Docket 815 may not be adjudged an NVOCC even after notice and hearing, the argument is fallacious in the extreme. In the first place the "guidelines" or "criteria" set out in Docket 815 are merely the culmination of a long line of precedents, both agency and common law, and even the courts have recognized the Commission's NVOCC concept. See *IML Sea Transit Ltd. v. United States,* 343 F. Supp. 32 (N.D. Calif. 1972), aff'd 409 U.S. 1002 (1972), rehearing denied, 409 U.S. 1118 (1973). The argument is of course without merit but complainant has another string to its bow.

In Docket 815 the parties under investigation were all either "motor truck companies, freight forwarders [or] express companies" each of which were "initial carriers" providing "the service of moving household

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[11] For the sake of convenience the term Commission is used to encompass the various designations of the Commission's predecessors.

[12] See e.g., *Alaska Rates,* 2 U.S.M.C. 558 (1941); *Agreement 7260,* 2 U.S.M.C. 749 (1947); *Bernard Ulmann Co. Inc. v. Puerto Rican Express Co.,* 3 F.M.B. (1951).and Docket 74–14, *Possible Violations of Section 18(a) of the Shipping Act, 1916, etc.,* Mimeo. decision, November 16, 1975, (14 SRR 425).

[13] This characterization comes from the language of the decision which announces one of the purposes of the proceeding to be the determination of the status under the Shipping Act of the parties under investigation in the case "in order to arrive at a general rule or interpretation *applicable in the future to all persons* . . ." (6 F.M.C. at 248). (Emphasis mine.)

goods and other personal property from points in the United States to points overseas using both trucks or vans which they own or operate and ocean ships which they do not own or operate." These initial carriers offered their services to the public by advertisement and solicitation. They issued their own through bills of lading and generally assumed liability for safe arrival of the shipments. (6 F.M.B. 248–249)

Complainant urges that SPMT does not fit the criteria of Docket 815 because it is not an "initial carrier", it does not "issue [its] own bill of lading to the original shipper-consignor"[14] and does not assume "sole responsibility 'for the entire journey'." As for the last alleged discrepancy "responsibility for the entire journey", complainant refers to SPMT's asserted status as shipper's agent for the inland portion of the movement, i.e., in most cases the movement from California to the Gulf. At page 256 of its Report in Docket 815, the Commission said:

> Actual liability as a common carrier over the entire journey including the water portion is essential.

Complainant would appear to read this language as requiring SPMT to operate as a "common carrier" over the inland portion of the movement as well as the water portion. However, no authority either statutory or precedential (other than the referred to statement from Docket 815) is cited as conferring on the Commission the power to require a person to assume the status of a common carrier for inland line-haul movement over which the Commission would appear to lack statutory jurisdiction.

Although the statement in question, when removed from the circumstances of the case, can be read as complainant reads it, a close examination of the problem the statement was designed to redress makes it appear that it was intended to mean quite something else.

The examiner in his recommended decision in Docket 815 summed up the Commission's "standards" for common carrier status and concluded that:

> . . . a person who holds himself out by the establishment and maintenance of tariffs, by advertising and solicitation, and otherwise, to provide transportation for hire in interstate or foreign commerce, as defined in the Shipping Act; *assumes responsibility* for the safe *water* transportation of the shipments and arranges in his own name with the underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act . . . (Emphasis mine.) (Quoted by the Commission at 6 F.M.B. 252–253.)

In commenting upon the examiner's summation, and in recasting it, the Commission did two relevant things. First it concluded that the "assumption or attempted assumption of liability" should not be the sole test, but

[14] Here complainant apparently refers to the issuance of a SPMT bill of lading for the inland portion of the movement because an SPMT bill is issued for the port-to-port or water portion.

[15] An example of the somewhat cavalier use of language in the Report in Docket 815 is the fact that actual or imposed liability is transformed from a "significant factor" to an "essential" indicia in less than the space of a paragraph.

rather that "the actual existence or imposition of liability is also a significant factor." This comment is immediately followed by the troublesome statement, "Actual liability as a common carrier over the entire journey including the water portion is essential."[15]

On the other hand the Commission altered slightly the examiner's expression of the liability standard which he had expressed as ". . . assumes responsibility for the safe water transportation of the shipments." As stated by the Commission the standard became ". . . assumes responsibility or has liability imposed by law for the safe transportation of the shipments. . . ." (6 F.M.B. 256.) The eliminated word is of course "water".

In Docket 815 some 14 parties to the case were found not to be common carriers by the Examiner and one other party's status was questioned by the Commission itself.[16] Of these parties only two are specifically dealt with in the Commission's Report—Weaver Bros. and Railway Express. In both cases the question of the "assumed responsibility" or "imposed liability" was directed not to the "land" portion of the movement but to the water portions. In the case of Weaver there was in its bill of lading an express disclaimer of liability for certain events when the property was not in its (Weaver's) actual custody, which the property of course was not when on board the underlying ocean carrier.

In discussing the problem presented by the Weaver disclaimer the Commission said:

> These provisions show that Weaver has not assumed sole responsibility to the shipper *for the safe water transportation of shipments*. Instead it is a "forwarding agent" for the "convenience" of the shipper insofar as the water transportation part of the journey is concerned. Because of the restricted nature of its undertaking to the public as evidenced by its agreement with shippers we find that Weaver has failed to bring itself within the definition of common carrier by water.[17] (Emphasis mine.)

Thus the simple question presented was whether Weaver was a common carrier by water— it was clear that Weaver was a common carrier as to the inland movement.

In the case of Railway Express the so-called Uniform Through Bill of Lading issued by Railway Express "cast some doubt as to the extent of its *assumed* liability"—again for the water portion of the through movement.[18]

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[16] It is of interest, and to me at least of significance, that the immediate problem confronting the Commission was the approval of a number of section 15 agreements. Thus the initial task of the Commission was to determine if certain voluntarily assumed obligations "qualified" the persons *assuming* those obligations as common carriers by water. The Commission was not, at least then, called upon to *impose* obligations upon anyone.

[17] The Commission is still speaking in terms of the responsibility for "safe water transportation of shipments."

[18] In commenting on Railway Express's bill of lading the Commission said:

> We do not pass on the legality of these disclaimers . . . If the provisions are valid Railway Express does not assume liability and would not be a common carrier under the Examiner's tests.

The Commission kept the proceeding open pending either the assumption of liability by Railway Express or the imposition of liability by "the Courts." In a Supplemental Report it was found that Railway Express *assumed* liability for the water portion. Weaver was also found to be a common carrier by water in the Supplemental Report on the basis of Weaver's revised bill of lading form which again *assumed* liability.

It will be remembered that the parties to Docket 815 comprised three categories, i.e., "motor truck companies, freight forwarders and express companies." They were all "initial carriers" using both trucks and vans which they owned or operated for the inland movement. They all issued their own bill of lading to the original shipper-consignor. Thus, the liability of the companies and forwarders for the inland movement was clearly established. The question before the Commission then—and this should be obvious—was not the status of "carriers" on the inland movement but whether these admitted common carriers by "land" were also common carriers by "water" within the meaning of the Shipping Act. The test of liability was therefore that of liability as a common carrier by *water*.

In short in no case has the Commission been called upon to do more than determine whether a "person" is a "common carrier by water."[19]

Indeed, without exceeding its statutory boundaries how could it do more? Certainly the status of a person operating modes of carriage outside the Commission's jurisdiction is also outside the power of the Commission to control or determine.[20]

So, taking the controversial phrase in its overall context I conclude that what was really said is that where a "carrier's" liability for the inland movement of a combined land-water movement is not in issue, his liability for the water portion must be either clearly assumed or equally clearly imposed by law.

Perhaps it was the difficulty in succinctly phrasing the criteria under the facts presented in Docket 815 that led to the terse and, to me at least, misleading statement.[21] In any event the statement of the Examiner in the initial decision in Docket 815 of the criteria for NVOCC status under the Shipping Act is more precise and superior to the rather loosely formulated definition in the Commission's final report. In order to avoid further confusion the criteria should read:

. . . a person[22] [may be classified as a common carrier by water] who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act 1916; assumes responsibility or has liability imposed by law for the safe water transportation of the shipments and arranges in his own name with the underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act.

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[19] The Interstate Commerce Act 49 U.S.C. et seq. defines common carriers by rail, motor and interstate carriers by water and commits to the ICC their regulation. The Federal Aviation Act 72 Stat. 731 defines air carriers and commits their regulation to the Civil Aeronautics Board and the Federal Aviation Agency.

[20] I recognize that certain carriers or other persons subject to the original jurisdiction of the Commission can and do perform carriage or transportation which physically takes place on land and that these operations are sometimes subject to the Commission's jurisdiction, but here the situation is somewhat the reverse. See Docket 912, *Matson Navigation Co. Container Freight Tariffs*, 7 F.M.C. 480 (1963) and compare *Alaska Rates*, 2 U.S.M.C. 558 (1941).

[21] It could even have been that it was thought that there was no need to make the distinction.

[22] In the Commission's redrafting of the Examiner's criteria they followed the word "person" with "or business association." However, section 1 of the Shipping Act defines person as including corporations, partnerships and associations.

Accordingly, it is found that whatever SPMT may be under other Federal statutes, its failure to assume liability for the movement inland [generally speaking on this record the movement from California to a Gulf port] does not of itself preclude its being found a nonvesselowning common carrier by water within the meaning of the Shipping Act, provided of course it meets all the other criteria.

Despite its assertions that it "assumes" full liability for the water portion of the movement, SPMT's bill of lading clearly shows otherwise.

First SPMT's tariff defines "carrier" as being SPMT. Presumably this definition would apply throughout any transaction between SPMT and a "shipper." Yet the bill of lading issued by SPMT to the shipper provides, "The terms of this bill of lading constitute the contract of carriage, which is between the shipper and the owner of the ship designated to carry the goods." SPMT is obviously not the owner of the ship designated to carry the goods and by its own definition SPMT is not a shipper for the ocean carriage.

Thus SPMT would seem to attempt to exclude itself from the very contract of carriage for which it at the same time purports to "assume liability."

Additionally, the bill of lading purports to subject all shipments to the provisions of the Carriage of Goods by Sea Act (COGSA). However, COGSA defines a "carrier" as follows:

> The "carrier" includes the owner or charterer who enters into a contract of carriage with a shipper (46 U.S.C. 1301).

SPMT is not the "owner or charterer [of a vessel] who enters into a contract of carriage with a shipper." Under the definition of "carrier" under COGSA, SPMT's assumption of liability is meaningless since COGSA does not apply to the operation of SPMT.[23]

However, in Docket 74-14, *supra* (note 12), the Commission concluded that if a person in fact performs as an NVOCC any assumption of liability on the part of that person is unnecessary because liability will be imposed upon him by law. Equally, any disclaimer of liability whether inadvertent or intentional is without meaning and standing alone "has no legal consequence in determining . . . carrier status."

For the foregoing reasons I conclude that as to the port-to-port movements here involved SPMT was a nonvessel-owning common carrier by water under the Shipping Act, 1916, notwithstanding SPMT's failure to assume liability for the inland portion of the shipments in question.

Notwithstanding, the fact that under Commission precedent the various questionable provisions concerning SPMT's liability for the port-to-port movements are without legal significance they are nevertheless conflicting

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[23] See e.g. *Bernhard Ulmann, supra*, where the COGSA defense was pleaded and was denied because the definition "carrier" did not apply to Ulmann, presumably because it was not an owner or charterer of a vessel. (3 F.M.B. 779; and *J. C. Penney Co. v. American Express Company*, 102 F Supp. 742 (D.C.N.Y. 1951), aff'd., 201 F. 2d 846.)

and can only serve to confuse users of SPMT's tariff.[24] The provisions hereinabove noted should be removed from SPMT's tariff and a clear statement of SPMT's liability substituted for them. (See 6 F.M.B. at 256 and 287, 288.)

Complainant's remaining allegation is that SPMT's activities are those of a "freight forwarder as defined in 46 U.S.C. 801" and that SPMT has fåiled to obtain a license as required by section 44 of the Shipping Act, 1916.

In an argument notable only for its rather obscure brevity, complainant simply asserts that SPMT's description of its business "coincides precisely with the definition of forwarding in section 1 of the Shipping Act, 1916." In support of this assertion complainant simply refers to the entire prepared testimony of SPMT's president which appears in Exhibit 9. There is no attempt by complainant to correlate the "salient" points of Exhibit 9 with their counterparts in the section 1 definition.

The business of forwarding is defined in section 1 of the Act as:

> . . . the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories or possessions to foreign countries or between the United States and its Territories, or possessions or between such Territories and possessions and handling the formalities incident to such shipments.

At this point I am tempted to dismiss complainant's argument by simply stating that a review of the testimony in Exhibit 9 gives no clear demonstration that SPMT dispatches shipments on behalf of others by oceangoing common carrier. However in describing the reasons behind SPMT's offer to corrdinate inland movement its president said the following:

Someone has to know where it [the shipment] is, and make sure that it doesn't get delayed and forgotten, and make sure that it is promptly *tendered to the ocean carrier* upon arrival at the port city, and be prepared—if any hitch develops—to telephone the steamship line and the shipper immediately, rearrange bookings, and otherwise see that coordination problems are overcome. (Emphasis mine.) Complainant's argument then actually hinges on two factors. First, a conclusion that SPMT is not an NVOCC, and secondly, that since it is not an NVOCC, a construction of the language "tender to the ocean carrier" somehow converts SPMT into an ocean freight forwarder. As for the first, SPMT is in fact an NVOCC. As for the second, had SPMT's president said "tendered to the underlying ocean carrier" it would have been a more precise statement and one more in consonance with its status as an NVOCC. Rather than dispatching shipments for others, SPMT is tendering shipments to the underlying ocean carrier in its capacity as an NVOCC. Complainant offers no other reason for assigning forwarder status to SPMT. In short SPMT is not engaged in the business of forwarding as defined in section 1 of the Shipping Act, 1916, and therefore is not an unlicensed independent ocean freight forwarder in violation of section 44 of the above Act.

The foregoing disposal of the two remaining allegations in the complaint makes it unnecessary for me to deal with respondents' allegation that complaiant has waived its right to any reparation. SPMT is found to be a nonvessel-owning common carrier by

[24] I suspect that the conflict and confusion stems from SPMT's adoption of the bill of lading form used by vessel owners or operators.

water within the meaning of the Shipping Act, 1916. SPMT is found not to be engaged in the business of forwarding as defined in section 1 of the Shipping Act, 1916, and is not an independent ocean freight forwarder who must be licensed under section 44 of that Act. Accordingly, the complaint is dismissed.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 484

LOUIS FURTH INC.

v.

SEA-LAND SERVICE, INC.

Authority to waive collection of, and refund, freight charges denied.

REPORT

August 25, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

Sea-Land Service, Inc. (Sea-Land) has applied for permission to waive collection of a portion of the freight charges assessed on a shipment of "Tumeric" which moved from Kingston, Jamaica to New York under Sea-Land's bill of lading dated December 31, 1975. The present application was filed on June 24, 1976.

The rate in effect at the time of shipment was $45.50 per 40 cubic feet. Total freight charges, including applicable surcharges, were assessed at $1,561.28. Sea-Land asserts that on April 29, 1974, due to a clerical error in refiling the tariff, the rate base was changed from weight to measurement which resulted in higher charges than intended. It seeks permission to collect charges on the basis of $45.50 per 2,000 pounds which would yield $535.60 in freight charges and to waive collection of the balance of $1,025.68.

Before the application was submitted the U.S. Atlantic & Gulf-Jamaica Conference (Conference) whose tariff applies to the shipment, filed on April 5, 1976 a new tariff changing the rate base from measurement to weight. At the same time, however, it raised the level of the rate from $45.50 to $90.00. Thereafter, on April 25, 1977 the Conference amended its tariff to revert to the $45.50 per 2,000 pounds, the rate Sea-Land now seeks to apply retroactively to Complainant's shipment.

The Presiding Officer found that due to a clerical error the rate in effect at the time of shipment did not reflect the intended rate. He nevertheless concluded that the application complied with the requirements of section 18(b)(3) of the Shipping Act, 1916 and granted Sea-Land permission to waive collection of the unpaid balance of freight charges. We disagree with the Presiding Officer's disposition of this matter.

CONCLUSION AND RECOMMENDATION

Section 18(b)(3) of the Act, as amended by P.L. 90–298 reads in part:

> *Provided* . . . That the common carrier . . . has, *prior* to applying for authority to make a refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: . . . (Emphasis added) 46 U.S.C. 817(b)(3).

The provision is jurisdictional and cannot be waived. The tariff containing the rate Sea-Land would charge was filed on April 25, 1977 *after* and not prior to the filing of the application on June 24, 1976. Permission to waive collection of the balance of freight charges under the rate in effect at the time of shipment must therefore be denied. Accordingly,

IT IS ORDERED That the Initial Decision in this proceeding served July 29, 1977 be reversed and the application of Sea-Land Service, Inc. to waive the collection of, or refund, certain alleged overcharges is denied.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-46

U.S. MIAMI—CARIBBEAN PUERTO RICO TRADES, POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916, AND THE INTERCOASTAL SHIPPING ACT, 1933

ORDER

August 26, 1977

By an Order of Investigation and Hearing dated October 30, 1975, this proceeding was instituted to determine whether nonvessel operating common carriers in the Port of Miami area were engaging in practices violative of Sections 16, 17, and 18 of the Shipping Act, 1916, and/or Section 2 of the Intercoastal Shipping Act, 1933. Named as respondents in this proceeding were Drake Motor Lines, Inc., Econocaribe Consolidators, Inc., Marine Trailer Transport, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Transconex, Inc. and Twin Express, Inc. Pursuant to the special settlement procedures set forth at 46 CFR 505.5(c), Respondents Econocaribe Consolidators Inc., Transconex Inc. and Twin Express Inc. requested and received Commission permission to enter settlement negotiations with the Commission's Office of the General Counsel. On August 3, 1976, the presiding Administrative Law Judge suspended the hearing schedule in order to permit the respondents to explore the possibility of settlement. Respondents Sea Trailer Express, Inc., Drake Motor Lines, Inc., Drake Marine Division, and Meteoro Express Corporation have since joined in settlement negotiations. Respondent Marine Trailer Transport Inc. filed a cancellation supplement to its tariff and no longer operates as a common carrier or has common carrier rates or fares in effect.

Prior to commencement of settlement negotiations, respondents other than Drake Motor Lines, Inc. and Marine Trailer Transport, Inc. entered into stipulations with the Commission's Bureau of Hearing Counsel. Drake subsequently executed a similar stipulation. These stipulations set forth the factual background surrounding the violations alleged in the Order of Investigation and Hearing and provided the factual basis upon which settlements have been concluded. As an express condition of settlement the respondents have consented to the entry of an Order directing them to cease and desist from practices enumerated below and have further consented to the entry of an Order requiring the submission of compliance reports in a manner set forth below.

THEREFORE, IT IS ORDERED:

That Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall cease and desist from accepting shippers' measurements without having ascertained that the shippers' measurements are, in fact, correct measurements for the cargo.

That Respondents Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall cease and desist from the practice of rounding fractional cubic measurements prior to the computation of cubic measurements of cargoes tendered to Respondents for shipment.

That Respondents Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall cease and desist for a period of three years from the date of this order from discarding, mutilating, disposing of or otherwise destroying such underlying documents as warehouse receipts, shippers' instructions or packing lists, delivery receipts, weight bills or other documentation which shows or reflects the actual weight or measure of cargo received by Respondents and upon which the ocean freight rate is computed and assessed.

That Respondent Transconex, Inc. shall cease and desist from the assessment or collection of pickup and delivery charges, or any other rates or charges required to be filed with the Federal Maritime Commission, prior to the effective dates of such rates and charges.

That Respondent Transconex, Inc. shall cease and desist from applying rates and charges which have been superseded by subsequent filings of rates and charges with the Federal Maritime Commission.

That Respondents Transconex Inc., Twin Express Inc., Sea Trailer Express, Inc. and Meteoro Express Corporation shall cease and desist from applying rates and charges in a manner which differs from the methods of application of said rates and charges set forth in tariffs in effect and properly filed with the Federal Maritime Commission.

That Respondent Transconex Inc. shall cease and desist from the incorrect application of commodity descriptions contained in tariffs on file with the Federal Maritime Commission.

IT IS FURTHER ORDERED:

That Respondents Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall, upon reasonable notice, allow investigators or attorneys of the Federal Maritime Commission unimpeded access to the underlying documents required to be maintained by this Order, and shall allow the removal of such documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

That within sixty (60) days after service upon them of this order, Respondents Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall each file with the Commission, under the oath and signature of a responsible officer, a written report setting forth in detail the measures which have been taken to ensure the elimination of the practices which resulted in measurement errors and misratings which are the basis of the violations set forth in the Settlement Agreements concluded with each of the Respondents. Such reports shall also be submitted at such times as the Commission may require.

IT IS FURTHER ORDERED:

That this proceeding by, and hereby is, discontinued.

BY THE COMMISSION

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 380(I)

BRISTOL MYERS COMPANY

v.

PRUDENTIAL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

August 31, 1977

Notice is hereby given that the Commission on August 31, 1977 determined not to review the decision of the Settlement Officer in this proceeding served August 19, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 380(I)

BRISTOL MYERS COMPANY

v.

PRUDENTIAL LINES, INC.

August 19, 1977

Reparation Awarded.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed December 22, 1976, Bristol Myers Company (complainant) alleges that it was overcharged $924.19 by Prudential Lines, Inc., (carrier) as a result of a misdescription of cargo appearing on the bill of lading. Complainant states that on May 30, 1975, respondent issued its freight prepaid Bill of Lading No. 11, Voyage 31, of the Santa Barbara, to cover a shipment described thereon on "9 Pallets-1 Carton Harmless Chemicals (Dical. Phosphate and Hexachlorophene)," weighing 20,673 pounds and measuring 497 cubic feet, from New York to Guayaquil, Ecuador. For this service the carrier billed, and complainant paid, freight charges totaling $1,708.47, on the basis of a rate of $123.25 per measurement ton, plus a port congestion and a bunker surcharge.

This shipment actually consisted of 9 Pallets of Dicalcium Phosphate weighing 20,662 pounds and one carton of Hexachlorophene measuring two cubic feet. The net contents of the 9 Pallets of Dicalcium Phosphate weighed 20,000 pounds and was valued at $4,000.

At the time this shipment moved respondent's tariff, Atlantic and Gulf/West Coast of South America Conference Freight Tariff F.M.C. No. 1, provided in Item 670, 17th Rev. Page 108, a rate of $61 per weight ton from New York to Guayaquil for "Phosphates, viz: Calcium, including Monocalcium, Dicalcium and Tricalcium actual value not over $400 per freight ton."

[1] Both parties having consented to the informal procedure of Rule 19,46 CFR 502.301 (as amended), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

On this basis, complainant alleges that it has been overcharged $924.19 as follows: In response to the served complaint, the carrier admits to the complainant's statement with respect to tariff rates that should have applied but disclaims responsibility for the overcharge on the following grounds:

9 Pallets Dicalcium Phosphate—	
20,662 pounds @$61/2000 lbs.	$630.19
Port Congestion @$6/ton	61.99
Bunker Surcharge @$8.25/ton	85.23
1 Carton Hexachlorophene as Chemicals, N.O.S.	
2 cubic feet @$123.25/m.t.	6.16
Port Congestion @$6/ton	.30
Bunker Surcharge @$8.25/ton	.41
Total	$784.28

Paid $1,708.47—Should be $784.28—Overpaid $924.19.

1. Undue burden is placed on carrier where cargo is improperly described on bill of lading by an organization which, by its size and frequency of booking cargo should be cognizant of published tariff rates.
2. Requirements of the "Six-month Rule" (Page 12, Item 7, Rule B of Atlantic and Gulf/West Coast of South America Conference Rules and Regulations) was not adhered to.
3. Failure of the shipper to break down quantity of each chemical carried gave carrier no choice than to charge the higher rate to avoid discrimination.

With regard to cargo misdescription generally, past Commission policy and judicial precedent have unquestionably declared that a shipper's misdescription of cargo can still afford a basis for later reparation relief, and that in cases involving alleged overcharges under Section 18(b)(3) of the Act, the controlling test is what the complainant shipper actually shipped, and is not limited to how the cargo was described on the bill of lading. *Union Carbide Inter-America v. Venezuela Line,* 17 F.M.C. 181, 182 (1973); *Abbott Laboratories v. Moore-McCormack Lines, Inc.,* 17 F.M.C. 191, 192 (1973); *Western Publishing Co. v. Hapag Lloyd A.G.,* 13 SRR 16, 17 (1973). These cases have set a precedent which clearly rejects the respondent's position noted above despite the exceptions as listed.

In the first place, the degree of transportaton experience of knowledge of a shipper organization based upon its size and frequency of booking cargo, as suggested by the respondent, would not appear to constitute a valid mitigating factor sufficient to justify a departure from the conclusion reached in the above cases.

In cargo misdescription cases, where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant's amended cargo description, as in this case, the Commission has held that the complainant has a "heavy burden of proof" and must establish, with reasonable certainty and definiteness, the validity of the claim. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973); *Johnson & Johnson Intl. v. Venezuelan Lines*, 16 F.M.C. 87, 94 (1973); *Colgate Palmolive Peet v. United Fruit Co.*, 11 SRR 979, 981 (1970). Note is taken of the fact that the respondent does not deny that the bill of lading at issue was misrated, and a review of the documentation submitted by the complainant adequately supports the amount of overcharge which is stipulated by the shipper. Whileit is true that the requirements of the six months rule were not adhered to, thus denying the carrier an opportunity to inspect the cargo prior to its clearing the carrier's custody, this factor in itself, does not relieve the carrier from making an appropriate rate adjustment where, as in this instance, the heavy burden of proof establishing the proper description of the shipped cargo has been met.

Finally, with regard to respondent's statement that it was obliged to freight the bill of lading on the basis of the higher rate to avoid discrimination, I find that the multitude of Commission decisions which hold that the rate applicable to the cargo actually shipped is the only rate which may be applied, renders any such logic a nullity.

Since a shipper is charged with knowledge of a tariff, it should submit cargo specifications in a manner which insures the most favorable rate application statutorily permissable. Failure to do so, however, cannot insulate the carrier against claims for a subsequent rate adjustment if the carrier chooses to accept a questionable cargo description at face value or arbitrarily freight a mixed shipment at the highest rate for any item included in the shipment for lack of a break-down of the contents. A more appropriate course of action for the carrier to follow would be to resolve questionable or insufficient cargo descriptions at the time of billing by reviewing other available supporting documentation or by contacting the shipper.

The complainant is entitled to reparation in the amount of $924.19. It is so ordered.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 493

UNION CAMP INTERNATIONAL SALES CORP.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING PARTIAL REFUND OF CHARGES

September 1, 1977

Sea-Land Service, Inc. has submitted the statement of concurrence duly executed by the shipper Union Camp International Sales Corp., as directed by the Commission's Order on review, served in this proceeding on July 29, 1977.

The requirement of Rule 92, Appendix II(7) having thus been met, the Initial Decision of the Administrative Law Judge in this proceeding is hereby adopted as the decision of the Commission.

THEREFORE, IT IS ORDERED, That applicant Sea-Land Service, Inc. is authorized to refund $1,874.95 of the charges collected from Union Camp International Sales Corp.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 493 that effective September 1, 1976 for purposes of refund of freight charges on any shipments which may have been shipped during the period from May 8, 1976 through June 28, 1976 the rate on kraft wrapping paper from Savannah, Georgia, to Marseilles, France, was $55.00 per ton of 2240 lbs., minimum 18 tons per container, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 493

UNION CAMP INTERNATIONAL SALES CORP.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to refund a portion of the freight charges on two shipments of common Kraft wrapping paper, which moved from Savannah, Georgia, to Marseilles, France, under Sea-Land bills of lading dated May 8 and 29, 1976. The application was filed November 4, 1976.

The subject shipments moved under a Sea-Land tariff covering shipments from U.S. South Atlantic & Gulf ports to named ports in France and Italy, Sea-Land Tariff No. 168–B, FMC–73, 22d revised page 101, item 5940, effective April 8, 1976. The aggregate weight of the two shipments was 768,604 pounds. The rate applicable at time of shipment was $55.50 per ton of 2240 pounds, with a minimum of 22 tons per container. The rate sought to be applied is $55 per ton of 2240 pounds, with a minimum of 18 tons per container, per same tariff as above, except see 23d revised page 101, effective June 28, 1976.

Aggregate freight charges payable pursuant to the rate applicable at time of the shipments amounted to $21,014.48. Aggregate freight charges at the rate sought to be applied amount to $19,139.53. The difference sought to be refunded is $1,874.95. The Applicant is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this application.

Sea-Land offers the following as grounds for granting the application:

[1] This decision became the decision of the Commission September 1, 1977.

[2] 46 U.S.C. 817, as amended.

(4) In early May Sea-Land's Mediterranean sales and pricing personnel agreed with the complainant to publish a rate of $55.00 per ton of 2,240 lbs., minimum 18 tons per container, on Kraft wrapping paper from Savannah, Ga. to Marseilles, France to meet the rate quoted by another carrier serving that trade. A minimum of 90 tons per shipment (5 containers) was able to be attached to the rate and an effective date of May 7, 1976 was required. The effective rate at that time was $55.50 per ton of 2,240 lbs., minimum 22 tons per container as published in Sea-Land Tariff 168–B, FMC–73, Item 5940 on 22nd Revised Page 101 (Attachment No. 1).

Through clerical error, Sea-Land's pricing personnel instructed the tariff publishing officer to publish the promised rate in Item 5550 on Kraft liner board. This was done by telegraphic filing effective May 7, 1976 on 15th Revised Page 98 (Attachment No. 2). The error was called to Sea-Land's attention by the complainant to Sea-Land sales representative by letter dated June 18, 1976 (Attachment No. 3). The agreed rate of $55.00 was then filed telegraphically in Item 5940 to become effective June 28 on 23rd Revised Page 101 (Attachment No. 4). However, the requirement for a minimum of 90 tons per shipment (5 containers) was dropped.

The shipments here involved moved immediately after the rate had been erroneously published on Kraft liner board instead of Kraft wrapping paper and were assessed the higher rate and minimum that was then in effect on wrapping paper. Complainant paid the full charges as originally billed, through his freight forwarder, and has claimed against respondent for refund of the excess charges he paid. Copy of each of the bills of lading and freight bills are enclosed as Attachment No. 5. . . .

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an indavertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the publication of the agreed rate and minimum but in the wrong tariff item.
2. Such a refund of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such refund would be based.
4. The application was filed within 180 days from the date of the subject shipments.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

Accordingly, permission is granted to Sea-Land Service, Inc., to refund a portion o the freight charges, specifically the amount of $1,874.95. An appropriate notice will b published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 22, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–17

SEA-LAND SERVICE, INC.—AMENDMENT TO FREIGHT, ALL KINDS IN THE U.S. ATLANTIC/PUERTO RICO TRADE

NOTICE OF DETERMINATION NOT TO REVIEW

September 2, 1977

Notice is hereby given that the Commission on August 31, 1977, determined not to review the order of discontinuance of the Administrative Law Judge served in this proceeding August 8, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–17

SEA–LAND SERVICE, INC.—AMENDMENT TO FREIGHT, ALL KINDS IN THE U.S. ATLANTIC/PUERTO RICO TRADE

August 8, 1977

ORDER DISMISSING PROCEEDING

Effective May 2, 1977, Sea-Land Service, Inc. (Sea-Land or respondent) proposed to amend its tariff application on the commodity "Freight, All Kinds" (FAK) for shipments from U.S. Atlantic coast ports to Puerto Rico from one which required shipper loading to one applicable only when the carrier loads. By its May 19, 1977 Order of Investigation and Suspension, the Commission instituted an investigation into the particular tariff changes that would have effected the above result, i.e., 2d revised pages 242 and 243 and 1st revised page 285 of Sea-Land's Tariff FMC–F No. 34.

By a Petition to Postpone Prehearing Conference filed June 16, 1977, Sea-Land advised the presiding Administrative Law Judge that it had petitioned the Commission for authority to withdraw and cancel the subject pages under investigation (Special Permission Application No. 414, dated June 14, 1977). Special Permission Application No. 414 was granted and thereupon Sea-Land filed 3d revised pages 242 and 243 and 2d revised page 285, which became effective July 5, 1977. The net effect of those revisions was to return the "Freight, All Kinds" rate to the status quo existing prior to the filing of the pages that were to be subjected to investigation. Thus, the matters subject to investigation in Docket No. 77–17 have become moot and the relief originally sought by the petitioning intervenors has, in effect, been granted in full. Accordingly, on July 20, 1977, the respondent filed a Motion To Dismiss the proceeding. The motion is unopposed by either the petitioning intervenors or Hearing Counsel and, moreover, petitioners Martin Marietta Aluminum and Dolphin Forwarding have filed statements agreeing that their reasons for petitioning intervention have been rendered moot and that there is no need to continue the proceeding.

Accordingly, there being no regulatory purpose to be served in continuing this proceeding, nor any public interest to benefit from same, the Motion To Dismiss the proceeding is *GRANTED*.

(S) THOMAS W. REILLY,
ADMINISTRATIVE LAW JUDGE.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

Part 502—Rules of Practice and Procedure

[GENERAL ORDER 16, AMDT. 20, DOCKET NO. 77–12]

September 6, 1977

Designation of Parties

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: Rules of Practice and Procedure are amended to terminate the practice of naming persons protesting individual changes in tariffs "complainants" and to cease making them automatic parties to formal proceedings instituted by the Commission to investigate rate changes in general-revenue cases. The amendment is necessary to eliminate delay and confusion which resulted from the practice. The effect will be to simplify general-revenue proceedings and advise persons who protest rate changes of the appropriate procedural steps to take to protect their interests.

EFFECTIVE DATE: Upon publication in the *Federal Register*.

FOR FURTHER INFORMATION CONTACT:

Joseph C. Polking, Acting Secretary
Federal Maritime Commission
1100 L Street, N. W.
Washington, D. C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

This proceeding as instituted by notice of proposed rulemaking published in the *Federal Register* of May 3, 1977 (42 F.R. 22383). The purpose of the proceeding was to amend Rule 41 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.41) so as to discontinue the practice of naming persons who protest proposed rate changes "complainants" and automatically making them parties to proceedings instituted by the Commission to determine the lawfulness of proposed rate changes in so-called "general-revenue" cases. As the Commission explained in the notice cited, this practice frequently causes such proceedings to suffer undue delay because such protesting persons are usually interested in issues pertaining to the reasonableness of an individual rate or rates rather than the central issue whether the gross revenue which the carrier is seeking to derive from its proposed rate changes is just and reasonable. Consequently protestants usually consume time needlessly during the proceeding while they attempt to present evidence and arguments irrelevant to the basic issue, or they often do not appear or participate in the proceeding at all, although named as parties, requiring them to be served with pleadings and evidentiary documents, often at great expense to the active parties. Because such protestants are often interested in issues extraneous to the basic issue, they unduly broaden the proceeding and might not have even qualified as interveners under the standards prescribed by Rule 72, 46 C.F.R. 502.72 had they petitioned for leave to intervene under that rule. Nevertheless, under present practice, protestants are, in effect, granted intervention without having to make a showing of substantial interest in the issues in the proceeding or representing that they will not unduly broaden the issues.

Finally, the practice of designating protestants as "complainants" has led to confusion in the minds of such persons who have mistakenly believed that they have qualified as persons filing complaints pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821) with consequent rights and obligations. The Commission therefore proposed to eliminate confusion and unnecessary consumption of time and assist persons in understanding their rights and obligations in general-revenue proceedings simply by discontinuing the practice of naming such persons "complainants" and of making them parties to general-revenue proceedings automatically in orders instituting such proceedings. Should such persons have a substantial interest in the issues in these proceedings and make a proper showing that they will not unduly broaden the issues, they may, of course, be granted leave to intervene pursuant to Rule 72, cited above, and participate as parties to the proceeding.

Comments to the proposed rule were submitted by Matson Navigation Company (Matson), Sea-Land Service, Inc. (Sea-Land), and the Military Sealift Command (MSC). Matson supports the proposed rule, stating that "it will help eliminate confusion and unnecessary consumption of time and to assist persons in understanding their rights." Sea-Land agrees with the objective of simplifying and streamlining procedures and assisting persons to understand their rights, but does not believe that the proposed rules will achieve these objectives. On the contrary, Sea-Land believes that the rules will add uncertainty and place additional burdens on carriers.

Sea-Land contends that a person protesting a rate change or changes may merely file a protest, cause an investigation and suspension of the proposed rate changes, and have nothing further to do with the proceeding, unless he files a petition for leave to intervene. Sea-Land believes that this situation may be unfair to the person with a legitimate interest in active participation in the proceeding and furthermore unfair to the carrier who is faced with an ongoing proceeding without the presence of the adversary party who caused the proceeding to commence in the first place. Sea-Land suggests that the Commission should continue to name protestants as parties to the proceeding so that the carrier can decide whether to direct its attention to the substance of the protests.

We believe that Sea-Land's comments lack merit. Even Sea-Land admits that "[i]n many, if not most such instances," statements of persons protesting rate changes "do not meet the requirements of the Commission's rules and the senders frequently have no intention of participating in an official investigation proceeding." Sea-Land even agrees that "generally speaking, senders of such statements, if called upon, will add little or nothing to the development of a factual record upon which a proper decision could be made." Furthermore, Sea-Land appears to be under the mistaken impression that protestants must be participants in Commission investigations so that the carrier can protect its interests. Sea-Land also incorrectly believes that failure to name protestants parties at the outset of the proceeding is tantamount to their being "arbitrarily dismissed in advance."

The decision to institute an investigation is made by the Commission on the basis of information submitted by the carriers, protesting persons, and other information available to the Commission, and not because protesting persons may or may not intend to take an active role in the proceeding. If protesting persons decide not to participate actively, as even Sea-Land admits happens frequently, this does not mean that the carrier suffers some kind of prejudice. By law a carrier has the burden of proving the justness and reasonableness of its proposed rate changes. Section 3, Intercoastal Shipping Act, 1933, 46 U.S.C. 845; *Commonealth of Puerto Rico* v. *Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir., 1972). The failure to name as a party someone who had filed a protest before the proceeding as instituted does not change the carrier's burden nor should it prejudice the carrier if the protestant has so little interest in the proceeding that he does not even bother to seek to intervene, thereby presenting no evidence or arguments on the record against the carrier's interests. Should the carrier for whatever reason need to examine the position of such an absentee protestant, the carrier is not without means to obtain information from such a person by means of the Commission's deposition and subpena processes. Nor does the protestant suffer from arbitrary dismissal if he is not automatically named a party to the proceeding, because, as mentioned above, if sufficiently interested, such person can seek to become an active party by filing a petition for leave to intervene as provided by Rule 72.

MSC opposes adoption of the proposed rule change. MSC does not believe that protestants are confused by being designated "complainants" in orders instituting proceedings but has no objection to another appellation for such persons. However, MSC does object to the view expressed by the Commission that "general revenue cases are only concerned with carriers' needs for increased revenue and that other matters raised by protestants are not appropriate for investigation." MSC contends that a carrier's revenue needs "cannot be examined in a vacuum" and that changes in the level of particular rates will have an effect on the quantity of cargo that will move depending upon various demand factors, and therefore consideration of particular rate levels must be considered by carriers and the Commission in evaluating the reasonableness of the carrier's requests for increased revenue and the effect on the carrier's ultimate rate of return. Furthermore, MSC contends that a carrier might incorrectly evaluate the effect of increases on particular rates with the result that individual rates or groups of rates might be unjust or unreasonable. These matters should be included in any general-revenue investigation, according to MSC. Additional matters that bear consideration in general-revenue investigations are the questions whether, in the age of containerization and uniform costs, rate levels on commodities should be more uniform and whether tariffs should reduce the number of individual rates published.

Finally, MSC argues that there are two disadvantages which would result if protesting persons were compelled to file formal complaints under section 22 of the Act. First, this would create multiple proceedings with probable consolidation and increased costs of additional pleadings. Second, the burden of proof would shift from the carrier to the complainant, contrary to the Congressional intent expressed in section 3 of the 1933 Act, cited above.

The comments submitted by MSC are not without some merit but do not withstand careful analysis. Contrary to MSC's beliefs, confusion has in fact arisen in the minds of parties named as "complainants" who have confused their status as protestants with actual complainants filing under section 22 of the Act. In *Matson Navigation Company—General Rate Increase in the Hawiian Trade,* Docket Nos. 73–22, etc. (Initial Decision, February 22, 1977), fourteen protestants were named as "complainants", yet only one such "complainant" fully participated in the proceeding (Docket No. 73–22), Id., pp. 3, 4. Furthermore, in Docket No. 73–22 (Sub. No. 1), a protesting shipper named as "complainant" in the Commission's Order of Investigation, did indeed argue that it had been transformed into a section 22 complainant and was entitled to seek reparation, although it had never filed a formal complaint under that law. Id., pp. 26, 27. The presiding judge called attention to the confusion arising out of the present practice. Id., pp. 3, 4, footnote 10.[1]

[1] Significantly, despite MSC's argument that the term "complainant" is appropriate because section 3 of the

MSC's contention that the proposed rule change would eliminate all consideration of evidence pertaining to individual commodity rates and movements is unfounded. The proposed rule change is designed to facilitate general-revenue investigations by concentrating on the essential issue to be determined, that is, the reasonableness of the carrier's expected gross revenue and to avoid excursions into essentially different issues pertaining to the reasonableness of a particular rate or rates. This is not to say, as MSC seems to fear, that evidence concerning effect on the movement of particular rates has no relevance in determining the general-revenue issue. Of course, in any general-revenue case, the carrier attempts to predict volume of movement and the revenue to be expected following rate changes. Any such prediction or evaluation may obviously be affected by changes in volume of movement of particular commodities and if the commodities are major-moving items which are affected by elastic demand factors, the carrier's predictions may be subject to significant revisions. The proposed rule changes do not preclude consideration of these factors, as MSC seems to fear.[2] However, the question of reasonableness of a particular rate is still an essentially different issue which should be litigated in consideration of transportation factors such as cost of service, value of service, etc., which focus upon the particular commodity in question.[3] All too frequently, however, shippers interested in obtaining a determination that a particular commodity rate or rates are unjust or unreasonable engage in the futile endeavor of contesting evidence pertaining to the carrier's need for increased overall revenue

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Intercoastal Shipping Act, 1933, uses the term "complaint," there is independent evidence that the use of that term in the statute has no special importance. In a recent report issued by the House Committee on Merchant Marine and Fisheries on a bill amending section 3 (H.R. 6503), the Committee draft would replace the term "complaint" with the word "protest" as a routine change. See Report No. 95-474, 95th Congr., 1st Sess., June 30, 1977, pp. 14, 15.

[2] Indeed, the Commission, in several recent orders of investigation, has made clear that although the basic issue in a general-revenue proceeding still concerns the reasonableness of the carrier's gross revenue to be derived from the proposed rate changes, "[e]vidence as to the effect of the proposed changes on movement of any particular commodity or commodities will be considered relevant to this basic issue and may be used to determine what overall revenue, in fact, will be derived." See Docket No. 77-27, *Trailer Marine Transport Corporation—General Increase in Rates*, Order of Investigation and Suspension, June 30, 1977; Docket No. 77-28, *Gulf Caribbean Marine Lines, Inc.—General Increase in Rates*, Order of Investigation and Suspension, June 30, 1977; Docket No. 77-30, *Puerto Rico Maritime Shipping Authority—General Increase in Rates*, Order of Investigation, July 7, 1977.

[3] The Commission, other regulatory agencies, and the courts have recognized that the issues in a general-revenue case are essentially different from those in specific commodity cases. See, e.g., *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic/Gulf Puerto Rico Trade*, 9 F.M.C. 220, 222 (1966); *Matson Navigation Company—Rate Structure*, 3 U.S.M.C. 82, 87-88 (1966); *Wool Rates from Boston to Philadelphia*, 1 U.S.S.B. 20, 21 (1921). In commenting upon a decision of the Interstate Commerce Commission establishing the distinction between the two types of cases, one court stated:

> In 1905 (footnote omitted) the Commission pointed out the difference between such a rate [i.e., for carriage of a single commodity] and an entire system of rates. It said the question whether the revenue yielded by all the rates is a fair return has "only a very remote, if any practical, bearing on the reasonableness of a rate on a single article of traffic." On the other hand, it said, the reasonableness of a single rate depends upon "the value, volume and other characteristics affecting the transportation of the particular commodity." That decision of the Commission as affirmed by the Supreme Court (footnote omitted). . . . So far as we can ascertain, that rule is well established law. *Chicago Board of Trade* v. *United States*, 223 F.2d 348, 351 (D.C. Cir. 1955).

For a similar discussion see Locklin, *Economics of Transportation* (Irwin, Inc., 7th ed. 1972), Chapter 18, pp. 421-22, citing, among other cases, *Interstate Commerce Commission* v. *Union Pacific R.R. Co.*, 222 U.S. 541, 549 (1912). See also Docket No. 76-43, *Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*, Denial of Appeal, May 13, 1977, where we recently confirmed this principle, and the orders of investigation served in Dockets Nos. 77-27, 77-28, and 77-30, cited in the previous footnote.

armed with little more than evidence concerning anticipated effects on movements of their particular commodities.

As the Commission remarked in our previous notice, these efforts usually consume time needlessly and are essentially irrelevant in a general-revenue case. The answer to this problem is to avoid the wasteful practice of litigating issues in wrong proceedings. The proposed rule would require protestants to file their own complaints or, under the proper circumstances, petition the Commission to institute investigations concerning a particular rate or rates. In either event, the resulting proceeding would concentrate on the proper issue to be determined and the parties would proceed to develop truly relevant evidence pertaining to revenue, transportation, and ratemaking factors relating to the specific rate in question. Similarly, this would also apply to shippers who wish to litigate issues concerning revision of tariff rate structures or reduction in the number of published rates.

After consideration of all of the comments, the Commission remains convinced that the present practice in question has caused delay and confusion in the conduct of general-revenue proceedings and that the amendments will benefit all parties in obtaining quicker decisions in such proceedings as well as shippers or other protesting persons in more effectively protecting their interests.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 821, 841a), and section 3 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845), Part 502 of Title 46, Code of Federal Regulations, is amended as set forth below.

1. Section 502.41 is amended by deleting the following words from the second sentence:

"and/or § 502.67 (Rule 5(g))".

Effective Date. Inasmuch as the expeditious adoption of this rule change is desirable and the change is procedural in nature, it shall be effective upon publication in the *Federal Register* and shall be applicable to all future proceedings.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 382(I)

ALLIED CHEMICAL, S. A.

v.

FARRELL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

September 6, 1977

Notice is hereby given that the Commission on September 6, 1977, determined not to review the decision of the Settlement Officer in this proceeding served August 26, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 382(I)

ALLIED CHEMICAL, S.A.

v.

FARRELL LINES, LTD.

Reparation Denied.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed December 30, 1976, Allied Chemical, S.A. (complainant) alleges that Farrell Lines, Ltd. (carrier) assessed incorrect freight charges on three separate shipments of "yarn, carpet, synthetic" resulting in combined overcharges of $1,592.34. While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

According to the complainant, the carrier, on January 3, 1975, issued prepaid bill of lading No. 607 to cover a house-to-house shipment on the Austral Endurance of "1 Container: Said to contain Carpet Yarn," weighing 13,460 pounds and measuring 883 cubic feet, from Norfolk, Virginia to Melbourne, Australia. For this service the carrier assessed, and complainant paid charges in the amount of $3,070.63 based upon a rate of $143/m.t. plus a seven percent currency surcharge, less a $13/ton house-to-house container allowance.

Further, on January 27, 1975, the carrier issued its prepaid bills of lading Nos. 601 and 602 to cover two house-to-house shipments on the Austral Envoy of three (3) containers of "Carpet Yarn," from Charleston, South Carolina to Melbourne, Australia. The shipment in the single container on B/L No. 601 weighed 24,328 pounds and measured 1,867 cubic feet. The shipment in the two containers on B/L No. 602 weighed 48,374 pounds and measured 3,734 cubic feet. For its services the carrier billed, and complainant paid, charges of $6,502.93 on B/L 601 and $13,005.85 on B/L 602, based upon a rate of $143/m.t., plus a seven percent currency surcharge, less $13/ton house-to-house allowance.

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

The complainant contends that at the time these shipments were made, the carrier's tariff[2] provided a contract rate of $134 per ton, weight or measure, for "Yarn, Carpet, Synthetic." Said rate is shown in Item 3238, 4th Revised Page 306 of said tariff. Complainant was, at the time of these shipments, a dual rate contract signator.

On the basis of the $134 "effective" rate shown above, complainant seeks overcharges in the amount of $1,592.34 asfollows:[3]

B/L No. 601 —	1,867 cubic feet (46.675) @$134	=	$6,254.45
	Less H/H allowance @$13		−606.78
	CRA @seven percent		395.34
	Total		$6,043.01
Paid $6,502.93	Should be $6,043.01 *Overpaid $459.92*		
B/L No. 602 —	3,734 cubic feet (93.35) @$134	=	$12,508.90
	Less H/H allowance @$13		−1,213.55
	CRA @seven percent		790.67
	Total		$12,086.02
Paid $13,005.85	Should be $12,086.02 *Overpaid $919.83*		
B/L No. 607 —	883 cubic feet (22.075) @$134	=	$2,958.05
	Less H/H allowance @$13		−286.98
	CRA @seven percent		186.97
	Total		$2,858.04
Paid $3,070.63	Should be $2,858.04 *Overpaid $212.59*		

In support of its allegations *the complainant* supplied copies of the rated bills of lading; and *states as follows:*

"This is a case in which the carrier applied the wrong rate to shipments of carpet yarn. While we are not certain, we believe that the carrier applied the $128 rate shown in Item 3238 of its tariff plus a $15 bunker surcharge for a total of $143 per measurement ton. That rate became effective December 13, 1974, on 3rd Revised Page 306. However, 4th Revised Page 306 canceled 3rd Revised Page 306 on October 6, 1974, and provided a rate of $134, including the bunker surcharge. We note that the rates in Items 3230, 3234, 3235 and 3236, when republished on 4th Revised Page 306, were each increased $15 to reflect incorporation of the $15 bunker surcharge.

"There are no other questions that require Commission consideration. The commodity is plainly described on the carrier's bill of lading as Carpet Yarn. The shipper is an internationally known manufacturer of chemicals, synthetics and synthetic fibers and yarns. The tariff provides a specific rate for Carpet Yarn, Synthetic, and that description was apparently used by the carrier to compute its freight charges. But apparently it overlooked the change in 4th Revised Page 306 which effectively reduced the rate from $143 to $134 per measurement ton.

[2] U. S. Atlantic & Gulf/Australia—New Zealand Conference Freight Tariff No. 3, FMC No. 12.

[3] The $13/ton house-to-house (H/H) allowance is provided in Rule 31(c) of respondent's tariff. The seven percent currency realignment adjustment (CRA) is shown on 5th Revised Page 27 of the tariff.

"On that basis the complainant, which paid the freight charges, is obviously entitled to the reparation claimed in the total sum of $1,592.34."

In response to the served complaint, the carrier states as follows:

"The Governing tariff, U. S. Atlantic and Gulf/Australia—New Zealand Conference Freight Tariff No. 3, FMC No. 12, Third Revised Page No. 306 which lists the rate of $128.00 W/M plus an additional $15.00 per ton which was incorporated into the tariff base rate in accordance with the Temporary Supplement issued by the aforementioned Conference with an effective date of October 6, 1974. This point is expanded upon in the attached letter provided to us by the Vice Chairman of the U.S. Atlantic & Gulf/Australia—New Zealand Conference and we believe this reaction regarding the actual Conference tariff filings properly clarifies the question at hand.

"We conclude that proper freight charges were collected for the carriage of these three consignments in accordance with the tariffs on file with the Federal Maritime Commission."

Due to the complexity of the situation, pertinent portions of the "attached letter" from the Conference Vice Chairman are quoted below:[4]

"Firstly we would state that it is our opinion that the rates assessed by Farrell Lines were correct. The Tariff rate at the time of shipment *should have been $143.00 W/M.*

"To give you some background as to the confusion resulting from the changes in this rate we would point out the following information. This Conference issued a temporary supplement advising the shipping public that our bunker surcharge of $15.00 per ton was to be incorporated into the Tariff base rate. Since the rate for Carpet Yarn Synthetic was $128.00 the proper rate to be assessed *should have been $143.00 W/M.* However since it was a complete Tariff revision the printed Tariff pages were not mailed to the Federal Maritime Commission until February 13, 1975. *This would be your fourth page No. 306 showing an all inclusive rate of $134.00 for Synthetic Carpet Yarn.* Since Farrell Lines did not have the pages in hand prior to February 13, 1975, and were operating on the basis of the temporary supplement which was quite clear in stating that the Tariff rate should be increased by $15.00 per ton there was no reason and the shipper well knew it, that any lower rate should have been assessed.

"Third revised Page No. 306 dated December 13, 1974, shows a rate of $128.00 W/M. This revision was issued since this Conference reduced the rate for the shipper by adding the current notation for shipments moving in 40-foot containers. As the page showing a bunker surcharge had not been printed yet this page received the next revision number as 3rd Revised Page No. 306 and which was accepted by the Federal Maritime Commission. Subsequently when tariff page 4th Revised No. 306 was issued showing an effective date of October 6, 1974, a typographical error was made in the rate which showed that it was $134.00 W/M instead of

[4] Underscoring supplied.

$143.00 W/M which would have been the inclusion of the full bunker surcharge.

"By the time this error was brought forth to us enough time had elapsed so that this Conference could not advise the Commission of a typographical error and change the rate to $143.00 as this would have been an unfair increase to the shipper. What did happen was that due to a typographical error the shipper received in fact a $9.00 per ton reduction which the Member Lines of this Conference let stand due to the time lapse involved in filing corrections for typographical errors.

"This Conference takes the position that the Tariff Page 4th Revised No. 306 filed with the Federal Maritime Commission on February 13, 1975, is the correct rate to be assessed due to our error from that time on. Prior to that the rate should have been $143.00 that is to say from October 6 until February 12, 1975."

Temporary filings are permitted under 46 CFR 536.6(c)—General Order 13. They have the force of law to the same extent as permanent filings, i.e., the matter contained therein and *in effect* at the time the cargo moves, is the only matter which may be applied against such cargo. Accordingly, once a temporary filing is accepted by the Commission, the ". . . filing is valid and binding between shipper and carrier even if subsequently found to violate provisions of the Shipping Act or the Commission's Rules; it is not void *ab initio*."[5]

In the instant case, it appears the carrier transposed the numbers on the permanent filing resulting in an inadvertent rate reduction which, granted, should have been rejected by the staff. However, at best, the rate "reduction" could not have been put into effect earlier than the day it was received by the Commission.[6] Further, Rule 3 of the Conference tariff (Effective Dates) provides that the date of delivery of the goods to the ocean carrier, on dock or alongside on lighter, governs the rate to be applied, unless specifically provided. The rule further specifies that decreases will be effective as published while increases require 30 and 90 days' filing notice, as applicable.

Based upon the state of the tariff on January 3, and 27, 1975, and consistent with the foregoing, it is my opinion that the cargo at issue as properly freighted at a rate of $143.00 weight/measure. It is not subject to adjustment based upon a filing received after the time of shipment simply because the filing submission differs from the prior quotation. In instances here a permanent filing fails to accurately reflect a temporary filing, the permanent filing is rejected. If, however, the error is not detected and the filing rejected at the time of receipt, this failure obviously cannot negate the statutory requirement which requires the application of those rates

[5] See Docket No. 76-64—*States Steamship Company, Far East/USA Household Goods Tariff No. 2, FMC-9* (Report and Order served May 18, 1977).

[6] General Order 13, Section 536.6(a)(3), regarding retroactive effective date states: "Amendments which provide for changes in rates, charges, rules, regulations, or other provisions resulting in a decrease in cost to the shipper, or amendments which result in no change in cost to the shipper may become effective upon the *publication and filing* with the Commission."

specified in the carrier's tariff on file with the Commission and duly published and in effect at the time.[7] To deny this logic would have the effect of opening the door to retroactive rate application which section 18(b) of the Act expressly prohibits. Not only would overcharges by the carriers be subject to adjustment through freight refund to the shipper, but the inadvertant filing of *higher rates than those provided in the temporary filing would require the carrier to collect an additional freight assessment from the shipper.*

Since a retroactive rate application is prohibited in instances where a retained permanent tariff page differs from a temporary filing, the question arises as to the applicability of any new or different rate contained in the permanent filing. It is my view that on and after the date of receipt of the permanent tariff page, any erroneously printed rate becomes the lawful rate which must then be applied. The rate may not necessarily be the legal rate,[8] however, and if the quotation violates any part of the statute, relief may be sought by the shipper. As a case in point, had the rate error on the 4th Revised Page 305 permanent page resulted in an increase over the temporary filing, a shipper could have sought redress for failure of the carrier to observe statutory filing notice as to rate increases.

The record in this proceeding does not disclose any violations of the Commission's statutes and accordingly,

IT IS ORDERED, That Allied Chemical's petition for reparation be, and it is hereby denied.

(S) WALDO R. PUTNAM,
Settlement Officer.

[7] "Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, rules and regulations in the carrier's filed tariff." *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 323–fn. 4 (1974); *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181, 182 (1973). (See Initial Decision in Docket No. 77–2, *Sun Company, Incorporated v. Lykes Bros. Steamship Company, Incorporated*, served June 16, 1977).

[8] See 46 CFR section 531.13(d)

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–20

IN RE AGREEMENT NO. 8600–4

NOTICE OF DETERMINATION NOT TO REVIEW

September 12, 1977

Notice is hereby given that the Commission on September 12, 1977, determined not to review the order of discontinuance served by the Administrative Law Judge in this proceeding August 19, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–20

IN RE AGREEMENT NO. 8600–4

August 19, 1977

ORDER DISMISSING PROCEEDING

The Commission instituted this proceeding to determine whether Agreement No. 8600–4 should be approved, disapproved or modified as measured against the standards of section 15 of the Shipping Act, 1916, 46 U.S.C. §814. The investigation was to consider Agreement No. 8600–4, a proposed modification of basic Agreement 8600 concerning agency arrangements and participation at inter-conference meetings.

On July 29, 1977, the proponents of the agreement, the members of the Trans-Pacific Freight Conference of Japan/Korea and the Japan/Korea-Atlantic and Gulf Freight Conference, agreed to withdraw Agreement No. 8600–4 and they have notified the Federal Maritime Commission's Acting Secretary of this action. On August 2, 1977, they moved to dismiss this proceeding. Hearing Counsel supports the motion to dismiss.

The motion being unopposed and there being no regulatory purpose to be served in continuing the proceeding, the proponents' motion to dismiss is *GRANTED.*

(S) THOMAS W. REILLY,
ADMINISTRATIVE LAW JUDGE.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–3

CHEVRON CHEMICAL COMPANY

v.

MITSUI O.S.K. LINES, LTD.

ORDER AFFIRMING ADOPTION OF INITIAL DECISION

September 14, 1977

By petition filed May 6, 1977, Complainant asks the Commission to reconsider its adoption of the Initial Decision in this proceeding.

Complainant contends that the Order of Adoption fails to consider certain arguments Complainant raised on exceptions, specifically its objections to the Presiding Officer's comments concerning (1) the filing of small claims;[1] (2) the role of professional auditors, and (3) the need to consider the chemical composition of a compound for classification purposes. Complainant recognizes that these comments were "obiter dicta" but suggests they may have been nevertheless the basis for the Presiding Officer's decision and even the Commission's adoption thereof.

The Presiding Officer's comments on the manner in which the parties conducted this proceeding, and on the role of professional freight auditors, merely reflected the Presiding Officer's thinking on these matters. Characterized as a "small digression" they did not purport to be legal arguments or conclusions and did not therefore necessitate any discussion. With respect to the classification of chemical compounds, the order of Adoption clearly states that our prior decisions do not *require* that a chemical compound be reduced to its components for classification purposes. The proper description and classification of a product may depend on various factors which must be determined in each particular case.

Complainant also contends that our holding on the merits, *i.e.* that

[1] We do not read the Initial Decision as implying that a shipper should refrain from filing freight overcharge claims. The footnote reference to Rules 92 and 311 in the Initial Decision was not intended to suggest, as Complainant apparently believes, that *all* overcharge claims can be disposed of under the procedures set forth in these rules, but appears rather as an illustration of *other* procedures *available* to an aggrieved shipper, seeking relief from overpayment of freight charges. Rule 92 applies when, due to an alleged error in the tariff, the carrier charges a rate higher than would be otherwise applicable; Rule 311 provides an informal procedure for the settlement of claims not exceeding $5000.

OLOA 229 was properly classified as a "lubricating oil additive" rather than as a "detergent", is erroneous. The Presiding Officer determined after a full hearing that Respondent had properly classified the two shipments. We reached the same conclusion upon a review of the entire record. Complainant has brought no new matter to our attention which would cause us to alter that conclusion.

Nor is Complainant's reliance on *Union Pac. R. Co. v. United States*, 93 F. Supp. 617 (Ct. Cl. 1950) appropriate here. In *Union Pac.* the court rejected the railroads contention that a shipment of "napalm," for which there was no specific commodity listing in the railroad's tariff, should have been rated under the "Chemicals noibn (not otherwise identified by name)" classification, rather than as "soap powder," which carried a lower rate at the time. The court reasoned that:

> . . . any fairness which might exist in the application of the Chemicals noibn rate to any particular shipment would be purely coincidental. That would be the reason for avoiding the application of that classification if another fairly applicable one is available. (at 617)

The court then took notice of the fact that napalm was made by the same chemical process as soap bars or soap powder, down to the last stage when aluminate sulphate is added, and accordingly determined that the commodity shipped was properly classified as "soap powder." In so doing, the court explained that:

> To the man on the street, the housewife, the grocery clerk, Napalm is not a soap. . . . But to chemistry which devises these combinations, and to industry which uses them . . . these commodities are soap. . . . And it is in the industry, and not the housewife or the man on the street . . . which is concerned with freight classifications and rates. (at 618).

The *Union Pac.* case can be clearly distinguished from the one before us. Here we are not confronted with a generic classification such as "Chemicals noibn" but with two specific commodity descriptions, one of which, "lubricating oil additive," has been found both by the Presiding Officer and the Commission to more accurately describe the product than the description "detergent" urged by the Complainant.[2] Such a finding is based not on the concept of what "the man in the street, the housewife, the grocery clerk" may have of a detergent, but rather on the basis is of the manufacturer's own literature and description of the product and the testimony of an expert witness. Chevron failed to refute this testimony by an expert witness of its on choosing, or indeed to offer any expert evidence whatsoever. According to the holding in the *Pac. R. Co.* case cited by Complainant, once it is found that among two or more classifications, "one of them fits [the product] better than the other . . . that one will be applied." That is the finding made here and the principle followed.

Complainant's objections to the consideration given to the description

[2] As we noted in our Adoption of Initial Decision:

Chevron's own Data Product sheet and other evidence introduced by it do not indicate that detergency is the sole or even the primary function of OLOA 229.

in the export declaration are unfounded in light of the Commission's well established policy of considering any type of evidence by which a shipper may show the true nature of his cargo. See *e.g., Ocean Freight Consultants v. Royal Netherlands Steamship Company;*[3] *Abbott Laboratories v. Alcoa Steamship Company.*[4]

One final matter raised by Complainant in its Petition requires discussion. Noting that the Commission dismissed the complaint even though the Presiding Officer had awarded reparation in the amount of $92.99, Complainant is "certain that this was an unintentional oversight" requiring some form of correction. Complainant's concern is unwarranted.

The Order of Adoption clearly states that the Initial Decision is adopted in its entirety. This, of necessity, includes the award of reparation, which rested on a finding that freight charges on one of the shipments reflected a rate increase not in effect at the time of shipment, a ground for relief not stated in the complaint. However, to dispel any misunderstanding we hereby affirm the Presiding Officer's award of reparation in the amount of $92.99. To the extent the complaint claimed reparation on the ground of misdescription and misclassification of the cargo, our holding here called for its dismissal. For reasons stated above, therefore;

IT IS ORDERED that our Adoption of Initial Decision served in this proceeding April 13, 1977 is affirmed.

By the Commission.

Vice Chairman Clarence Morse dissenting. We have here another typical situation where for a reparation suit Commission decisions compel a determination of the true nature of a shipment irrespective of any tariff rules and regulations having reference to claims for reparations.

Where two tariff descriptions could fairly apply to a given shipment, the shipper is entitled to the benefit of the description producing the lesser rate. Here, Respondent's expert "agreed" that OLOA 229, described in the shipper's Product Data Sheet as a "highly alkaline detergent" is "a highly alkaline detergent as one function of this material" (Tr., 7) albeit, in his opinion, OLOA 229 is primarily an additive and secondarily an additive which, as only one of its functions, provides detergency.

The shipment was rated as a "Lube Oil Additive, NOS". The alternative tariff description for which Complainant contends is "Detergents, Liquid or Dry, Non-hazardous N.O.S."

Obviously, all detergents when added to another substance can be said to be an "additive" but it cannot be said that all "additives" are "detergents".[5] Hence, when the shipper's Product Data Sheet (Attachment 5 to Complaint) describes the goods as:

"DESCRIPTION HIGHLY ALKALINE DETERGENT—a calcium alkyl phenate lubricating oil additive

[3] FMC Docket No. 72–39, Commission Report served January 30, 1975; 14 SRR 1485 (1975).
[4] Informal Docket 321(I), Commission Order on Review served April 8, 1975; 14 SRR 1652 (1975).
[5] "... additives is the broader term and detergent is a narrower term". V. Horak, Tr., 22.

"APPLICATION	OLOA 229 is an economical source of very high levels of alkalinity plus good detergency for marine cylinder lubricating oils. This additive exhibits the superior antifoaming and solubility properties required for severe paraffinic base stocks. OLOA 229 is also used with other detergent and inhibitor additives in engine oils. It provides base for neutralizing corrosive acids and excellent detergency for upper ring belt deposit control under the high operating temperatures encountered in supercharged diesel engines."

it is clear that it names or describes the product OLOA 229 a "detergent" albeit a "highly alkaline" detergent.[6] Further, who is better qualified to declare the nature of a product and its intended use than the seller/manufacturer? It is the industry, not the housewife or man on the street or a professor of chemistry (no matter how brilliant a man he may be) which is concerned with freight classification and rates. *Union Pacific RR* v. *US, supra*. And industry, the manufacturer, calls it a detergent. Hence, it fairly can be said that both tariff commodity descriptions—"Detergents, Liquid or Dry, Nonhazardous N.O.S." and "Lube Oil Additive, NOS"—are applicable, although to me the greater emphasis is upon the word "detergent", and where such tariff imprecision occurs the tariff description bearing the lesser rate should apply.

I would award reparations based on the above analysis.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

[6] "The word "alkaline" is an adjective, not a noun, and means "having the properties of an alkali, or of resembling an alkali, or containing an alkali". Webster's *New World Dictionary of the American Language*, College Edition, 1968.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 377(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

ATLANTIC LINES, LTD.

June 21, 1977

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed December 16, 1976, Pan American Health Organization (complainant) alleges that Atlantic Lines, Ltd. (carrier) assessed incorrect freight charges on two separate shipments of "Malathion 50 percent Wettable Powder" resulting in combined overcharges of $1,176.13. While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier denied the claim solely on the basis of Item 105 of tariff[2] which prohibits the payment of overcharge claims not presented to the carrier within six months after the date of the shipment.

According to the complainant, the carrier on December 23, 1974, issued its bill of lading No. 13 (M/V Atlantic Pearl) to cover a prepaid shipment described thereon as "130 Drums: Malathion 50 percent Wettable Powder" weighing 14,430 pounds and measuring 788 cubic feet, from New York to Georgetown, Guyana. Total charges of $2,830.50 were assessed based upon a class rate of $131.00 W/M (plus certain surcharges and ancillary charges) the rate published for "Insecticides, N.O.S." in the carrier's tariff (see Footnote 2).[3]

The complainant contends that "Malathion" is actually an *agricultural* insecticide for which a specific Class 9 rate of $82.50 W/M is published in the carrier's tariff.[4]

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[1] *Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.*

[2] Leeaard and Windward Islands & Guianas Conference Freight Tariff FMC No. 1.

[3] *Ibid*, 13th Revised Page 53, Class No. 24; 9th Revised Page 38.

[4] *Ibid*, 13th Revised Page 53, Class No. 9; 9th Revised Page 38.

Based upon the above, the complainant states that the shipment should have been rated as follows:

788 cubic feet (19.7 tons) × $82.50	=	$1,625.25
Other charges, as billed		249.80
Total		$1,875.05

and seeks reparation in the amount of $955.45 ($2,830.50 less $1,875.05).

On February 12, 1975, a similar prepaid shipment was made under bill of lading 8 from New York to Grenada, B.W.I. The cargo was described on the B/L as "30 Drums Malathion 50 percent Wettable Powder" weighing 3,330 pounds and measuring 182 cubic feet. Total charges for this shipment, based upon an "Insecticide, N.O.S. class rate of $142.00 W/M plus a charge for receiving, storage and delivery (R S and D), were $668.85 (see Footnote 3).

The claimant contends that the shipment should have been rated Class 9 and agricultural insecticides at a rate of $93.50 W/M (Port Group 3(b)).[5]

Based upon the above the complainant states that the shipment should have been rated as follows:

182 cubic feet (4.55 tons) × $93.50	=	$425.42
R S & D, as billed		22.75
Total		$448.17

and, seeks reparation in the amount of $220.68 ($668.85 less $448.17).

In support of its claims for reparation, the complainant supplied copies of the pertinent bills of lading; carrier freight bills and freight forwarder bills to the complainant showing the amounts paid as ocean freight; and copies of the shipper's invoices showing the cargo to be "Malathion" and indicating that it was purchased by the complainant from "AGRI".[6]

The complainant also submitted a copy of Page 538 of the Condensed Chemical Dictionary, Eighth Edition which identifies "Malathion" as a generic name for a chemical or chemicals whose only use appears to be that of an insecticide. In addition, the complainant furnished a copy of a label allegedly obtained from the Environmental Protection Agency.[7] This label is for a commodity with the tradename "Cythion 50 W" which is identified as a 50 percent Wettable Powder containing Cythion insecticide, "The Premium Grade Malathion." The primary use of this product appears to be that of an agricultural insecticide and users of the product are referred to the "State Agricultural Experiment Station" for exact timing and spacing of sprays in their particular areas.

In response to the served complaint, the carrier: (1) admits that the claims were denied in accordance with the provisions of its tariff which

[5] See Footnote 4; also 14th Revised Page 37, Port Group 3(b).

[6] The complainant advises that "AGRI" identifies the Agricultural Division of Cyanamid International Sales Corporation (each invoice bears the notation "sold by AGRI").

[7] The label contains a perforated imprint "EPA.PR"; a E.P.A. Reg. No. 802-424-AA; and a stamp indicating that it was accepted March 7, 1974.

prohibit the adjustment of freight charges unless a claim is submitted in writing within six months of the date of the shipment (Item 105); (2) denies that the complainant was overcharged; (3) alleges that it had no knowledge or information as to the nature of Malathion; (4) asserts that it was the duty of the shipper to inform the carrier of the nature of the cargo; (5) states its opinion that the N.O.S. charges were properly applied; and (6) requests that the complaint be dismissed.

While not used as a defense by the carrier, the conference tariff contains other applicable rules which must be taken into consideration. For example:

1) Item 105, in addition to the six-month rule, prohibits payment of claims based upon alleged error in description after the cargo leaves the carrier's possession; and

2) Item 2(h) states that "whenever this tariff provides different rates on a commodity dependent upon type or kind and adequate description is not shown in the bill of lading, it will be assumed that it is of a type or kind subject to the highest of the rates provided on the commodity and freight will be assessed accordingly."

There is no question that the carrier was correct in denying the claims under its tariff, and in fact was required to. The claims were not diled within the time limits specified in the tariff; and the generic commodity description used by the shipper did not conform with the tariff descriptions dictating the assessment of the higher rates due to inadequate commodity descriptions on the bills of lading.

Concerning the published tariff time limits for filing claims, the Commission, in Informal Docket No. 115(I), *Colgate Palmolive Company v. United Fruit Company* reiterated what it specifically stated in *Proposed Rules—Time Limit on Filing Overcharge Claims* 12 F.M.C. 298, 308 (1969) that:

8 " . . . once a claim has finally been denied by a carrier, the shipper may still seek and in a proper case recover reparation before the Commission at any time within 2 years of the alleged injury, and this is true whether the claim has been denied on the merits or on the basis of a time limitation rule."

Further, in Informal Docket No. 294(I) *Prudential Grace Lines, Inc. v. P.P.G. Industries, Inc.* served February 1, 1973, it was held that the " . . . filing of a timely complaint has effectively eliminated the tariff technicality under with the claim originally was denied. . . ." Accordingly, the question of a complainant's right of relief from the so-called six-month rule has been laid to rest; and requires no further comment.

In considering the imposed time limits and conditions for filing claims alleging error in cargo descriptions, the Commission has established, and consistently held, that the determining factor is what the complainant can prove based upon all the evidence as to what was actually shipped. Informal Docket No. 256(I), *Union Carbide Inter-American v. Venezuelan Line*, Order on Review of Initial Decision, November 12, 1973; *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 SRR 16 (1972).

Where the shipment has left the custody of the carrier, however, and the carrier is thereby prevented from personally verifying the complainant's contentions, the Commission has held that the complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, cited above; *Johnson & Johnson International v. Venezuelan Lines,* 13 SRR 536 (1973); *United States v. Farrell Lines, Inc.*, 13 SRR 199, 202 (1973); *Colgate Palmolive Peet Co. v. United Fruit Co.,* 11 SRR 979, 981 (1970). Obviously, the doctrine of "what actually was shipped" applies with equal force against tariff Item 2(h), previously quoted, subject to the same "heavy burden of proof."

The carrier's tariff contains three descriptions under the generic heading of "Insecticides, viz:" i.e. Agricultural; Household, not hazardous; and N.O.S. There is no dispute that Malathion is an insecticide. The question is whether Malathion is, in fact, an insecticide used primarily in connection with agriculture so as to qualify for the specific rate on that commodity published in the carrier's tariff; or in the alternative, so far removed from agricultural use as to require the N.O.S. classification. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. *The Carborumdum Company v. Royal Netherlands Steamship Company (Antilles) N.V.*, decided January 5, 1977. Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Company v. Hamburg—Amerika Lines* 10 FMC 388 (1967).

According to the Condensed Chemical Dictionary, eighth edition, Malathion is moderately toxic by ingestion and inhalation—absorbed by skin. This would appear to eliminate the "household, non-hazardous" category.

A review of the documents supplied by the complainant, indicates that Malathion is equally effective in controlling insects, and other plant pests, which destroy crops; fruits, nuts and ornamentals.

Webster's New Collegiate Dictionary, sixth edition, defines *insecticides* as "an agent or preparation for destroying insects;" and *agriculture* as the "art or science of cultivating the ground; the production of crops and livestock on a farm; farming." The tariff defines neither of these terms.

As previously stated, the Commission has held that the more specific of two possible tariff applications must prevail. Malathion is an agricultural insecticide within the meaning of the tariff item and, accordingly, the N.O.S. rate has no application. Therefore, the more specific agricultural rate should be applied.

The complainant is entitled to reparation in the amount of $1,176.13. It is so ordered.

(S) WALDO R. PUTNAM,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 377(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

ATLANTIC LINES, LTD.

ORDER

September 16, 1977

By Notice served July 6, 1977, the Commission determined to review the decision of the Settlement Officer in this proceeding. Upon completion of review the Commission enters the following findings and conclusions:

The Settlement Officer's award of reparation to Complainant Pan American Health Organization (PAHO) in the amount of $955.45 for freight overcharges on the shipment from New York to Georgetown, Guyana, under bill of lading dated December 23, 1974, is hereby affirmed and his decision as to this shipment is adopted by the Commission.

With respect to the shipment to Grenada, B.W.I., the bill of lading dated February 12, 1975 and the manufacturer's invoice name as shipper not the Complainant PAHO but the World Health Organization (WHO). The complaint fails to show either corporate relationship or affiliation between PAHO and WHO which gives PAHO standing to seek reparation in its own name, or a valid assignment of the claim from WHO to PAHO. Rather than denying the claim with regard to the Grenada shipment because PAHO has not shown itself to be entitled to the reparation sought, the Commission will leave the record open for twenty (20) days within which time PAHO may correct this deficiency.

THEREFORE, IT IS ORDERED,

1. That the Settlement Officer's decision awarding reparation to Pan American Health Organization in the amount of $955.45 for freight overcharges on the shipment of Malathion from New York to Georgetown, Guyana, is hereby adopted as our own and made a part hereof.

2. That Complainant may, within twenty (20) days after service of this Order file either: (1) an affidavit duly executed by an officer of Pan American Health Organization demonstrating a relationship or affiliation with the World Health Organization which would support PAHO's

standing to claim and receive reparation on the shipment of the World Health Organization to Grenada, B.W.I., or; (2) a valid assignment of that claim from the World Health Organization; and

3. That, should Complainant fail to submit an affidavit or assignment as provided in Paragraph 2, above, reparation on the shipment to Grenada, B.W.I. in the amount of $220.68 shall be denied.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–21

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1744R
ORLANDO A. PUIG D/B/A/ HOUSTON EXPORT I NTERNATIONAL

July 18, 1977

ORDER DISCONTINUING PROCEEDING

This proceeding, pursuant to sections 22 and 44 of the Shipping Act, 1916, 46 U.S.C. 821, 841(c), was instituted by the Commission's Order of Investigation and Hearing served June 6, 1977 (published in the *Federal Register,* June 10, 1977, pages 29964 and 29965, Vol. 42 No. 112).

The order directed, *inter alia,* an examination into the details of the forwarding operation of Orlando A. Puig d/b/a Houston Export International (Licensee or Respondent) to whom independent ocean freight forwarder license FMC No. 1744R had been issued on January 14, 1976. Also, to determine whether an export shipper, Stewart and Stevenson Services, Inc. (SSS), of Houston, Texas, by whom the Licensee was employed as an export Manager prior to being licensed, directly or indirectly controls the forwarding activities of the Licensee, and if so, whether the Licensee continues to qualify for an independent ocean freight forwarder license. Mr. Puig had submitted a letter of resignation from SSS effectiv January i4, 1976, and was licensed as an independent ocean freight forwarder on the sam date.

It is pointed out in the Commission's June 6, 1977, Order of Investigation and Hearing that "Subsequently, information has been developed indicating that the Licensee maintains a private office in the Export Department of SSS and receives approximately the same remuneration from SSS that Mr. Puig had received as a salaried employee. The Licensee also appears to be performing the same services for SSS as an independent forwarder as Mr. Puig performed as Export Manager. The great majority of shipments handled by the Licensee since January 14, 1976 have been those of SSS."

By notice served June 16, 1977, pursuant to Rule 94 of the Commission's Rules of Practice and Procedure, 46 CFR 502.94, a prehearing conference in this proceeding was called for and held on Wednesday, July

13, 1977. At the prehearing conference, counsel for the respondent and the Commission's Hearing Counsel announced they have been exploring the issues raised and that satisfactory changes have been made that warrants counsel jointly or singularly to file a motion to discontinue this proceeding.

On July 15, 1977, the Commission's Hearing Counsel an counsel for Respondent filed a joint motion to discontinue these proceedings. In support of the motion the movants state, "The circumstances giving rise to the appearance of shipper control were as follows:

"1. Houston Export International's offices were located on the premises of SSS; (offices are being moved to a location in which SSS owns no interest)

"Orlando Puig was being compensated by SSS for his freight forwarding services on a flat monthly fee basis. (Mr. Puig has cancelled his fixed fee arrangement with SSS and has undertaken to obtain the advice of the Commission's Office of Freight Forwarders before handling shipments for SSS on other than a shipment by shipment basis)

"Most of the shipments handled by Houston Export International were those of SSS." (Mr. Puig solicits business from shippers other than SSS and a growing percentage of his freight forwarding comes from shippers other than SSS)

The joint motion to discontinue, states, "Since the institution of this proceeding, Respondent has retained counsel, who has had extensive conversations with the Commission's Bureau of Certification and Licensing, Office of Freight Forwarders, and Hearing Counsel. Pursuant to these conversations, the licensee has now changed the circumstances of his operation so as to avoid any appearance or possibility of shipper control."

The joint motion to discontinue states the sole issue in this proceeding is the question of Respondent's "shipper connectedness" and/or lack of independence. Puig's fitness, willingness, and ability to perform as a freight forwarder is otherwise not in question. Hearing Counsel concurs that the exhibits appended to the motion establish Mr. Puig's independence and freedom from shipper connectedness or control.

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* that the parties hereto have agreed upon the facts referred to above as the circumstances giving rise to the appearance of shipper control, and that the affidavits and other documents appended to the motion, make unnecessary oral hearing and cross-examination for the development of an adequate record. And, he agrees with the statement in the joint motion to discontinue this proceeding "that an evidentiary hearing would serve no valid regulatory purpose, since the appended exhibits would be stipulated into evidence as the basis for decision in this case. Should a hearing be ordered and held, the parties would recommend a continuation of license number 1744–R."

The Presiding Administrative Law Judge also *finds* and *concludes* that

SSS now does not directly or indirectly control the forwarding activities of the Licensee, and that the Licensee continues to qualify for an independent ocean freight forwarder license.

Wherefore, it is

Ordered,

(A) The joint motion to discontinue this proceeding be and hereby is granted.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

No. 77–21

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE No. 1744R
ORLANDO A. PUIG D/B/A HOUSTON EXPORT INTERNATIONAL

ORDER ON REVIEW OF DISCONTINUANCE

September 19, 1977

The Commission, by order served August 12, 1977, determined to review the order of discontinuance in this proceeding served July 18, 1977. Upon review, we have determined that no further purpose would be served by continuing this proceeding and hereby affirm the order of discontinuance.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 394(I)

ACME COTTON PRODUCTS CO., INC.

v.

ROYAL NETHERLANDS STEAMSHIP CO.
(ANTILLES N.V.)

NOTICE OF DETERMINATION NOT TO REVIEW

September 19, 1977

Notice is hereby given that the Commission on September 19, 1977, determined not to review the decision of the Settlement Officer in this proceeding served September 7, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 394(I)

ACME COTTON PRODUCTS CO., INC.

v.

ROYAL NETHERLANDS STEAMSHIP CO.
(ANTILLES N. V.)

September 7, 1977

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Acme Cotton Products, Inc. (complainant) claims the difference between total transportation charges based on assessment of a Class 1, $124.75rate instead of a Class 7, $79.50 rate, charges paid $1,136.62 instead of $748.60, or $388.02 as reparations from Royal Netherlands Steamship Co. (Respondent) for alleged freight overcharges on a shipment from New York, New York to La Guaira, Venezuela on the SS LEO STAR on bill of lading number 493 dated November 13, 1976. The applicable tariff is the United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference S.B. VEN.-11 Freight Tariff F.M.C. NO. 2. A freight forwarder prepared the bill of lading describing the shipment as 7 cartons: Disposable Hospital Supplies, which was assessed as Cargo, N.O.S., Not Dangerous which takes a Class 1 rate of $124.75 W/M (per ton of 40 cubic feet or 2,000 pounds whichever is higher). Complainant alleges that the shipment consisted of Surgical Cotton Wadding which comes under the Cotton Wadding description at 4th Revised Page 135 of the Tariff which takes a Class 7 rate of $79.50 W/M. The shipment weighed 1,626 pounds and measured 343 cubic feet.

While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be a violation of Section 18(b)(3) thereof.

Respondent denied the claim on February 3, 1977 citing Item 11 from the tariff which provides, in part:

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[2]

The claim was timely filed with the Commission on April 1, 1977.

The claim was accompanied by a copy of the (1) bill of lading, (2) complainant's invoice, (3) correspondence in Spanish from Caracas, Venezuela concerning the shipment, and (4) a shipper's export declaration correction form which all will be considered below.

As indicated above, the bill of lading description was 7 cartons: Disposable Hospital Supplies. Complainant's Invoice No. 17171, dated November 25, 1976, (which number appears on the bill of lading) identifies the shipment as follows:

HUARTA OUIRURGICA
[wadding, surgical][3]

No. 688	50	cjas.	72 rolles de 3″ × 6 yds.
689	100	cjas.	54 rolles de 4″ × 6 yds.
690	?	cjas.	43 rolles de 5″ × 6 yds.
691	50	cjas.	36 rolles de 6″ × 6 yds.
		[boxes]	[rolls]

The correspondence in Spanish which was received by complainant on January 21, 1977 was translated by him at our request. Of importance here is the portion that states:

". . . we noted that you are charging the client, only for shipping freight, the amount of $1,136.62, which represents almost 40% of the value FAS of the merchandise.

"This freight seems to be much too high in our opinion, consequently, we are requesting verification on the matter. . . ."

The Shipper's Export Declaration Correction form prepared by the freight forwarder, amended the description of the shipment from Disposable hospital supplies—Schedule B commodity number 8617150 to cotton surgical wadding—Schedule B commodity number 5419100. The latter commodity number covers bandages, gauze, wad, etc., impregnated or coated with pharmaceutical products.

A copy of complainant's catalog or price list was requested to verify what the shipment consisted of. A copy of the catalog has been provided and for catalog numbers 688–691, which appeared on Invoice No. 17171, the following description appears:

"Cast Padding, Surgical Wadding Padding of a soft white cotton, sized on both sides to provide strength and to prevent tearing and lumping. Designed especially for lining

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[2] With respect to such a rule the Commission, in its report on remand served November 24, 1976, in *Kraft Foods v. Moore McCormack Lines, Inc.*, negated its application with respect to claims before the Commission stating in part "In effect the Rule sets up as a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. . . ."

[3] The translations in brackets were made at the Commission.

under plaster of paris casts or splints. Also used as an impervious backing in preparation of special dressings."

Webster's New World Dictionary, Second College Edition, 1970, defines wadding as any soft or fibrous material for use in padding, packing, stuffing, etc., esp., cotton made up into loose, fluffy sheets, or batting.

From the above, the Cargo NOS Class 1 rate appears too high yet the Cotton Wadding description, which takes Class 7 rate, would not appear to apply to the further processed surgical wadding description as defined in the catalog.

However, the tariff contains another description, Surgical Gauze, at 10th Revised Page 96, which also takes a Class 7 rate. *Stedman's Shorter Medical Dictionary,* Eighth Printing, 1950, defines gauze:

"A thin, loose meshed cloth, employed in bandages or wound dressings, when sterilized or impregnated with antiseptics."

Webster's Third New International Dictionary, 1964, includes the following as one of the definitions for gauze:

"A loosely woven cotton fabric similar to cheesecloth that is extensively used for surgical dressings."

The actual commodity that moved was surgical gauze so a Class 7 rate is applicable.

Complainant submitted substantive matter when the complaint was filed as indicated above. In addition, at my request he also promptly submitted his company's catalog and a translation of the memorandum originally submitted by him to the Commission in Spanish. Complainant has sustained the heavy burden of proof required for a reparation award.

Complainant was assessed $1,136.62 transportation charges. The assessment, based on the Class 7 rate of $79.50, for 343 cubic feet of Surgical Gauze would be:

$\frac{343}{40}$ = 8.575 MT ($79.50)	$661.71
Port Congestion ($3.00)	25.73
Bunker Surcharge ($4.80)	41.16
	$748.60

Respondent overcharged complainant $388.02. Reparation for the amount is awarded.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 395(I)

A. BOHRER INC.

v.

HAPAG-LLOYD LINES
(U.S. NAVIGATION INC.)

NOTICE OF DETERMINATION NOT TO REVIEW

September 19, 1977

Notice is hereby given that the Commission on September 19, 1977, determined not to review the order of dismissal of the Settlement Officer in this proceeding served September 9, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 395(I)

A. BOHRER INC.

v.

HAPAG-LLOYD LINES
(U.S. NAVIGATION INC.)

DISMISSAL OF PROCEEDING[1]

A. Bohrer Inc. (complainant) filed this informal complaint against Hapag-Lloyd Lines (respondent) which covers two identical movements of 750 packages of mixed vegetables weighing 16,500 pounds and measuring 437.25 cubic feet, moving as freezer cargo at a temperature range of 0–10 degrees fahrenheit, from New York, New York to KLM Royal Dutch Airlines at Amsterdam, Holland. One shipment moved on bill of lading number 16396049 dated October 1, 1976 on the SS MOSEL EXPRESS, and the second shipment moved on bill of lading number 16422712 dated October 2, 1976, also on the SS MOSEL EXPRESS. The complaint was filed with the Commission on April 1, 1977. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be a violation of Section 18(b)(3) thereof.

The claim was filed with the Commission well within two years after the cause of action arose, i.e., October 1, 1976 and October 29, 1976, and must be considered on its merits as ruled by the Commission in *Colgate Palmolive Company* v. *United Fruit Company,* Informal Docket No. 115(I) served September 30, 1970. For the sake of good order, the settlement involved the matters discussed below.

On January 5, 1977, complainant's freight forwarder requested an adjustment based on error in measurement and respondent replied on January 6, 1977, to the effect that the conference tariff contains a rule that after a steamer left a port of loading, there can be no acceptance of packing list or reduction of measurement, however, had the matter been

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

brought to its attention prior to consignee's possession of the goods, then the cargo could have been remeasured at the destination port. The rule found in North Atlantic Continental Freight Conference Tariff No. (29) FMC–4 provides:

"OVERCHARGES—CLAIMS FOR ADJUSTMENT IN FREIGHT CHARGES. Claims for adjustment of freight charges, if based on alleged errors in weight or measurement, will NOT be considered unless presented to the Member Line in writing before the shipment involved leaves the custody of the Member Line. Any expense incurred by the Member Line in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found, by the claimant. All other claims for adjustment of freight charges must be presented to the Member Line in writing within six (6) months after date of shipment."

Both bills of lading were prepared by the freight forwarder indication: " 750 PKGS: MIXED VEGETABLES 16,500# 750 CF" to be moved under freezer stowage of 0–10° F. The tariff rate of $145.75 per Item No. 954.0001.115 per ton of 2,240 pounds or 40 cubic feet, whichever produces the higher revenue is found at 31st Revised Page 108 of the North Atlantic Continental Freight Conference Tariff No. (29) FMC–4.

Both due bills submitted complainant were for 750 cubic feet:

18.75 MT ($145.75)	$2,732.81	Paid 10–12–76	b/l	16396049
18.75 MT ($145.75)	2,732.81	Paid 11–23–76	b/l	16422712
	$5,465.62			

Complainant indicates in the claim that he erroneously gave the total cubic measurements as 750 cubic feet and the measurement actually was .583 cubic foot per package (750 packages) which totals 437.3 cubic feet per shipment. In its letter of December 30, 1976, complainant advised the freight forwarder that each of the packages measire 9″ W × 8″ H × 14″ L. I compute this to be $^{1008}/_{1728}$ = .583 (750) = 437.25 total cubic feet per shipment. In its Invoice #10161, which could have covered either of the above shipments, complainant showed 437 cubic foot measurement for 750 packages.

On April 18, 1977, in response to service of the claim respondent advised:

"We regret that the person originally reviewing this claim failed to notice the measurements on the pier dock receipts which confirm the shipper's statement as to what the actual measurement of the shipment was. We herewith are attaching two manifest correctors correcting the freights on both shipments, and since the bills of lading were both prepaid the shipper should be in receipt of our check for the overcharges within the next few days.

"We believe this terminates the matter and the need for an Informal Docket No. 395(I)."

As indicated above respondent collected $5,465.62 for the two shipments from complainant. Respondent computes what should have been charged per shipment as follows:

437 cu.ft. – 10.925 MT @$145.75 = $1,592.32[2]

[2] My computations per shipment are: $^{43725}/_{40}$ = 10.931 MT @$145.75 = $1,593.19.
As respondent has already settled the claim, I will not frustrate the settlement based on my computation which is 87 cents higher per shipment.

Two identical shipments would be assessed $1,592.32(2) $3,184.64. However, respondent advises that its settlement with complainant was:

Original bill	$5,465.62
Refund to complainant	2,295.56
Net paid by complainant	$3,170.06

Complainant should have paid $3,184.64 as computed above. As a result of the above settlement complainant received $14.58 in excess of what it should have received, i.e.,

Applicable transportation charges	$3,184.64
Net transportation paid by complainant	3,170.06
Balance due owed by complainant	$ 14.58

Pursuant to my request respondent has submitted a balance due bill of $7.29 for each of the above shipments, totalling $14.58.

Respondent has paid the claim in full and submitted the above two balance due bills to complainant. Respondent has requested termination of this proceeding, and in view of its settlement of the claim, the proceeding is hereby dismissed.

(S) JUAN PINE,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND REGULATED ACTIVITIES

DOCKET NO. 76-40; GENERAL ORDER NO. 38

October 3, 1977

Part 531—Regulations Governing the Publishing, Filing and Posting of Tariffs in Domestic Offshore Commerce

AGENCY: Federal Maritime Commission

ACTION: Adoption of Final Rules

SUMMARY: Part 531 has been substantially revised, updated and renumbered. Most changes were for the purpose of clarifying existing Commission practices, but several new requirements and procedures have been added. The major changes include: specific regulations for through intermodal transportation; a requirement that tariffs be published on standard sized paper in looseleaf rather than bound form; a requirement that carriers promulgate 15 "minimum" tariff rules and publish them in a specific sequence; a requirement that tariff matter filed with the Commission be simultaneously served upon tariff subscribers; a requirement that special permission applications be filed upon five days notice (except in extraordinary circumstances); specific procedures for the filing of project rates; additional definitions to govern certain terms commonly appearing in tariffs (especially terms which affect intermodal transportation); and more detailed procedures governing the "adoption" of another carrier's tariff.

EFFECTIVE DATE: January 1, 1978

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney, Secretary
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

This proceeding was commenced by a Notice of Proposed Rulemaking (Notice) inviting comments on a proposal to revise, update and republish the Commission's domestic tariff regulations which included amendments adding to and significantly altering existing tariff filing requirements (41 *Fed. Reg.* 32899, August 6, 1976). Comments were received from Mr. L. A. Parish; the Institute of International Container Lessors (IICL); Matson Navigation Company (Matson); the Military Sealift Command (MSC); Household Good's Carriers' Bureau (HGCB); Puerto Rico Maritime Shipping Authority (PRMSA); Sea-Land Service, Inc. (Sea-Land); the Commission's Bureau of Hearing Counsel (Hearing Counsel); and Trailer Marine Transport Corporation (TMT).[1] Reply Comments were submitted by Matson, IICL, HGCB, and MSC.

A total of 53 sections or subsections were objected to in the initial round of comments, but Hearing Counsel proposed modifications to the original proposal which eliminated the stated objections to 29 of the challenged provisions. These reconciliatory Hearing Counsel proposals have been employed in the final regulations. The remaining controverted points, identified by the section numbers designated in the original proposal, are discussed below.

A central purpose in proposing the Part 531 amendments was to eliminate tariff practices which are overly complex or of marginal utility in light of modern transportation conditions. Steamship tariffs and the Commission's regulations alike should be readily understandable to all persons seeking transportation by sea and not just to established tariff publication specialists. Further revisions may well be required before this goal is reached, but we have striven today to adopt rules which are both thorough and clearly stated. Most of the original section numbers were reordered in the version of the rules which has been adopted (final version). This renumbering was undertaken as a clarifying measure and not to substantively change the regulations. Similarly, the final version contains a number of editorial changes intended to simplify or clarify language employed in the original proposal and not to alter its meaning.

1. *Section 531.0* Scope and Exemptions. The Notice defined the Commission's interstate commerce jurisdiction in such a way as to omit the Alaska and Hawaii trades. Matson and Hearing Counsel both recognized this omission, but were unable to agree upon the wording of a substitute version. We have essentially separated original section 531.0 into two different sections.[2] The final version of section 531.0 is considerably shorter than the original proposal and states that Part 531

[1] TMT's Comments were filed over 30 days late and were accompanied by a "Motion for Leave to File" which failed to state reasonable grounds for waiving the filing deadline as required by section 502.102 of the Commission's Rules. Accordingly, TMT's motion will be denied and only its Reply Comments considered by the Commission.

[2] Certain items initially appearing in section 531.0 which pertained to the substantive content of tariffs were placed in final section 531.3(p).

applies to all transportation (including through intermodal transportation) offered by common carriers subject to the Shipping Act and defines these "domestic offshore carriers" in non-statutory terms.[3] Through transportation to Alaska and Hawaii offered under tariffs on file exclusively with the Interstate Commerce Commission (ICC) pursuant to 49 U.S.C. 36(c), 905(b) or 1018 has been included as an exemption in final section 531.1, thereby eliminating a second Matson objection.

2. *Section 531.1.* Definitions. Mr. Parish objected to the absence of a specific statement restricting the application of the proposed definitions to "this regulation only," but neglected to explain why such a disclaimer was necessary. Although these definitions are not intended to limit the activities of domestic offshore carriers outside of the tariff promulgation sphere, neither does the Commission intend for them to be applied restrictively. Accordingly, final section 531.2 states that the definitions are to be used in interpreting *tariffs* filed pursuant to Part 531 as well as to the Part 531 *regulations* themselves.

3. *Section 531.1(m) and Section 531.14.* Intermodal Transportation. Sea-Land states that the Commission lacks jurisdiction over through routes formed in conjunction with carriers other than the "common carriers by water" mentioned in Intercoastal Shipping Act section 2. TMT contends that the Commission has authority to "accept intermodal joint rates" between FMC regulated domestic offshore carriers and carriers regulated by other agencies. The latter view must prevail in domestic offshore commerce just as it has in foreign commerce, see *Commonwealth of Pennsylvania v. Interstate Commerce Commission,* ______ F.2d ______, D.C. Cir. No. 76–1558, June 20, 1977, 16 SRR 195, and the final rules require the filing of through intermodal tariffs (final section 531.8).[4] The acceptance of such tariffs and the regulation of practices clearly ancillary to the all water transportation of domestic offshore carriers does not represent an attempt to assert substantive authority over inland activities within the exclusive jurisdiction of the ICC or the Civil Aeronautics Board (CAB). The Commission's responsibilities to prevent unfair and unreasonable rates and practices pursuant to Shipping Act sections 16 First and 18(a) and Intercoastal Shipping Act sections 2, 3 and 4, is sufficient to support the requirement that domestic offshore carriers file their entire through rate with the FMC as well as their port-to-port rates when they provide through transportation to the public. Shipping Act section 33 does not prohibit the Commission from obtaining tariff information which is also submitted to the ICC. *Alabama Great Southern Railroad Company v. Federal Maritime Commission,* 379 F.2d 100 (D.C.

[3] To more clearly distinguish interstate commerce subject to the Shipping Act from interstate commerce subject to the Interstate Commerce Act, the Commission has adopted the term "domestic offshore commerce" to refer to the former. See final section 531.2(h).

[4] Appropriate editorial changes were made in final section 531.8 to conform it to the modified definition of "through intermodal transportation" contained in final section 531.2(u). See also Items 8 and 10, *infra.*

Cir. 1967); we do not intend to "concurrently regulate" the inland rates and practices of participating overland carriers.

4. *Section 531.1(t) and Section 531.5(m).* Filing of Project Rates. The proposed rules permitted the filing (without special permission) of project rates which met certain specifications. Governmental and charitable shipments were not included within the definition of "project rates," however, and MSC objected to this exclusion. Matson stated that project rates should be banned in principle because they allegedly result in the "subsidization" of project shippers. The final rule has been modified to include major, one time only, governmental and charitable *construction or relief projects* otherwise eligible for project rates under the standards of final section 531.6(m).[5] Matson's fear that project rates will unfairly subsidize project shippers is unwarranted inasmuch as the rule requires each such rate to be accompanied by a showing that the rate covers all of the carriers' variable costs and makes more than a *de minimis* contribution to fixed expenses.[6]

5. *Section 531.1(u).* Proportional Rates. The proposed rule defined "proportional rates" as those which are "predicated on a prior or subsequent movement." Matson proposed that the definition be limited to rates for cargo "moving beyond the carrier's own line" without indicating why such a limitation was necessary or desirable. Final section 531.1(p) contains essentially the same definition as the original proposal, but has been modified for the sake of clarity.

6. *Section 531.1(v).* Definition of Substituted Service. The proposed definition limited the use of "substituted service" to the *occasional* use of other carriers or other modes of transportation necessitated by unexpected operating exigencies. Matson claimed that this limitation is inconsistent with present industry practices and suggested an amendment allowing "substitute service" to be offered on a regular basis. We have rejected Matson's proposal. It is our intention to alter industry practices in this regard. *Regular* arrangements for serving a locality indirectly on a single bill of lading by substituting the facilities of another carrier must be treated as joint through transportation (whether intermodal or not), and not as the through service of a single carrier.

7. *Section 531.1(z) and Section 531.1(aa).* Definitions of Through Rate and Through Route. Matson objected to the original proposal's failure to state that certain joint through rates in the Alaska and Hawaii trades are exclusively regulated by the ICC. Our revisions to the Scope and Exemptions sections (final sections 531.0 and 531.1) specifically mention 49 U.S.C. 316(c) and further reference is unnecessary. We have, however, deleted the requirement that a through route be offered under a single through bill of lading in response to Mr. Parish's observations on that

[5] Not all government or charity shipments fall within this relatively narrow category.

[6] Final section 531.6(m)(5) states that a project rate must *contribute to* the carrier's fixed expenses, but does not prescribe on exact percentage or standard for measuring this contribution. Proposed rates will be examined on a case-by-case basis to determine if a genuine, commercially realistic contribution is being made.

point. Otherwise, final sections 531.1(v) and (w) reflect our original proposal despite considerable modifications of an editorial nature. Final section 531.1(w) defines "through route" as an offering of a single domestic offshore carrier, two or more FMC regulated water carriers, or a domestic offshore carrier and one or more other carriers. Whether a "through rate" is formed by combining local or proportional rates is, by itself, irrelevant for tariff purposes, and requirements relating to such combinations have been deleted from final section 531.1(v).

8. *Section 531.1(bb).* Definition of Transshipment. Mr. Parish contended that the original proposal should expressly disclaim any applicability to cargo transfers between commonly controlled carriers. Such an exclusion was intended and should have been evident from the proposed definition which spoke in terms of cargo transfers between *"different common carriers by water."* We have, however, modified the original proposal in a manner which narrows this exclusion in some respects. The final rule defines "transshipment" as the physical transfer of cargo from a vessel operating domestic offshore carrier to *any other carrier* (section 531.1(x)) and the definition of "carrier" has been modified to indicate that commonly owned or controlled carriers operating in different transportation modes shall be considered separate carriers for tariff filing purposes (section 531.1(c)). We have also provided that ICC *regulated* Part III carriage shall be considered a different "mode" of transportation than domestic offshore water carriage for tariff filing purposes (section 531.1(u)). These regulations are intended to key the Commission's through intermodal tariff rules to the ICC's interpretation of "transshipment" under section 302(i)(3)(B) of the Interstate Commerce Act,[7] where the term has critical jurisdictional significance. See generally *Sacramento-Yolo Port District,* 341 I.C.C. 105, 111–113 (1972).

9. *Section 531.1(l).* Definition of Cargo Interchange. The proposed definition of "interchange" has been deleted from the final rules because the term was not employed in the regulations and because part of the original definition was incorporated into the final definition of "transshipment." It is assumed, however, that "interchange" will be employed in tariffs to describe cargo transfers which are not "transshipments" (*i.e.*, transfers between vessels of the same carrier or transfers between non-FMC regulated carriers).

10. *Section 531.1(m).* Definition of Port. The proposed subsection defined a port as "a place where actual water transportation subject to the Shipping Act commences or terminates as to any particular movement of cargo." Matson commented that the terms "commence" or "terminate" could be construed as omitting the situation where an ocean going vessel transships its cargo during through transportation. In order to eliminate any confusion on this point, we have made modifications incorporating Matson's suggestion as well as editorial changes of our

[7] 49 U.S.C. 902(i)(3)(B)

own. The final definition (section 531.1(m)) no specifically states that ocean carriage can originate or terminate by "transshipment" as well as by other methods. In the case of non-vessel operating carriers, it is assumed that "actual ocean carriage" begins when the cargo is tendered to the underlying vessel operating carrier.

11. *Section 531.2(b)*. Series Designation for Government Tariffs. Matson argued that the repeal of former section 6 of the Intercoastal Shipping Act (P.L. 93–487, October 26, 1974) effectively prohibits the publication of tariffs exclusively for government cargo in domestic offshore commerce. This position is clearly erroneous. Section 6 dealt only with the *level* of government rates. Carriers may, but are not required to, continue offering rates for U.S. Government cargos provided that any discounts or other privileges provided are reasonable and cost justified under accepted Shipping Act standards.

12. *Section 531.2(c)*. Thirty Days Notice of Effective Date. Matson opposed the proposed elimination of two existing Part 531 regulations which permitted carriers the option of "posting" (filing) tariffs 45 days prior to their effective date and thereby obtaining a longer period to respond to protests pursuant to section 502.67(b) and at least two days notice of any rate suspensions imposed by the Commission. We have adopted the original proposal with editorial changes. Final section 531.3(f) requires tariff filings to provide a *minimum* of 30 days notice. Carriers are free to file tariffs which furnish a greater period of notice if they wish, but the procedures employed to protest tariffs (section 502.67(a)) shall remain the same in each instance. Uniform procedures for protesting tariffs allow for greater efficiency in the Commission's administration of Intercoastal Act section 3 and should eliminate a present source of confusion to shippers and carriers alike. On several occasions shippers have failed to observe the special "25 days before effective date" deadline for filing protests now specified for "posting date" tariffs.

13. *Section 531.2(d) and (3)*. Service of Tariff Filings on Tariff Subscribers. PRMSA claims it is unreasonable that PRMSA be required to mail tariff matter to its "large number" of tariff subscribers on or before the time it submits its filing with the Commission. PRMSA further states that a simultaneous service requirement could delay its rate changes for as long as three days while it is preparing subscriber mailings. No other carrier objected to the simultaneous service requirement, and Sea-Land specifically stated that it had no objection to it. Final section 531.3(h) incorporates the original proposal. Although some carriers may find it necessary to begin planning their tariff filings somewhat earlier than they do now, there is no reason to believe such advance planning will cause inefficiencies or hardships as a general rule. Simultaneous service will, however, maximize the notice period provided to tariff subscribers and facilitate their participation in the rulemaking process. Should a situation arise where simultaneous service would result in a

significant hardship to a carrier, relief can be readily obtained through the special permission process (final section 531.18).

14. *Section 531.2(g)*. Tariff Filing Receipts. Matson claimed that the Commission should pay the postage for mailing carriers a receipted copy of their tariff filing transmittal letters because the government enjoys a franking privilege. Final section 531.3(j) incorporates the original proposal—receipts will be provided only to carriers which furnish a stamped self-addressed envelope. The Commission does not have a franking privilege and pays the regular rates of the U.S. Postal Service. Moreover, the primary purpose for requiring carrier provided envelopes is to free the Commission's relatively small staff to work on more substantive matters than the typing of envelopes to receipt what frequently exceeds 100 different tariff filings per week.

15. *Section 531.2(m)(3)*. Tariffs Must Be "Posted" 30 Days Prior to Their Effective Date. HGCB argues that the practice of posting tariffs in advance of their effective date, *i.e.*, making them available for public inspection, would confuse the public, cause delays in effectuating rate changes, and generally impose an unnecessary burden upon carriers. Final section 531.3(o)(3) incorporates the original proposal. Although an express posting requirement was not present in the Commission's previous domestic tariff rules, Intercoastal Shipping Act section 2 unmistakenly requires 30 days advance posting, and HGCB has not provided us with detailed or compelling reasons why an exemption from this statutory requirement should be granted. Posting is the only practical method for non-tariff subscribers to obtain the advance notice of tariff changes which is integral to the statutory scheme of carrier initiated rates reflected in the Shipping Act. A well informed shipping public will generally advance the purposes of the Shipping Act and assist the Commission in accomplishing its regulatory duties. Modifications were made in the final rule in response to HGCB's comments, however. These modifications more clearly indicate that "posting" refers to the maintenance of complete and up-to-date tariffs for public inspection during ordinary business hours, and require tariff material which is filed, but not yet effective, to be maintained in a manner which indicates its prospective nature. Carriers are also required to provide members of the public with sufficient access to informed carrier personnel to permit interested persons to accurately ascertain the carrier's present and proposed rates as expressly set forth in the applicable tariff or tariffs.

16. *Section 531.3(a)*. Uniform Tariff Format. HGCB opposed the proposal to change the size of tariff pages from 8 by 11 inches to 8½by 11 inches and the standard format from bound to loose-leaf because HGCB wishes to avoid the expense of republishing its present tariff. Final section 531.4(a) adopts the original proposal. HGCB represents an extreme minority view in tariff filing matters. Its bound tariff (FMC–1) has rarely been modified since its initial submission in 1949, because HGCB's members essentially offer through transportation service between

interior points, and accomplish rate changes by altering their overland charges—charges which are exempt from ICC regulation pursuant to 49 U.S.C. 1002(b)(2). For the Commission's staff and for most carriers and shippers, the use of standard sized paper and a loose-leaf format minimizes difficulties in printing, circulating and maintaining tariff material in an accurate, up-to-date and useful manner. To the extent that HGCB can demonstrate good cause for the waiver of the new format requirements, relief is freely available via the special permission process articulated in final section 531.18. Section 531.19 contemplates that special permission to file bound tariffs will be granted in some instances, and prescribes standards to be followed in such tariffs. Final section 531.19(b) has been altered in response to another HGCB comment to specifically provide that "saddle stitching" is an acceptable method of fastening bound tariffs.

17. *Section 531.4(b)(3)*. Street Address of Freight Receiving and Disbursing Stations. Mr. Parish and HGCB disfavored the proposal that tariffs list the street addresses of all freight receiving or disbursing stations employed by the filing carrier. Mr. Parish perceived this requirement as an attempt by the Commission to restrict carriers to the use of specific pier facilities, while HGCB complained that its 54 member carriers employ a large number of such stations and HGCB would be required to frequently amend its tariff to reflect changes in these facilities. Final sections 531.5(b)(3) and (4) incorporate the original proposal with modifications which more clearly indicate that the purpose of the rule is not to require carriers to use a particular facility within a port district, but only to provide shippers with the actual street address of any freight stations which are used. To the extent HGCB can demonstrate that it would be unreasonable to require them to furnish the street addresses of the freight stations employed by their individual members, they may obtain special permission to file tariffs which omit such information.

18. *Section 531.4(b)(7)(I(*. Effective Date of Rate Changes for Through Intermodal Transportation. Matson claimed the original proposal was unduly vague in its use of the terms "intermodal shipment" and "originating carrier." Final section 531.5(b)(8)(ii) modifies the proposed rule so that it applies to all *joint* through routes (but not single carrier transportation featuring pickup and delivery service), while retaining the essential requirement that shippers be charged the rate in effect on the day the first (or initiating) carrier takes possession of the cargo.

19. *Section 531.4(b)(7)(xv)*. Container Description Rule. IICL argued for a longer, more precise definition of "container" and claimed that the proposed rule should expressly permit carriers to employ conversion tables which assess proportionately higher rates for the use of nonstandard sized containers. Matson anted the proposed definitions deleted, or, alternatively, that the definition of "container" be modified to include boxes "with or without wheels"—apparently to accommodate specific provisions in Matson's present tariff. Final section 531.5(b)(7)(xv) has

been revised to more clearlystate that its intended objective is only to require an adequate *description* of all equipment used as basis for assessing rates. The rule does not require the *use* of any particular type of equipment. We find no specific fault with IICL's proposed definition of "container" from a substantive viewpoint; but it is overly complex for our present purpose. The final rule distinguishes "containers" from "trailers" in a simple fashion. Carriers are then required to describe each type of container or trailer for which they chose to make rates available. Final section 531.5(b)(7)(xv) does not forbid the use of conversion tables which discriminate against nonstandard equipment. However, any deviations from uniform treatment will be closely scrutinized by the Commission to assure that the discriminatory charges are justified by cost differences or other legitimate transportation considerations.

20. *Section 531.5(e)*. Options as to Applicable Rates Forbidden. MSC found the proposed rule confusing as applied to commodities which may move under either government or civilian cargo classifications, and sought assurances that certain "options" presently available to military cargo which are under investigation in FMC Docket No. 75–20 will continue to be permitted under the new Part 531 regulations. Final section 531.6(a) contains a simplified version of the original proposal which is not intended to directly address the validity of shipper "options" such as the choice between a genuine "FAK" rate or a specific commodity rate. The final rule merely forbids the filing of rates which are clearly duplicative, conflicting or ambiguous. The possibility that a tariff allows a given commodity to qualify (*upon meeting expressly stated conditions for carriage*) for more than one rate when the different rates in question reflect *bona fide* differences in transportation conditions is not grounds for rejection or cancellation.

21. *Section 531.8(g)(6)*. Notarization of Special Permission Applications. PRMSA objected to the original proposal because Puerto Rican law allows only attorneys to be notary publics and, PRMSA claims, attorneys charge too much for notarial services. MSC suggested that formal attestation be replaced with a signed "unsworn declaration under penalty of perjury" pursuant to recently enacted P.L. 94–550, 28 U.S.C. 1746. Final section 531.18(e)(3) incorporates MSC's suggestion.

22. *Section 531.9(a)*. Collections or Absorptions of Terminal Charges. Matson contended that the proposed regulation was unclear and unworkable to the extent it required the "dollar amounts" of collections or absorptions to be stated in the carrier's tariff, primarily because the exact amounts involved often vary from day to day. Final section 531.9 has been modified and reorganized to eliminate the features complained of by Matson. The final rule requires a full description of all terminal services provided as part of a tariffed transportation service, whether charged for separately or included in the line haul rate. Dollar amounts must be stated only when the carrier collects a separate charge for services *it performs itself* (or through agents) or offers shippers a terminal allowance in lieu of

performing specified services—*i.e.*, when the carrier can control the dollar amounts involved. When a *third party* (not the carrier or its agents) performs terminal services which are charged against the cargo, the tariff must advise the shipper of this fact, but may refer to a terminal tariff or other governing publication for an exact statement of the charges in question.

23. *Section 531.14(d)(1)*. Publication of Exact Rate Divisions Received For Through Intermodal Transportation. TMT claimed that the rate divisions received by participating carriers do not interest through route shippers, and the public availability of such information would only aggravate local shippers who pay higher rates for local transportation between the same points. The ICC permits joint through route carriers to file rate divisions on a confidential basis and TMT suggests that the Commission adopt the same policy. Final section 531.8(a)(5) contains the original proposal, modified by editorial changes and by the addition of a requirement that "charges" applicable to the through transportation in question also be broken out on a port-to-port basis. This Commission has always required public disclosure of through route rate divisions (although not always in tariff form) and has found that public reaction to such divisions is valuable in assessing the fairness and usefulness of the through rate. No valid reason occurs to us for deviating from this practice in the case of through intermodal transportation, especially since it involves rate divisions subject to the regulatory jurisdiction of different administrative agencies.

24. *Section 531.1(s)*. Definition of Tariff Posting. No comments were received concerning the original proposal, but modifications were made which limit the applicability of "post" to the maintenance of tariffs for public inspection, thereby more clearly distinguishing the term from "filing" which is the submission of tariff matter to the Commission.

25. *Section 531.16(a)(2)*. Seasonal Transportation Tariffs. No comments were received concerning the original proposal, but subparagraph (a)(2) has been deleted to more clearly indicate that tariffs which are filed without an express reference to their seasonal nature are subject to rejection.

26. *Sections 531.17(c)(3) and (4); section 531.17(d)*. Arrangement of Tariffs in an Index of Tariffs. No comments were received concerning the original proposal, but modifications were made in final section 531. 16(c) to simplify the proposed requirements. The final rule now requires Tariff Indices to be arranged by type of tariff, listed in the order of their FMC series and number designations. Paragraph (d) was modified to require Tariff Indices to be amended within 30 days after any change in the information contained therein, rather than by the periodic reissuance of the Index.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553); sections 15, 16, 18(a) and 43 of the Shipping Act, 1916 (46 U.S.C. 814–815, 817(a) and 841a); and sections 2, 3 and 4 of the

Intercoastal Shipping Act,,, 1933 (46 U.S.C. 844–845a), IT IS ORDERED, That the Commission's Domestic Commerce Tariff Rules (46 C.F.R. Part 531) are amended as set forth in the attached Appendix; and

IT IS FURTHER ORDERED, That the aforesaid amendments shall take effect on January 1, 1978, provided that General Accounting Office clearance pursuant to 44 U.S.C. 3512 is obtained prior to that date. New or reissued tariffs tendered for filing on or after January 1, 1978 shall be fully subject to the new regulations. Tariff *amendments* submitted on or after the effective date will, however, continue to be accepted in the same format as the tariff being amended until January 1, 1979. By the latter date, all tariff material employed by carriers engaged in domestic offshore commerce shall conform to the requirements of revised Part 531.* Tariffs on file at that time which do not meet these requirements shall be cancelled; and

IT IS FURTHER ORDERED, That the aforesaid amendments to Part 531 be designated as General Order 38; and

IT IS FURTHER ORDERED, That the exemption from the Shipping and Intercoastal Shipping Acts granted to Foss Launch & Tug Co., Foss Alaska Line, Inc., Puget Sound Tug & Barge Company, and Alaska Barge & Transport, Inc., through December 31, 1978 (41 *Fed. Reg.* 6070) shall not be affected by the adoption of the aforesaid amendments; and

IT IS FURTHER ORDERED, That existing grants of special permission excusing compliance with domestic commerce tariff filing requirements shall continue according to their original terms until further action of the Commission; and

IT IS FURTHER ORDERED, That the "Motion to Accept Late Filed Comments" of Trailer Marine Transport Corporation is denied.

By Order of the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*The text of the amended is reprinted in 46 C.F.R. 531.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 353(I)

FREEPORT KAOLIN COMPANY

v.

COMBI LINE

NOTICE OF DETERMINATION NOT TO REVIEW

October 7, 1977

Notice is hereby given that the Commission on October 7, 1977, determined not to review the decision of the Settlement Officer in this proceeding served September 27, 1977.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 353(I)

FREEPORT KAOLIN COMPANY

v.

COMBI LINE

Reparation denied.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER[1]

Complainant seeks reparation in the amount of $4,121.74 alleging that the respondent overcharged complainant on a shipment of common ground clay which moved from Savannah, Georgia to Antwerp, Belgium, carried aboard respondent's vessel under bill of lading dated May 24, 1974.

The circumstances surrounding the shipment are as follows:

1. The complainant booked through the respondent's agent, Halnav, Inc., one lash barge for a minimum of 360 long tons of bagged common ground clay on May 10, 1974. By letter dated May 15, 1974, Halnav, Inc. confirmed the booking citing a 360 long ton minimum and quoting a rate of $40.75 per long ton (berth terms) plus a $11.75 surcharge.

2. When the cargo arrived for shipment only 231.91 long tons (519,477 lbs.) were loaded into the barge although 360 long tons of clay were available for loading. Respondent contends that the cargo was a fluffier grade than had been expected and that one barge would not accommodate 360 long tons.

3. Complainant was assessed ocean freight charges of $15,780 based upon a rate of $40.75 weight plus a $11.75 surcharge at a 300 long ton minimum weight.

4. Complainant proffers an insurance adjuster report which disclosed

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Notice of determination not to review October 7, 1977.)

that the shipment after discharge at Antwerp was 323 bags short and of the delivered cargo 280 bags were damaged.[2]

Complainant contends that it is liable for freight only on 221.27 long tons delivered.

A review of the carrier's tariff, Combi Line-South Atlantic/Continental & South Atlantic/French Atlantic-Tariff No. 1 (FMC No. 3), reveals three rates covering the subject movement. More specifically $57.00 W, no minimum;[3] $42.25 W with a 300 ton minimum (berth terms)[4] and $40.75 weight (berth terms) with a 350 ton minimum.[5]

The issue to be resolved is simply that of improper rate application. Complainant bases his computations on the $40.75 rate which in order to be applicable must meet a 350 long ton minimum weight. Respondent assessed charges at the $40.75 rate but applied a 300 long ton minimum. Both parties were erroneous in applying the $40.75 rate. The tariff clearly shows for the $40.75 rate to be applicable a 350 long ton minimum must be met. The bill of lading shows 519,477 lbs. (231.91 long tons of clay) were shipped. Hence, the only applicable rate for 231.91 long tons would be the $57.00 no minimum rate, which would produce charges of $15,943.81 (231.91 LT × $57.00 plus $11.75 surcharge). The proper charges of $15,943.81 creates an undercharge by respondent of $193.81.

Accordingly, the claim is denied and it is found respondent is due additional transportation charges in the amount of $193.81.

(S) CAREY R. BRADY,
Settlement Officer.

[2] Claims against common carrier for loss or damage to cargo in transit are specifically excluded from adjudication under the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301). The complainant's remedy for loss and damage lies elsewhere.

[3] Commodity Code 27621, Section I, Page 71Ac, effective March 22, 1974, To Continent and France Only: Clay in bags: All other movements, effective April 4, 1974.

[4] Commodity Code 27621, Section I, 15th revised Page 71B, Clay in bags, To: Rotterdam/Antwerp/Bremen, effective April 4, 1974.

[5] Ibid

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 421(I)

STOP & SHOP COMPANIES, INC., BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND BARBER STEAMSHIP LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

October 19, 1977

Notice is hereby given that the Commission on October 19, 1977, determined not to review the decision of the Settlement Officer in this proceeding served October 12, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING, *Acting Secretary.*

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 421(I)

STOP & SHOP COMPANIES, INC., BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND
BARBER STEAMSHIP LINES, INC.

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed June 22, 1977, Stop & Shop Companies, Inc., Bradlees Division (complainant) alleges that Barber Blue Sea Line (carrier) applied an incorrect rate on a shipment of "Artificial Christmas Trees", resulting in an overcharge of $459.54 in violation of section 18(b)(3), Shipping Act, 1916. That section prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The complainant also alleges that the carrier denied the claim in accordance with Tariff Rule 280[2] because the claim was not presented to the carrier within six months after the date of the shipment.

According to the complainant, the carrier, under bill of lading No. C16, dated August 14, 1975, transported a shipment of 419 cartons of cargo described as "Artificial Christmas Trees" measuring 76.591 cubic meters and weighing 6,770 kilograms from Keelung, Taiwan to Boston, Massachusetts. Rates and charges were billed as follows:

	Revenue Tons	*Rate*	*Amount*
Ocean Freight	76.591 M3	$53.00	$4,059.32
Bunker Surcharge	76.591 M3	2.70	206.80
Container Yard Delivery Charge (CYCD)	76.591 M3	.75	57.44
Total			$4,323.56

The complainant contends that the applicable rate for "Artificial Christmas Trees" is published in New York Freight Bureau Taiwan Tariff

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.
[2] New York Freight Bureau Taiwan Tariff No. 8, FMC No. 11.

No. 8, FMC No. 11, Item 0970. Based on tariff Item 0970 rates and charges should have been billed as follows:

	Revenue Tons	*Rate*	*Amount*
Ocean Freight	76.591 M3	$47.00	$3,599.78
Bunker Surcharge	76.591 M3	2.70	206.80
Container Yard Delivery Charge (CYCD)	76.591 M3	.75	57.44
Total			$3,864.02

Based upon the foregoing, the complainant seeks reparation in the amount of $459.54 ($4,323.56 less $3,864.02).

In support of its allegations the complainant submitted a copy of its Claim No. 450303; the carrier's letter of denial thereof; the prepaid bill of lading No. C16; the shipper's invoice; and the packing/weight/measurement list.

The carrier in its response to the served complaint, does not dispute the complainant's contention that the rate was incorrectly applied; however, it states that the claim was denied in accordance with Rule 59 of the Japan/Korea, Atlantic & Gulf Freight Conference Tariff.

A review of the supporting documentation and Commission tariff files discloses that on August 14, 1975, the carrier was a participating party in the New York Freight Bureau Taiwan Tariff No. 8, FMC–11,[3] and that the effective rate for the involved commodities was, in fact, $47.00 on that date, i.e. the date of the shipment.

The complaint was filed with this Commission within the statutory time limit specified by statute and it has been well-established by the Commission that a carrier's so-called "six-month" rule may not act to bar recovery of an otherwise legitimate overcharge claim in such instance.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under the applicable tariff. Accordingly, the complainant hereby is awarded reparation in the amount of $459.54.

(S) WALDO R. PUTNAM,
Settlement Officer.

[3] The carrier resigned from this tariff effective August 20, 1975.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–72

AGREEMENT NO. 10056—POOLING, SAILING AND EQUAL ACCESS TO CARGO IN THE ARGENTINA/U.S. PACIFIC COAST TRADE

An equal access to controlled cargo, coordination of sailings and net revenue pooling agreement among carriers already concertedly fixing rates, which excludes competitors from a significant share of a trade, is a *per se* violation of Sherman Act section 1 and must be justified by the parties thereto.

Agreement No. 10056 found not sufficiently justified and accordingly disapproved.

J. Alton Boyer and *William H. Fort,* for Prudential Lines, Inc.

Seymour H. Kligler and *David A. Brauner,* for Empresa Lineas Maritimas Argentinas, S.A.

Thomas E. Kimball and *Robert B. Yoshitomi* for Westfal-Larsen & Co., A/S.

Donald J. Brunner and *C. Douglass Miller,* Hearing Counsel.

REPORT AND ORDER

October 21, 1977

BY THE COMMISSION: (Clarence Morse, *Vice Chairman;* Karl E. Bakke, Bob Casey and James V. Day, *Commissioners.* Richard J. Dashbach, *Chairman,* not participating)

This proceeding was instituted to determine whether Agreement No. 10056 (Agreement) between Empresa Lineas Maritimas Argintinas, S.A. (ELMA), the national flag line of Argentina, and Prudential Lines, Inc. (PLI), a United States flag carrier, should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916. The Agreement provides for equal access to government controlled cargoes, the pooling of certain net freight revenues, and the coordination of sailings in the Argentina/U.S. Pacific Coast trade. It was formulated in response to various Argentine cargo preference laws which directly (imports) and indirectly (exports) reserve a significant portion (40%–80%) of that nation's trade to Argentine flag carriers and to carriers participating in revenue pooling arrangements with Argentine flag carriers. Westfal-Larsen & Co. A/S (WL), a third flag carrier in the trade, participated in the instant proceeding as a protestant seeking disapproval of the Agreement.[1] ELMA, PLI and WL are members of the U.S. Pacific Coast/River Plate, Brazil Conference.

Administrative Law Judge Norman D. Kline (Presiding Officer) issued an Initial Decision conditionally approving the Agreement[2] on the grounds that such arrangements were a customary means of alleviating the discriminatory effects of Latin American cargo preference laws and that their anticompetitive features were overcome by their potential for avoiding conflict between governments. Heavy reliance was placed upon the Commission's decisions approving *Agreement No. 9939 (Peru Equal Access and Pooling Arrangement),* 16 F.M.C. 293 (1973), and *Agreement Nos. 9847/9848 (Brazil Equal Access and Pooling Arrangement),* 14 F.M.C. 149 (1970).[3]

Exceptions to the Initial Decision were filed by the Commission's Bureau of Hearing Counsel, WL and PLI, variously alleging that: (1) the Presiding Officer effectively and improperly shifted the burden of proof from the Proponents of the Agreement to the Protestant (WL and Hearing Counsel); (2) the Agreement's anticompetitive features have not been sufficiently justified to warrant approval (WL and Hearing Counsel); (3) the conditions imposed by the Presiding Officer are ineffective and meaningless (WL and Hearing Counsel); (4) proper analysis of the evidence warrants a finding that WL is substantially likely to be precluded from the trade (WL); (5) the record does not support a finding that the Commission's 1973 approval of Agreement No. 9939 was a "major factor" in the subsequent decline of WL's "A" (counterclockwise) service to Peru (PLI); and (6) the record requires a finding that Agreement No. 10056 will benefit the shipping public and not eliminate competitive incentives between PLI and ELMA (PLI). Replies to exceptions were submitted by WL, Hearing Counsel, PLI and ELMA. All parties participated in Oral Argument.

Following Oral Argument, the Commission issued a "Notice of Intent to Withhold Decision" wherein it stated that action would be postponed for up to 120 days while ELMA and PLI attempted to negotiate a modified agreement which would include WL in both the sailing/equal access and the pooling arrangements. Upon PLI's unopposed request, this negotiation period was extended an additional 120 days. Negotiations proved unfruitful, however, when, as reported to us by PLI, ELMA and PLI wished to include previously exempt cargoes (*i.e.*, woodpulp and newsprint) in the cargo pool and increase "overcarriage refunds" from 50 to 60 percent of the freight paid, and WL did not. On December 28, 1976,

[1] Further details concerning the parties, their operations, the applicable Argentine statutes and decrees, and trade conditions through 1973, are set forth in the Initial Decision, at 3–34; 47–50; and 57–59. We adopt these Findings of Fact as our own (see Appendix).

[2] The Presiding Officer's proposed conditions were: (1) a requirement that Argentine cargo preference law waivers be granted to Non-Agreement vessels if an Agreement vessel is not in position within 7 days; (2) a requirement that the parties strictly adhere to the provisions of Argentine Resolution 456 calling for negotiations between all carriers in the trade for the purpose of agreeing upon a division of cargoes which would assure the continuation of third flag carriage on an equitable basis.

[3] Hereinafter cited as the *"Peru case"* and the *"Brazil case"*, respectively.

PLI advised the Commission that Resolution No. 456 of the Argentine Undersecretariat of Maritime Interests had been revoked, thereby terminating Argentine approval of the Agreement.[4]

DISCUSSION

Among other things, the agreement calls for a pooling of net revenues by carriers belonging to the same rate fixing combination which would reduce the Proponents' economic incentive to develop individual markets while simultaneously foreclosing competitors from a substantial share of the U.S. Pacific Coast/Argentina trade.[5] Such an arrangement must be considered a *per se* violation of section 1 of the Sherman Antitrust Act (15 U.S.C. 1)[6] and is *prima facie* subject to disapproval under the public interest standard of Shipping Act section 15 (46 U.S.C. 814). *Mediterranean Pools Investigation,* 9 F.M.C. 264, 290–291 (1966); *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968). Approval is only possible if its anticompetitive features have been sufficiently justified. A sufficient justification is a showing that the arrangement is *necessary* to meet a serious transportation need, to secure important public benefits, or to further a valid regulatory purpose of the Shipping Act, or the agreement is otherwise found to be in the public interest. The burden of making the required showing falls squarely on the parties to the Agreement. *Canadian-American Working Arrangement,* 16 SRR 733, 736–737 (1976). The pivotal question raised by the exceptions is whether Proponents have met that burden. We hold that they have not.[7]

The Commission shares the Presiding Officer's conclusion that the state of the record does not permit a reasonably accurate forecast of competitive conditions in the U.S. Pacific Coast/Argentina trade.[8] It has not been

[4] The date of revocation and the exact language employed by the Argentine Undersecretariat were not furnished.

[5] Articles 5 and 12 of the Agreement contemplate PLI and ELMA providing sufficient vessel sailings and cargo capacity to "satisfy the needs of the trade" and thereby assure that other carriers will have difficulty obtaining more than a negligible share of Argentine controlled cargo subject to the pooling provision. Proponents have not demonstrated what legal or practical consequences flow from the fact that the cargoes covered by the Argentine preference laws and the major provisions of the proposed Agreement are not necessarily the same. Whatever the exact description and extent of the cargo block involved, however, the purpose of Agreement No. 10056 is to divide this market equally between ELMA and PLI.

[6] See *Citizen Publishing Company v. United States,* 394 U.S. 131, 135–136 (1969) and *United States v. Topco Associates,* 405 U.S. 596, 608–609 (1972), and cases cited therein.

[7] PLI contends that equal access agreements should be viewed as concerted efforts to influence public officials, protected by the First Amendment from the application of the antitrust laws. *Eastern R.R. Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). The instant pooling agreement involves far more than the filing of waiver requests at the U.S. Maritime Administration and is clearly concerned with business conduct not covered by the *Noerr/Pennington* doctrine. Moreover, the constitutional freedom "to petition the Government" does not extend to the petitioning of foreign governments, at least as far as the Sherman Act is concerned. *Cf. Occidental Petroleum Corp. v Buttes Gas & Oil Co.,* 331 F. Supp. 92, 107–108 (C.D. Calif. 1971), aff'd *per curiam,* 461 F.2d 126 (9th Cir. 1972), *cert. den.,* 409 U.S. 950 (1972). PLI's further argument that the Agreement's division of preferred cargo and revenue pooling provisions are exempt from the Sherman Act because they are authorized by the Argentine Government is equally misplaced. See *United States v. Sisal Sales Corp.,* 274 U.S. 268, 276 (1927); *Continental Ore Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 690, 707 (1962).

[8] Hearing Counsel expressed concern that the Presiding Officer unduly emphasized the availability of wayport revenues to WL. A fair reading of the initial decision does not indicate that complete abandonment of U.S./Argentina service would be necessary before WL could prevail. Wayport conditions have a definite bearing upon the overall competitive strength of a carrier's operations in a specific trade. If, however, an agreement causes a nonparty carrier to stop serving the ports of one country, the elimination of that one country is a cause for concern in its own right,

established that the instant Agreement is likely to cripple WL's ability to participate meaningfully in the trade or that it is needed to better serve the shipping public. What is clear is that ELMA's 1972 entry into the trade intensified competition for many if not most cargoes. ELMA attracted appreciable tonnage from other carriers during 1972 and 1973 and was assisted to some unquantifiable extent in this accomplishment by the Argentine cargo preference laws. Nonetheless, PLI and WL successfully competed with ELMA—and with each other—during those two years and apparently continue to do so.[9] There is nothing to indicate that the present level of competition is causing service disruptions, carrier malpractices, or is otherwise detrimental to the public interest.

The Presiding Officer held that Proponents met their burden of proof because he found an important public benefit in the Agreement's potential for creating "intergovernmental harmony." Once it was determined that the Agreement was formulated in response to the Argentine cargo routing laws, the Presiding Officer automatically assumed that the Agreement represented an improvement over an unduly discriminatory and otherwise unalterable "reality." No true balancing of interests was conducted. Such an approach is, perhaps, a natural result of the Commission's decision in the *Peru case, supra*. We believe, however, it is inadvisable to adhere to the expansive rationale presented in *Peru*. Anticompetitive equal access agreements must be justified upon their individual merits and not merely because they have been "customary responses" to the problem of national flag discrimination which tend to obviate Commission consideration of more direct corrective measures pursuant to section 19 of the Merchant Marine Act, 1920, 46 U.S.C. 876.

Any "remedial effects" of Agreement No. 10056 are remote and speculative at best. The record does not reveal the existence or substantially probable existence of specific unfavorable conditions requiring remedy. Despite the potentially all-encompassing scope of the Argentine laws, as a practical matter they do not appear likely to harm shippers or to prevent either U.S. or third-flag carriers from retaining a viable portion of the traffic. The Commission sincerely hopes that intergovernmental conflict over Argentina's discriminatory shipping statutes and decrees does not occur, but the possible avoidance of conflict cannot alone provide a basis for compromising the United States' policy of free and open competition in its foreign trades. If an agreement is to be justified on the basis of "intergovernmental harmony", the Proponents must first establish a clear likelihood that a specific type of official confrontation would be avoided and particularize the negative effects this confrontation would have upon ocean shipping in the United States trade

regardless of whether the carrier otherwise adheres to its prior schedule along an established multi-country trade route. In the instant case, the continuation of WL's "C" (clockwise) service would be irrelevant if WL were forced to omit Argentine ports of call from that service.

[9] Despite the fact that their respective market shares declined since ELMA appeared as a regularly scheduled competitor, neither PLI nor WL even attempted to prove that it is now faced with unprofitable operating conditions.

route in question. It is insufficient that the Commission may at some future date be required to take direct action against discriminatory conditions pursuant to section 19 of the Merchant Marine Act. A more immediate benefit is required to justify an obviously anticompetitive arrangement such as Agreement No. 10056.

Moreover, the methods Proponents have chosen to cope with the discrimination created by the Argentine laws are unnecessarily broad. Even if it were established that ELMA possessed (or was substantially certain to obtain) an unreasonably large market share by virtue of these preference laws and that section 19 action was an undesirable means of dealing with the problem, a multi-lateral agreement among all carriers participating in the trade would increase competition equally well without giving PLI an unfair advantage over WL.

Proponents have failed to justify their agreement to divide the U.S. Pacific Coast/Argentina market. Whether our 1973 approval of Agreement No. 9939 was a "major factor" in WL's abandonment of its "A" service is irrelevant under the circumstances.

THEREFORE, IT IS ORDERED, That Agreement No. 10056 is disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

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

APPENDIX

FINDINGS OF FACT

THE PARTIES TO THE PROCEEDING

PGL

1. PGL operates ships registered under the United States flag. It maintains various liner services under an operating-differential subsidy agreement with the United States under Title VI, Merchant Marine Act, 1936, including the service between the West Coast of the United States and Argentina subject of this proceeding. PGL is the only company operating U.S.-flag liner service in that trade. It has served the Latin American trades for nearly one hundred years, and has served the United States/Argentine trade since 1966. It has two separate Latin American services from the U. S. West Coast, the "M-class" service in this proceeding, and its "Jet" cargo service, serving only the West Coast of South America.

2. During 1971 and part of 1972 PGL operated older C–3 cargo vessels in the United States West Coast/Argentine trade. In 1972 PGL began replacing its C–3 vessels with modern "M-Class" combination cargo/passenger vessels. Commencing with sailings beginning in July 1972, all PGL vessels serving the trade have been M-class. The vessels are full cargo vessels below the main deck with passenger capacity in the deck house, main deck and above. Three holds are container holds serviced by shipboard gentry cranes, with the remaining three holds constructed to carry refrigerated cargo including deep freeze cargo, and vehicles and general cargo, serviced by under-deck bridge cranes. M vessels are 9,508 deadweight tons with a bale cubic capacity of 514,813 cubic feet and contain approximately 360,000 cubic feet of reefer space. When M service was initiated in 1972, refrigeration capacity was increased approximately tenfold, round trip transit time reduced by approximately 50 percent and container capacity increased to 175 per vessel. M vessels have a side loading capability and cargoes are unitized by PGL or by the shipper. The three M vessels presently serving in the trade have a speed of approximately 20 knots.

3. From the Pacific Coast, PGL serves Argentina in a clockwise fashion around South America via the Panama Canal. Voyages begin at Vancouver, British Columbia, and then proceed south calling at Tacoma, Washington, and San Francisco and Los Angeles, California. Vessels proceed directly to the Panama Canal and thence to Cartagena, Colombia; Curacao; La Guaira, Venezuela; Puerto Cabello, Venezuela; Rio de Janeiro, Brazil; Santos, Brazil; Paranagua, Brazil; and Buenos Aires, Argentina. Northbound voyages depart Buenos Aires and sail through the Strait of Magellan with calls at Valparaiso, Chile; Callao, Peru; and thence to Los Angeles, and San Francisco, California; Tacoma, Washington, and Vancouver, British Columbia. M vessels maintain a frequency of service of approximately once every 21 days. Since the vessels carry passengers, schedules are prepared up to a year in advance and are strictly followed. PGL plans to maintain as a minimum the 10 annual sailings called for by Agreement No. 10056 and anticipates between 15 and 17 sailings annually to Buenos Aires.

4. PGL has had considerable experience with refrigeration and containerization. Its vessels are constructed to carry containers and to accommodate refrigerated commodities, and it tends to concentrate its efforts toward securing those types of cargoes. It does not presently carry bulk liquids, including alkane and tung oil in this trade, because its vessels' deep tanks have been converted to carry fuel oil and because the cost of cleaning is excessive. PGL's M-class ships have carried woodpulp, newsprint and lumber only in relatively small quantities. Much of the woodpulp and lumber moving in the trade originates at outports in the Pacific Northwest which the M-class vessels do not serve because of their rigid scheduling requirements.

5. In addition to its clockwise Argentine service, PGL serves the West

Coast of South America from the United States Pacific Coast. This second and distinct service operates in a ''shuttle'' fashion, calling at ports on the United States West Coast, the West Coast of Central America, and thence to the West Coast of South America calling as far south as Chile and returning northbound. PGL has operated ''Jet'' class vessels in this service since December 1972, at which time two vessels were introduced to replace the older ships then in service. The ''Jets'' are larger, faster, and better equipped than their predecessors.

ELMA

6. At the time it entered the United States West Coast/Argentine trade, ELMA was an unincorporated agency of the Government of The Republic of Argentina. Effective April 6, 1973, ELMA became an Argentine corporation all of whose stock is owned by the Government. All of the ships operated in the U. S. West Coast/Argentine trade are owned by the Argentine Government and fly the Argentine flag. As a part of the Argentine Merchant Marine, ELMA acts as an instrument of national economic policy. ELMA initiated its service in this trade in April 1972. Transpacific Transportation Company is general agent for ELMA on the West Coast of the United States.

7. Initially, ELMA assigned three ships to the Pacific Service: RIO CALCHAQUI, RIO PARANA and RIO CORRIENTES. RIO CORRIENTES was an older vessel and found to be essentially unsuited to the trade. After two voyages she was dropped from the service and replaced by the RIO DE LA PLATA. A few months thereafter a fourth vessel, the RIO ABAUCAN, was added in order to provide regular monthly sailings. These four vessels are presently in service and are all relatively new, the oldest being the RIO DE LA PLATA constructed in 1970. They average approximately 10,000 deadweight tons capacity with approximately 450,000 cubic feet of dry cargo space, 60–80,000 cubic feet of reefer space, and deep tanks capable of handling between 600 and 800 tons of bulk liquid cargo. Service speed varies from 17 to 18 knots permitting a transit time from California ports to Buenos Aires of 30–35 days. In addition to its regular service ELMA has, on three occasions in 1973, chartered vessels to be used in the trade for the purpose of carrying full vessel loads of steel slabs.

8. Northbound, ELMA vessels proceed from Argentina through the Strait of Magellan and up the West Coast of South America, offering service paralleling that of PGL and WL. Southbound, it offers a counter-clockwise service from Canadian and United States Pacific ports, down the West Coast of South America, through the Strait of Magellan and terminating in Argentina. ELMA does not participate in the trade between Brazilian or Caribbean ports and the United States Pacific Coast. ELMA offers a sailing on the average every 25–30 days. Typically, its northbound vessels proceeding from Buenos Aires call in sequence at Valparaiso, Chile; Callao, Peru; one or two Peruvian outports; Guayaquil and Manta,

in Ecuador; Buenaventura, Colombia, and one or two Central American ports depending upon northbound cargo offerings. The ships then proceed to the United States to Los Angeles and San Francisco, California, and to the Columbia River calling at Portland, Oregon, occasionally at Vancouver, Washington, and/or Longview, Washington; then to either Seattle or Tacoma, Washington; Vancouver, British Columbia, and between one and three British Columbia outports. Vessels then proceed south to San Francisco and Los Angeles. Subject to inducement, the vessels then call at one or two Central American ports. Occasionally ships have called at Mexican ports to load southbound cargo for the West Coast of South America and Argentina. The first port of call in South America is normally Buenaventura, then to Guayaquil, Callao, Valparaiso, through the Strait of Magellan and north to Buenos Aires. ELMA had 8 sailings northbound from Buenos Aires in 1972 and 12 in 1973.

9. In addition to its Pacific Coast service, ELMA participates in the trade between the United States and Argentina by serving ports on the Gulf of Mexico and Atlantic Coast. In its entire service, which includes service to Europe and Japan, ELMA operates from 40 to 50 vessels. It has undertaken a shipbuilding program which, in the next 10 years, envisions the construction of approximately 50 to 60 vessels.

WL

10. WL is a Norwegian company with corporate offices in Bergen, Norway. It owns a total of 20 ships, operating bulk vessels and tankers and since 1926 has maintained a liner service in the United States West Coast/Latin American trade with vessels registered in Norway and crewed principally by Norwegians. General Steamship Company, Ltd., serves as general agent for WL on the United States Pacific Coast.

11. When these proceedings were initiated, the WL service pattern was as follows: WL covered the full range of Canadian and United States Pacific Coast ports in British Columbia, Alaska, Washington, Oregon, and California, calling regularly at Vancouver, B.C.; Seattle; Columbai River ports (such as Vancouver, Washington, and Portland); San Francisco; and Los Angeles; as well as the following outports on inducement; Ketchikan, Alaska; Bellingham, Tacoma, Everett, Hoquiam (Gray's Harbor), and Longview, Washington; Astoria and Coos Bay, Oregon; and Eureka, Richmond, Oakland, Long Beach, and Wilmington, California. These vessels proceeded from Canadian and U. S. Pacific Coast ports via Pacific Coast Mexican and Central American ports and then southbound along the Pacific Coast of South America, calling at ports in Colombia, Ecuador, Peru and Chile, then via the Strait of Magellan to the River Plate (Buenos Aires, Argentina, and Montevideo, Uruguay), then northbound via ports in Brazil (Rio de Janeiro, Santos, etc.), Trinidad, Colombia (Barranquilla and Cartagena), Panama Canal, Colombia (Buenaventura), returning to the Pacific Coast of the U. S. and Canada, with occasional calls at Pacific Coast Central American ports homebound. The

intervals between sailings on this voyage pattern were approximately 18 days.

In 1973, WL decided to inaugurate a new "C" (clockwise) service, proceeding from the Canadian and U. S. Pacific Coast ports listed above, via Mexico and the Pacific Coast of Central America, then through the Panama Canal to Colombian ports in the Caribbean, then southbound along the East Coast of South America via ports in Venezuela, Brazil, and the River Plate, returning northbound via the Strait of Magellan and ports in Chile, Peru, Ecuador, and the Pacific Coast of Colombia, with possible calls at Pacific Coast Central American ports before returning to the U. S. Pacific Coast. It was projected that each service would then have approximately one sailing per month.

For a number of reasons discussed below, at the end of 1973, WL discontinued its original anticlockwise, or "A" service which WL had maintained since 1926. Westfal Larsen now operates only the clockwise or "C" service, regarding the economic prospects there as more encouraging than in the "A" service. Nevertheless, WL has not abandoned completely the idea of providing an "A" service. WL is a member of the appropriate conference, has the necessary agents, and could resume the service if such resumption were economically justified.

For the years shown below, based upon round voyages as terminating in Vancouver, British Columbia, the voyage terminations in the trade are as follows:

Year	*Voyages*
1969	19
1970	18
1971	18
1972	18
1973	10—"A" service 4—"C" service

Assuming a 120-day round trip, WL plans approximately 12 voyages in 1974.

12. WL has followed a program of frequent replacement and modernization of its vessels employed in the trade. Modernization includes elimination of all 'tweendeck hatchcoamings and leveling and reinforcing of all 'tweendeck surfaces to permit the use of forklift trucks and other mechanized equipment; installation of mechanically operated steel hatchcovers, and in some cases installation of sideports. These improvements permit more efficient and economical handling of cargo and help prevent damage to cargo and subsequent inconvenience to shippers.

Further, WL has added vessels to the trade so long as it could be demonstrated that the tonnage would be utilized and the vessels would be filled on a competitive basis.

At the time this proceeding was initiated, WL operated six vessels in the trade. All had been modernized since 1966. The vessels sailing in the new "C" service were principally the M/S RAVNANGER, M/S FAUS-

KANGER and M/S HOSANGER, with the remaining vessels, M/S VILLANGER, M/S HOYANGER and M/S SIRANGER, operating in the original "A" service.

At the time of the hearing, i.e., March 1974, two of the older vessels in the service, M/S HOYANGER AND M/S VILLANGER, had been withdrawn. WL is unable to commit itself as to replacement of vessels at the present time owing to its belief that its prospects in the trade are uncertain because of the pendency of the subject agreement and other agreements such as that involved in the Colombian trade now pending before the Commission in Docket No. 74-5. The four vessels presently serving the trade have a speed of approximately 15 knots, an average deadweight capacity of 12,259 tons and an average bale cubic capacity of 620,601 cubic feet. They can carry a limited number of containers and have no reefer space. By and large, the vessels operated in the trade by PGL and ELMA are newer and faster.

13. For over ten years WL has provided the shipping public with sailing frequencies of approximately 18 days. This enabled suppliers to schedule their parcels in a way such as to keep a steady flow of material moving to customers in accordance with their requirements and their ability to handle cargoes in warehouses which are, generally speaking, rather limited in some Latin American areas. Since the "A" service was suspended, WL has not yet been able to establish a fixed frequency for its "C" service pattern although it hopes to establish a frequency of 28-30 days.

WL has been able to achieve dependability of service and scheduling by maintaining the same basic voyage pattern and itineraries over the years and by careful maintenance and periodic drydocking of its vessels. Also, during its entire history of service to this trade, WL vessels have never lost time or been delayed due to strikes or labor stoppages by shipboard personnel. This freedom from the effects, and even the threats, of offshore labor disputes has contributed to the stability and dependability of Westfal-Larsen schedule and services. WL has been especially helpful and cooperative as regards exporters of forest products located in the Pacific Northwest who have had difficulty in obtaining space elsewhere.

14. WL carries a broad range of commodities between the United States and Argentina. Southbound, this includes so-called base cargoes such as lumber, woodpulp, and newsprint, in addition to all types of general cargo such as canned goods, machinery, chemicals, metals and seeds. Northbound, this includes general cargoes such as canned beef and other foodstuffs, tung oil, ore, and quebracho extract.

WL has historically shown an interest in carrying forest products consisting primarily of lumber, woodpulp, and newsprint. It has tried to adapt to the trade by improving its vessels and adapting to carry these commodities. WL rates woodpulp among its "desirable" cargoes, i.e., those cargoes "that give the best results" and has demonstrated its interest by calling regularly at outports and mill docks in the Pacific Northwest and Alaska to load forest products. Recently it has begun "to go for the larger parcels" of these cargoes. WL also carries relatively large quantities of alkane and tung oil, both bulk liquids and considers them to be desirable and "very desirable."

The Trade

15. The Agreement between PGL and ELMA covers the trade between ports on the United States West Coast and Buenos Aires. At the present time PGL, ELMA, and WL are the only carriers offering regular liner service in the trade, ELMA having entered the trade in April 1972. Orient Overseas Line and Mitsui-OSK Line had offered service in the past, however, by 1973 they had substantially withdrawn. The record is silent as to their plans for future participation. All carriers are members of the Pacific Coast River Plate Brazil Conference and also serve one or more ports in British Columbia from which the greatest portion of the total Pacific trade to Argentina is lifted.

16. With the exception of 1971, the northbound liner trade from Argentina to the U. S. West Coast has remained relatively level over the past four years with an annual cargo movement of between 16 and 18 thousand revenue tons. Southbound, the trade has declined steadily from a high of 55,532 revenue tons in 1970 to 27,393 revenue tons in 1973. The southbound movement from Canada to Argentina, which exceeds in volume the movement from U. S. West Coast ports, also suffered a sharp decline, dropping from 44,319 revenue tons in 1972 to 33,259 revenue tons in 1973. The following tables illustrate the situation:

	U.S. Pacific/Argentina		*Canada/Argentina*	
	Southbound	*Northbound*	*Southbound*	*Northbound*
1970	55,532	18,753	45,389	3,779
1971	41,869	13,314	46970	1,363
1972	37,631	16,671	44,319	2,583
1973	27,393	17,271	33,259	1,236

The current level of traffic is expected to continue, with the prospect that it will increase, particularly with respect to forest products.

17. The relative percentage of participation of the carriers, in terms of revenue tons for the four-year period has been as follows:

	U.S. Pacific/Argentina Southbound				*Canada/Argentina Southbound*			
	PGL	*WL*	*ELMA*	*Other*	*PGL*	*WL*	*ELMA*	*Other*
1970	50%	46%	—	4%	36%	61%	—	3%
1971	48%	50%	—	2%	17%	61%	—	22%
1972	23%	60%	13%	4%	4%	64%	25%	7%
1973	20%	38%	42%	under 1%	1%	12%	87%	—

	U.S. Pacific/Argentina Northbound				*Canada/Argentina Northbound*			
	PGL	*WL*	*ELMA*	*Other*	*PGL*	*WL*	*ELMA*	*Other*
1970	66%	34%	—	Under 1%	46%	54%	—	—
1971	60%	32%	—	8%	69%	23%	—	8%
1972	40%	25%	34%	1%	25%	38%	37%	—
1973	46%	18%	35%	1%	41%	7%	52%	—

18. Among the principal commodities shipped from the United States West Coast to Argentina are woodpulp, alkane (in bulk), aluminum ingots, lumber, seed, pencil slats, and infusorial earth, with woodpulp and alkane comprising well over half the total volume (in kilotons) moving. Northbound, the major commodities have been canned corned beef, quebracho, tung oil (in bulk), and apple juice concentrate with a substantial traffic in refrigerated cargoes including horsemeat, fish, cheese, and fruit concentrates.

By far the major commodity moving in the southbound trade between U. S. West Coast ports and Argentina, both in terms of tonnage and revenue, has been bulk woodpulp. WL has traditionally carried the major portion of this commodity and WL's retention of this commodity, even after the entry of ELMA into the trade, accounted in substantial part for its retention of a larger percentage of the trade than has PGL. PGL has followed a policy in which it tries to "steer clear of woodpulp, newsprint, and lumber for Argentina whenever we have other cargoes available paying better freight." The results of this policy can be seen in the data relating to carryings southbound of cargoes originating in Canada, where PGL's share fell from 36% in 1970 to 17% in 1971 because PGL decided to carry less newsprint, one of the major commodities moving from that area. PGL has called at outports to pick up cargoes of forest products but has required greater inducement in terms of cargo offerings than was required by WL.

WL does not have in the northbound trade the predominance in a single major commodity as is the case with woodpulp in the southbound trade, although WL has maintained substantial carryings in tung oil and canned beef which are among the major cargoes in this trade.

Argentine Cargo Preference Laws

19. The primary purpose of Agreement No. 10056 is to permit equal access for PGL to that cargo moving in the U. S. West Coast/Argentine trade which is restricted by Argentine law to Argentine-flag vessels. Cargo reservation or preference laws are utilized by virtually all South American maritime countries. Beginning in the 1950's and with increasing rapidity in the 1960's, cargo imported into Chile, Brazil, Colombia, Ecuador, Peru, Venezuela, Uruguay and Argentina has been restricted to the national flag vessels of the importing country as the result of action taken by these governments. In addition, various measures have been

adopted by these countries to stimulate exports on their national flag vessels and to foster and strengthen their respective merchant marines. Cargo has been restricted by South American countries to their national flag lines through one or more of the following actions: specific reservation of a percentage of the trade; discriminatory consular fees or other taxes; exchange controls; exoneration from import duties; reservation of government purchases or government-controlled cargoes; and direct routing. The action taken by the South American countries has been designed to foster their respective national flag lines not only because this was considered necessary to support a developing national economy but also as a matter of national pride and prestige.

20. With respect to Argentina, by a series of laws, decrees, and resolutions that Government has required that an increasing percentage of import and export cargoes be reserved for carriage by Argentine-flag vessels. As early as 1948 the Argentine Government had adopted certain discriminatory policies which effected a routing preference in favor of its national flag line. These earlier measures have since given way to a more recent and more comprehensive body of laws designed to route import and—to a lesser extent—export cargoes on Argentine-flag vessels. On June 10, 1969, the Argentine Government, citing "the necessity of securing for the vessels of its own flag a substantial share in the transport arising from" international commerce and recognizing the action taken by other countries including the United States, to promote their fleets, promulgated Law 18.250. Law 18.250, among other things, reserved to national flag vessels all imports destined to certain government entities and provided that non-governmental imports financed by State banking system were to move in Argentine bottoms. A system of fines was established to enforce compliance. The law provided that the reservation with respect to imports by government entities did not apply where treaties or private agreements were in force which reserved not less than 50% of the cargo to Argentine-flag vessels. Law 18.250 was amended by Law 19.877 on October 6, 1972. Together with its implementing decrees, the amended law constitutes the primary vehicle by which cargoes imported from the United States are routed on ELMA vessels.

21. Law 18.250 as amended by Law 19.877 provides that all goods imported "for account of, or with the intervention [of] or destined to" the national government, the provincial governments, the municipalities, or their respective departments, or government-owned or controlled entities must be transported on Argentine-flag vessels. Non-governmental imports financed by the State banking system are also so reserved. Law 19.877 made two significant modifications to Law 18.250. First, it enlarged the scope of controlled cargoes available to foreign lines which had agreements with Argentine lines by extending access to those cargoes required to be routed on Argentine-flag vessels where the importation was financed by the State banking system. Prior to that time equal access was granted to only those cargoes imported by government entities. Second, it

redefined the type of agreement which would permit foreign lines to share in the carriage of controlled cargoes. The amended law provides that agreements between lines must provide for participation by the Argentine line of "not smaller than fifty percent (50%) of the freights earned." Article 3 of Law 18.250 as amended by Law 19.877 provides that only those shipowners who are parties to approved agreements shall have a right to carry government-controlled cargoes. By these provisions it appears that only an agreement with pooling provisions would qualify to permit non-Argentine-flag lines to carry controlled cargo. The law also provides that "the necessary measures shall be adopted" to secure "the maximum participation" by Argentine-flag vessels in the carriage of exports by governmental entities; it is not known, however, what steps, if any, have been taken to implement this provision.

22. Decree 6.942 dated October 6, 1972, was issued pursuant to Law 18.250 as amended by Law 19.877. It establishes a procedure to be followed by government entities to effectuate routing on Argentine-flag vessels and provides certain implementing regulations for Law 18.250 as amended. Article 5 provides a system for permitting a waiver of the routing requirement where no national flag vessel has space available or is in position to carry the cargo. "There is no vessel in position when it causes to non-perishable goods a delay greater than seven (7) days and to perishable goods a delay greater than forty-eight (48) hours."

23. Resolution 518 of October 24, 1972, denominates the Argentine National Administration of Customs as the agency responsible for policing the import restrictions of Law 18.250, as amended. It further refines the procedure for the issuance of waivers. According to Resolution 518, the importer must secure and present to the Customs Administration a certificate of "Shipment of goods in vessels under Foreign Flag—Law No. 18.250" before the Customs Administration may release controlled cargo into the market which has been transported to Argentina on a foreign line. Certificates are granted by the National Direction of Shipping Activities (NDSA). In order to obtain a certificate, the importer must petition the NDSA 30 days before shipment is scheduled setting forth certain prescribed information relating to the nature of the goods, the date of shipment, etc. The NDSA advises the Argentine line of the petition and requests notification that no vessel is in position to lift the cargo. The Argentine line must certify the existence or nonexistence of a vessel in position within 48 hours of receipt of the request, or the NDSA grants the certificate of "Shipment of goods on vessels under Foreign Flag—Law No. 18.250" as a matter of course.

24. Law 18.250, as amended by Law 19.877, has had little or no discernible effect on exports from Argentina, as distinct from imports, however, the preferential routing of exports has been influenced by Law 19.184 and its implementing decree, Decree 3.255. Law 19.184, dated August 24, 1971, empowered the executive to establish a system of tax reimbursements for exported commodities to promote the sales abroad of

goods and services (the drawback). Pursuant to Law 19.184, Decree 3.255 dated August 24, 1971, establishes the amount of reimbursement and the commodities covered. The amount of reimbursement is computed as a percentage of the FOB vessel value if shipped on non-Argentine-flag vessels and as a percentage of the C & F value if shipped on Argentine-flag vessels. The law influences specific commodities, among which moving in the U. S. West Coast/Argentine trade are canned corned beef, frozen fish, cheese and apple juice concentrate.

25. On November 23, 1972, the Undersecretary of the Argentine Merchant Marine promulgated Resolution 626. Resolution 626 concerns the trade moving between the United States and Argentina and refers to Article 7 (non-controlled cargo) and Article 9 (exceptions) of Law 18.250, as amended. The resolution states the governmental policy with respect to the percentile division of imports and exports in the trade as between national flag and third flag lines, reserving 15% of non "official cargo" to the latter, and requires that agreements between lines which permit access to Argentine-controlled cargoes contain measures which provide equivalent freight values to the Argentine line. Consistent with Resolution 626, the Argentine Government, which gave its approval to Agreement No. 10056, provided in Resolution 456, that during the first year after approval, "the lines involved will make the necessary contacts to accomplish the participation of the remaining Conference lines which regularly serve the traffic, to be incorporated to the new Agreement . . . without affecting what is established in the preceding article" (which approved the subject agreement).

26. Finally, in Law 20.447 dated May 22, 1973, the Argentine Government declared that its merchant marine was an instrument of national economic policy, and asserted its right to carry 50 percent of all its foreign trade in its national flag vessels. The statute specifically provides for the promotion of bilateral and multilateral traffic agreements with other governments or between steamship lines and provides for additional support and regulation of the merchant marine. Decree No. 4.780 was issued pursuant to the law. The decree provides, among other things, that Argentine financial entities may finance freights for cargo carried on foreign vessels only where no service or space is available on an Argentine-flag vessel or where "agreements exist [providing] for the distribution of freights."

27. The Argentine cargo preference laws are not, for the most part, designed to route specific commodities. Generally, Argentine-flag preference arises because of the identity of the consignee or as a result of some form of government financial support given the exporter or consignee. Accordingly, it is impossible to determine with precision what proportion of the total cargo in the trade moves under such controls or how much cargo has been routed to ELMA because of such controls. Estimates have been made that 40 to 80 percent of cargoes imported into Argentina are presently controlled but, in theory, 100 percent could be subject to

the laws in question. Some commodities known or reported to have been affected by preferential routing of one kind or another are tinplate, crysylic acid, woodpulp, aluminum ingots, seed, apple juice concentrate, military vehicles.[1] It does not appear, however, that all of the cargo in any one of these categories has been controlled. In the Canadian/Argentine trade aluminum ingots, asbestos, and newsprint have been affected. According to a list furnished by ELMA, an additional variety of commodities such as machinery, seeds, some types of lumber, and logs have also been affected. Although lumber appears to have been generally free of routing controls, there is some indication that it too may become subject. Despite these controls, except for Canadian newsprint, it appears that these commodities have also moved via carriers other than ELMA and may have been free of controls at one time or another. There is no evidence that cargo presently designated as government-controlled will be substantially increased in the future but neither is there any way of determining whether it will be substantially decreased.

28. Although none of the carriers is able to determine with any precision what overall portion of the trade is subject to preferential routing under the laws, or how much cargo has been lost to ELMA because of the operation of the laws, it appears that it is substantial and that they have been damaged because cargo has been diverted to ELMA or has not been offered to them because it was required to move on ELMA.[2] When ELMA entered the trade ELMA anticipated that its "support in the traffic will be constituted by the so called 'cargo controlled by the Government,' which Law 18.250 reserves for the Argentine flag." ELMA's Pacific Coast agent indicated that considering the ideal of open competition it would be highly unusual for a new carrier to enter a trade and, within 18 months, succeed, as has ELMA, in capturing 40 to 50 percent of the cargo moving. PGL's Freight Traffic Manager testified that ELMA's rapid rise to prominence, considering PGL's and WL's reputations as established carriers, could only have been accomplished with the aid of the Argentine cargo preference laws. From ELMA's first year in the trade PGL's average tonnage per vessel in 1972 dropped down to about 300 tons a vessel, whereas, it had been about a thousand tons a vessel, the two previous years. PGL also dropped in participation from around 50% in the total trade to less than half that, partly due to the Argentine preference laws and probably partly due to a new carrier in the trade offering regular service. The effect on WL has been to appreciably curtail carryings in the northbound and

[1] Alkane, an important bulk liquid commodity moving southbound may become subject to preferential routin requirements in connection with the Argentine government's program of subsidizing imports of certain basic an scarce raw materials by means of special exchange rates, although up to the time of the hearing WL had been able t carry it without getting a waiver.

[2] Although both PGL and WL witnesses expressed the opinion that the Argentine cargo preference laws ha worked to reduce their respective carryings, the record provided few specific examples showing whether diversion t ELMA occurred as a result of the laws as distinct from the added entry of ELMA into the trade. Since the law operate on consignees in Argentina, as a practical matter, it is unlikely that the precise amount of cargo diverted t ELMA solely as a result of the laws could ever be quantified.

southbound trade. In 1973, for instance, WL's participation dropped to *38% whereas in 1972 WL had attained a level of 60% in the southbound* trade.

Background of Agreement No. 10056

29. PGL first became acquainted with the Argentine cargo preference laws and the effects which they could have on a U. S.-flag carrier prior to the inauguration of ELMA's West Coast service. Before entering the Pacific service, ELMA had been operating in the trades between the Gulf and Atlantic Coasts and Argentina, trades served respectively by the U. S.-flag carriers Delta Steamship Lines, Inc. (Delta), and Moore-McCormack Lines, Inc. (Moore-McCormack). Problems occasioned by the Argentine laws discussed, affected these carriers and ultimately led to the intervention of the United States Government in an effort to resolve the situation before it escalated into a "shipping war" between the two countries. Officials of PGL were made aware of the developments in these trades through their agent in Buenos Aires, a subsidiary of Moore-McCormack and through contacts with Moore-McCormack officials in New York. In addition, PGL received correspondence from Delta concerning Argentine discrimination and later was in periodic contact with officials of the Maritime Administration.

30. In early 1969, after initial negotiations and discussions on Argentine discrimination involving officials of the U. S. and Argentine Governments, Delta and Moore-McCormack negotiated southbound Rationalization of Sailings and Cargo Agreements with ELMA which provided that each line would have equal access to government-controlled cargoes. These agreements were signed on November 27, 1969, and approved by the Federal Maritime Commission on February 18, 1970. Despite the fact that these agreements were intended to resolve the cargo discrimination experienced by the U. S. lines, however, Delta did not thereafter carry what it considered to be its proportionate share of the cargo moving from the Gulf and Moore-McCormack likewise did not regard the equal access arrangement as satisfactory.

31. Although PGL had anticipated that ELMA would enter the U. S. West Coast trade, it was not until May 1971 that it learned officially that ELMA had decided to institute a Buenos Aires/U. S. West Coast service. At that time two ELMA officials visited PGL's San Francisco office and indicated that ELMA intended to commence service from Buenos Aires in July. At that time they proposed an equal access agreement between the lines. PGL had already felt the discriminatory effects of Law 19.184 and Decree 3.255 (the drawback) in the Argentine wayport trades and from this point on took a definite interest in what was taking place with respect to Moore-McCormack and Delta. In late 1971 PGL learned from its agent in Buenos Aires that ELMA had decided to postpone commencement of its West Coast service until the longshoreman's strike then affecting U. S. ports had been settled. PGL was also aware at this time

that further Delta and Moore-McCormack negotiations with ELMA had turned toward pooling and equal access agreements which were expected to settle the problems being experienced on the Gulf and Atlantic Coasts. PGL's Buenos Aires agent represented Moore-McCormack in these negotiations. Because of the problems experienced by Delta and Moore-McCormack, and because the full effect of the Argentine laws reserving cargo for Argentine vessels would become effective once ELMA entered the trade, PGL notified its agent in December 1971 to inform ELMA officials at their next meeting on the Moore-McCormack pooling agreement that PGL was interested in entering into an equal access agreement and that it wished to be included in the pooling discussions which were then taking place.

32. By the spring of 1972 negotiations between ELMA, Delta and Moore-McCormack concerning the pools had reached an impasse. Despite its request, PGL had not been made a part of these negotiations, and ELMA had recently inaugurated its West Coast service. In an effort to resolve the continuing cargo discrimination suffered by Delta and to lay the groundwork for broader pooling agreements, a series of meetings were held between representatives of the governments of the United States and Argentina. In May 1972 the General Counsel of the U. S. Department of Commerce and a representative of the Maritime Administration visited Buenos Aires and met with the Undersecretary of the Argentine Merchant Marine. Talks were held again in June involving the Maritime Administration and U. S. State Department, but no satisfactory solution was reached at that time. Thereafter, an aide memoire was prepared by the State Department and forwarded to the Argentine Government. In the aide memoire the State Department reviewed the history of Delta's problem and expressed the policy of the United States. In pertinent part the aide memoire stated:

> US SHIPPING LEGISLATION AND THE MARITIME POLICIES OF THE EXECUTIVE BRANCH ARE BASED ON THE PREMISE THAT REASONABLE COMPETITION AND NONDISCRIMINATION AMONG CARRIERS BEST SERVE THE DEVELOPMENT OF EFFICIENT SHIPPING SERVICES AND THE EXPANSION OF TRADE. WE SEEK TO HAVE A MERCHANT MARINE CAPABLE OF CARRYING A SUBSTANTIAL PART OF OUR FOREIGN TRADE ON A COMPETITIVE BASIS, AND WE RECOGNIZE THAT MANY OTHER NATIONS HAVE THE SAME ASPIRATION.
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> * * *
>
> SPECIFICALLY WITH RESPECT TO CARGO RESERVATIONS, THE UNITED STATES HAS FIRMLY SUPPORTED THE PRINCIPLE THAT THERE SHOULD BE EQUAL ACCESS TO GOVERNMENT-CONTROLLED CARGOES AS BETWEEN THE LINES OF THE TRADING PARTNERS. WE KNOW OF NO OTHER EQUITABLE RULE. . . .
>
> * * *
>
> REGARDING POOLING AGREEMENTS AMONG SHIPPING LINES, WE PREFER THOSE WHICH INTERFERE LEAST WITH COMPETITION AND THUS

PROTECT THE INTERESTS OF SHIPPERS AS WELL AS SHIPOWNERS. CONSISTENT WITH OUR LEGISLATION, THE FMC HAS APPROVED AGREEMENTS WHICH SIMPLY PROVIDE EQUAL ACCESS BY EACH SIDE TO GOVERNMENT-CONTROLLED CARGOES, AS IN THE DELTA/ELMA AGREEMENT, AND HAS ALSO APPROVED BROADER POOLING AGREEMENTS WHICH DIVIDE REVENUES EQUALLY BETWEEN THE CARRIERS OF THE TRADING PARTNERS WITH RESPECT TO THE TRAFFIC THEY CARRY, WITHOUT INVOLVING QUOTAS OR OTHERWISE RESTRICTING THE FREEDOM OF "THIRD FLAGS" TO COMPETE FOR NORMAL COMMERCIAL CARGOES.

* * *

IN THE US VIEW, CARGO RESERVATIONS SHOULD NOT BE SO EXTENSIVE THAT REASONABLE THIRD FLAG SERVICES CANNOT BE MAINTAINED ON AN ECONOMIC BASIS, AND THE AREA OPEN TO COMPETITION BY ALL FLAGS SHOULD BE AS WIDE AS POSSIBLE IN ORDER TO PROMOTE EFFICIENT SHIPPING SERVICES AT REASONABLE RATES FOR THE TRADING PARTNERS CONCERNED.

In conclusion, the Department urged the Argentine Government to accord equal access to Delta in order to resolve the immediate problem and "establish a basis for the negotiation of broader arrangements if desired by the parties involved." The intervention by the United States government was beneficial in bringing about meaningful negotiations between ELMA and Delta and Moore-McCormack.

33. In Chile, Ecuador, Colombia, Venezuela and Peru, PGL had seen its services adversely affected by the emergent nationalism of South American countries and the efforts of those countries to promote a national flag merchant marine as an instrument of government policy. The situation confronting PGL with respect to Argentina was therefore not novel. ELMA had entered the trade with the express intention of utilizing Argentine preference laws, and almost immediately thereafter PGL had experienced a loss in northbound cargoes as a direct result.

34. The alternatives open to PGL to prevent cargo discrimination were familiar. PGL could have done nothing while ELMA's service became established on the strength of its cargo preference laws and with the consequent erosion of PGL's cargo base. This was not acceptable to it. Another alternative, which was to negotiate an equal access type agreement with ELMA, was the most desirable from PGL's standpoint because it would avoid resort to government intervention and would not create animosity between the lines. PGL's efforts at reaching a solution on this basis, even with governmental assistance, had not met with success. Finally, PGL could have sought retaliatory or countervailing assistance directly from the United States Government, for example, action by the Federal Maritime Commission under section 19, Merchant Marine Act of 1920, and it could have requested that the Maritime Administration refuse to grant waivers for the carriage of Export-Import Bank cargoes on Argentine-flag vessels. Both alternatives were considered, and it was decided that the second approach—denial of "Eximbank" waivers—would be the appropriate course under the circumstan-

ces. PGL considered the use of section 19 to be the more drastic and least satisfactory approach. PGL considered section 19 to be both time consuming and burdensome. Moreover, whenever section 19 has been invoked in the past it has almost always resulted in a commercial agreement between the national flag lines involved.

35. PGL routinely receives communications from the Maritime Administration giving it an opportunity to express its views as to whether a waiver should be granted to a foreign line for the carriage of cargoes financed by the Export-Import Bank.[3] The Maritime Administration's judgment as to whether a waiver should be granted is based on the United States as a whole and, while there were no Eximbank cargoes moving in the U. S. West Coast/Argentine trade in the fall of 1972, the denial of waivers could be applied to shipments from the Gulf or Atlantic. In October 1972 PGL wrote the Maritime Administration and requested that no further waivers be granted.

36. In mid-December 1972, Mr. A. Theodore DeSmedt, then PGL's President, and Mr. Albert B. Wenzell, PGL's Vice-President and General Manager in charge of its Pacific services, traveled to Buenos Aires and met with ELMA representatives to discuss ELMA's continuing refusal to enter into an agreement which would grant PGL access to Argentine-controlled cargoes. ELMA remained reluctant to enter into a commercial agreement, and PGL suggested that unless some form of agreement could be reached between the lines, PGL would be obliged to seek assistance from the United States Government by opposing waivers for Eximbank cargoes or through the aid of the Federal Maritime Commission. ELMA agreed to review the situation and meet again in January. Thereafter, PGL contacted the Maritime Administration, explained their failure to reach an understanding in December, and again requested that Eximbank waivers be denied to Argentine-flag vessels until PGL and ELMA had entered into meaningful discussions. The Maritime Administration continued to grant waivers, however, because it was reluctant to upset pending Delta and Moore-McCormack negotiations while there was a reasonable prospect of finally settling that dispute without government retaliation. PGL received a copy of a letter from Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs, to the Argentine Undersecretary of the Merchant Marine indicating Mr. Blackwell's desire that all three U. S. lines be included in the agreement discussions then underway. It was the Maritime Administration's hope that this letter would start serious negotiations between ELMA and PGL.

[3] Under Public Resolution 17 of the 73rd Congress, the Congress expressed "the sense of Congress" that publi[c] agencies making loans to finance exports shall require that those exports be carried on United States-flag vessels. PR 17 is applicable to loans of the Export-Import Bank to foreign individuals or entities for the purpose of the acquisitio[n] and shipment of United States products. A waiver of the U.S.-flag requirement is permitted and may be granted b[y] the Maritime Administration to vessels of the recipient country. In granting waivers for PR–17 cargoes, the Maritim[e] Administration considers, among other things, whether U.S.-flag vessels are accorded parity of treatment in th[e] carrying of cargoes controlled by the government of the recipient country. When the Maritime Administration i[s] satisfied that parity is extended to U.S.-flag vessels, a 50 percent participation in the carriage of Eximbank cargoe[s] may be granted to foreign-flag vessels. P&F SRR p. 501:101).

37. In late January 1972 Mr. DeSmedt and Mr. Wenzell returned to Buenos Aires and reached an agreement in principle with ELMA officials respecting an equal access and pooling agreement. The Delta and Moore-McCormack agreements had been completed by then,[4] and a draft agreement was drawn following those examples. After additional negotiations in the spring of 1973 during which time ELMA asked that certain changes be made,[5] agreement was finally reached. Agreement No. 10056 was signed by the parties on May 21, 1973, and approved by the Argentine government pursuant to Resolution 456, dated July 4, 1973, apparently for one year[6] during which time, as noted above, the lines are supposed to make provision for the participation of the remaining Conference lines.

38. WL has made no effort to contact PGL or ELMA to discuss an agreement concerning operations or the distribution of traffic in the United States/Argentina but neither has PGL or ELMA contacted WL for such a purpose. The Norwegian Government has expressed its concern to the Argentine Government over discriminatory Argentine cargo preference laws and has communicated its concern over Agreement No. 10056 as well as other pending agreements in the South American trades to the Commission.[7]

Agreement No. 10056

39. Agreement No. 10056 is divided into two parts, one covering cargo moving northbound (Annex I) and the other cargo moving southbound (Annex II). The operative provisions are identical except for the commodities which are excluded from the pooling provisions and the amount of the pool deductible. The agreement is limited to cargoes moving between U. S. ports in the San Diego and Bellingham range on the one hand and Buenos Aires, Argentina, on the other hand. It does not include wayport cargoes or cargoes moving to or from Canadian ports.

40. Agreement No. 10056 provides an instrument for PGL to secure equal access to cargo restricted to Argentine-flag vessels by the Argentine Government which it would otherwise be denied. Articles 3(b) (Annex I and Annex II) are the key or necessary provisions for providing equal access to government-controlled cargoes. They provide, in pertinent part:

[4] They were signed on February 18, 1973, and approved by the Federal Maritime Commission on May 3, 1973 (Agreement Nos. 10038 and 10039). The Delta and Moore-McCormack agreements were based upon an existing pooling agreement between PGL and Lloyd Brasiliero covering the U. S. West Coast/Brazil trade (Agreement No. 9873).

[5] The changes brought the agreement more in line with the PGL/Lloyd Brasiliero agreement.

[6] The Resolution, as translated, states that the agreement "is hereby homologated until the first year of its validity."

[7] Official notice is taken of the fact that an aide memoire has been transmitted and is located in the official file for this Docket and that the matters contained therein express the position of the Norwegian Government. As PGL notes, however, the Norwegian Government appears to have manifested a willingness to sanction pooling agreements between its national-flag carriers and Latin American lines in Norwegian-Latin American trades. *Agreement Nos. 9847 and 9848—Revenue Pools, U. S./Brazil Trade*, 14 F.M.C. 149, 156–157 (1970).

b) In order for he parties to participate under equal competitive conditions in the carriage of pooled cargoes, parties will do everything possible through appropriate channels with their respective Governments to assure that the legal and/or administrative regulations and practices in force in the Argentine Republic and the United States of America, regarding the reservation, protection and promotion of cargoes to their respective merchant marines are extended equally to both parties.

41. Equal access applies only to government-controlled cargoes. It does not provide for quotas or guarantees of participation. The provision would permit PGL to freely compete with ELMA for all cargo controlled by the Argentine Government. With respect to ELMA, the provision requires that PGL do everything possible to obtain equal access for ELMA to United States government-controlled cargo. This includes not only those cargoes moving from the Pacific Coast—which account for well under 10% of the total U. S. Pacific Coast/Argentine trade but also those moving from the Atlantic or Gulf Coasts which are considerable greater.

42. In order for PGL to gain equal access to Argentine-controlled cargoes, it was necessary to enter into an agreement which contained a pooling provision because of the requirements imposed by Law 18.250 and Resolution 626.

Articles 7 (Annex I and Annex II) provide for the pooling of revenues from certain specified cargoes carried by the lines. Article 3(a) excludes from the pooling provisions revenues from the carriage of the following commodities: Northbound (Annex I), liquid and dry bulk (except vegetable oils, wines, or derivatives thereof), open rated cargo, iron and steel pipe and tube, transshipment cargo and certain other miscellaneous cargoes; and southbound (Annex II), liquid and dry bulk, woodpulp, newsprint, open rated cargo, transshipment cargo and certain other miscellaneous cargoes.[8]

43. Under the pool calculation provisions (Article 7), a party's total revenue from pooled cargoes is first subject to the calculation of a carrying rate which is 50 percent of the average revenue per revenue ton and which is retained by the pool partners. It represents cargo handling charges and a part of vessel expenses. The remaining revenue is shared equally between the lines subject to a deductible of $15,000 northbound and $30,000 southbound credited to the overcarrier. PGL anticipates that there will be minimum payments from time to time or that cargoes, as between the lines, will average out so that there will not be payments over the long run.[9]

44. Article 12(b) provides that the parties will "coordinate to the best of their abilities, their sailings with spacing at regular intervals, as cargo needs may dictate." Because M ships are combination cargo/passenger vessels, PGL plans and publishes its sailing schedules one year in

[8] The "handling charge" levied on the U. S. West Coast which is applied to the movement of cargo to or from the place of rest on the dock and the ship's hook is excluded from revenue. Surcharges, taxes levied against cargo, port differentials and wharfage fees are also excluded.

[9] Had the Agreement been in effect during 1973, it was calculated that PGL would have been required to make a payment of $30,000 to ELMA in the northbound trade. This compares with total revenues of $671,515. In the southbound trade, no payment would have been necessary.

advance. It does not intend any change in its sailings as a result of Agreement No. 10056.

45. Under Article 5, each party is required to maintain a minimum of 10 sailings per year and in the event one party fails to meet his minimum, an adjustment mechanism is provided reducing that party's share of the revenue pool. The agreement does not limit the number of sailings of either party. Article 5(e) provides that each party "will provide sufficient cargo capacity to satisfy the needs of the trade." This provision does not require any specific allocation of space, but rather is an expression on the part of the lines that they will provide sufficient space to insure that there is no "cargo going begging."

46. Article 9 provides that the length of the pool accounting period shall be 12 months, including all sailings from January 1 through December 31, that the parties shall exchange bills of lading and manifests, and that certain other measures shall be employed for accounting purposes. The remaining provisions are standard and relate to cancellation, rates, claims for lost or damaged cargo, force majeure, arbitration of disputes, successors, notification, consultation, extension, and initiation.

47. As noted previously, both PGL and ELMA are members of the Pacific Coast River Plate Brazil Conference, and Articles 4(a) of Annex I and Annex II provide that cargoes shall be handled in accordance with rates, rules, and regulations prescribed by filed freight tariffs. The agreement does not call for cooperation in the setting of rates nor does PGL intend to collaborate with ELMA outside the conference structure in setting rates.

48. As the Commission's Order mentions, there are two typographical errors appearing in the original copy of the agreement filed with the Commission. First, Article 6(c) of Annex I should be amended to strike the period at the end of that sentence, and to insert the following language: "to the total number of actual sailings made by all parties. Second, the third definition of revenue tons appearing in Article 7(b)(1) of Annex II should be corrected by striking the work "long" and replacing it with "short". The corrected definition then properly reads: "two thousand (2,000) pounds on pooled cargo ratable per short ton." These corrections bring the English text into harmony with the Spanish.

49. PGL does not contemplate engaging in any joint solicitation of cargo with ELMA, joint use of offices, joint employment of agents or joint furnishing of services to shippers; nor does PGL at this time plan to act as an agent or broker, formally or informally, for ELMA. There is no provision in the Agreement restricting the solicitation of cargo. Articles 1(b) (Annex I and II) specifically provide that each line will actively and aggressively compete for available cargo traffic and promote and develop to the best of their abilities the commerce between the Argentine ports and ports in the United States. Each party is to maintain its sole discretion in the manning, navigation and operation of its vessels.

50. Article 17 provides that the agreement shall remain in force and

effect for a period of three years following approval by the respective government authorities but may be extended by mutual consent of the parties and approval of the respective authorities.

51. WL presented as its chief witness, Mr. Per Schumann-Olsen, director and chief executive officer of the line, who came to the hearing in San Francisco from Bergen, Norway, and in addition provided the record with financial data relating to WL's overall operations in the Latin American trades. Analysis of the testimony and data, however, do not permit a clear prediction as to the future of WL in these trades.

52. The primary bases for WL's contentions that approval of Agreement No. 10056 would most likely cause it to depart from all Latin American trades is Mr. Schumann-Olsen's testimony, plus certain financial data pertaining to WL's operations in 1973, and WL's experience in the Peruvian trade. In his prepared testimony (Exhibit 51) Mr. Schumann-Olsen concluded:

> * * * the most likely result of approval of Agreement No. 10056 is that Westfal-Larsen Line would be unable to continue any part of its Latin American service. In other words, Westfal-Larsen Line would cease to exist.

Elsewhere he elaborated on the considerations which enter into his thinking, stating:

> Westfal-Larsen Line is anxious to remain in the trades to and from Argentina as well as the rest of Latin America. Otherwise we would not bother to fight for our existence as we are doing in this case. We thrive on competition and we are willing to continue to compete fairly and effectively with Prudential-Grace Lines and ELMA, despite the present unilateral restrictions and discriminations imposed by the Government of Argentina. The same is true for other trades where Latin American governments favor their own fleets, but *only* their own fleets. We have been faced with such flag discrimination in the past and have had the flexibility and opportunity to adapt and survive. But when both national-flag lines join in agreements which result in our losing most or all of our carryings in the trade, there is no inducement for us to rationalize or adapt. We cannot do that when we do not know which country will be closed next by agreements which the Federal Maritime Commission approves.
>
> In making our judgments about the future of Westfal-Larsen Line, we must weigh considerations such as these: What is United States shipping policy with respect to freedom of competition among vessels of all flags and freedom of shippers to choose among them? Are we, or any third-flag lines, wanted in these trades? Are we needed? We have witnesses who say we are. But approval of Agreement No. 10056 would indicate to us that the Federal Maritime Commission does not agree.

53. Mr. Schumann-Olsen gave the appearance of sincerity and genuine concern over the prospects of his line's operations in the Latin American trades. Additionally he authorized the production of financial information relating to WL's service's despite their confidential or semi-confidential nature in order to show the basis for his concern. As chief executive officer, of course, he is in a policy-making position and presumably either he or his co-directors have the authority to "call it quits" in the Latin American trades after consideration of all factors. However, as the Commission has indicated in the Peruvian case, it is objective evidence concerning WL's overall Latin American operations, including wayport

operations, which is required in order to make a reasonably accurate forecast. Peruvian case, cited above, slip opinion, p. 18. It is furthermore reasonable to expect that objective evidence will also be considered by Mr. Schumann-Olsen and his co-directors, i.e., that WL's management would carefully consider the financial prospects of the line regarding its entire Latin American operations before making any final decision to withdraw.

54. WL introduced into the record a series of financial exhibits (Exhibits 52–58; 60) containing information of a confidential nature. These exhibits contained WL's 1972 and first half 1973 operating results (Exhibit 52) and further analyzed cargo carryings and revenues derived over a period of time extending from 1970 through 1973 in WL's Latin American services. Two exhibits (53, 54) illustrate that because of the existence of many fixed costs, a relatively small reduction in gross revenues will cause a disproportionately large reduction in net results. Of course, as PGL and ELMA point out, the converse would be true in principle, i.e., a relatively small gain in revenues would lead to a disproportionate increase in net results. Nevertheless the exhibits do illustrate a peculiar sensitivity to revenue decline. Furthermore, Exhibit 52 shows that WL's net results for the first half of 1973 underwent a severe decline when compared to results from the preceding full year 1972. The exhibits also indicate a considerable volume of business derived from wayport traffic and from Latin American trade areas other than Argentina. In 1972, out of six southbound Latin American trade areas, revenues derived from the U. S. Pacific to Argentina trade area were the smallest of all areas except for Canada/U.S. to East Coast Latin America. Northbound a similar ranking existed except that the smallest trade area was shown to be Argentina to Canadian Pacific ports. For first half 1973 U. S. Pacific to Argentina revenues were far exceeded by revenues derived from Canada/U. S. Pacific to other Latin American countries and even by wayport traffic between Latin American countries.

55. Aside from the fact that some of the exhibits product results inconsistent with others owing to different bases of computation,[10] they suffer from a fundamental shortcoming which renders them unreliable for purposes of forecasting WL's prospects in the Latin American trades. Basically, the problem is that the exhibits were based upon operating experiences and facts which no longer exist. In 1972 WL had operated its so-called "A" service, serving the West Coast of South America southbound. In 1973, however, WL experimented with a new "C" service, i.e., serving the East Coast of South America southbound, and by the end of the year had abandoned the "A" service altogether. Furthermore, the year 1972 was admittedly a "very, very bad year" for WL. Other factors which have changed include the fact that WL operates

[10] For example, total freight revenues shown in Exhibit 52 for 1972 are more than $600,000 greater than those shown on Exhibit 55 for the same period of time apparently because of a different basis for including voyages.

the "C" service with four of its larger vessels whereas the "A" service had employed six vessels in 1972, including two older and more costly ships. These four ships, according to Mr. Schumann-Olsen, are better suited to the cargo moving in the "C" service than to that moving in the "A" service. Apparently, however, WL has hopes for the "C" service which serves a market showing the greatest traffic growth potential, i.e., Brazil, and at the time of the hearing (March 1974), according to WL's agent Skellenger, cargo offerings in the new service appeared to be more favorable than those in the old "A" service. Finally, as Mr. Schumann-Olsen acknowledged, the critical financial exhibits (52, 53, and 54), based as they were upon a previous pattern of operations, could not be used as the basis for determining the profitability of WL's new "C" service.

WL's Cargo Prospects

56. Both PGL and ELMA dispute WL's contention that approval of Agreement No. 10056 will cause such a serious loss of necessary cargoes as to jeopardize its continued existence in the trade. They point out that WL's revenues from the area covered by the agreement, i.e., U. S. Pacific Coast/Argentina northbound and southbound, represent a small proportion of WL's total business because of the greater volume of wayport and non-Argentine cargoes which are carried by WL. These facts have been discussed above. ELMA cites data showing that the Canadian portion of the Canada/U. S. Pacific southbound Argentine trade, not covered by Agreement No. 10056, produced greater revenues than the U. S. Pacific Coast portion for 1971 and 1972 (58.4 and 58.2 percent respectively) although this figure declined to 25.4 percent in the first half of 1973 and northbound Canadian revenues were well in the minority. They further point out that among WL's ten leading commodities are such items as woodpulp, alkane, and paper products, which are excluded from the pooling provisions of the agreement and presumably will be available to WL regardless of approval of Agreement No. 10056.[11] Of greater significance, however, is the question whether these commodities are subject to the Argentine routing laws and consequently the "equal access" rather than the pooling provisions of the agreement. If that is the case, WL could only carry the items after ELMA and PGL had first crack, after which waivers would have to be obtained in WL's behalf.

57. PGL, after analyzing WL's 1973 carryings from U.S. Pacific and Canadian ports, concludes that WL would stand to lose a maximum of only 1,590 revenue tons if Agreement No. 10056 were approved, a minimal amount of business compared to total revenue tons moving. This exercise is based upon a number of assumptions and even its final conclusion assumes that the loss of 1,590 revenue tons would not be

[11] In 1973, WL carried 55.9% of the woodpulp, 71.6% of the bulk alkane, and 73.3% of the lumber. The last item, while not excluded from the pool, moves out of Columbia River ports, which PGL is not essentially equipped to carry. Elsewhere the record indicates that so-called "low-rated" cargoes such as alkane, aluminum ingots, tinplate, all with rates at or lower than that for woodpulp ($40W) generated as much as 84% of WL's total revenue tons in 1973 in the U. S. Pacific/Argentine trade. (Exhibits 23 and 24).

significant. PGL begins with the fact that in 1973 WL carried 14,279 revenues tons from U. S. Pacific and Canadian ports to Argentina of which 12,689 tons consisted of cargoes (woodpulp, alkane, or Canadian cargo) either not covered by the agreement or by Argentine routing restrictions or not considered attractive cargo by PGL. Woodpulp and alkane, as ELMA has pointed out and the record shows, represented over 80 percent of WL's southbound revenue tonnage in 1973 in these trade areas and between 60 and 80 percent in previous years since 1970. The record shows that these items have generally been free of Argentine routing restrictions and that PGL does not consider them desirable cargoes, both being bulk commodities.[12] Theoretically, then, WL could continue to carry these items. Whether this fact standing alone would induce WL to continue its service in the subject trade area is another question. It should be remembered, however, as previously discussed, that the U. S. Pacific Coast/Argentine service of WL has been relatively small compared to WL's entire Latin American operation because of the greater volume of wayport and non-Argentine cargoes which WL has carried under its "A" service. But, as mentioned previously, since WL has now abandoned its "A" service in favor of a "C" service, WL's past experience with regard to wayport or non-Argentine cargoes or indeed with regard to overall financial results, cannot be used to predict WL's prospects.

[12] Woodpulp is not desirable cargo for PGL's M-Class cargo/passenger vessels and PGL does not regularly call at outports in the Pacific Northwest from which the greatest portion of forest products originates. Consequently PGL has carried relatively small quantities. Alkane, which is a bulk liquid, is not suitable because PGL's vessels presently do not have adequate tank capacity since the tanks have been converted to carry fuel oil. As Hearing Counsel contend, however, PGL could reconvert the tanks. Furthermore, the alkane is carried for a sole shipper and there is testimony that this commodity may become a controlled cargo in the future. Also, woodpulp, which is WL's most important single revenue-producing commodity, has been declining in tonnage over the past three years, dropping from 22,639 revenue tons in 1971 to 9,932 tons in 1973 from U. S. Pacific ports to Argentina. From Vancouver, British Columbia, the comparable figures are 25,456 down to 17,091.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 393(I)

NATIONAL STARCH & CHEMICAL CCORPORATION

v.

ATLANTIC CONTAINER LINE, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

November 1, 1977

Notice is hereby given that the Commission on November 1, 1977, determined not to review the decision of the Settlement Officer in this proceeding served October 18, 1977.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 393(I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

ATLANTIC CONTAINER LINE. LTD.

October 18, 1977

Reparation Awarded, in Part.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed March 25, 1977, as amended August 15, 1977, National Starch & Chemical Corporation (complainant) alleges that Atlantic Container Line, Ltd., (carrier) applied incorrect rates or charges on each of several (six) individual shipments, resulting in combined overcharges of $449.81.[2] While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier, in response to the served complaint, admitted that the claims were denied solely on the basis of tariff rules which prohibit the payment of overcharge claims not presented to the carrier within six months after the date of the shipment.[3] The carrier also stated that it did not dispute the complainant's contentions of misapplication of rates, incorrect computation of cubic measurements and rate extension errors.

The carrier, under bill of lading No. B 75410, dated March 25, 1975, transported a container of cornstarch in drums on a house-to-house basis from Baltimore, Maryland, to Antwerp, Belgium. The carrier assessed a rate of $101.25 per 2,240 pounds on 40,448 pounds. The cargo should have been rated under tariff Item No. 048.8216.001 of the North Atlantic Continental Freight Conference Tariff (29), FMC–4, which provides for a

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] The original complaint involved eleven (11) individual claims, five (5) of which proved to be time-barred by statute.

[3] North Atlantic French Atlantic Freight Conference Tariff No. (2), FMC–3, (Rule 8); North Atlantic French Atlantic Freight Conference Tariff No. (3), FMC–4 (Rule 9); North Atlantic Continental Freight Conference Tariff No. (29), FMC–4 (Rule 8); North Atlantic United Kingdom Freight Conference Tariff No. (47), FMC–2 (Rule 22).

rate of $93.75 per 2,240 pounds. On the basis of an incorrect application of freight charges, the complainant paid $1,910.54 ($1,828.27, plus a 4.5 percent currency surcharge of $82.27). The correct charges should have been $1,769.04 ($1,692.82, plus a 4.5 percent currency surcharge of $76.18). The resultant overcharge is $141.50 ($1,910.54, less $1,769,04).

The carrier, under bill of lading No. A 67058, dated April 19, 1975, transported a shipment of adhesive glue from New York, New York, to London, England. The carrier assessed a rate of $78.25 per 40 cubic feet on 216 cubic feet or 5.4 M/T. The cubic measurements shown on the bill of lading prove the shipment to consist of 204.5 cubic feet or 5.1 M/T. On the basis of an incorrect computation of cubic density, the complainant paid $422.55. The correct charges should have been $399.08. The resultant overcharge is $23.47 ($422,55, less $399.08).

The carrier, under bill of lading No. A 91138, dated July 5, 1975, transported a shipment of synthetic resin in bags from New York, New York, to Le Havre, France. The carrier assessed a rate of $86.50 per 40 cubic feet on 39 cubic feet. The cubic measurements shown on the bill of lading prove the shipment to consist of 28 cubic feet. On the basis of an incorrect computation of cubic density, the complainant paid $87.29 ($84.34, plus a currency surcharge of $2.95). The correct charges should have been $62.67 ($60.55, plus currency surcharge of $2.12). The resultant overcharge is $24.62 ($87.29, less $62.67).

The carrier, under bill of lading No. B 67402, dated July 10, 1975, transported a container of synthetic resin in drums on a house-to-house basis from Baltimore, Maryland, to London, England. The carrier assessed a rate of $99.75 per 2,240 pounds on 40,576 pounds. The cargo should have been rated under tariff Item No. 581.1001 which provides for a rate of $90.00 per 2,240 pounds. On the basis of an incorrect application of freight charges, the complainant paid $1,806.90. The correct charge should have been $1,630.29. The resultant overcharge is $176.61 ($1,806.90, less $1,630.29).

The carrier, under bill of lading No. A 67011, dated September 19, 1975, transported a shipment of water clarifying or purifying compounds in drums, value over $500, to and including $1,000 per 2,000 pounds, net weight, from New York, New York, to London, England. The carrier assessed a rate of $126.00 per 40 cubic feet based upon 117 cubic feet. The cargo should have been rated under tariff Item No. 510.0001 of North Atlantic United Kingdom Freight Conference Tariff (48), FMC–3, which provides for a rate of $104.00 w/m or within this value range. On the basis of an incorrect application of freight charges, the complainant paid $368.55. The correct charge should have been $304.20. The resultant overcharge is $64.35 ($368.55, less $304.20).

As previously stated, the carrier denied the above claims in accordance with the provisions of its tariffs restricting payment of overcharge claims to those claims filed within six months after date of shipment.

The complaint was filed with this Commission within the statutory time limit specified by statute and it has been well-established by the Commission that the carrier's so-called "six-month" rule may not act to bar recovery of an otherwise legitimate overcharge claim in such instance.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under the applicable tariff(s). Accordingly, the complainant hereby is awarded reparation as follows:

Bill of Lading B 75410	$141.50
Bill of Lading A 67058	23.47
Bill of Lading A 91138	24.62
Bill of Lading B 67402	176.61
Bill of Lading A 67011	64.35
Total	$430.55

In addition to the above, the claimant seeks $19.26 as reparation for an overcharge caused by an extention error on bill of lading No. A 91104 dated August 22, 1975. This bill covered a shipment of adhesive glue in drums and synthetic resin in bags from New York, New York, to Le Havre, France. The shipment was rated as follows:

2 Drums Adhesive Glue 638 lbs. at $196.00/2240 lbs.	$ 55.86
62 Bags Synthetic Resin 1612 lbs. at $89.75/2240 lbs.	83.02
Surcharge	6.25
	$145.13

The complainant correctly points out that the extension for the synthetic resin rate shown on the bill of lading should be $64.59 with a correspondent reduction in the 4.5 percent surcharge. However, the rate of $89.75 applies on a weight or measurement basis, whichever produces the greater revenue. Based upon the cubic measurements of the bags shown on the bill of lading (4 × 12 × 23), the shipment should have been rated as follows:

2 Drums Adhesive Glue 638 lbs. at $196.00/2240 lbs.	$ 55.86
62 Bags Synthetic Resin 39.61 cu. ft. at $89.75/MT	88.87
Surcharge	6.51
	$151.24

The resultant undercharge of $6.11 should be promptly adjusted between the parties with evidence of such adjustment furnished the undersigned to complete the record.

(S) WALDO R. PUTNAM,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND REGULATED ACTIVITIES

DOCKET NO. 72-19; GENERAL ORDER NO. 13

November 10, 1977

Part 536—Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States

AGENCY: Federal Maritime Commission

ACTION: Denial of Petitions for Reconsideration and implementation of revised tariff filing regulations.

SUMMARY: Petitions seeking reconsideration of 13 sections of General Order 13 as it was revised on October 2, 1975 (40 F.R. 47770) are denied, but several amendments to the regulations are being made on the Commission's own initiative based upon Petitioners comments. These modifications relax some requirements complained of as overly stringent and make numerous editorial changes which do not alter the substantive effect of the rules. The principal modification is the renumbering of most sections to conform the format of the foreign commerce tariff filing rules to the Commission's recently enacted domestic commerce regulations (General Order 38, 46 C.F.R. Part 531, 42 F.R. 54810). Further rulemaking on intermodal tariff requirements and other matters is anticipated shortly.

EFFECTIVE DATE: January 1, 1978

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney, Secretary
1100 L Street, N.W.
Washington, D.C. 20573
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SUPPLEMENTARY INFORMATION:

The Commission has before it for decision five petitions seeking reconsideration of its foreign commerce tariff filing regulations, as revised on October 2, 1975 (General Order 13, 46 C.F.R. Part 536, 40 F.R. 47770).[1]

The new features of the 1975 Rules fall into two general categories: (1) changes designated to regulate post-1970 developments in intermodal transportation; and (2) changes designated to clarify and update technical tariff format and filing requirements. Both types of changes were intended to aid shippers and the Commission's staff in applying ocean carrier tariffs. Petitioners seek reconsideration of 13 individual provisions, including five existing regulations which were not substantively altered by the 1975 revisions. The challenged sections of the 1975 Rules are:

1. 536.1(e). Definition of Local Rates.
"Should be made expressly synonymous with a carrier's port-to-port rate; the 1975 definition could be construed as *excluding* port-to-port rates."
ANAFC and South Atlantic Group.

2. 536.1(k). Definition of Transshipment.
"Inconsistent with parts of section 536.4; the word 'relay' should be added to the basic definition (first sentence) and 'feeder' and 'relay services' should be expressly excluded, regardless of whether such services are operationally controlled by the line-haul carrier."
ANAFC and South Atlantic Group.

3. 536.1(m). Definition of Substitute Service.
"Needlessly complex and substantive in nature; a thinly disguised attempt to enlarge the meaning of 'through intermodal transportation' to which additional tariff filing burdens attach."
ANAFC and South Atlantic Group.

4. 536.1(p). Definition of Port.
"Limiting the term 'port' to the place where actual transportation by water commences or terminates as to any *particular movement of cargo* favors LASH barge operators at the expense of other intermodal carriers; the definition should be constant for all modes of transportation; a port should be any place having water transportation facilities at which transportation by water does commence or terminate."
Sea-Land.

5. 536.15(d) (1). Intermodal tariffs must contain a precise breakout of port-to-port rates for each commodity.
"This is a harsh, commercially unreasonable, potentially disastrous practice in light of current intermodal arrangements between water and land carriers; inland carrier divisions are constants, and subject to container volume discounts, and calculated on a per container basis, while the through routes are calculated on a weight or measurement basis."
Trans-Pacific.

6. 536.4(a) (12). Tariff subscription price must include any bill of lading or rules tariff published by the carrier.
"Section 18(b) (1) does not require carriers to *distribute* bill of lading tariffs to *all* their tariffs subscribers; many shippers do not need all the components of a carrier's tariff; it is sufficient that supplementary subscriptions be offered at a reasonable cost."

[1] The effective date of the revised regulations (1975 Rules) was stayed pending disposition of the instant petitions. Foreign commerce carriers continue to operate under the previous General Order 13 regulations (Existing Rules).

Petitions were received from Sea-Land Service, Inc. (Sea-Land); the Association of North Atlantic Freight Conferences (ANAFC); Waterman Steamship Corporation (Waterman); five Trans-Pacific Freight Conferences (Trans-Pacific) and two U.S. West Coast/Latin America Conferences (Pacific Coast). Replies were tendered for filing by ANAFC and by a group of six U.S./Europe freight conferences (South Atlantic Group). Former section 502.261 of the Commission's Rules shall be waived to permit the filing of these replies.

Trans-Pacific.

7. 536.4(a) (4) (i). *Tariffs listing* a range of ports served must also include a specific listing of ports *not* served.

"Section 18(b) does not provide an unequivocal answer on this point as evidenced by the Commission's long standing practice of accepting only a statement of the range of ports; the rule should at least permit carriers to serve *designated ports* in a range of ports with the proviso that undesignated ports may be served on an 'inducement subject to agreement' basis; the phrase 'any restriction applying at a port' should be modified to read 'any restriction under the control of or imposed by the carrier.' "

ANAFC and South Atlantic Group.

8. 536.5(O). Conditional, temporary or emergency rates (including project rates) shall be listed under the appropriate commodity heading for each commodity affected.

"Many projects involve hundreds of commodities and the materials shipped are often not described by the carrier in the same manner as its existing commodity descriptions; it is not enough to say that large projects may be granted special permission not to list each commodity; such a procedure is time consuming and troublesome for carriers and the present standard of 'impossibility' is unfair; it would be better to place the burden on the Commission by having the staff reject any unreasonably small or non-*bona fide* project filings; a new section should be inserted to read 'Project rates may be placed in a special section of the tariff providing that the Table of Contents or Commodity Index contain a specific reference to Project Rates.' "

Pacific Coast and Waterman.

9. 536.6(a) (2). Amendments to dual rate contract rates may not be increased less than 90 days after a previous rate change has taken effect *and* before 90 days' notice has been given to contract shippers.

"This rule conflicts with the pending proceeding in Docket No. 75-13."

ANAFC, Sea-Land, and South Atlantic Group.

10. 536.4(b) (10) (v). Freight Forwarder compensation must be included in carrier tariffs.

"The rule should be revised to state that tariffs include freight forwarded compensation 'on the ocean freight' because there is considerable confusion as to what a permissible basis for freight forwarder compensation might be."

ANAFC and South Atlantic Group.

11. 536.9(c). Tariffs on imports to New York shall contain a rule which complies with General Order 8.

"This rule conflicts with the pending evidentiary proceeding in Docket No. 73-55 pertaining to the application of General Order 8 to containerized imports."

Sea-Land and ANAFC.

12. 536.5(L). When a dual rate system permits two rates to be employed, both the contract and the noncontract rates shall be published with each individual commodity item subject to the dual rate system.

"This requirement is in the present tariff rules and was superseded by Circular Letter 10-74 upon the request of ANAFC members. The Circular Letter stated that the suspension was temporary and occasioned by the 'international paper and forestry products shortage,' a somewhat dubious basis not mentioned in ANAFC's waiver request. It should be sufficient for carriers to provide a formula for calculating dual rate contract discounts rather than publishing two rates for each commodity. To do otherwise would make the use of commodity coding data more difficult."

ANAFC and South Atlantic Group.

13. 536.8(a). The last sentence of the rule states that "Section 14b of the Act does not permit . . . relief from the [advance filing] requirements of that section and applications for such permission will not be entertained."

"A statutory prohibition against section 14b waivers exists *only* if section 14b were interpreted as a *notice* provision. Until Docket No. 75-13 is resolved by the Commission the last sentence of the proposed rule should be deleted as it prejudges the issue in that proceeding."

ANAFC and South Atlantic Group.

In light of Petitioners' arguments and the Commission's recent experience in revising its domestic tariff regulations (Docket No. 76–40, 42 F.R. 54810) we have determined to make certain modifications in the 1975 Rules. The following *sua sponte* amendments are either of an editorial nature or ease 1975 requirements which were complained of as burdensome.

I. Part 536 has been renumbered to coincide with Part 531; section 536.12 has been consolidated with section 536.2; and sections 536.13, 536.14 and 536.17 have been combined in a single section captioned "Exemptions and exclusions."

II. The definitions of "through rate", "through route", "transshipment", "interchange", "substitute service", "absorption", "equalization", "port", "feeder service", "water carrier" and "intermodal transportation" have been temporarily withdrawn from section 536.1 to avoid possible conflict with recent court cases concerning intermodal transportation and the Commission's General Order 38. The definition of "carrier" was conformed to the definition in the Existing Rules, except that an express reference to nonvessel operating carriers was added to avoid any claim that the Commission has altered its long standing recognition of nonvessel operating carriers as section 1 carriers.

III. Section 536.14 governing through intermodal transportation tariffs has been withdrawn and existing section 536.16 adopted in its place, thereby temporarily removing the requirement that tariffs contain a precise breakout of the port-to-port rates for each commodity carried. Existing section 536.16 contains its own definitions of "through rate" and "through route." The reference to "through intermodal transportation" in section 536.1(u) was also deleted in light of the withdrawal of sections 536.14 and 536.1(r).

IV. A reference to the Commission's statutory responsibilities to police and prevent undully discriminatory and prejudicial practices pursuant to Shipping Act sections 15, 16, and 17 has been added to section 536.0. Tariff regulations which rely upon statutory authority in addition to that of sections 18(b) and 14b is consistent with past Commission action and the purposes of the Shipping Act. *Filing of Through Rates and Through Routes*. 35 F.R. 6394, 6397 (1970); *Report in Docket No. 875* (General Order 15), 30 F.R. 12682 (1965).

V. Section 536.16 establishes an effective date for the 1975 Rules which has long since passed. A new effective date is stated in the dispositive language of the instant Order and section 536.16 has been deleted.

VI. Section 536.4(a) (12) has been relaxed to permit carriers to offer individual subscriptions to bill of lading tariffs, rules tariffs, or other major components of their total tariff filing rather than charging a single subscription price which includes all tariff material on file, regardless of its usefulness to particular shippers. It is expected, however, that carriers will provide subscription information which can be readily understood by shippers and which clearly identifies the various tariff components available and the charge assessed for each.

VII. Section 536.6(a) (2) has been modified to coincide with the Commission's final decision in Docket No. 75-13, 17 SRR 305 (1977). I.e., contract rates may be increased after 90 days' notice to contract shippers without regard to the length of time the rate has been in effect.

VIII. Section 536.5(O) has been mitigated by the addition of a new subsection which permits *bona fide* multiple commodity "project rates" to be printed in a special tariff section whenever the tariff contains a Table of Contents clearly identifying the existence of such a "project rates section."

IX. Section 536.8(a) has been amended to eliminate the last sentence which flatly proscribed the filing of requests for special permission to increase Merchant's Contract rates upon short notice. The Commission wishes to reserve judgment on this point until it has an appropriate opportunity to consider the matter in greater depth. In the interim, any such requests shall be entertained on an *ad hoc* basis.

These amendments moot Petitioners' stated objections to Items 1, 2, 3, 4, 5, 6, 8, 9, and 13, above. We wish to stress, however, that this action is taken only as an interim measure and does not represent the Commission's final position on the points in question—especially insofar as intermodal tariff filings are concerned. Another rulemaking proceeding proposing definitions (and other matters) which more closely parallel the domestic commerce regulations served October 4, 1977 in Docket No. 76-40 (General Order 38, 46 C.F.R. Part 531) is contemplated.

Petitioners' remaining contentions (Items 7, 10, 11 and 12, pp. 3-4, above) are rejected for the following reasons.

Item 7. Section 536.4(a) (1). Shipping Act section 18(b) requires precision in tariff preparation, content and filing to the greatest extent practical. The Commission is responsible for interpreting what is "practical" in light of current shipping conditions. In today's containerized, highly competitive shipping environment, the Commission's staff, port interests, competing carriers and shippers can all better conduct their business when tariffs list only the individual ports or points which actually receive regular service from the publishing carrier(s). ANAFC has failed to demonstrate any harm which would occur from requiring carriers to amend their tariffs upon the requisite statutory notice when they wish to call at additional ports in a port range they already serve, especially since the notice period may be shortened in appropriate cases by use of the special permission process.

Item 10. Section 536.4(b) (10) (v). This requirement has long been applicable to foreign commerce carriers as section 510.24(f) of the Commission's Freight Forwarder Rules (General Order 4). The 1975 Rules restate the General Order 4 requirement purely as an organizational improvement—in order that all tariff regulations might appear together in

General Order 13. The challenged rule requires carriers to accurately *disclose* what they pay to ocean freight forwarders. It is beyond the scope of this proceeding to determine whether modifications should be made in the nature and extent of forwarder brokerage compensation that carriers are presently paying. ANAFC's broad, conclusory contention that 1975 section 536.4(b) (10)(v) is vague and ineffective should be presented in the form of a petition or complaint directed at specific aspects of General Order 4.

Item 11. Section 536.9(c). Sea-Land misconstrues the purpose of the regulation, which is to insure that tariffs contain a rule that complies with the free time requirements of the Commission's General Order 8 (46 C.F.R. Part 526)—regardless of what these requirements are at any particular time. The fact that possible extensions of General Order 8 are under consideration in pending Docket No. 73–55 is therefore irrelevant to the instant proceeding.

Item 12. Section 536.5(1). The requirement that both contract and noncontract rates be published immediately adjacent to each individual tariff item to which they apply long precedes the 1957 Rules. Subsequent to the initiation of this proceeding, the Commission chose to temporarily suspend this existing requirement (Circular Letter 10–74), and, as a matter of policy, believes it desirable to briefly continue both the rule and the temporary suspension to gather further operating experience concerning the value of "Conversion Tables" as a means of establishing noncontract rates. Further rulemaking on this point is anticipated shortly.

THEREFORE, IT IS ORDERED, That the aforesaid "Replies to Petition for Reconsideration" are accepted for filing; and

IT IS FURTHER ORDERED, That the aforesaid "Petitions for Reconsideration" are denied; and

IT IS FURTHER ORDERED, That, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 14b, 15, 16, 17, 18(b), 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 813a, 814, 815, 816, 817(b), 820 and 841(a), the Commission's Foreign Commerce Tariff Rules (46 C.F.R. Part 536; General Order 13) are amended.*

IT IS FURTHER ORDERED, That the aforesaid amendments shall take effect on January 1, 1978. New or reissued tariffs tendered for filing on or after January 1, 1978 shall be fully subject to the new regulations. Tariff *amendments* submitted on or after the effective date will, however, continue to be accepted in the same format as the tariff being amended until January 1, 1979. On or after the latter date, all tariff material employed by common carriers by water in the foreign commerce of the United States shall fully conform to the requirements of revised Part 536. Tariffs on file January 1, 1979 which do not meet the requirements of revised Part 536 shall be cancelled; and

IT IS FURTHER ORDERED, That any existing grants of special

*The text of the amendment is reprinted in 46 C.F.R. 536.

permission excusing compliance with foreign commerce tariff filing requirements beyond the aforesaid effective date of revised Part 536 shall continue according to their original terms until further action of the Commission.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 346(I)

C S C INTERNATIONAL, INC.

v.

VENEZUELAN LINES

NOTICE OF DETERMINATION NOT TO REVIEW

November 8, 1977

Notice is hereby given that the Commission on November 8, 1977, determined not to review the decision of the Settlement Officer in this proceeding served October 25, 1977.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 346(I)

C S C INTERNATIONAL, INC.

v.

VENEZUELAN LINES

October 25, 1977

Reparation awarded.

DECISION OF FRANK L. BARTAK, SETTLEMENT OFFICER[1]

C S C International, Inc. (CSC) seeks $1,333.56 from Venezuelan Line for an alleged overcharge of freight on a shipment of 110 drums of Animal Feed Supplement from New Orleans to Puerto Cabello, Venezuela on the vessel MERIDA under bill of lading No. 27 dated April 3, 1974.

Complainant states that the shipment weighed 65,856 pounds and that the freight paid was $2,966.77 including surcharges and other accessorial charges, based upon a rate of $81.75 per weight ton.

According to complainant the correct rate for this shipment should have been $41.25 per weight ton of 2000 pounds, as provided in Item 280 of the United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff F.M.C. No. 2. The freight was prepaid.

In a letter antedating the filing of the complaint herein, the carrier admitted that the claim was correct but denied the claim based upon Item 11, of the United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff which requires that claims be filed within six months of date of shipment.

The Commission has repeatedly held that the conference tariff rule, requiring the presentation of claims for adjustment of freight charges within six months after date of shipment, cannot bar determination on their merits, if the claims are filed with the Commission within two years of accrual.[2]

[1] Both parties deemed to have consented to the informal procedure under Subpart S, 46 CFR 502.301–304 as amended. This decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Notice of determination not to review November 8, 1977).

[2] Informal Docket No. 115(I), *Colgate Palmolive Co.* v. *United Fruit Co.*, 11 SRR 979 (1970); *The Carborundum Co.* v. *Venezuelan Line*, 17 FMC 198, 201 (1973).

Under "Subpart S—Informal Procedure for Adjudication of Small Claims," the Commission's rules provide that if a carrier, in its response, is silent regarding consent to the informal procedure, the carrier is nevertheless deemed to have consented. See 46 CFR 502.304(e).

Despite a specific invitation to submit additional information in defense of the claim, the carrier has filed no response. Under the circumstances, it appears to this Settlement Officer that a determination on the merits of the claim is warranted.

In support of its claim, complainant filed a copy of the bill of lading, a copy of the CSC invoice (with translation), a copy of the letter of denial from the carrier (which admits the correctness of the claim but denies the claim as time-barred per conference tariff), and a copy of the pertinent pages of the tariff.

The bill of lading clearly describes the shipment as 110 drums of Animal Feed Supplement (Choline Chloride 70%) weighing 65,856 pounds.

The shipment was billed at $81.75 per ton, the rate for "Feed, Animal or Poultry, NOS . . . including . . . Supplements, NOS" based on "Actual value over $500.00 per 2000 lbs." According to complainant the actual value was $287.91 per ton and the shipment should have been billed at the rate of $41.25, the rate for "Actual value over $250.00 but not over $350.00 per 2000 lbs."

From review of the tariff and supporting documents, complainant was billed at the rate of $81.75 per ton or $2,691.84 and should have been billed for the 32.928 tons at the rate of $41.25 per ton or $1,358.28, resulting in an overcharge of $1,333.56.

This Settlement Officer can symphathize with the carrier faced with an overcharge claim made almost two years after shipment and based on value per the shipper's invoice. However, the claim was filed within two years of accrual. The conference tariff, requiring submission within six months of date of shipment, cannot bar determination on its merits. The shipper's invoice supports the claim and respondent carrier has admitted that claim is correct and has offered nothing (other than the six-month tariff rule) in defense.

Complainant has proved its overcharge claim herein and is hereby awarded reparation in the amount of $1,333.56 from Venezuelan Line.

(S) FRANK L. BARTAK,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 436(I)

THE R. T. FRENCH COMPANY

v.

PRUDENTIAL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

December 6, 1977

Notice is hereby given that the Commission on December 2, 1977, determined not to review the decision of the Settlement Officer served November 23, 1977.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 436(I)

THE R. T. FRENCH COMPANY

v.

PRUDENTIAL LINES, INC.

November 23, 1977

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

By complaint timely filed with the Commission on August 24, 1977, The R. T. French Company (complainant) alleges that Prudential Lines, Inc. (respondent) applied an incorrect rate to a shipment of empty glass bottles resulting in an overcharge of $2,842.66. Complainant alleges that the overcharge is in violation of Section 18(b) (3) of the Shipping Act, 1916.

In denying the claim in its letter of May 25, 1977, respondent referred to the publicly stated policy of the Associated Latin American Freight Conferences not to honor late filed claims regardless of merit.[2] In addition, respondent advised complainant:

> "A commercial invoice attached to your claim indicates FAS value $10,962.00 and C and F value $19,649.52. We certainly do not agree as this bill of lading was rated in accordance to shipper's export declaration Schedule B 6651110 indicating a value of $40,392.00, therefore, bills of lading are rated according to FOB value and not FAS or C and F. Moreover, this bill of lading was correctly rated and this is the main reason of declining your claim."

The shipment moved from New York, New York to Puerto Cabello, Venezuela on the S/S SANTA RITA on bill of lading number 62 dated May 12, 1976. The shipment was described thereon as 101 pallets (5049 cardboard ctns.) of empty glass bottles measuring 4,025 cubic feet and weighing 53,014 pounds. The applicable tariff is the United States Atlantic

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] The complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that a carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

& Gulf-Venezuela and Netherlands Antilles Conference S.B. Ven.-11 Freight Tariff F.M.C. No. 2.

Respondent assessed the rate from Item No. 175 on 17th Revised Page 29 which covers Bottles, or Jars, Glass, Empty, N.O.S. Actual value over $1,000.00 per 2,000 pounds, which was $78.25 per 40 cubic feet or 2,000 pounds. Because of the high cubic measurement of the shipment, $\frac{4{,}025\text{cft}}{40} = 100.625$ measurement tons compared to $\frac{53{,}014}{2{,}000} = 26.507$ weight tons, respondent computed the charges on a measurement basis. Rates and charges assessed were:

Ocean Fright	4,025 cft	$78.25/40 cft	$7,873.91
Bunker Surcharge[3]	4,025 cft	$ 4.80/40 cft	483.00
Port Congestion[4]	4,025 cft	$ 3.00/40 cft	301.88
Total			$8,658.79

The claim centers on the actual value of the bottles per ton of 2,000 pounds. Complainant submitted the following pertinent documents: (1) the bill of lading; (2) respondent's due bill; (3) a letter from respondent to complainant alleging the shipment was valued at $40,392.00 based on Export Declaration Schedule B 6651110; (4) a copy of the export declaration; (5) a certified translation from Spanish to English of the commodity description on the invoice "jars for mustard with a 6 oz. capacity" and (6) a copy of the Invoice (No. 470–3220) which is cross-referenced on the bill of lading.

A review of the export declaration reveals that the figure respondent cites as valuation, i.e., 40,392 is net quantity in Schedule B units. The value declared on the export declaration is $9,593.00. Complainant advised its rate auditor of this in its letter of August 4, 1977.

In computing the actual value per ton of 2,000 pounds, it does not matter if we use the declared value on the export declaration, i.e., $9,593.00 or the value complainant indicated in its claim, i.e., $10,962.00. The latter figure was arrived at by use of complainant's invoice:

Jars for mustard with a 6 oz. capacity	$9,593.00
Palletization charge	505.00
Inland freight	864.00
	$10,962.00

Using the valuation indicated on the export declaration, $\frac{\$9{,}593}{26.507}$ results in a value per ton of 2,000 pounds of $360.19. Using the valuation indicated in the claim, $\frac{\$10{,}962}{26.507}$ results in a value per ton of 2,000 pounds

[3] Item 9, 9th Revised Page 11–A of subject tariff.

[4] Ibid.

of $413.56. Either way the actual value is over $350.00 but not over $600.00 per ton of 2,000 pounds. Therefore, the applicable rate under Item 175 of the Tariff is $50.00 per measurement ton of 40 cubic feet.

Complainant alleges that rates and charges should have been computed as follows:

Ocean Freight	4,025 cft	$50.00/40 cft	$5,031.25
Bunker Surcharge[5]	4,025 cft	$ 4.80/40 cft	483.00
Port Congestion[6]	4,025 cft	$ 3.00/40 cft	301.88
			$5,816.13

The amount assessed was $8,658.79, complainant indicated that the amount that should have been assessed was $5,816.13. The overcharge claim is for $2,842.66. It has been substantiated.

In a letter of October 24, 1977, respondent indicated that it was required by the Conference to raise the six months late claim reporting rule but apart from that it must agree that complainant is correct. The six month rule has already been discussed and disposed of. Reparation of $2,842.66 is awarded to the complainant.

(S) JUAN E. PINE,
Settlement Officer.

[5] Item 9, 9th Revised Page 11-A of subject tariff.
[6] Ibid.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 489

WILLIAMS, CLARKE COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

ORDER ON REMAND

November 29, 1977

Sea-Land Service, Inc. (Sea-Land) applied for permission to refund a portion of the freight charges collected on a shipment of rubber pneumatic tires which moved from Long Beach, California to San Juan, Puerto Rico. The complaint filed under section 22 of the Shipping Act, 1916 (the 1916 Act), in the form of an application as required by Rule 92(b) of the Commission's Rules of Practice and Procedure (46 C.F.R. section 502.92(b)), alleges that, when Sea-Land reissued its tariff to incorporate a 30% rate increase and a 11% surcharge, the truckload (TL) rate on tires, contained in the cancelled tariff which was lower than the rate on less-than-truckload (LTL) shipments, had by clerical error been omitted from the new tariff, and that the rate of 82 cents per cubic foot in effect at the time of shipment, as it applied to TL as well as to LTL shipments alike was unjust and unreasonable.

In his Initial Decision, Administrative Law Judge Thomas E. Reilly found that inasmuch as Sea-Land's tariff had in the past consistently provided lower rates on TL than on LTL shipments, the assessment of the rate applicable to LTL shipments to a shipment offered in TLS was unjust and unreasonable in violation of section 18(a) of the 1916 Act and section 2 of the Intercoastal Shipping Act, 1933 (the 1933 Act). The Presiding Officer determined that 68 cents per cubic foot rather than 82 cents per cubic foot collected by Sea-Land was the maximum just and reasonable rate applicable to this shipment. In reparation for the unlawful charge, the Presiding Officer granted Sea-Land permission to refund $296.36 from the charges collected "to the party which paid" those charges. The Commission determined to review the Presiding Officer's Initial Decision.

While we agree with the Presiding Officer's award of reparation, we are not convinced that this award was made to the proper party. The Initial Decision authorizes the refund requested "to the party which paid the freight charges", leaving unclear who the recipient actually is. The only parties here are Complainant and Respondent, yet the award implies that some other "party", a stranger to the proceeding, might be entitled to the refund.

Section 22 of the 1916 Act provides in part:

> "*Any* person may file with the board a sworn complaint setting forth any violation of this Act. . . . The board . . . may direct the payment . . . of full reparation *to the complainant* for the injury caused by such violation. (Emphasis added) 46 U.S.C. 821.

Thus, while "any person" may file a complaint, reparation may be awarded only to a complainant who has shown that it was injured by a violation of the statute.

The application states that Complainant paid the charges. It does not say in what capacity. Complainant, an independent ocean freight forwarder, was not the shipper[1] and thus had no obligations to the carrier under the contract of affreightment.[2] In the event Complainant advanced freight monies as agent of the shipper, we do not know whether and to what extent it was reimbursed by its principal.

As Complainant was not a party to the contract of affreightment, he would have no standing to seek reparation under that contract in the absence of an assignment of the claim from the shipper. See *Ocean Freight Consultants, Inc. v. Bank Line Ltd.*, 9 F.M.C. 211 (1966). Should it appear that Complainant was not fully reimbursed for the freight paid, such an assignment might be implied. The record however is void of the information needed to reach a conclusion in that respect.

For the foregoing reasons we are remanding the proceeding to the Presiding Officer and directing expedited handling so that he may elicit the information necessary to make additional findings of fact and conclusions of law on the questions raised herein, and issue a supplemental decision thereon, within 60 days of the date of this Order.

THEREFORE, IT IS ORDERED, That this proceeding be remanded to the Presiding Officer for decision consistent with this Order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[1] "Shipper" means "the owner or person for whose account the carriage of the goods is undertaken." *Norman G. Jensen, Inc. v. Federal Maritime Commission*, 497 F.2d 1053 (8 Cir. 1974).

[2] The bill of lading names as shipper the Goodyear Tire & Rubber Company and as consignee the Goodyear Western Hemisphere Corp.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 514

MILCHEM INCORPORATED

v.

FLOTA MERCANTE GRAN CENTROAMERICANA, S. A.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

November 3, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on November 3, 1977.

It is Ordered, That applicant is authorized to waive collection of $382.11 of the charges previously assessed Milchem Incorporated.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 514 that effective December 10, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from December 10, 1976, through January 18, 1977, the rate to Gulf Ports on 'Mud, Drilling Additives and Barytes', under 500 Tons is $50W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 514

MILCHEM INCORPORATED

v.

FLOTA MERCANTE GRAN CENTROAMERICANA, S.A.

Adopted November 3, 1977

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Respondent (Flomerca) seeks permission to waive collection of a portion of the freight charges on a shipment of Mud, Drilling Additives and Barytes from Houston, Texas, to Santo Tomas de Castilla, Guatemala, aboard respondent's vessel the *Dominique V–149*. The shipment weighing 20,655 lbs. moved under bill of lading dated December 11, 1976. The aggregate freight charges collected of $516.38 were based upon a rate of $50.00 per 2000 lbs., the rate which respondent thought was applicable to the shipment. A waiver for the collection of $382.11 is sought.

By telex of December 10, 1976, Flomerca sought to establish an initial rate on Mud, Drilling Additives and Barytes from Gulf Ports of $50.000 per 2000 lbs. Due to typographical error the requested effective date was stated as December 1, instead of December 10. The Commission's Bureau of Compliance, by letter dated January 24, 1976, rejected this filing since "no filing may bear an effective date prior to the date of its receipt by the Commission." Unaware that the filing had been rejected, Flomerca charged and collected aggregate freight on the basis of the $50.00 rate. In view of the rejection of Flomerca's filing the applicable rate at the time of shipment was the General Cargo rate of $87.00 per 2000 lbs. Flomerca has filed a tariff containing the $50.00 rate. No other shipments were involved and no discrimination would result from granting the waiver.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of

[1] This decision became the decision of the Commission November 3, 1977.

Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[2]

The error set forth in the application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Accordingly it is found:

1. That there was a clerical error which resulted in rejection of the rate sought.

2. The waiver requested will not result in discrimination among shippers.

3. Prior to applying for the waiver a new tariff was filed setting forth the rate on which the waiver was based.

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

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
November 3, 1977.

[2] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice an Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 408(I)

CONTINENTAL SHELLMAR, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

November 29, 1977

Notice is hereby given that the Commission on November 29, 1977, determined not to review the decision of the Settlement Officer in this proceeding served November 15, 1977.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 408(I)

CONTINENTAL SHELLMAR, INC.

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Continental Shellmar, Inc. (complainant) claims the difference between transportation charges based on assessment of a $52.50 rate instead of a lower commodity rate of $42.00 per 40 cubic feet, charges paid $2,546.55 instead of $2,105.02, or $441.53 as reparation from Sea-Land Service, Inc. (respondent) for alleged freight overcharges. The shipment moved house-to-house from Baltimore, Maryland to Kingston, Jamaica on the SS SEATTLE on bill of lading number 956648523 dated May 13, 1975. The applicable tariff is the United States Atlantic Gulf-Jamaica Conference S.B. JAM–8 Freight Tariff F.M.C. No. 1.

The shipment measured 1,682 cubic feet as indicated on the bill of lading and consisted of two containers containing 32 pallets of metal parts for tin cans. The carrier assessed a rate of $52.50 per ton of 40 cubic feet on the basis of Cans, N.O.S. Class 4, 9th Revised Page 45, as provided under volume shipments on 16th Revised Page 38. Total rates and charges assessed were as follows:

Ocean Freight	1,682 cft	$52.50/40 cft	$2,207.63
Bunker Surcharge	1,682 cft	$ 6.00/40 cft	252.30
Rate of Cess[2]	1,682 cft	$ 2.06/40 cft	86.62
Total			$2,546.55

Complainant advises that the claim as submitted directly to the Commission in view of the publicly stated policy of the Associated Latin

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(*Note: Notice of decision not to review November 29, 1977.*

[2] The terminals at Kingston assess a charge against vessels which is said to be similar to payments made towards a guaranteed annual income paid to stevedoring labor in the port of New York.

American Freight Conferences not to honor claims filed with its members which are submitted after six months of the date of shipment. This policy appears in the tariff in Item 116(a) which provides:

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[3]

Complainant timely filed its complaint with the Commission on May 12, 1977 alleging violation of Section 18(b)(3) of the Shipping Act, 1916. The claim was accompanied by a bill of lading and invoice. The invoice covers "Ends." The bill of lading description is Metal Parts for Tin Cans.

Complainant alleges that the applicable rate for tin can parts (can ends) is the rate in Item 257, on 9th Revised Page 20–1 of the subject tariff, which is $42.00 per 40 cubic feet applicable to Tin Cans, Empty, S.U. in carrier's containers stuffed by shipper. He refers to the subject tariff's Item 10(f) which provides:

"Whenever rates or ratings are provided for an article named herein the same basis will also be applicable on named parts of such article, when so described on the ocean Bills of Lading, except where specific rate is provided for such parts."

In view of the lack of a more specific rate in the tariff on metal parts for tin cans, complainant's commodity description is closer then that used by respondent. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. *The Carborundum Company* v. *Royal Netherlands Steamship Company (Antilles) N.V.*, decided January 5, 1977. Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply, *Corn Products Company* v. *Hamburg—Amerika Lines,* 10 FMC 388 (1967).

Complainant recomputes the rates and charges he feels should have been assessed:

Ocean Freight[4]	1,682 cft	$42.00/40 cft	$1,766.10
Bunker Surcharge		$ 6.00/40 cft	252.30
Rate of Cess[5]		$ 2.06/40 cft	86.62
Total			$2,105.02

Complainant paid $2,546.55 transportation charges on this shipment. The proper charge, indicated above is $2,105.02. Therefore, the claim for $441.53 has been substantiated.

[3] The complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

[4] The lower volume rate of $34.00 for a minimum of 1600 cft included in Item 257 does not apply as the shipment moved in to 35' containers. See Item 128(V) of the subject tariff.

[5] See footnote 2.

In a letter of July 12, 1977, respondent indicated that the complainant was correct in his contention of the rate that should have applied. Respondent further indicated that it was awaiting this decision regarding the proper disposition of the overcharge.

Complainant has sustained the burden of proof and respondent advises that complainant is correct. Reparation of $441.53 is awarded to the complainant.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 407(I)

CONTINENTAL SHELLMAR, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

November 29, 1977

Notice is hereby given that the Commission on November 29, 1977, determined not to review the decision of the Settlement Officer in this proceeding served November 15, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 407(I)

CONTINENTAL SHELLMAR, INC.

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Continental Shellmar, Inc. (complainant) claims the difference between transportation charges based on assessment of a $54.50 rate per 40 cubic feet instead of a lower volume (1600 cubic foot) commodity rate of $34.00 per 40 cubic feet, charges paid $2,602.50 instead of $1,749.70, or $852.80 as reparation from Sea-Land Service, Inc. (respondent) for alleged freight overcharges. The shipment moved from New York, New York to Kingston, Jamaica on the SS TAMPA on bill of lading number 941951 dated July 22, 1975. The applicable tariff is the United States Atlantic & Gulf-Jamaica Conference S.B. JAM-8 Freight Tariff F.M.C. No. 1.

From the measurements on the bill of lading respondent determined that the shipment measured 1,664 cubic feet, and complainant agrees. The shipment consisted of 1,868 cartons of empty metal tin cans, setup and parts. The carrier assessed a rate of $54.50 per ton of 40 cubic feet. Total rates and charges assessed were as follows:

1—Container 1868 Ctns—Empty Metal Tin Cans S/U & Parts	1,664 cft	$54.50/40 cft	$2,267.20
Bunker Surcharge	1,664 cft	$ 6.00/40 cft	249.60
Rate of Cess[2]	1,664 cft	$ 2.06/40 cft	85.70
Total			$2,602.50

Complainant filed a claim with respondent on May 6, 1977. On June 2,

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Notice of determination not to review November 29, 1977.

[2] The terminals at Kingston assess a charge against vessels which is said to be similar to payments made towards a guaranteed annual income paid to stevedoring labor in the port of New York.

1977, respondent denied the claim based on tariff Item 116(a) which provides:

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[3]

Complainant timely filed its complaint with the Commission on May 12, 1977 alleging violation of Section 18(b)(3) of the Shipping Act, 1916. The claim was accompanied by a bill of lading and invoice. The invoice covers open top cans and loose ends. The bill of lading description is Empty Metal Tin Cans S/U & Parts.

Complainant alleges that respondent's basis for the ocean freight rate of $54.50 per 40 cubic feet is unknown. He further states that the applicable rate is found in the subject tariff under Item 257 on 9th Revised Page 20-1. The description thereunder is Tin Cans, Empty, S.U.: In Carrier's Containers, Stuffed by Shipper, minimum 1600 cubic feet. The contract rate thereunder is $34.00 per 40 cubic feet. Complainant further refers to Item 10(f) which provides in essence that whenever rates or ratings are provided for an article named in the tariff the same basis will apply on the named parts of such article, except where a specific rate is provided for such a part. It is indicated that a specific rate is not provided for tin can parts, therefore, Item 257 is applicable to tin can parts.

Complainant recomputes the rates and charges he feels should have been assessed:

Ocean Freight	1,664 cft	$34.00/40 cft	$1,414.40
Bunker Surcharge	1,664 cft	$ 6.00/40 cft	249.60
Rate of Cess[4]	1,664 cft	$ 2.06/40 cft	85.70
Total			$1,749.70

Complainant paid $2,602.50 total transportation charges on the shipment. The proper charge, indicated above, is $1,749.70. Therefore, the claim for $852.80 has been substantiated.

In a letter of July 12, 1977, respondent indicated that the complainant was correct in his contention of the rate that should have applied. Respoondent further indicated that it was awaiting this decision regarding the proper disposition of the overcharge.

Complainant has sustained the burden of proof and respondent advises

[3] The complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that a carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

[4] See footnote 2.

that complainant is correct. Reparation of $852.80 is awarded to the complainant.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-39

LATINVAN, INC., FREIGHT FORWARDER LICENSE NO. 1660

DISCONTINUANCE OF PROCEEDING

December 2, 1977

This proceeding is before the Commission on Joint Motion of Respondent Latinvan, Inc. and Hearing Counsel for dismissal of the Order to Show Cause issued by the Commission in this proceeding. This proceeding was instituted to determine whether Respondent's license to operate as an independent ocean freight forwarder should be suspended or revoked.

The basis of the Commission's Order was Respondent's apparent failure to respond to written inquiries, dated December 13, 1976, and May 2, 1977, from the Commission's Office of Freight Forwarders, wherein Respondent was asked to submit information of amounts due and payable to ocean carriers and/or steamship agents for ocean freight on shipments Respondent handled as forwarder. When no reply to these letters was received, the Commission, on July 28, 1977, instituted this proceeding.

We are now advised that Respondent only learned of the Commission's Order when an item in the Journal of Commerce was called to his attention and that upon so being informed Respondent immediately contacted the Commission, by telephone and letter of the same day, explaining that it had never received the letter of December 13, 1976, and that it had, by letter of May 18, 1977 replied to and submitted, the information requested by the Commission's letter of May 2, 1977. A copy of Respondent's May 18 letter with attachment was enclosed. Respondent by affidavit confirmed these events.

Because the premise for the issuance of the Order to Show Cause was Respondent's apparent failure to answer the Commission's inquiries and because Respondent has now shown to our satisfaction that it was not responsible for the delay and had fully complied with the Commission's request, the basis for questioning Respondent's fitness to hold its license no longer exists. Therefore, no regulatory purpose would be served by continuing this proceeding and the Joint Motion will accordingly be granted.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.
By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 518

CAPITAL TRADING CO., INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

November 30, 1977

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on November 30, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 518

CAPITAL TRADING CO., INC.

v.

SEA-LAND SERVICE, INC.

Adopted November 30, 1977

Application denied.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land seeks permission to waive collection from Capital Trading Co., Inc., of a portion of the freight charges on nine shipments of onions from Elizabeth, N.J., to Rotterdam, Holland.[2] The aggregate weight of the shipments was 650 long tons and the aggregate freight actually collected was $62,859.39. The rate applicable at the time of shipment was $117.50 W-noncontract[3] and the rate sought to be applied is $100.00 W-contract.[4] Permission to waive $11,812.52 is sought. The circumstances which are said to support the waiver and as they appear in the application are:

On October 11, 1976 Capital Trading Co. made application to the North Atlantic United Kingdom Conference for a rate modification on Onions. On October 25, 1976 Mr. J. P. McCluskey of N.A.U.K.F.C. advised Mr. Behrens of Capital Trading by telegram (Exhibit 2) that effective October 22, 1976 through January 20, 1977 the member lines had approved the Service rate of $100.00 W. This rate was filed by telex on October 22, 1976 on 6th RP 127 N.A.U.K.F.C. Tariff No. (48) FMC—3 (Exhibit 3).

At the time of making the application for the rate modification, Mr. Behrens of Capital Trading was not aware that Capital Trading did not have a Merchants Freight Contract with NAUKFC. The Conference did not advise Mr. Behrens in their telegram of October 25, (Exhibit 2) that it would be necessary for Capital Trading Co. to sign a Merchants Freight Agreement to qualify for the $100.00 W rate. The telegram led him to believe that he qualified for the $100.00 W rate. Capital Trading was billed the Non-Contract rate of $117.50 on the shipment as noted in Exhibit 1. It wasn't until January

[1] This decision became the decision of the Commission November 30, 1977.

[2] For the bill of lading numbers, vessels, dates of shipment and collection and the weights of the various shipments see *Appendix*.

[3] North Atlantic United Kingdom Freight Conference Tariff No. (48) FMC 3.

[4] *Id.*

31, 1977 that Mr. Behrens of Capital understood that the $117.50 billing is the $100.00 rate expected was the result of Capital not having a Merchant Freight Agreement with N.A.U.K.F.C. (See Exhibit 4). Capital advised the Conference on January 31, 1977 by telex that they would in fact sign the Agreement. This was accomplished effective January 31, 1977. The shipper, Capital Trading Company, tendered the shipment to Sea-Land fully expecting to pay the rate of $100.00 as telexed to them by N.A.U.K.F.C. and confirmed by Sea-Land employees. The Conference, at the time of the conference rate modification, should have advised that the $100.00 rate only applied when the shipper executed a Merchants Freight Contract. The Carrier representative should also have advised that no contract was in effect when question on the $117.50 billings surfaced.

The shipper contracted to sell 800 tons of onions at the freight rate of $100.00 (See Exhibit 5). Respondent believes that shipper acted in good faith and therefore requests that it be allowed to waive the collection of $11,812.52 based on the Conferences and Carriers error in not advising that an executed Merchants Freight Contract was necessary to qualify for the $100.00 W rate.

Section 18(b)(3), 46 U.S.C. 817 makes it unlawful for a carrier in foreign commerce to "charge, demand or collect or receive a greater or less or different compensation for the transportation of property . . . than the rates and charges which are specified in its tariffs on file with the Commission. . . ." However, the Commission,

> . . . may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to . . . waive the collection of a portion of freight charges from a shipper where it appears that there is an error *in a tariff* of a clerical or administrative nature or an error due to inadvertence in failing to *file a new tariff*. (Emphasis mine.)

Statutes such as section 18(b)(3) requiring strict adherence to tariffs are themselves to be strictly construed. (See *Mueller v. Peralta Shipping Corp.*, 8 FMC 361 (1965) and cases cited therein.) Departures from the proscriptions of section 18(b)(3) should be permitted only under the express terms of that section itself, i.e., due to an error of a clerical or administrative nature in an otherwise properly filed tariff or an error due to inadvertence in failing to file a tariff. The error here was of neither kind. The tariff was filed and there was no clerical or administrative error in it. The error was in failing to notify the shipper that in order to obtain the rate quoted to him he must have signed a dual rate contract. Congress was quite specific in setting the outer limits upon departures from the rates fixed in filed and published tariffs. Those limits once set must, of course, be observed.

The application should be denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
November 11, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 515

PORCELLA, VICINI & CO., INC.

v.

U. S. ATLANTIC & GULF—SANTO DOMINGO CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

November 30, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on November 30, 1977.

It is Ordered, That applicant is authorized to waive collection of $22,024.60 of the charges previously assessed Procella, Vicini & Co., Inc.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 515 that effective October 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period October 1, 1976 through February 28, 1977, the contract volume rate from Atlantic Ports on 'Empty Wooden Barrels, S.U.', not over 14 cu. ft. each, minimum 1000 units is $4.75 each, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 515

PORCELLA, VICINI & CO., INC.

v.

U. S. ATLANTIC & GULF-SANTO DOMINGO CONFERENCE

Adopted November 30, 1977

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

The U. S. Atlantic & Gulf-Santo Domingo Conference seeks permission to waive collection of a portion of the freight charges on four shipments of "Empty Wooden Barrels, S.U., not over 14 cu. ft. ea." from Baltimore, Md., to Santo Domingo. The aggregate of the four shipments was 8471 units weighing 914,868 lbs. on which the total freight actually collected was $57,979.89. The four shipments moved on vessels of Seatrain Line under separate bills of lading. The first bill was dated September 9, 1976, and the last November 18, 1976. The rate sought to be applied is $4.75 per barrel. The applicable rate at the time of shipment was $7.35 per barrel. Permission is sought to waive collection of $22,024.60.

At a meeting of the Conference on August 26, 1976, it was agreed to extend the temporary rate of $4.75 on the commodity in question through June 30, 1977. The rate of $4.75 was due to expire September 30, 1976.[2] However, when the new page was filed the extension of the rate was, due to clerical error, omitted.[3] Subsequent to the shipments in question the error was discovered and the $4.75 rate was corrected by telex filing on November 22, 1976.[4] Unaware of the error, freight charges were assessed and collected on the basis of the $4.75 rate.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of

[1] This decision became the decision of the Commission November 30, 1977.
[2] U.S. & Gulf-Santo Domingo Conference Tariff FMC No. 1, 54th rev'd. page 27.
[3] 55th rev'd page 27 of FMC No. 1.
[4] 57th rev'd page 27 of FMC No. 1.

Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Thereafter, upon consideration of the documents presented by the Applicant, it is found that:

1. That there was a clerical error which resulted in the failure to extend the rate now sought to be applied.

2. That the waiver requested will not result in discrimination as between shippers.

Prior to applying for the waiver a new tariff was filed setting forth the rate upon which the waiver is to be based.

4. The application was filed within 180 days of shipment.

The application should be granted.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
November 9, 1977.

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 340(I)

NATIONAL STARCH & CHEMICAL CORP.

v.

HAPAG-LLOYD & UNITED STATES NAVIGATION, INC., AGENT

ON REVIEW OF DECISION OF SETTLEMENT OFFICER

December 5, 1977

This proceeding involves claims for overcharge of ocean freight on five shipments. Each of the shipments was described on the bill of lading as "Adhesive Glue Red Label". Respondent's applicable tariff contained a rate for "Adhesives, (Red Label)". Claimant seeks to have this rate applied to all five shipments.

The tariff rate in question applies on a "weight" basis only. Three of the shipments in question were rated at the applicable rate but the rate was applied on a "measurement" basis. On the other two shipments different rates were applied. The record does not show under which tariff item they were assessed.

The Settlement Officer denied the claims in question primarily on the grounds that documentation submitted in support of the claim was illegible. We determined to review and requested claimant to submit legible copies of the documentation. Claimant has submitted clear copies.

Review of the evidence now shows that the bills of lading,* and carrier due bills both show the shipments to have been adhesive glue red label and show the weights of the shipments to be as alleged by claimant. There is no evidence in the record to the contrary. Respondent has not answered in opposition.

The bill of lading is the *prima facie* evidence of what was shipped. There is no need to question the bill of lading in this instance since no one disputes the accuracy of the information contained therein. In any event, other documents substantiate the information. We think claimant has satisfied its burden of proof as to description and weight of the commodity shipped. Application of the pertinent tariff requires that the

*The Settlement Officer's concern that the bills of lading are incomplete because there is no receipt by the carrier is unfounded because each bill of lading bears the carrier's stamp of receipt showing date and number.

shipments be rated as "Adhesives, (Red Label)" on a "weight" basis. Accordingly, claimant is entitled to reparation.

One area of uncertainty remains before the amount of reparation can be determined. The Settlement Officer had observed that where claimant is seeking the benefit of a contract rate evidence should be adduced showing that the shipper indeed was eligible for such lower rate. We agree with this principle and have previously so stated. Claimant here seeks the contract rate but has not submitted any such evidence in this proceeding to show he is a contract shipper.

Accordingly, while we award reparation herein of the requested amount ($293) such award is conditioned upon submission by the claimant, within 30 days, of a copy of the contract evidencing its dual rate shipper status.

It is so ordered.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 399(I)

SIDNEY-WILLIAMS CO.

v.

MAERSK LINE AGENCY

NOTICE OF DETERMINATION NOT TO REVIEW

December 2, 1977

Notice is hereby given that the Commission on December 2, 1977, determined not to review the decision of the Settlement Officer in this proceeding served November 25, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 399(I)

SIDNEY-WILLIAMS CO.

v.

MAERSK LINE AGENCY

November 25, 1977

Complaint dismissed.

DECISION OF JAMES S. ONETO, SETTLEMENT OFFICER[1]

By complaint filed April 5, 1977, Sidney-Williams Company, an importer of general merchandise, alleges that charges in excess of those lawfully applicable for transportation in violation of section 18(b)(3) of the Shipping Act, 1916, were assessed by Maersk Line, a common carrier by water in the foreign commerce of the United States, on approximately four or five shipments of toys from Japan, Hong Kong, Taiwan, and Korea to Los Angeles sometime in August and September 1976. One thousand eight hundred and fifty-two dollars and sixty-nine cents are sought as reparation.

More particularly, the Sidney-Williams Company avers it had been shipping most of its toys from Japan, Korea, Hong Kong, and Taiwan on Orient Overseas Container Line and had been experiencing some problems in booking space on OOCL. In July 1976 complainant entered into negotiations with Maersk representatives for transportation of its imports on their vessels provided respondent's rates were the same as OOCL. Complainant alleges respondent's representatives indicated that their rates were competitive. It was not stated at the time that respondent was a member of the Japan/Korea Transpacific Freight Conference. Therefore, with the understanding that the rates of the respondent would be the same as OOCL, that is "non-conference rates," complainant agreed to specify the respondent as the carrier on its import orders. When the complainant's shipments were booked on respondent's line, it was quoted

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

as $63.00 (conference) rate per CBM from Korea which was higher than the complainant had expected.

Maersk Line asserts that its relationship with the Sidney-Williams Company commenced in July 1976 when discussions were held concerning the possibility of its carriage of complainant's toys from Taiwan/Hong Kong to Los Angeles. At that time respondent's rates on toys from those areas were competitive with those charged by OOCL. It was agreed that the complainant would specify respondent's line as carrier on future import orders. Shortly thereafter, respondent received notification of pending orders of the complainant from various Far East countries including Japan and Korea. This, it is alleged, was the first indication that complainant was importing from Japan and Korea. No question was asked regarding respondent's membership in the Transpacific Freight Conference of Japan and Korea. Moreover, respondent denies it was asked as to its competitiveness with OOCL or any other steamship company. Respondent concludes that if it was assumed, on the basis of the July meeting, that it was a non-conference operator from Japan or Korea, that it was not its fault.

The first question, and in the light of the result of this discussion, the only question presented is that of jurisdiction. This controversy is not one that comes within the purview of section 18(b)(3) of the Shipping Act, 1916, as enacted by Public Law 87–346, approved October 3, 1961.

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, except in accordance with such tariffs: . . . .

Discussing the philosophy of the Act, the Commission has said:

The Shipping Act is designed to place similarly situated shippers *and importers* on equal footing when using the facilities of our ocean borne foreign commerce. There is no place in this design for undue preference or unjust discrimination in the form of differing rates and charges to like users of those facilities. (Emphasis added.)[2]

Even as amended by Public Law 90–298, this section permits a common carrier by water to refund a portion of the freight charges only in the case of errors in a tariff of a clerical or administrative nature or in the case of errors due to an inadvertence in failing to file a new tariff. The legislative history of this provision in the House Report[3] describes the errors that would be rectified more particularly:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that (it) intends

[2] *Inter. Trading Corp., Inc. v. Fall River Line Pier, Inc.*, 8 F.M.C. 145 (1964).

[3] House Report No. 920, November 14, 1967 (to accompany H.R. 9473) on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges, Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

What is presented is not a question of "greater or less or different compensation for . . . transportation . . ." Neither is it a question of a clerical or administrative error or an error due to inadvertence in failing to file a new tariff. Rather the question appears to be one more properly sounding in contract and therefore resolvable by an appropriate *nisi prius* court.

By way of summation, therefore, the legality of the actions of a common carrier by water can only be judged against the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. A shipper and a carrier are free to negotiate whatever terms they may but until those understandings are fixed as specified by the Shipping Act, the Federal Maritime Commission is not involved. Accordingly, as a cause of action has not been stated, the parties must be left where they were found and the complaint is herewith dismissed.

(S) JAMES S. ONETO,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 552

GAYNAR SHIPPING CORP.
PERRY H. KOPLIK & SONS

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

December 28, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 28, 1977.

IT IS ORDERED, That applicant is authorized to refund $400.00 of the charges previously assessed Gaynar Shipping Corp. and Perry H. Koplik and Sons.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff the following notice:

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 552 that effective July 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1977, through July 12, 1977, the rate on 'Paper, waste' is $50.00 per 2,240 lbs. Minimum 20 WT per container, subject to all applicable rates, rules, regulations, terms and conditions of said rate and this tariff".

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 552

GAYNAR SHIPPING CORP.
PERRY H. KOPLIK & SONS

v.

SEA-LAND SERVICE, INC.

December 7, 1977

Application for permission to refund portion of freight charges granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Sea-Land Service, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916, has filed a timely (within 180 days from July 6, 1977, the date of the two involved shipments) application for permission to refund for the benefit of complainants Gaynar Shipping Corp. and Perry H. Koplik & Sons aggregate freight charges of $400.00 of $8,400.00 aggregate freight charges actually collected for transportation of freight from Charleston, S.C., to Leghorn, Italy.

Sea-Land's Bill of Lading No. 975718135–0 dated July 6, 1977, shows the shipper Perry H. Koplik & Sons, the freight forwarder Gaynar Shipping Corp. shipped freight prepaid on Sea-Land's vessel *Baltimore/Market 083e* from Charleston, S.C., to Leghorn, Italy, 2 House to House containers said to contain 58 bales of Wastepaper for Recycling. The gross weight was 82,410 lbs. as 89,600 lbs. The total charges were $2,100.00 (89,600 lbs. at $42.50 per 2,240 lbs. = $52.50 × 40 = $2,100.00) and paid to carrier by the shipper.

Sea-Land's Bill of Lading No. 975718138–3 dated July 6, 1977, shows the same shipper and freight forwarder as above and also the same vessel and destination. The freight, Wastepaper for Recycling, was in 6 House to House, 35′ containers, and was freight prepaid. The gross weight was 204,900 lbs. as 268,800 lbs. The total charges were $6,300.00 (268,800 lbs.

[1] This decision became the decision of the Commission December 28, 1977.

at \$52.50 per 2,240 lbs. = \$52.50 × 120 = \$6,300.00) and paid to carrier by the shipper. The two B/L charges total \$8,400.00.

The application for permission to refund \$400 of the \$8,400 gives the following facts in support:

> Effective May 9, 1977, special rates were established on Wastepaper in both Section 1 (France and Italy) and Section 2 (Spain) of Sea-Land Tariff 168–13. Special rate was \$50.00 W, minimum 20 WT per container thru June 30, 1977.
>
> On June 28, 1977, it was Sea-Land's intent to extend this special rate in Section 1 only thru July 7, 1977. However, due to a clerical error, this extension was made in Section 2 on proposal #4482.
>
> On July 13, 1977, we realized our error and immediately published a \$50.00 rate in Section 1 thru August 11, 1977.
>
> The shippers on whose behalf we are filing this application, moved their shipments on July 6, 1977, and would have been afforded a \$50.00 rate had it not been for our error."

The tariff applicable herein is Sea-Land Tariff 168–B–FMC–73, Item 5860. Under that tariff and similar facts in Special Docket No. 551, Sea-Land was granted permission in an Initial Decision served December 5, 1977, to waive collection of portion of freight charges. The instant application also contains the statement pointed out in Special Docket No. 551, "There are additional shipments which moved via respondent during the same period of time at the rates set forth in (1) above. Special Docket Applications will be filed for relief concurrent with this application."

Upon consideration of the above, the Presiding Administrative Law Judge deems the application for permission to refund \$400 of the \$8,400 freight charges collected comports with Rule 92, Special Docket Applications, Rules of Practice and Procedure, and section 18(b)(3) of the Shipping Act, referred to above, and the error asserted and explained is within the contemplation of the rules and statutes applicable.

Therefore, upon consideration of the documents presented herein, it is found:

1. There was an error of a clerical or administrative nature (corrected by effective tariff before this application was filed), which resulted in payment of an overcharge.
2. The permission to refund requested overcharge will not result in discrimination as between shippers.
3. The application, having been timely filed and having shown acceptable cause, should be granted.

Wherefore, it is,

Ordered,

The application be and hereby is granted.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 7, 1977.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[General Order 39; Docket No. 77–22]

December 8, 1977

Part 507—Actions to Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Trade of the United States

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission hereby enacts rules and regulations pursuant to section 19(1) (b) of the Merchant Marine Act of 1920 (46 U.S.C. 876(1) (b)) in order to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States which result from discriminatory laws of the Government of Guatemala. These rules require Guatemalan-flag carriers and their associates to pay an Equalization Fee designed to eliminate the discriminatory diversion of cargo to those carriers caused by the Guatemalan laws. These rules also require such carriers to file Summary Reports of Cargo Carryings in the U.S. to Guatemala Trade and file an Equalization Fee Payment Guarantee with the Federal Maritime Commission.

EFFECTIVE DATE: To become effective January 13, 1978.

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney
Secretary
Federal Maritime Commission
Room 11101
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

Every sovereign nation has the right to control its commercial intercourse with other nations. Therefore, participation by the citizens of another nation in the foreign commerce of the United States is a privilege *which may be terminated, conditioned, or limited.*

However, the United States does not generally exercise such power because it recognizes that reciprocal privileges of commercial participation are preconditions to any substantial commercial intercourse. The United States is committed to the general idea that unrestricted participation in international trade is in the best interest of both the United States and her trading partners. It is believed that free trade can be relied upon to stimulate the most effective and efficient production and distribution of goods and services, redounding to the benefit of all involved. This commitment to the ideals of free trade is a logical extension of our national belief in market economy and competition in the marketplace.

These principles of free trade have found expression in the General Agreement on Tariffs and Trade (GATT), the antitrust laws, and the shipping laws of the United States. Generally, the ports of the United States are therefore open to the vessels of all nations who wish to compete to carry our commerce.

This commitment to the idea that all persons should be allowed to compete in the international marketplace, does not, however, constitute an abandonment of the power of the United States over its own commerce. Quite the contrary, the power to control commercial interaction with other nations is a power which must be preserved for use whenever the goods and services of the United States and her citizens are unnaturally handicapped in the international marketplace by the acts of other nations. When the acts of a foreign nation unfairly tip the delicate scales of competition in favor of their own citizens or commerce to the detriment of the citizens or commerce of the United States, it is only right and just that the scales be rebalanced. This may be done by persuading the other state to abandon or cease its actions or by balancing the detriments so as to negate any artificial advantages for the citizens or commerce of the foreign nation.

The power to regulate commerce of the United States is vested with the Congress by Article I, Section 8, Clause 3 of the Constitution. It is well recognized that the power of Congress over foreign commerce is absolute and may be used for the purposes of retaliation. These powers may, of course, be delegated by Congress.

Section 19(1) (b) of the Merchant Marine Act, 1920 (46 U.S.C. section 576, hereinafter referred to as section 19), is the delegation of such authority to the Federal Maritime Commission (Commission). Section 19 authorizes and directs the Commission to make rules and regulations affecting shipping in the foreign trade of the United States in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade of the United States and which arise out of, or result from, foreign laws, rules or regulations, or from competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country.

The types of conditions which the Commission has found to be unfavorable to shipping in the foreign trade of the United States are generally set forth by Commission General Order No. 22 (46 C.F.R. 506). Among these are conditions which preclude or tend to preclude vessels in the foreign trade of the United States from competing in a trade on the same basis as any other vessel, and those which are discriminatory or unfair as between carriers. (46 CFR 506.3(a) and (d)).

Republic of Guatemala Decree No. 41–71 establishes a penalty of 50 percent of the ocean freight charges paid on any goods imported into Guatemala which are duty free under the Guatemalan Industrial Development Laws or the Central American Agreement on Tax Incentives for Industrial Development and which are not carried on "Guatemalan carriers." More than 600 importing industries, accounting for the vast preponderance of Guatemalan imports from the United States, qualify for such duty free status for their imports under the Guatemalan Industrial Development Law or the Central American Agreement on Tax Incentives for Industrial Development.

Decree No. 41–71 defines the term "Guatemalan carriers" as those carriers owned by the State (Guatemala), or in which the State has a majority interest, or those private enterprises of which the capital is at least 75 percent Guatemalan and their vessels are of Guatemalan registry and have a capacity of no less than 2,000 tons. Guatemalan carriers may contract for the services of foreign carriers (known as "associated carriers"), in which case, duty free goods may be transported by the associated carriers to Guatemala without being subject to the aforementioned 50 percent penalty.

Coordinated Caribbean Transport, Inc., (CCT) is such an "associated carrier". Pursuant to Article 3 of Guatemalan Decree 41–71, CCT and Flota Mercante Gran Centro Americana, S.A. (a Guatemalan-flag carrier known as Flomerca) have entered into an agreement of "association" whereby CCT pays Flomerca 2.25% of all the revenue CCT earns on cargo carried to Guatemala in return for the privilege of having CCT cargo exempted from the charges provided for in Article 3 of Decree No. 41–71.

On July 1, 1975, Delta (Delta Steamship Lines, Inc.) filed a petition with the Commission seeking relief under section 19, Merchant Marine Act, 1920, from the effects of Decree No. 41–71. Delta also filed a complaint under section 301 of the Trade Act of 1974 with the Special Representative for Trade Negotiations (STR).

On July 25, 1975, the Commission served fact finding Orders under section 21 of the Shipping Act, 1916 (46 U.S.C. 820), on all carriers serving in the trade between the U.S. Atlantic and Gulf Coasts and Guatemala. The STR also held hearings on the Delta complaint on September 25 and 26, 1976.

Based upon the information gleaned from the section 21 Orders, the hearings before the STR, and other information available to the Commis sion, the Commission ascertained that cargoes subject to Decree 41–71 carried by U.S. vessels not associated with Guatemalan flag carriers were being fined by the Government of Guatemala. Furthermore, the preponderance of goods transported from the United States of Guatemala were subject to the Decree 41–71 penalties. Shippers were also discouraged from shipping any cargo on U.S. vessels because they could not determine which cargo was subject to Decree 41–71 and which cargo was not.

Those circumstances resulted in the diversion of cargo from U.S. and nonassociated carriers to the carriers of Guatemala and their associates. Furthermore, delays in the transportation of goods had occurred because of the limited capacities of the Guatemalan carriers. Clearly, U.S. carriers had been discriminated against and potential entrants into the U.S. Guatemalan trade had been discouraged if not precluded.

The Commission, therefore, found that not only was Decree 41–71 discriminatory on its face but that its implementation had created conditions unfavorable to shipping in the foreign trade of the United States.

By letter dated December 4, 1975, the Chairman of the Commission notified the Secretary of State of the Commission's findings in this matter. The Chairman's letter asked the Department of State to seek a diplomatic resolution of the problem, and advised that, absent such resolution by February 14, 1976, the Commission would have no recourse but to promulgate a final regulation that would impose countervailing fees on Guatemalan carriers and associated carriers transporting goods from the United States which are to be imported duty free into Guatemala.

On February 4, an earthquake devastated Guatemala and the Commission agreed, at the request of the Department of State, to postpone the implementation of this regulation.

In light of the lack of progress in the diplomatic negotiations with the Government of Guatemala, the Chairman of the Commission notified the Secretary of State on August 16, 1976, that the Commission had decided to issue a proposed rule pursuant to the authority of section 19(1) (b) of the Merchant Marine Act, 1920.

Issurance of this rule was again postponed on the basis of assurances by representatives of the Guatemalan flag lines that a satisfactory resolution of the problem would be forthcoming. However, this contemplated resolution failed to materialize and negotiations reached an impasse. Therefore, a proposed rule was issued and interested parties were given an opportunity to comment.

Comments to the proposed rule were received from Delta Steamship Lines, Inc. (Delta), Crowley Maritime Corporation (Crowley), Sea-Land Service, Inc. (Sea-Land), Transportation Institute, Dow Chemical Latin America (Dow), the Embassy of Guatemala, and Marine Chartering Co., Inc. (Marine Chartering).

Delta commented that the Government of Guatemala has again been fining the importers of exonerated cargoes carried by Delta's vessels. Delta asserts that the Guatemalan lines have not only failed to resolve the problems in the U.S.-Guatemalan trade (which they had assured the Commission they would do, in return for holding any section 19 action in abeyance) but that the Guatemalan Lines had deliberately caused the imposition of fines against cargo carried by U.S. vessels to be reactivated.

Delta also points out that during the comment period of these rules, Decree No. 26–77 was introduced in the Congress of Guatemala. Decree No. 26–77, which has yet to be transmitted by the Guatemalan Congress to the President of Guatemala for signature, would repeal Decree 41–71 but retain a similar discrimination against U.S. vessels. Instead of penalizing the users of U.S. carriers by imposing a fine of 50 percent of the ocean freight rate, Decree No. 26–77 would punish users of U.S. carriers by denying them the duty (tax) free benefits on the imports which are provided by their industrial development laws. In light of the failure of both commercial and diplomatic negotiations, Delta asserts that the Commission has no recourse but to proceed with the promulgation of countervailing regulations.

Crowley states that their affiliated companies, namely Gulf Caribbean Marine Lines, Inc. and Trailer Marine Transport Corporation, have had numerous audiences with officials of the Government of Guatemala and Guatemalan flag lines in the previous year in an attempt to participate in the movement of cargo from U.S. to Guatemala. Crowley states:

> We have been totally unsuccessful in securing the desired waivers of penalties (50% of ocean freight) imposed by Guatemalan Decree 41–71. Our most recent meeting with Guatemalan authorities was during the week of July 18.

Crowley, like Delta, asserts that the new Guatemalan Shipping Law 26–77 would be, if finally adopted, just as discriminatory to United States flag line carriers as Decree 41–71. Crowley, therefore, also supports promulgation of countervailing fees on Guatemalan carriers and their associates.

Sea-Land fully supports the Commission's proposed rulemaking to establish countervailing fees on "favored" Guatemalan carriers. However, Sea-Land suggests that the Equalization Fee be assessed against all cargo carried by Guatemalan carriers and refunds be given for cargo identified and proven to be *not* exempt. Sea-Land also suggests that the Commission require the Equalization Fee to be passed on to the shippers in full.

On the whole, we find Sea-Land's comments to be well made. Since we have found that most of the cargo moving to Guatemala does receive the benefits of the industrial incentive laws and that the Government of Guatemala keeps the identity of importers who are granted duty free status from being revealed, we are amending the final rules to require the "favored carriers" to pay an Equalization Fee on all cargo, and make a specific request for a refund of the Equalization Fee for any shipment which does not enjoy a duty free status under the industrial incentive laws. Refunds will not be granted for cargoes which have been subjected to penalties under Decree No. 41–71 in the past and will be granted only for cargoes which are clearly ineligible for duty free status under the industrial development incentive laws.

The Equalization Fee is expected to be passed through the carrier to the shipper. The Commission recognizes that the "favored carriers" may attempt to absorb the Equalization Fee but does not expect such an absorption to occur. The Commission will not, at this time, require any amendments to any carrier's tariff. If, however, it appears that the Equalization Fee, by itself, does not stem the artificial diversion of cargo, further measures will be taken.

The Transportation Institute, a maritime industry research organization comprised of 140 member shipper companies also supports issuance of countervailing regulations. The Transportation Institute states that:

> Because U.S. shippers often could not know the tax status of their exports until they were landed, and because the same commodity was sometimes subject to the penalty and at other times exempt, the Decree created chaos and uncertainty in the U.S.-Guatemalan trade and was tantamount to 100 percent exclusion of U.S. carriers.

It also asserts that the Decree has caused delays in transportation and discourages new entrants into that trade.

The Transportation Institute therefore concludes that countervailing regulations are required, otherwise, other nations will be encouraged to establish similar discriminatory laws.

Dow also supports the proposed rules alleging that Decree 41–71 has caused it to suffer economic loss, lost business and other undue hardships. In support of these allegations, Dow states,

> A. To date, Dow cargo routed to Guatemala on U.S. flag vessels have been fined more than U.S. $12,000 by the Guatemalan government.
>
> B. To avoid such fines, Dow has been required to ship on vessels of Guatemala flag lines, *i.e.*, Flomerca and Armagua. These lines offer relatively poor sailing schedules due to their shortage of vessels and the fact that their existing vessels are comparatively old. This poor service has caused us to lose business due to our inability to ship our products on a timely basis.
>
> C. Dow has suffered severe economic loss due to the fact tha these lines are generally restricted to break-bulk service. We have consistently sought containerized service from these lines so that our losses and damages could be controlled and, hopefully, reduced. To date, Flomerca still does not offer container service. Only recently, Armagua began to offer containers in limited numbers to Santo Tomas. This limited service is hardly adequate to cover Dow's needs, much less other U.S. shippers. Due to Decree 41–71, we continue to suffer financial losses as a result of lost and damaged cargo, because we must ship on "favored" carriers, using what we consider inadequate service.
>
> D. Two "favored" carriers do operate Ro/Ro ships from Miami. So as to take advantage of this more frequent service offered by these "favored" carriers, we must move our cargo to Miami from our principal manufacturing sites in Freeport, Texas (freight premium $29/ton); Plaquemine, Louisiana (freight premium $13/ton); or Midland, Michigan (freight premium $35/ton).
>
> This service is obviously not the most economical or timely. However, these Miami services do offer frequent sailings and house-to-house containerized service. This allows Dow the alternative of shipping break-bulk and possibly suffering severe losses or

damaged cargo, or paying premiums and shipping via Miami. By comparison, two U.S. carriers, Sea-Land and Delta, offer containerized service from the Gulf, and Sea-Land offers service from the North Atlantic. Due to Decree 41–71, however, Dow is unable to utilize these superior alternatives without subjecting Dow cargoes to 50% fines by the Guatemalan government.

E. The "favored" carriers of Guatemala have no regularly scheduled service from Europe and the Far East. Because of Decree 41–71, Dow and other U.S. exporters are restricted to Guatemalan flag lines (and associates), while Dow's foreign competitors are free to ship to Guatemala on *any* line that offers acceptable rates and service. As a result, Dow continually faces loss of business to foreign competition.

F. While Dow and its customers have continually sought waivers so that Dow could better service the Guatemalan market through a variety of carriers, these requests have *always* been denied. When Dow has shipped on U.S. flag carriers and those cargoes were fined, Dow has had to absorb this additional expense.

Dow concludes that it is unfortunate but nevertheless necessary that countervailing regulations are required to provide U.S. flag lines equal access to cargo being shipped to Guatemala.

Marine Chartering, as managing agents of Lineas Maritimas de Guatemala, S.A., submitted comments requesting the postponement of this rulemaking because of the passage of Decree 26–77. Marine Chartering asserts that with Decree 41–71 no longer in effect, Commission action will be no longer necessary.

The Embassy of the Government of Guatemala also submitted a comment. The Embassy forwarded the following message from the President of Flomerca:

> Please inform FMC that proposed Law modifying Decree 41–71 is pending approval of Congress of the Republic and therefore we request to postpone enactment of proposed actions against Guatemalan shipping lines.

The Embassy points out that new shipping law (Decree 26–77) now with the Congress of Guatemala replaces Decree 41–71 with the purpose of eliminating any conflict with section 19, Merchant Marine Act of 1920.

Contrary to the assertions of Marine Chartering, Decree 26–77 has not yet been forwarded to the President of Guatemala for signature. However, even if that Decree were to be implemented, many of the problems would still remain. One type of discrimination would merely be substituted for another which would probably also require countervailing action by the Commission.

The comments of Delta, Dow, Crowley, Sea-and and the Transportation Institute firmly establish that the conditions unfavorable to shipping in the foreign trade of the United States have not been abated despite our repeated objections to the Government of Guatemala. Since our remonstrances have been met with refusal, the Commission will exercise the authority delegated by Congress to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States which have been and continue to be resulting from the laws and acts of the Government of Guatemala.

This rule imposes an Equalization Fee on all Guatemalan vessels and the vessels of their associated carriers transporting goods from the United

States to Guatemala which may be imported into Guatemala duty free under the Guatemalan Industrial Development Laws or the Central American Agreement on Tax Incentives for Industrial Development. This Equalization Fee, amounting to 50 percent of the freight charges, is calculated to offset the penalty imposed under Decree No. 41–71 for the transportation of such goods on carriers other than Guatemalan carriers or associated carriers. Furthermore, the Commission will, by notice in the *Federal Register,* adjust the level of the Equalization Fee to any extent necessary to adjust or meet the level of discrimination imposed by the Republic of Guatemala. Thus, the Equalization Fee is designed to eliminate the discriminatory diversion of cargo to certain carriers in the U.S. to Guatemala trade resulting from Decree No. 41–71, and to place all carriers in those trades on an equal competitive footing. Guatemalan carriers and associated carriers which are authorized under Decree No. 41–71 to transport duty free goods from the United States to Guatemala will be designated as "favored carriers."

Pan American Mail Line, Inc., (Pan Am) has notified the Commission that their affiliations with Flomerca have ceased and that the joint Pan Am/Flomerca service known as Flomerca Trailer Service is now being exclusively operated by Pan Am. Pan Am d/b/a Flomerca Trailer Service has therefore requested that Flomerca Trailer Service be deleted from the list of "favored carriers".

The Commission is not convinced, however, that Pan Am d/b/a Flomerca Trailer Service is not still associated with Flomerca and receiving benefits under Decree 41–71. We are therefore issuing an Order under Section 21 of the Shipping Act, 1916, directing Pan Am to produce such information as will allow the Commission to determine whether their "associated carrier" status has indeed ceased. If an analysis of Pan Am's response to the section 21 Order shows that Pan Am d/b/a Flomerca Trailer Service is no longer receiving the benefits and privileges of an associated carried under Decree 41–71, then Flomerca Trailer Service will be deleted from the list of "favored carriers".

A "favored carrier" must file an Equalization Fee Payment Guarantee with the Commission to ensure that all Equalization Fees will be paid. The Equalization Fee Payment Guarantee must be in an amount equal to one-sixth of the total freight charges earned by the favored carrier on cargo which it loaded in the United States for unloading in Guatemala during the preceding twelve months, or equal to $75,000, whichever is greater. It is believed that this amount would be adequate to cover the total Equalization Fees which any favored carrier might accrue and not pay in a timely fashion.

A procedure is established for the favored carrier to report data pertaining to each voyage from the United States to Guatemala by each vessel of the favored carrier, including the freight charges on which Equalization Fees must be paid. Such reports would have to be filed with the Commission within four calendar days following departure of each vessel from the United States and be accompanied by the Equalization Fee arising from that particular voyage. Failure to comply with the requirements of this rule could result in the detention of any vessel owned, operated, or carrying cargo for the account of such "favored carrier."

The final rules allow for any Equalization Fee Payment Guarantee (certified check or Surety Bond) to be used to satisfy any unpaid Equalization Fee which is delinquent for more than 15 days. The time period of 15 days has been adopted because the Commission is of the opinion that a longer period would merely encourage delinquency and that 15 days is long enough for the carriers to clear up any unforeseen difficulties in paying an Equalization Fee.

Therefore, pursuant to Section 19(1) (b) of the Merchant Marine Act, 1920 (46 U.S.C. section 876(1) (b)) and Sections 21, 29, 32, and 43 of the Shipping Act, 1916 (46 U.S.C. section 820, 828, 831, 841a), the Commission hereby enacts Part 507, Title 46 CFR.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*The text of the amendment is reprinted in 46 C.F.R. 507.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 522

HERCULES INTERNATIONAL TRADE CORP., LTD.

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

December 14, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 14, 1977.

It is Ordered, That applicant is authorized to refund $1,077.05 of the charges previously assessed Hercules International Trade Corp., Ltd.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 522 that effective February 9, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 9, 1977, through April 15, 1977, the rate on 'Ethyl Cellulose' is $131.00W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 522

HERCULES INTERNATIONAL TRADE CORP., LTD.

v.

PACIFIC WESTBOUND CONFERENCE

November 22, 1977

ERRATA

The following corrections should be made in the initial decision in this proceeding served November 21, 1977:

1. Delete footnote 4 on page 1.
2. The last sentence on page 4 amended to read: "The application should be granted in the amount of $1,077.05."

(S) JOHN E. COGRAVE,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 522

HERCULES INTERNATIONAL TRADE CORP., LTD.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted December 14, 1977

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

The Pacific Westbound Conference seeks permission to refund a portion of the freight charges on a shipment of Ethyl Cellulose from Norfolk, Virginia, to Yokohama, Japan. The shipment weighing 21,373 lbs. and measuring 867 cu. ft. was carried aboard Japan Line's *MV Pacific Arrow* under a bill of lading dated April 14, 1977.[2] The rate applicable at the time of shipment was $121.00 per kilo ton or cubic meter whichever produces the greater revenue and on this basis aggregate freight charges of $3,216.18 were collected.[3] The rate sought to be applied is $131.00 per kilo ton subject to a minimum of 36,000 lbs. which would have resulted in aggregate freight charges of $2,139.13. Permission is sought to refund $1,077.05.[4] As they are set forth in the application, the circumstances said to justify the refund are:

Per PACIFIC WESTBOUND CONFERENCE INTERMODAL TARIFF #8, FMC–15, ICC–1

Original and 1st revised page 511, item 581–3220–30 clearly stated rate on basis kilo ton (2204.62) only; when 2nd revised page 511 of tariff filed (effective 2/9/77) kilo ton basis omitted from page in error by tariff agent and not corrected on proofreading. Such omission caused illegal rate increase on less than 30 days advance notice. Japan Line, Ltd. became party to the rate filing on 2/21/77. The shipment in question originated from Norfolk 3/28/77 and laden on board vessel 4/14/77. The error in tariff filing noted between time cargo originated Norfolk and time laden on board vessel Oakland—and was corrected by 7th revised page 511, effective 4/15/77. Shipper and carrier were

[1] This decision became the decision of the Commission December 14, 1977.

[2] The shipment moved by rail from Norfolk to Oakland under a rail bill of lading dated March 8, 1977.

[3] The actual rate assessed was $131.00 per cu. meter.

[4] The correct figure is of course $77.05. $3,216.18 minus $2,139.13 leaves $77.05.

unaware of this inadvertant, erroneous error until shipment covered by this Special Docket was already enroute in joint rail/water service. This shipment was cause for discovery of error and its immediate correction. Since incorrect rate was not a result of Conference action and was effected on less than 30 days notice shipper is entitled to freight assessment based on kilo ton, minimum 36,000# and not on kilo ton/cubic meter, whichever creates greater revenue.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was a clerical error which resulted in the failure to extend the rate now sought to be applied.

2. The refund requested will not result in discrimination as between shippers.

3. Prior to applying for the refund a new tariff was filed setting forth the rate upon which the refund is to be based.

4. The application was filed within 180 days of shipment.

The application should be granted but only in the amount of $77.05.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
November 21, 1977.

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 519

BUCKLEY & FORSTALL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION FOR COMBI LINE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

December 14, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 14, 1977.

It is Ordered, That applicant is authorized to refund $116.04 of the charges previously assessed on the condition that the parties, on or before February 16, 1978, either amend the complaint to substitute M. Braunschweig Co. as the nominal complainant and supply the certification required by the Rules of Practice or Buckley & Forstall, Inc., submit an affidavit that it is acting as agent for M. Braunschweig and will remit the refunded monies to the latter.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 519 that effective March 11, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from March 11, 1977 through April 1, 1977, the rate on 'Coffee Sweepings, packed, including Green Coffee rejected by USDA' is $96.75W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 60 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 519

BUCKLEY & FORSTALL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION FOR COMBI LINE

December 5, 1977

ERRATA

Since the issuance of the initial decision, applicant has informed me that there was a typographical error in the application. The figure $1,144.38 should have been $1,044.38. This necessitates the following changes in the initial decision:

1. On page 1, next to last sentence, change $1,144.38 to $1,044.38.
2. Delete footnote 4 on page 1.
3. On page 3 delete "($16.04)."
4. On page 4 change $16.04 to $116.04.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 519

BUCKLEY & FORSTALL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION FOR COMBI LINE

Adopted December 14, 1977

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

The Gulf European Freight Association, for Combi Line, seeks permission to refund a portion of the freight charges on a shipment of green coffee sweepings from New Orleans, Louisiana, to Antwerp, Belgium. The shipment weighing 24,180 lbs. moved on the Combi Line vessel *Captain Lygonos* under bill of lading No. 20, dated March 25, 1977. The rate applicable at the time of shipment was $107.50 W[2] and on the basis of that rate Combi Line collected from M. Braunschweig Co. aggregate freight $1,160.42. The rate sought to be applied is $96.75[3] under which the aggregate freight would be $1,144.38. Permission to refund $116.04 is requested.[4]

The circumstances which are said to support the refund as they are set out in the application are:

At a meeting of March 1, 1977, the Gulf European Freight Association agreed to file a rate of $96.75 W on Coffee Sweepings, packed, including Green Coffee rejected by the U.S.D.A., effective as of March 11, 1977. (See Page 1 of Minutes of G.E.F.A. Meeting of March 1, 1977, filed with the Federal Maritime Commission.)

The office of the Gulf Associated Freight Conferences, which files all tariff rates for the Gulf European Freight Association failed to file the appropriate tariff correction.

At time of shipment, the shipper was billed at the tariff rate of $107.50 W, and the amount of $1160.42 was paid. However, the shipper had already been informed that the rate on the commodity in question would be reduced to $96.75 W as of March 11, 1977, and he seeks refund in the amount of $116.04.

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[1] This decision became the decision of the Commission December 14, 1977.

[2] Gulf European Freight Association Tariff 2 (FMC 2)—15th Rev. Page 55.

[3] Gulf European Freight Association Tariff 2 (FMC 2)—16th Rev. Page 55.

[4] The $116.04 figure is of course wrong. The correct figure is $16.04, i.e., $1,160.42 minus $1,144.38 leaves $16.04.

When the error was discovered on April 1, 1977, the office of the Gulf Associated Freight Conferences immediately filed the rate of $96.75 W by telex, effective as of April 1, 1977.

Combi Line therefore requests permission to refund $116.04 to Buckley & Forstall, Inc.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was a clerical error which resulted in the failure to extend the rate now sought to be applied.
2. The refund requested will not result in discrimination as between shippers.
3. Prior to applying for the refund a new tariff was filed setting forth the rate upon which the refund is to be based.
4. The application was filed within 180 days of shipment.

From the foregoing it would appear that the application should be granted, however, one requirement has not been met. The nominal complainant here is Buckley & Forstall, Inc., and permission is sought to refund $116.04 ($16.04) to the complainant. Yet the application itself shows that Combi Line collected the freight charges from M. Braunschweig Co. in Antwerp. All special docket applications seeking to refund freight monies must be accompanied by a certification that the person to whom the refund is to be made actually paid the freight charges. However, since the application is in all other respects proper, rather than deny the application outright 60 days will be allowed to afford the parties an opportunity to either amend the complaint to substitute M. Braunschweig Co. as the nominal complainant and supply the necessary certification, or to allow Buckley & Forstall, Inc., to submit an affidavit

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

that it is acting as agent for M. Braunschweig and will remit the refunded monies to the latter.

The 60 days here granted shall run from the date of service of this decision and if the parties comply with the conditions set forth above the application should be granted but only in the amount of $16.04.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
November 21, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–36

OCEAN DRILLING & EXPLORATION CO.

v.

KAWASAKI KISEN KAISHA LTD.

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

Accordingly Kawasaki Kisen Kaisha is hereby ordered to pay to Ocean Drilling and Exploration Co. the sum of $8,401.45 with interest at 6% to begin within 45 days of the date of service of this decision unless the full amount is paid prior thereto, provided, that within 15 days of the date of service Ocean Drilling submits data demonstrating the correctness of the claimed amount. Failing this the amount to be refunded shall be $8,366.51.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 77–36

OCEAN DRILLING & EXPLORATION CO.

v.

KAWASAKI KISEN KAISHA LTD.

December 20, 1977

Respondent found to have overcharged complainant $8,401.45. Reparation awarded..

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

This complaint by Ocean Drilling & Exploration Co. alleges that Kawasaki Kisen Kaisha Ltd. (KKK) overcharged Ocean Drilling on some shipments of "Oilwell Equipment." Claims for the alleged overcharges were filed with Kerr Steamship Company, Inc., the agent of KKK in New Orleans, Louisiana. These claims were rejected by Kerr on the basis of a rule in the Far East Conference Tariff No. 26 (FMC No. 8) which limits the filing of overcharge claims to not later than six months from the date of shipment. With the rejection of its claims Ocean Drilling filed the complaint here requesting that the overcharge claims be decided pursuant to the shortened procedure outlined in Subpart K of the Commission's Rules of Practice and Procedure (46 CFR 502.181).

The complaint was served on Kerr as the agent for KKK. In the notice accompanying the complaint KKK was told that should it consent to the shortened procedure an "answering memorandum" had to be submitted within 25 days of the date of service of the complaint. By the same notice KKK was informed that if it did not agree to the shortened procedure an answer to the complaint had to be filed within "20 days after the date of service stamped on the complaint unless additional time is permitted under Rule 64. . . ."[2] KKK neither agreed to the shortened procedure

[1] This decision became the decision of the Commission January 11, 1978.

[2] Rule 64 allows 30 days to answer if a respondent resides in Alaska or beyond the Continental limits of the United States.

nor filed an answer to the complaint and on September 21, 1977, I issued an *Order to Show Cause Why Default Judgment Should Not be Entered.* In that order I gave KKK until October 15, 1977, to either (1) file an answer to the complaint together with an affidavit stating the reasons for failing to file a timely answer, or (2) furnish a statement that it did not dispute the allegations and did not object to an award of reparations on the basis of those allegations. Failure to do either was deemed to be an admission that KKK did not intend to defend against the allegations and did not object to the entry of a default judgment. The October 25th deadline passed with no response from KKK.

At this point with unsupported allegations of the complaint before me, I issued on October 28, 1977, pursuant to Rule 64 an Order for Further Proof in which Ocean Drilling was to furnish such documentary proof in support of the complaint as was in its possession. Then on November 7, 1977, I received a letter from Kerr referring to my order of September 20th and stating:

> We can only reiterate our refusal to refund the disputed amount: Existing FEC tariff rules do not permit such refunds on claims presented later than six months after shipment, and any departure from these rules of the FMC-approved agreement would be in violation of the Conference Agreement to which our Principals, Kawasaki Kisen Kaisha are party.

The letter closes with apologies for the delay in response "which was entirely unintentional." [3]

At an extension of time Ocean Drilling on November 28, 1977, complied with my order to furnish further proof. In response to that order Ocean Drilling furnished:

(1) Copies of bills of lading Nos. 3 and 4 dated July 13, 1975, issued by Kawasaki Kisen Kaisha.

(2) Copies of the export declaration covering the shipments.

(3) A copy of Far East Conference Tariff No. 26, Third Revised Page 518 listing a project rate to Kobe, Japan on Oil Well Drilling Rigs Parts and Accessories as covered by Item 982 1005 00.

(4) A copy of a letter from Kerr dated February 18, 1977, stating that it would settle the overcharge claims against them on the basis of $118.45 W/M.[4]

The complaint states that under KKK bills of lading 3 and 4 shipments described on those bills as 57 packages "Oilwell Equipment" weighing 247,767 pounds and measuring 9.175 cubic feet moved from Houston, Texas, to Kobe, Japan, aboard the KKK vessel *Navada Maru.* KKK assessed the following freight charges on the shipments:

[3] This response is quite simply evasive. No reason is given for the total lack of response to the complaint in this case nor is the "unintentional delay," whether it is in response to the complaint or to my order, in any way explained. Finally Kerr itself has appeared in a number of Commission proceedings and should be familiar with the proper method of dealing with a formal complaint against it.

[4] The record does not, of course, show just what prompted Kerr to later revoke the six-month rule. Possibly it was a refusal by the Conference or KKK to honor the settlement offer.

B/L 3:	*Ocean Freight*	*Rate*	*Amount*
	26,690 lbs.	152.65/2000 lbs.	$ 2,037.11
	2,009 cu. ft.	152.65/40 cu. ft.	7,666.85
	H/L Charges		
	26,290	27.25/2000 lbs.	358.30
	20,510	26.00/2000 lbs.	266.83
TOTAL			$10,329.09
B/L 4:			
	Ocean Freight	*Rate*	*Amount*
	46,064 lbs.	152.65/2000 lbs.	$ 3,515.85
	6,322 cu. ft.	152.65/40 cu. ft.	24,126.33
	H/L Charges		
	58,000 lbs.	43.40/2000 lbs.	1,258.60
	E/L Charges		
	3,336 cu. ft.	7.45/40 cu. ft.	621.33
	9,900 lbs.	7.45/2000 lbs.	36.88
	284 cu. ft.	17.40/40 cu. ft.	123.54
TOTAL			$29,682.53

On December 9, 1976, Ocean Drilling through its freight auditing agent filed overcharge claims 3905 and 3906 with respondent requesting a refund in the amount of $8,401.45 on the ground that the freight charges were not in order. The complainant goes on to allege that:

> Respondent by its letter of April 19, 1977, to complainant's freight audit agency ignored the issue of the claims merits and did not request additional proof in support of the claims, but denied the claims on the basis of a technical tariff rule which limits the filing of overcharge claims to not later than six months after date of shipment.[5]

Ocean Drilling then goes on to allege that "tariff Item 7(b) is in violation of Paragraph 502.302 Title 46 which provides for a two-year statute of limitations.[6] Finally it is alleged that the respondent applied an improper rate ($152.65W/M) to the shipments of Oil Drilling Equipment and that the proper rate should have been $118.45 W/M. A violation of section 18(b)(3) is alleged and reparation in the amount of $8,401.45 is sought.[7]

There are only two issues presented by the complaint: (1) What was the proper rate for the shipments in question, and (2) Does the "six-month" rule act to bar an award of reparation on a complaint filed within the two-year statutory period of limitation?

To deal with the latter first. It is almost inconceivable that anyone would at this late date invoke the six-month rule as ground for refusal to

[5] Ocean Drilling has unfortunately used the term respondent to mean both Kerr and KKK so it is not possible to tell whether it was Kerr or KKK which invoked the "six-month rule." Since all of the correspondence of record has been with Kerr it seems more than probable that it was Kerr which invoked the rule on April 19, 1977. This does not explain its offer to settle on February 18, 1977.

[6] This reference is to the Commission's Rules of Practice and Procedure. The two-year statute of limitations is written into law in Section 22 of the Shipping Act, 1916, (46 U.S.C. 821).

[7] Using $118.45 rate I compute the total charges at $31,644.51. Subtracting this from the total charges assessed, $40,011.30, leaves an overcharge of $8,366.79. Thus it would appear that there has been an overclaim of $34.66. However, rather than reduce the claim by that much, complainant will be given an opportunity to supply its on computations showing that the amount claimed is proper.

properly respond to formal Commission process. That no mere conference rule can work to oust the Commission of its statutory jurisdiction should, even without case precedent, be obvious even to the most oblivious. However there is precedent. See e.g., *Time Limit on the Filing of Overcharge Claims,* 10 F.M.C. 1 (1966); *Proposed Rule—Time Limit on Filing Overcharge Claims,* 12 F.M.C. 298 (1969).[8]

The bills of lading show that the commodity shipped as "Oilwell Drilling Equipment." The export declaration for the shipments show the commodity as "Parts, Accessories and Attachments, for Well-Drilling Machines." FEC tariff Item 982 1005 00 shows a rate (noncontract of $118.45 W/M)for "Oil Well Drilling Rigs, Parts and Accessories—To Kobe Only." Thus, the documents submitted by Ocean Drilling show that the proper rate to be applied to the shipments in question was the $118.45 W/M provided in Item 982 1005 00, and not the $152.65 rate charged by KKK. Even Kerr announced that the proper rate was $118.45 and but for the six-month rule would apparently have satisfied the claim.

Accordingly Kawasaki Kisen Kaisha is hereby ordered to pay to Ocean Drilling and Exploration Co. the sum of $8,401.45 with interest at 6% to begin within 45 days of the date of service of this decision unless the full amount is paid prior thereto, provided, that within 15 days of the date of service Ocean Drilling submits data demonstrating the correctness of the claimed amount. Failing this the amount to be refunded shall be $8,366.51.

(S) JOHN E. COGRAVE ,
Administrative Law Judge.

WASHINGTON, D.C.,
December 20, 1977.

[8] This case offers but one example of the need to institute a rule-making proceeding which would ultimately require that every conference which has or in the future adopts a six-month rule must include in that rule a statement that invocation of the rule against a shipper cannot bar the shipper from seeking redress from the Commission. Such a rule would serve a tofold purpose. On the one hand it would afford unaware shippers of their rights, while on the other it would preclude the kind of tactics employed by respondent here.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 379(I)

ROYAL CATHAY TRADING CO.

v.

SEAWAY EXPRESS LINES

NOTICE OF DETERMINATION NOT TO REVIEW

December 21, 1977

Notice is hereby given that the Commission on December 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served December 8, 1977.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 379(I)

ROYAL CATHAY TRADING CO.

v.

SEAWAY EXPRESS LINES

DISMISSAL OF PROCEEDING[1]

December 8, 1977

Royal Cathay Trading Co. (complainant) filed this informal complaint against Seaway Express Lines (respondent) on December 20, 1976 covering two shipments. While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be Section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of shipment.

The complainant was the consignee of two shipments of bambooware from Chung I Trading Co. Ltd., Keelung, Taiwan loaded on board the MANCHESTER CONCEPT on November 18, 1974 under bills of lading KSF-2 and KSF-4, for which the port of discharge was indicated as San Francisco, California. Complainant's place of business is in San Francisco. The vessel discharged at Oakland. The equalization claims are based on the excess of the trucking rates from Oakland to San Francisco,[2] (paid by complainant) over the drayage rates within San Francisco.

The claims are based on Rule 9 of respondent's Freight Tariff No. 7, FMC No. 7 which provides:

"*CARGO DISCHARGED AT OTHER THAN BILL OF LADING PORT*

"When the ocean carrier discharges cargo at a terminal port other than the port named in the ocean bill of lading, the ocean carrier shall arrange, at its expense, for movement via rail, truck or water of the shipment from port of actual discharge:

"A. To ocean carrier's terminal dock at port of destination declared on the bill of lading in the case of cargo which has been entered through customs at the port of discharge. The ocean carrier may forward such cargo direct to a point designated by the consignee provided the consignee pays the costs which he would normally have incurred

[1] Both parties having consented to the informal procedure of Rule 19 46(CFR 502.301-304) (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Complainant has submitted freight bills covering the truck movements via P&R Motor Express of the subject shipments from Oakland to San Francisco. Complainant also submitted copies of the bills of ladings which indicate San Francisco as the port of discharge.

either by rail, truck or water, to such point if the cargo had been discharged at the terminal port named in the ocean Bill of Lading, or: . . ."

On November 3, 1975 complainant filed a claim with respondent. After allegedly receiving four unanswered tracers, respondent advised complainant in the beginning of October 1976 that it would receive payment within the next few weeks. As indicated above complainant filed this claim with the Commission on December 20, 1976.

This proceeding covers two claims, both covering port equalization. The first claim covers a movement by P&R Motor Express from Oakland to San Francisco on December 16, 1974. The claim was not filed (received by) the Commission until December 20, 1976. It could be inferred that this claim was not filed within the two-year statutory limit set in Section 22 of the Shipping Act, 1916. However, reference is made to the Commission's Order on Remand in Docket No. 76–1, *CSC International, Inc.* v. *Orient Overseas Container Line, Inc.*, served July 12, 1976, wherein it held:

"The law is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. *Aleutian Homes, Inc.* v. *Coastwise Line, et al*, 5 F.M.B. 602, 611 (1959); *United States of America* v. *Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971); *U.S. ex rel Louisville Cement Company* v. *I.C.C.* 296 U.S. 638, 644 (1917). . . ."

P&R Motor Express Freight Bill No. 05814 dated December 16, 1974, was paid by complainant with its check number 9857 dated March 19, 1975 covering both shipments, which are the subject of the claim. Therefore, this claim was filed within the two-year statutory limit of Section 22 of the Act.

The first part of Claim No. RC–11 covers a movement of Bambooware (MANCHESTER CONCEPT B/L KSF–2) from Oakland to San Francisco weighing 13,709 pounds shipped as 20,000 pounds to take advantage of the lower 98 cent rate, i.e.:

Oakland to S.F. 13,709 as 20,000	($.98)	$196.00
	s/c	3.40
	1%	2.00
		$201.40
S.F. to S.F. 13,709	($1.03)	$141.20
	1%	1.41
		$142.61
Freight equalization		$ 58.79

The second Part of Claim No. RC–11 covered a December 23, 1974 movement of Bambooware (MANCHESTER CONCEPT B/L KSF–4) from Oakland to San Francisco, which moved by P&R Motor Express weighing 5,291 pounds:

Oakland to S.F. 5,291	($12.18)	$115.34
	s/c	3.40
	1%	1.19
		$119.93
S.F. to S.F. 5,291	($1.15)	$60.85
	1%	.61
		$61.46
Freight equalization		$58.47

Both claims were timely filed.

Respondent has submitted a copy of its letter, dated January 17, 1977, to complainant forwarding its check for $117.26 covering this claim in full. Under letter of June 20, 1977, complainant advised that it had received a check for $117.26 from respondent.

Respondent has paid the claim in full and complainant has acknowledged receipt of same. In view of this settlement, the proceeding is hereby dismissed.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 415(I)

CPC INTERNATIONAL TRADING CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

December 21, 1977

Notice is hereby given that the Commission on December 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served December 9, 1977.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 415(I)

CPC INTERNATIONAL TRADING CORPORATION

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

CPC International Trading Corporation (complainant) claims the difference between the transportation rate based on assessment of a \$133.50 rate per ton of 2,000 pounds, on a shipment of corn starch, in bags, from New York, New York to Port of Spain, Trinidad instead of a lower rate of \$98.00 per ton of 2,000 pounds. Transportation charges of \$5,393.40 were assessed while complainant alleges said charges should have amounted to \$3,595.50, and is seeking reparations in the amount of \$1,797.80 from Sea-Land Service, Inc. (respondent). Although no violation of the Shipping Act, 1916, is alleged, it is assumed to be a violation of Section 18(b)(3) thereof.

The shipment consisted of 800 bags of corn starch, weighing 80,800 pounds loaded in two containers moving from New York, New York to Port of Spain, Trinidad on the SS TAMPA on bill of lading number 923447 dated June 4, 1975. The claim was timely filed with the Commission on June 1, 1977. The applicable tariff is the Leeward & Windward Islands & Guianas Conference S.B. L & W 10 Freight Tariff FMC No. 1.

The shipment weighed 80,800 pounds or $\frac{80,800}{2,000} = 40.4$ weight tons of 2,000 pounds. It consisted of 800 bags measuring 2.35 cubic feet each, or 1,880 cubic feet or $\frac{1,880}{40} = 47$ measurement tons of 40 cubic feet.

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Notice of determination not to review December 21, 1977.)

Respondent assessed a rate of $133.50 per ton of 2,000 pounds or $5,393.40. Total rates and charges assessed were as follows:

Ocean Freight	40.4 weight tons	($133.50)	$5,393.40
Wharfage Dues	40.4 weight tons	($.28)	11.31
Receiving, Storage & Delivery Charges	47 measurement tons	($4.91)	230.77
Port Labor Rationalization Levy	47 measurement tons	($1.00)	47.00
Total			$5,682.48

Complainant submitted the claim to respondent on May 17, 1976. On May 26, 1976 respondent declined the claim based on Item 105 of the subject tariff which provides:

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[2]

Complainant alleges the appropriate rate for this shipment which is found on 30th Revised Page 22-A of the tariff under Item 211 is $89.00 per ton of 2,000 pounds, applicable to Cornstarch, in bags, barrels or drums. Complainant is correct with respect to the applicable rate. However, it overlooked the fact that the receiving, storage & delivery charge, and the port rationalization charge were assessed on the higher 47 measurement ton basis instead of on a 40.4 weight ton basis. The computations below and footnote 3 will clarify this oversight.

The charges that should have been assessed on the subject shipment are as follows:

Ocean Freight	40.4 weight tons	($89.00)	$3,595.60
Wharfage Dues	40.4 weight tons	($.28)	11.31
Receiving, Storage & Delivery Charge[3]	40.4 weight tons	($4.42)	178.57
Port Labor Rationalization Levy[3]	40.4 weight tons	($1.00)	40.40
Total			$3,825.88

Complainant paid total rates and charges of $5,682.48, whereas the above total rates and charges of $3,825.88 apply. The overpayment was $1,856.60.

In a letter of July 11, 1977, respondent advised that the above rates and

[2] The complaint was filed with this Commission within the time limit specified by statute; and it has been well established by the Commission that carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

[3] Complainant was originally assessed a charge of $4.91 per measurement ton. However, Item 110 of the subject tariff contains a Receiving, Storage & Delivery Charge on Bagged Cargo, N.O.S. of $4.91 per 40 cubic feet or $4.42 per 2,000 pounds as cargo is freighted. Cornstarch, in bags, barrels or drums is assessed a rate of $89.00 per ton of 2,000 pounds per Item 211 of the subject tariff. Therefore, the $4.42 charge applies. The Port Labor Rationalization Levy Charge is assessed on the same weight or measurement basis as the Receiving, Storage & Delivery Charge.

charges should have been assessed. Respondent further indicated that it was awaiting this decision regarding the proper disposition of the overcharge.

Complainant has sustained the burden of proof and respondent agrees that the overcharge assessed was $1,856.60. Reparation of this amount is awarded to the complainant.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 418(I)

TOKHEIM CORPORATION

v.

HAPAG-LLOYD A.G.
UNITED STATES NAVIGATION INC., AGENTS

NOTICE OF DETERMINATION NOT TO REVIEW

December 21, 1977

Notice is hereby given that the Commission on December 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served December 9, 1977.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 418(I)

TOKHEIM CORPORATION

v.

HAPAG-LLOYD A. G.
UNITED STATES NAVIGATION INC., A GENTS

Reparation Aarded.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed June 8, 1977, Tokheim Corporation, Fort Wayne, Indiana, (complainant) alleges that it was overcharged approximately $1,260.73 as a result of Hapag-Lloyd A.G., (carrier) incorrectly billing the cubic measurement of a shipment transported from New York to Greenock, Scotland in December 1976.

The cargo cleared Fort Wayne via Wilson Motor Freight for delivery to the carrier's vessel M/V WESER EXPRESS sailing New York 12/10/76. Through mishap, oversight, or other unknown causes, Wilson failed to deliver 10 pallets in time for the December 10th sailing. The carrier issued bill of lading 16461966 showing 44,836 pounds and 1,612 cubic feet which, as it developed later, was only part of the total consignment of 53 pallets and boxes of gasoline pump parts weighing 57,822 pounds and measuring 1,438 cubic feet. Despite the short shipment factor, the first part of the shipment was billed out on the basis of 1,612 feet at $119.50 per 40 cubic feet. The balance of the consignment was located and shipped on the M/V MOSEL EXPRESS on December 22, 1976. This parcel which reportedly weighed 12,986 pounds and measured 248 cubic feet was freighted on basis of the measurement factor at $119.50 per 40 cubic feet.

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Notice of determination not to review December 21, 1977.

The two shipments provided a total of 57,822 pounds as per complainant's packing list and inland bill of lading. However, the combined charges amounted to $5,556.76 based upon a total of 1,860 cubic feet at $119.50/40. The excess cube of 422 cubic feet resulted in the $1,260.73 overcharge which is claimed.

The record reveals that while the complainant applied for refund of the alleged overcharge and supported its petition with a copy of the packing list covering the shipment, the carrier rejected the claim based upon its obligation to adhere to the North Atlantic United Kingdom Freight Conference Tariff FMC-3, which restricts adjustments in freight charges on cargo that has left the custody of the carrier. The pertinent Rule 9, published on page 17 of the tariff reads as follows:

> (A) Claims for adjustment of freight charges, if based on alleged errors in weight or measurement, will not be considered unless presented to the member line in writing before the shipment involved leaves the custody of the member line. Any expenses incurred by the member line in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found, by the claimant. All other claims for adjustment of freight charges must be presented to the line in writing within six (6) months after date of shipment. This rule shall not apply to cargo shipped by the governments of the United States, United Kingdom or Eire. Unquote.

Although the carrier is indeed prohibited by the above Rule from making a freight adjustment, it has been well established that such a tariff provision can not serve to void the requirements of Sections 18(b)(3) and 22 of the Shipping Act, 1916, as they relate to assessing the properly applicable tariff rates and charges and providing a two years time period in which a violation may be brought before the Commission.

A review of the complainant's statement and an inspection of the accompanying documentation sustains the validity of the complainant's claim as submitted. This opinion is fortified by copy of a letter dated February 4, 1977, to the complainant's broker by United States Navigation, Inc., Agent of the carrier, in which the above tariff rule was cited as the reason for not entering into an informal settlement of the claim, and a further letter of June 23, 1977, addressed to this Settlement Officer confirming that the carrier does not dispute the facts outlined in the Tokheim Corporation's complaint.

There is a plethora of Commission decisions which hold that, carrier or conference imposed tariff rules limiting the period or conditions under which claims for adjustment in freight due to errors in weight or measurement shall be considered, cannot circumvent or contravene provisions of the Shipping Act, 1916, where the assessment of an improper freight charge has been demonstrated, as in this instance. Therefore, since the propriety of the complainant's claim for refund of the overcharge is adequately supported, it is found that the complainant is entitled to reparations in the amount of $1,260.80 based upon the following computation:

Particulars of shipment as tendered Wilson Motor Freight at Fort Wayne, Indiana—	
53 pallets and boxes gasoline pump parts weighing 57,822 pounds and measuring 1,438 cubic feet.	
Shipment as freighted by ocean carrier—	
M/V WEISER EXPRESS 12/10/76, 44,836 pounds, 1,612 cubic feet	
1,612 cubic feet × $119.50 per 40 cubic feet	$4,815.93
M/V MOSEL EXPRESS, 12/22/76, 12,986 pounds, 248 cubic feet	
248 cubic feet × $119.50 per 40 cubic feet	$ 740.90
TOTAL FREIGHT CHARGES	$5,556.83
Shipment should have been freighted based upon measurement factor of cargo as received by Wilson Motor Freight.	
57,822 pounds, 1,438 cubic feet	
1,438 cubic feet × $119.50 per 40 cubic feet	$4,296.03
OVERCHARGE	$1,260.80

A refund of $1260.80 is due the complainant and it is so ordered.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 542

ALCOA INTERNATIONAL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

January 25, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 25, 1978.

It is Ordered, That applicant is authorized to waive collection of $1,785.74 of the charges previously assessed Alcoa International, Inc.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff the notice prescribed in the initial decision.

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 542

ALCOA INTERNATIONAL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION

January 4, 1978

Application granted.

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

By application filed August 22, 1977, respondent Gulf European Freight Association (GEFA) and its member line, Lykes Bros. Steamship Co., Inc., seek permission to waive a portion of the freight charges on three shipments of calcined alumina and two shipments of high temperature bonding mortar from New Orleans, Louisiana, to Rotterdam, The Netherlands. The five shipments moved under bills of lading issued May 12, 1977. The complainant is Alcoa International, Inc., the shipper shown on each bill of lading. The complainant paid freight charges (exclusive of tollage) in the amount of $22,710.31 on June 6, 1977. The amount sought to be waived is $1,785.74.

The application states that the rates applicable at the time of shipment were $83.75 W on calcined alumina and $91.25 W on bonding mortar and that the rates sought to be applied are $79.25 W on calcined alumina and $83.00 on bonding mortar.

The application goes on to say that respondent "is not aware of any other shipments of the same commodity which moved via respondent during the same period of time at the rate applicable at time of shipment." Respondent adds that it does not believe any discrimination among shippers will result from the waiver. It also agrees to publication of a notice or taking such action as the Commission may direct if permission to waive is granted.

[1] This decision became the decision of the Commission January 25, 1978.

The statement of facts made by the parties in support of the application, as pertinent, is as follows:

On February 21, 1977, the Gulf European Freight Association announced a general rate increase of 10% to become effective May 1, 1977.

On March 11, 1977 the office of the Gulf Associated Freight Conferences received a letter dated March 8, 1977 from Mr. R. W. Swoger, Assistant Manager, Export-Import Traffic Division of Aluminum Company of America, requesting relief from the 10% increase. Mr. Swoger stated that Calcined Alumina could stand a 4% increase, but requested that . . . High Temperature Bonding Mortar be maintained at the existing rate levels at least through September 30, 1977.

Alcoa's request was discussed at a meeting of the Gulf Euopean Freight Association on March 29, 1977, but no decision was reached, until April 7, 1977, when the Chairman informed Mr. Swoger, by telephone, of the following:

. . .

Calcined and Activated Alumina would take a 4% increase on May 1, 1977

High Temperature Bonding Mortar would not take increase on May 1, 1977

Effective October 1, 1977, rates would be subject to increase of 2% to 4%.

This information was confirmed to the Member Lines by telex, dated April 7, 1977.

At this time, Gulf European Freight Association Tariff 3 (FMC-3) was being assembled, incorporating the general rate increase to become effective May 1, 1977, and the pages covering Alumina and Mortar were issued, through an administrative erro, showing these commodities taking the full 10% increase.

When shipment was made on May 12, 1977, shipper was billed at the only applicable tariff rates of $83.75 W on Calcined Alumina, and $91.25 W on High Temperature Bonding Mortar, totalling $24,496.05 (plus tollage). However, Alcoa, having been informed that the rates were to be $79.25 W on Calcined Alumina and $83.00 W on High Temperature Bonding Mortar, made payment based on these rates, for a total of $22,710.31 (plus tollage).

Alcoa then called the attention of the Conference Office to the error in the tariff, and the Conference filed the correct rates with the Federal Maritime Commission on May 19, 1977.

Lykes Bros. Steamship Co. Inc. therefore requests permission to waive collection of the difference of $1,785.74 from Alcoa International, Inc.

In further support of the application the following documents were submitted:

Letter from Aluminum Corporation of America, dated March 8, 1977

Telex dated April 7, 1977 from Chairman to Member Lines confirming that rates on Alumina and High Temperature Bonding Mortar would not take 10% increase of May 1, 1977

Tariff Pages:

- 11th Rev Page 44, GEFA Tariff 2 (FMC-2) showing Alumina rates prior to May 1, 1977
- Original Page 141, GEFA Tariff 3 (FMC-3) showing Alumina rates increased by 10% effective May 1, 1977
- 1st Rev Page 141, GEFA Tariff 3 (FMC-3) showing Alumina rates adjusted to a 4% increase, effective May 19, 1977
- 24th Rev Page 90, GEFA Tariff 2 (FMC-2) showing Mortar rates prior to May 1, 1977
- Original Page 166, GEFA Tariff 3 (FMC-3) showing Mortar rates increased by 10%, effective May 1, 1977
- 2nd Rev Page 166, GEFA Tariff 3 (FMC-3) showing Mortar rates adjusted back to level prior to May 1, 1977

Copies of Bills of Lading Nos. 30, 31, 47, 66 and 92.

Copies of Invoices Nos. 30, 31, 47, 66 and 92.

Copies of deposit ticket covering ocuments involved.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[2] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

> *Provided, however,* That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

Upon scrutiny of all of the documents attached to the application and tariffs on file with the Commission, I find the statement of facts contained in the application correct in all material respects.[3]

I find that the mistake, found here, is an "error due to inadvertence in failing to file a new tariff" of the type which Congress had in mind when it enacted section 18(b)(5).[4]

I find that the application was filed within one hundred and eighty days from the date of shipment and that prior to filing the application the conference filed a new tariff with the Commission setting forth a rate on

[2] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

[3] There is a difference between my computation of the aggregate charges to be waived and the computation of the parties. The difference amounts to a few pennies and is substantively insignificant. My calculations also show that all the conditions for rating the shipments under the tariff Item No. for calcined alumina "Measuring up to & incl. 80 cu ft per 2240 lbs" rather than the higher rate under the Item No. for shipments measuring over 80 cu. ft. were met. In addition, my calculations show that the bonding mortar was properly rated.

[4] The following illustration is provided in the legislative history to the above quoted four provisions of section 18(b)(3):

> For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rate.

House Report No. 920 (90th Cong., 1st Sess. 1967).

which the waiver would be based. I find, further, that the conference has agreed to publish an appropriate notice in its tariff and is willing to take such other steps as the Commission may require to give notice of the rate for which waiver would be based.

Under the safeguards provided in the order, below, I find that the waiver will not result in discrimination among shippers and that additional refunds will be made with respect to other shipments of the same or similar commodities made during the same period of time.

Accordingly, the application to waive collection of a portion of freight charges is granted. It is ordered:

1. Lykes Bros. Steamship Co., Inc., shall waive collection of freight charges in the amount of $1,785.74 due it from Alcoa International, Inc., in connection with the five shipments of calcined alumina and high temperature bonding mortar under bills of lading issued May 12, 1977.

2. Gulf European Freight Association shall publish the following notices at appropriate pages in its tariff:

> Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 542, that effective May 1, 1977, and continuing through May 18, 1977, inclusive, the rate on "Alumina, Calcined, measuring up to & incl. 80 cu ft per 2240 lbs in House/House containers only," from U.S. Gulf of Mexico ports as defined in this tariff to Continental European ports in the Bordeaux/Hamburg Range, as defined in this tariff, for purposes of refunds or waiver of freight charges is $79.25 W per ton of 2240 pounds, such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.
>
> Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 542, that effective May 1, 1977, and continuing through May 18, 1977, inclusive, the rate on "Mortar, High Temperature Bonding: Packed in House/House containers, minimum 38,000 lbs. per container," from U.S. Gulf of Mexico ports as defined in this tariff to Continental European ports in the Bordeaux/Hamburg Range, as defined in this tariff, for purposes of refunds or waiver of freight charges is $83.00 W per ton of 2240 pounds, such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

3. Gulf European Freight Association shall mail copies of the tariff notices to any persons shipping calcined alumina or high temperature bonding mortar via members of that conference during the period from May 1, 1977, through May 18, 1977, inclusive.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
January 4, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–32

PUBLICATION OF INACTIVE TARIFFS BY NONVESSEL OPERATING COMMON CARRIERS IN DOMESTIC OFFSHORE COMMERCE

ORDER

January 5, 1978

This proceeding commenced with the issuance of a Commission Order directing four nonvessel operating common carriers (Respondents) to show cause why certain FMC tariffs maintained by them should not be cancelled on the grounds that said tariffs no longer reflected *bona fide,* active offerings of transportation service. None of the Respondent carriers replied to the Commission's Show Cause Order.

In view of Respondents' default in the instant proceeding, their failure to amend the subject tariffs since at least July 1, 1974, and their failure to submit annual financial reports pursuant to section 512.22 of the Commission's Rules commencing with their respective 1975 fiscal years, it is concluded that Respondents are no longer active participants in the trades covered by the subject tariffs and that said tariffs should be cancelled as inconsistent with section 2 of the Intercoastal Shipping Act, 1933, and the Commission's tariff filing regulations (46 C.F.R. Part 531).

THEREFORE, IT IS ORDERED, That the following tariffs are cancelled effective immediately:

Ponce De Leon Shipping Co., Inc.
350 Brook Avenue
Bronx, New York 10454

FMC–F No. 2—Between points in New York City and places in Puerto Rico.

REA Express, Inc.
219 E. 42nd Street
New York, New York 10017

FMC–F No. 2—Between Oakland, San Francisco, California; Express Offices in the State of Hawaii, Express Offices in the Continental United States or Canada (Routed via Oakland or San Francisco, California) and Express Offices in the State of Hawaii.

FMC 32—(Railway Express Agency Incorporated, series) Between Seattle, Washington; Prince Rupert, Vancouver, B.C.; Express Stations in Alaska; Express Stations in the United States or Canada (Routed via Seattle, Washington, or Vancouver, B.C.) and Express Stations in Alaska.

FMC 20—(Railway Express Agency Incorporated, series) Official Express Classification 36—Containing Ratings, Rules and Regulations applying on Express Traffic covered by Tariffs issued subject thereto.

Rico Shipping Co.
1997 Third Avenue
New York, New York 10029
FMC–F No. 1—Between New York, New York and San Juan, Puerto Rico.

Unidos Moving Express Co.
4242 W. Armitage Avenue
Chicago, Illinois 60639
FMC–F No. 3—Between New York, New York and Points and Places in Puerto.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 511

IMPERIAL OIL & GREASE COMPANY

v.

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

December 28, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 28, 1977.

IT IS ORDERED, That applicant is authorized to refund $366.12 of the charges previously assessed Imperial Oil and Grease Company.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

> "Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 511, that effective August 19, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped from August 19, 1976 through September 30, 1976, the rate on 'Oil, lubricating, in bulk, in collapsible containers' to ports in Chile only is $93.50 per 2,000 lbs. subject to all applicable rules, regulations and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 511

IMPERIAL OIL & GREASE COMPANY

v.

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE

Adopted December 28, 1977

Application granted.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

The Latin America/Pacific Coast Steamship Conference seeks permission to refund a portion of the freight charges on a shipment of lubricating oil in bulk in collapsible containers weighing 12,430 pounds and measuring 300 cubic feet, shipped August 19, 1976, from Los Angeles to Valparaiso, Chile. The rate applicable at the time of shipment was $123.25 per 2,000 pounds or 40 cubic feet plus 3% CMM tax & terminal charges.[2] This rate resulted in aggregate freight charges of $1,025.24. The rate sought to be applied is $93.50 per 2,000 pounds plus 3% CMM tax & terminal charges.[3] This rate would have resulted in total freight charges of $659.12. Therefore permission to refund $366.12 is sought.

Relying on a conference rate on seal drums which had through several increases been in effect since 1967, Imperial Oil in May 1976 made a shipment of five collapsible rubber seal drums from Los Angeles to Valparaiso on the assumption that the rate was $93.50 per 2,000 pounds. In August 1976, Imperial Oil discovered that the applicable rate was $123.25 W/M and the charge was $1,025.24. The reason for that was that the conference had cancelled what they thought was a "paper rate" to effect an increase in rates on cargo which proved to be moving.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

[1] This decision became the decision of the Commission December 28, 1977.

[2] Latin America/Pacific Coast Steamship Conference Tariff No. 80 FMC–8.

[3] Same tariff of rates.

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[4]

It is therefore found that:

1. There was an error of an administrative nature in failing to extend the rate in question.

2. The refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to refund a portion of the freight charges, the Latin America/Pacific Coast Steamship Conference filed a new tariff which sets forth the rate on which such refund would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to the Latin America/Pacific Coast Steamship Conference to refund a portion of the freight charges represented by $366.12.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
December 6, 1977.

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[4] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 545

GENERAL MOTORS OVERSEAS DISTRIBUTION CORPORATION

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY

NOTICE OF ADOPTION OF INITIAL DECISION

December 28, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 28, 1977.

IT IS ORDERED, That the application herein for permission to waive collection of a portion of demurrage charges is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 545

GENERAL MOTORS OVERSEAS DISTRIBUTION CORPORATION

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY

Adopted December 28, 1977

Application to waive a portion of demurrage charges denied.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

The Puerto Rico Maritime Shipping Authority has applied[2] for permission to waive $4,676.76 of a total of $4,962.03 in accrued demurrage charges.[3]

The admitted facts are as follows:

On February 14 and 25, 1977, General Motors Overseas Distribution Corporation shipped under Bills of Lading 360400915–0 and 360406752–6 five passenger cars consigned to Daniel Duran Motors Corp. With respect to some of these cars this original consignment was erroneous and consequently on February 28, 1977, General Motors reconsigned four of the five cars to Ralco Auto Sales. Ralco was unable to clear three of these units (XCOS 411717, 411719, and 411721) due to financial difficulties—they were unable to post a bond with the local excise tax office. Unfortunately General Motors had not been informed of these problems at the time they arranged the reconsignment. However, Ralco advised General Motors that their financial problems would be worked out shortly and that they would be able to clear the units accordingly.

It was not until the end of June that Ralco advised General Motors of their intent to relinquish the Buick and Pontiac franchises.[4] By this time considerable demurrage charges had accumulated on these units.

Since General Motors has no excise tax bond in effect in Puerto Rico (its dealers supply the bond), they had to arrange for the units to be

[1] This decision became the decision of the Commission December 28, 1977.

[2] 46 CFR 502.92(b).

[3] Pursuant to PRMSA Tariff No. 1—FMC–F No. 12, 5th Revised p. 103 and p. 103–A.

[4] Ralco has subsequently filed a petition for bankruptcy.

cleared by another one of their dealers, Gomar Auto Corporation. This was done on July 22, 1977. The demurrage accumulated on these units by this date was $4,962.03. General Motors objected to being made responsible for the totality of this charge, arguing that they were never the intended consignee and therefore they should not be made responsible for Ralco's failure to clear the units. They have agreed to pay, and on July 26, 1977, did pay $285.27 for the demurrage charge accumulated due to General Motors' original erroneous consignment.

The parties argue that General Motors should not be saddled with consignee's obligation to pay demurrage charges. They agree that General Motors was not responsible for consignee's failure to clear the units.

It is clear that the liability for demurrage is that of the consignee despite General Motor's assumption of part of that liability for demurrage occasioned by its error in improperly designating the consignee.

There is no basis for waiver of demurrage charges otherwise properly accrued and owing pursuant to the tariff on file. Even if the provisions of section 509.92(a)—applicable in foreign commerce—were to be utilized as a basis for waiver.no waiver could be granted inasmuch as we do not have any error of a clerical or administrative nature between the parties or an error due to inadvertence in failing to file a new tariff. The clerical error on the part of General Motors was between itself and its consignee. No fault can be imputed to the carrier which would constitute any equitable basis for its waiving charges otherwise due it.

The proper remedy would appear to be the filing of a claim by PRMSA for demurrage charges against consignee in the Ralco bankruptcy proceeding.

Application for permission to waive a portion of the demurrage charges is denied and the complaint dismissed.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
December 1, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 551

EUROPAM PAPER & FIBRE CORP.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

December 28, 1977

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 28, 1977.

IT IS ORDERED, That applicant is authorized to waive collection of $1,300.00 of the charges previously assessed Europam Paper and Fibre Corp.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 551, that effective July 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1977, through July 12, 1977, the rate on 'Paper,' waste is $50.00 per 2,240 lbs. Minimum 20 WT per container subject to all applicable rules, regulations, terms and conditions of said rate and this tariff".

IT IS FURTHER ORDERED, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 551

EUROPAM PAPER & FIBRE CORP.

v.

SEA-LAND SERVICE, INC.

Adopted December 28, 1977

Application to waive collection of portion of freight charges granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916, Sea-Land Service, Inc. (Carrier) has filed a timely (within 180 days of July 6, 1977, the date of the involved shipments) application for permission to waive collection of $1,300 aggregate freight charges from the shipper Europam Paper & Fibre Corp. The aggregate freight charges actually collected were $26,000. If not waived, the $1,300 would have to be paid as the 408 Bales of Wastepaper under Sea-Land Bill of Lading 975718009–6, dated July 6, 1977, and the applicable rate would be $13,650 and the 425 Bales of Wastepaper under Sea-Land's Bill of Lading 975718085–6, dated July 6, 1977, and applicable rate would also be $13,650, a total of $27,300. The $26,000 were paid and borne by Europam Paper & Fibre Corp., who attests to same as well as concurring in this application by affidavit executed September 30, 1977, attached to this application.

Sea-Land Service, Inc. Tariff No. 168–B—FMC–73 is the applicable tariff. The application for waiver states these facts in support:

> Effective May 9, 1977, special rates were established on Wastepaper in both Section 1 (France and Italy) and Section 2 (Spain) of Sea-Land Tariff 168–B. Special rate was $50.00 W, minimum of 20 WT per container through June 30, 1977.
>
> On June 28, 1977, it was Sea-Land's intent to extend this special rate in Section 1 only through July 7, 1977. However, due to a clerical error, this extension was made in Section 2 on proposal #4482.

[1] This decision became the decision of the Commission December 28, 1977.

On July 13, 1977, we realized our error and immediately published a $50.00 rate in *Section 1 through August 11, 1977.*

The shipper on whose behalf we are filing this application, moved their shipment on July 6, 1977, and would have been afforded a $50.00 rate had it not been for our error.

The freight under B/L referred to above shipped from Charleston, S.C., to Livorno, Italy, on Sea-Land's vessel *S.S. Baltimore/Market 083E,* the rate applicable at the time of shipment was $52.50 per 2,240 lbs., minimum 20 WT per container, Sea-Land Tariff 168B—FMC–73, Item 5860; the rate sought to be applied is $50.00 per 2,240 lbs., minimum 20 WT per container.

Attention is called to page 2, paragraph (3) of the application: "There are additional shipments which moved via respondent during the same period of time at the rates set forth in (1) above. Special Dockets Applications will be filed for relief concurrent with this application."

Upon consideration of the above, the Presiding Administrative Law Judge deems the application for permission to waive collection of portions of the freight changes comports with Rule 92, Special Docket Application, Rules of Practice and Procedure, and section 15(b)(3) of the Shipping Act; referred to above, and the error is one within their contemplation.

Therefore, upon consideration of the documents presented herein, it is found:

1. There was an error of a clerical or administrative nature (corrected by effective tariff before this application was filed), which resulted in having freight charge due if not waived.

2. The waiver requested will not result in discrimination as between shippers.

3. The application, having been timely filed and having shown acceptable cause, should be granted.

Wherefore, it is

Ordered

The application be and hereby is granted.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 5, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 550

U. S. INFORMATION AGENCY

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

December 28, 1977

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on December 28, 1977.

IT IS ORDERED, That applicant is authorized to refund $2,841.38 of the charges previously assessed the U. S. Information Agency.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff the following notice:

> "Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 550, that effective March 28, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from March 28, 1977 through April 14, 1977, the rate on 'Scenery and Wardrobes, Theatrical' is $98.51 cm subject to all applicable rules, regulations, terms and conditions of said rate and this tariff".

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 550

U. S. INFRMATION AGENCY

v.

SEA-LAND SERVICE, INC.

Adopted December 28, 1977

Application granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARIS, ADMINISTRATIVE LAW JUDGE

Sea-Land Service, Inc. (Sea-Land), makes a timely (within 180 days from April 4, 1977, the date of the involved shipment) application for permission to refund $2,841.38, a portion of the $12,008.00 aggregate freight charges actually collected, to the complainant U. S. Information Agency.

The involved shipment was of Scenery & Wardrobes, Theatrical in four containers weighing 25,987 lbs., measuring 86.51 cm on April 4, 1977, from Portland, Oregon, via Houston to Antwerp, Belgium. The rate applicable at the time of the shipment was 131.35 cm (Group 2 Service A) Eastbound Pacific Coast European Joint Container Freight Tariff No. 1 ICC No. 1 FMC No. 1, Item 655, 4670. The rate sought to be applied is the 131.35 less 25% = $98.51 cm.

The 25% reduction, as set out in the circumstances in the application in support of refund, was agreed to at a March 17, 1977, meeting of Agreement 10052 and PCEC, for the U. S. Government Bicentennial Exhibit, effective March 28, 1977, through June 30, 1977. The PCEC published the new freight rate effective March 28, 1977, but, due to an Agreement 10052 staff administrative error the change was not issued and made effective in the Eastbound Pacific Coast European Joint Container Freight Tariff No. 1 until April 15, 1977. Second Revised Page 264 of the said tariff on file shows the change effective April 15, 1977.

It is deemed the application for refund comports with Rule 92, Special Docket Applications, Rules of Practice and Procedure, 46 CFR 502.92(a)

[1] This decision became the decision of the Commission December 28, 1977.

and section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817 (as amended by Public Law 90–298. The administrative error recited in the instant application should be accepted as warranting granting the application.

Therefore, upon consideration of the documents presented herein, it is found:

1. There was an error of an administrative nature (corrected by effective tariff before this application was filed), which resulted in the failure to apply the discount now sought to be applied.

2. The refund requested will not result in discrimination as between shippers.

3. The application, having been timely filed, should be granted.

Wherefore, it is,

Ordered,

The application be and hereby is granted.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 1, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 541

A. E. STALEY MFG. CO., DECATUR, ILLINOIS

v.

MAMENIC LINE

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is ordered, that the application herein for permission to waive collection of a portion of freight charges is denied.

It is further ordered, that Mamenic shall file an affidavit of compliance with the terms of the initial decision within thirty days of service of this order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 541

A. E. STALEY MFG. CO., DECATUR, ILLINOIS

v.

MAMENIC LINE

Adopted January 11, 1978

Application denied. Respondent ordered to collect balance of freight charges.

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

By application filed August 15, 1977,[2] respondent Mamenic Line, requested permission to refund a portion of the freight charges collected on a shipment of Dextrine, in bags, from New Orleans, Louisiana, to Puerto Limon, Costa Rica. The shipment, weighing 20,200 pounds and measuring 600 cubic feet was shipped under a bill of lading dated March 11, 1977.

The application states that the tariff rate applicable at the time of shipment was $70 weight (W)[3] or measurement (M),[4] whichever yielded the greater revenue. There was also a $3.75 bunker surcharge applicable to either W or M, depending on which of those standards was used in rating the commodity. The freight charges paid by the complainant, shipper, A. E. Staley Mfg. Co.,[5] was computed on the measurement basis, because measurement yielded the greater revenue, and amounted to $1,106.25.[6]

The rate sought to be applied is $70 W plus bunker surcharge of $3.75

[1] This decision became the decision of the Commission January 11, 1978.
[2] The Secretary of the Commission returned an incomplete filing made May 4, 1977.
[3] W = per ton of 2,000 pounds.
[4] M = per unit of 40 cubic feet.
[5] Daniel F. Young, a licensed freight forwarder, paid the freight charges as agent for and on behalf of Staley.
[6] The calculation follows:

15 units × $70 = $1,050
15 units × $3.75 = 56.25
Total = $1,106.25

W. At this rate the charges would amount to $774.87.[7] Permission is sought to refund the difference of $361.38.

The following explanation appears in the application:

On Feb. 15, 1977, Mamenic Line, through their agent in Chicago, U. S. Navigation Inc., was asked by Staley to establish a rate of $70.00 on Dextrine to Puerto Limon, Costa Rica. Request was granted and shipment was made. Freight was then assessed on original rate of $111.00 W/M. Mamenic Line advised they had failed to use new rate which they had established at $70.00 W/M rather than $70.00 W. Staley complained to Mamenic that the original agreed upon rate was not the rate they published. They were asked to review the matter and let us know if there was any means to recover our losses and they suggested this approach.

The documentation attached to the application clarifies the attenuated explanation. The parties mean to say: Prior to the time of shipment there was no line item for Dextrine in Mamenic's tariff. Consequently, absent other arrangements the shipment would have carried the tariff N.O.S. rate of $111 W/M. In advance of the shipment, an agreement was reached whereby Mamenic would publish and file a tariff revision listing Dextrine as a line item carrying a rate of $70 W.[8] However, through clerical error, the published tariff bearing an effective date of February 28, 1977, showed a rate of $70 W/M for Dextrine.[9] Thereafter, Mamenic issued an initial billing to Staley reflecting the N.O.S. rate of $111 W/M. Later a corrected bill showing a rate of $70 W/M was issued by Mamenic and was paid by Staley. When the clerical error in the tariff was called to Mamenic's attention, it published another tariff revision bearing the effective date of April 18, 1977, showing a rate of $70 W for Dextrine.[10]

The application fails to state whether there were shipments made by shippers, other than Staley, of the same or similar commodity which were carried by Mamenic during approximately the same period of time at the $70 W/M rate, as required by Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in

[7] The calculation follows:

10.1 tons × $70 =	$707
10.1 tons × $3.75 =	37.87
Total =	$744.87

[8] A written statement from Mamenic's agent confirming the agreement is in the record.

[9] Freight Tariff No. 21, FMC No. 17, Correction No. 92, 1st revised page 30.

[10] Freight Tariff No. 21, FMC No. 17, Correction No. 94, 2nd revised page 30. Physically, the tariff is printed in a way which might lead to the erroneous conclusion that Dextrine, in bags, would not be entitled to the $70 rate. As pertinent, the line items of commodities appears as follows:

Detergent Alkylates, in bulk, in drums
[R] Dextrine
Dry Goods . . .

From the foregoing, at first glance it would appear that Dextrine is a type of Detergent Alkylate and had to be shipped in drums to be rated at $70. But, Dextrine is a polysaccaride and not a Detergent Alkylate. The indentation of Dextrine after [R] (for reduction) is bad form but is substantively immaterial.

failing to file a new tariff is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[11] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides as pertinent:

> *Provided, however,* That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier on conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

These facts would seem to satisfy all the requirements for relief under section 18(b)(3), but one essential ingredient is missing in connection with both 1st and 2nd revised pages 30. An examination of the tariffs on file with the Commission discloses that neither of those revisions was ever filed with the Commission and that original page 30 is still in effect.[12]

The upshot of the failure to file the two revisions requires the findings that (1) this Special Docket application must be denied because it fails to satisfy the requirements of section 18(b)(3), and (2) the shipment must be rated and charges must be collection at the N.O.S. rate of $111 W/M, the effective rate at the time of shipment.

It will be recalled that Dextrine is a polysaccaride. Assuming, but not deciding, that this polysaccaride shipment may be entitled to a rating other than N.O.S. under Mamenic's tariff, finding (2), above, is without prejudice to the filing of a complaint by Staley pursuant to section 22 of

[11] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a).

[12] The Commission has fashioned a procedure designed to protect against clerical or administrative error, in processing filed tariffs, on the part of the Commission's staff. That procedure is published at 46 CFR 536.2(e), which provides:

> (e) All tariffs filed with the Commission, except temporary filings as permitted hereinafter in § 536.6(c)(1) shall be accompanied by a letter of transmittal which shall clearly identify the tariff and pages involved. If the sender desires a receipt, a duplicate of such letter must be furnished together with an envelope approximately 4½ by 9¾ inches completely blank except for the name and address of the sender. The duplicate will be stamped with the date of receipt by the Commission and returned to the sender. If a duplicate and an envelope are not submitted, a receipt will not be furnished.

Telephone conversations with Mamenic's general agent, United States Navigation, Inc., reveal that it is the agent's practice to submit a duplicate letter of transmittal and a self-addressed envelope with all correction notices, but that a search of its records fails to reveal a stamped receipt by the Commission applicable to correction Nos. 92 and 94.

the Shipping Act, 46 U.S.C. 821, setting forth a violation of section 18(b)(3) (misclassification) or any other provision of the Shipping Act.

Therefore, it is ordered that:

1. Mamenic shall collect the additional amount of $615[13] from Staley for the shipment.

2. Mamenic shall file an affidavit of compliance with the terms of this order within thirty days. The affidavit shall state whether the additional freight charges have been collected or shall describe the steps taken to effect collection.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
December 19, 1977.

[13] At $111 W/M, the charges amount to $1,721.25. It is noted that the initial billing, rated at $111 W/M, shows total charges of $1,728.32. But the latter amount includes a figure of $7.07 representing wharfage charges. Wharfage charges are not included in Mamenic's tariff. However, if Mamenic advanced wharfage charges for Staley and has not been repaid, Mamenic shall collect those charges, as well, from Staley.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 543

HENRY I. DATY, INC.

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is ordered, that the application herein for permission to refund a portion of freight charges is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 543

HENRY I. DATY, INC.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted January 11, 1978

Application denied.

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

The Pacific Westbound Conference (PWC) and its member line, Yamashita-Shinnihon Line (Y-S), seek permission to refund a portion of the freight charges on a shipment of Clay—N.O.S., Ground from Savannah, Georgia, to Tokyo, Japan. The shipper who paid the freight charges was Henry I. Daty, Inc. (Daty). The application was filed August 24, 1977.

According to the documentation furnished by PWC, 46,822 kilograms (103,224 pounds) of ground clay in 3 containers[2] was delivered to Southern Railway System at Savannah on April 20, 1977,[3] and was transported by railroad surface carriers to Oakland, California, where it was loaded aboard a Y-S vessel on May 6, 1977. The applicable tariff is PWC Westbound Intermodal Tariff No. 8.[4]

The aggregate freight charges collected from Daty by Y-S were $4,588.56. The basis on which those charges were collected was Item 276.2100.50 of the tariff which carried a rate of $98.00 per 1,000 kilograms. The rate sought to be applied is $56 per 1,000 kilograms. Thus, Y-S seeks

[1] This decision became the decision of the Commission January 11, 1978.

[2] The railroad waybill shows a weight of 141,000 pounds for the 3 containers. The weight discrepancy is not explained but probably reflects the weight of the clay, containers and bogies. However the application places reliance on the weight which appears on the Y-S bill of lading, that is, 103,224 pounds. As will be seen, Daty confirms the latter to be the correct weight. The size of the containers is not disclosed in the application, but as also will be seen, the containers were 20 footers.

[3] The application states that the date of delivery was April 6, 1977, but the date shown on the railroad waybill is April 20, 1977.

[4] I.C.C. No. 1, F.M.C. No. 15.

to charge $2,622.03 for the shipment and to refund $1,966.53.[5] The reason given by PWC in support of the lower rate is oversight in increasing the rate on less than 30 days notice.

The application recites that there are shipments of others than Daty, of unknown quantity, of the same or similar commodity, which moved via PWC carriers during approximately the same period of time at the $98 per 1,000 kilograms rate. The record does not indicate whether the other shippers were notified. Although section 18(b)(3) does not appear to require that notice be given individually to all shippers similarly situated prior to filing an application to make refund (appropriate notice is required only if the application is approved), elemental fairness dictates that PWC members should notify similarly situated shippers who paid charges based on rates which were increased on less than 30 days notice.

PWC furnished the following statement in support of the application to refund charges:

> Effective February 21, 1977, second revised page 374, Pacific Westbound Conference Intermodal Tariff No. 8, FMC No. 15, contained a rate for clay, N.O.S., Ground of $56.00 Wt. to Group 1 Ports in special rate Item 276.2100.60. This rate was subject to a minimum weight of 45,000 pounds per 40 ft. container when shipped by American President Lines and a minimum charge of $1300.00 per 40 ft. container when shipped by Nippon Yusen Kaisha. In all other instances, regardless of container size, the applicable rate to Group 1 ports was $56.00 Wt. This condition prevailed until March 23, 1977 when, in fourth revised page 374 issued March 22 and effective March 23, Conference adopted the previously independent $56.00 Wt. rate and 40′ container minimum of 45,000 lbs. This action, however, caused the rate previously applicable for cargo loaded in 20 and 35 foot containers to increase from $56.00 to $98.00 Wt. on less than 30 days notice as required by the Federal Maritime Commission. This condition, through oversight, continued until May 20, 1977 with the effectiveness of seventh revised page 374. Revisions two through seven of page 374 are attached to this application.
>
> Through this application the Pacific Westbound Conference is respectfully seeking permission to refund a portion of freight charges to Henry I. Daty, Inc. in the amount of $1,966.53, the difference between the rate of $98.00/kilo ton improperly contained in the tariff and $56.00/kilo ton, the rate which should have been assessed for Ground Clay, N.O.S. in other than 40 ft. containers between March 23 and May 20, 1977.
>
> Also attached is a copy of Yamashita-Shinnihon Line on Board Bill of Lading #SVOT-507 indicating the charge of $4,588.56 was paid by the complainant on June 6, 1977.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[6] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified

[5] The railroad waybill shows a per container rate for 3 containers on flat cars and total railroad charges of $1,764.00. Ms. Flo of Y-S informed me by telephone that the amount shown is incorrect. The amount paid to the railroad by Y-S was $1,614 ($538 per container).

[6] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

in tariffs on file with the Commission, section 18(b)(3) provides, as *pertinent:*

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers:

Provided further, That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

This application turns on the second proviso of section 18(b)(3), which requires the carrier, *prior* to applying for authority to make refund, to file a new tariff with the Commission *which sets forth the rate on which such refund or waiver would be based.* This proviso "is jurisdictional and cannot be waived." *Louis Furth, Inc., v. Sea-Land Service, Inc.,* 17 SRR 1171, 1172 (1977).

The record reveals that PWC failed to file a new tariff setting forth a rate which would permit the requested refund to be made prior to applying for authority to make refund. Although the explanation offered by PWC appears to imply that seventh revised page 374, a new tariff provision filed prior to the filing of this application, sets forth a rate on which refund would be based, in fact the new tariff provision does not.

Accepting as correct that second revised page 374, effective February 21, 1977, contained a rate of $56.00, weight, regardless of container size for all PWC members except American President Lines (APL) and Nippon Yusen Kaisha (NYK),[7] and giving effect to the candid admission by PWC that fourth revised page 374 issued March 22, 1977, effective as to ground clay on March 23, 1977, caused the rate previously applicable to that commodity to be increased on less than 30 days notice when applied to 20 foot containers,[8] it is nevertheless clear that insofar as this

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[7] I do not intend this to be a finding that $56.00 was the rate in all other instances. Item No. 276.2100.60 on second and third revised pages 374 was published as a special rate of $56.00 and is susceptible of being construed as applying independently only to NYK and APL. Should it be determined in a later proceeding, if one is instituted, that Item 276.2100.60 applied only to NYK and APL shipments, the applicable rate would appear to be the rate shown in Item No. 276.2100.50 in effect on the date the shipment was made. As noted earlier, it is not clear whether the shipment was made on April 6 or April 20, 1977. On April 6, 1977, the effective rate was $85.00, per second revised page 374. Third revised page 374 became effective April 15, 1977, and it shows a rate of $98.00 for Item 276.2100.50.

[8] Section 18(b)(2) of the Shipping Act, 1916, 46 U.S.C. 817(b)(2) prohibits rate changes which result in an increase of cost to the shipper in less than 30 days after filing unless Commission approval is obtained. There is no evidence that such approval was either sought or given.

shipment is concerned, Item No. 276.2100.50 on seventh revised page 374, which became effective May 20, 1977, does not satisfy the jurisdictional requirement that a new tariff set forth a rate on which the proposed refund could be granted.

Item No. 276.2100.50 on seventh revised page 374 shows two rates for ground clay. The first is a rate of $98 per 1,000 kilograms and the second is a rate of $56 per 1,000 kilograms. As pertinent, the $56 rate applies only to shipper stuffed containers subject to a minimum weight for 20 footers of 40,000 pounds per container.

As indicated earlier, the documentation accompanying this application shows the total weight of the clay in all containers to be 103,224 pounds. From this, alone, it is manifest that the minimum of 40,000 pounds could not have been reached by each container in the shipment.

To supplement the record and to ascertain the actual size of the containers and the weight of the contents of each container, I spoke to representatives of Y-S and Daty by telephone.

Ms. Flo of Y-S advised that each of the containers was a 20 footer. Mr. Daty stated that the weight of a bag of clay was 50.6 pounds. His records showed the following:

NYKU289730—670 bags—33,902 pounds
NYKU290027—700bags—35,420 pounds
NYKU278610—670 bags—33,902 pounds
Total—2,040 bags—103,224 pounds

Obviously, none of the 3 containers met the 40,000 pounds minimum weight requirement for the $56 rate appearing in seventh revised page 375 for Item No. 276.2100.50.[9]

I find that the jurisdictional requirement for Special Docket relief under section 18(b)(3) has not been satisfied in that neither PWC nor Y-S filed a new tariff setting forth a rate which would permit the requested refund to be made prior to filing this application for authority to make refund.[10] This finding necessitates denial of the application to make refund.

The denial of the application is without prejudice to Daty, the nominal complainant in this proceeding, filing a complaint pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. 821, setting forth a violation of section 18(b)(2) or other provisions of the Shipping Act, 1916, and asking reparation for the injury, if any, caused thereby. However, because the

[9] Although not referred to in the Application, it is noted that in 8th revised page 374, effective June 15, 1977, and in subsequent revisions effective prior to the filing of this application, the 20 foot container minimum weight was reduced to 16,783 kilos per container—36,999.8 pounds. Even with this reduction, none of the containers would qualify for the $56 rate. It has been suggested by PWC that, for the purpose of this application, the shipment could still be rated at $56 by computing charges on the basis of the minimum container weight shown in the tariff. PWC means by this that under eighth revised page 374, charges could be computed by multiplying $56 times 50.349 kilo tons (3 × 16,783 kilograms). This approach suffers from two defects. At the threshold, there must be an enabling tariff provision authorizing this method of computation. However, no such tariff provision has been cited. Second, even if the tariff did contain such enabling provision, the resulting charges would be greater than the shipper should have paid, assuming that Daty was entitled to a $56 rate based on the actual weight of the shipment, as the application recites.

[10] Therefore, it is not necessary to decide whether or under what circumstances relief may be afforded pursuant to section 18(b)(3) to shipments made under intermodal tariffs. See Judge Kline's discussion of this issue in Special Docket No. 535, *Farr Co. v. Seatrain Lines* (Initial Decision issued December 14, 1977, at pp. 10–11).

record before me in this proceeding is incomplete, nothing contained in this decision should be construed as a finding that there has been a violation of section 18(b)(2) or any other provision of the Shipping Act.

Accordingly, permission is denied to PWC and Y-S to refund a portion of the freight charges collected from Daty.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
December 15, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 553

ABIKATH EXPORT CORP.
C/O FRANLIG FORWARDING CO., INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is Ordered, That applicant is authorized to refund $803.54 of the charges previously assessed Abikath Export Corp.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 553 that effective July 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1977, through July 12, 1977, the rate on 'Paper, Waste' is $50.00 per 2,240 lbs, Minimum 20WT per container, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 553

ABIKATH EXPORT CORP.
C/O FRANLIG FORWARDING CO., INC.

v.

SEA-LAND SERVICE, INC.

Adopted January 11, 1978

Application for permission to refund a portion of freight charges granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Sea-Land Service, Inc., pursuant to Rule 92(a), Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3)of the Shipping Act, 1916, as amended, has filed a timely (within 180 days of July 6, 1977, the date of the involved shipments) application to refund an aggregate of $803.20, a portion of $16,867.04 aggregate freight charges actually collected by Sea-Land on September 26, 1977, from Franlig Forwarding Co., Inc.

Sea-Land's Bill of Lading No. 975718125–4, dated July 6, 1977, shows the shipper Abikath Export Corp., the freight forwarder Franlig Forwarding Co., Inc., and the shipment, freight prepaid, of nine (9) 35 ft. containers said to contain 288 bales Waste Paper for Recycling, gross weight 405,040 lbs. as 406,060 lbs. on Sea-Land's vessel *Baltimore/Market 083E* from Charleston, S.C., to Naples, Italy. The rate is shown as $52.50 per 2,240 lbs. for 406,060 lbs. and the charge is shown as $9,517.04. (The arithmetic of the situation is 406,060 lbs. ÷ 2,240 lbs. = 181.27. 181.27 × $52.50 = $9,516.67, a difference of 37 cents.)

Sea-Land's Bill of Lading No. 975718113–6, dated July 6, 1977, shows same shipper and freight forwarder as above, shipment freight prepaid of seven (7) 35 ft. containers said to contain 203 bales Waste Paper for Recycling, gross weight 305,230 lbs. as 313,600 lbs. on Sea-Land's vessel *Baltimore/Market 083E* from Charleston, S.C., to Leghorn, Italy. The rate is at $52.50 per 2,240 lbs. for 313,600 lbs. and the charge is shown as

[1] This decision became the decision of the Commission January 11, 1978.

\$7.350.00. (The arithmetic checks: 313,600 lbs. ÷ 2,240 lbs. = 140. 140 × \$52.50 = \$7,350.00.)

The application submitted the following facts in support:

> Effective May 9, 1977, special rates were established on Wastepaper in both Section 1 (France and Italy) and Section 2 (Spain) of Sea-Land Tariff 168–B. Special rate was \$50.00 W, minimum 20 Wt. per container thru June 30, 1977.
>
> On June 28, 1977, it was Sea-Land's intent to extend thru special rate in Section 1 only thru July 7, 1977. However, due to a clerical error, this extension was made in Section 2 on proposal #4482.
>
> On July 13, 1977, we realized our error and immediately published a \$50.00 rate in Section 1 thru August 11, 1977.
>
> The shippers on whose behalf we are filing this application, moved their shipments on July 6, 1977 and would have been afforded a \$50.00 rate had it not been for our error.

This application was concurred in by Franlig Forwarding Co., Inc., as agents for Abikath, and in the affidavit executed October 21, 1977, attached to the application, Franlig Forwarding certifies that charges of \$16,867.04 on the shipments involved herein were paid and borne by it as agents for Abikath Export Corp.

The application also states "There are additional shipments which moved via respondent during the same period of time at the rates set forth in (1) above. Special Dockets applications will be filed for relief concurrent with this application."

The tariff applicable herein is Sea-Land Tariff 168–B—FMC–73, Item 5860. Under that tariff and facts similar to those herein, see Special Dockets No. 551 and 552 in which Initial Decisions were served December 5 and December 7, 1977, respectively.

Under B/L No. 975718125–4, correction of error becomes 181.27 × rate of \$50.00 = \$9,063.50. Under B/L No. 975718113–6, correction of error becomes 140 × rate of \$50.00 = \$7,000.00. Total, \$9,063.50 + \$7,000.00 = \$16,063.50. The actual amount paid for freight charges was \$16,867.04. Amount to be refunded (\$16,867.04 minus \$16,063.50) is \$803.54.

Upon consideration of the documents presented herein and of the above, the Presiding Administrative Law Judge deems the application for permission to refund a portion now shown to be \$803.54 of the \$16,867.04 freight charges collected comports with Rule 92, Special Dockets Application, Rules of Practice and Procedure, and section 18(b)(3) of the Shipping Act, as amended, referred to above, and the error asserted is explained within the contemplation of Rules and statutes applicable.

The Presiding Administrative Law Judge *finds and concludes* in addition to the findings and conclusions hereinbefore stated:

(1) There was an error of a clerical or administrative nature (corrected by effective tariff before this application was filed), which resulted in payment of an overcharge.

(2) The permission to refund requested will not result in discrimination as between shippers.

(3) The application, having been timely filed and having shown acceptable cause, should be granted.

Wherefore, it is

Ordered

The application to refund a portion of the freight charges be and hereby is granted. The amount to be refunded is $803.54.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 12, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 549

U. S. POST OFFICE

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is Ordered, That applicant is authorized to waive collection of $2,831.59 of the charges previously assessed the U. S. Post Office.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 549 that effective April 15, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period April 15, 1977, through August 9, 1977, the rates on 'U. S. Mail, Mail Freight, Mail Express, Including Mail Bags' are determined pursuant to negotiated contracts with the U. S. Postal Service, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 549

U. S. POST OFFICE

v.

SEA-LAND SERVICE, INC.

Adopted January 11, 1978

Application to waive collection of a portion of freight charges granted.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

On June 22, 1976, the Commission issued Amdt. 6 to General Order 13, exempting mail rates from the tariff filing provisions of the Shipping Act.

By reason of inadvertence and administrative error, the Pacific Westbound Conference Local and Overland Freight Tariff No. 5, FMC No. 13, was not amended to conform to General Order 13, Amdt. 6, until August 10, 1977.

During the period April 18, 1977—June 1, 1977, the United States Post Office made three mail shipments, aggregate weight 54,460 lbs., from Oakland, California, to Bangkok, Thailand, on ships of Sea-Land Service, Inc., F/B 993–730733, F/B 993–732075, F/B 993–732583.

The tariff in effect at the time of shipment, 2nd Revised Page 748, Item 983–0002–00, had an applicable rate of 16 cents per pound. At such rate, the aggregate charges would total $8,713.60.

By 4th Revised Page 748, effective August 10, 1977, the tariff was revised to conform to the General Order 13, Amdt. 6, whereby it provided that member lines could contract with the Postal Service rather than by a tariff rate. The Postal Contracting Manual provides that contracts for the carriage of mail for Distance (Nautical Miles) 7500–7999 shall be at the Rate (c/lb.) 10.8 cents.

At such rate the 54,460 lbs. carried in the three shipments would be charged $5,882.01.

The application for waiver of freight charges requests permission to

[1] This decision became the decision of the Commission January 11, 1978.

waive $2,831.59, being the difference between $8,713.60 (charges at 16 cents per pound) and $5,882.01 (charges at 10.8 cents per pound).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.

The administrative error of not promptly conforming the tariff to the regulations is an appropriate basis for waiving the tariff rate and permitting the lower rate to prevail.

It is therefore found that:

1. There was an error of an administrative nature in failing to delete the rate in question.

2. The waiver of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive a portion of the freight charges, the Pacific Westbound Conference filed a new tariff which sets forth the basis by which such waiver would be computed.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive a portion of the freight charges represented by $2,831.59.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
December 12, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 548

NAN FUNG TEXTILES, LTD.

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.*

It is ordered that applicant's request for permission to refund a portion of freight charges is denied.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

*The Administrative Law Judge by order served January 5, 1978, reiterated his initial decision. This order was prompted by a letter from the agent of NYK Line requesting reconsideration by the Administrative Law Judge of the initial decision. Nothing in the January 5, 1978, order serves to alter our determination here. We note, however, that the appropriate avenue of seeking relief from an initial decision would be to file exceptions to the Commission and not to petition the Administrative Law Judge for reconsideration (See 46 CFR 502.227).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 548

NAN FUNG TEXTILES, LTD.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted January 11, 1978

Application for permission to refund a portion of the freight charges denied.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

Pacific Westbound Conference has filed an application for permission to refund $752.54, being a portion of the freight charges totalling $66,591.84 on 8 shipments of Raw Cotton Other Than Linters, totalling 1,012,298 lbs. from Galveston, Texas, to Hong Kong during the period April 13, 1977-June 5, 1977, carried on vessels of NYK line.

The freight charges were collected pursuant to Item 265–1000–21 of Pacific Westbound Conference Westbound Intermodal Tariff No. 8, F.M.C. No. 15.

On January 28, 1977, NYK by letter confirmed to the Pacific Coast Traffic Bureau its intent for the Bureau "to file the lowest independent rate on our behalf in the new P.W.C. Intermodal Tariff Number 8. This action is only on rate that will be filed in new tariff between February 1, 1977 through February 4, 1977."

However, by teletype TKSK 1918, dated February 3, NYK advised "we finally came up with a conclusion to file additional items in addition to 52 items previously filed per TKSF 1362/1715/1728 as our independent rate matched with the lowest filed rates *rather than to give blanket authority to PWC* bearing in mind the climate surrounding us. *In accordance with above conclusion please file following rates* at the lowest level. . . ." (Emphasis added.)

The items instructed to be filed at the lowest level did *not* include item 263–1000–21.

The specific instruction in TKSF not to give blanket authority thus

[1] This decision became the decision of the Commission January 11, 1978.

replaces and withdraws the intent set forth in the letter of January 28, 1977, "*to file the lowest independent rate.*"

NYK contends that they had a letter on file from PWC showing that the NYK rate level should have been at the lowest filed rate as of February 4, 1977. Significantly, however, no such letter is supplied by NYK in support of the application.

Even if such letter exists, it is difficult to understand how PWC could have considered it had blanket authority in view of the TKSF 1918 specifically negating blanket authority and filing only for specified items.

The narrative setting forth the basis for requesting permission to refund is as follows:

> On February 4, 1977, NYK informed the Pacific Westbound Conference that they intended to follow the lowest filed rate in the new PWC Intermodel Tariff No. 8 to all port areas other than Japan. These rates would be effective on February 21, 1977. The lowest rate shown for cotton (263.1000.01/21) on February 4 was $4.60 CWT to Hong Kong. NYK negotiated their business informing the Consignees that on the 21st of February our rate would be $4.60 CWT. We carried our first shipment in April. We also had further shipments in May and June. We were informed by the PWC in June that NYK was not a party to the $4.60. The rate that should be charged is $4.65 CWT. NYK protested this ruling to the PWC stating that they had a letter on file from us showing that NYK rate level should have been at the lowest filed rate as of February 4, 1977. NYK feels that the Consignees (since they paid the charges) are entitled to a refund of $752.54 which is the difference between the $4.60 rate and the $4.65 rate. For your ready reference, we are attaching copies of the bill of lading plus our letter to the PWC showing the action we wanted them to take on our behalf.

It is noted that on February 4, 1977, communication is included with the application for permission to refund a portion of the freight charges. The letter of January 28, 1977, is time stamped received by PWC January 31, 1977. The teletype is dated February 3, 1977. If the date "February 4, 1977" is intended to refer to the teletype of "February 3, 1977" the teletype still does not support the statement that NYK "intended to follow the lowest filed rate in the new PWC Intermodal Tariff No. 8 . . ." inasmuch as the teletype specifically rescinds blanket authority and is for the "lowest filed rate" for items specifically dated therein, which list does not include Item 263.1000.01–21.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission

is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

Thelegislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly discribed:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The statute while forgiving is to be strictly construed lest there by any suspicion that it could be utilized as a vehicle for improper rebating.

The evidence supplied in this application does not sufficiently warrant granting the application.

Permission to refund a portion of the freight charges denied.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
December 12, 1977.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Status Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 428(I)

KRAFT FOODS

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

January 12, 1978

Notice is hereby given that the Commission on January 12, 1978, determined not to review the decision of the Settlement Officer in this proceeding served January 5, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 428(I)

KRAFT FOODS

v.

SEA-LAND SERVICE, INC.

Reparation Denied.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Kraft Foods (complainant) claims $159.38 as reparation from Sea-Land Service, Inc. (respondent) for an alleged overcharge on a shipment that moved from New York, New York to Port-au-Prince, Haiti via the S/S HOUSTON on bill of lading 289604 dated December 12, 1975. Complainant specifically alleges a violation of Section 18[(b)(3)] of the Shipping Act, 1916. Complainant submitted the claim to respondent on April 4, 1977. On May 12, 1977, respondent denied the claim citing Item 45(b) of the United States Atlantic & Gulf-Haiti Conference S.B. HTI 9, Freight Tariff F.M.C. No. 1, i.e.:

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment.. . ."[2]

The shipment consisted of:

Chill Cargo 35 to 40 degree F		
750 Ctns. Proc. Cheese	24,000# (12 wt tn)	458 cft (11.45 mt)
75 Ctns. Cream Cheese	1,500# (.75 ft tn)	55 cft (1.375 mt)
825	25,500#	

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Notice of determination not to review January 11, 1978.)

[2] The complaint was filed with this Commission within the time limit specified by statute; and it has been well established by the Commission that carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

General Cargo		
170 Ctns. Proc. Cheese FD.	*2,465# (1.233 wt tn)*	80 cft (2 mt)
25 Ctns. Salad Dressing	275# (.138 wt tn)	7 cft (.175 mt)
195	2,740#	

Respondent rated the shipment as follows:

825 Ctns. Refrigerator Cargo, N.O.S. 25,500# or 12.75 wt tn ($146.00)	$1,861.50
195 Ctns. Canned Goods, N.O.S. 87 Cft or 2.175 mt ($86.00)	187.95[3]
	$2,048.05[4]
Port Improvement Charge 600 Cft or 15 mt ($1.71)	25.65
Wharfage 600 Cft or 15 mt ($4.57)	68.55
Landing & Delivery to Customs 600 Cft or 15 mt ($2.00)	30.00
Customs Handling Charge 600 Cft or 15 mt ($4.11)	61.65
Total	$2,234.40

Complainant's claim is directed solely to the 825 cartons weighing 25,500 pounds of processed cheese and cream cheese which moved as Refrigerator Cargo, N.O.S., at a rate of $146.00 per weight ton—$1,861.50. It alleges that the charges should have been $133.50 per 2,000 pounds per Item 294, 14th Revised Page 21A or $1,702.12. An overcharge of $159.38 is claimed. However, complainant errs as the rate in Item 294 on Refrigerated Cargo N.O.S. is $146.00 per weight ton of 2,000 pounds or $133.50 per measurement ton of 40 cubic feet, whichever produces the higher revenue.

Respondent counters by stating that the ocean freight of $1,861.50 on the 825 cartons of processed cheese and cream cheese moving under refrigeration was based only on the measurement instead of weight or measurement, whichever produced the greater revenue. Recalculation showed that the 750 cartons of processed cheese should have been moved on a weight basis, while the remaining 75 cartons of cream cheese should have moved on a measurement basis. Referring back to the first description of cargo at page 2 herein it will be noted that the 750 cartons of processed cheese (Refrigerated Cargo, N.O.S.) weighed 12 tons of 2,000 pounds and measured 11.45 measurement tons of 40 cubic feet. Therefore the weight basis rate of $146.00 per ton of 2,000 pounds was correct. However, the 75 cartons of cream cheese (Refrigerated Cargo, N.O.S.) weighed .75 tons of 2,000 pounds and measured 1.375 measurement tons of 40 cubic feet. Therefore, the measurement basis rate of $133.50 per measurement ton of 40 cubic feet would have applied only on the 75 cartons.

[3] There is no disagreement on the rate assessed the 195 cartons of processed cheese and salad dressing. The rate assessed thereon was the Canned Goods, N.O.S. Class 5 rate found on 8th Revised Page 31, of $86.00 per ton of 40 cubic feet or 2,000 pounds, whichever produces the greater revenue. This portion of the shipment weighed 2,740# and measured 87 cubic feet so was properly rated on the higher measurement ton basis.

[4] Transportation charges appearing on freight bill. However, in computing total transportation charges, respondent used the sum of $2,048.55.

Respondent alleges that the transportation charges that should have been assessed were:[5]

750 Ctns. Refrigerator Cargo, N.O.S. 12 wt tn ($146.00)	$1,752.00
75 Ctns. Refrigerator Cargo, N.O.S. 1.375 mt ($133.50)	183.56
195 Ctns. Canned Goods, N.O.S. 2.17 mt ($86.00)	187.05
Total	$2,122.61

Complainant paid transportation charges of $2,048.55, therefore, respondent is correct in its position that an undercharge has been assessed, i.e.:

Revised computation	$2,122.61
Original transportation paid	2,048.55
Balance due respondent	$ 74.06

This undercharge of $74.06 should be promptly adjusted between the parties with evidence of such adjustment furnished the undersigned to complete the record.

(S) JUAN E. PINE,
Settlement Officer.

[5] The 750 cartons of processed cheese weigh 24,000 pounds (12 weight tons of 2,000 pounds) and measure 458 cubi feet (11.45 measurement tons of 40 cubic feet). As the 12 weight tons produce the higher revenue thereon a weigh basis rate is assessed. However, as the service charges found in Item 11 at 14th Revised Page 8 and Original Page 8 A of the subject tariff are based on a ton of 2,000 pounds (12 weight tons) or a measurement ton of 35 cubic feet—45 35—(13.086 measurement tons), said service charges are all assessed on the higher revenue measurement basis. Ite 11 covering the various port charges indicates a charge per 35 cubic feet or 2,000 pounds and a higher equivalen charge per 40 cubic feet. The balance of the commodities on the bill of lading are assessed a transportation rate pe measurement ton of 40 cubic feet; therefore, service charges on these commodities are also assessed per measuremer ton of 40 cubic feet.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 535

FARR CO.

v.

SEATRAIN LINES

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

It is ordered, that the application herein for permission to waive collection of a portion of freight charges is denied.

It is further ordered, that Seatrain shall take steps to recover the full amount of the lawful applicable rate which applies to the shipment in question.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 535

FARR CO.

v.

SEATRAIN LINES

Adopted January 11, 1978

Application for waiver of a portion of freight denied.

A misquotation or misreading of a lawfully filed tariff by a carrier's rating clerk gives rise to no cause of action under P.L. 90–298, amending section 18(b)(3) of the Shipping Act, 1916, since it constitutes neither an error in a filed tariff nor an inadvertent failure to file an intended, new rate in a tariff conforming to an agreement between carrier and shipper.

Tariffs have the force and effect of law and must be adhered to strictly unless the limited type of mistake or failure to file a tariff envisioned by P.L. 90–298 applies under the circumstances.

Such applications involving a joint intermodal landbridge tariff must show that the requested refund or waiver will apply only to the water portion of the through rate and should also indicate whether any other shippers of the same or similar commodities are involved.

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

This proceeding was commenced by an application filed by Seatrain Lines, S.A., pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), 46 U.S.C. 817(b)(3), as amended by P.L. 90–298, and to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a). In its application filed August 12, 1977, Seatrain states that it wishes to waive collection of a portion of freight charges on a shipment of mechanical air cleaners which were transported under a bill of lading dated March 28, 1977, from Los Angeles, California, to Bilbao, Spain.

The subject shipment moved under a "landbridge" tariff from Los Angeles to Charleston, South Carolina, and was rated at $83.25 W/M per cubic meter as provided in the tariff in effect at the time.[2] Seatrain wishes to waive collection of a portion of the freight and wishes instead to apply

[1] This decision became the decision of the Commission January 11, 1978.

[2] Seatrain International, S.A., Eastbound Pacific Coast European Joint Container Freight Tariff No. 704, FMC No. 23—ICC No. 3, 31st Revised Page 92, effective March 23, 1977.

a rate of $43.00 per cubic meter. If its application is granted, the amount which Seatrain would forego would be $1,113.54, according to its application. For reasons discussed below, this waiver cannot be allowed.

As Seatrain states the matter, on or about March 22, 1977, a Ms. Ruth Odian, assistant export traffic manager of the Farr Company, the complainant in this case, called Seatrain's local office, asked to book a container of mechanical air cleaners, and inquired about the applicable rate. Seatrain's rate person quoted her a rate of $43.00 per cubic meter. This rate was published in the Eastbound Pacific European Joint Container Freight Tariff, F.M.C. No. 1, on 3rd revised page 296. This tariff page bore an effective date of March 28, 1977, on the upper right hand corner of the page. However, at the bottom of the page appeared a notation indicating that the rate would not be effective as to Seatrain until April 1, 1977.[3] As Seatrain states: "Our rate person apparently referred to the effective date at the top of the page (March 28) without referring to the small print at the bottom (April 1).

On the basis of this quotation, according to Seatrain, Ms. Odian loaded the container and tendered it to the inland carrier at Los Angeles on March 28, 1977, receiving a bill of lading issued by Seatrain bearing that date. However, when the container reached Charleston, it was inspected by an independent cargo inspection entity known as "TAG" which determined that the $43 rate was incorrect. A corrected invoice based upon the $83.25 rate was then submitted to the Farr Company, the shipper on the bill of lading. "TAG" indicated in its corrected invoice that the proper tariff rate effective at the time of shipment was the $83.25 rate published in the Seatrain tariff, cited above, which bore an effective date of March 23, 1977.

Discussion and Conclusions

Seatrain acknowledges that its rating person erred by misreading the tariff in effect at the time of shipment. Seatrain acknowledges furthermore that the shipper booked and shipped its container on the basis of what this person told the shipper. Seatrain obviously has no desire to capitalize on its agent's mistake and wishes to assess only the $43.00 rate. Indeed, some time after the shipment moved, the shipper requested a tariff change which was published in the pertinent Conference tariff, effective June 17, 1977, for shipments occurring on or after that date, at the rate of $43.00. However, despite the obvious mistake and the fact that the shipper had been misled, Seatrain's application cannot be granted under the special-docket procedure established by P.L. 90—298 and Rule 92(a) because the

[3] The notation at the bottom of the tariff page reads as follows:

Issued by: R. A. Valez, Secretary, AGREEMENT FMC 10052, 417 Montgomery Street, San Francisco, California 94104, for participating carriers: Italian Line, Sea-Land Service, Inc. *Seatrain International, S.A. (from April 1, 1977),* United States Lines, Inc. and Zim Israel Navigation Co, Ltd. (from April 7, 1977) (Emphasis added.)

mistake involved in this case was not an error in the tariff or an error on the part of the carrier in inadvertently failing to file a new tariff.

It has long been established that tariffs have the force and effect of law and that carriers must adhere to them strictly. *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965), and cases cited therein; *Penna. R.R. Co. v. International Coal Co.*, 213 U.S. 184, 197 (1913); *State of Israel v. Metropolitan Dade County, Florida*, 431 F. 2d 925, 928 (5th Cir. 1970); *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16, 19–20 (1970). In recognition of the fact that this hard and fast doctrine could result in inequities and hardship on shippers who may have relied upon a carrier's representation that an agreed-upon reduced rate would be assessed, Congress passed P.L. 90–298. See discussion in *United States v. Columbia S.S. Company*, 17 F.M.C. 8, 19–20 (1973). The legislative history to P.L. 90–298 illustrates the type of mistake which the statute was designed to remedy as follows:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[4]

The Senate Report states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.[5]

Accordingly, section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3), was amended in pertinent part to read as follows:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The applicability for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The question to be decided in this case is whether the type of mistake committed by Seatrain's rating person was the type contemplated by the above statute. In my opinion it was not.

It may be true that Seatrain's rating person misled the shipper and that

[4] House Report No. 920, 90th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.
[5] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [To accompany H.R. 9473], p. 1.

both parties thought that the applicable rate would be only $43. However, *to be subject to the remedial provisions of P.L. 90–298, more is required* than merely a mutual misunderstanding. It is not every case of mistake which this statute is designed to cover. Rather the statute is designed to cover only two situations: (1) "where there is an error in a tariff of a clerical or administrative nature," or (2) where there is "an error due to an inadvertence in failing to file a new tariff . . ." The legislative history illustrates the types of mistake contemplated in the first category, for example, when a carrier publishes a new tariff page which, through typographical error, changes a $37 rate to a $73 rate. House Report No. 920, 90th Congr. 1st Sess., p. 4. Another example which might fall under the first category (if not the second) is the example of a tariff republication which unintentially deletes a specific commodity rate thereby causing a shipper to be assessed the usually much higher general cargo NOS rate. Senate Report No. 1078, 90th Congr. 2d Sess., p. 4.

The example of the second category of error relating to inadvertent failure to file a new tariff is that situation in which "a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates." House Report, cited above, pp. 3, 4. The critical elements surrounding the second category of error contemplated by the statute appear to be a mutual understanding between the shipper and carrier prior to the time of shipment that a different, lower rate will be charged which will be filed in a new tariff and that the new tariff rate is intended to be filed by the carrier prior to the shipment. As noted above, the Senate Report in stating the purpose of the bill which became P.L. 90–298, refers to the situation "where through inadvertence there has been a failure to file a tariff reflecting an *intended* rate." Senate Report, cited above, p. 1. (Emphasis added.)

In this case, there is no mistake in the tariff which Seatrain's rating person consulted, thus eliminating the first category covered by P.L. 90–298. Nor is there any showing on the facts submitted that Seatrain's rating person, after mistakingly quoting an incorrect rate, intended to file a new tariff reflecting the lower rate and advised the shipper of such intention. Indeed, there would be no such advice from the rating person since he thought that the applicable rate was already on file. In short, the error committed was simply a misquotation or misreading of a correctly filed tariff. I have searched the legislative history to P.L. 90–298 and can find absolutely no mention of any congressional intention to apply this law to such misquotations by rating clerks. Not only is there nothing in that history regarding such mistakes or misquotations by rating clerks but there are indications that the types of mistakes contemplated by the framers of P.L. 90–298 were limited to such things as typographical errors in tariffs, inadvertent deletions of lower rates in republished tariffs and failures to consummate agreements for lower rates between shipper and carrier by neglecting to carry out the intended tariff filings. Furthermore, there were definite warnings expressed to Congress that P.L. 90–298 should be used by the Commission with great care so that the anti-rebating provisions of section 18(b)(3) would not be subverted and that the carrier's inadvertent failure to file a new tariff would be truly related to a good-faith promise to a shipper made prior to booking the shipment which the carrier intended to honor by filing a new tariff containing the agreed, lower rate prior to the date of shipment.[6]

Consistent with the above, the Commission has specifically refused to grant special-docket relief in cases in which the error is merely one of misquotation of rates, regardless of reliance by shippers on the rating clerk's errors. In *Commodity Credit Corp. v. Delta Steamship Lines, Inc.*, 14 SRR 1207 (1974), the carrier had erroneously quoted a $32 rate instead of the properly applicable $36 rate on file at the time of shipment. When notified of the misquotation, Delta attempted to make good on the mistake by filing a conforming tariff. The Commission denied the application, stating:

> We do not believe this to be "an error in a tariff of a clerical or administrative nature" or "an error due to inadvertence in failing to file a new tariff." Rather, it appears that what is involved here is an erroneous quotation of a rate, not an error in the tariff of a clerical or administrative nature or inadvertent failure to file an anticipated tariff. 14 SRR at pp. 1208, 1209.

See also *Perkins-Goodwin Co., Inc. v. Lykes Bros. Steamship Co., Inc.*, 16 SRR (1975), where the presiding officer denied the application because it involved a misquotation. This case, however, also involved a jurisdictional defect regarding failure to file a conforming tariff within the statutorily prescribed time period and was affirmed on those grounds. 16 SRR 444 (1975).[7]

[6] Both the Senate and House Reports, cited above, provide illustrations of typographical errors in tariffs, errors in republished tariffs, and inadvertent failures to file agreed rates in new tariffs which solicitors had promised to do prior to shipment. These situations are discussed furthermore by several witnesses who appeared at the congressional committee hearings. See Hearings before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, 90th Congr. 1st Sess., August 15, 16, 1967, pp. 85–110, containing statements and testimony of Chairman Harllee of the F.M.C. and Mr. John Mahoney. Mr. Mahoney provided illustrations of the type mentioned above (pp. 104–109) and further cautioned the committee against giving relief too broadly lest the anti-rebating provisions of section 18(b)(3) be subverted. For example, Mr. Mahoney warned against zealous carrier solicitors who made promises to shippers on the solicitors' own initiative where there was no intention by the carrier to file a conforming tariff and consequently no right of the shipper to demand the lower, promised rate under a special-docket procedure. Hearings, p. 109. Mr. Mahoney cautioned the committee as follows:

> We can see the possibility that relief in the inadvertence cases could be used to subvert the rebate provisions and recognize that the Commission has to guard against this. . . . This possibility arises because in the inadvertence cases the question of relief swings on the question of the intent of the particular carrier and the shipper applying for relief. . . . If the Commission gets this power, it must be made clear that carriers and shippers alike will have a very heavy burden to show good cause for relief under these conditions. *Id.*, p. 103. See also p. 95.

Chairman Harllee agreed with Mr. Mahoney on the need to limit special-docket relief cases to clerical or administrative error or inadvertent failure to file and further agreed to the limiting language suggested by Mr. Mahoney, which became part of P.L. 90–298. *ID.*, pp. 109–110. Chairman Harllee also cautioned against permitting rebating and agreed that the situations to be covered by the statute related to "typographical error or a failure on the part of a carrier to submit a tariff which they intended to submit and promised the shipper they would submit. . . ." *Id.*, pp. 87, 88.

[7] There is a curious confusion in Seatrain's application regarding the new tariff filed to correct the misquotation problem. In its application, Seatrain states that it wishes to apply the lower $43 rate but states that the conforming tariff which "must be on file with the Commission prior to application" is the Seatrain Tariff No. 704, FMC 23. But this named tariff contains the higher $83.25 rate which Seatrain does not wish to assess. The $43 rate which Seatrain

Accordingly, I must conclude that a mere misreading of a tariff or misquotation by a carrier's rating clerk does not fall under P.L. 90–298 since it constitutes neither an error in a filed tariff nor an inadvertent failure to file a new rate in a tariff which the rating clerk or carrier had intended and promised to do prior to date of shipment. Therefore, regardless of equities, the application must be denied. As the Commission stated in *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191 (1977):

> [I]t is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment. While we recognize that should the application be denied the consequences of the carrier's consecutive errors would fall upon the shipper, nevertheless the authority granted by P.L. 90–298 to depart from the rigid requirements of section 18(b)(3) of the Act and to make a rate applicable retroactively is strictly limited and in our opinion would not extend to approve a rate which was never agreed upon or intended to be filed. 17 SRR at p. 1193.[8]

Since the only lawful rate in effect at the time of shipment, namely $83.25 per cubic meter, must still be applied in its entirety, as the independent cargo inspection company has determined, Seatrain must seek full recovery of the total amount of freight based on that lawful rate. Cf. *United Nations et al. v. Hellenic Lines Ltd. et al.*, 3 F.M.B. 781, 786 (1952). Seatrain shall therefore take steps to recover this amount and report to the Commission as to how it has complied with this order within such time as the Commission may direct, if this Initial Decision is affirmed.

Although the application must be denied for the reasons stated above, the fact that it concerned a "landbridge" tariff but failed to show that the desired waiver applied only to the water portion of the joint, through intermodal rate requires some remarks in case Seatrain or any other water

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wishes to apply, however, is published in two tariffs, both of which were on file on or after the date of shipment. See Eastbound Pacific Coast European Joint Container Freight Tariff No. 1, F.M.C.–I.C.C. 1, effective March 28, 1977, but effective for Seatrain on April 1, 1977, 3rd. rev. page 296, and same tariff, 5th rev. page 296, effective June 17, 1977. If this application were to otherwise have qualified, which of these tariffs was intended to be the conforming tariff filed prior to the application?

[8] As noted above, the traditional and longstanding policy regarding tariffs is that they have the force and effect of law and demand strict adherence. The primary purpose of this strict requirement, of course, is to prevent discrimination among shippers. See *United States v. Columbia S.S. Company*, cited above, 17 F.M.C. at page 19; *Martini & Rossi et al. v. Lykes Bros. S.S. Co.*, 7 F.M.C. 453, 456 (1962). This strict policy prevails even if in some cases hardship will result. *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915); *Midstate Co. v. Penna. R. Co.*, 320 U.S. 356, 361 (1943). Furthermore the filed rate is considered to be the only lawful rate which can be charged and the shipper is charged with notice of it. Ignorance of the rate or even misquotation is not considered to be an excuse justifying departure from the published rate. In *Louisville & Nash. R. R. v. Maxwell*, cited above, the Supreme Court enunciated these principles in connection with comparable tariff-filing provisions of the Interstate Commerce Act as follows:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext. *Shippers and travelers are charged with notice of it*, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. *Ignorance or misquotation of rates is not an excuse for charging either less or more than the rate filed*. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. (Emphasis added.) 237 U.S. at page 97.

The Commission has followed this strict policy (except, of course, where all the requirements of P.L. 90–298 are met). See *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965), *Ocean Freight Consultants, Inc. v. Bank Line Ltd.*, 9 F.M.C. 211, 215 (1966).

carrier publishing a joint F.M.C.–I.C.C. intermodal tariff seeks special docket relief.

Had Seatrain otherwise qualified under P.L. 90–298 and provided a water portion breakout of it through, joint rate as the Commission's General Order 13 had required, 46 CFR 536.16(b), it might have been possible to verify that the amount of the waiver applied only to the water portion of the through movement. However, Seatrain has not provided such a breakout nor furnished proof that the waiver would apply only to the water portion. It is therefore impossible to determine whether the waiver would affect the inland portion as well. It is recognized that this Commission will not interfere with inland rates which are under the jurisdiction of the Interstate Commerce Commission.[9] That Commission has no special-docket procedure permitting the filing of retroactively effective tariff pages designed to remedy inequities. Since the application must be denied in any event, however, there is no point in seeking further proof from Seatrain on this particular matter.

However, for future reference, Seatrain should take care to show that any desired refund or waiver pertains to the water portion of the joint F.M.C.–I.C.C. tariff.[10]

Finally, since P.L. 90–298 permits a waiver or refund to be granted "where it appears that such refund or waiver will not result in discrimination among shippers," Seatrain's application should have contained a statement as to whether any other shippers of the same or similar commodity were involved around the time of shipment. The application makes no reference whatsoever to the existence of any such shippers on the standard form submitted pursuant to Rule 92(a), 46 CFR 502.92(a).

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
December 14, 1977.

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[9] The cited regulation which appears to have been in effect at the time of shipment during 1977 requires a port-to-port breakout of a through intermodal rate. The regulation states that this breakout will be treated "as a proportional rate subject to the provisions of the Shipping Act, 1916." The Commission explained when issuing the regulation that its jurisdiction over rates did not extend beyond port areas. See *Filing of Through Rates and Through Routes*, 1 SRR 574, 579 (1970). Since that time there has been an understanding between this agency and the I.C.C. that each agency would confine its regualtion to its respective spheres. See *Commonwealth of Pennsylvania v. I.C.C.* (D.C. Cir. June 20, 1977), slip opinion, pp. 27–29; *Ex Parte 261*, 351 I.C.C. 490 (1976); *Interpretations and Statements of Policy*, F.M.C., April 12, 1976; *Order Approving Rules of the Interstate Commerce Commission, etc.*, F.M.C., April 12, 1976. Regulation of several agencies over the same party under their respective statutes in which the regulation is confined to each respective sphere of jurisdiction is not unprecedented. Cf. *Baton Rouge Port Commission v. United States*, 287 F. 2d 86, 92 (5 Cir. 1961), cert. den. 368 U.S. 985; *Municipal Electric Utilities Association v. F.P.C.*, 4[illegible] F. 2d 967, 971 (D.C. Cir. 1973); *Modern Intermodal Traffic Corporation-Investigation*, 344 I.C.C. 557, 565–5[illegible] (1973); *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82, 89 (1970).

[10] In previous special-docket proceedings involving joint "landbridge" tariffs, the carrier has stated that the waiver or refund "would affect only the ocean carrier's portion." Special Docket No. 492, *Toei Kogyo Co. Ltd. v. Sea-Land Service, Inc.*, 17 SRR 427 (1977); Special Docket No. 495, *Universal Molin v. Sea-Land Service, Inc.*, 17 SRR 45[illegible] 451 (1977); Special Docket No. 505, *Kuhne & Nagel v. Sea-Land Service, Inc.*, 17 SRR 383, 388 (1977).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 378(I)

LORD EXPORT CO., A DIVISION OF LORD CORP.

v.

UNITED STATES NAVIGATION, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

January 13, 1978

Notice is hereby given that the Commission on January 13, 1978, determined not to review the decision of the Settlement Officer in this proceeding served January 6, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 378(I)

LORD EXPORT CO., A DIVISION OF LORD CORP.

v.

UNITED STATES NAVIGATION, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Lord Export Company, a Division of Lord Corporation (complainant) alleges that it was overcharged $445.50 by United States Navigation, Inc., General Agent for Marina Mercante Nicaraguence S.A. (respondent) as a result of misdescription of cargo on the bill of lading for the subject shipment.[2] Complainant states that on July 21, 1975 respondent issued its bill of lading 12 covering the movement of "5 PALLETS (50 PCS.)—SHOCK ABSORBERS 12735# 5777K" from New York, New York to Acajutla, El Salvador on the vessel COSTA RICA.

The applicable tariff is the Atlantic & Gulf West Coast of Central America and Mexico Conference S.B. CA–8 Freight Tariff F.M.C. No. 1. Respondent assessed the Cargo, N.O.S., Harmless, Class 1 rate of $152.50 per ton of 40 cubic feet or 2,000 pounds, whichever produces the greater revenue. The shipment weighed 12,735 pounds and measured 396 cubic feet as indicated on the bill of lading/freight bill. Therefore, the weight was $\frac{12,735}{2,000} = 6.368$ weight tons and the measurement was $\frac{396}{40} = 9.9$ measurement tons, the latter being the higher applies. Respondent assessed the rate and charges as follows:

5 Pallets Cargo, N.O.S.	9.9 mt ($152.50)	$1,509.75
Bunker Surcharge	9.9 mt ($7.00)	69.30
Manifest Fee		.50
		$1,579.55

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Notice of determination not to review January 13, 1978.)

[2] Although no violation of the Shipping Act, 1916, is alleged, it is assumed to be a violation of section 18(b)(3) thereof.

Complainant alleges that the correct rate should have been that for fenders, ship or dock—Class 7 at a rate of $107.50 per 40 cubic feet as contained in the same tariff plus surcharges for a total of $1,134.05. The overcharge claim was filed with respondent on September 21, 1976 who refused to honor the claim stating that the shipment was rated per the description on the bill of lading and export declaration and that the claim would be considered only when submitted within six months per Item 7b of the tariff, i.e.:

> "Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight bases on alleged error in weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[3]

In its claim to the Commission, complainant alleges that the shipment consisted of 5 Pallets Fenders or Bumpers, Boat or Dock Rubber, O/T cut from Old Rubber Tires and Steel Comb. as shown on the original collect bill of lading. [motor carrier's bill of lading]

With regard to claims involving cargo misdescription, past Commission policy and judicial precedent have unquestionably declared that a shipper's misdescription of cargo can still afford a basis for later reparation relief, and that in cases involving alleged overcharges under section 18(b)(3)of the Act the controlling test is what the complainant shipper actually shipped, and is not limited to how cargo was described on the bill of lading. *Union Carbide Inter-America* v. *Venezuelan Line*, 17 F.M.C. 181, 182 (1973); *Abbott Laboratories* v. *Moore-McCormack Lines, Inc.*, 17 F.M.C. 191, 192 (1973); where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant shipper's (new) description, the Commission has held that the complainant has a "heavy burden of proof" and must establish, with reasonable certainty and definiteness, the validity of the claim. *Western Publishing Co.* v. *Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973); *Johnson & Johnson Intl.* v. *Venezuelan Lines*, 16 F.M.C. 87, 94 (1973); *Colgate Palmolive Peet* v. *United Fruit Co.*, 11 SRR 979, 981 (1970).

It is usually the case, as it is here, that the carrier in classifying and rating a shipment must look to the information supplied him by the shipper or freight forwarder. Accordingly, one cannot "fault" the carrier for relying on descriptions set forth on the bill of lading. However, in determining whether reparation should be awarded in a given case, i.e., whether section 18(b)(3) has been violated vis-a-vis the filed tariffs, "a

[3] The complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that carrier's so called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

tariff is a tariff" and the controlling test is finally what the complainant shipper can prove was actually shipped.[4]

Complainant had the shipment transported from Erie, Pennsylvania via motor carrier to a freight forwarder in New York, New York prior to the port-to-port movement. The motor carrier's bill of lading dated July 15, 1975, describes the cargo as:

> "5 Pallets Fenders or Bumpers, Boat or Dock Rubber, O/T cut from Old Rubber Tires and Steel Comb. 12,735#"

It was further indicated on the motor carrier's bill of lading that the dock receipt described the cargo as "5 PALLETS (60 PCS.)—SHOCK ABSORBERS 12735#" and contained a further partial clarification "UNHARDENED VULCANIZED RUBBER ARTICLES, N.E.C., AS: SHOWN ABOVE."

Complainant also submitted its Invoice No. 55002 dated July 15, 1975 covering the shipment. From the above submissions it did not appear that a definite description of the commodity moved could be developed. On June 27, 1977, in response to my request of June 7, 1977, complainant submitted a copy of the export declaration and an advertising brochure (Bulletin No. 800) covering the subject commodity.

The export declaration contained the same commodity description and clarification as the dock receipt. The Schedule B Commodity No. thereon was 629.9860 which covers:

> "Unhardened vulcanized rubber articles, n.e.c. (including plates, sheets, and strips cut to nonrectangular shapes and/or worked more than surface worked, and profile shapes worked more than surface worked) except specially fabricated for vehicles and aircraft (formerly 6298850 and part of 6298869)."

Complainant's invoice covers the shipment of 60 items of Lord Part Number 1F4 180. Part 1F4 180 is shown on page 6 of complainant's advertising brochure and is described as a marine fender. The item is further described on the title page of the brochure as:

> "High-strength, bonded-rubber fenders bring greater shock-absorbing efficiency and economy to marine fendering systems. Facilitate smoother berthing with optimum safety to both vessel and pier. Permit lighter construction in new facilities, and adapt easily to existing piers, increasing their capabilities for handling today's highest-tonnage ships. . . ."

Respondent's allegation that the shipment consisted of Fenders, Ship or Dock at the Class 7 rate [as indicated on 10th Revised Page 46 of the subject tariff] has been verified. It has been verified singularly by some of the documentation and collectively by some of the documentation. Said documents consist of the original motor carrier bill of lading, the dock receipt, the export declaration, the invoice and the advertising brochure. The proper rate and charge assessment thereon is:

[4] "Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, rules and regulations in the carrier's filed tariff" *Kraft Foods v. Moore-McCormack Lines*, F.M.C. 320, 323 fn. 4 (1974).

5 Pallets Fenders, Ship or Dock	9.9 mt ($102.00)	$1,009.80
Bunker Surcharge	9.9 mt ($7.00)	69.30
Manifest Fee		.50
		$1,079.60

The difference between what respondent paid and the applicable charges is $499.95:

Transportation rate and charges paid	$1,579.55
Applicable rate and charges	1,079.60
Overcharge	$ 499.95

Complainant alleged a lower overcharge of $445.50.[5] However, this was based on a Class 7 rate of $107.50 which did not become effective until March 15, 1976 per 9th Revised Page 31 of the subject tariff. According to complainant, as verified by the dock receipt, respondent received the shipment on July 21, 1975. The Class 7 rate then in effect was $102.00 per 8th Revised Page 31 of the subject tariff effective January 27, 1975.

Complainant has furnished documentation enabling ascertainment of the actual commodity that moved. It has borne the heavy burden of proof. Reparation of $499.95 is awarded complainant.

(S) JUAN E. PINE,
Settlement Officer.

[5] Complainant's computation of a lower overcharge follows:

Transportation rate and charges paid			$1,579.55
5 Pallets Fenders, Ship or Dock	9.9 mt ($107.50)	$1,064.25	
Bunker Surcharge	9.9 mt ($7.00)	69.30	
Manifest Fee		.50	1,134.05
Overcharge alleged by complainant			$ 445.50

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 540

SALENTINE & CO., INC.

v.

EUROPE CANADA LAKES LINES

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 11, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 540

SALENTINE & Co., INC.

v.

EUROPE CANADA LAKES LINE

Adopted January 11, 1978

Application withdrawn. Respondent ordered to collect balance of freight charges.

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

By application filed August 4, 1977, respondent, Europe Canada Lakes Line, by Ernst Russ-North America, Inc., its general agent, requested permission to waive collection of a portion of freight charges for the benefit of Salentine & Co., Inc., in connection with a shipment from Hamburg, Germany, to Milwaukee, Wisconsin.

The application recites that under bill of lading issued June 18, 1977, respondent carried a shipment consisting of one case of "Maçhine, Bottle Labelling," weighing 600 kilograms and measuring 1.39 cubic meters. The application goes on to say that the rate applicable at the time of shipment was $91.50 per 1,000 kilograms or cubic meter and that the rate sought to be applied is $63 per 1,000 kilograms or cubic meter. Respondent collected charges of $87.57 from Schenker & Co., Hamburg, and permission is sought to waive the amount of $39.62, representing the difference between what was charged and what should have been charged.[2] The application also states that there were no shipments of the same or similar commodity for shippers other than complainant during approximately the same period of time at the $91.50 rate.

The following explanation was offered:

[1] This decision became the decision of the Commission January 11, 1978.

[2] The computation follows:

1) $91.50 × 1.39 = $127.19
2) $63.00 × 1.39 = 87.57

$39.62

We received Telex instructions from Ernst Russ (Europe Canada Lakes Line) on June 16, 1977 to file on that day Tariff Amendments with the Federal Maritime Commissions to become effective on June 16, 1977 until July 16, 1977. Unfortunately the clerk in charge of the telex machine misplaced the telex from Ernst Russ, Hamburg and we only located it after Ernst Russ, Hamburg sent another telex on June 21, 1977 asking for confirmation of the filing with the F.M.C. The rate was then filed on June 21, 1977. (copy of Bill of Lading and telex exchanges are attached hereto)

Contrary to what was said in the explanation, no documentation was attached to the application.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3).[3] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

Pursuant to Rule 92(c), 46 CFR 502.92(c), I telephoned Ernst Russ, requesting the documentation referred to in the application. Werner Scholtz, President of Ernst Russ, agreed to furnish the missing material. He also agreed to submit copies of the tariff pages showing the rate applicable at the time of shipment and the rate sought to be applied, as required by the second proviso of section 18(b)(3).[4]

Inasmuch as the nominal complainant (i.e., the party for whose benefit

[3] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of *Practice and Procedure.*

[4] The application did not specify the tariff pages applicable to the shipment. There was only a general reference to a tariff publication—"FMC-10."

the freight charges were sought to be waived) is Salentine & Co., Inc., but the freight charges were actually paid by Schenker & Co., I also asked Mr. Scholtz to supply documentation showing Salentine's entitlement to benefit from the waiver or, in the alternative, to substitute Schenker as complainant. Mr. Scholtz declined to do either, stating that it was not worth the effort, in view of the small amount involved, to communicate with Schenker. Instead, he asked that the application be dropped.

Under the circumstances, I must consider the application to waive a portion of the freight charges to be withdrawn. However, the matter does not end there.

A tariff has the force and effect of law. *Pennsylvania R.R. Co. v. International Coal Co.,* 213 U.S. 184, 197 (1913). The tariff rate in effect and having the force and effect of law, at the time the shipment was made, was \$91.50 M. Europe Canada Lakes Line and Schenker & Co. must comply with the law.[5] Therefore, Europe Canada Lakes Line is ordered to collect the additional amount of \$39.62 from Schenker for the shipment.

The respondent is further ordered to file an affidavit of compliance with the terms of this order within thirty days. The affidavit shall state whether the additional freight charges have been collected or shall describe the steps taken to effect collection.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
December 15, 1977.

[5] Because Schenker is not a party to the proceeding, the principles of "*res judicata* to enforce repose" (*Cf. Safir v. Gibson,* 432 F.2d 137, 142–143 (2 Cir. 1970) may not be applicable to a subsequent proceeding in another forum. This, of course, highlights the vice of failing to have the real party in interest submit itself to the jurisdiction of the Commission in a Special Docket proceeding.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 411(F)

SUPREME OCEAN FREIGHT CORPORATION
FMC—1331

v.

ALL CARIBBEAN, INC.

ORDER ON REVIEW OF DISMISSAL

January 24, 1978

An order of dismissal was served November 28, 1977, by the Administrative Law Judge in this proceeding. Dismissal was based on the fact that settlement has been reached and counsel for both sides have jointly moved for dismissal of the proceeding.

The Administrative Law Judge stated that the Commission is without power to force a complainant to litigate his claim. We note, however, that Rule 93 of the Commission's Rules of Practice states that satisfied complaints will be dismissed in the *discretion* of the Commission. The parties here apparently feel that settlement is more prudent than bearing the expense of further litigation. Considering this fact and the fact that it is not even clear that respondent is subject to our jurisdiction, we have determined to uphold the order of dismissal.

The terms of the settlement have not been furnished to the Commission. Accordingly, our action should not be construed as a determination regarding the propriety of these terms. However, section 18(b)(3) of the Shipping Act, 1916, requires strict adherence to published tariff rates of common carriers, and parties who settle section 18(b)(3) rate disputes are charged with knowledge of the requirements of that section and the penalties for violation thereof.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76-48

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 161—J. T. STEEB & COMPANY, INC.

ORDER OF DISCONTINUANCE

January 30, 1978

This proceeding was instituted by Commission Order to Show Cause requiring respondent freight forwarder to demonstrate why its license should not be revoked because of the existence of a shipper relationship prohibited by section 44 of the Shipping Act.

Subsequently the shipper relationship was severed by transfer of ownership. Transfer of the license in question was then approved by the Managing Director under delegated authority. On this basis, Hearing Counsel have now moved for discontinuance of the proceeding.

Transfer of ownership has rendered the issues herein moot. Accordingly, the motion to discontinue is hereby granted.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 517

TEXACO EXPORT, INC.

v.

AMERICAN WEST AFRICAN FREIGHT CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION

March 1, 1978

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same notice is hereby given that the initial decision became the decision of the Commission on March 1, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 517

TEXACO EXPORT, INC.

v.

AMERICAN WEST AFRICAN FREIGHT CONFERENCE

February 2, 1978

Application denied.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

By this application the American West African Freight Conference seeks to refund to Texas Export, Inc., $4,569.55 as an overcharge on a shipment of "Lubricating Oil and Grease" from Port Arthur, Texas, to Conakry, Republic of Guinea. The shipment weighing 2,250,258 lbs. and measuring 53,918 cubic feet, was carried aboard Delta Lines' "*Del Sol*" under a bill of lading dated December 20, 1976. On January 14, 1977, Delta collected $165,047.21 in aggregate freight charges from Texas Export under the Conference's Eastbound Tariff No. 15 (FMC No. 16). The rate applicable at the time was $103.75 W/M. The rate sought to be applied is a 15% discount from that rate.

On August 4, 1976, Texas Export telexed the Conference office requesting a 15% discount from the rate on Lubricating Oil and Grease in Drums, Pails and Cases from Port Arthur to Conakry. The discounted rate was to be applicable only to 2,000 long ton shipments with a minimum 1,000 long tons per vessel. At a meeting on August 5, 1976, the Conference agreed to the rate subject to all other charges in effect at the time of shipment. The effective date of the new rate was to be established upon the written acceptance of Texas Export. On August 10, 1976, Texas Export telexed the Conference requesting that the Conakry Port Detention Charge be waived on its shipments of Oil and Grease. On August 30, 1976, Texas Export by telex accepted the discounted rate "without prejudice" to further consideration of its request to waive the Conakry

[1] This decision became the decision of the Commission March 1, 1978.

Port Detention Charge. The Conference took no action on the acceptance pending decision on the waiver request. On September 2, 1976, at a Conference meeting the request for waiver of detention charges was denied and Texas Export was notified of the denial by letter on September 7, 1976.

From this point on an administrative error in the Conference office resulted in future correspondence from the Conference and the shipper referring only to Lubricating Oil in Drums to Conakry. No further reference was made to shipments of Grease in Drums, Pails and Cases even though the Conference had agreed to apply the discount to Grease as well as Lubricating Oil. This error was further compounded when the Conference filed an amendment to its Eastbound Tariff (Correction No. 1594 to Page 142A) which was to effectuate the discount agreed upon—the amendment itself was limited to "Lubricating Oil in Drums to Conakry" and no mention was made of Grease. Thus, it would appear that the error was of the kind that would afford a basis for relief. There is, however, an insurmountable barrier to granting that relief.

Section 18(b)(3) in authorizing the Commission to grant relief such as requested here requires as a condition precedent to the grant, "That the carrier by water in foreign commerce or conference of such carriers has prior to applying for authority to make refund, filed a new tariff with . . . the Commission which sets forth the rate upon which such refund or waiver would be based." The required filing has not been made here. The last correction to be filed was the above mentioned No. 1594.

The requirement that the rate upon which the refund or waiver is to be based must be filed prior to making application is statutory and there is no discretion to waive it. *Oppenheimer International Corp. v. South African Marine Corp.*, 15 F.M.C. 49 (1971).

Accordingly, the application is denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 2, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–35

PUBLICATION OF INACTIVE TARIFFS BY CARRIERS IN FOREIGN COMMERCE

Persons not actively carrying cargo (or clearly committed to commence carrying cargo) between ports named in a published tariff at the rates stated therein are not common carriers by water within the meaning of Shipping Act section 18(b) and Part 536 of the Commission's Rules, and their tariffs in such unserved trades are subject to cancellation.

Stanley O. Sher, John R. Attanasio, for Concordia Line.

Edward Aptaker, for Farrell Lines, Inc.

John Robert Ewers, Paul J. Kaller, Bert I. Weinstein, Hearing Counsel.

REPORT AND ORDER

February 6, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day, and Clarence Morse, *Commissioners*)

This proceeding was commenced by an Order directing some 338 common carriers by water in the foreign commerce of the United States (Respondents) to show cause why 752 specified tariffs published by them and maintained on file with the Commission should not be cancelled on the grounds that said tariffs do not reflect an active, *bona fide* offering of common carrier service.

Fifty-nine Respondents filed amendments expressly cancelling 170 of the subject tariffs, thereby mooting any need to inquire further into their status.[1] Another group of 246 Respondents either did not reply to the Show Cause Order and its invitation to submit supporting affidavits of fact and memoranda of law, or consented to cancellation insofar as another 484 tariffs were concerned.[2] In light of these Respondents' failure to contest cancellation and failure to amend the subject tariffs for at least 18 months, it is concluded that the tariffs in question do not describe an

[1] This group of tariffs and their cancellation dates are listed in Appendix "A" hereto.

[2] Some carriers in this group did raise objections concerning other of their tariffs, however.

active common carrier service and should be cancelled as contrary to section 18(b) of the Shipping Act, 1916, and the Commission's tariff filing regulations (46 C.F.R. Part 536). *Publication of Inactive Tariffs,* 17 SRR 471, 472 (1977); *Sugar From Virgin Islands to United States,* 1 U.S.M.C. 695, 699–700 (1938); *Intercoastal Schedules of Hammond Shipping Co., Ltd.,* 1 U.S.S.B. 606, 607 (1936); *Intercoastal Investigation, 1935,* 1 U.S.S.B. 400, 449 (1935).

A total of 40 Respondents opposed the cancellation of 68 different tariffs, some by filing a timely affidavit as required by the Commission's Show Cause Order, but most by submitting unsworn written communications or tariff amendments.[3] A Reply Memorandum was filed by the Commission's Bureau of Hearing Counsel, and seven carriers responded to that Memorandum.[4] These submissions contain sufficient evidence of common carrier activity or of oversights in the Show Cause Order to warrant the continued publication of 29 of the subject tariffs by their respective carriers.[5] We turn now to those relatively few tariffs whose status remains a matter of controversy.

Twelve Respondents filed brief, unsworn statements asserting that certain tariffs were indeed active.[6] Their letters do not even suggest that actual cargo carryings, regularly scheduled voyages, or ongoing cargo solicitation were being provided. No recent bills of lading, sailing schedules, agency contracts, trade advertisements or other evidence of serious and continuing commercial activity were furnished. Such a meager response is insufficient to overcome the presumption that active common carrier service has ceased which is created by Respondents' failure to amend the subject tariffs for the last two to eight years. Accordingly, the tariffs of these twelve carriers will be cancelled.

A. P. Moller-Maersk Line (Maersk) asserts that trade to the Red Sea/

[3] Alcoa Steamship Company; Baltic Shipping Company; Blue Star Line, Ltd.; British M/V "Dram Buoy"; British M/V "Fendo"; British M/V "Mary Ann Kate"; British M/V "Primavera"; Central Gulf Contramar Line; Central Gulf Lines, Inc.; Compagnie Generale Maritime; Compania Maritime Del Nervion, S.A.; Concordia Line; Constellation Line; Dart Containerline, Inc.; Deppe Line; The East Asiatic Company, Ltd.; Farrell Lines, Inc.; Hapag-Lloyd, A.G.; Thos. & Jas. Harrison, Ltd.; Hellenic Lines, Ltd.; Japan Line, Ltd.; Koninklijke Nedlloyd; Koninklijke Nedlloyd (Nedlloyd, Inc.); Koninklijke Nedlloyd, B.V.; Kirkpride Shipping Co., Ltd.; Leonard Cephas; Bernard W. Roberts; Jugolinja-Rijeka, Yugoslavia; Jugoslavenska Oceanska Plovidba; A. P. Moller-Maersk Line; Maritime Company of the Philippines; Marcella Shipping Company, Ltd.; Navimex, S.A.; Orient Overseas Lines; Regent Line; Spanish North American Line; Torm Lines; Valocean Line; Victoria Line; Sands Construction & Shipping Co., Inc.

[4] Dart Containerline, Inc.; Hellenic Lines, Ltd.; Farrell Lines, Inc.; A. P. Moller-Maersk Line; Concordia Line; and Torm Lines. The filing of answers was permitted by Order of the Commission served October 21, 1977.

[5] The tariffs of the following 22 carriers shall not be cancelled:

Central Gulf Contramar Line (FMC–25); Central Gulf Lines (FMC–12 and FMC–14); Compania Sud American De Vapores, S.A. (FMC–6); Concordia Line (FMC–20); Constellation Line (FMC–22); Dart Containerline, Inc. (FMC–11); Deppe Line (FMC–32 and FMC–33); The East Asiatic Company, Ltd. (FMC–7); Blue Star Line, Ltd. (FMC–5); Hapag-Lloyd, A.G. (FMC–43); Thos. & Jas. Harrison, Ltd. (FMC–2, FMC–3 and FMC–6); Japan Line, Ltd. (FMC–9); Jugolinja-Rijeka, Yugoslavia (FMC–39); Jugoslavenska Oceanska Plovidba (FMC–10); Marcella Shipping Company, Ltd. (FMC–1); Maritime Company of the Phillippines (FMC–14); Navimex, S.A. (FMC–1, FMC–3, FMC–4); Orient Overseas Line (FMC–30); Spanish North American Line (FMC–1); Torm Lines (FMC–23 and FMC–26); Valocean Line (FMC–2); and Victoria Line (FMC–1).

[6] Hellenic Lines, Ltd. (FMC–3, FMC–8, FMC–9, FMC–11, FMC–12 and FMC–23); Leonard Cephas (FMC–1); Bernard W. Roberts (FMC–1); Koninklijke Nedlloyd (FMC–1); Koninklijke Nedlloyd (Nedlloyd, Inc.—FMC–11); Koninklijke Nedlloyd, B.V. (FMC–19 and FMC–53); Kirkpride Shipping Co., Ltd. (FMC–1); British M/V "Dram Buoy" (FMC–1); British M/V "Fendo" (FMC–3); British M/V "Mary Ann Kate" (FMC–12); British M/V "Primavera" (FMC–1); and Sands Construction & Shipping Co., Inc. (FMC–1).

Gulf of Aden, and to India, Pakistan and Ceylon is heavily one-sided inbound from the United States. Such a situation might sufficiently explain some 18 months of tariff inactivity by Maersk if Maersk had actually been serving the inbound trades during the same period (thereby providing regular outbound cargo capacity). Maersk admits, however, that its vessels only "pass through the Red Sea," and come within "geographical proximity of India, Pakistan, and Ceylon." This standing-in-the-wings arrangement cannot be considered a *bona fide* common carrier service to the Near East ports listed in the subject tariffs. Accordingly, Maersk's Tariff Nos. FMC–67, FMC–68 and FMC–69 will be cancelled.

Alcoa Steamship Company, Inc. (Alcoa), also admits that it does not serve Haiti or the Netherlands Antilles, but, unlike Maersk, it further claims to be actively soliciting Haitian business through a "long-standing relationship" with a shipping agency in Port-au-Prince, while maintaining regular voyages to nearby Caribbean islands. Alcoa did not present evidence of recent cargo carryings or other factors which would demonstrate that the subject tariff represents a commercially realistic offer of transportation service. A tariff maintained solely for the purpose of obtaining a competitive edge over carriers who have not filed tariffs in a given trade—by avoiding the 30 days' notice or FMC Special Permission requirements of Shipping Act section 18(b) prior to entering a trade—is a "paper tariff." Paper tariffs do not contain rates which are commercially attractive to ordinary shippers, but do allow the carrier to quickly reduce rates whenever a large enough shipment is tendered to make a vessel call profitable. The Commission does not permit the filing of such tariffs because they are essentially misleading to the shipping public, potentially unfair to smaller shippers and carriers attempting to maintain regular schedules in the trade, encourage misunderstandings and sharp practices (if not actual malpractices), and impose an unnecessary administrative burden upon the Commission's staff. Accordingly, Alcoa's Tariff No. FMC–15 will be cancelled.

Baltic Shipping Company (Baltic); Torm Lines; Farrell Lines, Inc.; Concordia Line; Hapag-Lloyd, A.G. (Hapag); Compagnie Generale Maritime (French Line); and Compania Maritima Del Nervion, S.A. (Nervion Line), present essentially the same arguments as Maersk and Alcoa. They wish to retain tariffs to areas not now receiving vessel service in order to facilitate prompt entry into trades geographically related to those in which they do offer regular voyages. In each instance, actual common carrier service is in fact conditioned upon the appearance of sufficient quantities of cargo to make a special vessel call worthwhile. The Commission will therefore cancel Baltic's Tariff No. FMC–3; Farrell Line's Tariff Nos. FMC–27, FMC–31 and FMC–32; Torm Lines' Tariff Nos. FMC–27, FMC–34 and FMC–35; Concordia Lines' Tariff Nos. FMC–1, FMC–12 and FMC–14; Hapag's Tariff No. FMC–102; French Line's Tariff No. FMC–16 and Nervion Line's Tariff Nos FMC–6, FMC–7 and FMC–8.

Maritime Company of the Philippines (MCP) opposed the cancellation of its tariffs from Hawaii and Puerto Rico to the Far East because "pending sugar mill movements" make them "potentially active," despite the absence of vessel calls at Hawaii and Puerto Rico in recent years. Without further information establishing that the "pending sugar movements" are reasonably imminent and likely to result in actual vessel calls at the rates stated in MCP's tariffs, MCP Tariff Nos. FMC-6 and FMC-10 must also be deemed "paper tariffs," subject to cancellation for not reflecting a *bona fide* common carrier service.

Farrell and Concordia further argue that because the Shipping Act, 1916, does not require a carrier to maintain service with a "prescribed regularity" the Commission may not prohibit carriers from publishing tariffs which provide for vessel calls on a "by inducement" basis. This proposition is untenable. Shipping Act section 18(b) applies only to common carriers by water and the Commission has held that carriers who serve a trade "by inducement only" are not common carriers by water for the purpose of publishing a tariff covering that trade.[7] It has, in effect, defined common carriage for tariff filing purposes as commercial activity which demonstrates a clear intention to move cargo under the proffered tariff within a commercially reasonable period of time subsequent to filing. It is unnecessary to find that Respondents have actually refused cargoes tendered for carriage at their published tariff rates as occurred in *Ghezzi Trucking, Inc.*, 13 F.M.C. 253 (1970) and *Intercoastal Charters*, 2 U.S.M.C. 154 (1939).[8] It is enough that there has been an extended period within which no common carrier service has been provided to the subject trades.

Concordia also claims that the instant proceeding is unfair because it challenges the legitimacy of only those tariffs which have not recently been amended and does not include (1) tariffs which have been so amended, but are nonetheless inactive, or (2) tariffs which list "ranges" clof ports served, without noting that the publishing carrier customarily withholds vessel calls from one or more ports within the specified range.

The Commission is not favoring form (mere tariff amendment) over substance (carrier inactivity). Suffice it to say, the present method of proceeding was chosen for the sake of administrative convenience as a rational first step dictated by the difficulty of gathering current and detailed operating data on the almost 1,000 different common carriers by water operating under FMC tariffs. When carrier inactivity is in fact established, appropriate action will be taken without regard to the length of time which has elapsed between tariff amendments. See discussion of

[7] Cases cited above. Respondents attempt to distinguish three of these decisions on the grounds that they dealt with domestic offshore rather than foreign commerce, but this distinction is without present significance. The fact that 30 days' notice must be given before section 2 tariffs may be cancelled is not relied upon therein, and there is no substantive difference between the requirements of Intercoastal Shipping Act section 2 and Shipping Act section 18(b) concerning common carrier status.

[8] Both *Ghezzi* and *Intercoastal Charters* do, however, reflect the governing principle that tariffs may not hold out services which are not routinely performed by the carrier.

Trans-Globe Shipping in *Publication of Inactive Tariffs, supra,* at 472. Moreover, the Commission's revisions to its foreign commerce tariff filing regulations (General Order 13, 42 F.R. 59265) which take effect January 1, 1978 will curb the practice of calling at individual ports within a stated range of ports on a "by inducement only" basis.[9] 42 F.R. 59269; 46 C.F.R. 536.5(a)(4)(i). This practice has never been permitted in domestic offshore commerce under 46 C.F.R. 531.5(a)(c).

THEREFORE, IT IS ORDERED, That the designated tariffs of the Respondent carriers listed in Appendix "B"[10] hereto are cancelled effective immediately; Provided, however, that this cancellation is without prejudice to said carriers filing new tariffs covering the subject trades at such time as they actually commence common carrier service in those trades.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[9] These regulations were first adopted in October 1975 (40 F.R. 47770), but were stayed pending disposition of reconsideration petitions. Newly effective section 536.5(a)(4) does not, however, preclude a carrier from placing commercially reasonable restrictions upon its service to a port within a given range, provided that the restriction is specifically stated in its tariff. See subsection (4)(ii) thereof.

[10] Appendix A & B not included.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 530

EME NORLETT AB

v.

SEA-L AND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 1, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 1, 1978.

It is Ordered, That applicant is authorized to waive collection of $150.00 of the charges previously assessed EME Norlett AB.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 530 that effective February 11, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 11, 1977 through March 13, 1977, the rate on 'Equipment, Garden Care Supplies/Outdoor Power' in House/House containers, minimum 10 WT per container is $179.00W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 530

EME NORLETT AB

v.

SEA-LAND SERVICE, INC.

Adopted February 1, 1978

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to waive collection of a portion of the freight charges on a shipment of garden equipment (riding mowers) that moved from Houston, Texas, to Stockholm, Sweden, under a Sea-Land bill of lading dated February 24, 1977. The application was filed August 1, 1977.

The subject shipment moved under Sea-Land Tariff 162–A, FMC–137, 2nd revised page 59, effective February 11, 1977, under the rate for "Equipment, Garden Care Supplies/Outdoor Power, viz: Mowers, Riding Mowers . . . in House/House containers, minimum 10WT per container." (Item 2015) The aggregate weight of the shipment was 21,896 pounds. The rate applicable at time of shipment as $194 W (per 2,240 lbs.) in house-to-house containers, with a minimum of 10 WT per container. The rate sought to be applied is $179 W, in same containers and with same minimum, per Sea-Land Tariff 162–A, FMC–137, 3rd revised page 59, effective March 14, 1977 (Item 2015).

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $1,948.21 (including wharfage). Aggregate freight charges at the rate sought to be applied would be $1,798.21 (including wharfage). The difference sought to be waived is $150. The

[1] This decision became the decision of the Commission February 1, 1978.
[2] 46 U.S.C. 817, as amended.

Applicant is aware of one other shipment of the same commodity which moved via Sea-Land during the same period of time at the rates involved in this shipment. That other shipment is the subject of a separate Special Docket proceeding (Special Docket No. 529), which was filed simultaneously with this one.

Sea-Land offers the following as grounds for granting the application:

Mr. F. E. Hague, Traffic Manager for XM World Trade, Inc., agents for the consignor, corresponded with Mr. R. Van Dijk of Sea-Land's Atlantic Pricing in New Orleans by letter dated August 31, 1976 concerning the publication of a rate on garden tractors and attachments. By letter dated September 15, 1976, Mr. Van Dijk confirmed to Mr. Hague of Sea-Land's intention to publish a rate of $179.00 W/T, minimum 10 W/T per container on Garden Tractors and attachments, not subject to September 23, 1976 General Rate Increase of 8-1/2%, in Sea-Land Tariff 162–A, FMC–137.

A Publication Request as properly prepared by Atlantic Pricing in New Orleans and sent to Sea-Land's Tariff Publication Department on September 14, 1976 requesting the confirmed rate of $179,00 W/T to be published. Upon receipt of the Publication Request, Tariff Publications made telegraphic filing to the FMC on September 22, 1976 to publish the confirmed rate. Publication appeared on 1st Revised Page 59 of Sea-Land Tariff 162–A, FMC–137, item 2015.

Sea-Land's Atlantic Pricing in New Orleans prepared a Publication Request, dated January 18, 1977 to update various pages in Sea-Land Tariff 162A to include the September 23, 1976 G.R.I. Included in this Publication Request was 1st Revised Page 59. Unfortunately, due to a clerical error, Sea-Land tacked on the 8-1/2% GR.I. to the $179.00 rate, which was flagged from the G.R.I., and increased the rate in item 2015 to $194.00 on 2nd Revised Page 49, effective February 11, 1977.

When Sea-Land became aware of this error, Atlantic Pricing in New Orleans sent a Publication Request to Tariff Publications requesting to reinstate the $179.00 rate. The $179.00 rate was reinstated on 3rd Revised Page 59, effective March 14, 1977. Meantime, the shipment involved herein had moved on February 24, 1977 and was assessed the then applicable rate of $194.00 W/T. . . . Payment was made on the basis of the $179.00 rate by Complainant.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . .Commission may in its discretion and for good cause show permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the correct special rate for shipments of the subject commodity (without the general rate increase), as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

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

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $150. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY ,
Administrative Law Judge.

WASHINGTON, D.C.,
January 6, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 533

CATHOLIC RELIEF SERVICE

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 8, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 8, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $5,018.89 of the charges previously assessed Catholic Relief Service.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 533 that effective February 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 1, 1977 through February 15, 1977, the Group 4 rate on 'Medicinal and Pharmaceutical Products—N.O.S.' Donated for Relief or Charity Ordinary Stowage is $133.00, subject to all applicable rules, regulations, terms and conditions of said rates and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 533

CATHOLIC RELIEF SERVICE

v.

PACIFIC WESTBOUND CONFERENCE

Adopted February 8, 1978

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), the Pacific Westbound Conference (Conference or the Applicant) has applied, with the concurrence of Sea-Land Service, Inc. (Sea-Land), and the Catholic Relief Service (shipper), for permission to waive collection of a portion of the freight charges on a shipment of medicinal and pharmaceutical products that moved from New York, N.Y., to Keelung, Taiwan, via rail from Kearny, N.J., to Oakland, California, then via ocean carrier to Taiwan (joint rail-water intermodal service). The bill of lading was dated February 10,[3] 1977, and the application was filed August 5, 1977.

The subject shipment moved under Pacific Westbound Conference westbound intermodal Tariff No. 8, ICC No. 1, FMC No. 15, original page 475, effective February 1, 1977, under the rate for "Medicinal & Pharmaceutical Products" (Group 4 ports), item No. 540 0000 00. The shipment measured 35.595 cubic meters. The rate applicable at time of shipment was $274 per cubic meter (greatest of W/M). The rate sought to be applied is $133 per cubic meter plus $8 "CFS" (Origin Freight Station Container Stuffing charge), pursuant to Pacific Westbound Conference westbound intermodal Tariff No. 8, ICC No. 1, FMC No. 15, revised

[1] This decision became the decision of the Commission February 8, 1978.

[2] 46 U.S.C. 817, as amended.

[3] The application gives February 18 as the date of shipment, but the bill of lading shows February 10. This latter is consistent with the narrative portion which states the shipment was received at the rail origin (Sea-Land) on February 7, 1977.

page 485, effective February 16, 1977, under the rate for "Medicinal & Pharmaceutical Products—N.O.S., Donated for Relief or Charity, Ordinary Stowage" (Group 4 ports), item no. 541 8000 00.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $10,037.79. Aggregate freight charges at the rate sought to be applied amount to $5,018.90. The difference sought to be waived is $5,018.89.[4] The Applicant is not aware of any other shipment of the same commodity which moved via Sea-Land or any other Conference carrier during the same time period at the rates involved in this shipment.

The Pacific Westbound Conference offers the following grounds for granting the application:

(A) When the Pacific Westbound Conference was provided with intermodal authority in their Basic Agreement 57 it was the intent of the Conference to publish the Far East Conference all-water rates, less the $3.00 dollars per revenue ton cargo administrative charge for shipper loaded container cargo, (CY origin cargo), (See Exhibits H and I-1 page 5 and further on I-2, page 6) where individual carriers did have independent rates in their intermodal tariffs on certain commodities and desired to retain the independent rate in the new Conference tariff, each carrier was to submit a list of those rates and tariff items on the independent publications which was to be retained, (See Exhibit H)

(B) Relief or charity shipments were not on any special independent actions, however, in the Far East Conference Freight Tariff No. 27 Page 363, (See Exhibits A, A-1 and A-2) does provide for Tariff Items 541 8000 00 and 541 80000 03 which would cover the involved shipment covered by F/B 901 839134.

(C) Based on the belief that there would be no drastic increase in ocean freight charges when the Pacific Westbound Conference Tariff 8 superceded Sea-Land Westbound Intermodal Tariff 234 on February 1, 1977 the shipper tendered the involved shipment to Sea-Land Service and was received at the rail origin rail freight station on February 7, 1977. When the papers involving the shipment were to be rated it was discovered ocean freight rates were not available to Taiwan under items 541 8000 00 or 541 8000 03 on original page 485 of Pacific Westbound Conference Westbound Intermodal Tariff 8 (See Exhibit B)

(D) Refer Exhibit C, R. C. Palmros' teletype message 1040 of February 15, 1977 to Oakland M. R. Cook outlining the apparent oversight and requesting that the both items be added to the Conference Intermodal Tariff at the earliest possible time.

NOTE—(In the message there is an error on the referenced Item numbers ie: 541 8003 should have been 541 8000 30.

(E) The Pacific Westbound Conference Westbound Intermodal Tariff 8 corrected the error in both tariff items by publishing the metric scale of rates $3.00 per revenue ton under the Far East Conference all-water structure. (See Exhibit D also comparison of FEC rate Exhibits A through A-2 and D will indicate the Pacific Westbound publication met the all-water levels). The publication was published on short notice with an issue date of February 15, 1977 and an effective date of February 17, 1977.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 92(a), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

[4] The application states $5,018.*90;* however, deducting the requested (new) total charges of $5,018.90 from the originally billed $10,037.79 leaves a balance of $5,018.89, a negligible difference due to "rounding off" several decimal places.

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to carry forward in the tariff filings the special rate for relief or charity shipments from the Sea-Land Westbound Intermodal Tariff and the original Far East Conference tariff to the new Pacific Westbound Conference tariff, as had been intended by Sea-Land and the Conference and as promised to the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, the Pacific Westbound Conference filed a new tariff which set forth the rate on which such waiver would be based.

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

Accordingly, permission is granted to the Pacific Westbound Conference (and Sea-Land) to waive collection of a portion of the freight charges, specifically the amount of $5,018.89. An appropriate notice will be published in the Pacific Westbound Conference tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
January 11, 1978.

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 529

S. C. SORENSEN

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 8, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 8, 1978.

It is Ordered, That applicant is authorized to waive collection of $300.00 of the charges previously assessed S. C. Sorensen.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

> "Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 529 that effective February 11, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 11, 1977 through March 13, 1977, the rate on 'Equipment, Garden Care Supplies/Outdoor Power' in House/House containers, minimum 10 WT per container is $179.00W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 529

S. C. SORENSEN

v.

SEA-LAND SERVICE, INC.

Adopted February 8, 1978

Application granted.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to waive collection of a portion of the freight charges on two shipments of garden equipment that moved from Houston, Texas, to Aarus, Denmark, under two Sea-Land bills of lading dated February 24, 1977. The application was filed August 1, 1977.

The subject shipments moved under Sea-Land Tariff 162–A, FMC–137, 2nd revised page 59, effective February 11, 1977, under the rate for "Equipment, Garden Care Supplies/Outdoor Power, viz: Mowers, Riding Mowers . . . in House/House containers, minimum 10WT per container." (Item 2015) The aggregate weight of the shipments was 43,316 pounds. The rate applicable at time of shipment was $194 W (per 2,240 lbs.) in house-to-house containers, with a minimum of 10 WT per container. The rate sought to be applied is $179 W. in same containers and with same minimum, per Sea-Land Tariff 162–A, FMC–137, 3rd revised page 59, effective March 14, 1977 (Item 2015).

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $3,596.24 (including wharfage). Aggregate freight charges at the rate sought to be applied would be $3,896.24 (including wharfage). The difference sought to be waived is $300. The Applicant is aware of one other shipment of the same commodity which

[1] This decision became the decision of the Commission February 8, 1978.

[2] 46 U.S.C. 817, as amended.

moved via Sea-Land during the same period of time at the rates involved in this shipment. That other shipment is the subject of a separate Special Docket proceeding (Special Docket No. 530), which was filed simultaneously with this one.

Sea-Land offers the following as grounds for granting the application:

Mr. F. E. Hague, Traffic Manager for XM World Trade, Inc., agents for the consignor, corresponded with Mr. R. Van Dijk of Sea-Land's Atlantic Pricing in New Orleans by letter dated August 31, 1976 concerning the publication of a rate on garden tractors and attachments. By letter dated September 15, 1976, Mr. Van Dijk confirmed to Mr. Hague of Sea-Land's intention to publish a rate of $179.00 W/T, minimum 10 W/T per container on Garden Tractors and attachments, not subject to September 23, 1976 General Rate Increase of 8½%, in Sea-Land Tariff 162–A, FMC–137.

A Publication Request was properly prepared by Atlantic Pricing in New Orleans and sent to Sea-Land's Tariff Publication Department on September 14, 1976 requesting the confirmed rate of $179.00 W/T to be published. Upon receipt of the Publication Request, Tariff Publications made telegraphic filing to the FMC on September 22, 1976 to publish the confirmed rate. Publication appeared on 1st Revised Page 59 of Sea-Land Tariff 162–A, FMC–137, item 2015.

Sea-Land's Atlantic Pricing in New Orleans prepared a Publication Request, dated January 18, 1977 to update various pages in Sea-Land Tariff 162A to include the September 23, 1976 G.R.I. Included in this Publication Request was 1st Revised Page 59. Unfortunately, due to a clerical error, Sea-Land tacked on the 8½% G.R.I. to the $179.00 rate, which was flagged from the G.R.I., and increased the rate in item 2015 to $194.00 on 2nd Revised Page 49, effective February 11, 1977.

When Sea-Land became aware of this error, Atlantic Pricing in New Orleans sent a Publication Request to Tariff Publications requesting to reinstate the $179.00 rate. The $179.00 rate was reinstated on 3rd Revised Page 59, effective March 14, 1977. Meantime, the shipment involved herein had moved on February 24, 1977 and was assessed the then applicable rate of $194.00 W/T. . . . Payment was made on the basis of the $179.00 rate by Complainant.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the correct special rate for shipments of the subject commodity (without the general rate increase), as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

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

Accordingly, permission is grated to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $300. An appropriate notice will be published in Sea-Land's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 11,1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 528

JUILLARD ALPHA LIQUOR CO.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 8, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review the same, notice is hereby given that the initial decision became the decision of the Commission on February 8, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $203.60 of the charges previously assessed Juillard Alpha Liquor Co.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision in Special Docket 528 that effective February 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 1, 1977 through May 1, 1977, the Group 1 rate on 'Liquors and Spirits' in cartons or cases in containers moving pier to house or house to house is $134.00W subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 528

JUILLARD ALPHA LIQUOR CO.

v.

SEA-LAND SERVICE, INC.

Adopted February 8, 1978

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land has requested permission to waive a portion of the freight charges on one shipment of liquor from Leghorn, Italy, to Oakland, California. The shipment weighing 22,432 lbs. moved under bill of lading dated February 11, 1977. The rate applicable at the time of shipment was $154.00 per 1000 kilos. The rate sought to be applied is $134.00 per 1000 kilos.

In attempting to provide for a "Special Rate" on tariff item 02–050[2] a "rough draft" of 26th Revised page 93 was prepared.[3] This draft was made by penciled or penned notations on the existing tariff page. Unfortunately the penmanship of the revisor left something to be desired and the intended "house to house" rate was transcribed as "house to pier." The error was discovered on May 2, 1977, and the rate of $134.00 was republished to apply to house to house shipments. Freight charges under the $154.00 rate would have been $1,623.71. Freight charges under the $134 rate would have been $1,420.11.[4] Permission to waive $203.60 is granted.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

[1] This decision became the decision of the Commission February 8, 1978.

[2] "Liquors and Spirits," Sea-Land Service, Inc., Freight Tariff No. 205, ICC No. 73, FMC No. 77.

[3] A copy of the rough draft was attached to the application.

[4] Freight charges were computed: applicable rate 10,180 at 154 = 1567.72 + 55.99 (handling) = 1623.71; Rate sought 10,180 at 134 = 1364.12 + 55.69 (handling) = 1420.00; the difference being $203.60. Through arithmetical error the application sought to waive $142.50. The error was corrected by letter dated December 5, 1977.

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in the tariff of a clerical or administrative nature.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

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

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $203.60. An appropriate notice will be published in Sea-Land's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 11, 1978.

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92 (a) & (c).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 536

THE A.W. FENTON CO.

v.

EUROPE CANADA LAKES LINE

NOTICE OF ADOPTION OF INITIAL DECISION

March 29, 1978

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 29, 1978.

It is ordered that applicant shall refund charges, publish the appropriate notice in its tariff and notify the Commission of its action as required by the ordering paragraphs of the initial decision.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 536

THE A.W. FENTON CO.

v.

EUROPE CANADA LAKES LINE

February 27, 1978

Application for permission to refund a portion of freight charges granted.

Carrier found, through inadvertence, to have failed to file a new tariff in time to assess a lower rate on a movement of fork lift trucks from Hamburg, Germany, to Cleveland, Ohio.

Application, as clarified and supplemented by additional supporting information, found to qualify for the relief requested under section 18(b)(3), as amended by P.L. 90–298..

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

This proceeding was commenced by an application filed by Europe Canada Lakes Line (ECLL)[2] pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), 46 U.S.C. 817(b)(3), as amended by P.L. 90–298, and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a). In its application filed August 4, 1977[3] (the date it was received by the Commission's Office of the Secretary), ECLL stated that it wished to waive collection of a portion of freight charges payable by the consignee Fenton on a shipment of "Forklifts" which were transported under a bill of lading dated June 18, 1977, from Hamburg, Germany, to Cleveland, Ohio.

This application further stated that the shipment was rated at $63.50 per 1000 kos. but that the rate applicable at the time of shipment was $76.50 per 1000 kos., as provided by the tariff in effect.[4] Hence, ECLL

[1] This decision became the decision of the Commission March 29, 1978.

[2] ECLL is the name of the carrier operated by "Ernst Russ located in Hamburg, Germany. The application was filed by its general agent, Ernst Russ-North America, Inc. Although the documentation frequently refers to "Ernst Russ—Hamburg," to avoid confusion, I have used the term "ECLL" instead of "Ernst Russ—Hamburg."

[3] ECLL had filed an earlier application which was returned because it was not filed by an attorney or F.M.C. practitioner. (See letter dated January 17, 1978, addressed to me by Werner E. Scholtz, counsel for ECLL.)

[4] See ECLL Tariff No. 2—Continent (FMC 10), original page 78, and 1st rev. page 59, effective May 6, 1977.

wished to waive the excess portion of freight which would have been assessed at the higher rate. This portion amounted to $449.80.

The application, as submitted, appeared to be deficient in several respects. It did not furnish supporting documentation, such as a copy of the bill of lading, paid freight bills, pertinent tariff pages, etc., required by paragraph (4) of the Commission's prescribed form. As authorized by Rule 92(c), 46 CFR 502.92(c), I notified counsel for ECLL of the deficiencies and advised him to furnish the missing documentation. (See letter dated December 21, 1977.) The missing information was furnished by letter of January 17, 1978, together with additional information regarding other deficiencies in the application. The application, as supplemented by the information furnished at my direction, establishes the following situation.

On June 16, 1977, ECLL sent telex instructions to its wholly owned subsidiary and general agent, Ernst Russ-North America, Inc. (ERNA) directing ERNA to file a tariff amendment with the Commission to become effective on June 16, 1977. This tariff amendment would have published a special rate on "Trucks, Fork Lift—Hamburg/Cleveland" in the amount of $63.50 W/M plus half H.L. extras. However, the amendment was not filed because the clerk in charge of the telex machine misplaced the telex from ECLL in Hamburg. When the agent did not confirm the filing with ECLL in Hamburg by telex, as was customary, ECLL in Hamburg sent another telex on June 21, 1977, inquiring as to the status of the filing. The agent ERNA then discovered that a mistake had been made and on the same day (June 21, 1977) filed the tariff amendment.[5] However, the vessel carrying the fork lift trucks had sailed in the meantime. Since, on the date of shipment, the original tariff rate was still in effect, ERNA notified ECLL in Hamburg that the original, higher rate had to be charged the American consignee, as required by section 18(b)(3) of the Act. ECLL through ERNA thereupon issued a "manifest corrector," and the additional freight was collected. Thereafter ECLL filed its applications, the first returned, the second received, as mentioned above. Although the situation called for a refund of a portion of the total freight collected, the second application, which initiated this proceeding, mistakenly requested a waiver. Counsel for ECLL advised me orally and by letter that the application was intended to request a refund but was typed mistakenly. (See letter of Werner E. Scholtz, addressed to me, dated January 17, 1978.) I am therefore considering the application as one for refund rather than waiver.[6]

Although the application, as supplemented by the additional information, appeared to qualify under applicable law, a further deficiency

[5] See ECLL Tariff No. 2—Continent (FMC 10), 2nd revised page 59, effective June 21, 1977.

[6] A clarification of a pleading which commences a proceeding has been held to relate back to the time of the original filing of the pleading especially where the pleading erred only in the type of relief requested. See *Heterochemical Corp. v. Port Line, Ltd.*, 12 SRR 223 (1971); *Chr. Sahesen Ltd. v. West Michigan Dock & Market Corp.*, 9 SRR 1154 (1968); 12 F.M.C. 135, 141 (1966).

appeared which rendered it impossible to verify the validity of the figures showing freight actually collected and that which ECLL wished to retain. Consequently, it was impossible to determine the validity of the amount of refund ($449.80) which ECLL desired to make to the consignee Fenton. The problem arose because the "manifest corrector," the document used by ECLL to recompute freight owed, failed to include the figure showing what the shipment measured. Without such figure, the data on the "manifest corrector" showing weight in kilos and the applicable rates could not be used to substantiate the amounts of freight which ECLL claimed to have collected. I telephoned a representative of ERNA requesting clarification and confirmed the request by letter. (See letter to Werner Scholtz, Esq., ATTN: Mr. William L. MacKay, January 26, 1978.) The deficiency was corrected to show that the shipment measured 34.6 cubic meters and was rated on a measurement basis. (See letter to me from William L. MacKay, dated January 31, 1978.)[7] A copy of the original bill of lading dated June 18, 1977, showing the computation of freight on a measurement basis was submitted to confirm this fact.[8]

Discussion and Conclusions

The question to be decided in this case is simply whether the application for refund establishes that the type of error contemplated by P.L. 90–298 occurred and that the application meets all other requirements established in that law regarding the time of filing the application and the corrective tariff and the assurance that no discrimination among shippers will result if the line is permitted to grant the refund. In my opinion, the application, as supplemented and clarified, qualifies in all respects.

P.L. 90–298, which amended section 18(b)(3) of the Act, was designed to remedy inequities and financial harm visited upon shippers which resulted from inadvertent errors in tariff-filing by carriers. Thus, when a carrier intended to apply a lower rate on a particular shipment but failed to file an appropriate tariff conforming to the carrier's intention and usually the shipper's understanding, prior to the enactment of P.L. 90–298, the carrier was bound to charge the higher, unintended rate even if the shipper had relied upon the carrier's representations that a lower rate would be charged and that an appropriate tariff would be filed. Or, if the

[7] The letter itself caused a little confusion. It explained that the correct measurement figure for the shipment was "34,600 cubic meters." This is an obvious error. If the shipment were truly of such size, at a rate of $76.50 per cubic meter, as ECLL's tariff provided, ECLL would have had to collect $2,646,900 in freight, instead of $2,646.90, which was actually collected. The refund would amount to $449,800 instead of $449.80, as requested. I telephoned ERNA in Chicago to clarify this matter and was informed that the correct measurement was indeed 34.600 cubic meters. The confusion was caused by the fact that the German custom is to use commas in place of decimal points under the metric system. (See also letter from Werner E. Scholtz dated February 15, 1978.) The letter also attached pertinent tariff pages explaining the source of the rate of $76.50 W/M which was applied to the forklift truck shipment.

[8] ECLL, in the apparent belief that the lower rate had been filed as per its instructions, rated the shipment at the lower rate on the original bill of lading. Subsequently, the "manifest corrector" submitted for the record shows that ECLL rebilled the consignee at the higher rate still in effect at the time of the shipment. The rated bill of lading and "manifest corrector" show that ECLL assessed the base rate plus seaway tolls but not heavy lift charges, which are not assessed for containerized cargo. (See letter from Werner E. Scholtz, dated February 15, 1978.) ECLL's Tariff Rule No. 50 pertaining to heavy lift charges (Original page 8) assesses heavy lift charges only if there are any extra costs for loading and discharging. (See Tariff Rule cited.)

carrier, through inadvertence, republished a tariff and caused the tariff to reflect an unintended, higher rate, prior to the enactment of this remedial law, the carrier nevertheless was compelled to charge the higher rate, again causing shippers to suffer financial loss. These inequitable results were unavoidable because of the governing principles of law requiring strict adherence to tariffs effective at the time of shipment regardless of equities. See *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *United States v. Columbia S.S. Company,* 17 F.M.C. 8, 19–20 (1973).

In recognition of the fact that this hard and fast doctrine could result in inequities and hardships, Congress passed P.L. 90–298. The legislative history to P.L. 90–298 illustrates the types of mistakes which the statute was designed to remedy as follows:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he as may be required to give notice of the rate on which such refund or waiver would be to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[9]

The Senate Report states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.[10]

Accordingly, section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3), was amended in pertinent part to read as follows:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

In the instant case, it is clear that there was "an error due to an inadvertence in failing to file a new tariff." The documentation supports ECLL's contention that it fully intended to have a special reduced rate filed with the Commission to be effective prior to the date of shipment but that its intentions were not carried out because its instructions were misplaced. As soon as the mistake was recognized, however, ECLL's

[9] House Report No. 920, 90th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.
[10] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [to accompany H.R. 9473], p. 1.

American agent filed the intended tariff. These facts establish that a bona fide mistake occurred, which resulted in the shipper's having to pay a higher, unintended rate. Furthermore, the critical element in all special-docket cases, namely, the fact that it was the carrier's intention prior to *the time of shipment* to apply the lower rate, is present here. As the legislative history to P.L. 90-298 illustrates, this element is essential.[11] See also *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191, 1193 (1977), in which case the Commission stated:

> [I]t is clear that the "new tariff" is expected to reflect a *prior intended rate*, not a rate agreed upon after the shipment. (Emphasis added.)

I therefore find that:

1. There was an error due to inadvertence in failing to file a new tariff, within the meaning of P.L. 90-298.
2. There is no evidence that any other shipment of the same or similar commodity (fork lift trucks) moved during the time within which the desired, lower rate would be made effective retroactively (June 18, 1977 through June 20, 1977). Even if there were such shipments, however, ECLL's publication of a tariff notice, as ordered below, will mean that any other shipments would be entitled to the same rate during this period of time. Therefore, payment of the refund requested will not result in discrimination among shippers.
3. ECLL filed a new tariff on June 21, 1977, prior to the filing of its application on August 4, 1977, as required by the statute.
4. The application was filed well within the 180-day period prescribed by the statute (date of shipment occurring on June 18, 1977).

Accordingly, the application for permission to refund a portion of the freight to the consignee (The A.W. Fenton Co.) who paid the freight is granted.

It is ordered that upon adoption of this decision by the Commission:

1. ECLL shall refund $449.80 to the above-named consignee, in connection with the shipment of fork lift trucks which moved under bill of lading dated June 18, 1977.
2. ECLL shall promptly publish the following notice in an appropriate place in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 536, that effective June 18, 1977, and continuing through June 20, 1977, inclusive, the rate on Trucks, Fork Lift, Hamburg/Cleveland," is $63.50 W/M plus half H.L. extras, subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during this period of time.

3. Refund of the charges shall be effectuated within 30 days of service of the Commission's notice of adoption of this decision (if adopted) and

[11] Thus, the Senate Report, cited above, at page 1, refers to the situation "where through inadvertence there has been a failure to file a tariff reflecting an *intended* rate." (Emphasis added.) See also Hearings before the Subcommittee on Merchant Marine and Fisheries, etc., 90th Cong. 1st Sess., August 15, 16, 1967, p. 103, in which a *witness stated that* "*in* the inadvertence cases the question of relief swings on the question of the intent of the particular carrier and the shipper applying for relief."

ECLL shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 24, 1978.

20 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 489

WILLIAMS, CLARKE COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

February 22, 1978

No exceptions having been taken to the supplemental initial decision in this proceeding and the commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 22, 1978.

It is Ordered, That applicant is authorized to refund $292.32 of the charges previously assessed Williams, Clarke Company, Inc. as agent for Goodyear Tire and Rubber Company: Williams, Clark Company, Inc. is ordered to remit said amount directly to Goodyear Tire and Rubber Company and to submit proof to the Commission of such payment no later than 45 days from the date of this notice.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 489 that effective June 6, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from June 6, 1975 through September 10, 1975, the Group 1 rate on 'Tires or Tubes, pneumatic,' TL Minimum 1600 cu. ft. is 68 cents per cu. ft., subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 489

WILLIAMS, CLARKE COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

Adopted February 22, 1978

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to sections 18(a)[2] and 22 of the Shipping Act, 1916, as amended, section 2 of the Intercoastal Shipping Act, 1933, as amended, and section 502.92(b) of the Commission's Rules of Practice and Procedure (46 CFR 502.92(b)), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of rubber pneumatic tires, which moved from Long Beach, California to San Juan, Puerto Rico, as reparation for an inadvertent unjust, unreasonable charge for that shipment. The shipment moved under Sea-Land bill of lading dated September 9, 1975. The application was filed October 13, 1976.

The shipment measured 2088 cubic feet and weighed 15,952 pounds. The rate applicable at time of shipment was the ocean rate of 82 cents per cubic foot. Sea-Land Tariff No. 8–C, FMC–F No. 29, original page 154, item 3460 effective June 6, 1975. The rate sought to be applied is 68 cents per cubic foot, per 1st revised page 154 of the above tariff, effective September 11, 1975, same item 3460 but under the "TL" or truckload rate for shipments having a minimum of 1600 cubic feet.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $1930.67. Aggregate freight charges at the rate sought to be applied amount to $1638.35. The difference sought to be refunded is $292.32. The Applicant is not aware of any other shipment of

[1] This decision became the decision of the Commission February 22, 1978.
[2] 46 U.S.C. 817(a).

the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

> Freight charges were calculated on an ocean rate of 82 cents per cubic foot, per Item 3460 on Original Page 154 of Sea-Land Tariff No. 8–C, FMC–F No. 29 (Attachment No. 1). Total charges of $1930.67 were paid to the carrier on September 16, 1975 by Williams, Clarke Co., the shipper's freight forwarder (Attachment No. 2).
>
> Tariff No. 8–C became effective June 6, 1975 and cancelled Tariff No. 8–B per its Original Title Page (Attachment No. 3). It was a reissue of Tariff 8–B to incorporate in the rates a general increase of 30% plus a bunker surcharge of 11%. At the time of its cancellation, Item 3460 on 1st Revised Page 142 of Tariff No. 8–B (Attachment No. 4) named a rate on truckloads of 68 cents per cubic foot (47 cents plus 30% per Supplement No. 20, plus 11% per Item 155 on 3rd Revised Page 33).
>
> However, when bringing Item 3460 forward to Original Page 154 of Tariff No. 8–C (Attachment No. 1) the "TL" rates in the "Per Cu. Ft." column were omitted by clerical error. As was the case throughout the tariff, it was fully intended that the same rates in Item 3460 be brought forward without change. The entry in the descriptive part of the item, reading "TL, Minimum 1600 cu. ft." was properly brought forward. As a result, effective June 6, 1975 only the LTL rates of 82 cents per cubic foot and 442 cents per 100 Lbs. were legally in effect on pneumatic tires.
>
> As soon as this clerical mistake was discovered, it was corrected by reinstating the TL rate of 68 cents on 1st Revised Page 154 (Attachment No. 5), issued August 5 and effective September 11—only two days after the shipment was tendered to the carrier. Item 530 of Tariff No. 8–C provides that changes in rates become effective on shipments received at the terminal on and after the effective date of the tariff change; therefore, the LTL rate of 82 cents was the only legally applicable rate for the shipment. Sea-Land believes the rate of 82 cents was unjust and unreasonable for TL shipments during the period from June 6 to September 10 inclusive since it did not intend that rate to be any different than the TL rate of 68 cents that was in effect prior to June 6 and on and after September 11.

Section 18(a) of the Shipping Act, 1916, 46 U.S.C. 817(a) provides, *inter alia:* "That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications and tariffs, . . . (and that) No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the (Commission)." The section further provides that: "Whenever the (Commission) finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

Section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92) provides in subsection (b):

> (b) Common carriers by water in interstate or intercoastal commerce . . . may file application for permission to refund a portion of freight charges collected from a shipper or waive collection of a portion of freight charges from a shipper. All such applications shall be filed within the 2-year statutory period referred to in § 502.63. . . . Such applications will be considered the equivalent of a complaint and answer admitting the

facts complained of. If allowed, an order for payment or waiver will be issued by the *Commission.*

The reference in the above section to § 502.63 is to the statute of limitation provided for reparation actions. § 502.63, in turn, refers to section 22 of the Shipping Act, 1916, which provides the authority for the Commission to accept and act upon reparation complaints based upon *any* violation of the Shipping Act. *Inter alia,* section 22 provides that:

> . . . If the complaint is not satisfied (by the respondent) the (Commission) shall investigate it in such manner and by such means, and make such order as it deems proper. (It), if the complaint is filed within two years after the cause of action accrued, may direct the payment . . . of full reparation to the complainant for the injury caused by such violation.

The investigation referred to in section 22 ("in such manner and by such means . . . as it deems proper") may be fulfilled in cases where there is no dispute by a review of the application and documentation provided for in the shortened Special Docket section of the Commission's Rules (46 CFR 502.92(b)). Thus, the Special Docket procedure for obtaining permission for refunds gives the Commission and the parties an expeditious and less costly alternative for determining reparation merits where the facts are not in dispute—in effect, "submitting the case on the pleadings" without the necessity of a lengthy investigation and formal evidentiary hearing.

We turn now to a consideration of the merits of this, in effect, joint request for refund permission. It is customary in the shipping industry to grant substantially lower rates for truckload ("TL") shipments than for less-than-truckload ("LTL") shipments. It is evident in hundreds of other items throughout the subject tariff pages that wherever there are specific truckload rates, they are always substantially lower than the less-than-truckload rates. (This is a custom not only in the shipping industry but in all modes of cargo transportation.) The reasons for this custom and practice in the trade are quite obvious—truckloads and trailerloads of a single commodity reduce the problems of mixing and segregation at departure and destination points. From a labor standpoint, it is less costly and more efficient to handle large shipments of the same commodity, than a myriad of smaller, diversified loads of different sizes, shapes, weights and degrees of fragility. The preference for handling and moving larger unit loads impel the carriers to offer volume discounts that will encourage shippers and freight forwarders to tender cargo in truckload lots.

With this background in mind, and reviewing the consistent tariff history of this particular commodity item (its constant truckload vs. less-than-trickload differential), I find that to charge a shipment offered in truckload lots the same high rate applicable to less-than-truckload shipments would be unjust and unreasonable, and therefore unlawful. I further find that in view of the 82 cents per cubic foot rate on less-than-truckload shipments of tires, and the 68 cents per cubic foot rate on truckload shipments having a minimum of 1600 cubic feet, which existed both before and after the shipment in question, the only just and reasonable maximum rate for that shipment was 68 cents per cubic foot for truckload lots measuring a minimum of 1600 cubic feet. § 18(a) Shipping Act, 1916, 46 U.S.C. 817(a). The 82 cents per cubic foot rate varied so greatly from the usual truckload rate for pneumatic tires as to be clearly unreasonable.[3] See *Oxenberg Bros. v United States*, 3 F.M.B. 583, 584 (1951).

Therefore, upon due consideration of the application submitted, it is found that:

1. For purposes of this proceeding and with regard to this particular shipment, Sea-Land operated as a common carrier by water in interstate or intercoastal commerce, within the meaning of section 18(a) of the Shipping Act, 1916, as amended; section 2 of the Intercoastal Shipping Act, 1933, as amended; and 46 CFR § 502.92(b) of the Commission's Regulations.

2. The application to refund a portion of the freight charges as reparation for the admitted, but unintentional, unjust and unreasonable charge, was made within the 2-year statutory period prescribed in section 22, Shipping Act, 1916, as amended, and 46 CFR §§ 502.92(b), 502.63.

3. The charging of the less-than-truckload rate on a truckload size shipment measuring a minimum of 1600 cubic feet was unjust, unreasonable and unlawful, in violation of section 18(a)[4] of the Shipping Act, 1916.

4. The charging of any rate higher than the truckload rate of 68 cents per cubic foot for truckload shipments measuring at least 1600 cubic feet, which rate existed immediately before and immediately after the shipment in issue, was unjust, unreasonable and therefore unlawful.

5. A refund of a portion of the freight charges, representing the difference between the truckload and less-than-truckload tariff rates, which existed immediately before and immediately after the subject shipment, should be allowed as appropriate reparation for the unjust, unreasonable and unlawful charge.

6. Prior to applying for permission to refund a portion of the freight charges as reparation for the admitted unjust and unreasonable charge, the Applicant filed a new tariff setting forth the rate on which such refund would be based.

7. Such a refund of a portion of the freight charges will not result in discrimination among shippers.

Accordingly, permission is granted to Sea-Land Service, Inc. to refund a portion of the freight charges, specifically, the amount of $292.32 to the

[3] Even today, the present tariffs display a differential between less-than-truckload and truckload shipments of this same commodity, as well as for a large number of other commodities. Furthermore, notwithstanding the steady upward march of inflation for over 18 months, the tariff rate for truckload lots of tires still has not reached 82 cents per cubic foot. Sea-Land Tariff No. 8-C, FMC-F No 29, 3rd revised p. 154, effective October 8, 1976 (Oakland or Long Beach, Cal. to Puerto Rico).

[4] An alternative statutory basis for relief, under the facts in this case, would appear to be under § 16 First of the Shipping Act, 1916 (46 U.S.C. 815, First), as an "undue or unreasonable prejudice or disadvantage." *Cf. Valley Evaporating Co. v. Grace Line Inc.*, 14 F.M.C. 16 (1970), and *General Mills v. Hawaii*, 17 F.M.C. 1 (1973).

party which paid those charges. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 4, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 526

JTH TENG PRINTING INK FACTORY

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

March 29, 1978

No excpetions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 29, 1978.

IT IS ORDERED, That applicant is authorized to refund $69.32 of the charges previously assessed Jth Teng Printing Ink Factory.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket 526 that effective January 18, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from January 18, 1977, through February 20, 1977, the rate on 'Carbon Black' to Kaohsiung/Keelung is $116.00/ 1,000 kgs. subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 526

JTH TENG PRINTING INK FACTORY

v.

SEA-LAND SERVICE, INC.

March 3, 1978

Application for permission to refund $69.32 of freight charges granted.

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

By application timely filed on July 25, 1977, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), applicant Sea-Land Service, Inc., seeks authority to refund a portion of the freight charges on a containerized shipment of carbon black, in bags, in rail-water intermodal service from New Orleans, Louisiana, via the rail service of the Southern Pacific Co., to Los Angeles, California, thence via the ocean service of Sea-Land Service, Inc., to Keelung, Taiwan, as per bill of lading number 031–135196 issued at New Orleans, dated January 26, 1977.

Disposition of this application was delayed for two reasons. First, the supporting exhibits attached to the application were in large part illegible. Applicant provided legible exhibits on December 15, 1977. Second, the applicant promised the signature of the complainant located in Taiwan, and this concurrence of the complainant was received on February 21, 1978.

Rule 92(b) of our Rules of Practice and Procedure states that applications under this rule shall be made in accordance with the form prescribed in Appendix II(7) of these rules. In that form, the respondent water carrier or conference of water carriers submits a notarized application, and the form also provides for the notarized signature of the complainant under his statement that he concurs in the application and certifies that

[1] This decision became the decision of the Commission on March 29, 1978.

the charge of $_____ on the shipment involved were paid and borne by _____ and no other.

However, a close check of the law, section 18(b)(3) shows that Rule 92(b) goes beyond the law in requiring the concurrence of the complainant. There is no requirement in the law that complainant concur in the application under section 18(b)(3).

It is concluded that the purpose of the form in Appendix II(7) may well be justified for other types of special docket applications which ante-date section 18(b)(3) applications, such as applications under the two-year statute of limitations in the domestic trade.

In the present situation we have a 180-day limitation on the filing of this type of application and there is no dispute as to who paid and bore the freight charges.

In these circumstances, the fact that the complainant's signature was obtained much later than the 180 days following the date of shipment is immaterial. It is concluded that the application was properly filed within the 180 days from the date of shipment, regardless of the date of the complainant's signature.

From the amount of the requested refund or waiver of a portion of the freight charges in relation to the amount of the total rail-water intermodal charges, it is concluded that the requested refund or waiver will apply only to the ocean portion of the through charges. The applicant did not so state, but should so state on future applications, because our authority to sanction waivers or refunds under section 18(b)(3) relates only to the ocean portion of the through rate.

A competitor (Seatrain International, S.A.) of the applicant Sea-Land had a rate of $105 W (ton of 2,000 pounds) on carbon black from New Orleans to Keelung. Sea-Land in order to induce the shipment herein promised to publish the same rate. It was intended that Sea-Land publish the $105 W rate to Keelung and to Kaohsiung, Taiwan. However, because of clerical error the rate of $105 was published to Hong Kong, but not to those two Taiwan destinations.

The rate of $119 W was published in error to Keelung and Kaohsiung. This was the rate charged or the rate that should have been charged because of the tariff error.

The rate sought to be charged on which waiver or refund of a portion of the charges would be based is $105 W. In actual fact, Sea-Land has not published the $105 rate as such because the applicable tariff has been converted from imperial tons of 2,000 pounds to metric tons of 1,000 kilograms.

The shipment or shipments moved on January 26, 1977, when the erroneous $119 W (imperial) rate applied. This error was corrected effective February 21, 1977, in the Pacific Westbound Conference Tariff No. 8 (F.M.C. No. 15, I.C.C. No. 1) by the publishing of a rate of $116 W (metric ton of 1,000 kilograms, using the conversion factor of 2,204.62 pounds per 1,000 kilograms), with Sea-Land participating in this confer-

ence rate, circle reference Sea-Land, item No. 513–2700–00. On February 1, 1977, Sea-Land's tariff 234 (with the erroneous $119 W rate) was canceled and superseded by the conference tariff.

The imperial rate of $105 using the conversion factor becomes a metric rate of $115.74 and this when rounded off becomes the actual tariff metric rate of $116 W.

Further calculations herein are based on the imperial rates of $119 and of $105, with imperial weights.

This special docket application No. 526 is one of three interrelated applications. The other two are special docket No. 524 and No. 525. Carbon black was shipped in all three of these cases, but to three different complainant-consignees, all on freight collect bases. For convenience, these three complainants will be designated by their special docket numbers, as complainant–524, etc.

Two forty-foot containers were utilized by Sea-Land for the shipments of the three complainants. The consignor put all of complaint–524's 7,210 pounds of carbon black in the first container, SEAU–106776. This same container also had on it 22,660 pounds of complainant–525's carbon black, or a total of 29,780 pounds. In the second container, SEAU–100431, the consignor put 15,300 pounds of complainant–525's carbon black, and all of complainant–526's 5,050 pounds of carbon black. In this second container was a total of 20,350 pounds.

Because the applicable tariff provided for a minimum of 40,000 pounds of carbon black for forty-foot containers, there were deficit poundages in each container. The deficit in SEAU–106776 was 10,130 pounds, and the deficit in SEAU–100431 was 19,650 pounds. In billing the three complainants Sea-Land prorated these deficits. These billings were as follows:

Complainant—524 =	$ 506.85
Complainant—525 =	$3,594.83
Complainant—526 =	$ 590.45
Total	$4,692.13

The billing was based on a rate of $119 W (imperial ton of 2,000 pounds). The billing was mathematically incorrect. Each container of 40,000 pounds, or of 20 imperial tons, when billed at the $119 rate should have produced charges of $2,380, or a total for the two containers of $4,760. This does not jibe with the total billed charges above of $4,692.13, even with the addition of $67.58 of charges sought to be waived regarding complainant–524. The difference in computations with this adjustment is only 29 cents.

The correct basis of charges, at the $119–W rate, and also at the $105–W rate sought by these applications, both depend on the precise computations of tons moved and of deficit tons under the minimum container tons, all as provided to each of the three complainants. The correct mathematics follows:

Complainant-524 shipped 7,210 pounds, or 3.605 tons. There were 29,870 pounds in the container he used, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant-524 shipped 24.13793 percent (7210 ÷ 29,870) of the carbon black shipped in container SEAU-106776. This percent times the deficit tons of 5.065 results in 1.2226 deficit tons attributable to complainant-524. (In error Sea-Land used the deficit figure 1.2221 tons.) Complainant-524's total tonnage for proper charges is 3.605 plus 1.2226, or 4.8276 tons. This tonnage times the $119 rate produces charges of $574.48. At the $105 rate the charges are $506.90.

The application states that Sea-Land collected charges of $506.85[2] from complainant-524 and seeks to apply corrected charges, at the $105 rate, of $506.85, and to waive a portion of the charges at the $119 rate, amounting to a waiver of $67.58.

It is found and concluded that at the sought basis for complainant-524 the corrected charges are $506.90. Inasmuch as $506.85 was collected according to Sea-Land, it should collect an additional 5 cents. Since this is an insignificant amount, waiver of collection of this 5 cents is granted.

Complainant-525 shipped 22,660 pounds, or 11.330 tons in container SEAU-106776. There were 29,870 pounds in this container, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant-525 shipped 75.86207 percent (22,660 ÷ 29870) of the carbon black shipped in container SEAU-106776. This percent times the deficit tons of 5.065 results in 3.8424 deficit tons attributable to complainant-525. (In its computation Sea-Land used the deficit figure of 3.8423 tons.) Complainant-525's total tonnage for proper charges on its carbon black in container SEAU-106776 is 11.330 plus 3.8424, or 15.1724 tons. This tonnage times the $119 rate produces charges of $1,805.52. At the $105 rate the corrected charges for complainant-525 for his carbon black in container SEAU-106776 are $1,593.10 ($105 times 15.1724).

Complainant-525 shipped 15,300 pounds, or 7.650 tons, of carbon black in container SEAU-100431. There were 20,350 pounds in this container, and there were 19,650 pounds deficit, or 9.825 deficit tons. Complainant-525 shipped 75.18427 percent (15,300 ÷ 20,350) of the carbon black in this second container SEAU-100431. Thhis percent times the deficit tons of 19.825 results in 7.3869 deficit tons attributable to complainant-525. (Sea-Land used the deficit figure of 7.3864 tons.) Complanant-525's total tonnage for proper charges on its carbon black in the second container, SEAU-100431 is 7.650 plus 7.3869, or 15.0369 tons. This tonnage times the $119 rate produces charges of $1,789.39. At the $105 rate the corrected charges for complainant-525 for his carbon black in container SEAU-100431 are $1,578.87 ($105 times 15.0369).

The total corrected charges for complainant-525 are $1,593.10 plus $1,578.87, or $3,171.97. (Sea-Land's sought basis was $3,171.91.)

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[2] In a paper filed on February 21, 1978, the complainant-524 says he paid charges of $524.43, which contrasts with Sea-Land's statement in the application of $506.85 collected. Sea-Land's statement is accepted herein as correct.

Complainant–526 shipped 5,050 pounds, or 2.525 tons. There were 20,350 pounds in the container he used, and there were 19,650 pounds deficit, or 9.825 deficit tons in this container, SEAU–100431. Complainant–526 shipped 24.81572 percent (5,050 ÷ 20,350) of the carbon black in this second container. This percent times the deficit tons of 9.825 results in 2.4381 deficit tons attributable to complainant–526. (Sea-Land used a deficit tonnage of 2.4375.) Complainant–526's total tonnage for proper charges is 2.525 plus 2.4381 or 4.9631 tons. This tonnage times the $119 rate produces charges of $590.61. At the $105 rate the corrected charges for complainant–526 for his carbon black in container SEAU–100431 are $521.13 ($105 times 4.9631).

The recapitulation of corrected charges are:

Complainant—524	$ 506.90
Complainant—525	3,171.97
Complainant—526	521.13
Total—3 Complainants	$4,200.00

This recapitulation of corrected charges comports with the minimum charge of $2,100 per container, based upon the rate of $105 and minimum of 20 tons (40,000 pounds) per container.

It is ultimately concluded and found that there was an error of an administrative or clerical nature in the tariff of Sea-Land in that it failed to publish the $105 W rate to Keelung which it promised to publish prior to the movement of the shipment herein; that the authorization of a refund of a portion of the freight charges in the amount of $69.32 ($590.45 − $521.13) will not result in discrimination among shippers; that prior to applying for authority to refund a portion of the charges collected, Sea-Land through its participation in the Conference's tariff filed a new tariff which sets forth the correct imperial basis of $105 W, albeit that the conference publishes the new tariff on a metric basis with the metric rate of $116 W; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to refund $69.32 to the complainant of the freight charges collected.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
March 3, 1978.

FEDERAL MARITIME COMMISSION

FPECIAL DOCKET NO. 525

YAH SHENG CHONG YUNG KEE CO. LTD.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

MARCH 29, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 29, 1978.

IT IS ORDERED, That applicant is authorized to refund $422.86 of the charges previously assessed Yah Sheng Chong Yung Kee Co. Ltd.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket 525 that effective January 18, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from January 18, 1977, through February 20, 1977, the rate on 'Carbon Black' to Kaohsiung/Keelung is $116.00/ 1,000 kgs. subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 525

YAH SHENG CHONG YUNG KEE CO. LTD.

v.

SEA-LAND SERVICE, INC.

March 3, 1978

Application for permission to refund $422.86 of freight charges granted.

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

By application timely filed on July 25, 1977, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916 (the Act), applicant Sea-Land Service, Inc., seeks authority to refund a portion of the freight charges on two lots of carbon black, in bags, shipped, one lot in one container, and the other lot in another container, in rail-water intermodal service from New Orleans, Louisiana, via the rail service of the Southern Pacific Co., to Los Angeles, California, thence via the ocean service of Sea-Land Service, Inc., to Keelung, Taiwan, both lots as per single bill of lading number 031–135197 issued at New Orleans, dated January 26, 1977.

Disposition of this application was delayed for two reasons. First, the supporting exhibits attached to the application were in large part illegible. Applicant provided legible exhibits on December 15, 1977. Second, the applicant promised the signature of the complainant located in Taiwan, and this concurrence of the complainant was received on February 21, 1978.

Rule 92(b) of our Rules of Practice and Procedure states that applications under this rule shall be made in accordance with the form prescribed in Appendix II(7) of these rules. In that form, the respondent water carrier or conference of water carriers submits a notarized application, and the form also provides for the notarized signature of the complainant under his statement that he concurs in the application and certifies that

[1] This decision became the decision of the Commission March 29, 1978.

the charge of $______ on the shipment involved were paid and borne by ______ and no other.

However, a close check of the law, section 18(b)(3) shows that Rule 92(b) goes beyond the law in requiring the concurrence of the complainant. There is no requirement in the law that complainant concur in the application under section 18(b)(3).

It is concluded that the purpose of the form in Appendix II(7) may well be justified for other types of special docket applications which ante-date section 18(b)(3) applications, such as applications under the two-year statute of limitations in the domestic trade.

In the present situation we have a 180-day limitation on the filing of this type of application and there is no dispute as to who paid and bore the freight charges.

In these circumstances, the fact that the complainant's signature was obtained much later than the 180 days following the date of shipment is immaterial. It is concluded that the application was properly filed within the 180 days from the date of shipment, regardless of the date of the complainant's signature.

From the amount of the requested refund or waiver of a portion of the freight charges in relation to the amount of the total rail-water intermodal charges, it is concluded that the requested refund or waiver will apply only to the ocean portion of the through charges. The applicant did not so state, but should so state on future applications, because our authority to sanction waivers or refunds under section 18(b)(3) relates only to the ocean portion of the through rate.

A competitor (Seatrain International, S.A.) of the applicant Sea-Land had a rate of $105 W (ton of 2,000 pounds) on carbon black from New Orleans to Keelung. Sea-Land in order to induce the shipment herein promised to publish the same rate. It was intended that Sea-Land publish the $105 W rate to Keelung and to Kaohsiung, Taiwan. However, because of clerical error the rate of $105 was published to Hong Kong, but not to those two Taiwan destinations.

The rate of $119 W was published in error in Keelung and Kaohsiung. This was the rate charged or the rate that should have been charged because of the tariff error.

The rate sought to be charged on which waiver or refund of a portion of the charges would be based is $105 W. In actual fact, Sea-Land has not published the $105 rate as such because the applicable tariff has been converted from imperial tons of 2,000 pounds to metric tons of 1,000 kilograms.

The shipment or shipments moved on January 26, 1977, when the erroneous $119 W (imperial) rate applied. This error was corrected effective February 21, 1977, in the Pacific Westbound Conference Tariff No. 8 (F.M.C. No. 15, I.C.C. No. 1) by the publishing of a rate of $116 W (metric ton of 1,000 kilograms, using the conversion factor of 2,204.62 pounds per 1,000 kilograms), with Sea-Land participating in this confer-

ence rate, circle reference Sea Land, item No. 513–2700–00. On February 1, 1977, Sea-Land's tariff 234 (with the erroneous $119 W rate) was canceled and superseded by the conference tariff.

The imperial rate of $105 using the conversion factor becomes a metric rate of $115.74 and this when rounded off becomes the actual tariff metric rate of $116 W.

Further calculations herein are based on the imperial rates of $119 and of $105, with imperial weights.

This special docket application No. 525 is one of three interrelated applications. The other two are special docket No. 524 and No. 526. Carbon black was shipped in all three of these cases, but to three different complainant-consignees, all on freight collect bases. For convenience, these three complainants will be designated by their special docket numbers, as complainant–524, etc.

Two forty-foot containers were utilized by Sea-Land for the shipments of the three complainants. The consignor put all of complainant–524's 7,210 pounds of carbon black in the first container, SEAU–106776. This same container also had on it 22,660 pounds of complainant–525's carbon black, or a total of 29,780 pounds. In the second container, SEAU–100431, the consignor put 15,300 pounds of complainant–525's carbon black, and all of complainant–526's 5,050 pounds of carbon black. In this second container was a total of 20,350 pounds.

Because the applicable tariff provided for a minimum of 40,000 pounds of carbon black for forty-foot containers, there were deficit poundages in each container. The deficit in SEAU–106776 was 10,130 pounds, and the deficit in SEAU–100431 was 19,650 pounds. In billing the three complainants Sea-Land prorated these deficits. These billings were as follows:

Complainant—524 =	$ 506.85
Complainant—525 =	$3,594.83
Complainant—526 =	$ 590.45
Total	$4,692.13

The billing was based on a rate of $119 W (imperial ton of 2,000 pounds). The billing was mathematically incorrect. Each container of 40,000 pounds, or of 20 imperial tons, when billed at the $119 rate should have produced charges of $2,380, or a total for the two containers of $4,760. This does not jibe with the total billed charges above of $4,692.13, even with the addition of $67.58 of charges sought to be waived regarding complainant–524. The difference in computations with this adjustment is only 29 cents.

The correct basis of charges, at the $119–W rate, and also at the $105–W rate sought by these applications, both depend on the precise computations of tons moved and of deficit tons under the minimum container tons, all as prorated to each of the three complainants. The correct mathematics follows:

Complainant–524 shipped 7,210 pounds, or 3.605 tons. There were 29,870 pounds in the container he used, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant–524 shipped 24.13793 percent (7210 ÷ 29,870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 1.2226 deficit tons attributable to complainant–524. (In error Sea-Land used the deficit figure of 1.2221 tons.) Complainant–524's total tonnage for proper charges is 3.605 plus 1.2226, or 4.8276 tons. This tonnage times the $119 rate produces charges of $574.48. At the $105 rate the charges are $506.90.

The application states that Sea-Land collected charges of $506.85[2] from complainant–524 and seeks to apply corrected charges, at the $105 rate, of $506.85, and to waive a portion of the charges at the $119 rate, amounting to a waiver of $67.58.

It is found and concluded that at the sought basis for complainant–524 the corrected charges are $506.90. Inasmuch as $506.85 was collected according to Sea-Land, it should collect an additional 5 cents. Since this is an insignificant amount, waiver of collection of this 5 cents is granted.

Complainant–525 shipped 22,660 pounds, or 11.330 tons in container SEAU–106776. There were 29,870 pounds in this container, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant–525 shipped 75.86207 percent (22,660 ÷ 29870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 3.8424 deficit tons attributable to complainant–525. (In its computation Sea-Land used the deficit figure of 3.8423 tons.) Complainant–525's total tonnage for proper charges on its carbon black in container SEAU–106776 is 11.330 plus 3.8424, or 15.1724 tons. This tonnage times the $119 rate produces charges of $1,805.52. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–106776 are $1,593.10 ($105 times 15.1724).

Complainant–525 shipped 15,300 pounds, or 7.650 tons, of carbon black in container SEAU–100431. There were 20,350 pounds in this container, and there were 19,650 pounds deficit, or 9.825 deficit tons. Complainant–525 shipped 75.18427 percent (15,300 ÷ 20,350) of the carbon black in this second container SEAU–100431. This percent times the deficit tons of 9.825 results in 7.3869 deficit tons attributable to complainant–525. (Sea-Land used the deficit figure of 7.3864 tons.) Complainant–525's total tonnage for proper charges on its carbon black in the second container, SEAU–100431 is 7.650 plus 7.3869, or 15.0369 tons. This tonnage times the $119 rate produces charges of $1,789.39. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–100431 are $1,578.87 ($105 times 15.0369).

The total corrected charges for complainant–525 are $1,593.10 plus $1,578.87, or $3,171.97. (Sea-Land's sought basis was $3,171.91.)

[2] In a paper filed on February 21, 1978, the complainant–524 says he paid charges of $524.43, which contrasts wit Sea-Land's statement in the application of $506.85 collected. Sea-Land's statement is accepted herein as correct.

Complainant–526 shipped 5,050 pounds, or 2.525 tons. There were 20,350 pounds in the container he used, and there were 19,650 pounds deficit, or 9.825 deficit tons in this container, SEAU–100431. Complainant–526 shipped 24.81572 percent (5,050 ÷ 20,350) of the carbon black in this second container. This percent times the deficit tons of 9.825 results in 2.4381 deficit tons attributable to complainant–526. (Sea-Land used a deficit tonnage of 2.4375.) Complainant–526's total tonnage for proper charges is 2.525 plus 2.4381 or 4.9631 tons. This tonnage times the $119 rate produces charges of $590.61. At the $105 rate the corrected charges for complainant–526 for his carbon black in container SEAU–100431 are $521.13 ($105 times 4.9631).

The recapitulation of corrected charges are:

Complainant—524	$ 506.90
Complainant—525	3,171.97
Complainant—526	521.13
Total—3 Complainants	$4,200.00

This recapitulation of corrected charges comports with the minimum charge of $2,100 per container, based upon the rate of $105 and minimum of 20 tons (40,000 pounds) per container.

It is ultimately concluded and found that there was an error of an administrative or clerical nature in the tariff of Sea-Land in that it failed to publish the $105 W rate to Keelung which it promised to publish prior to the movement of the shipment herein; that the authorization of a refund of a portion of the freight charges in the amount of $422.86 ($3,594.83 – $3,171.97) will not result in discrimination among shippers; that prior to applying for authority to refund a portion of the charges collected, Sea-Land through its participation in the Conference's tariff filed a new tariff which sets forth the correct imperial basis of $105 W, albeit that the conference publishes the new tariff on a metric basis with the metric rate of $116 W; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to refund $422.86 to the complainant of the freight charges collected.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
March 3, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 524

PAI TAI INDUSTRIAL CO., LTD.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

March 29, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 29, 1978.

IT IS ORDERED, That applicant is authorized to waive $67.63 of the charges previously assessed Pai Tai Industrial Co., Ltd.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

> "Notice is hereby given, as required by the decision in Special Docket 524 that effective January 18, 1977 for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from January 18, 1977, through February 20, 1977, the rate on 'carbon black' to Kaohsiung/Keelung is $116.00/1,000 kgs. subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 524

PAI TAI INDUSTRIAL CO. LTD.

v.

SEA-LAND SERVICE, INC.

March 3, 1978

Application for permission to waive $67.63 of freight charges granted.

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

By application timely filed on July 25, 1977, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), applicant Sea-Land Service, Inc., seeks authority to waive collection of a portion of the freight charges on a containerized shipment of carbon black, in bags, in rail-water intermodal service from New Orleans, Louisiana, via the rail service of the Southern Pacific Co., to Los Angeles, California, thence via the ocean service of Sea-Land Service, Inc., to Keelung, Taiwan, as per bill of lading number 031–135195 issued at New Orleans, dated January 26, 1977.

Disposition of this application was delayed for two reasons. First, the supporting exhibits attached to the application were in large part illegible. Applicant provided legible exhibits on December 15, 1977. Second, the applicant promised the signature of the complainant located in Taiwan, and this concurrence of the complainant was received on February 21, 1978.

Rule 92(b) of our Rules of Practice and Procedure states that applications under this rule shall be made in accordance with the form prescribed in Appendix II(7) of these rules. In that form, the respondent water carrier or conference of water carriers submits a notarized application, and the form also provides for the notarized signature of the complainant under his statement that he concurs in the application and certifies that

[1] This decision became the decision of the Commission March 29, 1978.

the charge of $______ on the shipment involved were paid and borne by ______ and no other.

However, a close check of the law, section 18(b)(3) shows that Rule 92(b) goes beyond the law in requiring the concurrence of the complainant. There is no requirement in the law that complainant concur in the application under section 18(b)(3).

It is concluded that the purpose of the form in Appendix II(7) may well be justified for other types of special docket applications which ante-date section 18(b)(3) applications, such as applications under the two-year statute of limitations in the domestic trade.

In the present situation we have a 180-day limitation on the filing of this type of application and there is no dispute as to who paid and bore the freight charges.

In these circumstances, the fact that the complainant's signature was obtained much later than the 180 days following the date of shipment is immaterial. It is concluded that the application was properly filed within the 180 days from the date of shipment, regardless of the date of the complainant's signature.

From the amount of the requested refund or waiver of a portion of the freight charges in relation to the amount of the total rail-water intermodal charges, it is concluded that the requested refund or waiver will apply only to the ocean portion of the through charges. The applicant did not so state, but should so state on future applications, because our authority to sanction waivers or refunds under section 18(b)(3) relates only to the ocean portion of the through rate.

A competitor (Seatrain International, S.A.) of the applicant Sea-Land had a rate of $105 W (ton of 2,000 pounds) on carbon black from New Orleans to Keelung. Sea-Land in order to induce the shipment herein promised to publish the same rate. It was intended that Sea-Land publish the $105 W rate to Keelung and to Kaohsiung, Taiwan. However, because of clerical error the rate of $105 was published to Hong Kong, but not to those two Taiwan destinations.

The rate of $119 W was published in error to Keelung and Kaohsiung. This was the rate charged or the rate that should have been charged because of the tariff error.

The rate sought to be charged on which waiver or refund of a portion of the charges would be based is $105 W. In actual fact, Sea-Land has not published the $105 rate as such because the applicable tariff has been converted from imperial tons of 2,000 pounds to metric tons of 1,000 kilograms.

The shipment or shipments moved on January 26, 1977, when the erroneous $119 W (imperial) rate applied. This error was corrected effective February 21, 1977, in the Pacific Westbound Conference Tariff No. 8 (F.M.C. No. 15, I.C.C. No. 1) by the publishing of a rate of $116 W (metric ton of 1,000 kilograms, using the conversion factor of 2,204.62 pounds per 1,000 kilograms), with Sea-Land participating in this confer-

ence rate, circle reference SL , item No. 513-2700-00. On February 1, *1977, Sea-Land's tariff 234 (with the erroneous $119 W rate) was canceled* and superseded by the conference tariff.

The imperial rate of $105 using the conversion factor becomes a metric rate of $115.74 and this when rounded off becomes the actual tariff metric rate of $116 W.

Further calculations herein are based on the imperial rates of $119 and of $105, with imperial weights.

This special docket application No. 524 is one of three interrelated applications. The other two are special docket No. 525 and No. 526. Carbon black was shipped in all three of these cases, but to three different complainant-consignees, all on freight collect bases. For convenience, these three complainants will be designated by their special docket numbers, as complainant-524, etc.

Two forty-foot containers were utilized by Sea-Land for the shipments of the three complainants. The consignor put all of complainant-524's 7,210 pounds of carbon black in the first container, SEAU-106776. This same container also had on it 22,660 pounds of complainant-525's carbon black, or a total of 29,780 pounds. In the second container, SEAU-100431, the consignor put 15,300 pounds of complainant-525's carbon black, and all of complainant-526's 5,050 pounds of carbon black. In this second container was a total of 20,350 pounds.

Because the applicable tariff provided for a minimum of 40,000 pounds of carbon black for forty-foot containers, there were deficit poundages in each container. The deficit in SEAU-106776 was 10,130 pounds, and the deficit in SEAU-100431 was 19,650 pounds. In billing the three complainants Sea-Land prorated these deficits. These billings were as follows:

Complainant—524 =	$ 506.85
Complainant—525 =	$3,594.83
Complainant—526 =	$ 590.45
Total	$4,692.13

The billing was based on a rate of $119 W (imperial ton of 2,000 pounds). The billing was mathematically incorrect. Each container of 40,000 pounds, or of 20 imperial tons, when billed at the $119 rate should have produced charges of $2,380, or a total for the two containers of $4,760. This does not jibe with the total billed charges above of $4,692.13, even with the addition of $67.58 of charges sought to be waived regarding complainant-524. The difference in computations with this adjustment is only 29 cents.

The correct basis of charges, at the $119-W rate, and also at the $105-W rate sought by these applications, both depend on the precise computations of tons moved and of deficit tons under the minimum container tons, all as prorated to each of the three complainant. The correct mathematics follows:

Complainant–524 shipped 7,210 pounds, or 3.605 tons. There were 29,870 pounds in the container he used, and there were 10,130 pounds deficit, or 5.065 deficit dons. Complainant–524 shipped 24.13793 percent (7210 ÷ 29,870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 1.2226 deficit tons attributable to complainant–524. (In error Sea-Land used the deficit figure of 1.2221 tons.) Complainant–524's total tonnage for proper charges is 3.605 plus 1.2226, or 4.8276 tons. This tonnage times the $119 rate produces charges of $574.48. At the $105 rate the charges are $506.90.

The application states that Sea-Land collected charges of $506.85[2] from complainant–524 and seeks to apply corrected charges, at the $105 rate, of $506.85, and to waive a portion of the charges at the $119 rate, amounting to a waiver of $67.58.

It is found and concluded that at the sought basis for complainant–524 the corrected charges are $506.90. Inasmuch as $506.85 was collected according to Sea-Land, it should collect an additional 5 cents. Since this is an insignificant amount, waiver of collection of this 5 cents is granted.

Complainant–525 shipped 22,660 pounds, or 11.330 tons in container SEAU–106776. There were 29,870 pounds in this container, and there were 10,130 pounds deficit, or 5.065 deficit tons. Complainant–525 shipped 75.86207 percent (22,660 ÷ 29870) of the carbon black shipped in container SEAU–106776. This percent times the deficit tons of 5.065 results in 3.8424 deficit tons attributable to complainant–525. (In its computation Sea-Land used the deficit figure of 3.8423 tons.) Complainant–525's total tonnage for proper charges on its carbon black in container SEAU–106776 is 11.330 plus 3.8424, or 15.1724 tons. This tonnage times the $119 rate produces charges of $1,805.52. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–106776 are $1,593.10 ($105 times 15.1724).

Complainant–525 shipped 15,300 pounds, or 7.650 tons, of carbon black in container SEAU–100431. There were 20,350 pounds in this container, and there were 19,650 pounds deficit, or 9.825 deficit tons. Complainant–525 shipped 75.18427 percent (15,300 ÷ 20,350) of the carbon black in this second container SEAU–100431. This percent times the deficit tons of 9.825 results in 7.3869 deficit tons attributable to complainant–525. (Sea-Land used the deficit figure of 7.3864 tons.) Complainant–525's total tonnage for proper charges on its carbon black in the second container, SEAU–100431 is 7.650 plus 7.3869, or 15.0369 tons. This tonnage times the $119 rate produces charges of $1,789.39. At the $105 rate the corrected charges for complainant–525 for his carbon black in container SEAU–100431 are $1,578.87 ($105 times 15.0369).

The total corrected charges for complainant–525 are $1,593.10 plus $1,578.87, or $3,171.97. (Sea-Land's sought basis was $3,171.91.)

[2] In a paper filed on February 21, 1978, the complainant–524 says he paid charges of $524.43, which contrasts with Sea-Land's statement in the application of $506.85 collected. Sea-Land's statement is accepted herein as correct.

Complainant–526 shipped 5,050 pounds, or 2.525 tons. There were 20,350 pounds in the container he used, and there were 19,650 pounds deficit, or 9.825 deficit tons in this container, SEAU–100431. Complainant–526 shipped 24.81572 percent (5,050 ÷ 20,350) of the carbon black in this second container. This percent times the deficit tons of 9.825 results in 2.4381 deficit tons attributable to complainant–526. (Sea-Land used a deficit tonnage of 2.4375.) Complainant–526's total tonnage for proper charges is 2.525 plus 2.4381 or 4.9631 tons. This tonnage times the $119 rate produces charges of $590.61. At the $105 rate the corrected charges for complainant–526 for his carbon black in container SEAU–100431 are $521.13 ($105 times 4.9631).

The recapitulation of corrected charges are:

Complainant—524	$ 506.90
Complainant—525	3,171.97
Complainant—526	521.13
Total—3 Complainants	$4,200.00

This recapitulation of corrected charges comports with the minimum charge of $2,100 per container, based upon the rate of $105 and minimum of 20 tons (40,000 pounds) per container.

It is ultimately concluded and found that there was an error of an administrative or clerical nature in the tariff of Sea-Land in that it failed to publish the $105 W rate to Keelung which it promised to publish prior to the movement of the shipment herein; that the authorization of a waiver of a portion of the freight charges in the amount of $67.63 ($574.48 − $506.85) will not result in discrimination among shippers; that prior to applying for authority to waive a portion of the charges not collected, Sea-Land through its participation in the Conference's tariff filed a new tariff which sets forth the correct imperial basis of $105 W, albeit that the conference publishes the new tariff on a metric basis with the metric rate of $116 W; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to waive $67.63 of the freight charges not collected.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
March 3, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 564

COMMODITY CREDIT CORPORATION

v.

DELTA STEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

April 12, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 12, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $8,453.35 of the charges previously assessed Commodity Credit Corporation.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision in Special Docket 564 that effective September 16, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from September 16, 1977 through January 8, 1978, the rate on 'Rice in Bags' from Houston to Banjul, Gambia is $70.00 per 2,240 lbs. subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 564

COMMODITY CREDIT CORPORATION

v.

DELTA STREAMSHIP LINES, INC.

March 13, 1978

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Delta Steamship Lines, Inc. (Delta or Applicant), has applied for permission to waive collection of a portion of the freight charges on a shipment of rice, which moved from Houston, Texas, to Banjul, Gambia, West Africa, under Delta bill of lading dated September 16, 1977. The application was filed February 13, 1978.

The subject shipment moved under American West African Freight Conference (AWAFC) Eastbound Tariff No. 15, FMC No. 16, 12th revised page 22, effective September 15, 1977, under the rate for "Rice, in bags (Tariff Item No. 4030)." The aggregate weight of the shipment was 2,209,510 pounds (1002 gross metric tons). The rate applicable at time of shipment was $78.57 per ton of 2240 pounds, plus harbor dues of 72 cents per ton. The rate sought to be applied is $70 per ton of 2240 pounds, plus harbor dues of 72 cents per ton, pursuant to AWAFC Eastbound Tariff No. 15, FMC No. 16, original page 500C, effective January 9, 1978, correction 286, under the "Open Rate Authorization" for Tariff Item No. 4000, "Rice in Bags—From Houston to Banjul, Gambia."

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $78,210.74. Aggregate freight charges at

[1] This decision became the decision of the Commission April 12, 1978.
[2] 46 U.S.C. 817, as amended.

the rate sought to be applied amount to $69,757.39. The difference sought to be waived is $8,453.35. The Applicant is not aware of any other shipment of the same commodity which moved via Delta during the same time period at the rates involved in this shipment.

The documents submitted by Delta establish that there was a prior agreement between the carrier (Delta) and the shipper (U.S. Department of Agriculture, Commodity Credit Corporation) to move this particular shipment of over 1,000 tons of rice in bags, from Houston, Texas to Banjul, Gambia, at a special rate ("Open Rate Authorization") of $70 per 2240 pounds plus 72 cents per 2240 pounds harbor dues, instead of the AWAFC eastbound tariff page 22 rate of $78.57 per 2240 pounds plus 72 cents harbor dues. (Although the application states that the majority of prior negotiations with the shipper were verbal "except for attached telex between Delta Nola and Washington office," there are two attached documents that clearly establish the pre-existence of the mutual agreement for the specific rate—the U.S. Department of Agriculture "Cargo Booking Confirmation" forms issued August 25 and August 31, 1977, both of which give the ocean freight rate as $70[3] and both of which are signed by representatives of both the carrier and the shipper.) However, the carrier's clerical people inadvertently failed to notify the Conference (AWAFC) to process and file the new tariff publishing the new, special rate for this one shipment, before the bill of lading was issued on September 16, 1977. The Department of Agriculture, Commodity Credit Corporation (CCC), brought this mistake to the attention of the carrier, and Delta collected only the agreed amount of $69,757.39 from CCC on December 19, 1977, and thereupon began the process of gathering the necessary documentation to submit with its application to the Commission for permission to waive collection of the difference. The originally-intended "Open Rate Authorization" page was finally filed in the AWAFC tariff effective January 9, 1978. (Original page 500C, correction 286.)

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be

[3] The second of these two executed forms merely adds the harbor dues amount of 72 cents per long ton, which had been inadvertently deleted from the first form.

based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[4]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the special rate for this particular shipment of rice, as had been agreed upon in advance by the carrier and the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3 Prior to applying for authority to waive collection of a portion of the freight charges, Delta filed a new tariff which set forth the rate on which such waiver would be based.

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

Accordingly, permission is granted to the Delta Steamship Lines, Inc., to waive collection of a portion of the freight charges, specifically the amount of $8,453.35. An appropriate notice will be published in the tariff of the American West African Freight Conference (Eastbound Tariff No. 15, FMC No. 16).

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 13, 1978.

[4] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-10

FREIGHT FORWARDER BIDS ON GOVERNMENT SHIPMENTS AT UNITED STATES PORTS—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916, AND GENERAL ORDER 4

PETITION FOR DECLARATORY ORDER DENIED

March 13, 1978

The General Services Administration (GSA) has filed a "Petition for Declaratory Order" setting forth the rates it has accepted for freight forarding services in 11 ports for its fiscal year commencing July 1, 1977 and requests the Commission to "confirm the lawulness of the rates" under section 510.24(b) of the Commission's Rules and the standards recently articulated in Docket No. 74-10, 17 S.R.R. 285, 681 (1977).[1]

A joint "Reply" was filed by the National Customs Brokers and Forwarders Association of America, Inc., and the New York Foreign Freight Forwarders and Brokers Association, Inc., which is not in fact a "reply" to GSA's statements, but rather a renewal of its twice rejected proposal for a rule limiting GSA rates to the average of a forwarder's commercial rates during the preceding year.

The 19 freight forwarders listed in the Petition have either performed forwarding services for GSA at the stated rates since July 1, 1977 or offered to perform such services. Although all 19 forarders certified to GSA that their rates ere compensatory, equitable and nondiscriminatory vis-a-vis commercial shippers—the standard established by the Commission's Report in Docket No. 74-10, 17 S.R.R. at 300—some of the rates and bids are so low as to appear on their face to violate section 510.24(b). It is not possible, however, to ascertain whether any of the stated rates and bids in fact violate section 510.24(b) without inquiry to the services provided, the commercial rates of the forwarder involved, and that forwarder's cost structure. GSA's Petition must therefore be denied to the extent it requests an immediate "confirmation" of the lawfulness of

[1] These rates range from one cent ($1.00 minus a 99-cent discount for payment within GSA's normal payment period) to $16.47 per shipment. All bidders certified to GSA that their rates were compensatory, equitable and nondiscriminatory vis-a-vis commercial shippers—the standard established by the Commission's Report in Docket No. 74-10.The one cent rate is that of L. F. Surillo Co., Inc. (Surillo), for the Port of New York. GSA has further requested the Commission to ascertain which of eight alternative bids should be accepted for its New York shipments if Surillo's bid is violative of section 510.24(b). The alternative bids range from $3.25 to $37.50.

the 1977–1978 rates and the alternative bids for Port of New York. The Commission shall, however, take steps to institute an appropriate investigation into the probable violations revealed by the instant petition.

THEREFORE, IT IS ORDERED, That the "Petition for Declaratory Order" of the General Services Administration is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 566

DAVID ULLMAN

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND AND WAIVER OF CHARGES

April 12, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 12, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $1,832.70 and refund $100.00 of the charges previously assessed David Ullman.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision in Special Docket 566 that effective October 7, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 7, 1977 through December 31, 1977, the rate on 'Sail Boats, 470 Class—U.S. Olympic Yachting Team' from Yokohama to Long Beach is free of charge subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund and waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 566

DAVID ULLMAN

v.

SEA-LAND SERVICE, INC.

March 14, 1978

Application for permission to refund portion of freight charges collected and waive balance of freight charges granted.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc. (Sea-Land), by application dated February 24, 1978, has applied for permission to refund and waive collection of freight charges aggregating $1,932.70 in connection with one shipment of boats by the U.S. Olympic Yachting Team.[2] The shipment in question was from Yokohama, Japan, to Long Beach, California, on October 7, 1977 (as per Bill of Lading No. 937–998062). The tariff involved is the Trans-Pacific Freight Conference of Japan/Korea, Tariff No. 35, FMC–6, Item No. 5400–60, 17th Revised page 291, effective January 1, 1978.

The facts are as follows:

In the early summer of 1977, Sea-Land Service was approached by the U.S. Olympic Yachting Team to donate the ocean transportation for the boats to be used by the Olympic Team in yachting races to be held in Japan in September of 1977. Sea-Land was willing to do so and, accordingly, on August 5, 1977, Sea-Land's Westbound Pricing Manager, M. R. Cook, wrote to the Pacific Westbound Conference seeking conference action to publish a charitable free-of-charge rate item covering the ocean move from California to Japan. On the blind carbon copy of the letter, instructions were given to Sea-Land's Tokyo Conference Representative (D. F. Robinson) requesting similar action to be taken in the homebound Trans-Pacific Freight Conference Japan/Korea freight tariff. Mr. Robinson, however, inadvertently failed to bring this matter to

[1] This decision became the decision of the Commission April 12, 1978.

[2] Complainant is a member of the U.S. Olympic Yachting Team.

the attention of the Trans-Pacific Freight Conference Japan/Korea. On October 7, 1977, after the races were concluded, the U.S. Olympic Team forwarded one container (containing the sailboats) for the homebound voyage on Sea-Land 937–998062. Sea-Land's administrative failure in failing to petition the conference to publish a free transportation item in the Eastbound TPFC J/K tariff became apparent when the Olympic Team attempted to claim the container in Long Beach. The Olympic Team was informed ocean charges of $1,932.70 were due; Sea-Land collected $100, balance due $1,832.70.

When the oversight was brought to its attention on November 18, 1977, Sea-Land petitioned the TPFC J/K to establish a free provision covering the movement from Yokohama to Long Beach.

On December 14, 1977, the Conference Rate Committee recommendation to the TPFC J/K was to publish Sea-Land's request for a free-of-charge item and the free-of-charge item was published in the TPFC J/K tariff effective January 1, 1978.

Sea-Land petitions the Federal Maritime Commission to permit the refund of the freight charges paid ($100) and waive the collection of the remaining freight charges ($1,832.70) in view of Sea-Land's inadvertence in failing to request the Conference publish the appropriate tariff provision which would have permitted the free movement for the Olympic Team.

Discussion

The documents submitted in support of the petition clearly establish that it was the intention of the parties to file tariffs which would permit the carriage of the U.S. Olympic Yachting Team boats to Japan and return free of charge as a charitable item. This intention was fully carried out for the westbound carriage by appropriate tariff filing but inadvertently through administrative error and oversight not carried out for the eastbound carriage.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[3]

[3] Section 18(b)(3) provides, as pertinent.

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based. *Provided further* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refonds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

It is concluded that:

The inadvertent failure to extend the free carriage for a charitable item to the tariff governing the eastbound carriage falls within the intended ground for waiver or refund; that authorization to refund and waive collection will not result in discrimination against shippers similarly situated;

That a new tariff was filed prior to the filing of the application for permission to refund and waive collection of freight charges;

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

Wherefore: In accordance with section 18(b)(3) of the Act, permission is granted to refund $100 of the freight charges collected and to waive collection of $1,832.70 of the freight charges.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 14, 1978.

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refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.*

*The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 534

CUTLER-HAMMER DENVER

v.

LYKES BROS. STEAMSHIP CO., INC.

ORDER ON REMAND

March 14, 1978

The Commission by notice served February 14, 1978, determined to review the initial decision in this proceeding. The Administrative Law Judge had granted a request for waiver under section 18(b)(3) based on his finding that a specific rate had been agreed to but inadvertently incorrectly filed.

Upon review, the record discloses no evidence to support the Administrative Law Judge's finding. Lykes states that a verbal agreement had been reached in March 1976 with a freight forwarder for a lump sum rate to cover a particular shipment of printing press parts to move on a particular vessel from Houston and New Orleans. On November 30, 1976, Lykes filed such a lump sum rate but failed to include Houston as a port of loading. On February 10, 1977, a shipment from Houston was effected.

No evidence has been furnished which would substantiate that a prior agreement was reached to establish a rate to include Houston as a loading port or that the exclusion of Houston from the tariff was inadvertent. We think more should be required than the mere allegation of the carrier concerning the nature of the agreed rate. This is especially true in this case because the wide lapse of time between the alleged agreement and the date of shipment casts doubt on the allegation that the agreement was to cover a specific shipment on a particular vessel. Even though the agreed rate is said to have been reached "verbally", evidence of such agreement likely exists in the form of confirmation by the forwarder to the shipper or instructions to the tariff filer, etc. If not, affidavits of those involved in the rate negotiations and agreement could serve as a substitute.* As stated in a previous decision adopted by the Commission in SD–467 *Union Engineering v. Iran Express Lines,* 16 SRR 610, if freight charges are to be waived solely on the basis of conclusory statements, the applicant for waiver becomes the arbiter instead of the Commission.

Accordingly, it is ordered that proceedings in this matter are remanded to the Administrative Law Judge for the purpose of allowing the parties an additional opportunity to furnish evidence of the nature described herein, and for issuance of a supplemental initial decision within 45 days of the date of this order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

* We are aware that the application is submitted under the sworn statement of applicant's Director of Seabee Marketing. Nonetheless, we think that under the circumstances of this case independent evidence should be required and if it is necessary to resort to sworn statements, it is appropriate that such statements indicate they are from persons who were involved in forming the alleged agreement which is sought to be proven.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–79

HOUSEHOLD GOODS FORWARDERS ASSOCIATION OF AMERICA, INC., ET AL.

v.

AMERICAN EXPORT LINES, INC.
SEA-LAND SERVICE, INC.,
UNITED STATES LINES, INC.

ORDER DENYING RECONSIDERATION

March 14, 1978

The Commission has before it for decision a petition filed by the Household Goods Forwarders Association of America, Inc. (HGFA), seeking reconsideration of our May 18, 1977 decision (Report) in the above-captioned proceeding. Therein we held that certain United States flag carriers (Respondents) had not violated Shipping Act section 17 by charging different rates for household goods shipped by the Military Sealift Command (MSC) as "Military Cargo, N.O.S." than for household goods shipped by nonvessel operating common carriers (NVO's) and by civilian shippers under specific "Household Goods" tariff items.[1] HGFA now argues that this conclusion is erroneous because: (1) the Report does not contain adequate findings of fact; (2) the absence of injury in fact is irrelevant in a section 17 proceeding; (3) the record nonetheless shows injury in fact to be present; and (4) the stipulated facts establish a section 17 violation as a matter of law—*i.e.*, that cargo distinguishable only by the identity of the shipper is moving at different rates.

A section 17 violation does not necessarily require a finding that a shipper has been commercially injured and, to the extent our use of the phrase "—to the detriment of one of them—" (Report, at 6, line 15) implies such a finding is mandatory, we retract it. It does not follow, however, that HGFA's present arguments warrant reconsideration of our decision. The burden of proof in this proceeding is squarely on HGFA,

[1] Respondents each maintain two specific tariff items for household goods—a "U.S. Government" item and a "commercial" (or "civilian") item—and charge different rates for each. HGFA members may, and presumably do, ship under both rates upon occasion, but complain only of the "U.S. Government" rate as being violative of section 17.

and, like the complainant in *Port of New York Authority v. A. B. Svenska,* 4 F.M.B. 202 (1953), HGFA has failed to establish that Respondents's practice of transporting household goods for MSC and HGFA under different rate items constitutes *unjust* discrimination.[2]

HGFA's argument that a *per se* Shipping Act violation has occurred relies primarily upon the summary exposition of section 17's potential breadth contained in *North Atlantic Mediterranean Freight Conference,* 11 F.M.C. 202 (1967), the Commission decision reversed by the Court of Appeals in *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 409 F.2d 1258 (2nd Cir. 1969). Even without the *American Export* precedent, however, it is clear that section 17 is not as simplistic and dogmatic as HGFA contends. Congress did not intend to adopt a rule of absolute uniformity. The existence of unjust discrimination is a factual question which depends upon more than a bare difference in rates on similar commodities. *Nashville Ry. v. Tennessee,* 262 U.S. 318, 322 (1923); *National Gypsum Co. v. United States,* 353 F. Supp. 941, 947–948 (W.D.N.Y. 1973). An examination of all attendant transportation circumstances is permitted. See *L. T. Barringer Co. v. United States,* 319 U.S. 1, 8–9 (1943); *Koppers Co., Inc. v. United States,* 166 F. Supp. 96, 102–103 (W.D. Pa. 1958); *Coal to New York Harbor Area,* 311 I.C.C. 355, 365–368 (1960). The decided cases reveal that a variety of rate discriminations are permissible in the presence of justifying transportation conditions. *E.g., L. T. Barringer Co. v. United States, supra,* different loading charges on cotton shipments bound for different destinations; *Texas & Pacific Ry. Co. v. Interstate Commerce Commission,* 162 U.S. 197 (1896), different rates for import and export cargos; *Interstate Commerce Commission v. Baltimore & Ohio Ry. Co.,* 145 U.S. 263, 271-273 (1892), different passenger rates for parties of 10 or more persons; *Investigation of Overland/OCP Rates,* 12 F.M.C. 184, 219–222 (1969), *aff'd sub nom, Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971); different rates for overland/OCP and local cargos; *Port of Houston Authority v. Lykes Bros. Steamship Co.,* 16 S.R.R. 1069 (1976); different charges for handling baled cotton at different loading ports; *Coal From Kentucky,* 308 I.C.C. 99 (1959) and *Coal to New York Harbor Area, supra,* different rates for shippers of a minimum volume within one year; *Eastern Coal to Chicago,* 306 I.C.C. 195 (1959) and *Molasses from New*

[2] The Commission's reference to MSC's increased reliance on direct procurement since 1971 (Report, at 4) was not a finding of fact, but a recapitulation of MSC's arguments. HGFA's alternative assertion that it has suffered actual injury is based solely upon its own March 19, 1974 submission to the Department of Defense (DOD), stating that DOD's direct procurement of household goods transportation increased from an average of 8–10 percent of DOD's total shipments during 1962–1966 to a 35–38 percent average during an unspecified period subsequent to 1966. This statement deserves little weight. It not only omits total tonnage and revenue data, but the Affidavit of Frank G. Lazzari (Appendix B to MSC's "Memorandum of Law", at 4–5) indicates that rates for through NVO shipments also tended to be *higher* than those for direct procurement shipments during the 1962–1966 period, and that it was the introduction of new technology (intermodal shipping containers) rather than the existence of a rate differential which has altered household goods transportation patterns since the early 1960's.

Orleans, 235 I.C.C. 485 (1935), different rates for multiple rail car shipments.

Legally, the instant dispute arises because Respondents' "Military Cargo, N.O.S." rate permits, but does not require, a mixture of freight items to be loaded in a single shipping container.[3] MSC May ship full containers of household goods, or beer, or paper towels at the same "N.O.S." rate. It may also ship containers mixed with several different commodities in the nature of a "Freight, All Kinds" (F.A.K.) tariff item. Whether the commercial rate used as a basis for comparison is an "N.O.S.", "F.A.K.", or specific commodity item, MSC's use of competitive bidding techniques to obtain rates for its cargo offerings generally assures that "military cargo" is assessed at a different (usually lower) rate than comparable civilian commodity items.[4]

Practically, the instant dispute involves an effort by HGFA to obtain a larger share of the Department of Defense's (DOD) household goods business, and by Respondents to achieve higher freight rates for MSC shipments. Toward this end, a brief, conclusory Stipulation of Facts was prepared which states, *inter alia,* that: (1) both MSC and HGFA "tender household goods for shipment in steamship-furnished containers"; (2) the ocean transportation performed for HGFA and MSC is "substantially similar"; (3) transportation circumstances and conditions do not warrant a "substantial differential" in MSC and HGFA rates for household goods; (4) Respondents' rates for U.S. Government Household Goods are discriminatory, but not "unreasonably high" or otherwise unreasonable; and (5) the determination of whether a shipment is to move via MSC or via an NVO is made by DOD.[5]

These facts do not establish that MSC invariably tenders "full container loads" of household goods, or that it ever tenders containers packed exclusively with household goods—although the Commission does not doubt such shipments occasionally occur. In any event, MSC retains the option to submit containers of mixed freight. Absent proof to the contrary, this option alone defeats the contention that MSC and HGFA are shipping "identical commodities". The record is also noticeably silent concerning the exact carrier costs and other transportation conditions prevailing for any of Respondents' three types of household goods shipments. Evidence that there are no special economies associated with the handling of MSC cargo would be particularly relevant.

[3] "N.O.S" is an abbreviation for "Not Otherwise Specified". MSC accepts bids for (and Respondents publish) only two other military commodity rates—"Military Cargo, Refrigerated," and "Military Cargo, Vehicles."

[4] Since 1967, MSC shipments have been rated on the premise that "military cargo" comprises a distinct commodity for rate making and other Shipping Act purposes. The repeal of former section 6 of the Intercoastal Shipping Act in 1974 (P.L. 93–487) now precludes discounts for government cargos which are not based upon accepted transportation factors and has generated considerable controversy concerning the continued validity of several MSC procurement practices. The Commission's staff has been directed to prepare a study of present military cargo operations in light of P.L. 93–478's requirements.

[5] DOD's present policy is to ship via both MSC and HGFA with a preference for the method which is "most practical" in a particular situation. That is, cost effectiveness is not the sole determinant. Affidavit of Lt. Col. Coleman, at 2. HGFA has apparently opposed recent DOD proposals to ship household goods on a cost effectiveness basis. *Id.*

The present tripartite rating system for household goods is unusual, but does contain checks and balances of its own which reasonably protect the interests of the instant parties. Unless the household belongings of DOD employees have transportation characteristics distinguishing them from those of civilians, Respondents could refuse to establish a special "U.S. Government" rate for household goods. They should, however, have little incentive to take such action. Generally speaking, the more DOD business HGFA members attract at a rate *greater than* the "Military Cargo, N.O.S." rate, the larger the total revenues received by Respondents. If there were no "U.S. Government" rate, DOD would either have to pay NVO's to handle its household goods at Respondents' higher "commercial" rate[6] or, more realistically, rely exclusively upon direct MSC shipments. We consider it likely that Respondents will strive to set their "U. S. Government" rates at levels which will make NVO utilization "cost effective" for MSC. Should they do otherwise, the net result might well be a lessening of gross revenues realized by HGFA members and Respondents alike.

Unless and until it is clearly demonstrated that the ocean rates available to MSC do not reflect *bona fide* differences in carrier costs, value of service, competition or other recognized transportation factors, we believe the most appropriate course is to permit the RFP system employed over the past decade to continue. Whatever adjustment P.L. 93–487 may eventually require in MSC's current procurement methods can probably be best accomplished by amending the Commission's General Order 29 regulations (46 C.F.R. Part 549) and not by *ad hoc* rulings on an incomplete record designed to benefit a special interest group.[7] At this time, we are without sufficient information available to permit the sound formulation of guidelines which will accommodate the several competing interests involved—including those of the Armed Services Procurement Act. 10 U.S.C. 2301, *et seq.*[8], and the nongovernment shippers now paying the "commercial" rate for the transportation of their household goods—and are unwilling to prescribe a piece-meal remedy which could entirely eliminate MSC's present procurement system.

MSC once negotiated the "U.S. Government" rates paid by NVO's directly with the Respondent carriers (Affidavit of Frank G. Lazzari, *supra*), and could presumably do so again. If DOD's voluntary failure to include NVO rates in its present RFP program results in higher costs to DOD in those instances when it chooses to employ NVO's, the Commission is not prepared to proclaim that this conscious government

[6] As indicated at page 2, note 1, of the Report, exact comparison of the "commercial" and "U.S. Government" rates is not possible on the present record. The "commercial" rate is presumed to be higher because otherwise the NVO's would be employing it or complaining of its unavailability.

[7] General Order 29 assures that MSC's competitive procurement methods will not drive Respondents' rates below fully distributed costs.

[8] We do not imply that the Procurement Act takes precedence over the Shipping Act. The former statute does express a national policy favoring competition to the "maximum practicable" extent in the procurement of military supplies and services, however, and is entitled to consideration in the development of Shipping Act policy. See *Southern Steamship Co. v. Labor Board*, 316 U.S. 31, 47 (1942).

procurement policy represents unjust discrimination within the meaning of Shipping Act section 17.[9] The complained of "U.S. Government Rates" exist only as an integral part of DOD's transportation system and appear, on the present record, as likely to benefit HGFA's members as to injure them. Under these circumstances, we cannot find that different amounts have been charged to contemporaneous shippers of the *same commodities* over the same line between the same points under the *same transportation circumstances and conditions*.

THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration" of the Household Goods Forwarders Association of America, Inc., is denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[9] The Report did not find, and is not dependent upon a finding, that HGFA members are "agents" of the Defense Department. HGFA's attempt to distinguish the holding in *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission, supra*, where two government agencies were the shippers, from the present dispute was rejected because the differences between HGFA members and MSC as shippers are insufficient to result in unjust discrimination. It could alternatively be stated, that insofar as the equalitarian purposes of section 17 are concerned, MSC and HGFA must be considered as though they were a single shipper. The *American Export* decision supports our conclusion that the existing discrimination between the rates assessed for the MSC and NVO methods of transporting DOD household goods is not "unjust".

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 523

MITSUI AND CO. U. S. A. INC.,

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

March 9, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 9, 1978.

IT IS ORDERED, That applicant is authorized to refund $882.80 of the charges previously assessed Mitsui and Co. U. S. A. Inc.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

> "Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 523 that effective January 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped from January 1, 1977 through February 16, 1977, the local rate on 'Helium, Gas or Liquid, Not Including Mixtures' is $109.00 to Japan base ports, subject to all applicable rules, regulations and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 523

MITSUI AND CO. U.S.A. INC.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted March 9, 1978

Application for permission to refund $882.80 of freight charges granted.

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

By application timely filed on July 8, 1977, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916 (the Act), the Pacific Westbound Conference seeks authority to refund a portion of the freight charges collected for to shipments of liquid helium, bills of lading dated January 11, 1977, from Los Angeles, California, one shipment to Tokyo, Japan, and the other to Kobe, Japan. The application is concurred in by the complainant Mitsui And Co. U.S.A., and by the participating ocean carrier, Mistui O.S.K. Lines, Ltd.

The two shipments each had gross weights of 4,990 pounds and measurements of 542 cubic feet. The Conference's tariff, PWC No. 5, FMC-13 with rates on the metric system (1,000 kilograms or 2,204.62 pounds (W), or one cubic meter or 35.314 cubic feet (M) equals one ton) took effect on January 1, 1977. The Conference's prior tariff, PWC No. 4, FMC-12 provided rates on the imperial system (2,000 pounds (W) or 40 cubic feet (M) equals a ton).

The old rate on liquid helium in tariff No. 4 was $123 W/M imperial system. In converting this imperial rate to the metric rate, the Pacific Westbound Conference applied a stowage factor based on the weight of this cargo. The old $123 imperial rate times the stowage factor of 1.10230 resulted in a new metric rate of $135.58 rounded to $136 W/M, which was the rate charged on the two shipments herein.

However, the measure of this cargo exceeds its weight, and the

[1] This decision became the decision of the Commission March 9, 1978.

conversion from the imperial rate to the metric rate should have been made with a lower stowage factor. The correct new rate results from the old rate of $123 times the stowage factor of .88285, which gives a new metric rate of $108.59 rounded to $109 W/M.

It was not until February 17, 1977, (which was after the two shipments herein moved) that the Pacific Westbound Tariff Circular 12–77 announced a correction of the rate in issue to $109 W/M. There are no known similar shipments, other than these two, of liquid helium which moved during the same period of time.

Aggregate charges were collected totalling $4,343.48 on these two shipments, based on the rate of $136 per metric ton and 15.348 metric tons per shipment, or $2,087.33 per shipment, plus a terminal receiving charge of $84.41 per shipment.

The sought basis of charges is $109 per metric ton times 15.348 metric tons per shipment or $1,672.93 per shipment, or aggregate sought charges for both shipments of $3,345.86. The sought basis of charges does not factor in the terminal receiving charges of $84.41 per shipment, or $168.82 for the two shipments.

Recomputing the sought basis of charges so as to include the terminal receiving charges results in an aggregate sought basis of $3,345.86 plus $168.82 or $3,514.68.

The aggregate charges collected of $4,343.48 exceed the recomputed sought charges above of $3,514.68 by $828.80.

It is concluded that respondent, acting for its participating ocean carrier or said ocean carrier (Mitsui O.S.K. Lines, Ltd.) should be authorized to refund $828.80 to the complainant Mitsui And Co. U.S.A. Inc.

It is concluded and found that there was an error of an administrative or clerical nature in the conversion of the tariff item in issue from the imperial to the metric system; that the authorization of a refund of a portion of the freight charges collected will not result in discrimination among shippers; that prior to applying for authority to refund a portion of the charges collected, the Pacific Westbound Conference filed a new tariff which sets forth the correct metric rate basis, on which the refund of a portion of the charges collected would be computed; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to refund a portion of the charges collected. The refund authorized is $882.80.

(S) Charles E. Morgan,
Administrative Law Judge.

WASHINGTON, D.C.,
February 8, 1978.

FEDERAL MARITIME COMMISSION

DOCKET No. 77-48

SEA-LAND SERVICE, INC.
GENERAL INCREASE IN RATES IN THE U. S. WEST COAST/PUERTO RICO TRADE

DISCONTINUANCE OF PROCEEDING

March 15, 1978

This proceeding was instituted by order of the Commission served September 28, 1977, to determine the lawfulness of a rate increase by Sea-Land Service, Inc. applicable to the U. S. West Coast/Puerto Rico trade.

Sea-Land has since terminated its all water service in this trade and has cancelled its tariff which is the subject of the proceeding. Based on the cancellation Sea-Land has moved for discontinuance of this proceeding. Hearing Counsel replied in support of the motion to discontinue. The subject matter of this proceeding having been withdrawn no purpose would be served by continuing the proceeding.

IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–15

MATSON NAVIGATION COMPANY

v.

PORT AUTHORITY OF GUAM

DOCKET NO. 77–16

UNITED STATES LINES, INC.

v.

PORT AUTHORITY OF GUAM

NOTICE OF ADOPTION OF INITIAL DECISION

March 10, 1978

No exceptions having been filed to the initial decision in these proceedings and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 10, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 77–15

MATSON NAVIGATION COMPANY

v.

PORT AUTHORITY OF GUAM

No. 77–16

UNITED STATES LINES, INC.

v.

PORT AUTHORITY OF GUAM

Adopted March 10, 1978

Respondent found to have established, assessed, and collected a terminal service charge not provided for in tariff in violation of section 17 of the Shipping Act, 1916.
Reparation awarded.

Edward D. Ransom for complainants Matson Navigation Company and United States Lines, Inc.

Edward S. Terlaje for respondent Port Authority of Guam.

Aaron W. Reese as Hearing Counsel, intervenor.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

These proceedings began with the filing of "Complaints and Petitions for Declaratory Orders" by Matson Navigation Company in No. 77–15 and United States Lines, Inc., in No. 77–16. Since both cases were virtually identical, they were consolidated for hearing and decision pursuant to Rule 148 of the Commission's Rules of Practice and Procedure (46 CFR 502.148). Hearing Counsel was granted leave to intervene under Rule 72 (46 CFR 502.72). After the scheduling of a prehearing conference the parties presented a stipulation which would eliminate the need for a prehearing and hearing. I approved the stipulation, cancelled the prehear-

[1] This decision became the decision of the Commission March 10, 1978.

ing, and set up a procedural schedule. Basically the stipulation provided that the cases were to be submitted for decision on the basis of the pleadings and briefs.[2]

The gravamen of the complaints[3] is that the Port Authority of Guam has established a charge for electric power furnished to refrigerated containers when plugged into "reefer slots" which is in violation of section 17 of the Shipping Act, 1916, (46 U.S.C. 816(b)) because the Port's tariff failed to provide for the charge.[4]

The findings of fact which are set forth below are not contested by the respondent. They are taken from the complaints and the respondent's answers to the interrogatories of Hearing Counsel.[5]

Findings of Fact

Matson and U. S. Lines are common carriers by water serving the Territory of Guam and use the Port Authority of Guam's terminal facilities at Apra Harbor (the Port). The Port Authority was established under Title XV, Government Code of Guam.

The Port Authority is engaged in carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in operating the Port in connection with common carriers by water. The Port is, therefore, "an other person" subject to the Shipping Act, 1916 (46 U.S.C. 801).

The Port has on file with the Commission a terminal tariff entitled "Commercial Port of Guam Terminal Tariff" which became effective on September 1, 1973. This tariff names "Rates, Charges, Rules and Regulations Applying at Apra Harbor."[6] The Port's tariff has from its effective date applied to refrigerated cargo in containers.

From the inception of Matson's and U. S. Lines' services to Guam, the Port has received, delivered, and stored their refrigerated containers, and has furnished electric power to all those containers while in storage in the Port's reefer slots.

The complaints specifically allege that:

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[2] "Pleadings" as used in the stipulation, include the complaint and petition filed in each docket together with their attachments, the answer filed in each docket with attachments, Hearing Counsel's petition to intervene, the interrogatories propounded by Hearing Counsel and Guam's answers to those interrogatories, and the various orders issued by the Acting Secretary and myself. The stipulation also provided for official notice of the Guam tariff on file with the Commission.

[3] "Complaints" as used in this decision include the petitions for declaratory order.

[4] Other violations are alleged which would result from projected actions of either complainants or respondent, i.e., should respondent make good its threat to cut off electric power to Matson's and U. S. Lines' refrigerated containers, they assert that respondent would be guilty of an unjust and unreasonable practice under section 17. Complainants go so far as to allege that even the threat to cut off the power is a violation of section 17. Additionally complainants assert that should they enter into an agreement to pay the charges assessed by the Port for electric power they would be in violation of section 15 of the Shipping Act (46 U.S.C. 816).

[5] The complaints of Matson and U. S. Lines are in all material respects identical.

[6] The tariff provides, "The rates, charges, rules, regulations, revisions or supplements named in this tariff apply on all freight received at the terminal or wharves at port."

The wharfage charge in the Port's filed tariff covers the use of its terminal facilities by containers and includes the furnishing of electric power to refrigerated containers located on the Port's facilities, prior to loading or subsequent to unloading from the vessel during free time. At the expiration of free time the demurrage charge covers and includes the furnishing of electric power to refrigerated cargo. When a container remained at the port for a substantial period of time arrangements were made for those containers at a charge provided in the tariff for "open storage on paved area per square foot per month."[7]

The Port's tariff consistently states with specificity any special rates or charges which are to be assessed in addition to the basic charges for general services such as wharfage, e.g., the tariff has long specifically stated charges for electric, telephone, water and heavy lift services when provided to vessels during stevedoring.

On May 4, 1976, the Port sent to "All Agents" a memorandum the subject of which was "Reefer Slots." It said:

Effective May 5, 1976,[8] all refrigerated containers plugged in the Port's Reefer Slots will be charged Ten Dollars ($10.00) per container per day. When computing the aforementioned charges, halves of plugged in periods shall be considered and assessed in the following manner:

(1) Twelve (12) hours or less shall be charged at one-half the rate per 24 hour period.

(2) Over twelve (12) hours and not more than 24 hours shall be charged at the full rate per 24 hour period.

Your cooperation in this regard is appreciated.

Prior to May 5, 1976, the Port furnished electric power to refrigerated containers of complainants when they were plugged into the reefer slots, but no charge over and above the rates and charges stated in the Port's tariff for wharfage, demurrage or storage, was assessed for electric power furnished these containers.

The charge of $10.00 a day for power to reefer slots was instituted as a result of public meetings of the Board of Director's of the Port,[9] at which the Board adopted a resolution by majority vote to assess the charge.

After the May 4th memo the Port began assessing the $10.00 charge for power furnished complainants when their containers were in reefer slots. The assessment against Matson for the period to and including May 1, 1977, amounts to some $66,000. The assessment against U. S. Lines for the same period amounts to approximately $12,000. Except for $75.00 paid by Matson for the period June 1–8, 1976, and $540.00 paid by U. S. Lines for the period June 20-July 7, 1976, complainants have refused to pay the charges for power supplied to the reefer slots.[10] The Port has

[7] Rule 64 of the Rules of Practice provides that "recitals of material and relevant facts in a complaint . . . unless specifically denied in the answer thereto shall be deemed admitted as true. . . ." (46 CFR 502.64). Complainants insist that the proposed findings in this paragraph are of fact and should be accepted as true. There is a question, however, as to whether the proposals are indeed findings of fact or questions of proper tariff interpretation, which latter would present issues of law. However, in view of an argument made on brief and its disposition later in this decision, it is unnecessary to resolve this question.

[8] The Port's answer would set the effective date at June 1, 1976. However this discrepancy is not material to the disposition of these cases.

[9] Pursuant to the Government Code of Guam, the Board has the power to fix all rates, dockage, rentals, tolls, pilotage, wharfage and charges applicable to Apra Harbor.

[10] Both Matson and U. S. Lines have been and are continuing to escrow funds sufficient to meet the assessments of the Port.

threatened to withhold electric power from Matson and U. S. Lines but *has not as yet done so.*

On August 10, 1977, the Port filed with the Commission an amendment to its tariff which became effective September 10, 1977. Original Page 15 of the tariff was amended to provide for a charge for furnishing electric power to containers plugged into reefer slots. Item No. 6 of the amended page 15 reads:

6. The daily charge for plugged in refrigerated containers will be at cost as determined by the Guam Power Authority. As of November 1974 the cost was $9.00 per container per day.

Discussion and Conclusions

As cast by the complainants the sole issue presented in these cases is:

Since the Port failed to file a tariff amendment with the Commission or to amend its tariff, can it enforce and collect an additional charge for furnishing electric power to refrigerated containers previously furnished and covered under general charges in its tariff.[11]

In resolving this issue [in favor of complainants, of course], the following relief is requested:

1. That the Commission hear and resolve the controversy between complainants and the Port with respect to such special extra charges for furnishing electric power to refrigerated containers and determine the lawfulness of the Port collecting such charges from complainants, in excess of the rates and charges for the terminal services stated in the Port's tariff.

2. That the Commission by its order determine:

(a) that the only charges which complainants are obliged to pay to the port are those set forth in the Port's tariffs;

(b) that the furnishing of electric power to refrigerated containers is included in wharfage, demurrage, storage or other basic charges in such tariffs and;

(c) that the special extra charges for such electric power, over and above such tariff, are unlawful charges which complainants are not obligated to pay.

3. That the Commission determine whether complainants and the Port can, in the absence of a section 15 agreement, lawfully agree upon payment of, or otherwise pay, the special extra electric service charges assessed by the Port but not set forth in its tariff.

4. That the Commission issue a cease and desist order to the Port ordering the Port not to carry out its threat to withhold terminal facilities from complainants and in particular, not to withhold the furnishing of electric power to complainants' refrigerated containers at the Port's facilities, and not to refuse to accept their refrigerated cargo or not to penalize or otherwise retaliate against them.

5. That the Commission determine that the threat to withhold terminal services from complainants is in itself a practice which is unlawful under section 17 of the Shipping Act.

6. That in the event complainants should be compelled by the Port to pay special extra charges for electric power, as alleged, the Commission order reparations to complainants by the Port in the amount of such excess charges imposed and paid, plus costs, interest and attorney's fees.

[11] Complainants would, perhaps from a desire for symmetry, state the converse: ". . . can Matson and U. S. Lines refuse to pay on the grounds that it is an unlawful and invalid charge."

As an other person subject to the Act, respondent must adhere to the requirements of the Commission's General Order 15 (46 CFR 533.1 et seq.) which establishes the rules and regulations governing the filing and content of tariffs by persons engaged in furnishing wharfage, dock or other terminal facilities to common carriers by water. The relevant provisions of General Order 15 are:

Section 533.2—Purpose. The purpose of this part is to enable the Commission to discharge its responsibilities under section 17 of the Shipping Act, 1916, by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

Section 533.3—Persons Who Must File. Every person . . . carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities as described in section 533.1, including, but not limited to terminals owned or operated by states and their political subdivisions; . . . shall file in duplicate . . . a schedule or tariff showing *all* its rates, charges, rules, and regulations related to or connected with the receiving, handling, storing and/or delivering of property at its terminal facilities. (Emphasis mine.)

Since the inception of complainants' service to Guam respondent has furnished electric power to containers which were received by respondent and placed in "reefer slots" to await delivery to consignees or transshipment. Prior to May 5, 1976, respondent made no attempt nor did 1t claim any right to assess or collect special charges for electric power furnished to refrigerated containers while they were in the "reefer slots." Nor did respondent's tariff contain any specific provision for a change for power furnished to containers while in those slots. However, respondent now claims that there is a provision which has all along authorized the assessment and collection of that charge. That provision is said to be Rule P of the tariff which is a part of a section entitled "Stevedoring Services" and which reads in part [the part selected by respondent]:

At the request of the Shipping Line, or their agent, electric power may be supplied for at the same rates that the Guam Power Authority would charge for the service if supplied directly. . . .

(a). . . .
(b). . . .
(c). . . .
(d). . . .[12]

According to respondent this "section expressly and explicitly authorized the Port to assess charges for electric power supplied, although such rate must be at the same rate that the Guam Power Authority would charge." Respondent continues:

It is manifest from a reading of these provisions that the Commercial Port of Guam clearly intended the 1973 terminal tariff to include specific rates for electric power supplied to shipping lines over and above rates and charges.

While respondent admits that subparagraphs (a) through (d) of the rule govern the rate for electric power provided to vessels, but nevertheless

[12] This is how respondents reproduced Rule P in its Opening Brief. The subparagraphs (a)-(d) speak exclusively of electric power supplied to the vessel. No mention whatever is made of power to be supplied to *containers* whether or not in reefer slots.

continues to say that ". . . the language contained in the first paragraph of said rule indicates that the electric power rate stated therein may be assessed separately and in addition to those outlined in section (a) through (d) [and that] . . . the electric power rate described in the first paragraph of Rule P is applicable to refrigerated cargo in containers when said containers are placed at rest in the port's container yard."[13]

Even the most cursory examination of Guam's tariff belies such a construction. Indeed in some respects the tariff is a model of organization. It begins with a section devoted to the general rules and regulations applicable to the whole tariff and then proceeds through those rules and regulations and charges governing the specific services offered by the Port. In the "General Rules and Regulations" section such disparate matters as "notices to the public," Right to Withhold Delivery of Freight, loss and damage claims and Whalebacks are dealt with.[14] The "General Rule" section is followed by other sections which deal specifically with "Wharfage," "Docket and Dockage," "Stevedoring Service," "Cargo Handling Services," "Container Stevedore and Handling Services," "Equipment Rental," "Free Time and Demurrage," and "Rentals." Thus, the tariff has a specific section which contains the particular rules, regulations, rates and charges governing each service offered by the Port. Each section begins with a definition of the particular service covered by it and each section includes the rates or charges for that service.

Rule P itself is in the section of the tariff entitled "Stevedoring Services" and the section is devoted exclusively to those services. Stevedoring is defined in that section as:

> Services rendered by the Port in removing or handling cargo from the end of the vessel's tackle or place of rest on pier to the vessel's hold, dock, 'tween decks and deep tanks or to any spaces in the vessel, and from any space in the vessel, remove and handle cargo, including on deck, 'tween decks, holds, and deep tanks, and land said cargo at place of rest on pier.

When dealing with the proper application of the definition of wharfage in a terminal tariff, the Commission in *Sacramento-Yolo Port Dist. v. Fred V. Noonan Co. Inc.*, 9 F.M.C. 551 (1966), laid down the following general principles:

> . . . It is a basic principle in the law of tariff construction that tariffs must be clear and unambiguous to avoid possible discrimination among users of tariff services. When a tariff is clear on its face, no extrinsic evidence may be used to vary its "plain meaning." Tariffs are, moreover, drawn unilaterally and must therefore be construed in the case of ambiguity against the one making and issuing the tariff, and "it is the meaning of express

[13] Complainants argue that the Port's contentions on Rule P are directly contrary to the stipulated record and the Port is precluded from making any argument about the meaning of Rule P citing Rule 64 again. While 64 is quite explicit and provides clear ground for rejecting any argument about Rule P it is unnecessary to base rejection of the Port's contentions exclusively on Rule 64.

[14] For those of more than idle curiosity a "whaleback" is "a steel pallet specifically constructed by ocean carriers, which is not larger than eight (8) feet by twelve (12) feet and is suitable for forklift handling." Presumably the pallet's shape resembles the back of a whale, although information of record does not confirm this.

language employed in the tariff and not the unexpressed intention . . . which controls.. . . " *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 608. . . . (9 F.M.C. at 558)[15]

Of course, a tariff must be read as a whole and not in part and neither side (here the carrier or the terminal) may resort to a strained or unnatural construction. *Storage Practices at Longview, Wash.*, 6 F.M.B. 178, 182 (1960); *U. S. v. Farrell Lines, Inc.*, 16 F.M.C. 42 (1912).

The Port's tariff is admirably clear in its overall organization. It is divided into sections—one for each service offered by the Port. Each section is self-contained. For example, the section (Original page 5–13) begins with a definition of wharfage, deals with limitations and exemptions, explains when wharfage will not be charged and concludes with the rates for the service. In other words all a potential user of the service needs to know about wharfage can be found, not so suprisingly, in the section of the tariff entitled "Wharfage." The section on "Dock and Dockage" is structured similarly. The same can be said for "Stevedoring" and the other sections dealing with specific services. The most significant feature of the format of the Port's tariff is that in none of the sections could I find any cross-referencing to other sections.[16] The charges contained in the "Wharfage" section are for wharfage, just as the rates in the "Dock and Dockage" section are for dockage. The question, of course, now becomes, how can a provision for an electric power charge appearing in the "Stevedoring Services" section be made to apply to a service which is rendered after stevedoring either ends or begins? The simple answer is that it cannot. The power charge contained in Rule P is for the furnishing of power to the vessel during stevedoring operations only—no other interpretation is reasonable. To adopt the Port's interpretation would be to create an ambiguity where none now exists.

Respondent, however, argues that, "It is manifest from a reading of these provisions that the Commercial Port of Guam clearly intended the 1973 terminal tariff to include specific rates for electric power supplied to shipping lines over and above rates and charges in the Port's tariff for wharfage, demurrage, storage, and stevedoring services."[17] There are naturally several things wrong with this statement. In the first place the intentions of the Commercial Port of Guam, whatever in fact they may have been, cannot work to change the clear meaning of a tariff provision. Secondly, if it indeed was the intention in 1973 to impose a charge for power in addition to the rates or charges for wharfage, demurrage,

[15] Although I have not found a case which specifically states that the same principles of construction apply to terminal tariffs as well as carrier tariffs, the *Sacramento* case, *supra*, and others make it clear that they do.

[16] By this I mean cross-referencing between those tariff sections dealing with the specific services offered. There is at least one actual cross-reference to the General Rules Section from the specific services sections and it would sometimes be necessary to resort to the General section to find the definitions of terms used in the specific sections. This does not however detract from the all-inclusive nature of the sections dealing with specific services offered by the port.

[17] If the meaning of Rule P was so "manifest" why was there no mention of it in the May 4th memo? That memo creates the impression that it is dealing with a *new* charge and not with the belated imposition of an already existing and authorized charge. Quite often when an advocate uses "manifest," and its kindred terms like "it is axiomatic," I have found behind the "logic" of an argument a rather unhappy lawyer doing his best to save a bad situation for his client.

storage, or stevedoring services why did the Port wait until 1976 to do it?[18] Finally, the argument that Rule P expressly and explicitly authorized the charge is belied by the manner in which the Port amended its tariff to specifically provide for the charge. In its brief the Port says:

> Notwithstanding the clear meaning of Rule P . . . the Port's board of directors, in its desire to avoid confusion in the future relating to its intention to commence charging for electric power supplied to shipping lines, amended its tariff.[19]

Once having determined to amend the tariff the logical expectation of a user of the Port's services—in view of the Port's understanding of Rule P—would be that Rule P itself would be amended. Not so, however, Original page 14 entitled "Cargo Handling Services" was amended by, among other things, the addition of a new sentence which reads:

> 6. The daily charge for plugged in refrigerated containers will be at cost as determined by the Guam Power Authority. As of November 1974 the cost as $9.00 per container per day.

The amendment to the *Cargo Handling* section of the tariff does nothing to further the Port's cause for Rule P. In fact it can only be interpreted as an indication of the confusion which would have been created had the Port amended Rule P to provide for the power charge.

The tariff of the Commercial Port of Guam did not provide for an electric power charge to be assessed for containers plugged into reefer slots; and the complainants were not obligated to pay that charge. The attempted establishment, assessment, and collection of the charge without a proper amendment to the tariff was an unjust and unreasonable practice in violation of section 17 of the Shipping Act, 1916.

At this point a small digression seems warranted in an attempt to avoid further confusion which could lead to more litigation over the charge at issue here.

As noted the amendment which was intended to avoid just such confusion was made to the Cargo Handling section of the tariff. That section defines "Cargo handling" as:

> Services rendered for the benefit of *non-containerized cargo*, including cargo from the Container Freight Station, during the period the cargo is in the care and custody of the Port, when received at the place of rest assigned to the cargo by the Port, and from which cargo may be delivered to/from consignee/shipper trucks within the Port premises.

There just doesn't seem to be any rhyme or reason for the inclusion of a charge for a service to be rendered exclusively to containers in a section of the tariff which by its very definition excludes those services. There is even less reason for the inclusion of the charge in this section when by simply turning to the next page of the tariff (Original page 15) you find a

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[18] If this argument is accepted it could well follow that the Port had been operating illegally prior to May 5, 1976, by providing free a service for which the Port required the assessment and collection of a charge.

[19] It cannot be determined from this record whether there are any containers plugged into reefer slots that belong to shippers or consignees and not to "shipping lines," but if there are, the intention of the Port to "commence" charging shipping lines is discriminatory if there is no intent to "commence" charging shippers and consignees as ell. The amendment is, however, not so worded.

section entitled "Container Stevedoring and Handling Services." In view of the overall structure and format of the tariff it would seem that the amendment should be made here not in the "Cargo Handling" section.

The present amendment needlessly adds confusion to an otherwise well organized tariff, creates an ambiguity and could well foment further dispute as to the applicability of the charge. This seems almost inevitable since complainants have specifically reserved the right to object to the current amendment for, among other things, vagueness, although just when and to whom these objections will be made is not stated.

The present provision authorizing the electric power charge provides that the cost for power "will be as determined by the Guam Power Authority." Then it simply states that as of November 1974 the cost as \$9.00 per container per day. While the cost of power in November 1974 might well be of interest to a scholar of Guam's economic history, it does not apprise a user of the Port's reefer slots of the current charge for power—unless of course the cost has remained the same all these years.[20] In any event the amendment in question requires the user of the service to look beyond the Port's tariff to ascertain what the cost to him for electric power on any given day will be. This places upon the user an "onerous burden not imposed by law" and such a practice "cannot be too strongly condemned." *Intercoastal Investigation 1935*, 1 U.S.S.B. 400, 415–416 (1935); *Matson Nav. Co.—Container Frt. Tariffs*, 7 F.M.C. 504, 508 (1963).

In addition to requesting a determination that the Port's assessment and collection of the electric power charge is unlawful complainants have made a series of requests for further relief. These requests create somewhat of a dilemma which stems primarily from their coupling the complaints in these cases with petitions for declaratory orders. Thus, at the time the complaints and petitions were filed it would appear that the Port was actively pursuing the collection of the challenged charge and was threatening to cut off electric service if payment was not made. This gave rise to requests for such relief as a declaration by the Commission that the simple threat to cut off power was a violation of section 17 and that in the absence of an approved section 15 agreement complainants

This amendment is not of course an issue in this complaint proceeding. However, the Port in due regard to its duties and obligations under section 17, to say nothing of avoiding future controversy, should review the current rule in the light of the comments above, and, if the need should arise, consult with the Commission's staff with a view to coming up with a provision that will meet with the requirements of the law.

[20] It would not appear to have remained the same since the Port had argued throughout this case that it was always its intention to supply power at the same cost as if it were obtained from the Power Authority. If the memo of May 4, 1976, was in furtherance of this intention then the cost of power from the Power Authority as of that date was \$10.00 per day, not \$9.00.

could not "agree upon payment of, or otherwise pay, the special extra electric service charge."

In one sense these issues can be considered as moot. The power was never cut off and no agreement, section 15 or otherwise, was ever entered into. If these were simple complaint cases there would be no occasion to deal with them. Indeed, I cannot see how they could have been framed as issues in a complaint. But does the inclusion of a petition for a declaratory order make it necessary for me to resolve those issues and provide the essentially declaratory relief requested? I think not.

The fundamental purpose of a declaratory order is the resolution or removal of a controversy or uncertainty (46 CFR 502.68). Here the controversy or uncertainty do not appear to exist. Moreover, the putative controversies presented by complainants are not so refined as to be capable of any definitive resolution or even helpful prognostication absent the projection of hypothetical situations which of course may and probably won't arise. Take for instance the threat of the Port to cut off electric power to the reefer slots. If this decision had gone the other way and the validity of the charge upheld, would it not have been right of the Port as a part of its pre-complaint efforts to collect its lawful charges to announce its intention to withhold power if payment wasn't made? Does the announced intention depend upon the outcome of the case? Does it depend upon the precise terms of the threat and the conditions under which it was made? There simply isn't a sufficient record here to afford the declaratory relief requested. Needless to say the resolution of this issue is not necessary to the disposition of these cases. Consider next the requested determination under section 15. The first and most obvious question here is, What were the terms of the agreement to have been? Without the answer to that question, no determination under section 15 is possible. The Port has at no time objected to the Commission's jurisdiction over this matter, nor has it indicated that it would not abide by the Commission's decision on it. Thus there does not appear a sufficient degree of probability that a controversy will arise to warrant the exercise of the discretion to issue a declaratory order. Under these circumstances to do so would in my opinion serve no useful purpose, would unduly complicate what is essentially an uncomplicated case, and could quite possibly serve to create the very future uncertainty which declaratory orders are designed to avoid.

Respondent has violated section 17 by its establishment, assessment, attempted, and actual collection of a charge for electric power furnished to containers plugged into reefer slots which was not authorized and provided for in its tariff. Accordingly, the respondent Port Authority of Guam is hereby ordered to cease and desist from all efforts to collect that charge for power furnished to the reefer slots prior to September 10, 1977. Respondent is further ordered to pay reparation to Matson Navigation Company in the amount of $75.00 and to United States Lines in the amount of $540.00. These amounts represent the sums collected from complainants as payments of a portion of the unlawful charges.

(S) John E. Cograve,
Administrative Law Judge.

WASHINGTON, D.C.,
February 9, 1978.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 448(I)

AMERICAN IMPORT CO.

v.

JAPAN LINE (U.S.A.) LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

March 10, 1978

Notice is hereby given that the Commission on March 10, 1978, etermined not to review the Settlement Officer's decision in this roceeding served February 24, 1978.

By the Commission.

;EAL] (S) FRANCIS C. HURNEY, *Secretary.*

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 448(I)

AMERICAN IMPORT CO.

v.

JAPAN LINE (U.S.A.) LTD.

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

American Import Co., (complainant) alleges that Japan Line (U.S.A.) Ltd., (carrier) applied incorrect rates or charges on each of several (eight) individual shipments, resulting in combined overcharges of $309.17 in violation of section 18(b)(3) of the Shipping Act, 1916. This section prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier, in response to the served complaint, stated that the involved shipments were made on January 19 and April 8, 1976, but that the claims were not filed until February 11, 1977. Rule 512 of the Conference tariff[2] prohibits the payment of overcharge claims not presented to the carrier in writing before the cargo leaves the carrier's possession, in cases of alleged errors in description; and within six months after the date of the shipment for all other claims. The carrier did not dispute the claimant's contentions of rate misapplication.

Claim No. AI–20 involves five (5) separate intermodal bills of lading, each dated January 19, 1976. These documents purport to evidence the water transportation of 355 bales of "Bamboo Poles of Japanese Origin" weighing 34.954 revenue tons aboard the YAMASHIN MARU from Kobe, Japan, to Los Angeles, California. Each bill of lading was rated $72.55 per revenue ton plus a 1.5 percent currency surcharge ($2,535.91 plus $38.04 equals $2,573.95). The claimant contends that the involved cargo actually was "fishing poles," value not exceeding $1,000.00 per revenue ton and should properly have been rated as "Fishing Tackle" under Item 5840–05, 7th Revised Page 223 of the Conference tariff. (See footnote 2). The published effective date of this page is January 1, 1976;

[1] Both parties having consented to the informal procedure of 46 CFR 502.301–304 (as amended), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Transpacific Freight Conference of Japan/Korea, Eastbound Intermodal Tariff No. 1, ICC No. 1/FMC No. 4.

the published effective rate was $68.55 per revenue ton plus 1.5 percent currency surcharge ($2,396.10 plus $35.94 equals $2,432.04). The resultant combined overcharge is $141.91.

Claim No. AI–21 involves three (3) separate intermodal bills of lading, each dated April 7, 1976. These documents purport to evidence the water transportation of 507 bales of "Bamboo Poles of Japanese Origin" weighing 34.399 revenue tons aboard the JAPAN ACE from Kobe, Japan, to Los Angeles, California. Each bill of lading was rated $82.75 per revenue ton plus 1.5 percent currency surcharge ($2,812.11 plus $42.18 equals $2,854.29). The claimant contends that the involved cargo actually was "fishing poles," value not exceeding $1,000.00 per revenue ton and should properly have been rated as "Fishing Tackle" under Item 5840–05, 9th Revised Page 223 of the Conference tariff. (See footnote 2). The published effective date of this page is April 1, 1976; the published effective rate was $76.75 per revenue ton plus 1.5 percent currency surcharge. ($2,640.12 plus $39.60 equals $2,679.72). The resultant combined overcharge is $174.57.

In support of its claims, the complainant submitted the following documentation:

1. Price list for bamboo fishing poles from Jarmain, Harrisons & Crossfield Ltd.;
2. Copy of page 4 from catalog of American Import Co., showing picture of bamboo fishing poles;
3. Invoice covering shipment on the YAMASHIN MARU;
4. Custom entry for same shipment;
5. Bills of lading J060–01055, 57, 58, 59 and 60;
6. Invoice covering shipment on the JAPAN ACE;
7. Bills of lading J060–01240, 41 and 42; and
8. Custom entry for same shipment.

A review of the supporting documentation in conjunction with the corresponding effective tariff pages leaves no doubt as to the validity of the complainant's claims.

The complaint was filed with this Commission within the time limit specified by statutes[3] and it has been well-established by the Commission that a carrier's published tariff rule may not act to bar recovery of an otherwise legitimate overcharge claim in such instances.

Section 18(b) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under its effective tariff. Accordingly, the complainant hereby is awarded reparation in the amount of $141.91. for Claim No. AI–20; and $174.57 for Claim No. AI–21[4] for a total of $316.48.

(S) WALDO R. PUTNAM,
Settlement Officer.

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[3] The shipments were made in January and April 1976; the claim was filed with the Commission in October 1977.

[4] This represents an increase of $7.31 over the reparation sought by the claimant due to a mistake by the complainant in transferring certain numbers from the bills of lading to the complaint. On B/L J060–01240, the total charges are listed as $2,378.01 but appear on the complaint as $2,370.01. On B/L J060–01241, the revenue tons appear as 3.608; on the complaint as 3.600.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–54

ALLIED CHEMICAL INTERNATIONAL CORP.

v.

ATLANTIC LINES

NOTICE OF ADOPTION OF INITIAL DECISION

March 9, 1978

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 9, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 77–54

ALLIED CHEMICAL INTERNATIONAL CORP.

v.

ATLANTIC LINES

Adopted March 9, 1978

Violation of section 18(b)(3) found and reparation awarded.

William Levenstein for complainant.

Tallman Bissell for respondent.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Allied Chemical International Corp. alleges that it was overcharged by Atlantic Lines on a shipment of Toluene Diisocyanates carried by Atlantic from New York to Georgetown, Guyana. Allied requested that the case be handled under the Shortened Procedure provided for in Rules 181–187 of the Commission's Rules of Practice and Procedure (46 CFR 502.181–187). The shortened procedure is designed to do away with oral hearings, and if the respondent consents to it, the case is decided upon a record consisting of (1) the complaint and a memorandum of facts and arguments together with any supporting documents such as bills of lading, etc.; (2) the respondent's answering memorandum and supporting documents; (3) the complainant's memorandum of reply.[2] The respondent is given 25 days to file his answering memorandum.

Atlantic failed to respond to the complaint and while Rule 64 would have allowed me to decide this case on the record as presented by complainant (if found sufficient) past experience with the uncertainty of the mails led me to contact respondent. A phone call[3] to respondent's counsel elicited the fact that since the claim of Allied, when presented to the conference, was rejected solely on the basis of the so-called six-month rule, Atlantic thought it was not necessary to respond to the complaint

[1] This decision became the decision of the Commission March 9, 1978.

[2] The filing of the reply memorandum closes the record unless the Presiding Officer deems the record insufficient and requires additional evidence.

[3] Complainant did not object to the use of the telephone and was informed of the conversation.

and was merely awaiting an order from the Commission so that it could repay Allied the amount of the claimed overcharge.[4] Subsequently, Atlantic submitted a letter stating:

. . . Atlantic Lines does contest the overcharge in the amount of $2,368.08 as alleged in the complaint and upon issuance of your order providing for such reimbursement Atlantic Lines will proceed accordingly.

We enclose a copy of the applicable freight tariff and the bill of lading showing the recomputation of the freight.

The circumstances leading to the overcharge as set out in the complaint are as follows:[5]

IIIA. On October 31, 1975, respondent issued its bill of lading No. 87 to cover complainant's shipment described thereon as 120 (x–550 lb. ea.) STEEL DRUMS TOLUENE DIISOCYANATES (NACCONATE 80), weighing 71760 pounds and measuring 1272 cubic feet (10.6 x 120), for carriage from New York to Georgetown, Guyana.

B. For its service respondent billed, and complainant paid on December 4, 1975, total charges of $5361.41, based upon a rate of $138 per weight ton, plus surcharges and accessorial charges as shown on the rated bill of lading.

C. At the time of this shipment respondent's tariff, Leeward and Windward Islands & Guianas Conference Freight Tariff F.M.C. No. 1, published a class 6 rate of $72 W/M for TOLUENE DIISOCYANATE (21st Rev. Page 67 and 9th Rev. Page 38) for this same service.

D. On this basis the proper charges for this shipment should be as follows:

71,760 lbs. (35.88 tons) at $72/ton	=	$2,583.36
L.R. & S.—31.8 M/T at $10.88 (1)	=	345.03
Surcharge—35.88 W/T at $1.60 (2)	=	57.41
Tonnage Dues—35.88 W/T at .21/ton (3)	=	7.53
		$2,993.33

(1) 14th Rev. Page 14, Item 110 (3)(a)
(2) 14th Rev. Page 14, Item 110 (3)(b)
(3) 25th Rev. Page 15, Item 110 (3)(b)
Paid $5,361.41—Should be $2,993.33 Overpaid $2,368.08

Attached to the complaint are: (1) a copy of the bill of lading showing the cargo to be Toluene Diisocyanates in Steel Drums; (2) a copy of the freight invoice showing freight paid of $5,361.41; (3) a copy of 21st Rev. Page 67 of the Leeward & Windward tariff showing Toluene Diisocyanate as a Class 6 commodity; (4) a copy of 9th Rev. Page 38 showing the Class 6 rate as $72.00; (5) copies of 14th Rev. Page 14 and 25th Rev. Page 15 showing certain additional charges applicable to the shipment; and (6) a copy of a letter from the agent of Atlantic showing that the overcharge claim was rejected because it was filed too late.

The letter from counsel for Atlantic had as enclosures copies of 21st Rev. Page 6 and 9th Rev. Page 38 and a copy of the bill of lading in which the freight, recomputed on the basis of the $72.00 rate, is shown as $2993.33.

[4] More will be said about this later.
[5] Quotation marks have been omitted.

The record here clearly establishes an overcharge by Atlantic. The only thing the record does not establish is the reason for the overcharge.

The commodity was Toluene Diisocyanate. The tariff had a specific rate for Toluene Diisocyanate. That rate was not charged. Thus, respondent violated the express provisions of section 18(b)(3) of the Shipping Act, 1916,[6] by not applying the proper rate to the shipment.

As already mentioned, Atlantic's failure to respond in any way to Allied's complaint was due to the misplaced notion that response was unnecessary. This notion was the product of a misreading of *Kraft Foods v. FMC*, 538 F. 2d 445 (D.C. Cir. 1976). Atlantic apparently read *Kraft* as outlawing the six-month rule; thus, Atlantic appears to have felt that even if it answered the complaint the decision was a foregone conclusion. So Atlantic did nothing in the expectation of an order directing the refund of the overcharge.

Kraft did not deal with the six-month rule and of course did not outlaw it.[7] Moreover, even if the court in *Kraft* had done as Atlantic thought that was no reason or excuse for failing to respond to the formal process of the Commission.

In an earlier decision (*Ocean Drilling & Exploration Co. v. Kawasaki Kisen Kaisha, Ltd.*, Docket No. 77-36, served December 20, 1977; Notice of Adoption served January 16, 1978), I had occasion to comment on the confusion apparently attendant to the six-month rule in its invocation in overcharge claims.[8] There, I suggested that the Commission institute a rulemaking proceeding leading to a rule which would require that every tariff containing the six-month rule must also contain a statement that the rule does bar a shipper from seeking redress from the Commission. The situation here leads me to suggest also that when the six month rule is invoked every notice to the shipper that his claim has been denied should also contain the statement of his rights before the Commission. Had this been done here perhaps Atlantic would have answered the complaint.[9]

Accordingly, respondent Atlantic lines shall pay as reparation to Allied Chemical International Corp. $2998.33 within 30 days from the date of the Commission's final order in this case.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 9, 1978.

[6] That section provides that a carrier may only charge the rates and charges which are specified in its tariff on file with the Commission at the time of the shipment.

[7] For the status of the six-month rule under the Shipping Act, 1916, see *Proposed Rule Covering Time Limit on Filing Overcharge Claims*, 12 F.M.C. 298 (1969); *Polychrome Corp. v. Hamburg-America Line*, 15 F.M.C. 221 (1972).

[8] Docket No. 77-36, page 5, footnote 8.

[9] I realize that there would appear to be some inconsistency between the belief that the rule was outlawed and its retention in the tariff, but this might be due to the inability of Atlantic to sell its view to the Conference.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–55

IN RE: TRAILER MARINE TRANSPORT CORPORATION—JOINT SINGLE FACTOR RATES, PUERTO RICAN TRADE

Common Carriers by water engaged in joint through transportation in conjunction with ICC regulated rail carriers, between points in the mainland United States and the Commonwealth of Puerto Rico, are subject to the Shipping Act, 1916 and Part 531 of the Commission's Rules.

Joint rail/water carriers in the Puerto Ricam trade must file tariffs in conformity with section 531.8 of the Commission's Rules, identifying both the through rates charged to shippers and the exact rate division received by the water carriers.

Part I of the Interstate Commerce Act (ICA) was modified by the Transportation Act of 1940 which enacted ICA Part III. Part III precludes exclusive Interstate Commerce Commission jurisdiction over joint rail/water transportation in domestic offshore commerce.

In domestic offshore commerce, as in foreign commerce, once export cargo is "transshipped" to an ocean-going vessel, the transportation is subject to full FMC regulation.

Respondent has violated section 2 of the Intercoastal Shipping Act by not filing a tariff with the Commission which properly describes its joint rail/water service to Puerto Rico.

Respondent has violated section 21 by failing to produce information duly requested by the Commission.

John Cunningham for Respondent Trailer Marine Transport Corporation.

John Robert Ewers, Joseph B. Slunt, and *John C. Cunningham,* Hearing Counsel.

C. C. Guidry, for the Board of Commissioners of the Port of New Orleans.

G. B. Perry, for New Orleans Traffic and Transportation Bureau, Inc.

Neal M. Mayer and *Paul D. Coleman,* for Seatrain Gitmo, Inc.

Donald J. Brunner, for Sea-Land Service, Inc.

John L. Hill, David Kendall, David Hughes, Marilynn Poole, for the State of Texas.

REPORT AND ORDER

March 15, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Clarence Morse, *Commissioners*)

PROCEEDING

Trailer Marine Transport Corporation (TMT), is a common carrier by water in interstate commerce subject to the jurisdiction of the Federal Maritime Commission (FMC or Commission).[1] On November 18, 1977, the Commission ordered TMT to show cause why its operation of an intermodal joint through rail/water transportation service (Rail/Water Service) between mainland states and the Commonwealth of Puerto Rico without an appropriate tariff on file with the FMC did not violate section 2 of the Intercoastal Shipping Act (46 U.S.C. 844) and the Commission's domestic offshore tariff filing regulations (46 C.F.R. Part 531).[2] TMT was also ordered to produce certain information concerning the Rail/Water Service pursuant to Shipping Act section 21 (46 U.S.C. 820).

Fifteen persons were granted leave to intervene herein,[3] but only five of the Intervenors actually participated,[4] and one (the Government of Puerto Rico) has formally withdrawn. Oral argument was not held nor was it requested by any party.

TMT responded to the Show Cause Order by submitting a copy of a 40 page memorandum it had filed with the ICC on August 30, 1977 asserting that Section 1(1)(a) of the Interstate Commerce Act (ICA) confers *exclusive* jurisdiction over all aspects of joint through rail/water transpor-

[1] TMT has operated an all-water service between Puerto Rico and Jacksonville and Miami, Florida under FMC Tariffs since February 11, 1975. Tariff No. FMC-F-2.

[2] The Rail/Water Service commenced November 8, 1977 pursuant to a tariff filed only with the Interstate Commerce Commission. TMT Freight Tariff No. 6, ICC No. 2. This tariff, as amended through March 6, 1978, has expanded considerably in scope during the pendency of this proceeding, and now includes TMT and eight participating rail carriers—Louisville and Nashville Railroad Company, Seaboard Coast Line Railroad Company, Southern Pacific Transportation Company, Kansas City Southern Railway Company, Louisiana and Arkansas Railway Company, Missouri Pacific Railroad Company, Winston-Salem Southern Railway, and Southern Railway System—and offers transportation between ports in Puerto Rico and points in the states of Alabama, Arkansas, California, Georgia, Illinois, Indiana, Kentucky, Louisiana, North Carolina, Ohio, South Carolina and Tennessee and Texas. Rates are quoted as lump sum amounts for the through transportation. The tariff contains no breakout of the division or share of the through rate actually retained by the individual participating carriers. TMT was advised by the Commission's staff prior to the effective date of ICC Tariff No. 2 that the proposed Rail/Water Service was subject to the Shipping Act's tariff filing requirements. Telex dated October 28, 1977.

[3] Those granted intervention rights were the Commonwealth of Puerto Rico, Puerto Rico Manufacturers Association, Chamber of Commerce of Puerto Rico, Eric E. Dawson (Senator-Virgin Islands), Alabama State Docks Department, Board of Commissioners of the Port of New Orleans, New Orleans Traffic and Transportation Bureau, Inc., State of Texas, Sea-Land Service, Inc. (Sea-Land), Seatrain Gitmo (Seatrain), Southern Railway Company, Southern Pacific Transportation Co., Seaboard Coast Line, Louisville and Nashville Railroad Company, and Roldan International, Inc.

[4] Seatrain, Sea-Land, the State of Texas, and the two Port of New Orleans organizations replied to TMT's arguments, as did the Commission's Bureau of Hearing Counsel (Hearing Counsel). In view of the remaining Intervenors' unexplained and unsanctioned failure to participate, they shall be dismissed as parties to this proceeding.

tation between the U.S. mainland and Puerto Rico upon the ICC.[5] TMT also claimed that the ICC's acceptance of its Rail/Water Service tariff substantiates its "exclusive ICC jurisdiction" argument.

It is well established that mere tariff acceptance does not constitute agency adjudication of the lawfulness of the service ordered thereunder, *e.g., Davis v. Portland Seed Co.*, 264 U.S. 403, 425 (1924). Moreover, the ICC has also accepted joint through rail/water tariffs from Sea-Land Service, Inc., which do contain water and rail carrier rate divisions and are filed at both the FMC and ICC.[6] An ICC investigation into the service described by Sea-Land's tariffs was ordered on January 20, 1978.[7]

TMT responded to the Commission's Section 21 Order by providing a copy of its publicly filed ICC Tariff No. 6. It refused to reveal the rate divisions received by participating carriers on the questionable grounds that such information is irrelevant to the jurisdictional question presented by the Show Cause Order. TMT flatly ignored the language at page 2 of the Order wherein the Commission stated that the rate divisions were to be used to help "determine the reasonableness of TMT's *all water* rates from Jacksonville to Puerto Rico," *i.e.*, the service already being offered under its FMC Tariff No. F-2.[8] TMT has, therefore, plainly violated section 21 since December 16, 1977 by refusing to furnish the rate divisions applicable to the Rail/Water Service, which violation will be referred to the Office of General Counsel for preparation of an appropriate enforcement claim.

POSITION OF THE PARTIES

TMT's arguments in support of a continuous and exclusive ICC jurisdiction over joint through rail/water transportation to Puerto Rico can be summarized as follows:

1. ICA section 1(1)(a) states *inter alia,* that carriers providing joint through rail/water transportation from a state to: (1) a foreign country; (2) another state; or (3) a territory, are subject to Part I. 49 U.S.C. 1(1)(a); 24

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[5] ICA Section 1(1)(a) states, in pertinent part, that:

(1) [Part I of the ICA] shall apply to common carriers engaged in—

(a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; from one *State or Territory of the* United States or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or . . . from any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

[6] In granting *Sea-Land authority* to file rail/water tariffs in the dual FMC/ICC format employed in foreign commerce, *Ex Parte 261*, 351 I.C.C. 490 (1976), the ICC's Division 2 expressly reserved judgment on whether the ICC possessed exclusive jurisdiction over the proposed service. Special Permission Order No. 78-750.

[7] *Investigation No. 36810* into the "lawfulness" of Sea-Land's Freight Tariff No. 289, ICC No. 122 and Freight Tariff No. 290, ICC No. 123 (FMC Nos. 45 and 46, respectively). These tariffs offer service between the *U.S. West* Coast and both Puerto Rico and the U.S.-Virgin Islands, and took effect January 22, 1978. The ICC's Order of Investigation *was supplemented* on February 13, 1978 to specify issues relative to the nature and extent of the ICC's jurisdiction over joint rail/water common carrier service to Puerto Rico.

[8] The FMC is also responsible for the identification and prevention of unfair and unreasonable rates and practices by *Shipping Act carriers. The* extent to which intermodal rate divisions can be employed to injure all water shippers or other persons protected by the Shipping Act—and the power and practices of the ICC to prevent such injuries—is relevant in ascertaining the extent of the Commission's jurisdiction over through transportation arrangements made between *domestic offshore* carriers and ICC regulated carriers.

Stat. 379 (1887). The relevant provisions of this statute have not significantly changed since they were first enacted.

2. Puerto Rico was ceded to the United States by the Treaty of Paris (ratified in 1889, 30 Stat. 1754). Between the adoption of the first Puerto Rico Organic Act in 1900 (Foraker Act, 31 Stat. 77), and the commencement of Commonwealth status in 1952 (64 Stat. 319), the island possessed a locally elected government and was treated as if it were a "territory" by courts construing federal statutes. See generally, *Porto Rico v. American R. Co.*, 254 F. 369 (1st Cir. 1918), *cert. den.*, 249 U.S. 600 (1919). The Safety Appliance Acts (45 U.S.C. 1, *et seq.*), which were then administered by the ICC, were held applicable to Puerto Rico in 1913. *American R.R. v. Didricksen*, 227 U.S. 145, 148–149.

3. Section 28 of the Puerto Rico Organic Act of 1917 (39 Stat. 964) is still in effect. It states that:

> The Interstate Commerce Act [as amended], the Safety Appliance Acts [as amended], and section 19a of Title 49 [valuation of carrier property] shall not apply to Puerto Rico. 48 U.S.C. 751.

This statute was enacted to negate the effect of the *Didricksen* decision, *supra*, on Puerto Rican railroads, and to prevent the ICA in general and section 19(a) in particular from interfering with purely internal concerns which Congress had delegated to the Legislative Assembly of Puerto Rico. The sole purpose of 48 U.S.C. 751 is to exempt local, intra-island transportation from federal regulation. See 53 *Cong. Rec.* 8474–8475 (1916); *Safety Appliances on Railroads in Porto Rico*, 37 I.C.C. 470 (1915); *Porto Rico v. American R. Co., supra*, at 373–375; and *Benedicto v. West India & Panama Tel. Co.*, 256 F. 417 (1st Cir. 1919).

4. The ICC is not precluded by 48 U.S.C. 751 from regulating transportation between the mainland and Puerto Rico. In *Benedicto v. West India & Panama Tel. Co., supra*, the court held that the Puerto Rico Public Utilities Commission could not establish rates for cable communications service beyond the island's three mile territorial limit.[9] There is no substantive difference under the ICA between the through telegraph service involved in *Benedicto* and TMT's present rail/water transportation service. Section 1(1)(a) therefore applied to Puerto Rican rail/water traffic just as much after the adoption of section 751 as it did before.

5. The ICC's statement in *Fernandez & Co. v. Southern Pacific R.R.*, 104 I.C.C. 193 (1925), that 48 U.S.C. 751 barred *all* ICC regulation of transportation to Puerto Rico was (1) dicta and (2) erroneous. The error was probably caused by the absence of any reference to the seminal *Benedicto* decision during the proceeding.[10] TMT further asserts that no subsequent ICC decision has interpreted section 751 in this limiting manner.

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[9] Telegraph communications were then subject to ICC regulation under Part I.

[10] TMT furnished virtually the entire *Fernandez* record as an attachment to its present opposition. ICC Docket No. 15,045.

6. Puerto Rico's elevation to Commonwealth status did not generally affect the applicability of federal statutes there; Congress did not intend to alter the scope of existing legislation by creating the Commonwealth. *E.g., Moreno Rios v. United States*, 256 F.2d 68, 71 (1st Cir. 1958), holding that the Federal Narcotics Act continued to apply to Puerto Rico after July 25, 1952, even though it was not a "territory." It follows, therefore, that Part I continues to apply to Puerto Rico in the manner contemplated by *Benedicto*. See generally, *Liquilux Gas Services v. Tropical Gas Co.*, 303 F.Supp. 414, 420 (D.P.R. 1969).

7. Should the establishment of the Commonwealth mean that Puerto Rico is no longer a territory within the meaning of section 1(1)(a), then it must be considered a "state." Puerto Rico has been treated as *though it were* a state when such a result was consistent with the purpose of a particular piece of federal legislation. Most prominent of such cases are those construing 28 U.S.C. 2281.[11] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672–674 (1974); *Mora v. Mejias*, 206 F.2d 377, 386–388 (1st Cir. 1953).

A. The ICC's General Counsel has relief upon the above cases in concluding that Puerto Rico is a "state" within the meaning of section 1.[12]

In response to TMT, Hearing Counsel took the position that:

1. It is irrelevant whether Puerto Rico is best described as a "territory" or a "state," because any and all ICC regulation of transportation to and from the island is prohibited by 48 U.S.C. 751. This result is evident from the plain meaning of that statute, and the *Benedicto* decision provides no authority to the contrary. The reference to section 751 in *Benedicto* is merely dicta. The court held only that the Puerto Rico Public Utilities Commission could not regulate beyond the island's three-mile limit, *not* that the ICC could regulate up to that limit. Moreover, the subject matter of the *Benedicto* litigation was telegraph communications, not transportation.

A. The FMC lacks authority over joint through rail/water transportation to domestic offshore destinations *other than Puerto Rico*. ICA section 1(1)(a) would preempt all FMC regulation in this field, if the ICC were not excluded from Puerto Rico by 48 U.S.C. 751. This conclusion is supported by the statements of two witnesses testifying during 1933 and 1938 House Committee hearings on the Intercoastal Shipping Act.[13]

2. The ICC's disclaimer of Puerto Rican jurisdiction in *Fernandez &*

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[11] 28 U.S.C. 2281 requires convention of a three judge district court when injunctive relief is sought against a *state* statute or official.

[12] The FMC was furnished a copy of this memorandum (GC No. 401–77, dated October 19, 1977) subsequent to the November 7, 1977 meeting between Chairman O'Neil and Chairman Daschbach concerning the rail/water service, but it is not part of the record in the instant proceeding.

[13] *Regulation of Intercoastal Water Carriers (S. 4491)*, 72d Cong., 2d Sess. (January 19, 1933), at 402; *Amending Merchant Marine Act, 1936 (H.R. 8532)*, 75th Cong., 2d and 3d Sess. (January 12, 1938), at 247–248. The Commission notes, however, that these references actually pertain to those portions of the Panama Canal Act of 1912 (37 Stat 560, 568) set forth in former ICA section 6(13) between 1912 and 1940. See 1933 Hearings, *supra*, at 401. Section 6(13)(b) authorized the ICC to establish joint rail and water rates in interstate commerce and to regulate the maximum level of such rates. See Appendix "A" hereto.

Co., supra, represents the correct view of 48 U.S.C. 751. Contrary to TMT's contentions, the ICC continues to adhere to this "total exclusion" theory, and stated in *Trans-Caribbean Motor Transport, Inc.*, 66 M.C.C. 593, 596 (1956), that: "[B]y specific legislative enactment, it was declared that [the ICA] shall not apply to Puerto Rico, 48 U.S.C. 751."

The five participating Intervenors advanced the following additional arguments against exclusive ICC jurisdiction over the Rail/Water Service and in favor of the applicability of Intercoastal Act section 2:

1. Prior to 1952, Puerto Rico was not a "territory" for ICA purposes. When section 1(1)(a) was first enacted, Puerto Rico belonged to Spain and the United States had no insular possessions of any type. The "territories" contemplated by Congress were the continental territories of Utah, New Mexico, Washington, Dakota, Montana, Arizona, Idaho, and Wyoming.

2. Puerto Rico is neither a state nor a territory; it is an unique, semi-autonomous body politic.[14] Judicial decisions treating it as though it were a state for 28 U.S.C. 2281 purposes, can and should be limited to the particular objectives of that statute. The modern ICA is not subject to a geographically expansive interpretation. If Puerto Rico were deemed a state, then *all water* carriage between the island and the mainland would be subject to ICA Part III and not the Shipping Act—a result clearly unintended by Congress.

A. If Puerto Rico were a "state" within the meaning of section 1(1)(a), then TMT is subject to ICA Part III and requires a certificate of public convenience and necessity pursuant to ICA section 309. TMT has not only failed to procure such a certificate, but the ICC recently ruled that FMC regulated carriers engaged in through routes with ICC carriers cannot be certificated. *Joint Rail Water Rates to Hawaii (Matson Navigation Co.),* 351 I.C.C. 213, 217–218 (1975).

3. The plain meaning of Shipping Act section 1 confers the FMC with jurisdiction over the ocean portion of domestic offshore transportation. This jurisdiction is preserved and clarified by the Transportation Act of 1940, which defines "interstate commerce" in such a manner as to exclude Puerto Rico. 49 U.S.C. 902(i)(j)(k). Joint rail/water transportation to Puerto Rico is "foreign commerce" for purposes of ICA Part III, and, as such, is beyond the reach of the ICC once transshipment to an ocean-going vessel has occurred.

A. The Transportation Act of 1940 (54 Stat. 898) repealed prior inconsistent provisions of the ICA and the Shipping Acts. The jurisdictional limitations of ICA section 302(i)(2) and not those of section 1(1)(a) govern ICC regulation of the Puerto Rican trade.

B. National policy disfavors regulation of the ocean shipping industry by the ICC. See House Committee on Merchant Marine and Fisheries,

[14] *Fonesca v. Prann,* 282 F.2d 153, 155 (1st Cir. 1960); *Guerrido v. Alcoa Steamship Company, Inc.*, 234 F.2d 349, 352 (1st Cir. 1956); *Sanchez v. United States,* 376 F. Supp. 239, 241 (D.P.R. 1974); *Alcoa Steamship Co. v. Perez,* 295 F. Supp. 187, 196–197 (D.P.R. 1968).

Merchant Marine Act, 1938 (H.R. 10315), H.R. Report No. 2168, 75th Cong., 3d Sess. (1938), at 27, SR 52:124.

4. The legislative history of the 1962 "Rivers" amendments to the ICA wherein the House Committee stated that "statutory authority clearly exists" for ICC acceptance of joint rail/water rates to Alaska and Hawaii under ICA section 1(1)(a),[15] does not resolve the "exclusivity" of jurisdiction question, and is distinguishable from the instant case because Alaska and Hawaii had actually become states in 1959, thereby coloring Congressional attitudes towards transportation to these areas.

CONCLUSIONS

Shipping Act section 33 (46 U.S.C. 832) precludes the Commission from "concurrently" regulating the same transportation functions as the ICC. In order to construe section 2 of the Intercoastal Shipping Act, it becomes both necessary and proper to construe the Interstate Commerce Act as well.

The critical issue in this proceeding concerns the scope of the ICC's Part I authority over joint through rail/water rates in *domestic offshore commerce*. Unless 49 U.S.C. 1(1)(a) vests the ICC with exclusive jurisdiction over certain port-to-port operations of ocean carriers *not subject to ICA Part III,* TMT must submit to Shipping Act regulation. Although the section 1(1)(a) question is a matter of first impression whose resolution is clouded by time and legislative ambiguity, the answer is fairly discernible from the recent *Ex Parte 261* controversy defining the ICC's authority over *international* through routes and joint rates.[16] We therefore conclude that the Joint Service is not within the exclusive province of the ICC. The rate "divisions" received by the participating rail carriers are subject to rate regulation by the ICC and TMT's rate divisions are subject to full FMC regulation.

There is no conflict between ICA section 1(1)(a) and the tariff and rate making provisions of the Shipping Acts. The conflict is between section 1(1)(a)—which took its present form in 1920[17]—and ICA section 302—adopted with ICA Part III in 1940.[18] The latter section contains the following critical definitions:

(j) The term "United States" means the States of the United States and the District of Columbia.

(k) The term "State" means a State of the United States or the District of Columbia.

(i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce," as used in this part, means transportation. . . .

(3) wholly by water, or *partly by water and partly by railroad or motor vehicle,*

[15] House Committee on Interstate and Foreign Commerce, *Water Carrier Through Routes and Joint Rates,* H.R. Report No. 1769, 87th Cong., 2d Sess. (1962), at 2. See also Senate Committee on Commerce, *Alaska and Hawaii Through Routes and Joint Rates,* Sen. Rep. No. 1799, 87th Cong., 2d Sess. (1962), at 2. These committee reports were cited by the ICC General Counsel in his October 19, 1977 memorandum to the Section on Tariffs.

[16] 351 I.C.C. 490 (1976), *aff'd, Commonwealth of Pennsylvania v. Interstate Commerce Commission,* 561 F.2d 278 (D.C. Cir. 1977).

[17] Transportation Act of 1920 (41 Stat. 456, 474).

[18] Transportation Act of 1940 (54 Stat. 898, 930–931), 49 U.S.C. 902.

from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by water takes place from any place in the United States to any other place therein *prior to transshipment* at a place within the United States for movement to a place outside thereof. . . . ((Emphasis supplied).

ICA Part III represented a major adjustment in national transportation policy concerning water carriers; it was intended to modify both the Shipping Acts and ICA part I. 49 U.S.C. 920(a). If not the case prior to 1940, subsequent to that date all territories and possessions were unquestionably to be treated as places "outside the United States" for purposes of ICC *water carrier* regulation. When rail/water transportation moves between states (or the District of Columbia), it is exclusively an ICC matter. When such transportation moves from the mainland United States and a place *other than a state* as defined by section 302, the ICC has "exclusive" jurisdiction only before the cargo is transshipped to the ocean vessel.[19]

The language from the Transportation Act of 1920 now found in section 1(1)(a) is not separate and independent grant of ICC authority over water carriers. As the later, more comprehensive expression of legislative intent on the subject, section 302 preempts the vestigial rail/water provisions of section 1(1)(a) which might otherwise be construed to allow substantive regulation of the ocean rate division by the ICC.[20]

Section 1(1)(a) was part of the original ICA adopted in 1887. That statute—now ICA Part I—was not designed to subject water carriers to substantive rate regulation. Its purpose was to regulate railroad transportation; water lines were only incidentally included to prevent rail carriers from evading ICC control through such obvious devices as participating in joint rail/water rates. Part I is therefore not entitled to the liberal construction ordinarily afforded "remedial legislation" insofar as water carriers are concerned. See *United States v. Munson Steamship Lines*, 37 F.2d 681, 683–684 (4th Cir. 1930).

The Supreme Court has stated that ICA section 1 applies only to the *railroad* aspects of a joint rail/water service, *United States v. Pennsylvania R. Co.*, 332 U.S. 612, 622 (1944), and an ICC chairman has testified before Congress that:

"Under the Transportation Act of 1940, [the ICC's] jurisdiction over water carriers was limited to commerce between the States. Jurisdiction over waterborne traffic between the States and what were then the Territories of Alaska and Hawaii, as well as between the States and other areas, was continued in the Federal Maritime Commission."[21]

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[19] The word "primarily" more accurately describes the nature of such jurisdiction than does "exclusively." Today's intermodal transportation requires some "secondary inquiry" by both the ICC and FMC into the effects of the through rate. For instance, the ICC has "exclusive jurisdiction" over the rail division of the Joint Service, but the ocean carrier must identify the rail division in its FMC tariff and the FMC may consider the rail division's impact on the total movement in analyzing the lawfulness of the ocean division. See *Disposition of Container Marine Lines*, 11 F.M.C. 476, 491–492 (1968).

[20] This construction requires a finding that (a) Puerto Rico is a "state" or "territory," and (b) the "within the United States" proviso has no application to domestic offshore transportation.

[21] House Committee on Interstate and Foreign Commerce, *Hearing on H.R. 7297 and 7343*, 87th Cong., 2d Sess. (1962), at 13.

A recodification of United States Code Title 49 now pending before the House and Senate Judiciary Committees (H.R. 9777, S. 2361, 95th Cong., 1st Sess.), verifies that Part III was intended to limit Section 1(1)(a). The House Committee's draft report expressly states that Section 1(1)(a) is qualified by other sections of the ICA.[22]

Domestic offshore commerce was to be treated as foreign commerce under the original ICA. The framers of the ICA did not contemplate rail/water service to areas now defined as domestic offshore commerce. With the exception of Alaska, the United States had no offshore possessions in 1887. Water carriers were viewed as either serving foreign destinations or *mainland* United States destinations in the coastal, Great Lakes or inland rivers trades. See *Jurisdiction Over Water Carriers,* 15 I.C.C. 205, 212 (1909), where only foreign and mainland water carriers were discussed, despite the acquisition of Puerto Rico and Hawaii in 1899 and 1900, respectively, and the increased settlement and accessibility of Alaska.[23]

Section 1(1)(a) originally defined foreign commerce transportation as that moving from:

> ". . . any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a *port of transshipment,* or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." 24 Stat. 379. (Emphasis supplied).

The Transportation Act of 1920 amended section 1 to apply the transshipment limitation to all types of transportation covered by Part I.[24] Two legislative developments occurred in the interim which related to the 1920 amendment. One was the adoption of the Shipping Act, 1916 (39 Stat. 728) which defined carriers subject to the FMC's domestic commerce jurisdiction as those:

> ". . . engaged in transportation . . . 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." (Emphasis added).

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[22] Committee Print No. 10, *Revision of Title 49,* House Committee on the Judiciary, 95th Cong., 1st Sess. (1977), at 43. The draft report also indicates that "territories" ordinarily means "territories and possessions," but the term does not include Puerto Rico insofar as section 1(1)(a) is concerned. *Id.* at 3; H.R. 9777, section 10501(a)(2), sections 10102(21) and (24), and section 10541(a)(3). As a recodification, the bill is intended to make no change in existing law. *House Committee Print,* at 1.

[23] When first confronted with the prospect of domestic offshore traffic, the ICC asserted that it lacked jurisdiction over a water carrier's complaint against the railroad line in Alaska because Alaska was not a territory. *Jurisdiction over Rail and Water Carriers Operating in Alaska,* 19 I.C.C. 81 (1910). The Supreme Court reversed this determination. *Interstate Commerce Commission v. Humboldt Steamship Co.,* 224 U.S. 474 (1912). The ICA's impact in Alaska was weakened in 1914, however, when the United States acquired the Alaskan Railroad, entrusted its administration to the Secretary of Interior, and removed it from ICC jurisdiction. (38 Stat. 305). See 34 Attorney General's Opinions 232, 236 (1924).

[24] ". . . from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or . . . from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, *but only insofar as such transportation takes place within the United States.*" 41 Stat. 456, 474. (Emphasis supplied).

The term "high seas" is equivalent to "mean high tide" and was intended to *exclude* carriers operating on navigable rivers.

The second major development, and one which is responsible for much of the present confusion concerning section 1(1)(a), was the adoption of the Panama Canal Act of 1912 (37 Stat. 560, 568). Between 1912 and 1940, section 11 of this Act materially extended the ICC's jurisdiction with respect to rail/water transportation in interstate commerce. Codified as ICA section 6(13)(b), section 11 expressly provided for exclusive authority in the ICC to *establish* and regulate rail/water routes and fix the maximum rates charged thereon for traffic moving from "point-to-point in the United States" to an extent not obtainable under section 1(1)(a). See *Chicago, R.I., & P. Ry. v. United States,* 274 U.S. 29, 34–36 (1927).[25] It was former ICA section 6(13)(b) and not section 1(1)(a) which led this Commission to state on several occasions prior to 1940 that it lacked jurisdiction over joint rail/water rates. *E.g., Intercoastal Investigation,* 1 U.S.M.C. 455, 457 (1935); *Commodity Rates Between Atlantic and Gulf Ports,* 1 U.S.M.C. 642, 645 (1937); *Rates, etc., for Cotton, Bags, and Grain,* 2 U.S.M.C. 42, 44 (1939).[26]

But for the 1912 Panama Canal Act amendments, there would have been no conflict between ICA Part I and Shipping Act section 18 (39 Stat. 728, 735) of a nature which would have prevented the FMC from regulating domestic water carrier rate divisions following the latter statute's adoption in 1916.[27] Effective ICC scrutiny of railroads was possible by applying tariff filing requirements to the joint service; it was unnecessary to subject the participating water carrier to full Part I regulation.

Former ICA section 6(13)(b) was repealed by the Transportation Act of 1940 (54 Stat. 898, 910). The legislative history of the 1940 Act does not expressly state why section 6(13)(b) was repealed. What is revealed is a deliberate attempt to create a fair and balanced interstate transportation system by equalizing the regulatory climate in which the newly evolved motor and water transportation modes compete for traffic with the older, financially troubled railroads. *E.g.,* 49 U.S.C. prec. 1; 84 *Cong. Rec.* 6130–6131 (Sen. Wheeler), 6136 (Sen. Bailey), 6148–6149 (Sen. Wheeler); 86 *Cong. Rec.* 5868–5869 (Rep. Cole), 5872–5873 (Rep. Van Zandt), 5878 (Rep. Wolverton), 11286 (Sen. Wheeler), 11544 (Sen. Reed), 11545–11546 (Sen. Truman).

Also of importance, was the fact that Congress had amended the

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[25] Former section 6(13) stated that the jurisdiction conferred therein was "in addition to" that otherwise given by ICA Part I. See Appendix "A" hereto.

[26] Recognition that the ICC's primary authority to regulate joint rail/water rates was not derived from section 1(1)(a) is reflected in the remarks of Senator Wheeler during floor debate on the Transportation Act of 1940, wherein he noted that this power was not conferred by the original 1887 legislation. 84 *Cong. Rec.* 6123, 6130 (1939).

[27] It is also noteworthy that the 1933 and 1938 Intercoastal Act testimony cited by Hearing Counsel, note 13, *supra,* contemplates a lack of conflict between ICC regulation of the through rate and FMC regulation of the water portion thereof. It does not support the notion that the Commission cannot require joint through rail/water tariffs to be filed at the FMC as well as at the ICC—especially in light of the United States Court of Appeals' recognition that a joint through rate is not to be doctrinairly treated as an indivisible whole. *Commonwealth of Pennsylvania, supra,* at 292.

Intercoastal Shipping Act in 1938 (52 Stat. 963) to extend the FMC's rate making powers to all domestic commerce carriers as then defined by Shipping Act section 1,[28] and had included within the Merchant Marine Act of 1936 (49 Stat. 1975) provisions strengthening the Commission's procedural powers. Given this background of increased legislative reliance upon an independent ocean shipping board, it is not surprising that few issues caused greater controversy during the pendency of the 1940 Act than the proposal to shift mainland water carriers from FMC to ICC supervision through the adoption of ICA Part III. *E.g.*, 84 *Cong. Rec.*, 6119–6120 (Sen. Shipstead), 6133–6135 (Sen. Bailey), 6148 (Sen. Borah); 86 *Cong. Rec.* 5866–5867 (Rep. Wadsworth), 5875–5878 (Rep. Brand), 5881–5882 (Rep. Dondero), 10180–10182 (Rep. Brand), 10621–10622 (Sen. White), 11544–11545 (Sen. Reed).[29]

The principal of regulatory equality eventually prevailed, but the extensive floor debate clearly indicated that water carriers were not to be subjected to any greater ICC regulation than was necessary to achieve the overriding purpose of rationalizing competition between mainland transportation modes.[30] The need for "intermodal equality" is present only in situations where water carriers actually compete with other interstate transportation systems. Such situations basically occur only on the U.S. mainland, and involve coastal, inland and Great Lakes water carriers exclusively. See 86 *Cong. Rec.* 5874 (Rep. Halleck); 11286 (Sen Wheeler). No interstate railroad ever competed with a steamship line for cargo transported from New York to Puerto Rico (or other domestic offshore destination). It follows that Congress repealed former ICA section 6(13)(b) for the express purpose of limiting the ICC's exclusive jurisdiction over rail/water rates to transportation which would be covered by ICA Part III.[31] Domestic offshore carriers were thereafter to be governed by ICA Part I when and to the same extent that foreign commerce water carriers—also regulated by the FMC—were subject to these same provisions.

Section 1(1)(a) encompasses rail/water transportation to both foreign countries and territories "only in so far as such transportation takes place within the United States". This limiting provision has been construed to prohibit the ICC from regulating anything other than the domestic portion of through rail/water routes involving *foreign commerce*. *Commonwealth*

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[28] The rate making authority provided for by the 1933 Intercoastal Shipping Act (47 Stat. 1425) significantly extended that conferred by the original Shipping Act.

[29] Particularly troublesome to the Congressional minority opposing Part III was its elimination of a system of free entry into water trades in favor of a route certification system.

[30] Congress has consistently shown concern for the special problems of ocean carriers. More than once it has refused to enact legislation which would have entrusted maritime regulation to the ICC. *E.g.*, Committee on Merchant Marine and Fisheries, *Report on Shipping Act, 1916*, H.R. No. 659, 64th Cong., 1st Sess. (1916), P & F Shipping Regulation, at 51:51; Committee on Merchant Marine and Fisheries, *Merchant Marine Act, 1938, H. R. 10315*, H. R. Report No. 2168, 75th Cong., 3rd Sess. (1938), P & F Shipping Regulation, at 52:124.

[31] At one point, the principal Senate Conferee stated that the final proposal "did not change the intent and purpose of the Panama Canal Act." 86 *Cong. Rec.* 11269–11270 (Sen. Wheeler). This statement, however, was directed exclusively to certain hotly debated conference committee amendments which had been seized upon by those opposing the legislation for the purpose of raising a point of order. The amendments referred to then existing ICA sections 5(19), (20) and (21) limiting railroad ownership of water carriers, and not to section 6(13)(b).

of Pennsylvania, supra, at 285; *Armour Packing Co. v. United States,* 209 U.S. 56, 78–79 (1908). Assuming, *arguendo,* that Puerto Rico is a "territory" for Part I purposes,[32] logic and legislative history dictate that section 1(1)(a)'s proviso clause be given identical effect regardless of whether foreign or domestic offshore transportation is involved.[33] It would be arbitrary and impractical to base a drastically different interpretation of Part I solely upon the fact that domestic offshore *destinations* are possessions of the United States.[34]

A coherent national transportation policy does not require *exclusive* ICC jurisdiction over the filing and level of domestic offshore water carrier rates whenever the water carrier participates in a joint through arrangement with a railroad. The "dual authority" approach to joint through rates adopted in *Ex Parte 261, supra,* is reconcilable with both the ICA and the Shipping Act. In domestic offshore commerce, as in foreign commerce, it suffices that the ICC regulate the rail division as a proportional rate.

To interpret ICA section 1(1)(a) as permitting the ICC to regulate the ocean rate divisions of water carriers not regulated by that agency under Part III would be contrary to law,[35] and disserve the public by aggravating existing regulatory anomalies and creating new ones. A "carrier's choice" system of regulation already exists for certain through intermodal rates in the Alaska and Hawaii trades by specific (and limited) legislative enactment.[36] This situation tends to obscure the Commission's

[32] Whether Puerto Rico is in fact a "state", a "territory" or something else following the creation of the commonwealth in 1952 is largely a red herring. Given the absence of any express legislative pronouncement on the subject, and the continued effect of 48 U.S.C. 751, there is no indication that the change to commonwealth status altered the manner in which the ICA applies to the island. Cases construing statutes other than the ICA, *e.g., Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), are irrelevant to the proper interpretation of section 1(1)(a). We consider the suggestion that Congress now views Puerto Rico as a "state" for Part I purposes to border on the frivolous. If section 1(1)(a) did apply to the Joint Service, nothing of substance would be affected by whether Puerto Rico was considered a "state" or a "territory"—at least as far as ICA Part I was concerned.

We further note that except for the *Benedicto* ruling, *supra* (which has certain characteristics distinguishable from the instant case), no decision directly applying the ICA to Puerto Rico on a "territorial" theory appears to exist. The Safety Appliance Acts were never a part of the ICA, although they were administered by the ICC at one time. As late as 1930, the ICC stated that it considered the "territorial question" unsettled. *Conf. Ruling No. 201,* Appendix to 45 I.C.C. See also *Fernandez Co. v. Southern Pacific R.R. Co.,* 104 I.C.C. 193 (1925).

[33] In the case of foreign commerce, ICC jurisdiction over export movements does not persist until the vessel arrives at a foreign port. Nor does it continue until the vessel crosses into a foreign country's territorial waters, or even until the United States' territorial waters are left behind. The ICC's Part I jurisdiction stops *at the point at which cargo is transshipped to an ocean going vessel.* In 1939, an FMC predecessor agency advised Congress that the "within the United States" limitation applied to domestic offshore as well as foreign commerce, and indicated that it was the equivalent of the "transshipment" limitation contained in the bill which became ICA Part III. 84 *Cong. Rec.* 6141, 6144 (Table).

[34] We are mindful of decisions such as *United States v. Pennsylvania R. Co., supra,* holding that the ICC does not *lose* Part III jurisdiction over transportation from *one state to another* merely because a joint rail/water service makes an intermediate call at a foreign port or otherwise passes outside of territorial waters. Such decisions do not negate this Commission's jurisdiction over the intermediate *ocean portion* of a mainland/foreign or mainland/offshore movement.

[35] *Commonwealth of Pennsylvania, supra,* decides the matter as to foreign commerce carriers.

[36] Rate divisions established in joint Part II motor/FMC water and Part III water/FMC water routes to Alaska and Hawaii are regulated by the ICC pursuant to 49 U.S.C. 316(c) and 905(b), which state, *inter alia,* that:

> . . . [The] through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to [Part II or III, as the case may be].

On February 13, 1978, the ICC decided it lacked exclusive jurisdiction over joint motor/water rates to domestic offshore destinations other than Alaska and Hawaii. *Rejection of Trailer Marine Transport Corporation Tariff MF-I.C.C. No. 4 (No. 36791).*

view of a participating carrier's true operating condition, but has not caused undue difficulties to date. The problem is one of degree, however. The presence of additional ICC regulated cargo traveling on the same vessels and routes as FMC regulated cargo could complicate, and perhaps frustrate domestic commerce rate making functions—especially because the ICC does not require carriers participating in joint rates to disclose their respective rate divisions to the public.[37] Any increase in non-FMC regulated carryings in the domestic offshore trades offers ocean carriers a greater opportunity to evade effective rate regulation, and induce both the FMC and the ICC to seek greater financial information of an overlapping or duplicative nature from domestic offshore water carriers in order to more accurately analyze those rates which happened to be within their respective jurisdictions.

The ICC may not order Part II or Part III carriers to establish through routes with FMC carriers.[38] Such through intermodal arrangements are voluntarily established; they appear and disappear at the option of the participating carriers. The ICC's express authority to regulate the rate divisions of FMC carriers participating in through movements to Alaska and Hawaii is the result of specialized legislation passed three years after these states joined the Union.[39] This legislation was sponsored by certain motor carriers which had served the Alaska trade before statehood as FMC regulated nonvessel operating common carriers, and took the form of amendments to ICA sections 216(c) and 305(b).[40] The motor carriers advised Congress that the FMC and ICC had both rejected a Part II/FMC water tariff filed by Consolidated Freightways—purportedly because neither agency could lawfully accept a tariff unless it possessed sole jurisdiction over the entire movement—and further stated that the establishment of voluntary through route arrangements in the Alaska and Hawaii trades would be advantageous to shippers.[41]

The Rivers Bill purported to clarify uncertainty as to whether joint through Part II and Part III/FMC water carrier tariffs could be filed at the ICC, but its provisions went considerably beyond mere tariff filing. The Senate Committee Report stated that the legislation's purpose was to

"[E]xtend to the users of motor-water services between Alaska or Hawaii and the

[37] TMT is attempting to exclude its rate divisions from the FMC as well, see pages 4–5, *supra*, and may have obtained a short-run competitive advantage over other water carriers serving Puerto Rico in the process.

[38] ICA sections 216(c) and 305(b), 49 U.S.C. 316(c) and 905(b). Part II carriers have no duty to form through routes with any type of carrier. Part III carriers have a duty to form through rates with other Part III carriers and with Part I rail carriers.

[39] The Alaska and Hawaii Statehood Acts expressly preserved the FMC's "*exclusive jurisdiction*" over water transportation to those areas and excluded acquisition of ICC jurisdiction over such transportation. 72 Stat. 339, 48 U.S.C. Prec. 21, and 73 Stat. 4, 48 U.S.C. prec. 491, respectively.

[40] These amendments are commonly known as the Rivers Act (76 Stat. 397), and rendered obsolete a 1960 grandfather provision in ICA Part III pertaining to such Alaska trade "NVO's." (74 Stat. 382, 49 U.S.C. 903(e)).

[41] *Hearing on H.R. 7297 and H.R. 7343*, *supra*, 87th Cong., 2d Sess. (1962), at 18–19. Hereinafter cited as "*Hearings*." The ICC held that specific statutory authority such as that found in section 1(1)(a) was necessary before it could accept Consolidated Freightways' tariff. This tariff was later submitted to the FMC in a form which satisfactorily identified the port-to-port rate and remained on file until voluntarily canceled on November 24, 1961.

other 48 States the *full benefits* of coordinated service which are now available to users of motor-water service among the other 48 States." [Emphasis supplied].[42]

Among the "benefits" discussed was the placement of all aspects of cargo loss and damage claims under the ICA. *Senate Report,* at 3.[43] This factor may have alone motivated Congress to remove through water carriage involving Part II and Part III carriers from the FMC's jurisdiction, but it is also noteworthy that "[t]he Alaska Carriers Association . . . expressed a preference for ICC jurisdiction." *Senate Report,* at 2. Whatever the reason, it was unnecessary for the Rivers Bill to have provided for exclusive ICC jurisdiction over FMC water carrier rate divisions in order to permit the filing of intermodal tariffs to Alaska and Hawaii at that agency.

Testimony gathered in the brief hearings conducted by the House Committee indicates only that joint rail/water tariff filings were possible because section 1(1)(a) *permitted* the filing of such rates, and not because the ICC possessed exclusive jurisdiction over the through movement.[44] The same understanding is reflected in the Senate Report. Moreover, the House Committee recognized that a reasonable interpretation of ICA section 216(c) would have permitted the filing of joint through routes between Part II carriers and FMC carriers without an amendment.[45] That section's reference to "water carriers could not reasonably be limited to Part III carriers because it was adopted *prior* to the adoption of Part III (49 Stat. 543, 558). The only "clarification" problem lay with ICA section 305(b), which stated that Part III carriers could form through routes with *other Part III carriers* (not "water carriers" in general), Part I railroads and Part II motor carriers (54 Stat. 898, 934–935). Yet, the Rivers Bill sponsors indicated that the inclusion of Part III water carriers in their legislation was only a "collateral" concern. 108 *Cong. Rec.* 11419 (1962). Under these circumstances, the statement in the House Report implying that section 1(1)(a) had long authorized exclusive ICC regulation of FMC

[42] Committee on Commerce, *Alaska and Hawaii Through Routes and Joint Rates,* Sen. Rep. No. 1799, 87th Cong., 2d Sess. (1962), at 1. Hereinafter cited as "*Senate Report.*"

[43] Uniform treatment of loss and damage claims benefited the participating carriers as much as their shippers given the common law liability of joint venturers. The cause of action already existed, and ICA section 20(11) expressly permitted water carriers to employ the more favorable disclaimer of liability permitted under the Harter Act. 49 U.S.C. 20(11),319; 46 U.S.C. 183. The Congressional sponsors also held out the possibility that the joint rates established under the amendments would be lower than rates otherwise prevailing in the Alaska and Hawaii trades. *Id.,* at 3. Without suggesting that this has not to some extent occurred, we are also aware that residents of these states still perceive an unfavorable comparison between joint through rates applicable to them and joint through rates over similar distances in the contiguous United States. *E.g., Letter from Senator Stevens,* May 12, 1976; *Letter to Representative Young,* July 9, 1976.

[44] Representative Rivers of Alaska testified that:

"[T]he continental railroads and waterborne carriers operating in the Alaska trade were allowed to voluntarily establish joint rates under authority prescribed in Part I of the Interstate Commerce Act. This limited authorization has prevailed as to the continental railroads and the Alaska waterborne carriers notwithstanding the fact that each has been and still is regulated by a different Federal regulatory agency, as I have above indicated." *Hearings,* at 8.

See also testimony of ICC Chairman Murphy, quoted at page 15, *supra. Hearings,* at 13–14. The same statement is found in *Senate Report,* at 4, *House Report,* at 5, and 107 *Cong. Rec.* 7763 (1961).

[45] Committee on Interstate and Foreign Commerce, *Water Carrier Through Routes and Joint Rates,* H.R. Rep. No. 1769, 87th Cong., 2d Sess. (1962), at 2. Hereinafter cited as "*House Report.*"

carrier rate divisions is best viewed as "legislative dicta."[46] It is also incorrect and inconsistent with its own premise. If exclusive ICC jurisdiction flowed simply from the through route language of section 1(1)(a), the Rivers Amendments were far broader than necessary.[47] They need only have stated that ICA sections 216(c) and 305(b) applied to through routes with water carriers subject to Part III and water carriers regulated by the FMC.

The House Report also ignored the comments of the ICC and other hearing witnesses who noted that through routes formed with FMC carriers under ICA Part I are voluntarily established. *Hearings* at 7, 8, 14. The voluntary nature of such through arrangements is critical, because through routes between rail carriers and Part III water carriers are subject to the same Part I provisions, but are *not* voluntary. The ICC may order Part III carriers to form and adhere to certificated joint through rail/water routes.[48]

ICA section 1(4) places a duty to establish through routes upon "all carriers subject to Part I," while ICA section 15(3) authorizes the ICC to form through routes between "carriers subject to Part I" and also between railroads and water carriers subject to Part III. Any persisting doubts concerning section 1(1)(a)'s inapplicability to domestic offshore carriers following the adoption of ICA section 302 should be dispelled by the ICC's administration of section 15(3).

If the ICC did possess exclusive jurisdiction over rail/water carriage, it would necessarily be empowered to compel TMT and other domestic offshore water carriers to form joint rail/water routes in trades they do not presently serve. Exercise of true through route authority over FMC regulated carriers would allow the ICC to completely control the FMC's performance of its statutory responsibilities and effectively end the "freedom of the seas" deliberately preserved for domestic offshore carriers by the Shipping Act. See *Lucking v. Detroit and Cleveland Nav. Co.*, 265 U.S. 346 (1924); *McCormick Steamship Co. v. United States*, 16 F.Supp. 45 (N.D. Calif. 1936); 84 *Cong. Rec.* 6120 (1939). The ICC has recognized that such a result is incompatible with ICA Part III and

[46] The House Committee stated:

"H.R. 11643 treats of the problem in a direct, feasible, and simple manner by giving the Interstate Commerce Commission the same jurisdiction over through-route and joint-rate arrangements between motor and water carriers which it has had for many years over such arrangements between rail and water carriers in the Alaskan and Hawaiian trade and has had over such arrangements between rail, motor and water carriers in the other 48 States." *House Report*, at 3.

[47] The House Committee may not have been fully informed concerning the scope of section 1(1)(a) because of the narrowness of the proposal before the Congress and lack of debate thereon. The Rivers Bill was described as "wholly noncontroversial in the committee," 108 *Cong. Rec.* 11419 (1962), and as attracting "no opposition" beyond the perference of the FMC, Department of Commerce, and Bureau of Budget for an approach which would not have precluded FMC oversight of water carrier rate divisions. *Id., House Report*, at 1; *Hearings* at 5. When subsequently called upon to interpret the scope of the Rivers Act, one court described its legislative history as "inconclusive." *Alaska Steamship Company v. Federal Maritime Commission*, 399 F.2d 623, 626, note 2 (9th Cir. 1968).

[48] The Rivers Bill testimony of ICC Chairman Murphy included the statement:

"The only carriers of different modes subject to our jurisdiction which may be compelled to establish through rates and joint rates with each other are railroads and water common carriers subject to Parts I and III of the [ICA], respectively." *Hearings*, at 14.

has never attempted to control a non-Part III water carrier's free entry or exit from a trade, even when the exit was made upon less than the required 30-day statutory notice required by both the ICA and the Shipping Act. *Joint Rail Water Rates to Hawaii (Matson Navigation Company)*, 351 I.C. 213 (1975).[49]

THEREFORE, in view of the fact that the ICC does not possess exclusive jurisdiction over the Joint Service, that TMT is required to file an FMC tariff describing the Joint Service, and that TMT's failure to file an FMC tariff prevents the Commission from performing its regulatory functions under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933,

IT IS ORDERED, That Trailer Marine Transport Corporation cease and desist from violating Intercoastal Act section 2 and Part 531 of the Commission's Rules by refusing to file a tariff with the Commission which describes the joint rail/water service it presently operates to Puerto Rico pursuant to ICC Tariff No. 2; and

IT IS FURTHER ORDERED, That the effective date of the above ordering paragraph is suspended for a period not to exceed thirty (30) days from the service date of this Report to enable Trailer Marine Transport Corporation to file with the Commission a tariff describing the aforesaid joint service which conforms fully with Intercoastal Act section 2 and Part 531 of the Commission's Rules and particularly including a break-out of its port-to-port rate divisions as required by section 531.8 of said Rules; and

IT IS FURTHER ORDERED, That Trailer Marine Transport Corporation cease and desist from violating section 21 of the Shipping Act, 1916, by refusing to file with the Commission the information concerning the port-to-port rate divisions collected for the aforesaid joint service as required by the Commission's Order served November 18, 1977; and

IT IS FURTHER ORDERED, That the Puerto Rico Manufacturers Association, Chamber of Commerce of Puerto Rico, Eric E. Dawson, Alabama State Docks Department, Southern Railway Company, Southern Pacific Transportation Co., Seaboard Coast Line, Louisville and Nashville Railroad Company, and Roldan International, Inc., are dismissed as parties to this proceeding.

By the Commission.

[49] Ever since 1906, when the Hepburn Act first authorized the ICC to prescribe through routes (34 Stat. 584, 590), section 15(3) has been subject to a "Catch-22" limitation whenever non-Part III water carriers are involved. Section 1(1)(a) includes rail/water carriage only if the carriers are under common control or management or have entered into an arrangement for the continuous carriage of cargo. The ICC may therefore "regulate" non-Part III water carriers only so long as they voluntarily maintain a joint through route, and only as to the particular route which has been established. *Jurisdiction Over Water Carriers*, 15 I.C.C. 205, 209, 217–218 (1909). This is hardly the type of irreconcilable, "concurrent" regulation required to oust the FMC of its Shipping Act jurisdiction over the reasonableness of water carrier rates and practices. *Commonwealth of Pennsylvania v. Interstate Commerce Commission, supra*, at 292.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

APPENDIX "A"

PORTION OF 1912 PANAMA CANAL ACT FORMERLY CODIFIED AS ICA SECTION 6(13)(b)

(13) *Jurisdiction of commission over transportation by rail and water.*—When property may be or is transported from point to point in the United States by rail and water through the Panama Canal *or otherwise,* the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission *shall have jurisdiction* of such transportation and of *the carriers, both by rail and by water,* which may or do engage in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passenger or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided,* That construction required by the commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this chapter.

(b) *To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.*

(c) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to this chapter enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country. (Feb. 4, 1887, c. 104, § 6, 24 Stat 380; Mar. 2, 1889, c. 382, § 1, 25 Stat. 855; June 29, 1906, c. 3591, § 2, 34 Stat. 586; June 18, 1910, c. 309, § 9, 36 Stat. 548; Aug. 24, 1912, c. 390, § 11, 37 Stat. 568; Aug. 29, 1916, c. 417, 39 Stat. 604; and Feb. 28, 1920, c. 91, §§ 409–413, 41 Stat. 483.)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 537

SALENTINE & CO., INC.

v.

EUROPE CANADA LAKES LINE

SPECIAL DOCKET NO. 538

SALENTINE & CO., INC.

v.

EUROPE CANADA LAKES LINE

SPECIAL DOCKET NO. 539

M.E. DEY & CO., INC.

v.

EUROPE CANADA LAKES LINE

NOTICE OF ADOPTION OF INITIAL DECISION

April 12, 1978

No exceptions having been filed to the initial decision in these proceedings and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 12, 1978.

It is ordered that the parties shall refund charges, publish and mail the appropriate tariff notices and notify the Commission of their actions as required by the initial decision.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 537

SALENTINE & CO., INC.

v.

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SPECIAL DOCKET NO. 538

SALENTINE & CO., INC.

v.

EUROPE CANADA LAKES LINE

SPECIAL DOCKET NO.539

M.E. DEY & CO., INC.

v.

EUROPE CANADA LAKES LINE

March 16, 1978

Applications for permission to refund portions of freight charges granted.

Carrier found, through inadvertence, to have failed to file new tariffs in time to assess lower rates on movements of goods from Hamburg, Germany, to Milwaukee, Wisconsin.

Applications, as clarified and supplemented by supporting information and by the submission of affidavits of the nominal complainants promising to refund moneys to the actual shippers, found to quality for the relief requested under section 18(b)(3), as amended by P.L. 90–298.

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

[1] This decision became the decision of the Commission April 12, 1978.

These three proceedings were commenced on August 4, 1977, by the filing of applications by Europe Canada Lakes Line (ECLL)[2] pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), 46 U.S.C. 817(b)(3), as amended by P.L. 90–298, and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a). The applications sought permission to waive portions of freight charges. Since they all involved the same factual scenario relating to shipments on the same vessel, as well as the same problem regarding the appearance of nominal complainants who were not the shippers who paid the freight, the three proceedings were consolidated for decision, as provided by Rule 148, 46 CFR 502.148. (See Order of Consolidation, January 18, 1978.)

The same error in failing to file a new tariff which occurred with respect to the shipments involved in the three applications also occurred in two other cases. These are Special Docket No. 536, *The A. W. Fenton Co. v. Europe Canada Lakes Line,* Initial Decision, February 27, 1978, and Special Docket No. 540, *Salentine & Co., Inc. v. Europe Canada Lakes Line,* Initial Decision adopted, January 24, 1978. A full description of the error is contained in the *Fenton* case. Briefly, it is as follows.

On June 16, 1977, ECLL sent telex instructions to its wholly owned subsidiary and general agnet, Ernst Russ-North America, Inc. (ERNA), located in Chicago, Illinois, directing ERNA to file tariff amendments with the Commission to become effective on June 16, 1977. These tariff amendments would have provided special rates for "machines, bottle labelling—from Hamburg/Bremen to . . . Milwaukee at dllrs 63.00 W/M" and a special rate for "catalyst, automobile emission in 40′ containers—Hamburg/Milwaukee at dllrs 1800.00 per 40′ cont."[3] However, the instructions were not followed because the telex was misplaced in Chicago. On further inquiry from ECLL in Hamburg, however, ERNA discovered the error and on June 21, 1977, the tariff amendments were filed.[4] However, between June 16 and June 21, the three shipments involved in the present applications were carried on the *Tilly Russ* which departed Hamburg on June 19, 1977. ECLL was therefore unable to charge the lower special rates and was required by law to charge the higher rates in effect at the time of the shipments. In order to collect the full amount required by law, ECLL issued a billing document called a "manifest corrector" in each case. Thereafter, despite some initial

[2] ECLL is the name of the carrier operated by "Ernst Russ" located in Hamburg, Germany. The applications were filed by its general agent, Ernst Russ-North America, Inc. Although the documentation frequently refers to "Ernst Russ-Hamburg," to avoid confusion, I have used the term "ECLL" instead of "Ernst Russ-Hamburg."

[3] See telex dated June 16, 1977, from Hamburg to Chicago.

[4] See telex from Hamburg to Chicago, dated June 21, 1977; see also telex from Chicago to F.M.C. dated June 21, 1977, filing the various tariff amendments. Further explanation is contained in a letter from Werner Scholtz, counsel for ECLL, to me, dated January 17, 1978.

confusion and difficulties, ECLL filed the applications which commenced these proceedings.[5]

Special Docket No. 537 involved a shipment of 2 cases of spare parts for bottle labelling machines, measuring 2.748 cubic meters. The shipper was a company known as Roehlig & Co. in Hamburg, Germany, and the consignee, a customs house broker and freight forwarder known as Salentine & Co., Inc., located in Milwaukee, Wisconsin, who appears as the nominal complainant. In Special Docket No. 538, the shipment involved 1 case of spare parts for bottle labelling machines measuring 1.373 cubic meters. The shipper was a company known as Lassen GMBH in Hamburg and the consignee was again Salentine & Co., Inc. In Special Docket No. 539, the shipment involved a 40-foot container loaded with 80 drums of automotive emission catalysts, weighing 12,235.3 kilos. The shipper was a company known as Hachemie-Spedition in Hamburg and the consignee, a customs house broker, M.E. Dey & Company, Inc., located in Milwaukee, Wisconsin, who is the nominal complainant.

In all three cases, the shipments moved on bills of lading dated June 18, 1977, and were prepaid by the shippers in Hamburg.[6]

Although the applications which commenced these proceedings did not contain attached documentation, as in the *Fenton* case, ECLL furnished documentation and other information on my request, as provided by Rule 92(c), 46 CFR 502.92(c). This documentation establishes that ECLL wishes to refund a portion of the freight charges to the shippers in Hamburg on the basis of the following computations as shown in the "manifest corrector" in each case.

In Docket No. 537, ECLL collected $251.44, based on the applicable tariff rate of $91.50 per cubic meter[6] times 2.748 cubic meters. ECLL wishes to retain only $173.12 of this freight based upon the special rate of $63 W/M times 2.748 cubic meters. The difference, $78.32, is the amount of the refund which ECLL seeks permission to make.

In Docket No. 538, ECLL collected $125.63 based on the applicable tariff rate of $91.50 per cubic meter times 1.373 cubic meters. ECLL wishes to retain only $86.50 of this freight based upon the special rate of

[5] The applications which commenced these three proceedings were preceded by earlier applications which were rejected apparently because they were not filed by a proper representative or employee of ECLL or attorney as required by the Commission's rules. See letter from Werner Scholtz, representing ECLL, to me, dated January 17, 1978, p. 2, and letter from Werner Scholtz to Mr. Joseph C. Polking, dated August 8, 1977. Further problems concerning deficiencies in the applications which were filed on August 4, 1977, will be discussed later in this decision.

[6] The copies of the submitted bills of lading are either barely legible or not legible as to the date of issuance in Hamburg. The date clearly appears in the bill of lading submitted in Special Docket No. 536, a shipment which moved on the same voyage of the *Tilly Russ*. The applications state that the bills of lading were dated June 18, 1977. The affidavits submitted by the customs house brokers and nominal complainants in these cases, i.e., Salentine and Dey, state that the bills of lading were dated June 18, 1977. Legible copies of dated bills of lading should, of course, be submitted with the application. I find corroborative evidence of these dates in the affidavits furnished by the nominal complainants. Even if I could not make such finding, however, the original intention of ECLL in Hamburg to file a new tariff effective June 16, 1977, is clearly shown in the relevant telex. If there were any doubts as to the date on the bills of lading, the retroactive tariff notice to be published could simply be published dating back to June 16, 1977, to prevent discrimination among shippers. However, I see no need to take this extra step.

[6] See ECLL Tariff No. 2—Continent (FMC 10), 9th rev. page 43, effective June 14, 1977, showing a rate of $91.50 W/M for "Machinery, n.o.s. and Parts and Accessories."

$63 W/M times 1.373 cubic meters. The difference, $39.13, is the amount of the refund which ECLL seeks permission to make.

In Docket No. 539, ECLL collected $1,982.23 based on the applicable tariff rate of $162 W[7] times 12.236 kilo tons (i.e., metric tons).[8] ECLL wishes to retain only $1,800 of this freight based upon the special lump-sum rate of $1,800, which had not been timely filed. The difference, $182.23, is the amount of the refund which ECLL seeks permission to make.

The Problem of Compliance with the Current Regulation

The issuance of a decision in these cases has been impeded by the initial failure of ECLL to furnish supporting documentation. Another major reason for the delay, however, is the fact that under the current regulation of the Commission, Rule 92(a), 46 CFR 502.92(a), it is not sufficient for the carrier to file the application with supporting documentation unless the application contains the concurrence of the shipper or consignee who actually paid the freight. If the original application did not contain the concurrence of such person and his appearance as "complainant" but rather the name of a consignee or other person who did not pay the freight as a "complainant," the Commission permitted the application to be amended to allow the actual shipper to substitute his name for that of the nominal complainant. See Special Docket No. 513, *Velsicol Chemical Corporation v. Sea-Land Service, Inc.*, July 29, 1977. Later the Commission further liberalized the procedure to permit the nominal complainant who did not pay the freight to file an affidavit stating that he would act as the shipper's agent and remit the refund or benefit to the actual person who had paid the freight. See Special Docket No. 519, *Buckley & Forstall, Inc. v. GEFA*, December 16, 1977.

Although this gradual liberalization of the rule has enabled the Commission to effectuate the remedial purposes of P.L. 90–298, delay nevertheless can result because of the present structure of the regulation. In these cases, before being advised of the decision in Special Docket No. 519, which permitted the nominal complainants in this case, three American customs house brokers and forwarders, to file affidavits promising to transmit the refunds to the actual shippers, ECLL had indicated its intention to withdraw the applications.[9] The Commission's decisions liberalizing its procedures under Rule 92(a) obviously have been helpful. Nevertheless, the requirement that someone appear as "complainant" and concur in the application seems to impose a technicality which

[7] See ECLL Tariff, 1st rev. p. 27, which shows a rate of $162.00 W for "Chemicals, harmless, n.o.s., in bags or casks . . . value up to $1980 per freight ton."

[8] The manifest corrector shows that ECLL collected freight based upon 12.236 metric tons (1,000 kilos). The bill of lading shows the measurement to be 12,235.3 kilos. It is not clear why ECLL rounded off that figure for collection purposes. In any event, the matter is not significant since the 12.236 figure was used to collect the full amount and ECLL wishes to refund a portion of that amount so as to retain only $1,800 as originally intended.

[9] See letter of Werner Scholtz to me, cited above, p. 3. In Special Docket No. 540, *Salentine & Co., Inc. v. ECLL*, cited above, ECLL did in fact withdraw its application rather than go through the process of obtaining the concurrence of a shipper located in Germany.

leads to delay although the underlying statute does not indicate that such a requirement is necessary. See Special Docket Nos. 524, 525, 526, *Pai Tai Industrial Co. Ltd. v. Sea-Land Service, Inc.*, etc. Initial Decisions, March 3, 1978.[10]

Nevertheless, in conformance with current case law on the subject, ECLL furnished affidavits from the nominal complainants in the three cases, Salentine & Co., Inc., and M.E. Dey & Co., Inc., who stated that they would transmit any refunds which might be permitted to the shippers in Germany who paid the freight. With that technicality out of the way, it became possible to concentrate on the merits of these cases.

Discussion and Conclusions

The factual situation in these cases is exactly the same as that discussed in Special Docket No. 536, *The A.W. Fenton Co. v. Europe Canada Lakes Line,* Initial Decision, February 27, 1978. As discussed more fully in that case, it is clear that ECLL committed "an error due to an inadvertence in failing to file a new tariff" within the meaning of P.L. 90–298, amending section 18(b)(3) of the Act. The record clearly shows an intention on the part of ECLL to apply lower special rates in each case and to file appropriate tariff amendments with the Commission. It also shows that this intention was not executed because of inadvertence on the part of ECLL's agent who misplaced ECLL's instructions. As soon as the mistake was discovered, however, ECLL's agent filed the intended tariff. These facts establish, as they did in the *Fenton* case, that a bona fide mistake occurred, which but for the remedial amendment to section 18(b)(3), would have required the shipper to pay a higher, unintended rate. Since the evidence of a bona fide error in tariff filing is clear and the purpose of the statute is remedial, I believe that the applications should be granted despite ECLL's initial shortcomings in preparing them. Denial of the applications on the other hand would reward ECLL at the expense of the shippers for whose benefit the applications were filed.[11] Accordingly, in my opinion, the applications should be granted.

I therefore find that:

1. There was an error due to inadvertence in failing to file a new tariff, within the meaning of P.L. 90–298.

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[10] In the cited cases, Judge Charles E. Morgan noted that delay in ruling on applications resulted in part because of the fact that under Rule 92(a) the carrier had to obtain the concurrence of consignees located in Taiwan, although, as Judge Morgan noted, the statute makes no mention of any such requirement.

[11] I note also that these applications and those in Special Docket Nos. 536 and 540 seem to be the first ones filed by ECLL, which may account for the various shortcomings in them. ECLL has never refused to furnish supplemental information and has compiled with the order in No. 540 to file an affidavit of compliance after its application for a waiver was withdrawn. In the future we should expect ECLL's applications, if any are filed, to be free of the problems encountered in these cases.

2. ECLL filed new tariff amendments on June 21, 1977, prior to the filing of its applications on August 4, 1977, as required by the statute.

3. The applications were filed well within the 180-day period prescribed by the statute (dates of shipment occurring on June 18, 1977).

No discrimination among shippers must be found if the applications are granted. This finding is required under P.L. 90–298. There are two problems in this regard.

First, as I have noted, the applications, as originally filed, were deficient in several respects, mainly in the failure to furnish supporting documentation. However, they contained additional errors on the forms themselves. They erroneously asked for waivers instead of permission to refund which the supporting documentation shows to be the appropriate relief under the circumstances. However, they contained additional errors with regard to paragraphs (2) and (3) of the standard form. Paragraph (2) required ECLL to list other special docket proceedings which involved the same rate situation. ECLL's application stated "N/A." Paragraph (3) required ECLL to state whether there were other shipments of the same or similar commodity which moved during approximately the same period of time. ECLL responded by stating "NONE." In fact, however, these cases are part of five cases stemming from the same error (Special Docket Nos. 536, 537, 538, 539, and 540). Three of these other proceedings involved the same commodity, bottle labelling machines or parts thereof, namely, NOS. 537, 538, and 540. Yet none of the applications in each case refers to these other situations.

It may be that ECLL is unfamiliar and inexperienced in filing out special-docket applications, as I have noted. Furthermore, ECLL obviously did not attempt to conceal the fact that its error had affected all five shipments since it filed applications in all five instances to seek relief on behalf of each shipper or consignee. Therefore, it appears more probable that ECLL was merely careless or confused in filling out the forms rather than guilty of deliberately attempting to discriminate among shippers.

A second problem concerns the fact that in Special Docket No. 540, *Salentine & Co., Inc. v. ECLL,* ECLL has withdrawn its application and retained the full amount of freight paid by the German shipper for reasons explained above. Granting the applications in the present three cases will, in effect, require ECLL to make a similar refund to the shipper in No. 540, in order to prevent discrimination among shippers. Since special-docket proceedings involve tariff corrections affecting all shippers during a particular period of time, however, if one application is granted, all similarly situated shippers are entitled to similar relief. This situation again points out the need to simplify the Commission's regulation to eliminate unnecessary technicalities regarding nominal complainants, assignments of claims, or designation of agents for shippers.[12]

Therefore, I find that no discrimination among shippers will occur since: 1) there is no evidence that other shipments of the same or similar commodities moved besides those involved in Special Docket Nos. 536, 537, 538, 539, and 540; and 2) an appropriate tariff notice plus specific instruction to ECLL to notify the shipper involved in Special Docket No. 540 who may claim a similar refund will insure that all shippers will be treated similarly.

Accordingly, the three applications for permission to refund a portion of freight to the shippers in Germany who paid the freight are granted.

It is ordered that upon adoption of this decision by the Commission, and subject to any modification to this decision or to the following orders which the Commission may make:

1. ECLL shall refund $78.32 to the Salentine & Co., Inc., who shall remit this amount to the shipper, Roehlig & Co. in connection with a shipment of 2 cases of bottle labelling machinery parts which moved under bill of lading dated June 18, 1977.

2. ECLL shall refund $39.13 to the Salentine & Co., Inc., who shall remit this amount to the shipper, Lassen GMBH, in connection with a shipment of 1 case of bottle labelling machinery parts which moved under bill of lading dated June 18, 1977.

3. ECLL shall refund $182.23 to M.E. Dey & Company, Inc., who shall remit this amount to the shipper, Hachemie-Spedition, in connection with a shipment of one 40-foot container of automotive emission catalysts which moved under bill of lading dated June 18, 1977.

4. ECLL shall promptly publish the following notices in an appropriate place in its tariff:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket Nos. 537 and 538, that effective June 18, 1977, and continuing through June 20, 1977, inclusive, the rate on "Machines, bottle labelling, Hamburg/Bremen to Cleveland is $62.50 W/M and to Milwaukee is $63.00 W/M," subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during this period of time.

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 539, that effective June 18, 1977, and continuing through June 20, 1977, inclusive, the rate on "Catalyst, Automobile emission in 40' containers, Hamburg/Milwaukee, is $1,800.00 per 40' container," subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or

[12] For example, let us suppose that five shipments of widgets moved on the same voyage during the month of June 1977 and all five shippers involved are entitled to refunds because of carrier error in tariff filing. If only one application is filed and granted, the other four shippers are also entitled to refunds since the tariff notice published in the one proceeding will have retroactive effect during the month of June 1977. This leads to two conclusions: 1) that it is not really necessary to file five separate special-docket applications if the first shipment in time is covered by an order of the Commission making the new tariff retroactive; and 2) the need to appoint an agent, assignee, nominal complainant, or other such person to represent the shipper is not shown. Once the first refund is permitted, the other four will also have to be made although no special-docket application had to be filed at all. The carrier will simply make refunds to the other four shippers directly.

waiver of freight charges on any shipments which may have been shipped during this period of time.

5. ECLL shall mail copies of the tariff notice involving bottle labelling machinery to the shipper involved in Special Docket No. 540 plus any other shippers not included in the present cases who may have shipped and paid the freight on bottle labelling machinery or parts thereof during the period of time specified and shall mail copies of the tariff notice concerning automobile emission catalysts to any other shipper who paid the freight on such commodity which moved during the specified period of time. (See similar order in Special Docket No. 542, *Alcoa International, Inc. v. Gulf European Freight Association,* Initial Decision, January 4, 1978, adopted by the Commission, January 31, 1978.)[13]

6. ECLL shall effectuate refunds of the charges in question within 30 days of service of the Commission's Notice of Adoption of this Initial Decision, if the decision is adopted, and shall within five days thereafter notify the Commission of the date and manner of effectuating the refunds.

7. The nominal complainants, Salentine & Co., Inc., and M.E. Dey & Co., Inc., shall notify the Commission of the date and manner in which they have remitted the refunds to the actual shippers involved within 45 days from the date of the Commission's Notice of Adoption of this Initial Decision, if so adopted.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
March 16, 1978.

[13] All of the applications filed by ECLL affected by the tariff-filing error appear to have occurred on one voyage no. 41 wb of the *Tilly Russ*, and these cases may have taken care of all affected shippers. However, in view of th many errors in the applications and the specific mistakes concerning failure of ECLL to provide references to othe shippers in paragraphs (2) and (3) despite the fact that other shippers were involved, it is possible that still additione shippers might have escaped the notice of ECLL. To guard against any possible oversight which might lead t inadvertent discrimination among shippers, this particular order is being issued. P.L. 90–298 specifically provides the if permission is granted by the Commission, the carrier "agrees that . . . [in addition to publishing an appropriat tariff notice] . . . such other steps . . . [will be] taken as the Federal Maritime Commission may require, which giv notice,. . . ."

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 412(F)

C.S.C. INTERNATIONAL, INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION

April 4, 1978

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is given that the initial decision became the decision of the Commission on April 4, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 412(F)

C.S.C. INTERNATIONAL, INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

March 22, 1978

Nitropropane found properly classified as Chemicals, NOS, 2-Amino-2-Methyl-1-Propanol, found improperly classified as Chemicals, NOS. Reparation awarded. Complainant failed to show that respondent improperly assessed surcharge.

Herbert Levenstein and *William Levenstein* for complainant C.S.C. International, Inc.

Brian M. Dolan for respondent Lykes Bros. Steamship Co., Inc.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

C.S.C. International claims that it was overcharged $782.41 on two shipments carried by Lykes Bros. Steamship Co., Inc., from New Orleans to South Africa.[2] The claim stems from a quarrel over the proper tariff classification of two commodities, nitropropane and 2-Amino-2-Methyl-1-Propanol (AMP). Lykes classified both as "Chemicals NOS" (Item No. 0170, page 181, United States/South and East Africa Conference Southbound Freight Tariff No. 2, FMC No. 4). C.S.C. says that nitropropane is a petroleum solvent which should have been classified under Item 2720 and that AMP is a surface active emulsifier which should have been classified under Item 860.

C.S.C. is engaged in the manufacture and sale of chemicals and chemical products and has a dual rate contract with the United States/South and East Africa Conference. Lykes is a member of that conference. The two shipments moved under Lykes' bills of lading Nos. 111 and 129. On bill of lading No. 111 the shipment was described as "60 Drums: Chemicals NOS Flammable Liquids (Nitropropane) Flash Point Tag Open

[1] Under Rule 318 (46 CFR 502.318) this decision became the decision of the Commission April 4, 1978.

[2] This case was referred to the Office of Administrative Law Judges under Rule 304(f) of the Commission's Rules of Practice and Procedure (46 CFR 502.304(f)).

Cup 100° F. "Bill of lading No. 129 described the second shipment as "75 Drums (Nitropropane) Chemical NOS Flammable Liquids Flash Point Tag Open Cup *100° F*" and "*1 Drum (AMP) Chemicals* NO1, 2-Amino 2-Methyl 1-Propanol." The commodity description on both bills was of complainant (claimant).

Discussion and Conclusions

There are but two questions to be answered here: (1) Is Nitropropane a petroleum solvent within the meaning of Item 2720? and (2) Is AMP a "Compound, surface active (Emulsifier . . .)" within the meaning of Item 860?

Item 2720 reads as follows:[3]

PETROLEUM SOLVENTS, VIZ.:

Distillates N.O.S.
Heptane
Hextane
Mineral Spirits N.O.S.
Naptha (Nonhazardous, no label required)
Solvents, petroleum N.O.S.
Toluol (Toluene)
Zylol (Zylene)

C.S.C. thinks that nitropropane fits the description "Solvents, petroleum N.O.S." Lest through paraphrase I do violence to C.S.C.'s demonstrations that nitropropane is a solvent petroleum, NOS, I offer that demonstration verbatim:[4]

"Item 2720 of the carrier's tariff lists, under the generic heading 'Petroleum Solvents' a number of chemicals including 'Solvents, Petroleum NOS.' Since petroleum itself is not a solvent, the listed articles must be those made from petroleum or another petrochemical. Naptha and mineral spirits are natural gas and coal tar derivatives. (See pages 602 and 588 of the *Chemical Dictionary*.) Toluol and Zylene (should read Xylene) are petroleum and coal tar derivatives. (See pages 877 and 942 of the *Chemical Dictionary*.)"

"Nitropropane is a solvent. C.S.C., NP division, Technical Bulletin No. 20, attached, shows that Nitropropane is sold by C.S.C. as a solvent. It states that, 'NiPAR brand solvents are of great utility and widespread use in the protective coating industry, the printing ink industry, and in the solvent extraction processes.' The *Chemical Dictionary* lists nitropropane. That chemical is shown to be derived 'By reaction of propane with nitric acid under pressure.' Under 'Uses,' the *Dictionary* shows that nitropropane is used as a solvent. This dictionary expression is exactly the same as the statement by C.S.C. in its Bulletin No. 20. The *Chemical*

[3] The rates have been omitted since the dispute is over the meaning of the item's descriptive language.

[4] For ease in reading I have not indented and single spaced C.S.C.'s argument, the generally accepted way of citing an extended quote. Instead I have placed quotation marks at the beginning of the first sentence and at the end of the last of each paragraph.

Dictionary shows that propane is derived from 'Petroleum and natural gas' Page 123. On page 608 of the *Dictionary*, natural gas is shown as occurring in petroleum-bearing areas throughout the world. Page 672 of the *Dictionary* shows that propane is one of a long list of 'petrochemicals.' It is stated there, 'At least 175 substances are designated as petrochemicals . . . even though some of their commercial production is from sources other than petroleum.' "

"Whether the propane used in making nitropropane is derived from petroleum or natural gas, it is known as a petrochemical in the chemical industry. Petrochemicals are defined in the *Dictionary* as 'An organic compound for which petroleum or natural gas is the ultimate raw material.' See page 672. Since the list of Petroleum Solvents in the carrier's tariff contains articles derived from sources known collectively as petrochemicals (propane, toluene, naptha, etc.) and since nitropropane is a well known petrochemical solvent, it is obvious that Item 2720 of the carrier's tariff, construed in accordance with the chemical industry understanding reasonably describes the article shipped. We are not attempting to dissect the molecular structure of this commodity. We are showing through the use of a recognized chemical authority, that nitropropane is actually a petroleum solvent. . . ."[5]

Lykes, an apparent believer in brevity as a virtue, counters simply by saying that "acting as a solvent is only one use of nitropropane" and that "a commodity cannot lawfully be rated or classified according to the different uses to which it is put."

In *United States v. Pan American Mail Line, Inc.*, 359 F. Supp. 728 (S.D. New York 1972), the Court set forth the general principles of law which provide the background for the Commission's specific principles of tariff construction. The Court said: ". . . the only rate a carrier may charge is that rate appearing in the carrier's filed tariff [citations omitted]. This rate must be charged and paid regardless of seemingly innocent justifications for departure such as mistake, inadvertence, or contrary intention of the parties. . . ." (359 F. Supp. at page 733). The Court recognized that such "strict interpretation may work hardship . . . and may require decisions which are the reverse of those which would have obtained had the principles of equity been applied to the suit . . . Yet the courts have adhered consistently to their strict reading of the tariffs in question in order to effectuate the Congressional scheme against rebating and collusive pricing" (359 F. Supp. at 733). This prescription for "strict reading of tariffs" has led to some "specific" principles to be applied when interpreting tariff language.

[5] "The *Dictionary*" referred to throughout the above is the *Condensed Chemical Dictionary*, Eighth Edition. The Bulletin No. 20 cited by C.S.C. does indeed characterize nitropropane as a solvent. The bulletin also lists the physical property of NiPAR which is the trademark for C.S.C.'s nitropropane solvent. Nowhere in the list is there any reference to petroleum.

Tariffs are "but forms of words."[6] *Intercoastal Investigation 1935*, 1 U.S.S.B. 400, 432 (1935); and these words are to be interpreted according to "the reasonable construction of [the tariff's] language; neither the intent of the framers nor the practice of the carrier controls, for the shipper cannot be charged with knowledge of such intent or with carrier canons of construction." *Natl. Cable & Metal Co. v. Amer. Hawaiian S.S. Co.*, 2 U.S.M.C. 470–473 (1941). A "fair and reasonable" construction must be given the terms in a tariff; and "the terms in question must be construed in the sense in which they are generally understood and accepted commercially." As a corollary "shippers should not be permitted to avail themselves of a strained and unnatural construction," *Thomas G. Crowe v. Southern S.S. et al.*, 1 U.S.S.B. 145, 147 (1929). A tariff when in dispute is ordinarily to be construed "as any other document." *Gt. No. Ry. v. Merchant's Elev. Co.*, 259 U.S. 285, 291. *Himala International v. Fern Line*, 3 F.M.C. 53, 55 (1948). This rule means that "a tariff having been written by the carrier is vulnerable against the carrier if the tariff's meaning is ambiguous." *Rubber Development Corp. v. Booth S.S. Ltd.*, 2 U.S.M.C. 746, 748 (1945). It does not mean that other rules of documentary construction necessarily apply to the construction of tariffs, i.e., When interpreting a statute or contract a proper inquiry is the intent of the legislature or the parties; however, when construing a tariff the "express language" of the tariff governs not the "unexpressed intention" of the author of the tariff. *Sacramento-Yolo Port District v. Fred F. Noonan*, 9 F.M.C. 551, 558 (1966); *Aleutian Homes Inc. v. Coastwise Line*, 5 F.M.C. 602, 608 (1959).

So far all of the principles of tariff interpretation seem to assume that recourse to the tariff document itself alone can provide the proper "meaning" to be assigned to the words in dispute.[7] However, "proper" definitions are notoriously slippery things and words themselves have the often irritating habit of changing their meanings according to context. There are, therefore, allowances made for consideration of matters outside the tariff. Resort to extrinsic evidence or "matters outside the express language of the tariff" may be had in "only three instances: (1) where the language of the tariff is itself vague; (2) where the tariff contains technical words which require interpretation because their meaning is not generally known [*Aleutian Homes Inc. v. Coastwise Line*, 5 F.M.B. 602, (1959); *Thomas G. Crowe v. Southern S.S. Co.*, 1 U.S.S.B. 145 (1929)]; or (3) there exists a custom or usage of a trade or a

[6] The full sentence reads: "Tariffs are but forms of words and that in the exercise of its powers to administer the shipping acts the [Commission] can look beyond the forms [meanings?] to what caused them *and what they were intended to cause* is well established. *Int. Com. Comm. v. Balt. & Ohio R.R.*, 225 U.S. 325, 326" (1 U.S.S.B. 400 at 432). (Emphasis supplied.)

[7] I am here unavoidably reminded of one version of a "lawyer's paradise," which is a world "where all words have a fixed, percisely determined meaning; where men may express these purposes, not only with accuracy, but with fullness; and where, if the writer has been careful, a lawyer, having the document in front of him, may sit in his chair, inspect the text, and answer all questions without raising his eyes.

course of dealing of the parties which although not specified in the tariff, is such that it would be applied." Despite the seeming limitation of the phrase "only three instances," close examination of the occasions on which recourse to matters outside the tariff may be had demonstrates that in virtually every case coming before the Commission extrinsic evidence not only can but must be considered if the language in dispute is to be given a "reasonable" construction and one which is "generally understood and accepted commercially." The first instance—where the language is vague—covers every case I have been able to find and all that a perhaps limited imagination can conjure. The very existence of a dispute between a shipper (or his professional freight auditor) and a carrier would seem to present an arguable case of vague tariff language, and where tariff language is vague resort may be had to extrinsic evidence. In fact, if extrinsic evidence means resort to or consideration of *any* matters other than the language of the tariff itself, extrinsic evidence is routinely considered in virtually all cases involving tariff construction when the dictionary is consulted for the "proper meaning" of words. This is done so routinely that mention of the rule which allows resort to extrinsic evidence in the form of a dictionary is no longer even made. But resort to extrinsic evidence while including reference to dictionaries obviously encompasses a good deal more. For it is the rare case which can be decided on dictionary meanings alone.[8] This is amply demonstrated by the dispute in this case, where resort to the dictionary only gives rise to the problem of alternative meanings which only poses the further problem of which alternative to choose. The proper choice of course is that meaning of the word or phrase which is "generally understood and accepted commercially." Examination of dictionary definitions no matter how exhaustive cannot show which meaning is the one that those engaged in the particular line of commerce generally understand, accept and use.

Complainant's extrinsic evidence consists of the bills of lading covering the two shipments, two technical bulletins issued by complainant, a number of pages from respondent's tariff, and a number of pages from the *Chemical Dictionary* all of thich are attached to the complaint. From this basis complainant's argument as I understand it is that (1) Under the generic heading "Petroleum Solvents" a number of chemicals are listed including "Solvents, Petroleum N.O.S."; (2) Petroleum itself is not a solvent therefore the listed chemicals must be those made from either petroleum or another petrochemical;[9]and (3) Nitropropane is a petrochemical which is a solvent; therefore, it is a Solvent, petroleum, NOS

[8] "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing. . . . But it is one of the surest indexes of a mature and developed jurisprudence [and theory of tariff interpretation] not to make a fortress out of the dictionary. Judge L. Hand, *Cabell v. Markham*, 148 F. (2d) 737, 739 (CA 2, 1945).

[9] Complainant still using dictionary definitions shows further that Naptha and Mineral Spirits can be derived from natural gas and coal tar and Toluene and Zylene (Xylene) can be derived from petroleum and coal tar and that these are petrochemicals. Since propane is derived from "petroleum and natural gas" nitropropane is a petrochemical like naptha, mineral spirits, Toluene and Zylene.

under Item 2720.[10] Admittedly, this is one way of constructing a "definition" of nitropropane; but there is another way, a way that does less violence to the use of "Petroleum Solvents" as a generic heading in Item 2720.

To begin with, as complainant states there are "At least 175 substances designated as petrochemicals even though some of their commercial production is from *sources other than petroleum*." (*Dictionary*, page 672). If we adopt complainant's reasoning then a "petrochemical" which is neither derived from nor bears any real relation to petroleum would become a "Solvent, Petroleum, NOS" and classifiable under Item 2720. This is hardly a reasonable construction of the item. More importantly a closer examination of the chemical products listed under the generic heading of Item 2720 leads to a different, and in my view, a far more reasonable construction of the item.

The first article is "Distillates, NOS." A "distillate" is a "distilled liquid."[11] So it would be reasonable to conclude that as used in Item 2720, "Distillates NOS" is any product made from the distillation of Petroleum which is not included in the list of specific products found in the item. Heptane is derived from "(a) the fractional distillation of petroleum." (*Dictionary*, page 470).[12] For a definition of "Mineral Spirits" we are directed to "Naptha." (*Dictionary*, page 588.) The word "Naptha" "usually applies to a narrow boiling range fraction of petroleum." (*Dictionary*, page 602.) The derivation of Toluene is "(a) By catalytic reforming of petroleum." (*Dictionary*, page 877.) Zylene (Xylene) like Heptane is derived by the "fractional distillation of petroleum." As is readily seen all of the specific articles or chemical products listed under Item 2720 are or can be obtained by a chemical operation on petroleum itself—either distillation or catalytic reforming. Thus they are all compatible with the generic heading "Petroleum Solvents." This is not true of nitropropane.

Again using complainant's method of assembling dictionary definitions, we find: (1) Nitropropane is derived from "a reaction of propane and nitric acid under pressure," (*Dictionary*, page 625); (2) Propane is derived "from petroleum and natural gas," (*Dictionary*, page 672); and (3) "Natural gas" is, "A mixture of the low molecular weight paraffin hydrocarbons (methane (85%) ethane (10%) *propane* and butane with

[10] In his *Tyranny of Words* Stuart Chase demonstrates some of the pitfalls awaiting the user of the syllogism. The three laws of formal logic are: "(1) *The law of identity*. A is A. Pigs is Pigs; (2) *The law of the excluded middle*. Everything is either A or not A. Everything is either pigs or not pigs; and (3) *The law of contradiction*. Nothing is both A and not A. Nothing is both pigs and not pigs." Chase goes on to say: "Observe that there are no referrents (specific objects referred to). For symbols in our heads the laws are incontrovertible. But the instant we turn to the world outside and substitute an actual grunting animal, the laws collapse. They collapsed to the vase perplexity of the station agent in Ellis Parker Butler's famous story *Pigs is Pigs*, where the animals involved were guinea pigs. Then there is the story . . . of the bewildered porter in *Punch* who had to arrange the subtleties of nature according to the unsubtle tariff schedule of his company. 'Cats is dogs and guinea pigs is dogs, but this 'ere tortoise is a hinsect.' "

[11] Distillation is "the process of separation consisting of vaporizing a liquid and collecting the vapor which is usually condensed to a liquid."

[12] In each instance the primary or most common derivation of the article is used. There is no definition of "Hextane" in the *Chemical Dictionary*. This helps neither side. Hextane could be a trade name. The reasonable assumption here is that it is some kind of derivative of petroleum.

small amounts of higher hydrocarbons and other gases). (Emphasis complainant's.)[13] Complainant pointing out that natural gas occurs in "Petroleum-bearing areas throughout the world," concludes:

> Whether the propane used in making nitropropane is derived from propane or natural gas, it is known as a petrochemical in the chemical industry. Petrochemicals are defined in the Dictionary as an organic compound for which petroleum or natural gas is the ultimate raw material. See page 672. Since the list of Petroleum Solvents in the carrier's tariff contains articles derived from sources known collectively as petrochemicals (propane, toluene, naptha, etc.) and since nitropropane is a well known solvent, it is obvious that Item 2720 of the carrier's tariff, construed in accordance with the chemical industry understanding reasonably describes the article shipped."

I cannot agree that Item 2720 "reasonably" describes the article shipped. To begin with the proposition that some of the Petroleum Solvents listed in Item 2720 can also be designated petrochemicals does not carry with it the conclusion that all petrochemicals are petroleum solvents. To accept this conclusion, as already pointed out, could result in the inclusion under the generic head Petroleum Solvents, of a petrochemical solvent which is neither based on or derived from petroleum, certainly a strained and unnatural construction.

Complainant is incorrect when it implies that it really makes no difference whether nitropropane is derived from petroleum or natural gas. If nitropropane is derived from natural gas it is not derived from petroleum, and if nitropropane is not derived from petroleum then only a strained and unnatural interpretation could classify nitropropane under a generic heading which clearly speaks of petroleum derivatives. Furthermore, the specific petroleum derivatives listed in Item 2720 do not insofar as this record shows include products which are produced by the combination of petroleum with another chemical. They are all produced or derived by operations on petroleum itself. Here, even if we assume that the "propane" comes from petroleum, nitropropane is produced only by the reaction of the propane with nitric acid. This alone makes nitropropane distinct from the other solvents listed in Item 2720; and this distinction leads to the conclusion that nitropropane cannot reasonably be included in that group of solvents classifiable under Item 2720.

If complainant is urging that what we have here are "technical words which require interpretation because their meaning is not generally known," *Aluetian Homes* case, *supra,* and that his interpretation of those words is the one "generally understood and accepted" in the chemical industry, then he falls considerably short of the mark.

The manipulation of dictionary definitions can never establish that a

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[13] Complainant would also direct special attention to the following which appears in the *Dictionary* under "natural gas":

> Shipping regulations (ICC, CG, IATA) Redgas label. Not acceptable on passenger planes. *Legal label name (ICC,* CG, IATA) *Liquified petroleum gas.* (Emphasis complainant's; *Dictionary*, page 608.)

I can find no significance in the fact that the Interstate Commerce Commission, the Coast Guard and the International Air Transport Association declare the "Legal label name" for natural gas to be "Liquified petroleum gas." Nothing has been offered to show the reason for this legal label designation and it may well have nothing to do with tariff classifications, and it certainly has nothing to do with *Item* 2720.

particular meaning of a "technical term" or a particular description of a product is *the* meaning or *the* description generally attributed to it by those in a particular industry or commercial endeavor. Indeed, it is by no means clear that C.S.C. itself generally understands and accepts the meaning of nitropropane it now asserts. In *Johnson & Johnson International v. Venezuelan Lines,* 16 F.M.C. 87 (1973), another case involving tariff interpretation, the Commission while concluding that a shipper was not forever bound by his bill of lading description of the commodity, went on to say at page 94:

> Claimant's original interpretation of the tariff at a time when the controversy had not yet arisen may be given weight in deciding the correct description and rate now to be applied to the goods in question. This is in accord with accepted principles and is in no sense inconsistent with the Commission's holding that the description on the bill of lading should not be the controlling factor.

Here C.S.C. a manufacturer and exporter of chemical products, originally classified nitropropane under Item "Chemicals NOS." It is reasonable to conclude that C.S.C. had access to the tariff to chose that, and not some other, classification. This record does not disclose the circumstances which led C.S.C. to abandon its original classification and adopt the present one. Whatever those circumstances, the fact that C.S.C. originally did not view nitropropane as a "petroleum solvent" casts considerable doubt on the proposition that the chemical industry generally understands and accepts the notion that nitropropane is indeed a "petroleum solvent."

I cannot accept complainant's interpretation of Item 2720. Only by a strained and unnatural construction of the language could nitropropane be classified as a petroleum solvent under Item 2720; and complainant has not shown that nitropropane is a technical term with a peculiar meaning and that the chemical industry generally understands, accepts, and uses that meaning.[14] Therefore, I conclude that respondent properly classified nitropropane under Item 0170, Chemicals, NOS.

The second question presented here is somewhat easier to answer. 2-Amino-2-Methyl-1-Propanol-AMP is according to complainant a surface active emulsifier and as such should have been classified under Item 860, "Compounds, viz.: Surface Active (Emulsifiers, Wetting Agents)." C.S.C. says:

> AMP is manufactured and sold as a "very efficient emulsifying agent," See NP Technical Bulletin (NPTB No. 31) issued by the claimant. Page 45 of the *Chemical Dictionary* lists 2-amino-2-methyl-1-propanol and states that that chemical is issued as an emulsifying agent. There seems to be no question that AMP is manufactured, sold, *and understood in the chemical industry* to be an emulsifier. Item 860 of the carrier's tariff provides a Capetown rate of $107 for "Compounds, viz.: Surface Active (Emulsifiers, Wetting Agents)." That description completely covers AMP an emulsifier as shown above. (Emphasis, mine.)

[14] The burden of proof is on complainant and he must show with reasonable certainty and definiteness that his description of the commodity is the correct one. See *Johnson & Johnson Int'l. v. Venezuelan Lines, supra.*

Lykes, replying to this argument, asks that I take "judicial cognizance" of the Commission's decision in Docket No. 75–31, *C.S.C. International v. Waterman Steamship Corp.,* served February 15, 1977. As Lykes says, "In that proceeding, the same complainant (C.S.C.) contended that a shipment of 2-Amino-2-Methyl-1-Propanol should have been rated as Detergents, Liquid or Dry, non-hazardous, NOS.," while here ". . . the complainant is asserting that the same commodity should be rated differently depending upon the use made of it which would most certainly lead to discrimination. *Atchison Leather Products Co. v. Atchison T & S.F. Ry. Co.,* 274 I.C.C. 328, 329." Lykes continues, "The . . . Commission clearly stated in Docket No. 75–31 that in the making of rates and ratings there is no better entrenched rule than the one that states that a commodity cannot lawfully be classified according to the different uses to which it is put." To this C.S.C. responds:

> Respondent . . . argues that we are attempting to classify the two commodities here involved by "use." It supports this argument by referring to Docket No. 75–31. In that case the complainant sought the detergent rate for AMP because the tariff there involved . . . contained no rate for Surface Active Emulsifiers. Complainant argued unsuccessfully, that Surface Active Emulsifiers *were in fact detergents* and were thus covered by the tariff description for detergents. Here the tariff of respondent provides a rate for "Compounds, Surface Active (Emulsifiers, Wetting Agents). Our evidence, which respondent has not refuted, shows that AMP is in fact an emulsifier. (Emphasis mine.)

I suppose that is one way to characterize complainant's position in Docket No. 75–31. But the difficulty presented by it is that in order to show that AMP *was* a detergent it was necessary to show that AMP was sold and *used* as a detergent. I know that, at first, this seems inconsistent with the idea that, "There is no better entrenched rule in the making of rates and ratings than the one that a commodity cannot lawfully be rated or classified according to the different uses to which it may be put. *Food Machinery Corp. v. Alton & S.R.,* 269 I.C.C. 603 (606)." However, the use for which a product is manufactured and sold can indeed be a most important factor in deciding the proper tariff classification of the product.

In *Hazel-Atlas Co.—Misclassification of Glass Tumblers,* 5 F.M.B. 515 (1958), the articles in question were "packer's tumblers" which could be used first as a kind of jelly jar and then as drinking glasses. In deciding whether the articles should have been classified "Bottles, Jars, Empty Glass" or "Tumblers, viz.: Glass," the Commission said:

> Although we agree that the purpose for which a thing is manufactured—the controlling use—determines its classification tariffwise, we do not agree that its controlling use is necessarily its first use in point of time (at 518).

When "use" is a factor in deciding the proper tariff designation of an article, it is the "controlling use" that determines the nature and character of the shipment at the time tendered and the fact that an article may have other subordinate or secondary uses does not alter the nature of the product. See, *Continental Can Co. v. U.S.,* 272 F. 2d 312 (CA 2, 1959.)

It is true that in Docket 75–31 C.S.C. tried to argue that AMP was a detergent, and Judge Morgan found that AMP was not a detergent. In doing so Judge Morgan referred to Docket 75–50 in which C.S.C. sought to have AMP classified as "Compounds, Surface Active (Wetting Agents or Emulsifiers)," the same classification sought here. In that case the finding was that AMP was an emulsifier. The initial decision was made on the merits, but it was not adopted by the Commission because it was found that the complaint was untimely filed. However, the reasoning of the initial decision remains valid to my mind. There as here C.S.C. attached "documentation" to show that AMP is an emulsifier.

Attachment 12 to the complaint is an "NP Technical Bulletin" which announces that the use of AMP is, "To Prepare Clear Emulsions of Polyethylene or Wax." AMP is further identified as "a very efficient emulsifying agent for the emulsifiable polyethylenes and waxes in today's floor polish formulations. . . ."[15] It is clear that C.S.C. manufactures, markets and sells AMP as an emulsifier. The reasonable assumption is that AMP is also purchased and used as an emulsifier. No question is presented as to the chemical makeup or derivation of AMP. Accordingly AMP should have been classified under Item 860, "Compounds, viz.: Surface Active (Emulsifiers, Wetting Agents)." By classifying AMP under "Chemicals NOS" respondent Lykes has violated section 18(b)(3).[16] Complainant is entitled to reparation for the improper classification of AMP. The amount of reparation, however, poses somewhat of a problem.

Complainant has lumped together the charges for the entire shipment on bill of lading No. 129 in a way that makes it somewhat difficult to determine the precise amount of reparation claimed and due. On bill of lading No. 129, the 75 drums of nitropropane measured 804 c. ft. and weighed 37,725 lbs. and the 1 drum of AMP measured 11 c. ft. and weighed 448 lbs. The shipment was shown on the bill as follows:

804' (37,725#) at 108.50/40'	= 2,180.85	(the nitropropane)
11' (448#) at 133.00/40'	= 36.58	(the AMP)
Plus 40% S.C.	886.97	
BF 815' at 17.00/40'	= 346.38	
Toll	11.45	
	3,462.23[17]	

In its complaint C.S.C. computes the amount of reparation due on the shipment under bill of lading No. 129 as follows:

[15] The *Chemical Dictionary* at page 45 lists as uses of AMP: "Emulsifying agent (in soap form) for oils, fats and waxes; absorbent for acidic gases; chemical synthesis."

[16] A finding of violation is necessary to an award of reparation under section 22 of the Shipping Act, 1916, even where, as here the respondent would seem to have been perfectly justified in relying on the shipper's own description of its own product on the bill of lading.

[17] No commodity item numbers appear on the bill of lading.

Bill of Lading No. 129

804 cu. ft. at $98.75/MT (1)	$1,984.88
11 cu. ft. at $108.50/MT (2)	29.84
Port detention surcharge—25% (3)	503.68
Bunker surcharge at $17/MT (4)	346.38
Tolls (as billed)	11.45
	$2,876.23

(1) Capetown rate $97.25—plus $1.50 Dif.—Rules 18, page 115
(2) Capetown rate $107—plus $1.50 dif.—Rule 18
(3) Port Detention—25%—Rule 24a, 4th Rev. page 124–A
(4) Bunker surcharge $17/MT—Rule 25, page 124–c

On the basis of the above C.S.C. claims reparation of $585.50 for the shipment covered by bill of lading No. 129. This amount is, as shown, based (1) on the difference between the billed rate ($2180.35) and the sought rate ($1984.88) on nitropropane; (2) the difference between the billed rate ($36.58) and the sought rate ($29.84) on AMP, and (3) the difference between the 40% surcharge billed by Lykes ($886.97) and the 25% surcharge which is apparently claimed to be the proper surcharge by C.S.C. ($503.68).

The difference between the rates on nitropropane has been disallowed. The difference between the rate on AMP is $6.74 and this will be allowed. The remaining claim is based upon an apparent assertion that a "port detention surcharge" was improperly computed. I say that this assertion is apparent because it consists solely of the reference in C.S.C. computations in (3) above to 4th Rev. Page 124–A of the tariff. This page is attached and shows that effective June 2, 1975 a port detention surcharge of 25% per ton was to be assessed on shipments to Durban. This is the total evidence offered by complainant that Lykes improperly assessed the surcharge. There is not a single mention of the surcharge in the text of the complaint.

The complaint here reads in part: "On May 26, 1975, the carrier issued its prepaid bill of lading No. 129 to cover claimant's shipment, described thereon as 75 drums (Nitropropane) Chemical NOS and 1 drum (AMP) Chemical NOI, 2-Amino-2-Methyl-1-Propanol, from New Orleans to Durban, South Africa." The bill of lading simply lists "Plus 40% S.C." The evidence before me, such as it is, leaves too many questions unanswered and complainant, upon whom the burden of proof rests, spends not a single word of exposition or argument on the surcharge issue. Indeed, it is not even framed as an issue in the complaint.[18]

The bill of lading is dated May 26, 1975—and this is the only date in the complaint—and the effective date of the tariff page cited by complainant is June 2, 1975. Thus it is not clear that the surcharge would apply to the shipment. It is not even clear that complainant and respondent have the same surcharge in mind. Complainant has failed to

[18] In its answers, Lykes makes no reference to the surcharge and its entirely possible that it escaped Lykes' attention as it very nearly did mine.

establish that Lykes improperly assessed the surcharge imposed in bill of lading No. 129.

Since, the one drum of AMP was improperly classified, C.S.C. is entitled to the difference between the rate charged and the proper rate. Accordingly, C.S.C. is awarded reparation in the amount of $6.74.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
March 22, 1978.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NOS. 400(I), 401(I) AND 402(I)

KAISER ALUMINUM & CHEMICAL CORP.

v.

ATLANTIC CONTAINER LINE

Reparation awarded.

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Clarence Morse, *Commissioners*)

REPORT

March 23, 1978

In the three complaints filed in Informal Docket Nos. 400(I), 401(I) and 402(I) Complainant Kaiser Aluminum and Chemical Corporation seeks reparation from Respondent, Atlantic Container Line, for alleged freight over-charges on ten shipments described in the bills of lading as "Aluminum Can Stock (In Coils)" carried by Respondent from Baltimore to Rotterdam, the Netherlands.

Respondent charged a rate of $67.25 W/M, apparently under Item No. 692.2201.00 "Aluminum cans K.D. Packed (Body blanks and ends)".[1] Complainant contends that the shipments should have been classified as "Aluminum Sheets Flat or in Coils, up to/incl. 13,440 lbs. Minimum 40,320 lbs. per container" for which the applicable rate at the time of shipment was $61.00 per 2,240 pounds. Computed on that basis, the charges would amount to $25,085.43 or $11,981.16 less than that collected by Respondent. In support of its claims, Complainant submitted copies of bills of lading, dock receipts, factory invoices, shipping notices, load and tally sheets.

The Settlement Officer denied reparation. Except for three dock receipts which showed the same container marks as appeared in three of the bills of lading, the Settlement Officer failed to see any common

[1] For unexplained reasons, the charges amounting in the aggregate to $37,066.59 were assessed in some instances on a weight basis and in others on a measurement basis.

numerical reference between the bills of lading and the other documents filed and concluded that the evidence was insufficient to determine freight overcharges.

We disagree with this conclusion. By cross-checking the dock receipts against the bills of lading, it becomes evident that the booking numbers, export, shipper's and freight forwarder references, container marks and numbers are the same in the ocean bills of lading as in the dock receipts. Likewise, the factory invoices, shipping lists and load and tally sheets contain information which links them to the ten shipments involved in these proceedings. This refutes the Settlement Officer's finding that there is no common numerical reference between the documents offered in evidence.

As to the proper classification of the shipments, both the dock receipts and bills of lading specify that the aluminum can stock was *in coils*. We believe therefore that the tariff classification urged by Complainant "Aluminum Sheets Flat or in Coils" more accurately describes the cargo than "Aluminum cans K.D." and that Respondent should have collected freight charges on the basis of $61.00 per long ton, rather than on the $67.25 W/M rate it charged. The misclassification of the cargo and resulting overcharges violated section 18(b)(3) of the Shipping Act, 1916.

The decision of the Settlement Officer is therefore reversed. Complainant is awarded reparation as follows:

Docket 400(I) 2 shipments	$4,865.53
Docket 401(I) 3 shipments	4,880.90
Docket 402(I) 5 shipments	2,234.73
For a total of	$11,981.16

It is so ordered.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 531

MITSUBISHI INTERNATIONAL CORPORATION

v.

FAR EAST CONFERENCE AND AMERICAN PRESIDENT LINES, LTD.

ORDER

March 24, 1978

By application filed pursuant to section 18(b)(3) of the Shipping Act, 1916, and Rule 92 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92), the Far East Conference and American President Lines, Ltd., applied for permission to refund $11,793.02 of the $58,250.34 freight charges collected from Mitsubishi International Corporation on two shipments of nuclear fuel elements, unirradiated, carried from Charleston, South Carolina, to Kobe, Japan, via Oakland, California, under bills of lading dated January 17, 1977, and February 2, 1977. Respondents maintained that in the course of converting the Conference tariff to the metric system an error made in the tariff item applying to these shipments caused the assessment of charges higher than intended.[1]

Administrative Law Judge Thomas E. Reilly determined that, based on the dates on the two bills of lading, the application received by the Secretary of the Commission on August 2, 1977 had not been filed within 180 days from the dates of shipment as required by section 18(b)(3) of the Act. While the Presiding Officer denied the application on that ground, he nevertheless found that the error in the Conference tariff was of a type contemplated in section 18(b)(3).

Respondent filed a Petition to Reopen for the purpose of introducing evidence on the mailing date of the application. As the Petition was received within the time provided for filing exceptions under Rule 227 of the Commission's Rules of Practice and Procedure, it will be treated as exceptions. The manner of our disposition of this case obviates any need

[1] See Conference Notice of September 27, 1976 to contract shippers and tariff subscribers on the issuance of a new tariff based on the metric system, and the Conference's Tariff Circular No. 57 approving the reduction of the rate on the product shipped here, both attached to the application.

to reopen the proceeding for the admission of additional evidence as to the mailing date.

We note at the outset that while the application was not received in the Office of the Secretary until August 2, 1977, it bears a stamp showing that it was received at the Commission on August 1, 1977.[2] Therefore, with respect to the shipment which moved under bill of lading No. 9441 dated February 2, 1977 the application was in fact filed with the Commission within 180 days from that date, as required by section 18(b)(3). However, even considering August 1, 1977, as the filing date, recovery on the shipment which moved under bill of lading No. 9457 dated January 17, 1977 is time barred.

With respect to the merits of the claim, we agree with the Presiding Officer's conclusion that the error which occurred in the course of the conversion of the Conference tariff to the metric system was an administrative error of the type covered by section 18(b)(3).

Therefore, that portion of the Presiding Officer's decision denying permission to refund a portion of the freight charges collected on the shipment which moved under bill of lading No. 9457, dated January 17, 1977, is adopted and made a part hereof. The denial of permission to refund a portion of the freight charges collected on the shipment which moved under bill of lading No. 9441, dated February 2, 1977, is reversed and Respondents are granted permission to refund $6,254.71 of the freight charges collected on that shipment to complainant Mitsubishi International Corporation.

THEREFORE, IT IS ORDERED, That Respondents Far East Conference and American President Lines, Ltd., are authorized to refund $6,254.71 of the charges collected from Mitsubishi International Corporation.

IT IS FURTHER ORDERED, That Respondents shall publish promptly in the appropriate tariff, the following notice:

> "Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 531 that effective January 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped from January 1, 1977 through M: rch 1, 1977, inclusive, the contract rate on 'Nuclear Fuel Elements, Unirradiated' fr m United States Atlantic and Gulf ports to Kobe, Japan, is $263.00 W/M, subject to ıll applicable rules, regulations and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and Respondents shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[2] Section 18(b)(3) specifies that the application must be filed *with the Commission*.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 387(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

MOORE-MCCORMACK LINES, INC.

Respondent properly classified and rated the transported goods.
Reparation denied.

William Levenstein for Complainant Pan-American Health Organization.

A.C. Hidalgo for Respondent Moore-McCormack Lines, Inc.

REPORT

March 30, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman:* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Clarence Morse, *Commissioners*)

The Commission determined to review the decision of the Settlement Officer in this proceeding awarding reparation to Complainant Pan American Health Organization, Inc., for alleged freight overcharges by Respondent Moore-McCormack Lines, Inc., on a shipment described in the bill of lading as "8 skids SAID TO CONTAIN Office Stationery of paper and paper board n.e.c. except correspondence goods", carried by Respondent from Baltimore to Rio de Janeiro, Brasil.

Respondent assessed the rate of $147.50 per measurement ton provided in the tariff of the Inter-American Freight Conference under the tariff classification "Stationery." Complainant contends that the proper description was "PAPER, VIZ.: Bond, Sulphite or Sulphite and rag mixed—see PRINTING PAPER". Printing paper, defined in turn as "BOND, MIMEOGRAPH, LEDGER, TABLET AND ENVELOPE", carries a rate of $118 WT. Computed on that basis, Complainant claims freight overcharges in the amount of $1,778.77.

The Settlement Officer, satisfied with the evidence introduced by the Complainant found that the paper shipped, Mead Bond, is in fact a No. 1

grade watermarked sulphite pulp bond paper, covered by the above quoted description and granted reparation in the amount requested.

We find the decision of the Settlement Officer to be in error.

Although Complainant has shown that the paper shipped was sulphite pulp bond, it never denied that it was office stationery, nor did it assert that it was printing paper. Moreover, the description urged by Complainant is not a N.O.S.* tariff description but lists the precise types of paper covered by this tariff item, that is "Bond, Mimeograph, Ledger, Tablet and Envelope", thereby excluding all other types not specifically mentioned therein. While various types of paper may be made of sulphite pulp bond, we are of the opinion that "stationery" is a more specific description than "PAPER, VIZ.: Bond, Sulphite or Sulphite and rag mixed—see PRINTING PAPER." and, inasmuch as Complainant has not shown that the paper was for printing, we believe the carrier properly classified and rated the shipment.

The decision of the Settlement Officer granting reparation is therefore reversed, reparation is denied, and the complaint dismissed.

IT IS SO ORDERED.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*"Not Otherwise Specified."

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–29

BATON ROUGE MARINE CONTRACTORS, INC.

v.

CARGILL, INCORPORATED

ORDER REMANDING PROCEEDING

April 4, 1978

This proceeding arose from a complaint filed by Baton Rouge Marine Contractors, Inc. (BARMA or Complainant), alleging that Cargill, Inc. (Cargill or Respondent) had violated and continued to violate sections 15, 16, and 17, Shipping Act, 1916 (the Act), by unilaterally modifying a lease agreement between Cargill and the Greater Baton Rouge Port Commission (Port), which agreement had previously been approved by the Commission. BARMA contended that the subject modification resulted in the imposition of unlawful charges and conditions upon stevedores conducting business at the marine grain elevator at Port Allen, Louisiana, and was not filed with the Commission as required by section 15 of the Act.

After hearing, Initial Decision, exceptions and oral argument, the Commission served its Report and Order (Report) in this proceeding. 18 F.M.C. 140. In its Report, the Commission found that Cargill's imposition of charges and conditions did not constitute an unfiled modification of the lease agreement between Cargill and the Port. While the Commission did not find a violation of section 16, it did find that certain charges and conditions imposed by Cargill on stevedores, such as BARMA, were not reasonably related to the economic or commercial benefit of the stevedores derived by them from their use of the facilities and services provided by the Cargill terminal and thus constituted unjust and unreasonable practices in violation of section 17 of the Act. The Commission ordered the proceedings remanded to achieve a resolution of the proper allocation formula with regard to the actual benefits derived by stevedores from the use of Cargill's terminal facilities and for arriving at a proper charge against stevedores based thereon.

Administrative Law Judge William Beasley Harris has now served a "Supplemental Decision on Remand" wherein he concludes that the record developed before him was inadequate to resolve the issues raised by the Commission's Order of Remand, and that the proceeding should be reopened.

Both Cargill and BARMA except to the Presiding Officer's finding that the record should be reopened. Although Hearing Counsel also oppose the reopening of the proceeding, they agree with the Presiding Officer that the "very deficiencies which cause the remand still exist."

This proceeding was remanded for the formulation of a proper allocation formula based on the relative benefits derived from the use of Cargill's terminal facilities. If the Administrative Law Judge who presided at the reception of the evidence is of the opinion that the record is inadequate to permit him to make the necessary directed findings, then it remains his responsibility to take whatever action, including reopening of the record, to assure the development of a record sufficient to resolve the issues remanded. Indeed, given the Presiding Officer's determination as to the sufficiency of the record, we would have expected him *sua sponte* to reopen the proceeding rather than issuing a "Supplemental Decision" based on an admittedly "deficient" record. In any event, we are vacating the "Supplemental Decision" and remanding this proceeding for whatever further hearing the Presiding Officer deems appropriate.

THEREFORE, IT IS ORDERED, That the request for oral argument is denied.

IT IS FURTHER ORDERED, That the Supplemental Decision on Remand is vacated.

IT IS FURTHER ORDERED, That this proceeding be remanded and reopened for such further hearings as may be determined by the Presiding Officer.

IT IS FURTHER ORDERED, That the Presiding Officer shall serve his supplemental decision within 120 days from the date of this Order.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 510(I)

SWIFT & COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

April 5, 1978

Notice is hereby given that the Commission on April 5, 1978 determined not to review the decision of the Settlement Officer in this proceeding served March 24, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 510(I)

SWIFT & COMPANY

v.

SEA-LAND SERVICE, INC.

March 24, 1978

DECISION OF EDGAR T. COLE, SETTLEMENT OFFICER[1]

Swift & Company (complainant) claims $182.13 as reparation from Sea-Land Service, Inc. (respondent) for an alleged overcharge on a shipment of frozen beef tongues that moved from the port of New Orleans, Louisiana to the port of Felixstowe, England on bill of lading number E 69455 dated September 30, 1976. Complainant specifically alleges a violation of Section 18(b)(3) of the Shipping Act, 1916. Complainant submitted the claim to respondent on August 1, 1977. Respondent concurs in the fact that an incorrect rate was applied, however, denys the claim citing Rule 30, page 38 entitled "Overcharges: Claims for Refunds of Freight Charges" published in the Gulf/United Kingdom Conference which states:

". . . . claims for adjustment of freight charges must be presented to the Carrier in writing within six months after date of shipment."

A review of the complaint, supporting documentation and the involved tariff confirms the complainant's overcharge allegation. The complainant seeks reparation in the amount of $182.13, computed as follows:

Charges assessed by Sea-Land	$2,349.09
Correct Charges (40,790 lbs. [18.20982 wt. tons] times $119.00 = $2,166.96)	2,166.96
Total overcharge	$ 182.13

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

The complaint was filed with this Commission within the statutory time limit specified by statute; and it has been well established by the Commission that a carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate claim in such cases.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled under its applicable tariff. Accordingly, the complainant hereby is awarded reparation in the amount of $182.13. Evidence should be furnished the undersigned that the reparation has been made to complete the record.

(S) EDGAR T. COLE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 480(I)

MITSUBISHI INTERNATIONAL CORP.

v.

Y.S. LINE

NOTICE OF DETERMINATION NOT TO REVIEW

April 6, 1978

Notice is hereby given that the Commission on April 6, 1978, determined not to review the decision of the Settlement Officer in this proceeding served March 24, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 480(I)

MITSUBISHI INTERNATIONAL CORP.

v.

YAMASHITA-SHINNIHON LINE

March 24, 1978

Reparation awarded in part.

DECISION OF DONALD F. NORRIS, SETTLEMENT OFFICER

By a complaint filed with the Commission on December 27, 1977 pursuant to 46 CFR 502.301 et seq.,[1] the Mitsubishi International Corp. (Mitsubishi) makes claim for a refund in the amount of $105.93 with respect to a shipment of "fishing tackle" transported by the Yamashita-Shinnihon Line (Y.S. Line) from Yokohama to Boston via Tokyo under the Y.S. Line's bill of lading YYBS–003, dated December 23, 1975.[2]

The basis of the claim is as follows. At the time of shipment, the merchandise involved was rated upon its FOB value in accordance with the applicable tariff, that of the Japan/Korea-Atlantic and Gulf Freight Conference, Tariff No. 35, FMC–6 (the Tariff). That Tariff stipulated that fishing tacjle valued at $1,150 per revenue ton or less should be assessed a freight rate of $73 per 2,000 pounds or 40 cubic feet whichever earned the transporting carrier the greater revenue. Similarly, the same merchandise valued above $1,150 per revenue ton was to be rated at $90. The Tariff's Rule No. 8 requires shippers to submit commercial invoices, and Rule No. 11 explains how the FOB valuations are determined when necessary—either item by item or, in some instances, by the total valuation declared in the invoice divided by the total revenue tonnage. Mitsubishi submitted an item by item accounting. The Y.S. Line determined that the entire shipment amounted to slightly more than 3.4

[1] The respondent carrier having agreed to this informal procedure pursuant to 46 CFR 502.304(e), this decision will be final unless reviewed by the Commission within fifteen (15) days of the date of service.

[2] This shipment went forward in the "JAPAN AMBROSE", Voy. 23–A, which, according to the Lloyd's Shipping Index of January 19, 1976, transited the Panama Canal enroute to Baltimore on January 16. As the physical delivery of the merchandise encompassed by B/L YYBS–003 could only have occurred after this date, the Settlement Officer (S.O.) considers the claim filed within the two year statute of limitations specified in 46 CFR 502.302.

short tons and 12.7 measurement tons (508 cubic feet) and that the appropriate basis of assessment was the latter but at $90 per measurement ton. Mitsubishi contends that 6.65 measurement tons should have been rated at $90 and the remainder (6.04 measurement tons) at $73 because the FOB value of that portion of the shipment amounted to $1,150 per ton or less. Affected, too, is the application of the currency surcharge which then amounted to 3% of the freight rate plus the bunker surcharge of $3 per revenue ton.

The Y.S. Line's sole defense is that it is precluded from honoring the claim because of the presence of the Tariff's Rule No. 59. This rule proscribes the Conference's lines from honoring claims such as this if not submitted within six months of the date of shipment. The S.O. is compelled to join a legion of others who have held that no rule such as No. 59 can serve to subvert the Commission's jurisdiction in matters such as these. E.G., see *Time Limit on the Filing of Overcharge Claims,* 10 FMC 1 (1966); *Proposed Rule—Time Limit on Filing Overcharge Claims,* 12 FMC 298 (1969). Accordingly, the defense is rejected.

The S.O. has reviewed the matter thoroughly and has found that the volume of the shipment was slightly understated[3] and that 4.9925 revenue tons should have been rated at $73 and the remainder at $90. The value of 23 cartons of fishing tackle (Nos. 6924 through 6946) amounting to 42.2 cubic feet (1.055 measurement tons) is calculated to have been $1,151.09 per 40 cubic feet and was rated correctly at $90 per measurement ton. Accordingly, the correct assessment of freight and charges is as follows:

4.9925 tons × $73./ton	$ 364.45
7.7225 tons × $90./ton	695.02
12.715 tons × $3./ton (bunker surcharge)	38.14
Sub-total	$1,097.61
Currency surcharge—3%	32.93
12.715 tons × $2.50./ton (delivery charge)	31.79
Grand Total	$1,162.33

As the Y.S. Line assessed Mitsubishi $1,248.28 in freight and charges, the latter is entitled to a refund of $85.95. So ordered.

(S) DONALD F. NORRIS,
Settlement Officer.

[3] According to the "Certificate and List of Measurement and/or Weight" prepared by the Japan Marine Surveyers & Sworn Measurers Association, an organization employed by the Conference to perform such services, the volume of the shipment totalled 508.6 cubic feet or 12.715 measurement tons of 40 cubic feet.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–45

MADEPLAC S.A. INDUSTRIA DE MADEIRAS

v.

L. FIGUERIEDO NAVEGACAO S.A.
A/K/A FROTA AMAZONICA S.A.

ADOPTION OF INITIAL DECISION

April 12, 1978

This proceeding was initiated on the basis of a complaint filed by Madeplac S.A. Industria De Madeiras (Madeplac or Complainant) against L. Figueriedo Navegacao, S.A. a/k/a Frota Amazonica (Amazoncia or Respondent) alleging a freight overcharge on cargo shipped from Savannah, Georgia, to Manus, Brazil, aboard Respondent's vessel, the Salimoes. As a result of the alleged overcharge, Madeplac asserts a violation of section 18(b)(3) of the Shipping Act, 1916 and seeks reparation in the amount of $24,461.18.[1] Administrative Law Judge William Beasley Harris in his Initial Decision concluded that: (1) Complainant had failed to meet its burden of proving a violation of section 18(b)(3) of the Act by Respondent, and; (2) the Respondent had properly classified and rated the cargo shipped by Complainant. Complainant filed exceptions to the Initial Decision to which Respondent replied. We denied that request for oral argument.

FACTS

On October 2, 1973, Madeplac, a Brazilian corporation engaged in the business of processing wood, shipped certain cargo from Savannah, Georgia to Manus, Brazil aboard a vessel of Amazonica. The bill of lading described the cargo as "Components for Construction of Pre-Fabricated Building (See Attached)."[2] Respondent rated the shipment as "Buildings, Portable, K.D., [Knocked down] In Sections or Set-Up", as published in

[1] Initially, Complainant sought reparations of $45,580.38.

[2] The attachment referred to in the bill of lading consists of an itemized list of the items moved under the bill of lading. (Exhibit 4).

its tariff (3rd Revised, page 85 of the Inter-American Freight Conference—Section A, Tariff No. 3 (FMC No. 7)).

Complainant contends that because the building was a "permanent structure" when assembled, the "portable" building classification does not apply to the shipment. As a result, and because no other tariff classification is allegedly applicable to the shipment as a single item, Complainant contends that such shipment must be rated for each of its separate parts.

Respondent denied the Complainant's allegations and asserted, *inter alia,* that the cargo was properly rated. Alternatively, Respondent contended that if the classification utilized was improper then the cargo should be rated on its individual parts which, in its view, would result in additional freight charges being assessed against Complainant.

Discussion

The Presiding Officer, in his Initial Decision, while granting Respondent's Motion to Dismiss, nevertheless declared that "this decision is on the merits of the case." He noted that while Complainant alleged in its complaint that it had been subjected to the payment of charges for transportation which were, when exacted and still are, in excess of those lawfully applicable in violation of section 18(b)(3) of the Shipping Act, 1916, "the evidence presented by the Complainant bears little resemblance to the allegations in its complaint and burden of proof."

In evaluating the evidence of record in this proceeding, the Presiding Officer points out that in reparation proceedings the claimant has the burden of establishing by a preponderance of the evidence that the respondent exacted charges for transportation in excess of those lawfully applicable. *Johnson and Johnson International v. Venezuelan Lines,* Dockets Nos. 71–46, 71–47, 16 F.M.C. 87, 93 (1973). The Presiding Officer then notes that although Complainant's expert witness testified that the cargo was improperly rated in spite of the bill of lading description (Exhibit 3) and the shipper's export declaration (Exhibit 5), that witness nevertheless was unable to determine if there had been an overcharge. Accordingly, the Presiding Officer found that the Complainant had failed to meet its burden of proving a violation of the Act by Respondent and granted Respondent's Motion to Dismiss.

The Presiding Officer also determined that the evidence of record in this proceeding supported the Respondent's rating of the cargo. This latter finding he explained as follows:

> In view of the contract (Exh. 1) and other references to its freight as one building, and *Websters Third New International Dictionary* definition of portable as . . . as adj., capable of being carried; n., something portable as—a portable schoolhouse or other building—the building to be transported to Manus, Brazil; the classification used by Respondent to rate the freight was proper.

Complainant urges the Commission to find that the Presiding Officer erred. Complainant argues that it is not alleging that something other than what was shown on the bill of lading was actually shipped but rather that the Respondent misrated the cargo described on the bill of lading. Complainant submits that its evidence is unrefuted and unequivocally establishes that Respondent did, in fact, apply an improper rate.

According to Complainant its "unrefuted evidence" establishes that the components shipped were not a complete building nor, for that matter, a portable building, but rather the components for the construction of a prefabricated building. Complainant argues that, because Respondent's tariff does not contain such a classification, the shipment should be rated on its individual parts. Complainant concludes that it has met its burden of showing that the cargo was misrated and the Commission should reverse the Presiding Officer's Initial Decision and award the Complainant reparation.

Respondent supports the Presiding Officer's Initial Decision. Respondent argues that Complainant does not understand the law with respect to its burden of proof in reparation proceedings. Respondent contends that Complainant erred in assessing its burden in this case as follows:

> Our burden, as we see it, is to prove by a preponderance of the evidence that the respondent misrated the articles described in the bill of lading.

Respondent submits that this is a misstatement of the law. It is Respondents position that the Presiding Officer properly held that:

> To sustain a claim for reparations, a complaint must allege and prove that the respondent exacted charges in excess of those lawfully applicable in violation of section 18(b)(3) of the Shipping Act, 1916 as amended. (Respondent's Replies to Exceptions, page 2).

Respondent maintains that, even assuming that Complainant has established that the cargo was misrated, *i.e.*, misclassified, Complainant has not established that Respondent exacted charges in excess of those lawfully applicable as provided by its tariff in violation of section 18(b)(3). Respondent would have Complainant prove that Respondent misrated (misclassified) the cargo which resulted in the Respondent exacting charges in excess of those lawfully applicable. Respondent argues that Complainant has proved neither.

Respondent argues that evidence of record supports its contention that Complainant failed to meet its heavy burden of showing that the charges assessed were in excess of those lawfully applicable. For instance, Respondent points out that while the bill of lading (Exhibit 3) shows the cargo shipped as weighing 467,805 pounds and measuring 21,630 cubic feet, the attachment to the bill of lading (Exhibit 4) shows that the components weighed 466,563 pounds and measured 21,563 cubic feet. Respondent argues that this inconsistency and others[3] are indicative of the Complainant's failure to meet its heavy burden of proof.

[3] Respondent refers to various documents, including pleadings in this proceeding, wherein Complainant or its agent referred to the cargo as "a metallic structure", a "knocked down structure, a building"; and, in Complainant's Opening Brief, the "components of a building not a complete building."

Notwithstanding Complainant's alleged failure to meet its burden of proof, Respondent contends that the Presiding Officer correctly determined that the cargo shipped was properly rated. Respondent claims that Complainant was properly billed at the rate provided for "Buildings, Portable, K.D., In Sections or Set Up", which Respondent explains applies to: (1) portable buildings, (2) knocked down buildings, (3) buildings shipped in sections and (4) buildings shipped set up. Respondent submits that because the building was knocked down, the proper tariff rate was applied. Respondent concludes that even if the tariff required that the building be portable, as argued by Complainant, it was transported in a knocked down condition and was, *ipso facto,* a portable, knocked down building.

Discussion and Conclusions

The record supports the Presiding Officer's dismissal of the complaint because of the failure of the Complainant to carry its burden of proof. Furthermore, we agree with the Presiding Officer that the evidence of record supports the Respondent's classification of the cargo. We conclude, therefore, that the Presiding Officer's findings and conclusions are proper and adopt them as our own. However, we believe that some additional discussion is necessary.

In this proceeding Complainant has alleged that Respondent misrated the cargo and that this misrating resulted in an overcharge. Before these allegations can prevail, the Complainant must sustain a heavy burden of proof that the carrier misrated the cargo and that the misrating resulted in charges in excess of those lawfully applicable. *Ocean Freight Consultants v. Royal Netherlands S.S. Co.,* 17 F.M.C. 143 (1973); *Johnson & Johnson v. Venezuelan Line,* 16 F.M.C. 84 (1973).

In this proceeding Complainant's contentions as to the description of the cargo have been inconsistent. At various times Complainant has referred to the cargo as a building (the complaint), a complete structure K.D. (Exhibit 9); not a building at all but rather the components for the construction of a building (Complainant's opening brief). In its complaint, Complainant alleged that while the cargo was a building, it was not "portable" and thus should be rated on its individual parts. In its Opening Brief and in its Exceptions, Complainant argues that the cargo was not a building at all but rather individual components which must be individually rated.

Furthermore, even assuming that Complainant has established that the Respondent misclassified the cargo, the evidence with respect to the weight and amount of the cargo is inconsistent, thus clouding the Complainant's demand for reparations. As noted by Respondent and found by the Presiding Officer, the bill of lading (Exhibit 3) indicates that the shipment consisted of 7 boxes, 24 crates, 33 bundles and 109 pieces, a total of *173* pieces, measuring 21,630 cubic feet and weighing *467,805* pounds. Yet, the attachment to the bill of lading (Exhibit 4) shows the shipment as weighing *466,353*[4] pounds and measuring 21,563 cubic feet; and the export declaration indicates that the shipment consisted of *176* packages.

In summary, the Complainant has failed to meet its burden of showing that the Respondent misrated the cargo which resulted in charges in excess of those lawfully applicable. Rather, the evidence of record in this proceeding supports the Respondent's classification of the cargo.

The bill of lading described the cargo as "Components for the Construction of Pre-Fabricated Buildings (See Attached.)" The Respondent's tariff (Ex. 22) provided that commodities shipped disassembled shall be rated as a unit instead of applying rates for various parts comprising the unit. The record here indicates that the cargo consisted of the necessary parts to assemble the structure in Brazil although there was testimony that some masonry work was done on the construction site. The freight shipped consisted of pre-cut, drilled and punched parts that merely needed assembly in Brazil. Furthermore, although the completed building is of considerable size, and not portable when assembled, this does not negate the fact that the disassembled building was transported by Respondent, thereby evidencing its portability.

The shipper's export declaration itself is evidence that the size of a completed prefabricated structure does not alter the portability of a building. The export declaration (Exhibit 5) described the cargo as "Prefabricate (sic) Buildings of Aluminum." The Schedule B commodity number designated for the cargo was 69.2040, which is entitled "Prefabricated and portable buildings of aluminum." The Schedule B commodity number has listed thereunder prefabricated aircraft hangers, exhibit halls, garages, henhouses, silos, and tool sheds, all of which are of considerable size when set up. By virtue of their size these buildings are not readily portable when assembled, yet when disassembled in prefabricated sections, these structures are readily portable.

Finally, even assuming that Complainant has established that Respondent misclassified the cargo described in the bill of lading, Complainant has not met its burden of showing that the charges collected were in excess of those lawfully applicable. While Complainant's expert witness testified that the cargo was misclassified, he further testified that based on the testimony and evidence presented by Complainant, he could not determine if there had been an overcharge. In fact, the witness testified that if he rated the cargo based upon the testimony and evidence of record he would have assigned an N.O.S. classification to most of the cargo, which would have resulted in additional freight charges being assessed.

Accordingly, upon careful consideration of the record, the exceptions and reply thereto, we conclude that the Presiding Officer's factual findings and his conclusions with respect thereto were supported and correct.

[4] The net weight shown on Exhibit 4 is 458,421.

Exceptions not specifically discussed have nevertheless been reviewed and found either to constitute reargument of contentions already properly disposed of by the Presiding Officer or to be otherwise without merit. We therefore adopt the Initial Decision as our own and make it part hereof.

It is so Ordered.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 75–45

MADEPLAC S.A. INDUSTRIA DE MADEIRAS

v.

L. FIGUEIREDO NAVEGACAO, S.A.
A/K/A FROTA AMAZONICA, S.A.

April 13, 1977

Reparation: Complaint Dismissed.

William Levenstein for Complainant.

Michael J. Connelly for Respondent.

Jack E. Ferrebee, Commission's Office of General Counsel for subpoened[1] Commission employee.

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

This complaint case seeks reparation for alleged violations of Section 18(b)(3) of the Shipping Act, 1916. The complainant, Madeplac S.A. Industria de Madeiras (Madeplac) alleges that in violation of the said section it has been subjected to the payment of charges for transportation of freight on respondent's carrier *Salimoes*, from Savannah, Georgia, to Manaus, Brazil, in excess of charges lawfully applicable. Madeplac seeks from L. Figueiredo Navegacao, S.A. A/K/A Frota Amazonica, S.A. (Amazonica), named as respondent, reparation in the sum of $44,580.38 plus interest at 6% per annum from the date of payment of the alleged overcharge.

The complaint in this proceeding was filed October 24, 1975 (served October 29, 1975). Notice of the filing of the complaint was published in the *Federal Register* November 4, 1975 (Page 51224, Vol. 40, No. 213).

On February 3, 1976, at a hearing held in Washington, D.C., upon the respondent's argument that the freight moved under an October 2, 1973 Bill of Lading No. 26, on an irrevocable letter of credit, amounting to

[1] "A subpoena for the attendance of a Commission employee . . . shall be served upon the General Counsel . . . ." Rule 9(e) Commission's Rules of Practice and Procedure, 46 CFR 502.135.

[2] This decision became the decision of the Commission April 12, 1978.

prepayment of freight charges, and the complaint was not filed until October 24, 1975, not within the two years the Statute of Limitation in Section 22 of the Shipping Act provides, that the Commission was without jurisdiction, the Presiding Administrative Law Judge agreed and dismissed the complaint.

The complainant appealed to the Commission. The Commission on July 20, 1976, served its order remanding the proceeding for further hearings and findings, consistent with the order remanding, as may be appropriate.

On remand, pursuant to notice served July 21, 1976, a prehearing conference was held August 4, 1976. The parties entered into twenty (20) stipulations. The official stenographic report of the prehearing conference consists of pages 1 through 35. The date set at the prehearing conference for hearings to commence was October 6, 1976. Subsequently, at the request of the respondent the hearing date was changed to November 10, 1976.

The hearings on remand began on Wednesday, November 10, 1976, continued and concluded on November 11, 1976. The complainant presented two witnesses and the respondent presented two witnesses. Twenty-six (26) exhibits were identified, of which fourteen (14) were received in evidence (Exhs. 1, 2, 3, 4, 5, 9, 11, 13, 19, 21, 22, 23, 25 and 26); three (3) were not received in evidence (Exhs. for identification No. 20, 24(a) and 24(b)); the remainder were not asked to be received in evidence. The official stenographic report of the hearings consists of 2 volumes covering pages 1 through 185.

COMPLAINANT'S PRESENTATION TO PROVE ALLEGATIONS IN COMPLAINT

Madeplac called as a Witness John R. Prince, Jr., President of Bobbitt International Limited. Witness Prince substantially testified:

Bobbitt International Limited, domestically are general contractors and Butler Building dealers; internationally are a design and sales organization. Mr. Prince was involved in the sale of a Special Butler Building to Madeplac in Manaus, Brazil. He typed and signed the pro forma proposal and contract agreement between the parties which is Exh. 1 (Tr. 52). The contract calls for "one 150′ wide × 650′ long × 23′ 8″ eave height Type LRF II Special BUTLER Building . . . ." (Exh. 1) The equipment for the building, a plywood plant, was designed and laid out by a Mr. Kye from Canada (Tr. 52). Mr. Prince determined what parts were needed in order to put the building together. Butler Manufacturing Co. actually manufactured the components that were shipped (Tr. 15).

The price of the material sold, including material, inland freight and export crating was $220,000 (Exh. 1). Mr. Prince put together the prices of the components from the price book, a standard thing that Butler has (Tr. 35). He buys the material from the price book at the standard price Butler has (*Ibid*). Mr. Prince paid Butler Manufacturing Co. a net total of

$139,039 for the entire shipment that was shipped (Tr. 44). The total material cost of $198,511 (Exh. 1) is the price for which Mr. Prince sold all the materials (Tr. 46). The $220,000 price of the material sold (Exh. 1) did not include ocean transport charges (Tr. 10). The buyer of the building was supposed to pay the freight charges for shipment (Tr. 25). Bobbitt was paid for the material by a letter of credit (Tr. 10).

The complainant, without objection from the respondent, presented that the respondent, in response to requests for admission, had admitted:

1. On November 16, 1973, Agencias Mundiais S.A., was the agent of respondent in Manaus, Brazil, authorized to accept payments of freight charges for shipments delivered by respondent at Manaus, Brazil.

2. On November 16, 1973, said agent received the sum of three hundred eighty-five thousand three hundred and seventeen cruzeiros and eighty-six centaros (cr.385,317.86) in payment of the $62,551.60 freight charge made by respondent for the carriage of cargo from Savannah, Georgia, to Manaus, Brazil, under its *Salimoes* Bill of Lading No. 26, dated October 2, 1973, and issued its receipt No. 1964, for said payment.

3. That receipt No. 1964 (Exh. 21) may be translated to read that the payment referred to therein was received from Madeplac and that such payment was in fact received from a representative of the complainant.

4. That the copy of the said receipt is a true and correct copy of said receipt No. 1964 and is signed by an official or employee of said agent authorized to issue and sign said receipts.

The complainant introduced Exhs. 3 and 4 which were received in evidence. Exh. 3 is a copy of Bill of Lading No. 26, dated October 2, 1973, which covered the shipment herein (Tr. 24). Exh. 4 is the attachment to the Bill of Lading, listing the components shipped thereunder (Tr. 28). Referring to Exh. 4, Mr Prince stated package No. 1 described "Jack (one)" was a structural pipe column, with a hydraulic jack (Tr. 29), a piece of equipment used to assemble the building. As to package No. 2, "lockrivet guns" were tools (Tr. 30) "2 jacks" worked in combination with the final jack, "vertical support angles," all had to do with closing in the gable of that building (Tr. 30). A gable is the area between the top of the roof and the flat planes, the eave, a sort of triangle.

Packages No. 101 through No. 105 included hardware and caulk (Tr. 30). Packages No. 106 and No. 107 were structural bracing pieces for bracing the building. Package No. 108 is a misprint, cutters is supposed to be gutters (Tr. 31). Packages No. 108 to 111 are all light sheetmetal for framing the gutters. Then 112, with the exception of 125, 126, are aluminum sheets for the roof. 124, 125 and 126 are the panels, the sheets to go on that gable (Tr. 31). The remaining items are structural steel, consisting of beams, columns and eave struts, which consist of crates 130 to 270 (Tr. 31). Mr. Prince paid $86,130 for the column and roof beams (Tr. 43) which weighed 395,982 pounds (Tr. 44).

The components were all single pieces and the steel components were painted with a red oxide to prevent rusting during shipping (Tr. 32).

Mr. Prince viewed the building in Manaus on two occasions. The building has masonry walls that were supplied locally (Tr. 53).

The complainant called as a witness, under subpoena, the Commission's Assistant Chief, Office of Tariffs and Intermodalism, L. Merrill Simpson. He qualified as an expert in transportation (Tr. 63,) reading, construing and interpreting tariffs (Tr. 60). Mr. Simpson, referring to the B/L 26 description of goods "Components for Construction of Prefabricated Building (See Attached)," said he examined the respondent's tariff applicable herein and did not find such a rate (Tr. 61). And, absent a rate for a building, or the component parts of the building, he would rate each of the components that were made a part of the Bill of Lading that appear in the attachment (Exh. 4) (Tr. 64).

Rule 1(b) (Exh. 23) of the tariff reads:

Rating of K. D. shipments and packages of mixed freight—Parts of Commodities

Commodities shipped disassembled shall be rated as a unit instead of applying rates for various parts comprising the unit unless otherwise specified.

Where packages contain more than one commodity, freight must be assessed on said package on the highest rated commodity in the packages.

Whenever rates or ratings are provided for on commodities named in this tariff, the same basis will apply to parts thereof, when so described on the ocean bills of lading, except where specific rates or ratings are provided for such parts.

It was Witness Simpson's opinion, on the basis of the B/L description and the evidence regarding the size of the finished building, that the tariff item "Buildings, Portable, K. D. in Sections on Set-up" does not cover the articles shipped because the tariff item requires that the building be a portable building and he doesn't believe a building which components weigh 469,805 pounds is a portable building (Tr. 78). Witness Simpson is of the opinion this freight should have been rated for each component shown in the package list (Tr. 106). He testified that from looking at document (Exh. 4), Witness could not clearly tell how the goods should have been rated (Tr. 107). And, also, if told by the shipper the shipment was one building, he would have no alternative but to go to an NOS rate (Tr. 123). Further, if one did not know what the components were, an NOS rate would be resorted to (Tr. 124). If he were required to rate this shipment today, Witness Simpson, except for the aluminum sheets and the hardware would rate it NOS (*Ibid*). He does not know that there was an overcharge based upon all the evidence submitted so far (Tr. 125). It is his opinion that the freight should not have moved under the classification "Buildings, Portable, K. D. in Sections or Set-up."

According to Witness Simpson, when a building is knocked down, it is no longer a building, but components or sections of a building (Tr. 131).

The complainant rested his case. The respondent moved to dismiss the complaint (Tr. 155) on the basis the complainant's expert witness had testified that, based upon everything that he heard, there was no way of concluding there had been an overcharge in this shipment of the freight

(*Ibid*). Also that the complainant had not shown any facts to show that any other rate should be applied. The motion was taken under advisement by the Presiding Administrative Law Judge (Tr. 156, 158, 159).

RESPONDENT'S PRESENTATION

The respondent put on and completed its case.

In its defense, the respondent called Witness Michael Carroll, who is employed by Butler Manufacturing Co. as National Accounts representative. He is familiar with the LRF II Butler Building. He introduced what is in evidence as Exh. 19, pictures of Butler LFR II Building and Exh. 26, the specifications of Butler Manufacturing Co. as to how the company designs the LRF II (Tr. 163).

The respondent called Witness Joseph Urso, who is employed by TTT Ship Agencies, Inc., New York, as line manager for Amazonica (Tr. 179). TTT became the general agent for Amazonica March 1, 1976 (Tr. 180). He testified Amazonica (then L. Figueiredo) first became aware Madeplac was dissatisfied with the freight charges November 16, 1973 (Exh. 13) (Tr. 180). The formal written claim was received July 8, 1974 (Tr. 181) from Ocean Freight Consultants appointed by Madeplac to act on its behalf. It was agreed with Ocean Freight Consultants (per a Mr. Bilby) that the principals of Amazonica would abide by any decision of the Interamerican Freight Conference with regard to this controversy (Tr. 182). The Interamerican Freight Conference sent a letter saying the correct rate was assessed.

The complainant offered no rebuttal (Tr. 182).

The respondent renewed its motion to dismiss the complaint in this proceeding (Tr. 183). The Presiding Judge kept the motion under advisement and directed that the parties in their brief address the motion.

BRIEFING

Madeplac served and filed on January 12, 1977 a 21 page opening brief. Amazonica, on February 15, 1977 served (received February 17, 1977, in the Office of the Secretary of the Commission) a 25 page reply brief. On March 7, 1977, Madeplac filed a 10 page reply brief.

In ruling on the renewed motions to dismiss at the close of all evidence, the Presiding Administrative Law Judge is entitled to take into consideration all evidence presented both before and after the initial motion to dismiss at the close of the complainant's evidence. *Wealden Corp. v. Schweig*, CA–5th, 1973, 482 F (2d) 550, 552.

It is from the stipulations between the parties, official stenographic reports, the exhibits received in evidence and the papers filed in this proceeding that the Presiding Administrative Law Judge finds the following facts.

FACTS

1. Complainant Madeplac S. A. Industria de Madeiras is a corporation incorporated under the laws of Brazil, engaged principally in the processing of wood. Its principal place of business is located in Manaus, Brazil.

2. The respondent L. Figueiredo Navegacao, S.A. A/K/A Frota Amazonica, S.A. is a common carrier by water. Frota Amazonica is a successor in interest to L. Figueiredo Navegacao.

3. At all times relevant herein, Amazonica was a common carrier by water serving the trade from Savannah, Georgia, to Manaus, Brazil; and, Amazonica was a member of the Interamerican Freight Conference (I.A.F.C.).

4. At all times relevant herein, the applicable tariff for shipments carried by Amazonica from Savannah, Georgia, to Manaus, Brazil, was Interamerican Freight Conference, Section A, Tariff No. 3 (FMC No. 7).

5. Amazonica's general agent is, and at all times relevant herein was, Atlantic Coast Agencies, Inc.

6. Bobbitt International, Ltd., a subsidiary of G. E. Bobbitt Company, Raleigh, North Carolina, is a Butler Builder, *i.e.*, Bobbitt has a Butler franchise to market the Butler pre-engineered building in the Raleigh area.

7. On October 2, 1973, Amazonica issued its Bill of Lading No. 26 (Exh. 3) to cover the shipment in question here by Bobbitt International, Ltd., from Savannah, Georgia, consigned to the order of Banco Frances E. Italiano Para A American do Sal, Manaus, in Manaus, Brazil (the parties stipulated that Madeplac was the consignee of the shipment which moved under B/L 26—Stipulation 9, prehearing conference transcript, p. 8), on the M/S *Salimoes* a vessel of respondent.

8. On Bill of Lading No. 26, the shipment was described as "Components for Construction of Pre-Fabricated Building (See Attached)." Butler Manufacturing Co. manufactured the components that were shipped, to meet the needs for a building to be used in Bobbitt International, Ltd.'s business. Bill of Lading No. 26 indicates the shipment consisted of 7 boxes, 24 crates, 33 bundles and 109 pieces, a total of 173 pieces weighing 467,805 pounds (stipulated by parties—stipulation 11, prehearing Tr. 8) and measuring 21,630 cubic feet. B/L 26 was marked "Feight Collect." (Exh. 4 lists 173 packages weighing 466,353 pounds and measuring 21,563 cubic feet. Exh. 5 says the shipment totaled 176 packages, *i.e.*, 10 boxes, 24 crates, 33 bundles and 109 pieces.)

9. On the shipper's export declaration (Exh. 5) the cargo was described as 1 unit "Prefabricated Buildings of Aluminum." The Schedule B Commodity No. was listed as 691.2040 indicating the cargo was categorized by Bobbitt as "Prefabricated and Portable Buildings of Aluminum" (*Ibid*).

10. The material shipped was sold by Bobbit International, Ltd. to Madeplac as one 150 foot wide × 650 foot long × 23 feet 8 inch eave

height Type LRF II Special Butler Building for total material costs of $198,511.00; Inland Freight $9,639.00, Export Crating (60,080 pounds) $11,850.00. Total FOB $220,000.00. Total weight 671,279 pounds (Exh. 1).

11. Prior to the date of shipment, a letter of credit (irrevocable credit—dated August 7, 1973) in favor of Bobbitt International, Ltd. for the account of Madeplac, was issued in the amount of $176,000.00 covering "1 building of steel construction with aluminum finishing, Butler special, type LRF II—FOB Manaus." (English translation of Portuguese Exh. 2), accompanied by one full set of clean "on board" Ocean Bill of Lading . . . showing the amount of freight both in figures and words, issued to the Banco Frances E. Italiano Para A America Do Sul, Manaus, evidencing shipment from any U.S.A. port to Manaus.

12. On October 2, 1973, the tariff rate for carriage from Savannah, Georgia, to Manaus, Brazil, was $128.50 per weight or measurement ton for any of the following:

(a) Tools (stipulation 12—prehearing Tr. 8)
(b) Hardware (stipulation 15—prehearing TR. 8)
(c) Cargo not otherwise specified in the tariff (stipulation 19—prehearing Tr. 12).

13. On October 2, 1973, the tariff rate for the carriage of aluminum sheets from Savannah, Georgia, to Manaus, Brazil, was $111.00 per weight or measurement ton (stipulation 14, prehearing Tr. 8, 9).

14. Respondent billed for its service on the basis of a rate of $112.50 W/M as provided in its tariff for "Buildings, Portable, K. D. in Sections or Set-up." The charges were computed at $112.50 per 40 cubic feet for 20,825 cubic feet ($58,570.31) plus $112.50 per 2,240 pounds for 79,272 pounds ($3,981.29) ($58,570.31 + $3,981.29 = $62,551.60) (Exh. 3; stipulation 16, 17; prehearing Tr. 10).

15. The respondent's freight charges of $62,551.60 were correct if the aforementioned tariff provisions (Buildings, Portable, K. D., in Sections or Set-up) properly covered the cargo (stipulation 17; prehearing Tr. 10).

16. On November 16, 1973, respondent received $62,551.60 as payment of the freight charges billed for the shipment of the cargo (stipulation 15; Exh. 21).

17. The respondent did not have custody of the cargo at any time on November 16, 1973 or any time thereafter (stipulation 20).

18. The complainant did not present a claim for adjustment of the freight charges until after the shipment had left the custody of the respondent. It was not until July 8, 1974, more than six months after the date of shipment that the complainant presented a written claim for adjustment through its authorized agent Ocean Freight Consultants, Inc. (Exh. 11; Tr 181).

DISCUSSION

The complainant alleged in Paragraph IV of its complaint and had the burden of proving that it has " . . . been subjected to the payment of charges for transportation which were, when exacted and still are, in excess of those lawfully applicable, in violation of Section 18(b)(3) of the Shipping Act, 1916, as amended, injuring complainant to his damage in the sum of $44,580.38." The respondent in its answer denied each and every allegation contained in Paragraph IV of the complaint.

The complainant neither in its opening brief nor reply brief made any mention of the motion to dismiss. The respondent arguing in its reply brief the complainant has failed to meet its heavy burden of proof on the issue of whether the freight charges were proper, merely mentions the pendency of the motion (p. 21).

As trier of fact, the Presiding Administrative Law Judge, in considering the evidence, is not bound to view it in a light most favorable to the complainant, with all attendant favorable presumptions, but is bound to take, and took an unbiased view of all the evidence, direct and circumstantial, and accredited such weight as he believed it entitled to receive. (See *Allred v. Sasser,* 7 Cir., 1948, 170 F (2d) 233.) He did not concern himself with whether the complainant made out a *prima facie* case. (See *Emerson Electric Co. v. Farmer,* CA–5, 1970, 427 F (2d) 1082, and *Ellis v. Carter,* CA 9, 1964, 328 F (2d) 573.) Instead he weighed the evidence, resolving any conflicts in it and decided for himself where the preponderance lies.

The evidence presented by the complainant bears little relevance to the allegations in its complaint and burden of proof. The allegation in the complaint is as indicated above. Nevertheless, the complainant states, *inter alia,* "We are alleging that the respondent incorrectly and improperly rated the articles described on their bill of lading. A determination of the lawful rate is a question of law . . . . Here the Commission, as required by Section 22 of the Act, is called upon to determine the lawful rate(s) for the shipment involved" (complainant's reply brief, p. 4, 5). The Presiding Administrative Law Judge strongly points out that prior to reaching the determination of law and application of Section 22 of the Act by the Commission suggested by the complainant, that under the pleadings the complainant must go forward.

The complainant, under the pleadings, has the affirmative of the issue whether the respondent exacted charges for transportation in excess of those lawfully applicable, in violation of Section 18(b)(3) of the Shipping Act, 1916, as amended. And, upon the complainant rests the burden of sustaining its allegations of fact by a preponderance of evidence.

The Bill of Lading No. 26 described the freight as "Components for Construction of Pre-fabricated Building (See Attached)." The respondent billed for its services on the basis of a rate of $112.50 W/M in its tariff for "Buildings, Portable, K. D. in Sections or Set-up." Witness Simpson was of the opinion the freight should not have moved under that classification, but he did not know that there was an overcharge based on the evidence. The Shipper's Export Declaration (Exh. 5) describes the goods as "Prefabricated buildings of aluminum" net quantity, "1 unit." The complainant's agent, Ocean Freight Consultants, Inc., referred to shipment of "Plant structures—knocked down" (Exh. 9). Witness Simpson, the complainant argues (opening brief, p. 9), testified that under the tariff item "Buildings, Portable, K. D. in Sections or Set-up" the building must be a "portable" building and that the description that does not cover any building that is not portable.

Besides the description of the freight above, there is the description in the contract between the parties (Exh. 1) for ". . . one . . . type LRF II Special Butler Building." "One 150′ wide × 650′ long × 23′ 8″ eave height type LRF II Special Butler Building" (*Ibid*).

On the basis of the whole record, the complainant has not sustained the burden of showing by a preponderance of the evidence violation by the respondent of Section 18(b)(3) of the Shipping Act. It is well established that a carrier should not be lightly or perfunctorily found to have violated the Act and, hence, liable for reparation. Each claim should be carefully weighed on its own merits and reparation awarded only where the evidence of violation is proved by a preponderance of the evidence—especially, as here, where the goods in question have left the carrier's custody or control. See *Johnson & Johnson International v. Venezuelan Lines,* Docket Nos. 71–46, 71–47, 16 FMC 87, 93 (1973). The shipper and not the carrier must bear a heavy burden of proof to establish his claim in cases such as this. Claimant here has failed to provide the requisite proof of its contention.

Further, in view of the contract (Exh. 1) and other references to its freight as one building, and *Webster's Third New International Dictionary* definition of portable—as adj., capable of being carried; n., something portable as—a portable schoolhouse or other building—the building to be transported to Manaus, Brazil; the classification used by the respondent to rate the freight was proper.

The Presiding Administrative Law Judge *finds* and *concludes* that the complainant did not meet the burden of proving violation by the respondent of Section 18(b)(3) of the Shipping Act, 1916, as amended. The complainant has not presented evidence to meet such a burden. The evidence presented fails to show a right to relief.

This decision is on the merits of the case. The motion of the respondent to dismiss the complainant should be granted.

FINDINGS AND CONCLUSIONS

Upon consideration of all the aforesaid, the Pending Administrative Law Judge *finds* and *concludes,* in addition to the findings and conclusions hereinbefore stated:

(1) The complainant has failed to meet its burden of proving violation of Section 18(b)(3) of the Act by the respondent.

(2) The respondent's motion to dismiss the complaint for such failure should be granted.

WHEREFORE, IT IS ORDERED, subject to review by the Commission, as provded in the Commission's Rules of Practice and Procedure, that:

(A) The motion of respondent to dismiss the complaint here, be and hereby is granted.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–31

CHEVRON CHEMICAL INTERNATIONAL, INC.

v.

BARBER BLUE SEA LINE

Complaint dismissed. Complainant failed to state a claim upon which relief may be granted.

William Levenstein for Complainant.

Raymound T. Frias, Vice President, Barber Steamship Lines, Inc., as Agent for Respondent.

REPORT

April 17, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Clarence Morse, *Commissioners*)

The proceeding came before the Commission on exceptions from Complainant Chevron International, Inc. to the Initial Decision of Administrative Law Judge William Beasley Harris denying reparation for alleged freight overcharges on a shipment described in the bill of lading as "BP 225 (Oloa 219) LUBRICATING OIL ADDITIVES IN BULK", carried by Respondent Barber Blue Sea Line from New Orleans, Louisiana, to Port Kelang, Malaysia.

Pursuant to a Bulk Oil Agreement entered into by the parties,[1] Complainant paid freight charges in the amount of $31,844.32, computed on the basis of $85.00 per long ton plus $17.50 applicable surcharge. Respondent had not published that rate in its tariff and maintains that the agreement was for the carriage of bulk cargo exempt from the filing requirements of the Shipping Act.

At the time of shipment, the Atlantic-Gulf/Singapore, Malaya & Thailand Conference had opened the rate on lubricating oil additives

[1] The agreement is used in the Atlantic-Gulf/Singapore Malaya & Thailand Conference for the shipment of bulk oil. Barber Blue Sea Line is a member of the Conference.

leaving its members free to file individual rates subject to a $70.50 per long ton minimum.

Complainant points out that the Conference tariff required that Conference member lines furnish the Conference their rates "for filing with the Federal Maritime Commission" and concludes that:

> . . . since a carrier subject to the Shipping Act cannot lawfully carry cargo without having a rate for its service on file with the Commission and since *respondent did not file any rate other than the minimum rate to which it was a party*, the reduced rate of $70.50/LT is the only rate lawfully applicable to any shipment of the commodity that was carried by respondent at that time.[2] (Emphasis added)

We do not agree. Complainant admits that Respondent had not filed its own rate on lubricating oil additives under the open rate provision of the Conference tariff. Nor could the setting of a minimum for the member lines individual rates constitute the filing of a $70.50 rate by the Conference. Complainant's suggestion that because Respondent was a "party" to the $70.50 minimum agreement, such minimum is "the only rate lawfully applicable" is wholly without merit. There is absolutely no offered or known support for Complainant's theory that reparation should be granted on the basis of a nonexistent rate.

We affirm therefore the Presiding Officer's denial of reparation but solely for Complainant's failure to state a claim upon which relief can be granted. Accordingly, for the purpose of this claim, we see no need to determine whether or not the shipment of Complainant consisted of bulk cargo exempt from the requirements of section 18(b)(3) of the Shipping Act, 1916.

It is therefore ordered that the complaint be dismissed and the proceeding discontinued.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[2] Complainant cites no cases or legislative history to support its interpretation of section 18(b) of the Act.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–31

CHEVRON CHEMICAL INTERNATIONAL, INC.

v.

BARBER BLUE SEA LINE

ERRATUM

In the Report served April 17, 1978, herein, the heading inadvertantly stated that Commissioner Morse voted in favor of the Report. Commissioner Morse concurred in the result; his concurring opinion is attached.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

Commissioner Clarence Morse, concurring.

I concur in the result. I would deny reparations because the Bulk Oil Agreement covering the shipment of lubricating oil additives in bulk is an agreement for carriage of bulk oil cargo specifically exempted from the tariff filing requirements of Section 18(b)(1), Shipping Act, 1916, 46 U.S.C. 817.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 443(I)

KFC INTERNATIONAL SALES

v.

ATLANTIC LINES

NOTICE OF DETERMINATION NOT TO REVIEW

April 12, 1978

Notice is hereby given that the Commission on April 12, 1978 determined not to review the decision of the Settlement Officer in this proceeding served April 4, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 443(I)

KFC INTERNATIONAL SALES

v.

ATLANTIC LINES

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

KFC International Sales (complainant) alleges that Atlantic Lines (carrier) incorrectly rated a shipment of "Plastic Insulated Mugs," resulting in an overcharge of $1,162.00 (including a 25 percent port congestion charge). A claim filed with the carrier was denied on the basis that it was not timely filed.

The carrier, in response to the served complaint, admitted that the claim was denied solely in accordance with page 11 of the Conference tariff[2] which prohibits the payment of overcharge claims not presented to the carrier within six months after the date of the shipment. However, the carrier stated that the claim would have been denied on its merits had it been timely filed.

According to the claimant, the carrier, on November 24, 1976, issued its prepaid bill of lading No. 90 covering a shipment containing *inter alia*, 334 cartons of "Plastic Insulated Mugs" measuring 448 cubic feet (11.20 measurement tons) from Miami, Florida to Port of Spain, Trinidad. The carrier apparently assessed the tariff class 23 rate of $191.00 W/M applicable to "Plastic Goods, N.O.S." resulting in a charge of $2,139.00 for this portion of the shipment.[3]

The complainant contends that at the time this shipment moved, the carrier's tariff provided a first class rate of $108 W/M from Miami to Port of Spain, Trinidad, for "Plastic or Paper Products . . . viz: Bowls, Cups, Forks, Knives, Plates, Spoons," on 15th Revised Page 60 of its tariff. In

[1] Both parties having consented to the informal procedure of 46 CFR 502.301–34 (as amended), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Leeaard & Windward Islands & Guianas Conference Freight Tariff FMC No. 1.

[3] The *total* shipment weighed 19,949 pounds and measured 1,007 cubic feet. The carrier billed, and the complainant paid bill of lading charges totalling $4,837.26.

the opinion of the complainant, the plastic insulated mugs in this shipment should have been rated under this description which produces a charge of $1,209.60.

On the basis of the $108 rate shown above, the complainant seeks reparation in the amount of $1,162.00 as follows:

1. Food Preparations—340 cubic feet at $104	$ 884.00
2. Combo Buckets—215 feet at $94	505.25
3. Mugs—448 cubic feet at $108	1,209.60
4. Restaurant Supplies—4 cubic feet at $200	20.00
Subtotal	$2,618.85
5. Pt. Congestion—25 percent	$ 654.71
6. Other charges as billed	401.70
Total	$3,675.26

Paid $4,837.26–Should be $3,675.26–Overpaid $1,162.00

According to the carrier, had the claim been decided on its merits, it would have been denied on the basis that the $108 rate sought by the complainant is for ". . . disposable plastic items." The carrier states that it considered an insulated mug as a more expensive and sophisticated item than a plastic or paper cup and accordingly, applied the rate for "Plastic Goods N.O.S., actual value not over $150.00 per freight ton."

The carrier's tariff contains two descriptions under which "Plastic Insulated Mugs" could have moved, i.e.:

1. PLASTIC OR PAPER PRODUCTS, *including* Plastic Coated or Lined, viz.: Bowls, *Cups,* Forks, Knives, Plates, Spoons . . . Class 1 (underscoring supplied); and
2. PLASTIC GOODS, N.O.S., viz.: (see item 2–d).[4]

Obviously, in the absence of a *specific* commodity description for the involved article, it must be determined which of the two above items is the more specific. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. *The Carborumdum Company v. Royal Netherlands Steamship Company (Antilles) N.V.,* decided January 5, 1977. Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Company v. Hamburg-Amerika Lines* 10 FMC 388 (1967).

Webster's New Collegiate Dictionary, sixth edition, defines a *mug* as a ". . . kind of earthen or metal drinking *cup,* with a handle,—usually cylindrical, with no lip." (underscoring supplied) The fact that the dictionary uses the terms *earthen or metal* does not make a mug any less a cup merely because it is made of *plastic.*

The generic heading "PLASTIC OR PAPER PRODUCTS" published in the carrier's tariff stands alone. The qualifying statement that "Plastic

[4] This item is based on declared actual value and the ratings range from Class 12 for "actual value not over $150 per freight ton" to Class 23, "actual value over $500 per freight ton."

Coated or Lined, viz.: . . . cups . . . ." are *included* under the generic heading does little more than emphasize that fact, albeit, unnecessarily.

The carrier has used as its defense for assessing the "Plastic Goods, N.O.S." rate, the rationale that the generic item was intended to apply only to disposable plastic items, whereas, the N.O.S. rates were intended for more expensive and sophisticated items. The tariff does not reflect this rationale and, accordingly, the carrier's defense along these lines must fall. It may be that it was the carrier's intent to have the more expensive plastic product move under rates dependent upon value, however, under the tariff, as published, *all* plastic products would move under the lower Class 1 rate in the absence of a declared value.[5]

As previously stated, the Commission has held that the more specific of two possible tariff applications must prevail. "Plastic Insulated Mugs" are "Plastic Products" within the meaning of the generic tariff item and, accordingly, the N.O.S. rate has no application.

The complaint was filed with this Commission within the time limit specified by statutes[6] and it has been well-established by the Commission that a carrier's published tariff rule may not act to bar recovery of an otherwise legitimate overcharge claim in such instances.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under its effective tariff. The involved commodity was improperly rated by the carrier and the complainant was overcharged in the amount of $1,162.00.

Therefore, it is ordered that respondent Atlantic Lines be required to refund to complainant KFC International Sales the amount of overcharge in the sum of $1,162.00 with interest at six percent per annum if not paid within thirty days from the date this decision becomes final.

(S) WALDO R. PUTNAM,
Settlement Officer.

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[5] Where a tariff is ambiguous or doubtful, it should be construed against the carrier who prepared it. *United States of America v. Hellenic Lines Limited,* 14 F.M.C. 260 (1971). Also, see *Peter Bratti Associates, Inc. v. Prudential Lines, Ltd.,* 8 F.M.C. 375 (1964).

[6] The shipment was made in November 1976; the complaint was filed with the Commission in September 1977.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 429(F)

NATIONAL STARCH & CHEMICAL CORP.

v.

LYKES BROS. STEAMSHIP CO., INC.

ORDER ON REMAND

April 17, 1978

National Starch & Chemical Corp. filed a complaint asking reparation for alleged freight overcharges in the amount of $861.03 on a shipment described on the bill of lading as 40 drums of Liquid Synthetic Plastics (Catalyst B–29–9732) carried by Respondent Lykes Bros. Steamship Co., Inc. from New Orleans, Louisiana, to Guayaquil, Ecuador.

Respondent collected charges at the Cargo, N.O.S., Class 1 rate of $135.75 per 40 cubic feet. Complainant asserts that the proper rate was $62.00, provided under the description, "Resins, Synthetic; Non-hazardous N.O.S." Respondent's tariff conditioned the application of this rate on shipper describing ". . . on the bill of lading the specific Resin(s) being shipped; failing such specific description Resin(s) by such Bill of Lading shall be rated as Cargo, N.O.S. Class 1." (Note 1)

Respondent denied the claim on the basis of the tariff six-month rule and contended that it had an obligation to adhere to all the rules and regulations of the tariff.[1]

Administrative Law Judge William Beasley Harris granted reparation. The Presiding Officer first found that the six-month tariff rule was unenforceable under *Kraft Foods v. Moore McCormack Lines,* 538 F.2d 443 (D.C. Cir. 1976).

On the question of whether the description on the bill of lading, *i.e.*, "Liquid Synthetic Plastics No. 1 (Catalyst B 29–9732)", was sufficiently specific to comply with Note 1 of Respondent's tariff, the Presiding Officer held that Note 1 was unenforceable in light of *The Carborundum Company v. Royal Netherlands Steamship Co. (Antilles) N.Y.*, Commission Report in Docket 75–15, 16 S.R.R. 1634 (1977), which held that a

[1] Gulf/West Coast of South America Conference South Bound Freight Tariff No. 12, FMC No. 1, Item 740.

carrier's tariff rule could not preclude consideration by the Commission of the merits of a claim.

While unable to find a listing of Catalyst B–29–9732 in Hawley's Condensed Chemical Dictionary, the Presiding Officer nonetheless concluded that Complainant had adequately proved what was shipped and granted reparation. This determination was apparently made solely on the basis of a statement in Complainant's letter of September 16, 1976, addressed to Atlas Traffic Consultant Corp., which described the Catalyst B shipped as a "Resin, Synthetic; Non-Hazardous, (Acetone Formaldehyde condensation Polymer)". No other evidence was introduced in support of this statement.

Complainant was requested but refused to supply literature on the product shipped, on the ground that such evidence was "irrelevant to this matter". Therefore, the only proof as to the true nature of the product, in the absence of a listing in the dictionary, is Complainant's own description to its tariff consultant.

Hawley's Condensed Chemical Dictionary describes "Catalyst" as "Any substance of which a fractionally small percentage strongly affects the rate of a chemical reaction."[2] The same dictionary indicates that synthetic resins include synthetic rubbers, siloxenes and silicones, but *excludes water-soluble polymers (often called resins)* and calls for a distinction between a synthetic resin and a plastic.[3]

Section 18(b)(3) of the Shipping Act requires a carrier to charge only the rate provided in its tariff for the commodity it actually carried. As mentioned, the bill of lading covering the shipment at issue here describes such shipment as "Liquid Synthetic Plastics". Complainant, while seeking to change that description in the bill of lading to "synthetic resin", has offered no other proof but its own word to support its contention.

In light of the doubts arising from the chemical dictionary definition which excludes plastics from the class of synthetic resins as well as of Complainant's failure to supply literature concerning its own product, we are of the opinion that Complainant has not sustained the burden of showing with reasonable certainty that the product shipped was a liquid synthetic resin which should have been so classified and rated. Consequently we disagree with the Presiding Officer's conclusion that the shipper had adequately proven that what was shipped was something other than described in the bill of lading.

The Initial Decision granting reparation is therefore vacated. In order to provide Complainant further opportunity to introduce corroborating evidence in support of its claim, the proceeding is remanded to the Presiding Officer for issuance of a Supplemental Decision, with the request that such decision be issued within 45 days from the date of the service of this Order.

[2] *Condensed Chemical Dictionary*, 8th Rev. Ed. by Gesnner G. Hawley (1971) at p. 177.
[3] *Id.* At p. 758.

IT IS ORDERED.
By the Commission.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

INFORMAL DOCKET NO. 429(F)

Commissioner Bakke, dissenting in part.

I would have reversed the Initial Decision and dismissed the complainant with prejudice. In my view, the majority decision to remand this case for the taking of further evidence can only encourage careless documentation by shippers or their agents in the first instance, less-than-diligent preparation and presentation of reparation claims and casual disregard of the dignity of legal requirements of proof in proceedings before the Commission.

A shipper (or his agent) must be charged with superior knowledge of the proper description of commodities being shipped, particularly where products having highly technical commodity designations, such as chemicals, are concerned. Accordingly, it is not unreasonable to attach a strong presumption of correctness to descriptive documentation prepared by the shipper or his agent, and a heavy burden of proof to overcome that presumption.

To be sure, honest error can occur, and statutory procedures are available for redress in that event. However, substantially more than uncorroborated allegations of error and self-serving assertions of the "correct" description must be adduced before relief can be granted. See *Merck, Sharp & Dohme,* 17 F.M.C. 244 (1973).

A litigant can reasonably expect only one opportunity to make his best case, and fails to do so at his peril. In this case, respondent sought by interrogatories to elicit independent corroboration of the alleged character of the goods shipped, but complainant refused to comply. Under the circumstances, it is my view that complainant has had his opportunity to overcome the presumption that the shipment was properly described on the bill of lading, has failed to establish by probative evidence that the alternative description urged is, in fact, correct, and has chosen to present the Commission with a "take it or leave it" challenge.

As the record now stands, the majority has concluded that complainant cannot prevail. I agree, and would end the matter there, rather than ordering remand. To reward complainant's willful intransigence at the trial level by appellate grant of another bite at the apple is curious jurisprudence to which I cannot, in good conscience, subscribe.

*Commissioners Bakke and Morse would reverse the Initial Decision and dismiss the complaint. Commissioner Bakke's opinion is attached.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER NO. 16, AMDT. 22; DOCKET NO. 77-40]

April 17, 1978

Part 502—Rules of Practice and Procedure

Miscellaneous Amendments

AGENCY: Federal Maritime Commission

ACTION: Final Rules

SUMMARY: Rules of Practice and Procedure are amended to require that service of subpenas and discovery requests or motions directed against Commission staff personnel be served on the Secretary of the Commission; to authorize the General Counsel to appoint an attorney to represent Commission staff personnel who are involved; to permit rulings of the presiding officer to be appealed and to be reviewed by the Commission absent appeal in such matters; and to permit parties to file replies to appeals generally.

EFFECTIVE DATE: Upon publication in the *Federal Register*.

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney, Secretary
Federal Maritime Commission
1100 L Street, N. W.
Washington, D. C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

The Commission instituted this proceeding by Notice of Proposed Rulemaking published in the *Federal Register* on August 10, 1977 (42 F.R. 40452) to amend Rules 135, 209, and 153 of its Rules of Practice and Procedure (46 C.F.R. 502.135, 46 C.F.R. 502.209, and 46 C.F.R. 502.153). The purpose of these amendments was fully explained in the Notice cited above. The Maritime Administrative Bar Association (MABA) submitted initial and supplemental comments. A discussion of the rules and comments follows.

1. Rule 135, 46 C.F.R. 502.135. This rule deals with subpenas of Commission staff personnel and subpenas for production of documentary materials in the possession of the Commission. The proposed changes would considerably enlarge the present rule to establish the procedures to be followed by parties seeking to subpena Commission staff personnel and to obtain production of documents both at a hearing and in connection with prehearing depositions. The amendments would provide for service of subpenas on the Commission's Secretary and conform the procedural schedule regarding prehearing depositions with that which applies to motions to quash subpenas served in connection with depositions. The rule would also be changed to authorize the General Counsel to designate an attorney to represent Commission staff personnel under subpena and to permit rulings of the presiding officer to be appealed or, absent appeal, to be reviewed by the Commission. Replies to appeals would be permitted and the filing of such appeals would automatically stay the presiding officer's rulings until the Commission acted on the matter.

MABA suggests that the subpena be served directly on the Commission staff member although not opposing service of a copy on the Secretary for his information and that of the Commission. MABA expresses dissatisfaction with the proposal that the General Counsel designate an attorney to represent the staff member, suggesting that the staff member be permitted to retain his own counsel. Moreover, MABA is concerned that the authority granted to the General Counsel would result in a "commingling of functions." MABA believes that the General Counsel would be supervising the attorney representing the staff member in the matter of reviewing the subpena or discovery request and would also be supervising another attorney in the event of appeal or on Commission review of the presiding officer's rulings. MABA also expresses concern that the Commission would be reviewing rulings of the presiding officer and fears that the Commission will overrule the presiding officer without having the benefit of the parties' views if no appeal has been filed. It also fears that the Commission will rule without stating its reasons and supporting evidence. MABA believes that matters arising under the rule should be reviewed by the courts rather than the Commission.

In its supplemental comments, MABA opposes the idea of permitting automatic appeals or review by the Commission in the case of subpenas and discovery directed against Commission staff personnel. MABA argues that such a procedure establishes disparate treatment among litigating parties. MABA contends that the proposed procedure is inconsistent with section 27 of the Shipping Act, 1916, and with the legislative history thereof. MABA contends that the Commission's staff member should follow the same procedure as do other parties, that is, move for leave to appeal to the Commission, and that in the event of refusal to comply with a ruling of the presiding officer, the matter be tested in the courts. After careful analysis of these comments, the Commission believes that they are not persuasive and that the rule should be amended as proposed.

MABA's concern that service on the Secretary rather than on the staff member may not serve to inform the staff member of his obligations and that designation of an attorney to represent the staff member by the General Counsel will lead to improper "commingling of functions" is unwarranted. As explained in the Notice of Proposed Rulemaking, cited above, the rule change would eliminate the present inconsistencies and confusion as to the person on whom a subpena or discovery request is to be served. It would also provide a staff member with legal representation, something the present rule does not do, although in practice an attorney who is a member of the Office of the General Counsel has usually been designated to provide such representation. In previous practice, a staff member has been informed of the service of the subpena whether it had been served on the General Counsel or the Secretary. The staff member will continue to be informed. Furthermore, it does not follow that service on the Secretary deprives the staff member of his own views on the propriety of complying with a subpena or discovery order. Likewise, the designation of an attorney by the General Counsel is not intended to have this effect.

MABA's concern that appointment of an attorney by the General Counsel would lead to improper "commingling of functions" is based upon a wrong premise. MABA presumes that the General Counsel will supervise the designated attorney. In fact, that attorney will be free to represent the staff member before the presiding officer and the Commission without supervision by the General Counsel or by anyone whose interests may conflict with those of the staff member. The General Counsel would become involved only in the matter of advising the Commission when appeals are filed or the Commission decides to review on its own motion. Furthermore, to allay any possible remaining concern, the Commission would expect the General Counsel, whenever possible, to select an attorney from outside his office.

MABA's concern that the change in procedure would depart from the principle of equality embodied in section 27 of the Shipping Act, 1916, or its legislative history has superficial appeal but ignores the unique status and responsibilities of the Commission. As we stated in the Notice of Proposed Rulemaking, cited above, the Commission is a government agency involved in law enforcement activities, unlike private litigants, and certain privileges against disclosure have been recognized in the law because of these unique responsibilities. See the Freedom of Information Act, as amended, 5 U.S.C. 552 (b). Unless the Commission itself has some control over the matter of prehearing discovery and disclosure directed against its own staff and documents in its possession, the Commission cannot adequately protect functions which may involve delicate and sensitive considerations of policy as to which presiding officers may be unaware. MABA seems to assume, furthermore, that the Commission would always be overruling presiding officers in an effort to prevent disclosure. The rule change would also apply, however, to situations in which the presiding officer has denied a discovery request so that the Commission could also overrule him and order disclosure. Of course, as in any final ruling of the Commission, an aggrieved party ultimately has the right to judicial review. Finally, at worst a litigant might be deprived of access to general information in the possession of the Commission or a staff member, which information may or may not really be necessary to the development of the litigant's case. This is in contrast to the situation in which a party under investigation or accused of violations of law seeks access to relevant information for purposes of cross-examination of Commission staff members who testify against such party. In the latter situations, as MABA itself has observed, the Commission has adopted a procedure in which the presiding officer may rule upon the matter of production or disclosure and appeal to the Commission may be taken only by his leave. See *Delaware River Port Authority, et al. v. United States Lines, Inc., et al.*, 16 SRR 1546 (1976). It is obviously the latter type of situation in which a party might be prejudiced during the course of a proceeding if deprived of vital information rather than the former situation in which general preparatory probing is being conducted prior to hearing.[1] However, the Commission does not intend to deprive parties of vital information necessary for proper cross-examination nor conduct its investigations and present evidence in reliance upon secret, privileged information.

We are not persuaded by MABA's contentions that the Commission will be deprived of the views of the parties where no appeal is taken and that the Commission will not explain its reasons for its rulings. If an affected party wishes to present his views to the Commission in connection with a ruling of the presiding officer, he need only exercise his right to file an appeal within the prescribed period of time. In the event of review by the Commission, absent appeal, the parties' views as expressed to the presiding officer are on record and will be considered. MABA's contention that a statement of reasons explaining the Commission's rulings should be required erroneously presumes that the Commission will act contrary to law by issuing rulings without explanations.

2. Rule 209, 46 C.F.R. 502.209. This rule deals with the use of prehearing discovery processes directed to Commission staff personnel. It follows the same procedures as set forth in the preceding rule with regard to the designation of an attorney by the General Counsel and the matter of appeals from and review of the presiding officer's rulings. MABA's

[1] The distinction between general prehearing discovery and inspection and production of specific information for purposes of cross-examination has been recognized by the courts as well as by the Commission. The latter situation relates to the famous case of *Jencks v. United States*, 353 U.S. 657 (1957), and to Federal Rule of Evidence 612, 28 U.S.C.A. See 7 A.L.R. 3d 181, § 17; *Zuzich Truck Line, Inc. v. United States*, 224 F. Supp. 457, 461 (D. Kans. 1963); *United States v. Harrison*, 461 F. 2d 1127 (5th Cir. 1972) cert. denied, 409 U.S. 884.

comments regarding the proposed changes to this rule are identical with those directed to the previous rule and, as already discussed, are without merit.

3. Rule 153, 46 C.F.R. 502.153. The Commission proposed to amend this rule by permitting parties to file replies to motions for leave to appeal rulings of the presiding officer. The present rule fails to make such provision. As explained in the Notice of Proposed Rulemaking, this amendment would establish a fairer procedure, enable the presiding officer to rule after having the benefit of all views, and conform to current practice. MABA made no comments on this proposed amendment.

Having considered the comments on Rules 135 and 209 and found them to be without merit, the Commission is therefore adopting the amendments to the above three rules as originally proposed with slight clarifications.[2] Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 27 and 43 of the Shipping Act, 1916 (46 U.S.C. 826, 841a), Part 502 of Title 46, Code of Federal Regulations, is hereby amended.*

EFFECTIVE DATE. Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are procedural in nature, they shall be effective upon publication in the *Federal Register* and shall be applicable to all pending and future proceedings.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[2] The last sentences of proposed rules 135(c) and 209(c) have been revised to clarify the effective date of rulings.

*The text of the ammendment is reprinted in 46 CFR 502.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[GENERAL ORDER 7; DOCKET NO. 73-64]

April 18, 1978

Part 507—Self-Policing Systems

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: This rule amends the self-policing rules of the Commission by requiring that self-policing of Commission approved carrier agreements be done by persons not otherwise employed by or having any financial interest in a party to such agreement, and that self-policing include self-initiated investigations. This rule also amends the reporting requirements to include a more precise description of the self-policing activities. The purpose and effect of these regulations is to provide for better self policing

EFFECTIVE DATE: To become effective July 1, 1978.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

This rulemaking was initiated pursuant to section 43 of the Shipping Act, 1916, (46 U.S.C. 841) to enunciate and define the standards by which the Commission determines whether a particular ratemaking agreement is not adequately self-policed and therefore must be disapproved under section 15 of the Shipping Act, 1916. Furthermore, this rulemaking was intended to change the reporting requirements of self-policing activities in order to improve the ability of the Commission to determine whether a particular agreement is being effectively policed.

In response to the proposed rules many comments were received which were replied to by Hearing Counsel. Hearing Counsel's replies were answered by many of the original commentators. All of these comments have been considered by the Commission in promulgating the final rules. However, before the amended rules and the acceptance or rejection of the proposals of the commentators are explained, we think it is necessary to examine the rationale underlying "self-policing" as required by section 15 of the Shipping Act, 1916.

Section 1 of the Sherman Antitrust Act declares every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce to be illegal.[1] In interpreting that section, the Supreme Court has stated that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal. . . ."[2] Among the practices deemed to be unlawful in and of themselves are price fixing,[3] division of markets,[4] group boycotts,[5] and tying arrangements.[6]

Nevertheless, Congress has determined, first in 1916 and then again in 1961, that the transnational and nationalistic promotional setting in which the ocean liner industry operates is so commercially unique that there may be redeeming factors which make agreements fixing prices, dividing markets, or creating typing arrangements not only reasonable but desirable. Therefore, if the parties to an agreement which would otherwise be illegal *per se* can show that such agreement is required to fill a serious transportation need, necessary to secure important public benefits, or is in furtherance of a valid regulatory purpose of the Shipping Act, 1916, then it may be approved and receive immunity from the penalties of the Sherman Antitrust Act.[7]

However, when the Bonner Act amendments to the Shipping Act were passed in 1961, a requirement of effective self-policing was incorporated into section 15 as *quid pro quo* for antitrust immunity.[8] Thus, the duty to adequately self-police stems not from a finding by the Federal Maritime Commission of a need for policing, but rather *is an obligation imposed by law*. Furthermore, self-policing is an obligation which cannot be fulfilled *pro forma* but is one which requires *effective* positive conduct on the part of the conferences in return for continued recognition of the conference system.

Section 15 of the Shipping Act, 1916, requires the Federal Maritime Commission to determine which self-policing systems are effective and

[1] 15 U.S.C. 1.
[2] *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).
[3] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).
[4] *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898).
[5] *Fashion Originators' Guild of America v. F.T.C.*, 312 U.S. 457, 464 (1941).
[6] *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).
[7] *F.M.C. v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).
[8] Report on the Ocean Freight Industry, Antitrust Subcommittee, Committee on the Judiciary, H.R. Rep. No. 1419, 87th Cong., 2d Sess. (1972).

which are not and to disapprove thosehagreements which are inadequately policed. Hence, we have undertaken this rulemaking to prospectively determine and enunciate some of the standards by which self-policing systems will be judged to be adequate or inadequate.

Such a prospective determination and enunciation of some of the standards to be used in the future is not to be confused with adjudication as to whether those standards have been met in a particular case.[9] Although many parties contest the authority of the Commission to set such standards by rulemaking,[10] it is well settled that the Commission may make use of its rulemaking authority under section 43 of the Shipping Act, 1916, to define and articulate enforceable standards[11] to be used to judge the adequacy or inadequacy of self-policing.[12] In fact, a rulemaking proceeding appears to be both superior and preferable to case by case adjudication for the purpose of defining and articulating the standards a regulatory agency must enforce.[13] The proposed standards have been set forth as minimum requirements for inclusion in section 15 agreements. Any agreement which does not contain these required provisions will be presumed to not meet these standards of adequate policing and therefore may be found to be inadequately policed.[14]

Set forth below is a discussion of the self-policing rules themselves and an explanation of the changes which have and have not been made.[15]

Section 528.1 *Scope and Purpose.*

There have been no substantive changes in section 528.1. from that proposed

Section 528.2 *General Requirements; section 15 Agreements.*

The primary change proposed in this section was that self-policing would have to be carried out by neutral persons or bodies. This proposal recognized that policing by a conference chairman or secretary is necessarily ineffective because the demands of other duties and responsibilities do not leave enough time, nor are they able to devote sufficient attention, for the effective discharge of the self-policing functions. While the final rules promulgated herein retain the neutrality requirement generally, an exemption is provided in new section 528.4 where it can be demonstrated that the duties of the conference personnel entrusted with

[9] *Pacific Coast European Conference v. United States*, 350 F.2d 197 (9th Cir. 1965).

[10] "This contention [that the Commission may proceed only on a case by case basis] has the antique virtues of simplicity and straightforwardness. The difficulty is that it is a doctrinal archaism in moderm administrative law. It comes, indeed, at a time when many knowledgeable voices have been urging the agencies to make greater, rather than less, use of the rule-making authority in the interest of more precise definition of decisional standards." *Pacific European Conference v. F.M.C.*, 376 F.2d 785 (D.C. Cir. 1967).

[11] *Id.* at 788, 789; *Pacific Coast European Conference v. F.M.C.*, 439 F.2d 514, (D.C. Cir. 1970); *Cf. H. Friendly, The Federal Administrative Agencies, the Need for Better Definition of Standards*, (1967).

[12] *Outward Continental North Pacific Freight Conference v. F.M.C.*, 385 F.2d 981 (D.C. Cir. 1967).

[13] *CIBA-Geigy Corp. v. Richardson*, 446 F.2d 466 (2d Cir. 1971).

[14] "The Commission can reasonably 'find', without the necessity of an extended evidentiary hearing, that any conference which refuses to adopt and communicate to the Commission an outline of its policing methods does not adequately police its members." *Outward Continental North Pacific Freight Conference v. F.M.C.*, 385 F.2d 981, 984, 984 (D.C. Cir 1967).

[15] We are denying the request made by one commentator that the Commission stay these rules pending adoption of the UNCTAD Code of Conduct for Liner Conferences Convention. Not only does the UNCTAD code fail to address many of the issues treated by these rules, but the United States is not presently a signatory to the convention.

the self-policing functions, are minimal, the Agreement is limited, the parties to the agreement are small and the trade relatively free of malpractices.

We find, however, that it is desirable that the self-policing body be otherwise independent of the members to the agreement. No member or employee of the policing authority may be retained or employed by or financially interested in any party to the agreement. Since the policing authority will have access to the confidential business records of the members to the agreement, it is absolutely essential that the policing authority not have any connection with or financial interest in any of the members to the agreement. However, if the policing authority is an independent certified public accountant with no connection with a member line other than as an independent contractor, there is little likelihood of compromise of such confidential business records or chance that any bias will enter into the implementation of the functions of the policing authority. As the Commission has noted:

> In view of the fact that the Neutral Body functions are fact finding rather than judicial; that the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; that accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform this work; that fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed; that there is no evidence of actual bias or non neutrality relating to any of the firms heretofore used; and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible firms, thereby destroying this self-policing system, contrary to the public interest and to the detriment of commerce, it is found that a Neutral Body should not be disqualified because of a disclosed business relationship, *i.e.*, independent contractor for professional or business services, with a conference member line other than the accused.[16]

However, even an independent certified public accountant would be put into an untenable conflict of interest situation in cases where a firm would be called upon to investigate a client. In such situations the independent certified public accountant should not make the investigation and another independent certified public accountant without such connections with the investigated party should take its place.

Contrary to the assertions of some commentators, this neutrality requirement does not dictate employment practices or require one particular method or procedure of self-policing. We believe that this requirement is sufficiently flexible to accommodate any adequate self-policing system which a conference wishes to employ.

Another proposed amendment to section 528.2 was to broaden the scope of the self-policing rules to apply to all rate-fixing agreements between persons subject to the Shipping Act, 1916. However, the rules were primarily intended to apply to carriers by water and this proceeding has demonstrated that the application of the self-policing rules to terminal rate agreements and other parties involve factors which should be

[16] Final Report quoting Initial Decision, *Agreement 150–21*, 9 F.M.C. 355, 367 (1966).

considered separately. The application of these rules will therefore be confined to conference and other rate-fixing agreements between common carriers by water.

The rules have also been amended to more clearly state the requirements in the proposed rules that: (1) a policing authority must be established, (2) the functions and authority of the policing authority must be stated, and (3) the method or systems used to police the obligations under the agreement must be described. These changes were prompted by comments to the effect that the existing rules requiring a description of "the function and authority of every person having responsibility for administering the system" seem to require that the officer administering the self-policing system be personally named in the conference agreement. That was not the intent of the rule. The intent of the rule was, and is, to require that someone be invested with the power to investigate, adjudicate, and penalize any deviation from the rate-fixing agreement. The members to an agreement may accomplish these tasks by establishing one or more self-policing entities, as they wish. Nevertheless, the functions and authority of each of those entities must be described so that we can ascertain how the policing functions are apportioned and, more importantly, that all required self-policing functions are actually delegated and carried out. The names of the person or persons heading the policing authority and description of their staff, facilities, and budget must be made available to the Commission only on request.

With regard to self-policing procedures, investigations of malpractices or other violations of the agreement which come to the attention of the policing authority in any manner must be undertaken.

Section 528.2, as proposed, also requires self-initiated investigations. We think it is obvious that in order for a self-policing system to be effective, the policing authority must make investigations *sua sponte.*[17] While we are not prepared to establish all the kinds of investigations which must be carried out and set a minimum frequency for each type of self-initiated investigation, it is imperative that each conference does establish, for itself, a program of self-initiated investigations such as surprise audits of books, and examination of records, billings, classifications, bills of lading and other documents. Further, investigations, whether pursuant to a complaint or *sua sponte,* cannot be effective unless the policing authority is authorized to examine or inspect any books, records, billings, classifications, bills of lading, or other documents, cargo and containers, ships, property and facilities. The agreement must, therefore, provide for such authorizations.

A question has been raised regarding the constitutionality of requiring members to submit to surprise audits and other investigations. It was

[17] Report on Ocean Freight Industry, *supra,* n. 10, at 314.

alleged that this provision would violate the constitutional guarantee against unreasonable searches and seizures. Since there is no search or seizure by the Government and no criminal action is contemplated, we do not believe there is a constitutional impediment involved.

The effect of the laws of other nations upon the access of the policing authority to member records has also been brought to question. However, no law of another nation was cited, nor do we know of one, which would preclude a member from giving its records to one of its own agents. The policing authority's access to member records is essential for effective self-policing and is not a requirement that can be waived. Section 528.3 *Self-policing provisions; specific requirements.*

There were no proposed amendments to section 528.3. However, comments were received questioning the use of the phrase "liquidated damages" in this section. As we have already discussed, the concept of self-policing is based upon the ability of the conference to collect damages for breach of contract. The amount of damages for each breach may be calculated upon the amount of the actual damages shown for each particular occurrence or may be calculated in advance (liquidated damages) for each type of breach so that the actual damages do not need to be proven each and every time that type of breach occurs. Because these rules require an advance statement of the amount of damage for each type of breach, the use of the term "liquidated damage" is accurate. Nevertheless, the damages are calculated in the context of "policing" and, therefore, the Commission recognizes the use of terms such as violation, fine, settlement, offense or punishment, by the industry in place of the term "liquidated damages". The Commission has indicated in previous proceedings that the concept, not the terminology, is of importance.

We have also considered the assertion that a distinction should be made in this section between malpractices (defined by a commentator as deliberate acts intended to secure unfair competitive advantage) and misratings (defined by a commentator as inadvertent clerical error), and that only malpractices should be made subject to self-policing sanctions. Although we do not object to a conference establishing separate investigative bodies for different classes of breaches of their agreement, as long as they comply with the self-policing rules, we do not agree that so-called "misratings" should not be subject to self-policing sanctions. Misratings can be an effective and disguised method of rebating and should therefore be one of the prime concerns of an effective self-policing program. The introduction of an exception for misratings could offer an opportunity for abuse and virtually emasculate the self policing rules.

We are also not in agreement with the contention that the right of appeal to neutral arbitrators should be rescinded. Impartial adjudication by persons not connected with the investigation or prosecution is a feature which both the Commission and the courts[18] have found to be an important and necessary.

One commentator also objected to the provisions of paragraph (c) of this section requiring appeals by the complainant or conference and review *de novo*. The commentator misread the rule, in one respect, in that a *de novo* review is required, not a *de novo* trial. The right of appeal argument of this commentator is not persuasive. The reasons for requiring appeal to be given to the complainant and the conferences were set forth by the Commission in a previous rulemaking. 35 F.R. 16679, Oct. 28, 1970. That rationale continues to be valid.

A proposed addition to section 528.4 was that the reporting of the self-policing activities be done by a coded number for each violator. Numerous commentators objected on the grounds that the code could easily be broken, thus destroying the confidentiality necessary for effective policing and subjecting the parties to the perils of "double jeopardy".

We find these comments to be devoid of merit. There is no "double jeopardy" when a person becomes subject to penalties for violating both his contractual obligations and the criminal statutes of the United States. The question of the efficacy of reporting violations by a coding system does not revolve around the false issue of "double jeopardy" but rather depends upon how the powers of the Commission to surveil the self-policing activities, through the medium of required periodic reporting, can best be used to encourage effective self-policing and uncover ineffective self-policing.

However, there appears to be a concern about how the Commission's enforcement activities affect self-policing activities. It is asserted that it is unreasonable to expect carriers to willingly establish and finance an effective self-policing system if the self-policing records are routinely used to prosecute the members for statutory violations.

While we recognize that it is important to use the enforcement powers of the Commission in such a manner as to promote and not to discourage effective self-policing, we also have a duty to enforce the provisions of the Shipping Act, 1916. Further, the requirement to self-police contained in section 15 of the Shipping Act was not intended to limit the Commission in carrying out its enforcement function. We, therefore, will make every effort to encourage and cooperate with the self-policing authorities, and at the same time will remain committed to the use of enforcement powers to whatever degree necessary to free our waterborne commerce of Shipping Act violations.

The reporting of agreement violations gives the Commission some evidence of how effectively the self-policing activities are being administered. Therefore, the periodic reports must state how many violators are

[18] *States Marine Lines, Inc. v. Federal Maritime Commission*, F.2d 230 (D.C. Cir. 1967); In re *Modification of the Self-policing Provisions of Agreement No. 1509, 3103*, 11 F.M.C. 434 (1968).

caught. Another indication of the effectiveness of self-policing is the frequency of recidivism. We are therefore requiring the report to state the number and general description of other violations by the carrier involved (without identifying it or listing it by number), in the five years preceding the date of the finding of the violation. We believe this information, along with the specific and detailed description of the offense and the exact amount of the penalty (liquidated damages), will enable the Commission's staff to ascertain how effectively the self-policing obligations are being carried out.

Questions have also been raised as to how specific a "specific" description needs to be. Clearly something more than a mere category is required. Statements such as "violation of conference agreement," "rebate" or "misrating" are insufficient. A partial recital of the facts of each case is necessary so that the Commission may ascertain whether specific complaints are effectively and efficiently investigated.[20] The Commission staff occasionally refers the facts of an alleged breach of an agreement to the conference policing authority for disposition. Usually these occurrences have taken place in a foreign country where the conference can more easily make a complete investigation than can the Commission. Thus a recital of the essential facts of each completed investigation in the semi-annual report will allow the staff to ascertain how the referred complaint has been handled without the necessity of securing separate follow-up reports from the conference. Special reports may be solicited when conference action on a referred complaint is neither forthcoming nor apparent from the semi-annual reports. Such reporting will also enable the staff to assess the effectiveness of conference investigations of alleged breaches of which the Commission has independently become aware.

The specific description of the offense also allows the staff to evaluate the level of the penalty (liquidated damages) in terms of how effectively self-policing sanctions are being used to deter breaches and how vigorously recidivistic behavior is discouraged. The Commission does not believe that a statement of the exact amount of the penalty (liquidated damages) is in any way adverse to the administration of an effective self-policing program. Quite to the contrary, we believe that more detailed and specific reporting requirements introduce an element of accountability which has been lacking to date and should prove to be an incentive for more effective policing. The fact that some carriers do not want to know the amount of the fine levied by their self-policing authorities against other lines does not necessarily indicate to us that their primary concern is with better enforcement and certainly is not persuasive that this provision is in any way contrary to the intent of these rules.

Furthermore, the comparison of penalties (liquidated damages) accord-

[20] If a particular occurrence involved a rebate, for example, the report must state how the rebate was made and the amount of the rebate; *e.g.*, cash rebate, $2,500; or indirect rebate of $1,500, shipment described as 10 measurement tons of X at $50 a ton, actually 10 measurement tons of Y which has tariff rate of $65 a ton.

ing to the circumstances of each case, will not lead to controversy between lines unless the penalties are so arbitrary that they should be exposed anyway. The concern is unfounded that the Commission staff cannot appreciate the circumstances which the conference may take into account for mitigating penalties (liquidated damages), unless, of course, those circumstances are purposefully left out of the semi-annual policing reports.

The necessity of the negative reporting requirement of this section has also been questioned. However, the negative reporting requirement serves a useful purpose in informing the Commission that the conference, or parties to a rate making agreement, have no policing activities to report, as opposed to merely being delinquent in filing their reports. Because self-policing programs must have self-initiated investigations as well as investigations of complaints in order to be effective, it is quite important to distinguish between inactivity and delinquent reporting.

Section 528.5 *Filing of amendments to approved agreements.*

This section has been changed to require the filing of amendments to existing agreements to conform with this rule to be filed on or before July 1, 1978.

In preparing these rules for publication, we have become aware of some further problems and inadequacies in the proposed rules. For example, it is clear that the proposed rules in sections 528.2 and 528.3 would require a functionally separate policing authority and impartial adjudicator. We have, therefore, incorporated such a statement into 528.2.

The rules have also been reorganized into a more logical and comprehensive format. For example, section 528.2 sets forth the general requirements for section 15 agreements. Furthermore, the minimum requirements for policing authorities and impartial adjudicators have been set forth in new sections of their own (sections 528.4 and 528.5, respectively).

The new section 528.3 governing the specific requirements of self-policing provisions is, for the most part, a restatement of the requirements under section 528.3 of the existing rules, which were not proposed to be changed. However, paragraph (c), which sets forth the requirements for investigation of violations, has been relocated.

The minimum requirements for policing authorities (section 528.4) have been extensively rewritten. The requirements of qualified personnel, adequate staff, facilities and budget have been made to explicitly apply to all policing authorities.

As indicated above, the general requirement in section 528.4 for the use of a neutral body allows for an exemption upon a showing that the officer's or employee's other duties will not unduly interfere with the policing duties, and the need for vigorous policing is not great because of the nature of the agreement, the scope of the trade, and the history of violations.

This section also allows independent certified public accountants under specified conditions, to act as the policing authority without violation of the neutrality requirements, even though such accountant has a client which is a member of the Agreement. The rule has also been amended to accommodate policing entities such as those set up by the Associated North Atlantic Freight Conferences.

The section setting forth the minimum requirements for impartial adjudicators (section 528.5) is, for the most part, a restatement of the requirements of section 528.3 in the present rules.

The reporting requirements (section 528.6) have been amended by deleting the coding and emphasizing the reporting of the activities of the policing authorities and the results of their investigations.

Therefore, pursuant to sections 15, 21, and 43 of the Shipping Act, 1916 (46 U.S.C. sections 814, 820 and 841(a)), Part 528 of Title 46 C.F.R. is hereby amended.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*The text of the amendment is reprinted in 46 C.F.R. 528.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 465(I)

A. RAMI GREENBERG

v.

VENEZUELA LINE

NOTICE OF DETERMINATION NOT TO REVIEW

April 21, 1978

Notice is hereby given that the Commission on April 21, 1978 determined not to review the decision of the Settlement Officer in this proceeding served April 10, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 465(I)

A. RAMI GREENBERG

v.

VENEZUELAN LINE

April 10, 1978

Reparation Denied.

DECISION OF ROLAND C. MURPHY, SETTLEMENT OFFICER[1]

A. Rami Greenberg (complainant) claims $519.81 as reparation on a shipment of four automobile vans from Houston, Texas to La Guaira, Venezuela via the M/S ANZOATEGUI, Voy 64, of the Venezuelan Line, on bill of lading No. 37 dated May 19, 1977.

Complainant alleges that it was overcharged in the amount of $519.81 due to the failure of the steamship company, a member of the U.S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference, to quote the correct rate prior to booking and at booking of the cargo, and the claimant's inability to resolve the matter with the steamship company within the prescribed six-month period provided for in the Conference Tariff FMC No. 2, Item No. 11.[2]

Complainant originally negotiated the movement of ten automobile vans, and the carrier advised that the vehicles would have to be shipped in separate units. One part of the shipment consisted of four automobile vans and was rated at the contract rate of $48.50 W/M plus surcharges. The second shipment consisted of four automobile vans and was rated at the noncontract rate of $55.75 W/M. The respondent, when notified by the complainant of the alleged mistake, advised the complainant that the $55.75 W/M was the correct applicable noncontract rate. The complainant

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] The complaint was filed with this Commission within the time limit specified by statute; and it has been well established by the Commission that carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

was not a merchant's agreement signatory with the Conference, therefore, he was not entitled to the lower contract rate.

The respondent readily admits that on occasion that its personnel might be lax in rate quotations, especially informing shippers of the dual rate system contained in the Conference tariff. However, the fact the complainant was erroneously quoted the contract rates is not a criteria for the adjustment of freight charges that have gone forward.[3]

The respondent alleges that the transportation charges that should have been assessed were:

4 Passenger Vans	
2868 cft ($55.75)—40 cft	$3,997.28 (Noncontract)
B/S—40 cft ($4.80)	344.16
C/S—40 cft ($3.00)	215.10
	$4,556.54

Rates that were actually charged:

4 Passenger Vans	
2868 cft ($48.50)—40 cft	$3,477.45 (Contract)
B/S—40 cft ($4.80)	344.16
C/S—40 cft ($3.00)	215.10
	$4,036.71

Undercharge to respondent—$519.83

Complainant paid transportation charges of $4036.71 whereas the correct charge of $4556.54 should have been paid, and the respondent is correct in his position that an undercharge has been assessed in the amount of $519.83.

This undercharge should be properly adjusted between the parties with evidence of such adjustment furnished to complete the record.

(S) Roland C. Murphy,
Settlement Officer.

[3] Section 18(b)(3), Shipping Act, 1916, provides that "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. . . ."

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 354(I)

SUN OIL INTERNATIONAL, INC. ON BEHALF OF VENEZUELAN SUN OIL, A SUBSIDIARY COMPANY

v.

VENEZUELAN LINE & TTT SHIP AGENCIES, I NC., AGENT

NOTICE OF DETERMINATION NOT TO REVIEW

April 26, 1978

Notice is hereby given that the Commission on April 26, 1978 determined not to review the decision of the Settlement Officer awarding reparation in this proceeding, served April 12, 1978.

By the Commission*.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

*Commissioners Bakke and Kanuk would deny reparation for failure of complainant to meet its burden of proof.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 354(I)

SUN OIL INTERNATIONAL, INC. ON BEHALF OF VENEZUELAN SUN OIL, A SUBSIDIARY COMPANY

v.

VENEZUELAN LINE & TTT SHIP AGENCIES, INC., AGENT

April 12, 1978

Reparation Awarded.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER[1]

By complaint filed May 25, 1976, Sun Oil International, Inc. on behalf of Venezuelan Sun Oil, a subsidiary company, alleges that charges in excess of those lawfully applicable for transportation were assessed by Venezuelan Line. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be a violation of Section 18(b)(3) thereof.

The shipment was described on the bill of lading as 4 pallets containing 200 bags of "Jet Blast" which weighed 10,600 pounds and measured 367 cubic feet. Respondent rated the shipment Cargo, N.O.S., at $106.75 per 40 cubic feet,[2] under Item 2(n) in respondent's tariff which provides:

Bills of lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name to conform to merchandise descriptions appearing herein. Bills of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo, N.O.S., as minimum.

Freight charges assessed were $1,003.45 plus a bunker surcharge of $45.12 which totaled $1,048.57. Complainant alleges the shipment should have been rated Shells, viz.: Nut, Ground,[3] at $42.75 per 2,240 pounds and the surcharge applicable to the commodity on a weight rather than a

[1] Both parties deemed to have consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff F.M.C. No. 2.

[3] Tariff Item No. 1000, Class 16W, 4th Rev. Page 126 and Item No. 999, Group 1, 6th Rev. Page 68.

measurement basis.[4] Such a classification would have saved the Complainant $796.55.

No response was forthcoming from respondent and accordingly this procedure will be disposed of under Rules 19(2), et. seq., Informal Procedures for Adjudication of Small Claims, Commission's Rules of Practice and Procedure (46 CFR 502.301 to 502.304).

Complainant argues "that it is not the declaration on the bill of lading, but what is actually shipped that determines the applicable rate. 'Jet Blast' is a brand name of the Jet Blast Company, Fort Worth, Texas. 'Jet Blast' is ground nut shells used as an abrasive blasting material for the removal of carbon from metal surfaces, and cleaning of operating jet engines. 'Jet Blast' as produced by the Jet Blast Company is processed in accordance with Military Specification, MIL–G–5634C. The applicable Schedule B Number for 'Jet Blast' is 292.9800."

In The Carborundum Company v. Royal Netherlands Steamship Co., Docket 75–15 Report served January 5, 1977, the Commission reaffirmed the proposition that trade name rules govern only the rating of cargo by the carrier at the time of shipment and cannot be invoked as a bar to a later showing in a proper proceeding before the Commission as to the exact nature of the commodity shipped. If the evidence shows that a more specific tariff item fits the commodity shipped, complainant is entitled to be rated under that item.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the complainant can prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.[5] However, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier.[6]

In support of the claim, complainant has submitted a copy of the bill of lading and a copy of the packing list both of which are devoid of any description of what "Jet Blast" is. In addition, the complainant has submitted copies of letters dated March 22, and May 14, 1976, respectively, wherein the owner of the Jet Blast Company stated "Jet Blast" is the trade name of the company's product which is Ground or Crushed Pecan Shells used for cleaning turbine and/or jet engines. It is further stated "Jet Blast" is made to Federal Specifications MIL–G5634C. A copy of MIL–G–5634C has been submitted. MIL–G–5634 is a Department of Defense specification pamphlet entitled "Grains, Abrasive, Soft, For Carbon Removal" which covers soft abrasive grains to be used as abrasive blasting material for the removal of carbon from metal surfaces

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[4] Amendment 3 to Special Supplement 15 of the respondent's tariff provides that the bunker surcharge is assessed on the basis as the cargo is freighted.

[5] Western Publishing Company, Incorporated v. Hapag-Lloyd A.G., informal docket No. 283 (I) Commission Order served May 4, 1972.

[6] Colgate Palmolive Co. v. United Fruit Co., informal docket No. 115 (I) Commission Order served September 30, 1970.

and cleaning of operating jet engines. Various shells are identified as acceptable for this purpose along with standards for particle size distribution and consistency. Pecan shells are one of those so identified in the pamphlet. Under the heavy burden of proof requirement the above may fall short of meeting that burden. However, the complainant's offer of proof is perfected by the submission of a Shipper's Export Declaration Correction Form amending the Schedule B commodity number to 292.9800 identifying the commodity as Crude Vegetable Materials, N.E.C.

Accordingly, the complainant hereby is awarded reparation in the amount of $796.55.

(S) CAREY R. BRADY,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER 16, AMDT. 23, DOCKET NO. 77–59]

Part 502—Rules of Practice and Procedure

Conduct of Rulemaking Proceedings

AGENCY: Federal Maritime Commission

ACTION: Final Rules

SUMMARY: The Rules of Practice and Procedure are amended to provide for a single round of comments in rulemaking proceedings unless particular circumstances warrant the filing of replies to comments and to provide for the participation of the Bureau of Hearing Counsel. Multiple rounds of comments and participation of Hearing Counsel have proven unnecessary in some instances. The new procedure provides desirable flexibility.

EFFECTIVE DATE: Upon publication in the *Federal Register*

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney, Secretary
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

The Commission instituted this proceeding by Notice of Proposed Rulemaking published in the Federal Register on December 14, 1977, (42 F.R. 62939) to amend Rules 42 and 53 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.42 and 502.53. The purpose of the proposed amendments was to simplify the conduct of rulemaking proceedings by limiting them to a single round of comments unless there are particular circumstances in which this format would hinder the Commission's ability to formulate a just and reasonable rule. Specifically, Rule 42 would be amended to provide that the Director, Bureau of Hearing Counsel would be party to a rulemaking proceeding only by designation of the Commission. Rule 53 would be amended to provide that no replies to comments would be allowed unless the Commission determined that the nature of the proceeding warranted replies in order to fashion an adequate rule.

In response to the notice, comments were submitted by the Maritime Administrative Bar Association (MABA), the law firm of Lillick, McHose, and Charles (Lillick), Sea-Land Service, Inc. (Sea-Land), and Wade S. Hooker, Jr. (Hooker), an attorney who practices before the Commission. We have considered these comments carefully and have determined to publish the rules in final form as originally proposed. An analysis of the comments follows.

1. Rule 42. MABA takes no position with respect to the participation of Hearing Counsel although some of its members believe that Hearing Counsel should be permitted to request leave of the Commission to participate. Lillick similarly has no comment on this proposal while submitting that Hearing Counsel's participation is often beneficial. Sea-Land supports the proposal. Hooker has no comment but believes a second round of comments is essential.

As indicated, no commenter opposes this revision. The Bureau of Hearing Counsel always has the power to request an opportunity to participate and, of course, the proposal itself contemplates the Commission's designation of their participation.

2. Rule 53. MABA opposes this proposal on several grounds. First, no criteria are established to determine which proceedings are considered by the Commission to warrant a reply round. Secondly, the parties would be denied the views of others and the opportunity to comment on alternate recommendations made in response to the notice of proposed rulemaking. Thirdly, MABA is of the opinion that a reply round serves to narrow the controverted issues. Lastly, some members suggest that the Commission require that all comments be served on all other commentators to facilitate the filing of meaningful replies.

Lillick urges retention of the current system, expressing concern that the use of one round of comments would not afford a fair opportunity to be heard. Lillick also criticizes the lack of criteria for determining which proceedings will be limited to one round of comments.

Similarly, Sea-Land would have us definitively set forth which proceedings will be limited to one round of comments.

Hooker also expresses concern that the proposals would limit participation in formulation of a rule, urging that the Commission supplement the proposed changes herein to the effect that, should the Commission make substantial amendments to a proposal, another opportunity should be given for comment.

The instant proposals are designed to give the Commission flexibility in the type of rulemaking proceedings it conducts. In this context, we feel that the concerns expressed by the commentators are unfounded. As indicated in the notice instituting this proceeding, the one-round procedure would not be followed in proceedings involving factual disputes or complex issues. Moreover, the determinations as to what type of proceeding will be employed will not be made necessarily in the initial proposal. It may well be that we will determine to have further submissions after seeing the initial comments. Similarly, the Commission would not make substantive changes to a proposal and finalize without further opportunity for comment; such a procedure would not be permitted by the Administrative Procedure Act.

In summary, we reiterate that the single-round proceeding will not be employed where complex or factual issues are involved. We are therefore adopting the rules as proposed.*

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and section 43 of the Shipping Act, 1916 (46 U.S.C. 841a), Part 502 of Title 46, Code of Federal Regulations, is amended as set forth below:

1. Section 502.42 is amended by changing all references to "he" and "his" to "the Director" and "the Director's" and by changing the period at the end of the first sentence to a comma and adding the following:

> and in rulemaking proceedings the Director may become a party by designation if the Commission determines that the circumstances of the proceeding warrant such participation.

2. Section 502.53 is amended by changing the colon appearing after the word "manner" in the first sentence to a period and adding the following:

> No replies to the written submissions will be allowed unless, because of the nature ot the proceeding, the Commission indicates that replies would be necessary or desirable for the formulation of a just and reasonable rule:

EFFECTIVE DATE: Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are procedural in nature, they shall be effective upon publication in the *Federal Register*.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*Gender specific references in the existing and proposed rules have been eliminated.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 358(I)

UNION CARBIDE CORPORATION

v.

HAPAG-LLOYD A.G.

NOTICE OF DETERMINATION NOT TO REVIEW

April 26, 1978

Notice is hereby given that the Commission on April 26, 1978 determined not to review the decision of the Settlement Officer in this proceeding served April 17, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 358(I)

UNION CARBIDE CORPORATION

v.

HAPAG-LLOYD A.G.

Reparation Awarded.

DECISION OF CAREY R. BRADY[1]

Complainant seeks reparation in the amount of $305.83 from respondent, claiming a freight overcharge on a shipment from New York, New York to Antwerp, Belgium carried aboard respondent's vessel Weser Express on Bill of Lading No. C 0013 dated July 18, 1975.

Respondent denied the claim solely on the basis of Rule 8, North Atlantic Continental Freight Conference Tariff No. (29) FMC-4 which requires that claims be filed within six months after date of shipment. The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits.[2] The bill of lading is dated July 18, 1975 and the claim was filed with the Commission August 16, 1976. The claim has been filed within the two year statutory limit and thus will be treated on the merits.

Respondent does not dispute the claim and offers no defense other than of the claim being time barred under Rule 8 of the Conference tariff.

While the Commission has ruled that a rule similar to the one on which respondent is denying relief cannot be used to defeat a claim properly filed with the Commission the complainant nevertheless has a heavy burden of proof once the shipment has left the custody of the carrier.[3]

The shipment weighed 84,588 pounds and was rated on the basis of $79.75 per 2,240 pounds plus 4.5% currency adjustment factor, producing total charges of $3,147.08. The complainant alleges the commodity should

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Decision not to review April 26, 1978).

[2] Colgate Palmolive Company v. United Fruit Company, Informal Docket No. 115(I), 1970.

[3] Ibid.

have been rated Synthetic Resin, NES[4] at $72.00 per 2,240 pounds plus 4.5% currency adjustment. Such a classification would have saved the complainant $305.83.

The bill of lading, carrier's freight bill and the export declaration described the commodity shipped as Synthetic Resin in drums. Item 581.000.650 of the tariff specifically provides a rate on Synthetic Resin at $72.00 per 2,240 pounds. The bill of lading and supporting shipping documentation clearly show the cargo shipped to be Synthetic Resin.

Complainant having met his burden of proof, reparation is awarded in the amount of 305.83.

(S) CAREY R. BRADY,
Settlement Officer.

[4] Tariff item 581.0001.650, 26th Rev. Page 174.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 464(I)

GENERAL TIME CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

April 26, 1978

Notice is hereby given that the Commission on April 26, 1978 determined not to review the decision of the Settlement Officer in this proceeding served April 19, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 464(I)

GENERAL TIME CORPORATION

v.

SEA-LAND SERVICE, INC.

Reparation awarded in part.

DECISION OF GEORGE D. UNGLESBEE, SETTLEMENT OFFICER[1]

General Time Corporation (complainant) claims the difference between the total freight charges assessed on the basis of the noncontract rate, instead of the contract rate, on thirteen (13) separate overland common point (OCP) shipments of timers and clock parts, originating at Gadsden, Alabama and moving from Oakland, California to Tokyo, Japan, Hong Kong and Inchon, Korea. Total transportation charges of $17,220.32 were assessed, while complainant alleges said charges should have amounted to $15,631.80 and is seeking reparation in the amount of $1,588.52 from Sea-Land Service, Inc. (respondent). The thirteen (13) shipments, consisting of one to Tokyo, seven to Hong Kong, and five to Inchon, were shipped on board respondent's vessels M/S FINANCE, McLEAN, TRADE, EXCHANGE, and/or COMMERCE, between February 16, 1976 and July 6, 1976. The shipments involved were assessed the noncontract rates in effect on the date of shipment from point of origin of the particular shipment as contained in Item 864 0000 00 on 5th Revised Page 291, and Rule No. 1(s) (Rate Conversion Tables for Contract/Non-Contract Rates), of Pacific Westbound Conference Overland Freight Tariff No. 6, FMC–13.[2]

Complainant submitted the claim to respondent on June 21, 1977. On July 22, 1977, respondent denied the claim on the basis that complainant

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Determination not to review April 26, 1978.)

[2] Rates to Inchon are constructed by the use of the baseport rate to Busan, Korea found in Item 864 0000 00, plus an outport rate or arbitrary, of $6.00 as set forth on 4th Revised Page 10, Pacific Westbound Overland Freight Tariff No. 6, FMC–13.

was not included on the list of contract signatories of the Pacific Westbound Conference, and at the same time cited the provisions of Rule 43 of the subject tariff which provides in pertinent part:

> "All other claims for adjustment of freight charges must be presented to the Carrier in writing within six (6) months after date of shipment."[3]

The claim was resubmitted to respondent with the advice that complainant signed a merchant's rate agreement with the Pacific Westbound Conference on March 15, 1966 under Contract No. 3553. On September 7, 1977, respondent once again denied the claim, stating that respondent must adhere to the provisions of Rule 43, supra, but advised complainant that Section 22 of the Shipping Act, 1916, allows a two year statute of limitations.

Respondent and complainant confirm, by submission by each of a copy of Contract No. 3553, that the dual rate contract was executed on March 9, 1976. Complainant has amended the total amount of reparation claimed from $1,588.52 to $1,647.54 by properly deleting the overcharges claimed on one shipment made prior to its signing the contract, and by correcting erroneous rate computations made in the overcharge claims on two of the remaining shipments. However, complainant failed to delete the (corrected) overcharge claims on the latter two shipments which were also shipped from point of origin prior to March 9, 1976.[4]

The three shipments that were shipped from point of origin prior to March 9, 1976, are identified in Table I below, and Table II below is a computation deleting the total overcharges claimed on the three shipments in Table I from the total (amended) overcharges claimed.

Table I

	Overcharge Claimed
1. 5 Skids: Timers, shipped from Gadsden, Alabama, March 3, 1976, destined Hong Kong, on Bill of Lading No. 993–365762	$124.99
2. 12 Skids: Clock Parts, shipped from Gadsden on February 6, 1976, destined Inchon, Korea, on Bill of Lading No. 993–365112	83.21
3. 6 Skids: Clock Parts, shipped from Gadsden on March 5, 1976, destined Inchon on Bill of Lading No. 993–365893	80.85
Total	$289.05

[3] The complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that the carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

[4] Apparently, complainant did not delete the overcharges claimed on these two shipments because of the dates of March 9, 1976, and March 16, 1976, on bill of lading No. 993–365762 to Hong Kong, and bill of lading No. 993–365893 to Inchon, respectively. However, Rule 1(b) on 4th Revised Page 12 of the applicable conference tariff provides, inter alia, that ". . . rates of freight or other charges applicable are those in effect on the *date of shipment from point of origin*." (emphasis added).

Table II

Total overcharges originally claimed	$1,588.52
Less deletion of overcharge claimed on Shipment No. 2 in Table I	83.21
	$1,505.31
Plus increase in overcharges claimed on Shipments Nos. 1 and 3 in Table 1 due to complainant's corrected rate computations	142.23
Total overcharges claimed (amended)	$1,647.54
Less deletion of overcharges claimed on Shipments Nos. 1 and 3 in Table I	205.84
Total overcharges, as amended and corrected	$1,441.70

Shipments Nos. 1 and 3 in Table I were shipped from point of origin prior to March 9, 1976, the date on which the parties executed Contract No. 3553, and were properly assessed non-contract rates by respondent. Reparation in the amount of $205.84 sought on these two shipments is denied.

The remaining ten shipments were shipped from point of origin subsequent to March 9, 1976, and were improperly assessed non-contract rates by respondent. The amended claim, less the overcharges denied above, is for $1,441.70, or less than the proper total overcharges of $1,625.07 due on the ten shipments. In computing the proper freight charges on the ten remaining shipments, complainant applied the incorrect contract rate on one shipment[5], resulting in an understatement of $183.37 in the overcharges claimed thereon. The following computations apply:

$\frac{652 \text{ cu.ft.}}{40}$	= 16.3MT (rate $122.00, *applied by complainant*)	= $1,988.60	
	16.3MT (arbitrary—$6.00)	= 97.80	
	16.3MT (handling charge—$5.75)	= 93.73	
			$2,180.13
$\frac{652 \text{ cu.ft.}}{40}$	= 16.3MT (rate $110.75)	= $1,805.23	
	16.3MT (arbitrary—$6.00)	= 97.80	
	16.3MT (handling charge—$5.75)	= 93.73	
			1,996.76
			$ 183.37
			1,441.70
Total (amended) overcharges claimed			$1,625.07

Complainant is therefore awarded reparation in the amount of $1,625.07.

(S) GEORGE D. UNGLESBEE,
Settlement Officer.

[5] 11 Skids Clock Parts from Gadsden, shipped March 31, 1976, to Inchon on bill of lading No. 993-703182 dated April 19, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 482(I)

MITSUBISHI INTERNATIONAL CORPORATION

v.

N.Y.K. LINE

ORDER ON REVIEW OF SETTLEMENT OFFICER'S DECISION

May 2, 1978

The decision of the Settlement Officer in this proceeding was served April 12, 1978, wherein a claim for reparation for overcharge of ocean freight was awarded in part. We agree with much of that decision but modify it to the extent discussed herein.

The Settlement Officer's denial of claim MI–05 is based on the expiration of the statute of limitations. In computing the time under the Commission's rules, the Settlement Officer has interpreted "date of delivery" in Rule 302[1] to mean delivery of cargo to the consignee. The Commission has previously held that a cause of action involving overcharges under Section 18(b)(3) of the Act arises either upon delivery of cargo to the *carrier* or payment of charges.[2] Thus the reference in Rule 302 to "delivery of the property" is to be interpreted to mean delivery to the carrier rather than the consignee. Claim MI–05 is time-barred under either interpretation.

While awarding reparation on the other claims, the Settlement Officer has indicated that because it appears that the freight forwarder may have paid the charges on these shipments, rather than the shipper claimant, respondent is to ensure that the refunds ordered are remitted to the payer of the freights and charges. We too are concerned that refunds not be awarded to persons not entitled to them. However, Section 22 of the Shipping Act, 1916 and Commission precedent would not permit an award of reparation to one not a party to the proceeding. Therefore, the forwarder could not be awarded reparation here. Additionally, reparation may be awarded only to a claimant who has shown that it was *injured* by

[1] Rule 302 states that a cause of action is deemed to accrue . . . "upon delivery of the property or payment of the charges, whichever is later."

[2] *Commercial Solvents Corp.* v. *Moore McCormack Lines, Inc.* 16 S.R.R. 1631 and *U.S.* v. *Helenic Lines, Ltd.* 14 FMC 254, 260.

a violation of the statute.[3] While we agree that violations have occurred here, it has not been shown that claimant has paid the charges or been injured. Claimant has failed to indicate who paid the charges as required by the Commission's Rule 304 and form of complaint. As pointed out by the Settlement Officer there is some indication that the forwarder may have paid them and, if so, we do not know if reimbursement was made.

We conclude therefore, that while a violation of the Act has occurred, claimant cannot be awarded reparation until it demonstrates that it actually paid or reimbursed the forwarder for payment of the charges found to be unlawful. It is ordered that reparation will be denied unless claimant, within 30 days from the date of this order furnishes evidence to the Commission that it has paid the charges in question.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[3] See generally SD 489, Order on Remand served November 29, 1977, Supplemental Decision of the Administrative Law Judge served January 27, 1978, and Notice of Adoption served March 1, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 560

AMERICAN HOME FOODS

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

May 3, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 3, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $3,500.00 of the charges previously assessed American Home Foods.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision in Special Docket No. 560 that effective September 10, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from September 10, 1977 through December 6, 1977, the rate on 'Pizza, Frozen' is $11,000.00 per container subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 560

AMERICAN HOME FOODS

v.

SEA-LAND SERVICE, INC.

Adopted May 3, 1978

Application for permission to waive collections of a portion of freight charges granted.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc., pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916, as amended, on January 20, 1978, filed for permission to waive collection of $3,500.00, being a portion of applicable freight charges totaling $14,500.00 on a shipment of a container load of frozen pizza pies from New York, N.Y. (Elizabeth, N.J.) to Dammam, Saudi Arabia, on September 10, 1977.[2]

The rate for the commodity applicable at the time of shipment was $362.50 per 40 cubic feet, minimum 1,600 cubic feet per container.[3] The rate sought to be applied—$11,000.00 per container.[4]

On 8–24–77, a rate of $11,000.00 per container on Pizza, Frozen from POL/NY—POD/Dammam had been quoted by E. Aldridge of Sea-Land's Atlantic Division.

On August 25, 1977, Mr. Aldridge wrote Mr. Paul G. Davis[5] of Sea-Land's Pricing Office as follows:

> Paul, in reference to our telephone conversation of 8/24 please publish for frozen pizza the rate of $11,000 per refrigerated container from Elizabeth to Dammam.
>
> It is imperative that the rate be effective to cover booking number 6–27932 scheduled for sailing on S/L Market ex Elizabeth 9/8/77.
>
> Thanks.

---

[1] This decision became the decision of the Commission May 3, 1978.
[2] Per bill of lading 901–780999.
[3] Item 678, Sea-Land Tariff 256–A, FMC 136, page 80–B.
[4] Per item 678, Sea-Land Tariff 256–A, FMC 136, 6th RP page 80–C.
[5] Received at Iselin August 29, 1977.

Due to vacations and travel by Mid-East Pricing personnel, there was an inadvertent failure to revise the tariff in accordance with Mr. Aldridge's instructions and the cargo moved without the tariff being amended.

Prior to filing the application for permission to waive the difference between the tariff at time of shipment and the tariff as intended, Sea-Land, on December 7, 1977, amended Tariff 256–A, Item 678, to reflect the rate as intended.

Sea-Land is not aware of any other shipments of the same commodity during the same period or time from another shipper.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[6] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

> *Provided, however,* That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers:
>
> *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided, further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

It is concluded and found that there was an error of an administrative or clerical nature within the intent of section 18(b)(3) by the failure to file a new tariff; that the authorization of a waiver of a portion of the freight charges will not result in discrimination among shippers; that prior to applying for authority to waive a portion of the charges, Sea-Land filed a new tariff which sets forth the correct basis, on which the waiver of a portion of the charges would be computed; and that the application was timely filed.

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[6] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

In accordance with section 18(b)(3) of the Act, permission is granted to waige a portion of the charges. The waiver authorized is $3,500.00.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 6, 1978.

[1] This decision became the decision of the Commission May 3, 1978.
[2] Per bill of lading 901–780999.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 541

A. E. STALEY MFG. CO., DECATUR, ILLINOIS

v.

MAMENIC LINE

ORDER ON RECONSIDERATION

May 5, 1978

This proceeding was initiated by virtue of an application filed by Mamenic Line (Mamenic) requesting permission to waive collection from A.E. Staley Mfg. Co., Decatur, Illinois, of a portion of the freight charges assessed on a shipment of Dextrine, in bags, from New Orleans, Louisiana, to Puerto Limon, Costa Rica.

Mamenic alleged in its application that it had agreed at the shipper's request to file a rate for Dextrin of $70.00 per 2000 pounds but, due to a clerical error, published instead a rate of $70.00 applicable either by weight or measurement.

Administrative Law Judge Seymour Glanzer denied the application upon finding that Mamenic had, in fact, filed neither the $70.00 W/M or the $70.00 W rates in its tariff.

By Notice served January 16, 1978, the Commission adopted the Initial Decision.

Subsequently, Complainant requested the Administrative Law Judge to reconsider his denial of the application. This request was referred to the Commission, which by Notice served January 28, 1978, advised the parties that Complainant's letter would be treated as a petition for reconsideration of the Commission's adoption of the Initial Decision.

In its request Complainant concedes that Mamenic Line may not have filed the $70.00 W rate but points out that it and the carrier had nevertheless agreed on that rate for Dextrin. Complainant submits that had the rate been properly published there would have been no need for applying to the Commission.

While we are not unsympathetic to Complainant's claim, we are without the authority to grant the relief requested. Section 18(b)(3) of the Shipping Act, 1916, reads in part:

> That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce . . . to . . . waive collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature . . . *Provided* Further, That the common carrier . . . *prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based.* . . . (Emphasis added.) 46 USC 817(c)(3).

This provision makes clear that, unless the carrier prior to filing his application publishes a new tariff which sets forth the rate it seeks to apply, the Commission is without authority to consider the merits of the application. This requirement cannot be waived, and as much as the Commission might wish to grant relief in situations such as we have here, where the consequences of subsequent errors by the carrier fall upon the shipper, the Commission, whose jurisdiction is strictly limited by statute, has no power to grant the relief requested.

Accordingly, for reasons stated above, the Commission's adoption of the Initial Decision is hereby affirmed.

It is so ordered.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 460

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

SPECIAL DOCKET NO. 461

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE OF ADOPTION OF INITIAL DECISION

May 5, 1978

Notice is hereby given that, upon review, the Commission has determined to adopt the initial decision of the Administrative Law Judge in these proceedings.

It is ordered that applicant shall effectuate the waiver, publish the appropriate notice and notify the Commission of its actions in the time and manner required by the initial decision,

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 460

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

SPECIAL DOCKET NO. 461

U. S. DEPARTMENT OFAGRICULTURE

WATERMAN STEAMSHIP CORPORATION

v.

Adopted May 5, 1978

Permission granted to waive collection of portions of freight charges in Special Docket Nos. 460 and 461.

C. Neil Johnson and *Richard T. Iwamoto* for complainant.

Ralph E. Casey, Sanford C. Miller and *David S. Zweig* for respondent.

John Robert Ewers, C. Jonathan Benner and *Deana E. Rose* for Hearing Counsel.

INITIAL DECISION[1]
SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

These are two applications, made pursuant to the provisions of section 18(b)(3)[2] of the Shipping Act, 1916, as amended, 46 U.S.C. 817(b)(3), and

[1] This decision became the decision of the Commission May 5, 1978.

[2] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the

Rule 92(a)[3] of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), whereby Waterman Steamship Corporation (hereafter Waterman or carrier), respondent, asks permission to waive collection of portions of freight charges for the transportation of a shipment of yellow corn, in bags, consigned by the United States Department of Agriculture (Commodity Credit Corporation) (hereafter USDA or shipper), complainant,[4] from Galveston, Texas, to the U.N.D.P. Resident Representative, Addis Ababa, Ethiopia (Special Docket No. 460), and a shipment of grain sorghum, in bags, consigned by the same shipper from Houston, Texas, to the same consignee at the same destination (Special Docket No. 461). The applications state, respectively, that the shipments were delivered to the carrier's loading berth on October 17, 1973 and November 13, 1973.

Both applications contain the statement that, if the application is granted, respondent agrees to publish notice to that effect in its tariff (or any reissued tariff) and to take such other action as the Commission may require to give notice of the rate on which the waiver is based and that any additional refunds or waivers or other similar shipments will be made in the manner prescribed in the Commission's order. Therefore, in both Special Docket Nos. 460 and 461, the requirements of the third *proviso* of section 18(b)(3) have been met.

In Special Docket No. 460, an initial decision, in part, was served May 29, 1974. It granted permission to waive collection of a portion of the freight charges, representing the difference between those charges under the carrier's General Cargo N.O.S. rate plus a 25% deviation surcharge, on the one hand, and a negotiated rate, on the other hand (hereafter sometimes referred to as the General Issue to distinguish it from the War Risk Surcharge Issue), but deferred action, pending a hearing, on the waiver of collection of charges under the War Risk Surcharge provision of respondent's tariff. Thereafter, Hearing Counsel petitioned the Com-

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Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application. *And provided further*, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

[3] Rule 92(a) provides:

Common carriers by water in foreign commerce, or conferences of carriers may file application for permission to refund a portion of freight charges collected from a shipper or to waive collection of a portion of freight charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Such application must be filed with the Commission within 180 days from the date of the involved shipment. Prior to application, the applicant must file with the Commission an effective tariff setting forth the rate on which such refund or waiver would be based. All such applications shall be made in accordance with the form prescribed in Appendix II(7) and will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If permission is granted, the Commission will issue an order authorizing refund or waiver. The applicant must agree to publish notice of same in the appropriate tariff and to take such other actions as the Commission may require to give notice of the rate on which the refund or waiver is based. Additional refunds or waivers on other similar shipments will be made in the manner prescribed in the Commission's order.

[4] The second and fourth *provisos* of section 18(b)(3) authorize a carrier to apply for waiver, by filing an application. The format of the application, under Rule 92(a), establishes the shipper as a nominal complainant and the carrier as a nominal respondent. See *International Materials Corp. v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 118, fn. 2 at 119 (1969). Rule 92(a) provides that such applications be handled as Special Docket proceedings, and, for foreign commerce shipments requires the application to be filed in accordance with the form prescribed in Appendix II(7). Appendix II(7) requires the shipper to concur in and execute the application along with the carrier in situations in which refund is sought.

mission for leave to intervene in the proceeding and requested, as additional relief, that the Initial Decision be remanded for hearing and consideration of the issue already decided as well as the War Risk issue and further requested that Special Docket Nos. 460 and 461 (hereafter S.D. 460 or S.D. 461 individually, and S.D. 460 and 461, collectively), be consolidated. By order served August 15, 1974, the Commission granted Hearing Counsel's petition in its entirety.

Hearing was held April 29, 1975, through May 1, 1975. Four witnesses testified. Twenty exhibits were received in evidence.

I. The General Issue

A. S.D. 460

In considering an application for waiver, the Commission is obliged to determine whether the criteria established by the four *provisos* of section 18(b)(3) have been satisfied. In S.D. 460, a sequence of events occurred which caused the applicant to voice a special concern over its compliance with the jurisdictional requirements of the second and fourth *provisos* of section 18(b)(3). It is desirable to deal with these aspects of the proceedings, preliminarily, before going on to the other issues.

The application in S.D. 460 was initially tendered for filing with the Commission on April 9, 1974. However, the respondent had not filed with the Commission an effective tariff setting forth the rate on which such waiver would be based, as required by the second *proviso* of section 18(b)(3) and by the third sentence of Rule 92(a). Accordingly, the Secretary of the Commission rejected the tender, notifying the respondent by letter dated April 9, 1974, that he was returning the application without prejudice to timely resubmission, for under the fourth *proviso* of section 18(b)(3) the Commission lacks jurisdiction to entertain the application unless it is filed within 180 days from the date of shipment. Cf. *Walter Plunkett & Company v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 101, 103 (1969); *Oppenheimer Intercontinental Corp. v. Moore-McCormack Lines, Inc.*, 15 F.M.C. 49 (1971).

On April 15, 1974, prior to 3:00 p.m., respondent's agent made a telegraphic filing of an amendment to respondent's tariff,[5] setting forth the rate on which the waiver would be based. At 3:24 p.m., on that day, respondent resubmitted the application, by hand delivery, accompanied by a transmittal message[6] explaining the reason for delay in filing until

[5] The Commission's General Order 13, 46 CFR 536, authorizes telegraphic filings of tariff amendments. See 46 CFR 536.6(c). Telegraphic amendments resulting in a decrease in cost or no change in cost to the shipper may become effective upon publication and filing. 46 CFR 536.6(a)(3). Effective January 1, 1978, General Order 13 was revised. Under that revision, authorization for telegraphic filings appear at 46 CFR 536.10(c); 46 CFR 536.6(a)(3) now appears at 46 CFR 536.10(a)(3).

[6] The transmittal is time stamped as noted in the text, above. The time of receipt of the telegraphic filing of the tariff is detzrmined by the legend, "Time: 3:00 p.m.," which appears in the immediately subsequent message received by the Commission's telex machine.

April 15th. It attributed the delay to postal difficulties, advising that the Secretary's letter did not arrive until April 15th. In the apparent belief that the 180 day period had expired the previous day, but that a tardy mail delivery might toll the time, respondent added that "Had he been advised last week, this application would have been refiled prior to April 14." This statement would appear to indicate that the respondent made a calculation and reached the result that 181 days elapsed between the date of the shipment and the date of the filing of the application. If the respondent's computation proved out, then, under the express terms of the fourth *proviso* of section 18(b)(3), the Commission would be jurisdictionally barred from considering the application.

However, the respondent calculated erroneously and its apprehension that the application might be barred by the passage of time is groundless. The reasonable explanation for the miscalculation is that respondent started its tabulation by numbering October 17, 1973, as day number one. However, the use of the term "*from* the date of shipment" in the fourth *proviso*, establishes that the count should begin on the first day after the date of shipment. This is the construction applied by the Commission. *Ghiselli Bros. Inc. v. Micronesia Interocean Line, Inc.*, (Initial Decision) 13 F.M.C. 186 (1960), reversed on other grounds, 13 F.M.C. 179, 182 (1969).

However, we do not begin the tally of days with October 18, 1973,[7] for, here, the delivery to respondent's dock was not completed until November 5, 1973, and the bill of lading was not issued until even later—November 22, 1973. Either of those days may be considered the date of shipment for the purposes of section 18(b)(3) and the applicant may be given the benefit of the alternative. *Ghiselli Bros. Inc. v. Micronesia Interocean Line, Inc., supra*, 13 F.M.C. at 187 and 182.[8]

[7] The shipment was made up of eleven separate deliveries to the carrier extending from October 17, 1973 through November 5, 1973. (See eleven daily wharf reports attached to Ex. 1 and Transcript, p. 23.)

[8] Payment of the charges in S.D. 460 and 461 was made by Commodity Credit Corporation Check No. 699,970 on January 2, 1974. In view of the findings made herein (whether under the alternatives offered by *Ghiselli, supra*, by beginning the tally on October 18th, the day after delivery commenced, or November 6th, the day after the delivery to the carrier was completed, or November 23rd, the day after the on-board bill of lading was issued) it is unnecessary to decide whether the 180 day time period fixed by section 18(b)(3) may run from the date of payment. Cf., *Order on Remand*, served July 12, 1976 in Docket No. 76–1, *CSC Intercontinental Inc. v. Orient Overseas Container Line, Inc.*, at p. 2, emphasizing that "The law is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. *Aleutian Homes, Inc. v. Coastwise Line, et al.*, 5 F.M.B. 602, 611 (1959); *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971); *U.S. ex rel Louisville Cement Company v. I.C.C.*, 246 U.S. 638, 644 (1918)." Claims for reparation are governed by section 22, Shipping Act, 1916, 46 U.S.C. 821, which has a jurisdictional time limit for filing a complaint "within two years *after* the cause of action *accrued*." The operative time limit for filing under section 18(b)(3) is "within one hundred and eighty days *from* the time of *shipment*." Because of the different terminology employed in the two statutes, the date of payment has not been considered a relevant factor in proceedings brought under section 18(b)(3). However, while not entirely free from doubt, there is reason to believe that the term "from the date of shipment" was intended to be synonymous with the term "after the cause of action accrued." If this be so, then the 180 day count under section 18(b)(3) would begin at the time of shipment or upon payment of the freight charges, whichever is later.

"From the date of shipment" is an ambiguous term. It found its way into the statute without legislative discussion. The term was used first by a witness in proposing an amendment dealing with another aspect of the Commission's legislative proposal and was adopted by the Commission later in proposing a jurisdictional time limit for filing applications for relief. But, as explained in the text of this decision, *infra*, granting relief for inadvertent error was not novel at the Commission. The Commission had been doing so for years before it determined it did not have the

Accordingly, I find that the application in S.D. 460 meets the criteria of the second and fourth *provisos* of section 18(b)(3).

On the General Issue, findings were made in the partial initial decision in S.D. 460 based entirely on matters appearing in the application. Since then, no evidence has been introduced and no argument has been made at any subsequent phase of the proceeding to disturb those findings.[9] For that reason and because it will provide a convenient introduction to what follows, pertinent portions of those findings are repeated immediately below.

By written agreement,[10] dated October 3, 1973, the cargo was booked to be carried by respondents vessel, *SS Alex Stephens,* from Galveston to the discharge port of Djibouti, French Somaliland (The French Territory of Afars and Issas) at the rate of $68.75 per long ton plus a 25% Capetown Deviation surcharge. At that time, however, the applicable tariff rate for such shipment was $139.00, weight or measure for General Cargo, N.O.S. (not Dangerous, Hazardous or Refrigerated)[11] plus the aforementioned surcharge.[12] The agreement took this into account and specifically called for the carrier to amend its tariff to correspond to the negotiated rate. This was done,[13] but its effect on this shipment was negated when the shipper decided to change the destination port from Djibouti to Assab. A superseding written agreement, dated October 16, 1973, reflected this new discharge port, and, as did the supplanted agreement, required the carrier to amend its tariff. Otherwise, the aforementioned General Cargo N.O.S. rate would govern. The carrier, however, did not cause its tariff to be amended, as it had agreed.

Thereafter, commencing October 17, 1973, and ending November 5, 1973,[14] the cargo was delivered to respondent's pier at Galveston where it was loaded aboard the *SS Alex Stephens.* That ship then proceeded to Houston, Texas, where, on or about November 13, 1974, it on-loaded

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requisite statutory authority. However, in those cases in which relief was granted, it was done within the framework of proceedings instituted under section 22 and that section's two-year jurisdictional filing period which commenced upon accrual of the right to relief, or—upon payment of freight charges. The thrust of the Commission's legislative proposal was authorization to be allowed to do what it mistakenly had been doing in the past and to do it in conformity with the procedures it had employed in the past, but with certain added safeguards. There is nothing to indicate that in proposing as a safeguard a shorter jurisdictional time period for filing in section 18(b)(3) than is provided for in section 22, that the Commission intended to fix a new and different standard for measuring that time period.

[9] In fact, the Memorandum of Law submitted by Hearing Counsel in advance of the hearing unequivocally disclaimed opposition to the conclusion reached on the General Issue in the partial initial decision. At pp. 3–4 of that Memorandum, Hearing Counsel wrote, "Judge Glanzer's conclusion that refunds should be permitted of those portions of freight charges (exclusive of War Risk Surcharges) which exceeded the negotiated rate of $68.75 per 2240 pounds is, in our view, correct. His holding on this issue was confined to the Special Docket No. 460 cargo of corn. We submit that the operative facts relating to the rate assessed on the Special Docket 461 cargo are nearly identical and that similar relief is justified."

[10] Cargo Booking Confirmation (Ocean Carrier, a government form, No. EMS–393).

[11] Waterman Steamship Corporation Tariff F.M.C. No. 73, 3rd rev. p. 54.

[12] *Id.,* original p. 31.

[13] *Id.,* 12th rev. p. 116.

[14] The application states "Shipment was delivered to Carrier's terminal on October 17, 1973." A subsequent letter from respondent, dated May 7, 1974, confirms that delivery of the cargo began October 17, 1973, and was completed on November 5, 1973.

additional cargo,[15] a shipment of grain sorghum from the same consignor to the same consignee at the same destination as here. (The grain sorghum shipment is the subject matter of S.D. 461.) On November 22, 1973, the respondent issued its "on-board" bill of lading for the shipment of 55,115 100-pound bags of corn, the shipment involved in S.D. 460.

Had there been no negotiated tariff rate, the shipment, computed at the General Cargo N.O.S. rate, would have called for charges of \$718,217.33.[16] However, the respondent, in accordance with its agreement, billed the complainant at the contractual rate plus a 10% War Risk[17] Surcharge which had become effective October 23, 1973. The complainant paid the charge as billed, less the War Risk Surcharge. A further development of the facts surrounding the War Risk Surcharge appears in the discussion of that issue, *infra*.

The S.D. 460 application prays that respondent be permitted to waive the difference between \$718,217.33 and \$211,977.09 (the amount collected), the difference being \$506,240.24. The application recites that there were no other shipments of the same or similar commodity which moved via respondent's vessels during the same period of time at the rate applicable at the time of the shipment involved in this proceeding.

The purpose of section 18(b)(3) is stated in its first *proviso* in which the Commission is authorized in its discretion and for good cause shown "to permit a carrier to waive collection of a portion of the charges from a shipper when the carrier errs due to inadvertence in failing to file a new tariff" and that such "waiver will not result in discrimination among shippers."

The law was not always thus. After enactment of 18(b)(3) in 1961, as implied in n. 8, *supra,* the Commission initially believed it could provide relief pursuant to special docket procedures in cases of inadvertent error in foreign commerce. See, *e.g., Lutcher, S.A. v. Columbus Line,* 7 F.M.C. 588 (1963). However, in *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp.,* 8 F.M.C. 361 (1965), the Commission held that the earlier decisions were incorrectly decided because the Commission lacked the requisite statutory authority to alleviate burdens which fell upon innocent shippers due to a carrier's inadvertent error in failing to file an agreed-upon rate in the tariff. As a result, after *Mueller v. Peralta, supra,* and until the four *provisos* were added to section 18(b)(3) in 1968,[18] section 18(b)(3) was construed "to prohibit the Commission from author-

[15] In the partial initial decision in S.D. 460, I erroneously stated that the date of loading of the additional cargo was November 19, 1973. November 19th, of course, was the date of issuance of the on-board bill of lading for the additional cargo, the shipment involved in S.D. 461.

[16] Computed on the basis of 2466.6424 weight tons at the General Cargo N.O.S. rate plus the 25% surcharge, the charges for the shipment would be \$428,579.11. However, there were 4133.625 measurement tons which would obviously produce greater charges. Under Rule 5(a) of respondent's tariff (F.M.C. No. 13, original, p. 13), it is required to apply the rate (weight or measurement) which produces the greater revenue.

[17] *Id.*, 1st rev. p. 32–A.

[18] Public Law 90–298, 90th Cong.

izing relief where, through a bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be."[19]

Accordingly, the Commission sought to be empowered "to authorize carriers to . . . waive the collection of a portion of their freight charges for good cause such as bona fide mistakes."[20] By way of illustration of the inequity of existing law which would be cured by the amendment, in a case of bona fide mistake, the Commission stated:[21]

> For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rate.

The foregoing example of bona fide mistake fits the facts of S.D. 460 nicely and satisfies the requirements of the first *proviso*.

Therefore, on the General Issue in S.D. 460, I find that there was a bona fide mistake[22] and that the requirements of the statutory criteria for granting relief under section 18(b)(3) have been satisfied. Thus, there is warrant for the Commission to exercise its discretion, favorably, on the application and to grant permission to respondent to waive the collection of freight charges at the rate provided for General Cargo N.O.S. in its tariff. Since there have been no shipments of the same or similar commodity on respondent's vessels, I find that there is scant likelihood of discrimination.

B. S.D. 461

In S.D. 461, on the General Issue, the facts are substantially the same as those involved in S.D. No. 460 and the same relief is clearly warranted. These are the essential facts:

Prior to the shipment, Waterman and USDA entered into a booking agreement pursuant to which Waterman would establish a rate of $68.75 per 2240 pounds plus a 25% deviation surcharge for grain sorghum from Houston to Djibouti. At that time the applicable tariff rate for the shipment was $139.00 W/M for General Cargo, N.O.S. plus the deviation surcharge. The agreement took this into consideration and specifically

[19] House Report No. 920 (90th Cong., 1st Sess., November 14, 1967) *Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges*, pp. 3–4.

[20] *Id.*, p. 3.

[21] *Id.*, pp. 3–4.

[22] See Hearings on H.R. 9473 Before the Subcommittee on Merchant Marine, 90th Cong., 1st Sess., Sen. No. 90–11 (1967), p. 88, where Admiral Harllee, then the Chairman of the Commission, assured the Subcommittee that, in the administration of section 18(b)(3) the Commission was committed to an adjudicatory procedure before a hearing examiner to insure that entitlement to relief would be founded upon proof of the bona fide nature of the mistake. The colloquy follows:

> Admiral Harllee. On top of that, the case would come before a hearing examiner, who would seek proof of the bona fide nature of the mistake.
>
> Mr. Edwards. So that, in other words, it wouldn't just simply be a case of a shipowner writing out a check to the Shipper?
>
> Admiral Harllee. No.
>
> Mr. Edwards. There would be something more involved than that.
>
> Admiral Harllee. The case would appear before the hearing examiner, but under a very shortened procedure which we call "special docket procedure," in which there would have to be establishment of the fact that this is a bona fide mistake.

required the carrier to amend the tariff to correspond to the negotiated rate. The amendment was filed but, here too, the effect on the shipment was negated when USDA decided to change the destination port from Djibouti to Assab. A superseding written agreement, changing the destination to Assab was entered into on October 16, 1973, but in all other respects the new agreement's terms conformed to the earlier one. Waterman failed, however, to file a new tariff reflecting the Assab change. The grain sorghum was delivered to Waterman at Houston on November 13, 1973. An on-board bill of lading was issued on November 19, 1973; the conforming tariff setting forth the rate on which the waiver would be based was filed by telegraph April 26, 1974; and the application for waiver was filed April 30, 1974. There were no other shipments of the same or similar commodity during the same period of time at the rate applicable at the time of the shipment involved in this proceeding.

On those facts, on the General Issue in S.D. 461, I find that there was a bona fide mistake and that the statutory criteria for granting relief under section 18(b)(3) have been met. There appears to be no likelihood of discrimination. Therefore, permission is given to Waterman to waive collection of freight charges at the rate provided for General Cargo N.O.S. in its tariff.

II. War Risk Surcharge Issue

As noted earlier, in my Initial Decision, In Part, I deferred action, pending a hearing, on waiver of collection of charges under the War Risk Surcharge provision of Waterman's tariff. In that initial decision, I referred to many questions concerning the War Risk Surcharge Issue, some of which are no longer relevant or material in view of the testimonial and other evidence adduced at the hearing. I will omit any reference here to those matters raised in the partial initial decision which have now become inconsequential.

The application in S.D. 460 did not specifically seek waiver of collection of the War Risk Surcharge. It merely recited that the shipment was delivered to the carrier's terminal on October 17, 1973 (however, see n. 7 and n. 14, *supra*, showing that delivery began October 17, 1973 and was completed November 5, 1973); that Rule 105[23] contains an Effective Date of the Rate Rule providing that date of delivery of cargo to loading berth determines the effective date of the tariff rate; and that respondent "billed the charges at the rates set forth in the booking contract . . . but erroneously added a 10% War Risk Surcharge. The War Risk Surcharge did not become effective until October 23, 1973 (Rule 191 of Carrier's FMC 73) and therefore, when USDA paid the freight, the War Risk Surcharge was correctly deleted." USDA paid and Waterman collected $211,977.09 in freight charges.

[23] Rule 105, respondent's F.M.C. No. 73, original, p. 21, provides, "Cargo delivered to vessel's loading berth alongside or on the wharf, shall be assessed the Rate in effect at the time of such delivery."

Given those limited statements in the application, it was difficult to determine whether the parties viewed it as error to assess the War Risk Surcharge because of the so-called Effective Date of the Rate Rule or because of the *agreement*. In any event, I found that the War Risk Surcharge Issue must be considered within the purview of the proceeding in S.D. 460 although the application did not specifically seek waiver of collection of that Surcharge. However, because of the difficulty in determining what was the error upon which the parties relied and for other reasons set forth in the partial initial decision, a determination of the War Risk Surcharge Issue was deferred.

It is appropriate to note that all parties to the proceeding agree that the War Risk Surcharge Issue is properly before me in S.D. 460. With this understanding, the application for waiver may be deemed amended. As amended, the application should be read as a request for waiver of $790,039.06, computed as follows:

Applicable rate pursuant to Tariff:

4133.625 Measurement Tons	
at $139.00 Cargo N.O.S. rate	= $574,573.87
plus 25% Deviation Surcharge	= 143,643.46
plus 10% War Risk Surcharge	= 71,821.73
Total	$790,039.06
2466.6424 Weight Tons	
at $139.00 Cargo N.O.S. rate	= $342,863.29
plus 25% Deviation Surcharge	= 85,715.82
plus 10% War Risk Surcharge	= 42,857.91
Total	$471,437.02

Rating on the basis of measurement tons produces the greater revenue. Therefore, it is the applicable charge.

Freight charges under the agreement amount to $211,977.06, computed as follows:

2466.6424 Weight Tons	
at $ 68.75 W	= $169,581.65
plus 25% Deviation Surcharge	= 42,395.41
Total	$211,977.06

The difference between the charges under the applicable rate and the charges under the rate sought to be applied (the amount for which waiver is sought) in S.D. 460 is $578,061.97.

Inasmuch as the measurement tons, weight tons, applicable rate, rate sought to be applied and amount paid in S.D. 461 are the same as those in S.D. 460, the amount for which waiver is sought in S.D. 461 is also $578,061.97.

The applications in both special dockets reveal that on October 3, 1973, the same day that Waterman and USDA entered into their agreement Waterman issued telegraphic instructions to its tariff publishing agent to publish special rates. The message identified the contract by name, number, quantity, size and destination, dates and rate. The rate was given as "$68.75[24] plus 25 percent NSD."[25] Waterman's instructions contained no reference to a War Risk Surcharge or to Rule 190,[26] its tariff rule, at that time, relating to War Risk Surcharge.

It was the next happening in the sequence of events which caused the issues in S.D. 460 to become beclouded and set in motion the need for a hearing to ascertain whether there was a bona fide mistake in connection with the War Risk Surcharge.

The applications show that the tariff publishing agent made a telegraphic filing of the corn and sorghum tariffs on October 10, 1973, and followed this up with a permanent filing of those tariffs, as project rates,[27] on October 15, 1973. The agent complied with the instructions, up to a point. Transposing the instructions into tariff form, the agent published the rate as "$68.75 W NSD subject to Rules 185 [the deviation surcharge rule *and 190*."

No evidence was produced to show the agent's authority for adding the reference to Rule 190. It can only be conjectured that he acted on his own in recognition of the facts that, after he received his instructions, the Yom Kippur War had erupted on October 6, 1973, and that transportation to the destination port might be affected by the hostilities. However, the resolution of the War Risk Surcharge Issue does not turn alone on the *ultra vires* act of the agent. It yet must be determined whether that Surcharge would be applicable even if there had been no reference to Rule 190 in the tariff filing.

Rule 190, provided for sharply graduated surcharges, keyed to specified percentage increases in the war risk hull and machinery insurance rate above that in effect on August 31, 1970, which "will be assessed and added to and will be in addition to all other rates and charges (including any other surcharges) provided in this Tariff." The surcharge was also governed by time and place factors.

On October 17, 1973, Rule 190 was in effect and its provisions would seem applicable. However, other things occurred which negated the applicability of Rule 190.

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[24] By a second message, the same day, Waterman corrected a numerical error in the first message applicable to the sorghum. The first transmission read $68.00 instead of $68.75, as the second message noted the proper rate to be.

[25] NSD means not subject to discount.

[26] F.M.C. No. 73, original, p. 32.

[27] Project rates are authorized by the Commission. Until January 1, 1978, the applicable regulations for project rates appeared at 46 CFR 531.0(n) and 531.7(e)(i). Since January 1, 1978, they appear at 46 CFR 531.2(a) and 531.6(m).

At the tariff page on which Rule 190 appears, there is a notation that on October 17, 1973, Rule 190, which had become effective more than eleven months before, was found to be "in violation of Section (s) 18(b)(2) of the Shipping Act, 1916"[28] and was rejected for the stated reason that "Increases on less than 30 days notice are not allowed." Formal written notice of the rejection occurred on October 23, 1973, when the respondent was advised by a branch chief of the Office of Tariffs and Intermodalism. Apparently, respondent was advised orally of the rejection prior to the branch chief's letter because on October 17, 1973 it sought special permission[29] to file the 10% War Risk Surcharge amendment, and upon issuance of Special Permission No. F–1645–I, it filed the amendment[30] telegraphically on October 23, 1973. As pertinent, the amendment, Rule 191,[31] provides:

> Effective October 23, 1973, a War Risk Surcharge of 10% will apply on all rates and charges (including all other charges), applicable on all traffic moving to or via the Red Sea, Gulf of Suez, Gulf of Aqaba and other ports within the scope of this Tariff.

The foregoing are the factors which set the stage for the hearing.

At the hearing it was established that it was the mutual intention and understanding of Waterman and USDA that no other surcharge, including War Risk, in Waterman's tariff, except the deviation surcharge which was explicitly made to apply, would be applicable to the shipments in S.D. 460 and 461. The evidence shows not only that it was the custom and practice between those parties that rate negotiations which ended in booking contracts often resulted in all inclusive rates, meaning that—every element of the charges, except those expressed as "special additional terms" would be included in the carrier's base (or flat) rate—but, also, that Waterman generally melded potential surcharges, such as War Risk, in the base rate it offered during negotiations with USDA and, in particular, included the potential for War Risk Surcharge, here.

These are some of the pertinent facts:

Testimony concerning the customs and practices of USDA and Waterman in booking cargoes and with respect to the facts of the two bookings in the S.D. proceedings were given by individuals who had considerable experience in booking cargoes for USDA and Waterman. USDA's witnesses were John Hudgins, who had 19 years experience in the Ocean Transportation Division (OTD), Foreign Agricultural Service of USDA, Thomas Rinn, who had eight years experience with OTD, the last three years as the Chief of Cargo Operations Branch of OTD, and

[28] 46 U.S.C. 817(b)(2).

[29] Applications for special permission to permit increases in rates or issuance of new or initial rates on less than statutory notice were authorized and governed by specified provisions of General Order 13, 46 CFR 536.8. Cf. fn. 5, *supra*.

[30] Despite the requirements of 46 CFR 536.6(d)(ii) and the rejection letter, respondent did not place a notation on its War Risk Surcharge amendment filed pursuant to special permission that it was issued in lieu of the rejected rule. (By a correction to Rule 190, filed December 28, 1973, it did note that there was a rejection of Rule 190 on October 17, 1973.)

[31] F.M.C. No. 73, 1st rev., p. 32–A.

Leonard McCray, who has been a Traffic Management Specialist with OTD since 1967.

Robert Leyh, an employee of Waterman since 1968 and Waterman's Washington Office manager since January 1974, also testified.

The two shipments were made under Title II, Public Law 480, 83d Congress which was enacted in 1954. Under that statute, the United States makes agricultural commodities available to needy people throughout the world. The responsibility of USDA under this statute is to provide agricultural commodities and ocean transportation. OTD's responsibility is to obtain cargo space on ocean carriers to move this cargo. OTD normally makes around 2,000 to 2,500 bookings a year, although in Fiscal 1973, a slack year, there were about 1,200 to 1,300 bookings. Yet, about 2 million tons of cargoes were shipped in 1973. Ocean transportation costs range from $57,000,000, as in Fiscal 1973, to $120,000,000 a year. Except for the Department of Defense, USDA is, usually, the largest shipper of cargo from the United States.

USDA has had a considerable number of bookings with Waterman as shown, for example, by exhibits attached to Hudgins' affidavit (Ex. 1) evidencing 53 bookings in one year to the area near Djibouti and Assab.

Generally, the Minneapolis ASCS Commodity Office of USDA notifies OTD as to the type, quantity, loading port and destination of cargoes. Upon receipt of this information, OTD telephonically solicits bids from carriers which operate trade routes to the port of destination. The carriers are usually required to submit their offers within 24 hours. After all the offers are received, they are reviewed by the employee handling the booking with Rinn and a determination is then made as to which bid to accept or whether to continue further negotiation. Rinn had complete authority to make bookings up to $1,000,000.

OTD uses a work sheet called a "call sheet" in which the record of the telephonic negotiations are recorded. The call sheet shows the offer or replies made by the carriers, the counter-offers made by USDA and the final fixed rate. It also indicates the individuals participating, the dates involved and other data. The call sheet clearly indicates whether the rate fixed was a conference rate or an individual carrier's tariff rate which was negotiated and whether an amended rate was required to be filed by the carrier.

On occasions when Leyh was telephonically advised of a cargo availability by USDA, he would contact Waterman's New York office to consult with them as to the rate Waterman would offer.

After a booking is fixed by telephone, USDA prepares a booking confirmation showing the exact terms agreed to by the parties and the booking confirmation is sent to the carrier. The carrier must sign and return the form to USDA before USDA will pay freight charges. If there were any terms on the cargo booking confirmation form in variance with his understanding of the agreed terms, Leyh would contact USDA in order to make the appropriate changes.

There are two types of offers submitted by carriers. One type is the conference rate which is offered by a conference carrier and the other type is the rate offered by an individual carrier with its own tariff. USDA usually would accept the conference rate without negotiating further with the carrier. However, in cases where there were large quantities involved and Rinn believed that USDA was entitled to a better rate, he would ask the conference carrier to have the rate changed. But, it is recognized that it is cumbersome and time-consuming to change a conference rate because a telephone poll of all the conference carriers has to be taken. Because speed is essential in booking USDA's cargoes, changes in the conference rate are not usually requested in booking cargoes. USDA, however, continues to review conference rates and will request a conference to make rate changes if it believes that a rate is not reasonable.

With respect to the offers made by carriers with individual tariffs, USDA usually negotiates with the carrier to obtain the best possible rate. The rates negotiated by USDA are expressed in many ways depending on how the carrier makes its offer and how USDA counters the offers. USDA does not know why carrier offers sometimes include a surcharge in the base rate and sometimes have the surcharges broken out because the reasons for the practice are personal to the carrier. No one in USDA can tell what the monetary breakdown of the component parts of the negotiated base rate is since only the carrier knows.

One type of negotiated rate is the "all inclusive" rate which is expressed in a dollar amount only. It is shown on the USDA cargo booking confirmation form with a dollar amount in the block entitled "ocean freight rate" and with the words "all inclusive" shown in the block entitled "special additional terms and comments." An all inclusive rate is a rate where every element of the charges made by the carrier is included in a flat rate and the flat rate would include all the rates and surcharges which the carrier has on file.

There are variations of the "all inclusive" rate. In some cases, the base rate will be inclusive of certain charges but will not include one or more other charges. In that case, charges such as diversion charges, currency devaluation charge or other surcharges would be noted in the "special additional terms and comments" section of the cargo booking form.

There has been a custom, conduct and practice in the trade that when a carrier with an individual tariff rate offers a base rate plus surcharge, USDA and the carrier understand that to mean that the carrier intends the base rate to include all other charges that the carrier has on file.

The type of rate agreed to by the parties is shown on the cargo booking confirmation form. If the rate agreed to by the parties is a conference rate, the block on the booking form after the words "conference rate" is checked. If the rate is an individual carrier's tariff rate, the block after the words "carrier tariff" is checked. Sometimes when a rate is negotiated with a carrier publishing an individual tariff, the block after the words "negotiated" is also checked. The words "to amend" are also typed in after the block entitled "carrier tariff" to indicate that since the rate was negotiated, the carrier must amend its tariff to cover the negotiated rate.

Leyh testified that in making offers to USDA, he would either include everything in the rate or he would offer a rate with other charges broken out. He said that if he wanted a surcharge or any other charges in addition to the base rate, it was his practice to add it into the base rate when he offered it to USDA. Leyh stated that the reason Waterman varied its offers to USDA, sometimes making them "all inclusive" and in other cases, breaking out one or more surcharges, was for cosmetic effect so that the rates appear as attractive as possible.

Rinn and McCray for USDA and Leyh for Waterman booked the cargoes for the two shipments. After McCray was informed of cargo availabilities, he contacted various carriers to inform them and to request offers from them for carriage of the cargoes.

None of the carriers except Waterman expressed any interest in the two shipments. Waterman submitted identical bids for the two shipments—$71.75 per long ton plus 25 percent Capetown deviation surcharge. Leyh testified that the $71.75 per long ton base rate was intended to include all other charges, including the War Risk Surcharge. Rinn and McCray understood that the $71.75 per long ton base rate offered by Waterman included all the surcharges Waterman had on file except the 25 percent deviation surcharge based on their long experience in booking cargoes with Waterman and other non-conference carriers, although there was no mention of this fact in the negotiations.

After discussing the rate offered by Waterman, Rinn and McCray decided to counteroffer a rate of $65 per long ton "all inclusive" which then intended to be a complete counteroffer to Waterman's offer. Rinn made a counteroffer at $65 per long ton because in his judgment such an offer was low enough to enable USDA to find out what possible considerations Waterman could give. Rinn testified that he intended that the $65 per long ton "all inclusive" rate would be the total ocean transportation charge for the movement. McCray believed that the $65 "all inclusive" counter meant that whatever surcharge the carriers had on file would be included in the $65 per long ton rate. Rinn and McCray both understood that the words "all inclusive" meant that there would be no other charges in addition to the $65 rate.

McCray then called Mrs. Milton of Waterman and advised her of USDA's counteroffer of $65 per long ton "all inclusive." Leyh rejected the counteroffer and made a counteroffer of his own of $71.25 per long ton plus 25 percent deviation surcharge. Rinn understood the $71.25 per long ton base rate was to include all other charges and that the only additional charge would be the 25 percent deviation surcharge. Rinn, thereafter, made a counteroffer of $68.75 per long ton plus 25 percent deviation surcharge. Leyh agreed to this counteroffer and the booking was fixed.

Rinn and McCray had no question in their minds that the $68.75 per long ton base rate agreed to by Waterman included all other charges, except the deviation surcharge.

Although Rinn and McCray never had any discussion with Leyh during the negotiations as to whether the base rate included all other surcharges, except the 25 percent deviation surcharge, they had concluded on the basis of the long practice of their office and the course of dealing with all carriers that when a rate was offered without mentioning other charges which the carrier had on file, such other charges were included in the base rate. Although there could be a discussion with the carrier as to whether a base rate included surcharges when the cargo was a small quantity, when the cargo was large, as in this case, Rinn expected to get a base rate with surcharges included because he expected the carrier to make some concessions on the rate.

McCray and Rinn could not recollect whether they knew that Waterman had a War Risk Surcharge in effect at the time of the negotiations of the two shipments involved. Since Rinn was in charge of all the bookings made by OTD, which numbered into the thousands and covered worldwide ports with many different charges applicable on any shipment, he could not remember what he considered at that time. It was impossible for Hudgins to recapture all the multitudes of factors that went into the knowledge of what the rates were then. However, OTD knew what the carrier's offer really was because OTD kept up-to-date tariffs and could check on it and could tell all the elements of a carrier's tariff at anytime.

Leyh testified that he had considered the possibility of war breaking out in the Red Sea area when he booked the cargoes with USDA and therefore had included the War Risk Surcharge in the base rate which he offered and that the War Risk Surcharge was included in the final fixed rate of $68.75 per long ton. He also testified that Waterman's policy is to cover all costs in fixing its negotiated rate, including all anticipated costs for a particular movement, including those which might activate a War Risk Surcharge.

In response to Hearing Counsel's question as to how Leyh would indicate in Waterman's tariff that a rate included no surcharge, Leyh replied that he would have to have all the surcharges covered in some fashion in his rate. When asked about a rate in the tariff which stated that it was not subject to Rule 191 (War Risk Surcharge), Leyh replied that it meant that Rule 191 was taken into account when the rate was negotiated, and that Rule 191 was not to be applied separately in addition to the rate.

Other transportation documents submitted as exhibits confirm the oral testimony of the witnesses and show that it was the practice between Waterman and USDA to include all surcharges in the base rate unless separately and explicitly broken out.

Discussion and Conclusions

The threshhold question on the War Risk Surcharge issue is whether there was a bona fide mistake on the part of Waterman's tariff publishing agent in making the project rate on sorghum and corn subject to Rule 190. I find that it was a bona fide mistake, first, because the agent acted beyond the scope of his instructions from Waterman. Second, and more significantly, for this reason embraces the overall War Risk Surcharge Issue, I find that it was not the intent of Waterman to make these shipments subject to any surcharges, including War Risk, other than the deviation surcharge, but that it was Waterman's intention to include the potential application of a War Risk Surcharge in the base rate of $68.75 and that USDA entered into the booking contract with Waterman based on that understanding.

The testimony of witnesses who had a great deal of experience in the booking practices of Waterman and USDA and with each other and who negotiated the contracts in S.D. 460 and 461 clearly shows that it was their mutual intention and understanding gained from long-standing custom and usage in dealing with each other to include the potential for a War Risk Surcharge in the base rate. There is evidence, in connection with many other shipments which Waterman carried for USDA, that when those parties intended the War Risk Surcharge to apply, they made specific reference to that Surcharge in their contracts, but that when it was not to apply, that Surcharge was included in the base rate without making explicit reference thereto in the booking contract. Where a contract is silent on a particular matter, evidence of custom and usage may be received to show the tacit intention of the parties. *Edward F. Morgan Co. v. United States,* 230 F.2d 896 (5 Cir. 1956), cert. den'd, 351 U.S. 965 (1956). In that case, the Circuit Court explained the rule and its rationale, 230 F.2d 902:

> The well settled doctrine that custom or usage will not vary the terms of a written contract needs no citation in its support. But evidence of custom and usage may supply the meanings of words or phrases and supply by implication necessary provisions with respect to which the written instrument is silent. The . . . law has been thus stated:
>
> "A valid usage or custom concerning the subject matter of a contract, knowledge of which may be imputed to the parties, is, according to a general rule, incorporated into the contract by implication. This means that where there is nothing in the agreement to exclude the inference, the parties are presumed to have contracted with reference to the usage, provided that it is just and reasonable, and evidence of the usage is admissible, not to vary or contradict the terms of the contract, but to aid in interpreting it and to ascertain with greater certainty what was intended. When an agreement is silent or obscure as to a particular subject, the law and usage become a portion of it and constitute a supplement to it and interpret it.
>
> * * *
>
> "It follows from what is said above that if the language of a contract is ambiguous, uncertain, incomplete or inconsistent, evidence of usage or custom is admissible to show the meaning intended by the parties."

Here, the facts show that Waterman's representative was aware of and did consider the ever present possibility of war breaking out in the Red Sea area when he offered the base rate to USDA and that he blended the potential for War Risk Surcharge into the base rate as part of the cosmetic package which USDA agreed to. There are other factors to support the findings based on custom and usage. Had Waterman intended to charge separately for War Risk, there was ample time for it to take action to do so during the period after entering into the contract and after hostilities commenced and before deliveries under the contracts were made. During that time period Waterman could have instructed its agent to publish an amendment to the project rates making them subject to Rule 191. However, Waterman's subsequent filing of the conforming tariff is consistent with its intention not to assess a separate War Risk Surcharge on those shipments. In the conforming tariff, it was specified that the base rate and deviation surcharge are "not subject to [Rule] 191."

There is settled precedent for allowing carriers to include surcharges of general applicability in flat rates for government shippers in foreign commerce under a contractual arrangement upon proof that when the contract was made it was reasonably foreseen that the event which might trigger the surcharge was likely to arise during the contract period. *Gulf & South American Steamship Co., Inc. v. United States,* 500 F.2d 549, 553–554 (Ct. Cl. 1974); *Sea-Land Service, Inc. v. United States,* 497 F.2d 928 (Ct. Cl. 1974). It would appear that under those circumstances, even if the surcharge is imposed generally on other shippers, there would be no violation of the Shipping Act. See Non-Assessment of Fuel Surcharges or MSC SRR 526 (1973), modifying 15 F.M.C. 92 (1972).

Therefore, I conclude that the inclusion of Rule 190 in the tariff was the result of bona fide mistake and that Rule 191 has no application to the shipments in S.D. 460 and 461. I further conclude that waiver of the War Risk Surcharge will not result in discrimination against other shippers.

ORDER

Waterman is granted permission to waive collection of $578,061.97 in Special Docket No. 460.

Waterman is granted permission to waive collection of $578,061.97 in Special Docket No. 461.

Waterman shall publish the following notice in its tariff:

> Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket Nos. 460 and 461, that effective October 10, 1973, and continuing through April 25, 1974, inclusive, the Project Rates for the account of U.S. Department of Agriculture on Corn, in bags from Galveston, Texas to Assab, Ethiopia, pursuant to Contract No. 8596B, and on Sorghum, in bags from Houston, Texas to Assab, Ethiopia, pursuant to Contract No. 8596A, for purposes of refunds or waiver of freight charges is $68.75 W per ton of 2240 pounds plus 25% Capetown Deviation Surcharge (Rule 185), such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff except other surcharges, including War Risk Surcharge (Rules 190 or 191).

Waiver of the charges shall be effectuated within 30 days of service of notice by the Commission authorizing such waiver and Waterman shall within five days thereafter notify the Commission of the date and manner of effectuation of the waiver.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
February 28, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 535

FARR CO.

v.

SEATRAIN LINES

ORDER ON RECONSIDERATION

May 5, 1978

This proceeding was initiated by application filed by Seatrain Lines for permission to waive collection of a portion of the freight charges assessed on a shipment of mechanical air cleaners carried from Los Angeles, California, to Antwerp, Belgium, under bill of lading dated March 28, 1977.

Freight charges were assessed at $43.00 per cubic meter, the rate quoted to the shipper Farr Co. (Farr) by Seatrain Line's (Seatrain) rating clerk, which rate was contained in the Eastbound Pacific European Container Freight Tariff (PEC tariff) published under Agreement No. 10052.[1] Seatrain's clerk, however, failed to mention that the rate would not become effective as to Seatrain until April 1, 1977, so that the shipment which moved under bill of lading dated March 28, 1977, was subject to Seatrain's "landbridge" tariff which at the time of shipment provided a rate of $83.25 per cubic meter.

A freight bill based on the $43.00 rate was submitted to the shipper upon delivery of the cargo at Los Angeles. The Adherence Group, Inc. (TAG), an independent inspection entity, later corrected the bill by computing the charges on the basis of the $83.25 rate. Seatrain acknowledging the error of its rating clerk asked for permission to waive collection of the additional freight charges resulting from the assessment of the higher rate.

Administrative Law Judge Norman D. Kline denied the application. After a discussion of the legislative history of P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916, to give the Commission authority to permit waivers or refunds, the Presiding Officer

[1] The tariff was filed under Rate Agreement No. 10052 between the Pacific Coast European Conference and certain independent lines, Seatrain, an independent, became a party to the agreement effective April 1, 1977.

concluded that misquotation of the applicable tariff was not the type of mistake from which P.L. 90–298 was intended to afford relief.

No exceptions were filed within the time provided in Rule 227 and the Commission on January 17, 1978 determined to adopt the Initial Decision. Complainant Farr has now by letter requested the Presiding Officer to reconsider his denial of the application. This request has been referred to the Commission, which, by Notice served January 28, 1978, advised the parties that Complainant's letter will be treated as a petition for reconsideration of the Commission's Adoption of the Initial Decision.

In its letter, Farr states that approximately 10 months prior to the shipment involved here, in order to remain competitive in the European markets, it decided to avoid the high cost of transportation from Los Angeles by shipping its products from a plant in Illinois. In February of 1977, Seatrain and some other lines suggested that Farr apply to the Pacific Coast European Conference (PCEC) for rates comparable to the rates from Illinois. The Conference agreed and filed the $43.00 rate which, except as to Seatrain, became effective on March 28, 1977. At that time Farr was preparing a shipment to Spain and insists that it discussed the matter specifically with Seatrain's clerk. Only after the consignee received the revised bill from TAG did Farr learn that Seatrain had not filed the lower rate in its tariff and had not joined PCEC until April 1, 1977.

In its reply to the request for reconsideration, Seatrain contends that it intended to filed the $43.00 rate to be effective on March 28, 1977, but due to an administrative error, failed to do so. Seatrain acknowledges that its clerk referred to the joint tariff in quoting a rate of $43.00 but maintains that Seatrain's tariff should also have contained the same rate effective March 28th and further argues that "Should the application be denied, Farr would not be charged the rate both Seatrain and Farr intended to be applied to the March 28, 1977 shipment."

Farr's letter discloses no new fact which would call for a reversal of the Initial Decision.

What clearly emerges from the foregoing is that the Conference and the member lines to the rate agreement, in order to induce Farr to resume shipping from Los Angeles, agreed to and did file the $43.00 rate effective March 28, 1977. This rate was explicitly not made applicable to Seatrain, as to which the rate was to become effective three days later, on April 1, 1977. In its application, Seatrain admits that:

> On or about March 22, 1977 Ms. Ruth Odian called Seatrain to book a container of air cleaners/mechanical to Spain and at the same time inquired about the present rate. She was quoted $43.00 per cubic meter per tariff FMC No. 1 page 296, item 719.2360 (exhibit #1). Our rate person apparently referred to the effective date at the top of the page (March 28) without referring to the small print at the bottom (April 1).
>
> * * *
>
> Farr Co. in all good faith booked and shipped this container on the basis of what

Seatrain told her. We in turn again in all good faith mis-quoted and mis-billed the shipment.

Thus, while there is no doubt that Seatrain intended to charge the $43.00 rate, there is no allegation that the March 28th filing, specifically postponing the effective date of the tariff as to Seatrain, was filed in error, or that Seatrain intended, but failed, to file the $43.00 rate in its *own* tariff. Rather, as Seatrain admits in its reply to the petition for reconsideration,

> *because Seatrain was to enter into a joint tariff with PCEC* and certain independent lines *on April 1, 1977,* the formal act of physically reducing the rates shown in Seatrain's independent tariff with an effective date of March 28, 1977, was never accomplished. (Emphasis added).

It appears, therefore, that Seatrain in fact relied on the Conference's tariff and never intended to file the rate in its *own* tariff.

Section 18(b)(3) provides in part:

> That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that *there is an error in a tariff* of a clerical or administrative nature *or an error due to inadvertence in failing to file a new tariff* and that such refund or waiver will not result in discrimination among shippers. (Emphasis added). 46 U.S.C. 817(b)(3).

This provision makes clear, as the Presiding Officer noted, that the error must be in the tariff on file at the time of shipment which, because of that error does not reflect the intended rate. A misreading of the tariff is not the type of mistake contemplated in P.L. 90–298 and cannot, therefore, be a basis for granting a waiver.

Although the shipper was induced by the promise of a lower rate to resume shipping from its Los Angeles facilities and, because of the carrier's misrepresentation, has to pay higher charges than anticipated, the fact remains that unless there is an error of the type contemplated in section 18(b)(3) which makes the tariff inapplicable, the rate in effect at the time of shipment is the only rate the carrier can charge and the shipper must pay. *Ludwig Mueller Co., Inc. v. Peratta Shipping Corporation,* 8 F.M.C. 361 (1965).

Accordingly, for reasons stated above, the Commission's adoption of the Initial Decision is hereby affirmed.

It is so ordered.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 571

FIRESTONE INTERNATIONAL

v.

UNITED STATES LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

May 3, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 3, 1978.

IT IS ORDERED, That applicant is authorized to refund $822.69 of the charges previously assessed Firestone International.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket No. 571 that effective December 23, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from December 23, 1977, through February 15, 1978 the rate on 'Fabric, Tire Cord' is $110.00 W subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 571

FIRESTONE INTERNATIONAL

v.

UNITED STATES LINES, INC.

Adopted May 3, 1978

Application for permission to refund portion of freight charges granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916, respondent United States Lines, Inc. (USL of carrier), has filed a timely (within 180 days of January 19, 1978, the date of the involved shipments) application for permission to refund for the benefit of and with the concurrence of complainant Firestone International (Firestone or shipper) the sum of $822.63 of aggregate ocean freight charges of $11,000.00, paid by the shipper and actually collected by USL on February 1, 1978. The shipment of Fabric Tire Cord, in 5–40 foot containers, weighing 185,043 lbs. on the carrier's vessel *American Liberty*, under Bill of Lading No. 7001, dated January 19, 1978, from Savannah, Georgia, to Puerto Limon via Balboa, consigned to San Jose, Costa Rico, C. A., was rated under USL's Tariff FMC 85 (Section 2) Item 2140. The freight charges were collected on the basis of 200,000 lbs. at $110.00/2000 lbs (200,000 lbs. ÷ 2000 lbs. = 100 × $110.00—$11,000.00). The rate applicable at the time of shipment was $110.00 per 2000 lbs. minimum 4000 lbs. per TL (trailer load). The rate sought to be applied is $110.00 per 2000 lbs. with no minimum as per Tariff FMC 85 Page 227A effective February 16, 1978.

The application for permission to refund states facts in support thereof the contents of a letter to this Commission from USL dated February 23, 1978, reading as follows:

[1] This decision became the decision of the Commission May 3, 1978.

On December 23, 1977 a temporary telex filing to Item 2140 Tire Cord Fabric on page 227A reducing rate to $110.00 per 2000 lbs. and erroneously stipulated a minimum requirement of 20 weight tons per trailer load effective December 23, 1977.

This new rate was filed for firm of Firestone International at the request of our Marketing and Sales Traffic Department by a memorandum dated December 15th from Mr. A. J. Walkin to Mr. R. A. Wolf, Pricing Director, United States Lines, Eastern Division. The memorandum did not specify any TL minimum also be filed. The previous rate was $97.00 M minimum 30 measurement tons per trailer.

Realizing the $110.00 weight rate might be construed by the FMC to be an increase, the writer did discuss intended filing with Mr. Walkin, determining from him that shipper's average trailer loadability was 40000 pounds (20 tons) and cubic ratio over 40 cubic feet to the short ton of 2000 pounds, whereby filing of higher weight rate would result in a reduction of charges.

After above office conversation with Mr. Walkin, I unintentionally inserted 20 ton minimum reqirement when preparing written telex form for transmission to Commission.

Error went unnoticed until February 15th, when we filed correction deleting minimum effective February 16, 1978. Unfortunately, prior to this, Firestone had several shipments including a few containers that did not meet minimum weight.

We feel under the circumstances that shipper is being unjustly penalized due to a clerical oversight in interoffice department communications and appeal to Commission for permission to delete minimum effective with the initial filing date of December 23, 1977.

The Commissions (sic) consideration of this petition for relief will be greatly appreciated in order that we may reimburse Firestone International for payments made on short weight container shipments.

Upon consideration of the above and the documents presented herein, it is noted the application lists that under Tariff FMC 85 Page 227A effective February 16, 1978, the aggregate freight charges sought to be applied total $10,177.37. The rate is corrected deleting a minimum, leaving the rate at $110/2000 lbs. The shipment weighed 185,043 lbs. 185,043 lbs. divided by 2000 lbs. equals 92.5215 tons. $110 × 92.5215—$10,177.9650 or $10.177.97; $110 × 92.521—$10,177.31; and $110 × 92.52 = $10,177.20. The application arrived at a figure of $10,177.37 and the nearest figure to that is obtained in the use of 3 decimal places and a rate of $10,177.31 to be applied. The latter amount subtracted from the $11,000.00 actually paid leaves $822.69 to be refunded.

With the correction in the amounts as shown above, and consideration of the record herein, the Presiding Administrative Law Judge deems the application for permission to refund a portion of ocean freight charges to comport with Rule 92(a) of the Commission's Rules of Practice and Procedure, and section 18(b)(3) of the Shipping Act, referred to above and that the error is one within their contemplation.

Therefore, it is found and concluded:

(1) There was an error of a clerical or administrative nature (corrected before this application was filed) which resulted in having an ocean freight overcharge.

(2) The permission to refund requested will not result in discrimination as between shippers.

(3) The application, having been timely filed and having shown acceptable cause, should be granted with the corrections in arithmetic referred to herein.

Wherefore, it is

Ordered,

The application of the carrier be and hereby is granted to refund $822.69, collected by it in overcharges, to the shipper.

(S) WILLIAM BEASLEY HARRIS,
April 5, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 554

HERMANN LUDWIG, INC.

v.

WATERMAN STEAMSHIP CORPORATION

F. M. Sevekow for Respondent Waterman Steamship Corporation.

REPORT

May 8, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Leslie Kanuk, *Commissioners*)

This proceeding is before the Commission on exceptions from the Administrative Law Judge's denial of permission to waive a portion of the freight charges assessed on two shipments of machinery and equipment materials for cycle power plants in Busan and Inchon, Korea.

The application for a waiver, filed by Respondent Waterman Steamship Corporation (Waterman), pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), and Rule 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92(a)) was received by the Commission on November 1, 1977. While bill of lading No. 2, covering the carriage from Philadelphia to Inchon, is dated April 28, 1977 and bill of lading No. 12, covering the carriage from Philadelphia to Busan, is dated April 29, 1977, the application refers to May 6, 1977, the date the cargo was put aboard vessel, as the "date of shipment".

It is alleged that, at the request of the shipper, the Far East Conference (Conference), of which Respondent is a member, had approved the filing of special project rates for the two shipments but that Respondent's representative at the Conference meeting inadvertently failed to request that the new rate be filed on the same day the action was taken so as to make it applicable to the two shipments.

The Presiding Officer found that in view of the dates shown on the bills of lading, that is April 28 and April 29, 1977, the application received by the Commission on November 1, 1977 had not been filed within the one hundred and eighty days from the date of shipment, as required in section 18(b)(3) of the Act. He also determined that "merely applying to the Far East Conference for a project rate did not change the tariff on file or give the carrier any authority to charge less than provided in such tariff." On the basis of these findings, the Presiding Officer denied the waiver request.

Relying on the Commission's decision in *Ghiselli Bros. v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 179 (1969), Waterman excepted to the Presiding Officer's determination that the application was filed too late.

Waterman maintains that the dates appearing on the bills of lading attached to the application were the dates of delivery of the cargo to the carrier, whereas "the date of shipment" as settled in *Ghiselli Bros.* was May 6, 1977, the date the goods were loaded aboard vessel as shown by the "on board" bills of lading. Waterman points out that, when computed from that later date, the application received by the Commission on November 1, 1977, was filed within the one hundred and eighty days provided in section 18(b)(3).

With respect to the merits of the application, Waterman contends that the failure of its representative at the Conference meeting to ask for a telegraphic filing of the rate approved by the Conference so as to make it applicable to the two shipments was an administrative error which resulted in the inadvertent failure to file an intended rate, one of the grounds for the issuance of a waiver contemplated in section 18(b)(3).

Section 18(b)(3) of the Act provides in part:

> That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error *due to inadvertence in failing to file a new tariff* and that such refund or waiver will not result in discrimination among shippers. . . . *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days *from the date of shipment.* 46 U.S.C. 817(b)(3) (Emphasis added)

Whether the application here was filed "within the one hundred and eighty days" depends on what date is accepted as the "date of shipment".

In *Ghiselli Bros., supra,* the Presiding Officer in determining the "date of shipment" considered both the date of delivery of the merchandise to the carrier and the date of the on board bill of lading and, giving the parties the benefit of these "alternate dates", computed the statutory period from the date of the on board bill of lading.[1] While it reversed the Initial Decision on other grounds, the Commission without comment relied on the date of the on board bill of lading to arrive at the conclusion that the application had been filed timely.

In our opinion, on the basis of established precedent either the date of

[1] In his Initial Decision, the Presiding Officer cited among others *Coe v. Errol,* 116 U.S. 521 (1886) where the Court held that the transportation begins when the goods are delivered to the carrier *or* when they actually start in the course of transportation.

the delivery of the cargo to the carrier or the date of the on board bill of lading may properly serve as the start-up date for computing the 180-days statutory period of limitation. While section 18(b)(3) specifies the requirements which must be met before relief can be granted, neither the Shipping Act nor the legislative history of P.L. 90–298,[2] which added the refund and waiver provisions to section 18(b)(3), contains a definition or gives any explanation of what Congress meant by "date of shipment". Keeping in mind that P.L. 90–298 is a remedial statute aimed at affording shippers relief from the consequences of certain errors inadvertently committed by carriers or conferences of carriers in the filing of tariffs or in the failure to do so, we believe that a construction which would unnecessarily limit the meaning of that term to the date of delivery of the cargo to a carrier (not necessarily an ocean carrier) would defeat the legislative intent without serving any regulatory purpose. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 309, 311 (1934).[3]

One of the two shipments involved in this proceeding was delivered on April 28, 1977 and the other on April 29, 1977. The on board bills of lading are allegedly dated May 6, 1977. Respondent did not file a copy of those bills but maintains that the goods were put aboard vessel on that date as shown by a certificate of inspection performed at the pier on May 6, 1977. Should the date of the on board bill of lading be recognized as the "date of shipment", the application received by the Commission on November 1, 1977, was filed 175 days after that date, that is, within the statutory limit set in section 18(b)(3) of the Act.

In addition to finding that the application had been filed too late, the Administrative Law Judge denied it on the merits on the ground that the "inserted" error was not within the contemplation of the applicable statute. The record, however, contains copies of correspondence between Hermann Ludwig, Inc. and the Conference relating to the filing of the proposed special rates, and although Exhibit 2, purportedly a copy of the minutes of the Conference meeting, is only a recommendation of the Conference Rate Committee to the full Conference, we take official notice that minutes of the meeting of the Far East Conference held on May 4, 1977, and filed with the Commission show that the Conference had agreed to the filing of the rates requested by Complainant. The failure of Respondent's representative at the Conference meeting to request a telegraphic filing of the rates to make them applicable to Complainant's shipments, resulted in the Conference's "inadvertent failure" to file a rate it had approved and intended to file, an error clearly within the ambit of section 18(b)(3) of the Act.

Therefore, all other statutory requirements having been met,[4] the Initial

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[2] House Report No. 920, 90th Cong., 1st Sess., November 14, 1967 (to accompany H.R. 9473); Senate Report No. 1078, 90th Cong., 2nd Sess., April 5, 1978 (to accompany H.R. 9473).

[3] Such construction of the meaning of the term "date of shipment" under section 18(b)(3) would in no manner affect the rights and liabilities of the parties otherwise arising upon delivery of the cargo to the carrier.

[4] Before the filing of the application, the Conference on May 11, 1977, filed a new tariff setting forth the special project rates Respondent seeks to apply.

Decision denying the waiver is vacated. Respondent is granted permission to waive collection of an aggregate of $23,372.49 of the charges which would have been payable on the two shipments,[5] such waiver being contingent upon Waterman Steamship Corporation's filing within thirty days from the service of this Report either copies of the two on board bills of lading or an affidavit attesting to the date the shipments were placed aboard ship, in the absence of which the application shall be denied.

It is so ordered.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

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[5] The waiver authorizes the carrier to collect $93,112.22 in freight charges based upon the project rates it seeks to apply.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 359(I)

DURITE CORPORATION, LTD.

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

REPORT

May 12, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day, *Commissioner*)

By complaint filed August 20, 1976 Complainant Durite Corporation, Ltd., seeks reparation in the amount of $1,762.14 for alleged freight overcharges by Respondent Sea-Land Service, Inc. (Sea-Land) on a shipment of "Woodworking Machinery" carried by Sea-Land from Elizabeth, New Jersey to Arecibo, Puerto Rico, via San Juan. Settlement Officer Waldo R. Putnam denied reparation. The Commission determined to review the decision of the Settlement Officer.

The shipment moved under bill of lading dated June 20, 1974. In accordance with the description in the bill of lading Sea-Land assessed the rate applicable to "Machinery N.O.S." Freight charges in the amount of $7,869.18 were paid on February 18, 1975, by Canadian Foreign Minerals Limited, Hamilton, Bermuda, a parent of Complainant, Durite Corporation.

The cargo was destined for use in the construction of the "wall panel manufacturing plant". As agreed by both parties, the shipment qualified for the carrier's published project rate for "Equipment, machinery and materials used in the construction of a wall panel manufacturing plant". This project rate was not applied, however, because the requisite presentation to the carrier of a certificate of (proprietary) use as of, or prior to, this kind of shipment was lacking, as was the requisite annotation of this information on the bill of lading.

In support of its claim that the project rate should have been applied and that reparation is in order, Complainant has furnished a copy of the certification (dated August 10, 1976). Complainant also relies upon this Commission's holding in *Cities Service International, Inc. v. Lykes Bros. Steamship Co., Inc.*, (Docket No. 75–52, Adoption of Initial Decision, served April 30, 1976).[1]

Sea-Land denies the overcharge even though, as noted above, it does not contest the proprietary nature of the cargo. Sea-Land does not consider the decision in *Cities Service, supra,* as controlling. Sea-Land would distinguish that case on the basis that in *Cities Service* the missing proprietary use certification was only incidental to the contention that the contract rate applied to the shipment of an unlisted subsidiary of the shipper, a signatory to the Merchant's Freighting Agreement. (That agreement required that the contract shipper list beforehand the subsidiaries which were to be covered by the agreement). Here, according to Sea-Land, the special permission issued by the Commission specifically requires that the bill of lading contain a statement as to the priopnetary nature of the cargo.[2] Sea-Land argues that because Complainant failed to comply with the requirements of its tariff a subsequent rendering of such certificate does not constitute compliance with the tariff provision. Sea-Land thus concludes, that the Shipping Act's prohibition against the carrier departing from its tariff and Complainant's failure to insert the proprietary clause in the bill of lading bars recovery in this proceeding.

The Settlement Officer agreed and denied recovery. He distinguished the *Cities Service* case as involving tariff rules based upon agreements between the shipper and the carrier, whereas here, he found that the Commission, in granting special permission, set the terms and conditions upon which the project rate could be filed, including the requirement of a proprietary clause in the bill of lading. He found that Sea-Land had complied with the Commission's rules in publishing the project rate and that it had properly applied its tariff.

The Settlement Officer did not find controlling the line of cases which hold that the nature of the goods moved determines the properly applicable rate. Pointing out that there was no dispute here as to what was actually shipped, the Settlement Officer merely concluded that Complainant had not met the conditions upon which application of the lower rate was predicated, and that failure of Complainant, "to comply with the mandatory provisions of a lawfully applicable tariff provision, is sufficient to require dismissal of the complaint".

The distinction drawn by the Settlement Officer and by Sea-Land between *Cities Service* and this case is inappropriate. The Commission has consistently held with respect to overcharge claims that what actually was shipped determines the proper rate and has permitted shippers, who had failed to comply with some tariff provision, to cure the defect by later introduced evidence. *Cities Service* followed this policy.

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[1] In *Cities Service*, the Commission awarded reparations notwithstanding that the shipper had not complied with the requirements of the Merchant's Freighting Agreement (dual rate contract).

[2] On this point, see our discussion at page 5.

Here the special rate sought to be applied was published under special permission issued pursuant to Rule 531.7(e) of the Commission's rules governing the filing of freight rates and tariffs in the domestic off-shore trade. Rule 537.7(e)(2)(iii) requires carriers applying for permission to publish a special project rate, to include in their application, among other:

> a statement that the bill of lading used to move cargo under the project rates will be claused "All materials included in this bill of lading are of a wholly proprietary nature and may not be resold at destination or otherwise placed in commercial channels for resale". 46 CFR 531.7(e)(2)(iii).

While Sea-Land provided the necessary statement in its project rate application, the *requirement* is directed only to the carrier who publishes the tariff and not, as implied by the Settlement Officer, to the shipper. Commission Rule 537.7(e)(2)(iii) does not itself impose any obligation on the shipper. That being so, there is nothing to distinguish this case from the long line of cases wherein we held what actually is shipped governs the rate to be applied.

Because the proprietary nature of the cargo is clear and undisputed, we find that Respondent collected from Complainant freight charges in excess of those provided in its tariff for this type of cargo, in violation of section 18(b)(3) of the Shipping Act, 1916. Accordingly, the decision of the Settlement Officer is vacated and Complainant is granted reparation in the amount of $1,762.14.

It is so ordered.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

Commissioner Karl E. Bakke, dissenting. I dissent. The issue here is whether the legal requirements precedent to the shipper's entitlement to a project rate were complied with. They were not. It follows that the Settlement Officer's denial of reparation was correct and should have been sustained.

The Commission majority have, I fear, allowed themselves to be mesmerized by the gaudy glitter of "precedent" that has no ascertainable link either to the facts or to the principle of law involved in this particular case.

We are not dealing, as in the precedents relied upon by the majority, with litigation over a contractual relationship between a shipper and a carrier where a question has arisen as to the weight, measure or description of the goods actually shipped or whether the shipper was an undisclosed subsidiary of a party to a conference dual rate contract. Rather, we are dealing with the question whether the requirements of a Commission regulation were complied with.

Section 531.7(e)(2)(iii)(b) of the Commission's regulations governing the filing of tariffs in the domestic offshore trades requires, in effect, that in

*Commissioner Bakke's dissenting opinion is attached.

order for a shipment to qualify for a project rate under the carrier's tariff, *the bill of lading must be claused as follows:*

All materials included in this bill of lading are of a wholly proprietary nature and may not be resold at destination or otherwise placed in commercial channels for resale.

In accordance with these regulations and the Special Permission granted the carrier to publish the particular project rate involved in this proceeding, the carrier's tariff did require that the bill of lading include the proprietary and non-resale clause in order to qualify for the project rate. It is conceded by the parties that the bill of lading covering the subject shipment did not contain such a clause.

In this connection, it is important to bear in mind that, absent the special permission granted by the Commission, the carrier could not have published project rates at all without violating one or more provisions of the Commission's domestic tariff filing requirements. Thus, the Commission's regulations concerning publication of and entitlement to project rates in the carrier's tariff are, *pro tanto,* a waiver of otherwise applicable standards of Commission tariff filing regulations and, as such, must be strictly construed.

The majority casually wave this undisputed fact aside with the commercially unrealistic argument that the regulation in question imposes no obligation on the shipper seeking a project rate to include the requisite clause in the bill of lading. I ask, however, who *but* the shipper (or his agent) can assert what is, in essence, a statement of commercial intention at the time the shipment takes place?

Furthermore, the requisite clause in the bill of lading serves an important regulatory purpose that is at the very core of the shipper's entitlement to a project rate; namely, to put the consignee on notice of the shipper's undertaking that the goods are not to be resold or otherwise placed in commercial channels for resale. As a practical matter, neither the carrier nor the Commission can effectively police this restriction once the goods are in the hands of the consignee, and the bill of lading is, therefore, the only tangible evidence of even lip service to the shipper's implicit obligation, as the party best situated, to insure that the extrinsic conditions precedent to project rate entitlement are met and adhered to. In addition, without insistence that the requisite clause be in the bill of lading at the time of shipment, the Commission has lost even a tenuous enforcement claim against a shipper, under the "false classification" provision of section 16 (First) of the Shipping Act, 1916,* in the event the proprietary goods are later resold.

In light of the foregoing, the doctrine adopted by the majority in this case is puzzling to me, to say the least. Since the bill of lading was not properly claused, the carrier would have committed a violation of law if

*. . . [I]t shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable."

the shipment had been rated as project cargo. And since the only rate that the carrier could legally have charged the shipper was the non-project rate, it follows that by authorizing reparation the majority is, in effect, sanctioning retroactive application of an illegal rate. To explain how that squares with the Commission's own line of cases holding that an illegal transaction cannot be validated by approval after the fact calls for an exercise in metaphysics that is, I am frank to admit, beyond me.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–55

UNIFORM RULES AND REGULATIONS GOVERNING FREE TIME ON IMPORT CONTAINERIZED CARGO AT THE PORT OF NEW YORK

PARTIAL ADOPTION OF INITIAL DECISION

May 15, 1978

This proceeding was instituted to determine whether the provisions of General Order 8 (46 C.F.R. 526), which establish rules and regulations governing free time and demurrage on breakbulk import cargo at the Port of New York, should be extended to apply to containerized cargoes. In addition, the Commission proposed that container detention free time be set out separately from demurrage free time and begin upon the removal of the container from the terminal facility.

Administrative Law Judge Stanley M. Levy has issued an Initial Decision, wherein he concluded that the "record in this proceeding fails to disclose any practice which is unjust and unreasonable and which therefore would justify and authorize, pursuant to section 17, promulgation of the proposed rules." The Presiding Officer accordingly discontinued the proceeding.

Exceptions to the Initial Decision have been filed by the New York Foreign Freight Forwarders and Brokers Association, Inc. (Association) and Commission Hearing Counsel. Replies were submitted by Sea-Land Service, Inc. (Sea-Land), Puerto Rico Maritime Shipping Authority (PRMSA) and seven ocean conferences.[1]

The Association contends that the general rulemaking provisions expressed in section 43 of the Shipping Act provide the requisite authority for the Commission to promulgate the proposed demurrage rules notwithstanding the fact that there is no finding of unjust and unreasonable practice under section 17. In support, the Association cites *New York Foreign Freight Forwarders and Brokers Association, et al. v U.S., et al.*, 337 F.2d 289, *cert. den.* 380 U.S. 910 (1964); *Pacific Coast European Conference v. FMC*, 376 F.2d 785 (1967); and more recently, Docket No.

[1] Australia-Eastern U.S.A. Shipping Conference; Continental North Atlantic Westbound Freight Conference; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles North Atlantic U.S.A. Freight Conference; North Atlantic Westbound Freight Association; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

73–66, *Austasia Container Express, Possible Violations of Section 18(b)(1) and General Order 13,* (1977), reversed on other grounds. It is noted that in *Austasia Container Express,* the Commission stated:

> Since 1961, the Commission's rulemaking authority has resided in Shipping Act Section 43. This authority has been broadly interpreted by the courts and permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred. (Mimeo Dec. p. 15).

According to the Association, these authorities establish "that the Commission may, by rule, require carriers and terminals to establish free time and demurrage practices to prevent 'potential' problems without making a preliminary finding of a Shipping Act violation." Therefore, the Association concludes that because the Presiding Officer "erroneously limited the extent of the Commission's rulemaking authority, his conclusion that the proceeding should be discontinued should be reversed by the Commission."

The Association requests that the Commission use its authority under section 43 to establish fair and reasonable practices to assure that importers have a minimum of five days' free time to process their shipments through the port; that carriers not assess demurrage when they fail to provide undercarriage equipment; that free time be extended when an importer is unable to pick up his merchandise because of carrier disability; that carriers and/or terminals should be required to furnish proper documentation to substantiate demurrage claims, and that only first period demurrage should be charged when the shipment is under official inspection.

While Hearing Counsel does not disagree with the ultimate conclusion reached in the Initial Decision that the record in the proceeding does not support the amendments to General Order 8 proposed by the Commission, they except to the Presiding Officer's determination that such amendments could only be based on a prior finding of a section 17 violation. Hearing Counsel urge the Commission to address this and other miscellaneous issues they believe deserve the further attention of the Commission.

The Commission is also asked to clarify the scope of Commission General Order 35 (46 C.F.R. 551.1(i)).[2] Both Hearing Counsel and the Association take the position that carriers should be required to extend free time when the carrier is unable to fulfill its obligation to supply undercarriage equipment (chassis) necessary for removal of the container. The Presiding Officer found such a rule unnecessary because General Order 35 already imposed that requirement on carriers. Hearing Counsel argue that if the Presiding Officer's interpretation of General Order 35 is erroneous, the Commission should take this opportunity to rule that free time applies during the period of a carrier's refusal or inability to fulfill its obligations to provide necessary undercarriage equipment.

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[2] General Order 35 provides in part that: "Steamship companies responsible for house-to-house movements of containers . . . are responsible under this part for delay occasioned by a lack of sufficient chassis. . . ."

Hearing Counsel also urge the Commission to find unlawful the present practice of certain carriers conditioning the availability of additional free time for multiple containers on the requirement that such containers be covered by a single bill of lading. Hearing Counsel had contended that carriers should be required to provide additional free time when more than eight containers are received by a single consignee on a single vessel. The Presiding Officer rejected Hearing Counsel's argument, declaring instead that multiple container tariff provisions should be left to the carriers and terminals and promulgated in response to the requirements of particular commodities and particular trades.

Finally, Hearing Counsel seeks clarification of certain burden of proof issues and further urges adoption in an appropriate proceeding of several proposed amendments to General Order 8 which would apply to breakbulk cargo.

Sea-Land, PRMSA, and the Conferences generally contend that the issue of the proper legal standard to be applied in promulgating amendments to General Order 8 is not relevant in light of the clear finding on the record that no rules need be adopted.

We have reviewed the record in this proceeding and agree with the Presiding Officer's conclusion that there has not been demonstrated a need for the proposed extension of General Order No. 8 to containerized cargoes. Our determination is based on the absence of present practices which require remedial action or a showing that there exists a potential for future violations of the Shipping Act sufficient to warrant corrective action at this time. For this reason, the Presiding Officer's ultimate conclusion will be affirmed.

While we concur in the Presiding Officer's ultimate disposition of this proceeding, we do not agree with all of his reasons therefor. The Commission finds the Presiding Officer's interpretation of the Commission's powers under section 43 of the Act to be unduly restrictive and erroneous. The Commission's section 43 rulemaking authority has been "broadly interpreted by the courts and permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred." Docket 73–66, *Austasia Container Express, supra,* and cases cited therein. This view of this agency's rulemaking powers has also been fully supported by the courts. *New York Foreign Freight Forwarders and Brokers Association, Inc., et al., v. U.S., et al., supra; Pacific Coast European Conference v. F.M.C., supra.* In *Pacific Coast European Conference,* the court, after noting that section 43 of the Act "clothe the Commission with a broad authority . . ., going well beyond what it has possessed before," further explained that:

> . . . the Commission in rulemaking is not confined to the redress of demonstrated evils as distinct from the prevention of potential ones." 376 F.2 790.

This last point appears to have been overlooked by the Presiding Officer in reaching his conclusion that only upon a finding of a violation can the Commission promulgate a rule under the substantive provisions of section 17. For, while section 17 allows the Commission to prescribe a "just and reasonable regulation" to correct one found unlawful, that section may also form the substantive basis for establishing a rule of general applicability under section 43. Thus, section 17 can serve to redress "demonstrative" ills and, when used with section 43, "potential" ones as well. We are satisfied, however, that the record herein does not indicate a need for the proposed amendments under our general rulemaking authority.

For the most part the remaining points raised by the Association and Hearing Counsel deal with matters properly considered and disposed of by the Presiding Officer. Thus, the further amendments suggested by the Association and Hearing Counsel have already been found to be not justified on the present record, or are outside the scope of this rulemaking. We will, however, direct the Commission's staff to review the recommendations of Hearing Counsel and the Association listed at Appendix A of the Presiding Officer's Initial Decision and monitor any activities relating to these recommendations to determine whether further Commission action is warranted.

In regard to Hearing Counsel's requested clarification of the scope of Commission General Order No. 35, the specific provision under discussion applies only to penalities assessed under the detention rule and the consignee's obligation to pay demurrage to an independent terminal operator is not relieved where the carrier has failed to provide chassis necessary for the movement of a house-to-house container and as a result, free time is exceeded. In such a situation and pursuant to the provisions of the truck detention rule, the consignee or his agent could file a penalty claim against the water carrier responsible for the house-to-house movement.

However, where the water carrier publishes free time and demurrage provisions in its own tariff and is also responsible for providing a chassis for the container, the assessment of demurrage in a situation where free time is exceeded due to the lack of chassis could result in a practice violative of section 17. While the record is void of any evidence indicating sufficient lack of chassis or undercarriage equipment such as would warrant the promulgation of a remedial rule, the philosophy embodied in existing General Order 8 should serve as a guide to terminal operators, water carriers and importers/exporters with respect to the handling of containerized cargoes. Further, we intend to remain responsive to conditions that may arise in the future which warrant Commission action.

Upon a careful review and consideration of the record in this proceeding, as well as the exceptions and replies of counsel, we conclude that except, as amended herein, the Presiding Officer's findings and conclusions with respect to the discontinuance of this proceeding are proper and well founded. We, accordingly, adopt his Initial Decision as our own, subject to the discussion above, and discontinue the proceeding.

It is so Ordered.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 467(I)

J.T. BAKER CHEMICAL CO.

v.

BARBER BLUE SEA LINE

NOTICE OF DETERMINATION NOT TO REVIEW

May 12, 1978

Notice is hereby given that the Commission on May 12, 1978 determined not to review the decision of the Settlement Officer in this proceeding served May 2, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 467(I)

J. T. BAKER CHEMICAL CO.

v.

BARBER BLUE SEA LINE

Reparation Awarded.

DECISION OF MARVIN H. WHITTEVEEN, SETTLEMENT OFFICER[1]

J. T. Baker Chemical Company (complainant) claims $393.28 as reparation from Barber Blue Sea Line (respondent) for an alleged overcharge on a shipment that moved from New York, New York to Bangkok, Thailand aboard the SS PHEMIUS under bill of lading number 62 dated February 25, 1976. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be Section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of shipment. Complainant submitted claim to respondent on May 25, 1977. On October 7, 1977, respondent, as a conference member, denied the claim citing Rule Number 10 of the Atlantic and Gulf-Singapore Malaya and Thailand Conference Tariff No. 15, FMC–13 quoted in part below:

". . . Claims for adjustment in freight charges, if based on alleged errors in weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier; however, such requests will not be considered if the goods are covered by Standard Weight/Measurement Agreement, in which case the weights or measurements as shown in the agreement shall govern. Any expenses incurred by the party responsible for the error, or, if no error be found, by the claimant. *All other claims for adjustment of freight charges must be presented to the carrier in writing within six (6) months after date of shipment.*"[2]

Respondent on June 16, 1977, had initially declined complainant's claim referring to Item 695 of Atlantic & Gulf-Singapore, Malaya and Thailand

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Determination not to review May 12, 1978.)

[2] The complaint was filed with this Commission within the time limit specified under Section 22, Shipping Act, 1916. It has been well established by the Commission that carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

Conference Freight Tariff No. FMC–3 as shown on Twelfth Revised Page 121. Item 695 indicates rates on Dangerous or Hazardous Cargo, *NOS*, i.e., Commodities shown in Code of Federal Regulations—Title 46 Shipping, Chapter i—Coast Guard Department of Treasury, prescribing storage regulation and other required conditions for transportation; and Atomic Energy Commission regulation where applicable. Item 695 continues listing commodities such as Corrosive Liquids, Non-Inflammable Gases, Inflammable Solids and Oxidizing Material, Inflammable Liquids, etc. It specifies a contract rate of $251.25 per ton of 40 cubic feet or 2,000 pounds to Bangkok, when not restricted to on deck stowage. This is the rate applied by respondent.

Complainant bases his claim upon Item 65 in the above tariff which indicates rate on Alcohol, Viz: Butyl (Butanol), Denatured, Diethylamine Ethanol, Ethyl Butyl, Hexyl (Hexanol), Isobutyl (Isobutanol), Isopropyl (Isopropanol), Methyl (Methanol), etc., specifying a contract rate of $174.25 per 40 cubic feet or 2,000 pounds to Bangkok. Complainant states that Item 65 listed a specific rate for Methanol under Alcohol as above rather than the general listing under Dangerous or Hazardous Cargo, NOS.

In the *Materials Handbook* by George S. Brady, published by McGraw-Hill Book Company, Inc., at page 389, Methyl Alcohol (specifically shown in Item 65 Atlantic & Gulf-Singapore, Malaya and Thailand Conference Tariff No. FMC–3) is described as follows: "Methyl Alcohol. Commonly known as Wood alcohol and called Methanol when made synthetically." In the *American College Dictionary*, Methanol is described as "methyl alcohol, or wood alcohol."

The Commission laid down the rule of reasonability in dealing with the interpretation of tariff terms in *National Cable and Metal Co. v. American Hawaii S. S. Co.* 2 U. S. M. C. 471 (1941). At page 473 it stated: "In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially and neither carriers nor shippers could be permitted to urge for their own purposes a strained and unnatural construction. Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of construction. *A proper test is whether the article may be reasonably identified by the tariff description.*" (Emphasis added)

In this case the complainant may have caused some confusion by showing the commodity on the bill of lading under the general heading of flammable liquids, however, the commodity is clearly shown as methanol. The respondent does not deny that methanol was actually shipped.

The portion of the shipment on which the claim was entered consisted of 3 pallets of Methanol weighing 10,215 pounds. Shipment moved from New York to Bangkok, Thailand aboard the Barber Blue Sea Line's vessel SS PHEMIUS under bill of lading No. 62 dated Feburary 25, 1976.

Freight charges were assessed at a rate of $251.25 per 2,000 pounds for a total of $1,283.26. (5.1075 tons × $251.25). Charges should have been assessed at a rate of $174.25 per 2,000 pounds for a total of $889.98. (5.1075 tons × $174.25).

Section 18(b)(3) of the Shipping Act, 1916, prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment. The involved commodity was improperly rated by the carrier and the complainant was overcharged in the amount of $393.28.

Therefore, it is ordered that respondent Barber Blue Sea Line be required to refund to the complainant J. T. Baker Chemical Co. the amount of overcharge in the sum of $393.28.

(S) MARVIN H. WITTEVEEN,
Settlement Officer.

FEDERAL MARITIME COMMISSION

No. 73–55

UNIFORM RULES AND REGULATIONS COVERING FREE TIME ON IMPORT CONTAINERIZED CARGO AT THE PORT OF NEW YORK

December 8, 1977

The rules proposed to amend General Order 8 are not required to enforce just and reasonable practices relating to free time and container detention time on import containerized cargo at the Port of New York.

This proceeding is discontinued.

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

Stanley O. Sher, David C. Jordan and *Howard A. Levy* for Australia-Eastern U.S.A. Shipping Conference; Continental North Atlantic Westbound Freight Conference; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles North Atlantic U.S.A. Freight Conference; North Atlantic Westbound Freight Association; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

Paul J. McElligott for Sea-Land Service, Inc.

Thomas D. Wilcox for New York Terminal Conference.

Amy Loeserman Klein and *Robert L. McGeorge* for Puerto Rico Maritime Shipping Authority.

Patrick J. Falvey, F. A. Mulhern, Arthur L. Winn, Jr., Samuel H. Moerman and *Paul M. Donovan* for The Port Authority of New York and New Jersey.

Thomas E. O'Neill for National Association of Alcoholic Beverage Importers.

John Robert Ewers and *Paul J. Kaller,* Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

General Order No. 8, 46 CFR 526, sets forth rules and regulations regarding free time and demurrage on breakbulk import cargo applicable to common carriers by water moving through the Port of New York but

[1] This decision was partially adopted by the Commission May 15, 1978.

does not now apply to containerized cargo.[2] The Federal Maritime Commission instituted this proceeding to determine whether the provisions of General Order 8 should also be made applicable to containerized cargo.

The Commission, on August 28, 1973, proposed a rule[3] whereby free time on import containers at the Port of New York would be 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; and that this minimum free time of five days would apply on all cargo except that which was of a special nature so as to require earlier removal. The Commission proposed further that free time on cargo in temperature-controlled or insulated trailers/containers (reefer containers) and bulk liquid tank containers would not be less than two days, Saturdays, Sundays and holidays excluded. The proposed rule would also apply the strike provisions of General Order 8 to containerized cargo. Finally, the Commission proposed that container detention free time should be set out distinctly from demurrage free time and should begin upon the removal of the container from the terminal facility.

On March 13, 1974, by Supplemental Notice of Proposed Rulemaking, the Commission determined, in light of comments, requests and recommendations submitted pursuant to the August 28, 1973 Notice of Proposed Rulemaking, that the complex nature of the containerization issue warranted a full evidentiary hearing. In addition, the Commission directed that evidence be received on the subject of container detention free time.

Hearings were held before me in New York City from May 10 through May 12, 1977.[4] The transcript consists of 438 pages and eleven exhibits were admitted into evidence.

Upon conclusion of the hearing, briefs in support of amendments to General Order 8[5] were submitted by the New York Foreign Freight Forwarders and Brokers Association, Inc. (hereinafter Association), and by Hearing Council.[6] Briefs opposing amending General Order 8 were submitted by the Puerto Rico Maritime Shipping Authority (hereinafter PRMSA), the New York Terminal Conference, Sea-Land Service, Inc., as well as one on behalf of seven ocean conferences whose memebers discharge containerized cargo at the Port of New York.

The Port Authority of New York and New Jersey filed a brief limited to contesting a statement in Hearing Counsel's Brief (page 3) that "There is more congestion at the Port of New York than at other ports."

[2] *In The Matter of Free Time and Demurrage Practices on Inbound Cargo at New York Harbor*, 11 FMC 238 (1967); *Free Time and Demurrage Charges at New York*, 3 FMC 89 (1948).

[3] 38 *Federal Register* 23540.

[4] Proceedings in this Docket were suspended for a considerable length of time pending completion of an environmental assessment.

[5] Not necessarily as originally proposed by the Commission.

[6] These parties also filed Reply Briefs, November 8, 1977.

ISSUES

Some import cargo at the Port of New York is presently subject to a free time and demurrage rule. 46 CFR 526. The primary issue in this proceeding is whether the scope of that rule should be broadened to include containerized cargo. Subsidiary to that is, if so, whether the rule should encompass container detention time, *i.e.*, time between removal of the container from the terminal and its return.

DISCUSSION

This proceeding was instituted pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 17, 22 and 43 of the Shipping Act (46 U.S.C. 818, 821 and 841(a)).

Section 22 of the Shipping Act authorizes the Commission to investigate any violation of the Act. Section 43 authorizes the Commission to make such rules as may be necessary to carry out the provisions of the Act. Section 4 of the Administrative Procedure Act sets forth the procedure for rulemaking. As such, sections 22, 43 and 44 establish the Commission's jurisdiction and methodology.

Section 17 of the Shipping Act, however, is substantive in nature and sets forth the statutory requirements which must be met before a rule may be promulgated pursuant to the Commission's jurisdiction under appropriate procedures. Section 17 provides that the Commission may prescribe a just and reasonable practice "whenever it finds that any regulation or practice [of carriers or other persons subject to the Act which relate to the receiving, handling, storing or delivering of property] is *unjust or unreasonable* . . . ." (Italics added.) Absent a finding that a regulation or practice is unjust or unreasonable, the Commission cannot pursuant to section 17 promulgate a rule prescribing just and reasonable practices. As set forth in greater detail below, the record in this proceeding fails to disclose any practice which is unjust and unreasonable and which therefore would justify and authorize, pursuant to section 17, promulgation of the proposed rules. Accordingly, the proceeding to amend General Order No. 8 is discontinued.

The Commission received certain complaints in 1969 to 1972 about the then-existing period of two days free time on import containers at New York, and also about demurrage bills following a longshoremen's strike in 1971.[7] Written inquiries to the Commission regarding container demurrage at New York occurred in 1970 and 1971 and were only four in number.[8] Only one complaint since 1971 was received.[9] None of the complaints concerned container detention charges.[10] In no case were the complaints directed to the Puerto Rican trade or any other offshore domestic trade.[11]

[7] Ex. 1, p. 2.
[8] Tr. 10–11, 12, 89–90.
[9] Tr. 90–91, 111.
[10] Tr. 90–91, 103.
[11] Tr. 83–84.

Mr. Stakem, Chief of the Commission's Office of Domestic Commerce, testifying in support of a rule to establish uniform free time and demurrage rules on containerized cargo through the Port of New York[12] pointed out that inasmuch as more container cargo than breakbulk cargo was now being handled in the Port that General Order 8 was presently applicable to less than half the cargo moving through the Port. In his view, the rules should be amended to cover all cargoes moving through it.

Mr. Stakem testified that it should require less time for a consignee to pick up a container than to pick up 20,000 to 40,000 pounds of breakbulk cargo.[13] One reason for this is that, unlike breakbulk cargo which is available to consignees only after completion of discharge, containerized cargo is frequently available one or two days prior to completion of vessel discharge and prior to the beginning of free time.[14] He testified that the Commission's staff is not in a position to determine how much free time on containerized cargo at New York should or should not be allowed.[15]

Mr. Stakem stated that the staff was not necessarily committed to a five day minimum free time period, as proposed, if the evidence establishes that "containers can reasonably be removed from pier facilities in two, three, or four days . . . ."[16] He did not favor a rule limiting maximum free time a tariff could provide.[17] Nor did he believe that container cargo should have more free time than breakbulk, *i.e.*, five days.[18]

A primary concern of consignees regarding free time and demurrage charges arises out of strike situations where cargo removal has not been possible.[19] Accordingly, even if a rule establishing free time and demurrage is not necessary for normal conditions in the Port, it may be desirable to provide some rule to govern in a strike or other abnormal situation.[20]

The rule proposes that if because of an inability of the carrier to tender the cargo, as for example during a strike, the cargo would for the duration of the inability remain in the same status as it was at the beginning of the disability. The proposed rule is flexible to the extent that it permits the carrier in its tariff to specify that if the condition of inability arises after the expiration of free time, *i.e.*, while first period demurrage is being charged, the demurrage would not further accrue during the period of the carrier's inability. The option of the carrier in its tariff to continue first period demurrage during the period of inability is not precluded by the proposed rule.

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[12] Exs. 1 and 2.
[13] Tr. 43.
[14] Tr. 232–233; Ex. 6, pp. 7–8.
[15] Tr. 47–48, 62.
[16] Ex. 2, pp. 1–2.
[17] Tr. 47, 48.
[18] Tr. 46–47.
[19] Tr. 87–88.
[20] Tr. 88.

On the question of whether first period demurrage or penal demurrage should be assessed for cargo remaining on the terminal beyond the normal first demurrage period because of delays in government inspection, Mr. Stakem was of the opinion that first period demurrage only should be assessed since delay in removal is not by reason of fault on the part of the consignee.[21]

The Association questions when free time begins to run. Underlying this issue requires a determination of when has the carrier properly tendered the containerized cargo for removal by the consignee. Does the carrier meet its obligation by merely tendering a container or must it also tender a chassis—the undercarriage equipment[22]—in order that the consignee may be able to pick up and remove the container from the terminal?

The rule sets forth that free time starts when the carrier tenders. Whether the carrier is or is not going to furnish a chassis is a matter to be spelled out in the tariff. Thus the carrier tenders—with or without a chassis—as it contracts with its shippers in its tariff.

A factor in determining what is a proper and reasonable amount of free time is how fast most cargo normally moves through a terminal or a port. Using normal flow patterns would give some basis for deciding how much time is reasonably necessary for a consignee to remove cargo. This determines the time beyond which it would be reasonable to charge demurrage.[23]

In addition, the cost to carriers and terminal operators in extending the amount of free time must be balanced against the economic consequences to shippers and consignees of demurrage charges if free time is not extended.[24]

In any event, consignees of inbound domestic offshore containers would need less free time than consignees of foreign imported containers where customs clearance and documentation requirements are time-consuming.[25]

Mr. Stakem testified "As of today [May 10, 1977], I do not recognize that there is a problem [in New York] insofar as the amount of free time that is being offered."[26] And the same for all other North Atlantic ports.[27] Nor did he have knowledge of any complaints regarding detention.[28] He further testified that most conferences serving the Port have filed tariffs providing free time and demurrage consistent with the

[21] Tr. 40, 42.
[22] Often referred to as "bogies."
[23] Tr. 63.
[24] Tr. 66.
[25] Tr. 112.
[26] Tr. 97.
[27] *Ibid.*
[28] Tr. 103.

proposed rules;[29] a random sample by the Commission staff in 1975 and again in 1977 found that most conferences were allowing five days free time on containers except for reefers and other specialized equipment and cargoes.[30] This is in general conformity with the proposed rules. There are situations where no free time is allowed on hazardous cargoes or on gold or jewelry or where piers are not equipped to handle certain cargoes.[31] This is not a problem which the proposed rules are proposing to rectify.

Despite the lack of complaints now, Mr. Stakem testified that a rule providing for free time and demurrage was preferable to tariff provisions to the same effect because "if there aren't any rules there's nothing to prohibit the carrier's reverting to a lesser number of days."[32] He expressed a fear that if this proceeding was discontinued without a rule and then the carriers reduced free time that complaints would start to come to the Commission and a new proceeding would have to be commenced. "I'm generally unsuccessful in attempting to have carriers do something on a voluntary basis without an established rule."[33] Further, since considerable confusion has arisen in the past regarding applicable free time and demurrage under strike situations, he believed "adoption of the rules proposed in this proceeding [would] provide guidance necessary to deal with these types of situations."[34] Mr. Stakem testified that absent a uniform rule on free time and demurrage that consignees at different terminals but otherwise similarly situated might be assessed differently.[35] He believed that "they should all be treated equally."[36]

In summarizing Mr. Stakem's testimony, it is found and concluded that in large measure there is no present problem which the proposed rules propose to rectify. The best that can be said in this vein is that the proposed rules are designed to "freeze" the tariff rules which generally prevail now in the Port.

Mr. Klestadt, Chairman of the Import Committee of the Association, testified that ships today are very fast and often they are faster than the mails. Customs brokers experience delays in the receipt of documents

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[29] In the domestic offshore Puerto Rican trade, only two days of free time is offered. It is noted that no complaints have been received by the Commission relative to this trade. The record indicates that customs clearance, currency conversions, letters of credit or other delays typical to foreign trade do not occur in domestic offshore trades. Tr. 112, 281.

[30] Tr. 12–13. Historically the Australia Conference has offered no free time for refrigerated cargo (Ex. 5, p. 5). Consignees have not complained about the Conference's "no free time" rule, and no more than 5 percent of the refrigerated cargo transported in the trade ever enters a demurrage status (Ex. 5, pp. 5–6). Virtually none of the refrigerated cargo ever incurs second period demurrage (Tr. 162). Witness Stakem testified that where zero free time is offered on refrigerated cargo in a trade and very little of that cargo ever enters a demurrage status, there is no need to increase the free time offered (Tr. 63–64). Hearing Counsel agree that the Australia Conference should be permitted to continue offering zero free time on refrigerated cargo, and no one has submitted testimony or argument in opposition to this position (Hearing Counsel Brief, p. 10).

[31] Tr. 73–74.

[32] Tr. 111; Ex. 1, p. 3.

[33] Tr. 111.

[34] Ex. 1, p. 4.

[35] Tr. 109.

[36] Tr. 110.

from abroad and very frequently cargo coming from Europe arrives in New York one or two days before the documents are in.[37] After receipt of the documents additional time is necessary to prepare the delivery order and relay instructions to the trucker to pick up the import.

In the past brokers were permitted to prelodge the delivery order at the pier and notify the truckman that he could go down and pick up the cargo, thus saving time. Current rules of the Commission no longer permit prelodging of delivery orders.[38] A broker must wait until he has a proper release from customs before he can direct the trucker to pick up the cargo.[39] Additional time is then required to transfer the delivery order from the broker's office to the truckman.[40]

The Association, in part, urges that a five day minimum free time rule be promulgated because consignees of foreign cargo may face delay problems occasioned by government inspections. The Association does not suggest that free time be extended to include the period of government inspection.[41] It contends that during a period of government inspection the consignee should be required to pay only first period demurrage.

Accordingly, the Association recommends that §526.1(d) be changed by inserting in the first parenthetical clause after "trucking strikes" the words "government inspections."[42] Staff witness Mr. Stakem agreed that where a consignee is unable to remove his cargo from the pier during the course of a government inspection, he should not be charged at a penal rate.[43]

The record is far from compelling in regard to delays caused by government inspections,[44] but in any event, the Commission has accepted the premise, with respect to breakbulk cargo in the Port, that delays caused by inability to remove cargo shall not result in imposition of penal demurrage.[45] Nevertheless, the situation relating to government inspection is no different in the Port of New York than at any other North Atlantic port.[46] There is no evidence to support a finding that penal demurrage is being assessed against containers for delays caused by government inspections in the Port of New York.[47]

In summary, Mr. Klestadt testified that a five day free time minimum is required because of delays in receiving documents from overseas, because of the time needed to prepare the delivery order and lodge it with the trucker, because of the time required to obtain a proper release from customs and by reason of all other ministerial functions that must be performed to arrange for the clearance of the cargo.

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[37] Tr. 136.
[38] Tr. 150.
[39] Tr. 148.
[40] Tr. 153–154.
[41] See *Free Time and Demurrage Practices at New York Harbor*, 11 FMC 238, 259–260.
[42] Ex. 4, p. 3.
[43] Tr. 40–42.
[44] Tr. 40; Ex. 4.
[45] General Order 8, 46 CFR §526.1.
[46] Tr. 154, 317.
[47] Ex. 4 generally supports the position taken but contains no evidence of any unjust or unreasonable practice.

The Association admits that the carriers, for the most part, in their discretion do allow this period, but argues that importers have no guarantee that this minimum will always be available. It contends the Commission should prescribe a minimum free time period of five days on import containers.[48]

The Association contends that absent a rule, the Steamship Conferences will be able to reduce free time without consulting importers by the filing of a tariff change on the basis of allegedly improved facilities. The Association argues that importers need protection against such unilateral action.

Assuming the Conferences were to reduce free time, such unilateral action, however, would not necessarily be an unjust or unreasonable practice from which importers should be protected. The Commission cannot predetermine what conditions would then be prevailing which might determine whether such reduced free time was a just or unjust, a reasonable or unreasonable practice. Terminal facilities might well be improved. Technological changes might well require changes in present tariffs relating to free time and demurrage. It is as likely that computerized documentation will speed up the time now necessary for processing as that terminal facilities will be inadequate to move cargo within the present permitted free times. One can speculate either way. But the record in this proceeding does not support a finding that in the light of current conditions, present practices are unjust or unreasonable.

In addition to urging promulgation of a five day free time rule, the Association believes that free time should not begin to run until not only is the container tendered but that the container should not be considered to be tendered until there is also made available a bogie or other undercarriage equipment to the trucker to permit the removal of the container from the pier. Without such equipment, it is the position of the Association, the consignee is unable to remove the container from the terminial.

It urges that a distinction should be drawn in §526.1(b) with respect to the obligations of the carrier on each type of cargo. Accordingly, in subparagraph (b)(1) after the word "holidays," they desire that there be inserted "on the breakbulk cargo." In addition, a new sentence should be added to this subparagraph reading as follows:

> Free time of five (5) days (exclusive of Saturdays, Sundays, and legal holidays) on cargo in containers, such as house-to-house and pier-to-house containers, is adequate free time on such cargo in containers at New York under present conditions, provided, however, that such free time shall commence when the carrier tenders and makes available the container and such undercarriage equipment as may be necessary.[49]

The Association believes that subparagraph 526.1(c) should conform to the above-suggested revision with respect to cargo in containers by requiring the carrier not only to tender the container but also make it

[48] N. Y. Foreign Freight Forwarders and Brokers Association Opening Brief, p. 5.
[49] Ex. 3, pp. 1–2. Hearing Counsel support this; Opening Brief, p. 9.

available by providing the necessary undercarriage equipment. Accordingly, after the word "tender" in the second line of subparagraph (c), there should be added "and make available."[50] The rule proposed by the Association would delay the commencement of free time until the container is paired with a chassis.

The record herein indicates that the parties are in general agreement that the movement of containers from terminals is dependent upon the availability of undercarriage equipment; that while the operation of some carriers, as for example, Sea-Land, is based on a full chassis system,[51] others, because of the capital investment involved, operate on the basis of supplying and shifting chassis from container to container as the need arises to move a given container from the terminal.

The rule proposed by the Association is not required in order to impose on carriers the obligation to extend free time where by contract it is the carrier's obligation to supply undercarriage equipment and the carrier fails to do so. The carrier witnesses testifying in this proceeding recognized this duty.[52] The Commission's truck detention regulations already impose this obligation.[53]

Hearing Counsel contends that the obligation imposed by section 551.1(i) relates to the assessment of penalties under the Commission's Truck Detention Rule and "has nothing at all to do with extension of free time."[54] Hearing Counsel err in their ultimate conclusion. Although General Order 35 does indeed concern itself primarily with the problems of truck detention, nevertheless it is against the financial interest of the carrier to create a "delay occasioned by lack of sufficient chassis." When a carrier precludes such delay, *i.e.*, as having sufficient chassis, it enables the consignee to remove his shipment within the free time period and avoid imposition of demurrage charges.

The Association also contends section 551.1(i) does not cover the situation. It argues that General Order 35 is only concerned with houst-to-house containers, whereas its proposed rule covers pier-to-house containers as well. It asserts that merely reciting that the steamship company is "responsible" for delay caused by lack of chassis does not deal with the specific problem. It asks who would the steamship companies be responsible to? The terminals whose space they occupy? Or the consignee who is unable to remove his container? Or possibly both? Furthermore, being "responsible" does not mean that the free time period will necessarily under the cited rule be extended until a bogie is tendered with the container. The consignee will still get a demurrage bill if free time is exceeded due to the lack of a bogie.[55]

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[50] Ex. 3, p. 2.

[51] Tr. 235–236; Ex. 6, p. 4.

[52] Tr. 171, 183, 236.

[53] General Order 35, 46 CFR 551.1(i) provides: "Steamship companies responsible for house-to-house movement of containers . . . are responsible under this Part for delay occasioned by lack of sufficient chassis . . . ." 46 CFR 551.1(i).

[54] Hearing Counsel Reply Brief, p. 8.

[55] Association Reply Brief, p. 8.

The Association does not suggest that the terminal should not be compensated for space occupied by a container for which a chassis has not been provided thus occasioning delay. It agrees that the terminal is entitled to be paid,[56] but not by the consignee. If it is the carrier that is responsible for the inability of the consignee to remove the container because of failure to tender undercarriage equipment, then it should be the carrier, rather than the consignee, which should pay the terminal.

The concern of the Association is understandable. The Commission might well consider the advisability of publishing an interpretive order clarifying the questions raised by the Association. However, insofar as promulgation of the rule proposed is concerned there has been no showing, on this record, that a condition exists in the Port of such a chronic lack of chassis or undercarriage equipment as to amount to an unjust or unreasonable practice warranting the promulgation of the rule proposed by the Association.

The Association points out that there are occasions when a carrier is unable to deliver the cargo, *e.g.*, it has been lost at the pier. Accordingly, it suggests that the Commission should consider amending the rules on import free time which permit distinctions to be made in the treatment to be given to cargo that was in free time as distinguished from cargo that was in first period demurrage. The Association believes that when a carrier is unable to tender and make available cargo through a disability it is suffering, the treatment afforded the cargo, whether in free time or in a period of demurrage, should be the same in order to prevent unreasonable discrimination. For example, under §526.1(c) in the case of carrier inability to tender cargo, free time is extended for a period equal to the duration of the carrier's disability. But, if the disability arises after the expiration of free time, the carrier may under the rule assess either no demurrage or first period demurrage.

The Association argues that this latitude in the carrier creates an opportunity for discrimination in two areas. Firstly, there is no reason why cargo in free time should have the free time extended at no cost to the consignee while cargo in first period demurrage should have to continue to pay such demurrage even though it is the carrier's inability and no default by the consignee that has brought about the unavailability of the cargo. The Association believes that any time there is a disability to deliver by a carrier, there should be no assessment on the cargo at all, regardless of whether it is in free time or first period demurrage. Secondly, under this rule, discretion is left with the carrier as to whether no demurrage or first period demurrage should be assessed if the disability arises after the expiration of free time. This means that depending upon the carrier's or terminal operator's tariff, some consignee will be assessed demurrage in this situation while others will not. The Association says that there is no cogent reason for this opportunity for discrimination

[56] Association Reply Brief, p. 9.

between consignees. The Association recommends, therefore, that §526.1(c) be changed to read as follows:

Where a carrier is, for any reason, unable, or refuses, to tender and make available cargo for delivery, whether such cargo is in free time or demurrage, the carrier shall not assess any charge for demurrage for a period equal to the duration of the carrier's disability or refusal.[57]

Staff witness Mr. Stakem agrees that under the present language of subparagraph (c) on the identical factual situation two consignees can be treated differently by two carriers with respect to the assessment of demurrage.[58] He is of the view that in conformity with the general theory of the Shipping Act, all consignees in a demurrage situation should be treated equally.[59]

The Conferences contend that the Association is incorrect in its assertion that the present rule permits "unreasonable discrimination" because consignees using different carriers might be treated differently depending on the rules in the carriers' tariffs.[60] The Conferences claim that there can be no discrimination where, as is the case under the present rule, similarly situated shippers are treated equally under the tariff of the same carrier. Mere differences in tariff provisions of competing lines do not establish discrimination.[61]

The Conferences point out that the Commission carefully considered the issue raised by the Association when section 526.1(c) was first adopted. The conclusion of the Commission was that is is permissible, but that a carrier is under no obligation, to extend free time if the disability to tender cargo occurs after the expiration of the free time period. Thus, the Commission established the present section 526.1(c) fully recognizing and approving the fact that tariff provisions would differ from carrier to carrier.[62]

The Association admits that the Commission in *Free Time and Demurrage Practices on Inbound Cargo at New York Harbor* so decided. It points out that while the Commission granted the option to the carrier, it felt that the fair treatment would be to extend free time, saying:

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. 11 FMC at 253.

Now the Association says it is time for the Commission to adopt the "more equitable approach." It contends that there is no reason why a

[57] Ex. 3, pp. 3–4.
[58] Tr. 109.
[59] Tr. 110.
[60] See Association Opening Brief, p. 10.
[61] *Rates, Charges, and Practices of L. & A. Garcia and Co.*, 2 USMC 615, 618 (1941); *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 FMC 202, 213 (1967).
[62] See *Free Time and Demurrage Practices on Inbound Cargo at New York Harbor*, 11 FMC 238, 252–253 (1967).

consignee should be required to pay for space it is forced to use because of carrier fault. Where a consignee is "thwarted in its bona fide effort to pick up its goods," there should be no demurrage.[63]

In any event, there is no evidence that the present practice has worked harshly or is otherwise unjust or unreasonable and there is no statutory basis for adopting the Association's proposed rule.

CONTAINER DETENTION

Container detention refers to the cargo assessed for the use of container equipment as distinguished from demurrage charges which are assessed for use of the terminal facility.[64] Demurrage may be payable to the terminal operator whereas container detention charges may be payable to the owner of the container, the carrier, who may not necessarily own or operate the pier.[65]

The proposed rule contemplating imposition of container detention charges only after the container leaves the terminal is opposed by the carriers and by Hearing Counsel. They argue that containers are expensive equipment; free time should contemplate the time appropriate for the consignee to take possession; that once he takes—or should take—possession charges for use of the container should begin to accrue. Presently a container not removed during free time would thereafter be assessed demurrage and, in addition, container detention charges.

The Australia-Eastern U.S.A. Shipping Conference does not follow this approach. It provides for five days free time on general cargo in containers before assessment of demurrage but only two days free time before assessment of container detention charges.[66] Once the consignee pick up the container detention charges cease. "After pickup, the costs of the container, if any, are governed by interchange agreements with inland carriers."[67]

Hearing Counsel contends it is an unreasonable practice to assess container detention charges based on a different free time schedule then utilized for assessment of demurrage.[68]

The Conference's witness, Mr. Egan, testified that despite the fact that the problems attendant upon customs clearance and documentation may inhibit a consignee's ability to remove a container in less than four or five days, nevertheless, it was fair and reasonable for the Conference to allow only two days free time before charging for container detention. ". . . our costs are calculated on certain turn around of equipment. If that free time for detention was increased, then that is an additional cost to us which might be reflected somewhere than in a cost, in a charge, whether it was a freight rate or whatever."[69]

[63] Association Reply Brief, p 11; citing in support *Midland Metals Corp. v. Mitsui O.S.K. Line*, 15 FMC 193, 199.
[64] Tr. 98–99.
[65] Tr. 177, 199; Ex. 5, p. 12.
[66] Tr.175–176, 199, 205.
[67] Ex. 5, p. 12. To the same effect, see Tr. 241–243; Ex. 6, p. 17.
[68] Hearing Counsel Opening Brief, p. 14.
[69] Tr. 206.

Despite Hearing Counsel's contention that it is an unreasonable practice if free time for demurrage and free time for detention are not identical the evidence in this proceeding indicates that the cost elements relating to terminal space—which bear on free time and demurrage—and the cost elements relating to container equipment are different and therefore the amount of free time for demurrage and for container detention need not be identical. Accordingly, a tariff which specifies different free time for demurrage than for container detention is not *per se* an unjust or unreasonable practice. Neither Hearing Counsel nor any other party has introduced evidence establishing or even tending to establish that the Conference's two day free time for container detention is not based on valid economic considerations of capital investment or is otherwise unjust and unreasonable.

Nor is there any evidence in this proceeding which would establish that the imposition of a charge for container detention prior to removal from the terminal is an unjust or unreasonable practice which would warrant a rule precluding such charge until after the container leaves the terminal. Accordingly, the proposed rule on container detention cannot be justified as correcting an unjust or unreasonable practice.

DOCUMENTATION

The Association proposes an additional rule which would require that the carriers furnish certain documentation to the consignee relating to assessment of demurrage in order that the consignee may determine if he is being properly assessed.[70] For example, carrier records as to when the truck appeared; when it was discharged or let go.[71]

"It is sort of a discovery rule . . . ."[72]

The Conferences contend that such a rule is unnecessary. Regulations already require terminal operators to provide truckers (the agents of consignees) with copies of such documentation at the time they arrive at the terminal to pick up shipments. Section 551.2(a)(1) provides in relevant part:

> Motor carrier vehicles having physical possession of delivery orders or dock receipts immediately shall be issued a sequentially numbered and time-stamped gate pass by order of arrival. When dock receipts are lodged with the terminal operator or steamship company, the sequentially numbered and time-stamped gate pass immediately shall be issued upon tender of the dock receipt to the gateman by the motor carrier vehicle driver. The sequential number and all time stamps and notations recorded on the gate pass and any other arrival document shall be recorded on the copy of the delivery order or dock receipt retained by the motor carrier. 46 CFR 551.2(a)(1).

Section 551.2(f) of the regulations also provides:

> If documents are rejected by the terminal operator, or service is refused for any other reason, the terminal operator shall provide the motor carrier written explanation, time

70 Ex. 3, pp. 4–5.
71 Tr. 127.
72 Tr. 128.

stamped, of the deficiencies in documentation or other reason(s) for refusal of service . . . . 46 CFR 551.2(f).

The Association responds to such that demurrage claims usually arise several months after the cargo has been removed and to obtain copies of the pertinent documents from a motor carrier who may be located inland is "obviously a difficult chore."[73]

The Association further agrees that section 551.2(a)(1) would not be helpful to a consignee in the event that a trucker is shut out or not otherwise admitted to the pier. Its witness, Mr. Klestadt, claimed that there are frequently occasions where a truckman will appear at a terminal at 8:00 a.m., and after standing in line he finds that the cargo is refused because the delivery clerk has not received a freight release from his main office, even though the necessary bills of lading have been surrendered. The consignee is not at fault. But the truck will lose its place on line and it is unable to pick up the freight on that day. According to Klestadt, records are very rarely kept of these attempted pick-ups by the truckmen.[74]

With regard to section 551.2(f), the Association says it assumes a situation where the trucker reaches the pier clerk. Where he stands on line and is then "shut out," it argues the rule would be inapplicable and of no help to consignees.

The arguments of the Association are not convincing. There is no unreasonable practice under section 17 of failure to provide documentation. The documents necessary to support any position of a consignee in a demurrage dispute are presently being supplied its agent. That to obtain the records of the agent may be "a difficult chore" is scarcely a sufficient reason to publish a rule which in effect duplicates a rule already in effect and requires terminals to supply documentation to two parties in interest.

The situation described by Mr. Klestadt may arise on occasion but there is no evidence that they are chronic or that such conditions are so prevalent as to seriously increase the congestion which General Order 35 was designed to combat so as to warrant correction by utilization and implementation of General Order No. 8.

Further, present discovery rules are sufficient to meet the needs of any consignee for information in the event that a demurrage dispute is the subject of a proceeding before this Commission.

Mr. Baltz, import manager for Heublein Spirits Group, testified that in disputes over demurrage "we have to guarantee the demurrage to the terminal operator or else they hold our container for ransom . . . ."[75] "I had a case just three weeks ago where we owed the line two days demurrage, it was $18.50 and they refused to release the container [so] that [it] incurred an additional $9.90 because we owed them $18 or $19."[76] Mr. Baltz did not contend that there was any refusal to release a

[73] Association Reply Brief, p. 13.
[74] Tr. 125.
[75] Tr. 385.
[76] Tr. 386.

second shipment still in free time because of an outstanding demurrage bill on a prior shipment.[77] Only where a prior demurrage bill was outstanding and a second shipment was in a demurrage status was the terminal unwilling to release the second shipment under guarantee of payment but demanded actual payment. Thus until the payment is made in cash, a delay can occur resulting in accrual of additional demurrage charges.[78] No specific suggestions were put forth by Mr. Baltz ". . . but there is much room for improvement in many of these operations."[79] In any event, no complaint has been lodged by Mr. Baltz with the Commission alleging violation of terminal tariffs or of the truck detention rules.

MULTIPLE-CONTAINER RULE

Intervenor National Association of Alcoholic Beverage Importers[80] sponsored witnesses Bernstein and Baltz, who testified in favor of a multiple container rule.[81] Many import shipments of alcoholic beverages consist of multiple container loads of ten or more.[82] Hearing Counsel believes it is an unreasonable practice not to grant additional free time to consignees of multiple container shipments[83] but although NAABI suggests a schedule of additional free time, the record contains no convincing evidence as to why NAABI's suggestion is reasonable, nor what a precise schedule of additional free time should be.[84] That is probably because what free time is necessary may depend on the nature of the commodity and trade in question and may not be susceptible to a universal rule.

Although NAABI recommends that shipments of more than four containers should entitle the consignee to additional free time, Hearing Counsel believes that it is reasonable to expect a consignee to remove eight containers from a New York pier facility within five days free time, but if a consignee is receiving more than eight containers on a single vessel, Hearing Counsel argues that such consignee ought to be entitled to additional free time to remove those containers. They suggest a rule establishing that when a consignee receives nine or more containers, eight containers must be removed during the normal five days free time in order for the consignee to qualify for additional free time.[85]

Certain conferences and carriers presently offer a multiple container rule only when one consignee has a multiple container shipment on one vessel and where all the containers are moving on a single bill of lading.

[77] Tr. 397–398.
[78] Tr. 398–399, 407–408.
[79] Tr. 400.
[80] Though it participated in this proceeding, NAABI filed no brief.
[81] Tr. 339–346, 378 *et seq.* Hearing Counsel Opening Brief, pp. 14–17, supports a modified multiple-container rule.
[82] For one importer more than 50 percent of containers were received in shipments of ten or more containers. Tr. 420.
[83] Hearing Counsel Opening Brief, p. 15.
[84] Hearing Counsel Opening Brief, p. 15.
[85] Hearing Counsel Opening Brief, p. 16.

Hearing Counsel oppose this single bill of lading requirement. They argue that the important consideration is the number of containers which a consignee must absorb, and not the number of bills of lading which cover the shipments.[86]

However, this raises a problem where a single vessel is carrying containers moving under many different conference tariffs. In that situation, Hearing Counsel takes the position that the multiple container rule should only apply to containers on a single vessel destined to a single consignee moving under one conference tariff to avoid problems relating to section 15 of the Shipping Act.

It may well be that alcoholic beverage importers have problems peculiar to their industry which might warrant particular consideration. But the same undoubtedly could be said for many trades. The particular requirements of a particular commodity in a particular trade do not lend themselves well to rulemaking. Rulemaking must have a broader oversight. Whatever the merits of multiple-container tariffs, it would seem that their promulgating can best be left to the carriers and terminals who, within the strictures of sections 16 First, 17 and 18(a) of the Shipping Act, 1916, are well suited to deal with the requirements of particular commodities in particular trades.

The evidence in this case does not support a finding that any carrier or terminal has promulgated or failed to promulgate tariffs relating to multiple-containers which amount to an unjust or unreasonable practice. No rule, therefore, need be issued.

PUERTO RICAN DOMESTIC OFFSHORE TRADE

The Puerto Rico Maritime Shipping Authority (PRMSA) contends that the proposed rules, if adopted, should not be applicable to containers received from Puerto Rico in the domestic offshore trade.

Carrier tariffs on inbound containers from Puerto Rico presently permit two days free time on general cargo in dry containers, one day free time on refrigerated containers and one day free time on tank containers.[87]

Carriers in this trade currently publish less free time than is largely prevalent for the foreign trades in the Port because there is no customs inspection, no currency conversion problems, nor letters of credit.[88] The only import document necessary to receive the container is the delivery order which the motor carrier obtains from the consignee.[89] Consignees in this trade consequently do not face the same customs and documentation problems as consignees in the foreign trades, and therefore, do not require as much time to remove containers from pier facilities.

The experience of the Australia-Eastern USA Conference is that not more than 5 percent of the general cargo containers go on demurrage.[90]

[86] Hearing Counsel Opening Brief, p. 17.
[87] Tr. 355; Ex. 10, attach.
[88] Tr. 112, 281.
[89] Tr. 139, 369.
[90] Tr. 193.

PRMSA's experience in the Puerto Rican domestic offshore trade indicates a somewhat higher percentage of containers incur demurrage. A 1975 survey by PRMSA at New York found only 12 percent of containers incurring demurrage. A further survey in February 1977 found only 13 percent of containers incurring demurrage. Another survey in March found 9 percent of containers incurring demurrage.[91]

Nevertheless, because no complaints have been received regarding free time and demurrage problems in the Puerto Rican trade, Hearing Counsel takes the position that the free time provisions presently operative in the Puerto Rico trade on inbound containers are reasonable.[92]

The Association, the only other party in this proceeding advocating adoption of rules pertaining to import containers in the Port, did not in either its opening or reply brief specifically address itself to containers in the domestic offshore trade. The thrust of its position being that a minimum of five days or more was necessary because of documentation and procedures involved in the foreign trades, including customs clearance, government inspections and monetary matters. Its position relating to supply of undercarriage equipment presumably would be the same whether a container was in a foreign or domestic offshore trade.

In any event, since the free time and demurrage rules presently in effect in the Puerto Rican domestic offshore trade are not unjust or unreasonable practices, there is no basis for prescribing rules which can only be adopted upon a finding that present practices are unjust and unreasonable and which practices the rules are designed to make just and reasonable.[93]

CONCLUSION

Since existing free time and demurrage provisions are essentially the same as the rules proposed here, the record is clear that there are no present problems which adoption of the rules are designed to remedy. The argument, however, for promulgating the rules is the contention that without them a carrier or conference could at any time alter its free time and demurrage provisions.[94]

If this were to occur, it does not necessarily follow that such a change would *per se* be unjust and unreasonable. It would be mere speculation as to conditions which might prevail at the Port in the future warranting or not warranting a change in free time or demurrage rules.[95] In such case, an investigation might then be instituted by the Commission to determine if the changes were proper and whether to issue a rule appropriate in the then-existing situation. Hearing Counsel argues that a rule is needed now to preclude the possibility of a future potentially time-consuming proceeding. It is also true, however, that if the situation were to change in the

[91] Tr. 351, 360–361; Exs. 9, pp. 6–7; 10, p. 2.
[92] Hearing Counsel Opening Brief, p. 12.
[93] Section 17, Shipping Act, 1916.
[94] Tr. 13; Ex. 1, p. 3. Hearing Counsel's Opening Brief, p. 4; Freight Forwarders' Brief, p. 5.
[95] Tr. 187, 188, 202, 204; Ex. 5, p. 4.

Port that an equally time-consuming proceeding might be necessary for a Commission rule to be changed to meet the then-existing situation. No problem exists now.[96] A change in rules by the carriers would not necessarily create a problem if conditions in the Port warranted such change. Nothing is to be gained now by promulgating a rule which resolves no problem and which itself may result in a problem if future Port conditions warranted a change. The public interest is well served if the Commission remains vigilant and acts appropriately where changed conditions warrant action by it. To adopt the approach advocated by Hearing Counsel is to suggest that the Commission could not effectively resolve a future problem if and when it arises.

In the past when the Commission or its predecessors have established free time and demurrage rules, there have always been compelling reasons for imposing the regulations.

In 1937 the free time on import cargo at New York was limited to ten days because carriers were allowing import cargo to remain on the piers indefinitely causing severe congestion. *Storage of Import Property,* 1 USMC 676 (1937).

In 1941 the Commission's predecessor requested carriers to reduce free time on import cargo at New York from ten to five days in order to reduce congestion at the Port, and in 1946, as a result of congestion during strikes against steamship and trucking companies in New York, rules were adopted for free time and demurrage on import cargo during strike situations. *Free Time and Demurrage Charges at New York,* 3 USMC 89, 94, 106 (1948).

A longshoremen's strike in 1965 resulted in further modification of the free time and demurrage rules on import cargo at New York, but since the Commission found no evidence of problems with respect to containerized cargo, the rules were limited to non-containerized cargo. *Free Time and Demurrage Practices on Inbound Cargo at New York Harbor,* 11 FMC 238, 260 (1967).

Finally, in 1968 the Commission established rules for free time and demurrage on export cargo at New York and Philadelphia because unlimited free time was being permitted on export cargo at those ports resulting in waste, inefficiency, and congestion at the terminals. *Free Time and Demurrage Charges on Export Cargo,* 13 FMC 207–210 (1970).

Commission rules have been adopted in the past only in specific response to serious problems demanding remedial action. Where there has been no evidence of unjust o unreasonable practices (such as in 1967 when on problems were shown to exist with regard to containerized cargo at New York and in 1970 when no ports other than New York and Philadelphia offered unlimited free time on export cargo), the Commission has declined to impose free time and demurrage regulations.

The problems relating to pier congestion in the Port of New York

[96] Tr. 97.

affecting import breakbulk cargo which gave rise to the promulgation of General Order 8 do not, based on the record in this proceeding, currently exist in the Port insofar as import containerized cargoes are involved. The current tariffs and practices prevalent in the Port, insofar as they relate to import containerized cargoes, result in few, if any, complaints by consignees as to amount to unjust or unreasonable practices.

Consignees would prefer a Commission freeze on free time allowances but their testimony does not suggest or support a finding that additional free time is warranted. To issue such a rule would, however, confirm that the present practice is just and reasonable. The Commission's statutory authority does not permit it to act unless it finds a practice to be unjust or unreasonable so as to warrant corrective regulatory action.[97]

Hearing Counsel admits that the Conferences are correct when they assert that at the hearing "no details were provided as to why consignees considered [present] free time inadequate or whether the situation complained of involved unusual circumstances in a particular trade or related to particular commodities. Hearing Counsel thus suggests that "the details which are now of such interest to the Conferences could have been developed on cross-examination, but were not."[98]

Hearing Counsel misconstrue the requirements for promulgation of a rule. Section 17 of the Shipping Act requires a finding that a present practice is unjust or unreasonable so as to warrant changing such practice by promulgating a rule which will result in a just and reasonable practice. As such, the burden is on those who assert the existence of an unjust and unreasonable practice to prove it. If "no details are provided as to why consignees considered free time inadequate," it can hardly be blamed on the Conferences' failure to elucidate same on cross-examination since the Conferences have no burden to justify the present free time and demurrage practice.

The conclusion to be drawn from the record in this proceeding is inescapable: Adoption of the proposed rule to make General Order 8 applicable to containerized cargo is not required by reason of any current unjust or unreasonable practices relating to containerized cargoes in the Port of New York.

Since 1971 relatively few complaints have been received and at the time the record was closed there were no present problems regarding free time and demurrage of which the staff of the Commission were aware.[99]

Absent a rule permitting unlimited free time, it is unlikely that demurrage would never occur. Thus, the fact that some demurrage does

[97] Section 17, Shipping Act, 1916.
[98] Hearing Counsel Reply Brief, p. 7.
[99] Tr. 97, 111, 114. Current tariffs generally prevalent in the Port of New York met and alleviated in the substance of the complaints previously made to the Commission.

occur despite the five day free time rule generally in effect does not mean that five days free time is unjust or unreasonable.[100]

Therefore, in consideration of the entire record in this proceeding and for all the reasons herein above set forth, it is found and concluded that the rules proposed to amend General Order 8 are not required to enforce just and reasonable practices in the Port of New York relating to free time and container detention time on import containerized cargo and this proceeding is, accordingly, discontinued.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
December 7, 1977.

[100] For example, a random sampling of vessels in Sea-Land's North Atlantic-European service between August 1974 to February 1975 showed a decline in the percentage of containers incurring demurrage from 18 percent to approximately 4 percent. Average demurrage day were constant at 3.2 in 1974 and 3.3 in 1975. Another sampling found 7.2 percent of containers incurring demurrage in November 1976, with a reduction to 5 percent in February 1977. Average demurrage days declined from the initial sample to 2.9 in November 1976 and again declined to 2.6 in February 1977. Consignees who incur demurrage include those who use the pier for storage to save inland trucking and warehouse charges, those having no immediate market for the goods, and those who sometime are not able to get cargo cleared. Tr. 244, 257, 281–82; Ex. 6, pp. 8–9, 15.

APPENDIX A

Hearing Counsel puts forth certain recommendations relating to implementatio or clarifying General Order 8.

It is the finding of the Presiding Administrative Law Judge that the matters relative thereto do not correct any unjust or unreasonable practices within the meaning and requirements of section 17 of the Act.

The Commission, however, may wish to give consideration to their implementation in a manner otherwise within its authority.

Hearing Counsel recommendations are as follows:

Section 526.1(c)

Section 526.1(c) relates to a carrier's disability which precludes delivery to the consignee. Under this provision if the disability arises after the expiration of free time, the carrier may, under the rule, assess either no demurrage or first period demurrage.[1] Hearing Counsel believes this result may cause a disadvantage as between two competitors using different lines or terminal facilities. They suggest the Commission should consider eliminating this source of potential competitive disadvantage.

They believe tha the Commission also should examine a possible clarification of the intended application of paragraphs 526.1(c) and 526.1(d). If cargo is lost, or documents are lost, or some other similar cause relating to carrier fault precludes delivery, section 526.1(c) applies to extend free time for the duration of the carrier's disability. On the other hand, in the event of a strike, etc., section 526.1(d) applies.

A question was raised during the hearing as to the validity of certain aspects of the strike provisions. Hearing Counsel is of the view if cargo is in demurrage when a strike commences, it should stay in demurrage and pay compensatory storage charges because that cargo should have been picked up during the allotted free time period. On the other hand, if the cargo is in free time when the strike begins, it should stay in free time because the carrier has not completed its obligation to the consignee.

Delay Caused by Action or Inaction of a Government Agency

The New York Foreign Freight Forwarders and Brokers Association raises the question of delays caused by action or inaction of a government agency. Hearing Counsel agree with the Association's position that it is reasonable to assess compensatory (first period) demurrage upon expiration of free time even where the inability of the consignee to obtain the cargo during free time was the result of action or inaction of a government agency. However, Hearing Counsel also agree that it is unreasonable to assess penalty demurrage (second or third period demurrage) during such a delay. Since the cause of the delay is not within the control of the consignee, penalty assessments will not achieve their intended purpose of encouraging expeditious removal of containers. On the other hand, the terminal operator should be compensated for the use of their pier after expiration of free time through collection of first period demurrage.

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[1] See Ex. 3, pp. 3–4.

Records Applicable to Demurrage Charges

Hearing Counsel also agree with the position of the New York Foreign Freight Forwarders & Brokers Association that when a dispute arises over a demurrage assessment, the carrier should be required to provide the consignee, on request, all documents relating to the shipment which bear on the propriety of the assessment. While it is true that the motor carrier or consignee may maintain records, Hearing Counsel is concerned that ocean carriers and conferences will not always recognize the validity of those records when a demurrage charge is disputed.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 519(I)

FRITZI OF CALIFORNIA

v.

K-LINES

NOTICE OF DETERMINATION NOT TO REVIEW

May 12, 1978

Notice is hereby given that the Commission on May 12, 1978 determined not to review the decision of the Settlement Officer in th proceeding served May 5, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 519(I)

FRITZI OF CALIF.

v.

K LINES

Reparation Awarded.

DECISION OF ROLAND C. MURPHY, SETTLEMENT OFFICER[1]

Fritzi of Calif. claims $294.37 as reparation from "K" Lines for equalization with respect to five different shipments of such varied commodities as cotton denim jeans, twill jeans, polyester piece goods and cotton clothing transported from suppliers in Hong Kong to Fritzi of Calif., the bills of lading for which indicate that San Francisco, California is the port of discharge. The truck movements (Bonded Trucking Company, Inc.) from "K" Lines' port of delivery at Oakland to the consignee at San Francisco took place on March 16, 1976; March 15, 1976; April 15, 1976; June 1, 1976; and July 2, 1976. The claims were filed with the Commission on March 13, 1978, within two years from the date the cause of action arose and must be considered on their merits as ruled by the Commission in *Colgate Palmolive Company v. United Fruit Company,* Informal Docket No. 115(I), served on September 30, 1970.

The equalization claims are based on the excess of the trucking rates from Oakland to San Francisco[2] which were paid by Fritzi.

Rule No. 177 of "K" Lines' Tariff FMC–60 provides as follows:

> "When a shipment is consigned in a carrier's Bill of Lading to a port covered by this Tariff, the carrier at its option may arrange for movements of the shipment via rail, truck, or other conveyance from port of actual discharge to such port of destination named in the carrier's Bills of Lading at carrier's expense."

It is clear from the documentation presented by the complainant that "K" Line had discharged its cargo at a discharge port other than that

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Determination not to review May 12, 1978.)

[2] Fritzi has submitted freight bills covering the truck movements of the subject shipments from "K" Lines in Oakland to Fritzi in San Francisco.

specified by the bills of lading. The carrier had two options regarding the shipment in question: (1) they could have delivered the cargo at the designated ports indicated on the bills of lading; or (2) move the cargo from the port of diversion to the designated ports at its own expense. "K" Line chose the latter course of action.

Based on the aforementioned rule, that since the carrier has elected to arrange ground transportation when it discharges cargo at a port other than that specified in the bill of lading, the consignee pays only the amount which it would have cost him to arrange transportation from the proper port to a point of destination.[3]

Listed below are the computations in Fritzi's claim for equalization reparation by "K" Lines:

Claim FR–122		
3/17/76 ASIA MARU V/48, B/L K991–01000 & 01001		
F/B 76587 Oak. to S.F.	Charged	$ 98.50
S.F. to S.F. 3972 as 4000 × 100 =		$ 40.00
Frt. Equalization		$ 58.50
3/15/76 ASIA MARU V/48, B/L K225–53317		
F/B 76460 Oak. to S.F.	Charged	$143.40
S.F. to S.F. 18,241 × 72 =		$131.34
Frt. Equalization		$ 12.06
Claim FR–123		
4/15/76 ASIA MARU V/7049A, B/L K225–53506		
F/B 78088 Oak. to S.F.	Charged	$ 98.50
S.F. to S.F. 4285 × 100 =		$ 42.85
Frt. Equalization		$ 55.65
Claim FR–124		
4/15/76 ASIA MARU V/49, B/L K991–01135,36		
F/B 78087 Oak. to S.F.	Charged	$125.40
S.F. to S.F. 8939 × 90 =		$ 80.45
Frt. Equalization		$ 44.95
Claim FR–125		
6/2/76 QUEENSWAY BRIDGE V/37, B/L K991–01298,297		
F/B 80366 Oak. to S.F.	Charged	$ 98.50
S.F. to S.F. 2387 × 129 =		$ 30.79
Frt. Equalization		$ 67.71
Claim FR–126		
7/2/76 QUEENSWAY BRIDGE V/36, B/L K991–01445,447		
F/B 82075 Oak. to S.F.	Charged	$167.86
S.F. to S.F. 13143 × 81—106.46		
1% Inc. 1.06		$112.36
4.5% Inc. 4.84		
Frt. Equalization		$ 55.50
Total Equalization Charges		$294.37

[3] *Konwall Co. Inc., v. Orient Overseas Container Line*, Informal Docket No. 326(I), 1975.

Respondent denied the claims solely on the basis of Rule No. 28 in *Tariff FMC–60 which requires that claims be filed within six-months* after date of shipment.[4]

The foregoing indicates that "K" Lines is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for the transportation of property of any service in connection therewith than the rates and charges specified in its tariff. Therefore, Fritzi is awarded reparations in the amount of $294.37.

(S) ROLAND C. MURPHY,
Settlement Officer.

[4] The complaint was filed with this Commission within the time limit specified by statute; and it has been well established by the Commission that carrier's so called "six-month" rule cannot act to bar recovery of an otherwise légitimate overcharge claim in such cases.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 561

SUNPAK MOVERS, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

May 11, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 11, 1978, subject to the following clarifications.

The application for relief states that the tariff change was intended to be published no later than August 19, 1977. The date of shipment, however, was August 17, 1977. It is unclear from this whether the rate sought was in fact intended to apply to this shipment. However, a memo attached to the application unequivocally shows that the tariff filer was instructed to file the rate effective August 16, 1977, thereby establishing the requisite intent.

Applicant states that the shipper was billed at the 1520 cu. ft. minimum for two containers and seeks permission to waive $2,822.09. We find that application of the "overflow rules" contained in Rules 147 and 235 of the applicable tariff would have required billing only for the actual contents of the second container rather than the minimum. The amount to be waived would then be $509.25.

IT IS ORDERED, That applicant is authorized to waive $509.25 of the charges otherwise applicable on the shipment in question.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket 561 that effective August 16, 1977 for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from August 16, 1977, through September 1, 1977, the rate on 'Effects, Household or Personal', Minimum 1400 cu. ft. per container is $169.75 M subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 561

SUNPAK MOVERS, INC.

v.

SEA-LAND SERVICE, INC.

Adopted May 11, 1978

Permission granted for carrier to waive, for benefit of shipper, collection of $2,822.09 aggregate freight charges.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916, the respondent Sea-Land Service, Inc. (Sea-Land or carrier) has filed a timely (within 180 days of August 17, 1977, the date of the involved shipments) application for permission to waive, for the benefit of Sunpak Movers, Inc. (shipper or complainant) collection from the shipper of $2,822.09 aggregate freight charges. The $2,822.09 would be, if not waived, in addition to the $12,678.91 freight charges paid by the shipper to the carrier on October 10, 1977, totalling $15,501.00, for shipment of used household goods from Long Beach, California, to Tehran, Iran, via Bandar Abbas, on the carrier's vessel *Venture—V90E*, under Bill of Lading No. 995731915 dated August 17, 1977.

Bill of Lading No. 995731915 shows shipment of two 35 foot containers said to contain used household goods. Container No. 51269. with a gross weight of 10,932 lbs., measured 1,400 cubic feet. Container No. 307473, with a gross weight of 5,863 lbs., measured 975 cubic feet. Under Sea-Land Tariff 253, FMC 126, Item 0400, the rate in effect at the time of shipment was $169.75 per 40 cubic feet, minimum 1,520 cubic feet per container. Each container was regarded as measuring 1,520 cubic feet, a total of 3,040 cubic feet. 3,040 cubic feet divided by 40 cubic feet equals 76. 76 × $169.75 equals $12,901.00. There is also shown on the Bill of Lading, as well as Sea-Land's Home Ofc Acctg copy a "Beyond

[1] This decision became the decision of the Commission May 11, 1978.

Transportat Ch'' or BT—80.0 @ 32.50 per T.M. = $2,600.00. The application does not state, but it is assumed that there is no dispute as to the $2,600.00 charge and that it covers the land transportation charge from Bandar Abbas to Tehran. The $2,600.00 added to $12,901.00 equals $15,501.00.

The rate sought to be applied is $169.75 per 40 cubic feet, minimum 1,400 cubic feet per container. Container No. 51269 measured 1,400 cubic feet. Container No. 307473 measured 975 cubic feet. Together they measure 2,375 cubic feet, which divided by 40 cubic feet equals 59.375. 59.375 × $169.75 equals $10,078.91. To the $10,078.91 is added the $2,600 BT charge, making a total of $12,678.91. The $12,678.91 is the amount the shipper, in concurrence with this application, certifies it paid and bore.

The application for waiver states as facts in support the following:

> On August 8, 1977 Sea-Land's Seattle sales representative for the Mid East Services, D. A. Koenig, requested that the minimum of 1520 cu. ft. per container in item 0400 of Sea-Land tariff No. 253 FMC No. 126, ICC No. 102 be reduced to 1400 cu. ft. per container. The tariff change was to be published no later than August 19, 1977. Through error, the tariff change wasn't published until September 2, 1977.
>
> On August 17, 1977 Sun Pack Movers of Seattle tendered a shipment from Long Beach, California to Teheran, Iran.
>
> They were billed at the 1520 cu. ft. minimum rather than the expected 1400 minimum plus overflow. Sun Pak has paid the freight charges based on the expected 1400 cu. ft. minimum. In reviewing the charges the first container was paid as 1400 cu. ft. and the second container @975 cu. ft. per Rules 147 and 235 of Tariff No. 253. Respondent requests that it be allowed to waive the charges of $2,822.09. The error in not publishing the rate to be effective on the date requested was clerical in nature and therefore we request relief.

Upon consideration of the above, a review of the applicable tariff, and the documents submitted with the application, the Presiding Administrative Law Judge deems the application for permission to waive collection of portions of the freight charges comports with Rule 92, Special Docket Applications, Rules of Practice and Procedure, and section 18(b)(3) of the Shipping Act, 1916, referred to above, and the error to be one within the contemplation of said Rule and Act.

Therefore, upon said considerations, it is found,

(1) There was an error of a clerical or administrative nature (corrected by effective tariff before this application was filed), which resulted in having freight charges due if not waived.

(2) The waiver requested will not result in discrimination as between shippers.

(3) The application, having been filed timely and having shown acceptable cause, should be granted.

Wherefore, it is

Ordered

The application be and hereby is granted.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
April 11, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 558

AERO MAYFLOWER TRANSIT CO.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

May 17, 1978

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is given that the initial decision became the decision of the Commission on May 17, 1978.

It is ordered that applicant shall publish and serve tariff notices, refund monies, and report to the Commission in the manner prescribed by the initial decision.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 558

AERO MAYFLOWER TRANSIT CO.

v.

SEA-LAND SERVICE, INC.

Adopted May 17, 1978

Carrier, when republishing its tariffs, unintentionally subjected military household goods to a separate, additional bunker surcharge through clerical or administrative error. Its application for permission to refund or waive portions of freight charges qualifies for relief under P.L. 90–298 and, subject to certain conditions, is granted.

The carrier, having identified 56 "shippers" who moved the goods in question during the time the erroneous tariff was in effect, should make refunds to those persons who actually bore the extra costs resulting from the carrier's tariff-filing error, not to nominal "shippers" who bore no loss. Since the 56 "shippers" are in reality household goods forwarders who may not have borne the cost, a procedure is established whereby Sea-Land can make refunds to the actual shippers who did bear the cost.

An administrative agency is expected to maintain flexibility to meet novel problems and to tailor appropriate procedures to deal with such problems.

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

This proceeding was commenced by an application filed by Sea-Land Service, Inc. (Sea-Land) pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), 46 U.S.C. 817(b)(3), as amended by P.L. 90–298, and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a). In its application filed January 13, 1978 (the date it was received by the Commission's Secretary), Sea-Land stated that it wished to refund a portion of freight charges collected from the shipper Aero Mayflower Transit Co. (Aero) on four shipments of used military household goods which sailed from Houston, Texas, and New Orleans, Louisiana, under bills of lading dated August 16, August 19, and September 8, 1977, destined for Greece, Italy, and Spain. The aggregate amount of freight sought to be refunded on the four shipments is $1,076.88.

As I discussed below, this particular application was filed on behalf of

[1] This decision became the decision of the Commission May 17, 1978.

Aero, but the error in tariff filing affected 55 other shippers of the same type of goods who shipped such goods during the period August 13, 1977, and September 9, 1977. Rather than file 55 other special-docket applications, Sea-Land, quite properly in my opinion, identified the other affected shippers, and requests that any order of the Commission permit Sea-Land to refund or waive, as appropriate, portions of the freight charges so that all similarly situated shippers receive equal treatment.

Sea-Land submitted its sworn statement explaining the nature of the alleged error and provided pertinent tariff pages and shipping documents. On the basis of these materials, I find that an error occurred as follows.

Sea-Land has been engaging in a program of simplifying and updating its various tariffs. One particular tariff, FMC–48, had been in effect since 1970 and had grown to unmanageable size. Therefore, Sea-Land decided to break it up. The European and Mediterranean sections of that tariff were published in a new Tariff, No. 272, FMC–152, effective August 13, 1977. The particular tariff item involved in this proceeding is Item No. 625. This item was described in the earlier tariff (FMC–48) and in the new tariff (FMC–152) as follows:

> Household Goods and Personal Effects also unaccompanied Baggage of Military or other U.S. Government Personnel Moving on a Through U.S. Government Bill of Lading.

When Tariff FMC–48 was canceled by Sea-Land, it was Sea-Land's intention to republish Item No. 625 without change.[2] This meant that Sea-Land had not intended to change either the base rates nor the practice which included within such rates a portion to compensate for bunker costs. In other words, Sea-Land did not intend to assess a separate bunker surcharge on top of the base rates. However, in republishing Item No. 625, Sea-Land inadvertently omitted a notation which had appeared in the previous tariff (FMC–48) which had signified that no separate bunker surcharge would apply.[3] The result was that Item No. 625 was republished in Tariff FMC–172, page 36, subject to the additional assessment of a bunker surcharge. This new tariff page became effective August 13, 1977.

As soon as Sea-Land realized the error, it made a telex filing on September 9, 1977, making Item No. 625 not subject to rule 45, the

[2] The application erroneously stated "without charge" instead of "without change." The tariff pages attached to the application demonstrate that this was a typographical mistake.

[3] In the previous tariff (FMC–48), Item No. 625 had appeared on 1st Revised Page 23–D. At the top of that page of the tariff a notation appeared which stated "Rates Brought Up to Include Bunker Surcharge Rule 45." This notation signified that the base rates had already included the surcharge. In other portions of that tariff involving other trade areas, a separate surcharge was assessed on top of the base rate because of peculiar contractual arrangements between household goods forwarders and military agencies. The inclusion of bunker surcharges in base rates for military shipments has been permitted. See *Non-Assessment of Fuel Surcharges on MSC*, 13 SRR 526 (1973), modifying 15 F.M.C. 92 (1972), *Gulf & South American Steamship Co., Inc. v. United States*, 500 F.2d 549, 553–554 (Ct. Cl. 1974); *Sea-Land Service, Inc. v. United States*, 497 F.2d 928 (Ct. Cl. 1974).

The notation at the top of the previous tariff page, however, was not republished in Sea-Land's new tariff (FMC–172) because someone failed to reproduce the complete tariff page with the notation when using a Xerox machine.

bunker surcharge rule. The telex filing was followed by a permanent tariff page. See Tariff FMC–152, 1st Revised Page 36, effective September 9, 1977.[4] Thus, as Sea-Land states, because of this clerical error, a 19-percent bunker surcharge was in effect from August 13, 1977, until the tariff was corrected on September 9, 1977. Furthermore, not only Aero, the nominal complainant here, but 55 other shippers, who shipped similar goods during this period of time, were affected by the error.

Discussion and Conclusions

The question to be decided in this case, as in all special-docket proceedings, is simply whether the application for permission to refund establishes that the type of error contemplated by P.L. 90–298 occurred and whether the application meets all other requirements established in that law regarding the time of filing the application and the corrective tariff and the assurance that no discrimination among shippers will result if the application is granted. In my opinion, there is sufficient evidence to establish that these requirements of law have been met.

P.L. 90–298, which amended section 18(b)(3) of the Act, was designed to remedy inequities and financial harm visited upon shippers which resulted from inadvertent errors in tariff-filing by carriers. Thus, when a carrier intended to apply a lower rate on a particular shipment but failed to file an appropriate tariff conforming to the carrier's intention and usually the shipper's understanding, prior to the enactment of P.L. 90–298, the carrier was bound to charge the higher, unintended rate even if the shipper had relied upon the carrier's representations that a lower rate would be charged and that an appropriate tariff would be filed. Or, if the carrier, through inadvertence, republished a tariff and caused the tariff to reflect an unintended, higher rate, prior to the enactment of this remedial law, the carrier nevertheless was compelled to charge the higher rate, again causing shippers to suffer financial loss. These inequitable results were unavoidable because of the governing principles of law requiring strict adherence to tariffs effective at the time of shipment regardless of equities. See *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *United States v. Columbia S.S. Company*, 17 F.M.C. 8, 19–20 (1973).

In recognition of the fact that this hard and fast doctrine could result in inequities and hardships, Congress passed P.L. 90–298. The legislative history to P.L. 90–298 illustrates the types of mistakes which the statute was designed to remedy as follows:

[4] The Commission's tariff-filing regulations permit telegraphic filings of tariff amendments. If they reflect a reduction in or no change in costs, the rate is effective when so filed. At the time of these filings, these regulations were found in 46 CFR 536.6(c) and 46 CFR 536.6(a)(3). The telex filing must be followed by a permanent tariff page, as was done by Sea-Land. See 46 CFR 536.6(c)(5), the regulation then in effect.

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[5]

The Senate Report states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.[6]

Accordingly, section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3), was amended in pertinent part to read as follows:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

In the instant case it is clear that there was "an error in a tariff of a clerical or administrative nature." The materials submitted clearly demonstrate that in republishing its tariff, Sea-Land inadvertently allowed an error to become incorporated therein. Thus, while not intending that Item No. 625 be subject to an additional separate surcharge, Sea-Land's new tariff page was published in such a fashion that the goods in question became subject to the additional surcharge. This is the same type of clerical or administrative error in tariff publication shown in the legislative history to P.L. 90–298 such as when the carrier, in republishing its tariff, erroneously publishes a rate of $73 instead of $37. See House Report No. 920, cited above, p. 4; Hearings on H.R. 9473 Before the Subcommittee on Merchant Marine, 90th Cong. 1st Sess. (1967), p. 102. It is also clear that it was Sea-Land's intention prior to the shipments in question not to assess an additional bunker surcharge. As the legislative history to P.L. 90–298 illustrates, the element of the carrier's pre-shipment intention is essential. See Senate Report No. 1078, 90th Cong. 2nd Sess., April 5, 1968 [to accompany H.R. 9473], p. 1, referring to an "intended" rate. See also *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191, 1193 (1977).

The basis for the above findings is not merely the sworn statements in

[5] House Report No. 920, 90th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.

[6] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [to accompany H.R. 9473], p. 1.

the application. The tariff pages attached to the application corroborate these statements. Thus, Sea-Land's previous tariff applicable to shipments of military household goods (FMC–48) clearly shows that it was not Sea-Land's practice to assess a separate bunker surcharge on top of the base rates on shipments to Greece, Spain, and Italy, the relevant destinations in this case. The sudden disappearance of the notation appearing in the previous tariff (FMC–48, 1st Revised Page 23–D) which in effect had exempted military household goods moving to the named destinations from an additional bunker surcharge would be inexplicable except if it were the result of a clerical error in republishing the tariff page. Further corroboration of Sea-Land's good faith is provided by the fact that Sea-Land took pains to canvass its records to uncover 55 other shippers who are entitled to refunds or waivers of portions of freight charged and has requested that the Commission's order consider these other shippers as well as Aero. Taken as a whole, the application and supporting documents give every appearance that a bona fide error occurred and that Sea-Land is attempting to make amends under the law.[7] I therefore find that there was an error in Sea-Land's tariff of a clerical or administrative nature within the meaning of P.L. 90–298. The main problem that arises in this case, however, is not that proof is lacking regarding the fact that the tariff was in error. It is the fact that the proceeding is, in effect, a class action filed on behalf of 56 companies who, because they are household goods forwarders, may not have borne the cost of the surcharge.

The Problem of Ascertaining Who Bore the Extra Cost

In the usual special-docket case, the nominal complainant is an exporter, importer, or manufacturer who qualifies as a shipper and has borne the financial loss caused by the carrier's error. On occasion, however, the Commission has encountered special-docket proceedings in which the nominal complainant has really not borne the extra costs involved. Thus, ocean freight forwarders or customs house brokers have on occasion been named as complainants in such cases instead of the real shipper and have not borne financial harm either because they have not paid the freight or because they have been reimbursed by the real shipper. See, e.g., Special Docket No. 519, *Buckley & Forstall, In. v. Gulf European Freight Association for Combi Line,* Notice of Adoption of Initial Decision, December 16, 1977; Special Docket No. 489, *Williams Clarke Company, Inc. v. Sea-Land Service, Inc.,* Order on Remand, November 29, 1977; Special Docket Nos. 537, 538, 539, *Salentine & Co., Inc. and M.E. Dey & Co., Inc. v. Europe Canada Lakes Lines,* March 16, 1978 (I.D.); adopted April 18, 1978 (F.M.C.). In the cited cases, the nominal complainants were ocean freight forwarders or customs house

[7] The legislative history to P L 90–298 reveals that the then Chairman of the Commission represented to the Congress that special-docket proceedings would require a showing before a qualified judicial officer of "proof of the bona fide nature of the mistake " See Hearings on H.R. 9473 Before the Subcommittee on Merchant Marine, cited above, p. 88.

brokers who did not bear the cost of the freight. Accordingly, in each case it was necessary to insure that the refunds permitted would benefit the actual person who bore the loss, who, in each case, was not the forwarder or broker but the underlying shipper. Upon determining who bore the loss, the forwarder or broker usually submitted an affidavit promising to remit any refunds to the actual shipper.

The problem in the instant case is similar but more complicated. Nor only is Aero Mayflower Transit apparently a household goods forwarder, but there are 55 other similarly situated companies who appear on Sea-Land's shipping documents as "shippers." All of the movements consisted of military household goods. The underlying shipper is obviously the U.S. Government paying for the transportation probably under contractual arrangements between military household goods forwarders and military agencies. The application acknowledges that these types of shipment move under such arrangements and that in some trade areas and under some contracts bunker surcharges are passed on to the U.S. Government. It is not clear from the application, however, whether Aero passed on the surcharge or absorbed it. However, I have been advised by employees of Aero that the surcharges were passed on to the Government in the four shipments.[8] This statement, being a statement against its own financial interest, is entitled to be believed.[9]

Since Aero has suffered no apparent financial harm from Sea-Land's error, the question must be asked whether any of the 55 other forwarders also passed on the various surcharges. Unless we make sure that the refunds are made to the actual person who suffered the financial loss, a grave injustice can occur, since the household goods forwarders may receive compensation not only from the U.S. Government but also from Sea-Land for the same expense. As discussed above, P.L. 90–298 was enacted to remedy inequities, not to create them. Furthermore, the law requires that the granting of refunds or waivers must not result in discrimination among shippers. Accordingly, permission to grant refunds in the instant case must insure that 1) the real shippers who bore the financial harm on account of Sea-Land's error receive the benefit of the refund and 2) that all such persons be treated equally. In previous cases in which only one forwarder and one shipper were involved, such as the five special-docket cases cited above, it was a relatively simple matter to accomplish these dual objectives by requiring the nominal complainant to swear in an affidavit that if he had not borne the loss, he would act as agent of the person who did and remit the refunds to that person. When 56 forwarders are involved, however, the problem is more complicated.

[8] Because of the apparent status of Aero as a forwarder and the lack of clarity in the application explained above, I inquired whether Aero had in fact passed the surcharge on to the U.S. Government. Mr. William Lowry of Aero advised me by telephone that Aero had in fact passed the surcharge on. I instructed Mr. Lowry to confirm his advice to me in writing. See 46 CFR 502.92(e). As of the date of this decision, the confirming letter has not been received.

[9] A statement which is made by a declarant against his own pecuniary or proprietary interest has long been recognized as being entitled to belief and as an exception to the hearsay rule. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973); Federal Rule of Evidence 804(b)(3), 28 U.S.C.A.; McCormick, *Evidence*, § 277 (2d Ed. 1972).

Not only are 55 of these forwarders not parties to the case and thus not subject to orders of the Commission but the applicant carrier Sea-Land cannot be expected to ascertain from its records who the actual shipper was or who bore the freight since Sea-Land presumably deals only with the household goods forwarder and other companies whose names appear on Sea-Land's records.

In such a problematic situation, the problem calls for administrative ingenuity. Administrative agencies are supposed to maintain flexibility and ingenuity in fashioning procedures tailored to meet novel situations. As the Court in *American Airlines v. CAB,* 359 F.2d 624, 633 (D.C. Cir. 1966) stated:

> It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience.

In a similar vein the courts have encouraged administrative agencies to disentangle themselves from procedural morass and to structure appropriate expedited proceedings to fit peculiar problems. See, e.g., *Marine Space Enclosures, Inc. v. Federal Maritime Commission,* 420 F.2d 577, 588 (D.C. Cir. 1969), *Consumer Federation of America v. F.P.C.,* 515 F.2d 347, 355, n. 46 (D.C. Cir. 1975), *Shell Oil Company v. F.P.C.,* 520 F.2d 1061, 1075 (5 Cir. 1975), cert. den. 426 U.S. 1941 (1976).[10]

Therefore, I believe that the dual objectives of insuring equality of treatment among shippers and insuring that refunds are made to the persons who actually bore the financial harm can be achieved if Sea-Land notifies each forwarder and company shown on its records as "shippers" that each forwarder or company should submit to Sea-Land an appropriate affidavit identifying who bore the cost of the erroneous surcharge so that Sea-Land can make refunds to the proper person. Upon receipt of the affidavit, Sea-Land can make payments and report its action to the Commission, furnishing the affidavits in support of its action to the Commission. To insure that each forwarder or other company shown as "shipper" on Sea-Land's records is aware of its rights to file claims, Sea-Land should mail copies of the tariff notice regarding such rights to each such person. To insure further that the U.S. Government contracting office understands the situation, if it bore the cost, each such office should receive copies of the tariff notices together with payment of refunds by Sea-Land with appropriate explanations. In case the forwarders' or companies' affidavits, through some error, state that the forwarder or company rather than the Government has borne the cost of the surcharge, and Sea-Land accordingly makes payment on such a representation, each government military office involved should be sent

[10] In the *Shell Oil* case the Court made the following appropriate remarks citing *City of Chicago v. F.P.C.*, 458 F.2d 731, 743–744 (D.C. Cir. 1971), as follows

> The ability to choose with relative freedom the procedure it will use to acquire relevant information gives the Commission power to realistically tailor the proceedings to fit the issues before it, the information it needs to illuminate those issues and the manner of presentation which, in its judgment, will bring before it the relevant information in the most efficient manner.

copies of the tariff notices and an explanation by Sea-Land that payment has been made to the forwarder or company handling the military shipment, so that corrections can be made. Finally, a time limitation will insure that claimants are diligent in exercising their rights to refund and relieve Sea-Land of an indefinite state of uncertainty as to whether it will be required to dispense moneys. See Docket No. 69–57, *Agreement No. T–2336—New York Shipping Association Cooperative Working Arrangement,* Order Determining Amount and Directing Satisfaction of Remaining Valid Claims, April 3, 1978. In that case, which involved numerous claimants entitled to benefits because of past overassessment under a section 15 agreement, the Commission required claimants to assert their claims within 60 days of the date of the date of service of its order and to furnish supporting information so that the validity of the claim could be verified.[11] In granting claimants the right to seek benefits provided that they did so within the 60-day period, the Commission stated:

> To have cut off the rights of these additional claimants without notice would have been unfair to them, just as to allow the Damoclean sword of possible adjustment claims to hang forever over the head of NYSA would have been unfair to it. *Id.*, p. 11.

It should be noted that P.L. 90–298 provides that "the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or "*such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.*" (Emphasis added.) Rule 92(a), 46 CFR 502.92(a), contains identical language.

A 30-day period of time should be ample to enable Sea-Land to accumulate the necessary information and report to the Commission within 15 days thereafter as to how it has made refunds. In the event that some forwarders or companies do not assert claims and the underlying shipper, i.e., the U.S. Government, may be entitled to a refund, the Commission can take such steps as may be necessary to insure that a refund will ultimately be made.

I therefore make the following findings and orders:

1. The application was filed within the 180-day period prescribed by law. As noted above, the application was received by the Commission's Secretary on January 13, 1978. The shipments moved under freight bills showing dates of August 16, 1977, August 19, 1977, August 19, 1977, and September 8, 1977.[12]

2. Sea-Land filed a corrective tariff by telex, as permitted by the Commission's regulations, on September 9, 1977, prior to the filing of the application, as required by law.

3. If the application is granted, no discrimination among similarly

[11] See same case, Order of Reopening, February 23, 1977.

[12] The documents which Sea-Land has furnished to specify the dates of shipment look like freight bills. The documents show dates as follows: "F.B. Date 08 16 77, F.B. Date 08 19 77, F.B. Date 08 19 77, F.B. Date 09 08/77." Sailing dates are shown on these documents as "08 14 77, 08 17 77, 08 17 77, 09 04 77." Since all of these dates are well within the 180-day period of time prescribed by law (the application being filed, i.e., received, on January 13, 1978), it is not necessary to determine whether date of issuance of bill of lading, sailing date, or date of payment is used to determine the "date of shipment" for purposes of P.L. 90–298.

situated shippers will result for the following reasons. First, Sea-Land has canvassed its records to identify every other household goods forwarder who was affected by the erroneous publication regarding the bunker surcharge and requests that every affected shipper be treated equally. Second, as discussed above, Sea-Land will be ordered to send copies of an appropriate tariff notice to all affected forwarders, which notice will provide that each such forwarder will be entitled to seek refund upon submission of an affidavit specifying whether it bore the financial loss rather than the U.S. Government. Third, following submission of this information to Sea-Land, Sea-Land will make refunds to the forwarder or U.S. Government, as appropriate, to insure equality of treatment, and report to the Commission of the action it has taken. Finally, in order to insure that no shipper is harmed because Sea-Land's bunker surcharge was in effect from August 13, 1977, up to and including September 8, 1977 (the corrective tariff being effective on September 9, 1977), the tariff notice which Sea-Land will be ordered to publish will, in effect, eradicate the erroneous surcharge during that period of time.[13]

It is therefore ordered that upon adoption of this decision by the Commission and subject to any modifications to this decision or to the following orders which the Commission may make:

1. Sea-Land shall promptly publish the following notice in an appropriate place in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 558, that effective August 13, 1977, and continuing through September 8, 1977, inclusive, the rates on Household Goods and Personal Effects also unaccompanied Baggage of Military or other U.S. Government Personnel Moving on a Through U.S. Government Bill of Lading, are not subject to Bunker Surcharge published in Rule 45, but are subject to all rules, regulations, terms and conditions in this tariff otherwise applicable. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the goods described which may have been shipped during this period of time.

2. Immediately below the preceding notice, Sea-Land shall publish the following notice in its tariff:

> Notice is further given, as required by the decision of the Federal Maritime Commission in Special Docket No. 558, that requests for refunds may be submitted by any household goods forwarder or other company which has shipped the goods described in the notice above during the period specified. Such requests shall be accompanied by an affidavit specifying whether the forwarder or company bore the cost of the bunker surcharge which shall identify the military contracting office for whom the shipment was undertaken. If the latter office bore the cost of the surcharge, the affidavit should so state. Any requests for refund shall be submitted to Sea-Land Service, Inc. within 30 days after the effective date of this notice.

3. Copies of the above tariff notices shall be mailed to each of the 56 household goods forwarders or other companies shown as "shippers" on the list which Sea-Land has attached to its application.

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[13] The legislative history to P.L. 90–298 contains a suggestion that remedial action could take the form of issuance of a correction as of the date the error occurred. See Hearings, cited above, p. 103

4. Within 15 days after receipt of the requests for refunds and the affidavits, Sea-Land shall make refunds to the forwarder, company, or Government military office, depending upon which of these bore the cost of the surcharge, and shall file a report with the Commission as to the action it has taken, together with the supporting affidavits received. Refunds made to the U,S. Government military office shall be accompanied by a copy of the tariff notices with appropriate explanations. If refunds are made to the forwarder or company shown as "shipper" on Sea-Land's records, Sea-Land shall send a copy of the tariff notices to the Government military office identified in the affidavits with the notification that payment has been made to the forwarder or company which has certified in its affidavit that such forwarder or company bore the cost of the surcharge.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
April 24, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 570

DEUTSCHE SCHAGHTBAU-UND TIEFBOHRGESELLSCHAFT MBH

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF DETERMINATION TO REVIEW

May 17, 1978

Notice is hereby given that the Commission on May 17, 1978 determined to review the initial decision of the Administrative Law Judge in this proceeding served April 21, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 570

DEUTSCHE SCHACHTBAU-UND TIEFBOHRGESELLSCHAFT MBH

v.

LYKES BROS. STEAMSHIP CO., INC.

Application for permission to waive $16,611.45 of freight charges granted.

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

By application timely filed on March 22, 1978, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916 (the Act), Lykes Bros. Steamship Co., Inc., seeks authority to waive $16,611.45 of the total applicable freight charges of $31,079.20, on a shipment of oil well equipment (one drilling rig), bill of lading, dated September 25, 1977, from Houston, Texas, to Bremen, West Germany. The application is concurred in by the consignee-complainant, Deutsche Schachtbau-Und Tiefbohrgesellschaft MBH, which paid and bore freight charges of $14,467.75 on the shipment.

In September 1977, before the shipment moved, Lykes Bros. negotiated with the complainant's forwarder, acting on behalf of the complainant, a rate of $2.05 per cubic foot, including heavy lift and extra length charges, berth terms, plus a 4 percent currency adjustment factor.

Due to an administrative error, Lykes Bros. inadvertently filed the agreed rate of $2.05 showing New Orleans as the port of loading, rather than Houston (attachment #1 to the application, first revised page 186–A of the tariff), effective September 23, 1977.

At the time of the shipment on September 25, 1977, the applicable rate from Houston was on oil well equipment (attachment #2, 5th revised page 185), effective September 22, 1977. The applicable charges are computed as follows: The shipment weighed 65,040 pounds and measured 6,786 cubic feet. The applicable rate was $104.50, W (2,240 pounds) or M (40 cubic feet). The shipment measured 169.65 tons. This times $104.50

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

resulted in $17,728.43 basic freight charges. A heavy lift charge of $56.25 per ton applied, and this times 169.65 tons was $9,542.81. An extra length charge applied at 55 cents per foot for length over 30 feet. The extra 28 feet length times 55 cents resulted in an extra length charge of $15.40 per ton. This times 169.65 tons became a charge of $2,612.61. The total applicable charges were $29,883.85, exclusive of a currency adjustment charge of 4 percent of the previous total or $1,195.35. The total applicable charges were $31,079.20.

The complainant paid charges based on the agreed rate of $2.05 per cubic foot times 6,786 cubic feet, or $13,911.30, plus the 4 percent currency adjustment of $556.45, or a total or $14,467.75.

The difference between the applicable charges of $31,079.20 and the agreed charges of $14,467.75 is $16,611.45, which is the amount sought to be waived.

Lykes Bros. is a participant in Gulf European Freight Association Agreement No. 9360–3, and all pertinent tariffs are those of GEFA. Lykes Bros. has filed with group concurrence in the GEFA tariff the agreed rate of $2.05 per cubic foot, plus 4 percent currency adjustment factor (attachment #6, 4th revised page 186–A of the tariff), effective January 19, 1978, prior to the filing of this application, providing for application of the agreed rate from Houston to Bremen.

During the period in issue, no shipments of other than complainant's of the same or similar commodities moved via Lykes Bros., which believes no discrimination among shippers will result from approval of the sought waiver herein. Lykes Bros. agrees to the publication of a notice or of such action as the Commission may direct if permission for the waiver is granted.

The statutory requirements for the sought waiver have been met. It is concluded and found that there was an error of an administrative or clerical nature in that the negotiated or agreed rate was published from New Orleans rather than from Houston; that the authorization of a waiver of a portion of the applicable freight charges will not result in discrimination among shippers; that prior to applying for authority to waive a portion of the applicable charges, a new tariff has been filed which sets forth the application of the agreed rate from Houston, on which rate basis the waiver of a portion of the applicable charges would be computed; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to waive a portion of the applicable charges. The waiver authorized is $16,611.45.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
April 21, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 534

CUTLER-HAMMER DENVER

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF SUPPLEMENTAL INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

May 17, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 17, 1978.

It is Ordered, That applicant is authorized to waive collection of $21,061.38 of the charges previously assessed Cutler-Hammer Denver.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice:

> "Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 534 that effective November 30, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from November 30, 1976 through March 3, 1977, the rate from Houston to Helsinki on 'Printing Press K.D.' in 40' containers house to house is $2,100.00 lumpsum subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 534

CUTLER-HAMMER DENVER

v.

LYKES BROS. STEAMSHIP CO., INC.

Adopted May 17, 1978

Application to waive collection granted.

SUPPLEMENTAL INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to the Commission's Order on Remand issued March 14, 1978, this is a supplemental initial decision responding to the Commission's direction to afford the parties an opportunity to furnish additional evidence determined to be missing from the originally-filed application, and likewise held to be insufficient to support the Administrative Law Judge's Initial Decision of January 12, 1978.

As more fully set forth in the January 12th Initial Decision, this is a proceeding under section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), wherein the Lykes Bros. Steamship Co., Inc. (Lykes or Applicant) has sought permission to waive collection of a portion of the freight charges on a shipment of printing press parts, which moved from Houston, Texas to Helsinki, Finland under bill of lading dated February 10, 1977.

Lykes asserted that a verbal agreement had been reached in March 1976 with a freight forwarder for a lump sum rate to cover the subject shipment. On November 30, Lykes filed such a lump sum rate, but failed to include Houston as a port of loading. The Commission held that: "No evidence has been furnished which would substantiate that a prior agreement was reached to establish a rate to include Houston as a loading port or that the exclusion of Houston from the tariff was inadvertent." (Order, p.1.) The Commission pointed out that even though the applica-

[1] This decision became the decision of the Commission May 17, 1978

[2] 46 U.S.C. 817, as amended

tion was submitted under the sworn statement of an official of the carrier (Applicant), "(n)onetheless, . . . under the circumstances of this case independent evidence should be required and if it is necessary to resort to sworn statements, it is appropriate that such statements indicate that they are from persons who were involved in forming the alleged agreement . . . ." (Order, 2.)

In response to the Commission's March 14 Order On Remand, the presiding Administrative Law Judge sent a letter on March 15, 1978 to Lykes (with copy to Complainant and copy filed in public docket file), together with a copy of the Commission's Order, requesting the additional documentation sought by the Commission. A deadline of thirty days was imposed (but later extended at request of Applicant), in order to ensure compliance with the Commission's overall 45-day requirement for issuance of the supplemental decision.

Additional documentation has been supplied by the Applicant and I find this further evidence to be sufficient to now support the original findings of fact (Initial Decision, January 12, 1978, at 4). Those findings of fact and the conclusions of law set forth in that original Initial Decision are hereby incorporated by reference in this Supplemental Initial Decision as if fully set forth herein.

A brief summary of the nature and contents of the additional correspondence and further evidence from the Applicant (Lykes) is as follows:

EXHIBIT "A": April 10, 1978 letter from Lykes manager David W. Gunther to the Secretary of the Commission establishing necessity for extension of time beyond that established by the Administrative Law Judge.

EXHIBIT "B": April 18, 1978 letter from Lykes manager David W. Gunther to Judge Reilly enclosing original and three copies of two sworn affidavits responding to Judge's letter of March 15 (and Commission's Order On Remand); also contains statement that all Lykes files have been reviewed and they are unable to locate any "existing written evidence as to the verbal negotiations and agreement involved here"; that they are therefore submitting in lieu thereof affidavits from the parties directly involved in the negotiations.

EXHIBIT "C": April 10, 1978 affidavit of G.B. Chatelain, a Lykes Bros. official, attesting to the March 1976 verbal negotiations with John McGary, official of the shipper's freight forwarder (Schenkers International), and the subsequent tariff filing error.

EXHIBIT "D": April 13, 1978 affidavit of John McGary, an official of Schenkers International Forwarders, Inc., attesting to the March 1976 verbal negotiations with G.B. Chatelain, Lykes Bros. official.

Accordingly, permission is granted to the applicant, Lykes Bros. Steamship Co., Inc., to waive collection of a portion of the freight charges, specifically the amount of $21,061.38. An appropriate notice must be published in Lykes' tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 21, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 569

GEORGIA-PACIFIC CORPORATION

v.

GULF UNITED KINGDOM CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

May 17, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 17, 1978.

IT IS ORDERED, That applicant is authorized to refund $1,595.19 of the charges previously assessed Georgia-Pacific Corporation.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

> "Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 569, that effective January 11, 1978, for purposes of refund or waiver of freight charges on any shipments which may have been shipped from January 11, 1978 through February 9, 1978, the rate from Baton Rouge to Leith on 'Woodpulp', unitized in bales, measuring up to 1.2 CBM per ton, minimum 2250 metric tons is $43.50 per 2240 lbs. subject to all applicable rules, regulations and conditions of said rate and this tariff"

IT IS FURTHER ORDERED, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 569

GEORGIA-PACIFIC CORPORATION

v.

GULF UNITED KINGDOM CONFERENCE

Adopted May 17, 1978

Application o make refund granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and Rule 92 of the Commissions Rules of Practice and Procedure (46 CFR 502.92), the Gulf United Kingdom Conference (GUKC or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of bales of woodpulp, which moved from Baton Rouge, Louisiana, to Leith, Scotland, under four bills of lading dated January 10, 1978, issued by Phillips-Parr, Inc., as agents for Harrison Line (a member of the (Gulf United Kingdom Conference). The application for permission to refund was filed March 15, 1978.

The subject shipment moved under Gulf/United Kingdom Conference Tariff No. 39, FMC–18, 3rd revised page 230, effective January 9, 1978,[3] under the rate for "Woodpulp, Unitized in bales, measuring up to 1.2 CBM per Ton, min. 2250 metric tons, Baton Rouge/Leith thru February 10, 1978." The aggregate weight of the shipment was 5,115,600 pounds (2,283.75 long tons or 2,320.42 metric tons). The rate applicable at time of shipment was $43.50 per *metric* ton (a ton of 2204.6 pounds). The rate sought to be applied is $43.50 per *long* ton (a ton of 2240 pounds),

[1] This decision became the decision of the Commission May 17, 1978.

[2] 46 U S.C. 817, as amended.

[3] Although the cited tariff page bears a January 11th effective date at the top, there is a footnote specifically relating to the subject commodity stating "Filed by telex to FMC, Jan. 9, 1978." A reference to the telex on file in the Commission's official tariff files reveals that the telex itself expressly provides that it is to be effective January 9, 1978 ("EFF JAN 9") The Commission's General Order 13, 46 CFR Part 536, authorizes telegraphic filings of tariff amendments. See 46 CFR 536 6(c) Telegraphic amendments resulting in a decrease in cost or no change in cost to the shipper may become effective upon publication and filing. 46 CFR 536.6(a)(3). Effective January 1, 1978, General Order 13 was revised. Under that revision, authorization for telegraphic filings appear at 46 CFR 536.10(c); 46 CFR 536.6(a)(3) now appears at 46 CFR 536.10(a)(3).

pursuant to GUKC Tariff No. 39, FMC–18, 6th revised page 230, effective February 15, 1978.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amount to $100,938.32. Aggregate freight charges at the rate sought to be applied amount to $99,343.13. The difference sought to be refunded is $1,595.19. The Applicant is not aware of any other shipment of the same commodity which moved via the Harrison Line during the same time period at the rates involved in this shipment.

GUKC offers the following explanation as grounds for granting the application:

(4) The rate on Woodpulp in Gulf United Kingdom Tariff 39 (FMC–18) is "OPEN", subject to filing by individual Member Lines. Prior to December 15, 1977, tariff rates were based on long tons of 2,240 lbs. or measurement tons of 40 cubic feet, and Harrison Line had a rate filing as follows:

Woodpulp, Unitized in bales measuring up to 45 cuft per ton [2240 lbs.], minimum 1800 long tons—

Baton Rouge/Leith—Thru Dec. 31, 1977 . . . $40.00 W [2240 lbs.]

(See 12th Rev Page 136, Gulf United Kingdom Tariff 38—FMC–17)

On December 15, 1977, the Gulf United Kingdom Conference converted its tariff to the metric system—rates per metric ton of 2,204.6 lbs., or per cubic meter. Harrison Line's filing (as shown above) was converted as follows:

Woodpulp, Unitized, in bales, measuring up to 1.2 cubic meters per ton [2,204.6 lbs.], minimum 2250 metric tons—

Baton Rouge/Leith—Thru Dec. 31, 1977. . .$39.50 W [2204.6 lbs.]

(See Original Page 230, Gulf United Kingdom Tariff 39—FMC–18)

However, prior to the conversion to the metric system, Phillips-Parr Inc., agents for Harrison Line, had been corresponding with the shipper (Georgia-Pacific Corporation) with regard to a rate on Woodpulp beyond the December 31, 1977 expiration date; and in a letter dated December 14, 1977, Phillips-Parr quoted a rate of $43.50 per 2,240 lbs. for shipment during 1978.

On January 9, 1978, Phillips-Parr instructed the Conference Office to the Woodpulp filing (which had expired December 31, 1977) at a rate of $43.50, for 30 days. The Conference Office filed a rate of $43.50 W by telex to the FMC on January 9, 1978, and issued 3rd Revised Page 230 to the Tariff FMC–18, failing to take into account that the "W" basis was now per metric ton (2,204 6 tons) (*sic*, should read "2,204.6 *pounds*") instead of per long ton (2,240 lbs.)

On February 10, 1978, the Conference Office filed 6th Rev Page 230, at rate of $43.50 per 2240 lbs. for a period of thirty days

Respondent requests to grant Harrison Line permission to refund a part of the ocean charges on basis of misunderstanding on part of the Conference Office in filing the rate on a metric ton basis rather than a long-ton basis, due to recent conversion of the tariff to a metric basis.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)3 provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[4]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the agreed rate based on a "long ton" (of 2240 pounds per ton) instead of on a "metric ton" (2204.6 pounds per ton) basis, occasioned, at least in part, by confusion during the conversion to the metric system, and contrary to the negotiated agreement worked out in advance of the shipment.

2. Such a refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to refund a portion of the freight charges, the Conference (GUKC) filed a new tariff which set forth the rate on which such refund would be based.

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

Accordingly, permission is granted to the Harrison Line to refund a portion of the freight charges to the complainant, Georgia-Pacific Corporation, specifically the amount of $1,595.19. An appropriate notice wil be published in GUKC's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 19, 1978.

[4] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 430(I)

NATIONAL STARCH & CHEMICAL CORP.

v.

HANSA LINE

NOTICE OF DETERMINATION NOT TO REVIEW

May 19, 1978

Notice is hereby given that the Commission on May 19, 1978 determined not to review the decision of the Settlement Officer in this proceeding served May 9, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 430(I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

HANSA LINE

Reparation Denied.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed August 12, 1977, National Starch and Chemical Company, (complainant) alleges that it was overcharged an amount of $522.39 as result of Hansa Line (carrier) failing to apply an allowance for palletization on a shipment of Rubber Cement carried aboard the steamer STERNANFELS from New York to Kuwait May 29, 1976. The dispute at issue centers upon whether Rule 8,[2] *EXPLOSIVES, DANGEROUS OR HAZARDOUS CARGO*, of the applicable freight tariff, "The 8900 Rate Agreement Freight Tariff No. 5, F. M. C. 5", in some manner voids the application of Rule 26[3], entitled, *PALLETIZED CARGO*, as it relates to exemption of DANGEROUS and HAZARDOUS cargo.

Rule 8 above addresses itself in pertinent part to whether cargo shall be stowed *on* or *under* deck of the vessel based upon the requirements of the Code of Federal Regulations, Title 46-Shipping, as amended. The Rule additionally defines the rate level, i.e., *Dangerous/Hazardous Cargo*

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Determination not to review May 19, 1978.)

[2] 8 *EXPLOSIVES, DANGEROUS OR HAZARDOUS CARGO.*

a. Dangerous or Hazardous Cargo, unless otherwise specified, shall be determined in accordance with Code of Federal Regulations, Title 46-Shipping, as amended. Unless otherwise specifically rated, commodities for which the ONLY stowage is "ON DECK IN OPEN" or "ON DECK PROTECTED" shall take Dangerous Cargo Rates.

Dangerous or Hazardous Cargo bearing standard caution on labels as required by the U. S. Code of Federal Regulations—Title 46 but which may be stowed under deck in conformity with such regulations shall be assessed the Cargo N. O. S. Rate Item 215, unless a specific commodity rate is provided

[3] 26 *PALLETIZED CARGO*

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

Tariff Items	*Commodities*
. . . . .	All Dangerous and Hazardous Cargo Items in accordance with Rule 8

or *General Cargo, N. O. S.*, which shall be applicable in the absence of a specific commodity rate.

In contrast, Rule 26, relating to *PALLETIZED CARGO*, provides for a palletization allowance of 10 percent of the overall cubic measurement of the unit load if freighted on a volume basis, or a 5 percent allowance of the gross weight if freighted on a weight basis, plus a further discount of the three dollars ($3.00) per revenue ton for cargo moving under the terms and conditions of the rule, *with exceptions as provided in the rule*.

In support of its petition, the complainant alleges that the cargo described on the Bill of Lading as Rubber Cement, Flammable Liquid Label, Flash Point of 15 Degrees Fahrenheit, is considered NON-HAZARDOUS for rating purposes per Rule 8 of the Tariff.[4] Ostensibly the NON-HAZARDOUS classification entitles the cargo to a palletization allowance. No further explanation however, is offered to support the allegation that such an allowance should have applied on the shipment, or that the cargo is in fact NON-HAZARDOUS.

Rule 8, covering DANGEROUS AND HAZARDOUS CARGO, provides that where such cargo may be carried *under* deck pursuant to governing regulations, the General Cargo N. O. S. rate is applicable in the absence of a specific commodity rate listing. Alternatively, where cargo is restricted to *on* deck stowage and again, no specific commodity listing is provided in the tariff, the higher level DANGEROUS CARGO rate is applicable. With reference to this rule, and in the carrier's denial of the complainant's claim, the carrier allegedly stated that: "DANGEROUS OR HAZARDOUS CARGO bearing standard caution on labels . . . . but which may be stowed under deck shall be assessed the Cargo N. O. S. rate . . . It does not imply that it is Cargo N. O. S., but only differentiates it from that cargo that can only be stowed on deck." This Settlement Officer finds the carrier's statement represents a proper interpretation of the tariff.

Rubber Cement, having a flash point of 80 degrees or less, is classified as Label and Hazardous type cargo in the U. S. Code of Federal Regulation, Title 46-Shipping. Freight Tariff Rule 26, PALLETIZED CARGO, lists numerous freight commodities upon which the palletization allowance shall not apply. Notably, the Rule provides that Dangerous and Hazardous Cargo items in accordance with Rule 8, (which, by reference to Code of Federal Regulations, Title 46-Shipping, includes the commodity at issue), are not entitled to the palletization allowance. Whether the ordinary General Cargo N. O. S. rate may be applicable on certain DANGEROUS or HAZARDOUS CARGO which are not otherwise specifically provided for by commodity description does not change the fact Rule 26 exempts the application of a palletization allowance on Rubber Cement having a Flash Point of less than 80 Degrees Fahrenheit.

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[4] Also see the penultimate paragraph of Complainant's letter addressed to Mr. S. Muessig of F. W. Hartmann & Co., Inc., dated May 13, 1977.

Accordingly, the claim of complainant for reparation is hereby, denied; and its complaint dismissed.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–1

PACIFIC FAR EAST LINE—CERTIFICATE (PERFORMANCE) NO. P–88

PACIFIC FAR EAST LINE—CERTIFICATES (CASUALTY) NO. C–1084 AND C–1182

NOTICE OF REVOCATION AND DISCONTINUANCE

May 30, 1978

The Commission commenced this proceeding in order to determine whether or not the certificate of financial responsibility for nonperformance of transportation, numbered P–88, previously issued to Pacific Far East Line, Inc. (Respondent), should be revoked or modified. An Initial Decision has been issued, and exceptions to that decision have been filed with the Commission. Subsequent to the filing of those exceptions, Respondent withdrew the vessels *S.S. Monterey* and *S.S. Mariposa* from service. Those vessels were the subject of this proceeding.

Respondent had also been issued certificates of financial responsibility for death or injury to passengers or other persons on voyages on the named vessels. Those certificates are numbered C–1084 and C–1182. Certificate C–1182 expired on April 9, 1978.

Respondent has returned certificates numbered P–88, C–1084, and C–1182 to the Commission.

Because Respondent no longer has need of certificates numbered P–88 and C–1084, and because they have been voluntarily returned by Respondent for revocation, they will be revoked, and there is no longer any issue to be resolved by the proceeding docketed as number 77–1. Consequently, the Commission will vacate the Initial Decision in that proceeding, and discontinue it.

THEREFORE, IT IS ORDERED, That, pursuant to Part 540 of Title 46, Code of Federal Regulations, certificates of financial responsibility numbered P–88 and C–1084, heretofore issued to Pacific Far East Line, its affiliates, predecessors, successors or assigns, covering either the *S.S. Monterey* or *S.S. Mariposa*, or both, are revoked, effective immediately.

IT IS FURTHER ORDERED, That the Initial Decision issued on December 23, 1977, in Docket No. 77–1, *Pacific Far East Line, Inc.—*

Certificate (Performance) No. P–88 is vacated, and the proceeding is discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 405(I)

PARAMOUNT EXPORT COMPANY

v.

SEA-LAND SERVICE, INC.

REPORT

June 6, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman*; Thomas F. Moakley, *Vice Chairman*; James V. Day, *Commissioner*)

By complaint filed under section 22 of the Shipping Act, 1916, Complainant Paramount Export Company seeks reparation from Respondent Sea-Land Service, Inc. (Sea-Land) for alleged freight overcharges in violation of section 18(b)(3) of the Act.

Complainant delivered to Respondent two vans loaded with fruit and produce, packed and sealed by the shipper, for transportation from Oakland, California, to Hong Kong.

One of the vans moved aboard Sea-Land's vessel the S.S. McLEAN—Voyage No. 81 under bill of lading dated September 7, 1976. As to this particular container, the complaint alleges that:

> Our investigation confirmed that 90 crates of plums were never shipped. This fact is confirmed by the weight certificates as received from Sealand Service Inc. showing the difference of approximately 3000 lbs. representing the weight of 90 crates of plums. This shortage was also confirmed by Wood & Browne's survey in Hong Kong. Also, Superior Packing Co. confirmed that 90 crates were never shipped and refunded the FOB value of the plums.

Sea-Land denied any overcharges and urged dismissal of the complaint for lack of proof that a shortage had occurred. Sea-Land also contends that its tariff prohibits payments on such claims; that it had no opportunity to inspect the contents of the container; and that Complainant had not submitted to the Department of Commerce the necessary forms concerning the shortage.

In a decision issued February 7, 1978, Settlement Officer Ronald J. Neiforth held that Complainant had not proven its claim. The contention with respect to the quantity of goods stuffed in containers packed and sealed by the shipper in CY/CY transportation[1] should, in the opinion of the Settlement Officer, be proven by indisputable evidence.

The Settlement Officer also found that Rule 70(B)(9) of the tariff barred recovery[2] and concluded that Complainant had not sustained its burden of proof and that reparation could not be granted under the governing tariff.

We disagree with the Settlement Officer's conclusions. First, we find the Settlement Officer's reliance on Rule 70(B)(9) of the applicable tariff as bar to recovery to be misplaced. In our view, that rule is not directed to the question of *freight charges* but is rather a disclaimer on the part of the carrier of any *liability* for shortages in or damage to cargo received in shipper packed and sealed containers.

Under the terms of CY/CY transportation the carrier receives from the shipper and delivers to the consignee sealed containers. As the Settlement Officer properly pointed out, this type of transportation benefits shippers and carriers alike as reduced handling of the cargo by the carrier is translated into lower rates for the shipper. By accepting delivery of sealed containers the carrier for all practical purposes relinquishes control over the contents of the containers, and must rely on the information supplied by the shipper on the bill of lading for rating the cargo. The question then becomes whether a shipper who chooses the benefits of CY/CY transportation is estopped from later contending that the bill of lading contained errors of description which caused the carrier to misrate the shipment.

In *Cone Mills Corporation v. Trailer Marine Transport,* Informal Docket No. 369(I), Commission Order of Adoption served January 30, 1978, freight overcharges were claimed on four shipments of piece goods delivered to the carrier in shipper loaded and sealed trailers. The shipper's clerk, it was alleged, had by error omitted to state the measurements of the cargo in the bills of lading. Complainant in that case sought to have the freight charges adjusted in accordance with the measurements shown in the invoices. Because the tariff provided that unless the shipper stated in the bill of lading the cubic measurements of cargo rated on a per cubic foot basis, freight would be charged upon 100 percent cubic capacity of containers delivered sealed by the shipper, the settlement officer there found that, by sealing the containers, the shipper had prevented the carrier from using space which might otherwise have been available. He, therefore, denied reparation. The Commission agreed, holding that by sealing the containers the shipper had in effect leased and moved entire containers.

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[1] PACIFIC WESTBOUND CONFERENCE Freight Tariff FMC-12, Rule No 70, Cargo in Containers.

(A) *DEFINITION OF TERMS AS USED IN THIS RULE.* (9) CY/CY: The term CY/CY means containers packed by shippers off carrier's premises, delivered by shipper to carrier's CY, accepted by consignee at carrier's CY and unpacked by consignee off carrier's premises, all at the risk and expense of cargo

[2] RULE NO. 70(B)(9) *CY CONTAINER "SHIPPER" LOAD AND COUNT*

(a) When containers are packed and sealed by shipper, the carrier or his authorized agent will accept same as "Shipper's Load and Count" and the bill of lading shall be so claused.

(b) Carrier will not be directly or indirectly responsible for:

(2) Any discrepancy in count or consealed damage. (sic)

Section 18(b)(3)requires the carrier to assess and collect freight charges only for what it actually carries and at the rate in effect at the time of shipment. This requirement places upon the carrier the obligation of collecting *only* such charges as are provided in its tariff *for what actually moved.*[3]

In the *Cone Mills* case the piece goods packed in cartons were all assessed the same container rate. In the instant case the carrier assessed various commodity rates and charged freight according to the quantity of *each* commodity shipped. Clearly, under section 18(b)(3) the carrier may not, under these circumstances, collect freight on 400 crates of plums if, in fact, only 310 were shipped. For here the carrier did not charge a rate per container, as in the *Cone Mills* case, but rather a commodity rate on *each* of the items carried.

As the tariff rule mentioned by the Settlement Officer does not, in our opinion, bar recovery, the question is whether Complainant has sustained its burden of proof. We believe the Settlement Officer erred in holding that it had not.

Complainant has submitted an extract from a survey report prepared by the firm of Wood & Browne in Hong Kong at the request of Complainant and of the consignee, which asserts that a survey of the container revealed that while the seal on the container that arrived on the S.S. McLEAN was intact as were the packages inside the container, only 310 crates of plums of the advised quantity of 400 were found in the container. Complainant also submitted an invoice from the supplier of the plums, the Superior Packing Co., for 400 crates and a refund for the 90 crates short shipped. On the basis of the foregoing, we are of the opinion that Complainant has sustained its claim by substantial evidence and with reasonable certainty.

The decision of the Settlement Officer is therefore reversed and Complainant is awarded reparation in the amount of $368.10.

IT IS SO ORDERED.

By the Commission.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

Commissioner Leslie Kanuk dissenting. I would deny reparation in this proceeding and would uphold the Settlement Officer's decision to dismiss the complaint.

The shipper in this instance had the option of (1) delivering his cargo

[3] In *Chicago B & Q R Co v Ready Mix Cement Co* 487 F 2d 1263 1266 (8th Cir 1975) in considering section 6(7) of the Interstate Commerce Act which parallels section 18(b)(3) of the Shipping Act, the court citing *Boston & Maine R R v Hooker* 233 U.S 97 (1914), stated

"So strong is this anti-discrimination provision that the courts have generally refused to recognize an otherwise justifiable defense of estoppel "

*Commissioner Leslie Kanuk dissents, her dissenting opinion is attached the the carrier's yard for stuffing or (2) taking advantage of the lower CY/CY rate and stuffing and sealing the containers in his own yard. He chose the former option, thus precluding the carrier from examining the contents of either van.

The shipper then complained that one van was short 90 cases of plums, and cites as "evidence":

- a differential of 3,000 lbs. in weight between the two vans which was reported by Sea-Land;
- a survey by a Hong Kong firm that attests to the fact that the seal was intact and that the total shipment contained 90 cases of plums fewer than was listed on the bill of lading;
- a credit invoice by the packer to the Complainant for the value of 90 cases of plums.

I do not find the burden of proof sufficient to find for the Complainant. At no time did the carrier have the opportunity to examine the contents of either van. Nowhere in the record do we find an admission by the Complainant as to where the shortage occurred and who was responsible. In no way can we be certain that the "intact" seal has any corroborative utility, since the record does not support the finding that the seal at the end of the journey was in fact the same seal which was applied at the beginning of the journey.

Furthermore, I do not consider the weight differential between the two vans as constituting a heavy burden of proof. There is no reason to assume that the two vans should have been identical in weight. The differential could have been due to a variance in cargo composition or to a variance in cargo distribution between the two vans. The only "evidence" we are given as to the presumed contents of each van are the bills of lading provided by the shipper—one of which the shipper now claims was erroneous. Factors other than cargo weight discrepancies, singularly or combined, could also have accounted for the weight differential of the two vans. To borrow from Respondent's Reply to Complaint: "Chassis weight, cab weight, whether the scale was at true zero, all have a bearing on whether the weight is correct and accurate."

Since its inception, containerized shipping has provided substantial benefits to shippers and carriers alike, but these benefits to shippers and carriers alike, but these benefits are not realized without occasional problems. In this instance, the shipper had perishable cargo and elected to pack his own reefers and to enjoy the lower CY/CY rate. A condition precedent to the CY/CY rate is that the shipper must supply weight documentation which could be relied on by the carrier. The Complainant had the option of tendering his cargo to Respondent's container freight station for stuffing, thus passing the responsibility for container contents on to the carrier, but instead he opted to do his own packing.

In my opinion, the present case does follow the precedent set in *Cone Mills, supra,* regardless of whether one tariff or several tariffs were applied to the contents of one container. In both instances, the carrier had to rely on the shipper's documentation. In both instances, the shipper was exclusively responsible for loading and sealing the containers and for completing the bills of lading. Verification by the carrier was never intended.

I believe that the precedent in *Cone Mills* should be upheld. Furthermore, there has been no refutation that the CY/CY tariff involved here was unlawful. The carrier had no choice but to charge its lawfully filed rate, and the shipper must be charged with knowledge of the governing rules and regulations involved with such application.

I must, therefore, conclude that the law lies fully with the Respondent in this proceeding, and that the Complainant should be denied reparation.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–35

PUBLICATION OF INACTIVE TARIFFS BY INDEPENDENT CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER

June 6, 1978

On February 6, 1978, the Commission issued a final Order in the above-styled proceeding (Order), directing the cancellation of some 500 inactive steamship tariffs, including A.P. Moller-Maersk Line (Maersk Line) Tariff No. FMC–67 governing transportation to U.S. Atlantic and Gulf Ports from Red Sea and Gulf of Aden Ports.

Now before the Commission is a Petition for Reconsideration (Petition), filed by Maersk which requests that Maersk Line Tariff No. FMC–67 be reinstated because Maersk actually was providing vessel calls to the Red Sea and Gulf of Aden ports in question—despite its earlier representations to the contrary. The Commission's Bureau of Hearing Counsel replied to the Petition.

The Commission takes official notice that Maersk Line has filed a new tariff covering Red Sea and Gulf of Aden Ports which became effective on May 1, 1978 (Tariff No. FMC–90), and is apparently extending common carrier service pursuant thereto. Under these circumstances, the issues raised by Maersk Line's request to reconsider the February 6th Order have become moot.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of A.P. Moller-Maersk Line, be dismissed as moot.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–35

AGREEMENT NO. T–2880, AS AMENDED, ET AL.

DOCKET NO. 74–42

POUCH TERMINAL, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

ORDER DENYING RECONSIDERATION

June 7, 1978

The Commission has before it for decision two petitions requesting partial reconsideration of its Order conditionally approving the above-captioned agreements (Order), one from the Port Authority of New York and New Jersey (Port Authority) and another from the five terminal operator respondents (Operators).[1] Both Petitioners seek retroactive approval of all six mini-max terminal leases investigated in this proceeding to the time of their stated effective dates in August and September, 1973,[2] and also ask for a finding that no section 15 violations concerning the various Brooklyn Marine Terminal facilities covered by these leases have occurred.

In support of this relief, Petitioners allege that: the Order misstates the expiration date of UMS's pre-existing (nonmini-max) lease for Piers 1 and 2; there is no evidence that Respondents implemented an unapproved "cooperative working arrangement;" the Commission failed to "promptly approve or disapprove" the mini-max agreements filed December 14, 1973 as required by the last sentence of Shipping Act section 15; and, the

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[1] The Operators are: Barber Lines, A S Pittston Stevedoring Corp (Pittston), Nippon Yusen Kaisha (NYK); Universal Maritime Service Corp. (UMS) and International Operating Co. (ITO).

[2] Three of the six agreements were approved April 28, 1977 after being modified as required by the Commission's Order The other three agreements were disapproved after the Commission was advised that Pittston had abandoned all use of Piers 10 and 12 and NYK ITO wished to negotiate a different type of lease arrangement Pittston abandoned Pier 12 on November 1, 1975

failure to grant retroactive approval might unjustly injure three of the five Operators.[3]

There is some merit to the first of these arguments.[4] Accordingly, we shall amend the Order to find that UMS' pre-existing lease for Piers 1 and 2 expired October 1, 1973 instead of May 1, 1973—thereby reducing by five months the period of time during which an unapproved cooperative working arrangement was implemented as to those piers. Further reconsideration of the Order is not warranted.

Petitioners claim there is no evidence to support a finding that they have implemented an unapproved section 15 "cooperative working arrangement" since signing the mini-max agreements. There is, however, ample evidence in the record that eight of the nine Brooklyn mini-max piers were designated "public piers" with the understanding that provisions of Public Tariff PA No. 9 would not be actually applied to them pending resolution of the instant proceeding. These agreements were not filed for approval and were continually implemented in violation of section 15 from the date the respective piers were declared "public" until occupancy either ceased or became based upon an approved agreement. Pier 7 was never declared a public pier and no violations of section 15 were found as to NYK and ITO in the instant proceeding. The basis for any occupancy of Pier 7 by NYK/ITO subsequent to June 7, 1976 has yet to be reviewed by the Commission, however.[5]

Petitioners also stress the lengthiness of the instant proceeding and state that the Commission's final approval of the mini-max agreements should have accomplished all which would have been accomplished had approval occurred "promptly" as required by section 15.[6] This argument quickly reduces itself to a request for retroactive approval for which there is no support in law.

The mini-max leases were executed in August and September of 1973, but were not filed at the Commission until December 14, 1973, despite the fact that section 15 requires the "immediate" filing of subject

[3] The alleged injury to Pittston, ITO and UMS is described as "potential" (Operators' Petition, at 8) and depends upon the Port Authority's successful collection of substantial unpaid "on account" and "pre-existing contract" rents. If an attempt to collect these unpaid rents were made, it would necessarily require an adjustment in the Operators' favor to accurately reflect the lower Public Tariff PA No. 9 charges in effect for most of the period in question (*i.e.*, Piers 1 and 2—all but 2 months; Piers 4 and 5—all but 4 months, Pier 7—none, Pier 10—all but 12 months; Pier 12—5 out of 25 1/3 months). The details of this account are neither provided by Petitioners nor discernible from the record We note, however, that if the balance did favor the Port Authority, the three Operators would be "injured" only to the extent that the Port Authority held them to the terms of their freely negotiated nonmini-max lease agreements which expired at the time their respective facilities were declared "public piers."

[4] The pre-existing lease for Piers 1 and 2 was signed April 4, 1968 to expire April 30, 1973 with no month-to-month hold over provision. Two weeks before its expiration—at a time when mini-max negotiations had already begun—the parties signed a modification agreement permitting UMS to hold over on a monthly basis which was neither filed with nor approved by the Commission. Under these circumstances, there is a substantial question as to whether the April 16, 1973 modification was truly part of the prior lease or part of a new cooperative working arrangement. Because this issue is not clearly resolved in the record, we shall give Respondents the benefit of the doubt.

[5] The inapplicability of section 530.5(b)(2) of the Commission's Rules to the Operators' occupancy of the Brooklyn Piers is well set forth in the Administrative Law Judge's December 14, 1974 "Denial of Motion to Dismiss for Lack of Jurisdiction" which was incorporated by reference in his Initial Decision and from which no exceptions were taken. Appendix hereto, at 11–18

[6] The last sentence of section 15 states that "[t]he Commission shall promptly approve, disapprove, cancel or modify each such agreement in accordance with the provisions of this Section "

agreements. The proposed leases had widely varying initial terms and provided for indefinite occupancy under hold over tenancies. The only thing which would have been "accomplished" by immediate approval would have been immediate relief from the higher monthly payments of the pre-existing leases—the very fact which was the basis for Pouch Terminal, Inc.'s complaint. Allegations of urgency or immediacy of economic gain or loss will not alone defeat the hearing rights of a protestant raising substantial and material questions as to the legality of a proposed agreement. See *Marine Space Enclosures v. Federal Maritime Commission,* 420 F.2d 577 (D.C. Cir. 1969).

Most of the pre-existing leases expired or shifted to a monthly tenancy 17 days after the mini-max agreements were filed (December 31, 1973) and whatever need there might have been for immediate relief from the rental specified in those agreements disappeared at that time for UMS and Barber.[7] The Commission is as mindful of and concerned with the length of time required to complete formal adjudicatory proceedings as are Petitioners. It can sympathize, up to a point, with businesses which must engage in additional planning to assure that their activities do not become the subject of administrative litigation. The Commission cannot, however, excuse persons subject to the Shipping Act from the necessary responsibility of taking steps realistically designed to protect their concerted dealings from running afoul of the laws it administers. Whatever else might be intended by section 15's requirement that agency action occur "promptly" (consistent with due process), that statute does not authorize the approval of otherwise unapprovable agreements or the implementation of unapproved agreements whenever the proponents demonstrate that adjudication has not been "promptly" completed.

The command of section 15 is absolute. Violations do not require a showing of bad faith or even of intent, and the Commission lacks general equity powers to assure that "fairness" is achieved in all matters over which it possesses regulatory jurisdiction. Administrative agencies may only exercise authority conferred by their enabling statutes, *Transpacific Freight Conference of Japan v. Federal Maritime Commission,* 302 F.2d 876 (D.C. Cir. 1962). The Commission may not sanction past violations of the Shipping Act by retroactively approving an agreement under section 15. See *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 222 (1968); *River Plate & Brazil Conference v. Pressed Steel Car,* 227 F.2d 60, 63 (1955).

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[7] UMS and Barber occupied six of the nine piers in question. Pittston's pre-existing lease for Pier 10 expired August 30, 1974 and that for Pier 12 expired April 30, 1975, *but Pittston did not pay any rents which accrued after August 1974* (Exs. 70, 71). The pre-existing lease for Pier 7 was held jointly by NYK and ITO and continued until June 30, 1976. The only "relief" which would have followed from the approval of the Pier 7 lease before 1976 would have been a saving of the *difference* between the fixed pre-existing rent and the $2.00 per ton flexible assessment provided by the mini-max lease. In 1974 this difference was about $81,000 (Exs. 36, 40) and cargo handled that year was low because of depressed worldwide trade conditions. The Port Authority anticipated mini-max revenues to quickly rise towards maximum levels in subsequent years (Tr., at 264–265). Moreover, ITO was permitted to fall at least $360,000 behind in its rental payments by August, 1975 (Tr., at 168).

THEREFORE, IT IS ORDERED, That the Commission's March 31, 1977 "Order Adopting Initial Decision" is corrected by:

(1) deleting the last sentence of numbered paragraph 5 on page 3 and inserting the following:

> UMS's prior lease with the Port Authority for Piers 1 and 2 contained a fixed term which expired April 30, 1973, and also provided for month-to-month occupancy thereafter. These facilities were declared Public Piers by the Port Commissioners effective October 1, 1973.

(2) deleting the fourth full sentence on page 7.

and;

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" of the Port Authority of New York and New Jersey and the "Petition for Reconsideration" of Barber Lines A/S, Pittston Stevedoring Corp., Nippon Yusen Kaisha, International Operating Co., and Universal Maritime Service Corp., are denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

APPENDIX

FEDERAL MARITIME COMMISSION

No.74–35

AGREEMENT NO. T–2880, AS AMENDED, ET AL.

No. 74–42

POUCH TERMINAL, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: MOTION FOR SEPARATE HEARING ON JURISDICTION ISSUE DENIED: MOTION TO VACATE INTERROGATORIES DENIED: LEAVE GRANTED FOR INTERLOCUTORY APPEAL

The Port Authority of New York and New Jersey (Port Authority), respondent herein, has moved to discontinue the investigation in Docket No. 74–35 and dismiss the complaint in Docket No. 74–42 for the reason that the subject matter of the investigation and complaint is not within the jurisdiction of the Federal Maritime Commission under the Shipping Act, 1916. Respondents Barber Lines A/S, Pittston Stevedoring Corporation, International Terminal Operating Co., Inc., Universal Maritime Service Corporation join in the motion.

The subject matter and issues involved in the investigation in No. 74–35 and the complaint in No. 74–42 concern the making and carrying out of the following lease agreements between Port Authority and terminal operators and steamship lines:

No. T–2880, as amended, with Barber Lines A/S;

No. T–2881–1 and T–2882, as amended by T–2882–1, with Pittston Stevedoring Corporation;

No. T–2883, as amended, with Nippon Yusen Kaisha, Limited, and International Terminal Operating Company; and

No. T–2884, as amended, and No. T–2885, as amended, with Universal Maritime Service Corporation.

Respondents contend that a landlord-tenant lease, in order to come within the purview of section 15 of the Shipping Act, 1916, or the Commission's jurisdiction, in addition to its lease characteristics as a conveyance and demise of real estate, must contain a provision or provisions doing or authorizing the doing of some of the activities enumerated in section 15. See *Greater Baton Rouge Port Commission v. U.S.*, C.A. 5, 1961, 287 F. 2d 86, certiorari denied 368 U.S. 985. Section 15 of the Act does not embrace any agreement unless two or more of the parties to it are subject to the Commission's jurisdiction and, even as between such parties, section 15 does not extend to all agreements which they may make. Section 15 describes the kinds of agreements covered, the language of the section as to the kinds of agreements covered being as follows:

fixing or regulating transportation rates or fares;

giving or receiving special rates, accommodations, or other special privileges or advantages;

controlling, regulating, preventing, or destroying competition;

pooling or apportioning earnings, losses or traffic;

allotting ports or restricting or otherwise regulating the number and character of sailings between ports;

limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;

or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

It is respondent's position that none of the lease agreements made the subject of investigation in No. 74–35 or the complaint in No. 74–42 contains any terms or provision falling within the activities described in section 15; and neither such agreements nor the Port Authority as the maker thereof are subject to the Commission's jurisdiction.

The Commission has determined that an ordinary landlord-tenant lease, without more, is not subject to section 15 and that in order to bring such an agreement under section 15 some of the activities described in that section must be covered by the agreement.[1]

The Commission's interpretive rulings set forth that a landlord who does not control the lessee's rates or competitive practices is not an "other person subject to this Act." The ruling issued by the Commission provided that landlords would be considered to be "other persons" only where such control was retained, the ruling being in the following words:

[1] By interpretive rulings, dated June 25, 1965 (46 C.F.R., Section 530–5), the Commission has defined those agreements between persons subject to the Shipping Act, 1916, which are required to be filed under section 15.

Landlords, *when not acting merely in the capacity of a lessor of realty*, but who maintain some control over lessee's rates or competitive practices either by unilateral action or by mutual agreement;

Respondents argue that none of the lease agreements subject to these proceedings provide for any control of the lessee's "rates or competitive practices" and that the Port Authority has not acted as an "other person" in making the agreements and will not be an "other person" in carrying them out.

While generally only a landlord and not an operator of terminal properties, Port Authority concedes that as to certain piers and properties other than those covered by the leases here involved it acts in the capacity of an "other person" under the Shipping Act, 1916, in that as to such other properties the Port Authority carries on the business of "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." These activities are covered by and the charges therefor provided in the Port Authority's tariff F.M.C.—PA—9. However, it is the Port Authority's position that although it does engage in certain activities as an "other person" subject to the Act this nevertheless does not render its lessor business dealings with lessees subject to section 15 and therefore does not render such lessor business dealings by the Port Authority subject to the Commission's jurisdiction.

Each of the Port Authority lease agreements involved in these proceedings contains provisions requiring lessee to provide berthing for one or more ocean common carriers. The Port Authority contends, however, that this "use" provision requiring that the property leased be used for its intended purpose does not alter the landlord-tenant character of the agreement. It says, in support of its argument, that landlord-tenant leases in the business and commercial world frequently, and probably usually, provide the use to which the lessee may put the property involved. This, however, begs the question. If the lease provides the use to which the leasee may put the property it may be that very control by the landlord which brings it within the ambit of section 15.

The Port Authority points out that two lease agreements similar to the agreements which are the subject of these proceedings have previously been determined by the Commission not to be subject to section 15.[2]

The Port Authority claims that a comparison of agreements No. T–2880, as amended, and No. T–2883, as amended, will show that there is no material difference, as here pertinent, between the two agreements here involved and those ruled by the Commission to be not subject to the Act. It argues further that a comparison of the other agreements involved in these proceedings (Nos. T–2881–1, T–2882, T–2882–1, T–2884 and T–2885) with the agreements referred to above and held by the Commission

[2] By letters dated June 10 and June 12, 1964, an agreement between the Port Authority and Nippon Yusen Kaisha, Limited referred to as Agreement No. T–866, and by letter of July 24 1964 an agreement of the Port Authority with Barber Lines (formerly Martinsen and Company) designated T–863

to be not subject to the Act will show no material differences as to character or as to provisions as relevant to the issue of Commission jurisdiction.

The Port Authority issues certain rules and regulations. The leases set forth that each leasee is subject to all Port rules and regulations and, further, that the lessee is restricted from operating cold storage facilities on the leased premises. The Port Authority claims that these rules and regulations are almost entirely directed to safeguarding the safety of persons and property and that they do not fix or control or restrict in any way the rates or charges which the lessee may assess; nor do they contain any provision which in any way could be interpreted as providing any restriction upon the competitive conduct of the lessee. Hence, says the Port Authority, none of the activities subject to regulation under section 15 of the Shipping Act, 1916, is in any way involved in or touched by these rules and regulations and the Port Authority's rules and regulations do not, therefore, provide any basis for Commission jurisdiction of the leases here involved.

Each of the leases provides that "the Lessee shall not maintain or permit on the premises any refrigerating or cold storage facilities." However, the Port Authority has never interpreted or applied this provision as barring the lessee from providing on the leased property refrigerating facilities needed or desired by the tenant in the handling of ships' cargo or ships' stores. This provision has been understood as merely preventing the lessee from going into the general business of providing refrigeration or cold storage services on the leased premises.

The Port Authority argues that the restriction against the tenants entering the general cold storage business relates to a business activity performed before the ocean carrier transportation service is begun or after the transportation service is completed. Thus, it believes the cold storage restriction relates to commercial activities and business wholly outside the Commission's concern or jurisdiction. It contends that the general cold storage business is as remote from the Shipping Act, 1916, as manufacturing chemicals or carpets or shoes in Illinois, a thousand miles distance from the port and that the Commission has no jurisdiction over the general business of providing refrigerating or cold storage facilities in Brooklyn even though a business concern so engaged might provide storage facilities and service on articles previously transported or subsequently to be transported by an ocean common carrier, such storage occurring after the completion of, or before the beginning of, the ocean transportation service.

Pouch Terminal, Inc. (Pouch), complainant herein, and Hearing Counsel have each filed replies opposing the motion to discontinue and to dismiss the complaint.

Each of the agreements involved herein provides a formula pursuant to which the respondent tenants, some of whom are common carriers by water in the foreign commerce of the United States and the others of whom are stevedoring companies who operate terminals in connection with common carriers by water in the foreign commerce of the United States, will receive a reduced rental from that which would otherwise be applicable for the piers rented from the Port Authority pursuant to the agreements. In the event that cargo moving over the piers falls below prescribed limits, the rental which each respondent paid prior to the amendment of the leases by the addition of the formula was established as the maximum rental which could be paid; in the event that the number of revenue tons moving over the pier in any one year, multiplied by $2.00 per ton, produces a figure which is equal to or is in excess of the maximum annual rental, only the maximum annual rental will be paid. If the number of revenue tons moving over the pier in any one year multiplied by $2.00 per ton produces a figure which is less than the maximum annual rental but in excess of one-half of the maximum annual rental, then such amount will be paid as the annual rental. Finally, if the number of revenue tons moving over the pier in any one year multiplied by $2.00 per revenue ton produces a figure which is equal to or is less than one-half of the maximum annual rental, then a minimum rental of one-half the maximum annual rental will be paid.

Pouch's position is that the Port Authority's use of the rental formula will result in rentals which are non-compensatory; that such use has deprived and will continue to deprive Pouch of tenants of the piers which it owns and which are now vacant; that Pouch's only substantial source of income is from its pier rentals and adjacent warehouse operations; and that the Port Authority's utilization of the formula in its leases is intended to and will drive Pouch out of business.

In determining whether an agreement is subject to the Commission's section 15 jurisdiction, it is important to consider the standards governing the Commission's authority under section 15. In *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), the Supreme Court stated:

> Nothing in the legislative history suggests that Congress, in enacting § 15, meant to do less than . . . subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry. *Id.* at 276.

Thus, the Court in reviewing the legislative history of section 15 placed great importance on the fact that Congress intended the section 15 filing requirement to be very broadly interpreted so that numerous agreements would be subject to the Commission's careful and expert scrutiny.

As previously set forth, section 15 provides that certain kinds of agreements must be filed with and approved by the Commission before they may be carried out. The issue therefore is whether the agreements involved in this proceeding contains clear and specific provisions which bring it within the categories of agreements subject to section 15. The crux of Pouch's contention is that it is a competitor of the Port Authority in the leasing of terminal facilities and that Port is using these lease agreements, which provide for non-compensatory rents, as a device to damage and destroy Pouch as its competitor.

The Port Authority sets forth that two of the basic lease agreements have previously been determined by the Commission not to be subject to section 15.[3] These non-jurisdictional agreements have subsequently been amended, are at issue in this proceeding and denominated Agreement Nos. T–2880 and T–2883. The Port Authority argues that the amendments subsequently made to these agreements in no way change the basic character of the agreements as ordinary landlord-tenant leases and inferentially argues that the earlier rulings are binding and controlling.

The contention must fail on several grounds. Any determination made in 1964 by the staff or the Commission does not bind the Commission since it may modify or even reverse past policies and rulings if sufficient basis exists, as hereinafter set forth.[4] In any event the subsequent *Volkswagenwerk* ruling has enlarged the interpretation and scope of agreements subject to section 15. Even if the 1964 rulings were correct for T–863 and T–866, the agreements now before us contain numerous terms and conditions any of which, as set forth below in this ruling, are sufficient to bring the present leases within the ambit of Commission jurisdiction and scrutiny pursuant to section 15.

Although the Port Authority asserts in its motion that "none of the lease agreements subject to these proceedings provides for any control of the lessee's rates or competitive practices," this assertion is not necessarily so. Each of the subject agreements contain written provisions whereby the Port Authority impinges on the operating freedom of the lessee.

With respect to the Port's agreements with UMS and Pittston, each of these lease agreements provides:

> *The lessee shall have the right to berth* in the berthing area *seagoing vessels* operated by persons, firms or corporations for which the Lessee acts as stevedore or terminal operator and *which shall have the prior and continuing consent of the Port Authority* to be granted, withheld and withdrawn in the sole discretion of the Port Authority, carrying or about to carry general cargo . . . (Underlining added.)

Hence, each lessee may only berth those seagoing vessels operated by persons, firms or corporations which have the prior and continuing consent of the Port Authority. Thus, under these agreements the Port Authority reserves to itself an absolute veto as to which vessels may use the terminal facilities which it rents to the lessees.

The agreements with Barber and NYK differ somewhat. In the case of Barber, Barber is given specific authorization to berth the vessels of designated subsidiaries or affiliates; however, Barber may berth seagoing vessels of two other operators at such terminal facilities with the prior and continuing consent of the Port Authority. In the case of the agreement with NYK and ITO, NYK may only berth seagoing vessels owned or

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[3] No T–863 between the Port Authority and Barber Lines (formerly Martinsen and Company) per letter of July 24, 1964; No T–866 between the Port Authority and Nippon Yusen Kaisha, Limited, per letters of June 10 and 12, 1964.

[4] *Marine Space Enclosures, Inc. v. F.M.C.*, 420 F. 2d 577, 585 (D C. Cir 1969)

operated by it or by entities for which ITO acts as stevedore or terminal operator.

These provisions of the leases limiting the vessels which may call at the piers bring the agreements within the regulations of the Commission which define the agreements subject to the Commission's jurisdiction under section 15. One such provision is contained in 46 CFR § 530.5(b)(2) which requires filing of an agreement by any person, firm or governmental subdivision which owns or leases property used as a terminal in connection with a common carrier by water when the landlord maintains "some control over lessee's rates or competitive practices either by unilateral action or by mutual agreement." It also comes within the provision of 46 CFR 530.5(c)(3)(iv) which requires filing of agreements covering the lease of terminal facilities, when they control, regulate, prevent or destroy competition by "[o]bligating the lessee to discriminate against one carrier or shipper in favor of another."

The position of the Port Authority as the landlord in these agreements, is basically identical to that of the Port of Seattle in *Agreement 8905—Port of Seattle and Alaska S.S. Co.*, 7 F.M.C. 792 (1964). There, Seattle argued that by virtue of its terminal lease with Alaska Steamship Company, it had abdicated its position as terminal operator and thus was not within the section 1 definition of an "other person." However, the Commission recognized the Port of Seattle had reserved the right to control the berthing of vessels and therefore concluded that Seattle had not abandoned its function of furnishing terminal facilities at the pier.

Under the Commission's interpretive regulation, a landlord need only "maintain some control over [a] lessee's rates or competitive practices" (46 CFR section 530.5(b)(2)) to bring it within the Commission's section 15 jurisdiction.[5] On the basis of the agreement provisions previously set forth it would appear that the subject agreements do provide for some control by the Port over its tenants' competitive practices.

Nor are these the only examples of the lease agreements curtailing the competitive practices of the Port's tenants. In addition, as previously mentioned, each agreement provides that the lessee "shall not maintain or permit on the premises any refrigerating or cold storage facilities." Thus, the agreements further control how the facilities shall be used by limiting the kind of cargo that can be handled.

The Port Authority contends that this prohibition is inoperative insofar as it bars the lessee from providing refrigerating facilities necessary to handle ships' cargo. In other words refrigerating or cold storage facilities for maritime commerce is permitted but only refrigerating or cold storage

[5] This regulation provides:

Any person, firm, company, corporation, or government subdivision providing marine terminal services, or which owns or leases property used as a terminal, in connection with a common carrier by water, including, but not limited to the following designated categories, is an "other person subject to this Act" * * * (2) Landlords, when not acting merely in the capacity of a lessor of realty, but who maintain some control over lessee's rates or competitive practices either by unilateral action or by mutual agreement facilities for non-maritime commerce is barred. However, since this prohibition on its face appears all encompassing the Port Authority has not cited any instances where lessees are aware of their right to provide refrigerating or cold storage services and facilities to maritime commerce by establishing such facilities pursuant to leases providing that "the Lessee shall not maintain or permit on the premise *any* refrigerating or cold storage facilities." (Underlining added.)

The Port Authority admits that each of its tenants is required to observe the "Rules and Regulations of the Port Authority" pursuant to the subject lease agreements; but contends that such Rules and Regulations contain no provision which in any way could be interpreted as providing any restrictions upon the competitive practice of the lessee.

Despite this contention, Items 120 and 130 of its Rules and Regulations specifically prohibit the carrying on of any commercial activity without the consent of the Port Authority and which gives to the Port Authority, in its sole discretion, the right to assign railroad cars using the tracks at its terminals to any specified location at a terminal, and to limit the number of such cars permitted in any area at a terminal. Thus, the Rules and Regulations do in fact contain provisions which substantially affect the operations and competitive practices of the terminal facilities by tenants. The incorporation by reference into the agreements of the Port Authority's Rules and Regulations bring the agreements within the purview of Commission's interpretive regulation 46 CFR § 530.5(c)(1)(ii) which requires the filing of agreements covering the lease of terminal facilities when they fix or regulate the rates, rules, regulations or charges by requiring lessee to "conform to rates, rules or regulations established by lessor. . . ." The Port Authority admits that it operates "public wharves or public work facilities" at the Port of New York and that the charges for the use of these facilities "are those provided in its tariff, FMC Schedule No. PA–9." It further states that the charge made pursuant to Tariff PA–9 is closely comparable to $2.00 per ton, the basis upon which the minimum rental, pursuant to the agreements is computed, the agreements further provide that if the cargo moving over the pier is insufficient to produce the maximum rental at the rate of $2.00 per ton, the agreements provide for an abatement of rent. Thus, there is a deviation as to the rentals charged under the lease agreements to respondents as compared to those persons using the Port Authority's public cargo piers under PA–9, three of which are at the Port Authority's Brooklyn Marine Terminal. This deviation results in the agreements falling within the purview of the Commission's interpretive regulation 46 CFR § 530.5(c)(2)(i) which requires filing of agreements covering the lease of terminal facilities when they give or receive special rates, accommodations or privileges by "[d]eviating from established tariff charges through a fixed rental in lieu of tariff rates, or rental payment based on tariff charges with a maximum payment established."

This regulation is also applicable since not all of the Port Authority's tenants at its Brooklyn marine terminal are afforded the benefit of a reduced rental as is provided in the agreements. The respondents occupy six of the 12 terminals at the Port Authority's Brooklyn marine terminal. Three of the remaining piers in Brooklyn are not leased. Therefore, the other three which are leased do not have agreements which would entitle the lessee to an abatement of rent if the cargo moving over the pier is insufficient to produce the maximum rental at $2.00 per ton; hence, the agreements give special rates to respondent tenants not given to other tenants of its Brooklyn piers by this deviation from established tariff charges. This alone would be sufficient to establish that the leases are section 15 agreements. In *Agreement No. T-4; Term. Lease Agree., Long Beach, Calif.*, 8 F.M.C. 521, 530 (1965), Oakland and Long Beach received a fixed monthly rent in lieu of terminal charges. The Commission said:

> The rental provisions in agreements T-4 and T-5 are expressly stated to be "in lieu of" all terminal charges prescribed in the tariffs of lessors. The tariffs of Oakland and Long Beach provide that the regular charges to be assessed the user of a terminal facility are the charges which appear in their respective terminal tariffs, and it is equally clear that agreements T-4 and T-5 provide for the assessment of a charge based on other than tariff rates. All other users of lessors' facilities are assessed terminal charges by gross register ton of the vessel in the case of dockage and by the number of tons in the case of wharfage.
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> In docket 1097—*In the Matter of Agreement 8905, Seattle-Alaska Steamship Co.*, March 20, 1964, the Commission found that a terminal lease which provided for payment at tariff rates not to exceed a specified maximum was a special rate, accommodation, or privilege sufficient to bring that agreement within the ambit of section 15. Thus, the Commission in agreement 8905 found *a lease to be a section 15 agreement because it contained a rental charge based upon other than tariff rates* This is the fact pattern present in agreements T-4 and T-5. On this record, we find that Long Beach and Oakland, in granting Sea-Land, through a *terminal lease*, the exclusive use of a berth for a consideration *which substantially deviates from tariff charges applicable to others, have given* Sea-Land *a special rate which brings the leases within the meaning of section 15. Since we have determined the leases to be section 15 agreements on this ground, we need not further discuss nor make findings on other theories offered by parties on this issue.* (Underlining added.)

The Commission's interpretive regulation 46 CFR § 5305.5(c)(5) requires filing of agreements covering the lease of terminal facilities when they "provide that earnings or losses received from a marine terminal operation shall be divided between two or more persons subject to the Act; except that rental payments based directly upon the amount of cargo handled will not be considered an appointment of earnings."

The Port Authority has told the Commission that the purpose of the supplement is to provide the maximum agreed rental to the landlord, if the traffic is sufficient to permit the lessee to make the required payments. In essence, there is substituted for the previous fixed annual rental a maximum-minimum formula, the minimum payment being one-hald the previously fixed annual rent.

Thus rental payments are based upon the amount of cargo handled only when the amount of cargo brings the rental between the prescribed maximum and minimum rental. When the amount of cargo exceeds the maximum or falls below the minimum the rental paid is not based on the amount of cargo but is a fixed amount. Hence the rental payments are not based directly upon the amount of cargo handled but only in some instances and not in others. That the Port Authority intended the terms, at least in some degree, to provide that earnings or losses shall be divided between the parties is revealed in its statement to the Commission that:

> ***The facilities are employed by the tenant for the handling of break bulk cargo. The advent of container shipping has reduced the traffic moving over the facilities. As a result, the lessee is experiencing some financial hardship. The purpose of the supplement is *to alleviate lessee's burden but at the same time to provide the maximum agreed rental to the landlord if the traffic is sufficient* to permit the lessee to make the required payments." (Underlining added.)

This is a form of dividing risk—a form of profit or loss sharing.

These leases are not simple landlord-tenant real estate transactions in which the interest of the landlord is remote from the maritime commerce of the United States. The landlord's interest is directly and financially involved in the cargo which moves through the terminal. This is further exemplified by the Port Authority's statement that the leases are in furtherance of its mandate "to protect and develop the trade and commerce of the Port of New York District."

Of particular interest in this regard is the observation of the Court in *Greater Baton Rouge Port Commission v. United States*, 287 F. 2d 86, 93 (5th Cir. 1961), *cert. den.* 368 U.S. 985 (1962):

> ***It is part and parcel of an over-all scheme for the greater commercial development and use of the Baton Rouge port area. An agreement pertaining to the exclusive operation of such an elevator, dealing with preferences and rates, maritime services and facilities, has such a significant maritime connection as to fall well within the jurisdiction and scope of authority of the Federal Maritime Board.

The Port Authority argues that if the Commission determines that the agreements here involved are landlord-tenant leases not subject to section 15, it follows that the Port Authority in making such leases is acting as a landlord and owner of real estate and is not acting as an "other person" subject to the Shipping Act, 1916, or in any other capacity as a regulated entity under the statute. Thus, a ruling that the lease agreements involved are not subject to section 15 necessarily results also in a ruling that the Port Authority in making and carrying out such leases has not acted and is not acting as a regulated person or entity under the Shipping Act.

The Commission's order of investigation herein states as one of its purposes:

> that it be determined whether these agreements subject Pouch to undue or unreasonable prejudice or disadvantage or establish unjust and unreasonable regulations and practices in connection with the receiving, handling, storing or delivery of property in violation of sections 16 and/or 17 of the Shipping Act, 1916. . . .

The complaint of Pouch presents the same issues: that even if it be found that the landlord-tenant lease agreements, the subject of this investigation and complaint, are not section 15 agreements there remains under the order of investigation and under the Pouch complaint the section 16 and section 17 issues for resolution; and that, therefore, the investigation should not be discontinued and the complaint dismissed without a hearing even though it be determined that the agreements are not subject to section 15. Thus, neither the order of investigation nor the complaint are dependent for their existence upon whether the agreements are subject to the Commission's section 15 jurisdiction.

The crux of the Port Authority's argument is that although it is admittedly an "other person" subject to the Shipping Act, 1916, in regard to other activities elsewhere in New York Harbor, absent a finding that the instant leases are subject to section 15 it follows that the activities of the Port Authority with respect to these leases are insufficient for it to be classified as an "other person" as defined in section 1 of the Act. Section 1 provides:

> The term "other person subject to this act" means any person not included in the term "common carrier by water" carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

In support of its position the Port Authority cites *New Orleans Steamship Assn. v. Bunge Corp., Etc.,* 8 F.M.C. 687, 695 (1965).See also *G. C. Schaefer v. Encinal Terminals,* 2 U.S.M.C. 630, 631 (1942), wherein the Commission recognized that a regulated "other person" may engage in a "separate" business free of and beyond regulation.

In the first of these cases, Bunge Corporation owned and operated a waterfront terminal grain elevator located in Destrehan, Louisiana. Through a wholly-owned subsidiary, it also owned and operated the Port Richmond Elevator at the Port of Philadelphia, Pennsylvania. The Commission concluded that although it was an "other person" subject to the act with respect to its Philadelphia operation, the Louisiana operation was not subject to Commission jurisdiction.

Bunge's situation, however, is quite distinguishable from that of the Port Authority in the instant proceeding. In *Bunge,* the Commission refused to assert jurisdiction over a Louisiana grain elevator merely because Bunge operated an elevator over 1000 miles away in Philadelphia where there was no relationship between the operations. However, in the instant proceeding, the Port Authority is engaged in operations subject to Commission jurisdiction within the very same port and indeed at its very same Brooklyn Marine Terminal. These operations at the Port of New York are related since the Port Authority has stated that the lease agreements involved herein are part of its general plan for the over-all development of the Port of New York.

In *G. C. Schaefer,* the second case cited, the complainant instituted a complaint proceeding against Encinal Terminals in connection with Encinal's pool car service which involved use of Encinal's wharves and other terminal facilities. The Commission found that Encinal's pool car business "is an independent, private venture, separate and apart from its terminal operation"; nevertheless, the Commission rejected the motion of Encinal to dismiss the proceedings on jurisdictional grounds and, in fact, the Commission determined the issues raised by complainant on the merits. Thus, this case supports the proposition that the Commission does have jurisdiction over the Port Authority if it is otherwise subject to Commission jurisdiction under section 1.

More persuasive of the proposition that the Commission has jurisdiction to determine section 16 and 17 issues relating to these leases because the Port Authority is within section 1 definition as an "other person" was determined in *Agreement No. T-4: Term. Lease Agree. Long Beach, Calif.*, 8 F.M.C. 521 (1965). In that case the two ports claimed that although they were with respect to certain of their operations within the definition of an "other person" within the jurisdiction of the Commission, with respect to the particular terminal lease agreements there under investigation by the Commission, they were not operating as such an "other person" and were therefore outside the Commission's jurisdiction. The Hearing Examiner rejected this argument, saying:

> This condition is without merit. It serves no useful purpose to attempt to establish split personalities. Section 1 lists the functions that bring an "other person" within the Act. Once the Commission finds that a person is performing those functions, that person is subject to the jurisdiction of the Commission for the purposes set forth in the Act. In this manner, the Commission is carrying out the pattern contained in the Shipping Act that requires the regulation of persons subject to the Act and an investigation into their activities. Once having made a jurisdictional determination, it would serve no useful purpose for the Commission to go through the same jurisdictional process each time an activity of that person comes to the Commission's attention. (5 SRR 491 at 509, footnotes omitted.)

The Commission concurred in this finding, stating:

> The examiner predicated his finding upon the fact that Oakland and Long Beach own certain terminal facilities and retain wharfage and dockage charges at these facilities. To that extent, they furnish terminal facilities within the meaning of section 1 of the Shipping Act and are, therefore, other persons subject to the act. We adopt this finding. (8 F.M.C. at 527)

The Port Authority has moved that, before ruling on the jurisdictional issue, we grant an evidentiary hearing limited to presentation of facts relevant to the Commission's jurisdiction. We see no benefit to be gained from such a procedure. The Port Authority has filed an extensive brief in support of its motion as well as a supplemental brief in support. The question of jurisdiction is essentially a legal issue in which the leases are the factual evidence. The movant has had ample opportunity to explain the leases and why they are not within section 15. An interlocutory appeal to the Commission is being permitted. Rule 10(m). The expedition which the Port Authority says it seeks in its request for evidentiary hearing on jurisdiction is more expeditiously accomplished by interlocutory appeal.

Believing that the Commission has jurisdiction of all the matters in this proceeding and that hearing on the merits must consequently eventuate the suspension of pending discovery matters set forth in my order of October 23, 1974, is hereby lifted. All parties will proceed with such discovery procedures permitted by Subpart L of the Commission's Rules of Practice and Procedure as they may deem appropriate in the circumstances.

Wherefore, upon consideration of the foregoing, it is

Ordered,

1. The motion to dismiss for lack of jurisdiction is denied;
2. The motion for an evidentiary hearing on jurisdiction issue is denied;
3. Leave is granted to appeal these rulings to the Commission;
4. The previously ordered suspension of discovery procedures is lifted.

(S) STANLEY M. LEVY,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.

DISMISSAL OF COMPLAINT

June 8, 1978

On June 5, 1975, Colt Industries (Colt), on its own behalf and as an agent for the Government of the Republic of Korea, filed a complaint before us against Interconex, Inc. (ICX), and Sea-Land Service, Inc. (Sea-Land), American Export Lines, Inc. (AEL) and U.S. Lines, Inc. (USL), seeking reparation for alleged overstatements of weight or measure. This proceeding was designated Docket No. 75–19. ICX subsequently filed a counterclaim against Colt in Docket No. 75–19 as well as a separate complaint which initiated this proceeding.

The ICX complaint advised that this proceeding (Docket No. 75–24) was instituted primarily to toll the two-year statute of limitations with respect to any claims ICX may have had against Sea-Land, AEL, and USL as a result of any ICX liability to Colt arising from Docket No. 75–19.

Thereafter, the Presiding Administrative Law Judge dismissed both Colt's claim and ICX's counterclaim in Docket No. 75–19 acknowledging a negotiated settlement reached among Colt, the Republic of Korea and ICX. The parties did not appeal the Administrative Law Judge's dismissal.

The Presiding Officer also granted motions to dismiss the proceedings in Docket No. 75–24. This dismissal was appealed to us.

On appeal, the Commission affirmed the Presiding Officer's dismissal, explaining, *inter alia:*

> This dismissal [issued by the Presiding Officer] of the underlying Colt complaint [in Docket No. 75–19] destroys the possibility of a finding of ICX liability in that proceeding which would give rise to any claim by ICX in this proceeding. Therefore, ICX has no claim as to which, under any set of circumstances, as framed, it would prevail.

ICX sought review of that ruling in the United States Court of Appeals for the Second Circuit. That court found error in the Commission's denial of permission to ICX to amend its complaint and its subsequent dismissal of such complaint with prejudice. It accordingly remanded the proceeding to the Commission with directions to allow ICX to keep its cause of action alive by amending its complaint.

ICX has now advised by letter of counsel that:

> . . . Interconex . . . has settled its disputes with all underlying carriers named as respondents in Docket 75-24 over shipments covered by Interconex's complaint in that case. Therefore, it will not be necessary for the Commission to assign this case for hearing on remand.

In light of this clear indication that Interconex, Inc. does not intend to pursue its complaint, we have determined to dismiss that complaint and discontinue the proceeding. So Ordered.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–47

IN RE: FAR EAST CONFERENCE AMENDED TARIFF RULE REGARDING THE ASSESSMENT OF WHARFAGE AND OTHER ACCESSORIAL CHARGES

The Far East Conference tariff provision (Rule 1(a)(1) to its Tariff FMC No. 10), relating to the assessment of wharfage and other charges against the cargo, found to be in contravention of section 205 of the Merchant Marine Act, 1936 and, therefore, contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916.

Elkan Turk, Jr., Far East Conference, respondents.

C. C. Guidry for Board of Commissioners of the Port of New Orleans.

G. B. Perry for New Orleans Traffic and Transportation Bureau.

Carl S. Parker, Jr. for the Board of Trustees of the Galveston Wharves.

Lamar C. Walter for Georgia Ports Authority.

William H. Vaughan, Jr. for South Carolina State Ports Authority.

Gary E. Koecheler and *Richard A. Lidinsky, Jr.* for Maryland Port Administration.

J. Robert Bray for Virginia Port Authority.

Martin A. Heckscher and *Jared I. Roberts* for Delaware River Port Authority.

Francis A. Scanlan for Port of Philadelphia Marine Terminal Association.

Joseph F. Kelly, Jr. and *Barbara Gard* for Massachusetts Port Authority.

Charles H. Lombard for Alabama State Docks Department.

F.William Colburn for Port of Houston Authority.

G. E. Strange for Houston Port Bureau, Inc., and Brazos River Harbor Navigation District.

Rufus L. Edmister, Attorney General and *George J. Oliver,* Assistant Attorney General for North Carolina State Ports Authority.

Edward M. Shea and *C. Michael Tarone* for Sea-Land Service, Inc.

Howard A. Levy and *Patricia E. Byrne* for North Atlantic Conferences, Intervenors.

John Robert Ewers, C. Douglass Miller and *John C. Cunningham* for Hearing Counsel.

REPORT

June 8, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Leslie L. Kanuk, *Commissioners*)

On September 27, 1977, the Commission ordered the Far East Conference (FEC)[1] to show cause why the Commission should not find the provisions of its proposed tariff rule relating to the assessment of wharfage charges against the cargo to be contrary to the public interest and in violation of section 15, to result in the giving of an undue or unreasonable preference or advantage to certain ports and persons shipping through such ports while subjecting other ports and persons to unreasonable prejudice or disadvantage in violation of section 16 First, to result in the assessment of varying rates and charges which are unjustly discriminatory and constitute an unreasonable practice or regulation and violation of section 17, and to be in contravention of section 205, Merchant Marine Act of 1936, and, accordingly, why the FEC should not be ordered to modify its tariff rules to correct such violations.[2] A number of ports, steamship lines and steamship conferences intervened.[3]

The proceeding was limited to affidavits of fact and memoranda of law. Memoranda and/or affidavits were filed by the FEC, the North Atlantic Steamship Conferences, The Board of Trustees of Galveston Wharves, The Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau, Virginia Port Authority, Massachusetts Port Authority, Maryland Port Administration, South Carolina State Ports Authority, Georgia Ports Authority, Port of Philadelphia Marine Terminal Association and Commission Hearing Counsel.

BACKGROUND

Wharfage charges are presently assessed against the vessel at the majority of North and South Atlantic ports. While the FEC's tariff provides that the rates contained therein are tackle-to-tackle, historically, the practice has been for the FEC to absorb the costs of wharfage at

[1] The FEC, operating under Agreement No. 17, as amended, is a conference of common carriers providing liner service from the United States Atlantic and Gulf ports to ports in the Far East. The FEC is comprised of the following carriers: American Export Lines, Inc., American President Lines, Ltd., Barber Blue Sea Line, Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Maritime Company of the Philippines, Inc., Mitsui OSK Lines, A. P. Moller-Maersk Line, Nippon Yusen Kaisha Line, United States Lines, Inc., Waterman Steamship Corp. and Yamashita-Shinnihon Steamship Co., Inc.

[2] While our Order to Show Cause alleged possible violations of sections 16 and 17, Shipping Act, 1916, we are deciding this matter solely on the basis of the section 15/section 205 issues. Therefore, it is unnecessary to address the section 16 and 17 issues.

[3] Delaware River Port Authority, Virginia Port Authority, Georgia Ports Authority, Maryland Port Administration, Board of Commissioners of the Port of New Orleans and New Orleans Traffic and Transportation Bureau, Alabama State Docks Department, Massachusetts Port Authority, North Carolina State Ports Authority, South Carolina State Ports Authority, Port of Houston Authority and Houston Port Bureau, Board of Trustees of Galveston Wharves, Port of Philadelphia Marine Terminal Association, seven North Atlantic steamship conferences, and Sea-Land Service, Inc.

these ports, except at New York where wharfage is included in the stevedoring contracts. The effect has been to provide uniform rates to shippers at North and South Atlantic ports.

On May 24, 1977, the FEC filed an amendment (Rule 1(a)(1) to its Tariff FMC No. 10) modifying its tariff rules to provide that wharfage and other charges, which are assessed by the terminal operators against the vessel, will be rebilled by the carrier for the account of the cargo.[4] The proposed revision would enable the FEC member carriers to pass along to the shipper any charges assessed by terminal operators against the vessel for services rendered beyond ship's tackle. Because terminal charges generally vary from port to port, the effect of this proposed revision would result in shippers paying a total ocean carrier freight charge which varies at different ports.

DISCUSSION AND CONCLUSIONS

This proceeding brings to bear the Commission's holding in *Associated Latin American Freight Conferences*, 15 F.M.C. 151 (1972), a case presenting a factual situation significantly similar to the one before us here. In *Associated Latin American Conferences, supra,* the respondent conferences had revised their tariff rules so as to fix wharfage and handling charges and generally to shift their assessment from carrier to shipper at U.S. Atlantic and Gulf ports. The amended provisions would have imposed on the cargo wharfage and handling charges previously assessed against the carriers in port terminal tariffs, except at Baltimore, Philadelphia and New York, where the conferences established their own accessorial charges. As a result, shippers at these ports would have been assessed rates which varied from those assessed at neighboring ports. The question there, as here, was

> "whether the provisions of section 205, of the 1936 Act constitute a blanket prohibition against any conference taking concerted action which results in the assessment of varying rates and charges among federally improved continental U.S. ports, thereby rendering such action 'contrary to the public interest' under section 15 of the 1916 Act, and beyond the power of the Commission to sanction by its approval". (15 F.M.C. 154)

The Commission determined that the Respondents' tariff structure contravened section 205 of the 1936 Act, and concluded that Commission decisions under the Shipping Act must take into consideration the Congressional policy expressed in section 205, and conform to that policy. It was further concluded that section 205 removed from the Commission's

[4] Specifically, this rule would provide that

Tolls, wharfage, lighterage, cost of landing, and all other expenses beyond ship's tackle are for account of Owner, Shipper, or Consignee of the cargo; all such expenses levied in the first instance against the carrier will be billed in an equal amount to the Owner, Shipper, or Consignee of the cargo. Relative charges at loading ports will be based on the individual Port Terminal tariffs and reissues thereof on file with the Federal Maritime Commission, as listed on Pages 133–A through 133–C herein.

The effective date of Rule 1(a)(1) has been postponed several times; the most current effective date is September 1, 1978.

jurisdiction all authority to approve, under section 15 of the 1916 Act, any activity proscribed by section 205. As a result, the Commission ordered the respondent conferences to strike the proposed tariff provisions from their tariffs.

The *Associated Latin American Conferences* decision would appear to be controlling here. Certainly, we see no reason or basis either to distinguish or to retreat from our holding in that case.

FEC here is apparently of the view that section 205 has no application to its filing because that section "talks about the prevention, by agreement, of a carrier from serving an improved port 'at the same *rates* which it charges at the nearest port already served by it.' " According to the FEC, the rates quoted by the Conference in its tariff are the same regardless of port of loading and only the *charges* assessed by the terminal operator are to be passed on to the cargo interests. The FEC argues that it should not be held in any way responsible for any differences that may exist between port terminal charges established without the FEC's slightest participation, let alone power to control.

Alternatively, FEC claims that even assuming section 205 has application to this type of situation, the facts here can be distinguished from those obtaining in *Latin American Conferences*. In this connection, FEC points out that in *Latin American Conferences* the tariff established different levels of accessorial charges at Baltimore, Philadelphia and New York which, when added to uniform tackle-to-tackle rates, would produce different total conference charges at different ports, whereas here, the FEC is establishing a single tackle-to-tackle rate which will continue to be uniform in the conference loading range. According to the FEC, any additional charges are established by the various ports and the FEC will merely pass these charges on to the cargo.

A number of authorities[5] are cited by the FEC in support of its position that a conference "is entitled to divide its service and to charge one charge for the actual water transportation and to require the cargo interests to pay separately for the use of loading terminal facilities," and that a conference may pass along to the cargo interests charges for terminal facilities levied by terminal operators. *Terminal Rate Structure at Pacific Northwest Ports,* 5 F.M.B. 53, 56–57 (1956), decision on reargument in part 5 F.M.B. 326–327 (1957).

The FEC further argues that the:

> "port interests which are opposing Rule 1 (a)(1) are, in effect, seeking Commission aid in eliminating port competition on the basis of efficiency and other advantages and disadvantages inherent in the geographical location of the ports and their facilities by forcing carriers to equalize the cost to the shipper regardless of the port used."

Finally, in responding to suggestions that FEC's proposed rule would result in double compensation, FEC states that Conference rates have not

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[5] *Los Angeles By-Products Company v. Barber S.S. Lines, Inc.*, 2 U.S.M.C. 106 (1939); *J. G. Boswell Co. v. American Hawaiian S.S. Co.*, 2 U.S.M.C. 95, 102–105 (1939); and *Los Angeles Traffic Managers' Conference, Inc. v. Southern California Carloading Tariffs Bureau*, 3 F.M.B. 569, 578–80 (1951).

increased or remained unchanged since Rule 1(a)(1) was filed; rather, many of them have been "reduced drastically."

While FEC's argument regarding carrier tackle-to-tackle rates, terminal charges and their relationship to section 205 has some superficial appeal, it does not bear up under closer scrutiny. It is apparent that the overall assessment made by *the Conference* is not uniform, and because it is established through conference action falls squarely within the prohibitions of section 205. Historically, while the FEC has tackle-to-tackle tariff, it has absorbed any additional terminal charges assessed against the vessel. These additional charges, lawfully assessed against the vessel, are the responsibility of the carrier and presumably have been considered in establishing the level of tackle-to-tackle rates.[6] As a result, the shipper has been assessed a total rate which is uniform at all ports. The FEC's decision to discontinue absorbing these terminal charges and, instead, pass them on to the shipper, results in a new and additional charge *by the carrier* against the shipper. As long as the charges are, in the first instance, properly assessed against the carrier, any pass-through to the shipper results in a charge by the carrier and becomes a component part of the overall ocean freight paid for transportation by the shipper.

The FEC relies on *Terminal Rate Structure at Pacific Northwest Ports, supra,* for the proposition that carriers may assess cargo interests charges for terminal facilities. While the proposition is valid, the FEC misconstrues its application to the facts in this proceeding. A vessel may assess terminal charges against the cargo where the terminal operator has billed and collected such charges from the carrier, *provided the terminal charges are, in the first instance, incurred for the benefit of the cargo and are the responsibility of that party.* The difference here is that FEC's Rule 1(a)(1) would allow for the pass-through of terminal charges *lawfully assessed against the vessel.* When this pass-through is attempted within the framework of a conference agreement section 205 must be taken into consideration.

We do not argue with the right of a carrier to break out its tackle-to-tackle rates and accessorial charges. Indeed, section 18(b)(1) specifically provides for a separation of terminal or other charges under the control of the carrier or conference of carriers which is granted or allowed. Our concern is with the manner in which the FEC seeks to assess these terminal charges. Thus, a carrier could assess different accessorial charges at different ports, plus a uniform tackle-to-tackle rate provided it acts independently of other carriers. Similarly, the FEC could publish its Rule 1(a)(1) and avoid section 205 problems if each member line was given the

[6] Mr Gerald J. Flynn, Chairman of the FEC by affidavit states that Conference rates prior to the adoption of Rule 1(a)(1) were not intended to cover accessorial charges and that effectuation of Rule 1(a)(1) would not result in double compensation for accessorial charges. To what extent Rule 1(a)(1) would benefit the carrier beyond the level of benefits received we are unable to determine; however, it is difficult to believe that the FEC's existing rate structure does not incorporate some element of these accessorial charges.

right of independent action. In such situations the concerted action with which section 205 concerns itself would be lacking.

FEC's attempts to distinguish the facts presented by its tariff filing with those at issue in *Latin American Conferences* fall far short. The Associated Latin American Freight Conferences would have transferred carrier responsibility for terminal charges assessed against the vessel by establishing in the conference tariff specific wharfage and handling charges against the shipper or consignee. The only distinction in the FEC filing is that the FEC would not establish a specific charge at any port but merely pass through to the shipper the existing terminal charge at that port. While the form is different, the substance is not. The result is that the FEC's proposed rule would have the same effect as the tariff provisions found unlawful in *Latin American Conferences*.

Intervenors, North Atlantic Conferences (NAC), filing in support of the FEC, attack a number of prior Commission decisions addressing section 205. In addition, NAC contends that the Order to Show Cause does not frame any issues as to whether or not the FEC's relevant tariff rule is unlawful *per se*.

Specifically, with respect to section 15, NAC contends that the Order to Show Cause does not allege "that the tariff rule which is in issue is outside the scope of FEC's basic section 15 authority nor is there any allegation that FEC's approved section 15 agreement should be disapproved or modified." It is further contended that the Commission's past treatment of the "public interest" criteria and its application to section 205 are improper. NAC argues that the resolution of any section 15 issue necessarily involves matters of fact and cannot be determined as a matter of law because the initial determination of a section 205, Merchant Marine Act, 1936 violation is not a Shipping Act issue, but solely and exclusively a Merchant Marine Act issue. NAC contends that the Commission cannot base Shipping Act decisions solely upon its conclusion that other federal statutes have been violated by the conduct of persons subject to the Shipping Act. According to NAC, before there can be findings of unlawful conduct under section 205 there must be proof of required facts to support a violation.

NAC's challenge is directed at the Commission's decision in *Latin American Conferences* and prior cases which culminated in that decision. According to NAC, the Commission has strayed from the principles laid down in *Sun Maid Raisin Growers Association and SunLand Sales Cooperative Association v. Blue Star Line, Limited*, 2 U.S.M.C. 31 (1939) and *Encinal Terminals, et al. v. Pacific Westbound Conference*, 5 F.M.B. 316 (1957), both of which were decided by the "government agencies responsible for the administration of Section 205 of the Merchant Marine Act . . ."[7]

[7] The agencies involved were the United States Maritime Commission and the Federal Maritime Board, predecessors to the Federal Maritime Commission

The key to the *Sun Maid* and *Encinal* decisions, according to NAC, was the determination that there had to exist a "prevention" by the conferences involved which deprived individual members from serving particular federally improved ports regardless of the level of rates at these various ports. NAC argues that subsequent Commission decisions[8] have adopted a theory that:

> "substantial evidence of a prevention of service is not necessary to sustain a finding of a Section 205 violation. Such a finding may be sustained . . . by mere evidence of a difference in conference rates at applicable ports."

This allegedly erroneous rationale forms the basis of the *Latin American Conference* decision.

The arguments raised by NAC in connection with alleged procedural deficiencies in our Order to Show Cause are without merit. Tariff actions formulated by the FEC are taken pursuant to authority granted under the approved section 15 agreement. It follows therefore, that tariff matters found to be unlawful relate back to the issuing authority—the conference agreement—and failure to modify or delete an unlawful tariff provision can result in the disapproval of the underlying section 15 agreement. We see no procedural defect in not detailing the step-by-step procedure when the result should be obvious to all affected parties.

Similarly, NAC's challenge of the Commission's application of section 205 in connection with Shipping Act violations must be rejected. In *Pacific Coast European Conference—Rules 10 and 12,* 14 F.M.C. 266 (1971), the conference had maintained throughout the proceeding that the Commission had no authority to administer section 205 because administration of that section was not specifically delegated to the Commission under Reorganization Plan No. 7 in 1961. The Commission rejected that argument on the basis first enunciated in *Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12, 29 (1965), that "[T]he plan did not repeal section 205, and so long as it continues to be a part of the law of the land . . . [it] must be considered by the Commission in exercising its delegated functions.' " *Port of Stockton, supra,* p. 24.

The Federal District Court for the Northern District of California in *Sacramento-Yolo Port District v. Pacific Coast European Conference,* No. C–70–499 RFP (1970) took the same view of section 205 pointing out that:

> Even if the FMC does not have responsibility for section 205 it must take account of it in its deliberations . . . That which would contravene section 205 of the Merchant Marine Act would be grounds for disapproval under section 15 of the Shipping Act.[9]

On the basis of the foregoing, it is clear that where the facts indicate that a particular activity contravenes section 205 of the Merchant Marine

[8] *Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12 (1965).*Pacific Coast European Conference—Rules 10 and 12, Tariff No. FMC 14,* 14 F.M.C. 266 (1971), *Sacramento-Yolo Port District v. Pacific Coast European Conference,* 15 F.M.C. 15 (1971)

[9] *See also Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663, 670 (6th Cir. 1970), *cert. den.* 401 U.S. 909 (1971) for a similar treatment of section 8 of the Merchant Marine Act of 1920, another provision of law not specifically administered by the Commission

Act of 1936, the Commission applying the "public interest" standard of section 15 of the Shipping Act, 1916 has no alternative but to disapprove such activity.

While contending on the one hand that the Commission has no authority to determine a section 205 violation, NAC also argues that the Commission has abandoned the "prevention" criteria established in earlier cases dealing with section 205. This argument ignores the fact that there is a "prevention" whenever a conference binds its members to a certain course of action. Here, the FEC members are bound by the provision in the FEC tariff. A Conference member cannot, absent the right of independent action, ignore Rule 1(a)(1) and continue to absorb terminal charges assessed against the vessel. This concerted action by the FEC prevents a member carrier from serving a particular port at the same rates which it charges at the nearest port already regularly served by it. As indicated previously, the FEC could have avoided any section 205 problems if the member lines had been given the option of absorbing the terminal charges.[10]

One final matter warrants discussion. NAC points out that while the FEC's disputed tariff rule is also directed to tolls, lighterage, cost of landing and "all other expenses beyond ship's tackle," the Commission's Order to Show Cause is directed only to the ". . . assessment of wharfage and other charges . . ." and does not discuss these other charges. NAC contends "that in view of this glaring ambiguity, the Commission should either confine its decision to the wharfage issue or publish a revised Order and afford further opportunity to be heard if it intends to determine the lawfulness of any other subject matter of FEC's relevant tariff . . ."

We see no reason to adopt either suggestion raised by NAC. Our Order put at issue Rule 1(a)(1) in its entirety and if the other charges encompassed within that rule are properly for the account of the vessel they are likewise included within the scope of our decision here.

Of the remaining intervenors, only the Board of Trustees of Galveston Wharves and the Board of Commissioners of the Port of New Orleans Traffic and Transportation Bureau, Inc., filed memoranda of law in support of the FEC's proposed tariff change. Their arguments generally follow those expressed by the FEC and accordingly, do not require further discussion. Similarly, the comments of Hearing Counsel and those ports opposed to implementation of Rule 1(a)(1) have been considered, and to the extent found meritorious, are reflected in our decision.

Any additional argument not specifically dealt with in this Report has been considered and found to be either irrelevant, immaterial or unnecessary to our decision herein.

Accordingly, and for the reasons stated above, we find the proposed tariff rule relating to the assessment of wharfage and other charges against

[10] The FEC's apparent reluctance to allow such independent action indicates the possibility that certain member carriers might absorb. This supports our view that the FEC's concerted action in adopting Rule 1(a)(1) is the "prevention" prohibited under section 205.

the cargo at issue in this proceeding to be in contravention of section 205 of the Merchant Marine Act of 1936 and therefore contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916.

THEREFORE, IT IS ORDERED, That Rule 1(a)(1) relating to the assessment of wharfage and other accessorial charges filed by the Far East Conference be stricken from that Conference's tariff.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 481(I)

MITSUBISHI INTERNATIONAL CORP.

v.

U. S. LINES

NOTICE OF DETERMINATION NOT TO REVIEW

June 1, 1978

Notice is hereby given that the Commission on June 1, 1978, determined not to review the decision of the Settlement Officer in this proceeding served May 18, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 481(I)

MITSUBISHI INTERNATIONAL CORP.

v.

UNITED STATES LINES

Reparation awarded in part.

DECISION OF DONALD F. NORRIS, SETTLEMENT OFFICER

By a complaint filed with the Commission on December 27, 1977 pursuant to 46 CFR 502.301 et seq.,[1] the Mitsubishi International Corp. (Mitsubishi) makes claim for refunds in the amount of $1,030.79 with respect to two shipments of fishing reels and parts, generically described and shipped as "fishing tackle," all of which were transported by United States Lines (U.S. Lines). According to the applicable tariffs[2], merchandise of this nature was to be assessed sums certain per kiloton or cubic meter, whichever yielded the transporting carrier the greater revenue, but at rates which were dependent upon the value of the particular items shipped. In all instances, fishing tackle valued at $1,000 per revenue ton or less was to be assessed a lower rate than that valued at more than $1,000 per revenue ton. Each Conference's tariff's Rule No. 8 requires shippers to submit commercial invoices to the carriers, and Rule No. 11 of each tariff explains how the FOB valuations are determined when necessary, as here,—either item by item or, in some instances by the total valuation declared in the invoice divided by the total revenue tonnage. Mitsubishi submitted item by item accountings in all instances, and in all instances U.S. Lines determined correctly that the appropriate basis of assessment was per cubic meter, but at the higher rates inasmuch as the fact that the value of some of the items shipped was less than $1,000 per revenue ton seems to have been overlooked.[3]

In its reply, U.S. Lines concedes that some adjustment is in order but disputes the amount. The Settlement Officer (S.O.) agrees with U.S.

[1] The respondent carrier having agreed to this informal procedure pursuant to 46 CFR 502 304(e), this decision will be final unless reviewed by the Commission within fifteen (15) days of the date of service

[2] i e , those of the Trans-Pacific Freight Conference or Japan-Korea, Tariff No 35, FMC-6 and of the Japan-Korea/Atlantic and Gulf Freight Conference, Tariff No 35, FMC-6.

[3] A violation by U.S. Lines of Section 18(b)(3) of the Shipping Act, 1916 is alleged by Mitsubishi

Lines but not to the extent that it would allow. In deciding as he has, the S.O. has, in all instances, verified the extensions of the measurements taken by the Japan Marine Surveyors & Sworn Measurers' Association[4] and has calculated the values per cubic meter of the various lots of cargoes itemized in the commercial invoices. Each claim will now be considered.

1. Claim MI-02:

This shipment went forward in the AMERICAN LEGION, Voy. 65E under U.S. Lines' Yokohama-San Francisco bill of lading (B/L) No. 631-380I dated May 14, 1976. U.S. Lines determined that the shipment amounted to 52.295 cubic meters which, as overland common point cargo, it rated at $78 per measurement ton plus a 1½% currency adjustment charge (CAC). On this basis, total freight and charges amounted to $4,140.20.

The S.O. has determined that 12 of the 21 lots of cargo involved, totaling 41.080 cubic meters, were valued at less than $1,000 per measurement ton and should have been rated at $62 per ton plus 1½% CAC. Details are appended. The proper freight ($3,521.73) and charges ($51.33) amount to $3,472.06 or $668.14 less than that assessed Mitsubishi. Accordingly, a refund for this amount is in order. So ordered.

2. Claim M-03:

This shipment went forward in the AMERICAN ARCHER, Voy. 54E, under U.S. Lines' Yokohama-New York B/L No. 631-1 P/P dated April 15, 1976. U.S. Lines determined that the shipment amounted to 10.971 cubic meters which it rated at $93 per measurement ton plus a 1½% CAC. On this basis, total freight and charges amounted to $1,035.60.

The S.O. has determined that 5 of the 19 lots of cargo involved, totaling 7.063 cubic meters, were valued at less than $1,000 per measurement ton and should have been rated at $76 per ton plus 1½% CAC. The correct freight ($900.23) and charges ($13.50) amount to $913.73 or $121.87 less than that assessed Mitsubishi. Accordingly, a refund for this amount is in order.

So ordered.

(S) DONALD F. NORRIS,
Settlement Officer.

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[4] According to the minutes of the Conferences meetings this organization is employed by the Conferences to perform such services.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 572

COLLIER CARBON & CHEMICAL CORP.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

June 6, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on June 6, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $653.50 of the charges previously assessed Collier Carbon & Chemical Corporation.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

> "Notice is hereby given, as required by the decision in Special Docket 572 that effective February 1, 1978, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 1, 1978 through February 26, 1978, the rate on 'Naphthalene' to Marseilles and Genoa, Minimum 39,000 lbs. per tank container is $134.25 W, subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund and waiver of the charges will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 572

COLLIER CARBON& CHEMICAL CORP.

v.

SEA-LANDSERVICE, INC.

Adopted June 6, 1978

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298)and Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on a shipment of four tanks of napthalene, that moved from Elizabeth, New Jersey to Marseilles, France under Sea-Land bill of lading dated February 22, 1978. The application was filed April 24, 1978.

The subject moved under Sea-Land Tariff No. 232, FMC–104, 5th revised page 6, item 170, effective February 1, 1978, under the rate for "Napthalene: To Marseilles and Genoa, Minimum 39,000 lbs. per trailer." The aggregate weight of the shipment was 160,680 pounds. The rate applicable at time of shipment was $6.40 per hundred pounds. The rate sought to be applied is $6 per hundred pounds (W: $134.25 per ton of 2240 pounds) pursuant to Sea-Land Tariff No. 232, FMC–104, 6th revised page 6, item 155, effective February 27, 1978.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $10,283.52. Aggregate freight charges at the rate sought to be applied amount to $9,630.02. The difference sought to be waived is $653.50. The Applicant is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

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[1] This decision became the decision of the Commission June 6, 1978.
[2] 46 U.S.C. 817, as amended

(4) On December 12, 1977 Mr. Williams of Collier Carbon wrote to Mr. Szewczyk requesting that the rate on napthalene in tanks ($6.00 per 100 lbs) item 155 Sea-Land Tariff 232 FMC—104 which was scheduled to be increased to $6.40 per 100 lbs. effective February 2, 1978 be extended through June 30, 1978.

On January 12, 1978 Mr. Szewczyk wrote to Mr. Williams of Collier Carbon and advised that the rate of $6.00 per 100 lbs. (W 134.25 per 2,240 lbs) converted to a per ton rate would be extended through June 30, 1978. A publication request was processed to update Sea-Land Tariff 232 FMC—104 but through an oversight the filing was not made effective until February 27, 1978.

A shipment moved forward on February 23, 1978 and was correctly rated at $6.40 per 100 lbs. Shipper is claiming that due to a Sea-Land administrative error the correct rate (W 134.35) was not filed on time and due to this error he was overcharged $653.50.

It should be noted that although the application refers alternately to both the Collier Carbon & Chemical Corporation and the Union Oil Company of California as if they were separate parties involved in the negotiation of the freight rate and the ultimate payment of the freight charges, supplemental correspondence with both Sea-Land and the shipper has established that the Collier Carbon & Chemical Corporation (Collier) was a wholly-owned subsidiary of the Union Oil Company of California and on February 1, 1978 Collier was merged into the Union Oil Company of California, and became the Union Chemicals Division of the Union Oil Company of California.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the intended earlier effective date on the special rate for napthalene, which would have continued the lower rate as had been promised the shipper.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

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

Accordingly, permission is granted to Sea-Land Service Corp. to waive collection of a portion of the freight charges, specifically the amount of $653.50. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
May 11, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC.— PROPOSED RULES ON CONTAINERS

DOCKET NO. 74–40

PUERTO RICO MARITIME SHIPPING AUTHORITY—PROPOSED ILA RULES ON CONTAINERS

ORDER ON RECONSIDERATION

June 14, 1978

These proceedings were instituted to determine the legality of the so-called "50-mile container rules" proposed by Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Ltd., and subsequently, as successor to these two carriers, by Puerto Rico Maritime Shipping Authority (PRMSA). After extensive hearings and the filing of briefs, Administrative Law Judge Charles E. Morgan issued an Initial Decision finding the rules unlawful under the Shipping Act, 1916. Exceptions to the Initial Decision were filed, as were replies to such exceptions. Oral argument was heard and the matter came before the Commission for decision.[1]

By Order dated August 10, 1977, the Commission discontinued these consolidated proceedings as moot on the basis of a ruling by the Court of Appeals for the Second Circuit,[2] affirming the National Labor Relations Board decision finding the collective bargaining provisions underlying the 50-mile rules unlawful under the National Labor Relations Act, and on the basis of PRMSA's "effective withdrawal" of the allegedly unlawful rules on containers.

Following issuance of the Order of Discontinuance, petitions for reconsideration were filed. On the basis of those petitions, the Commission issued its Order Granting Reconsideration on November 22, 1977.

[1] For a more comprehensive discussion of the early proceedings in this case, see our Report and Order Adopting Initial Decision issued this date.

[2] *International Longshoremen's Association v. N L R B*, 537 F.2d 706 (1976), *cert den.* 429 U.S. 1040 (1977), *rehearing denied* 51 L. Ed. 2d 589.

Replies to the petitions have now been filed by Hearing Counsel and PRMSA.

PETITIONS

Petitions for reconsideration of the Commission's discontinuance of this proceeding were filed by National Customs Brokers & Forwarders Association of America, Inc., New York Foreign Freight Forwarders & Brokers Association, Inc., and Consolidated Forwarders Intermodal Corp. (filing a joint petition); International Association of NVOCC's; and Hearing Counsel.

The petition of National Customs Brokers & Forwarders Association of America, Inc. (National), *et al.*, alleged that the Commission erred in holding that the "Note" in the PRMSA tariff dated February 29, 1976 was an "effective withdrawal" of the proposed 50-mile rules which vitiated any need for a Commission determination of the rules' validity under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933.[3] In the 10-page argument in support of its petition, National raised numerous issues.

National first posited that, to have reached the conclusion that it did, this Commission must have taken "official notice" of certain extra-record facts—an action alleged to be error for numerous reasons. First, in order to be a fact susceptible to "official notice", it must, indeed, be fact under both our rules and those of the Federal Courts (see, 46 C.F.R. Section 502.226(a) and Federal Rules of Evidence, Rule 201(b), 28 U.S.C.A.). National pointed out that under the Federal Rules an adjudicative fact of which judicial notice may be taken:

> . . .must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. (Rule 201(b), *supra*.)

Citing the notes from the Advisory Committee on Proposed Rules, accompanying this rule, National claimed that the essence of this rule is the requirement that the fact be one of "a high degree of indisputability." National claimed that the tariff note on which the Commission based its decision to discontinue the proceeding is merely advice from the International Longshoremen's Association (ILA) to the New York Shipping Association which in turn was passed on the PRMSA and which ultimately was filed in the tariff. As such, that note was allegedly nothing more or less than ". . . a triple hearsay statement . . . (which) cannot rise to the dignity of a fact not subject to reasonable dispute. . . ."

[3] The tariff note, in pertinent part provided

> . . the New York Shipping Association . . has informed PRMSA that the NYSA "have been advised by the International Longshoremen's Association, AFL–CIO that they will take no action against the NYSA or its members requiring them to enforce such rule "
>
> Therefore, the Rule set forth herein shall not be enforced until a determination of the validity of the Rule is made by the proper court of law or further advice is given from the parties of the Collective Bargaining Agreement.

National further argued that the tariff note deals only with the Port of New York while PRMSA serves other ports as well and that there is no basis upon which the Commission could conclude from the tariff note that the proposed rules will not be enforced at those other ports. As a result, National characterized the Commission's conclusion that the rules are not being enforced at those other ports. As a result, National characterized the Commission's conclusion that the rules are not being enforced at other ports as pure speculation.

National also challenged the Commission's determination that the rules at issue have been mooted. Citing case law, National took the position that even if PRMSA had actually withdrawn its rule, the Commission could not consider the issues raised by the rules to be moot, because to do so would mean that:

> An ocean carrier can adopt a practice by tariff rule, gain its benefits for several years, put injured parties to the trouble and great expense of a lengthy docket and then, as the proceeding is drawing to a close, deny the parties the opportunity for a decision by withdrawing the tariff rule.[4]

National concluded that if this Commission were to permit this course of action, we would be sanctioning an abuse of our processes and an abuse of the Shipping Act, 1916.

Finally, National submitted that all segments of the export-import commerce of the United States would benefit from a determination on the merits of the validity of the proposed rules under the Shipping Act, 1916. National explained:

> It is always possible that the ILA may in the future claim that the NLRB decision dealt only with that portion of the rules which denied containers to the NVOCC, and then only in the Puerto Rican trade and that the NLRB did not treat other aspects of the rules relating to exporters and importers. Also, it is always possible that another union, not party to the litigation before the NLRB, may adopt these rules in whole or in part.

As a result, National alleged that a determination of the lawfulness of the proposed rule under the Shipping Act is a necessary determination which would go beyond the limited issue posed before the NLRB—*i.e.*, whether the rules were or were not an unlawful secondary boycott prohibited by the National Labor Relations Act.

The International Association of NVOCC's (NVO's) alleged basic error by the Commission in our conclusion that the rules on containers are not being enforced because of the NLRB decision (upheld by the courts) finding them invalid under the National Labor Relations Act. The NVO's advised that the ILA and the ocean carriers including PRMSA have construed these rulings against the proposed rules to apply only to New York. The NVO's stated:

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[4] Cases cited by National include: *Southern Pacific Terminal Co. v. I.C.C. et al.*, 219 U.S. 498; and *Walling v. Haile Gold Lines*, 136 F2d 102 (and cases cited therein)

Indeed, as recently as August 16, 1977 six days *after* the Commission's order of discontinuance herein, an article appeared in the Journal of Commerce reporting that the NLRB found the same container rules involved herein unlawful under the National Labor Relations Act at the Ports of Baltimore and Hampton Roads. The rules had been in force up to March 17, 1977 at those ports until an injunction was obtained against those rules. . . .

The NVO's also averred that two of their number were informed "during the early months of 1976" that the NLRB and court decisions applied only to New York and that the rules on containers were in effect in Philadelphia. In fact, the NVO's claim, PRMSA itself refused to furnish containers in the Port of Philadelphia subsequent to the date of the tariff note on which the Commission relied.

The NVO's also urged that we reach a decision on the merits of the rules at issue. The NVO's submitted that the parties to these proceedings and the shipping public deserve a decision by the Commission on the merits of the legality of these rules. This would also allegedly eliminate the need to litigate and relitigate the issues involved each time a party proposes to implement such rules.

Hearing Counsel's Petition for Reconsideration argued that while it may be presumed that PRMSA's tariffs rules were not enforced subsequent to its tariff note, absent any record evidence, the events do not dispose of the need to address the issue of lawfulness of PRMSA's operations prior to the effective date of the note. Hearing Counsel, accordingly, requested Commission resolution on the merits if for no other reason than to determine whether or not PRMSA's enforcement of the tariff rules for some 16 months violated the Shipping Act. Finally, Hearing Counsel urged that this Commission:

. . .weigh whether dismissal of this case is consistent with its policy of enforcing the shipping statutes and whether dismissal does not seriously damage the viability and credibility of its enforcement program in the eyes of the shipping industry and the shipping public.

REPLIES TO PETITIONS

Only PRMSA and Hearing Counsel filed Replies to the Petitions described above. PRMSA's Reply cited two grounds in opposition to reconsideration of this proceeding. First, PRMSA alleged that there is no unfinished business remaining in these dockets because, by notice of cancellation published in its tariff and effective November 6, 1977, PRMSA cancelled its proposed rules.[5] Additionally, PRMSA denied that there should be considered in this proceeding the issue of possible sanctions against it for enforcement of these rules at any time prior to the cancellation. PRMSA alleged that this issue had never been raised within the proceeding until the petition for reconsideration filed by Hearing Counsel, and urges the Commission to maintain this proceeding within its

[5] It is to be understood that this notice is not the same as the note at issue in the requests for reconsideration

original limitations. If the Commission does so, PRMSA claims, there remains nothing further to be determined in this docket.

Second, PRMSA alleges that no useful purpose would be served by the Commission deciding to proceed further in these dockets. PRMSA urges that the rules at issue in its tariff have been withdrawn; the courts have ruled on the underlying labor agreement provisions and found them unlawful; and PRMSA has acted promptly by appropriate court action to frustrate ILA attempts to enforce the rules. This being so, PRMSA claims that the Commission need not address the merits of the rules further.

PRMSA claims this is not a rulemaking proceeding of general applicability, but is, rather, an inquiry into the lawfulness of tariff rules which are no longer in the tariff. As a result, PRMSA urges that no further action by the Commission is required, and that any such action would simply be pointless.

Hearing Counsel's Reply urges that the Commission not embroil itself in post-record factual questions requiring a reopening of the proceeding. The Reply discusses certain of the procedural difficulties which Hearing Counsel see arising should the Commission determine to delve into post-record considerations. It is Hearing Counsel's position that consideration of such post-record information is unnecessary to deciding the case on the merits and should be avoided.

Hearing Counsel urge avoidance of post-record issues in light of its view of the original objective of the proceeding which they describe as simply a determination of a carrier's duties and obligations under the Shipping Act. Hearing Counsel state:

> If, as we are inclined to believe, . . . the post-trial matters are factual developments which are much more meaningful to understanding the post-record situation as a matter of labor law or policy, or the subject carrier's status as an employer of union labor, then further development of the post-record matters would appear to be unnecessary to a decision on the basis of the shipping statutes. Moreover, since a speedy resolution of the shipping statute questions would eliminate any uncertainty as to the carrier's obligations and duties under those statutes, it should lessen any conflicts that PRMSA or any carrier may have as a contractual matter under its labor contracts.

Thus, irrespective of the status of any post-record information, Hearing Counsel submit that those issues of carrier responsibility and obligation may be readily determined on the record already available to, and placed before, the Commission. It is Hearing Counsel's view that no consideration of post-record facts will sharpen any of those issues.

Discussion and Conclusions

We have reviewed each petition any reply submitted to us. On the basis of issues raised therein we have reconsidered our decision to discontinue these proceedings and have determined that we must vacate our previous order of discontinuance and enter a decision on the merits of the controversy at issue in this proceeding.

While numerous issues of varying merit were raised, we are of the opinion that the reasoning urged upon us by National is sufficient in its own right to warrant the action taken here. We find persuasive the cases cited by National in support of its claim that the issues regarding the validity of the PRMSA rules are not moot. We find both the principle of law and the reasoning of National compelling. Further, no party opposing the position of National has pursuaded us to adopt a contrary view.

It is our determination, then, that the public and the parties deserve a ruling by this Commission on the merits of these cases and that law and policy require that we provide such a decision. This we are doing by separate Report and Order, served this date.

THEREFORE, IT IS ORDERED, That our Order of Discontinuance of August 10, 1977 is hereby vacated.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 555

COMMERCIAL METALS COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

June 14, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on June 14, 1978.

It is Ordered, That applicant is authorized to waive collection of $5,820.00 of the charges previously assessed Commercial Metals Company.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

> "Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 555 that effective August 8, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period August 8, 1977 through August 29, 1977, the rate on 'Scrap, viz. Stainless Steel', Minimum 20 WT for container, is $76 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within thirty (30) days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver and submit a copy of the published tariff notice.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 555

COMMERCIAL METALS COMPANY

v.

SEA-LAND SERVICE, INC.

Adopted June 14, 1978

Permission to waive collection of overcharges granted.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Sea-Land seeks permission to waive collection of a portion of the freight charges on a shipment of stainless steel scrap carried aboard the Consumer Voyage Jacksonville, Florida, to Rotterdam. The scrap moved under freight bill 971–752946.[2] It weighed 89,600 lbs. and measured 1500 cu. ft. At the time of shipment the applicable rate was $221.50 W/M 2240 lbs. or 40 cu. ft.[3] The rate sought to be applied is $76.00 W (2240 lbs.) minimum 44,800 lbs. per container.[4] The aggregate freight charges under the $221.50 rate would have been $8.993.60. The aggregate freight charges under the $76.00 rate would be $3,073.60—$3,040.00 ocean freight plus $33.60 charge at Tampa.[5] Sea-Land actually collected freight charges of $3.073.60 and seeks to waive collection of $5,820.00.

The circumstances set forth by Sea-Land as justifying the refund are:

ON MAY 27, 1977, SEA-LAND'S SALES PERSONNEL REQUESTED SEA-LAND PRICING PERSONNEL TO PROCEED WITH THE ESTABLISHING OF A NEW RATE FOR STAINLESS STEEL SCRAP FROM TAMPA TO CONTINENTAL EUROPE IN SEA-LAND TARIFF 259 FMC 133 ICC 104 WHICH WAS CONFIRMED

[1] This decision became the decision of the Commission June 14, 1978

[2] The shipment was "Sea-Land minibridge Tampa, Florida-Jacksonville, Fla. Thence water to Rotterdam."

[3] A short form ocean bill of lading was also issued by Sea-Land.

[4] Sea-Land Tariff No. 259 FMC No. 133, ICC No 104, Page 52, 7th Revised Item No. 90

[5] Sea-Land Tariff No. 259 FMC No. 133, ICC No. 104 Page 58, 10th Revised Item 545 as reinstated by Sea-Land proposal No GNF 2292 and Page 58, 9th Revised Item 545, erroneously showing expiration date of 8/7/77.

BACK TO SALES WITH A TELETYPE MESSAGE TO BE VALID THROUGH 8/17/77, COPY OF WHICH WAS GIVEN TO MR. WILLIAM BETCHER OF CLAIMANT ON 6/13/77—(SEE ATTACHMENT NO. 1). HOWEVER, ACTUAL PUBLISHING REQUEST SENT TO SEA-LAND'S TARIFF PUBLICATION DEPT. INADVERTENTLY SHOWED AN EXPIRATION DATE OF 8/17/77 (ATTACHMENT NO. 2). ACTUAL PRINTED PAGE, 6TH REVISED PAGE 58 SHOWED DATE OF 8/17/77 (ATTACHMENT NO. 3). CONSEQUENTLY, WHEN A SHIPMENT OF TWO CONTAINERS WAS OFFERED TO SEA-LAND LEAVING TAMPA'S RAIL TERMINAL ON 8/16/77 (ATTACHMENT NO. 4), SEA-LAND'S RATING PERSONNEL HAD NO APPLICABLE RATE OTHER THAN CARGO NOS PER 7TH REVISED PAGE 52 (ATTACHMENT NO. 5). CLAIMANT NOT BEING AWARE OF RATE EXPIRING ALREADY ON 8/7/77 INSTEAD OF 8/17/77 PAID FOR SHIPMENT ON BASIS OF RATE SEA-LAND COMMITTED TO THEM (ATTACHMENT NO. 6). RESPONDENT REQUEST PERMISSION TO WAIVE COLLECTION OF PART OF FREIGHT CHARGES ON BASIS OF CLERICAL ERROR IN PUBLISHING EXPIRATION DATE DIFFERENT THAN THAT ADVISED CLAIMANT.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[6]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of an administrative nature, in publishing expiration date different than that advised claimant.
2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to waive collection of the freight charges, Sea-Land Service, Inc., filed a new tariff which set forth the rate on which such waiver would be based.
4. The application was filed within 180 days from the date of the subject shipment.

[6] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c)

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $5,820.00. An appropriate notice will be published in Sea-Land's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 22, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 567

KUEHNE & NAGEL INC.

v.

LYKES BROTHERS STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION

June 14, 1978

No exceptions having been filed to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on June 14, 1978. Accordingly, Lykes Brothers Steamship Co., Inc. is authorized to modify charges assessed on the shipment in question and is ordered to publish, file and serve the tariff notice required and report to the Commission regarding compliance in the time and manner required by the Administrative Law Judge.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 567

KUEHNE & NAGEL INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Adopted June 14, 1978

Application granted.

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

By application, received for filing in the Office of the Secretary of the Commission on March 8, 1978, respondent, Lykes Bros. Steamship Co., Inc. (Lykes), seeks permission to waive a portion of the freight charges on a shipment of air conditioners from Green Bay, Wisconsin, to Oran, Algeria. The shipment moved under an "on board" bill of lading issued at New York, N.Y., on September 10, 1977. The complainant is Kuehne & Nagel Inc., as agent for Beton-Und Monierbow AG (Beton). Beton is shown as the shipper on the bill of lading. Kuehne & Nagel is a freight forwarder.[2] The complainant paid freight charges amounting to $2,793.23 on February 27, 1978. The amount sought to be waived is $1,111.69.

The application states that the rate applicable at the time of shipment was $125.00 W/M,[3] plus heavy lift charges and seaway tolls. The rate sought to be applied is $86.50 W/M plus the aforesaid heavy lift charges and seaway tolls.

The application goes on to say that respondent is not aware of any other shipments of the same or similar commodity which moved via respondent during approximately the same period of time at the rate applicable at the time of shipment. Respondent adds that it does not believe any discrimination among shippers will result from the waiver. It also agrees to publication of a notice or to take such action as the Commission may direct if permission to waive is granted.

[1] This decision became the decision of the Commission June 14, 1978

[2] License No. F.M.C. 1162

[3] W/M here means weight (2240 pounds) or measurement (40 cubic feet), whichever yields the greater revenue

The statement of facts made by the parties in support of the application, as pertinent, is as follows:

In August 1977, Lykes Bros. Steamship Co., Inc. negotiated with Kuehne & Nagel Inc. of New York, as agents for Beton—UND Monierbou AG, an ocean rate of $86.50 W/M plus heavy lifts and Seaway Tolls covering a shipment of 1155 cft. of Air Conditioners to move on the S. S. Marjorie Lykes Position 7018 Voyage 61 from Green Bay to Oran. . . .

Cargo was loaded on September 10, 1977, Bill of Lading (B/L) dated accordingly and cargo rated at $125.00 W/M, the applicable tariff rate at time of shipment. . . . however shipper paid ocean freight of *$2,793.33* basis the negotiated rate. . . .

Due to a clerical error, Lykes Bros. Steamship Co., Inc. inadvertently failed to file the agreed rate covering the above shipment and this rate was not filed in the American Great Lakes/Mediterranean Eastbound Freight Tariff No. 1 (FMC-88) until September 20, 1977 for a 30 day period. . . . Therefore at the time shipment was effected, the only tariff rate applicable was $125.00 W/M covering Machinery, N.O.S. . . .

The Machinery, N.O.S. rate of $125.00 W/M plus heavy lifts and Seaway Tolls would produce *$3,908.89* [should be $3,905.02] ocean freight representing an increase in costs of *$1,111.69* [should be $1,112.69] to the shipper greater than the negotiated rate of $86.50 W/M plus heavy lift and Seaway Tolls. Complainant has remitted *$2,793.33* as payment for the above referenced shipment which represents freight charges at the agreed upon $86.50 W/M plus heavy lifts and Seaway Tolls. This leaves the above mentioned *$1,111.69* as the amount uncollected for which respondent is requesting permission to waive collection. . . .

Respondent has filed the requested $86.50 W/M rate plus heavy lifts and Seaway Tolls . . . effective March 2, 1978. . . .

At my request, the parties submitted supplemental affidavits and documentation which establish the following:

(1) On an unspecified date in August 1977, when the cargo was booked, W. E. Wegmann, Manager-Great Lakes Traffic Eastbound, Lykes, and Wolfgang Emden of Kuehne & Nagel, negotiated the $86.50 W/M rate to cover the shipment of air conditioners from the consignor, Beton, originating at Green Bay, to the consignee at Oran. Mr. Wegmann inadvertently failed to file the agreed upon lower rate.

(2) Under the express terms of the tariff,[4] the cargo interest rather than the carrier paid stevedoring costs and other costs involved in the discharge of the cargo.

(3) The heavy lift charges and the seaway tolls remained constant irrespective of whether the shipment was rated at $86.50 or $125.00. Heavy lift charges inadvertently were incorrectly billed as $286.84. The proper charge is $295.97.[5] Seaway tolls were $8.80.[6]

(4) The shipment was delivered to Lykes at Green Bay at various times during the period from August 29, 1977 through September 9, 1977. The on board bill of lading, which also was the rated bill of lading, was the only bill of lading issued by Lykes for the shipment. The on board bill of

[4] See Rule 4(n) of Lykes' American Great Lakes/Mediterranean Freight Tariff No 1 (FMC-88), 1st Rev. Page 5D, effective April 21, 1977, providing that all rates to Algerian ports are on a Free Out (F O.) basis. See also, 29th Rev. Page 40-A1 and 32nd Rev. Page 40 showing that the applicable rate and the rate sought to be applied were on an F.O. basis

[5] See Rule 28, Heavy Lift Scale, at 1st Rev. Page 18.

[6] See Rule 31, St Lawrence Seaway Cargo Tolls, at original Page 27.

lading was issued at New York as a service to the cargo interest and accurately reflects the date the cargo was loaded aboard the vessel.

(5) When Lykes realized that it had failed to file the agreed air conditioner rate, it filed 32nd Rev. Page 40, effective September 20, 1977, showing an $86.50 rate through October 19, 1977 and showing a $120.25 rate effective October 20, 1977. In the erroneous belief that this was not the requisite filing of the conforming tariff under the second proviso of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3) (see text of statute, *infra*), Lykes filed another conforming tariff showing the $86.50 rate on March 2, 1978.[7]

(6) Kuehne & Nagel billed Beton at the rate of $86.50 plus heavy lift charges and seaway tolls for the shipment.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff is derived from the provisions of section 18(b)(3).[8] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

> *Provided, however,* That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

An analysis of the application, the documents attached thereto and the supplemental affidavits and documents attached thereto shows that the application should be granted.

I find that it was an "error due to inadvertence in failing to file a new tariff," of the type which the Congress had in mind when it enacted

[7] 41st Rev. Page 40.

[8] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

section 18(b)(3),[9] which occurred when Lykes mistakenly did not file the $86.50 rate as it had agreed to do. Unquestionably, Lykes, per an executive officer authorized to cause negotiated rates to be published in the tariff, formed the intent prior to the shipment to publish and file the $86.50 rate for air conditioners, in lieu of the existing Machinery, N.O.S. rate of $125.00.

I find that the application was filed within one hundred and eighty days from the date of shipment[10] and that prior to filing the application Lykes

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[9] The following illustration of a remediable situation is provided in the legislative history ofthe above quoted four provisos of seetion 18(b)(3), House Report No. 920 (90th Cong., 1st Sess., November 14, 1967), pp. 3–4:

> For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rate.

[10] A period of 179 days elapsed between the date the air conditioners were loaded aboard the vessel (the same day the on board bill of lading was issued) and the date the application was received for filing This satisfies the requirements of the fourth proviso of section 18(b)(3) under Commission precedents.

The fourth proviso has been construed to mean that the Commission lacks jurisdiction to entertain the application unless it is filed within 180 days from the "date of shipment." *U.S.D.A v Waterman Steamship Corporation*, Initial Decision (adopted May 5, 1978), at p. 5. In computing the time period, the count begins on the first day after the "date of shipment." *Id.*, at p. 6. The count ends on the date of filing the application. Filing takes place on the day the application is deposited in the mail or the day the application is received by the Commission, if filed by hand. *Ghisselli Bros. v. Micronesia Interocean Line, Inc.*, 13 F.M C. 179, 182 (1970); Notice of Proposed Rulemaking, Rules of Practice and Procedure, Simplification of the Rules Governing Special Docket Applications for Permission to Refund or Waive Portions of Freight Charges in the Foreign Commerce, 43 F.R. 18572. Thus, because it is tied to a discrete event, the date the count ends is certain and uniformly applies to all Special Docket proceedings This is not yet true of the date the count begins as the Commission has said in its Notice of Proposed Rulemaking, *supra*.

Because the count begins the day after "date of shipment," identifying the "date of shipment" is critical in determining approvability of Special Docket applications. The term is not defined in section 18(b)(3) or in the Shipping Act, 1916. The legislative history of the four provisos neither "contains a definition [n]or gives any explanation of what Congress meant by date of shipment." *Hermann Ludwig, Inc v. Waterman Steamship Corporation*, Report of the Commission, served May 8, 1978, at p. 4

The term "date of shipment" is not self-defining because the word "shipment" is ambiguous In various forums, "shipment" has been construed to mean such diametrically opposite things as delivery of the goods to the carrier and delivery of the goods by the carrier. There are still other interpretations which would define shipment in terms of events or actions occurring between the dates of delivery to or delivery by the carrier. See *Black's Law Dictionary*, 4th Ed., p. 1546, Words and Phrases (Permanent Edition, Volume 39), Shipment, p. 264. *et seq.*

After enactment of Public Law 90–298, containing the four provisos, the problem of establishing "date of shipment" first became crucial in *Ghiselli Bros., supra*. The rationale of the Initial Decision (adopted on this point by the Commission, but without comment) treated "date of shipment" as synonymous with "date the transportation begins," adding, "Transportation may be said to begin either when the merchandise is placed in the possession of a carrier or when the merchandise actually starts in the course of transportation," citing several cases, including *Coe v. Errol*, 116 U.S. 517, 525 (1886) and *Penna. R. Co. v. P. U. Comm'n*, 298 U.S. 170, 175 (1936) 13 F.M.C. 187. Assuming that the two terms (date of shipment and date the transportation begins) are synonymous (although there is nothing to support that theory in the Initial Decision), the Initial Decision misreads the rules of the two cited cases *Coe v. Errol* involved the validity of state taxation on merchandise in interstate commerce and for that purpose treated transportation as beginning either when the merchandise was placed with the carrier or when it actually started in the course of transportation. However, as Justice Cardozo reasoned in the second cited case, construing the applicability of the Interstate Commerce Act, 49 U.S C 1, *et seq* , dealing with common carriage and common carriers, just as the Shipping Act, 1916 does, there is a distinction between commerce and transportation by common carriers subject to regulation. He said, "Not all commerce is transportation, and not all transportation is by common carriers by rail. . For many purposes, as for example in testing the validity of state taxation, merchandise is deemed to be in interstate commerce when it has started on its journey, though still in the possession of consignor or seller. . . . Not so, however, in determining the application of this Act. *Transportation begins for that purpose, if not for others, when the merchandise has been placed in the possession of a carrier " (Emphasis supplied.) 298 U.S. 174–175.*

In Ghiselli, the merchandise was delivered to the possession of the carrier on November 5, 1968, and the carrier issued an on board bill of lading on November 8, 1968. The application was given the benefit of the later date. As a result, *Ghiselli* has often been cited for the precedent and settled proposition that the date of issuance of the on board bill of lading is the "date of shipment" for the purpose of the fourth proviso See, e g , *Ludwig v Waterman, supra*, pp. 2–3, 3–4. In that case, the Commission explained that limiting "date of shipment" to mean the date of delivery of the cargo to the carrier would defeat the remedial legislative intent without serving any regulatory purpose. *Id* , pp 4–5. However, because the carrier could not locate the on board bills of lading, but maintained that they were issued the filed a new tariff with the Commission setting forth a rate on which the waiver would be based.[11] I find, further, that Lykes has agreed to publish an appropriate notice in its tariff and is willing to take such other steps as the Commission may require to give notice of the rate on which waiver would be based.

Under the safeguards provided in the order, below, I find that the waiver will not result in discrimination among shippers and that additional refunds will be made with respect to other shipments of the same or similar commodities made during the same period of time, i.e., during the period from the approximate date in August 1977 when the negotiated rate was agreed upon to the date when the first conforming tariff was filed.

Accordingly the application to waive collection of a portion of freight charges is granted. It is ordered:

1. Lykes shall waive collection of freight charges in the amount of $1,112.69 due it from Benton in connection with a shipment of air conditioners under a bill of lading issued September 10, 1977. However, Lykes shall collect $9.13 (the amount of the inadvertent heavy lift undercharges) from Beton.

2. Lykes shall publish and file the following notice at the appropriate pages[12] in its tariff:

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same day the merchandise was stowed aboard the vessel, the Commission authorized relief upon proof that the goods were placed aboard ship on the date alleged.

It would appear then, that under the teaching of *Ludwig v. Waterman*, the latest of two, or possibly three, dates may be viewed as the reference point for "date of shipment"—(a) the date of delivery to the carrier, (b) the date of the on board bill of lading, or (c) the date of loading. But that case is susceptible of being construed to mean that the Commission equated the date of loading to be synonymous with the date of issuance of the on board bill of lading. However, it is not necessarily true in all instances that an on board bill of lading is issued on the same day as loading takes place. See, *U.S.D.A. v. Waterman, supra* (Initial Decision) p. 9, where an on board bill of lading was issued at least 9, and perhaps as many as 17, days after loading, also, see *Miles Metal Corporation v. M. S. Hasjo*, 494 F.2d 563 (2 Cir. 1974), in which an on board bill of lading was issued without any evidence that the merchandise was even placed on board and in which the court held that an on board bill of lading (also known as a "shipped" bill of lading, see 46 U.S.C. 1303(7)) is not *prima facie* evidence of shipment. See, also, Gilmore and Black, *The Law of Admiralty* (Second Ed.) at 522–523 for a discussion indicating the general lack of conclusiveness and irrelevancy of an on board bill of lading as a shipping document. Manifestly, an on board bill of lading is not indicative of the discrete event of loading the merchandise aboard a vessel.

The Commission recognizes that "there is as yet no clear definition of the term 'date of shipment.'" Notice of Proposed Rulemaking, *supra*. The proposed rule seeks to fix the definition of that term to a discrete event so that fair and uniform treatment will be afforded to all Special Docket applications. Initially, the rule would define the term "to mean the date of issuance of the rated bill of lading, [another] point of reference which has often been employed in previous cases." *Id.* 43 F.R. at 18573. But the Commission has invited comments regarding other standards deemed more appropriate and fair. *Id.*

Thus, the Commission has evidenced its concern about continuing to rely on ad hoc determinations of what "date of shipment" means. It has embarked on a procedure to rectify the problem because "the Commission believes that it is necessary to define [this] statutory [term] so that prospective applicants will not have to function in a state of uncertainty and to insure that applications which qualify in other respects are treated equally." *Id.*

[11] The filing of the first conforming tariff after transportation commenced satisfied the requirements of the second proviso. Any tariff filing setting forth a rate on which refund or waiver would be based, prior to filing the application suffices. See, *Henry I. Daty, Inc. v. Pacific Westbound Conference*, Initial Decision (adopted January 16, 1978), p. 6, n. 9.

[12] The notice shall appear at those tariff pages where the commodities "Air Conditioners" and "Machinery, N.O.S." are shown.

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 567, that effective August 1, 1977, and continuing through September 19, 1977, inclusive, the rate on *Air Conditioners* (*which during that* period of time had been rated as Machinery, N.O.S.) from United States Great Lakes and St. Lawrence River Ports to Oran, Algeria, for purposes of refunds or waiver of freight charges is $86.50 W/M–FO, such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

3. Lykes shall canvass its records for the period August 1, 1977 through September 19, 1977, to ascertain whether there were any other shipments of Air Conditioners from United States Great Lakes and St. Lawrence River Ports to Oran and shall mail copies of the tariff notices to any persons making such shipments during that period of time.

4. Waiver of the charges shall be effectuated within 30 days of service of notice by the Commission authorizing such waiver and Lykes shall within five days thereafter (a) notify the Commission of the date and manner of effectuation of the waiver, and (b) file with the Commission an affidavit of compliance with paragraphs 1, 2 and 3 of this order. In connection with paragraph 1, the affidavit shall state whether the additional heavy lift charges have been collected or shall describe the steps taken to effect collection.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
May 16, 1978.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 387(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

MOORE-MCCORMACK LINES, INC.

ORDER ON RECONSIDERATION

June 19, 1978

Complainant Pan American Health Organization has requested the Commission to reconsider its decision served March 30, 1978 denying reparation in the above docketed proceeding. No reply to the petition for reconsideration was filed.

Complainant contends that the Commission erred in finding the description "office stationery" more specific than "PAPER VIZ: Bond, Sulphite or Sulphite and rag mixed—see PRINTING PAPER" the description urged by Complainant. Complainant also maintains that even assuming that both descriptions equally applied to the shipment, the shipper is entitled to the lower of the two rates provided in the tariff.

Petitioner, however, states no new facts, provides no new information which would warrant a reconsideration of the Commission's decision.* Once the proper description for the product shipped has been established, the rate provided in the tariff for that description is the only applicable rate.

Complainant's other contentions are but a reiteration of the arguments made in the complaint which the Commission has rejected after careful consideration.

The relief requested must therefore be denied. The Commission decision served March 30, 1978 is hereby affirmed.

IT IS SO ORDERED.

By the Commission.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261)

*Commissioner Kanuk dissents

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–31

CHEVRON CHEMICAL INTERNATIONAL, INC.

v.

BARBER BLUE SEA LINE

ORDER ON RECONSIDERATION

June 19, 1978

By petition filed May 12, 1978, Complainant Chevron Chemical International, Inc. asks the Commission to reconsider its decision denying reparation upon a finding that Complainant had failed to state a claim upon which relief can be granted. No reply to the petition for reconsideration was filed.

The petition states no new facts, brings to our attention no new matter which would warrant a reconsideration of one decision* but reiterates the arguments made in the complaint and on exceptions, which the Commission rejected after careful consideration. Contrary to Complainant's contention, our finding that the complaint did not state a valid claim went to the merits of Complainant's case. Nothing in our decision implies that the dismissal rested on procedural grounds. The indisputable and controlling fact is that on the date of Complainant's shipment, there was no rate on "file" with this Commission applicable to such shipment.

The relief requested must therefore be denied. The Commission's decision served April 28, 1978, is affirmed.

IT IT ORDERED.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*Rule 261 of the Commission's Rules of Practice and Procedure (46 C.F.R 502 261)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 565

MITSUI & CO.(USA), INC.

v.

PACIFIC WESTBOUND CONFERENCE

REPORT

June 23, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman*; Thomas F. Moakley, *Vice Chairman*; Karl E. Bakke, James V. Day and Leslie Kanuk, *Commissioners*)

The Commission determined to review the Initial Decision issued by Administrative Law Judge William Beasley Harris in the above-docketed proceeding.

By application filed under section 18(b)(3) of the Shipping Act, 1916, and section 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92(a)), the Pacific Westbound Conference, with the concurrence of the carrier, Sea-Land Service, Inc., asked permission to refund[1] a portion of the freight charges assessed on a shipment described in the bill of lading as "2 AMINO—2METHYL—1 PROPANO (AMP)."

The application alleges that when the Conference took over the tariffs published by its member lines, it republished many of the items in its own tariff[2] without changing the IBM item number identifying the commodity, to the Schedule B classification number as required by Rule 5 of the Conference's own tariff.[3] Because of this discrepancy the rate of $89.00 per 1000 kgs. provided in the Conference tariff for "Amino mixed with methyl propanol" could not be applied to the shipment which was therefore assessed an N.O.S. rate of $140.00 W/M.

[1] The request was later changed to a request for a waiver.

[2] The reference apparently is to the intermodal tariffs filed independently by some lines which were withdrawn when the Conference filed its own intermodal tariff

[3] Rule 5 of the Pacific Westbound Intermodal Tariff No. 8, which is no longer in effect, provided in part,

SCHEDULE B APPLICATION TO TARIFF

Commodities in this tariff are classified and organized in accordance with Schedule B Tariff (see Rule 10) and are identified by a 9-digit number shown as Item Numbers in the Commodity Rate Sections of this tariff.

In determining the applicable freight rate under this tariff determine the applicable 5-digit number in Schedule B Tariff and apply the most specific Commodity Item in this tariff the first 5 digits of which correspond to that Schedule B Tariff

The Presiding Officer denied the application for the Conference's failure, prior to applying for a waiver, to file a new tariff upon which such waiver would be based even though the $89.00 W the Conference seeks permission to charge was already on file and in effect at the time the application was filed on January 9, 1977. Furthermore, in the Presiding Officer's opinion, the failure to change the item numbers could not be considered a clerical or administrative error of the type contemplated in section 18(b)(3), but reflected rather a change of policy on the part of the Conference "without its adequately checking as to the implementation of the policy and its effect."

We disagree with the denial of the application on the following grounds.

Section 18(b)(3) requires that prior to applying for a waiver the carrier or conference of carriers file a new tariff upon which such refund or waiver will be based. This presumes that the rate the carrier is asking permission to apply is not already on file with the Commission. However, where, as here, the rate upon which the waiver is to be based is already on file prior to the filing of the application, the filing of a new tariff reflecting an identical rate becomes superfluous and the failure to file such a tariff is not in our opinion a proper ground for denying the application.

We also disagree with the Presiding Officer's conclusion that the failure to change the commodity item number was not an error of a clerical or administrative nature. We presume, in the absence of proof to the contrary that in publishing its tariff the Conference intended to follow the rules contained in such tariff and that the failure to do so was caused by a clerical or administrative error of the type contemplated in section 18(b)(3).

On the basis of the foregoing we reverse the Presiding Officer's decision denying a waiver. The Pacific Westbound Conference is granted permission to waive $1,694.62 of the freight charges assessed on Mitsui's shipment, subject to the condition imposed below.

The Conference concedes that:

> When the Conference took over the tariffs published by its member lines, *many* items were published in the Conference Tariff carrying item numbers which bear no relationship to Schedule B numbers as does (sic) the rate items established by the Conference. Further, many of the previously independently published tariffs by member lines contained no rule similar to Rule 5. Thus the previous tariffs did not have to adhere to the application of a Schedule B number to its rates.
>
> On September 28, 1977, the independent member lines withdrew their filing and the Conference as a whole established the same rate without changing this IBM number to reflect the proper Schedule B number. (Emphasis added)

The question thus arises whether between September 28, 1977, when the Conference tariff became effective and December 31, 1977, when Rule 5 expired, other shippers in similar circumstances were charged the N.O.S. rate instead of the specific rate provided in the tariff for the commodity shipped.[4] Granting the Conference an unconditional permission in this instance to waive collection of a portion of the freight charges assessed on Complainant's shipment might result in discrimination against such shippers if they were not given the opportunity to have their freight charges adjusted in the same manner.

Section 18(b)(3) embodies a provision intended to remedy just this type of situation. That provision states:

> That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application . . . .

Applying this procedure, and in order to prevent discrimination against shippers similarly situated, the Conference is directed to adjust the freight charges of any shipper who between September 28, 1977 and December 31, 1977, was assessed an N.O.S. rate instead of the specific commodity rate published in the Conference tariff without the proper Schedule B classification number. The Conference is further required to submit within sixty (60) days from the service of this order, a list of the shippers entitled to a refund, setting forth the manner in which freight charges are adjusted and the amount of each refund. Should the Conference fail to submit such a list within sixty days, permission to waive a portion of the freight charges shall be denied and the application dismissed.

It is so ordered.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

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[4] This also raises a question as to whether the failure to attach the proper item number to a specific commodity description created an ambiguity in the tariff so that the assessment of an N.O.S. rate rather than the specific commodity rate provided in the tariff for that description, might have violated section 18(b)(3) of the Shipping Act, *Continental Can Co., Inc. v. U.S.*, 272 F.2d 312 (2nd Cir. 1959), *United Nations Children's Fund v. Blue Sea Line*, 15 F.M.C. 206 (1972). In view of the nature of this proceeding and our recommended disposition of the special docket application, we need not, and indeed cannot, address this issue here.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 445(I)

MINE SAFETY APPLIANCES CO.

v.

CHILEAN LINE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

June 21, 1978

Notice is hereby given that the Commission on June 21, 1978, determined not to review the decision of the Settlement Officer in this proceeding served June 7, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 445(I)

MINE SAFETY APPLIANCE COMPANY

v.

CHILEAN LINES, INC.

Reparation awarded in part.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Mine Safety Appliances Company, (complainant) which engages in the manufacture and distribution of safety gear used in mining enterprises, alleges that Chilean Lines, Inc. (respondent) transported a shipment of respiratory appliances from New York, New York to Arica, Chile, charging the Cargo, NOS class 1 rate of $153.75 per 40 cubic feet as contained in the Atlantic & Gulf/West Coast of South America Conference Freight Tariff F.M.C. No. 1, instead of the rate for Gas Masks, class 10 of $116.25 per 40 cubic feet contained in the same tariff. Respondent declined the Claim citing Item 7 of the conference tariff which provides:

> ". . . Adjustment of freight based on alleged error in weight, measurement or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before cargo leaves the carrier's possession . . ."[2]

While no violation of the Shipping Act is alleged, it is presumed to be a violation of Section 18(b)(3) thereof.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the complainant can prove based on all the evidence as to how what was actually shipped differed from the bill of lading description.[3] However, the complainant

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] With respect to such a rule the Commission, in its report on remand served November 24, 1976, in *Kraft Foods v. Moore McCormack Lines, Inc.*, negated its application with respect to claims before the Commission stating in part "In effect the Rule sets up as a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act . . ."

[3] *Western Publishing Company Incorporated v. Hapag-Lloyd A.G.*, Docket No. 283(I), May 4, 1972.

has a heavy burden of proof once the shipment has left the custody of the carrier.[4]

In support of the Claim, complainant has submitted the bill of lading, freight bill, invoice, packing list and sales material concerning the goods shipped. Respondent's bill of lading No. 1 dated December 12, 1975 covered the movement of 37 cartons of respiratory appliances weighing 2,222 pounds, measuring 251 cubic feet moving on the COPIAPO from Port Newark, New Jersey to Arica, Chile.

The packing list indicates what actually moved in the subject shipment:

13 cartons of Respirators	@8.9 cu ft	115.7
24 cartons of Type S Filter Cartridges	17 @5.6 cu ft	95.2
	1 @5.1 cu ft	5.1
	5 @5.8 cu ft	29.0
	1 @5.8 cu ft	5.8
		250.8
	or	251 cu ft

Respondent was assessed:	
Cargo, N.O.S. 6.275 mt ($153.75)	$ 964.78
Bunker surcharge 6.275 mt ($8.25)	51.77
	$1,016.55
Respondent claims he should have been assessed:	
Gas Masks (class 10) 6.275 mt ($116.25)	$ 729.47
Bunker surcharge 6.275 mt ($8.25)	51.77
	$ 781.24
Alleged overcharge	$ 235.31

Two different commodities, separately packed, were moved, i.e. respirators and filter cartridges. With respect to the respirators, reference is made to *Webster's Third New International Dictionary*, G. & C. Merriam Company, 1964. Applicable definitions found therein are:

Respirator—A device (as a gas mask) for protecting the respiratory tract (as against irritating and poisonous gases, fumes, smoke, dusts) with or without equipment supplying oxygen or air (filters—provide protection against any particulate matter, either solid, mist or spray in an atmosphere containing a sufficient amount of oxygen).

Gas mask—A close fitting face piece connected to a canister through which all air breathed is drawn to protect the respiratory tract and face against irritating and poisonous gases: respirator.

Reference is made to *United States of America v. Hellenic Lines Limited,* 14 F.M.C. 255, (1971) at pages 256 and 257 wherein it is held:

[4] *Colgate Palmolive Co. v. United Fruit Co.*, Docket No. 115(I), September 30, 1970.

"The N.O.S. classification is a catchall which, by definition, is applicable if no other classification is or can be specified. While one should not unduly strain to find a classification for goods, nevertheless, an N.O.S. classification is a classification which should not be resorted to if a reasonable classification can otherwise be found in the tariff. . . ."

Title 30 of the Code of Federal Regulations in Chapter 1 entitled "Mining Enforcement and Safety Administration, Department of the Interior" under Section 11.3(ff) defines a respirator as any device designed to provide the wearer with respiratory protection against inhalation of a hazardous atmosphere. Section 11.90(a) thereof defines gas masks as including all completely assembled air purifying masks designed for use as respiratory protection during entry into atmospheres not immediately dangerous to life or health or escape only from hazardous atmospheres containing adequate oxygen to support life.

Based on the above, the lower class 10 Gas Mask rate (9th Revised Page 174 of the tariff) of $116.25 per measurement ton applies to the 13 cartons of respirators measuring 115.7 cubic feet. However, this rate would not apply on the filter cartridges.

With respect to the filter cartridges, which are used in the respirators shipped, here again respondent assessed the Cargo, NOS rate of $153.75. Reference is again made to Title 30 of the Code of Federal Regulations in Chapter 1 under Section 11.94 which covers:

"Filters used with canisters and cartridges; location; replacement.

"(a) Particulate matter filters used in conjunction with a canister or cartridge shall be located on the inlet side of the canister or cartridge.

"(b) Filters shall be incorporated in or firmly attached to the canister or cartridge and each filter assembly shall, where applicable, be designed to permit its easy removal from and replacement in the canister or cartridge."

The Cartridge and filter, as a single unit, is placed in the respirator. From the preceding coverage of respirators it is known that the cartridge and filter will be used to filter air. Such need may be required by (1) oxygen deficiency, (2) gases and vapors, (3) particles, including dusts, fumes and mists, and (4) pesticides. The Air Filter Class 9A rate (11th Revised Page 161 of the tariff) of $120.75 per measurement ton of 40 cubic feet applies to the 24 cartons of type S filter cartridges measuring 135.1 cubic feet.

Respondent has been assessed:	
Cargo, N.O.S. 6.275 mt ($153.75)	$ 964.78
Bunker surcharge 6.275 mt ($8.25)	51.77
	$1,016.55
Respondent should have been assessed	
Gas Masks 2.893 mt ($116.25)	$ 336.31
Air Filters 3.382 mt ($120.75)	408.38
Bunker surcharge 6.275 mt ($8.25)	51.77
	$ 796.46
Overcharge	$ 220.09

Respondent overcharged complainant $220.09.

Reparation for this amount is awarded.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 526(I)

MAN FUNG CHINA TRADING CO.

v.

K-LINES

NOTICE OF DETERMINATION NOT TO REVIEW

June 21, 1978

Notice is hereby given that the Commission on June 21, 1978, determined not to review the decision of the Settlement Officer in this proceeding served June 7, 1978.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 526(I)

MAN FUNG CHINA TRADING CO. INC.

v.

K-LINES

Reparation Awarded.

DECISION OF EDGAR T. COLE, SETTLEMENT OFFICER[1]

The Man Fung China Trading Co., Inc. claims $54.75 as reparation from "K" Line regarding one shipment of 29 cartons of Quilt Fibre Filling transported aboard "K" Line's vessel Queens Way Bridge, Voyage 41A from a supplier in Kobe, Japan[2] to The Man Fung China Trading Co., Inc., the bill of lading which indicates that San Francisco, California is the port of discharge. The cargo however was discharged at the port of Oakland and subsequently transported to San Francisco via Lucky Transfer on December 17, 1976. The claim was filed with the Commission on March 24, 1978, within two years from the date the cause of action occurred and must be considered on its merit as ruled by the Commission in *Colgate Palmolive Company v. United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970.

The rate assessed on the commodity is not in dispute, it is the equalization amount claimed by complainant based on the excess of the trucking rates from Oakland to San Francisco which were paid by The Man Fung China Trading Co. Documentation furnished shows freight bills covering the truck movements of the 29 cartons of quilt fibre filing from Oakland to San Francisco.

Rule 46 of the Trans-Pacific Freight Conference of Japan/Korea FMC 6, of which "K" Line is a participating member, provides as follows:

"The ocean carrier may forward such cargo direct to a point designated by the consignee, provided the consignee pays the cost which he would normally have incurred

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] The complainant's claim indicates that shipment originated in Hong Kong which is in error. The bill of lading clearly shows that Kobe, Japan is the port of origin.

either by rail, truck or water, to such point if the cargo had been discharged at the terminal port named in the ocean bill of lading."

The documents presented by the complainant show clearly that "K" Line discharged the cargo at a discharge port other than that specified on the bill of lading. "K" Line had two options available to them to accomplish delivery. They could have delivered the cargo at the designated port or moved the cargo from the port of diversion to the designated port at their own expense. They chose the latter course.

Based on the aforementioned rule, that since the carrier has elected to arrange ground transportation when it discharges cargo at a port other than that specified in the bill of lading, the consignee pays only the amount which it would have cost him to arrange transportation from the proper port to a point of destination.[3]

Listed below is the computation utilized by The Man Fung China Trading Co.'s claim for equalization reparation by "K" Lines:

11/26/76 Queensway Bridge Voyage 41 B/L K255–550218			
Lucky Transfer (19 cartons)	Charged		$64.43
S.F. to S.F. 1159 × 209		$24.22	
4.5% Inc.		1.09	
		$25.31	25.31
Freight Equalization			$39.12
11/26/76 Queensway Bridge Voyage 41 B/L K255–550218			
Lucky Transfer (10 cartons)	Charged		$34.12
S.F. to S.F. 610 × 209		$12.75	
4.5% Inc.		5.74	
		$18.49	18.49
Freight Equalization			$15.63
Total Freight Equalization			$54.75

Rates Oakland to San Francisco P.U.C. Tariff No. 2
San Francisco to San Francisco P.U.C. Tariff No. 19

"K" Line denied the claim solely on the basis of the rule published in their independent tariff which is incorrect.[4] However, it is our opinion that if they had used the correct tariff, Trans-Pacific Freight Conference of Japan/Korea, they would have denied the claim based on Rule 59, in the aforementioned tariff, which requires that claims be filed within six-months after date of shipment.[5]

The foregoing indicates that "K" Line is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for the

[3] Konwall Co., Inc v. Orient Overseas Container Line, Informal Docket No 326(I), 1975.

[4] "K" Line Freight Tariff No 218, FMC 60, Rule 177(a)(2). This rule states that claims for adjustment of freight charges must be presented to the carrier in writing within 6 months after date of shipment

[5] The complaint was filed with this Commission within the time limit specified by statute, and it has been well established by the Commission that carrier's so called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

transportation of property or any service in connection therewith than the rates and charges specified in its tariff. Therefore, based on the facts at hand, The Man Fung China Trading Co., Inc. is awarded reparation in the amount of $54.75.

(S) EDGAR T. COLE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 525(I)

ARNELLE OF CALIFORNIA

v.

K-LINES

NOTICE OF DETERMINATION NOT TO REVIEW

June 26, 1978

Notice is hereby given that the Commission on June 26, 1978, determined not to review the decision of the Settlement Officer in this proceeding served June 15, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

· INFORMAL DOCKET NO. 525(I)

ARNELLE OF CALIFORNIA

v.

K-LINES

Reparation Awarded.

DECISION OF EDGAR T. COLE, SETTLEMENT OFFICER[1]

Arnelle of California claims $61.80 as reparation from "K" Line regarding one shipment consisting of 79 cartons of ladies cotton dresses transported aboard "K" Lines' vessel Queens Way Bridge, Voyage 35A from a supplier in Hong Kong to Arnelle of California located in San Francisco, California. The bill of lading indicates that port of discharge is San Francisco, California. However, according to the documents submitted the cargo was actually discharged at the Port of Oakland and subsequently transported to San Francisco via Bart Trucking Co. on May 27, 1976. The claim was filed with the Commission on March 24, 1978, within two years from the date the cause of action occurred and must be considered on its merit as ruled by the Commission in *Colgate Palmolive Company v. United Fruit Company*, Informal Docket No. 115(I), served September 30, 1970.

The rate assessed on the shipment in question is not in dispute, it is the equalization amount claimed by complainant based on the excess of the trucking rates from Oakland to San Francisco that were paid by Arnelle of California. The freight bill furnished indicating the movement from Oakland to San Francisco clearly shows that the 79 cartons of ladies dresses being picked up in Oakland by Bart Trucking Co. for delivery at San Francisco.

At the time of this shipment "K" Line published its own independent tariff i.e. "K" Line Freight Tariff No. 218, FMC 60 applying from Hong Kong and Taiwan to Hawaii, Alaska, Pacific, Atlantic and Gulf Ports of the U.S.A. Rule 177(a)(2) of the aforementioned tariff provides the

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

following in connection with cargo being discharged at other than bill of lading port:

"The ocean carrier may forward such cargo direct to a point designated by the consignee, provided the consignee pays the costs which he would normally have incurred either by rail, truck or water, to such point if the cargo has been discharged at the terminal port named in the ocean Bill of Lading."

The documents presented by the complainant show that "K" Line discharged the cargo at a discharge port other than that specified on the bill of lading. "K" Line had two options available to them to accomplish delivery. They could have delivered the cargo at the designated port or moved the cargo from the port of diversion to the designated port at their own expense. They choose the later course.

Based on the aforementioned rule, that since the carrier has elected to arrange ground transportation when it discharges cargo at a port other than that specified in the bill of lading, the consignee pays only the amount which it would have cost him to arrange transportation from the proper port to a point of destination[2].

In the computation to arrive at the amount due, complainant used the figure of $104.00, which represents the amount paid to Bart Trucking for the carriage of the cargo from Oakland to San Francisco. However, in reviewing the bill submitted by Bart an amount of $101.50 is shown. Contact made with the complainant indicated that in making a xerox copy of the bill the amount of $2.50 in the xeroxing process was inadvertently excluded. Complainant is unable to furnish the original bill showing the additional amount, therefore, the amount of $101.50 will be used in computing the reparation due. In line with the foregoing, listed below is the computation by Arnelle of California's claim for equalization reparation by "K" Lines:

5-27-76 Queensway Bridge Voyage 35A B/L K991-01300

Bart Trucking Co.		$101.50	
San Fr. to San Fr.	3655 as 4000 × 100	$40.00	
	5.5% Inc.	2.20	
			42.20
Freight Equalization			$59.30

Rates: Oakland to San Francisco P.U.C. Tariff No. 2
San Francisco to San Francisco P.U.C. Tariff No. 19

"K" Line denied the claim based on their Rule 280 published in their Freight Tariff FMC 60 which states that claims for adjustment of freight charges must be presented to the carrier in writing within six months after the date of shipment. In this connection, the Commission has held that the carrier's so called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such case. In the instant case the

[2] Konwall Co., Inc. v. Orient Overseas Container Line, Informal Docket No. 326(I), 1975.

complaint was filed with the Commission within the time limit specified by statute.

The foregoing indicates that "K" Line is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for the transportation of property or any service in connection therewith than the rates and charges specified in its tariff. Therefore, based on the facts at hand, Arnelle of California is awarded reparation in the amount of $59.30.

(S) EDGAR T. COLE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 73–22, 73–22 (SUB. NO. 1) and 74–36 (SUB NO. 1)

IN RE: MATSON NAVIGATION COMPANY—CHANGES IN RATES IN THE U.S. PACIFIC COAST—HAWAII TRADE

Rates under investigation in Docket Nos. 73–22 and 73–22 (Sub. No. 1) found to be just and reasonable under section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933.

Rates under investigation in Docket No. 74–36 (Sub. No. 1) found not unreasonably high.

Respondent found not to he in violation of section 16, First by virtue of hold down on sugar and molasses rates.

Respondent found not to be in violation of section 16, First by virtue of increased rates on automobiles.

Respondent found not to be in violation of section 16, First with respect to the two-tier rate increase.

Respondent's rate base, for purposes of this proceeding, will be calculated as of the beginning of the year.

Rate base should be adjusted to reflect the existence of deferred income taxes in the carrier's capital structure.

Peter P. Wilson, David F. Anderson, David V. Ainsworth, and *George D. Rives* for respondent Matson Navigation Company.

Ronald Y. Amemiya, R. Dennis Chong, Richard S. Sasaki and *William W. Milks* for complainant-intervenor The State of Hawaii.

Charles Farrar, James J. Garrett, and *James P. Bennett* for complainant Pineapple Growers Association of Hawaii.

Jacob P. Billig and *Terrence D. Jones* for complainants Geo. A. Hormel & Company and Oscar Mayer and Company.

Alan F. Wohlstetter for complainant Household Goods Forwarders Association of America, Inc.

William W. Schwarzer for complainant Oroweat Baking Company.

John W. Gilius for complainant General Foods Corporation.

Myron Smith for complainant American Home Products Corp.

Dudley J. Clapp, Jr., Milton J. Stickles, Ronald L. Shingler, John L. Degurse, Jr., Harley E. Dilcher, and *Robert H. Swennes, II,* for complainants-intervenors Department of Defense, Military Sealift Command.

Stephen Chesnoff for complainant, J. C. Penney Company, Inc.,

Charles H. Lockwood II, and *Frank J. Mahoney* for complainant-intervenor Motor Vehicle Manufacturers Association of the United States, Inc.

Philip E. Diamond, Howard D. Neal, and *Beryl G. Fritze* for complainant Hunt-Wesson Foods, Inc.

Ann M. Pougiales for intervenor The Wine Institute.

David Handel and *Calhoun E. Jacobson* for intervenor Traffic Managers Conference of California.

James F. Holden for intervenor AM General Corporation.

Michael E. Murphy for intervenor California and Hawaiian Sugar Company.

Keith J. Steiner for complainant-intervenor Hawaii Automobile Dealers Association.

J. Robert Ewers, Donald J. Brunner, Charles L. Haslup, III, David Fisher, C. Douglass Miller, and *C. Jonathan Benner,* for the Bureau of Hearing Counsel.

DECISION AND ORDER PARTIALLY ADOPTING INITIAL DECISION

June 30, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman*; Thomas F. Moakley, *Vice Chairman*; Karl E. Bakke*, James V. Day and Leslie L. Kanuk, *Commissioners*)

These consolidated proceedings were individually instituted to test the justness and reasonableness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of certain rate changes filed by Matson Navigation Company (Matson) during the years 1973, 1974 and 1975 in the U.S. Pacific Coast/Hawaii Trade. The proceedings were consolidated by order of the Chief Administrative Law Judge on July 25, 1975, and an Initial Decision was issued on February 22, 1977 in which, among other things, Presiding Administrative Law Judge Seymour Glanzer found that the issues of the justness and reasonableness of the rates had become moot.

Exceptions to the Initial Decision were filed by Matson, the Military Sealift Command (MSC) and Hearing Counsel. Oral argument was heard June 28, 1977.

Upon consideration of the entire record, and particularly the points raised in exceptions and oral argument, we have decided to adopt the Initial Decision, as modified and clarified below, with the exception of that portion declaring moot the issues of justness and reasonableness of rates. We find on consideration of the record that the rates in Docket No. 73–22 and 73–22 (Sub. No. 1) have been shown to be just and reasonable, and we so find. With respect to the rates under investigation

*Concurring in final result.

in Docket No. 74–36 (Sub. No. 1), we find that Matson has carried its burden of demonstrating that the increase in question is not unreasonably high. Should the State of Hawaii wish to pursue its theory that Matson's rates on automobiles are unreasonably low, a complaint proceeding under section 22 would be the more appropriate forum.

DISCUSSION

A. Rate Base Adjustments

1. Average Depreciated Rate Base

We generally agree with the decision reached by the Presiding Officer on this issue. Matson has calculated its rate base taking into account accummulated depreciation as of the beginning of the year in accordance with the provisions of the Commission's General Order 11 (46 C.F.R. section 512). While Matson should be permitted to rely upon the Commission's regulations in presenting its case in this proceeding,[1] there are facts and arguments in the record in this case supporting the conclusion, that mid-year or average rate base may be a more appropriate basis for measuring rate of return. The use of a rate base stated at cost, less accumulated depreciation as of the beginning of the year, gives no effect to the fact that rate base is being reduced during the year by depreciation expense. For that reason, such a rate base may not be properly matched, for rate of return purposes, to the income which is being earned over the entire period. Therefore, we have commenced a rulemaking proceeding[2] to focus directly on this question so that the industry as a whole, as well as the shipping public may have the opportunity to comment on this matter and to assist the Commission in formulating a final rule on this issue.

2. Deferred Income Taxes

We agree with Matson that the language of the Initial Decision on the subject of deferred income taxes could lead to confusion as to which issues are being decided therein. It should be understood at the outset that we are deciding in this case whether an appropriate portion of accumulated deferred income taxes should be deducted from rate base and *not* whether it is more appropriate, to utilize "normalization" or "flow-through" of depreciation and tax expenses for purposes of the income side of the rate of return equation.

With respect to this latter issue, General Order 11 currently contains no specific guidance as to the method to be utilized by carriers in calculating

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[1] In so ruling, we are mindful of the fact that Matson has deviated from the methodology prescribed by General Order 11 in other areas, particularly in the use of measurement tons for allocation purposes whereas General Order 11 prescribes revenue tons However, in that instance the Commission staff agreed to the filing and use of this alternate data taking the position that measurement tons are a more appropriate method of allocating costs in a container operation (see 46 C.F.R. 512.3(c)(2)).

[2] Docket No. 78–21, *Average Value of Rate Base*, Notice of Proposed Rulemaking served June 9, 1978.

depreciation, amortization and tax expense. Virtually all carriers in reporting these expenses under General Order 11, however, have chosen to use straight line or "normalized" depreciation and a hypothetical or "normalized" tax expense figure based upon the income resulting from the use of straight line depreciation, regardless of the related figures used for tax purposes.

While none of the parties raised the issue on brief to the Presiding Officer, both Matson and MSC now seek a decision on this issue of "normalization" vs. "flow-through"; Matson arguing for adoption of the former, and MSC taking a position in favor of flow-through. Because the matter was not decided in the Initial Decision, and because the issue has not been widely discussed or addressed by the parties to this proceeding, much less the industry as a whole, we deem it more appropriate to consider this issue in a rulemaking proceeding, rather than to remand this proceeding for further briefing of this question.

On the issue of deferred income taxes, we find general agreement among the parties[3] and the Presiding Officer that some portion of the deferred taxes found on the balance sheet of the carrier should be deducted from the rate base. Two refinements are necessary to this general proposition.

First, the Presiding Officer states, at pages 24 and 25 of the Initial Decision:

> "I find that for the future Matson shall be required to calculate its rate base without the inclusion of deferred income taxes This approach assures the protection of consumer interests and the financial health and integrity of Matson and is the method more likely to yield just and reasonable rates under the criterion of *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944). This finding shall not be construed as a determination concerning tax reserves accumulated in prior years".

We disagree with this conclusion. The item "Deferred Income Taxes" shown on the balance sheet of a corporation is, in fact, a reserve accumulated in prior years. The issue argued by the parties here concerns this accumulated reserve and not some figure to be accumulated in future years. To rule that Matson shall make an adjustment to rate base in the future with respect to deferred income taxes accumulated only in the future is akin to no decision on this issue in this case.

We are convinced that the record in the case supports an adjustment to Matson's rate base for the test years in question.[4] The record will likewise support the use of the accumulated deferred income tax reserve shown on Matson's balance sheet as the starting point for this adjustment. In other words, in determining whether the rates subject to this investigation are reasonable, we will reduce Matson's rate base by a *pro rata* share of the deferred tax reserves reflected on Matson's balance sheet.

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[3] While Matson argued in opposition to this rate base adjustment throughout most of the proceeding, it conceded in writing and in its oral argument, that a *pro rata* share of deferred income taxes resulting from the use of accelerated depreciation should be deducted from rate base

[4] Calendar year 1975, and July 1, 1975—June 30, 1976.

The second refinement concerns the mechanics of the proper adjustment to rate base and the component parts of the deferred tax reserve reflected on the balance sheet. Matson and Hearing Counsel are now in agreement[5] that the adjustment to rate base should be made by multiplying the amount of deferred income taxes on the balance sheet by a ratio which has the rate base (prior to adjustment for deferred income taxes) as the numerator and the carrier's total capital as the denominator, as shown below.

$$\text{Adjustment for Deferred Income Taxes} = \text{Deferred Taxes} \times \frac{\text{Rate Base}}{\text{Total Capital}}$$

As a general rule, this formula accomplishes the purpose of equitably apportioning the carrier's deferred tax reserve between the rate base in question and other assets of the carrier and we adopt this formula as the appropriate method of arriving at the deferred income tax adjustment.[6]

The deferred tax reserve which is to be utilized in this formula is the reserve which has been accumulated only as a result of the use of accelerated depreciation for tax purposes. This decision is not meant to reduce rate base by any portion of deferred taxes resnlting from deposits in a Capital Construction Fund.[7] In the case of deferred taxes arising from deposits in a Capital Construction Fund, there is no record in this case on which to base a decision relating to a rate base adjustment. Therefore, the issue is not properly before us at this time.

B. Reasonableness of Rates

1. General

The issue of reasonableness of rates in these consolidated proceedings focuses on two test years—Constructive Calendar Year 1975 (relating to Docket No. 73–22) and Constructive Year July 1, 1975—June 30, 1976 (relating to Docket Nos. 73–22 (Sub. No. 1 and 74–36 (Sub. No. 1).

The test to be applied to determine whether the rates resulting from these general rate increases are reasonable is whether those rates produce revenues for the carrier which are sufficient to cover all legitimate expenses plus a fair return on the assets properly utilized in the trade.[8] In determining whether the return on assets is fair, the Commission must consider whether this return is sufficient to cover the cost of the debt

[5] See Oral Argument, Transcript at p 30

[6] In adopting this formula we realize that further definition of the term "total capital" may be necessary for the future For example, one of the issues in Docket No 76–43, *Matson Navigation Company—Proposed Rate Increase in the United States Pacific Coast/Hawaii Domestic Offshore Trade* whether deferred income taxes and other deferred credits should be included in total capital for purpose of determining the adjustment That question is not an issue in this case, however As determined herein, the rate of return is already within the zone of reasonableness with the deferred tax and credits removed from the denominator of the equation Mathematically, a larger denomination would result in a lower portion of deferred income taxes being removed from rate base, thus a larger rate base and a lower rate of return

[7] See Section 607 of the Merchant Marine Act, 1936, (46 U S.C. section 1177)

[8] See *Atlantic-Gulf/Puerto Rico General Increases in Rates and Charges*, 7 F.M C. 87 (1962).

capital properly allocated to those assets and to compensate the equity holder for its investment in those assets at a level which is comparable to the return achieved by equity holders in companies with similar risk characteristics.[9]

As with most general rate cases which have recently come before the Commission, there is a great deal of testimony and argument in this record which deals with this issue of a proper return on the equity portion of the pertinent rate base. Matson's position is that a fair return on its equity in the test years in question would be approximately 16 percent.[10] The State of Hawaii and Hearing Counsel, on the other hand, take the common position that a fair return on equity would be approximately 11.3 percent.[11]

Matson's return on equity for each of the test years in question is well below 10 percent. Without reaching a decision on the specific return which may have been appropriate for these test years, we find that any return on equity capital for a carrier similar to Matson which is below 10 percent cannot be found to be unreasonably high, either for the test years in question or for the foreseeable future.

2. *Income—Rate Base—Rate of Return*

Appendix A to this decision is a statement of rate base, income and rate of return for Matson for calendar year 1975. Appendix B is similarly, a statement of rate base, income and rate of return for constructive year July 1, 1975 to June 30, 1976. We have constructed these tables from the data in the record, with necessary adjustments, to implement our decision on the methodology questions prevsiously discussed herein.

On the basis of these figures, as shown in Appendix A, we find that, for constructive calendar year 1975, Matson's return on equity was 9.02 percent. Therefore, we find that the rate changes which are the subject of Docket No. 73–22 are just and reasonable.

Appendix B reflects a rate of return of equity of 7.75 percent for constructive year July 1, 1975—June 30, 1976. On the basis of these figures we find that the rate changes which are the subject of Docket No. 73–22 (Sub. No. 1) are likewise just and reasonable.

C. Discussion of Docket No. 74–36 (Sub. No. 1)

This part of the consolidated proceeding was instituted by the Commission on April 22, 1975 to determine whether increases in rates by Matson on automobiles and related commodities are just and reasonable under section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The Commission's Order of Investigation also required a determination whether Matson by these increases would subject any particular person, locality, or description of traffic to any

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

[10] Exhibit C–60, p. 41 and Reply Brief of Matson Navigation Company, p. 36–54.

[11] Opening Brief of Hearing Counsel, p. 68, and Response of the State of Hawaii to Supplemental Order of Administrative Law Judge, p. 12.

undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Shipping Act, 1916. The increases were accomplished by first melding the then existing bunker surcharge of 9.3 percent into the rates and then increasing the resulting rates by 3 percent in the case of automobiles and by 8 percent on buses, fire trucks and trailers.

The Presiding Officer concluded that this record does not support a finding that there has been a violation of section 16 First as a result of these increases. We agree..

With respect to the reasonableness of the increases in rates on buses, fire trucks and trailers, Matson has presented evidence that the after tax earning per measurement ton on these vehicles will average $5.00 for the test year in question on a corresponding average revenue per measurement ton of $27.00. No evidence was presented in opposition to the reasonableness of rates on these vehicles.

We cannot find, on the basis of this record, that the increases in rates on these vehicles other than automobiles produce an unreasonable profit. Moreover, we find merit in Matson's argument that lack of shipper opposition to rate increases is one indication of reasonableness,[12] particularly where shippers of that commodity, as here, would normally be sophisticated industrial shippers. Therefore, we find the increases in rates on buses, fire trucks, and trailers to be just and reasonable pursuant to section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act.

In so concluding, we have specifically considered the evidence and arguments set forth by MSC in opposing the reasonableness of Matson's increases in question. The foundation of MSC's position is that westbound rates to Hawaii are subsidizing lower rates in the eastbound direction and that, if the eastbound rates were raised to an appropriate level, Matson would not need the increase sought in this proceeding.

This issue is substantially the same as that raised and disposed of in our earlier investigation into rate increases by Matson in the Hawaiian trade. In Docket No. 71–18—*Matson Navigation Company—General Increase in Rates in the U.S. Pacific/Hawaii Trade,* 16 F.M.C. 96 (1973), we concluded the following:

> We agree that to the extent Matson held down eastbound container cargo rates, they are justified as a matter of business judgment on the back-haul nature of the cargo. (16 F.M.C. 103)

There is likewise considerable evidence in this record on the need for lower eastbound rates on certain commodities, particularly canned pineapple moving in containers. None of the eastbound cargo has been shown to be less than profitable on an incremental basis. We will continue to adhere to the general principle enunciated in Docket No. 71–18, *supra* that the revenue from this cargo, some of which may not move except for the lower rates, contributes to the entire operation. Therefore, we will not

[12] See *e.g.*, *Alaskan Rate Investigation,* 1 U.S.S.B. 1 (1919).

adopt the adjustments suggested by MSC to the financial statements set forth as Appendices A and B.

With respect to the reasonableness of the rate increases on automobiles, only Hearing Counsel take a position that the resultant rates may be unreasonably high. Matson defends the rates as reasonable while the State of Hawaii takes the position that automobile rates are too low, even after the increases, a position that the State has traditionally voiced with respect to automobile rates.[13]

In supporting their position on the level of automobile rates, Hearing Counsel argue that the average pre-tax profit $34.32 per automobile. Matson contends that the comparable pre-tax profit figure is $31 per automobile ($14.00 after taxes). A major difference in the two pre-tax figures is found in the fact that Hearing Counsel allocate the total expenses attributable to automobiles evenly across all automobiles, both westbound and eastbound, while Matson allocates the majority of such expenses to westbound automobiles.

Because we find neither profit figure to be unreasonably high, we need not decide whether automobiles should be an exception to the general rule with respect to eastbound cargo discussed earlier in this decision. There is little in this record to support the position that eastbound automobiles would not move except for unusually low rates.

After concluding that the average profit per automobile is $34.32, Hearing Counsel state the following:

> "Although a $34.32 profit per automobile might not be unreasonable in the abstract, it is important to consider the economic impact that the 3 percent increase will have on the sale of U.S. automobiles in Hawaii." (Opening Brief of Hearing Counsel, p. 39)

As Matson points out, the record discloses a relatively minimal impact of the automobile increase on sales of U.S. automobiles in Hawaii. The fluctuations in sales during the period in question were far more dependent upon general economic conditions and the availability of gasoline (see Exhibits C–26, C–27 and C–28)than upon freight rates.

We conlude, therefore, that the increases in rates on automobiles which are the subject of Docket No. 74–36 (Sub. No. 1) have not been shown to be unreasonably high.

Whether the rates are unreasonably low, as argued by the State of Hawaii is a question that we will not decide in this case. We are not persuaded by the evidence and arguments presented by the State that the matter should be addressed in this proceeding. The State apparently miscalculated expenses attributable to automobiles resulting in an overstatement of such expenses. Furthermore, we are influenced in this action by the fact that the attorneys for the State of Hawaii are arguing a position that is founded primarily in policy when the State itself has not yet formulated a policy with respect to this issue.[14] Resolution of this

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[13] See *e.g.* Docket No. 71–18 *supra*

[14] See *e.g.* T.R. 1180

matter would be better left to a complaint proceeding under section 22 of the Act if the State wishes to pursue its position.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is adopted, as modified and clarified herein, and made a part hereof.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

APPENDIX A

MATSON NAVIGATION COMPANY
PACIFIC COAST-HAWAII SERVICE
ADJUSTED INCOME STATEMENT—RATE BASE—RATE OF RETURN
REVISED CONSTRUCTIVE CALENDAR YEAR 1975*

(Dollars in Thousands)

Line No.	Item	Matson Ex. C–I2	Adjustment	Adjusted Amount
(1)	(2)	(3)	(4)	(5)
	Income Statement			
1	Operating Revenue	143.547	—	143,547
2	Vessel Operating Expense	94,142	—	94,142
3	Gross Profit	49,405	—	49,405
4	Administrative & General Expense	9,265	—	9,265
5	Other Shipping Operations Expense	21,116	—	21,116
6	Inactive Vessel Expense	342	—	342
7	Depreciation & Amortization Expense	7,677	—	7,677
8	Total—Other Expense	38,400	—	38,400
9	Net Income Before Provision for State and Federal Income Tax	11,005	—	11,005
10	State and Federal Income Tax	4,639	(60)	4,579
11	Net Income	6,366	60	6,426
	Rate Base			
12	Vessels	40.562	—	40,562
13	Other Owned Property and Equipment	17,580	—	17,580
14	Net Working Capital	5.303	—	5,303
15	Assets of Related Companies	14,238	—	14,238
16	Elimination of Deferred Income Taxes	—	(5.515)	(5,515)
17	Total Rate Base	77,683	(5.515)	72,168

* See notes for source of figures and explanation of adjustments

18	Amount of Debt	18.636	1.369	20.005
19	Amount of Equity	59.047	(6.884)	52.163
	Rate of Return on Rate Base			
20	Return on Debt—Amount	1.603		1.720
21	Return on Equity—Amount	4.763		4.706
22	Return on Debt—Percent	8.60%		8.60%

23	Return on Equity—Percent	8.06%	9.02%
24	Overall Rate of Return	8.19%	8.90%

NOTES

Line No.	
1	Matson Schedule I. (Ex C–12).
2	Matson Schedule II. (Ex. C–12).
3	Line 1 minus Line 3.
4	Matson Schedule III. (Ex. C–12).
5	Matson Schedule IV. (Ex. C–12).
6	Matson Schedule V. (Ex. C–12).
7	Matson Schedule VI. (Ex. C–12).
8	Sum of Lines 4 through 8.
9	Line 3 minus Line 8.
10	Tax calculated at 41.61% per adjusted Matson Schedule VII.

ADJUSTED MATSON SCHEDULE VII AFTER REMOVAL*
OF $15,000,000 LOAN TO ALEXANDER AND BALDWIN
AND USING ADJUSTED RATE BASE CALCULATION

1. Net Income before Taxes (The Service)	(Schedule VII Ex. C–12)			11,005
$ Deduct Interest Expense:				
2. Total Interest Expense	(Schedule VII Ex. C–12)			2,359 (3)
Debt/Equity Ratio:	(Schedule VII Ex. C–12)			
3. Long-Term Debt @Jan. 1, 1975	26,728 (2)	27.72%	After the $15,000,000 loan to Alexander & Baldwin has been removed from equity.	
4. Equity @Jan. 1, 1975	69,682	72.28%		
5. Total	96,410	100.00%		
Capital Employed:				
6. Debt (.2772 × 72,168)	20,005 (1)			
7. Equity (.7228 × 72,168)	52,163			
8. Total	72,168			
9. Interest Expense $\frac{20{,}005\ (1)}{26{,}728\ (2)}$	× 2,359 (3)	1,766		
10. Taxable Income for State Taxes (Item 1 minus Item 9)				9,239
11. State Tax Rate (Ex. C–12)				3%
12. State Tax Provision (Item 10 multiplied by Item 11)				277
13. Taxable Income for Federal Taxes (Item 10 minus Item 12)				8,962
14. Federal Tax Rate (Ex. C–12)				48%
15. Federal Tax Provision (Ex. C–12)				4,302
16. Combined State and Federal Tax Provision (Item 12 plus Item 15)				4,579
17. Effective Tax Rate (Item 16 divided by Item 1)				41.61%

* Matson agreed with Hearing Counsel and the State of Hawaii that the $15,000,000 loan to A & B should be excluded from Matson's capital structure. See Reply Brief of Respondent, p. 21.

Line No.	
11	Line 9 minus Line 10.
12	Matson Schedule VIII (Ex. C–12).
13	Matson Schedule VIII (Ex. C–12).
14	Matson Schedule IX (Ex. C–12).
15	Matson Schedule X (Ex. C–12).
16	Deferred income taxes of $6.844 million are included in Matson's Balance Sheet for July 1, 1975 (Ex. C–23). The following methodology was employed to remove a portion of these deferred taxes from the rate base: Matson's rate base before elimination of deferred income taxes (the sum of Lines 12, 13, 14 and 15, page 1 of Appendix A) was divided by the total capital in Matson Navigation Company (Line 5, Page 3 of Appendix A). This quotient was then multiplied by the amount of deferred income taxes [$77.683 million divided by $96.410 million × $6.844 million = $5.515 million].
17	Sum of Lines 12 through 16.
18	Matson Schedule VII Ex. C–12 adjusted to the new debt equity ratio and rate base [.2772 (Line 3, Page 3 of Appendix A) multiplied by $72.168 million (Line 8, Page 3 of Appendix A) = $20.005 million].
19	Capital employed in the Service is .7228 (Line 4, Page 3 of Appendix A) multiplied by 72.168 million (Line 8, Page 3 of Appendix A) equals $52.163 million.
20	Line 22 multiplied by Line 18.
21	Line 11 minus Line 20.
22	Line 20 divided by line 18.
23	Line 21 divided by Line 19.
24	Line 11 divided by Line 17.

APPENDIX B

MATSON NAVIGATION COMPANY
PACIFIC COAST-HAWAII SERVICE
ADJUSTED INCOME STATEMENT—RATE BASE—RATE OF RETURN
CONSTRUCTIVE YEAR JULY 1, 1975—JUNE 30, 1976*

(Dollars in Thousands)

Line No.	Item	Matson Ex. C–16	Adjust-ment	Adjusted Amount
(1)	(2)	(3)	(4)	(5)
	Income Statement			
1	Operating Revenue	136,578	—	136,578
2	Vessel Operating Expense	87,810	—	87,810
3	Gross Profit	48,768	—	48,768
4	Administrative & General Expense	9,487	—	9,487
5	Other Shipping Operations Expense	22,793	—	22,793
6	Inactive Vessel Expense	374	—	374
7	Depreciation & Amortization Expense	6,581	—	6,581
8	Total—Other Expense	39,235	—	39,235
9	Net Income Before Provision for State and Federal Income Tax	9,533	—	9,533
10	State and Federal Income Tax	3,969	(56)	3,913

11	Net Income	5,564	56	5,620
	Rate Base			
12	Vessels	39,315	—	39,315
13	Other Owned Property and Equipment	16,865	—	16,865
14	Net Working Capital	5,039	—	5,039
15	Assets of Related Companies	15,373	—	15,373
16	Elimination of Deferred Income Taxes	—	(5,431)	(5,431)
17	Total Rate Base	76,592	(5,431)	71,161

* See notes for source of figures and explanation of adjustments.

18	Amount of Debt	17,877	1,315	19,192
19	Amount of Equity	58,715	(5,746)	51,969
	Rate of Return on Rate Base			
20	Return on Debt—Amount	1,486		1,595
21	Return on Equity—Amount	4,077		4,025
22	Return on Debt—Percent	8.31%		8.31%
23	Return on Equity—Percent	6.94%		7.75%
24	Overall Rate of Return	7.26%		7.90%

NOTES

Line No

1 Matson Schedule I (Ex. C–16).
2 Matson Schedule II (Ex. C–16).
3 Line 1 minus Line 3.
4 Matson Schedule III (Ex. C–16).
5 Matson Schedule IV (Ex. C–16).
6 Matson Schedule V (Ex. C–16).
7 Matson Schedule VI (Ex. C–16).
8 Sum of lines 4 through 7.
9 Line 3 minus line 8.
10 (A) Taxes have been recomputed at a 41.63 percent of effective rate for Matson's Schedule VII (Ex. C–16) because of the rate base revision on Page 1 of Ex. C–16.

Matson Schedule VII As Corrected In View Of
Revision No. 1 to Ex. C–16 (Line 10)

1. Net Income before Taxes (The Service)	(Schedule VII Ex. C–16)		9,533
Deduct Interest Expense:			
2. Total Interest Expense	(Schedule VII Ex. C–16)		2,220 (3)
Debt/Equity Ratio:			
3. Long-Term Debt @July 1, 1975	26,028 (2)	23.34%	Schedule VII, Ex. C–16
4. Equity @July 1, 1975	85,479	76.66%	
5. Total	111,507	100.00%	
Capital Employed:			
6. Debt (.2334 × 76,592)	17,877 (1)		
7. Equity (.7666 × 76,592)	58,715		
8. Total	76,592	as shown on Page 1 of Ex. C–16.	
9. Interest Expense 17,877 (1) / 26,028 (2)	× 2,220 (3)		1,525

10. Taxable Income for State Taxes (Item 1 minus Item 9)			8,008
11. State Tax Rate (Ex. C–16)			3%
12. State Tax Provision (Item 10 multiplied by Item 11)			240
13. Taxable Income for Federal Taxes (Item 10 minus Item 12)			7,768
14. Federal Tax Rate (Ex. C–16)			48%
15. Federal Tax Provision (Item 13 multiplied by Item 14)			3,729
16. Combined State and Federal Tax Provision (Item 12 plus Item 15)			3,969
17. Effective Tax Rate (Item 16 divided by Item 1)			41.63%

10 (B) Taxes for adjusted rate base have been calculated at a 41.05 percent effective rate due to changes in net income before taxes and the capital structure.

Matson Schedule VII As Adjusted

1. Net Income before Taxes (The Service) as shown on Line 9, Page 1 of Appendix B			9,533
Deduct Interest Expense:			
2. Total Interest Expense	(Schedule VII Ex. C–16)		2,220 (3)
Debt/Equity Ratio:	(Schedule VII Ex. C–16)		
3. Long-Term Debt @ July 1, 1975	26,028 (2)	26.97%	After the $15,000,000 loan to Alexander & Baldwin has been removed from equity.
4. Equity @ July 1, 1975	70,479	73.03%	
5. Total	96,507	100.00%	
Capital Employed:			
6. Debt (.2697 × 71,161)	19,192 (1)		
7. Equity (.7303 × 71,161)	51,969		
8. Total	71,161	as shown on Line 17, Page 1 of Appendix B.	
9. Interest Expense $\frac{19{,}192\ (1)}{26{,}028\ (2)} \times 2{,}220\ (3)$			1,637
10. Taxable Income for State Taxes (Item 1 minus Item 9)			7,896
11. State Tax Rate (Ex. C–16)			3%
12. State Tax Provision (Item 10 multiplied by Item 11)			237
13. Taxable Income for Federal Taxes (Item 10 minus Item 12)			7,659
14. Federal Tax Rate (Ex. C–16)			48%
15. Federal Tax Provision (Item 13 multiplied by Item 14)			3,676
16. Combined State and Federal Tax Provision (Item 12 plus Item 15)			3,913
17. Effective Tax Rate (Item 16 divided by Item 1)			41.05%

11 Line 9 minus Line 10.
12 Matson Schedule VIII (Ex. C–16).
13 Matson Schedule VIII (Ex. C–16).
14 Matson Schedule IX (Ex. C–16).

15 Matson Schedule X (Ex. C–16).

16 Deferred income taxes of $6.844 million are included in Matson's Balance Sheet for July 1, 1975 (Ex. C–23). The following methodology was used to compute the amount of these taxes which should be removed from Matson's rate base:

First, Matson's rate base before elimination of deferred income taxes (the sum of Lines 12, 13, 14, and 15, Page 1 of Appendix B) was divided by the total capital in Matson Navigation Company (Line 5, Page 4 of Appendix B)—$\frac{76,592}{96,507} = 79.36\%$.

Second, this percentage was multiplied by the amount of deferred income taxes to arrive at the correct amount to be subtracted from the rate base. (TR. 2107) This methodology arrives at the following amount of deferred income taxes to be deducted from rate base: .7936 × $6.844 million = $5.431 million.

17 Sum of Lines 12 through 16.

18 Matson Schedule VII, corrected to conform to Matson's rate base in Revision No. 1, Ex. C–16, and recomputed capital structure and rate base. Debt employed in the Service is .2697 (Line 3, Page 4 of Appendix B) multiplied by $71.161 million (Line 8, Page 4 of Appendix B) equals $19.192 million.

19 Capital employed in the Service is .7303 (Line 4, Page 4 of Appendix B) multiplied by $71,161 million (Line 8, Page 4 of Appendix B) equals $51,969 million.

20 Line 22 multiplied by Line 18.

21 Line 11 minus Line 20.

22 Line 20 divided by Line 18.

23 Line 21 divided by Line 19.

24 Line 11 divided by Line 17.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 527

FORD FRANCE, S.A.

v.

SEA-LAND SERVICE, INC.

November 29, 1977

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land has requested permission to waive collection on a portion of the freight charges on four shipments of "Tractors, truck" from Elizabeth, New Jersey, to Antwerp, Belgium. The shipments weighing 157,543 lbs. and measuring 18,870 cu. ft. were shipped under bills of lading variously dated January 1, 1977, and February 4, 10 and 19, 1977. The rate applicable at the time of shipment was $100.25 WM or $74.75 WM depending upon the date of the particular shipment and the aggregate freight charges which would have been collected were $48,934.63.[2] The rate sought to be applied is $1,425.00 lump sum per tractor under which the aggregate freight charges would be $14,250.00. Permission is sought to waive the collection of $34,684.63.

As stated in the application the circumstances which warrant the waiver are:

> On January 14, 1977, the Ford Export Corp. requested Sea-Land to publish in the open rate section of the N A.C.F.C. Tariff No 29, FMC–4, a rate on Tractors, Truck (Model LTS 900 LWH $^{25}/_{6} \times {}^{7}/_{11} \times {}^{9}/_{0}$ – 102999 lbs.). Lump sum $1,425.00 per tractor. This rate was filed by telex effective January 19, 1977, on 25th Revised page 188–D, N.A.C F C. Tariff No. 29, FMC–4 (Exhibit 2).
>
> Subsequent to this filing respondent was notified by Ford that Sea-Land filed the incorrect specifications in the rate item. In actuality, the model tractor was Model LTS 9000 (not LTS 900) LWH $^{25}/_{6} \times {}^{8}/_{0} \times {}^{9}/_{3}$ – 14065 lbs. This amendment was filed on 27th revised page 288–D, N.A.C.F.C. Tariff No. 29, FMC–4. (Exhibit 3)

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502 227)

[2] Actually no freight was collected since consignee asserted that due to foreign exchange currency regulations they were unable to pay until an invoice on the agreed amount of freight charges was presented

> Consignee has not paid any of the freight charges. They advise that due to foreign exchange control regulations, they are unable to pay until an invoice is issued in the amount of the agreed upon freight charges. If this waiver is granted, the corrected invoice can be prepared and collection obtained.
>
> The clerical error in publishing the specifications for the model LTS–900 rather than the specifications for the model LTS–9000 was not discovered until the shipment had commenced. The mistake was corrected on February 23, 1977 and subsequent shipments moved at the lump sum rate.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver should be based . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was a clerical error which resulted in rejection of the rate sought.
2. The waiver requested will not result in discrimination among shippers.
3. Prior to applying for the waiver a new tariff was filed setting for the rate on which the waiver was based.
4. The application was filed within 180 days from the date of shipment.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
November 29, 1977.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 527

FORD FRANCE S.A.

v.

SEA-LAND SERVICE, INC.

ORDER

July 3, 1978

In the Initial Decision served in this proceeding, Chief Administrative Law Judge John E. Cograve granted Sea-Land Service, Inc. permission to waive collection of $34,684.64 of the $48,924.63 assessed on four shipments of "tractors, truck" from Elizabeth, New Jersey to Antwerp Belgium. Before the time for filing exceptions had expired, Sea-Land petitioned for a reopening of the proceeding to permit the filing of a supplementary bill for heavy lift charges amounting to $967.32, erroneously omitted in the request for a waiver.

It appears that heavy lift charges were computed in the freight bills on three of the four shipments involved which were the subject of the application but were billed separately on the fourth shipment. Inasmuch as the request for a waiver extends to the freight charges assessed on that shipment and heavy lift is now included in the rate found to be applicable, the supplemental bill is accepted into the record, as requested by Sea-Land. The Initial Decision is hereby amended to increase the amount of the waiver from $34.684.63 to $35.661.15.

It is ordered.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 429(F)

NATIONAL STARCH & CHEMICAL CORP.

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF DETERMINATION NOT TO REVIEW

June 28, 1978

Notice is hereby given that the Commission on June 28, 1978, determined not to review the Supplemental Decision of the Presiding Judge in this proceeding.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 429 (F)

NATIONAL STARCH & CHEMICAL CORP.

v.

LYKES BROS. STEAMSHIP CO., INC.

Recovery for alleged overcharges denied.

Henry G. Kavanagh, Traffic Director, National Starch and Chemical Corporation, for Complainant.

Brian M. Dolan and *David W. Gunther,* Assistant to the Manager and Manager, respectively—Traffic Legislative and Regulatory Affairs, Lykes Bros. Stamship Co., Inc., for Respondent Carrier.

SUPPLEMENTAL[1] DECISION[2] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Background

The complaint in this proceeding sought to have the matter proceed under Subpart S—Informal Procedure for Adjudication of Small Claims, Rule 301 of the Commission's Rules of Practice and Procedure, 46 CFR 502.301. The complaint herein, received in the Commission on August 12, 1977, was filed timely. Pursuant to Rule 301 the case was assigned on August 17, 1977, to a Settlement Officer. The respondent, however, in a letter dated September 16, 1977, as well as in its answer to the complaint, elected not to consent to proceed under Rule 301, therefore this proceeding is pursuant to Subpart T—Formal Procedure for Adjudication of Small Claims, 46 CFR 502.311. The case was assigned on September 30, 1977, to the Presiding Administrative Law Judge, who on December 7, 1977, served his Initial Decision herein.

On December 27, 1977, the Commission served notice that on December 22, 1977, it determined to review the Initial Decision..On April 17, 1978, the Commission served its Order on Remand, in which it vacated the December 7, 1977, Initial Decision and directed the Presiding

[1] Supplemental Decision was directed to be issued by Commission's April 17, 1978, Order on Remand.

[2] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 318, Rules of Practice and Procedure, 46 CFR 502.318)

Administrative Law Judge to issue, within 45 days from April 17, 1978, a Supplemental Decision.

On April 18, 1978, the Presiding Administrative Law Judge served an Order for Procedural Schedule to Implement the Commission's Order on Remand, directing, *inter alia,* (1) Complainant to file on or before May 2, 1978, all facts supported by documents or affidavits and briefs it deems necessary to prove and corroborate the product shipped herein; (2) Carrier to file on or before May 15, 1978, any reply to Complainant's case with facts supported by documents or affidavits and briefs deemed necessary and (3) Complainant to file on or before May 22, 1978, a closing brief in response to Carrier's brief. The Complainant and Respondent complied with (1) and (2) respectively. No closing brief was received from the Complainant.

The Carrier's Bill of Lading No. 28 is dated September 26, 1975, at New Orleans, Louisiana, for the transportation on the Carrier's vessel *Thompson Lykes* from New Orleans to Guayaquil, Ecuador:

1000 bags Cornstarch =		
101,000 lbs. (2,125 cft) at $67.50/2000 lbs.	=	$3,408.75
Bunker Surcharge at $8.25/2000 lbs.	=	416.63
Congestion Surcharge at $6.00/2000 lbs.	=	303.00
		$4,128.38
Tolls		36.78
		$4,165.16

(There is no dispute as to this commodity and the freight charge for it.) 40 Drums: Liquid Synthetic Plastics N.0.1 (Catalyst B–29–9732) of a gross weight of 21,600 lbs. (467 cu. ft).

The applicable tariff herein is Atlantic and Gulf/West Coast of South America Conference (Agreement No. 2744), South Bound Freight Tariff No. 12, FMC No. 1. The Carrier applied Tariff Item 999, page 137, Class 1 at $135.75/40 cu. ft. (467 cu. ft. ÷ 40 = 11.675; $135.75 × 11.675 = $1,584.88; bunker surcharge at $8.25/40 cu. ft. = $96.32; congestion charge at $6.00/40 cu. ft. = $70.05 for a total charge of $1,751.25).

The Complainant contends the 40 drums should have been rated under Tariff Item 740, 36th Rev. Page 116, Resins, Synthetic; Non-hazardous, N.O.S. in other packing under Group 1 contract rate at $62.00/40cu. ft. and that the charge should have been $890.22 ($62.00 × 11.675 = $723.85; Bunker Surcharge $96.32; Congestion Surcharge $70.05—total $890.22). The $890.22 subtracted from the $1,751.25 leaves $861.03 which Complainant alleges is overpayment and for which recovery is sought.

In support of its claim, the Complainant alleged and attached to the complaint a copy of an overcharge claim made for it under date of August 2, 1976, No. 450221, by its consultant to the Respondent. Also attached was a letter from the complainant dated July 15, 1976, to its consultant stating, *inter alia,* "The complete description for Catalyst B (29–9732) is

Resin, Synthetic; Non-Hazardous, (Acetone Formaldehyde Condensation Polymer) in drums." The Commission in its April 17, 1978, Order on Remand indicated it was ". . . to provide Complainant further opportunity to introduce corroborating evidence in support of its claim. . . ." In a letter dated April 27, 1978, postmarked Somerville, N.J., April 28, 1978, Certified Mail No. 800943 (received May 2, 1978), the Complainant stated:

> . . . As corroborating evidence in support of our position that material shipped were in fact a synthetic resin, *we offer the following:*
>
> (a) U. S. Department of Labor, OSHA Material Safety Data Sheet submitted by my company for "Catalyst B" indicating that this is a ketone aldehyde *"thermosetting resin."*
>
> (b) A copy of a page from Van Norstrand Reinhold Company issue of The Condensed Chemical Dictionary covering "resins, synthetics."[3] Please note the "see also plastic" reference as well as specific reference to "resins are broadly classified as thermosetting."
>
> (c) A notarized statement by our Mr. R. H. Williams, Product Development Manager for Industrial Chemicals certifying the product in question to be a "synthetic resin."

The Respondent by letter dated May 12, 1978 (received May 15, 1978), replied to the Complainant's corroborating evidence, attaching from the 8th revised Van Norstrand Reinhold Company (Hawley's) issue of the Condensed Chemical Dictionary a copy of the definition of "resin, synthetic."[4] Attached also was a copy of the "illegible Export Declaration" Complainant sent to respondent in response to request for production of documents. Respondent asserts the Schedule B number allegedly used by the Complainant did not exist at the time of shipment. Respondent asserts it has not received catalogs, brochures, specifications, plans, drawings, memoranda, correspondence or other documents it requested describing each component of the shipment. Further, the Respondent reiterates its position that the Complainant was correctly charged on the shipment in question.

Discussion

The Carrier admits it is a common carrier engaged in transportation by water from ports in the United States to Ports in Ecuador and as such subject to the provisions of the Shipping Act of 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended.

There is no dispute as to the charges totalling $4,164.16 for the transportation of the 1000 bags of cornstarch on the Carrier's Bill of

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[3] 7th Edition edited by Arthur and Elizabeth Rose published 1966.

resins synthetic (See also plastic.) Amorphous, organic semisolid or solid materials produced by polymerization. The term synthetic resin is also sometimes applied to *chemically modified natural resins. Resins are broadly classified* as thermoplastic or thermosetting according as they soften or harden with application of heat

[4] 8th Edition, published 1971

resin, synthetic A man-made high polymer (q.v.) resulting from a chemical reaction between two (or more) substances, usually with heat or a catalyst. This definition includes synthetic rubbers, siloxanes, and silicones, but excludes modified, water-soluble polymers (often called resins). Distinction should be made between a synthetic resin and a plastic (q.v.) the former is the polymer itself, whereas the latter is the polymer plus such additives as fillers, colorants, plasticizers, etc

Lading No. 28. The dispute is as to the 40 drums described on Bill of Lading No. 28 as Liquid Synthetic Plastics N01 (Catalyst B-29-9782) and the $1,751.25 charge for its transportation from New Orleans, Louisiana, to Guayaquil, Ecuador. The total charge on B/L 28 is $5,916.41 from which is subtracted the undisputed charges of $4,165.16 leaving balance of $1,751.25. According to the complainant the 40 drums should have been rated under Tariff Item 740, Synthetic Resin, Non-Hazardous NOS at a rate of $62.00/40 cu. ft. thus:

467 cft at 62.00/40 cft	$723.85
Bunker sucharge (same as on B/L 28)	96.32
Congestion surcharge (same as on B/L 28)	70.05
	$890.22

The $890.22 subtracted from the $1,751.25 results in the $861.03 which the complainant alleges to have been overcharged.

Tariff Item 740, 36th Rev. page 116 of the applicable tariff herein, Atlantic and Gulf/West Coast of South America Conference (Agreement No. 2744), South Bound Freight Tariff No. 12, FMC No. 1, effective March 31, 1975, was in effect September 26, 1975, the date of shipment of freight in question. Tariff Item 740 reads, Resins, Synthetic; non-hazardous N.O.S. in other packing under Group 1 contract rate $61.00/40 cft. After NOS is (See Note 1). Note 1 reads, "For classification and rating under this item shipper must describe on the Bill of Lading the specific Resin(s) being shipped; failing such specific description Resin(s) by such Bill of Lading shall be rated as Cargo N.O.S. Class 1." The Carrier says that as to the drums Tariff Item 999, page 137, Class 1 is proper at $135.75/40 cu. ft. and that is what the Carrier applied.

As the Commission pointed out in its April 17, 1978, Order on Remand no evidence was introduced in support of the statement in the Complainant's letter of September 16, 1976, addressed to Complainant's consultant which described the Catalyst B shipped as a "Resin, Synthetic, non-hazardous, (Acetone Formaldehyde Condensation Polymer)." In response to the further opportunity given by the April 17, 1978, Order on Remand to introduce corroborating evidence in support of its claim, the Complainant introduced the definition of "resins, synthetic" from the 1966 Condensed Chemical Dictionary, to which the Respondent replied with introducing the 1971 edition of the said dictionary of "resins, synthetic" (both are footnoted above). The later edition points out the differences.

The Presiding Administrative Law Judge *finds and concludes* that the shipper has not provided the corroborating evidence demanded by the April 17, 1978, Order on Remand. He also finds and concludes that the Carrier properly rated the freight under the tariff and has not violated the Shipping Act

Upon consideration of the entire record in this proceeding, and in appraisal thereof, the Presiding Administrative Law Judge *finds and concludes,* in addition to the findings and conclusions heretofore stated:

(1) The Carrier has not violated the Shipping Act.

(2) There has been no overcharge.

(3) Recovery for alleged overcharges should be denied.

(4) The claim should be dismissed and this proceeding discontinued.

Wherefore, it is ordered:

(A) The claim for recovery of alleged overcharges be and hereby is denied.

(B) The claim is dismissed and this proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
May 30, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69–57

AGREEMENT NO. T–2336—NEW YORK SHIPPING ASSOCIATION COOPERATIVE WORKING ARRANGEMENT

NOTICE CONCERNING SATISFACTION OF REMAINING VALID CLAIMS AND DISCONTINUANCE OF PROCEEDING

July 5, 1978

On April 3, 1978 we issued an order in this proceeding in which we determined the amount and directed satisfaction within 60 days of the remaining valid claims for assessment adjustments stemming from over-assessments made by the New York Shipping Association (NYSA) in funding benefits under a collective bargaining agreement between NYSA and the International Longshoremen's Association, AFL–CIO.

On June 2, 1978 NYSA notified the Commission of the manner in which it had satisfied the claims and requested that we find such satisfaction to be in compliance with our April 3rd order.[1]

NYSA has extended credits for the full amount of each claim on cargo loaded and/or discharged on or after June 2, 1978. Such credits are made subject to immediate refund with interest at the rate of 6 percent per annum computed from the date such credits or portions thereof were applied, in the event there is a final judicial determination reversing and setting aside our April 3rd order. We find that the granting of credits for the claims in question brings NYSA into substantial compliance with that order at the present time.

We have already approved credits as a proper means of satisfying the remaining claims (see April 3rd order, page 21), and we see nothing wrong with NYSA's making the credits effective as of June 2, 1977. It is clear that NYSA chose that date, as the 60th day after service of the April 3rd order, for the proper purpose of avoiding the payment of interest on the remaining claims. (See April 3rd order, pages 24–26.) NYSA adopted a similar course of making credits effective 60 days after service of our order directing satisfaction of the claims of the States Marine Group herein which we have already found to be in compliance

[1] In proceeding with satisfaction of the claims, NYSA has preserved its right to challenge our April 3rd order directing such satisfaction, review of which is now pending before the Court of Appeals for the District of Columbia Circuit

with that order. (See "Notice Concerning Satisfaction of States Marine Group's Claim," served November 18, 1977, pages 4–5.)

We have two reservations with respect to NYSA's satisfaction of the remaining claims, which are the same as those we had with respect to the satisfaction of some of the claims of the States Marine Group.

First of all, NYSA has sought to attach a condition to grant of the credits in question that interest shall be payable thereon in the event of judicial reversal of the Commission's April 3rd order. The question whether interest should be charged under these circumstances and, if so, as of what date, is a matter which should be judged in the light of facts and circumstances as they appear when final judicial resolution of the question of NYSA's liability for the assessment adjustments directed in our April 3rd order herein is made. Determinations with respect to liability, if any, for interest may vary depending upon the time when they are made.[2] Accordingly, we do not approve the provision with respect to interest payable by claimants to NYSA, but will await the termination of judicial review to examine the matter of interest which the remaining claimants could conceivably owe NYSA as a result of findings adverse to the Commission on such review as it appears after such review.

Secondly, we are unable to hold definitively at the present time that credits will continue to be a proper and sufficient means for satisfying the remaining claims since, if at some future time some of the claimants cease operations at the Port of New York, cash payments might be necessary to satisfy the remainder of their claims.

At the present time, however, we find NYSA to be in substantial compliance with our April 3, 1978 order herein directing satisfaction of the remaining valid claims.

Since all necessary adjustments have now been made with respect to the assessments which are the subject matter of this proceeding, no reason remains to continue it any longer. If the method of satisfaction of the claims here recognized as proper at the present time becomes improper, because a claimant ceases operations at the Port, or if it becomes necessary to consider the question of interest possibly due NYSA with respect to the claims, this proceeding can and will be reopened. For the present, however, our task here is completed. *Therefore, It is Ordered, That this proceeding be, and it hereby is, discontinued.*

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[2] See, e.g., our denials of pre-order interest herein but grant of post-order interest to run after 60 days of service of orders for unsatisfied claims.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 449(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 450(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 451(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 452(I)

MECHANICAL PLASTICS CORP.

v.

DART CONTAINER LINE, INC.

INFORMAL DOCKET NO. 453(I)

MECHANICAL PLASTICS CORP.

v.

ATLANTIC CONTAINER LINE LTD.

INFORMAL DOCKET NO. 454(I)

MECHANICAL PLASTICS CORP.

v.

ATLANTIC CONTAINER LLINE LTD.

INFORMAL DOCKET NO. 455(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 456(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 457(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

INFORMAL DOCKET NO. 458(I)

MECHANICAL PLASTICS CORP.

v.

AMERICAN EXPORT LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

Notice is hereby given that the Commission, on July 5, 1978, determined not to review the decision of the Settlement Officer served June 23, 1978 subject to the corrections set forth below.

In Informal Docket No. 456(I) the rating factor should be 1.351 mt; the applicable freight charges should be $262.63; and the overcharge should be $126.73. The total overcharges set out on page 12 should be $2,537.08 and the amount of reparation due from American Export Lines, Inc. (page 13) should be $126.73 for 456(I) and the total reparation should be $1,808.99.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

Reparation awarded in part.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

By 10 complaints filed on September 30, 1977, Mechanical Plastics Corp. (complainant)[2] alleges that for the period from September 26, 1975 to October 30, 1975, American Export Lines, Inc. (7 claims), Dart Containerline, Incorporated (1 claim), and Atlantic Container Line Ltd. (2 claims) handled 10 shipments of plastic fasteners from New York, New York to ports as covered herein on the Continent, Baltic and Mediterranean. It could be inferred that any claim filed covering shipments moving under bills of lading dated after September 30, 1975, was not filed within the two-year statutory limit set in Section 22 of the Shipping Act, 1916. However, reference is made to the Commission's Order on Remand in Docket No. 76–1, *CSC International, Inc.* v. *Orient Overseas Container Line, Inc.*, served July 12, 1976, wherein it held:

> "The law is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. *Aleutian Homes, Inc.* v. *Coastwise Line, et al*, 5 F.M.B. 602, 611 (1959); *United States of America* v. *Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971); *U.S. ex rel Louisville Cement Company* v. *I.C.C.* 296 U.S. 638, 644 (1917). . . ."

Complainant's customer overseas, Hilti A.G. has submitted documentation indicating that the subject ocean freight bill payments were made to the respondents between October 14, 1975 and April 5, 1976. Therefore, the claims were filed within the two-year statutory limit of Section 22 of the Act.

On September 20, 1976, respondent American Export Lines, Inc., advised claimant's agent that the tariffs involved in the seven claims submitted to it all provided under their rules that any claims presented to the carrier alleging overcharges based on measurements, must be presented in time for the carrier to remeasure the cargo either at the port of loading or upon discharge from the vessel at destination.[3] As respondent was unable to measure the cargo it advised that it could not adjust the seven claims. On September 24, 1976, Atlantic Container Line gave the same response to complainant's agent. On August 24, 1977, (referring to an earlier letter of September 29, 1976) Dart Containerline gave the same

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[1] All parties having consented to the informal procedure of Rule 19(a) of the Commissions Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Determination not to review July 5, 1978.)

[2] *Mechanical Plastics Corp. is the complainant herein even though the shipments moved freight collect.* The consignees were Hilti A.G. customers organizations located in Europe. Hilti A.G. paid the collect charges and assigned the overcharge claims to Mechanical Plastics. Hilti A.G. authorized Mechanical Plastics Corp. to file these claims with the Commission.

[3] With respect to such a rule the Commission, in its report on remand served November 24, 1976, in *Kraft Foods v. Moore McCormack Lines, Inc.*, negated its application with respect to claims before the Commission stating in part: *In effect the Rule set up as a period of limitation*, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. . . ."

response to complainant's agent. Complainant has a heavy burden of proof once the shipment has left the custody of the carrier.[4]

While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be Section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of shipment.

The claims are all the result of complainant's agent's excess volume declarations on the bills of lading. The computation of the correct cubic measurements are simplified due to the fact that complainant only ships three carton sizes in ocean foreign commerce. Below are my computations using the measurement rules of the governing tariffs:

Small 14#	$21\frac{3}{4} \times 12\frac{1}{2} \times 8$	
	$22 \times 13 \times 8 = \frac{2,228}{1,728}$	= 1.324hcft ctn
Medium 20#	$27\frac{1}{2} \times 12\frac{1}{2} \times 10 = \frac{3,510}{1,728}$	= 2.031 cft ctn
	$27 \times 13 \times 10$	
Large 24#	$30 \times 12\frac{1}{2} \times 11\frac{1}{2}$	
	$30 \times 12 \times 12 = \frac{4,320}{1,728}$	= 2.5 cft ctn

As will be shown herein approximately double the above cubic foot measurements were used on the bills of lading and in computing the freight charges. Complainant has submitted a packing list on each shipment which indicates how many cartons of each of the above sizes were shipped to each consignee. Each list covers one shipment moved on the bill of lading which is the subject of each claim.

A second matter to be resolved is the conversion of currency. Complainant's (Hilti A.G.) customers marketing organizations were overcharged in the currency of the country of destination, e.g. Portugal (Escudo), Germany (Deutsche Mark), France (Frank), etc. In computing the balance due from complainant, Hilti A.G. converted the foreign currency to the Swiss franc on the date the freight charges were paid (between October 14, 1975 and April 5, 1976). However, in debiting complainant's account Hilti A.G. further converted the Swiss franc to the United States dollar on March 21, 1976 using an exchange rate of $0.4054 per Swiss franc. A total balance due of $3,742.70 was computed. However, this was an overstatement in that it covered two shipments on which claims were not filed. One involved a shipment to France involving an overcharge of 362.50 Swiss francs. The other involved a shipment to Finland involving an overcharge of 192.80 Swiss francs. These two shipments on which no claims were filed must be converted to U.S. dollars and subtracted from the above balance due. 362.50 plus 192.80 = 555.30 Swiss francs at the conversion rate of $0.4054 (as used by Hilti,

[4] *Colgate Palmolive Co. v. United Fruit Co.*, Docket No. 115(I), September 30, 1970.

A.G.) per Swiss franc totals $225.12. Subtracting this from the above balance due amends same to $3,517.58.

In my currency computations conversion of the foreign currency was made directly to the United States dollar at the exchange rate in effect, in the New York market, on the date of payment of the freight charges (between October 14, 1975 and April 5, 1976). My computations result in a balance due of $2,541.94. Complainant has agreed to the use of my currency exchange computations. My computations of $2,541.94 balance due covers the amount complainant was overcharged by respondents. The difference between Hilti A.G.'s total deduction from complainant's account of $3,742.70 and $2,541.94 reparation due from respondents is a matter between complainant and Hilti, A.G.

The product shipped is described on the bills of ladings as "Plastic Togglers." The product is completely made of plastic. Advertising material submitted by complainant gives insight into the uses for the product and what it is.

> "*THE NEW PLASTIC ANCHOR SHOWS WHAT IT CAN DO*"
>
> "Application
> For light-duty fastening in non-loadbearing partition walls such as plasterboard, gypum board (Drywall), asbestos sheeting, woodwool panels or in hollow or cavity brick, concrete blocks, hollow filler tiles, acoustic ceilings and other lightweight materials.
>
> "Trades
> For all tradesmen, craftsmen and workmen, especially electricians, joiners, cabinet makers and internal decorators."

Upon reviewing the various tariffs involved, the only appropriate description therein was either General Cargo, Other Than Dangerous Cargo, N.E.S. or Articles of Artificial Plastic Materials, N.E.S., both of which take the same rate.[5] The only exceptions were American Export Lines Tariff No. 1, F.M.C. 141 (449–I), and the North Atlantic Baltic Freight Conference Freight Tariff No. 15, F.M.C.–3 (458–I), which have no rate on plastic articles, and therefore The General Cargo, N.O.S., Not Dangerous or Hazardous rate, was used.

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[5] All of the conference tariffs but the North Atlantic Baltic Freight Conference have a lower valuation rate, i.e :

Plastic Articles, N E S., Packed Up to incl. $500 per Freight ton

However, the valuation of a measurement ton of the subject shipments exceeds $500.00 for all three size cartons.
Small ctn—5,000 units ($17.20 per 1,000 units)—$86.00 valuation per ctn

$$\frac{40 \text{ cft mt}}{1.324 \text{ cft ctn}} = 30.2 \text{ ctns} = \text{mt } 30.2 \text{ ctns } (\$86.00) = \$2,597.20 \text{ value per mt}$$

Medium ctn—5,000 units ($13.90 per 1,000 units)—$69.50 valuation per ctn

$$\frac{40 \text{ cft mt}}{2.031 \text{ cft ctn}} = 19.6 \text{ ctns} = \text{mt } 19.6 \text{ ctns } (\$69.50) = \$1,362.20 \text{ value per mt}$$

Large ctn—5,000 units ($21.50 per 1,000 units)—$107.50 valuation per ctn

$$\frac{40 \text{ cft mt}}{2.5 \text{ cft ctn}} = 16 \text{ ctns} = \text{mt } 16 \text{ ctns } (\$107.50) = \$1,720.00 \text{ value per mt}$$

Following is a computation of each of the 10 subject small claim settlements:[6]

449(I) bill of lading 158119 of 9–29–75 to Lisbon, Portugal

18 ctns. Plastic Togglers 65 cu ft—Complainant debited[7]			$233.92

American Export Lines, Inc. Freight Tariff No. 1–F.M.C. No. 141 General Cargo $115.75 W/M

6 small ctns. (1.324)	7.944 cu ft		
6 medium ctns. (2.031)	12.186 cu ft		
6 large ctns. (2.5)	15 cu ft	$\frac{35.13}{40} = .878$ mt	
	35.130		
Applicable freight charges $115.75 (.878) =			$101.63
Overcharge			$132.29

450(I) bill of lading 158404 of 9–26–75 to Munich, West Germany

60 ctns. Plastic Togglers 232 cu ft—Complainant debited $1,109.37

North Atlantic Continental Freight Conference Tariff (29) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $180.75 W/M

20 small ctns. (1.324)	26.48 cu ft		
40 large ctns. (2.5)	100.0 cu ft	$\frac{126.48}{40} = 3.162$ mt	
	126.48		
Applicable freight charges $180.75 (3.162) =			571.53
Overcharge			$537.84

451(I) bill of lading 158100 of 9–26–75 to Antwerp, Belgium

18 ctns. Plastic Togglers 65 cu ft—Complainant debited $316.59

North Atlantic Continental Freight Conference Tariff (29) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $180.75 W/M

5 small ctns. (1.324)	6.62 cu ft		
8 medium ctns. (2.031)	16.248 cu ft		
5 large ctns. (2.5)	12.5 cu ft	$\frac{35.368}{40} = .884$ mt	
	35.368		
Applicable freight charges $180.75 (.884) =			159.78
Overcharge			$156.81

[6] Claims 452(I), 454(I) and 455(I) cover shipments rated in the North Atlantic French Atlantic Freight Conference, claim 458(I) in the North Atlantic Baltic Freight Freight Conference, and claim 456(I) in the North Atlantic Mediterranean Freight Conference. All of these conferences have dual rate contract systems but as neither the complainant or consignee is a contract signator, the higher non-contract rates apply. The other five claims are governed by tariffs which do not have dual rate contract systems.

[7] By Hilti, A.G.

452(I) bill of lading H0023 of 10–30–75 to LeHavre, France

176 ctns. Plastic Togglers 690 cu ft—Complainant debited $2,101.74

North Atlantic French Atlantic Freight Conference Tariff No. (3) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $212.50 W/M

16 small ctns. (1.324)	21.184 cu ft		
98 medium ctns. (2.031)	199.038 cu ft		
62 large ctns. (2.5)	155.0 cu ft	$\frac{375.222}{40} = 9.381$ mt	
	375.222		
Applicable freight charges $212.50 (9.381) =			$1,993.46
Overcharge			$ 108.28

453(I) bill of lading A75019 of 10–23–75 to Antwerp, Belgium

15 ctns. Plastic Togglers 60 cu ft—Complainant debited $275.48

North Atlantic Continental Freight Conference Tariff (29) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $180.75 W/M

10 medium ctns. (2.031)	20.31		
5 large ctns. (2.5)	12.5	$\frac{32.81}{40} = .820$ mt	
	32.81		
Applicable freight charges $180.75 (.820) =			148.22
Overcharge			$127.26

454(I) bill of lading A91032 of 10–26–75 to LeHavre, France

94 ctns Plastic Togglers 328 cu ft—Complainant debited $1,438.81

North Atlantic French Atlantic Freight Conference Tariff No. (3) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $212.50 W/M

34 small ctns. (1.324)	45.016		
36 medium ctns. (2.031)	73.116		
24 large ctns (2.5)	60.000	$\frac{178.132}{40} = 4.453$ mt	
	178.132		
Applicable freight charges $212.50 (4.453)			946.26
Overcharge			$492.55

455(I) bill of lading 160699 of 10–15–75 to LeHavre, France

37 ctns. Plastic Togglers 132 cu ft—Complainant debited $572.46

North Atlantic French Atlantic Freight Conference Tariff No. (3) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $212.50 W/M

5 small ctns. (1.324)	6.62		
32 medium ctns. (2.031)	64.992		
	71.612		
		$\frac{71.612}{40} = 1.790$ mt	
Applicable freight charges $212.50 (1.790)			380.38
Overcharge			$192.08

456(I) bill of lading 160123 of 10–8–75 to Genoa, Italy

28 ctns. Plastic Togglers 99 cu ft—Complainant debited			$389.36
North Atlantic Mediterranean Freight Conference Freight Tariff No. 10–FMC–3 Articles of Artificial Plastic Materials, N.E.S. $194.40 W/M			
8 small ctns. (1.324)	10.592		
14 medium ctns. (2.031)	28.434		
6 large ctns. (2.5)	15.0	$\frac{54.026}{40} = 1.326$ mt	
	54.026		
Applicable freight charges $194.40 (1.326)			257.77
Overcharge			$131.59

457(I) bill of lading 160557 of 10–17–75 to Hamburg, Germany

32 ctns. Plastic Togglers 133 cu ft—Complainant debited			$770.51
North Atlantic Continental Freight Conference Tariff No. (29) FMC–4 Articles of Artificial Plastic Materials, N.E.S. $180.75 W/M			
16 medium ctns. (2.031)	32.496		
16 large ctns. (2.5)	40.0	$\frac{72.496}{40} = 1.812$ mt	
	72.496		
Applicable freight charges $180.75 (1.812)			327.52
Overcharge			$442.99

458(I) bill of lading 160572 of 10–17–75 to Copenhagen, Denmark

40 ctns. Plastic Togglers 154 cu ft—Complainant debited			$590.00
North Atlantic Baltic Freight Conference Freight Tariff No. (15) F.M.C.–3 General Cargo, N.O.S. $177.00 W/M			
10 small ctns. (1.324)	13.24		
10 medium ctns. (2.031)	20.31		
20 large ctns. (2.5)	50	$\frac{83.55}{40} = 2.089$ mt	
	83.55		
Applicable freight charges $177.00 (2.089)			$369.75
Overcharge			$220.25
Total Overcharges			$2,541.94

Complainant has borne the heavy burden of proof with respect to the subject shipments. Initially, with the claims, it filed the bills of lading showing the high cubic measurement indicated on each shipment. In addition, packing lists were submitted which contained the measurements of each of the three size cartons that complainant ships overseas. A compilation of the debiting of complainant's account by Hilti A.G. for overcharges paid by Hilti's marketing organizations was furnished. The dates of payment of transportation charges overseas on each shipment was provided—both to determine that the claims were not time-barred and to determine the date for currency exchange. Its status with respect to dual rate contracts in each of the trades was furnished. Abundant literature was furnished showing just what a plastic toggler is to assist in determining its appropriate commodity tariff description.

There are three respondents herein and the reparation due complainant from each is summarized below:

American Export Lines, Inc.		
Docket No. 449(I)		$ 132.29
Docket No. 450(I)		537.84
Docket No. 451(I)		156.81
Docket No. 455(I)		192.08
Docket No. 456(I)		131.59
Docket No. 457(I)		442.99
Docket No. 458(I)		220.25
	Total	$1,813.85
Dart Containerline, Incorporated		
Docket No. 452(I)		$ 108.28
Atlantic Container Line Ltd.		
Docket No. 453(I)		$ 127.26
Docket No. 454(I)		492.55
	Total	$ 619.81

Reparation for the above amounts totalling $2,541.94, by the above respondents is awarded to complainant.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–35

CANCELLATION OF THE CONSOLIDATION ALLOWANCE RULE PUBLISHED IN THE FREIGHT TARIFFS OF CONFERENCES AND THE RATE AGREEMENT OPERATING FROM UNITED STATES ATLANTIC PORTS TO PORTS IN THE UNITED KINGDOM, IRELAND, THE SCANDINAVIAN PENINSULA AND CONTINENTAL EUROPE

Concerted establishment and maintenance of a system of payment of consolidation allowances found authorized by Respondents' approved agreements.

Maintenance of a system of consolidation allowances found to be in the public interest within the meaning of section 15 of the Shipping Act, 1916.

Concerted elimination of system of consolidation allowances found to be action requiring separate approval under section 15 of the Shipping Act, 1916.

Howard A. Levy, Jacob P. Billig and *John R. Attanasio* for Respondents.

F. Conger Fawcett for Intervenors Latin America/Pacific Coast Steamship Conference, North Europe—U.S. Pacific Freight Conference, Pacific Coast Australasian Tariff Bureau, Pacific Europe Conference, Pacific Coast River Plate Brazil Conference and Pacific—Straits Conference.

Gerald H. Ullman for Intervenors National Customs Brokers and Forwarders Association of America, Inc. and New York Foreign Freight Forwarders and Brokers Association, Inc.

Raymond P. deMember and *Abraham A. Diamond* for Intervenors J. E. Bernard & Co., Boston Consolidation Service, Inc., C.S. Greene and Company, Inc., and Yellow Forwarding Co. d/b/a/ Yellow Freight International.

Paul A. Mapes, et al., for United States Department of Justice.

John Robert Ewers, Martin F. McAlwee, Carlos Rodriguez for the Bureau of Hearing Counsel.

REPORT

July 12, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day, *Commissioner;* Karl E. Bakke, *Commissioner* dissenting in part (separate opinion to be issued); Leslie Kanuk, *Commissioner*, not participating.)

In December, 1975 this Commission received tariff revisions from certain conferences, member carriers and a rate agreement indicating that, effective in January, 1976, those entities (Respondents hereafter) intended to suspend certain tariff rules which provided, generally, for payments to consolidators for consolidation into containers of a minimum of three different commodities from four separate shippers on outbound shipments.[1] The proposed suspension of those rules elicited expressions of great concern from non-vessel operating common carriers (NVO's), freight forwarders, and consolidators.[2]

In response, on June 22, 1976, the Commission issued an Order to Show Cause instituting this proceeding. Following issuance of that Order, Respondents produced a new proposed tariff amendment superceding the proposed cancellation of the tariff rules which would have resulted in loss of allowance payments by the majority of consolidators and greatly reduced allowances to the few which continued to qualify. On the basis of this filing, apparently, Respondents submitted a petition seeking discontinuance of the proceeding.

Replies to Respondents' Petition were filed and other procedural requests seeking "clarification of issues" were pursued. On September 24, 1976, the Commission issued an Order which denied the Petition to Discontinue, but restructured the proceeding. Issues pertaining to section 16 of the Act were made the subject of a separate proceeding while this docket was limited to two issues pertaining to section 15. As amended, the issues to be pursued in this proceeding were framed as:

> IT IS . . . ORDERED. That Respondents Show Cause why the Commission should not find that any concerted action of Respondents with regard to consolidation allowances are actions which implement unfiled, unapproved agreements in violation of section 15. . . .
>
> IT IS FURTHER ORDERED. That since the joint fixing of consolidation allowances is a horizontal price fixing *per se* violation of the antitrust laws. Respondents Show Cause why, even if the concerted actions are pursuant to agreements approved by the Commission under section 15 of the Shipping Act. 1916, the Commission should not find such agreements contrary to the public interest which should be disapproved or modified.[3]

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[1] These parties, the Respondents, are North Atlantic Baltic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic United Kingdom Freight Conference, South Atlantic North Europe Rate Agreement, Seatrain International, S.A., American Export Lines, Inc., Atlantic Container Line (G.I.L.), Dart Container Co. Ltd., Hapag-Lloyd Aktiengesellschaft, Norwegian American Line, Sea-Land Service, Inc., United States Lines, Inc., Transatlantic Container Management, N.V., and Combi Line.

[2] Hereinafter for convenience, all of these persons will be referred to as "Consolidators." These and numerous other parties intervened. The Intervenors are: Department of Justice, J.E. Bernard & Co., Boston Consolidation Service, Inc., C.S. Greene and Company, Inc., Yellow Forwarding Co., National Customs Brokers and Forwarders Association of America, Inc., New York Foreign Freight Forwarders and Brokers Association, Inc., Trans Freight Lines, Inc., Pacific Westbound Conference, Far East Conference, North Europe U.S. Pacific Freight Conference, Pacific Straits Conference, Latin America Pacific Coast Steamship Conference, Pacific Coast Australasia Tariff Bureau, Pacific Coast River Plate Brazil Conference, and Pacific Coast European Conference.

[3] *Order Denying Petition to Discontinue and Amending Order to Show Cause.* Certain parties contend that the issues are so broad as to be improperly directed toward Respondents alone. They urge that at issue are policy questions of industry-wide impact. As a result, it is submitted that the Commission has only two alternatives before it, it may either abandon this proceeding and reconstitute it as a rulemaking, or it may decide these matters so as to restore the *status quo ante*—i.e., find this concerted activity to be within the scope of the agreements. We disagree. The same claim would be heard with respect to any proceeding before this Commission insofar as any forthcoming decision has precedent value. Further, it is clear that the choice between the use of rulemaking or an *ad hoc*

Additionally, the Order limited hearing to affidavits of fact and memoranda of law unless any party considered an evidentiary hearing to be required and requested one be held. That Order further provided, that such a request, would not be proper unless accompanied by:

> . . . a statement setting forth in detail the facts to be proven, their relevance to the issues . . . a description of the evidence which would be adduced to prove those facts and why such proof cannot be submitted through affidavit.

On October 15, 1976, Respondents filed a document entitled Request for Hearing and Associated Relief. This request was summarily denied by the Commission on the ground that:

> . . . Respondents have shown nothing . . . which indicates a need for evidentiary hearing. . . . On the contrary, Respondents have not addressed the issue at all.

Thus, this proceeding came before the Commission upon the affidavits and memoranda.[4]

Discussion

The parties to this proceeding have divided themselves into three groups with respect to the issues involved. In one, are the Respondents and Intervenors on their behalf. Opposing them is the Commission's Bureau of Hearing Counsel. Finally, between these two, are the Intervenor Consolidators. The positions and arguments will be described separately as those of "Respondents," "Hearing Counsel", and "Consolidators", respectively.

Respondents' position is sweeping but precise. In their view any concerted action by the conference with respect to the practice of paying consolidation allowances is merely another form of rate setting which is within the general ratemaking authority granted them by Commission approval of their various agreements. As such, this action allegedly cannot be, and is not, the implementation of unfiled, unapproved section 15 agreements.

Respondents reached this conclusion by arguing that their approved authority to agree upon and establish rates and charges for the carriage of cargo extends to the consolidation of intermodal shipments. The specific language of the approved agreements, upon which Respondents' view is based, is as follows:

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proceeding to determine policy is within the discretion of the administrative agency *Giles Lowery Stockyards, Inc. v. Dept. of Agriculture*, 565 F 2d 321.

[4] A motion filed by the Consolidators seeking Commission issuance of a cease and desist order to Respondents was rendered moot when the Consolidators sought and were awarded an Order of the Federal District Court of the Southern District of New York requiring restoration of the *status quo ante* (November 5, 1976, *C. S. Greene & Co., Inc v. North Atlantic Baltic Freight Conference*).

> This Agreement shall also extend to intermodal shipments . . . and shall cover . . . consolidation . . . and such other matters as may be ancillary to the transport of such intermodal shipments and the Conference may, reserving the right of independent action, consult, cooperate and agree with other Conferences having jurisdiction in the establishment, policing and enforcement of rules, practices and charges relating to the use, employment and transport of loaded and unloaded containers outside the gate of member lines' ocean terminals at European ports within the ranges covered by the Agreement.

Respondents concede that if the Commission is looking for express language in their agreements stating that:

> . . . the member lines may take concerted action to establish, maintain, and modify allowances to be granted in respect of consolidated shipments of cargo it will not find it . . .

They are quick to point out, however, that this is equally true with respect to explicit language in any agreements authorizing the members to establish rates for house-to-house containerized cargo, for particular commodities, or special volume rates—all being activities in which the Commission has permitted conferences to engage. Respondents note that no such explicit wording is found in any general ratemaking agreement nor has it been required by the Commission. Hence, Respondents argue that under the general provisions of the agreements quoted above, ". . . all of the ratemaking authority otherwise provided in the agreements is thus clearly extended to the consolidation of intermodal shipments."

In order, of course, for this premise to be persuasive, Respondents must also prevail in their claim that the concerted action on the allowances is merely another form of ratemaking. This they seek to do by relying upon *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969) *aff'd. sub. nom., Port of New York Authority v. F.M.C.*, 429 F.2d 663 (5th Cir. 1970) cert. den. 401 U.S. 909 (1971).

In that case, the Commission and the Court of Appeals both found that overland and OCP rates and practices were interstitial to the conferences' approved agreements in that they were a particular type of ratemaking ". . . based upon normal economic factors such as cost and competition" and therefore within the scope of general ratemaking authority permitted by FMC approval of the agreements.[5] Respondents argue strenuously that their activity here is precisely that sort of interstitial rate setting described in the *Overland/OCP* case. They allege:

> The concerted action at issue herein is clearly ratemaking. In form, the involved consolidation allowances are stated as a sum payable to the shipper (Consolidator/NVO) tendering cargo meeting certain conditions, but in fact (because it is payable only to shippers) these allowances merely represent a factor in the computation of the net rate applicable to such shipments.

Opposed to Respondents' view is the position of Hearing Counsel. Hearing Counsel is of the opinion that any concerted action taken regarding the allowances at issue is clearly something other than mere

[5] *Port of New York Authority v. F.M.C., supra* at p. 668

joint ratemaking which might otherwise be found to be within the approved authority of Respondents' agreements. In support of this conclusion, Hearing Counsel relies entirely on the *Persian Gulf Outward—Freight Conference,* 10 F.M.C. 61 (1966), *aff'd sub. nom., Persian Gulf Outward Freight Conference v. F.M.C.,* 375 F.2d 335 (1967).

Persian Gulf catalogued circumstances in which, in prior decisions, the Commission or its predecessors had required that various arrangements be treated as separate agreements, subject to the filing and approval requirements of section 15 notwithstanding claims that the arrangements were interstitial or routine implementation of previously approval authority. Included in this compendium were arrangements:

> (1) introducing an entirely new scheme of rate combination and discrimination not embodied in the basic agreement . . .; (2) representing a new course of conduct; (3) providing new means of regulating and controlling competition; (4) not limited to the pure regulation of intraconference competition; or (5) instituting an activity the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement. (10 F.M.C. 61 at p. 65).

Under these criteria, Hearing Counsel contends that concerted action suspending or cancelling consolidation allowances is clearly an action requiring separate section 15 scrutiny. Indeed, Hearing Counsel argues that the original institution of the system of consolidation allowance payment was, under the standards of *Persian Gulf,* an action requiring such separate approval. Therefore, any concerted activity regarding the allowances by the conferences was, and is, the effectuation of an activity subject to section 15 scrutiny which lacks FMC approval and is, therefore, unlawful *ab initio.* In sum, Hearing Counsel's position is that: (1) the joint setting of consolidation allowances is an activity subject to section 15; (2) the activity is neither routine nor interstitial activity encompassed within approved agreements; and (3) implementation of the allowances was, and remains, an act subject to section 15 which has not been approved by the Commission and which thus remains a violation of the Shipping Act, 1916.

Notwithstanding its view that the consolidation allowance activity has always been unlawful under section 15, however, Hearing Counsel argues that once in place, the allowances and their maintenance at current levels fulfill a serious transportation need which justifies approval of authority to set and maintain such allowances. In order to reach this conclusion, Hearing Counsel relies on testimony to the effect that consolidation allowances attract cargo and allow it to move when it might not otherwise have moved and fulfill a serious transportation need by providing a sound rate basis for containerized cargo and encouraging uniformity of allowances among carriers.[6] On the strength of these considerations, Hearing Counsel concludes that, although unlawful at their inception, the current

[6] See, *Affidavit* of Louis P. Kopley, Chairman, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, and North Atlantic Baltic Freight Conference

consolidation allowances are justified and should be approved. Hearing Counsel urges, however, that future modifications be viewed under the standards of *Persian Gulf* and be required to be filed pursuant to section 15.

The positions of the various Intervenor Consolidator interests are expressed in two joint filings. The filing on behalf of National Customs Brokers and Forwarders Association of America, Inc. and the New York Freight Forwarders and Brokers Association, Inc. (National) takes a position closely akin to that of Hearing Counsel. The filing on behalf of J. E. Bernard & Co., Boston Consolidation Service, Inc., C. S. Greene and Company, Inc. and Yellow Forwarding Co., d/b/a Yellow Freight International (Bernard) takes a position somewhere between those of Hearing Counsel and Respondents. Each of these intervenor positions are discussed separately here for the sake of clarity.

National, like Hearing Counsel, takes issue with the Respondents' characterization of concerted action on the allowances as routine ratemaking. National charges:

> There can be no reasonable basis to equate the consolidation allowance with the usual activity of a conference in fixing a rate for a particular commodity.
>
> * * *
>
> The major policy determination [conference adoption of the system of payment of allowance] may not be glibly described as the fixing of a rate.

This activity, as described by National, allegedly fits squarely within the criteria of *Persian Gulf* and requires separate section 15 scrutiny and resolution. It is argued:

> When respondents decided to encourage the development of a consolidation industry, [by adopting the system of allowance payments] this was "a new course of conduct." When they decided to terminate the consolidation allowance . . .. this was "providing new means of regulating and controlling competition." And, when the conferences decided to restore an allowance in a restrictive form, this was "constituting an activity the nature and matter [sic] of effectuation of which cannot be ascertained by a mere reading of the basic agreement."

National next attempts to refute the reliance of Respondents on the rationale of the *Overland/OCP* case, *supra*. National claims that the Commission's reason for its determination that the setting of the OCP rates was a function included within the conferences' approved ratemaking authority was its finding that OCP rates ". . . are purely ocean rates in the trades served by respondents, and respondents' basic, approved agreements permit the setting of ocean rates. On this basis, they contend that the concerted institution or removal of the system of payment of consolidation allowances is clearly something other than routine rate setting. To hold otherwise, they submit, would be to permit the conferences "under the guise of 'routine rate-making' " to ". . . control the destinies of third parties, who, puppet-like, must dance on the conference string.

Bernard, as noted earlier, assumes a more moderate stance on the issues. Its position is that institution and maintenance of the allowance system are actions within the approved authority of Respondents which continue to be justified and in the public interest by fulfilling a serious transportation need.

Citing an affidavit attached to Respondents' filings, (see fn. [6] *supra*) Bernard alleges that it is uncontested that the consolidation allowance system supports a competitive industry which provides a valuable service to carriers and shippers alike. The system of allowance payments is universally seen as a means of attracting cargo which might not otherwise move, and as providing a sound rate basis for so doing.

Bernard argues that it must be borne in mind that the concerted action at issue here is the *cancellation* of the practice of paying allowances to consolidators. In this regard, it is noted that the system has been in place unchallenged for some seven years as an authority assumed to be within the scope of Respondents' agreements. Bernard submits, however, that the ability to cancel or to amend radically the system already in place is such a substantial restructuring of present container handling practices as to be beyond the scope of any existing agreement approved under Section 15.

Bernard then challenges Respondents' reliance on the *Overland/OCP* case as support for the proposition that the concerted action on the consolidation allowances is simply another form of ratemaking which does not require Commission approval. It is argued that:

> The cancellation, suspension or modification of the rules (where such modification severely impairs the ability of the consolidator/NVO from continuing in business) must necessarily require approval from this Commission. This follows from the fact that such drastic changes do not depend on "normal economic forces." The Commission has held.
>
> > ". . . that authority under general rate-setting agreements is limited to the adjustment of rates 'as the normal economic forces which govern the establishment of such rates may require.' " [citations omitted]

Further, Bernard claims that:

> Cancellation, suspension or modification of consolidation allowance rules are not "routine" rate changes no matter how often such language is repeated . . . . Severe economic loss results from such changes. They may make or break an industry. Such results cannot be "routine"; therefore, the causes cannot be "routine".

Finally, Bernard cites *Practices and Agreements of Common Carriers by Water in Connection with Payment of Brokerage or Other Fees to Ocean Freight Forwarders and Freight Brokers,* 7 F.M.C. 51 (1962) as "closely analogous" to the situation here. In that case we determined that agreement by carriers to prohibit the payment of brokerage to forwarders or a significant diminuation of such payments was an activity

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[6] See, *Affidavit* of Louis P Kopley, Chairman, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, and North Atlantic Baltic Freight Conference.

subject to section 15 and which also would be detrimental to the commerce of the United States in its deleterious effect upon the forwarder industry. Applying that ruling here, Bernard states that:

> Regardless of the substantive merits of the "agreements" to cancel, suspend or modify the consolidation allowance rules they must be held to be agreements subject to section 15. To do otherwise would be tantamount to permitting the respondent conferences to agree to eliminate the consolidator/NVO or the entire industry. This result cannot be a mere "normal" or "routine" rate adjustment. The Commission's responsibility is clear—preserve the NVOCC's competitive consolidation services which fulfill a serious transportation need and serve the public interest . . . .

Thus, Bernard concludes that, whatever else may be said about the implementation and maintenance of a system of payment of allowances to consolidators, the attempted cancellation or drastic modification of that system is a concerted conference action, subject to section 15 of the Shipping Act, 1916 which must be filed for approval and, in fact, approved by this Commission prior to its implementation.

CONCLUSIONS

The first issue set forth in our Show Cause Order of September 24, 1976, as discussed by the parties to this proceeding, requires resolution in three segments. As we used the term "concerted action" on consolidation allowances in that Order, it may be seen clearly to encompass the setting, maintenance (or reasonable modification), or the elimination or effective elimination of the allowances. Hence, we must determine as to each of these, whether or not it is an action implementing an unfiled, unapproved agreement subject to section 15, or is within an authority already convered by our approval of the Respondents' basic agreements. Consequently, of course, if we find any of these actions to be within Respondents' approved authority we are obligated to scrutinize the action or actions pursuant to the mandate of section 15 to determine whether or not it is one which serves the public interest so as to justify its continued maintenance.

As may be seen from the positions of the parties described above, the authority (or lack of it) at issue has been addressed in terms of whether or not a given action regarding consolidation allowances was or was not mere routine, interstitial ratemaking. It should therefore be made clear at the outset that we do not consider the consolidation allowance rules as ents' tariffs provide for payment to the consolidator of certain sums of ents' tariffs provide for payment to the consolidation of certain sums of money under particular circumstances. While Respondents' arguments to the contrary are creative, we are not persuaded that such a payment may be changed into a rate for the transportation of cargo by a carrier no matter how often that may be repeated. More accurately, these allowances represent a *fee* whose payment the carriers have jointly determined to be acceptable in return for a service performed by the consolidator. There is a critical difference between such a payment of compensation to the consolidator for a service provided and a rate or charge assessed a shipper/consignee for the carriage of cargo. This difference underlies the basis upon which the situation here can be distinguished from that at issue in the *Overland/OCP* case.[7] However, whether or not the action under scrutiny is "ratemaking" is not necessarily controlling, or even relevant, here. What is relevant is whether or not, whatever one calls the authority, that authority is encompassed within the approved provisions of Respondents' agreements. The resolution, we conclude, is not to be based upon labels but upon proper documentary construction and interpretation. The pivotal issue is simply what is included within the scope of Respondents' agreements.

We have clearly stated that, while section 15 agreements have certain indicia of private contracts, their investment with the public interest and their regulations by the Commission makes them something more than a mere meeting of the minds of the parties signatory.[8] This distinction notwithstanding, one characteristic which section 15 agreements share with private contracts is the set of general principles of construction by which they are to be interpreted. A section 15 agreement, like any contract, is to be construed insofar as possible by interpretation of the language contained within the four corners of the document.

While the provisions which extend the conference agreements at issue to ". . . consolidation . . . and such other matters as may be ancillary to the transport of . . . intermodal shipments . . ." are broad enough on their face to encompass concerted action on consolidation allowances, they are not conclusive of the scope of the agreements. This must be done by a consideration of external circumstances which may be relevant to the scope of the phrase quoted above.

The most telling circumstance to be brought to our attention is that the system of payment of consolidation allowances has continued to appear without challenge in Respondents' tariffs for a number of years. In our opinion, the existence and maintenance of such a payment system show that we and all other interested parties have considered Respondents to have had the authority concertedly to institute and maintain this system. We find, therefore, that Respondents' agreements as approved by this Commission permit them the authority to initiate and maintain a system of payment of consolidation allowances with respect to intermodal shipments as currently found in the Respondents' applicable tariffs.

We must also determine whether or not the authority found to have been vested in the Respondents to initiate and maintain these allowances includes the right to cancel or effectively to eliminate this system. By our acquiescence in a particular course of conduct, *i.e.*, establishment and maintenance of a system of consolidation allowances, we have shown our

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[7] That the compensation to the Consolidator is computed on the basis of an allowance to be deducted from the commodity rate does not alter this determination As was succinctly pointed out by National "Of importance is not the mechanism used, but the system adopted."

[8] See, *e.g., In Re: Pacific Coast European Conference*, 7 F.M C. 27 at p 37 (1961).

approval of concerted action by Respondents only to the extent of that particular course of conduct. The initial attempt at a concerted cessation of a course of conduct cannot be shown to have had our approval. There has never been a history of concerted cancellation of this system which could be shown to be within our approval.

It is manifest that the proposed new concerted action is also conduct which affects competition outside the conferences. As such, there can be no question that section 15 applies to such concerted action and that its implementation requires prior Commission scrutiny and approval. In this respect, we find the *Overland/OCP* and *Persian Gulf* cases both to be apposite and both to support our findings.

Concerted action to withdraw or eliminate the consolidation allowances at issue here is an action which falls within at least three criteria of *Persian Gulf*, any one of which would require separate section 15 scrutiny. Specifically, we find that the proposed action: (1) represents a new course of conduct; (2) provides a new means of regulating and controlling competition; and (3) is not limited to the pure regulation of intraconference competition. Further, and as discussed above, it is clear that this proposed action cannot be called some sort of routine, interstitial ratemaking of the type involved in the *Overland/OCP* case.

Having determined what authority is and is not encompassed within Respondents' approved agreement with respect to the payment of consolidation allowances, we must now turn to the second issue. We must decide whether or not the authority jointly to implement and maintain these allowances as approved by the Commission is or is not in the public interest such that its perpetuation is warranted.

The record in this proceeding indicates that there exists a portion of the shipping commerce of the United States—the consolidators and NVO's—which in large measure owes its existence to the institution and continuation of a system of payments by the conference carriers for the services it renders. Not only does this segment of the industry exist and flourish, but it provides a service valuable to shippers and carriers alike.[9] We find that the consolidation industry which is supported by the system of allowances serves a useful transportation purpose and is accordingly in the public interest. That service fulfills a serious transportation need by allowing the carrier to attract cargo which otherwise might not move. Further, we find that the ability of Respondents to set and maintain these allowances in concert permits and requires the evenhanded tratment of recipients of the payments and of the underlying shippers.[10]

On the basis of the foregoing it is found that the approved agreements of Respondents authorize them to act concertedly to implement and maintain a system of payment of consolidation allowances. Further, it is

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[9] See, in this regard, the affidavit of Louis P. Kopley, Chairman, North Atlantic Continental Freight Conference North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference and North Atlantic Baltic Freight Conference.

[10] *Id.*

found that the maintenance of this system is in the public interest and continues to be justified. Finally, we find that any concerted action by which this system is attempted to be eliminated or effectively eliminated through radical restructuring or diminution would be outside the scope of Respondents' approved authority; would be *prima facie* contrary to the public interest, and would require separate prior approval by this Commission.

THEREFORE, IT IS ORDERED, That Respondents cease and desist from concertedly eliminating the system of consolidation allowances presently maintained without prior approval pursuant to section 15 of the Shipping Act, 1916.

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

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 516(I)

ALLIED STORES INTERNATIONAL, INC.
SUBSIDIARY OF ALLIED STORES CORP.

v.

UNITED STATES LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

July 7, 1978

Notice is hereby given that the Commission on July 7, 1978, determined not to review the decision of the Settlement Officer in this proceeding served June 29, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 516(I)

ALLIED STORES INTERNATIONAL, INC.
SUBSIDIARY OF ALLIED STORES CORP.

v.

UNITED STATES LINES, INC.

Reparation awarded.

DECISION OF GEORGE D. UNGLESBEE, SETTLEMENT OFFICER[1]

Allied Stores International, Inc., Subsidiary of Allied Stores Corporation (complainant), alleges that United States Lines, Inc. (carrier) incorrectly rated six shipments consisting, inter alia, of electric crock pots and, in one instance ceramic covers therefor,[2] resulting in total overcharges of $2,405.12 (including a 1.5% Currency Surcharge) in violation of Section 18(b)(3) of the Shipping Act, 1916. Claims filed with the carrier were denied because they were not timely filed.

In responding to the served complaint, the carrier advised the claims were denied on the basis of the applicable conference tariff[3] provision pertaining to the filing of claims within six months for adjustment of ocean freight charges.

The six shipments, five from Yokohama, Japan to Kearny, New Jersey and one from Kobe, Japan to Kearny, moved under separate through bills of lading dated between March 12, 1976, and May 20, 1976,[4] on carrier's vessels AMERICAN AQUARIUS, AMERICAN LIBERTY and/or AMERICAN LYNX. The carrier assessed the rate named in Item

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Determination not to review July 7, 1978)

[2] Referred to in this manner for simplification purposes. These commodities were described on the respective bills of lading as "Electric Crockery Chef," "Electric Crockery Cooker," "Electric Crockery Pot," and/or "Crock Cover of Electric Cooker."

[3] Trans-Pacific Freight Conference of Japan/Korea Eastbound Intermodal Tariff No. 1, F.M.C. No. 4, I.C.C. No. 1.

[4] The complaint was filed with the Commission on March 9, 1978.

4160–00 of the governing conference tariff applicable, briefly and as far as pertinent herein, to:

> "Electrical Goods, Supplies and Parts, not elsewhere covered includes:
>
> Appliances for preparing Foods and Drinks, not elsewhere covered under this hearing."

on the electric crock pots; and, apparently, the rate named in Item 1260–05 of the governing tariff applicable to:

> "Porcelainware, Earthenware, Chinaware and Manufactures thereof, Combined with Other Materials and/or Accessories and/or Attachments, including Electrical Heating Units,*shipped as a unit*." *(emphasis added)*

on ceramic covers for electric crock pots. Total freight charges on the electric crock pots and the ceramic covers amounted to $19,526.46.

The complainant contends that the electric crock pots should have been assessed the rate contained in Item 1260–05,[5] and that the ceramic covers for electric crock pots should have been accorded the rate in Item 1320–05 of the governing conference tariff applicable to:

> "Porcelainware, Earthenware, Chinaware and Manufactures made wholly thereof, N.O.S."

Based upon complainant's contention, the total freight charges on the electric crock pots and ceramic covers would have amounted to $17,121.34. Accordingly, complainant seeks reparation in the amount of $2,405.12 ($19,526.46 minus $17,121.34), plus interest. Of this amount, $2,402.38 is attributable to the electric crock pots and $2.74 to the ceramic covers for electric crock pots.

At the time the shipments in question moved, the governing tariff contained two commodity descriptions under which the electric crock pots could have moved.[6] The two descriptions were, in pertinent part, as follows:

1. Item 4160–00 (in Section 4 of the tariff)

ELECTRICAL EQUIPMENT
(EXCLUDING ELECTRICAL MACHINERY)

This heading
includes: 1) All apparatus that functions by the use of electrical energy.

. . .

excludes: 1) Articles made wholly of ceramic material or ceramic combined with other materials and/or accessories and/or attachments (See Section 3).

. . .

Electrical Goods, Supplies and Parts, not elsewhere covered includes:
Appliances for preparing Foods and Drinks, not elsewhere covered under this heading

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[5] The carrier concurs with complainant that the electric crock pots should have been rated under Item 1260–05.

[6] This irregularity was subsequently corrected. Section 4 of the governing tariff was amended, effective May 1, 1977, to provide under the general heading of Electrical Equipment a new Item No. 3650–03 reading "Cooking Pots, Domestic." Effective October 1, 1977, Item 3650–03 was further amended to add "includes Procelainware, Earthenware and Chinaware Fitted with Electric Heating Units and "Rice Cookers, Domestic."

. . .

and

2. Item 1260–05 (in Section 3 of the tariff)

PORCELAINWARE, EARTHENWARE AND CHINAWARE

This heading covers all commodities wholly made of Chinaware, Earthenware, and Porcelainware Except as otherwise specified herein

Porcelainware, Earthenware, Chinaware and Manufactures thereof, Combined with Other Materials and/or Accessories and/or Attachments, including Electrical Heating Units, shipped as a unit

Absent a *specific* commodity description for electric crock pots, a determination must be made as to whether the commodity description in Item 4160–00 or the commodity description in Item 1260–05 more properly applies. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. Docket No. 75–15, *The Carborundum Company v. Royal Netherlands Steamship Company (Antilles) N.V.*, Report served January 5, 1977. Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Company v. Hamburg-Amerika Lines*, 10 FMC 388 (1967).

The general heading for "ELECTRICAL EQUIPMENT" in Section 4 of the governing tariff specifically provides for the exclusion of [all] "Articles made wholly of ceramic[7] material or ceramic combined with other materials and/or accessories and/or attachments" [even though the articles may include appliances for preparing foods and drinks]; and specifically directs the tariff user's attention to Section 3 of the tariff which contains Item 1260–05 quoted above. In turn, the commodity description in Item 1260–05 is explicit and restricted in its application in that it covers only the articles [including electrical heating units] which are specifically excluded from the application of Item 4160–00. The commodity description covered by Item 1260–05 is more specific and, therefore, more properly applies. With repect to ceramic covers for electric crock pots, in the absence of a *specific* commodity description therefor it is clear they should have been properly accorded the rate named in Item 1320–05, supra, which is not restricted to apply only when the specified articles are shipped as a unit, instead of the rate named in Item 1260–05 which is restricted to apply only when the specified articles are shipped as a unit.

The complaint was filed with the Commission within the time limit specified by statutes, and it has been well-established by the Commission that a carrier's published tariff rule may not act to bar recovery of an otherwise legitimate overcharge claim in such instances.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under its effective tariff. The involved commodities were improperly rated by the carrier and the complainant was overcharged in

[7] Webster's New World Dictionary, second college edition, defines ceramic as ". . .relating to pottery, earthenware, tile, porcelain, etc . . ."

the amount of $2,405.12. Accordingly, reparation for this amount is awarded to complainant.

(S) GEORGE D. UNGLESBEE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 568

WESTINGHOUSE TRADING CO. DIVISION OF WESTINGHOUSE ELECTRIC CORP.

v.

AMERICAN EXPORT LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

July 10, 1978

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 10, 1978.

Applicant is ordered to effectuate the waiver, publish the prescribed tariff notice and notify the Commission of the date and manner of compliance as prescribed in the initial decision.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 568

WESTINGHOUSE TRADING CO. DIVISION OF WESTINGHOUSE ELECTRIC CORP.

v.

AMERICAN EXPORT LINES, INC.

Adopted July 10, 1978

Carrier applicant found to have failed to file lower rate on a shipment of iron and steel rejects through inadvertence on the part of its rate clerk. Carrier also found to have filed its application for waiver under P.L. 90–298 within 180 days after date of shipment and its corrective tariff prior to the filing of the application. No discrimination among shippers will result if the application is granted. The application therefore meets all the requirements of P.L. 90–298 and is granted.

Although the carrier's original bill of lading was dated at a time beyond the 180-day period prior to date of shipment prescribed by law, the carrier has furnished evidence showing that the date of loading aboard vessel was within the 180-day period. Such a date has been accepted by the Commission in determining date of shipment.

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

This proceeding was commenced by an application filed by American Export Lines, Inc. (AEL) pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), 46 U.S.C. 817(b)(3), as amended by P.L. 90–298, and pursuant to Rule 92(a) of the Commission's Rules of Practive and Procedure, 46 CFR 502.92(a). In its application filed March 10, 1978 (the date it was received by the Commission's Secretary), AEL stated that it wished to waive a collection of a portion of freight charges for the benefit of the shipper, Westinghouse Trading Co. (Westinghouse), the nominal complainant in this proceeding, on a shipment of iron and steel rejects. AEL stated that this shipment was transported under a bill of lading dated September 16, 1977, from Baltimore, Maryland, to Keelung, Taiwan and that it moved on AEL's *S/S Export Builder*. The application further states that AEL collected $3,849.66 in freight based upon a rate of $63 per weight ton which AEL had quoted to the shipper and that AEL wishes to

[1] This decision became the decision of the Commission July 10 1978.

waive $7,458.73 in freight charges because, through AEL's inadvertence, the $64 rate was not filed prior to the time of shipment. If the application is denied, then, AEL would be required to seek recovery of this amount of freight on the basis of the rate in effect at the time of shipment, i.e., cargo, not otherwise specified, $188 W/M. The shipment of iron and steel rejects, according to the bill of lading and corrected export declaration, weighed 132,610 lbs. (60.151 kilograms).

Although the application stated that AEL had quoted the $64 W rate to the shipper with the intention to request the Far East Conference (FEC), of which AEL was a member,[2] to file such rate on behalf of AEL in the FEC tariff's open rate section before the shipment and stated other facts tending to show that AEL had inadvertently failed to effectuate the tariff filing, the application, as originally filed, furnished virtually no supporting information or evidence, contrary to the Commission's Rule 92(a) and the standard form to which that rule refers.[3] Accordingly, I instructed AEL to furnish such information and evidence so that I would have a record on which to base a rational decision. See Order to Furnish Supporting Evidence, March 20, 1978. In response to my instructions, AEL furnished various materials consisting of an affidavit of Mr. T. Tjom, Pricing Manager of AEL, with copies of the rated bill of lading, AEL's freight bill, and a page from AEL's receipts journal. In addition, AEL furnished a letter from complainant-shipper's Senior Buyer, Mr. H. Philip Kennedy, to which was attached an invoice from the shipper's ocean freight forwarder confirming payment of freight charges in the amount stated in the application, and finally, a copy of the pertinent export declaration as corrected.

This additional information furnishes sufficient evidentiary support for the statements contained in the application with one exception relating to the date of AEL's bill of lading. This date is important because of the 180-day time limitation for the filing of special-docket applications contained in P.L. 90–298. As will be seen in my discussion below, this time factor is critical to a decision in this case. As shown by the affidavit and supporting evidence furnished by AEL, the factual situation is as follows.

In late August or early September of 1977, Mr. T. Tjom, Pricing Manager for AEL, authorized AEL's rate clerk in Baltimore to quote to the shipper Westinghouse a rate of $64 per weight ton for a shipment of steel seconds to be loaded at Baltimore, destined for Keelung, Taiwan. At that time, AEL was a member of FEC. That Conference, however, had "opened" the rate for this commodity item subject to a $64 per weight ton minimum. Under these circumstances each member carrier of the Conference was authorized to file its own rate for this commodity

[2] Since this proceeding was instituted, AEL has been acquired by Farrell Lines, Inc. See affidavit of Mr. T. Tjom, Pricing Manager, AEL, April 11, 1978, p. 1

[3] The only documents attached to the application, as originally filed, were copies of two tariff pages showing a higher, allegedly unintended rate and a lower, allegedly intended rate.

subject to the minimum. At the time of the quotation, AEL did not have an individual rate on this item. However, it did have its own cargo, not otherwise specified (NOS) rate applicable to commodities as to which the Conference had voted to "open" rates. See FEC Supplemental Freight Tariff No. 27–A, F.M.C. No. 11, 1st revised page 6. Therefore, since AEL had not filed a specific commodity rate in the "open" rate section of the Conference tariff for the item in question, the higher NOS rate of $188 W/M would have to apply. AEL, however, does not wish to apply the NOS rate because of its own admitted inadvertence in failing to file the intended $64 rate in timely fashion.

The explanation for the inadvertent failure to file the lower rate is further set forth in Mr. Tjom's affidavit. He explains that it was his intention, when quoting the $64 rate, to instruct FEC to file this rate for AEL upon advice that Westinghouse had agreed to ship at that rate. However, although Westinghouse agreed to the rate, AEL's rate clerk in Baltimore failed to inform Mr. Tjom and because of this failure AEL never caused the $64 to be filed before the shipment moved. To corroborate the fact that an agreement regarding the $64 rate had been reached between Westinghouse and AEL, AEL has furnished the bill of lading issued to Westinghouse's freight forwarder, H. W. St. John & Co., which was prepared and rated on the basis of $64. This bill of lading bears a date of August 25, 1977. On or before September 7, 1977, furthermore, the forwarder paid AEL on behalf of Westinghouse freight charges calculated on the basis of the $64 rate.

The Conference noticed that the shipment had been rated at the unfiled $64 rate through its Misrating Committee, which notified Mr. Tjom of that fact. However, upon explanation of the matter, the Misrating Committee decided not to proceed for collection of penalties against AEL and not to insist that AEL collect additional freight pending decision in this proceeding.[4] Moreover, Mr. Tjom gave instructions to the Conference to file the $64 rate on behalf of AEL. This rate was filed, effective January 1, 1978. See FEC Supplemental Freight Tariff No. 27–A, FMC No. 11, 9th revised page 17.

Mr. Tjom sums up the situation by stating that AEL's intention to make a timely filing of the quoted rate of $64 upon acceptance by the shipper was frustrated because of the inadvertence of AEL's clerical personnel and that failure to grant its application "would penalize the shipper in connection with an open and aboveboard transaction." Affidavit of T. Tjom, p. 3.

Discussion and Conclusions

The question to be decided in this case is simply whether the application for permission to waive a portion of freight charges and the supporting evidence establish that the type of error contemplated by P.L.

[4] The Conference has also concurred in the application itself.

90–298 occurred and that the application meets all other requirements in that law regarding the time of filing the application and corrective tariff and the assurance that no discrimination among shippers will result if the application is granted. All of these requirements appear to have been met. However, there is a problematic area relating to the question whether the application was filed within 180 days after "date of shipment," as required by law.

P.L. 90–298, which amended section 18(b)(3) of the Act, was designed to remedy inequities and financial harm visited upon shippers which resulted from inadvertent errors in tariff-filing by carriers. Thus, when a carrier intended to apply a lower rate on a particular shipment but failed to file an appropriate tariff conforming to the carrier's intention and usually the shipper's understanding, prior to the enactment of P.L. 90–298, the carrier was bound to charge the higher, unintended rate even if the shipper had relied upon the carrier's representations that a lower rate would be charged and that an appropriate tariff would be filed. Or, if the carrier, through inadvertence, republished a tariff and caused the tariff to reflect an unintended, higher rate, prior to the enactment of this remedial law, the carrier nevertheless was compelled to charge the higher rate, again causing shippers to suffer financial loss. These inequitable results were unavoidable because of the governing principles of law requiring strict adherence to tariffs effective at the time of shipment regardless of equities. See *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *United States v. Columbia S.S. Company*, 17 F.M.C. 8, 19–20 (1973).

In recognition of the fact that this hard and fast doctrine could result in inequities and hardships, Congress passed P.L. 90–298. The legislative history to P.L. 90–298 illustrates the types of mistakes which the statute was designed to remedy as follows:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.[5]

The Senate Report states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.[6]

Accordingly, section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3), was amended in pertinent part to read as follows:

[5] House Report No. 902, 90th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp 3, 4

[6] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [to accompnay H R. 9473], p 1.

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the . . . carrier . . . has, prior to applying for authority, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* . . . That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

The statement in the application that AEL failed to file the specific commodity rate of $64 through inadvertence is fully explained in Mr. Tjom's affidavit. Had it not been for the failure of the Baltimore rate clerk to inform Mr. Tjom of Westinghouse's acceptance of the $64 rate, Mr. Tjom would have taken steps to have that rate filed for AEL in the open rate section of the FEC tariff. Furthermore, it is clear that it was AEL's intention to apply the $64 prior to shipment. Such intention is a necessary element to establish that there was an error in a tariff due to an inadvertence in failing to file a new tariff, as the legislative history to P.L. 90–298 demonstrates.[7] See also *Monoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1911, 1193 (1977),in which case the Commission stated:

[I]t is clear that the "new tariff" is expected to reflect a *prior intended* rate, not a rate agreed upon after the shipment. (Emphasis added.)

I therefore find that there was an error in AEL's tariff due to an inadvertence in failing to file a new tariff.

With respect to the question of possible discrimination among shippers if the application is granted, I make the following findings. The application states that AEL is aware of no similar shipment other than that of Westinghouse which moved via AEL during the period of time involved herein. No evidence has been presented to indicate that other shippers of iron and steel seconds shipped via AEL during this time. Even if other shippers might have been involved, however, the possibility of discrimination will be eliminated by the publication of a notice in AEL's tariff, as ordered below, which will mean that any other shipments of the commodity in question will be entitled to the same rate. Therefore, permission to waive a portion of the freight charges in this case will not result in discrimination among shippers.

With respect to the requirement that the carrier file a new tariff prior to filing its application for permission to refund or waive, I find that this requirement has been met inasmuch as the new tariff was filed, effective January 1, 1978, whereas the application was filed (received by the Commission's Secretary) on March 10, 1978. There remains only the

[7] Thus, the Senate Report, cited above, at page 1, refers to the situation "where through inadvertence there has been a failure to file a tariff reflecting an *intended* rate." (Emphasis added.) See also Hearings before the Subcommittee on Merchant Marine and Fisheries, etc., 90th Cong. 1st Sess., August 15–16, 1967, p. 103, in which a witness stated that "in the inadvertence cases the question of relief swings on the question of the intent of the particular carrier and the shipper applying for relief."

question whether the application was filed within 180 days from the "date of shipment," as required by law.

The "Date of Shipment" Problem

The problem which arose in this case concerning the requirement that the application be filed with the Commission within 180 days after "date of shipment" occurred because the relevant bill of lading under which the shipment moved bore a date of August 25, 1977, whereas the application was filed (received by the Commission's Secretary) on March 10, 1978. This would amount to 197 days between bill of lading date and filing date and the application would have to be denied if we were limited to these dates. However, the Commission has followed a policy of flexibility in connection with this particular statutory requirement and has specifically permitted the date of an "on board" bill of lading or the date of loading aboard vessel to start the time running. In other words, "date of shipment" has been determined by reference to an "on board" bill of lading date or date of loading, not merely by a bill of lading originally issued by the carrier. See *Ghiselli Bros. v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 179, 182, 186 (1970); Special Docket No. 554, *Hermann Ludwig, Inc. v. Waterman Steamship Corporation*, May 8, 1978.[8] In both *Ghiselli* and Hermann Ludwig, the Commission remarked that P.L. 90–298 "is permissive and affords the Commission wide latitude of discretion" (13 F.M.C. at p. 182) and that it is a "remedial statute aimed at affording shippers relief from the consequences of certain errors inadvertently committed by carriers . . . ." *Hermann Ludwig*, cited above, pp. 4, 5. In the latter case the Commission confirmed the flexible policy enunciated in *Ghiselli* by stating that "a construction [of P.L. 90–298] which would unnecessarily limit the meaning of that term [i.e., date of shipment] to the date of delivery of the cargo to a carrier . . . would defeat the legislative intent without serving any regulatory purpose. (Citation omitted)." *Herman Ludwig*, cited above, p. 5.

There is therefore direct precedent to permit the carrier to submit evidence showing when the shipment was loaded aboard the vessel and to start the time running from "date of shipment" as meaning date of loading. Therefore, regardless of the present state of uncertainty occasioned by the lack of a fixed definition of the term "date of shipment" in the statute and Commission's regulations, there is no reason to deny the present application provided that satisfactory evidence has been furnished which meets the boundary marks of *Ghiselli* or *Hermann Ludwig*. Indeed, it would be inequitable for the Commission to deny the application when it has established certain guidelines by its won case law on which applicants may have relied, by *retroactively* changing such

[8] In *Ghiselli*, the Commission also held that a special-docket application could be considered to be "filed" not merely when it was actually received by the Commission but when the application was deposited in the mails, as evidenced by the postmark date. 13 F.M.C at p 182.

guidelines. See *Mediterranean Pools Investigation*, 9 F.M.C. 264, 304 (1966); *N.L.R.B. v. Guy F. Atkinson*, 195 F.2d 141, 149 (9 Cir. 1952); *Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 389 (1932); *Wainwright v. National Dairy Products Corp.*, 304 F. Supp. 567, 573 (N. D. Ga. 1969). Hopefully, as a result of the pending rulemaking proceeding seeking to amend Rule 92(a), 46 CFR 502.92(a), which, among other things, would fix a definite point of reference for "date of shipment," the difficulties of the type occurring in this case and in other cases will be avoided.[9]

In any event, AEL has furnished ample evidence explaining the critical facts. This evidence consists of an affidavit in letter form with attached dock and pier receipts and a Bureau of Customs Declaration showing date of departure of the *S/S Export Builder* from Baltimore. According to this evidence, the shipment in question was received at the terminal in Baltimore on August 25, 1977, but was not loaded aboard the *Export Builder* until September 22, 1977. The ship departed Baltimore on that date. If, as permitted by the *Hermann Ludwig* case, the date of shipment is considered to be September 22, 1977, and the date of filing is considered to be the date received by the Commission's Secretary (March 10, 1978), then the intervening time period is only 169 days, which is well within the 180-day period established by law.[10] Therefore all the requirements of P.L. 90–298 set forth above have been met.

Ultimate Conclusions and Orders

As discussed above, I have found that AEL failed to file a tariff conforming to its intentions to charge complainant a $64 rate through inadvertence, a type of error which is contemplated by P.L. 90–298. I have also found that AEL has met the other statutory requirements

[9] This rulemaking proceedings is Docket No. 78–12 *Rules of Practice and Procedures, Simplification of the Rules Governing Special Docket Applications, etc.*, 43 Fed. Reg. 18572. In that proceeding the Commission is seeking comments from the public in an effort to establish a fixed definition of the term "date of shipment" as used in P.L. 90–298 The Commission acknowledges that the legislative history to that law is not illuminating and that the continued state of uncertainty regarding the proper defintion has caused problems in disposing of special docket cases in the preamble to the proposed rule which suggests the date of rated bill of lading as the standard but invites comments on other standards such as date of payment, date of delivery, etc In Special Docket No 567, *Kuehne & Nagel Inc. v. Lykes Bros Steamship Co* Initial Decision, May 16, 1978, Judge Glanzer explains these problems at some length. See footnote 10 to the Initial Decision As he states, several standards have been used, such as date of delivery to the carrier, date of the "on board" bill of lading and date of loading aboard vessel Although not advocating any particular standard he notes serious dangers in using "on board" bill of lading and cites some authorities for the use of delivery to or by the carrier.

According to *Words and Phrases* Shipment, p 264 *et seq* there is case law supporting both date of delivery to the carrier or date of loading aboard vessel. See, e.g. *Chicago R I & P Ry. Co. v. Petroleum Refining Co* 39 F.2d 629, 631 (E D Ky. 1930) (delivery to carrier) and *Lamborn & Co. v. Log Cabin Products Co* 291 Fed 435, 438–439(D. Minn. 1923) (loaded on board ship)

Counsel for AEL suggests date of sailing as well as date of loading on the grounds that these dates show the carrier's commitment to carry Another possibility is the use of carriers' own tariff rules regarding the time in which their rates are considered to be effective Every tariff must have such rules under the Commission's regulations. 46 CFR 536.5(d)(3) Such rules show the carriers' intention and intention is a critical factor in special-docket cases. Interestingly, AEL's own tariff (Far East Conference Tariff F.M.C. No. 10, 5th revised page 134, Rule 1(c)) uses the time of acceptance of the cargo at the carrier's terminal or date of sailing from port of loading in case of a rate reduction if such occurs prior to sailing

[10] Of course, if the date of filing is considered to be the date the application was placed in the mail, as mentioned in *Ghiselli*, which may have been as early as March 6, 1978, judging by the cover letter of AEL's counsel, the time period would be further reduced to 165 days

regarding the filing of its application within the 180-day period prescribed by law and the filing of its corrective tariff prior to the filing of its application. Furthermore, I have found that no discrimination among shippers will result if the application is granted since there do not appear to be any other shipments of the commodity in question which were similarly affected by AEL's inadvertence and the tariff notice to be published, as ordered below, will insure that even if such shipments did in fact occur, they will be treated similarly.

Therefore, the application for permission to waive a portion of the freight charges is granted. If this decision is adopted by the Commission and subject to whatever modifications the Commission may make, it is ordered that:

1. AEL is authorized to waive collection of freight in the amount of $7,458.73[11] in connection with a shipment of iron and steel rejects loaded on the *S/S Export Builder* on September 22, 1977, for the benefit of the shipper Westinghouse Trading Co., Division of Westinghouse Electric Corp.

2. AEL shall publish promptly in an appropriate place in its tariff the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 568, that effective August 25, 1977, and continuing through December 31, 1977, inclusive, the rate on Plates or Sheets, Uncoated, Iron or Steel N.O.S., Rejects, Secondaries, Waste, as shown in Tariff Item 674.4000.28, is $64 per 2204.62 lbs., to Kaohsiung/Keelung, subject to all applicable rules, regulations, terms and conditions in this tariff, for purposes of refund or waiver of freight on any shipments which may have been shipped during this period of time.[12]

3. Waiver of the portion of freight charges shall be effectuated within 30 days of service of the Commission's notice of adoption of this decision (if adopted) and AEL shall within 5 days thereafter notify the Commission of the date and manner of compliance with this order.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 12, 1978.

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[11] AEL collected freight in the amount of $3,849.66 based upon a rate of $64 per weight ton of 1,000 kgs. applied against a weight of 132,610 lbs., which converts to 60,151 kgs. (The tariff states that 1,000 kgs. is the equivalent of 2204.62 lbs.) At the rate of $188 W/M previously in effect, the freight would have amounted to $11,308.39, on a shipment of 132,610 lbs. or its equivalent, 60,151 kgs. Thus, AEL wishes to waive $7,458.73, the difference between $11,308 39 and $3,849.66.

[12] The parties will notice that I have used the commodity description "Plates or Sheets, Uncoated, Iron or Steel N.O S. . . ." instead of the description "Secondary Tinplate, Terneplate & Tinfree Steel Plate (Chromium Coated) etc.," which appears in the corrective tariff effective January 1, 1978. That corrective tariff specifies that AEL intends the $64 rate to apply only to "Tariff Item 674.4000.28." According to the Tariff (FEC F.M.C. No. 10, 10th revised page 474) item 674.4000.28 is described as "Plates or Sheets, Uncoated, Iron or Steel N.O.S., etc." Therefore, I have employed the more specific description of the commodity shown for the item to provide more adequate notice to shippers.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 546

UNITED GROCERY EXPORT COMPANY

v.

PACIFIC WESTBOUND CONFERENCE

ORDER ON REVIEW OF INITIAL DECISION

July 14, 1978

Applicant in this proceeding seeks permission to refund a portion of freight charges applicable on a shipment of cream substitutes. Applicant alleged that the qualification "in bags" had inadvertently been added to the special rate which had been established for this commodity, thereby unintentionally depriving the shipper of such special rate.

Upon review of the initial decision, we determined that the application was not adequately supported since no evidence of inadvertent error had been submitted. The Secretary informed applicant that the application would be denied unless supporting evidence was supplied by a certain date. Applicant has now submitted an affidavit from its Executive Assistant who has the responsibility of implementing conference tariff actions. Applicant explains that the reinsertion of "in bags" was never intended and that the error occurred as a result of the heavy volume of tariff page turnover which is accomplished through the medium of magnetic card typing systems. Our independent search of conference minutes during this period also discloses no action by the Conference to reinsert the "in bags" qualification.

On the basis of the above we are satisfied that the reinsertion of the "in bags" qualification was not intended and that it happened as a result of inadvertent administrative or clerical error. The application complies with all of the other requirements of Section 18(b)(3) and, accordingly, applicant is authorized to refund \$211.82 of the charges previously assessed.

It is Ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 546 that effective January 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period January 1, 1977 through June 8, 1977, the special rate on 'Cream and Milk Substitutes' applies without the qualification of "in bags," subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within thirty (30) days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the refund and submit a copy of the published tariff notice.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 547

TOSHOKU AMERICA, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

July 14, 1978

We previously determined to review the initial decision in this proceeding. Upon completion of such review we have now determined to adopt the initial decision.

It is Ordered, That applicant is authorized to waive collection of $19,572.29 of the charges previously assessed Toshoku America, Inc.

It is further Ordered, That applicant shall publish promptly in its Tariff No. 183–A, FMC No. 134, the following notice.

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 547 that effective December 22, 1975, for purposes of refund or waiver of freight charges on any shipments of any commodities which may have been shipped during the period December 22, 1975 through May 14, 1977, the list of Ports served by Sea-Land includes Chignik, Alaska.

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver and submit a copy of the published tariff notice. Applicant shall also inform the Commission of any other shipments of any commodities during the period in question which are affected by this order and the rate adjustments made thereon.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 547

TOSHOKU AMERICA, INC.

v.

SEA-LAND SERVICE, INC.

Adopted July 14, 1978

Application to waive collection of a portion of freight charges granted.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service seeks permission to waive collection of $19,572.29 arising out of six shipments of refrigerated shell fish from Chignik, Alaska, to Tokyo, Japan, during the period April 29, 1977 - June 3, 1977.

The tariffs applicable at time of shipments were Sea-Land Service, Inc. Freight Tariff No. 197, ICC No. 71, Item 2220, 14 Revised Page 36 plus Supplement No. 12 (7%)–$7.80 per 100 lbs., minimum of 20,000 lbs.; $5.86 per 100 lbs., minimum of 30,000 lbs. Pacific Westbound Conference Local and Overland Freight Tariff No. 5., FMC–13, Item 031 3000 73, 1st Revised Page 263–$241.00 per ton of 1,000 kilos plus Terminal Receiving Charge, Rule 24.1, 1st Revised Page 67–$5.50 per metric ton as freighted, whereas the tariff sought to be applied is Sea-Land Service, Inc. Tariff No. 183–A, FMC No. 134, Item 200, Original Page 12.

The freight charges were assessed on the basis of an ocean rate of $200 per ton of 2,000 lbs., whereas the rate sought to be applied is an ocean through rate of $200 per ton 2,000 lbs., minimum of 15 tons per trailer.

The facts of record are as follows:

Sea-Land Service, Inc. (Sea-Land) has offered a domestic service from Chignik, Alaska, to the Continental United States. The service from Chignik, Alaska, to Far East ports is via a domestic vessel from Alaska to Seattle, Washington, then relayed to Pacific Division vessel in Seattle for transportaion to Far East. The Far East Service was regulated by Sea-Land Service, Inc. Tariff No. 183, FMC No. 57. This tariff was superseded by Tariff No. 183–A, FMC No. 134. The domestic service

[1] This decision became the decision of the Commission July 14, 1978

from Chignik, Alaska, is regulated by Sea-Land Service, Inc. Freight Tariff No. 197, ICC No. 71.

Sea-Land served Chignik, Alaska, by its own vessel and jointly with Salmon Carrier, Inc. under provisions of a connecting carrier agreement for service to Far East, see Tariff No. 183, 1st Revised Page 5–A, Effective July 11, 1973. This service was terminated by the connecting carrier in November 1973. The tariff page was revised to remove ports where service was no longer available. One of these ports was Chignik, Alaska. Tariff No. 183 was amended by 4th Revised Page 5–A when Sea-Land was able to jointly service Chignik with Puget Sound Tug and Barge Company. Chignik was again added to the ports serviced.

In December 1975, Puget Sound Tug and Barge Company ceased offering service and 6th Revised Page 5–A was issued canceling the joint service offered. Sea-Land's own vessels called Chignik during the above time frame and continued to call after cancellation by Puget Sound Tug and Barge Company. Freight Tariff No. 197, ICC 71 was used for shipment from Chignik, Alaska, to Seattle, Washington, on various commodities, including fish and related products. An administrative error was committed by removing Chignik from Tariff No. 183–A, FMC No. 134 when, in fact, Sea-Land did offer service via its own vessels under domestic Tariff No. 197, ICC No. 71 to Seattle. This service to and from Chignik, Alaska, never ceased; therefore, Chignik, Alaska, should not have been removed from Sea-Land Freight Tariff No. 183 or replacement Tariff 183–A.

This error, the removal of a port served by Sea-Land, was discovered when Sea-Land loaded nine trailers in Chignik, Alaska, for Tokyo, Japan, on March 31, 1977. A bill of lading was issued under Tariff 183–A, Bill of Lading No. 989–156742; but this bill of lading was canceled and replaced by Bill of Lading No. 992–298792 and 989–158660. The movement, due to the error in Sea-Land Tariff 183–A, FMC 134, was unable to be correctly billed. A combination of rates, Chignik, Alaska, to Seattle, Washington, Domestic Tariff 197, ICC No. 71, Item 2220 and Seattle to Japan, Pacific Westbound Conference Local and Overland Freight Tariff No. 5–FMC–13, Item 031–3000.73 was used to effect the shipments. This combination of rates was used in all six shipments in question.

No through rates were in effect from Chignik, Alaska, to ports in the Far East from December 1975 until Sea-Land corrected this error by publishing 2nd revised page 10 in Tariff No. 183–A–FMC No. 134, effective May 15, 1977. This was accomplished by a telegraphic filing.

The shipper, Toshoku America, Inc., paid all the Pacific Westbound Conference bills which covers the movement from Seattle to Japan. A partial payment has been made on Freight Bill 989–158660 of $8,045.69 of the total bill of $14,518.53. No other payments have been made.

In order to correct freight bills, Sea-Land needs authority to issue correct freight bills under Sea-Land Service Tariff 183–A, No. 134. This would allow a waiving of collection of $19,572.29, which was caused by the administrative error since corrected.

Respondent does not believe that any discrimination among shippers will result from a waiver of collection of the amount involved. Respondent agrees to publication of a notice, or of such action that the Commission may direct, if permission to waive the collection of freight charges is granted.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 92, *Special Docket Applications,* Rules of Practice and Procedure, is the law sought to be invoked. Briefly, it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistakes. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The inadvertent error of removing Chignik, Alaska, from Sea-Land Freight Tariff No. 183 or replacement Tariff 183–A as hereinabove set forth falls within the intended ground for waiving collection. Accordingly,

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[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges, Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916 Authorized Refund of Certain Freight Charges, under Purpose of the Bill.*

Sea-Land is hereby granted permission to waive collection of $19,572.29 from Toshoku America, Inc.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
December 5, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–15

THE CARBORUNDUM COMPANY

v.

ROYAL NETHERLANDS STEAMSHIP CO.
(ANTILLES) N.V.

ORDER ON RECONSIDERATION

July 17, 1978

This matter comes before the Commission on the Petition for Reconsideration (Petition) of the Carborundum Company (Complainant), requesting the Commission to amend its Report and Order in the above-captioned matter (Order). The original Order awarded Complainant reparation in the amount of $216.38. Complainant now requests that the total amount of reparation be increased to $402.04. Complainant bases this request upon item 10(o) on 14th Rev. page 8 of the United States Atlantic and Gulf-Jamaica Conference Freight Tariff F.M.C. No. 1. Royal Netherlands Steamship Co., the Respondent herein, has not responded to the Petition.

The Commission's prior award of $216.38 was based upon the "less volume" rate for the particular commodity which Complainant actually shipped. However, Item 10(o) of the above-referenced tariff operates to limit the freight and charges on this particular shipment to $980, the rate applicable to the next higher minimum of 14 weight tons.[1] Based upon this 14 ton minimum, the proper charge for the shipment including bunker surcharges and L and L charges totals $1,092.52. This represents a difference of $402.04 from the freight actually assessed by Respondent and $185.66 more than was awarded by the Commission's original Order.[2] Complainant is, accordingly, entitled to reparation in the total amount of $402.04.

THEREFORE, IT IS ORDERED, That the relief requested by the

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[1] Item No 10(o) was in effect at the time of shipment and states as follows:

Whenever in this tariff a commodity is subject to two or more ratings based on quantity, the freight and charges on quantities less than a specified minimum shall not exceed the freight and charges applicable to the next higher minimum.

[2] It is assumed that Respondent has already paid Complainant the $216.38 specified in the original Order.

"Petition for Reconsideration" of the Carborundum Company is hereby granted; and

IT IS FURTHER ORDERED, That Royal Netherlands Steamship Co. pay to the Carborundum Company on or before 60 days from the date hereof, an additional \$185.66, with interest at the rate of 6% per annum on any amount unpaid after 60 days.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[GENERAL ORDER 4; DOCKET NO. 77–53]

July 24, 1978

Part 510—Licensing of Independent Ocean Freight Forwarders

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: This rule increases the amount of the surety bond required for Commission licensed independent ocean freight forwarders engaged in the business of forwarding in the United States export trade from $10,000 to $30,000. The rule further provides for return of the application for failure to submit such required bond within a specified period. The rule also deletes certain provisions rendered obsolete or unnecessary by the passage of time.

EFFECTIVE DATE: To become effective September 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney
Secretary
Federal Maritime Commission
Room 11101
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523–5725

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking published in the *Federal Register* on October 21, 1977 (42 FR. 56139–56140) to: (1) amend section 510.5(g)(3) of the Commission's General Order 4 (46 CFR 510.5(g)(3)), by raising the amount of the surety bond required for Commission licensed independent ocean freight forwarders engaged in carrying on the business of forwarding in the export commerce of the United States from $10,000 to $50,000; (2) provide for the return of an application for a freight forwarders license to the applicant for failure to submit surety bond in the required amount; and (3) make other modifications to section 510.5.

In its Notice the Commission explained that while the bonding requirement was intended to offer some degree of protection to the shipping public in the event a forwarder should cause financial loss to the shipper, experience has demonstrated that in many instances of forwarder default, the present amount of the bond does not reasonably afford the degree of protection originally intended. In this regard, it was noted that inflationary spiral since 1963, the date of the original $10,000 bond, requires that more financial protection be afforded shipper clients of freight forwarders. This, the Commission pointed out, is demonstrated by the fact that freight rates, the monies received by forwarders from shippers to be paid to carriers, have doubled and tripled since the original bond was established. The Commission also noted that to obtain such a bond would require the applicant forwarder to demonstrate a substantial degree of financial responsibility and that the surety companies would require a higher degree of financial responsibility from the forwarder.

In addition to increasing the amount of the required surety bond, the Commission also proposed to amend the existing provisions of section 510.5 by: (1) providing for the return of the application to the applicant for failure to submit required bond; (2) establishing a time period within which existing licensees would be required to file the increased bond; (3) eliminating those provisions pertaining to "grandfather" rights of forwarders and temporary bonding which have been rendered unnecessary by the passage of time; and (4) redesignating certain provisions and making other editorial revisions necessitated by the above changes.

The stated reason for additional amendment (1) above was to terminate the existing procedure of issuing a notice of intent to deny an application and affording the applicant an opportunity for hearing where such applicant has failed to file the required bond. The Commission reasoned that because the filing of a bond by an applicant prior to licensing is mandatory under General Order 4 and section 44 of the Shipping Act, 1916, to require a hearing under circumstances where no bond has been furnished is unnecessary and time consuming.

Comments to the proposed rule were received from 134 parties, 122 forwarders, four forwarder associations, two congressmen, two shippers, one insurance association, one government agency, one surety company, and one group of ocean freight agents. The Commission's Bureau of Hearing Counsel replied to the comments and answers to Hearing Counsel's replies were also submitted.

All of the comments address the proposal to raise the amount of the bond from $10,000 to $50,000. Most of these oppose the proposed increase in the amount of bond. Those opposed, including Hearing Counsel, agree, however, that some change in the present bonding requirement is necessary and a variety of alternatives is suggested.

Several reasons are advanced by those commentators supporting the proposed increase; the increased bond would better protect the shipping public, help "professionalize" an industry in which, at present, an individual may enter with relatively little capital, reduce malpractices and deter undercapitalized individuals from entering the field.

Those opposing changes in the present bonding requirements take the position that the increase would impose a severe burden on small forwarders; that small forwarders would be forced from the business, leaving the field entirely in the hands of large forwarders. Several of these parties, including an insurance association and the Small Business Administration, submit that forwarders will be unable to: (1) afford the premium on such a bond; and/or (2) establish to the bonding companies that a small forwarder has sufficient financial strength to be eligible to receive a bond of the proposed size.[1] While most of those opposing the Commission proposal believe that the present bond is sufficient, some argue that no bond should be required.

A large number of comments was received favoring some change in the present bond, but opposing the proposed increase to $50,000. This group, which includes Hearing Counsel, states that small forwarders will be unable to secure a $50,000 bond due to the size of their forwarding operations and inability to pledge the required collateral, thus driving small forwarders from the trade, leaving ocean freight forwarding entirely in the hands of a limited number of large forwarders.

Many of these parties urge that the size of the bond be based upon the volume of the forwarder's business. Other comments suggest that recently licensed forwarders, or those licensed in the future, should be required to maintain a large bond while forwarders with several years of experience should be permitted to operate under the current bond requirements.

Certain of the commentators in favor of some change recommend that the amount of the bond be raised to $20,000; Hearing Counsel suggest $25,000. Some suggest that the public would be better served by rigorous Commission enforcement of existing regulations governing the conduct of forwarders in addition to imposing stricter requirements on forwarders seeking a Commission license. Several parties believe that the amount of credit extended by carriers to forwarders should be limited and that the bond requirement be replaced by a yearly license fee.

Hearing Counsel suggest the initiation of a further rulemaking proceeding to strengthen the Commission's regulation of the forwarding industry by establishing experience requirements for new forwarders and requiring financial data reporting by existing forwarders in order to identify those with potential problems.

Finally, one commentator suggests that the Commission give consideration to allowing the submission of security other than a bond. In this regard, it is noted that while section 44(c) of the Shipping Act, 1916,

[1] This is contravened in an answer submitted by another commentator engaged in the bonding of forwarders which submits that the $50,000 bond would not have an adverse impact on the forwarding company This commentator claims that $50,000 is not beyond the ability of forwarders, even small forwarders, to secure

provides for a bond, "or other security", section 510.5(g)(3), of Commission General Order 4, allows only for the filing of a surety bond.

In this proceeding the Commission must weigh the consequences of the following alternatives. An increase in the amount of the forwarder bond to $50,000 could impose hardship on small forwarders and be detrimental to the interests of the shipping public and possibly reduce the number of forwarders with a corresponding lessening of competition. Conversely, requiring a $50,000 bond could enhance the level of protection to the shipping public by holding forwarders to a higher degree of financial responsibility.

After carefully considering and evaluating all arguments advanced in support of these conflicting propositions, we have decided to increase the amount of the forwarder bond to $30,000.[2] This not only should act to temper the fears of those who believe the existing $10,000 bond is inadequate to protect the shipping public, but also appears to be within the range which many of those opposing an increase to $50,000 would find reasonable.

No comments were made on the remaining proposed amendments to section 510.5 and subject to one minor change in redesignated paragraph (h)(2), will be adopted as proposed.[3]

Hearing Counsel have suggested various changes in the Commission's freight forwarder regulations which are outside the scope of this rulemaking and, accordingly, are not addressed here. However, these comments will, be considered for possible inclusion in any future rulemaking.

Therefore, pursuant to sections 43 and 44 of the Shipping Act, 1916 (46 U.S.C. 841 a, 841 b); and section 4 of the Administrative Procedure Act (5 U.S.C. 553), section 510.5, Title 46 CFR, is hereby amended as follows:

1. Paragraphs (g)(1) and (g)(2) are deleted.

2. Paragraph (g)(3) is redesignated paragraph (g)(1) and revised as follows:

(1) No license shall be issued to a person to whom this paragraph is applicable unless such person has filed with the Commission a surety bond in the amount of $30,000 on Form FMC-59 as set forth below.

3. New paragraph (g)(2) is added as follows:

(2) Every licensee shall file with the Commission on or before December 1, 1978, a surety bond in the amount of $30,000 on Form FMC-59 as set forth below; otherwise such license issued to the licensee shall be revoked in accordance with section 510.9 of this Part.

4. Paragraph (h)(1) is deleted.

5. Paragraph (h)(2) is redesignated as paragraph (h)(1) and revised as follows:

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[2] Commissioner Karl E. Bakke dissents on this point. He does not find the proposed $50,000 figure to be unreasonable and would hold to that amount.

[3] The phrase "for failure to prosecute its application in accordance with this section" has been deleted from final paragraph (h)(2) as unnecessary.

(1) The Commission shall notify applicants for license of their qualification for the issuance of a license. Within 30 days of such notice the applicant shall file with the Commission a surety bond in the form and amount prescribed in paragraph (g) of this section. The Commission may, upon a showing of good cause, extend the time within which to file said surety bond.

6. Paragraph (h)(3) is redesignated as paragraph (h)(2) and revised as follows:

(2) If the applicant shall not have submitted the surety bond required under paragraph (g)(1) of this section, within the period specified in paragraph (h)(1), or otherwise authorized, the Commission shall return the application to the applicant.

By Order of the Federal Maritime Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 554(I)

BEMIS MANUFACTURING CO.

v.

TRAILER MARINE TRANSPORT CORP.

NOTICE OF DETERMINATION NOT TO REVIEW

July 26, 1978

Notice is hereby given that the Commission on July 26, 1978, determined not to review the decision of the Settlement Officer in this proceeding served July 21, 1978.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 554(I)

BEMIS MANUFACTURING COMPANY

v.

TRAILER MARINE TRANSPORT CORPORATION

Reparation Awarded.

DECISION OF EDGAR T. COLE, SETTLEMENT OFFICER[1]

The Bemis Manufacturing Company claims $536.70 as reparation from Trailer Marine Transport Corporation (TMT) on a shipment of Bedpans and Urinals transported aboard their vessel TMT San Juan, bill of lading 8–1, from Jacksonville, Florida to San Juan, Puerto Rico, June 25, 1976. Complainant alleges a violation of Section 18(b)(3) of the Shipping Act, 1916.

The carrier in rating the subject shipment relied on its Freight Tariff No. 1, FMC–F No. 2, Item 3440, applying a rate of $.95 cft. applicable to Hospital, Medical, Surgical or Dental Material, viz.: Equipment. The complainant, on the other hand states that the correct rate should be $.58 cft., TL minimum 2000 cu. ft., based on the description Disposable Laboratory and Hospital Ware NOS. The foregoing description is also found in Item 3440.

The main issue in the instant case is whether the commodity shipped, bedpans and urinals, would qualify to be rated under the disposable rate of $.58 cft. No exceptions are taken to the accessorial charges that were assessed. Charges assessed by the carrier amounted to $1763.18 while the complainant alleges that the freight charges should be $1226.48, a difference of $536.70.

In considering claims involving disputes as to the nature of cargo, if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the Commission has traditionally imposed a heavy burden of proof on complainant. See Informal Docket

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note Determination not to review July 26, 1978.)

283(I), *Western Publishing Company, Inc. v. Hapag Lloyd A.G.* In support of its claim complainant has submitted a catalog page indicating that the shipment bedpans and urinals are for single patient use and therefore they qualify for the disposable rating. Webster's Dictionary defines disposable as subject to or available for disposal; a discarding or throwing away.

Although the documents originally submitted to the carrier do not indicate that the commodity shipped was disposable the catalog page furnished by Bemis does indicate that the plastic bedpans and urinals are for single use for the prevention of cross-infection.[2] In view of the new information it is believed that the claimant has furnished the necessary information and reasonable burden of proof in support of its claim and therefore has met the heavy burden of proof requirement.

In denying the claim the carrier relied solely on Rule 450 in its tariff which provides that overcharge claims for adjustment of freight charges to be presented in writing within six (6) months from date of the bill of lading. In this connection, it is noted that the claim was filed with the Commission within the two (2) year statutory time period and it has been well established by the Commission that carrier's so called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

Based on the information presented in connection with this claim, we believe that the complainant has supplied sufficient information that would warrant reparations in this case. Therefore, Bemis Manufacturing Company is awarded reparation in the amount of $536.70.

(Sh) EDGAR T. COLE,
Settlement Officer.

[2] Complanant acknowledges the fact that the bill of lading description was deficient and should have read bedpans and urinals, disposable hospital ware, rather than bedpans and urinals

TABLE OF COMMODITIES

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

AGREEMENTS UNDER SECTION 15: See also Terminal Leases

— In general

Following a determination that a stipulation and settlement agreement between complainant and respondent is not subject to section 15 of the Shipping Act, 1916, the Administrative Law Judge dismisses the proceeding without prejudice to its renewal on a showing of non-compliance with any of the terms and conditions of the stipulations and settlement agreement. Complainant's request to hold the proceeding in abeyance for 30 days for the complainant to decide it agrees with the order of dismissal or to file an amended complaint seems to seek an unwarranted advantage. To grant such request would sanction giving an unwarranted advantage, as well as tacitly approving the filing of an amended complaint. Capital City Stevedores, Inc, v. Greater Baton Rouge Port Commission, 9 (11–12).

A shipper's complaint failed to state a claim for relief under section 15 of the Shipping Act, 1916, where the complaint contained no allegations of fact which even mentioned a second carrier or an agreement between carriers. Carton-Print, Inc, v. The Austasia Container Express Steamship Co. 30 (31, 35–36).

Investigation into the approvability of agreements is discontinued upon withdrawal by the proponent of the agreements. Nothing in the order of investigation or in Commission precedent authorizes the Administrative Law Judge to disregard the voluntary withdrawal of the very agreements that are specified to be the precise subject of investigation and hearing and to unilaterally "shift the focus," i.e., change the subject, of the proceeding to another area that is of great interest to a designated protestant. That is not to say that the Commission lacks power to, *sua sponte*, initiate a new investigation into any area it believes may be violative of the 1916 Act. Also, the aggrieved party may file a complaint pursuant to the Act. Agreements Nos. 10072 and 10072–1, 127 (129–130).

Since the agreements which are the subject of the instant investigation are no longer in effect, and in the absence of any request to extend the life of the agreements, the issues in the proceeding are moot. No useful regulatory purpose would be served by continuing the proceeding and, accordingly, the proceeding is discontinued. Agreements Nos. 10040–2 and 10153—Agreements in the United States/Guatemala Trade, 162 (164).

Proceeding involving the approvability of an agreement to modify a basic agreement is dismissed upon withdrawal of the modification agreement by the proponents. Agreement No. 8600–4, 214 (215).

Whatever else might be intended by the requirement of section 15 that agency action occur "promptly" (consistent with due process), that statute does not authorize the approval of otherwise unapprovable agreements or implementation of unapproved agreements whenever the proponents demonstrate that adjudication has not been "promptly" completed. Agreement No. T-2880, as Amended, et al., 753 (755).

The command of section 15 is absolute. Violations do not require a showing of bad faith or even of intent, and the Commission lacks general equity powers to assure that "fairness" is achieved in all matters over which it possesses regulatory jurisdiction. The Commission may not sanction past violations of the Shipping Act by retroactively approving an agreement under section 15. Agreement No. T-2880, as Amended, et al., 753 (755).

Where the facts indicate that a particular activity contravenes section 205 of the 1936 Merchant Marine Act, the Commission applying the "public interest" standard of section 15 of the 1916 Shipping Act has no alternative but to disapprove such activity. Far East Conference Amended Tariff Rule Regarding the Assessment of Wharfage and Other Accessorial Charges, 772 (778–779).

—Collective bargaining agreements

Proceeding relating to assessments made by the New York Shipping Association in funding benefits under a collective bargaining agreement between NYSA and ILO is discontinued. The Commission had directed satisfaction of remaining claims for assessment adjustments stemming from overassessments and the necessary adjustments had been made. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement, 846 (847).

—Pooling agreements

Agreement calling for, *inter alia,* a pooling of net revenues by carriers belonging to the same rate fixing combination which would reduce the proponents' economic incentive to develop individual markets while simultaneously foreclosing competitors from a substantial share of the U.S. Pacific Coast/Argentina trade, must be considered a per se violation of section 1 of the Sherman Antitrust Act and is *prima facie* subject to disapproval under the public interest standard of Shipping Act section 15. Approval is only possible if its anticompetitive features are sufficiently justified. A sufficient justification is a showing that the arrangement is necessary to meet a serious transportation need, to secure important public benefits, or to further a valid regulatory purpose of the Shipping Act, or the agreement is otherwise found to be in the public interest. The burden of making the required showing falls on the parties to the agreement. Agreement No. 10056—Pooling, Sailing and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade, 255 (257).

The Presiding Officer held that the proponents of an equal access to controlled cargo, coordination of sailings and net revenue pooling agreement between an Argentine and a U.S.-flag carrier met their burden of justifying the agreement because he found an important public benefit in the agreement's potential for creating "inter-governmental harmony." Once it was determined that the agreement was formulated in response to the Argentine cargo routing laws, the Presiding Officer assumed that the agreement represented an improvement over an unduly discriminatory and otherwise unalterable "reality." This approach was a natural result of the Commission's decision in the *Peru case,* 16 FMC 293. The Commission believes, however, that it is inadvisable to adhere to the expansive rationale presented in that case. Anticompetitive agreements must be justified on their individual merits and not merely because they have been customary responses to the problem of national flag discrimination. To do otherwise would tend to obviate Commission consideration of more direct corrective measures pursuant to section

19 of the 1920 Merchant Marine Act. Agreement No. 10056—Pooling, Sailing and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade, 255 (258).

An equal access to government controlled cargo, coordination of sailings and net revenue pooling agreement between an Argentine and a U.S.-flag carrier already concertedly fixing rates, which agreement excludes competition from a significant share of a trade, is a *per se* violation of the Sherman Act. Since the agreement was not sufficiently justified, it is disapproved. Id. (257–258).

Any "remedial effects" of an agreement between an Argentine and a U.S.-flag carrier providing for equal access to controlled cargo, coordination of sailings and net revenue pooling were remote and speculative at best. The record did not reveal the existence of substantially probable unfavorable conditions requiring remedy. Despite the potentially all-encompassing scope of the Argentine cargo preference laws, as a practical matter they do not seem likely to harm shippers or prevent U.S. or third-flag carriers from retaining a viable portion of the traffic. Possible avoidance of intergovernmental conflict cannot alone provide a basis for compromising the United States' policy of free and open competition in its foreign trades. Proponents would have to establish a clear likelihood that a specific type of official confrontation would be avoided and particularize the negative effects this confrontation would have on ocean shipping in the U.S. trade route in question. Even if it were established that the Argentine carrier possessed or was certain to obtain an unreasonably large market share by reason of the preference laws, and that section 19 action was an undesirable means of dealing with the problem, a multilateral agreement among all carriers participating in the trade would increase competition equally well without giving the U.S.-flag carrier an unfair advantage over third-flag carriers. Id. (258–259).

— Public interest

Maintenance by conferences of a system of payment of consolidation allowance is in the public interest within the meaning of section 15 of the 1916 Act. The consolidation industry which is supported by the system of allowances serves a useful transportation service and is accordingly in the public interest. That service fulfills a serious transportation need by allowing the carrier to attract cargo which otherwise might not move. Cancellation of the Consolidation Allowance Rule Published in the Freight Tariffs of Conferences, 858 (867–868).

— Rates

The Commission does not consider consolidation allowance rules of conferences as constituting routine ratemaking. The allowances represent a fee in return for the services of consolidators. However, whether or not the action is "ratemaking" is not necessarily controlling. What is relevant is whether or not authority to adopt such rules is encompassed within the approved provisions of the conference agreements. Cancellation of the Consolidation Allowance Rule Published in the Freight Tariffs of Conferences, 858 (865–866).

Provisions which extend conference agreements to "consolidation . . . and such other matters as may be ancillary to the transport of . . . intermodal shipments" permit the conference to initiate and maintain a system of payment of consolidation allowances with respect to intermodal shipments as currently found in the conferences' applicable tariffs. The system of payment of consolidation allowances has continued to appear without challenge in the tariffs for a number of years. This shows that the Commission and all other parties have considered the conferences to have had the authority concertedly to institute and maintain the system. Id. (866).

Authority of conferences to intiate and maintain consolidation allowances does not include the authority to cancel the system without Commission approval. Concerted action to eliminate the allowance falls within at least three criteria which require separate section 15 scrutiny. Specifically, cancellation represents a new course of action; provides a new means of regulating and controlling competition; and is not limited to the pure regulation of intra-conference competition. Further, cancellation cannot be called some sore of routine, interstitial ratemaking. Id. (867).

— Self-policing

Self-policing rules are amended to require that self-policing of Commission approved carrier agreements be done by persons not otherwise employed by or having any financial interest in a party to such agreement, and that self-policing include self-initiated investigations. Reporting requirements are also amended. Self-Policing Systems, 609.

The duty to adequately self-police stems not from a finding by the Commission of a need for policing, but rather is an obligation imposed by law. The obligation cannot be fulfilled *pro forma* but is one which requires effective positive conduct on the part of the conferences in return for continued recognition of the conference system. Id. (610).

The Commission may make use of its rule making authority under section 43 of the Shipping Act, 1916, to define and articulate enforceable standards to be used to judge the adequacy or inadequacy of self-policing. A rule making proceeding appears to be superior and preferable to case by case adjudication. Id. (611).

Self-policing rules require that self-policing be carried out by neutral persons or bodies. An exemption is provided where it can be shown that the duties of the conference personnel entrusted with the self-policing functions are minimal, the agreement is limited, the parties to the agreement are small and the trade relatively free of malpractices. Id. (611–612).

Self-policing rules provide that no member or employee of the policing authority may be retained or employed by or financially interested in any party to the conference agreement. However, if the policing authority is an independent certified public accountant with no connection with a member line other than as an independent contractor, there is little likelihood of compromise of confidential business records or chance that any bias will enter into the implementation of the policing authority. However, even independent certified public accountants would be put into an untenable conflict of interest situation in cases where a firm would be called on to investigate a client. In such situations the public accountant should not make the investigation and another independent certified public accountant without such connections with the investigated party should take its place. Id. (612).

Self-policing rules are amended to more clearly state the requirements that a policing authority must be established, that the functions and authority of the policing authority must be stated, and that the method or systems used to police the obligations under the agreement must be described. Id. (613).

With regard to self-policing procedures, investigations of malpractices or other violations of the agreement which come to the attention of the policing authority must be undertaken. Id. (613).

In order for a self-policing system to be effective, the policing authority must make investigations *sua sponte*. Each conference must establish a program of self-initiated investigations such as surprise audits of books, and examination of records, billings, classifications, bills of lading and other documents. Agreements must provide for such authorizations. Id. (613).

Since there is no search or seizure by the government and no criminal action is contemplated, there is no constitutional impediment to requiring members of a conference to submit to surprise audits and other investigations in connection with the self-policing of conference agreements. Id. (614).

"Misratings" are subject to self-policing sanctions. Misratings can be an effective and disguised method of rebating and should therefore be one of the prime concerns of a self-policing program. Id. (614).

While the Commission recognizes that it is important to use its enforcement powers in such a manner as to promote and not to discourage self-policing, it also has a duty to enforce the provisions of the Shipping Act, 1916. The requirement to self-police contained in section 15 of the Act was not intended to limit the Commission in carrying out its enforcement function. The Commission will make every effort to encourage and cooperate with self-policing authorities, and at the same time will remain committed to the use of enforcement powers to whatever degree necessary to free U.S. waterborne commerce of Shipping Act violations. Id. (615).

Periodic self-policing reports must state how many violators are caught. The report must state the number and general description of other violations by the carrier involved in the five years preceding the date of the finding of the violation. This information, along with the specific and detailed description of the offense and the exact amount of the penalty (liquidated damages), will enable the Commission's staff to ascertain how effectively self-policing obligations are being carried out. Id. (615–616).

COMMON CARRIERS: See also Tariffs

A terminal operator is not an "other person" subject to the 1916 Shipping Act if the only vessels calling at its piers are not common carriers. The Shipping Act applies to common carriers at common law. At common law, a carrier is a common carrier if it holds itself out to carry goods for anyone Here, vessels calling at the operator's coal piers do not hold themselves out as common carriers. Rather, the vessels carry coal under contract or charter only for either the purchaser or the seller of the coal. The vessels do not advertise a sailing schedule, they have not published a tariff for the carriage of coal, nor have they filed a tariff for such carriage at the Commission. Accordingly, vessels calling at the coal piers are not common carriers, and thus the operator does not provide terminal services in connection with a common carrier by water. The operator is not an "other person" with respect to its operations at the coal piers and, consequently, the Commission does not have jurisdiction over the operations of the coal piers. McAllester Brothers, Inc. v. Norfolk & Western Ry. Co., 62 (65–66).

The definition of a nonvessel operating common carrier does not include liability for the inland movement goods and liability for such movement is immaterial to the Commission's exercise of jurisdiction over the water portion of the movement. Thus a company which met the criteria for being classified as a common carrier by water and which disclaimed liability for the inland portion of the movement of goods was, in this case, a nonvessel operating common carrier. Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc., 166 (167–168).

The Commission has determined that a person or business association may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, as defined in the 1916 Shipping Act; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Act. Liability for the inland movement was not included within the definition and is immaterial to the Commission's exercise of jurisdiction over the water portion of the movement. Id. (168).

Failure of an entity purporting to operate as a nonvessel operating common carrier to assume liability for the inland movement of goods does not of itself preclude it being found to be an NVOCC within the meaning of the Shipping Act, provided it meets all the other criteria. Id. (168, 183).

The imposition of liability on a nonvessel operating common carrier is a rule of general applicability and does not necessarily turn on the particular facts of each case. Thus, distinctions drawn on the basis of the trade or type of proceedings involved or the position taken by the parties as to their status are all irrelevant. Liability will be imposed by law regardless of these considerations if a person in fact performs as an NVOCC. Id. (169).

The Commission does not decide whether the provisions of the Carriage of Goods by Sea Act are applicable to NVOCCs. That is for the courts to decide. If it is determined that an NVOCC is not a "carrier" under COGSA, liability for the loss of or injury to goods received by it for transportation would probably be imposed by law on the NVOCC as an insurer. The important consideration is that liability, in some form, will be imposed on an NVOCC as a "common carrier." Id. (171–172).

While an entity purporting to operate as a nonvessel operating common carrier failed, in fact, to assume liability for the water portion of the movement of goods, if a person in fact performs as an NVOCC any assumption of liability on the part of that person is unnecessary because liability will be imposed on him by law. Equally, any disclaimer of liability whether inadvertent or intentional is without meaning and standing alone has no legal consequence in determining carrier status. As to the port-to-port movements involved in the present case, the entity is an NVOCC. Id. (183).

The fact that the president of a nonvessel operating common carrier referred to shipments as "tendered to the ocean carrier" did not make the NVOCC a freight forwarder. The entity was in fact an NVOCC. The statement should have been: "tendered to the underlying ocean carrier." Rather than dispatching shipments for others, the entity was tendering shipments to the underlying ocean carrier in its capacity as an NVOCC. Id. (184).

CONDITIONS UNFAVORABLE TO SHIPPING IN U.S. FOREIGN COMMERCE

The Commission enacts rules pursuant to section 19 of the 1920 Merchant Marine Act to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States which result from discriminatory laws of Guatemala. Guatemalan-flag carriers and their associates are required to pay an equalization fee on all cargo, and make a specific request for a refund of the fee for any shipment which does not enjoy a duty free status under the industrial incentive laws of Guatemala. The fee is expected to be passed through the carrier to the shipper. A "favored carrier" must file an equalization fee payment guarantee with the Commission. Actions to Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Commerce of the United States, 330 (334–337).

DISCRIMINATION

A violation of section 17 of the 1916 Shipping Act does not necessarily require a finding that a shipper has been commercially injured and, to the extent a prior decision implies such a finding, it is retracted. Household Goods Forwarders Association of America, Inc. v. American Export Lines, 496.

Complainant, which had the burden of proof, failed to establish that the practice of carriers of charging different rates for household goods shipped by the Military Sealift Command than for household goods shipped by nonvessel operating common carriers and by civilian shippers constitutes unjust discrimination. The existence of unjust discrimination is a factual question which depends upon more than a bare difference in rates on similar commodities. A variety of rate discriminations is permissible in the presence of justifying transportation conditions. The record in the present case did not show the exact carrier costs and other transportation conditions prevailing for any of the carriers' three types of household goods shipments. Id. (497–498).

FREE TIME AND DEMURRAGE

Proceeding to determine whether the rules and regulations governing free time and demurrage on break bulk cargo at the Port of New York should be extended to containerized cargoes is discontinued in view of the absence of present practices which require remedial action or a showing that there exists a potential for future violation of the Shipping Act sufficient to warrant corrective action at this time. Free Time on Import Containerized Cargo at the Port of New York, 679 (681).

The Commission's power to adopt free time and demurrage rules does not depend upon a prior finding of a violation of section 17 of the 1916 Shipping Act. The Commission's section 43 rule making authority permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred. While section 17 allows the Commission to prescribe a just and reasonable regulation to correct one found unlawful, that section may also form the substantive basis for establishing a rule of general applicability under section 43; thus, section 17 can serve to redress "demonstrative" ills and, when used with section 43, "potential" ones as well. Id. (681–682).

The provision of the rules dealing with truck detention at the Port of New York (GO 35), which states that "steamship companies responsible for house-to-house movements of containers . . . are responsible under this part for delay occasioned by a lack of sufficient chassis," applies only to penalties assessed under the detention rule and the consignee's obligation to pay demurrage to an independent terminal operator is not relieved where the carrier has failed to provide chassis necessary for the movement of a house-to-house container and, as a result, free time is exceeded. In such a situation, the consignee or his agent could file a penalty claim against the water carrier responsible for the house-to-house movement. Id. (682).

FREIGHT FORWARDING

The Commission will not add to its freight forwarders compensation rule (Rule 510.25 (B)) language "that with respect to shipments handled for a government agency the forwarding fee shall not be less than the average freight forwarding fee recovered by the licensee on commercial accounts in the preceding fiscal year. The Commission prefers to handle the problem of preferential forwarding fees on government shipments by an *ad hoc* process of investigation and adjudication. Freight Forwarder Bids on Government Shipments at United States Ports, 16 (17).

Commission report on the matter of freight forwarder bids on government shipments does not generally condone variation between commercial and government forwarding fees. Only variations grounded on demonstrable economies of scale in providing the forwarding services in question are permitted. Id. (17).

The Presiding Officer properly found that nonvessel operating common carrier by water was not carrying on the business of forwarding without a license. There was no evidence in the record that freight forwarding services were performed on shipments not handled by the carrier in its capacity as an NVOCC. It is not a question of determining whether the NVOCC performs "forwarding services as a matter of fact" as contended, but whether the services are rendered on shipments not carried under the NVOCC's own bill of lading. Provided the carrier only performs freight forwarding services in connection with its own shipments it need not be licensed by the Commission. Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc., 166 (169).

Proceeding instituted to determine whether a shipper directly or indirectly controlled the forwarding activities of a licensed freight forwarder was discontinued in view of the fact that the licensee had changed the circumstances of his operation so as to avoid any appearance or possibility of shipper control. Orlando A. Puig, dba Houston Export International, 226 (227, 229).

Proceeding instituted to determine whether respondent's freight forwarder license should be suspended or revoked is discontinued. Because the premise for the Order To Show Cause was respondent's apparent failure to answer the Commission's inquiries and because respondent showed that it was not responsible for the delay and had fully complied with the Commission's request, the basis for questioning respondent's fitness to hold its license no longer existed. Lativan, Inc., Freight Forwarder License No. 1660, 313.

Proceeding instituted to require freight forwarder to show why its license should not be revoked because of the existence of a shipper relationship was discontinued on severance of the relationship by transfer of the license. The transfer was approved under delegated authority. J. T. Steeb & Co., Inc. 429.

Petition for declaratory order that the rates accepted by the General Services Administration for freight forwarding services in 11 ports for its fiscal year commencing July 1, 1977, are lawful under the freight forwarder rules of the Commission, is denied. An appropriate investigation into the probable violations revealed by the petition will be instituted. Freight Forwarder Bids on Government Shipments at United States Ports—Possible Violations of the Shipping Act, 1916, and General Order 4 488 (489).

Rules with respect to the licensing of independent ocean freight forwarders are amended to increase the amount of the surety bond required for licensed forwarders engaged in the business of forwarding in U.S. export trade from $10,000 to $30,000; to provide for the return of an application for a license to the applicant for failure to submit a bond in the required amount; to establish a time period within which existing licensees will be required to file the increased bond; and to eliminate those provisions pertaining to "grandfather" rights of forwarders and temporary bonding. Licensing of Independent Ocean Freight Forwarders, 892 (893, 895–896).

OIL POLLUTION, ALASKA PIPELINE

The purpose of the Commission regulation with respect to financial responsibility for oil pollution (Alaska pipeline) is to assure that adequate funds will be available within reach of the courts of the United States, to pay all persons suffering injury as a result of oil pollution occasioned by the transportation of North Slope oil to other ports of the United States. The term "persons" is intended to refer to any individual or entity permitted to make a claim under the provisions of the Trans-Alaska Pipeline Authorization Act. Financial Responsibility for Oil Pollution, Alaska Pipeline, 80 (83).

When the broad purposes of the Trans-Alaska Pipeline Authorization Act are considered, to wit, to push ahead with the construction and operation of the pipeline without permitting further environmental challenge, and to provide compensation for injuries sustained as a result of the production and transportation of Alaskan oil; and in view of the position taken by the Department of the Interior in its final rules regarding this subject, the Commission concludes that the sounder interpretation of the Act is that its financial responsibility provisions apply to all vessels engaged in any segment of the transportation of the pipeline oil between the terminal facilities of the pipeline and the port under the jurisdiction of the United States where that oil is first brought ashore. Accordingly, the Commission intends its financial responsibility regulations to apply to any vessel which has on board oil which has been transported through the pipeline at any time between the time the oil is originally loaded at the terminal facilities of the pipeline and the time it is first brought ashore at a port under the jurisdiction of the United States. Id. (85–86).

With respect to financial responsibility for oil pollution, Alaska pipeline, so long as the person operates the vessel carrying Alaska pipeline oil or is responsible for its operation, the person is an operator within the definition of the term, whether or not the person is the titled owner of the vessel, a demise charterer of the vessel, any other owner *pro hac vice* of the vessel, or any other class of person. Id. (86).

By its regulations on financial responsibility for oil pollution, Alaska pipeline, the Commission intends to prohibit any vessel to receive oil that has been transported through the pipeline, prior to the time oil is first brought ashore at a U.S. port, unless the vessel has on board the original copy of the certificate required by the rules, and can produce that certificate to enforcement officials on demand. This rule applies to the original loading of the oil in Alaska, the subsequent loading of that oil at any other place, the transportation of that oil, the transfer of that oil from one vessel to another, and merely having the oil on board a vessel whether or not the vessel is transporting the oil, or merely storing it. Id. (86–87)

Applications for certificates of financial responsibility for oil pollution, Alaska pipeline, must be filed at least 45 days prior to the date on which the vessel to be certificated will need the certificate. Fees may be paid at any time, but certificates will not be issued until the fees have been paid. If anyone other than an individual, a partner in a partnership, and an officer of a corporation signs the application, the application must be accompanied by documentation of the authority of the signer to sign the application, which documentation must itself be signed by a person authorized to confer the authority. Only persons who actually conduct or are responsible for the operation of a vessel may apply for a certificate. Owners may apply, but only if the owner operates the vessel. Id. (87)

Requests for renewal certificates of financial responsibility for oil pollution, Alaska pipeline, must be filed no later than 45 days before the expiration of the existing certificate, but not before 60 days prior to the expiration date. A request shall not be considered to have been filed unless it is complete. Id. (87–88).

All applicants for certificates of financial responsibility for oil pollution, Alaska pipeline, must keep the Commission informed of any changes in facts having a bearing on their financial responsibility. An applicant should not wait the five days technically permitted by rule, hoping that a certificate will be issued in the interim, for if such a certificate is issued, it might well be revoked immediately thereafter. Id. (88).

The Commission's rules on financial responsibility for oil pollution, Alaska pipeline, provide that financial responsibility established under the rules shall be separate from, and in addition to, the financial responsibility, if any, required of a vessel operator by the Federal Water Pollution Control Act and the Commission's rules implementing that Act. Since reasonable arguments can be made that liability would attach to a vessel operator under both the FWPCA and the Trans-Alaska Pipeline Authorization Act for damages arising out of the same incident, the Commission must require that financial responsibility for both potential liabilities be evidenced before certificates of financial responsibility are issued. The Commission does not express any view as to whether the liability of an operator in any one incident shall be greater than $14,000,000. Id. (88–92).

With respect to an applicant for a certificate of financial responsibility for oil pollution, Alaska pipeline, who wishes to self-insure, the Commission adopts a modified working capital test. The applicant/certificant must show that it has working capital and net worth in the amount of $19,000,000 in order to obtain a certificate for only one vessel. The self-insured operator of more than one vessel is requried to have only $5,000,000 in additional assets for the second vessel, $4,000,000 for the third, $3,000,000 for the fourth, $2,000,000 for the fifth, and $1,000,000 for the sixth. No additional assets will be required for the seventh and subsequent vessels. Id. (92–94).

The assets of an applicant for a certificate of financial responsibility for oil pollution (Alaska pipeline), who wishes to be a self-insurer, which may be included in computing the required working capital and net worth, must be located in the United States. Thus, working capital is calculated by determining the amount of current assets of the applicant which are located in the United States, and deducting from those current assets all of the current liabilities of the applicant, wherever they are owed. Net worth is calculated in a similar manner. The amount required of a self-insurer under the Alaska oil pollution rules is in addition to the amount required of the applicant under the rules relating to water pollution, if the applicant holds a certificate under the latter rules as a self-insurer. Id. (94–95).

Holders of certificates of financial responsibility for oil pollution, Alaska pipeline, who are self-insured, must notify the Commission within five days of the date they knew, or had reason to believe, that the amounts of working capital or net worth had fallen below the required amounts. Similarly, the annual financial reports, the six-month financial reports, and the quarterly affidavits must be filed at the stated times. Certificates of a self-insurer who fails to timely file reports will be revoked, on short notice, merely because the reports were not timely filed, whether or not the reports are actually filed later and evidence a satisfactory financial condition. Id. (95–96).

Because there may exist methods of establishing a vessel operator's financial responsibility for oil pollution, Alaska pipeline, other than those specifically set forth in the oil pollution rules, a catch-all method is added to the rules. This method is intended to apply to a new method, e.g., a letter of credit, or a rider or endorsement to an insurance policy, or some other form of financial responsibility. Under the catch-all method, an applicant must show that the new method is in the public interest by reference to identifiable and provable factors. Id. (96).

If a guaranty is filed as evidence of financial responsibility for oil pollution, Alaska pipeline, the guarantor must establish that it has the resources to make good on its guaranty. The guarantor must meet the same requirements as to working capital and net worth and the same reporting requirements as a self-insurer. A guarantor may also be a self-insurer in its own right and, if so, the guarantor must demonstrate and maintain working capital and net worth equal to the total of its obligations as a guarantor and as a self-insurer. Id. (97).

The oil pollution, Alaska pipeline, rules provide that any insurance form, guaranty, or bond provided as evidence of financial responsibility under the rules, shall expressly permit direct action by the claimant against the underwriter and that in any such action the underwriter will be entitled to invoke only those rights and defenses permitted by the Trans-Alaska Pipeline Authorization Act. The Act does not expressly grant a right or direct action against the underwriter by any claimant. As to defenses to direct action, the underwriter may assert the defenses it would have under the Federal Water Pollution Control Act, but only to the extent that those defenses are consistent with the purposes of the TAPAA. Clearly, the defenses of Act of God, and causation in a third party *without regard to the* negligence of that third party, and any causation in any third party other than the United States or other governmental entity, are not consistent with the purposes of the TAPAA. Id. (97–101).

The oil pollution, Alaska pipeline, rules require that the original copy of the certificate of financial responsibility be carried on board the vessel, that the certificate will expire at a date certain, and that the certificate will be void if there are any erasures on or alterations of the certificate, or if the certificant is not the operator of the vessel named on the certificate. Id. (102).

The oil pollution, Alaska pipeline, rules set forth five reasons for denying an application for a certificate of financial responsibility, or revoking a certificate. Certificates may be denied or revoked for willful false statements to the Commission, for failure to comply with Commission inquiries, regulations, or orders, for failure to timely file financial reports (self-insurers), for cancellation of any undertaking, e.g., a surety bond, and for failure to maintain financial responsibility. Id. (103–104).

Before denying an application for a certificate of financial responsibility, Alaska pipeline, or revoking a certificate, the applicant or certificant will be afforded an opportunity to show that the basis for the intended denial or revocation is not true. The period of time will vary according to the urgency of the action. Id. (105).

OVERCHARGES: See Reparation

PRACTICE AND PROCEDURE

—Administrative Procedure Act

Under the Administrative Procedure Act, an agency which issues opinions in narrative and expository form may do so without making separate findings of fact and conclusions of law, provided that the agency's findings and conclusions on material issues of fact, law, or discretion, are indicated with such specificity as to advise the parties and any reviewing court of their record and legal basis. Further, an agency need treat only material questions of fact, law, or discretion, and is not required to make findings and conclusions, and give reasons therefor, on collateral issues or issues not relevant to its decision. Department of Defense and Military Sealift Command v. Matson Navigation Co., 24 (25–26).

Commission order upholding an order of the Presiding Officer dismissing a complaint by the Military Sealift Command, relating to Matson's failure and refusal to file military class rates, met the requirements of the Administrative Procedure Act and the Commission's Rules of Practice and Procedure. The Presiding Officer concluded that MSC had failed to meet its burden of proving that Matson's failure and refusal is an unjust and unreasonable practice within the meaning of section 18(a) of the 1916 Act and section 4 of the 1933 Act. The Commission agreed and, in addition, considered the Presiding Officer's specific endorsement and adoption of the reasoning of Matson, Hearing Counsel, *et al.*, as well as a statement of his own reasoning and conclusions, as sufficient to comply with the APA and the FMC Rules. The Presiding Officer's order adequately and sufficiently apprised the parties, and any potential reviewing court, of the basis for the determinations reached therein. However, whatever the merits of the Presiding Officer's order, the FMC's order in effect addresses and disposes of the relevant issues raised *de novo* and, to that extent, cures any procedural or substantive failings argued to exist in the Presiding Officer's order. Id. (26).

— Complaints; dismissal

Joint motion to dismiss proceeding is granted in view of the fact that the practices of the carrier complained of have ceased. Any further consideration of the record with the view toward further proceedings on alleged past violations of law is singularly within the province of the Commission and no recommendation from the Administrative Law Judge seems either desirable or appropriate. International Paper Co. v. Lykes Bros. Steamship Co., Inc., 117 (119).

Complaint is dismissed upon a clear indication that complainant does not intend to pursue its complaint. Interconex, Inc. v. Sea-Land Service, Inc., 770.

— Declaratory orders

Petition for declaratory order to determine the applicability of a conference tariff to the movement of shipment from Ensenada, Mexico, to Wilmington, Calif., is denied and the proceeding is discontinued. The fact is that the shipment actually moved from Puntarenas, Costa Rica to Wilmington. As a result, and inasmuch as all parties have suggested in their pleadings that the conference tariff might well be applicable to the entire carriage, the Commission declines to issue a declaratory order within the framework of the instant proceeding. Thomas P. Gonzales Corp. v. Westfal-Larsen & Co., A.S., 131 (132).

— Designation of parties

Rules of Practice and Procedure are amended to terminate the practice of naming persons protesting individual changes in tariffs "complainants" and to cease making them automatic parties to formal proceedings to investigate rate changes in general revenue cases. Designation of Parties, 202.

Practice of naming persons protesting individual changes in tariffs "complainants" and making them automatic parties to formal general revenue proceedings frequently causes such proceedings to suffer undue delay because such protesting parties are usually interested in issues pertaining to the reasonableness of an individual rate or rates rather than the central issue whether the gross revenue which the carrier is seeking to derive from its proposed rate changes is just and reasonable. Under present practice, protestants are, in effect, granted intervention without having to make a showing of substantial interest in the issues or representing that they will not unduly broaden the issues. With elimination of the practice, protestants may still be permitted to intervene under the standards prescribed by Rule 72. Id. (203).

The decision to investigate rate changes in general revenue cases is made by the Commission on the basis of information submitted by the carriers, protesting persons, and other information available to the Commission, and not because protesting persons may or may not intend to take an active role in the proceeding. If protesting persons decide not to participate actively, this does not mean that the carrier suffers some kind of prejudice. By law a carrier has the burden of proving the justness and reasonableness of its proposed rate changes. Should the carrier need to examine the position of an absent protestant, the carrier can use the Commission's deposition and subpena processes. Id. (204).

Contention that elimination of the practice of naming persons protesting individual changes in tariffs "complainants," and making them automatic parties to formal, general revenue proceedings, would eliminate consideration of evidence pertaining to individual commodity rates and movements is unfounded. In any general revenue case, the carrier attempts to predict volume of movement and the revenue to be expected following rate changes. Any such prediction or evaluation may obviously be affected by changes in volume of movement of particular commodities and if the commodities are major-moving items which are affected by elastic demand factors, the carrier's predictions may be subject to significant revisions. The rule changes do not preclude consideration of these factors. However, the question of the reasonableness of a particular rate is still an essentially different issue which should be litigated in consideration of transportation factors such as cost of service and value of service. Id. (206).

—Discovery

Section 27 of the 1916 Act provides that in all proceedings under section 22 of the Act, discovery proceedings shall be available under rules and regulations of the Commission. The Senate Report accompanying the Act, whereby section 27 was amended to permit discovery, stated that discovery procedures would be applicable only in adjudicatory proceedings arising under section 22. Agreement No. 9973–3 and Agreement No. 9863, 133 (135).

The Administrative Procedure Act defines "adjudication" as the "agency process for the formulation of an order." "Order" is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." Section 15 of the Shipping Act, 1916, provides that the Commission shall approve, modify, or disapprove agreement by order. Hence, the instant proceeding involving the lawfulness of agreements is an adjudicatory proceeding. Under the actual wording of section 27 and its legislative history, discovery is available under Commission rules and regulations, in adjudicatory proceedings conducted, as here, pursuant to section 22 of the Act. Id. (135–136).

Section 22 of the 1916 Act authorizes the Commission to conduct investigations into "any violation of" the Act. The phrase "any violation of" includes inquiries concerning the approval or disapproval of agreements pursuant to section 15, as well as "violations" of the proscriptive provisions of the Act. Thus, it follows that discovery is available in proceedings instituted to determine the approvability, pursuant to section 15, of Agreements. Id. (136).

The Commission did not waive the applicability of its discovery rules because the order of investigation and hearing provided that the proceeding shall be limited to the submission of affidavits of fact and memoranda of law, replies thereto, and oral argument, if requested and/or deemed necessary by the Commission. The limitation was on the method whereby evidence and argument will be presented, but not on the method whereby that evidence will be acquired by the parties to the proceeding. Use of discovery is not inconsistent with the expeditious resolution of the proceeding because the discovery rules provide that the parties may be ordered to commence the "hearing" prior to the completion of discovery. Id. (136–137).

Where a proceeding was limited to the submission of affidavits and memoranda, and it was determined that discovery was available in the proceeding, the order of investigation was modified to provide for referral of the proceeding to an Administrative Law Judge to oversee the discovery phase of the proceeding. The Commission is not constituted to handle, with the degree of expedition desired, the interlocutory matters relating to discovery. On a date when the protestants to the agreements involved are required to file their affidavits, the jurisdiction of the judge shall terminate, and all subsequent documents shall be filed with the Commission. Id. (138–139).

Rule permitting automatic appeals or review by the Commission in the case of subpenas and discovery directed against Commission staff personnel does not depart from the principle of equality embodied in section 27 of the Shipping Act, 1916. Unless the Commission itself has some control over the matter of prehearing discovery and disclosure directed against its own staff and documents in its possession, the Commission cannot adequately protect functions which may involve delicate and sensitive considerations of policy as to which presiding officers may be unaware. The Commission does not intend to deprive parties of vital information necessary for proper cross-examination nor conduct its investigations and present evidence in reliance on secret, privileged information. Rules of Practice and Procedure, 604 (606–607).

—Ex parte communications

Complainant, who was not represented by counsel, violated the Commission's rules against ex parte communications where in response to a motion to dismiss it sent a letter from its president to the ALJ without sending a copy to the carrier. Although authorized to dismiss a complaint for breach of the rule against ex parte communications, the ALJ did not dismiss this complaint in consideration of the fact that the complainant was without counsel. The complainant's letter and attached documents were made part of the record and a copy was furnished to the carrier. Carton-Print, Inc. v. The Austasia Container Express Steamship Co., 30 (32–33).

—Informal docket procedure

Claims against a common carrier for loss or damages in transit are specifically excluded from adjustment under the informal docket procedure of Rule 19 of the Commission's Rules of Practice and Procedure. Freeport Kaolin Company v. Combi Line, 249 (250).

—Initial decisions, adoption of

The fact that an initial decision is adopted upon "the Commission's having determined not to review the same" does not deprive the decision of precedential value. Upon adoption, the initial decision becomes the decision of the Commission regardless of the procedure used to effect that adoption. Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc., 166 (169).

—Record, adequacy of

If the Administrative Law Judge who presided at the reception of the evidence is of the opinion that the record is inadequate to permit him, on remand, to make necessary directed findings, it remains his responsibility to take whatever action is necessary (including reopening of the record) to assure development of a record sufficient to resolve the issues remanded. Accordingly, where the presiding officer in a remanded proceeding issued a "supplemental decision" stating that the record developed before him was inadequate to resolve the issues raised by the Commission's order of remand and suggesting that the proceeding be reopened, the supplemental decision would be vacated and the cause again remanded with instructions to reopen for such further hearings as would be necessary to permit resolution of the stated issues. The presiding officer should have reopened the proceeding *sua sponte*. Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 570 (571).

—Rule making proceedings

Rules are amended to provide for a single round of comments in rule making proceedings unless particular circumstances warrant the filing of replies to comments and to provide for the participation of the Bureau of Hearing Counsel. The one-round procedure would not be followed in proceedings involving factual disputes or complex issues. Moreover, the determinations as to what type of proceeding will be employed will not necessarily be made in the initial proposal. Further submissions may be called for after seeing the initial comments. The Commission will not make substantive changes to a proposal and finalize without further opportunity for comment. Rules of Practice and Procedure, 626 (627–628).

—Subpenas

Rule 135 dealing with subpenas of Commission staff personnel and subpenas for production of documents in the possession of the Commission is amended to provide for service of subpenas on the Commission's Secretary; to conform the procedural schedule regarding prehearing depositions with that which applies to motions to quash subpenas served in connection with depositions; to authorize the General Counsel to designate an attorney to represent staff personnel under subpena; to permit rulings of the presiding officer to be appealed or, absent appeal, to be reviewed by the Commission; and to provide for replies to appeals. The filing of such appeals will automatically stay the presiding officer's rulings until the Commission acts on the matter. Rules of Practice and Procedure, 604 (605).

Rule requiring that subpenas of Commission staff personnel be served on the Commission's Secretary will not deprive the staff member of his own view on the propriety of complying with a subpena or discovery order. Likewise, the delegation by the General Counsel of an attorney to represent the staff member is not intended to have this effect. Id. (606).

An attorney designated by the General Counsel to represent a staff member under subpena will be free to represent him before the presiding officer and the Commission without supervision by the General Counsel or by anyone else whose interests may conflict with that of the staff member. The General Counsel would become involved only in the matter of advising the Commission when appeals are filed or the Commission decides to review on its own motion. The Commission expects the General Counsel, whenever possible, to select an attorney from without his office. Id. (606).

Rule permitting automatic appeals or review by the Commission in the case of subpenas and discovery directed against Commission staff personnel does not depart from the principle of equality embodied in section 27 of the Shipping Act, 1916. Unless the Commission itself has some control over the matter of prehearing discovery and disclosure directed against its own staff and documents in its possession, the Commission cannot adequately protect functions which may involve delicate and sensitive considerations of policy as to which presiding officers may be unaware. The Commission does not intend to deprive parties of vital information necessary for proper cross-examination nor conduct its investigations and present evidence in reliance on secret, privileged information. Id. (606–607).

PRACTICES OF CARRIERS

Proceeding to determine whether nonvessel operating common carriers in the Port of Miami area were engaging in practices violative of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, is discontinued in view of settlement agreements. As an express condition of settlement the respondent consented to the entry of an order directing them to cease and desist from certain practices and to the entry of an order requiring the submission of compliance reports. The orders related, inter alia, to: accepting shippers' measurements for cargo without having ascertained that they are in fact correct; the practice of rounding fractional cubic measurements prior to computation of cubic measurements of cargoes tendered for shipment; assessment of collection of pickup and delivery charges, or any other rates or charges required to be filed with the Commission, prior to the effective dates of such rates and charges; and applying rates and charges which have been superseded by subsequent filings and rates and charges. U.S. Miami—Caribbean Puerto Rico Trades, 188 (189).

PREFERENCE OR PREJUDICE

Carrier's rate increases on automobiles and related commodities did not subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or advantage in violation of section 16 First of the 1916 Shipping Act. Matson Navigation Co.—Changes in Rates in the U.S. Pacific Coast-Hawaii Trade, 822 (827–828).

RATES

— In general

Proposed rule requiring common carriers by water, conferences of such carriers and member carriers of such conferences operating in U.S. foreign commerce to submit revenue and cost data to the Commission in connection with general rate increases and certain surcharges filed with the Commission by such carriers or conferences, is withdrawn. Submission of Revenue and Cost Data Concerning General Rate Increases and Certain Surcharges Filed by Common Carriers, Conferences, and Member Carriers of Rate Agreements, 1.

Initial tariff of Arctic Lighterage Company in the Western Alaska Trade is not unreasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933. The tariff withstands the test of operating ratio which is 122.26%. Artic sustained a loss for the 1976 operating season, so that there can be no rate of return on equity or rate of return on rate base. Arctic Lighterage Co.—Proposed Initial Tariff in the Western Alaska Trade, 112 (116).

Proceeding to determine the lawfulness of a rate increase by a carrier in a domestic offshore trade is discontinued since the carrier had terminated its all water service in the trade and cancelled its tariff. Sea-Land Service, Inc.—General Increase in Rates in the U.S. West Coast/Puerto Rico Trade, 504.

While a carrier will be permitted to calculate its rate base taking into account accumulated depreciation as of the beginning of the year in accordance with General Order 11, there are facts and arguments in the record supporting the conclusion that mid-year or average rate base may be a more appropriate basis for measuring rate of return. The use of a rate base stated at cost, less accumulated depreciation as of the beginning of the year, gives no effect to the fact that the rate base is being reduced during the year by depreciation expense. Thus, such a rate base may not be properly matched, for rate of return purposes, to the income which is being earned over the entire period. A rule making proceeding has been instituted to focus on this question. Matson Navigation Co.—Changes in Rates in the U.S. Pacific Coast-Hawaii Trade, 822 (824).

The Commission is deciding in the instant case whether an appropriate portion of accumulated deferred income tases should be deducted from rate base, and not whether it is more appropriate to use "normalization" or "flow-through" of depreciation and tax expenses for purposes of the income side of the rate of return equation. The issue of "normalization" vs. "flow-through" will be considered in a rule making proceeding. Id. (825).

Some portion of deferred taxes found on a carrier's balance sheet should be deducted from the rate base. In this case, in determining whether the rates subject to investigation are reasonable, the carrier's rate base will be reduced by a pro rata share of the deferred tax reserves reflected on its balance sheet. The adjustment to rate base should be made by multiplying the amount of deferred income taxes on the balance sheet by a ratio which has the rate base (prior to adjustment for deferred income taxes) as the numerator and the carrier's total capital as the denominator. The deferred tax reserve to be used in this formula is the reserve which has been accumulated only as the result of the use of accelerated depreciation for tax purposes. Id. (825–826).

The test to be applied to determine whether rates resulting from general rate increases are reasonable is whether the rates produce revenues for the carrier which are sufficient to cover all legitimate expenses plus a fair return on the assets properly used in the trade. In determining whether the return on assets is fair, the Commission must consider whether it is sufficient to cover the cost of the debt capital properly allocated to those assets and to compensate the equity holder for its investment in these assets at a level which is comparable to the return achieved by equity holders in companies with similar risk characteristics. Id. (826–827).

Carrier's increases in rates of buses, fire trucks and trailers cannot be found to produce an unreasonable profit. Lack of shipper opposition to rate increases is one indication of reasonableness, particularly where shippers of that commodity, as here, would normally be sophisticated industrial shippers. Therefore, the increases are found to be just and reasonable pursuant to section 18(a) of the 1916 Act and sections 3 and 4 of the Intercoastal Shipping Act. Id. (828).

— Intermodal transportation

A carrier's intermodal joint through rail/water transportation service between mainland states and Puerto Rico is not within the exclusive jurisdiction of the ICC. The rate "divisions" received by the participating rail carriers are subject to rate regulation by the ICC and the water carrier's rate divisions are subject to full FMC regulation. Trailer Marine Transport Corp.—Joint Single Factor Rates, Puerto Rican Trade, 524 (530).

Under section 302 of the Interstate Commerce Act, adopted in 1940, when rail/water transportation moves between states, it is exclusively an ICC matter. When it moves from the mainland United States and a place other than a state as defined by section 302 ("State" means a State of the United States or the District of Columbia), the ICC has "exclusive" jurisdiction only before the cargo is transshipped to the ocean vessel. Today's intermodal transportation requires some secondary inquiry by both the ICC and FMC into the effects of a through rate. For instance, the ICC has "exclusive jurisdiction" over the rail division of a joint service (to Puerto Rico), but the ocean carrier must identify the rail division in its FMC tariff and the FMC may consider the rail division's impact on the total movement in analyzing the lawfulness of the ocean division. Id. (531).

A coherent national transportation policy does not require exclusive ICC jurisdiction over the filing and level of domestic offshore water carrier rates whenever the water carrier participates in a joint through arrangement with a railroad. The "dual authority" approach adopted by the ICC is reconcilable with both the ICA and the Shipping Act. In domestic offshore commerce, as in foreign commerce, it suffices that the ICC regulate the rail division as a proportional rate. Id. (535).

—Military rates

Certain provisions of Rule 549.5(b) pertaining to the use of a Uniform Capacity Utilization Factor in determining cargo unit costs in connection with carrier bids for the carriage of military cargo, are revoked. UCUF has rarely affected bidding and the burden of UCUF reporting is extreme in comparison to its utility. Military Rates, 3 (4).

The burden of proof in a proceeding commenced by the filing of a formal complaint is on the complainants as proponents of the order requested of the Commission. Here, the Military Sealift Command challenged Matson's decision not to reestablish special class rates for government cargoes subsequent to the repeal of section 6 of the 1933 Act, contending that Matson's failure to continue a long standing practice of a separate, simplified rate system for MSC cargo is a violation of section 18(a) of the 1916 Act. MSC's only justification for finding Matson's current practices unlawful was the problems encountered by MSC in complying with MILSTAMP in rating military cargoes under the commercial rate structure, which allegedly results in MSC paying a higher rate than is appropriate because it cannot furnish an adequate description of the cargo to permit selection at the lowest proper commodity rate in Matson's tariff. This justification was found to be insufficient to support a determination that Matson was in violation of section 18(a). Arguments by MSC that the record contains evidence of cost savings are without merit. Department of Defense and Military Sealift Command v. Matson Navigation Co., 24 (28).

Unless and until it is clearly established that the ocean rates available to the Military Sealift Command do not reflect *bona fide* differences in carrier costs, value of service, competition or other recognized transportation factors, the most appropriate course is to permit MSC's competitive procurement methods to continue. Whatever adjustment may eventually be required in these methods, by reason of repeal of section 6 of the Intercoastal Shipment Act, can probably be best accomplished by amending the Commission's regulations governing the level of military rates. Household Goods Forwarders Association of America, Inc. v. American Export Lines, Inc., 496 (499).

REFUND AND WAIVER APPLICATIONS: See Reparation
REPARATION

—In general

The complainant shipper did not have standing to recover reparation of alleged overcharges where the consignee, not the shipper, paid the freight and the shipper had never received a valid assignment of the claim from the consignee. Carton-Print, Inc. v. Austasia Container Express Steamship Co., 30 (31, 34–35, 42).

Even if the shipper's poorly drafted complaint could be interpreted as alleging that the carrier assessed "unjust and unreasonable" rates and thus as invoking section 18(b)(5) of the Shipping Act, 1916, no award of reparation would be granted under section 18(b)(5), since that law does not apply retroactively and cannot properly be applied where, as was the case herein, there is no rate on file with the Commission. Id. (36).

A shipper's complaint did not state a claim for relief under section 18(b)(1) of the Shipping Act, 1916, notwithstanding that the Commission had previously determined in another matter that the carrier had not filed a tariff with the Commission, since the carrier's failure to file a tariff could not be shown to have been the proximate cause of any injury to the shipper. The supporting information furnished by the shipper gave absolutely no indication that the consignee's injury (it was the consignee, not the shipper, which paid the freight charges), which allegedly resulted from the overcharges, was caused even remotely by the carrier's failure to file a tariff. Id. (31, 36–38, 42).

Where a carrier's tariff rules provided that the carrier may load other freight in the free space available in a container, and that rates would be assessed based on 100 percent of the cubic capacity of the container if the shipper failed to furnish the cubic measurements of cargo rated on a cubic foot basis; complainant delivered containers sealed, thereby effectively preventing the carrier from using whatever space might otherwise have been available; and complainant failed to apprise the carrier of the actual measurements of the cargo as required by the tariff, complainant was not entitled to reparation on the basis that it had been overcharged because of the application of the carrier's tariff rules. Recovery will be allowed under proper circumstances where due to inaccuracies in the shipping documents the carrier is led into assessing higher charges than provided in its tariff for what actually moved. In this case, what actually moved, and what complainant was properly assessed for, were entire containers. Cone Mills Corp. v. Trailer Marine Transport Corp., 141 (142, 144); 146 (147, 150).

There is no basis for complainant's assumption that the reparation issues in the proceeding would be considered in a separate proceeding. Commission Rule 251 contemplates a two-tier procedure within the same proceeding, with the reparation phase following a determination that a right to reparation exists, i.e., upon a showing that a violation of the Shipping Act, 1916, has occurred. In the present case, complainant alleged violations by respondent but failed to introduce evidence in support of the alleged violations. In the light of their failure, due process does not require that the proceeding be remanded for further hearing without some additional assurance by complainant that it is interested in actively litigating the alleged violations. Pacific Coast European Conference v Southern Pacific Marine Transport, Inc., 166 (170–171).

A shipper was entitled to reparation for overcharges resulting from misdescription of chemicals carried by respondent and assessed at the highest rate potentially applicable according to the description provided on the bill of lading. A shipper's misdescription of cargo can still afford a basis for later reparation relief; the controlling test is what the complainant shipper actually shipped, and is not limited to how the cargo was described on the bill of lading. Bristol-Myers Co. v. Prudential Lines, Inc., 191 (193).

The degree of transportation experience or knowledge of a shipper organization, based upon its size and frequency of booking cargo, does not appear to constitute a valid mitigating factor sufficient to justify denial of the shipper's claim of reparation for overcharges resulting from misdescription of cargo on the bill of lading. Id. (193).

Since a shipper is charged with knowledge of a tariff, it should submit cargo specifications in a manner which insures the most favorable rate application statutorily permissible. Failure to do so, however, cannot insulate the carrier against claims for a subsequent rate adjustment if the carrier chooses to accept a questionable cargo description at face value or arbitrarily freight a mixed shipment at the highest rate for any item included in the shipment for lack of a breakdown of the contents. A more appropriate course of action for the carrier to follow would be to resolve questionable or insufficient cargo descriptions at the time of billing by reviewing other available supporting documentation or by contacting the shipper. Id. (194).

Where a carrier filed a temporary tariff rate covering carpet yarn in December, 1974, which rate consisted of a price/metric ton component and a bunker surcharge; the carrier's conference issued a permanent tariff filing in February, 1975, bearing an effective date of October 1974, in which it was intended that the price/ton component and the bunker surcharge be incorporated into a single rate, but in which the last two digits of the intended combined rate were accidentally transposed, resulting in the issuance of a rate nine dollars lower than that actually intended; and where the inadvertent error was not discovered immediately upon receipt of the tariff, resulting in publication of the erroneous rate in February, 1975, two shipments of carpet yarn which moved in January, 1975, were properly freighted at the dual component temporary rate effective in December, and were not subject to the erroneously stated permanent rate, despite its earlier purported effective date. Where a permanent tariff filing differs from the temporary filing which it replaces due to error in the permanent filing, the erroneously printed rate does not become the lawful rate which must be applied until the date of receipt of the permanent tariff page. Mere failure to detect and reject an erroneous tariff filing cannot negate the statutory requirement that those rates specified in the carrier's tariff on file with the Commission and duly published and in effect at the time of shipment be applied; any other course would permit retroactive rate application, which is expressly prohibited by section 18(b) of the Shipping Act, 1916. Allied Chemicals, S.A. v. Farrell Lines, Inc., 208 (212–213).

Where a permanent tariff filing differs from the temporary filing that it replaces due to error in the permanent filing, the erroneously printed rate, whether higher or lower than the intended rate, becomes the lawful rate which must be applied on and after the date of receipt of the permanent tariff page. The rate may not be the legal rate, however, and if the quotation violates any part of the statute, relief may be sought by the shipper. Id. (213).

The Commission's dismissal of a complaint did not affect the award of reparation by the Presiding Officer. The Order of Adoption of the initial decision clearly stated that it was adopted in its entirety. That, of necessity, included the award of reparation which rested on a finding that freight charges on one of the shipments reflected a rate increase not in effect at the time of shipment, a ground for relief not stated in the complaint. To the extent the complaint claimed reparation on the ground of misdescription and misclassification of the cargo, the holding called for its dismissal. Chevron Chemical Co. v. Mitsui O.S.K. Lines, Ltd., 216 (218).

A carrier was correct in denying a shipper's overcharge claims based on misidentification of goods and consequent misapplication of rates where the shipper's claims were not filed within the time limits specified in the applicable tariff and where the misapplications, if any, were the result of the use by the shipper of a generic commodity description not conforming with the tariff description of the commodities allegedly shipped. Pan American Health Organization v. Atlantic Lines, Inc., 220 (222).

Reparation was denied and additional transportation charges were due to respondent where the evidences adduced clearly showed that the only applicable rate produced charges in excess of those paid by the shipper. Freeport Kaolin Co. v. Combi Line, 249 (251).

Reparation may be awarded only to a "complainant" who has shown that it was injured by a violation of the Shipping Act, 1916. Accordingly, the Commission did not approve an initial decision which awarded reparation "to the party which paid the freight charges" and left unclear who was to be the actual recipient. The application for reparation stated that the "complainant," an independent ocean freight forwarder, not the shipper, had paid the charges, but it did not state in what capacity. Since the freight forwarder was not a party to the contract of affreightment, it would not have standing to seek reparation under that contract in the absence of an assignment of the claim from the shipper. In the event the forwarder had advanced freight monies as agent of the shipper and was not fully reimbursed for the freight paid, such an assignment might be implied. However, the record was void of the information needed to reach such a conclusion. The proceedings were therefore remanded so that the presiding officer might make additional findings of fact. Williams, Clarke Co., Inc. v. Sea-Land Service, Inc., 300 (301).

A shipper of red label adhesives was entitled to reparation in the amount of the difference between the freight charges assessed by the carrier and the contract rate for red lable adhesives. However, where a claimant is seeking the benefit of a contract rate, evidence should be adduced showing that the shipper was indeed eligible for the lower rate; the shipper had submitted no such evidence in the instant proceeding. Accordingly, the award of reparation was made conditional upon submission by the claimant of a copy of the contract evidencing its dual rate shipper status. National Starch & Chemical Corp. v. Hapag-Lloyd & United States Navigation, Inc., Agent, 321 (322).

The legality of the actions of a common carrier by water can only be judged against the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. A shipper and a carrier are free to negotiate whatever terms they may, but until the understandings so negotiated are fixed in the manner specified in the Shipping Act, the Commission cannot become involved. Accordingly, a shipper's contention that a carrier charged it freight rates higher than it had been led to expect during negotiations with the carrier (during which the shipper drew the incorrect conclusion that the carrier was not a member of the Trans-Pacific Freight Conference, and would charge rates lower than those charged by Conference members) did not state a cause of action within the Commission's jurisdiction, where the freight rate charged by the carrier was not higher than that allowed by its applicable tariff and where no clerical, administrative or inadvertent error of the type contemplated by section 18(b)(3) of the Shipping Act, 1916, was involved. The shipper's claim appeared to be one sounding more properly in contract and resolvable by an appropriate *nisi prius* court. Sidney-Williams Co. v. Maersk Line Agency, 323 (325–326).

Reparation was awarded where the appropriate rate for the shipment was $89.00 per ton 2,000 pounds rather than $133.50 per ton of 2,000 pounds as assessed by the carrier, and where the proper basis for the receiving, storage and delivery charge and the port rationalization charge was 40.4 weight tons rather than 47 measurement tons as assessed by the carrier. Reparation was awarded with respect to the receiving, storage and delivery overcharge and the port rationalization overcharge, notwithstanding that the complainant had overlooked this discrepancy in its complaint. CPC International Trading Corp. v. Sea-Land Service, Inc., 358 (359–361).

Reparation was awarded on a shipper's claim that the carrier had erred in measuring the shipment where the claim was substantiated by supporting documentation (the packing list covering the sbipment) and where the carrier did not dispute the facts outlined in the complaint but defended the claim solely on the basis of a tariff rule which prohibited a carrier from considering claims based on error in measurment after the shipment has left the custody of the carrier. Such a tariff provision cannot serve to void the requirements of sections 18(b)(3) and 22 of the Shipping Act, 1916, as they relate to assessing the properly applicable tariff rates and providing a two-year time period for filing a complaint. Tokheim Corp. v. Hapag-Lloyd A.G., United States Navigation, Inc., Agents, 362 (363–364).

A carrier conference's application for permission to refund a portion of the freight charges assessed on certain shipments of raw cotton was denied The application was supported by a letter from the cotton's carrier to the conference, confirming the carrier's intention that the conference file on the carrier's behalf the "lowest independent rate" in the conference's new intermodal tariff covering raw cotton; however, a teletype message dated about one week later rescinded the carrier's grant of blanket authority to file the lowest rates, and instructed the conference to file such rates for it only with respect to certain enumerated items, of which raw cotton was not one. Since the latter communication replaced and withdrew the intention set forth in the former, the carrier conference could not have had blanket authority to file the lowest rate, and its failure to do so with respect to the cotton shipment could not have constituted a ground for refund under section 18(b)(3) of the Shipping Act, 1916. Nan Fung Textiles, Ltd. v. Pacific Westbound Conference, 403 (404–405).

The legislative history of the amendment to section 18 of the Shipping Act, 1916 (Public Law 90–298) specifies that carriers are authorized to make voluntary refunds and to waive collection of a portion of their freight charges for good cause such as bona fide mistake. Although the statute is forgiving, it is to be strictly construed, so as to prevent its use as a vehicle for improper rebating. Id. (406).

A shipper's claim for reparation for an alleged overcharge on a shipment of refrigerated cargo was denied. The shipper's contention that the cargo, which moved at a rate assessed per weight ton, should have moved at a rate assessed per measurement ton, which would have produced a saving to the shipper, was without merit; the applicable tariff provision stated that the cargo would move at whichever of the two rates would produce the higher revenue. Moreover, as to part of the shipment, the carrier had applied the lower of the two rates; thus, the shipper had in fact been undercharged on the shipment, and the parties would be required to adjust the undercharge promptly to complete the record. Kraft Foods v. Sea-Land Service, Inc., 407 (409–410).

Applications for waiver or refund of freight charges pursuant to P.L. 90–298, involving a joint intermodal landbridge tariff, must show that the refund or waiver will apply only to the water portion of the through water. Farr Co. v. Seatrain Lines, 412 (417–418).

With regard to claims involving cargo misdescription, past Commission policy and judicial precedent have unquestionably declared that a shipper's misdescription of cargo can still afford a basis for later reparation relief, and that in cases involving alleged overcharges under section 18(b)(3) of the Shipping Act the controlling test is what the complainant shipper actually shipped, and is not limited to how cargo was described in the bill of lading. Lord Export Co., A Division of Lord Corp. v. United States Navigation, Inc., 419 (421).

A carrier's application for permission to waive collection of a portion of freight charges assessed upon a shipment of labeling machines was considered to have been withdrawn when, in response to the administrative law judge's request that the carrier contact the shipper in order to obtain certain necessary documentation, the carrier stated that it would not make such a request in view of the small amount of money in issue. Salentine & Co., Inc. v. Europe Canada Lakes Line, 424 (426–426).

A tariff has the force and effect of law. Accordingly, where a carrier's application for permission to waive collection of freight charges is withdrawn, the carrier is required to comply with the law by collecting the portion of the freight charge as to which the application was originally filed, and will be required to file within 30 days an affidavit of compliance with the order dismissing the waiver application and requiring such collection. Id. (427).

Where a carrier which intended to request a "refund" of a portion of freight charges mistakenly requested a "waiver" and the hearing officer was advised orally and by letter of this typographical error, the application would be considered as one for refund rather than waiver. A clarification of a pleading which commences a proceeding relates back to the time of the original filing of the pleading especially where the pleading errs only in the type of relief requested. A.W. Fenton Co. v. Europe Canada Lakes Line, 453 (455).

A close examination of section 18(b)(3) of the Shipping Act, 1916, shows that Rule

92(b) of the Commission's Rule of Practice and Procedure goes beyond the law in requiring the concurrence of the complainant on an application for permission to refund a portion of freight charges. There is no requirement in the law that complainant concur in the application. Accordingly, the fact that the signature of the complainant in this case was obtained much later than 180 days following the date of shipment was immaterial for purposes of determining whether the application was timely filed. The application was properly filed within the 180 days from the date of shipment, regardless of the date of the complainant's signature. JTH Teng Printing Ink Factory v. Sea-Land Service, Inc. 466 (486).

A close examination of section 18(b)(3) of the Shipping Act, 1916, shows that Rule 92(b) of the Commission's Rules of Practice and Procedure goes beyond the law in requiring the concurrence of the complainant on an application for permission to refund a portion of freight charges. There is no requirement in the law that complainant concur in the application. Accordingly, the fact that the signature of the complainant in this case was obtained much later than 180 days following the date of shipment was immaterial for purposes of determining whether the application was timely filed. The application was properly filed within the 180 days from the date of shipment as required by section 18(b)(3), regardless of the date of the complainant's signature. Yah Sheng Chong Yung Kee Co. Ltd. v. Sea-Land Service, Inc., 472 (474).

A close examination of section 18(b)(3) of the Shipping Act, 1916, shows that Rule 92(b) of the Commission's Rules of Practice and Procedure goes beyond the law in requiring the concurrence of the complainant on an application for permission to refund a portion of freight charges. There is no requirement in the law that complainant concur in the application. Accordingly, the fact that the signature of the complainant in this case was obtained much later than 180 days following the date of shipment was immaterial for purposes of determining whether the application was timely filed. The application was properly filed within 180 days from the date of shipment as required by section 18(b)(3), regardless of the date of the complainant's signature. Pai Tai Industrial Co., Inc. v. Sea-Land Service, Inc., 478 (480).

Where the carrier's tariff had a specific item for the commodity shipped and that rate was not charged, the carrier violated the express provisions of section 18(b)(3) of the Shipping Act, 1916, by not applying the proper rate to the shipment. The complainant was awarded reparation in the form of a portion of the freight charges where the documentation it had submitted in support of its claim was sufficient to enable the hearing officer to determine the proper freight charges. Allied Chemical International Corp. v. Atlantic Lines, 520 (521–523).

Commission Rule 92(a) which requires that someone (normally the shipper or consignee or other person who actually paid the freight) appear on a carrier's application for permission to refund freight charges as the "complainant," and concur in the application, seems to impose a technicality which is not required by the underlying statute but which can nonetheless cause delay in deciding the application. Salentine & Co., Inc. v. Europe Canada Lakes Line, 542 (546–547).

A carrier's application for permission to refund a portion of certain freight charges could not be considered until the carrier had submitted the names of "complainants" who concurred in the application. A carrier complied with this requirement where it submitted affidavits of freight forwarders stating the forwarders' concurrence and stating that the forwarders would transmit any refunds which might be permitted to the shippers who had actually paid the freight charges involved. Id. (547).

A shipper of chemical products which were described as "chemical, n.o.s." was entitled to reparation in the amount of the difference between the general rate and the rate applicable to "emulsifiers" upon a showing that the chemicals involved were generally used as emulsifiers for plastics and waxes. CSC International, Inc. v. Lykes Bros. Steamship Co., Inc., 551 (560–561).

A shipper of "aluminum can stock (in coils)" was entitled to reparation in the amount of the difference between the rate charged by the carrier, which applied to "aluminum cans k.d. packed (body blanks and ends)" and the rate which should have been applied, which covered "aluminum sheets, flat or in coils." Kaiser Aluminum & Chemical Corp. v. Atlantic Container Line, 564 (565).

A shipper's claim for reparation for overcharges assessed on a shipment of fishing tackle was granted in part where the claim, while otherwise accurate and sufficient to warrant an award, understated slightly the actual volume of misrated cargo which had moved in the shipment. Mitsubishi International Corp. v. Y.S. Line, Inc., 575 (577).

Where the complainant was not a merchant's agreement signatory with the conference and thus was not entitled to a lower contract rate, reparation of alleged freight overcharges was denied since the sole basis for the claim was the complainant had been quoted the contract rate and had in fact been charged that rate on its first shipment. The respondent was correct in its contention that an undercharge had been assessed with respect to the first shipment and an adjustment of the undercharge between the parties was ordered. A. Rami Greenberg v. Venezuelan Line, 619 (620–621).

The complainant was entitled to reparation of a portion of freight charges on certain shipments which moved after the date on which the complainant had signed the merchant's rate agreement and thereby made itself eligible for the lower contract rate. The shipments which moved had been incorrectly rated at the higher rate applicable to shippers not included on the conference's list of contract signatories. General Time Corp. v. Sea-Land Service, Inc., 632 (634–635).

While a violation of the Shipping Act, 1916, had occurred, the settlement officer erred in awarding reparation where the claimant failed to demonstrate that it actually paid or reimbursed the forwarder for payment of the charges found to be unlawful. Mitsubishi International Corp. v. N.Y.K. Line, 636 (637).

Where a special project rate sought to be applied was published under special permission pursuant to Commission rules governing the filing of rates and tariffs in the domestic offshore trade; the rules require carriers in such cases to include in their applications a statement that the bill of lading will be claused "All materials included in this bill of lading are of a wholly proprietary nature"; the carrier provided the necessary statement in its project rate application but did not properly clause the bill of lading; and the proprietary nature of the cargo was clear and undisputed, the shipper was entitled to reparation inasmuch as the carrier failed to apply the project rate and instead applied a higher N.O.S. rate. The clausing requirement is directed only to the carrier and does not impose any obligation on the shipper. The proper rate is determined by what is actually shipped. Durite Corp., Ltd. v. Sea-Land Service, Inc., 674 (675–676).

Where, in its application for permission to refund a portion of freight charges, the carrier identified 55 other affected "shippers" of military household goods, who were in reality forwarders acting for the U.S. Government, the underlying shipper, a procedure was established whereby the carrier could make refunds (or waiver portions of freight charges as applicable) to the actual shippers who bore the cost. The carrier was required to notify each forwarder and company appearing on its records as "shippers" that it should submit to the carrier an affidavit as to who bore the cost of the shipment. On receipt of the affidavit, the carrier can make payments and report its action to the Commission, furnishing the affidavit in support. To insure that each forwarder and company is aware of its rights to file claims, the carrier is to mail copies of its tariff notice regarding such rights to each such person. To insure further that the Government contracting office understands the situation, if it bore the cost, each such office should receive copies of the tariff notice together with payment of refunds by the carrier with appropriate explanations. Time limitations are also imposed. Aero Mayflower Transit Co. v. Sea-Land Service, Inc., 719 (724–729).

A tariff rule which provided that when containers are packed and sealed by the shipper, the carrier will accept them as shipper's load and count and the carrier will not be responsible for any discrepancy in count or concealed damage did not bar recovery of reparation where the shipper was able to prove what actually moved. The rule was not directed to the question of freight charges, but was rather a disclaimer of any liability for shortages in or damage to cargo received in shipper packed and sealed containers. Paramount Export Co. v. Sea-Land Service, Inc., 747 (748–749).

A carrier must assess and collect freight charges only for what it actually carries and at the rate in effect at the time of shipment. This requirement places on the carrier the obligation of collecting only such charges as are provided in its tariff for what actually moved. Where, in the case of containers packed and sealed by the shipper, the carrier assessed various commodity rates and charged freight according to the quantity of each commodity shipped (and not a rate per container), the carrier could not collect freight on 400 crates of plums if, in fact, only 310 were shipped. Reparation was awarded where the shipper proved that only 310 were shipped (the bill of lading showed 400). Id. (749).

Reparation was awarded where a carrier determined correctly that the appropriate basis for assessment of shipments of fishing tackle was per cubic meter, but overlooked the fact that the value of some of the items shipped was less than $1,000 per revenue ton and should have been assessed at a lower rate than other items which were valued at more than $1,000 per revenue ton. Mitsubishi International Corp. v. U.S. Lines, 781 (782–783).

Prior decision denying reparation is affirmed. Once the proper description for the product shipped has been established, the rate provided in the tariff for that description is the only applicable rate. Pan American Health Organization v. Moore-McCormack Lines, Inc., 805.

Prior decision denying reparation is affirmed. Contrary to complainant's claim, the Commission finding that the complaint did not state a valid claim went to the merits of the case. The controlling fact is that on the date of the shipment involved there was no rate on "file" with the Commission applicable to the shipment. Chevron Chemical International, Inc. v Barber Blue Sea Line, 806.

Where the documents presented by the consignee showed clearly that the carrier had discharged the cargo at a discharge port other than that specified on the bill of lading, the consignee was entitled to reparation of that part of the overland trucking charges it had paid, which charges were in excess of what it would have cost the consignee to arrange transportation from the proper port of discharge to the point of destination. Nan Fung China Trading Co., Inc. v. K-Lines, 814 (815–817).

Where the carrier had elected to arrange ground transportation after it discharged cargo at a port other than that specified in the bill of lading, the consignee would be required to pay only the amount of ground transportation charges which it would have incurred to arrange transportation from the proper port of discharge to the point of destination. Reparation of ground transportation charges paid by the consignee in excess of that amount was awarded. Amelle of California v. K-Lines, 818 (819–821).

A shipper of electric crock pots and ceramic crock pot lids was entitled to an award of reparation in the amount of the difference between the freight charges assessed by the carrier and the charges payable under a more specific tariff item, which should have been applied to the cargo by the carrier. Allied Stores International, Inc v. United States Lines, Inc., 869 (872).

P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916, was designed to remedy inequities and financial harm visited upon shippers which resulted from inadvertent errors in tariff filing by carriers. Thus, when a carrier intended to apply a lower rate on a particular shipment but failed to file an appropriate tariff conforming to the carrier's intention (and usually the shipper's understanding), the carrier was bound, prior to the enactment of P.L. 90–298, to charge the higher, unintended rate even if the shipper had relied upon the carrier's representations that a lower rate would be charged and that an appropriate tariff would be filed. Moreover, if the carrier, through inadvertence, republished a tariff and caused the tariff to reflect an unintended, higher rate, prior to the enactment of the remedial statute the carrier was compelled to charge the higher rate, causing shippers to suffer financial loss. These inequitable results were unavoidable because of the governing principles of law requiring strict adherence to tariffs effective at the time of shipment, regardless of the equities. Westinghouse Trading Co. v. American Export Lines, Inc., 874 (878).

A shipper was entitled to reparation in the amount of the difference between the freight charges actually paid, which were based on application of a "less volume rate" covering shipments of less than 14 tons, and the charges which should have been assessed, which involved application of a tariff provision limiting the total amount of charges which could be assessed on two shipments of less than 14 tons to the rate applicable to the next higher minimum weight. Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V., 890.

—*Administrative or clerical errors* **(see also negotiated rates)**

Where the carrier's sales personnel made a verbal commitment with the shipper to reduce a certain rate but, through clerical error compounded by misunderstanding between the carrier's sales and pricing personnel, the promised reduction was not published until after the goods were shipped, the carrier would be permitted to waive collection of that portion of the freight charges due to the inadvertent filing error. The waiver would not result in discrimination among shippers; prior to requesting permission to waive collection of the freight charges the carrier had filed a new tariff setting forth the rate upon which the waiver was assessed; and the waiver application was filed within 180 days of the date of shipment. U.S. Despatch Agency v. Sea-Land Service, Inc., 46 (47–49).

Permission to refund a portion of freight charges paid by a shipper of beer kegs was granted where, due to a clerical error not discovered until after the date of shipment, the carrier's tariff publishing department failed to pick up the revised page of the carrier's tariff reflecting a reduction in the applicable rate and instead copied the higher rate formerly applicable which rate was billed to and paid by the shipper. The carrier's error was an "error due to inadvertence in failing to file a new tariff" within the meaning of section 18(b)(3) of the Shipping Act, 1916. Van Munching & Co., Inc. v. Sea-Land Service, Inc., 158 (160–161).

The failure of a carrier to notify a shipper of onions that the shipper would be required to sign a dual rate contract before a reduced contract rate quoted to the shipper could be put into effect did not constitute a "clerical or administrative error in a tariff" or an "inadvertent error in failing to file a new tariff" within the meaning of section 18(b)(3) of the Shipping Act, 1916. The carrier's application for permission to waive collection of the difference between the quoted contract rate and the higher regular tariff rate was accordingly denied. Capital Trading Co., Inc. v. Sea-Land Service, Inc., 315 (317).

A carrier was permitted to waive collection of freight charges in the amount of the difference between the agreed rate covering empty wooden barrels and the higher applicable rate in effect at the time of shipment where the carrier's conference had agreed to extend the lower rate beyond its scheduled expiration date in order to accommodate the shipment of barrels but the agreed extension had been omitted from the new tariff page due to inadvertence, causing the overcharge. The omission of the extension was a clerical or administrative error of the type contemplated by section 18(b)(3) of the Shipping Act, 1916. Porcella, Vicini & Co., Inc. v. U.S. Atlantic & Gulf-Santo Domingo Conference, 318 (319–320).

A carrier's application to refund freight charges paid in connection with a shipment of wastepaper for recycling was granted where the carrier, which had intended to extend the reduced contract rate covering wastepaper through the month in which the shipment moved, mistakenly entered the extension in the wrong section of its tariff, and did not discover and correct its error until after the shipments had moved. The carrier's error was a clerical error resulting in the payment of an overcharge of a type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. Gaynar Shipping Corp. v. Sea-Land Service, Inc., 327 (329).

A carrier conference was permitted to refund freight overcharges paid in connection with a shipment of ethyl cellulose which should have been freighted under a tariff provision provding for rating on the basis of price per kiloton, but which was instead rated under a provision permitting rating on the basis of price per kiloton per cubic meter, whichever produced the greater revenue. The latter provision had been operative due to the omission of the former, proper rate by the tariff agent, which was not discovered and corrected until the shipment was already en route; the agent's mistake was a clerical or administrative error of a type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. Hercules International Trade Corp., Ltd. v. Pacific Westbound Conference, 340 (341–342).

A carrier was permitted to refund a portion of freight charges assessed on a shipment of green coffee sweepings where the carrier's freight association had agreed to file a reduced rate in time for application to the shipment in question, but the freight conference office which filed all the association's tariffs failed, due to inadvertence, to file the agreed rate until after the shipment had moved. The conference's error was a clerical error of a type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. Buckley & Forstall, Inc. v. Gulf European Freight Association for the Combi Line, 343 (346–347).

A freight conference was permitted to refund a portion of freight charges where, due to an administrative error, (cancellation of a rate that was thought to be a "paper rate" to effect an increase in rates on cargo that proved to be moving), the conference had failed to extend the coverage of the proper rate. The refund would not result in discrimination among shippers; prior to applying for authority to refund a portion of the freight charges, the conference had filed a new tariff which set forth the rate on which the refund was based; and the refund application was filed within 180 days from the date of shipment. Imperial Oil & Grease Co. v. Latin America/Pacific Coast Steamship Conference, 373 (374–375).

Liability for demurrage was that of the consignee despite the shipper's assumption of part of that liability for demurrage occasioned by its error in improperly designating the consignee. There was no basis for waiver of demurrage charges otherwise properly accrued and owing pursuant to the tariff on file. Even if the provisions of the Special Docket rules applicable to foreign commerce were to be utilized as a basis for waiver, no waiver could be granted inasmuch as there was no error of a clerical or administrative nature between the parties or an error due to inadvertence in failing to file a new tariff. General Motors Overseas Distribution Corp. v. Puerto Rico Maritime Shipping Authority, 376 (377–378).

A carrier was permitted to waive collection of a portion of freight charges where, due to a clerical error, the carrier had failed to extend a certain "special rate" applicable to the shipment. The error had been corrected before the waiver application was filed; the waiver would not result in discrimination among shippers; and the waiver application was timely filed. Europam Paper & Fibre Corp. v. Sea-Land Service, Inc., 379 (380–381).

A carrier was permitted to waive collection of a portion of freight charges where, due to an administrative error, a reduced agreed to freight rate was not issued and made effective in the carrier's tariff until after the date of shipment. The error had been corrected before the waiver application was filed; the waiver would not result in discrimination among shippers; and the waiver application was timely filed. U.S. Information Agency v. Sea-Land Service, Inc., 382 (383–384).

A carrier was permitted to waive collection of a portion of freight charges assessed upon shipments of U.S. mail where, as a result of inadvertent administrative error, the applicable tariff was not amended to conform to a Commission General Order amendment exempting mail rates from the tariff filing provisions of the Shipping Act for almost two months, during which time the shipments of mail moved at the higher rate applicable prior to the amendment. The failure to conform the tariff to the regulations promptly was an appropriate basis for waiving the tariff rate and permitting the lower rate to prevail pursuant to section 18(b)(3) of the Act. U.S. Post Office v. Sea-Land Service, Inc., 400 (401–402).

Tariffs have the force and effect of law and carriers must adhere to them strictly unless, pursuant to P.L. 90–298, there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff. Farr Co. v. Seatrain Lines, 412 (414).

Carrier's application to waive collection of a portion of the freight charges assessed on a relief or charity shipment of pharmaceutical products was granted where the shipper had tendered the shipment to the carrier under the belief that there would be no drastic increase in rates covering the goods when the carrier's conference filed its amended intermodal tariff, but the new tariff did not provide for the previously-applicable reduced rate on relief shipments, an oversight which was not discovered or corrected by the carrier until after the shipment had moved. The oversight and the resultant failure to effectuate the carrier's intention to carry forward the special rate for charity or relief shipments constituted an error justifying relief under section 18(b)(3) of the Shipping Act. Catholic Relief Service v. Pacific Westbound Conference, 442 (444–445).

Where due to a clerical error the truckload rate on pneumatic tires was omitted from the carrier's tariff, the carrier was granted permission to refund a portion of the freight charges representing the difference between the truckload rate and the less-than-truckload rate at which the freight charges had been assessed on a truckload size shipment of pneumatic tires. The charging of the less-than-truckload size shipment measuring a minimum of 1600 cubic feet was unjust, unreasonable and unlawful, in violation of section 18(a) of the Shipping Act, 1916. Williams, Clarke Co., Inc. v. Sea-Land Service, Inc., 460 (463–464).

A carrier's application for permission to refund a portion of freight charges was granted where the application was based on an error in the published rate at which freight charges on the subject shipment were assessed which error was of a clerical nature. JTH Teng Printing Ink Factory v. Sea-Land Service, Inc., 466 (467–471).

A carrier's application for permission to refund a portion of freight charges was granted where the application was based on error in the published rate at which freight charges on the subject shipment were assessed, which error was of a clerical nature. Yah Sheng Chong Yung Kee Co. Ltd. v. Sea-Land Service, Inc., 472 (473–477).

A carrier's application for permission to refund a portion of freight charges was granted where the application was based on an error in the published rate at which freight charges on the subject shipment were assessed, which error was of a clerical nature. *Pai Tai Industrial Co., Inc. v. Sea-Land Service, Inc.*, 478 (479–483).

A petition for permission to refund a portion of freight charges was granted where the evidence submitted supported the conclusion that there had been an error of a clerical nature in the conversion of the tariff item upon which the charges had been assessed from the imperial to the metric system. Mitsui and Co. U.S.A., Inc. v. Pacific Westbound Conference, 501 (502–503).

A carrier was permitted to refund a portion of the freight charges assessed on a shipment of nuclear fuel elements, unirradiated, where, in the course of converting the applicable conference tariff to the metric system, an error was made in the pertinent tariff item which had caused an overcharge to the shipper. The administrative error involved was of a type warranting a refund pursuant to section 18(b)(3) of the Shipping Act, 1916. Mitsubishi International Corp. v. Far East Conference and American President Lines, Ltd., 566 (567).

Carrier is permitted to waive collection of a war risk surcharge where the carrier's tariff publishing agent made a bona fide mistake in making a project rate subject to a war risk surcharge tariff rule. The mistake was bona fide because the agent acted beyond the scope of his instructions from the carrier and, more significantly, it was not the intent of the carrier to subject the shipments in question to the surcharge. The shipper had entered into the booking contract with the carrier based on that understanding. There is settled precedent for allowing carriers to include surcharges of general applicability in flat rates for government shippers in foreign commerce, as here, under a contractual arrangement upon proof that when the contract was made it was reasonably foreseeable that the event which might trigger the surcharge was likely to arise during the contract period. U.S. Department of Agriculture v. Waterman Steamship Corp., 644 (659–661).

Application for permission to refund a portion of freight charges was granted where, through clerical oversight, a minimum weight requirement was stipulated in filing the rate, no discrimination would result as between shippers, and the application was timely filed. Firestone International v. United States Lines, Inc., 666 (668–669).

Carrier is permitted to waive collection of a portion of freight charges, where the carrier's tariff filer was instructed to file a particular rate effective by a certain date, but failed to do. The error was clerical in nature, no discrimination as between shippers will result, and the application was timely filed. *Sunpak Movers, Inc. v. Sea-Land Service, Inc.*, 714 (717).

Where the carrier, in republishing a tariff item, inadvertently omitted a notation which had appeared in the previous tariff that no separate bunker surcharge would apply, the carrier was permitted to refund a portion of freight charges collected on the shipments in question. It was clear that it was the carrier's intention prior to the shipments not to assess an additional bunker surcharge. The element of the carrier's pre-shipment intention is essential. Aero Mayflower Transit Co. v. Sea-Land Service, Inc., 719 (721–723).

Application for permission to waive collection of a portion of freight charges is granted where the carrier inadvertently filed the agreed rate, but to a port other than intended. Deutsche Schaghtbau-und Tiefbohrgesellschaft MBH v. Lykes Bros. Steamship Co., Inc., 730 (731–732).

Application for permission to waive collection of a portion of freight charges is granted upon submission of additional documentation to show that the carrier filed an agreed rate but inadvertently excluded a particular port from the tariff. Cutler-Hammer Denver v. Lykes Bros. Steamship Co., Inc., 733 (734–735).

Application for permission to refund a portion of freight charges was granted where the carrier inadvertently failed to file an agreed rate based on a long ton instead of on a metric ton. The error was occasioned, at least in part, by confusion during the conversion to the metric system. Georgia-Pacific Corp. v. Gulf United Kingdom Conference, 737 (739–740).

Carrier was granted permission to waive collection of a portion of freight charges where, through oversight, the carrier failed to timely file an agreed extension of a rate which expired prior to the time of shipment. Collier Carbon & Chemical Corp. v. Sea-Land Service, Inc., 784 (786–787).

Carrier was permitted to waive collection of a portion of freight charges where, in filing a rate, it inadvertently showed an expiration date other than was intended, resulting in a higher rate becoming applicable to the shipment involved. Commercial Metals Co. v. Sea-Land Service, Inc., 794 (795–796).

Where, when the conference took over the tariffs published by its member lines, it republished many of the items in its own tariff without changing the IBM item number identifying the commodity to the Schedule B classification number as required by its own tariff rule, the Commission presumed, in the absence of proof to the contrary, that the conference intended to follow its tariff rule and that the failure to do so was caused by a clerical or administrative error of the type contemplated in section 18(b)(3) of the 1916 Act. To prevent discrimination against shippers similarly situated, the conference was directed to adjust the freight charges of any shipper who between September 28, 1977 (when the conference took over its members' tariffs) and December 31, 1977 (when the conference rule expired) was assessed an N.O.S. rate instead of the specific rate published in the conference tariff without the proper Schedule B classification number.
Carrier was permitted to waive a portion of freight charges where it inadvertently failed to file a negotiated rate prior to the time of shipment. The carrier had formed an intent prior to shipment to publish and file the agreed rate. Kuehne & Nagel, Inc. v. Lykes Bros. Steamship Co., Inc., 798 (799–802).

A carrier was permitted to waive collection of a portion of the freight charges assessed on a shipment of frozen shellfish where, due to inadvertence, the port of origin of the shellfish had been removed from the applicable tariff, which forced the application of a series of connected rates in place of the formerly applicable ocean through rate, causing an overcharge. The administrative error fell within the intended grounds for permitting waiver pursuant to section 18(b)(3) of the Shipping Act, 1916. Toshoku America, Inc. v. Sea-Land Service, Inc., 885 (887–888).

— Burden of proof

Reparation was awarded on a claim that the carrier applied an incorrect measurement to a shipment of auto parts where the complainant met its heavy burden of proof as to the true weight and measurement of each piece of the shipment that was actually transported. It was immaterial that the error in measurement was not brought to the carrier's attention in sufficient time for it to verify the shipper's figures. Guiterman Co., Inc. v. Prudential Lines, Inc., 5 (6–8).

What actually moves as shown by all the evidence determines the applicable tariff rate. Accordingly, reparation was awarded on a claim that a commodity was misclassified and incorrectly measured where the claim was adequately substantiated by supporting documentation as to what was actually transported. It was immaterial that the documentation had not been provided the carrier at the time of shipment; nor would any weight be given to a tariff rule which provided that wherever the tariff provides different rates on a commodity and an adequate description of that commodity is not stated in the bill of lading, the highest of the rates will be assessed. Pan American Health Organization v. Prudential-Grace Line, Inc., 18 (21–23).

In determining whether reparation should be awarded in a cargo misdescription case, the controlling test is what the complainant shipper can prove was actually shipped. Thus, reparation was awarded where the shipper met its heavy burden of proof that it had been overcharged for a shipment of oil well drilling supplies through a combination of commodity misdescriptions and improper billing under a standard contract rate rather than an industrial contract rate. Sun Company, Inc. v. Lykes Bros. Steamship Company, Inc. 67 (68–74).

In cargo misdescription cases, where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant shipper's amended cargo description, the complainant has a heavy burden of proof and must establish, with reasonable certainty and definiteness, the validity of its claim. However, even where the requirements of the "six-month rule" are not adhered to, and the carrier is therefore denied an opportunity to inspect the cargo prior to its clearing the carrier's custody, the carrier is not relieved from making an appropriate rate adjustment where that burden is met by the shipper. Bristol Myers Co. v. Prudential Lines, Inc., 191 (194).

A shipper seeking reparation for overcharges resulting from misdescription of cargo satisfied its heavy burden of proving the validity of its claim where respondent carrier did not dispute that the cargo was misrated and where the shipper submitted unchallenged documentation adequately supporting the stipulated amount of overcharge. Id. (193–194).

In deciding claims for reparation alleging error in cargo descriptions, the determining factor is what the complainant can prove, based upon all the evidence, as to what was actually shipped. Pan American Health Organization v. Atlantic Lines, Inc., 220 (222).

Where a shipment, as to which reparation based on error in cargo description is sought, has already left the custody of the carrier, and the carrier is thereby prevented from personally verifying the complainant's contentions, the complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of its claim. Id. (223).

A shipper of Malathion was entitled to reparation in the amount of the difference between the tariff rate for "insecticides, n.o.s.," and the lower rate for "agricultural insecticides" where the documentation presented by the shipper (including a chemical dictionary and an ordinary English dictionary) established that Malathion was an insecticide primarily employed in agriculture, and thus an "agricultural" insecticide within the meaning of the tariff. Id. (223).

Complainant was entitled to reparation for freight overcharges which had been assessed on the basis of a freight forwarder's misdescription of a commodity, where the complainant met its heavy burden of proof with respect to what was actually shipped. It was immaterial that the carrier's tariff provided that adjustment of freight charges based on alleged misdescriptions would be declined unless an application for adjustment were submitted to the carrier sufficiently in advance to permit verification of the description before the cargo left the carrier's possession. Acme Cotton Products Co., Inc. v. Royal Netherlands Steamship Co., 230 (231–233).

Reparation was awarded where complainant was able to prove that the actual value per ton of the commodity transported was less than that at which it was assessed by the carrier and the carrier in a letter to the Settlement Officer agreed that the complainant was correct R.T. French Co. v. Prudential Lines, Inc., 296 (298–299).

Where the evidence showed that a more specific tariff item than that used by the carrier fit the commodity shipped, the complainant was entitled to be rated under that item, and, accordingly, was entitled to reparation of the freight overcharges that had been assessed because of the improper classification. Continental Shelmar, Inc. v. Sea-Land Service, Inc., 305 (306–307).

A shipper of empty tin cans and parts was entitled to reparation in the amount of the difference between the rate assessed by the carrier, the source of which was undetermined, and the lower rate applicable to empty tin cans according to the carrier's tariff. The shipper carried its burden of proving the nature of the goods actually shipped, and the carrier advised that the shipper was correct and did not dispute the claim. Continental Shellmar, Inc. v. Sea-Land Service, Inc., 309 (311).

A shipper of adhesives satisfied its burden of proving the description and weight of the commodity shipped in a reparation proceeding alleging overcharge based on misapplication of rate on a shipment of "red label" adhesive. The bills of lading and carrier due bills both showed the shipments to have contained red label adhesives and showed the weights thereof to be as claimed by the shipper; moreover, the carrier did not dispute the shipper's claim. National Starch & Chemical Corp. v. Hapag-Lloyd & United States Navigation, Inc., Agent, 321.

In a reparation proceeding alleging misapplication of rates, the bill of lading is the prima facie evidence of what was actually shipped in the purportedly misrated shipment. Where no party disputes the accuracy of the bill of lading, there is no need to question it, particularly where the information contained therein is substantiated by other documents. Id. 321.

Reparation was awarded to a shipper where goods described in the bill of lading as "oil well drilling equipment" were shown by the export declaration actually to have been "parts, accessories and attachments for well-drilling machines," which were subject to a lower tariff rate. The shipper's documentary evidence, which was unchallenged by the carrier, was sufficient to establish the alleged overcharge. Ocean Drilling & Exploration Co. v. Kawasaki Kisen Kaisha, Ltd., 349 (353).

Where reparation is sought by a shipper on the ground of misdescription of cargo in the bill of lading, and the shipment involved has left the custody of the carrier (thus preventing the carrier from personally verifying the shipper's new description), the shipper has a heavy burden of proof and must establish, with reasonable certainty and definiteness, the validity of its claim. Lord Export Co., A Division of Lord Corp. v. United States Navigation, Inc., 419 (421).

In cargo misdescription cases, it is usually the case that the carrier, in classifying and rating a shipment, must look to the information supplied it by the shipper or freight forwarder. Accordingly, where goods are incorrectly described in the bill of lading, one cannot "fault" the carrier for relying on the incorrect descriptions set forth. However, in determining whether reparation should be awarded in a given case, a "tariff is a tariff," and the controlling test is what the shipper can prove was actually shipped. Id. (421–422).

Shipper was entitled to reparation for an overcharge assessed on a shipment of cargo described in the bill of lading as "shock absorbers" but shown by the original motor carrier bill of lading, the dock receipt, the export declaration, an invoice and an advertisingbrochure, singularly and collectively, to have consisted of rubber fenders or bumpers, as to which a lower freight rate was applicable under the carrier's tariff. Id. (422).

Complainant was awarded reparation in the form of a portion of freight charges in a rate misapplication case where the documentation submitted in support of its claim, consisting of price lists, invoices, customs entries and bills of lading for the shipments in question, amply demonstrated that the carrier had misclassified the goods that were transported. American Import Co. v. Japan Line (U.S.A.) Ltd., 517 (518–519).

Complainant shipper of chemical products did not carry its burden of proving entitlement to reparation in the amount of a surcharge allegedly improperly assessed by respondent carrier where complainant did not raise the surcharge issue in its complaint and presented neither exposition nor argument on the issue at the hearing. CSC International, Inc. v. Lykes Bros. Steamship Co., Inc., 551 (562).

A shipper seeking reparation based on respondent's alleged misrating of the cargo shipped could not carry its heavy burden of proving the alleged misclassification of the cargo where its contentions as to the actual description of the cargo was inconsistent (the cargo was described differently in the shipper's complaint, its exhibits, its opening brief and its exceptions). Moreover, the record evidence appeared to support the respondent's classification of the cargo. Madeplac S.A. Industria De Madeiras v. L. Figueriedo Navegacao S.A., 578 (581).

Even if a shipper had carried its burden of proving that respondent carrier had incorrectly described cargo carried for the shipper, the evidence presented by the shipper with respect to the weight and amount of the cargo was inconsistent, which clouded the shipper's demand for reparations. Id. (581–582).

Even assuming that a shipper of a prefabricated building could establish that respondent carrier had misclassified the cargo according to its tariff, the shipper failed to meet its burden of establishing that an overcharge had resulted. The shipper's expert witness testified that, based on the testimony and evidence presented by the shipper, he could not determine if there had been an overcharge; moreover, the witness testified that if he had rated the cargo based on that evidence, he would have assigned an n.o.s. classification to most of it, which would have resulted in the assessment of additional freight charges. Id. (582).

Because of the complainant's failure to supply literature on the product shipped and in light of a chemical dictionary definition which excluded plastics from the class of synthetic resins, the complainant failed to sustain its burden of showing with reasonable certainty that the product shipped, which was described on the bill of lading as "Liquid Synthetic Plastics (Catalyst B-. .)," was a liquid synthetic resin which should have been classified and rated under the tariff item for resins. Accordingly, the initial decision in which reparation was awarded was vacated and the case remanded to provide the complainant further opportunity to introduce corroborating evidence National Starch & Chemical Corp. v. Lykes Bros. Steamship Co., Inc., 601 (602).

Reparation of a portion of freight charges was awarded where supporting documentation consisting of a Department of Defense specification pamphlet and the shipper's export declaration correction form substantiated the complainant's claim that a commodity described by its trade name on the bill of lading was entitled to be rated under a more specific tariff item than "Cargo N O S " Sun Oil International, Inc on behalf of Venezuelan Sun Oil v. Venezuelan Line & TTT Ship Agencies, Inc., 622 (624–625).

Reparation of a portion of freight charges was awarded where supporting documentation consisting of the carrier's freight bill and the export declaration, which documents described the commodity shipped as "Synthetic Resin," substantiated the complainant's claim that the cargo should have been classified and rated under the carrier's specific tariff item for "Synthetic Resin." Union Carbide Corp. v. Hapag-Lloyd A G , 629 (630–631).

Reparation of a portion of freight charges was awarded where supporting documentation consisting of the bill of lading, freight bill, invoice, packing list and sales material concerning the goods shipped, substantiated the complainant's claim that the goods shipped should have been classified and rated under a more specific tariff item than the N.O.S classification. Mine Safety Appliances Co. v. Chilean Line, Inc , 810 (811–813).

In an action for recovery of alleged overcharges which had been remanded by the Commission for purposes of allowing the complainant further opportunity to introduce evidence in support of its claim that the commodity shipped was a "Synthetic Resin," the complainant failed to provide such corroborating evidence demanded by the order on remand and thus was denied reparation of the alleged overcharges. National Starch & Chemical Corp. v. Lykes Bros. Steamship Co., Inc., 840 (843–845).

Reparation of a portion of freight charges was awarded where supporting documentation, consisting of a packing list on each shipment which indicated how many cartons of each size were shipped, substantiated the complainant's claim that its agent had made excess volume declarations on the bills of lading. Mechanical Plastics Corp. v. American Export Lines, Inc., 848 (852, 857).

— Carrier's six-month tariff rule

Complainant was entitled to reparation where the carrier did not dispute complainant's contention that it had not applied the correct rate on a cargo of "Artificial Christmas Trees," and offered nothing other than the so-called "six-month" tariff rule in its defense. It has been well established that a carrier's "six-month" rule may not act to bar recovery of an otherwise legitimate claim. Stop & Shop Companies, Inc., Bradlees Division v. Barber Blue Sea Lines and Barber Steamship Lines, Inc., 252 (253–254).

Reparation was awarded in a rate application case where the carrier had denied complainant's claims solely on the basis of the provisions of its tariff restricting payment of overcharge claims submitted to it within six months after the date of shipment, and complainant substantiated its claim. National Starch & Chemical Corp. v. Atlantic Container Line, Ltd., 282 (284–285).

A carrier conference's "six-month rule" governing claims for refund of overcharges did not act to bar an award of reparation on a complaint filed within the two-year statutory period of limitation. No mere conference rule can work to defeat the Commission's statutory jurisdiction. Ocean Drilling & Exploration Co. v. Kawasaki Kisen Kaisha, Ltd., 349 (352–353).

Commission holding that OLOA 229 was properly classified as a "lubricating oil additive" rather than as a "detergent" was based not on the concept of what "the man in the street, the housewife, the grocery clerk" may have of a detergent, but rather on the bases of the manufacturer's own literature and description of the product and the testimony of an expert witness. Complainant failed to refute this testimony by an expert witness of its own, or indeed to offer any expert evidence whatsoever. Chevron Chemical Co. v. Mitsui O.S.K. Lines, Ltd., 216 (217).

A shipper of frozen beef tongues was entitled to reparation where the carrier had admittedly applied a higher rate to the shipment than was permitted under the applicable tariff. The carrier had denied the shipper's claim under the "six-month rule" set forth in the tariff; however, such a rule is not a bar to recovery of reparation for overcharge in a subsequent Commission proceeding. Swift & Co. v. Sea-Land Service, Inc., 572 (573–574).

A carrier's "six-month rule" pertaining to overcharge claims by shippers cannot serve to subvert the Commission's jurisdiction where an otherwise proper claim is presented by a shipper. Mitsubishi International Corp. v. Y.S. Line, 575 (577).

— Classifications

Prior decisions of the Commission do not require that a chemical compound be reduced to its components for classification purposes. The proper description and classification of a product may depend on various factors which must be determined in each particular case. Chevron Chemical Co. v. Mitsui O.S.K. Lines, Ltd., 216.

The Settlement Officer erred in concluding that a shipment of office stationery of paper and paper board was improperly classified by the carrier as "stationery" and in awarding reparation to the shipper on the basis of a rate covering "paper, viz.: bond, sulphite or sulphite and rag mixed—see Printing Paper." Although the shipper showed that the paper involved was sulphite bond, it never denied that it was office stationery, nor did it assert that it was printing paper; moreover, the description urged by the shipper was not an n.o.s. tariff description, but listed the precise types of paper covered, thereby excluding all other types not specifically mentioned. While various types of paper may be made of sulphite bond, the term "stationery" is more specific than the term "paper, viz.: etc." used in the tariff; thus, the carrier properly classified and rated the shipment. Pan American Health Organization v. Moore-McCormack Lines, Inc., 568 (569).

A shipper of hospital bedpans and urinals was entitled to reparation in the amount of the difference between the charges paid, which were based on application of the rate for "hospital equipment," and the charges that would have been assessed had the proper rate, covering "disposable laboratory and hospital ware," been applied. A catalog page submitted by the shipper, which showed that the bedpans and urinals were for single patient use, was sufficient to establish that they qualified for the "disposable" rating. Bemis Manufacturing Co. v. Trailer Marine Transport Corp., 897 (898–899).

— Discrimination

Where a shipper sought reparation for freight overcharges resulting from misdescription of the cargo on the bill of lading, respondent carrier's contention that it was obliged to freight the shipment on the basis of the highest rate potentially applicable in order to avoid discrimination was without merit, in view of the multitude of prior Commission decisions holding that the rate applicable to the cargo actually shipped is the only rate that may be applied to any given shipment. Bristol Myers Co. v. Prudential Lines, Inc., 191 (194).

Since P.L. 90–298 permits a waiver or refund of freight charges to be granted "where it appears that such refund or waiver will not result in discrimination among shippers," an application for waiver or refund should contain a statement as to whether any other shippers of the same or similar commodity were involved around the time of shipment. Farr Co. v. Seatrain Lines, 412 (418).

Granting carrier's application for permission to waive collection of a portion of freight charges assessed upon a shipment of garden supplies due to clerical error would not result in discrimination among shippers, despite the fact that one other shipment of such goods had moved during the period involved, where the second shipment was itself the subject of a special docket proceeding filed simultaneously with the instant application. EME Norlett AB v. Sea-Land Service, Inc., 438 (440).

Permitting carrier to waive collection of a portion of freight charges assessed upon a shipment of garden supplies due to clerical error would not result in discrimination among shippers, despite the fact that one other shipment of such goods was known to have moved during the period involved, where the latter shipment was itself the subject of a concurrently filed special docket proceeding. S.C. Sorensen v. Sea-Land Service, Inc., 446 (448).

The payment of a requested refund of freight charges would not result in discrimination among shipper where there was no evidence that any other shipment of the same or similar commodity moved during the time within which a desired lower rate was to have been effective, and where, even if there were such shipments, the carrier's publication of a tariff notice would mean that any other shipper would be entitled to the same rate during the same period of time. A.W. Fenton Co. v. Europe Canada Lakes Line, 453 (458).

Denial of a carrier's applications to refund portions of freight charges assessed on certain shipments of bottle labeling machines and parts was not required merely because the shipper had failed in each of the five applications filed to mention the other four shipments which moved during the relevant time period. The carrier's omissions appeared to be the result of carelessness or confusion due to its inexperience in filing special docket applications, and not the result of a deliberate attempt to conceal the existence of the other shipments, and would not result in discrimination among shippers. Salentine & Co., Inc. v. Europe Canada Lakes Lines, 542 (548).

Denial of a carrier's application for permission to refund portions of freight charges assessed on five shipments of bottle labeling machines and parts was not required merely because the carrier had withdrawn one of its five special docket applications due to the small amount involved therein. Discrimination among shippers could be avoided by requiring the carrier to publish an appropriate tariff notice and to notify the shipper involved in the withdrawn application of the availability of a refund of charges. Id. (548–549).

Even if other shipments of iron and steel seconds might have moved during the period of complainant's shipment (as to which waiver of collection due to inadvertent error was requested by respondent), which appeared not to be the case, the possibility of discrimination could be eliminated by the publication of a notice in respondent's tariff which would indicate that such other shipments as might have moved would be entitled to the rate applied to complainant's shipment. Westinghouse Trading Co. v. American Export Lines, Inc., 874 (879).

— Filing of new tariff

A carrier's application for permission to waive collection of a portion of freight charges was denied where, after an agreed reduced rate was not timely filed due to administrative error by the carrier, and after the shipment was delivered to the carrier, the carrier filed a corrected tariff which, due to another clerical error, reflected a rate lower than that previously agreed upon by the parties. Section 18(b) of the Shipping Act, 1916, requires that the carrier file a new tariff upon which a waiver will be based prior to applying for permission to waive collection of charges; such a "new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment. The Commission's authority to depart from the rigid requirements of section 18(b)(3) of the Act and to make a rate applicable retroactively is strictly limited, and does not extend to approving a rate upon which agreement was never reached and which was never filed. Munoz y Cabrero v. Sea-Land Service, Inc., 152 (153).

Permission to waive collection of a portion of freight charges assessed on a shipment of "Tumeric" was denied where the tariff rate for which retroactive application was sought was not filed by the carrier prior to filing the application for permission to waive collection. Section 18(b)(3) of the Shipping Act, 1916, provides in part that waiver of collection cannot be granted unless the carrier has filed a new tariff setting forth the rate on which the waiver would be based prior to applying for authority to waive collection; this provision of the Act is jurisdictional, and cannot be waived. Louis Furth, Inc. v. Sea-Land Service, Inc., 186 (187).

Carrier was permitted to waive collection of a portion of freight charges where, due to a typographical error as to the effective date of an initial rate, the rate was rejected by the Commission's Bureau of Compliance. The waiver would not result in discrimination among shippers; prior to applying for the waiver a new tariff had been filed setting forth the rate on which the waiver was based; and the waiver application had been filed within 180 days from the date of shipment. Milchem, Inc. v. Flota Mercante Gran Centroamericana, S.A., 302 (303–304).

A carrier was not permitted to waive collection of a portion of freight charges because of a clerical error in its failing to file a rate promised the shipper where an examination of the tariffs on file with the Commission failed to turn up the tariff amendments which the carrier alleged it had filed to reflect the appropriate rate and the carrier could not furnish proof in the form of a stamped receipt from the Commission that it had filed the amendments. A.E. Staley Mfg. Co., Decatur, Illinois v. Mamenic Line, 385 (388).

An application to refund a portion of freight charges was denied where the jurisdictional requirement for Special Docket relief under section 18(b)(3) had not been satisfied in that neither the conference nor the carrier had filed a new tariff setting forth a rate which would permit the requested refund to be made prior to filing the refund application. Henry I. Daty, Inc. v. Pacific Westbound Conference, 390 (394).

Carrier's application to refund a portion of certain freight charges on the ground of administrative error was denied. While the error involved was of the type within the contemplation of section 18(b)(3) of the Shipping Act, 1916, the carrier had failed to file a new tariff setting forth the rate on which its application was based prior to filing the application, as required by the Act. The requirement that the rate upon which the refund is to be based be filed prior to making application is statutory, and there is no discretion to waive it. Texaco Export, Inc. v. American West African Freight Conference, 430 (432).

Unless the carrier prior to filing its application to waive collection of a portion of freight charges publishes a new tariff which sets forth the rate it seeks to apply, the Commission is without authority under section 18(b)(3) of the Shipping Act, 1916, to consider the merits of the application. This requirement cannot be waived; and as much as the Commission might wish to grant relief in situations where the hardship resulting from the carrier's error in failing to file a rate promised the shipper falls upon the shipper, the Commission, whose jurisdiction is strictly limited by statute, has no power to grant such relief. A.E. Staley Mfg. Co., Decatur, Illinois v. Mamenic Line, 642 (643).

Section 18(b)(3) of the 1916 Act requires that prior to applying for a waiver the carrier or conference of carriers file a new tariff upon which a refund or waiver will be based. This presumes that the rate the carrier is asking permission to apply is not already on file with the Commission. However, where the rate is already on file prior to the filing of the application, the filing of a new tariff reflecting an identical rate becomes superfluous and failure to file such a tariff is not a proper ground for denying an application. Mitsui & Co. (U.S.A.), Inc v Pacific Westbound Conference, 807 (808).

— Intended use of cargo

The use for which a product is manufactured and sold can be a most important factor in deciding the proper tariff classification for the product. CSC International, Inc. v. Lykes Bros. Steamship Co., Inc., 551 (560).

When "use" is a factor in deciding the proper tariff designation of an article, it is the "controlling use" that determines the nature and character of the shipment at the time tendered; the fact that an article may have subordinate and secondary uses does not alter the nature of the product. Id

— Interest

While the complainant in a cargo misdescription case was able to prove that it was entitled to reparation, no interest was awarded on the reparation because of the confusion caused by the complainant's improper description in the bill of lading of the commodities by their trade names and because of the complainant's own failure to submit the required proprietary clause at the time of loading which clause entitled the complainant to an industrial contract rate rather than the standard contract rate applied by the carrier. Sun Company, Inc. v. Lykes Bros. Steamship Co., Inc., 67 (73).

—*Misinterpretation of tariff*

Application to waive collection of a portion of freight charges cannot be granted under the special docket procedure established by P.L. 90–298 and Rule 92(a), where the mistake involved in the case—a misreading by the carrier's rating person of the tariff in effect at the time of shipment—was not an error in the tariff or an error on the part of the carrier in inadvertently failing to file a new tariff. Farr Co. v. Seatrain Lines, 412 (413–414).

To be subject to the remedial provisions of P.L. 90–298, more is required than merely a mutual misunderstanding of the carrier and shipper as to the rate applicable to a particular shipment. A misquotation of a rate by a carrier's clerk is not an error in a tariff of a clerical or administrative nature, nor is it an error due to an inadvertence in failing to file a new tariff. Id. (415–416).

A misreading of a tariff is not the type of mistake contemplated in section 18(b)(3) of the Shipping Act, 1916, and cannot, therefore, be a basis for granting a waiver of collection of a portion of freight charges. Accordingly, where the carrier's rate clerk informed the shipper that an agreed upon rate would become effective on March 28 (which it did for all carriers belonging to the rate agreement as of that date) but, because she apparently did not read the small print at the bottom of the tariff, failed to inform the shipper that the lower rate would not be effective for the carrier herein until three days later (the date that this carrier joined the rate agreement), permission to waive collection of a portion of freight charges was properly denied. There was no allegation that the March 28th filing was filed in error, or that the carrier intended, but failed, to file the agreed rate in its own tariff. Farr Co. v. Seatrain Lines, 663 (664–665).

—*Negotiated rates*

The carrier was permitted to waive collection of a portion of certain freight charges where the rate promised by the carrier on the basis of "2,240 pounds, minimum 44,480 pounds per container" was inadvertently filed on the basis of "40 cubic feet or 2,240 pounds, whichever resulted in the greater freight charge." The waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for authority to waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of shipment. Sadagen Trading, Inc. v. Sea-Land Service, Inc., 50 (51–53).

Where, due to a tariff clerk's inadvertence, a lump sum rate negotiated by the carrier and the consignee was not filed until after the shipment was loaded, the carrier was granted permission to waive collection of a portion of the freight charges on the shipment. The waiver would not result in discrimination among shippers; prior to applying for authority to waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of shipment. Ideco Rigs and Equipment Operations v. Lykes Bros. Steamship Co., Inc., 54 (55–57).

The carrier was permitted to waive collection of a portion of the freight charges on a shipment of rice where due to clerical error the carrier had failed to timely file the rate on the shipment it had promised the shipper. The waiver would not result in discrimination among shippers; prior to applying for authority to waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver was based; and the application was filed within 180 days from the date of the subject shipment. Riviana Int'l., Inc. v. Lykes Bros. Steamship Co., Inc., 58 (59–61).

Where a clerical and administrative error by the freight conference resulted in its inadvertent failure to timely file a new minimum rate for shipments of the subject commodity which had been promised the shipper, the conference was permitted to refund that portion of the freight charges collected on the shipment which resulted from the error. The refund would not result in discrimination among shippers; prior to applying for authority to refund a portion of the freight charges, the conference had filed a new tariff which set forth the rate on which the refund would be based; and the refund application was filed within 180 days from the date of the subject shipment. Corning Glass Works v. North Atlantic Continental Freight Conference, 75 (76–78).

The carrier would be permitted to waive collection of a portion of freight charges where there was an error in the tariff rate assessed by the carrier of a clerical and administrative nature which resulted from the inadvertent failure of the carrier to file the rate it had promised the shipper. The waiver would not result in discrimination among shippers; prior to applying for authority to waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver was based, and the waiver application was filed within 180 days from the date of the subject shipment. Footner and Co., Inc. v. Sea-Land Service, Inc., 123 (124–126).

Permission to refund a portion of freight charges paid by a shipper of herbicides was granted where, through clerical error compounded by a misunderstanding between the carrier's sales and pricing personnel, an agreed reduced rate was not telegraphically filed until the day after the date of the shipment. The shipment involved was the only shipment of similar commodities made by the carrier during the relevant time period, and the carrier's error was of a type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure. Velsicol Chemical Corp. v. Sea-Land Service, Inc., 154 (156–157).

Permission to refund a portion of freight charges paid by a shipper of paper was granted where, through clerical error, the carrier's pricing personnel instructed the tariff publishing officer to publish an agreed reduced rate in an incorrect item of respondent's tariff, which he did, and where the error was discovered and the agreed rate (albeit without the agreed minimum quantity term) was published after the movement of the shipments involved but prior to the filing of the petition for refund with the Commission. The clerical and administrative error involved, which resulted in the publication of the originally agreed rate and minimum, but in the wrong tariff item, was of the kind contemplated by section 18(b)(3) of the Shipping Act, 1916, and the other requirements of that section were met by the carrier. Union Camp International Sales Corp. v. Sea-Land Service, Inc., 195 (197).

A carrier was permitted to waive collection of a portion of freight charges where, due to a clerical error by the carrier's freight association, a higher rate than that promised the shipper was published in the association's tariff. The waiver would not result in discrimination among shippers; prior to filing the waiver application the association filed a new tariff with the Commission setting forth the rate on which the waiver was based; the association had agreed to publish an appropriate notice in its tariff with respect to the correct rate; and the waiver application had been filed within 180 days from the date of shipment. Alcoa International, Inc. v. Gulf European Freight Association, 366 (367–370).

An application to waive a portion of freight charges was granted where, due to clerical error, a promised extension of a special rate was not timely filed with the Commission. The error had been corrected by an effective tariff before the waiver application was filed; permission to refund would not result in discrimination as between shippers; and the application for a waiver was timely filed. Abikath Export Corp. C/O Franlig Forwarding Co., Inc. v. Sea-Land Service, Inc., 396 (397–399).

Where a carrier agreed with a shipper to a 15% reduction in the tariff rate applicable to a shipment of lubricating oil and grease, but due to administrative error the carrier's tariff amendment referred only to lubricating oil, the carrier's error appeared to be of a kind that would support an application for permission to refund resultant overcharges pursuant to section 18(b)(3) of the Shipping Act, 1916. Texaco Export, Inc. v American West African Freight Conference, 430 (432).

A carrier was permitted to waive collection of a portion of the freight charges assessed upon a shipment of garden equipment where, after the carrier had agreed with the shipper upon a rate for the shipment, and had further agreed that the rate would not be subject to the carrier's upcoming general rate increase, the carrier's tariff office failed, due to clerical error, to exempt the agreed rate from the general increase, which error was not discovered and corrected until after the shipment had moved. The clerical error involved was of the kind within the contemplation of section 18(b)(3) of the Shipping Act, 1916. EME Norlett AB v. Sea-Land Service, Inc., 438 (440).

A carrier was permitted to waive collection of a portion of the freight charges assessed upon a shipment of garden equipment where, after the carrier had agreed with the shipper upon a rate for shipment, and had further agreed that the rate would not be subject to the carrier's upcoming general rate increase, the carrier's tariff office failed due to clerical error to exempt the agreed rate from the general increase, which error was not discovered and corrected until after the shipment had moved. The clerical error involved was of the type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. S.C. Sorensen v. Sea-Land Service, Inc., 446 (448).

Carrier was permitted to waive collection of a portion of the freight charges assessed on a shipment of liquor where the carrier and the shipper had agreed upon a reduced rate to cover the shipment and the carrier's agent had written a "rough draft" of the revised applicable tariff page, but the rough draft had specified that the rate would apply "house to pier" instead of stating the agreed "house to house" basis. The mistaken transcription was a clerical or administrative error in a tariff of the type within the contemplation of section 18(b)(3) of the Shipping Act, 1916. Juillard Alpha Liquor Co. v. Sea-Land Service, Inc., 450 (451).

A carrier who through inadvertence failed to file a new tariff in time to assess a lower rate on a movement of fork lift trucks, which rate had been promised the shipper, was granted permission to refund a portion of the freight charges on that shipment. The documentation submitted by the carrier supported its contention that it fully intended to have a special reduced rate filed with the Commission to be effective prior to the date of shipment but that its intentions were not carried out because its instructions to that effect had been misplaced. Payment of the requested refund would not result in discrimination among shippers; a new, correct tariff had been filed prior to the filing of the refund application; and the refund application was filed within 180 days from the date of shipment. A.W. Fenton Co. v. European Canada Lakes Line, 453 (457–458).

The carrier was permitted to waive collection of a portion of freight charges where its clerical personnel inadvertently failed to notify the conference to process and file a special rate promised to the shipper for a certain shipment of rice before the bill of lading was issued on that shipment. The documents submitted by the carrier, the Department of Agriculture "Cargo Booking Forms" for the shipment, which were signed by representatives of both the carrier and the shipper, established that there was a prior agreement between the carrier and the shipper to move the rice at the special rate. The clerical error recited in the waiver application was of the type within the intended scope of section 18(b)(3) of the Shipping Act, 1916. Commodity Credit Corp. v. Delta Steamship Lines, Inc., 484 (486–487).

A petition for permission to waive collection of a portion of freight charges and to refund freight charges already collected was granted where the documents submitted in support of the petition clearly established that it was the intention of the parties that a tariff be filed which would permit the carriage of the U.S. Olympic Yachting Team boats to Japan and return free of charge as a charitable item. This intention was fully carried out for the westbound carriage by appropriate tariff filing but inadvertently, through administrative error and oversight, not carried out for the eastbound carriage. David Ullman v. Sea-Land Service, Inc., 490 (491–493).

Initial decision granting waiver of collection of freight charges is remanded to the ALJ for further proceedings. No evidence had been furnished which would substantiate that a prior agreement was reached to establish a rate to include a particular port as a loading port or that the exclusion of the port from the tariff was inadvertent. More is required than the mere allegation of the carrier concerning the nature of the agreed rate. If written evidence of the verbal agreement does not exist, affidavits of those involved in the rate negotiations and agreement could serve as a substitute. Cutler-Hammer Denver v. Lykes Bros. Steamship Co., Inc., 494 (495).

A carrier was permitted to refund a portion of the freight charges assessed on certain shipments of bottle labeling machines and parts where the carrier had transmitted to its tariff agent a request that special rates be filed on such commodities prior to the shipments, but the agent had misplaced the telex request an had failed to comply with the request until after the shipments had moved. The misplacing of the telex constituted an error due to inadvertence in failing to file a new tariff within the meaning of section 18(b)(3) of the Shipping Act, 1916. Salentine & Co., Inc. v. Europe Canada Lakes Line, 542 (547)

A shipper's reparation claim was dismissed for failure to state a claim upon which relief could be granted. The shipper had shipped bulk lubricating oil at a rate agreed upon between the shipper and respondent carrier, but not filed by respondent; the shipper's claim was based on the difference between the agreed rate and the minimum rate specified in the carrier's open conference tariff provision covering lubricating oil, which the shipper alleged to be the applicable rate in view of respondent's failure to file the higher agreed rate. However, the setting of a minimum rate in an open rate provision of a conference tariff could not constitute the "filing" of that rate by the conference; and the shipper's contention that, since respondent was a party to the conference minimum, that minimum was the only rate lawfully applicable, was wholly without merit; reparation cannot be granted on the basis of a nonexistent rate. Chevron Chemical International, Inc. v. Barber Blue Sea Line, 594 (595)

The carrier's application for permission to waive collection of a portion of freight charges was granted where, due to vacations and travel by the carrier's pricing personnel, there had been an inadvertent failure to revise the tariff in accordance with the carrier's agreement with the shipper and the cargo had moved without the tariff being amended. American Home Foods v. Sea-Land Service, Inc., 638 (640-641).

Carrier is permitted to waive collection of freight charges at the rate provided for General Cargo N.O.S. in its tariff, where the carrier, through a bona fide mistake, failed to file a rate which had been negotiated with the shipper. U.S. Department of Agriculture v. Waterman Steamship Corp., 644 (649, 651–652).

Where the conference at a conference meeting had agreed to the filing of special project rates requested by the shipper, the failure of carrier's representative at the meeting to request a telegraphic filing of the rates to make them applicable to the shipments resulted in the conference's inadvertent failure to file a rate it had approved and intended to file, an error clearly within the ambit of section 18(b)(3) of the 1916 Act. Thus, the carrier will be permitted to waive collection of a portion of freight charges, provided that the carrier file within 30 days either copies of the on board bills of lading or an affidavit attesting to the date the shipments were placed aboard ship. Hermann Ludwig, Inc. v. Waterman Steamship Corp., 670 (672–673).

Permission to waive collection of a portion of freight charges was granted where due to clerical error the carrier had filed the incorrect specifications for the goods shipped in the rate item amendment it had promised the shipper. The waiver request would not result in discrimination among shippers; prior to filing for the waiver a new tariff was filed setting forth the rate on which the waiver was based; and the waiver application was timely filed. Ford France, S.A. v. Sea-Land Service, Inc., 837 (838–839).

The failure of respondent's local rate clerk to inform respondent's pricing manager of complainant's acceptance of a proposed tariff rate constituted an error due to inadvertence in failing to file a new tariff within the meaning of section 18(b)(3) of the Shipping Act, 1916. It was clear that, but for the error, steps would have been taken by the pricing manager to file the necessary tariff. Further, it was clear that it was respondent's intention to file the agreed rate prior to the date of the shipment; such intention is a necessary element in establishing that an error is of a type within the contemplation of the statute. Westinghouse Trading Co. v. American Export Lines, Inc., 874 (879).

An affidavit from respondent's Executive Assistant, stating that the insertion of a qualifying term in a tariff provision (which had the effect of depriving complainant of the benefit of an agreed special rate) was never intended and occurred as a result of the heavy volume of tariff page turnover which is accomplished through the medium of magnetic card typing systems, and the Commission's independent search of conference minutes, which disclosed no action by the conference to insert the term, were sufficient to establish the existence of an inadvertent clerical or administrative error justifying refund of freight overcharges paid by complainant as a result of the error. United Grocery Export Co. v. Pacific Westbound Conference, 883.

—Port equalization

Where a tariff rule gave the carrier the option of discharging cargo at ports designated on the bills of lading or moving the cargo from the port of actual discharge to the port of designation at carrier's expense, the shipper was entitled to equalization reparation. The carrier had discharged the cargo at a port other than that designated and had charged the shipper for the cost of transportation to the port of destination. Fritzi of Calif. v. K-Lines, 710 (711–713).

—Settlements

Complaint alleging that complainant's vessel was improperly evicted from a terminal in order that a vessel of respondent could be berthed, and that the berthed vessel caused a break in the bus bar conductor system which had the effect of precluding the movement of container cranes at another terminal so that complainant's vessels could not use dockside space at the latter terminal, is dismissed with prejudice in view of a settlement between the parties whereby respondent would pay complainant $10,000. The parties also agreed that the settlement would not prevent either party from contending in any court that any conduct or acts alleged in any complaint or action before the FMC constituted, or were part of, or were evidence of violation of any federal or state laws. Sea-Land Service, Inc. v. City of Anchorage, Alaska and Totem Ocean Trailer Express, Inc., 13 (14–15).

Complaint is dismissed and the proceeding terminated on the basis of a settlement agreement between complainant and respondents. Both the law and Commission policy favor settlements. State of Alaska v. Pelican Cold Storage, Inc., 109 (111).

The informal docket proceeding with respect to complainant's request for reparation for freight overcharges was dismissed where a settlement of the claim with the carrier had been achieved. A. Bohrer, Inc. v. Hapag-Lloyd Lines (U.S. Navigation, Inc.), 234 (237).

Shipper's claim for reparation was dismissed upon a showing that respondent carrier had paid the shipper's claim in full and that the shipper had acknowledged receipt of such payment. Royal Cathay Trading Co. v. Seaway Express Lines, 354 (357).

With respect to a statement by the ALJ, in dismissing a complaint proceeding upon the basis of a settlement between the parties, that the Commission is without power to force a complainant to litigate his claim, Rule 93 of the Commission's Rules of Practice and Procedure states that satisfied complaints will be dismissed in the discretion of the Commission. Considering the fact that the parties here feel that settlement is more prudent than bearing the expense of litigation and the fact that it is not clear that respondent is subject to the Commission's jurisdiction, the order of dismissal is upheld. Since the terms of settlement were not furnished to the Commission, dismissal should not be regarded as a determination of the propriety of the terms. Parties who settle section 18(b)(3) rate disputes are charged with knowledge that the section requires strict adherence to published tariff rates of common carriers and the penalties for violation of the section. Supreme Ocean Freight Corp. v. All Caribbean, Inc., 428.

— Statute of limitations

A claim for alleged freight overcharges on a shipment which occurred in October, 1974, was timely filed with the Commission in July, 1976, well within the two years after the cause of action accrued. Pan American Health Organization v. Prudential-Grace Lines, Inc., 18 (19).

Where it was determined that the complainant shipper did not have standing to assert a claim for reparation of alleged overcharges which had been paid by the consignee, not the shipper, and that no valid assignment of the consignee's claim had been made to the complainant within the two-year period of limitations prescribed by section 22 of the Shipping Act, 1916, the complainant would not be permitted to file an amended complaint based on an assignment of the consignee's claim subsequent to the running of the limitations period. Delay in filing a sustainable complaint beyond a permissible period of time established by law is not excusable on the ground that the person did not know the law or understand its procedures. Carton-Print, Inc. v. Austasia Container Express Steamship Co., 30 (39–42).

The two-year limitations period set forth in section 22 of the Shipping Act, 1916, starts either upon delivery of the cargo to the carrier or upon payment of the freight charges, whichever is later. Accordingly, a complaint filed on February 17, 1977, was timely filed notwithstanding that the bill of lading was dated February 12, 1975, where payment of the freight charges was actually made on or about March 10, 1975. Sun Company, Inc. v. Lykes Bros. Steamship Co., Inc., 67 (68–69).

Carrier was required to pay a freight overcharge claim made almost two years after shipment and based on value per the shipper's invoice, where the claim was filed within two years of accrual, the invoice supported the claim, and the carrier had admitted that the claim was correct and had offered nothing other than the so-called "six-month" tariff rule in its defense. CSC International, Inc. v. Venezuelan Lines, 293 (294–295).

A cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. Accordingly, shipper's claim for refund of an overcharge, which was received by the Commission two years and four days after the date of shipment, was nonetheless filed within the two-year statute of limitations since the freight charges on the shipment were not paid until three months after the date of shipment. Royal Cathay Trading Co. v. Seaway Express Lines, 354 (356).

Section 18(b)(3) of the Shipping Act, 1916, specifies that an application for permission to refund portions of freight charges must be filed with the Commission within 180 days from the date of shipment. An application which was not received in the Office of the Secretary of the Commission until 181 days after the date of shipment, but which bore a stamp showing that it had been received at the Commission on the 180th day, was timely filed within the meaning of the statute. Mitsubishi International Corp. v. Far East Conference and American President Lines, Ltd., 566 (567).

The settlement officer incorrectly interpreted the Commission's rule which states that a cause of action is deemed to accrue "upon delivery of the property or payment of the charges, which ever is later," to mean delivery to the consignee. The correct interpretation of the rule is delivery to the carrier rather than the consignee. In this case one of the complainant's claims was time-barred under either interpretation. Mitsubishi International Corp. v. N.Y.K. Line, 636.

Provision of law that an application for refund or waiver of freight charges must be filed with the Commission within 180 days from the date of shipment means that the count begins on the first day after the date of shipment. The date when the cargo is delivered to the carrier's dock or the date when the bill of lading is issued may be considered as the date of shipment. There is reason to believe that the term "from the date of shipment" was intended to be synonymous with the term "after the cause of action accrued" in section 22 of the Shipping Act, 1916. If this is so, then the 180 day count under section 18(b)(3) would begin at the time of shipment or upon payment of the freight charges, whichever is later. U.S. Department of Agriculture v. Waterman Steamship Conference, 644 (648)

On the basis of established precedent either the date of delivery of the cargo to the carrier or the date of the on board bill of lading may properly serve as the start-up date for computing the 180-days statutory period of limitation for filing refund or waiver applications. Hermann Ludwig, Inc. v. Waterman Steamship Corp., 670 (671–672).

Where a period of 179 days elapsed between the date the cargo was loaded aboard the vessel and the date an application to waive a portion of freight charges was received for filing, the 180-day requirement of section 18(b)(3) of the 1916 Act was satisfied. Kuehne & Nagel, Inc. v. Lykes Bros. Steamship Co., Inc., 798 (802).

In computing the 180-day time period for filing waiver or refund applications pursuant to section 18(b)(3) of the 1916 Act, the count begins on the first day after the "date of shipment" and ends on the date of filing the application. Filing takes place on the day the application is deposited in the mail or the day the application is received by the Commission, if filed by hand. Id. (802).

With regard to the statutory requirement that an application for permission to waive collection of a portion of freight charges be filed with the Commission within 180 days of the date of shipment, the Commission has followed a policy of flexibility and has specifically permitted the date of an "on board" bill of lading or the date of loading aboard vessel to start the time running; that is, the "date of shipment" has been determined by reference to an "on board" bill of lading date or date of loading, not merely by the bill of lading originally issued by the carrier. Westinghouse Trading Co. v. American Export Lines, Inc., 874 (880).

Regardless of the present state of uncertainty occasioned by the lack of a fixed definition of the term "date of shipment" as used in section 18(b)(3) of the Shipping Act and the Commission's regulations thereunder, there was no reason to deny a carrier's application for permission to waive collection of certain freight charges provided that the carrier provided sufficient evidence to place its application within the boundaries of timeliness established by the Commission's prior decisions. Indeed, since the Commission had established by its prior case law certain guidelines for computing the 180 day period within which the application was required to be filed, it would have been inequitable to deny the application due to a retroactive change in those guidelines. Id. (880).

A carrier which sought permission to waive collection of a portion of the freight charges sufficiently established that it had filed its application within 180 days after the date of shipment (despite the fact that the application was filed 197 days after the date of shipment shown on the carrier's original bill of lading) where it presented an affidavit with attached dock and pier receipts and a Bureau of Customs Declaration showing date of departure of the carrying vessel which proved that the shipment in question had not been loaded on the ship until 169 days prior to the filing of the carrier's application. Id. (881).

— Tariff designations; ambiguity

Where two tariff descriptions apply to shipped goods, the more specific of the possible applications must prevail. Pan American Health Organization v. Atlantic Lines, Inc., 220 (223).

The Commission's domestic offshore commerce tariff rules with respect to forbidding options as to applicable rates merely forbids the filing of rates which are clearly duplicative, conflicting or ambiguous. The possibility that a tariff allows a given commodity to quality (on meeting expressly stated conditions for carriage) for more than one rate when the different rates in question reflect *bona fide* differences in transportation conditions is not grounds for rejection or cancellation. Publishing, Filing and Posting of Tariffs in Domestic Offshore Commerce, 238 (246).

A fair and reasonable construction must be given to the terms of a tariff, and the terms must be construed in a sense in which they are generally understood and accepted commercially. As a corollary, shippers should not be permitted to avail themselves of a strained and unnatural construction. CSC International, Inc. v. Lykes Bros. Steamship Co., Inc., 551 (555).

A tariff, when in dispute, is to be construed "as any other document." This rule means that a tariff, having been written by the carrier, is vulnerable against the carrier if the tariff's meaning is ambiguous. It does not mean, however, that other rules of documentary construction necessarily apply to the construction of tariffs. Thus, for example, when construing a contract or statute, a proper inquiry is the intent of the parties or the legislature, however, when construing a tariff, the "express language" of the tariff governs, not the "unexpressed intention" of the author of the tariff. Id. (555).

In construing tariff provisions, resort to extrinsic evidence or matters outside the express language of the tariff may be had in only three instances; where the language of the tariff is itself vague; where the tariff contains technical words which require interpretation because their meaning is not generally known; or where there exists a custom or usage of a trade or a course of dealing of the parties which, although not specified in the tariff, is such that it must be applied. Id. (555–556).

The rule of tariff construction which permits resort to extrinsic evidence where the language of the tariff is "vague" appears to permit the introduction of extrinsic evidence in virtually every case in which a tariff provision is subject to dispute. The very existence of a dispute between a skipper or his professional freight auditor and a carrier would seem to present an arguable case of vague tariff language. Id. (556).

Extrinsic evidence, in the form of consultation of the dictionary, is considered in virtually all cases involving tariff construction. Resort to extrinsic evidence, however, obviously encompasses a good deal more than mere reference to dictionaries; resort to the dictionary may give rise to the problem of alternative meanings, which only poses the further problem of which alternative to choose. Where this problem arises, the proper choice is that meaning of a tariff word or phrase which is generally understood and commercially accepted. Id. (556).

A shipper's contention that the term "petroleum solvents" appearing in a carrier's tariff item, interpreted in accordance with chemical industry understanding, reasonably described a shipped substance which was a "petrochemical," was without merit. To accept the shipper's conclusion would require the inclusion under the generic head "petroleum solvents" of petrochemical solvents that were neither based on nor derived from petroleum, which would constitute a "strained and unnatural" construction. Id. (558).

The manipulation of dictionary definitions can never establish that a particular meaning of a "technical term" or a particular description of a product is the meaning or description generally attributed to it by those in a particular industry or commercial endeavor. Id. (558–559).

The fact that a shipper of chemical products, which presumably had access to the applicable tariff, described chemical products delivered to respondent carrier as "chemical, n.o.s.," and not as "petroleum solvents," cast considerable doubt on the shipper's subsequent contention that the chemicals shipped were understood by the chemical industry to be petroleum solvents within the meaning of the tariff Provision. Id. (559).

Reparation of a portion of freight charges was awarded where the carried improperly classified a shipment of "Plastic Insulated Mugs" under the tariff item designated "Plastic Goods, N.O.S." rather than under the more specific tariff item designated "Plastic or Paper Products." The Commission has held that the more specific of two possible tariff applications must prevail, and since "Plastic Insulated Mugs" were "Plastic Products" within the meaning of this generic tariff item, the N.O.S. rate had no application. KFC International Sales v. Atlantic Lines, 597 (598–600).

Where the carrier had a rate for alcohol, including methanol, and a rate for dangerous or hazardous cargo, N.O.S., the shipper of methanol, described on the bill of lading as flammable liquids, was entitled to the lower rate for methanol. Tariff terms must be interpreted in the sense they are generally understood and accepted commercially. Methanol is described as methyl alcohol or wood alcohol. Reparation is awarded. J. T. Baker Chemical Co. v. Barber Blue Sea Line, 684 (686–687).

Shipper was not entitled to reparation because it was allegedly overcharged as a result of the carrier failing to apply a palletization allowance on a shipment of rubber cement. The cargo was hazardous and the tariff rule on palletized cargo listed dangerous and hazardous cargo as cargo upon which the allowance was not to apply. National Starch & Chemical Corp. v. Hansa Line, 741 (742–743).

Rules of tariff construction require that the more specific of two possibly applicable tariff items must apply. If evidence presented by a shipper shows cargo shipped and rated by the carrier to be covered by a more specific item of the carrier's tariff, the shipper is entitled to rating of the cargo under that item. Allied Stores International, Inc. v. United States Lines, Inc., 869 (872).

— Trade name rules

The trade name rule, whereby bills of lading reflecting only trade names are automatically subject to application of the rate specified for Cargo, N.O.S., governs only the rating of cargo by the carrier at the time of shipment and cannot be invoked as a bar to a later showing in a proper proceeding before the Commission as to the exact nature of the commodity shipped. If the evidence shows that a more specific tariff item fits the commodity shipped, the complainant is entitled to be rated under that item. Sun Oil International, Inc. on behalf of Venezuelan Sun Oil v. Venezuelan Line & TTT Ship Agencies, Inc., 622 (623–624).

TARIFFS

Investigation into the lawfulness of proposed ILA tariff rules on containers is discontinued in the light of the effective withdrawal of the rules through a decision of the court upholding a decision of the National Labor Relations Board that ILA had violated the National Labor Relations Act with respect to the collective bargaining provisions which underlie the tariff rules, and by a tariff rule providing for non-enforcement of the container rules. The determination of the Commission to take no action should not be construed as a conclusion by the Commission with respect to its authority over the container rules where they attempted to be enforced at any time. Sea-Land Service. Inc and Gulf Puerto Rico Lines. Inc.—Proposed Rules on Containers, 120 (121–122).

Nonvessel operating common carrier is required to amend the bill of lading to clarify the contractual relationship between the actual shipper and the NVOCC as "carrier." The title page in its tariff must be amended to delete the statement that the tariff is applicable to cargo moving on "through Bill of Lading issued by the Carrier." The NVOCC admitted that it does not issue a through bill of lading and reference to such on the title page is misleading. Pacific Coast European Conference v. Southern Pacific Marine Transport, Inc., 166 (171).

Investigation into Sea-Land tariff changes on the commodity "Freight, All Kinds" for shipments from U.S. Atlantic coast ports to Puerto Rico is discontinued. The carrier had received permission to withdraw and cancel the subject tariff pages. Thus, the matters under investigation were moot and the relief originally sought by petitioning intervenors had, in effect, been granted in full. Sea-Land Service, Inc.—Amendment to Freight, All Kinds in the U S. Atlantic/Puerto Rico Trade, 199 (200).

Regulations governing the publishing, filing and posting of tariffs in domestic offshore commerce are revised to require the filing of through intermodal tariffs. The Commission has authority to "accept intermodal joint rates" between FMC regulated domestic offshore carriers and carriers regulated by other agencies. The acceptance of such tariffs and the regulation of practices clearly ancillary to the all water transportation of such carriers does not represent an attempt to assert substantive authority over inland activities within the exclusive jurisdiction of the ICC or the CAB Publishing, Filing and Posting of Tariffs in Domestic Offshore Commerce, 238 (240).

The Commission's responsibilities to prevent unfair and unreasonable rates and practices pursuant to Shipping Act sections 16 First and 18(a) and Intercoastal Shipping Act sections 2, 3 and 4, is sufficient to support a requirement that domestic offshore carriers file their entire through rate with the FMC as well as their port-to-port rates when they provide through transportation to the public. Shipping Act section 33 does not prohibit the Commission from obtaining tariff information which is also submitted to the ICC. Id. (240).

Rules governing the publishing, filing, and posting of tariffs in domestic offshore commerce are amended to permit the filing (without special permission) of project rates which meet certain specifications. Major, one time only, governmental and charitable construction or relief projects otherwise eligible are included in the definition of project rates. Each such rate must be accompanied by a showing that the rate covers all of the carrier's variable costs and makes more than a *de minimis* contribution to fixed expenses. Id. (241).

Definition of "substituted service" in the revised rules governing the filing of tariffs in domestic offshore commerce limits the use of such service to the occasional use of other carriers or other modes of transportation necessitated by unexpected operating exigencies. Regular arrangements for servicing a locality indirectly on a single bill of lading by substituting the facilities of another carrier must be treated as joint through transportation (whether intermodal or not), and not as the through service of a single carrier. Id. (241).

Requirement that a through route be offered under a single bill of lading is deleted from the final rules on publishing and filing tariffs in domestic offshore commerce. Whether a through rate is formed by combining local or proportional rates is, by itself, irrelevant for tariff purposes, and requirements relating to such combinations are deleted from the definition of through rate. Id. (241–242).

"Transshipment" in the revised rules governing the filing of tariffs in domestic offshore commerce is defined as the physical transfer of cargo from a vessel operating domestic offshore carrier to any other carrier, and the definition of "carrier" is modified to indicate that commonly owned or controlled carriers operating in different transportation modes shall be considered separate carriers for tariff filing purposes. ICC regulated Part III carriage shall be considered a different "mode" of transportation than domestic offshore water carriage for tariff filing purposes. Id (242).

Definition of cargo "interchange" is omitted from the revised rules on filing of tariffs in domestic offshore commerce. The term is not used in the rules and part of the original definition is incorporated into the final definition of "transshipment." It is assumed that "interchange" will be used in tariffs to describe cargo transfers between vessels of the same carrier or transfers between non-FMC regulated carriers Id. (242).

Repeal of former section 6 of the Intercoastal Shipping Act does not prohibit the publication of tariffs exclusively for government cargo in domestic offshore commerce. Section 6 dealt only with the level of government rates. Carriers may, but are not required to, continue offering rates for government cargoes provided that any discounts or other privileges provided are reasonable and cost justified under Shipping Act standards. Id. (243).

Rules governing the filing of tariffs in domestic offshore commerce provide a minimum 30-days notice. Carriers may file tariffs which furnish a greater period of notice, but the procedures employed to protest tariffs remain the same in each instance. Uniform procedures for protesting tariffs allow for greater efficiency in the administration of the Intercoastal Act section 3 and should eliminate a present source of confusion to shippers and carriers alike. Id. (243).

Contention of PRMSA that it is unreasonable that PRMSA be required to mail domestic commerce tariff matter to its large number of tariff subscribers on or before the time it submits its filing with the Commission is rejected. Although some carriers may find it necessary to begin planning their tariff filings somewhat earlier than they do now, there is no reason to believe such advance planning will cause inefficiencies or hardships as a general rule. The special permission process is available in hardship cases. Id. (243–244).

Revised rules on the posting of tariffs in domestic offshore commerce require posting 30 days prior to their effective date. Intercoastal Shipping Act section 2 requires 30 days advance posting. Posting is the only practical method for non-tariff subscribers to obtain advance notice of tariff changes. "Posting" refers to the maintenance of complete and up-to-date tariffs for public inspection during ordinary business hours, and tariff material which is filed, but not yet effective, must be maintained in a manner which indicates its prospective nature. Carriers are also required to provide the public with sufficient access to informed carrier personnel to permit interested persons to accurately ascertain the carrier's present and proposed rates as expressly set forth in the applicable tariff or tariffs. Id. (244).

Rule with respect to the effective date of rate changes for through intermodal transportation in domestic offshore commerce is revised so that it applies to all joint through routes (but not single carrier transportation featuring pickup and delivery service), while retaining the essential requirement that shippers be charged the rate in effect on the day the first (or initiating) carrier takes possession of the cargo. Id. (245).

The Commission's domestic offshore commerce tariff rules require a full description of all terminal services provided as part of a tariffed transportation service, whether charged for separately or included in the line haul rate. Dollar amounts must be stated only when the carrier collects a separate charge for services it performs itself (or through agents) or offers shippers a terminal allowance in lieu of performing specified services—i.e., when the carrier can control the dollar amounts involved. When a third party performs terminal services which are charged against the cargo, the tariff must advise the shipper of this fact, but may refer to a terminal tariff or other governing publication for an exact statement of the charges in question. Id. (246–247).

Rules governing the publishing of tariffs in domestic offshore commerce require public disclosure of through intermodal transportation rate divisions Id. (247).

Foreign commerce tariff filing regulations are amended to, *inter alia*, temporarily withdraw certain definitions to avoid possible conflict with recent court cases concerning intermodal transportation and the Commission's General Order 38; to expressly include nonvessel operating carriers in the definition of "carrier;" to remove temporarily the requirement that tariffs contain a precise breakout of the port-to-port rates for each commodity carried; to permit carriers to offer individual subscriptions to bill of lading tariffs, rules tariffs, or other major components of their total tariff filing; to permit contract rates to be increased after 90 days' notice without regard to the length of time the rate has been in effect; and to delete a provision which flatly proscribed the filing of requests for special permission to increase Merchant's Contract rates on short notice. The action taken by the Commission does not represent its final position—especially insofar as intermodal tariff filings are concerned. Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States, 286 (289–290).

Section 18(b) of the Shipping Act requires precision in tariff Preparation, content and filing to the greatest extent practical. The Commission must interpret what is "practical" in the light of current shipping conditions. In today's containerized, highly competitive shipping environment, the agency's staff, port interests, competing carriers and shippers can all better conduct their business when tariffs list only the individual ports or points which actually receive regular service from the publishing carrier. Carriers can amend their tariffs on the requisite statutory notice when they wish to call at additional ports. Id. (290).

Foreign commerce tariff filing regulations require carriers to accurately disclose what they pay to ocean freight forwarders. It is beyond the scope of the instant proceeding to determine whether modifications should be made in the nature and extent of forwarder brokerage compensation that carriers are presently paying. Contention that the rule is vague and ineffective should be presented in the form of a petition or complaint directed at specific aspects of General Order 4, the freight forwarder rules. Id. (291).

Certain tariffs of four nonvessel operating common carriers are cancelled in view of the carriers' failure to respond to a show cause order, failure to amend the tariffs since at least July 1, 1974, and failure to submit annual financial reports commencing with their respective 1975 fiscal years. Publication of Inactive Tariffs by Nonvessel Operating Carriers in Domestic Offshore Commerce, 371.

Carriers not actively carrying cargo or clearly committed to commence carrying cargo between ports named in a published tariff at the rates stated therein are not common carriers by water within the meaning of Shipping Act section 18(b) of the Commission's tariff filing regulations, and their tariffs are subject to cancellation. Publication of Inactive Tariffs by Carriers in Foreign Commerce, 433 (434).

The presumption that active common carrier service has ceased which is created by carriers' failure to amend their tariffs for at least two to eight years is not overcome by statements that the tariffs were active, but with no showing of actual cargo carryings, regularly scheduled voyages, ongoing cargo solicitation, recent bills of lading or other evidence. The tariffs are cancelled. Id. (434).

A tariff maintained solely for the purpose of obtaining a competitive edge over carriers who have not filed tariffs in a given trade—by avoiding the 30 day notice or special permission requirements of Shipping Act section 18(b) prior to entering a trade—is a "paper tariff." Paper tariffs do not contain rates which are commercially attractive to shippers, but do allow the carrier to quickly reduce rates whenever a large enough shipment is tendered to make a vessel call profitable. Filing of such tariffs is not permitted because they are essentially misleading to shippers, potentially unfail to small shippers and carriers attempting to maintain regular schedules in the trade, encourage misunderstanding and sharp practices, and impose an unnecessary administrative burden on the Commission staff. Such a tariff is cancelled in the instant proceeding. Id. (435).

Proposition that because the Shipping Act, 1916, does not require a carrier to maintain service with a "prescribed regularity" the Commission may not prohibit carriers from publishing tariffs which provide for vessel calls on a "by inducement" basis, is untenable. Section 18(b) applies only to common carriers by water and carriers who serve a trade "by inducement only" are not common carriers by water for the purpose of publishing a tariff covering that trade. Common carriage for tariff filing purposes is defined as commercial activity which shows a clear intention to move cargo under the proffered tariff within a commercially reasonable period of time subsequent to filing. It is not necessary to find that a carrier has actually refused cargoes tendered for carriage at its published tariff rates. It is enough that there has been an extended period within which no common carrier service has been provided to the subject trade. Id. (436).

Tariff actions formulated by a conference are taken pursuant to authority granted under the approved section 15 agreement. It follows that tariff matters found to be unlawful relate back to the issuing authority—the conference agreement—and failure to modify or delete an unlawful tariff provision can result in the disapproval of the underlying section 15 agreement. A show cause order was not procedurally defective in not detailing this step-by-step procedure when the result should be obvious to all affected parties. Far East Conference Amended Tariff Rule Regarding the Assessment of Wharfage and Other Accessorial Charges, 772 (778).

On reconsideration of decision to discontinue proceedings instituted to determine the legality of so-called "50-mile container rules," the Commission determines that the order of discontinuance must be vacated and a decision issued on the merits. Cases cited by a party opposing discontinuance are persuasive of the claim that the issues regarding the validity of the rules are not moot. The proceeding had been discontinued as moot on the basis of a court ruling affirming an NLRB decision finding the collective bargaining provisions underlying the rules unlawful under the NLRA, and on the basis of an "effective withdrawal" of the rules. Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.—*Proposed* Rules on Containers, 788 (792–793).

TERMINAL LEASES: *See also* Terminal Operators

Considering the time lapse since the institution of the proceeding and the technological changes which have occurred in the operation of terminals, the Commission withdraws its proposed rules governing the filing of terminal lease agreements between common carriers by water and/or "other persons" subject to the 1916 Shipping Act. Filing of Agreements Between Common Carriers by Water and/or "Other Persons" Subject to the Shipping Act, 1916, 44 (45).

The Commission reaffirms its finding that respondents implemented a cooperative working arrangement without Commission approval since signing mini-max terminal lease agreements. Eight mini-maxi piers were designated as "public piers" with the understanding that the provisions of a public tariff would not actually be applied to them pending resolution of the instant proceeding. These agreements were not filed for approval and were continually implemented in violation of section 15 from the date the piers were declared "public" until occupancy either ceased or became based upon an approved agreement. Agreement No. T–2880, As Amended, et al., 753 (754).

Mini-max terminal lease agreements cannot be approved retroactively. Id. (754).

Whatever else might be intended by the requirement of section 15 that agency action occur "promptly" (consistent with due process), that statute does not authorize the approval of otherwise unapprovable agreements or implementation of unapproved agreements whenever the proponents demonstrate that adjudication has not been "promptly" completed. Id. (755).

The command of section 15 is absolute. Violations do not require a showing of bad faith or even of intent: and the Commission lacks general equity powers to assure that "fairness" is achieved in all matters over which it possesses regulatory jurisdiction. The Commission may not sanction past violations of the Shipping Act by retroactively approving an agreement under section 15 Id. (755).

Terminal lease agreements which reserve to the lessor an absolute veto as to which vessels may use the leased facilities or limiting vessel use of the facilities bring the agreements within the regulations of the Commission which define the agreements subject to the Commission's jurisdiction under section 15. One provision of the regulations requires the filing of an agreement by any person who owns or leases property used as a terminal in connection with a common carrier by water when the landlord maintains some control over the lessee's rates or competitive practices either by unilateral action or by mutual agreement. Another provision requires filing of agreements covering the lease of terminal facilities, when they control, regulate, prevent or destroy competition by obligating the lessee to discriminate against one carrier or shipper in favor of another. The agreements here provide for some control by the lessor port over its tenant's competitive practices. In addition, the leases provide that the lessee shall not maintain or permit on the premises any refrigerating or cold storage facilities. Thus, the agreements further control how the facilities shall be used by limiting the kind of cargo that can be handled. Id. (762–763).

The incorporation by reference into terminal lease agreements of the lessor's rules and regulations, which substantially affect the operations and competitive practices of the terminal facilities by the lessees, bring the agreements within the purview of a Commission interpretive regulation which requires the filing of agreements covering the lease of terminal facilities when they fix or regulate the rates, rules, regulations or charges by requiring the lessee to conform to rates, rules or regulations established by the lessor. Id. (764).

Where the lessee of terminal facilities under a mini-max lease also operated public terminals, with the charges made pursuant to a tariff, the deviation as to rentals charged under the lease agreements as compared to those persons using the public piers, results in the lease agreements falling within the purview of the Commission's interpretive regulation which requires filing of agreements covering the lease of terminal facilities when they give or receive special rates, accommodations or privileges by deviating from established tariff charges through a fixed rental in lieu of tariff rates, or rental payment based on tariff charges with a maximum payment established. Id. (764).

Commission regulation which requires filing of agreements covering the lease of terminal facilities when they give or receive special rates, accommodations or privileges by deviating from established tariff charges through a fixed rental in lieu of tariff rates, or rental payment based on tariff charges with a minimum payment established, is applicable to the Port Authority's leases of its Brooklyn terminal since not all of the tenants are afforded the benefit of a reduced rental as is provided in the leases. Id. (764–765).

TERMINAL OPERATORS: See also Terminal Leases; Wharfage

A terminal operator is not an "other person" subject to the 1916 Shipping Act if the only vessels calling at its piers are not common carriers. The Shipping Act applies to common carriers at common law. At common law, a carrier is a common carrier if it holds itself out to carry goods for anyone. Here, vessels calling at the operator's coal piers do not hold themselves out as common carriers. Rather, the vessels carry coal under contract or charter only for either the purchaser or the seller of the coal. The vessels do not advertise a sailing schedule, they have not published a tariff for the carriage of coal, nor have they filed a tariff for such carriage at the Commission. Accordingly, vessels calling at the coal piers are not common carriers, and thus the operator does not provide terminal services in connection with a common carrier by water. The operator is not an "other person" with respect to its operations at the coal piers and, consequently, the Commission does not have jurisdiction over the operations of the coal piers. McAllester Brothers, Inc. v. Norfolk & Western Ry. Co., 62 (65–66).

A port authority violated section 17 of the 1916 Shipping Act by establishing, assessing, attempting, and actually collecting a charge for electric power furnished to containers plugged into reefer slots which was not authorized and provided for in its tariff. Prior to May 5, 1976, the port furnished electric power to refrigerated containers when they were plugged into the reefer slots, but no charge over and above the charges stated in the port's tariff for wharfage, demurrage or storage was assessed for electric power furnished these containers. The port then claimed that a tariff provision authorized a charge. However, that provision was contained in a section of the tariff relating to stevedoring services and dealt with electric power supplied to the vessel. The organization of the tariff was such that to interpret the provision as authorizing a charge for electric power furnished to containers would be to create an ambiguity where none existed. Matson Navigation Co. v. Port Authority of Guam, 505 (508, 510–513).

Provision of a terminal tariff which provides for an electric power charge at a cost to be determined by another person requires the user to look beyond the tariff to ascertain what the cost to him will be. This places on the user an onerous burden not imposed by law and such practice cannot be too strongly condemned. Id. (514).

WHARFAGE

Proposed tariff rule of the Far East Conference which would assess wharfage and other accesorial charges against the cargo contravenes section 205 of the 1936 Merchant Marine Act and, therefore, is contrary to the public interest within the meaning of section 15 of the 1916 Shipping Act. Since terminal charges generally vary from port to port, the effect of the rule would be that shippers would pay a total ocean carrier freight charge which varies at different ports. Far East Conference Amended Tariff Rule Regarding the Assessment of Wharfage and Other Accessorial Charges, 772 (774–775).

Conference argument that section 205 of the 1936 Merchant Marine Act does not apply to the conference's filing of a tariff assessing wharfage and other charges against the cargo because that section speaks about prevention, by agreement, of a carrier from serving an improved port at the same rates which it charges at the nearest port already served by it, and the rates quoted by the conference in its tariff are the same regardless of port of loading and only the charges assessed by the terminal operator are to be passed on to the cargo interests, is rejected. It is clear that the overall assessment made by the conference is not uniform (terminal charges vary), and because it is established through conference action falls squarely within the prohibition of section 205. The conference decision to discontinue absorbing these terminal charges and, instead, pass them on to the shipper, results in a new and additional charge by the carrier against the shipper. As long as the charges are, in the first instance, properly assessed against the carrier, any pass-through to the shipper results in a charge by the carrier and becomes a component part of the overall ocean freight paid for transportation by the shipper. Id. (775–776).

A vessel may assess terminal charges against the cargo where the terminal operator has billed and collected such charges from the carrier, provided the terminal charges are in the first instance, incurred for the benefit of the cargo and are the responsibility of that party. Far East Conference tariff rule would allow for the pass-through of terminal charges lawfully assessed against the vessel. Where this pass-through is attempted within the framework of a conference agreement section 205 of the 1936 Merchant Marine Act must be taken into consideration. Id. (776).

A carrier has the right to break out its tackle-to-tackle rates and accessorial charges. A carrier could assess different accessorial charges at different ports, plus a uniform tackle-to-tackle rate provided it acts independently of other carriers. Similarly, a conference could publish a tariff rule assessing wharfage and other charges against the cargo and avoid problems with section 205 of the 1936 Merchant Marine Act if each member line was given the right of independent action. In such situations the concerted action with which section 205 concerns itself would be lacking. Id (776–777).

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