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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1973

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GEORGE H. HEARN, *Vice Chairman*

ASHTON C. BARRETT, *Member*

JAMES V. DAY, *Member*

CLARENCE MORSE, *Member*

FRANCIS C. HURNEY, *Secretary*

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COMMODITY CREDIT CORP., AS AGENTS FOR WORLD FOOD PROGRAM

v.

SAN ROCCO LINE (ANCHOR SHIPPING CORP.—GEN. AGENTS)

Decided August 2, 1972

Application for leave to waive collection of any amount in excess of the agreed rate granted.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, Chairman; George H. Hearn, Vice Chairman; Ashton C. Barrett, James V. Day, and Clarence Morse, Commissioners)

San Rocco Line (San Rocco), a common carrier by water, through its agent Anchor Shipping Corporation, filed an application to waive collection of a portion of the freight charges representing the difference between rates on file with the Commission and lesser rates charged to Commodity Credit Corporation (CCC), agents for the World Food Program in connection with a shipment of all-purpose flours from Milwaukee, Wisconsin to Beirut, Lebanon. Examiner Herbert K. Greer has issued an Initial Decision dismissing the carrier's application, to which exceptions were filed.

This proceeding was originally initiated by San Rocco with the filing of Special Docket 437, wherein permission was sought to waive collection of a portion of the freight charges on a shipment of all-purpose flours, total weight 338,148 pounds, carried from Milwaukee, Wisconsin to Beirut, Lebanon.

Prior to movement of the cargo, San Rocco had agreed with the CCC, as evidenced by the carrier's bill of lading, that the flour would be carried at the rate of $32.00 per long ton instead of the application rate on file of $84.75 per long ton for cargo N.O.S., not dangerous or hazardous. San Rocco, however, inadvertently failed to file the agreed rate, and on discovery of this oversight instituted the aforementioned Special Docket No. 437.

Because its first application (Special Docket No. 437) contained errors,[1] San Rocco withdrew this application and simultaneously filed a new application, thereafter designated Special Docket No. 443, involving the same shipment wherein it requested permission to waive collection of any amount in excess of the agreed rate of $32.00 per long ton.[2]

Prior to the withdrawal of its application in Special Docket No. 437 and in response to an inquiry of the Examiner regarding the status of that application, San Rocco, by letter of March 3, 1972, stated, ". . . that as of the present time, all matters have been completely settled." Thereupon, the Examiner notified the carrier that any settlement of a freight charge less than the tariff rate without the Commission's approval, would be in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817 (the Act).

Believing that the Examiner was misinterpreting its letter of March 3, 1972, San Rocco, via a subsequent letter of April 21, 1972, submitted an explanation of the statement that "all matters have been completely settled." It stated that what was meant by this remark was that it had agreed with the Department of Agriculture that the $32.00 per long ton rate had inadvertently failed to be filed and that it had taken the proper action by filing a waiver application, as provided by Public Law 90–298,[3] noting also that "final and complete settlement of this matter must wait for the approval of the Commission." Nevertheless, the Examiner determined that San Rocco's explanation could not be reconciled with the fact that it had received payment for the shipment nor the fact that the payment was a "settlement" of the account. The Examiner, placing heavy reliance on Applicant's statement of March 3, 1972, that the matter was "completely settled", concluded that under the circumstances, "nothing remains to be done with respect to the application." Thus, he dismissed Special Docket No. 443

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[1] The errors in question, brought to San Rocco's attention by the Examiner, resulted from the fact that although San Rocco sought to apply a rate of $32.00 per long ton, it referred to a tariff filing which only reduced the rate to $35.75 per long ton.

[2] It should be noted that prior to filing its application in Special Docket No. 443, San Rocco filed freight tariff No. 1, eleventh revised page 25, specifying the rate of $32.00 per long ton on "flour, N.O.S. for account of U.S.D.A. Rates to include all Terminal Charges and Seaway Tolls . . . from Milwaukee to Beirut."

[3] Public Law 90–298 (46 U.S.C. 817), which amended section 18(b) of the Shipping Act, 1916, provides in part as follows:

> . . . 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 granted permission to withdraw the application in Special Docket No. 437.

Both Applicant San Rocco and CCC have expected to the Initial Decision, asking that the decision be vacated and their application in Special Docket No. 443 be approved by the Commission.

DISCUSSION AND CONCLUSION

In its exceptions, CCC contends that at no time did it acquiesce in a settlement with San Rocco despite payment to the carrier of the agreed rate of $32.00 per long ton. CCC explains that all it has done is seek to obtain relief through the Commission's special docket procedure, realizing that the matter can only be settled either by payment of the application rate at the time of the shipment ($84.75 per long ton) or waiver by the Commission of the collection of a portion of this applicable rate. Clearly, CCC is correct in its appraisal of existing law and procedure.

Section 18(b)(3) requires that no carrier may charge less than the filed tariff in effect at the time of the shipment unless it is granted permission by the Commission. The information submitted in support of the application clearly evidences the fact that San Rocco's failure to file the agreed tariff was the result of inadvertence.[4]

Regardless of the facts relating to the settlement between the carrier and shipper, the parties are plainly in violation of the Act by not acquiring the Commission's approval of their action. Also, as we have stated in *Oppenheimer Intercontinental Corp.* v. *South African Marine Corps.*, Special Dockets 429 and 430, 15 FMC 49, 52 December 2, 1971:

> It is equally clear that before any such permission can be granted the carrier must first file a new tariff and thereafter file an application requesting the new tariff be made applicable to the prior shipment.

Thus, since the carrier's application was in order and duly filed and based upon the type of administrative error contemplated by section 18(b)(3), we are granting its application. Accordingly,

It is ordered, That the application of San Roceo Line, in Special Docket No. 443, be, and is hereby granted. An appropriate order will be entered.

[SEAL] FRANCIS C. HURNEY,
Secretary.

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[4] Section 18(b)(3) of the Act provides that shippers would not be penalized for clerical mistakes or inadvertent failures on the part of the carrier to file new tariff rates for shipments which they have agreed to carry as such rates.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NOS. 437 AND 443

COMMODITY CREDIT CORP., AS AGENTS FOR WORLD FOOD PROGRAM

v.

SAN ROCCO LINE (ANCHOR SHIPPING CORP.—GEN. AGENTS)

ORDER

The Federal Maritime Commission having this date entered its Report in these proceedings, which report is made a part hereof by reference,

It is ordered, That the application in Special Docket No. 437 is deemed withdrawn;

It is further ordered, That applicant in Special Docket No. 443 is authorized to waive collection of $7,963.08 of the charges previousy assessed Commodity Credit 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 Nos. 437 and 443 that effective December 2, 1971, the rate on 'Flour, N.O.S. for account of U.S.D.A. to include all Terminal charges and Seaway tolls' for purposes of refund or waiver of freight charges on any shipments which may have been shipped from Milwaukee, Wisconsin, to Beirut, Lebanon, during the period from December 2, 1971, to February 28, 1972, is $32.00 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 30 days of service of this order 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

INFORMAL DOCKET NO. 288(I)

EMBASSY OF SWITZERLAND

v.

LYKES BROS. STEAMSHIP CO., INC.

Decided August 16, 1972

Reparation awarded.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, Chairman; George H. Hearn, Vice Chairman; Ashton C. Barrett, James V. Day, Clarence Morse, Commissioners)

On July 18, 1972, we decided to review the decision of Examiner Charles E. Morgan in this proceeding. The facts as found by the Examiner appear below with quotation marks omitted.

The Embassy of Switzerland, claimant, is the official representative of the Government of Switzerland to the United States. By its complaint filed March 15, 1972, the claimant seeks reparation not to exceed $1,000.00 on a shipment of 225 skids of 262,125 pounds of military tank parts made on June 14, 1970, from New Orleans, La., to Antwerp, Belgium. The tank parts were licensed by the United States for ultimate destination in Switzerland.

These tank parts were to be used by the Swiss Army, and were assessed a rate of $49.75 per ton of 2,240 lbs. The freight charges based on 117.02 tons were $5,821.75. A similar shipment of tank parts was transported by the respondent Lykes Bros. Steamship Co., Inc., from New Orleans to Antwerp, ultimately destined to Austria for use by the Austrian Army, at a lower rate of $40.25 per ton.

The claimant was charged the applicable tariff rate of $49.75 per ton on military tank parts for its shipment and thus there was no overcharge, under section 18(b)(3) of the Shipping Act, 1916 (the

Act). However, the claimant seeks reparation under sections 16 and 17 of the Act.

Lykes Bros. has acknowledged that there is no basis for the difference in the rate on tank parts ultimately destined to Switzerland compared with the rate on tank parts ultimately destined to Austria. Lykes Bros. has taken steps to reduce the Swiss rate to the level of the Austrian rate on tank parts.

On the basis of the foregoing, the Examiner concluded that Lykes had violated section 17 of the Act and awarded reparation to claimant in the amount of $1,000.00. Our determination to review the decision was based on our inability to tell from it the basis for the lower $40.25 rate charged by Lykes on the Austrian shipment. We were unable to determine from the decision whether the lower rate was properly filed with the Commission. Of course, if the lower rate was not properly filed, then section 18(b) would have required that the Examiner deny reparation to claimant and order Lykes to collect the undercharge from the shipper of the Austrian tank parts.*

Examination of Lykes' tariff shows that there was in fact a rate of $40.25 on file for Austrian tank parts; thus the Examiner's conclusion that the assessment of the higher $49.75 rate on the shipment in question is unjustly discriminatory in violation of section 17 was proper. (See *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202 (1967).)

Claimant is awarded reparation in the amount of $1,000.00.

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

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*Section 18(b) forbids a common carrier by water from charging "a greater, less or different compensation . . . than the rates and charges on file with the Commission."

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-3

UNITED STEVEDORING CORP.

v.

BOSTON SHIPPING ASSOCIATION

ON REMAND FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Decided August 24, 1972

Boston Shipping Association (BSA) found to be subject to the Shipping Act, 1916 (the Act).

Incorporation papers and by-laws of the BSA, inasmuch as they do not on their face purport to exceed the purpose of creating a multiemployer collective bargaining unit, found to be entitled to labor exemption and therefore not required to be filed and approved under section 15 of the Act.

Agreement among and between members of the BSA as to allocation of labor gangs among stevedores found to be entitled to labor exemption and therefore not required to be filed and approved under section 15 of the Act.

Agreement among and between members of the BSA as to the "first call-recall" system found to be entitled to labor exemption and therefore not required to be filed and approved under section 15 of the Act.

Evidence adduced insufficient to declare the practices of the BSA violative of sections 16 and/or 17 of the Act.

Robert N. Kharasch and *Olga Boikess* for United Stevedoring Corp.[1]

Leo F. Glynn and *Francis A. Scanlan* for Boston Shipping Association.

C. P. Lambos, *Francis A. Scanlan*, *Dennis Lindsay*, and *Abgate Duer* for New York Shipping Association, Inc.; Philadelphia Marine Trade Association; Master Contracting Stevedore Association of the Pacific Coast, Inc.; and Steamship Trade Association of Baltimore, Inc.

[1] United Stevedoring did not participate in the remand proceeding.

Thomas E. Kimball for Pacific Maritime Association.

Robert Eikel for West Gulf Maritime Association.

Edward S. Bagley for New Orleans Steamship Association.

Irwin A. Seibel and *Robert B. Nicholson* for the Department of Justice.

Glen M. Bendixsen, *Stanley Brown* and *Patrick Hardin* for the National Labor Relations Board.

Seth D. Zinman and *Craig A. Berrington* for the Department of Labor.

Donald J. Brunner and *Norman D. Kline* for Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, Chairman; Ashton C. Barrett and James V. Day, Commissioners)

This case comes before us by remand of our original decision from the First Circuit Court of Appeals. In that decision, served November 9, 1971, 15 F.M.C. 33, we found that the Boston Shipping Association (BSA) is subject to the Shipping Act, 1916 (the Act); in addition, we found to be subject to section 15 of the Act and ordered to be filed with us for approval the following:

1. The incorporation papers and by-laws of the BSA;
2. The agreement among and between members of the BSA as to allocation of labor gangs among stevedores; and
3. The agreement among and between members of the BSA as to the "first call-recall" system.

We also found that the practices of the BSA were not violative of sections 16 and/or 17 of the Act.

We denied reconsideration of our decision on January 10, 1972. Following this denial, BSA filed suit in the Court of Appeals for the First Circuit seeking review of our decision. Seven maritime trade associations sought and were granted leave to intervene before the court.[2] The views of the Department of Labor (Labor) and the National Labor Relations Board (NLRB) were contained in the brief filed by the Department of Justice (Justice), statutory respondent in the court proceeding.

Prior to oral argument before the court, we requested the court to remand the proceeding in order for us to consider the views of the various government agencies and intervenors, none of which had appeared in thhe initial proceeding. This motion was granted on May 31,

[2] These intervenors are: Pacific Maritime Association; West Gulf Maritime Association; Steamship Trade Association of Baltimore, Inc.; New Orleans Steamship Association; Master Contracting Stevedore Association of the Pacific Coast; Philadelphia Marine Trade Association; and New York Shipping Association.

1972, on the condition that we stay our Order of November 9, 1971, and further that the proceeding be concluded within ninety days. Accordingly, opening and reply briefs were filed by the various parties and we heard oral argument on August 2, 1972.

The facts of this case are undisputed and are adequately set forth in our original decision.[3] The issues to be determined on this remand are: (1) whether the Federal Maritime Commission has jurisdiction under section 15 of the Shipping Act, 1916 (46 U.S.C. 814) over articles of incorporation or association and by-laws of a maritime trade association, one of whose purposes is multi-employer collective bargaining; and (2) whether the Federal Maritime Commission likewise has jurisdiction over agreements otherwise subject to section 15 but which are embodied in a collective bargaining agreement.

Discussion And Conclusion

I. *Jurisdiction Over the BSA*

A threshold issue in this proceeding is the question of whether the BSA is, under section 1 of the Act, subject to the jurisdiction of the FMC. The Examiner concluded that the BSA was not an "other person" within the meaning of section 1. This conclusion is based, exclusively it would appear, on findings (1) that the BSA is a nonprofit corporation formed under the general laws of Massachusetts; (2) that the BSA is not a business corporation and is without business functions (which may be just another way of saying that the BSA is a nonprofit corporation); and (3) that the BSA is not "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities" within the meaning of the definition of an "other person" (here the Examiner is concerned solely with that corporate entity which is the BSA and not at all with its individual members).

While it is true that the BSA as an entity does not engage in any of the activities enumerated in the definition of "other person", it cannot be gainsaid that its individual members do. A similar argument was raised with respect to the conference situation in *Far East Conference v. F.M.C.*, 337 F. 2d 146 (1964). The court there swiftly rejected the theory that a conference is not an entity to which a section 21 order may be applied. Conferences were held to be agents of the carriers which compose them.

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[3] In order that this decision be self-contained, pertinent portions of our discussion of the proceeding and statement of facts are hereby incorporated by reference and are attached hereto as Appendix A

BSA attempts to distinguish an "association" from a "conference" by asserting that:

> . . . the relationship among members of a Conference is determined by the contract which establishes the Conference and the Commission has jurisdiction *ab initio* over the contract and the conference it creates. The relationship among members of a conference is defined by a conference agreement which the Commission must consider and over which the Commission inherently retains jurisdiction.[4]

We are of the opinion that the two situations are indistinguishable. Aside from the fact that some members of the BSA may not be subject to our jurisdiction, there are members of the BSA which clearly are subject to the Act. Whether or not stevedoring contractors are subject to the Act,[5] terminal operators and steamship lines clearly are; thus, we find members of the Association in their individual capacities to be subject to our jurisdiction. To argue that these individuals can band together and form an association which, although as an entity does not do any of the things enumerated in the section 1 definition of "other person" but does otherwise engage in matters which are or may be of Shipping Act concern, would frustrate the entire purpose of the Act. We will not tolerate such a device to blunt our regulation of this nation's maritime industry.

II. *Jurisdiction Over the Subject Matter*

A. The Labor Exemption

The subject matter with which we are here concerned consists of three agreements: the incorporation papers and by-laws of the BSA (hereinafter the organic agreements), the agreement as to the original allocation of gangs, and the first call-recall agreement.

The immediate problem we encounter is that of reconciling or accommodating Shipping Act policies with labor act policies. We are not unaware of the ill effects which any untoward intrusion into the matter of collective bargaining might cause in the already strife-ridden maritime labor world. On the other hand, we must adhere to the guidelines set forth in *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968) [hereinafter *Volkswagen*], in which we were reproached for taking "an extremely narrow view of a statute that uses expansive language." 390 U.S. at 273. It will be recalled in that case that we initially refused to entertain jurisdiction of the assessment agreement there involved.[6]

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[4] Overlooked in this "distinction" is the fact that, of course, the "Conference" itself does not solicit or book cargo, does not collect freight or operate ships. Its members do these things.

[5] There is ample evidence in the record that most if not all of these stevedoring contractors are also terminal operators.

[6] The assessment agreement in *Volkswagen* was not embodied in the collective bargaining agreement, but was in implementation of a provision therein.

We have attempted to apply the rather imprecise guidelines of *Volkswagen* to the agreements herein, although they differ to a certain extent from those in *Volkswagen.* Those guidelines have been tempered by the views expounded by the various parties who participated in this remand and we are indebted to them, especially to the NLRB for the light shed on the matter of creating a so-called "labor exemption".

The "labor exemption" originated in the area of accommodation of the labor laws and the antitrust laws. To preclude the application of the antitrust laws to various collective bargaining agreements entered into between labor and management, the courts carved out of the antitrust laws a "labor exemption", by means of which such agreements were held to be immune from attack under antitrust laws. Thus, the analogy to a "labor exemption" from the shipping laws is obvious. We are in agreement with the view that such a labor exemption should exist. However, the problem is one of line drawing, i.e., just how far should that labor exemption extend and at what point should the shipping laws be activated. Inevitably, the criteria for that point of demarcation are inexact and impossible of general application. These criteria do, however, provide a sound point of embarkation for an ad hoc resolution of a problem involving the accommodation of the policies of the labor laws with the policies of the antitrust laws and thus by analogy with the policies of the shipping laws. A brief discussion of three of the leading cases will suffice to establish the criteria to be considered for the labor exemption.

The first of these was *Allen Bradley Co., v. Local 3, International Bhd. of Electrical Workers,* 325 U.S. 797 (1945), which exemplified the problem of harmonizing conflicting policies of the antitrust laws and the labor laws. The Supreme Court attempted to balance the interests of both policies so that only "legitimate" collective bargaining objectives would be without the scope of the antitrust laws. The union was found to have conspired with employers to give the employers a monopoly in the industry in a certain area; in return, the union was given a monopoly of work opportunity. Notwithstanding the fact that this conspiracy was embodied in the collective bargaining agreement, the Court refused to exempt it from the antitrust laws. Had the union acted alone, said the Court, and achieved the same result, its activities would have been exempt. So, from *Allen Bradley* came the criterion that concerted union-management activity to eliminate competitors would fail to be entitled to the labor exemption.

A similar problem was raised in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) and *Local 189, Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965). In the former, the union agreed not to oppose automation in the coal industry and that it would impose the terms of the agreement on all operators regardless of their ability to pay. The complaint alleged that it was the purpose of the agreement to eliminate small operators from the industry. The union claimed it was exempt from the antitrust laws since the agreement dealt with wage standards, a mandatory subject of collective bargaining.

The Supreme Court again held that the "labor exemption" from the antitrust laws would be inapplicable to a situation in which it was found that the union had conspired with its employers to eliminate competitors from the industry. The Court's rationale was based on several principles, two of which were:

1. A union wage agreement with a multi-employer bargaining unit does not per se violate the antitrust laws.

2. By the same token, however, the mere fact that a collective bargaining agreement involves a mandatory subject of bargaining does not ipso facto exempt the agreement from the antitrust laws.

On the other hand, in *Jewel Tea* it was alleged that the union had violated the Sherman Act by engaging in an illegal conspiracy with various food stores to prevent night operations by large self-service stores such as *Jewel Tea*. The Court, however, distinguished *Jewel Tea* from *Pennington*, on the ground that in the former there was no evidence of a union-employer conspiracy, but rather the union on its own had attempted to obtain the same terms from Jewel Tea as it had obtained from other employers.

Absent evidence of a conspiracy between the union and other employers, the issue was whether the hours-of-operation provision was so intimately related to wages, hours, and other terms and conditions of employment as to be a mandatory subject of bargaining. Since unions have a direct interest in the hours they work, the hours-of-operation provision was held to be a mandatory subject of collective bargaining. Thus, the "labor exemption" was held to apply and the union's activities were not violative of the antitrust laws.

Hence, from these cases have evolved the various criteria for determining the labor exemption from the antitrust laws and which we herewith adopt for purposes of assisting us in determining the labor exemption from the shipping laws with this caveat. These criteria are by no means meant to be exclusive nor are they determinative in each and every case. Just as in the accommodation of the labor laws and the antitrust laws the courts have resolved each case on an ad hoc basis, so too will we. Each of the following criteria deserves consideration, but it is obvious that each element is not in and of itself controlling. They are rather guidelines or "rules of thumb" for each factual situation. These criteria are as follows:

1. The collective bargaining which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball".

2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.

3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.

4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management.

In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement. In balancing the equities, the above criteria will no doubt be of value. We cannot, however, subscribe to the view that collective bargaining agreements be granted a blanket labor exemption from the Shipping Act. For, as Mr. Justice Harlan stated in his concurring opinion in *Volkswagen*, "I see no warrant for assuming, in advance, that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both." 390 U.S. at 286.

Since maritime employers are permitted to bargain as a group, and since they are required to bargain about certain subjects (the mandatory subjects of collective bargaining), the resulting agreements must have some exemption from the requirements of section 15. Further, each such agreement will be entitled to labor policy considerations on an ad hoc basis with respect to possible violations of sections 16 and 17 of the Shipping Act.

B. The "Labor Exemption" as Applied to the Instant Agreements

1. The Organic Agreements

As to articles of incorporation and by-laws of maritime collective bargaining associations, *Volkswagen* cannot be read as denying that those agreements are subject to the requirements of section 15 of the Act. The Court was simply not concerned with any agreements other than:

. . . the one among members of the Association allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the

Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of section 15. 390 U.S. at 278.

Upon thorough review of the views presented on this issue, we conclude that no valid regulatory purpose would be served in requiring organic agreements of pure collective bargaining units to be filed and approved pursuant to section 15. However, to the extent that any organic agreements provide for purposes other than collective bargaining, no labor exemption from section 15 would apply to those portions of the organic agreements, and filing and approval of those provisions would be required.

Thus, the line is drawn at the point where purely labor matters cease and shipping matters begin. In the instant situation, we are satisfied that insofar as the BSA is primarily a collective bargaining unit, the labor exemption should be given effect and the organic agreements exempted from the requirements of section 15. Although the purposes of the Association as set forth in the organic agreements are extremely broad, we see nothing which in itself is specifically subject to the requirements of section 15. However, any and all other agreements concerning Shipping Act matters entered into by the members of the BSA pursuant to its organic agreements are of course required to be filed for section 15 approval.

2. The Allocation of Labor

We have been convinced that the original allocation of labor gangs following the "Final Shape" although that allocation of necessity had competitive overtones and effects, in actuality amounted to nothing more or less than the hiring by employers of employees. Because of the strong labor considerations involved and minimal and remote effects upon competition in the industry, we find that this unwritten allocation agreement between BSA and the Union is exempt from the requirements of section 15.

3. First Call-Recall Agreement

This agreement was embodied in the written collective bargaining agreement. This fact alone, however, cannot serve as the basis for a distinction between the instant situation and that of the *Volkswagen* case. As Mr. Justice Harlan pointed out:

> [t]he fact that the "labor" agreement and the assessment" agreement were on different pieces of paper is of course not critical. What is important is that the whole process raised both labor problems and distinct shipping problems. It would not be impossible for there to be a single agreement raising some problems of Labor Board "concern" and other, separate problems appropriate to Commission review. 390 U.S. at 291, n. 7.

The mere fact, therefore, that a certain agreement is part of a collective bargaining agreement does not automatically immunize that agreement from the antitrust laws. Authority for this proposition is the three leading cases dealing with the labor exemption discussed heretofore, *Pennington*, *Jewel Tea*, and *Allen Bradley*. In the same manner in which offensive collective bargaining agreements in general are challenged under the antitrust laws, collective bargaining agreements in the shipping industry can be challenged under the shipping laws, with due regard for the labor policy considerations discussed above.

We find, however, that the first call-recall agreement before us is entitled to a labor exemption from the provisions of section 15. Although this agreement goes beyond the mere hiring of employees and provides for the assignment and reassignment of those employees strictly within the discretion of management and does in fact have some competitive effects and overtones, it nonetheless is a product of bona fide arm's-length collective bargaining. Moreover, its subject matter is apparently a mandatory subject of collective bargaining, and no terms were imposed on entities outside the collective bargaining group. Thus, this provision of the collective bargaining agreement falls within the guidelines set forth above and is entitled to a labor exemption from the requirements of section 15.

While we cannot here decide that every such collective bargaining agreement is entitled to a labor exemption, Hearing Counsel and the Department of Justice recommend the consideration of a section 35 rulemaking proceeding in order to exempt for the future this class of agreements from some or all of the requirements of section 15 of the Shipping Act, 1916, thereby not jeopardizing collective bargaining by any threat of pre-approval implementation penalty. This we intend to do.

C. The Alleged Violations of Sections 16 and 17

The Examiner concluded that even were the jurisdictional questions resolved in favor of United, the record failed to establish that United had been harmed by the practices of the BSA. The case is built upon gang shortages on peak days, and necessarily upon gang shortages under precise and specific circumstances. Thus, in order to show that it has been prejudiced under section 16 or that the practices of the BSA are unfair or discriminatory under section 17, United must show:

1. That it has more than one vessel in port on a given day, thus establishing a need for additional gangs;

[7] Section 35 of the Shipping Act grants us the authority to "exempt for the future any class of agreements . . . from any requirement of the Shipping Act, 1916 . . . ."

2. That all other gangs are unavailable because they have been called or recalled; and

3. That at least one of United's stevedore competitors is working only one vessel with all of its seven gangs.

Any thing less than this, which is the allegation of United and Hearing Counsel, might constitute prejudice or discrimination but it would not be undue or unjust. Although the allocation of gangs and the first call-recall agreements do give special accommodations or other special privileges or advantages to certain members of the BSA, we have studied the record in this proceeding and have found no evidence to support any findings that the above practices are unjustly discriminatory or otherwise in violation of sections 16 and 17. In fact, those special accommodations or privileges would appear to be justified on the ground that United refused to hire another "walking boss" which was the criterion for receiving more gangs. Thus, we find no violations of sections 16 and 17.

Ultimate Conclusions

For the foregoing reasons, we conclude that (1) the BSA is subject to our jurisdiction; (2) the BSA organic agreements are entitled to a labor exemption from the requirements of section 15; (3) the allocation of labor gangs is entitled to a labor exemption from the requirements of section 15; (4) the agreement as to first call-recall is entitled to a labor exemption from the requirements of section 15; and (5) the practices of the BSA pursuant to these agreements have resulted in no violations of sections 16 and/or 17 of the Act.

Vice Chairman George H. Hearn, concurring and dissenting

I concur that the BSA is subject to the Shipping Act, 1916, that the various agreements are cooperative working arrangements within the meaning of section 15, and that the labor exemption is justified with respect to the incorporation papers and by-laws of the BSA and also the original allocation agreement. However, I do not agree that the first call-recall arrangement is entitled to exemption from the provisions of section 15 on the basis of labor policy considerations, even though it may be contained within the collective bargaining agreement.

In my opinion, the first call-recall agreement does not meet the criteria for finding a labor exemption as set forth in the majority opinion. It is not merely a situation where management hires employees. The primary purpose of first call-recall is to vest in management the sole discretion for the collective allocation of gangs which can resut in competitive effects upon the shipping industry for outweighing the reason for not interfering with collective bargaining. This provision, while eventually approved by the union, was not so much the product of bargaining but the cause of it, and the union obtained something entirely unrelated in consideration for their acceptance of this provision which is obviously not in their own self interest. For this reason, the negotiations leading to this agreement can hardly be said to be bona fide bargaining upon a subject commonly associated with wages, hours or working conditions, and the first call-recall provision is therefore the type of cooperative working arrangement contemplated by section 15 requiring filing with and approval by the Commission.

In so holding, however, I am not unmindful of section 15's effect upon the entire collective bargaining agreement and would welcome a type of section 35 exemption referred to in the majority opinion to relieve the pre-approval implementation penalty of certain labor-related section 15 agreements. Here, however, the record does not indicate any violation of section 16 or 17, and I see no other reason why the first call-recall arrangement should not be approved by the Commission under section 15.

In all other respects I agree with the majority opinion.

COMMISSIONER CLARENCE MORSE, CONCURRING AND DISSENTING

I concur that the agreements under consideration do not require Section 15 approval but in so doing I follow a path different from that followed by the majority.

The majority opinion is premised on the conclusion that the agreements involved (1, articles and bylaws of BSA; 2, agreement among and between members of the BSA as to allocation of labor gangs among stevedores; and 3, agreement among and between members of the BSA as to the "first call/recall" system)[8] are agreements which fall within the intent and scope of Section 15, Shipping Act, 1916, but nevertheless should and do receive from us labor-exempt status under cases such as *Labor Board* v. *Truck Drivers*, 353 US 87, 94–96; *Jewel Tea*, 381 US 676; *Volkswagenwerk*, 390 US 261. I would concur in allowing the labor-exempt status if I were to agree that the three agreements are Section 15 agreements. My basic premise is that be-

[8] Note that items 2 and 3 are part and parcel of the collective bargaining agreement and the direct result of collective bargaining between the ILA and BSA. No one, to my knowledge, asserts that that collective bargaining agreement itself is a Section 15 agreement. Hence, the majority, in concluding that said items 2 and 3 are Section 15 agreements can only do so on the basis that before and as preliminary to BSA signing the collective bargaining agreement with ILA the BSA membership must necessarily have agreed, intra-BSA, to the inclusion of these two terms as part of the collective bargaining agreement. It is this preliminary intra-BSA agreement which the majority asserts is a Section 15 agreement and to which this opinion is addressed in addition to the articles and by-laws.

cause of "mixed membership" none of these "agreements" is a Section 15 agreement and therefore we do not reach the question whether labor-exempt status should be granted.

The shareholders in BSA are companies which are common carriers by water, steamship agents, stevedoring contractors, terminal operators, lighterers,[9] contracting guard service and renters of fork lifts (Exhibit 10). If, to qualify BSA as coming within our jurisdiction, i.e., over common carriers by water and "other persons subject to the Act," we say that BSA conducts the business of its membership or if we disregard the corporate fiction and look at the membership of BSA it is obvious that the membership includes companies which are neither common carriers by water nor "other persons" in that they do not carry "on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities." Section 1, Shipping Act, 1916.

In order to highlight my disagreement with the majority it may be helpful to give two examples:

First example. Ocean Common Carrier A and Ocean Common Carrier B enter into an agreement to establish an association for the purpose of "fixing or regulating transportation rates" by water in our foreign commerce and file the agreement with us for our approval under Section 15. Such an association is, in our parlance, a conference. The majority and I are in agreement that this clearly is an approvable Section 15 agreement. After receiving our approval, lawful activities thereunder are immune from antitrust. Thereafter, if the approved association enters into an agreement with, for example, a freight broker as to brokerage rates to be paid by the ocean carriers that agreement with the freight broker is not Section 15 because it is not an agreement "with" a common carrier by water or "other person".[10] Section 15, Shipping Act, 1916.

Second example. Ocean Common Carrier A, Ocean Common Carrier B, and Rail Common Carrier R enter into an agreement to establish an association for the purpose of "fixing or regulating transportation rates" by water in our foreign commerce, and file the agreement with us for our approval under Section 15. This is a "mixed membership" agreement for it includes a person who is neither a common carrier by water nor an "other person subject to the Act." Under the reasoning of the majority, the majority could approve this

[9] *U.S. v. AUT Inc.*, 327 US 437 (1946) at pages 451–453.

[10] *In Re Gulf Brokerage and Forwarding Agreements:* (1936) 1 USSBB. 533, 534: "Brokers are not subject to the Shipping Act, 1916, and consequently agreements between carriers subject to that act and brokers are not of the character required to be filed under section 15 thereof. However, if carriers enter into agreements with each other relating to their employment of brokers, such agreements must be submitted for the Department's consideration."

agreement as a Section 15 agreement, despite the presence of R as a member thereof, for, so they assert, A and B are agreeing and, by the device of including R as a party in the association, they cannot defeat our jurisdiction over an agreement between ocean common carriers which, but for the presence of R, is clearly a Section 15 type agreement.[11] Such an assertion means that if approved by us, when the association fixes such rates, A and B would be immune from antitrust by the terms of Section 15 but R would be exposed to antitrust.[12]

I analyze the second example from a different approach. I view the basic philosophy of our laws as being antitrust oriented, that immunity from antitrust is an exception, and in order to qualify for the exception one must fit the statutory guidelines.

Section 15 contains two essential elements or conditions, namely parties and subject matter (the seven categories of agreements). For this discussion we need only consider parties, but in my opinion, it is essential to our jurisdiction that the parties test must be squarely satisfied.[13]

The critical words are:

> . . . every common carrier . . . shall file . . . every agreement *with another such carrier* . . .

Unless one fragmentizes the agreement,[14] the Second Example is an agreement between three people—or, in the language of Section 15, A is agreeing *with* B and R, B is agreeing *with* A and R, and R is agreeing *with* A and B. I fail to find any indication that A and B (independently of R) are agreeing to anything separate and distinct from the agreement *with* R. Hence, while there is an agreement by a common carrier with another common carrier and a rail carrier there is no agreement by a common carrier "with another such carrier" only. Hence, in this "mixed membership" situation I find that there is and can be no basis for asserting it is a Section 15 agreement in any respect.

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[11] In this example I outline a multi-party agreement wherein all three parties have a common objective. I distinguish that type agreement from an agreement between X and Y on one side of the bargaining table negotiating at arms length with Z on the opposite side of the bargaining table. In this latter situation the interests of X and Y on the one hand and Z on the other hand are opposed. If X and Y are common carriers by water and the subject matter of their joint actions falls within any of the seven categories detailed in Section 15 then the relationship of X and Y may be a Section 15 agreement.

I wonder what the majority would do as to approvability if presented with a multiparty agreement having many strangers to the Act as members but only two common carriers as members?

[12] Implicit in the majority's determination that the three BSA "agreements" are Section 15 agreements are two conclusions: 1. The "agreements" in fact are subject to Section 15 and may be approvable, and 2. Carrying out the agreements prior to Section 15 approval exposes the members to Section 15 penalties and to antitrust penalties (*Carnation*, 383 US 213).

[13] I analogize with *Allen Bradley Co.* v. *Union*, 325 US 797 (1945). In that case labor lost its antitrust immunity by collaborating with management.

[14] See *Transshipment Agreement*, 10 FMC 201, 215 (1966).

It is my view that in Section 15 the Congress clearly indicated that only those agreements which are between common carriers and "other persons" are approvable. If strangers to the Act are included as parties to a mixed membership agreement the agreement is not approvable under section 15 and all parties are exposed to antitrust. I find it impossible to believe the Congress gave us authority to grant antitrust immunity to common carriers and "other persons" parties to a mixed membership agreement whereas strangers to the Act (but parties to said agreement) are exposed to antitrust. No court case has squarely held we can approve mixed membership agreements. There are cases which discuss, for example, shippers rate agreements as being approved Section 15 agreements, but a careful examination establishes that the court was approving our action validating the shippers rate agreement form as part of a dual rate system—not that the court was approving the shippers rate agreement as a Section 15 agreement between carriers and shipper. *Anglo Canadian Shipping*, 264 F.2nd 405; *Martrans*, 9 FMC 431, 436; *Transshipment*, 10 FMC 199, 216.

Volkswagenwerk, supra, has been cited at times as holding that a mixed-membership agreement is approvable. In that case the Federal Maritime Commission stated in part, 9 FMC 77, 81 (1965):

> The Examiner found that . . . the "Mech" fund agreement which respondents had entered into with the other members of PMA, all of whom he found to be common carriers or "other persons" subject to the Act . . . .

and went on to say, page 82, "Even if we assume all of the members of PMA are "other persons" within the meaning of the Shipping Act, 1916." Hence, it is clear at the Commission level the agreement was treated as one between common carriers and "other persons" only and that the Supreme Court never considered the case as being a Section 15 "mixed membership" agreement.

Fortifying my position is the fact that Section 22, Shipping Act, 1916, grants to us jurisdiction in complaint cases only over "a common carrier by water or other persons subject to this Act." Except for a violation of the Act, we have no jurisdiction over a stranger to the Act but party to a mixed membership agreement even if we asserted we could approve a mixed membership agreement.[15]

Note also that Section 15 provides in part that:

> Every *agreement* . . . lawful under this section . . . shall be excepted

[15] *U.S.* v. *AUT*, supra, at 448:

> . . . That the Commission may have jurisdiction over one of the two parties to a discriminatory agreement or arrangement hardly means that it shall not have jurisdiction over both. Indeed, unless the jurisdiction includes both, it may be ineffective as to the one covered; for the Commission then might lack the necessary means of obtaining or checking upon information (cf. § 21) necessary to ascertain the existence of a discrimination or to take other action commanded by the statute.

from the federal antitrust laws. It is the *agreement* (and lawful activities thereunder) which are excepted. The parties to approved agreements receive "exception" only through the agreement, so we are again, full circle, back to the language of Section 15 "that every common carrier . . . shall file . . . *every agreement with another such carrier or other person* subject to this Act." I cannot read the above without concluding it was the intent of the Congress that only those agreements whose membership is confined to common carriers by water and "other persons" are subject to Section 15.

The early Commission cases squarely held that an agreement between two or more common carriers and a stranger to the Act is not approvable under Section 15. *In re Gulf Brokerage*, 1 USSBB 533, 534; *Wharfage Charges*, 2 USMC 245, 251; see also *Agreement No. 7620*, 2 USMC 749, 754; *Grace Line*, 7 FMC 432, 448; *Portalatin*, 10 FMC 362, 371. I see no reason for departing from that holding. I would overrule subsequent decisions to the contrary, such as *Martrans*, 9 FMC 431, 436; *Investigation of Overland/OCP Rates*, 12 FMC 183, 216, (1969), and the Report in the instant case.

On the foregoing bases, the articles and by-laws are not Section 15 agreements because the shareholders (members) of BSA include not only common carriers and other persons subject to the Act, but also strangers to the Act.

On the foregoing bases, the intra-BSA gang-allocation and the first call/recall agreements likewise are not Section 15 agreements because they are "mixed membership agreements."

An appropriate order will be entered.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-3

UNITED STEVEDORING CORP.

v.

BOSTON SHIPPING ASSOCIATION

ORDER

The Federal Maritime Commission has this day served its Report in the subject proceeding, which is hereby incorporated herein, in which it found several agreements among and between parties subject to the Shipping Act, 1916, to be exempt from the requirements of section 15 of the Act.

Therefore, for the reasons articulated in said Report,

It is ordered, That our Order of November 9, 1971, served in this proceeding be vacated.

By the Commission.

[SEAL]

JOSEPH C. POLKING,
Assistant Secretary.

APPENDIX A

STATEMENT OF THE PROCEEDING AND FACTS

This proceeding was initiated by the Commission upon a petition of the United Stevedoring Corp. (United) alleging that the Boston Shipping Association (BSA) had violated section 15 of the Shipping Act because it had not obtained Commission approval for its concerted activities in the allocation of stevedoring gangs at the Port of Boston. As a result of the petition, the Commission directed the BSA to show cause why it should not cease and desist from its activities in allocating gangs for failing to obtain the required Commission approval.

Upon consideration of the affidavits of fact and memoranda of law filed by the parties, the Commission referred the case to the Office of Hearing Examiners for an evidentiary hearing to resolve the disputed issues of fact posed by the pleadings of the parties and for the issuance of an initial decision.

Following a request by United, the Commission expanded the scope of the proceeding to include the issue of "whether the practices of BSA in the allocation of stevedoring gangs on the Boston piers result in violations of sections 16 and 17 of the Shipping Act, 1916."

Broadly stated, United's position is that the BSA, pursuant to Article 10 of its collective bargaining agreement with the International Longshoremen's Association, which reserves to the BSA the right to determine "the number of gangs to be employed and how they are to be distributed on the vessel", has "confine[d] to four favored stevedores [all of whom are competitors of United] effective daily control of the longshore work force in the Port of Boston." This effective control has resulted in "the ships served by the favored stevedores obtaining preference over all other ships calling at Boston, and prevents any other stevedore from offering fairly comparable service and obtaining customers." Moreover, this control, asserts United, is exercised pursuant to "an unwritten and unfiled working arrangement among the BSA members", which governs the "exercise of rights *reserved to management* under a collective bargaining agreement." United asserts that it "is a stevedore directly harmed" by these practices.

In his Initial Decision, Examiner Richard M. Hartsock ultimately concluded (1) that the BSA is not an other person subject to the Shipping Act; (2) that the collective bargaining agreement entered into by the BSA is not an agreement subject to approval by the Commission under section 15, hence the BSA has not violated section 15 by effectuating an unapproved agreement; (3) that the agreement between the members of the BSA to collectively bargain for house gangs and first call and recall rights with the ILA is not subject to section 15, but if it is, the agreement is not unreasonable or illegal or otherwise contrary to the Act; and (4) that the BSA has not violated sections 16 and 17 of the Shipping Act.

United and Hearing Counsel except to each basic conclusion of the Examiner. Thus, the Comimssion is confronted with a threshold issue of its jurisdiction over the parties in the case and their agreements in addition to the question of the lawfulness of the particular activity in question under sections 16 and 17 of the Act.

After charging that the decision is not a fair, balanced or complete analysis of either the Commission's jurisdiction or the testimony or exhibits of record, and after taking some 16 general exceptions to the decision, United "regretfully [asks] the Commission to start from scratch, to disregard the initial decision, and to consider anew our [United's] opening and reply briefs to the Examiner . . . ." In much the same vein, Hearing Counsel assert that not only did the Examiner commit "serious errors of law regarding the Commission's jurisdiction", he also "ignored significant portions of the record", relied on "innuendo" and "concentrated on the portion of the record where no violations of the Shipping Act are shown, ignoring that portion of the record which demonstrates violations." In short, the exceptions call for an examination of the transcript of testimony and exhibits in the record in order to fill in the "gaps" left by the Examiner so as to construct a factual foundation upon which the Commission may proceed to a determination of the issues.

Statement of Facts

United Stevedoring Corporation is a locally-owned stevedore at the Port of Boston. United has been in business at Boston since some time in the 1930's. The Boston Shipping Association is an association of carriers, stevedores, ship agents, terminal operators and other maritime concerns at Boston. The BSA is a noonprofit corporation organized under the general laws of Massachusetts, primarily for the purpose of negotiating and administering collective bargaining agreements with labor.[1] The Board of Governors of the BSA is composed of four officers and six members. Of the five general cargo stevedores operating in the Port of Boston, all but United are directly represented on the Board. Except for an annual membership meeting, decisions of the BSA are made by the Board, and in general the Board's action do not appear to need ratification by the membership.

In September 1964, the United States Department of Labor published a study entitled , "Manpower Utilization—Job Security in the Longshore Industry, Boston", known as the "Stow Report". Among the various findings dealing with the decline in longshore employment were underutilization of members of the work force, archaic hiring procedures, lack of permanent gangs, frequent shortage of sufficient gangs to work ships in port and resistance to technological change in cargo handling methods.

The basic reform arising out of the Stow Report was a fundamental change in the gang and hiring systems. After an informal comparison of prevailing practices at other East Coast ports, the International Longshoremen's Association local in Boston decided to replace the previous hiring method with a system of

[1] The BSA's by-laws state that its other purposes are "to endeavor to promote and to assist in encouraging friendly and harmonious relations between shipowners, shipping agents, etc. . . . to improve working conditions in the shipping industry; to encourage sound business relationships between both the members and between the members and the employees . . . ."

permanent gangs and a central hiring hall.[2] The permanent gangs were set up by what has become known as the "Final Shape". On December 6, 1966, each stevedore employer of longshore labor, having been notified in advance, was invited to send hiring bosses to a place in Boston known as Castle Island. The hiring bosses stood on piles of lumber and each longshoreman chose the boss for whom he wanted to work. This Final Shape resulted in the formation of 30 permanent gangs; the number remains the same today.

At the time of the Final Shape, there were seven stevedores operating in Boston, six general cargo and one scrap metal (Schiavonne). The six general cargo stevedóres were J. T. Clark Sons, ITO Corporation (Jarka), Nacirema, Atlantic & Gulf, Bay State, and United. According to a general understanding among the ILA and stevedores, each hiring boss or foreman sent by a stevedore would be entitled to hire two gangs. Only United apparently had some difficulty with this understanding since it contends that it had no such understanding. Clark, Jarka, Nacirema and Atlantic & Gulf put up three bosses each and hired six gangs apiece; Bay State put up two bosses and hired four gangs; United put up one foreman but hired only one gang. Apparently, United had some difficulty in filling even one gang since the men were prone to "go where the work was", and were reluctant to "shape" in front of United's boss.

In the first half of 1967, one of the leading stevedores, Atlantic & Gulf, terminated its operations in Boston, making its six gangs available for redistribution among the remaining stevedores. Through the efforts of the BSA and with the cooperation of the ILA, these gangs were redistributed in June 1967 in a way that United picked up two more gangs while its competitors picked up one each. The reallocation left the distribution at: Clark, Jarka and Nacirema—seven gangs; Bay State—five gangs; United—three gangs; and Schiavonne (the scrap metal stevedore)—one gang. This distribution is in effect today.[3]

Between the Final Shape and October 1, 1969, the assignment system operated in such a way that considerable rotation of gangs among stevedores was permitted. Thus, if gangs were not requested by the stevedore to whom they had been assigned, they were free to work for other stevedores. Also, it appears that no single walking boss could secure more than three gangs. This seems to have meant that a stevedore with a single ship to service was effectively limited to the use of three gangs, even if he had five or six assigned to him.[4] This particular part of the system was modified on October 1, 1969.

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[2] Under the old system, longshoremen would congregate daily on the streets and form around to "shape" in front of a hiring boss on an *ad hoc* basis and then move off to work the ships. It was felt that this system was not only undignified but extremely inefficient since the absence of permanent gangs prevented the development of those skills attendant to an experienced team on which each member is familiar with each other's work habits, strengths and weaknesses.

[3] In 1969, United attempted to obtain another gang and requested the BSA to assist it. The Board of Governors interceded on behalf of United with the Union but decided that in return for the additional gang United should employ a second permanent hiring boss. The Board felt this condition reasonable and necessary to persuade the Union that United could produce the work. Significantly, other general cargo stevedores at Boston had two or three such bosses. For reasons not entirely clear from the record, the matter was not pressed and United did not get an additional gang.

[4] At this point, it should be noted that neither United nor Hearing Counsel challenge the basic concept of the house gang system or the establishment of a central hiring hall. Nor do they quarrel too strenuously with the present allocation of gangs to the various stevedores.

The change in the assignment system stemmed from the decision of the BSA to secure for management a greater control over the work force for the professed purpose of improving service to the ships calling at Boston. Consequently, one of the major objectives during the collective bargaining in 1968 was the modification of the then-existing gang assignment practices so as to establish a strengthened "first call-recall" system. This was met by resistance by the ILA, who wished to preserve the method of "rotation" of gangs under which the gangs were dispatched by the Union from the hiring hall in sequence so as to distribute the work more equally and improve the position of "low hour" gangs.

So insistent were the parties that the Port of Boston remained on strike in 1969 for several months beyond the end of the strike at other ports on the East Coast. The issue was finally resolved by the Union trading first call-recall rights for a guaranteed annual wage program. The change in the gang assignment practices was embodied in Article X of the collective bargaining agreement.

Article X—Gang Assignment. *Until October 1, 1969* the present system whereby each employer's hiring foreman controls a specific number of gangs shall remain in effect. Gangs not working for their regular Hiring Foreman shall be dispatched by the Dispatcher in accordance with the present procedures. The Employer shall determine the number of gangs to be employed and how they will initially be distributed on the vessel to which they have been ordered.

As of October 1, 1969, the effective date of the Guaranteed Annual Income Program, each Employer will have first call on all the regular gangs assigned to his company. An Employer whose regular gang is working for another Employer at a time when the regular Employer has no work for them may recall his regular gang when he has work available at the start of the next work period. In such instances, the work commenced will be completed by other gangs. Gangs not working for their regular Employer shall be dispatched by the Dispatcher in accordance with the present procedure. The Employer shall determine the number of gangs to be employed and how they will initially be distributed on the vessel to which they have been ordered.

By the exercise of first call-recall rights provided in Article X, a stevedore in addition to having the "first call" on any of the gangs assigned to him may "recall" any of his assigned gangs to any single vessel, even though the recalled gangs may not have completed work on the vessels from which they are recalled. Under the system embodied in Article X, the stevedore exercising "recall" could employ his full quota of assigned gangs, seven in the cases of Clark, Jarka or Nacirema, on a single vessel, leaving the stevedore from whom the gangs were "recalled" as few as three gangs, in the case of United, even though United was working more than one ship. Apparently, under the old system a vessel with a single hiring boss or walking boss would have been limited to three gangs in such circumstances.

Barely two months after Article X went into effect, the Union complained to the BSA that certain gangs were not getting sufficient work and suggested that the Union be allowed to "rotate" those low-hour gangs away from their assigned stevedores (in this case United and Bay State). The BSA considered any such rotation to be a breach of the collective bargaining agreement, but after a period of negotiation it was agreed that seven gangs would be "adopted" by other stevedores. Under the "adoption" system, stevedores who were designated "adopting" stevedores had first call on their "adopted" gangs over all other stevedores except the stevedore to whom the adopted gang was primarily assigned. This system was tried on an experimental basis for three months, but apparently because of problems arising under it, no attempt was made to continue it beyond the experimental period.

The ILA next made known its intention to return to the old system in effect prior to October 1, 1969, where the Union would fill out gangs for any particular ship by its own selection of "low-hour" gangs except for the two or three assigned to the particular walking boss for that ship. Management again considered this a breach of the collective bargaining agreement. Ultimately, arbitration resulted in a modification of the bargaining agreement by which the Union was permitted to select the fourth and fifth gangs dispatched to any stevedore while the stevedore retained the right to call his regularly assigned first three gangs and the sixth and seventh gangs if he was entitled by assignment to a sixth and seventh gang. This was the last modification of the first call-recall system, representing an attempt to distribute the work among the 30 gangs more evenly and thereby support that number of gangs at the Port.

The original allocation at the Final Shape which resulted in a 6–4–1–1 arrangement corresponded roughly to the previous year's volume of work per stevedore and reflected the ILA on-the-spot estimate of who could offer the most work. United did proportionately better than its competitors, receiving one gang per 40,000 hours worked the previous fiscal year to one gang per 75,740 for Nacirema; one gang per 63,615 for Atlantic & Gulf; one gang per 51,781 for Clark, etc. Again, when Atlantic & Gulf went out of business and its gangs were redistributed so as to give United two more, United did proportionately better than its competitors. Thus, although United now had three gangs, it only produced 48,000 hours of work for the three quarters prior to June 1967, compared with Nacirema's 310,000; Clark's 270,000; Jarka's 240,000; and Bay State's 116,000. Proportionately this means that Nacirema had two and one-third the number of gangs assigned United but produced over eight times as much work.[5]

On days when there is no congestion of vessels at the port and more than enough gangs are available, the distribution of gangs seems to present no problems. The daily average of gangs working has been declining over the past few years due to the general decline in activity at the Port. In 1969, an average of 17.94 gangs were hired daily, while the first six months of 1970 showed a daily average of only 15.99 gangs. In 1968, the daily average was 20.15. Thus, on "quiet" days obtaining gangs presents no problem even under first call-recall since the Union would always have gangs available and would be only too happy to dispatch them. However, vessels do not call at conveniently spaced intervals but tend to "cluster" on busy days. On these days a stevedore has been called upon with some frequency to work three ships simultaneously. Thus, in theory at least, even if each stevedore were assigned the same number of gangs, there could still be labor shortages; and, of course, any stevedore with a low number of assigned gangs vis-a-vis his competitors would have greater difficulty in securing sufficient labor.

[5] Latest BSA records show that United continues to be the low-hour stevedore. The only competitor who had proportionately more gangs than United per hour was Bay State with five gangs. Its hours were only 69,905 to United's 51,527.

FEDERAL MARITIME COMMISSION

DOCKET No. 72–5

AUSTRALIA/U.S. ATLANTIC & GULF CONFERENCE, PROPOSED IMPOSITION OF CURRENCY ADJUSTMENT SURCHARGE

Decided September 11, 1972

Rejection of tariff filing under sections 14b and 18(b) of the Shipping Act, 1916, without a hearing proper where statutory violations exist and premise used to support the filing is an obvious nullity as a matter of substantive law.

The clear language of Article 23(a), Shippers Rate Agreement, as it relates to currency devaluation by governmental action presupposes the action of the government issuing the currency under which the terms of the contract are written.

Elmer C. Maddy and *Baldvin Einarson* for Australia/U.S. Atlantic & Gulf Conference, respondent.

Norman D. Kline and *Donald J. Brunner*, Hearing Counsel.

REPORT

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

This proceeding arises from an order served by the Commission upon the Australia/U.S. Atlantic & Gulf Conference (Conference or respondent) directing respondent to show cause why the Federal Maritime Commission (Commission) should not find the imposition of a currency devaluation surcharge to be in violation of sections 18(b)(1), (3) and (4), and 14b of the Shipping Act, 1916, and consequently should not order respondent to cease and desist from assessing and collecting such surcharge.

On December 18, 1971, the United States, in the Communique of the Group of Ten, agreed to propose to the Congress a suitable means for devaluing the United States dollar in relation to other world currencies by means of a change in the existing par value of the dollar.

Subsequent thereto, on December 22, 1971, the Australian Government revalued the Australian dollar, appreciating it a total of 6.32 percent as against the United States dollar. The same day, the Conference, which covers the trade from ports in Australia to United States Atlantic and Gulf ports, filed a currency devaluation tariff surcharge of 8.57 percent, to become effective January 8, 1972. Later, on December 24, 1971, the Conference reduced the amount of surcharge to 6.32 percent.

The Conference and its members file tariffs pursuant to section 18(b) of the Shipping Act, 1916. The Conference's approved dual rate system additionally subjects conference increases in rates to the 90-day notice requirement of section 14b of the Act. This particular increase did not comply with the 90-day notice requirement. The Conference grounded its failure to give the required 90 days' notice on Article 23(a) of the Shippers Rate Agreement, which provides in relevant part:

> In the event of . . . currency devaluation by governmental action, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions . . . . [A surcharge may be imposed on 15 days' notice.]

By telegram of December 23, 1971, the Bureau of Compliance advised the Conference that its failure to give the required 90 days' notice was not justified by the currency devaluation provision of Article 23(a) of its contract, and that the surcharge could be imposed only upon 90 days' notice.

The Conference, by telegram of December 29, 1971, expressed its disagreement with the Bureau's position and offered its opinion that Article 23(a) did support the lack of 90 days' written notice. On January 7, 1972, the effective date of the surcharge was deferred to January 15, 1972.

By telegram dated January 12, 1972, and letter dated January 13, 1972, the Conference was informed that the Commission, at its meeting on January 11, 1972, had rejected the Conference's surcharge since it failed to conform to the requirements of sections 14b and 18(b) of the Shipping Act, 1916, and advised the Conference that "rejected tariff matter is void and its use unlawful and the rates quoted in the rejected filings may not be implemented until lawfully refiled and in effect." Notwithstanding this rejection, the Conference, by telegram dated January 14, 1972, informed the Commission that the member lines intended to assess the surcharge on or after January 15, 1972.

On January 15, 1972, Judge Edward Weinfeld of the United States District Court for the Southern District of New York granted the Commission's motion for a temporary restraining order prohibiting the Conference and its member lines from giving effect or taking any action pursuant to the rejected tariff filings with respect to the currency devaluation surcharge until further order of the Court.

On January 18, 1972, the Commission issued an Order to Show Cause why the Commission should not find the imposition of the subject currency devaluation surcharge to be in violation of sections 18(b)(1), 18(b)(3) and 18(b)(4), and section 14b of the Shipping Act, 1916, and should not order the Conference to cease and desist from assessing and collecting the surcharge.

Discussion and Conclusion

Respondent contends that we exceeded our authority in summarily rejecting the surcharge without affording the respondent the benefit of an evidentiary hearing. In the alternative, respondent urges that even if we should conclude that an evidentiary hearing was unnecessary, Article 23 of the Shippers Rate Agreement fully authorized the imposition of the surcharge on less than 90 days' notice.

Respondent's argument that the rejection was improper is grounded primarily upon our decision in *Rejection of Tariff Filings of Sea-Land Service, Inc.*, 13 F.M.C. 200 (1970). In that case the Bureau of Compliance had rejected a tariff filing on the ground that it violated sections 14b and 15 of the Shipping Act, 1916. We found that rejection improper because the asserted violations turned on the resolution of several issues of fact which could only have been resolved after a hearing. Accordingly, the failure to afford respondent a hearing had denied it due process of law.[1]

While respondent seems to recognize the Commission's right to reject a tariff filing under section 18(b) when it results in a per se or "obvious" violation of another section of the Act, it is respondent's contention that "very real" questions of fact are presented here in this case. Thus, no per se or obvious violation can be found to exist, and an evidentiary hearing was a necessary condition precedent to any rejection of the surcharge. But despite a number of assertions that the Commission necessarily "arrived at certain factual conclusions" in rejecting the tariff, respondent specifically points to only two areas which it contends may hold disputed issues of fact—i.e. the precise actions taken by the International Monetary Fund and the actions of the Australian Government "in making effective the fact of devaluation of the dollar." Of all the "facts" alluded to by respondent,

[1] However, in concluding that the Sea-Land rejection was improper, we expressly stated, ". . . we do not here decide that a rejection under section 18(b) may not be supported by a violation of another section of the Shipping Act."

not one is disputed; and in view of the construction we place on Article 23, we agree with Hearing Counsel that those "facts" have no relevance to the issue at hand. This clearly renders any evidentiary hearing unnecessary to a valid rejection of a tariff filing which is a "patent nullity". See *Municipal Light Board of Reading & Wakefield, Mass.* v. *Federal Power Commission*, 450 F.2d 1341 (D.C. Cir. 1971). For much the same reason we feel that little additional aid would be forthcoming if oral argument were held as requested by respondent.

There remains only the proper construction of Article 23 of the Shippers Rate Agreement.

Respondent's proposed construction turns on the assignment of broad meanings to certain operative terms in the phrase "In the event of . . . currency devaluation by governmental action, [or] regulations of any governmental authority pertaining thereto or other official interferences." To respondent it is obvious that the term "governmental action" cannot be restricted to action by Congress in officially devaluing the price of gold and must include other actions by the government. As for the term "currency devaluation", respondent urges that it cannot mean only U.S. governmental action devaluing currency. Finally, by way of saying somewhat the same thing slightly differently, the terms "governmental action", "governmental authority", and "any other official interferences" must of necessity include actions by governments other than that of the United States,[2] i.e. the Government of Australia.

Using its interpretation of the "operative" terms in Article 23 as a springboard, respondent argues that even though Congress had not officially devalued gold currency at the time of its short-notice filing, devaluation nevertheless had in fact taken place because of certain acts taken by the U.S. Government.

Two considerations belie any such interpretation. First, the currency devaluation clause was a later amendment to Article 23 and came some time after the official British devaluation of the pound. This direct relationship of the clause to the British experience is strong ground for restricting the operation of the clause to a situation where a country devalues its own currency by whatever "official" means the particular country adopts. Secondly, as Judge Weinfeld pointed out in granting his injunction, both the contract and respondent's tariff are written in terms of United States currency and therefore it is highly unlikely that the clause in question was meant to refer to

[2] Pointing out that the clause in question originated with the Commission's decision in *The Dual Rate Cases*, 8 F.M.C. 16, 47–48 (1964), respondent quotes at length from the decision in an attempt to support its interpretation of the phrases in question. We agree with Hearing Counsel that *The Dual Rate Cases* are inapposite since the currency clause here in issue was not a part of the contract considered in that decision.

devaluation of that currency by a government other than the United States. Thus, we are not swayed by respondent's argument that because the tariff was amended to provide "for the conversion" of certain rates into Australian currency, an action by the Australian government can work to invoke Article 23. Were the action of any government sufficient to invoke clauses such as Article 23 shippers would, as Hearing Counsel point out, be buffeted by an unforeseeable number of short-notice increases—a result grossly out of harmony with the avowed purpose of dual rate contracts.

Moreover, if respondent had intended to seek our approval of such a broad clause, however doubtful the success of such an attempt, clear language was readily at hand—e.g., "governmental action" could just as readily have become "action of any government" and "devaluation" could have included "de facto devaluation". We cannot help but conclude that what is really the case here is an example, albeit understandable, of a later expedient construction overriding original understanding and intent.

We think, then, the resolution of this matter is relatively simple. At the time the surcharge was filed, there existed no actual devaluation, no action by Congress, the only governmental body with the authority to devalue U.S. currency. Thus, any filing by respondent purporting to implement a clause authorizing the imposition of a short-notice surcharge because of devaluation was a nullity creating clear statutory violations which were not dependent upon the resolution of any factual issues. The rejection of such filing without hearing, pursuant to sections 14b and 18(b) of the Shipping Act, 1916, was therefore quite proper. Of course, the substantive problem in this case, the imposition of the surcharge, has been mooted by the actions of the Secretary of the Treasury on May 8, 1972, when he formally introduced the devaluation "package" to the International Monetary Fund. Respondent has effectuated the pertinent provisions of Article 23 of the Shippers Rate Agreement and is assessing the surcharge in question. Accordingly, it is unnecessary to issue an order in this proceeding and the proceeding is hereby discontinued.

COMMISSIONER CLARENCE MORSE, CONCURRING AND DISSENTING

I dissent.

There are two basic problems involved; one being procedural—the propriety of the ex parte actions taken by the Commission's staff on December 23, 1971, and the Commission itself on January 11, 1972, in rejecting the tariff filing without giving the Conference a hearing and an opportunity to present its justifications; and the second being substantive—the right of the Conference under the existing facts to initiate a tariff increase under Article 23 of the Shippers Rate Agreement.

Procedure. I have no doubts of our authority, in a proper case, to reject a tariff filing without a hearing. Section 18(b)(4), Shipping Act, 1916;[3] *Rejection of Tariff Filings of Sea-Land Service, Inc.*, 13 F.M.C. 200 (1970). But rejections, without a hearing, based on defects in form or substance are permissible only when so patently a nullity as a matter of substantive law that administrative efficiency and justice are furthered by such rejection. *Municipal Light Board, etc., Mass., supra*, 450 F.2d at 1345–1346. In my opinion, this filing was not such a patent nullity.

We are not concerned with a rejection based on a defect in form. Therefore, we are faced only with an asserted defect in substance, and within this limited framework the threshold question, whether the tariff filing was a patent nullity, is the interpretation of the phrase "currency devaluation by governmental action." Does it mean only de jure devaluations—currency devaluations enacted by the Congress of the United States? Does it include de facto devaluations such as cessation of payment of gold by the United States on August 15, 1971, or the impact on the dollar in international currency markets resulting from the agreements reached between the President and the Group of Ten on December 18, 1971?[4] Does it include the revaluation upward of the Australian dollar? Does it have some other meaning? The phrase is not clear and unambiguous on its face. The question cannot be answered within the four corners of the document. The negotiations and intent of the parties at the time the language was adopted should have been and must be developed and considered in arriving at its interpretation.

[3] Section 18(b)(4)—". . . the Commission is authorized to reject any tariff filed with it which is not in conformity with this section and with such regulations."

[4] The Smithsonian meeting produced a multilateral agreement by the President and the Group of Ten to immediately realign the currencies of the major trading nations. Some countries, including Germany, Japan, the Netherlands, and Belgium, revalued their currencies with respect to gold. Others, including the U.K. and France, maintained the par values unchanged. For its part in the realignment package, the President of the United States agreed to propose to the Congress a devaluation of the dollar by 7.89% in terms of gold. But the immediate impact of the agreement in exchange markets was de facto devaluation of the dollar with reference to gold (and also the British pound and the French franc) by 7.89% and by varying percentage rates with reference to the currencies of other countries. The U.S. Treasury recognized that "de facto" devaluation resulted from the President's agreement with the Group of Ten on December 18, 1971. See: Statement by the Honorable John B. Connally, Secretary of the Treasury, before the Banking and Currency Committee, U.S. House of Representatives, March 1, 1972; Statement of Deputy Under Secretary for Monetary Affairs of the Treasury Department Jack F. Bennett, before the Subcommittee on International Commerce and Tourism of the Senate Commerce Committee on January 24, 1972; Statement of Paul A. Volcker, Treasury Undersecretary, appearing in the *Wall Street Journal*, April 4, 1972; and U.S. Treasury's News Release #C–305 dated May 5, 1972.

Its interpretation is a mixed question of law and fact. Hence, the tariff filing was not a patent nullity and its *ex parte* rejection constituted a denial of due process guaranteed by Section 23 of the Shipping Act, 1916, and Section 5 of the Administrative Procedure Act, and a reversible procedural error.

In this case, in my opinion, it is unfortunate that the tariff filing was rejected. It was not until May 8, 1972, at the earliest, that the Conference was permitted to file for a 15-day-notice rate increase, and during the interval between December 23, 1971 (plus 15 days) and May 8, 1972 (plus 15 days), the Conference was precluded from assessing higher rates to offset the effect of devaluation. That loss cannot be recovered. On the contrary, had the filing been accepted but its propriety questioned by appropriate Commission action on shippers complaints under Section 22, then if we ultimately found the filing to have been improper, we could have ordered reimbursement by the carriers of the improper rate increase. As it now stands, and if my analysis is correct, shippers have received a "windfall" at the expense of the carriers contrary to the intent and terms of the Shippers Rate Agreement.

Substantive. We have for interpretation the phrase in Article 23 of the Shippers Rate Agreement reading:

> In the event of . . . currency devaluation by governmental action, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse *arising from the above conditions* . . . .

The critical phrase is "currency devaluation by governmental action." In respect to United States dollars, the majority herein relate "governmental action" solely and exclusively to de jure or constitutional devaluation which may be declared only by the Congress. Had the phrase read "de jure devaluation" or "devaluation by the Congress" then there would be no question of interpretation. But it is not so phrased, for it identifies devaluations by "governmental action" and its coverage includes "regulations . . . or other official interferences with commercial intercourse arising from" devaluation by governmental action. The phrase "devaluation by governmental action" is certainly inclusive of "de jure devaluation" or "devaluation by the Congress." The issue here is whether "devaluation by governmental action" is synonymous with and limited to "de jure devaluation" or "devaluation by the Congress." [5]

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[5] I contend we can have de facto devaluation by governmental action which in fact may not amount to de jure devaluation directed by the Congress under Article I, Sec. 8, of the Constitution. I analogize to another governmental activity. While negotiations toward a treaty with a foreign power are conducted by the President, the power to authorize

The ultimate issue here is the intent of the parties when they adopted the phrase under consideration and, even more critical, the intent of the Commission when it approved the phrase under consideration.[6] True, the phrase under consideration was adopted and approved as the result of a letter from the Commission's staff which advised Conferences that it was doubtful the then existing contract provisions "cover devaluation situations" and this letter originated because of uncertainty resulting from currency devaluation by the British Government and other governments.[7] But the fact that an "official" devaluation by the British Government may have triggered the adoption of the staff letter or the phrase itself does not, standing alone, establish that the approved phrase was intended to apply, in the case of the United States, only to devaluations authorized by the Congress.[8] Neither Conference nor Hearing Counsel addressed themselves or submitted affidavits to establish what in fact was in the contemplation of the Commission itself when it approved the specific phrase—that is, to the specific question whether the Commission approved the phrase as applying only to Congressionally approved devaluation or whether the Commission approved the phrase as applying to any devaluation by or flowing from governmental action.[9] That failure may have resulted from an absence of any documentary record in the files of the

committing this government to a treaty with a foreign country is vested in the Senate (U.S. Const., Art. II, Sec. 2). Nevertheless the President, acting without the advice or consent of the Senate, has entered into many international Executive Agreements which, while binding on this government, do not achieve the status of a treaty and may be said by some to infringe upon the Senate's constitutional powers over treaty making. (*The Constitution of the United States of America, Analysis and Interpretation.* U.S. Govt. Printing Office, 1964, pages 484 et seq.)

[6] *Swift & Co. v. FMC*, 306 F.2d 277, 281 (D.C. Cir., 1962): The Commission "must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval."

We are here dealing with the interpretation of a commercial document. The parlance of businessmen may compel a broader interpretation than might be the case if we were interpreting a document exchanged on the level between the U.S. Treasury and the International Monetary Fund.

[7] Affidavit of William Levenstein attached to Brief of Hearing Counsel to Respondents' Memorandum of Law. This letter was written despite the action of the Commission taken on December 21, 1967, *approving* the rate increase by NAWFA where the Shippers Rate Agreement contained a force majeure clause but with *no* reference to devaluations as such.

[8] Only the Congress may authorize changes in the par value of the dollar. *U.S. Constitution*, Article 1, Section 8, Clause 5; Section 5(b), *Bretton Woods Agreement Act*, 22 USC 286c.

[9] The action of the President on August 15, 1971, in discontinuing gold payments, for all practical purposes, may have constituted a de facto devaluation of the dollar by governmental action, for it permitted the dollar to float in terms of other major currencies, seeking its own value on the open market. The Smithsonian Agreement of December 18, 1971, between the President and the Group of Ten, for all practical purposes, may have amounted to a de facto devaluation of the dollar by governmental action. Hence, depending on how the pertinent phrase is to be construed, we may have a factual situation which in fact justified and validated the tariff filing which was rejected by the staff on December 28, 1971, and by the Commission on January 11, 1972.

Commission or may have resulted from failure to make a thorough search of the records.[10]

The District Court and Hearing Counsel suggest that the phrase should not be interpreted as meaning other than de jure or Congressional devaluation because (1) foreign governments frequently take action affecting the value of their currencies, (2) "If any governmental action affecting valuation of the U.S. dollar were enough to justify short-notice rate increases, shippers could conceivably be buffeted by any number of 15-day notice rate increases", and (3) "it is questionable that the parties would have agreed upon or the Commission approved a rate agreement which could have been so easily and often changed on short notice." [11] The reverse of that coin means that it is perfectly OK for the carriers to be buffeted about by devaluations which could have been so easily and often changed on short notice. The Court's statement relative to Commission non-approval is self-serving and not supported by anything in this record. The foregoing contentions are but arguments used to buttress an interpretation—not sound determinations of the basic intent of the phrase itself as based on proper evidence culled from records at the Commission.

The only pertinent facts of record presented to the Commission by Hearing Counsel relative to interpretation of the phrase under consideration are contained in the affidavit of William Levenstein, Appendix to Reply of Hearing Counsel to Respondents' Memorandum of Law. That affidavit is of little help in providing the facts establishing what was intended by the pertinent phrase or why the more precise phrases "de jure devaluation" or "official devaluation" or "devaluation by the Congress" were not used. In our deliberations in the instant proceeding we had before us the rejection telegram of December 23, 1971, which recited in part: "Notwithstanding recent governmental agreement to revalue certain currencies including U.S. dollar, U.S. Government has not yet officially devalued, hence Article 23(b) not presently applicable." Based on said telegram and affidavit, Hearing Counsel contends that the pertinent phrase applies only to "official"

[10] My own limited research of Commission files uncovered a letter from William Levenstein to Mr. Jack L. Wilson dated September 20, 1968 (Attached as Appendix A). That letter is indicative of the Commission staff's then interpretation of the phrase under consideration and appears broad enough to encompass revaluation of the Australian dollar on December 22, 1971, and, at least arguably, *de facto devaluation of the U.S. dollar* due to the actions of the President on August 15, 1971, and December 18, 1971.

[11] How do such *statements square* with *the fact* that this Commission heretofore approved the following phrases in Shippers Rate Agreements:

(a) "currency devaluations". Conference agreements 8220, 5660, 9615, and 9616.

(b) "in the vent of a devaluation of at least 5% in any of the currencies capable of being used for the payment of freight as compared to other such currencies". Conference Agreement 5850.

(c) "currency devaluation by any government". Conference Agreements 7100, 7670, 7770.

devaluations (which I interpret as being synonymous with de jure devaluation), that there was no "official" devaluation at that time because the Congress had not acted, and that the phrase did not apply to the devaluation which existed as a result of the action of the President and the Group of Ten on December 18, 1971.

On the limited record in this docket I am unable to determine to my satisfaction whether the Commission intended to approve the pertinent phrase as applying only to Congressionally approved devaluations or whether it intended to approve the pertinent phrase as also applying to fact situations which included de facto devaluations by or resulting from governmental action. Hence, absent satisfactory proof of such intent, I would construe the pertinent phrase strictly—adversely to the Conference—and as applying only to Congressionally approved devaluations of the dollar.[12] To me, such construction results not from an interpretation based on an evaluation of all the surrounding circumstances, but rather from a default in production of evidence.

[SEAL] FRANCIS C. HURNEY,
Secretary.

APPENDIX A

SEPTEMBER 20, 1968.

A17-9-1/57 D.R.:32(B)

MR. JACK L. WILSON,
Weil Brothers-Cotton, Inc.
Montgomery, Ala. 36104

DEAR MR. WILSON: Reference is made to your letter of September 17, 1968, written in your capacity of Chairman, Transportation & Insurance Committee, American Cotton Shippers' Association, concerning the Pacific Westbound Conference's Notice of Amendment to Shippers' Rate Agreement dated August 5, 1968.

To recapitulate briefly, the proposed modification would establish "currency devaluation by governmental action" as a force majeure circumstance warranting either (a) suspension of the contract system by the carriers pursuant to Article 13(a) of the Agreement, or (b) an increase in freight rates on shortened notice provided for in Article 13(b).

While we do not profess to be intimately versed in all the complexities of international financial transactions, our expectation is that a devaluation of the franc or pound sterling would not directly affect rates established by the PWC inasmuch as the Conference's rates are quoted in dollars and all goods and services necessary to the operation and maintenance of steamship services are paid for with dollars here, yen in Japan, pesos in the Philippines, and Hong Kong dollars there. There might be an indirect affect depending upon what actions

[12] A contract susceptible to two constructions by reason of uncertainty as to the meaning of ambiguous language should be construed against the party by whom, or in whose behalf, the contract was prepared. *17A C.J.S. Contracts* Sec. 324, page 217.

these governments take to counter the impact of any devaluation of the pound or franc. This would depend upon the importance of the British or French markets, and/or reliance upon British or French goods. A devaluation of the Japanese yen, Philippine peso or Hong Kong dollar would probably have no effect upon Conference rates for the simple reason that the American dollar would have appreciated in terms of those currencies, i.e. an American dollar can be exchanged for more units of the local currency. Conversely, should either the yen, the peso, or the Hong Kong dollar be appreciated by governmental action, the American dollar will have been devalued, in effect, and undoubtedly the Conference would probably seek to adjust its freight rates to account for the fact the American dollar no longer commands the purchasing power of other currencies to the extent enjoyed in the past.

Insofar as the mechanics are concerned, we interpret "devaluation by governmental action" to mean just that—that the responsible financial institution of any of the various governments would make an official pronouncement to the effect that the value of its currency has been altered. On this basis, and only on this basis, would the Conference be free to resort to the options provided for in its Shippers' Rate Agreement.

We hope that the foregoing is helpful. If we may be of further assistance, please do not hesitate to contact us.

Sincerely yours,

(S) William Levenstein
WILLIAM LEVENSTEIN,
Chief, Office of Carrier Agreements
(Foreign Commerce) Bureau of Compliance.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 445

CONSUL GENERAL OF INDONESIA

v.

NEDLLOYD INC.
GENERAL AGENTS FOR HOEGH LINES

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

Adopted September 20, 1972

No exceptions having been taken to the initial decision of the presiding judge 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 September 20, 1972.

It is ordered, that applicant is authorized to refund $20,168.25 of the charges previously assessed the Consul General of Indonesia.

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 445 that effective June 30, 1972, the arbitrary charge for 'Rice, in Bags', to Balik Papan ports, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from June 30, 1972 through August 8, 1972 is $3.00/metric ton, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, that refund of the charge 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]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 445

CONSUL GENERAL OF INDONESIA

v.

NEDLLOYD INC.
GENERAL AGENTS FOR HOEGH LINES

Respondent is permitted to refund the sum of $20,168.25 as part of the freight charges previously assessed and collected.

M.S. Alberga, for respondent.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING JUDGE [1]

Nedlloyd, Inc., General Agents for Hoegh Lines (respondent) has filed an application to refund to the Consul General of Indonesia (complainant) $20,168.25 being a portion of the freight charges aggregating $102,797.87 on a shipment of bagged rice weighing 6,636,257 pounds from Mobile, Alabama to Balik Papan, Borneo under a bill of lading dated June 30, 1972, aboard the MS *Hoegh Pride*.

The rate applicable at the time of shipment was $23.75/Metric Ton (including 4½ percent currency adjustment charge). Basis one load port/one discharge port Indonesia plus $.35 for each additional port used. For West Irian ports and Balik Papan arbitarary charge $9.00/Metric Ton.[2] The aggregate freight charge applicable and actually collected was $102,797.87.

Pursuant to a tariff filed by respondent, effective August 8, 1972, Hoegh Lines-Atlantic Gulf and Great Lakes/Indonesia Singapore,

[1] This decision became the decision of the Commission Sept. 20, 1972.

[2] Hoegh Lines—Atlantic, Gulf and Great Lakes/Indonesia, Singapore, Malaysia and Thailand Freight Tariff No. 1, F.M.C. No. 12.

Malaysia Freight Tariff No. 1—F.M.C. No. 12, 21st Rev., p. 80, the basic rate remains unchanged but the Balik Papan arbitrary is reduced to $3.00/Metric Ton. Under the new tariff the aggregate freight charges for this shipment would amount to only $82,629.62. It is the difference between the $102,797.87 previously applicable and the $82,629.62 that is sought to be refunded.

The reduction in the Balik Papan arbitrary from $9.00 to $3.00 per metric ton is requested because of an administrative error in filing the earlier tariff at $9.00 per metric ton. The earlier tariff should have been filed at $3.00 per metric ton, which is the prevailing standard arbitrary charge for this port.[3]

Section 18(b)(3) of the Shipping Act, 1916, as amended by Public Law 90–298, 75 Stat. 764 provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to refund a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature, and that such waiver will not result in discrimination among shippers. The application discloses a set of facts and circumstances which fall within the purview and intent of the statute. Having complied with the requirements of the staute, and good cause appearing, applicant is permitted to refund to the Consul General of Indonesia the sum of $20,168.25. The notice of waiver required by the statute shall be published in the appropriate tariff.

(S) STANLEY M. LEVY,
Presiding Judge.

[3] See page 162, sixth revised, effective June 15, 1972, Atlantic and Gulf/Indonesia Conference Freight Tariff No. 14, FMC–8.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-4

UNITED STATES OF AMERICA

v.

FARRELL LINES, INCORPORATED

ADOPTION OF INITIAL DECISION

November 14, 1972

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge Herbert K. Greer, served July 12, 1972, in which the Administrative Law Judge concluded that complainant United States of America failed to adduce sufficient evidence to indicate with reasonable certainty that a shipment of plastic pipe from Bayonne, New Jersey, to Freetown, Sierra Leone, should have been rated as plumbing supplies, N.O.S., and accordingly denied reparation.

Complainant's arguments on exception to the Administrative Law Judge's Initial Decision are essentially a restatement of its case in brief. Respondent has replied to those arguments.

Upon review and careful consideration of the entire record, the arguments on exception and the specific allegations of error raised by claimant as well as respondent's reply, we conclude that the Administrative Law Judge's factual findings and his conclusion with respect thereto are supported by the record and correct. We therefore adopt the Initial Decision as our own and make it a part hereof. Accordingly, the complaint is hereby dismissed.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 71-4

UNITED STATES OF AMERICA

v.

FARRELL LINES, INC.

Shipper having failed to adduce evidence sufficient to indicate with reasonable certainty that a shipment of plastic pipe from Bayonne, New Jersey, to Freetown, Sierra Leone, should have been rated as plumbing supplies N.O.S., reparation denied.

Thomas L. Jones for complainant.
Elmer C. Maddy and *Baldwin Einarson* for respondent.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER [1]

The United States of America (complainant), represented by the Department of Justice, seeks to recover reparation in the amount of $22,586.29, plus interest, from Farrell Lines, Inc. (respondent), alleging an overcharge on a shipment by complainant's General Services Administration (GSA) from Bayonne, New Jersey, to Freetown Sierra Leone, in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act). The parties filed opening briefs, and though respondent filed an answer brief complainant did not.

THE FACTS

1. Respondent is a common carrier by water between United States Atlantic and Gulf ports and various foreign ports, and at material times was a member of the American West African Freight Conference (the conference).

[1] This decision became the decision of the Commission Nov. 14, 1972.

2. On May 29, 1967, complainant's Agency for International Development (AID) issued to GSA a "Project Implementation Order/Commodities" in connection with its Rural and Community Development Program in Sierra Leone, requisitioning commodities which included:

Items 1 through 16—Plumbing items for village water systems (*plastic items*)

Items 1 through 4 were "Plastic tubing, 100′ coil" and the remaining items were nylon tees, elbows, and couplings.

3. On March 5, 1968, a contract was awarded to Precision Polymers, Inc., for the furnishing of "Pipe, Plastic, Polyethylene."

4. On or about November 31, 1968, GSA delivered to respondent at Bayonne, New Jersey, certain of the articles which had been procured, for shipment aboard respondents SS *African Glade* to CARE Warehouse, Freetown, Sierra Leone, and prepared a bill of lading which described the shipment as "213 crates, Plastic Pipe," measuring 57,362 cubic feet and weighing 151,503 pounds. At the time of the shipment, no other information of the character or intended use of the articles shipped was made available to respondent or its employees.

5. There having been no item in respondent's tariff describing plastic pipe, the rating clerk applied the "Cargo, General, N.O.S." rate of $64.50 per 40 cubic feet.

6. The bill of lading was marked prepaid, but respondent submitted its voucher to complainant for $93,398.18 on December 2, 1968, and prior to audit and on January 15, 1969, complainant paid that amount.

7. Subsequent to payment and after the shipment had left the custody of the carrier, complainant's auditors found in the tariff a rate on "Plumbing Supplies, N.O.S." of $48.75 per 40 cubic feet, and on September 30, 1969, issued to respondent a "Notice of Overcharge," which was not recognized by respondent as justified.

8. The shipment consisted of "two inch polyethylene, PBC, polyvinyl chloride, semi-rigid, in 100 foot coils and intended for use as a plumbing item in a village water system." (The parties by stipulation adopted this description.)

9. The description of the commodity upon which the requisition was based and as set forth in the GSA stock catalogue furnished for guidance to government agencies in submitting requisitions to GSA was:

PLASTIC TUBING. (1) Corrosive-resistant polyethylene plastic pipe. Use above or below ground for cold water lines . . . nontoxic-imparts no taste to liquids—safe for drinking water. Has NSF approval. May also be used for electrical conduit, sprinklers, pump installations, air-conditioner water lines, irrigation and host of other uses. Unaffected by freezing or sunlight. It's light-weight—about one-eighth weight of conventional pipes. Cuts easily with knife or handsaw. Joins readily with insert fittings listed below. 100 foot coils. Int. Fed. Spec. L-P-315a.

* * * * * * *

4710-756-1206 . . . 2

10. The conference tariff provided rates for pipe cement, asbestos cement, vitrified, as well as for steel pipe with coal tar, felt, plastic or other wrapping, and steel pipe, cement coated; also, rates on polyethylene bags at $64.50 per 40 cubic feet and on polyethylene film and sheeting at $56.75 per 40 cubic feet. No specific item described plastic pipe.

11. The tariff provides a rate of $48.75, weight or measurement, under the general heading of "Plumbing Equipment and Supplies" (Item 1647A), and specifically names the following items:

Bath tubs	Sanitary ware
Bidets	Shower Stalls
Bowls, toilet	Sinks
Lavatories	Tanks, toilet
Lavatory trays	Tubs, Bath (Non-collapsible & Wash)
Plumbing supplies N.O.S.	Urinals

12. Under the heading "Tariff Rules and Regulations" (original page 8, paragraph 1(g), the tariff provided:

Articles not specifically provided for herein will be freighted at the rates named in the classification of "Cargo, General, N.O.S."

DISCUSSION

The issue is whether respondent, in charging and collecting the $64.50 per 40 cubic feet rate applicable to "Cargo, General, N.O.S.", instead of the $48.75 per 40 cubic feet rate on "Plumbing Supplies, N.O.S.," violated section 18(b)(3) of the Act, which provides:

No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariff on file with the Commission and duly published and in effect at the time;

It is complainant's position that:

There can be no doubt that under the evidence presented in this case that the item shipped can reasonably be identified by the tariff description, plumbing supplies, N.O.S. It is a commonly known fact that plastic, polyethylene pipe has been for many years widely used as a plumbing item in homes and other internal water systems. Further, the description and picture contained in the GSA catalogue, upon which the original AID request was based, clearly identifies this item as falling within the description of plumbing supplies, N.O.S. Its intended use which may also be considered further supports its identification as a plumbing supply.

Respondent contends that complainant has not met the burden of proof to demonstrate a violation, citing *Colgate Palmolive Peet Company v. United Fruit Company*, Docket No. 115 (I), served September 30, 1970, wherein it was stated:

> The emphasis in terms of evidence has been in setting forth sufficient facts to indicate with reasonable certainty or definiteness the validity of the claim. Claims involving alleged errors of weight, measurement, or description, of necessity involve heavy burdens of proof once the shipment in question has left the custody of the carrier.

In a recent report, *Ocean Freight Consultants, Inc. v. Italpacific Line*, Docket No. 71–81, 15 F.M.C. 312, served June 20, 1972, it was held:

> The importance of declaring in bills of lading the correct description of the cargo shipped cannot be overemphasized. The carrier has a right to expect that a shipper will properly identify the shipment. The shipper similarly has the right to expect the carrier to charge the proper rate for the actual goods carried. Where a mistake occurs the party who commits it has the heavy burden of proof to support a claim for rectification.

The evidence presented by complainant consists of documents relating to the requisitioning and procurement of the article shipped. AID requisitioned "Plumbing items for village water systems (*plastic items*)" which were intended for use with potable water in connection with the Rural and Community Development Program in Sierra Leone. A contract was awarded for "Pipe, Plastic, Polyethylene," 2 inches in diameter. The picture in the GSA catalogue upon which the requisition was based portrays a coil of plastic pipe under the heading of "Plastic Tubing" and relates to a description of the pipe or tubing as for use above or below ground for cold water lines and a "host of other uses." (See Finding of Fact No. 9.) The description of the shipment on the bill of lading prepared by complainant is "Plastic Pipe." The argument that it is commonly known that such pipe is widely used as a plumbing item in internal water systems is not related to 2 inch pipe which, respondent argues, is not used in connection with the items specifically named in tariff item 1647A (see Finding of Fact No. 11), which require connections of smaller diameter. No evidence was adduced to support either argument. Neither is addressed to common knowledge, rather, to plumbing expertise. The term "plumbing" appears only in the requisition.

Complainant, citing *National Cable and Metal Co. v. American Hawaiian S.S. Co.*, 2 U.S.M.C. 471, 473 (1941), *Johns Manville Products Corp.*, 13 F.M.C. 192 (1970), *United States v. Strickland Transp.*

Co., 200 F. 2d 234, 235 (5th Cir. 1952), and *Corn Products Co. v. Hamburg-Amerika Lines*, 10 F.M.C. 388 (1967), contends that the evidence demonstrates that the plastic pipe may be reasonably identified by the description set forth in tariff item 1647A, "Plumbing Supplies N.O.S.," which is more specific than the general cargo N.O.S. item, and which more precisely describes and better fits the shipment.

In *National Cable and Metal Co.* the frequently applied rule for tariff interpretation was established (p. 473):

> 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 should 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 * * *. A proper test is whether the article may be reasonably identified by the tariff description.

In applying the rule, the factual situation found was that (p. 473):

> Compalnant's testimony and exhibit admit of no dispute that the articles shipped were parts or equipment, of metal, for self-propelling vehicles, which are not otherwise specified in the governing tariff.

National Cable and Metal Co. was concerned with the application of tariff items other than general cargo, N.O.S., as was *United States v. Strickland.* Corn Products involved the application of rates on "Condiments, N.O.S.," "Onions, N.O.S." or "General Cargo, N.O.S.," the commodity being dehydrated onion powder. It was found that as "seasoning" onion powder is unquestionably a "condiment." In these proceedings as well as in *Johns Manville Products*, dictionary definitions were resorted to in order to determine the nature of the commodity shipped, that is, whether the commodity could reasonably fall within a specific tariff item.

"Plumbing," as defined in *Webster's Third New International Dictionary*, is:

> * * * plumber's work: the pipes, fixtures, and other apparatus concerned in the introduction, distribution, and disposal of water in a building * * *.

The tariff item complainant would have applied is headed "Plumbing Equipment and Supplies." Under that heading, specific articles are named, all clearly for indoor construction. The inclusion of the term "Plumbing Supplies, N.O.S." must reasonably be considered as relating to articles having similar characteristics. *Norris Stamping & Mfg. Co. v. Pennsylvania R. Co.*, 259 I.C.C. 593, 597 (1945). The burden is on complainant to establish that the plastic pipe shipped may reasonably be included in the tariff item. The fact that the individual preparing the requisition used the term "plumbing supplies," without more, would not constitute proof that the plastic pipe fell within that category nor would the description in the GSA catalogue which demonstrates that the pipe is for use above or below ground in connection with cold water lines and many other uses including those obviously not properly classified as plumbing, such as electrical conduit, irrigation, and sprinklers, satisfy the burden of proof.

Complainant relies on *Johns Manville Products* to support the proposition that the intended use of the commodity shipped may be considered as reasonably identifying it as plumbing supplies. In that proceeding the Commission noted the Interstate Commerce Commission decision in *Kelly Pipe Co. v. American-Hawaiian S.S. Co.*, 286 I.C.C. 328 (1952), "which stands for the proposition that it is the nature or character of a commodity not its *use* which determines the applicable rate * * *." It was found unnecessary to apply that concept because, according to dictionary definitions, the tariff terms considered could be used interchangeably with the commodity descriptions and that the I.C.C. rule:

> . . . only comes into play when it is not clear whether a commodity would be carried under a specific description or when there are two rather specific descriptions under which the commodity might be carried and it must be determined which is more applicable. (page 195)

In *Kelly Pipe Co.*, reference to the use of an article was not completely rejected. It was held:

> While evidence of the use for which articles were purchased and the use to which they were actually put may properly be considered in determining the nature of the articles, such evidence is not the controlling factor where the articles clearly come within a description contained in the applicable tariffs. (page 330)

The evidence relating to the use of the plastic pipe shows that it was intended for use for "village water systems" in connection with the AID Rural and Community Development Program in Sierra Leone. Whether the water system included indoor construction and could reasonably be considered as plumbing was not established. On the contrary, the testimony of a witness familiar with rural Sierra Leone renders doubtful that plumbing is found in such rural areas. Thus, the evidence concerning the intended use of the plastic pipe does not satisfy the burden of proof that itt was in the category of plumbing supplies, that is, that it was concerned with the introduction, distribution, and disposal of water in a building.

The principal distinction between this proceeding and *Johns Manville Products* and *Corn Products* is that the terms "plastic pipe" and "plumbing" cannot be used interchangeably as were the terms of the tariff and the bills of lading in those proceedings. Nor may it be found that plastic pipe is "unquestionably" a plumbing supply. Plastic pipe has a "host" of uses. In *United States v. Strickland, supra*, the Court refused to consider as controlling, the evidence which showed what the article "might well" be used for. However, in that case there was a tariff item which definitely described the article shipped which is not the situation here. Complainant does not contend that ambiguity in respondent's tariff is an issue.

Respondent further defends on the ground that complainant failed to exercise reasonable diligence in describing the shipment. In *Ocean Freight Consultants, Inc v. Italpacific Line, supra*, emphasis was placed on the importance of declaring the correct description of a shipment in the bill of lading, and it was found that the carrier has a right to expect a shipper to properly identify the shipment. (See also *Embassy Distributing Co., Inc. v. Western Carloading Co.*, 280 I.C.C. 229, 232 (1951)).[2] Here, the shipment was not incorrectly described as plastic pipe. The complainant, as a shipper, was on notice of the provisions of the tariff and should have been aware that it did not provide a rate on such pipe. *Silent Sioux Corp. v. Chicago & North Western Ry. Co.*, 262 F. 2d 474, 475 (8th Cir. 1959). No attempt was made to have the tariff amended to include a specific rate on the commodity.[3] Respondent's rating clerk was not negligent in applying the rate on general cargo N.O.S. as there was no item describing plastic pipe, and the tariff required that articles not specifically described therein would be classified as "Cargo, General, N.O.S." Under the circumstances here appearing, application of the rate on plumbing supplies would have been contrary to the tariff.[4]

ULTIMATE CONCLUSION

Complainant has not adduced sufficient evidence to indicate with reasonable certainty that the plastic pipe carried by respondent should have been rated as "Plumbing Supplies, N.O.S."

Reparation denied.

(S) HERBERT K. GREER,
Presiding Examiner.

[2] Respondent cites *Union Carbide v. Port Line, Ltd.*, Docket No. 240(I) (Examiner's decision), wherein it was held that the failure of the shipper to state on a bill of lading characteristics of a commodity particularly within its knowledge, barred relief. As the proceeding is pending review by the Commission, it is not considered as precedent except insofar as confirmed by *Ocean Freight Consultants*, which places responsibility on the shipper to properly describe the shipment.

[3] It is noted that the conference tariff presently provides a rate of $66.50 per 40 cubic feet on plastic pipe shipped to range 2, the range south of Sierra Leone.

[4] There are polyethylene articles described in the tariff, but there is no contention that they better fit or more precisely describe the shipment.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-14

McCABE, HAMILTON & RENNY CO., LTD.

v.

C. BREWER CORP., D.B.A. HILO TRANSPORTATION AND TERMINAL CO.

November 17, 1972

ADOPTION OF INITIAL DECISION [1]

BY THE COMMISSION: (Helen Delich Bentley, Chairman; Ashton C. Barrett, James V. Day, Commissioners)

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge John Marshall,[2] served February 2, 1972, in which the Administrative Law Judge concluded that McCabe did not demonstrate by substantial proof that HT&T's practices of self-preference and allocation of its work force subjected McCabe to undue or unreasonable prejudice or disadvantage. Further, the Administrative Law Judge found that the record did not reveal any impropriety in the formation of the rates used by HT&T for its labor loans to McCabe so as to violate either section 16 First or section 17 of the Shipping Act, 1916, 46 U.S.C. 815, 816.

McCabe excepted to the Initial Decision, while HT&T supported the Administrative Law Judge's position.

These exceptions fall into three distinct categories. The first is a disagreement with the Administrative Law Judge that there is no evidence of record to substantiate that McCabe is unduly prejudiced by HT&T preference of cargo which is shipped by companies controlled by C. Brewer Co. (parent company of HT&T). The second

[1] Commissioner Clarence Morse did not participate.

[2] Subsequent to the issuance of the Initial Decision, the title "Examiner" was changed to "Administrative Law Judge".

relates to HT&T's monopoly of the work force which McCabe alleges has deprived it from effectively competing with HT&T at Hilo. The third is directed at the method of ascertaining HT&T's overhead for labor loaned to McCabe, devised by HT&T and approved by the Administrative Law Judge, whereby the $2.00 per hour overhead is justified on a cost basis. McCabe contends that because it uses its own equipment and provides its own supervision, it can do the same limited services performed by HT&T for $0.25 per hour.

We find that the exceptions of McCabe are essentially a reargument of contentions which were exhaustively briefed and considered by the Administrative Law Judge in his Initial Decision. Upon careful consideration of the record, the exceptions, briefs and argument of counsel, we conclude that the Administrative Law Judge's factual findings and his conclusions with respect thereto were well supported and correct. Accordingly, we hereby adopt the Initial Decision as our own and make it a part hereof.

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

I agree with the conclusions of the majority report except as to the level of the labor loan rates.

The majority adopts the Administrative Law Judge's finding that the 58.38%, or $2.00 per hour, overhead charge by HT&T is justified. On the basis of the facts of record, the overhead charge appears to be *prima facie* excessive and necessary of further proof.

The industry rate in Hawaii for the labor loan administrative charge is only 3%. The substantial disparity between this amount and that charged by HT&T indicates the need for further evidence as to whether the $2.00 rate is reasonable.

The central question on this issue is "whether the charge levied is reasonably related to the service rendered." *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 282 (1968). On the evidence in this case it is impossible to determine whether the $2.00 per hour charge meets that test.

According to the computations of record there is insufficient support for respondent's allocation of its costs to its specific labor loan activities. Witnesses who were employees of respondent were unable to specify the portion of respondent's total resources which were used in the labor loan functions. Furthermore, it appears that the labor loan activities were but a small portion of respondent's overall business, thereby causing considerable doubt as to the reasonableness of the practice of HT&T in charging fully allocated costs to McCabe.

In addition, HT&T cannot, as it appears to have done, justify its labor loan rate on the ground that HT&T would have made more money if it had not engaged in labor loaning. Notwithstanding such circumstance, respondent is bound to maintain just and reasonable practices, and to assess charges reasonably related to the service rendered. *Pittston Stevedoring Corp.* v. *New Haven Terminal, Inc.*, 13 F.M.C. 33, 43–44 (1969).

Consequently, I consider the record before us to be inadequate as to whether HT&T violated sections 16 or 17 with respect to the labor loan rates. I would, therefore, remand the case to the Administrative Law Judge for the taking of further evidence on this issue.

[SEAL] FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 70–14

McCABE, HAMILTON & RENNY CO., LTD.

v.

C. BREWER CORP., D.B.A. HILO TRANSPORTATION AND TERMINAL CO.

Respondent not found to have been in violation of sections 16 First or 17 of the Shipping Act, 1916, (1) unduly or unreasonably preferring itself in labor loaning, (2) in failing to reasonably share the labor force with complainant on an equitable basis, or (3) in assessing excessive overhead in labor loans. Complaint dismissed.

Clarence Morse and *John Jubinsky* for complainant.
C. Jepson Garland for respondent.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER[1]

Complainant McCabe, Hamilton & Renny Co., Ltd. (McCabe), and respondent C. Brewer Corporation, d/b/a Hilo Transportation and Terminal Company (HT&T) are corporations organized and existing under the laws of the State of Hawaii. Complainant does not maintain terminal facilities at any island port but rather is a travelling stevedore[2] furnishing contract services to common carriers by water

[1] This decision became the decision of the Commission November 14, 1972.
[2] Hereinafter the term "stevedore" refers to stevedoring companies or collective entities, not individuals.

where they berth. These services include tieing up vessels, discharging and loading cargo, sorting cargo on the docks, connecting hoses for oil and molasses, and delivering cargo to consignees. HT&T furnishes terminal facilities in Hilo including a bulk sugar elevator leased from Matson Navigation Company (Matson). This consists of four steel silos that receive sugar from six plantations. This is the initial point for loading sugar on common carriers by water by a conveyance system at the pier.

McCabe alleges that HT&T, in its operations at the Port of Hilo, has been and is in violation of sections 16 First and 17 of the Shipping Act, 1916 (the Act),[3] in preferring itself in labor loaning; in failing to share the labor force with McCabe on an equitable basis; and in assessing excessive overhead on labor loans. HT&T denies McCabe's allegations adding that the complaint fails to comply with the provisions set forth in 46 CFR 502.44, having failed to name as respondents all necessary and proper parties, and finally, to the extent reparation is sought, that the cause of action did not accrue within two years next before the filing of the complaint.

THE FACTS

(1) In the State of Hawaii all longshore laborers are members of the International Longshoremen's & Warehousemen's Union, Local No. 142 (hereinafter the union). There are no "hiring halls" as on the mainland and employment is dependent upon collective bargaining with the union and the resulting agreement between the stevedore and the union recognizes that the longshoremen are employees of the stevedore. The agreement relates only to the conditions of the longshoremen's employment.

(2) The longshore workforce in outer ports in the State of Hawaii is customarily employed by one stevedore. A stevedore who controls the entire local labor force understandably prefers its regular customers over others where the work exceeds the capacity of the longshore workforce. Conflicts in requirements for longshoremen are avoided to a considerable degree by virtue of the fact that outports have only one deep water berth allocated for intrastate and foreign vessels, and ship operators try to schedule to avoid arriving when another ship is in port. Furthermore, stevedores try to handle all ships expeditiously.

(3) Ordinarily when work exceeds the capacity of the workforce of a stevedore, the labor loan is resorted to as one expedient. It is effective only if the lending stevedore has, at least temporarily, sur-

[3] 46 USC 815 and 816.

plus longshoremen. The borrowing stevedore pays the lending stevedore the industry or reciprocal rate for loaned labor. The "Stevedore Industry Negotiating Committee Agreement" established the *industry or reciprocal rate* for labor loan as wages plus 3% administrative costs *where two stevedores were exchanging labor.*

(4) The labor loan on a reciprocal basis was understood to be applicable only to exchanges between two or more stevedores, each with a workforce. It was not applicable within any port in which there was only one stevedore and one workforce. Therefore, at Hilo, labor loan on a reciprocal basis is economically precluded. Furthermore, in an outport where the workforce is at times inadequate even to permit labor loaning, the stevedore who does not control the local workforce must bring in off-island longshore labor gangs with consequent added costs for transportation and maintenance.

(5) The financial burden of this situation was, for a time, eased by the Wage (or Workforce) Supplementation & Utilization Plan (WS&UP) which was established for the purpose of more economical use of the Hawaii longshore labor force under an arrangement whereby employers of longshoremen would fly gangs from island to island in order to distribute work opportunity more evenly among the available workforce. Travel costs were segregated and charged against the WS&UP.

(6) Subsequently, in negotiations with the union, the stevedores obtained agreement that the statewide work equalization program was expensive and that its purposes were not being accomplished. The requirement of travel to equalize the work hours was contractually discontinued in 1969. The result, at least technically, was that required travel was for the account of whoever needed the men. In some instances, however, arrangements were made for sharing these costs.

(7) Late in 1966 Matson awarded a statewide stevedoring contract to McCabe, which then succeeded to the business of the other stevedores in the ports of Kahului in Maui and Nawiliwili in Kauai. McCabe now employs the entire union longshore workforce on those islands, comprising 50 men in Maui and about 34 in Kauai in addition to a force of 350 in Honolulu. In the Port of Hilo the longshore workforce ranged from about 52 in 1967 to 44 in 1970.

(8) Before McCabe began stevedoring for Matson in Hilo, HT&T handled this work. However, after the award of the Matson contract to McCabe, HT&T remained in business to continue serving its other customers, and in so doing retained the workforce. When McCabe nego-

tiated with both the local international representatives of the union and the Hilo leadership, first in an endeavor to employ all and thereafter 55 percent of the longshoremen in Hilo, it was informed that its offer would be taken up with the membership. As of the conclusion of this hearing there had been no response.

(9) At about this time, HT&T increased its group life insurance benefits for longshoremen and wharf clerks from $3,000 to $10,000. The work opportunities for stevedores in Hilo is low. The average number of longshoremen on labor loan in Hilo is 12 to 14 men a day for about 26 days a month. In October 1968, Matson changed their application of demurrage charges and assessed demurrage as soon as the vessel was alongside the dock. Where there is an inadequate number of men to supply HT&T's requirements and McCabe's requirements at the same time, if the HT&T vessel was carrying FIO cargo, HT&T was obliged to prefer itself.[4]

(10) In an FIO situation Ultramar (the bulk fertilizer shipper), or any one of the half dozen shippers of bulk sugar, pays for loading and unloading, until the cargo is delivered to the consignee. In the instance of bulk sugar, H&T has trained men who must be promptly employed. Nevertheless HT&T has shared on numerous occasions when they had two shifts going requiring a total of 35 men, and the workforce was reduced by vacations and other circumstances to 40 men, which left only five for McCabe.

(11) Further self-preference was experienced by HT&T in a period of labor shortage during late December 1969. This was due to very large bulk fertilizer shipments necessitating full utilization of the workforce by HT&T. Admittedly, these were unusual or "aggravated" situations. The experience with respect to these fertilizer shipments by Ultramar was that out of ten vessels worked by local people in the outport, only two were handled in the entirety by the port workforce. During other times, outside people had to be brought in.

(12) HT&T's labor loan rates to McCabe have not been the industry or reciprocal rate but rather the so-called "*Schedule A Rate*" *which carries an overhead factor but no profit.* The overhead on labor loan by HT&T to McCabe has been approximately 58 percent. The following method, which was unrebutted by McCabe, was used in arriving at the overhead rate. The actual overhead costs incurred by HT&T during the preceding year in its stevedoring operations were first computed. From such overhead the "administrative" portion of the serv-

[4] FIO cargo is free in and out. This means it is the responsibility of the charterer to load, or the consignee to discharge, the cargo for their respective accounts, free of expense to the carrier.

ice charges made by Brewer (the parent corporation) were deducted, so that the resulting overhead included only that portion of the service charge incurred for direct services rendered to HT&T. Then HT&T computed the total man-hours worked by its longshoremen during the preceding year in its stevedoring operations, categorized by the nature of the work. It then determined what percentage the man-hours of work allocable to labor loans to McCabe was of the total man-hours worked during the year. The resulting percentage was then applied to the overhead for such year (excluding the administrative portion of Brewer's service charge to HT&T) in order to determine the amount of such overhead which was fairly attributable to labor loans to McCabe during the course of the preceding year. The weighted average of the straight time base rates of pay for HT&T's stevedore, machine operators, winchmen, leadermen, foremen, warehousemen, and straddle operators, was based upon actual hours worked during the preceding year and current rates of pay which had been established in negotiations with the union. The resulting figure was the weighted average straight time rate of pay per hour for HT&T's workforce. This figure was multiplied by the total direct man-hours worked during the previous year by HT&T employees while on labor loan to McCabe. The result was a reasonable estimate of the aggregate, direct, straight-time labor costs which would be incurred by HT&T in the current year in connection with its labor loans to McCabe. HT&T then determined what percent the aggregate amount of overhead fairly attributable to the labor loans made to McCabe during the preceding year was of the estimated labor costs which would be incurred by HT&T in connection with its labor loans to McCabe during the current year. The result was the total overhead charge, expressed as a percentage of the direct labor costs, which was to be charged to McCabe for labor loans during the current year.

DISCUSSION

Jurisdiction

Despite the fact that it is the rates that are complained of, the essential question is whether the practice of lending longshoremen by a stevedore employing the whole work force in a port to another stevedore in the port that is not so advantaged is within the reach of the Shipping Act, and therefore subject to the Commission's regulation, or is a labor practice and as such subject to the exclusive purview of another agency. Notwithstanding the fact that ocean transportation is dependent upon the services of stevedores and longshoremen, and that the Act does not regulate, in any respect, the conditions of employment of maritime workers, the activity of an entity that is not a common carrier by water may be subject to the Commission's jurisdiction if it is an "other person subject to this act." This term is defined in section 1 thereof as any person "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." *Gillen's Sons Lighterage v. American Stevedores*, 12 F.M.C. 325 (1969), and cases there cited.

Where stevedores engage in activities of a kind which independently makes them subject to the Act, such as operating a terminal facility, then such stevedores are deemed to be engaged in the furnishing of wharfage, dock, warehouse, or other terminal facility in connection with common carriers by water and are within the Commission's jurisdiction. *Gillen, supra*, at page 337. This interpretation was extended to publicly-owned terminals in *California v. United States*, 320 U.S. 577 (1944). Moreover, expansion of this interpretation was recently made in *United Stevedoring Corp. v. Boston Shipping Association*, Docket No. 70–3, Commission's report served November 9, 1971, (15 FMC 33). There an agreement between members of a shipping association regarding allocation of labor among stevedores was held subject to section 15 of the Act because apart from the fact that the members of the association in their individual capacities would be subject to the Commission's jurisdiction, the Act defined the term "person" to include associations, and by virtue of such membership jurisdiction was also secured. Such is the situation here as regards HT&T, which furnishes terminal facilities for common carriers by water.

The matter in issue is primarily concerned with practices relating to the handling of cargo, and only incidentally involves labor-management questions. Recognizing that related agreements, and by inference also practices, may fall in "an area of concern" of different agencies, the Court in *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968), concluded that the collective bargaining agreement between the Pacific Maritime Association, an employer organization of common carriers by water, stevedoring contractors, and marine terminal operators, on the one hand, and the union, on the other hand, was in the area of concern of the National Labor Relations Board, whereas the Mechanization and Modernization Fund, an agreement among members of the same association allocating the impact of the assessment upon stevedoring contractors and terminal operators, was in the area of concern of the Federal Maritime Commission. Under that interpretation of the

Act, which was characterized as "a statute that uses expansive language" (p. 273), there is enough of that "area of corncern" to subject the practice of lending of longshoremen by a stevedore employing the whole workforce in a port to another stevedore in the port that is not so advantaged to regulation by the Commission.

Undue or unreasonable preferences or practices

With respect to the allocation of HT&T's workforce and the associated issue of self-preference by HT&T that gives undue or unreasonable preference or advantage to itself and subject McCabe to undue or unreasonable prejudice or disadvantage, within the meaning of section 16 First of the Act, it is well settled that the existence of undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. *Phila. Ocean Traffic Bureau v. Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936); *H. Kramer & Co. v. Inland Waterways Corp. et al.*, 1 U.S.M.C. 630, 633 (1937); *L. A. Traf. Mgrs. Conf., Inc. v. S. Calif. Carl'dg. Tariff Bur.*, 3 F.M.B. 569, 576 (1951), *Isbrandtsen Co., Inc. v. States Marine Corp. of Delaware*, 4 F.M.B. 511, 514 (1954); and *Charges, Delivery, Atlantic-Gulf/Puerto Rico Trades*, 11 F.M.C. 222, 235 (1967). The record does not reveal such substantial proof. In the year or year and a half before the hearing. McCabe's witness could specifically recollect only one period where McCabe had to fly longshoremen in during labor shortages and, as previously found, that was in late December 1969:

> . . . I think over a period of approximately two weeks we had to fly men from Maui for about eight of those days, and for about four of those days we had no men allocated to us from Hilo, and on another day one man, and on a couple of days, twenty men. . . . it depended completely on the requirements of the DeMetra III with their difficult cargo at the time.

The generalized statements of McCabe "that a good deal of difficulty was encountered with the cargo" or "where we had late arrivals and whether the men, if they work the night shift, are available the following morning" combined with the fact that the average number of longshoremen on loan labor basis is 12 to 14 men a day for about 26 days a month, almost a third of HT&T's workforce for the better part of each month, do not evidence "undue" or "unreasonable" advantage to HT&T. Further support for this conclusion is found in *Chr. Salvesen & Co., Ltd. v. West Mich. Dock & Market Corp.*, 12 F.M.C. 135 (1968), which held that the failure of a stevedore to apportion its available workforce more equitably due to shortage of shore labor was not violative of section 16 First.

Labor loan rates

With respect to the issue of rates of HT&T for loaned labor being excessive, arbitrary, unfair or unreasonable, and subjecting McCabe to undue or unreasonable prejudice or disadvantage within the meaning of section 16 First of the Act, and also constituting a practice which is unjust and unreasonable in connection with the receiving, handling, storing, or delivering of property within the meaning of section 17 of the Act, the Commission in *Pettston Stevedoring Corp. v. New Haven Terminal, Inc.*, 13 F.M.C. 33 (1969), reiterated the criterion laid down in *Armstrong Cork Co. v. American-Hawaiian Steamship Co.*, 1 U.S.M.C. 719, 723 (1938), that the language of section 16 forbidding "any undue or unreasonable prejudice or disadvantage in any respect whatsoever" is specifically directed against *every* form of unjust discrimination against the shipping public. This principle of equality forbids any difference in charge which is not based upon a difference in service. *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 45 (1922). Not only potential discrimination in unequal application of a tariff, but the mere possibility of a variance between regulation and practice render both regulation and practice unreasonable where the issue was the difference accorded by respondent to itself as a stevedore, on the one hand, as compared with the treatment of the complainant stevedore on the other hand. *Calif. Stevedore & Ballast Co., et al. v. Stockton Elev., Inc.*, 8 F.M.C. 97, 105 (1964), citing *Lopez Trucking Inc., et al. v. Wiggin Terminals, Inc.*, 5 F.M.B. 3, 15 (1956).

Despite these rather broad statements the record with respect to labor loan rates does not reveal undue or unreasonable prejudice within the meaning of section 16 First of the Act or a practice which is unjust and unreasonable in connection with the receiving, handling, storing, or delivering of property within the meaning of section 17 of the Act. The basis of the charge and the manner in which it was applied has been, as noted in accordance with Schedule A, the labor loan rate which carries overhead but no profit, whereas the industry or reciprocal rate for labor loan, *supra*, is composed of wages plus a 3 percent administrative charge.

A Schedule A labor loan rate, as earlier detailed, is made up of direct payroll costs of the loaned labor, fringe benefits, applicable income taxes, and an overhead charge which is allocated on a labor-dollar basis. HT&T's three-page justification entitled "Stevedoring Services—Labor Loans—Port of Hilo—1967, 1968, and July 1, 1969 to date," submitted in response to complainant's interrogatories, comports with its method of construction of labor loan rates set forth in the above-found facts. *Under the subheading "Overhead Cost"* all three periods are broken down by Salaries & Fringes; Brewer service Charges, excluding the administrative portion thereof leaving only the direct service charge, that is, that charge directly related to the labor loan relationship; General Overhead, that is, expense incurred as a result of operating a workforce, or maintaining it, and under the itemization of Stevedoring Costs sufficient exemplification for a typical year is adduced to adequately identify the general and indirect expenses; and finally, a category described as "All Others" which represents the smallest amount.

The percent of overhead to straight time labor cost in 1967 was 41.87 percent in 1968, it was 58.38 percent and July 1, 1969, to date, it was 63.69 percent. However, HT&T's management authorized charges at the rate of 58.38%—the previous year's charge. The method now complained of had been established with sufficient specificity and particularity to be used when HT&T stevedored for Matson with no complaint by Matson. Moreover, HT&T makes no profit on labor loan. The allocation of overhead expressed as a percentage of the direct labor costs which is charged to McCabe in the maintenance of the longshore workforce after excluding Brewer's administrative overhead charges made against H&T is satisfactorily justified on a cost basis and reflects only the costs incurred in providing labor on loan. Observing that "the goal is not slavish adherence to any particular formula, but a method of computation which takes into account direct and indirect expenses and projects an accurate estimate of costs of providing the particular service [and rate of return] . . ." the court in *City of Los Angeles v. Federal Maritime Commission*, 385 F. 2d 678, 682 (D.C. Cir., 1967), affirmed the Commission in *Agreement No. T-1768—Terminal Lease Agreement*, 9 F.M.C. 202 (1966).

Monopoly

With respect to the secondary accusation that HT&T has a monopoly over longshore labor at the Port of Hilo and thereby transgresses the holding of *Calif. Stevedore, supra*,* which condemned an agreement between elevators and a port district that established a stevedoring monopoly in a national port, preventing common and contract carriers by water from selecting stevedores of their choice as prime facie unjust and unreasonable, that decision must be regarded as inapplicable for the reason that labor negotiations are beyond the reach of the

*The Examiner is referring to *Calif. Stevedore & Ballast Co. v. Stockton Port Dist.*, 7 F.M.C. 75 (1962), which is also relied on by McCabe in its briefs.

Act. *Calif. Stevedore* involved an agreement between persons subject to the Act and the practice resulting therefrom was also subject to the Act, which differentiates it from the instant situation. Here, the agreement between HT&T and the union is not between persons subject to the Act, one being a labor union, although the practice resulting therefrom, that is, labor lending, may be subject to the Act. Fairly characterized, this agreement is a labor agreement, that is, one involving collective bargaining—labor-management problems within the area of concern of the NLRB. Since it is not a section 15 agreement, it is not entitled to antitrust immunity, and the aggieved party remains free to seek whatever remedy it may have under the antitrust laws in the United States courts.

Other defenses

Turning to HT&T's affirmative defenses, the first is that the complaint failed to name as respondents all the necessary and proper parties. Rule 3(d) of the Rules of Practice and Procedure, 46 CFR 502.44, *Necessary and proper parties in certain complaint proceedings*, in relevant part provides, "If the complaint relates to more than one carrier or other person subject to the shipping acts, all carriers or other persons against whom a rule or order is sought shall be made respondents." The complaint describes respondent as C. Brewer & Co., Ltd., a corporation, individually and doing business as Hilo Transportation and Terminal Company. This, according to respondent, is a misnomer. After a rapid succession of corporate changes, and at all times pertinent to the complaint, "C. Brewer Corporation, which is not named respondent has been doing business under the name Hilo Transportation and Terminal Company. . . ." Under Rule 3(c), 46 CFR 502.43, *Substitution of parties*, the presiding officer may order an appropriate substitution of parties and by such authority C. Brewer Corporation doing business as Hilo Transportation and Terminal Company is hereby substituted as respondent.

The second defense that the cause of action did not accrue within two years next before the filing of the complaint, is insufficient to bar consideration of the alleged violations two years or less antedating the filing of the complaint, which were of a continuing nature. The failure to obtain a portion of the labor force was a distinct occurrence but as earlier discussed is not a cognizable violation under the statutes the Commission administers and hence any discussion relating to section 22 is unnecessary. See *Grace Line, Inc. v. Skips A/S Viking Line et al.*, 7 F.M.C. 432, 447 (1962).

However, with regard to labor lending, every time McCabe did not receive the number of longshoremen it requested, that presumably constituted an accrual of action, with occurrences antedating two years being barred and those subsequent thereto being a possible basis for an award of reparation. Whatever the case may be, it is entirely academic since the practice is not found to be violative of the Act.[5]

ULTIMATE CONCLUSIONS

This record does not show the HT&T, in its operations at the Port of Hilo, has been or is in violation of sections 16 First or 17 of the Shipping Act, 1916, in unjustly and unreasonably preferring itself in labor loaning; in failing to reasonably share the labor force with McCabe on an equitable basis; or in assessing excessive overhead in labor loans.

The complaint herein is dismissed.

JOHN MARSHALL,
Presiding Examiner.

WASHINGTON, D.C., *February 2, 1972.*

[5] *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607 (1966); *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 358 F. 2d 790 (1966); *Flota Mercante Grancolombiana, S.A. v. Federal Mar. Com.*, 373 F. 2d 674 (1967); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (1957); *I.C.C. v. United States*, 289 U.S. 385 (1933); *Lawlor v. National Screen Service*, 349 U.S. 322 (1955); and *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451 (1968), in complainant's opening brief dealt with damages, and therefore are inapplicable. In like manner, the following authorities cited in complainant's reply brief dealt with damages and therefore are inapplicable. *Adams v. Mills*, 286 U.S. 397 (1932); *Atlantic City Electric Company v. General Electric Company*, 226 F. Supp. 59, 70 (1964); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906); *Commonwealth Edison Co. v. Allis Chalmers Mfg. Co.*, 225 F. Supp. 332, 334 (1963),; *Flintkote Co. v. Lysfjord*, 246 F. 2d 368 (1957); *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481 (1968); and *Southern Pac. Co. v. Darnell-Taenser Co.*, 245 U.S. 531 (1918).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 448

OVERSEAS IMPEX, INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

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

November 28, 1972

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 28, 1972.

It is ordered, That applicant is authorized to refund $257.53 of the charges previously assessed Overseas Impex, 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 448 that effective August 14, 1972, the rate on 'Sponges, artificial' for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 14, 1972 through October 5, 1972 is $355 W, subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff.

It is further ordered, That refund of these 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]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 448

OVERSEAS IMPEX, INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Carrier permitted to refund the sum of $257.53, being a part of the freight charges assessed and collected for one shipment of artificial sponges.

INITIAL DECISION OF JOHN MARSHALL, ADMINISTRATIVE LAW JUDGE [1]

This case concerns an application by Overseas Impex, Inc. (Overseas), for permission to refund [2] $257.53, being a portion of the freight charges assessed on a shipment of artificial sponges from Antwerp, Belgium, to New Orleans, Louisiana, under Lykes Bill of Lading No. 22, issued August 14, 1972.

The rate applicable at the time of shipment was $68.50 per cubic meter as prescribed in Lykes Bros. Continental Gulf Tariff No. 7 (F.M.C. 76), effective July 7, 1972. Total charges collected were based upon a measurement of 4.821 cubic meters and accordingly totalled $330.24. This was more than 350 percent in excess of previous charges under tariffs which prescribed weight rather than measurement as the rate basis. The change from weight to measurement was an oversight by Lykes and clearly falls within the provision of section 18(b)(3) of the Act, *supra*, which permits the refund of a portion of the freight charges where it appears that the relevant error in a tariff is of a clerical or administrative nature.

Lykes has filed a new tariff, effective October 5, 1972, setting forth the rate on which this requested refund is based; [3] the application

[1] This decision became the decision of the Commission, Nov. 28, 1972.

[2] Shipping Act, 1916, section 18(b) (3), as amended.

[3] Lykes Bros. Steamship Co., Inc., Continental Gulf Tariff No. 7 (F.M.C. 78), 3rd Rev., p. 94.

therefore is timely filed and contains the statement that there were no other shipments of the same or similar commodities which moved by Lykes during approximately the same period at the rate here in question.

Good cause appearing, Lykes is hereby permitted to refund to Overseas the sum of $257.53. The notice of waiver required by the statute shall be published in the Lykes tariff.

JOHN MARSHALL,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 449

U.S. DEPARTMENT OF AGRICULTURE

v.

TROPWOOD LINES

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

November 28, 1972

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 28, 1972.

It is ordered, That applicant is authorized to waive collection of the terminal transfer charges and seaway tolls previously assessed U.S. Department of Agriculture.

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. 449 that effective September 16, 1972, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from September 16, 1972 through October 21, 1972, the rates to Bangladesh on "Corn, Sweetened Soya Milk" and "Wheat, Sweetened Soy Blend" are $42 W, the rate to Bangladesh on "Paper Bags (including wire ties)" is $42 L/T, and the rate to Mauritius on "Flour N.O.S." is $48 W; said rates including terminal transfer charges and Great Lakes Seaway tolls, and 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]

FRANCIS C. HURNEY,

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 449

U.S. DEPARTMENT OF AGRICULTURE

v.

TROPWOOD LINES

Carrier permitted to waive the collection of certain terminal transfer charges and seaway tolls.

INITIAL DECISION OF JOHN MARSHAL, ADMINISTRATIVE LAW JUDGE [1]

By joint application, timely filed, the U.S. Department of Agriculture (Agriculture), on behalf of the Commodity Credit Corporation as Agent for A.I.D., and Tropwood Lines (Tropwood), a common carrier by water in foreign commerce, have requested permission to waive the collection of certain charges for one shipment, September 16, 1972, and three shipments, September 22, 1972, of corn sweetened soya milk, flour N.O.S., wheat sweetened soy blend and paper bags (including ties), from Green Bay and Milwaukee, Wisconsin, to Chittagong, Bangladesh, and Port Louis, Mauritius.

Prior to the booking of these cargoes for shipment it was understood between Agriculture and Tropwood that the effective freight rate was to be inclusive of terminal transfer charges and seaway tolls. This is verified by the terms specified on the Cargo Booking Confirmation documents. However, through clerical error, Tropwood's Tariff Filing Agent failed to carry out Tropwood's instructions to file the tariff corrections needed to permit Tropwood's absorption of these added charges and tolls. This filing has now been accomplished.[2]

There were no other shipments of the same or similar nature which moved by Tropwood in this trade during approximately the same period at the rate here in question. The relief sought is clearly within the provisions of section 18(b)(3) of the Shipping Act, 1916, as amended.

[1] This decision became the decision of the Commission Nov. 28, 1972.

[2] See Tropwood A. G. Freight Tariff No. 4, F.M.C. No. 4, Rev. 6th, p. 18.

Good cause appearing, Tropwood is hereby permitted to waive the collection from Agriculture of the terminal transfer charges and seaway tolls incident to the above four shipments. The notice of waiver required by the statute shall be published in Tropwood's tariff.

JOHN MARSHALL,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

No. 72–15

RATES, PRACTICES, RULES AND REGULATIONS OF NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE RELATING TO THE MOVEMENT OF HEAVY LIFT CARGO

NOTICE OF ADOPTION OF INITIAL DECISION

December 12, 1972

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 12, 1972.

Discontinuance of this proceeding will be ordered upon:

(1) Filing by respondent of appropriate tariff rules effectuating the proposed changes in heavy lift charges outlined and found acceptable in the initial decision; and

(2) Notification by respondent to the Secretary of the Commission that the appropriate tariff rules have been filed.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 72–15

RATES, PRACTICES, RULES AND REGULATIONS OF NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE RELATING TO THE MOVEMENT OF HEAVY LIFT CARGO

Proposed new tariff rule providing that the total heavy-lift charges for pieces of cargo up to nine tons moving to certain specified ports will be fifty percent of the Conference's Rule 27 heavy-lift charges is not unlawful.

Proposed new tariff rule providing for a positioning, lashing, and securing charge equal to 65 percent of the heavy-lift charge to be assessed in lieu of heavy-lift charges on the carriage of wheeled or tracked roadbuilding machinery and tractors to certain specified ports notwithstanding the type of vessel used is not unlawful.

Adoption of proposed new tariff rules would not be contrary to the public interest, detrimental to the commerce of the United States, nor be otherwise unfair, unreasonable, or unjustly discriminatory in violation of the provisions of sections 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916.

Proceeding discontinued.

Stanley O. Sher and *Paul M. Tschirhart* for North Atlantic Mediterranean Freight Conference.

James N. Jacobi for American Export Lines, Inc., respondents.

Donald J. Brunner, *Norman D. Kline*, and *Joseph B. Slunt* as Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE [1]

This proceeding was instituted by the Commission in order to determine the lawfulness of certain provisions relating to the assessment of heavy-lift charges published in the tariff of respondent North Atlantic Mediterranean Freight Conference (NAMFC or the Conference). The Commission was specifically concerned over the fact that despite the admission of carriers operating vessels of advanced design

[1] This decision became the decision of the Commission Dec. 12, 1972.

and technology into Conference membership, the Conference had refused to amend its heavy-lift rules so as to reflect the changing situation with regard to cost reductions. Instead the Conference continued to assess the regular heavy-lift charges predicated upon conventional breakbulk operator's costs even on cargoes moving entirely within containers or rolled on and off vessels. Hence, it appeared to the Commission that shippers were being assessed charges for which either no services were rendered or, if services were performed, at levels which were not related to carriers' actual expense.

The Commission expressed further concern over the fact that the refusal of the Conference to adjust their heavy-lift provisions might be unfair to carriers as well as harmful to shippers inasmuch as containerized and roll-on/roll-off vessel operators would be prevented by the Conference from passing on to shippers the savings realized by the new technology. This attitude on the part of the Conference thus raised serious questions as to whether the Conference was acting in a manner contrary to the public interest, detrimental to the commerce of the United States, or otherwise unfairly, unreasonably or unjustly in violation of the provisions of sections 15, 16, 17 and 18(b)(5) of the Shipping Act, 1916.

As the Commission's order made clear, the Commision was not merely interested in determining the question of the lawfulness of the Conference's heavy-lift provisions but in fashioning an appropriate amelioratory remedy, such as "opening" rates governing heavy-lift cargoes or otherwise modifying the Conference agreement.

Respondent conference believing that it had resolved the issues and concerns which were raised by the Commission's order, and in preference to a continuance of litigation, submitted an Offer of Compromise and Motion to Discontinue Proceeding.

Background

NAMFC is a conference of steamship lines serving the eastbound trade from United States North Atlantic ports in the Hampton Roads/Eastport, Maine range to various ports primarily on the Mediterranean Sea. The Mediterranean ports include those in Italy, France, Greece, North Africa, Turkey, Lebanon and others; approximately 50 percent of the Conference carryings are destined for Italy. The nature of the trade is quite broad; cargo moves both to highly industralized countries of Southern Europe and to other significantly less developed countries.

There are 11 members of the Conference. Three carriers offer fully containerized service: American Export Lines ("AEL"), Atlantica Line and Sea-Land Service, Inc. One operates LASH ships: Prudential-Grace Lines, Inc. One member employs ro/ro ships: AEL. The breakbulk or unitized carriers are: Concordia Line, Constellation Line, Hellenic Lines, Italian Line, Torm Lines, Zim Line, Nordana Line, and AEL. It is apparent that the Conference represents a broad and exceedingly diverse panoply of carrier operations and it is asserted that it is the only conference in the United States foreign trades in which every type of cargo-carrying operation is active.

The commodities moving in the trade and transported by the Conference members are of a general nature but lack the emphasis of finished and manufactured goods.[2] There exists substantial non-conference competition in the trade.[3]

Generally the container services by Conference members have been limited to the five ports of Marseilles, Genoa, Leghorn, Naples and Piraeus. Likewise, ro/ro ships are best suited for service to these ports and such vessels call only at these five ports.

HEAVY-LIFT CARGO

The movement of heavy-lift pieces of cargo and the revenue from such carriage varies markedly among the Conference members. The container carriers move heavy-lift pieces in only the most unusual circumstances and many container voyages show no heavy lifts whatsoever.[4]

Neither the Conference nor the carriers maintain records which show whether heavy-lift cargo is on tracks or wheels and, therefore, capable of being rolled on and off a suitable vessel. The Conference, however, believes the amount of this cargo is small.

To the conventional or breakbulk carriers, heavy-lift movements and revenue are of more importance. For these carriers, the percentage of heavy-lift revenue compared to total freight is, on the average,

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[2] In 1971, the top ten commodities carried by the Conference in order of importance (i.e., number of long tons), are as follows:

(1) Rags
(2) Tinplate
(3) Waste Paper
(4) Tallow
(5) Automobiles/Trucks and Parts
(6) Synthetic Resin
(7) Copper Basic Shapes
(8) Insecticides
(9) Cotton Hull Shaving Pulp
(10) Lube Oil

[3] The Conference estimates that in 1971 greater than 40 percent of the Italian cargo moving in the trade was carried by non-conference lines.

[4] The revenue the container carriers derive from application of heavy-lift charges is "substantially less than one-tenth of 1 percent of gross revenues".

about 2 percent. Heavy-lift revenue to the NASH carrier is more significant, approximately 10 percent.[5]

A review of the type of heavy-lift cargo carried by each line indicated that approximately one-half of the heavy-lift movements are pieces of cargo which weigh nine tons and less. Some Conference breakbulk vessels do not have gear to handle lifts in excess of nine tons. The container operators, in contrast, carry no cargo whatsoever in excess of nine tons. Container operations, of course, do not readily lend themselves to larger pieces of cargo. Any cargo over twenty tons cannot be carried in a container due to legal over-the-road weight restrictions—of approximately 45,000 lbs.—as well as the physical limitations of the containers. Further, there may be additional costs on those occasions when container carriers do move heavy-lift cargoes.[6] In those instances where container-type cargo may take heavy-lift charges, the Conference has nevertheless adjusted its tariff rules to reduce or eliminate such charges.[7]

Ro/Ro Aspects

There are only four vessels in the trade—all operated by AEL—which are capable of having wheeled or tracked cargo rolled on and off the vessel as opposed to being lifted on and off. These vessels, however, are essentially containerships with limited space—about 12,500 square feet—for ro/ro cargo.[8] The ro/ro space on these vessels is an odd configuration with the result that large ro/ro cargo, such as generators, cannot be accommodated.

The ro/ro cargoes most frequently moving in this trade for which the ro/ro vessels are suited are tractors and roadbuilding machinery. Despite the ro/ro capacity of the vessels, suitable tracked and wheeled cargo (such as tractors and roadbuilding machinery) cannot usually be rolled off the vessels; this is because all of the Conference discharge ports in the Mediterranean, save Genoa, do not have suitable stern ro/ro ramps and, therefore, the cargo must be lifted off. And, even in the United States, the facilities used by AEL do not always have the proper stern ramps for rolling on tracked or wheeled cargo. Specifically, AEL rolls tractors and roadbuilding machinery only at Norfolk

[5] This mode loads and discharges cargo into barges which have no gear at all and hence must always obtain such equipment at extra cost to the carrier.

[6] Sea-Land has special intracompany clearances and procedures for treating its rare heavy-lift cargo to ensure that it is properly braced, protected and stowed in the container.

[7] In the case of tinplate (an important commodity which moves in containers), it may be shipped in quantities up to "11,200 lbs." or five tons without paying heavy-lift charges.

[8] Earlier the AEL ro/ro vessels had significantly more ro/ro space, approximately 33,000 feet; they were recently modified reducing the ro/ro capacity by almost two-thirds and in lieu adding container capacity. As a result, the ro/ro capacity in the trade is sharply below that which existed earlier.

and Baltimore and lifts such cargo on with traditional gear at New York, *Boston and Philadelphia.*

Virtually all of the ro/ro tractors and roadbuilding machinery moving in the trade are nine tons or more. As is the case with container-type cargo, in situations where cargo usually moves on tracks or wheels, the Conference tariff has been appropriately adjusted. For example, automobiles up to and including "8960 lbs." (four tons) do not pay heavy-lift charges nor do trucks under five tons.

It is difficult to calculate the exact cost involved in loading and discharging roadbuilding machinery and tractors via the roll-on, roll-off method; it is, however, AEL's best estimate that a charge for this service equal to 65 percent of the Conference's heavy-lift scale is a reasonable charge in light of all the circumstances. Apart from AEL, the Conference members are of the unanimous view that the costs to roll-on and roll-off cargo (including proper allocation of capital costs, expenses of longshoremen who drive the vehicle, lashing, securing, positioning the cargo, etc.) are fully comparable to the total Conference heavy-lift scale rates.

Compromise Proposal

Believing that a resolution of the issues herein is susceptible by adoption of certain rules in the Conference's tariff, respondents propose that:

(1) A new tariff rule will be added to the Conference tariff which shall provide that the total heavy-lift charges for pieces of cargo up to and including nine tons moving to the Ports of Genoa, Leghorn, Naples, Marseilles and Piraeus will be 50 percent of the Rule 27 heavy-lift scale charges.

(2) A new tariff rule will be added to the Conference tariff providing for a positioning, lashing, and securing charge equal to 65 percent of the heavy-lift charge to be assessed in lieu of heavy-lift charges on the carriage of wheeled or tracked roadbuilding machinery and tractors to the Ports of Genoa, Leghorn, Naples, Marseilles and Piraeus notwithstanding the type of vessel used.[9]

The diversity of operations utilized by the Conference members results in both advantages and disadvantages. It is clear that shippers and consignees are offered the greatest variety of services from which to choose and this flexibility offered by the Conference members is a decided advantage to shippers. Different methods of carrier operation, however, entail different costs, timetables, and types of service.

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[9] As is apparent, the proposed tariff changes are carefully tailored—in terms of ports, weight, type of cargo, etc.—to the container and ro/ro shippers about which the Commission expresses concern in its Order of Investigation. If operating or competitive circumstances change indicating that the new rules should be extended beyond the five enumerated ports, the Conference, in its compromise submission, agrees that it will give fair consideration to doing so.

Consequently, this sharp diversity among its members is a disadvantage in resolving certain problems which affect the members in different ways.

Thus, the Conference members appear willing to grant significant heavy-lift rate reductions to shippers and give up certain revenues which they now receive for the carriage of heavy-lift cargo in return for a settlement of this litigation.[10]

The main feature of the Offer of Compromise is that the Conference will reduce by fifty percent all heavy-lift charges for cargoes up to and including nine tons moving to the ports presently served by container and ro/ro vessels. This reduction will apply to cargo carried on breakbulk and LASH vessels as well as to cargo carried on containerized and ro/ro vessels. If this proposal is implemented the Conference will in effect be passing onto all shippers of heavy-lift cargoes cost savings which have occurred as a result of the advent of containerized and ro/ro vessels to Conference service. Furthermore, since the majority of all heavy-lift cargoes are actually carried on breakbulk and LASH vessels, the application of a partial reduction to all heavy-lift shippers will probably result in a greater overall benefit to the shipping public than would even a full reduction applied only to container and ro/ro traffic.

The reasons for the tonnage and port limitations in the proposed rule are several. The nine-ton limitation is based upon the fact that all heavy-lift cargoes carried within containers are under nine tons and not all breakbulk vessels have gear for handling cargoes over nine tons. The five ports are the only ones at which containerized and ro/ro vessels generally call.

The Commission's Order stated that the assessment of heavy-lift charges on house-to-house containerized cargoes might be improper "where the carrier is not required to handle the cargo separately" or because "no services are performed". However, the record shows that there are some additional costs and services attributable to the handling of heavy-lift cargo even if such cargo moves within containers. Apparently, the advent of new containerized technology does not necessarily result in the total elimination of all extra costs attributable to the handling of heavy-lift cargoes. This does not mean that there are not substantial cost reductions nonetheless resulting from utilization of advanced technology nor that a 50 percent reduction exactly matches the savings in costs attributable to containerization. However, this proceeding is concerned not with individual carrier but with Conference rate making where different considerations come into play.

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[10] Hearing Counsel recommends that the Offer of Compromise be accepted and that the motion to discontinue be granted.

The reduction of thirty-five percent for roadbuilding machinery and tractors also offers substantial benefits to the shipping public since it applies to traffic carried on breakbulk and LASH vessels as well as that carried on ro/ro vessels. This extension of the reduction beyond ro/ro vessels is especially significant since the majority of roadbuilding machinery and tractors actually move via breakbulk ships and the ro/ro capacity in the trade which is offered by only one Conference member, American Export Lines, has been substantially reduced.

The application of this reduction to roadbuilding machinery and tractors is based upon the fact that this is the type of traffic subject to heavy-lift charges which in fact most frequently moves via ro/ro vessels and which is most suited to this type of handling.

The Commission's Order expressed concern over the possibility that the assessment of a heavy-lift or equivalent type charge on any cargo predicated on the conventional costs of breakbulk operators might be improper since a ro/ro operation does not involve mechanical lifting by special vessel rigging or shoreside crane. Hence, maintenance of a full heavy-lift level of assessment without regard to the cost savings inherent in a ro/ro operation would be of doubtful propriety.

In raising this issue the Commission may have assumed that the Conference had been assessing a heavy-lift equivalent charge on what in fact constituted a full-scale ro/ro operation. It now appears that the service offered by the only Conference member operating ro/ro vessels is in fact not fully ro/ro since only three ports (Norfolk, Baltimore, and Genoa) have suitable facilities permitting cargo to be rolled on or off. At New York, Boston, Philadelphia and all Mediterranean ports except Genoa such cargo is handled with traditional gear. A complete ro/ro service would exist therefore only from Norfolk to Genoa and from Baltimore to Genoa.

As in the case of the other Conference proposal, the 35 percent reduction does not appear to be based upon a precise individual carrier's cost study but rather reflects the Conference consideration of the advent of the new technology into overall Conference operations as well as competitive factors. Furthermore, considering the fact that the so-called ro/ro service for most ports served is actually a partial service and that Conference rate making is based upon a number of factors besides costs, the importance of a fully developed individual carrier's cost study is significantly reduced.

The Commission expressed a desire for the investigation to determine appropriate amelioratory action. Although reduction of heavy-lift charges solely in reliance on one carrier's fully developed cost experience might have constituted one approach to amelioration, the

Conference's proposal which considers factors other than merely costs is an acceptable alternative.

DISCUSSION

The Commission has long recognized that a conference is an association of carriers having divergent interests but who nevertheless attempt to reconcile them for the sake of maintaining stability. See, e.g. *Agreement No. 150–21, Trans-Pacific Freight Conference of Japan*, 9 F.M.C. 355, 370 (1966); *Atlantic & Gulf/West Coast of South America Conference Agreement No. 2744 et al.*, 13 F.M.C. 121, 126, 127 (1969). We may generally agree to the concept that Conference rate making is based upon a number of factors in addition to costs, among which competition is of great significance. *Investigation of Ocean Rate Structures*, 12 F.M.C. 34, 36, 37 (1968) (Initial Decision of Examiner E. Robert Seaver, *served January 31, 1968* DKT 65—45).

Were we to proceed on the rigid basis that every carrier's rates should be geared only to its own costs, a conference system might be impossible. It is probable that for the sake of certain benefits in terms of frequency of service and stability of rates shippers may be paying higher rates than those which would exist if rate competition based upon individual carrier's costs were to prevail.

Carriers of many countries with widely varying costs band together in a conference to offer uniform rates which are set, not on the basis of one carrier's cost, but as an average of all. The legislative history of the Shipping Act makes this clear:

> No extended discussion is needed of the fact that the operating and capital costs of American-flag ocean common carriers are considerably higher than those of any other nation. Since most carriers cannot operate as cheaply as some competitor which possesses national cost advantages, the conference affords a device whereby all carriers working as a group, set rates at a point where such an advantage is not absolutely controlling. *Steamship Conferences*, S. Rept. No. 860, 87th Cong., 1st Sess., 5 (1961).

Inherent in this Offer of Compromise is the desire of the members of the Conference to maintain uniform heavy-lift charges within the Conference. In orer to avoid litigation and to maintain these uniform rates the Conference members are apparently willing to compromise on the matter of their heavy-lift expenses and offer certain rate reductions to all shippers. This compromise shoud have the same, or a greater, effect as a larger reduction in heavy-lift charges applied to only ro/ro and container traffic. Thus, though the Offer may be merely a compromise designed to accommodate the desires of the Conference members, it not only serves the needs of the Conference but it also bestows immediate benefits on all heavy-lift shippers in the trade beyond the scope of the Order of Investigation.

The Offer of Compromise is admittedly not an exact procedure calculated to pass on to ro/ro and container shippers the precise savings inherent in the carriage of heavy-lift cargoes on these new types of vessels. However, ro/ro and container shippers will be benefiting from the innovations present in these services as their heavy-lift charges will be reduced. In addition, all other Conference shippers will share in the benefits of the new technology as all heavy-lift charges for cargoes nine tons and under will be reduced. This will, of course, not take any other advantages, such as faster service, reduced cargo damage, etc., away from the shippers utilizing the ro/ro and container vessels. Thus, the Offer should not discourage innovations within the trade or hinder the flow of cargo to ro/ro and container carriers.[11]

Adoption by the Conference of the proposed rules indicate that benefits which would immediately redound to shippers are:

(1) Significant immediate reduction in heavy-lift charges;

(2) Continued options for shippers of heavy-lift cargoes to use the variety of services offered by Conference members at uniform (and therefore predictable) rates;

(3) Maintenance of rate stability in the trade and avoidance of a possible debilitating rate war such as is alleged to have plagued other trades, notably the North Atlantic/Northern European trades.

(4) Preservation of the integrity of the Conference.

Conclusions

For all of the foregoing reasons, the Conference's Offer, while admittedly a compromise, is responsive to the Commission's expressed desire for amelioratory action. The Offer is accepted and the Motion to Discontinue is granted conditioned upon implementation of the Offer.

[11] Furthermore, the volume of heavy-lift cargoes moving in the trade for most carriers is relatively small and in the case of containerized operators is miniscule. Consequently it would be difficult to argue that containerized operators would be discouraged from entering the trade unless they would enjoy a rate advantage with regard to heavy-lift cargoes.

DISCONTINUANCE OF PROCEEDING

January 16, 1973

Respondent has now satisfactorily complied with conditions as set forth at page 68 *supra*.

Accordingly, it is ordered that proceedings in this matter are hereby discontinued.

S/ Francis C. Hurney,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 71–97

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION—ALVAREZ SHIPPING CO., INC.

Applicant, because of unlicensed forwarding operations in violation of section 44, found not fit to properly carry on the business of forwarding and its application for license as an independent ocean freight forwarder denied.

Morris Honig for Respondent.
Donald J. Brunner and *Stephen Rudman* as Hearing Counsel.

REPORT

January 9, 1973

BY THE COMMISSION: (Helen Delich Bentley, Chairman; Ashton C. Barrett and James V. Day, Commissioners.)

This proceeding is before us upon the exceptions of hearing Counsel to the Initial Decision of the Administrative Law Judge, wherein Alvarez Shipping Co., Inc. (Respondent) was granted a license as an independent ocean freight forwarder. The Commission's Order of Investigation and Hearing in this proceeding, served December 23, 1971, was issued to determine whether, in view of its past activities, Respondent is fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of section 44 of the Shipping Act, 1916 (the Act) (46 U.S.C. 841(b)), within the meaning of that statute; and whether its application should be granted or denied.

The Commission's Order states that Respondent "had engaged in at least 142 instances of illegal freight forwarding" during the period from approximately December 1, 1969 through March 22, 1971, without having obtained an independent ocean freight forwarder license, in apparent violation of section 44(a) of the Act. There is no dispute that the Respondent engaged in the business of forwarding without a license over a substantial period of time beginning approximately December 1, 1969.

Section 44 provides that a person desiring to engage in the business of forwarding must first secure a license from the Commission. The Commission, in turn, must issue the license if the applicant is "fit, willing, and able to carry on the business of forwarding and to conform to the provisions of the Act and the rules and regulations of the Commission issued thereunder." Operation without a license constitutes a violation of section 44.

Respondent, a New York corporation, was organized in 1966. It engages in local and interstate moving, but its principal activity is overseas shipment of household goods and privately owned automobiles. Respondent took over, in 1966, the moving and shipping business which had been operated by Alvarez as an individual since 1953, serving almost exclusively Spanish-speaking residents of New York City and nearby states. About 70 to 75 percent of Respondent's income is derived from NVOCC movements between the United States and Puerto Rico under a tariff filed with this Commission, and consists almost exclusively of household furnishings and privately owned automobiles of persons returning to Puerto Rico after a period of residence in the United States. The balance of Respondent's overseas business consists of shipments of the same kind of goods but in which Respondent acts as freight forwarder. These are for the most part to Santo Domingo, but include, to a lesser extent, shipments to Mexico, Panama, Central and South America. Respondent carries on its interstate shipments under a certificate from the Interstate Commerce Commission.

On January 28, 1971, the Commission's staff wrote to counsel for Alvarez informing him that it appeared that Respondent was operating as an unlicensed freight forwarder. A copy of the letter was dispatched to Alvarez cautioning him to cease all forwarding activities until he had obtained a license. On March 18, 1971, Respondent filed its license application. By letter dated March 31, 1971, receipt of the application was acknowledged by the Commission's staff and Respondent was informed that if it engaged in forwarding before receiving a license, it would be subject to penalties provided by law. By certified letter of October 27, 1971, Respondent and its president and principal stockholder, Jose Alvarez (Alvarez), were notified of the intention of the Commission to deny the application. Respondent by return letter, asked for the opportunity at a hearing to show that the intended denial of its application was unwarranted. Hearing was held in New York City on March 21, 1972.

Although, as indicated, Alvarez was warned in January and March 1971 that his engaging in the freight forwarding business without a license was contrary to the law and that his continuing to so engage would jeopardize his obtaining a freight forwarder's license; he nonetheless continued to accept a limited number of shipments with regard to which he acted as freight forwarder until January 1972. Alvarez readily admitted these actions, stating that the shipments were forwarded for customers storing goods in his warehouse or for friends of those customers.

On the basis of the foregoing facts, the Administrative Law Judge found that the application should be granted, adding an admonition that Respondent carefully assess its responsibilities as a licensed forwarder to insure full compliance with the Act and Commission regulations. The decision is based upon the Administrative Law Judge's belief that, while Alvarez's conduct may not be overlooked or excused, his violation of the Act may, from a practical point of view, be considered as somewhat technical in nature.

Judge Bryant cited various reasons to support his findings:

1. Respondent's president appears to be an honest, hard-working businessman who is attempting to serve the special transportation needs of a mostly Spanish-speaking minority.

2. Respondent has filed an NVOCC tariff with this Commission and is licensed by the Interstate Commerce Commission, but did not realize that it was required to obtain a freight forwarder's license until notified by the Commission's staff in January 1971.

3. Respondent made no attempt to collect brokerage from the carriers with whom it placed its illegally forwarded shipments, nor is there any evidence of improper dealing or unconscionable profit.

4. With regard to the forwarding activities conducted *after* Respondent was informed of the illegality of its acts, they were somewhat technical in nature and should not serve as a "death sentence" on Alvarez's future business as a freight forwarder.

On exceptions, Hearing Counsel contend that the Administrative Law Judged erred in concluding that Respondent's willful and knowing violations of the Act were "technical in nature" and thus did not bear on Respondent's fitness to engage in the business of ocean freight forwarding.

Hearing Counsel distinguish this proceeding from earlier Commission decisions where applications were granted even though the applicant had engaged in illegal forwarding activities.* The present proceeding involves an applicant who continued its illegal operations after being notified of their illegality on two occasions and whose illegal forwarding was neither limited as to number of shipments nor as to period

***Independent Ocean Freight Forwarder License Application—Fabio A. Duis,* Docket No. 71-91 (*15 F.M.C. 242*), served June 6, 1972, wherein applicant knowingly made illegal shipments, but ceased when warned not to continue. *Independent Ocean Freight Forwarder License Application—L.T.O. Air Cargo, Inc.,* 13 F.M.C. 267 (1970), wherein applicant forwarded shipments knowing that such action was illegal, but the forwarding was limited to two shipments.

of time. Hearing Counsel contend that a denial of the application now would not be a "death sentence", but that Commission could deny with leave to reapply after a certain amount of time.

Respondent contends in its reply that the only shipments forwarded after it became aware of the illegality of its activities involved goods in its warehouse which it felt compelled to complete as part of its overall obligation to its customers. Respondent further contends that the Administrative Law Judge correctly found that Respondent was presently "fit, willing and able" to conduce the business of an independent ocean freight forwarder in the manner prescribed by law, and that the license should be granted.

We do not agree with the finding of the Administrative Law Judge that Respondent was fit to be licensed as an independent ocean freight forwarder.

We have no dispute with the facts as presented in the Initial Decision. However, the conclusions drawn therefrom cannot be reconciled with these facts. We can accept Respondent's explanation for the numerous instances of illegal forwarding between approximately December 1, 1969 and January 28, 1971, as being unculpable, inasmuch as it appeared to be unaware of the Commission's licensing requirement. This is not to say, however, that we find the illegal activities excusable. However, on January 28, 1971, and again on March 31, 1971, Respondent was cautioned about the illegal activities in which it was then engaging. Respondent nonetheless *continued* to illegally forward shipments until approximately January 30, 1972. We cannot accept Respondent's explanation for these later illegal forwarding activities. No business obligation that Respondent felt it owed to its clients or their friends, by virtue of its warehousing activities, warrants an obvious disregard for the provisions of the law governing freight forwarders. Respondent cannot now contend that it is ready to abide by the Commission's rules when it has twice chosen to violate them.

We concur with Hearing Counsel in their distinctions drawn between the *Ruiz* and *L.T.C. Cargo* cases and this proceeding. Clearly, Respondent's violations cover a much greater period of time and a greater number of instances.

The Commission has an obligation to maintain and preserve the integrity of the freight forwarding industry. This proceeding clearly offers the Commission the opportunity to fulfill that obligation. We must, therefore, conclude that Respondent's application for a license as an independent ocean freight forwarder be denied.

Commissioner Clarence Morse, dissenting, with whom Vice Chairman George H. Hearn joins.

I dissent. I think the severity of the punishment (denial of a license) far exceeds the severity of the offense. Here is an applicant who, in all respects other than operating without a license, is a person providing a needed and satisfactory service to its customers. No one has been damaged by applicant's misconduct. There is here no actual wrongdoing in that a customer was overcharged or falsely charged or the services were incompetently performed. Applicant is not an evil doer, a criminal. I do not condone applicant's failure to obtain a license. I do assert that applicant has already been adequately punished in that it has had to bear the expense and inconvenience of this proceeding and has been unable to conduct its forwarding activities while this proceeding has been pending. I would issue the license now.

The suggestion is made that:

> . . . a denial of the application now would not be a "death sentence", but that the Commission could deny with leave to reapply after a certain amount of time.

I give scant weight to such a suggestion for two reasons: one being that the staff and the Commission will tend to consider applicant as suspect by virtue of the denial herein directed. As the old phrase goes—"once bitten, twice shy." Secondly, I am unaware of any reasons why, after a delay of one month, six months, one year, or even ten years, in which period applicant will not have been permitted to perform freight forwarder activities, applicant will be, or will be able to establish itself to be, any more fit, willing, or able properly to carry on the business of ocean freight forwarding than it is today. How does enforced nonperformance establish improved fitness or willingness?

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–97

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION—ALVAREZ SHIPPING CO., INC.

ORDER

The Commission having fully considered the above matters and having this date made and entered of record a Report containing its conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That the application for license of Alvarez Shipping Co., Inc. is hereby denied pursuant to section 44, Shipping Act, 1916.

By the Commission.

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

FEDERAL MARITIME COMMISSION

DOCKET NOS. 71–46 AND 71–67

JOHNSON & JOHNSON INTERNATIONAL

v.

VENEZUELAN LINES

ADOPTION OF INITIAL DECISION

January 29, 1973

This joint proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge Ashbrook P. Bryant served October 3, 1972, in which the administrative Law Judge concluded that claimant had not proved that something other than that which was described on the bill of lading was actually shipped, and thus had failed to establish any basis for a grant of relief.

On exception, the claimant argues that the Administrative Law Judge has cast upon the claimant the burden of proving "beyond reasonable doubt" that the articles shipped were not surgical dressings, and in so doing has misconstrued the tariff. Claimant also argues that by so doing the Administrative Law Judge has, by his decision, made it virtually impossible for a shipper ever to prove an overcharge for which reparation could be granted. Claimant takes issue with the Administrative Law Judge's decision that manufacturing can change the characteristics of a product for rating purposes. To support this point, claimant cites the Board's rejection of the "possible use test" set forth in *Misclassification and Misbilling of Glass Articles*, 6 FMB 153, 159 (1960):

> Possible use does not change the essential character of the article and is not a lawful basis for a difference in freight rates.

Claimant also reiterates its arguments that the carrier has the responsibility to properly limit its tariff classification, and urges that respondent has not so done, and that it is patent error for the Administrative Law Judge to now find some sort of limitation in the description "Gauze Viz. Surgical" so as not to include a product marketed as sponges. Further, says claimant, the Administrative Law Judge does not find that the articles in question were not surgical gauze, and the respondent, on page 47 of the transcript, admits that it is.

Claimant proffers several other allegations of error. It argues the Administrative Law Judge erred by "casting upon the claimant the burden of proving beyond reasonable doubt that an improper rate had been charged and collected." Further, claimant says that the Administrative Law Judge stated, on page 9 of his Initial Decision, that "all reasonable doubt should be resolved in the carrier's favor." Claimant calls these novel conclusions, and states that this exceeds the standard "heavy burden of proof" normally placed on claimants and also changes the settled rule of tariff construction that tariff ambiguities are to be resolved against the tariff framer.

Lastly, claimant attempts to rebut the several descriptions it has applied to the cargo in its attempts to seek lower rates as only proving that "shippers are seldom experts in tariff construction and . . . they can be confused."

The claimant argues that the only question before the Commission is whether it is reasonable to include the articles in question in the carrier's tariff description for "Gauze Viz. Surgical".

Finally, claimant requests oral argument.

We do not feel that anything can be elicited at oral argument that would change the Administrative Law Judge's initial findings. The essential question in this case is whether the claimant has established that something other than that which was described on the bill of lading was actually shipped. It is obvious that claimant, through its multiple changes in nomenclature and description of the commodities in question has attempted, after the fact, to locate a lower rate deeming that rate now applicable.

We note that the Administrative Law Judge in his Initial Decision makes the statement "where it has been established *beyond reasonable doubt* that . . . an improper rate has been charged and collected the carrier . . . must make reparation . . . ." We wish to make clear that the test is not so stringent as to require proof "beyond a reasonable doubt". Rather, the proper test we have required is for the claimant to sustain a "heavy burden of proof". *Ocean Freight Consultants, Inc.* v. *Italpacific Line*, Docket No. 71-81 served June 20, 1972 (15 F.M.C. 312).

Although the language in the Initial Decision may appear misleading, a review of the record and the Initial Decision does not convince us that the Administrative Law Judge placed a greater "burden of proof" on claimant to establish its case than that set forth above. We, therefore, find no basis for support of claimant's contentions to that end, or further, that respondent admitted that the commodities in question were other than that which they were described on the bill of lading and accordingly rated.

In short, claimant has failed to sustain its case. Accordingly, upon careful consideration of the record, the exceptions, and the replies thereto, we conclude that the Administrative Law Judge's factual findings and his conclusions with respect thereto were supported and correct. We therefore adopt the Initial Decision as our own and make it a part hereof.

By the Commission.

[SEAL] FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 71–46

JOHNSON & JOHNSON INTERNATIONAL

v.

VENEZUELAN LINES

No. 71–67

JOHNSON & JOHNSON INTERNATIONAL

v.

VENEZUELAN LINES

Complaint should be dismissed.

William Levenstein for complainant.
John Lamb, Jr., for respondent.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

This matter arose on two complaints filed by Johnson & Johnson International against Venezuelan Lines, originally served on April 29, 1971 (Docket 71–46) and June 2, 1971 (Docket 71–67), seeking reparation in a combined total sum of $3,945.20 and other appropriate relief. The shortened procedure provided by Rule 11 of the Commission's Rules of Practice and Procedure [Subpart K–46 CFR 502.181–187] was requested. Respondent answered agreeing to the shortened procedure, but denying that overcharge had occurred or that reparation or other relief was justified. The Presiding Administrative Law Judge (then Examiner) decided that the record made by the parties did not provide an adequate basis for making the technical and tariff determinations necessary to decide the matter and directed that an oral hearing be held.[2]

[1] This decision became the decision of the Commission January 29, 1973.
[2] Tr. p. 3; also, Notice of Hearing, April 18, 1972.

Amended complaints were filed in both actions (Docket 71–46 served May 31, 1972 and Docket 71–67 June 6, 1972) seeking reparation in the combined total sum of $2,839.45 plus 6 percent interest and other appropriate relief. In each case respondent answered and requested dismissal of the amended complaint. As the issues in both cases were virtually identical, the complaints were heard together in the same proceeding on July 26, 1972. It was agreed between the parties and ordered by the Presiding Administrative Law Judge that the evidence presented under the initial procedure be ignored and that the matter be decided on the basis of the evidence and exhibits produced at the oral hearing.[3]

FACTS

The shipment in Docket 71–46 moved under bill of lading dated February 27, 1970, and was described as "2185 Ctns. Surgical Dressings" and in Docket 71–67 the shipment moved under bill of lading dated March 27, 1970 and was described thereon as "787 Ctns. Surgical Dressings" weighing 10,096 pounds. In each instance the bill of lading was prepared and the commodity description viz. "Surgical Dressing," was provided by claimant or by his freight forwarder. Both shipments were via *Cd. De Barquisimeto* from New York, New York to La Guaira, Venezuela. Freight was assessed by respondent and paid by complainant at the Class 1 rate of $86 per 40 cubic feet provided in 1st Revised Page 89 of United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff F.M.C. No. 2 for "Dressings, viz. Surgical N.O.S." in the sums of $8,514 and $3,603.40 respectively—a total of $12,117.40.[4]

Claimant now alleges that in addition to articles properly rated as class 1, the shipment in Docket 71–46 included 299.7 cubic feet of Ray-Tec Sponges (J & J Code 7438), 329.1 cubic feet of Ray-Tec Sponges (J & J Code 7404), 282 cubic feet of Lap Sponges (J & J Code 7442), 324.9 cubic feet of Gauze Sponges (J & J Code 2318), 283.5 cubic feet of Gauze Sponges (J & J Code 7624) and 786 cubic feet of Topper Sponges (J & J Code 2436) and that the shipment in Docket 71–67 included besides articles correctly classified at class 1, 621 cubic feet of Gauze Sponges (J & J Code 2317), 331.5 cubic feet of Gauze Sponges (J & J Code 2319), and 185 cubic feet of Ray-Tee Sponges

[3] Tr. ps. 8–10.

[4] Later respondent sought to have the class 7 rate applied. On March 15, 1971 respondent denied the claims on the ground that the items in question had been properly classified as dressings and "recommended" that to avoid similar problems in the future claimant present to the conference "a list of the items shipped by Johnson & Johnson regularly and endeavor to work out classifications and rates which will be mutually satisfactory."

(J & J Code 7438). The complaints allege that these specified articles are properly chargeable at the class 7 rate of $53 per 40 cubic feet on the basis of the classification for Gauze, viz: Surgical in 1st Revised page 96 of the tariff.

The testimony showed that above articles may be divided into three general groups, i.e., Gauze Sponges, Ray-Tec Sponges and Topper Sponges. Gauze Sponges (Codes 2317, 2318, 2319 and 7624) are simply gauze folded into a number of plies. They range between 8 and 16 ply "meaning just the number of thicknesses." They are used in surgical operations to absorb blood. That is why they are called sponges. They come in two basic types. One "patient ready" sterile and one not sterile. They all are cut and folded by machine from 20′ x 12′ mesh gauze. The difference between the sponges identified by different code numbers are in (1) size, (2) number of plies, (3) packaging and (4) whether sterile or unsterilized.

The articles designated Ray-Tec Sponges (Code 7438, 7404, and 7442) are gauze sponges in which during the cutting, folding and packaging process a blue barium sulfate coated cotton thread or monofilament is woven into the sponge, making it X-ray detectable. The addition of the blue thread is highly functional as it enables the sponge to be located by X-ray in the event it is left in a wound after an operation.

Topper Sponges have three layers; the outer cover a soft non-woven gauze; the middle a viscose filament of long staple cotton and the inner layer cellulose. A non-woven fabric is the same material as gauze but has two layers of threads laminated together rather than woven as is gauze. The main advantage is that non-woven fabric has more absorbency—one sponge absorbs more blood. Also, Topper Sponges cost about 33% less than equivalent gauze sponges and are used in almost all sponging, cleaning and dressing functions where all-gauze sponges were formerly employed.

All of these sponges are made in exactly the same way. Rolls of material are fed into one end of a machine which cuts, folds, inserts, stitches and packages the sponges, and the same process is used for all gauze products regardless of size. Even 100 yard gauze rolls are cut and packaged by the same sort of machine. However, each of the articles is processed by claimant for a specific purpose which is effectuated by the manufacturing process.

The articles in question have been variously described by claimant at different stages of this proceeding and the negotiations which preceded it. The items covered by Docket 71–46 were first described by claimant in the bill of lading (February 27, 1970) as "Surgical Dressings;" Johnson & Johnson's refund claim to Venezuelan Line (September 11, 1970) and its original complaint to the Commission stated that the article in question should have been described as "gauze bandages." The amended complaint (May 30, 1972) asserts that the correct description should have been "gauze *viz* Surgical."

The articles in 71–67 were described by claimant in bill of lading (March 27, 1970) as "Surgical Dressings." Freight refund claim on 8/18/70 asserted that the bill of lading description for those articles described as "Surgical Combine Dressings" and "Band-Aid Brand Surgical Dressings" should have been "Rolls, Surgical Dressings (absorbent cotton and absorbent cellulose combined)." Amended freight claim of 9/11/70 and original complaint filed with the Commission 7/2/72 claimed proper description of all articles should have been "gauze bandages." Amended complaint filed June 5, 1972, claimed the proper description should have been "Gauze viz. Surgical."

At the time of the shipments here involved the United States Atlantic Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff FMC No. 2 shows the following classifications to have been in effect:

Dressings, viz.: Surgical, N.O.S.
Class 1 (1st Rev. page 89)
Gauze, viz.: Surgical
Class 7 (1st Rev. Page 96)

Discussion

The physical description of the items of merchandise here involved is not in doubt. Examples of all such items were received in evidence without objection and they were described in detail by the witnesses. The dispute concerns the tariff category in which these items should properly be included. The essential question is whether the cutting, shaping, folding, packaging, sterilizing and (in the cases of Ray-Tec and Topper Sponges, the addition of other material, concededly for functional purposes) so changes the character of the end products that they can no longer be considered to be simply surgical gauze but are, in fact, surgical dressings. This question is not entirely free from doubt, but on the basis of the whole record the complainant has not sustained the burden to show by clear and convincing evidence that the various kinds of gauze sponges here involved may properly be classified as surgical gauze. Indeed, the evidence appears to establish that claimant was correct in its original description of these items as surgical dressings.

Claimant asserts that while there are some physical and functional differences among them, the end products involved are all essentially gauze sponges used in operative procedures and should properly have been described and rated as surgical gauze. Even though some contain other material, the principal component of each is gauze and all are manufactured by similar processes on virtually identical machines for virtually identical functional purposes. Despite differences in "catalogue" designations each of these items is a variety of gauze sponge designed for use in connection with surgical procedures. Claimant concludes that in the case of those items designated simply as "gauze sponges" and made entirely of gauze, there can be no dispute as to the correctness of describing them as surgical gauze. It further contends that the addition of "minor" material elements in the course of manufacture of Ray-Tec and Topper sponges "does not and should not change the essential character of the article from surgical gauze to something else." These additional elements are "not sold or shipped separately from the gauze sponges . . . but are a minute part of the entire sponge." These elements are "specially made for use with and are components of the gauze sponges in which they appear." The complete articles are designed and used for one purpose—sponges to assist in surgical procedures. Claimant also points out that the governing classification, "i.e., gauze viz. Surgical," in the tariff "does not differentiate between the various kinds of surgical gauze." On a "reasonable interpretation" of the tariff, according to claimant, the questioned articles are covered by the tariff description "Gauze viz. Surgical." Claimant also asserts that if there is any doubt as to what is covered by that description, the tariff should have been clarified by the carrier. Failing that, the words of the tariff should be construed against the carrier and, according to claimant, require the interpretation here put forward.

Respondent's position in essence is that in the manufacturing process functional items are produced which are in fact "surgical dressings." The process by which the basic material loses the characteristics of "surgical gauze" and becomes surgical dressings in the preparatory process appears from the testimony of respondent's witness. (Tr. ps. 47–50).

'. . . the [dictionary] meaning of gauze . . . [is], any light transparent woven material.' You take any light transparent woven material and further manufacture it, you cut it, you fold it, you sterilize it, you package it, you are doing that for a certain purpose. What is that purpose? To save the time and money and expense of the party that is going to use that product. They are willing to pay you for it because they feel it costs them less to take a product that has been manufactured for their own convenience.

They could buy the gauze and make these things themselves, but then that means cutting and these various operations in making these products and then the sterilization process and this and that and the other. They apparently prefer not to do that. They want the product ready-made and properly packed and so on and so forth.

So I would say that if the material is originally surgical gauze, prior to that it was what we call unbleached gauze and it was further manufactured by Johnson and Johnson to make it surgical gauze when they bleached it. It is a simple operation but they changed it. Then they further changed that by cutting and packing and sterilizing and so forth, so the fact that these things were put into the catalogue specifically at the request of Johnson & Johnson indicated that at that time they knew what they were shipping. . . .

Now time elapses and someone comes on and say, oh, no we have been wrong all of this time. We weren't shipping the items in accordance with the catalogue, we have something else.

Then you say no, that isn't so, this cannot be regarded as surgical dressing with cellulose and cotton combined, and they say well, maybe you are right, it is gauze bandages.

Then [we] don't buy that, and they come along and say now, we weren't quite right on that, lets try surgical gauze, so what is the answer.

They should know what they are shipping. They have been manufacturing these commodities for years. . . .

* * * * * * *

EXAMINER BRYANT

. . . once having designated X as X, how would he get that changed?

THE WITNESS

He could go to the conference and file a request of the conference and say . . . we don't think this is such and such and . . . and we ask you to go into this matter and amend the tariff declaration.

* * * * * * *

EXAMINER BRYANT

So I gather that the procedure is that if at some point even though the product hasn't changed [if] in the opinion of the shipper either he has made a mistake or for some other reason there ought to be a change in the classification which will entitle him to . . . a lesser freight rate . . . what he should do is make application to the conference, is that it?

THE WITNESS

Yes.

EXAMINER BRYANT

You don't go to the carrier but go to the conference?

THE WITNESS

Yes.

It is, of course, true that a shipper is not bound to pay the charges in the bill of lading without recourse, simply because they are based on a description provided by the shipper, whether or not that description is erroneous. In *Western Publishing Co., Inc.* v. *Hapag Lloyd A. G.*, Docket No. 283(I), served April 4, 1972 (not published in F.M.C Reports), the Commission squarely negated the notion—if such existed—

that once having described the consist of a shipment in a bill of lading prepared by him or on his behalf, a shipper is forever bound by that description. There the Commission reasserted the principle that:

> . . . the description on the bill of lading should not be the single controlling factor. Rather, the test is what claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.

This principle is a necessary derivative from section 18(b)(3 of the Act which provides that no carrier or conference in the foreign commerce of the United States "shall charge or demand or collect or receive a greater or less or different compensation" than that specified in the appropriate tariff filed with the Commission.

Even the fact that an erroneous description of the goods actually shipped in effect induced the carrier's violation of the Act can not vary the express words of the statute. Where it has been established beyond reasonable doubt that, whatever the cause, an improper rate has been charged and collected, the carrier has violated the Act and must make reparation in an appropriate case. However, it is also 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 of the Act is clear and convincing and the liability of the carrier is free from reasonable doubt—especially where the goods in question have left the carrier's custody and control.

In this case, as noted above, there is no dispute as to the physical description of the goods shipped. It is nonetheless incumbent on claimant to establish his claim by clear and convincing evidence. Claimant now seeks to change its own interpretation of the tariff in its own favor and to the detriment of respondent carrier long after transit is complete and the goods have come to rest in the hands of the consignee. Fairness and equity would seem to require that in circumstances such as these all reasonable doubt should be resolved in the carrier's favor. In this case, after all the evidence is weighed there remains at least reasonable doubt, if not certainty, that the products in question may not rationally be considered surgical gauze, but are, indeed, surgical dressings as respondent contends.

Claimant is correct in his contention that the fact of its resting its claim on different bases at different times is not determinative of the issues herein. As above stated, the inquiry is simply (1) what was actually shipped and (2) what was the proper freight compensation due the carrier under the tariff. However, claimant has a substantial economic motive to establish that the original description and classification were made by it in error, and that it is entitled to the lower rate.

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 single controlling factor.

Complainant's present position verges on an assertion that no matter how or to what extent gauze may be cut, folded, packaged, sometimes sterilized or whether it may contain a blue X-ray detectable monofilament or layers of viscose and cellulose may be added, the material, for rating purposes, still retains its characteristics as surgical gauze. This interpretation seems to stretch the realities beyond permissible bounds.

Claimant places reliance for its present position on the fact that the tariff was prepared by or on behalf of the carrier and, hence, should be construed strictly against it. In this connection claimant points out that the description "gauze viz.: Surgical" in the tariff is not qualified or limited as to size, color, shape, degree of manufacture, packaging or quality, and argues that if the carrier had intended to except any specific kind of surgical gauze from the description it had a responsibility to say so in the tariff. Claimant does not differentiate among the "gauze sponges" involved and asserts that "by nature, use, character and manufacture" they are all the same.

On the other hand, respondent asserts that the distinction between "gauze" and the end products manufactured from it are clearly recognized in the tariff and that the distinction between gauze which has not been processed into sponges and that which has been so processed is the type of distinction which must "form the foundation of [any] rational view" of tariff interpretation. Respondent adds that over a substantial period these distinctions have been recognized and acted upon by claimant and points out that there are many instances where processing alone justifies rate distinctions between products made of the same material. It cites several examples from the tariff here involved of instances where such is the case. In these instances, as in the case of gauze sponges, no other material has been added to change the nature of the article shipped. Respondent concludes that the rational interpretation of the tariff—which has been followed by respondent over a period of time—establishes that the end products emerging from the manufacturing process are not "gauze" but are intended to be and are used as surgical dressings.

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. Indeed, it would appear from the record that there is a functional difference between gauze as such and the sponges which are manufactured to be used as surgical dressings. In any event, where a mistake in description or classification is asserted as the grounds for a finding that section 18(b)(3) of the Act has been violated by the carrier as the basis for a reparation award, the party who originally provides the commodity description now claimed to be in error (in this case the shipper) has a heavy burden to establish the requisite factual basis for his claim. Complainant has failed to sustain that burden.

Both complaints should be dismissed.

(Signed) ASHBROOK P. BRYANT,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-18

MATSON NAVIGATION COMPANY—GENERAL INCREASE IN RATES IN THE U.S. PACIFIC/HAWAIIAN TRADE

Increased rates and charges of Matson Navigation Company in the U.S. Pacific/Hawaiian trade are found not to be unjust, unreasonable or otherwise unlawful under section 18(a) of the Shipping Act, 1916, and/or sections 3 and 4 of the Intercoastal Shipping Act, 1933.

APPEARANCES: (Same as in the Administrative Law Judge's initial decision.)

Decided January 29, 1973

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; George H. Hearn, *Vice Chairman*; Ashton C. Barrett, James V. Day, Clarence Morse, *Commissioners*)

We instituted this proceeding to determine whether the proposed increased rates and charges of 12½ percent filed by Matson Navigation Company (Matson) were unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916, and/or sections 3 and 4 of the Intercoastal Shipping Act, 1933.

Hearing was held before Administrative Law Judge Stanley M. Levy,[1] who thereafter issued his initial decision. He concluded, *inter alia*, that the rates under investigation are not unjust or unreasonable or otherwise unlawful except to the extent that westbound general cargo is increased more than 11 percent. Matson, the State of Hawaii (hereinafter "the State"),

[1] Presiding Examiner at the time of issuance of the initial decision.

Sears, Roebuck and Company (hereinafter "Sears"), and the Pineapple Growers Association of Hawaii (hereinafter "PGA"), Lewers & Cooke, Inc.[2] and Hearing Counsel filed exceptions to his decision. Oral argument has been heard by the Commission. Upon consideration of the record and the contentions of the parties, we find ourselves in agreement with the initial decision with the exception to the conclusion that the increased rates and charges should be limited to 11 percent. We conclude that the Matson proposed increases of 12½ percent are not unjust or unreasonable or otherwise unlawful.

The positions of the parties and the facts pertinent thereto are set forth in detail in the initial decision and will be repeated only to the extent necessary for clarity of discussion. The exceptions, for the most part, of the State[3] and Sears[4] are merely a restatement of their arguments and contentions presented during the hearing and on brief. On the other hand, it is apparent that Matson and Hearing Counsel would have supported the initial decision in all respects had not the Administrative Law Judge determined to reduce the proposed increases from 12½ percent to 11 percent. PGA generally excepts to the suggestion that the rates on eastbound general cargo should be increased 11 percent and the reasoning behind the suggestion.

The State develops, over a few pages in its exceptions, and again in oral argument, its views that Matson failed to sustain its burden of proving that the proposed rates were just and reasonable.[5] In reality it objects not to the issue of the standards involved, but rather to the decision on the merits. The State continues to argue, as it has from the beginning, that Matson's proposed increases should be denied because of inefficiencies, mismanagement and excess fleet capacity. The factual matter contained in the State's exceptions is generally in the same vein as that already in the record and treated in the initial decision. In our opinion, the Administrative Law Judge's approach to these contentions and to the evidence is both reasonable and meaningful, and provides a highly rational basis for decision in this case. Certainly, it cannot be contended with fairness that the Administrative Law Judge displayed a "carrier knows best" attitude in his treatment of those areas of disagreement with the

[2] Lewers & Cooke supports and adopts the exceptions of the State and Sears.

[3] *The State did not file a reply to the exceptions of other parties.*

[4] Sears reinforced its arguments relating to the application of the economic stabilization program by reference to recent regulations.

[5] Assuming that Matson had the burden of proof for the entire rate increase, including that portion of the increased rates not under suspension—(See, *The Commonwealth of Puerto Rico* v. *Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir. 1972)), Matson has demonstrated persuasively and with an abundance of evidence that the rates are justified.

State's position. A fair appraisal of the facts, particularly those depicting Matson's vessel capacity, scheduling practices, treatment of automobiles, crane productivity and port time, and utilization of terminal facilities, lead inevitably to a realization that the Administrative Law Judge gave them careful attention. Both Matson and Hearing Counsel, in particular, painstakingly have refuted each of the major contentions posed by the State. In large measure the replies by these parties rely mainly upon the review of the evidence contained in the initial decision. Accordingly, we find it necessary, as to these issues, to summarily discuss the fundamental disputes between the positions of the State and, to a degree, Sears—on the one hand, and the initial decision, Matson and Hearing Counsel—on the other hand.

The State directed its principal attack against the alleged operating inefficiencies of Matson claiming that without inefficiencies, mismanagement and an excess fleet capacity Matson would have a reasonable rate of return without having need of a rate increase or, at least, a lesser increase than proposed.

These topics reach into conflicting evidence and arguments covering Matson's operations regarding excess fleet capacity, scheduling, crane productivity, the treatment of automobiles as container demand cargo and bear upon Matson's management decisions in fleet implementation or replacement and operations.

As to fleet scheduling and vessel deployment, the Administrative Law Judge found that the record fails to support a claim that Matson improperly utilizes its vessels. The State argues that Matson should operate direct shuttle service between Oakland and Honolulu rather than triangular service between Oakland, Los Angeles, and Honolulu. The State contends that triangular service is inefficient and conceals idle capacity. The Administrative Law Judge, on the other hand, found that if cargo flow and ports generating cargo were strictly uniform, a shuttle might be possible; but since cargo flow and port generated cargoes are not even regular, it requires triangulation. We agree; and furthermore, the evidence reflects problems of possible congestion and shipper market disadvantages under the State's proposal.

The State also criticized Matson's crane productivity and length of time in port. After analyzing the conflicting claims, the Administrative Law Judge reasoned that an average of 28½ containers net per vessel hours (berth time) compares favorably with the State's estimated 35 containers per hour of actual crane operations since the balance of time is attributable to nonproductive crane work for other operations or purposes. He also reasoned correctly that port time must be determined on a carrier-by-carrier basis since factors of distance, fleet configuration, and availability of port facilities, among others, vary so greatly.

The State also claims mismanagement by Matson because of its decision in 1967 to build two new ships instead of one, arguing that the company is turning to the rate payers for relief because the decision was a mistake producing excess capacity. Matson presented evidence that utilization of container slots including the two new ships for all vessels of all carriers in the trade (for the constructive year 1971-72) would amount to 74 to 78 percent. Even though there might be a slight overcapacity, it would only be a temporary situation because at the expected rate of traffic growth (9 percent annually) the present fleet would be totally incapable of accommodating the demands of the trade by 1974. This Commission's experience is sufficient to demonstrate to it that if one waits until the demand is greater than the supply, both the cost of vessels and carriage historically have been subject to unusually large increases.

The Administrative Law Judge correctly observed that Matson's container fleet capacity, the relationship of capacity to expected demand, and the proper treatment of overcapacity in ratemaking are key issues in the proceeding. Such market or demand forecasting is a matter of applying judgment to known factors. The State introduced evidence and argued that Matson has provided excessive capacity relative to current and forecasted market demand. Matson contended that a capacity of 20 percent over probable demand would be necessary to maintain a reasonable level of service and reasonably satisfy peak demands (even 25 to 30 might be necessary to accommodate customer demands). The Administrative Law Judge observed that the precise amount of excess capacity to be made available is necessarily an economic judgment. He reasoned that even if one were to conclude that overtonnaging exists, the building of an extra ship would be merely a mistake of managerial judgment. He concluded that "Mistakes of judgment made in good faith are insufficient to come within the doctrine of imprudent investment which would require elimination of the investment from the rate base." That is not to say that more could not have been done by the management of Matson, or could not now be done, but on the present record he found, and we agree, that Matson has not demonstrated grave mismanagement, gross inefficiencies, serious inadequacies of service, or indifference to the public need. We agree with his observation that, "The record reflects a reasonably high standard and quality of service by Matson."

The major dispute and one that the State seems most concerned about is the handling of automobiles. The State contends that automobiles should not be considered as bona fide container cargo in measuring cargo demand against fleet capacity. Basically, the State objects to the inclusion of automobiles in determining a prudent level of fleet capacity because the revenues derived from such carriage are below the average revenue per container, and if automobiles were legitimate container cargo, then they should be charged at a higher rate in order to obtain a more reasonable revenue. One automobile carried in a container yields only $209 (there is also testimony that it yields $250), which falls below the average $597 per container for dry cargo. However, the revenue yielded falls between direct costs ($156 in 1970; $165 in 1971) and fully distributed costs found by the Administrative Law Judge to be approximately $400. We agree with the Administrative Law Judge that those automobiles that have to move in container slots are a legitimate factor in determining the overall container slot demand. Furthermore, even with the elimination of automobile carriage from container demand this would not result in establishing an excess capacity which would operate to burden the rate payers as to require a reduction of the rate base or adjustment of the rate of return. In fact, the Administrative Law Judge's treatment of the issues covering excess capacity, Matson's rate base, and the State's other contentions have been thoroughly covered in the initial decision and his findings and conclusions on these matters are adopted by us. Our principal area of disagreement with him falls in our next discussion.

Matson claimed that rising costs were the primary reason for the rate increases, including other factors such as increased investment in new vessels and competition from Seatrain. Since the increases were selective, evidence was introduced to support holddowns on certain cargoes. For example, refrigerated cargoes were not increased since there was still wide disparity in the net-to-vessel contribution of dry and reefer cargoes. Iron and steel articles were held down because it was a relatively new item in the tariff (first appeared on November 15, 1970). The most controversial items are eastbound container cargoes, principally canned pineapple, which remained at the 1961 level as a result of a business judgment based on the backhaul nature of the cargoes. A witness testified that the eastbound dry container business was profitable on an incremental basis, but that no fully distributed cost studies had ever been made.

It is in this area where the Administrative Law Judge caused the principal concern of Matson, Hearing Counsel and the Pineapple Growers Association. Basically, he rationalized that westbound cargoes are more consumer oriented and eastbound cargoes more industry oriented. Thus, he reasoned that by raising the westbound and holding down the eastbound rates, the Hawaiian consumer must subsidize the Hawaiian industry. Principally from these considerations, he reached his ultimate conclusion of reducing the proposed westbound increases from 12½ percent to 11 percent and suggested that Matson increase its eastbound rates 11 percent. The steps he used were basically that there is insufficient evidence for concluding that the pineapple growers are less able to pass on added shipping costs or to absorb them than others involved in westbound shipments to do the same. He then concluded that eastbound dry container rates are not based on fully distributed costs, and that westbound cargo to that degree subsidizes eastbound cargo. He figured that of the projected operating revenues totalling "$69,594,000",[6] resulting in 8.53 percent return, $4,792,000 is eastbound cargo not subject to any rate increase. He found the average revenue for eastbound pineapple to be $252 per container as opposed to other eastbound commercial dry cargo of $324, while westbound the average is approximately $600 for commercial dry cargo. The heart of his reasoning lies in his statement that:

> Without the increase the westbound and eastbound projected revenues for containerized general cargo would amount to $37,032,128. As noted above, Matson says revenues totaling $41,964,000 arising out of containerized general cargo are necessary, when combined with other projected revenues, to achieve its requested rate of return. An increase of $4,032,822 in the combined westbound and eastbound general cargo revenues would realize this goal. An increase of 11 percent on both westbound and eastbound general cargo, including pineapple, would realize additional revenues of $4,073,539. By reducing the 12½ percent increase on westbound to 11 percent and increasing eastbound 11 percent, Matson could achieve its requested rate of return and at the same time not unduly burden westbound cargo.

As noted above, it was his conclusion that westbound rated be reduced from 12½ percent to an 11 percent increase, and his suggestion that the eastbound rates be increased 11 percent,

[6] This figure should be $69,954,000.

which precipitated the exceptions to his decision by three parties, i.e., Matson, Hearing Counsel and the Pineapple Growers Association.

Hearing Counsel argue that this conclusion ignores the record made by Matson who showed a need for the only rate increase in issue, i.e., the 12½ percent general increase on most westbound cargoes and on automobiles. They viewed his suggestion of increases on the eastbound cargoes as amounting to an invitation to immediately increase these rates, especially on canned pineapples. They also argue that the record indicates that eastbound rate payers more than reimburse Matson for incremental costs and thus are not burdening westbound rate payers.

They point out that the Administrative Law Judge's conclusion would deny Matson $483,404 in revenues and reduce its rate of return from 8.53 percent of 8.09 percent. They argue that what would justify a reduction from 12½ to 11 percent would be a showing that 12½ percent would produce an excessive rate of return or that it was attributable to the failure of eastbound rate payers to bear the direct costs of carrying their commodities. Neither of these situations exist since the 8.53 rate of return is admittedly low, and the Administrative Law Judge found that the eastbound rate payers contribute revenues per container which are well above incremental costs.

Additionally, they argue that it is not true that Matson has not increased any eastbound rates by pointing to bulk raw sugar, autos and household goods increases (the latter delayed because of Phase II of the Economic Stabilization Program).

The holddowns on eastbound containerized cargo was a reasonable exercise of business judgment to prevent diversion principally to competitive charter vessels. The evidence shows that the eastbound container movement is essentially back-haul in nature (i.e., the preponderance of cargo moves westbound) resulting in intense competition for eastbound cargoes. Although the Administrative Law Judge was not persuaded that diversion of canned pineapple was probable, no one for certain knows what would happen, and we cannot find that Matson's judgment based on the threat of competition and loss of revenues was not reasonable. Matson's records reflect a decline in volume of pineapple carried to a level below that of 1969.

In fact, the chartering is an actuality and not a mere possibility, since the PGA have set up an organization for this purpose and are chartering vessels to carry pineapple to East Coast destinations. The PGA assert, and the evidence shows, that an increase in those rates would shift the cost advantage to the *charter operation.*

Pineapple is profitable cargo on an incremental basis, and if diversion occurs the loss of revenue would adversely affect the westbound rate payers who would be obliged to carry that part of the cost burden now borne by the pineapple cargo.

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. We also find and conclude that Matson's decision not to increase eastbound general cargo rates is supported by evidence of record, and Matson should be allowed its requested 12½ percent rate increases as proposed.

We have carefully reviewed the contentions of the parties regarding the establishing of minimum standard load factors, the minimum bill of lading charge and other matters appearing in the briefs of the parties. We do not deem it necessary, for the purpose of this investigation, to establish minimum standard load factors and require Matson to attain this standard before allowing the authorized rate of return.

Although the establishment of a minimum load factor standard may be a useful tool to enable regulatory agencies to protect rate payers against situations where excess capacity and underutilization have developed over the years into serious problems, such as in the airline industry, the record in this case does not establish that a problem of such magnitude exists with regard to Matson in the Hawaiian trade. On the contrary, the record indicates that even if there does exist a current slight overcapacity the present fleet would be totally incapable of accommodating the demands of the trade by 1974. Finally, even if the record had shown a history of excess capacity and underutilization which would constitute a significant burden on rate payers in the future in the Hawaiian trade, there is insufficient evidence in the record to enable the Commission to determine a proper load factor standard. Furthermore, it must be recognized that the primary basis for decision by an administrative agency in any proceeding is the record compiled therein as affected by the applicable law. To this interpretation may be added that the record fully supports the requested rate increase as proposed. Our future actions, if any, in the field of establishing minimum standard load factors or requiring Matson to submit periodic reports in the future regarding its vessels utilization and scheduling does not affect our decision on the merits in this case.

One final issue should be resolved. Sears has made a lengthy and determined argument that the proposed rate increases are subject to the Price Commission's regulations. The Administrative Law Judge summarily dismissed Sears' arguments, stating in a footnote that the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (Supp. 1971), did not apply to Matson's rate increase. He found:

> Inasmuch as the increases became effective June 20, 1971, this assertion will not be further discussed. The recently promulgated regulations of the Commission recognize that rates which are the subject of pending proceedings come under the policy guidelines. However, no provision of the Economic Stabilization Act of 1970 nor any regulation of the Cost of Living Council or the Price Commission purports to require a rollback of a regulated rate which was in effect during the base period. This, of course, does not preclude an investigation as to its reasonableness under the regulatory statutes, such as the shipping acts.

Basically, the purpose of the Economic Stabilization Act and the initial wage/price freeze was to stabilize wages and prices at then-existing levels and to monitor any subsequent increases in those wages and prices under strict economic guidelines. In this proceeding, it is uncontested by all parties that Matson's rates went into effect by operation of law prior to the imposition of wage/price controls on August 15, 1971. Further, the Commission had approved a nine percent increase in these particular rates on March 6, 1971, prior to the freeze. Consequently, we are at most concerned with the remaining 3½ percent of increase and the application of the economic regulations thereto which became effective June 20, 1971 at the expiration of the four-month suspension. Matson began charging the full increased rates on June 20, 1971.

In August, subsequent to the expiration of the suspension period, the President issued Executive Order No. 11615, 3 C.F.R. 199 (1972), exercising his authority[7] under the Act, to issue appropriate orders for the stabilization of prices, rents, wages, and salaries.

In reviewing the implementing regulations under the Economic Stabilization Act, it is apparent that the program is designed to exercise controls over any price or wage increases above those levels which existed prior to the freeze. In order to determine these levels, a base period was established for wages and prices known as the "freeze base period",[8] from July 16, 1971 to August 14, 1971. The regulations further provide that the base

[7] The delegation of authority was upheld in *Amalgamated Meat Cutters & Butcher Workmen* v. *Connolly*, 337 F. Supp. 737 (D.C.D.C., 1971, three-judge court).

[8] 6 CFR § 300.5.

price is the highest price charged in a substantial number of *transactions during that period.*[9] There is no limiting language as to what kind of charge can be made during the base period, i.e., final price, approved price, lawful price, etc., but merely the highest price. In Matson's case, this highest price was the increased rates which were lawfully in effect during the entire base period.

Operating from that premise, and as the scope of the regulation is limited to increases in prices after November 13, 1971,[10] there has been no increase in Matson's rates since prior to the freeze, hence, no increase upon which the stabilization regulations can act. This point is further borne out by looking at the interim rate provisions[11] as issued on June 2, 1972,[12] by the Price Commission upon which Sears bases its most recent argument. That regulation, in its definitions, establishes that an "'interim rate' means an *increased* rate allowed to go into effect by operation of law. . . ." (emphasis ours)[13] In light of the purposes and scope of the Act this would make the interim rate regulation applicable to any rate increased over those base levels that were established in mid-July to mid-August. Here, as Hearing Counsel contend, and we agree, no increase exists upon which the Act can operate. The interim regulations, as part of the stabilization guidelines, must work to effectuate the scope and intent of that law and must find their powers and limitations under that law. Sears would seem to have the Commission believe that somehow the interim regulations go beyond the scope, purpose, and applicability of the Economic Stabilization Act (to regulate increases in prices after November 13, 1971), and require a rollback of a price upon which there has been no increase to levels of January and February 1971, a full eight months before the price regulations were even promulgated.

In essence, Sears would allow any party affected by a rate increase to pick a base period that best suits itself. It is not, we think, the purpose of the economic stabilization program to punish persons charging prices valid at the inception of the program, by a later promulgation of retroactive or *ex post facto* regulations which have no legitimate application to earlier increases.[14]

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[9] Id.

[10] 6 CFR § 300.1.

[11] 6 CFR §300.16a.

[12] These regulations were republished September 18, 1972, with no appreciable modifications.

[13] 6 CFR § 300.16a.

[14] On January 11, 1973, Executive Order 11695 amended the Economic Stabilization Act of 1970 by abolishing the Price Commission and Pay Board while retaining the Cost of Living Council.

Accordingly, except as noted herein, we adopt the Administrative Law Judge's initial decision as our own and make it a part hereof. This decision is not a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

This proceeding is discontinued.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 71–18

MATSON NAVIGATION COMPANY—GENERAL INCREASE IN RATES IN THE U.S. PACIFIC/HAWAIIAN TRADE

Increased rates and charges of Matson Navigation Company in the U.S. Pacific/Hawaiian trade for the most part are found not to be unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916, and/or sections 3 and 4 of the Intercoastal Shipping Act, 1933.

George D. Rives, *David F. Anderson*, and *Peter P. Wilson* for Matson Navigation Company, respondent.

George Pai, *Richard S. Sasaki*, and *Walton Hong* for the State of Hawaii, *Thomas M. Knebel* for Lewers & Cooke, Inc., *Stanton P. Sender*, *David W. Raymond*, *Vincent W. Jones*, and *Joseph L. Davis* for Sears, Roebuck and Co., and *Carl A. Leonard* for the Pineapple Growers Association of Hawaii, interveners.

Donald J. Brunner, *Norman D. Kline*, and *Paul J. Kaller* as Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER[1]

On January 5, 1971, Matson Navigation Company (Matson) filed with the Commission its Westbound Container Freight Tariff FMC–F No. 146 and Second Revised page 9 to Tariff FMC–F No. 143, to become effective March 1, 1971, generally increasing rates and charges from U.S. Pacific coast ports to ports in Hawaii. On February 24, 1971, the Commission ordered an investigation and hearing to determine whether the proposed 12½ percent increase was unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916, and/or sections 3 and 4 of the Intercoastal Shipping Act, 1933. However, the Commission granted Matson authority to publish "a script

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[1] This decision became the decision of the Commission January 29, 1973.

clause notation to provide for a percentage increase not to exceed 9 percent" to become effective not earlier than March 1, 1971. The balance of the tariff increases were suspended to and including June 19, 1971.

Tariff FMC–F No. 146 cancelled all dry cargo LCL commodity rates, which include pickup service, causing future LCL shipments to be assessed cargo n.o.s. rates, which do not include pickup service, thereby effectively increasing rates on LCL shipments requiring pickup service by 11 to 86 percent. To eliminate this and certain other controversial aspects of the tariff, Matson amended its filing and reinstated the LCL commodity rates to reflect an increase of 12½ percent. Thereafter, various protestants withdrew from the proceeding.

Hearings were held in San Francisco, California, from May 18 through May 26; August 17 and 18; and in Washington, D.C., from October 26 through 29, 1971. Participants were Matson, the State of Hawaii (the State), Sears, Roebuck and Company (Sears), the Pineapple Growers Association of Hawaii (PGA), Lewers and Cooke, Inc.,[2] and Hearing Counsel. In addition, a number of Hawaiian interests filed statements of position detailing the expected impact of the increases on various types of their operations.

BACKGROUND

Matson, a common carrier of property by water between United States Pacific coast ports and ports in the State of Hawaii, is a wholly owned subsidiary of Alexander & Baldwin, Inc. (A&B), a diversified company headquartered in Honolulu, and operates a fleet of 12 specialized container-bulk and raw sugar-automobile vessels (including the barge *Islander*). Matson has leased or been assigned preferential terminal facilities at Los Angeles, California, Portland, Oregon, Seattle, Washington, and Honolulu, Kahului, Hilo, and Nawiliwili, Hawaii.

Although the great bulk of Matson's cargoes move under port-to-port tariffs filed with the Commission, it does carry some cargoes under joint through rates with land carriers subject to tariffs filed with the Interstate Commerce Commission (ICC). Matson has equipment interchange agreements with connecting rail and motor carriers to facilitate through movement of its containers to and from inland points, including the Midwest.

The basic pattern of Matson's operation is the carriage of

[2] Of the participants, PGA and Lewers and Cooke did not file opening or reply briefs. Lewers and Cooke, however, subscribes to, supports, and adopts the opening brief of the State.

containerized cargo, automobiles, and bulk fuel oil westbound, and bulk raw sugar, bulk molasses, and containerized cargo eastbound. The great preponderance of the movement of containerized cargo and automobiles is westbound. Bulk raw sugar is loaded at all of the principal ports of Hawaii and carried to a sugar refinery at Crockett, California, about three hours steaming time from Oakland.

Unlike its containership competitors, Matson currently offers the public both containerload and less-than-containerload shipments. For many years it has been the major carrier in the trade and for some of those years it enjoyed a monopoly or near monopoly position. However, beginning in 1969 with the entry of Seatrain into the trade, Matson began to face substantial competition. Seatrain is considered to be the major competitor for westbound dry container cargo with about 22½ percent penetration. U.S. Lines penetration is estimated at about 4½ percent and barge operators 1 percent. All of the foregoing percentages of competitive carriage are estimates by Matson based on somewhat imperfect economic and business "intelligence" and were compiled prior to the recent introduction by Seatrain of an additional ship into the trade, which may reduce Matson's share to some unknown degree.

The overall total of 72 percent of westbound commercial dry cargo which Matson estimates as its share of the trade is derived, however, from carrying 98 percent of the containers moving out of the Pacific Northwest, 75 percent of the containers moving out of Los Angeles, and only 64 percent of the containers moving out of Oakland. The Oakland percentage reflects a basic difference in the operations of Matson and Seatrain. Operationally, Seatrain uses overland carriers from the Northwest and Southern California to connect with their ships sailing from Oakland. U.S. Lines sails out of Los Angeles as well as Oakland.

Except for Matson offering LCL service, for which it maintains and operates container freight stations, Matson concedes that the services offered by the containership carriers in the trade are generally parallel. Although there has been some suggestion that "cream-skimming" may exist in the trade, no evidence to this effect was presented and there is testimony that the cargo mix of Matson and Seatrain are generally similar. Matson continues to have a monopoly on westbound commercial reefer cargo (90 percent) and on westbound vehicles (96 percent). Eastbound, it has approximately 93 percent of the dry container cargo and 97 percent of the reefer container cargo.

Tariff increases and holddowns

The increases which are the subject of this proceeding are found in Westbound Container Freight Tariff No. 14–B, FMC No. 146 and Second Revised page 9 of Freight Tariff No. 27, FMC–F No. 143 (automobile rates). The holddowns in Tariff 14–B are household goods, iron or steel articles, tinplate, coins, and refrigerated cargo. Matson introduced evidence that westbound reefer rates have not been increased because the difference in average per-container revenues for reefer and dry containers already in existence under the old rates does not justify any increase based on added costs of carrying reefer containers. Hence, although claiming rising costs have finally forced it to apply for its first general rate increase in ten years, respondent has nevertheless held down rate increases for the transportation of fresh and frozen food. The company's rationale strongly suggests that based on lower than current costs of carriage, the Hawaiian housewife over the past ten years may have been paying too much for the transportation of fresh and frozen foods.

Subsequent to the institution of the proceeding a number of changes were made in the rates, having the effect of rolling back to the 12½ percent increase level all rates (except the minimum bill of lading charge) which had been increased more than 12½ percent. The less-than-containerload rates also were restored. The minimum bill of lading charge was increased from $6.86 to $25, admittedly for the purpose of discouraging the traffic which Matson suggests could otherwise move by means of freight forwarders, parcel post, or air carriers. The rate increases, with the roll backs noted above, became effective June 20, 1971, at the expiration of the four-month suspension. In accordance with authorization in the Order of Investigation, 9 percent icreases became effective on March 6, 1971. Thus, on June 20, the rates were increased an additional 3½ percent.

Although the witnesses primarily addressed themselves to the westbound container tariffs, it is not accurate to characterize the rate increases as limited to westbound cargoes. Additional revenues will be received from a new Sugar Freighting Agreement and Freight Tariff No. 12–C (FMC-F No. 147), which became effective July 1, 1971. The increase in annual revenues from the carriage of sugar under the new tariff, if applied to the 1970 sugar tonnage, would amount to $2,500,000.[3] In addition to east-

[3] Eastbound sugar comprises about 25 percent of the total revenue tons that are transported in the trade and accounts for approximately 10 percent of the trade revenues. Matson has 100 percent of the sugar carriage in the trade.

bound sugar, the increase in automobile rates in Tariff 27 applies to eastbound as well as westbound traffic, although Matson concedes that the movement is predominantly westbound.

Eastbound Container Freight Tariff No. 15-A, FMC-F No. 139, containing, among others, rates for the movement of canned pineapple, household goods, and refrigerated cargo, is not under investigation in this proceeding. Matson does not propose to increase the eastbound container rates. However, it was Matson's intent only to defer an increase in household goods rates and to request a 12½ percent increase, both eastbound and westbound, effective November 1, 1971. Most household goods move under a government bill of lading negotiated with the Government and bidding and contract procedures established by the Government permit changes in the household goods movers' rates only twice a year. Accordingly, Matson intended to defer its increases to the household goods movers so that they might have an opportunity to increase their rates to the Government before having to pay the increased rates. Matson did file 12½ percent increases in household goods rates to be effective at the expiration of Phase I of the Economic Stabilization Program, but Phase II of the program has further delayed the effective date.

For the constructive year, approximately 65 percent of the total revenue tons of cargo are subject to rate increases (includes increases in sugar tariff and projected increases in household goods).

Matson has filed increases in its joint rail-water and motor-water tariffs filed with the ICC comparable to the increases filed with this Commission in order that the relationship between the two can be maintained. Respondent's westbound ICC revenues constitute about 7 percent of its total westbound revenue. ICC Tariff Nos. 20, 21, and 22.

Matson projects that a 12½ percent rate increase will yield an overall rate of return on rate base of 8.53 percent or 8.75 percent return on common equity. Prior to the 12½ percent increases, the rates under investigation were generally at the same level as they were in 1961. The rates published in 1961 were approved in *General Increases in Rates (1961)*, 7 F.M.C. 260. In that decision, the Commission found "not excessive" a rate of return on rate base of 10.59 percent. The rate of return of 8.53 percent is premised on net income after taxes, which takes into account not only the 12½ percent increase under investigation, but also the increase for sugar. If and when the household goods increase of 12½ percent goes into effect, the increase in net resulting therefrom will enhance Matson's rate of return. The degree to which the 8.53 percent will be increased is not established by the record though presumably it will not be substantial. Without the proposed rate increases Matson believes that its earnings will be seriously inadequate; and that with the full proposed increases its earnings will not be excessive.

POSITIONS OF HEARING COUNSEL AND INTERVENERS

With the exception of the increase in minimum bill of lading charge, Hearing Counsel supports the rate increase.

The State's position, in essence, is that respondent failed to sustain its burden of proof and that the present rates are adequate to generate sufficient revenues to cover all of Matson's revenue requirements at a reasonable load-factor performance; and in the alternative, that adjustments in individual commodity rates to compensatory levels will produce sufficient revenues to cover all revenue requirements. It further asserts that the company has failed to show that the new rate structure (or the manner of distributing the cost burden) is not discriminatory. In large measure the State attempts to rebut the claim of need for a rate increase by asserting that the container vessel capacity is unreasonably excessive in relation to market demand.

Sears asserts that the increase would be violative of the economic stabilization program instituted in Executive Order No. 11627 (October 15, 1971).[4] In agreement with the State, it also asserts that Matson has failed to prove that its projected rate of return is based on a prudent rate base because its rate base includes an overtonnaged fleet. Finally, it contends that the increase is unjust and unreasonable because the major portion of the increase is arbitrarily imposed on westbound shippers.

EFFICIENCY OF OPERATION

The State urges that Matson be denied its requested rate increase, or be allowed a lesser rate increase than requested, because it is operating inefficiently, it being asserted that efficient operation would permit a reasonable rate of return without the necessity of a rate increase or, at least, necessitating a lesser rate increase than requested.

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[4] Inasmuch as the increases became effective June 20, 1971, this assertion will not be further discussed. The recently promulgated regulations of the Commission recognize that rates which are the subject of pending proceedings come under the policy guidelines. However, no provision of the Economic Stabilization Act of 1970 nor any regulation of the Cost of Living Council or of the Price Commission purports to require a rollback of a regulated rate which was in effect during the base period. This, of course, does not preclude an investigation as to its reasonableness under the regulatory statutes, such as the shipping acts.

Resolution of this issue requires an inquiry into Matson's fleet scheduling and operation necessarily involving consideration of cargo availability, cargo patterns, terminal facilities, and the relationship of fleet capacity to demand, particularly as it bears on management decisions relating to fleet implementation or replacement. It also requires inquiry into crane productivity, berth conflicts and port time as well as the company's practice regarding the carriage of automobiles.

Fleet scheduling and operation

Matson operates its fleet in the following manner. The *Enterprise* and *Progress* are on a 14-day triangular cycle from Los Angeles to San Francisco to Honolulu to Los Angeles, carrying containers, bulk fuel oil, vehicles, and conventional cargo westbound; and containers, vehicles, conventional cargo, and bulk molasses (*Progress* only) eastbound. The *Queen* and *Monarch* are on a 21-day triangular turn from San Francisco to Los Angeles to Honolulu to San Francisco, carrying containers, bulk fuel oil, and vehicles eastbound. The *Californian* and *Hawaiian* are on a 24-day schedule from San Francisco to Seattle to Portland to Honolulu to San Francisco, carrying containers, bulk fuel oil, and vehicles westbound; and bulk raw sugar, bulk molasses, and containers eastbound. The *Legislator* (or the *Motorist*) is on a 14-day direct turn from Los Angeles to Honolulu to Los Angeles every third week to fill in the gap in the schedule of the *Monarch* and *Queen*, and gives Los Angeles a direct departure for Honolulu each week.

In addition to the basic schedules outlined above, the *Legislator*, *Motorist*, and *Citizen* make additional voyages during peak demand periods and when other vessels are in annual layup. The *Kopaa*, a bulk sugar carrier, has only two voyages scheduled for the constructive year, the *Citizen* only five. Because of this limited use, no inactive vessel expense for those two vessels is allocated to the trade for the constructive year.

The basic fleet schedule gives San Francisco area shippers a fixed day-of-the-week departure[5] on either the *Enterprise* or the *Progress* every Friday morning. Los Angeles area shippers are provided one indirect departure each week (i.e., through San Francisco) on the *Enterprise* (or *Progress*), which departs Los Angeles each Tuesday. The *Monarch* (or *Queen*), supplemented every third week by the *Legislator* (or *Motorist*), gives the Los Angeles area shippers a fixed day-of-the-week direct departure

[5] Seatrain offers a weekly service but the day may vary from sailing to sailing.

for Honolulu. Fixed day-of-the-week service to Pacific Northwest ports cannot be achieved because of the 24-day turn of the *Californian* and *Hawaiian*, but 12-day departure frequency is offered.

Although it was the position of a witness for the State that Matson, by triangulating instead of shuttling, was failing to obtain maximum productivity from its fleet because of its desire to maintain consistent day-of-the-week departures from Oakland and Los Angeles, the weight of the evidence is that scheduling and operational advantages are the principal reasons for triangulating and fixed day-of-the-week service. There is no doubt that it also is advantageous from a marketing standpoint, but the State's witness contended that this advantage accrued to only a few shippers at the expense of efficiency. The greatest beneficiaries of day-of-the-week sailings are shippers of chill cargo, which comprises about 39 percent, on a weight basis, of westbound reefer container cargo. The chill cargo is regarded as the most time sensitive cargo in that shippers desire arrivals in phase with greater requirements of end-of-week shoppers.

The *Enterprise* and *Progress* not only cannot reasonably make their triangular Honolulu-Los Angeles-San Francisco-Honolulu run in less than 14 days, but have difficulty making that schedule. Matson has a continuous problem of getting empty containers back to the mainland from Honolulu, and if possible would have desired to fill the *Enterprise* and *Progress* with empties for most eastbound voyages. The *Enterprise/Progress* often carry more westbound than eastbound containers because the 14-day turn schedule does not allow sufficient time to completely fill out the vessels with eastbound empty containers. This may be alleviated with the addition of another long reach crane now under consideration. Thus, these vessels, instead of being deliberately slowed down as alleged by the State's witness, are in fact operated on a tight schedule. In addition, triangular service improves utilization of these ships because there is insufficient cargo at either Oakland or Los Angeles alone.

The *Citizen*, *Motorist*, and *Legislator*, when operating, are on a 14-day turn between Los Angeles and Honolulu and cannot turn faster. The *Hawaiian* and *Californian* are triangulating through the Northwest at their maximum continuous capacity. Since they are not on a fixed day-of-the-week schedule any contention that scheduling has been slowed to accommodate fixed day-of-the-week service could have no application to them. The *Monarch* and *Queen* have a minimum turn time of 19 days and 11 hours on their triangular runs, which include eastbound carriage of bulk raw sugar to Crockett. To avoid berth conflicts and port congestion that would arise if the *Monarch* and *Queen* were not operated in phase with the *Enterprise, Progress, Motorist, Legislator,* and *Citizen,* which are on 14-day turns, the *Monarch* and *Queen* have been slowed down from the 19-day, 11-hour turn to a 21-day turn. However, even if Matson attempted to operate them on a 19-day, 11-hour turn, port congestion, expecially at the Honolulu apex of the triangle which can be viewed as the spout of a funnel being force-fed by four West coast ports, would be such that the shorter schedule could not be maintained. An accelerated schedule, with reduced turnaround time, not only would produce berthing problems but would cause load factors to decline. A Matson exhibit illustrates that a reduction in turnaround time for the *Monarch* and *Queen,* although physically possible, results in a decline in load factor to a 75 percent level.

Mr. Plymale, Matson's assistant general manager for freight operations, was of the opinion that it would not be feasible from an operations standpoint to operate the fleet on a shuttle basis or with only one of the new *Enterprise* class vessels. He testified that one such 23-knot vessel could not be properly integrated into the fleet where the others are 15-knot vessels, to provide an acceptable service package because of the different turn times and different vessel capacities. If cargo flow and ports generating cargo were strictly uniform, a shuttle might be possible; but since cargo flow and port generated cargoes are not even regular it requires triangulation. Once a vessel is forced into a triangular operating pattern, a single vessel would create service patterns incompatible with other fleet units and would result in uneven utilization of port facilities. An even utilization of port facilities is necessary to prevent berth congestion and disruption of service. Two vessels in triangular service on a 14-day turn best meet the phasing demands of the traffic, other fleet units, and port facilities.

In consideration of all the factors, the record does not establish that Matson has improperly utilized its ships in a manner which would require that the rate increase be denied.

Crane productivity and port time

Another area of criticism by the State involves Matson's crane productivity and length of time in port. The State's witness Tucker relied on the MRC "Impact" study, the PRC study, plus personal observation, all of which caused him to conclude that efficient crane productivity should range from 20 to 40 containers per hour instead of 15 at Honolulu and 20 at Oakland, which he contends is Matson's case. Matson's actual experience at Oakland for the *Monarch* and *Queen* revealed, however, that on 35 voyage samples in 1969, productivity was 28.5 containers per hour if total berth time was considered, but 44 containers per hour if only actual crane operation time was considered.

The MRC study relied on by the State does not indicate whether the total time or merely productive time was considered, and it is also possible that the study did not mean 40 containers per hour for one crane but for two, i.e., 20 per hour. The PRC study is also not entirely comparable because it did not use total berth time so that its conclusion regarding 35 containers per hour must be reduced. If so, Matson suggests, the PRC study would have found 20 as the correct figure rather than 35.

At Honolulu, crane productivity is reduced because of the lack of adequate long-reach cranes to service the *Enterprise* and *Progress*. In order to speed loading and unloading, Matson is considering the economic feasibility of converting one of its short-reach cranes. If an additional long-reach crane is installed, it would not only serve to increase productivity but would serve to alleviate the problem relating to leaving empty containers behind in order to maintain schedules.

The average of 28½ containers net per vessel hours of berth time compares most favorably with the State's witness' estimated crane productivity of 35 containers per hour of actual crane operation when it is considered that the 28½ containers per berth hour is achieved when only 15.7 hours of the 48.3 hours on berth were productively utilized in loading and unloading. The balance of time is attributable to nonproductive crane work for other operations or purposes.

Mr. Tucker questioned Matson's efficiency by contending that its port time was an unduly high percentage of total voyage turn time. Various trades will have a different percentage generally relating to total sea time. Thus, for the European/Japan trade route, the percentage of port time would be quite low whereas on a short trade route, as for example, New York/Puerto Rico, where the total steaming time is about 2½ days each way, the percentage of port time is quite high. The rule of thumb of 25 percent, on which Mr. Tucker relies, is suggested for the North Atlantic trade and cannot be construed to show that Matson is inefficient in this regard. It is apparent that the reasonable ratio of steaming to port time, insofar as it reflects on operational efficiency, must be determined on a carrier-by-carrier basis since factors of distance, fleet configuration, and availability of port facilities, among others, vary so greatly.

On the basis of the foregoing, Matson's average port time of 37.2 percent is not unduly high.

Matson's utilization of port and terminal facilities has exceeded minimum use wharfage charges every year to date. Thus, payment of penalties for underuse of the facilities has been avoided. Avoidance of penalties is a positive factor in evaluating the issue of Matson's operating efficiency.

It is concluded and found that Matson's operations are reasonably efficient as reflected in crane productivity, port time, and utilization of terminal facilities, and that the record does not support a reduction in the rate base or the adjustment of the rate of return by reason thereof.

Efficiency and its relationship to permissible rates

Carriers or public utilities may be denied rate increases or may be ordered to improve service where inefficiencies or mismanagement have been demonstrated. See, for example, *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 556, 563 (1948); *American Export-Isbrandtsen Lines, Inc., et al.* v. *Federal Maritime Commission*, United States Court of Appeals for D.C. Circuit, No. 22,820, June 11, 1970. In such instances, however, the record must demonstrate grave mismanagement, gross inefficiencies, or serious inadequacies of service.

The State claims mismanagement by reason of the decision in 1967 to build both the *Enterprise* and the *Progress* instead of just one vessel, and charges that the company is turning to the rate payers for relief because of its bad judgment. Mr. Tucker, for the State, concluded that Matson has overtonnaged the trade by at least 24.58 percent. He recommends two methods by which the excess "imprudent" capacity may be eliminated in determining Matson's allowable revenues and returns, either by inflating the traffic base to bring traffic and capacity into proper balance or by reducing the rate base by disallowing a pro rata share of the rate base fleet, again to bring capacity and demand into a proper balance. Mr. Tucker calculated under the first method that traffic must increase by 24.6 percent, presumably producing a corresponding increase in revenue and approximately equal increase in certain costs. The results of such computations are that Matson would enjoy a return of 10.53 percent on its rate base without any rate increase based upon Mr. Tucker's lowest estimates of surplus capacity. Under his second approach, Mr. Tucker would disallow 24.58 percent of Matson's vessel portion of the rate base, or some $10,677,000, which would raise the rate of return to 10.08 percent.

Matson denies that it has overtonnaged the trade and contends that it has a prudent reserve lift capacity of about 20 percent relative to annual westbound requirements. Mr. Yates, for Matson, asserted that utilization of container slots during the constructive year July 1971-June 1972 for all vessels in the trade operated by Matson, Seatrain, and U.S. Lines would amount to some 74 percent (124,917 demand divided by 168,352 total capacity) with all vessels in continuous service and some 78 percent with the *Hawaiian Citizen* operating only an assigned 5 voyages per year (124,917 divided by 159,726), By 1974, furthermore, at an expected rate of traffic growth of 9 percent annually, utilization would rise to over 91 percent with all vessels in continuous service. Mr. Yates concluded that by 1974 the present fleet would be totally incapable of accommodating the demands of the trade.

Mr. Yates criticizes the MRC 1970 "Impact" study which Mr. Tucker quoted regarding overtonnaging in the Hawaiian trade. This study relied on a 1968 cargo base and determined that a 12 percent rate of traffic growth would be necessary to properly utilize capacity in 1974. However, Mr. Yates states that the study omitted the requirement to carry automobiles and that he was unable to determine how the 12 percent figure was derived. At most, Mr. Yates would admit that there is a slight overcapacity today but that this would not be true next year nor the year after, when there would be an inadequacy.[6]

Another way in which Matson refutes Hawaii's contention regarding overcapacity is to construct a fleet operation under the assumption that the second new containership, the *Progress*, had never entered the fleet. Under this assumption, excess capacity would amount to only 11.9 percent if the fleet were operated on a coordinated basis. On an uncoordinated basis, i.e., on accelerated voyages without regard to berth conflicts or port congestion, excess capacity would rise to 17.6 percent. Without the *Progress*, Matson's overall rate of return following the rate increase would rise from 8.53 percent to 8.87 percent. Return on

[6] This could occur if fully depreciated ships such as the *Californian* and *Hawaiian* are retired. The *Legislator* will be fully depreciated by September 1973. Matson has no present plan for fleet implementation or replacement. Mr. Tucker, however, calculated that excess capacity would not fall into the 20 percent range until 1975.

equity rises from 8.75 percent with the *Progress* in the fleet to 9.24 percent without her.

Excess capacity

Matson's container fleet capacity, the relationship of capacity to expected demand, and the proper treatment of overcapacity in rate-making are key issues in this proceeding. Whether a given amount of capacity is reasonable or unreasonable is largely dependent on the prevailing degree of overcapacity relative to demand, with due consideration given to the demand characteristics of the Pacific coast-Hawaii trade.

Market or demand forecasting, in the final analysis, is a matter of applying judgment to known factors. Matson utilized a trend line based on historical factors to forecast the market for the constructive year. Tucker, for the State, criticized this method, suggesting that a correlation analysis would yield better results. Although the witnesses differed on the preferable method, either method is susceptible to error and actual deviations in the Hawaiian trade have not varied materially from the trend line —in the vicinity of plus or minus 10 percent.[7]

The public interest is not served by fleets which are either too small or too large for the demand of the marketplace. To this end the State introduced evidence contending that the instant container trade is seriously overtonnaged and that Matson has provided excessive capacity relative to current and forecasted market demand.

At the heart of the question of capacity is a determination of the point at which capacity becomes excessive. Matson witnesses postulated that a capacity 20 percent over probable demand would be necessary to maintain a reasonable level of service and reasonably satisfy peak demands. The State's witnesses accept the proposition that a 20 percent level of capacity over demand is prudent and necessary. They contend, however, that any capacity in excess of 20 percent of demand is imprudent, a burden on the rate payers, and that rate base or rate of return should be adjusted to eliminate that burden. Matson's witnesses have denied that 20 percent is an "absolute" but rather assert that it is only a bench mark. They testified that even 25 to 30 percent might be necessary to accommodate customer demand.

It is axiomatic that the greater the excess capacity the greater

[7] The State introduced economic testimony indicating that the island's economy will not see the growth trends of the late '60's. If so, Matson may overestimate the market. It is not possible, however, to determine the accuracy of either prediction.

the ability to meet sudden surge in demand, and to that extent the greater the percentage of time the carrier can satisfy everybody's demands. The precise amount of excess capacity to be made available is necessarily an economic judgment. It thus requires a balancing between capacity which may be idle for part or even much of the year, and meeting the fluctuating requirements of customer demand.

Regarding Matson's method of forecasting market demand it is found to be reasonably accurate and should be relied on in this proceeding. It is also found and concluded that a 20 percent excess capacity is not excessive. However, it is not imprudent to provide excess capacity of 25 percent or even 30 percent under circumstances where peak or seasonal demand require it or other proper reasons exist which may temporarily cause such higher excess capacities as, for example, when new, large, and faster ships first become available in a trade which is expected to grow.

Even if one were to conclude that overtonnaging exists which would not have resulted if management had decided to build only the *Enterprise*, yet this would be merely a mistake of managerial judgment. Mistakes of judgment made in good faith are insufficient to come within the doctrine of imprudent investment which would require elimination of the investment from the rate base.

It is not to be presumed that there may not be room for improvement in Matson's present operations. Undoubtedly, in a business as large and involved as this, many improvements might be suggested and implemented, but the present record does not demonstrate grave mismanagement, gross inefficiencies, serious inadequacies of service, or indifference to the public need. Quite the contrary. The record reflects a reasonably high standard and quality of service by Matson, and no evidence was offered of customer complaint or discontent in terms of service.

On this record it is concluded that claims of mismanagement and inefficiency relating to the construction of two vessels have not been proved.

Carriage of automobiles

On the issue of Matson's actual capacity, the State estimated it to be 126,430 annual container slots whereas Matson estimates it to be 114,786 slots.

The State computes Matson's capacity over demand to be 52,140 containers or 41.2 percent of total capacity. Matson computes a capacity excess of 17,659 containers over demand or 15.4 percent of total capacity.

The reason for the wide discrepancy in the above calculations is the different treatment of automobiles in the demand portion of the calculation, the use of scheduled capacity of 26 voyages of the *Motorist* and *Legislator* as opposed to potential capacity with 50 voyages of these specialized auto carriers, and the inclusion by the State of 25 voyages of the *Citizen* instead of the five that are actually charged to the trade.

It is apparent that the determination of Matson's excess capacity will vary depending upon how one considers automobiles and whether one uses actual scheduling as opposed to potential capacity of Matson's ships. The automobiles which are the bone of contention number 44,968 in the constructive year, but they do not all move in containers or container slots; 17,331 move in garage stow aboard specialized vessels or vessels partially adapted for such carriage,[8] 9,600 in racks,[9] and only 18,037 actually in containers.[10] Although the State contends that automobiles should not be included in "demand" it concedes that not all of the 44,968 automobiles could be carried in garage stow even if the four ships[8] made every voyage annually which they are theoretically capable of making. Some 15,900 automobiles would still have to move in container slots. This portion of the automobile carriage is, in any event, a legitimate factor in determining container slot demand.

All things being equal, Matson prefers to carry automobiles in garage stow on its specialized auto carrying vessels and would prefer to sail a containership completely filled with cargo other than autos in containers or in auto racks. The sheer economics of the situation dictates this preference, since the average revenue per container slot for dry containerized cargo is in excess of $600 whereas the average per slot for autos in containers is $209 and $418 per slot when two autos per auto rack are carried.

As between carrying autos in garage stow on specialized vessels or on container vessels, Matson would prefer to carry them in garage stow since they can be moved more cheaply in that fashion. However, the overall economics of fleet operation may dictate carrying autos in an otherwise empty container in order to avoid additional round trip voyage costs of automobile ships. The fully distributed costs for a container are approximately $400. Though not meeting the fully distributed costs, the car-

[8] *Motorist*, *Legislator*, *Monarch*, and *Queen*.

[9] Two autos per rack occupying one container slot.

[10] One auto per container.

riage of an auto in a container at $209 is in excess of the $156 incremental cost of loading, carrying, and unloading, and the $418 revenue per auto rack is in excess of the fully distributed cost.

The issue of whether autos should be excluded from container demand in determining excess capacity over demand is further complicated because Matson's fleet under any plan of scheduling is not capable of carrying all automobiles in garage stow. To schedule an additional 24 voyages of specialized vessels as suggested by the State to reduce container slot demand by 11,758 autos[11] is economically unsound. Even if all the 11,758 autos were carried in containers, the revenue therefrom would exceed incremental costs; if all were carried in auto frames, the revenue would be in excess of fully distributed costs. The State's proposed alternative would be to make 24 additional voyages with the specialized vessels, with a resulting increase in excess container slot capacity of 11,758, assuming all shifted autos would otherwise be shipped in containers; 5,879 if in auto frames. This would cause the excess capacity to increase from 17,659 as now scheduled to 23,538 or 29,417, depending on how the autos would otherwise have been carried.

If container demand is reduced by 11,758 by assuming that all autos transferred from the containerships would otherwise have been carried in containers, the demand would be 85,369 instead of 97,127 as computed by Matson, who included automobiles. This shows an excess capacity of 25.6 percent instead of 15.4 percent as computed by the company. If container demand is reduced by 5,879 by assuming that all autos transferred from the containerships would otherwise have been carried in auto frames, the demand would be 91,248 slots rather than 97,127, and the excess capacity would be 20.5 percent rather than 15.4 percent. These increases in excess capacity are within acceptable limits, and scheduling of the extra voyages would be a high price indeed to pay for the privilege of asserting that Matson has greater excess capacity because autos are not properly includable in container demand.

It is concluded and found that elimination of auto carriage from container demand would not result in establishing an excess capacity which would so burden the rate payers as to require

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11	*Capacity*	*Const. yr.*	*Const. yr.*	*Potential*	*Potential*
Motorist	—517 autos	11 voyages	5,687 autos	25 voyages	12,925 autos
Legislator	—452 autos	15 voyages	6,780 autos	25 voyages	11,300 autos
			12,467		24,225

a reduction of the rate base or adjustment of the rate of return.

The foregoing discussion has been limited to excess capacity by reason of auto carriage. Whether excess capacity may exist if the *Citizen* is scheduled at 25 voyages instead of the five voyages scheduled for the constructive year will be discussed separately.

Extra scheduling of the "Citizen"

The *Citizen* is fully depreciated and there is an assignment of only scrap value to the rate base. It is scheduled for five voyages during the constructive year. The State asserts that the vessel is capable of 25 voyages per year and that fleet capacity should reflect this potential. Matson charges no inactive vessel expense to the *Citizen* by reason of only five sailings instead of 25. The State assumes that the rate payers would be benefited by elimination of excess capacity from the rate base—that is, by excluding an *Enterprise* class vessel. Respondent contends that if it has excess capacity, this surplus might more properly be eliminated by retirement of fully depreciated vessels such as the *Californian*, *Hawaiian*, and *Citizen*.

The *Hawaiian* and *Californian* each has potential container capacity of 7,905 for the constructive year, and the *Citizen* has a capacity for 12,200 containers, for a total of 28,010 container slots and computed by the State as part of capacity. If these vessels are retired, the capacity would be reduced more than the State's suggested increase in capacity of 26,854 slots through increased voyages and exclusion of autos,[12] and they approximate the 29,200 annual slots of an *Enterprise* class vessel.

The foregoing analysis indicates that the rate payers are not required to carry an inflated rate base comprised of superfluous capacity. If superfluous capacity exists, it would appear to be dedicated to the public at minimal cost and for minimal return.[13]

It is found and concluded that the scheduling of the *Citizen* for only five voyages a year imposes no burden on the rate base and does not distort capacity capabilities.

[12] The State alleges superfluous or excessive to be all capacity above the 20 percent prudent level of capacity over demand. Total potential container slots are 126,430, including extra 20 voyages of the *Citizen*. Twenty percent prudent excess is 25,286 slots—leaving 101,144 against which demand should be measured. Matson's anticipated container demand is 74,290—excluding all autos. The excess of prudent capacity of 101,144 over 74,290 demand equals 26,854 superfluous slots.

[13] Matson computes that the total net contribution to earnings of the *Californian*, *Hawaiian*, and *Citizen* at the 8.53 percent which will accure by reason of the rate increases under investigation will be $16,400 out of the total of $5,413,000 net.

RATE BASE, CAPITAL STRUCTURE, AND RATE OF RETURN

Matson's rate base for the constructive year is $69,320,000. The net income after taxes is projected at $5,911,000, which results in an overall rate of return on rate base of 8.53 percent.

Respondent's capital structure is comprised of 35.02 percent long-term debt and 64.98 percent common equity. The average of long-term debt is currently 8.1 percent. Thus, the 8.53 percent return on rate base which is projected as a consequence of the rate increases implies a return of 8.75 percent on the common equity portion of the captialization. This is illustrated by the following table:

Long term debt:	.3502	×	8.1%	=	2.84%
Common equity:	.6498	×	8.75%	=	5.69%
	100%				8.53%

The company's rate-of-return witness, Mr. Roseman, concluded on the basis of his study that the 8.75 percent return on equity which the 8.53 percent overall rate of return would produce is clearly on the low side. No other party made a rate-of-return comparability study.

The criteria for determining what constitutes a fair rate of return were set forth by the Supreme Court in the *Bluefield* and *Hope* cases.[14] Under those decisions, three factors must be reviewed in determining fair rate of return: (1) what rate of return is necessary to attract and retain capital; (2) what rate of return is being earned by other enterprises; and (3) what are the relative risks of the subject company compared with other enterprises.

Mr. Roseman testified that because Matson is a wholly owned subsidiary of A&B, the market price data on Matson's securities required to estimate directly the return which it needs to attract capital, are not available. The company has no equity securities traded on the open market. Nor can A&B's market price data be used to determine cost of capital or rate of return for the subsidiary since the former's other operations are of such dissimilar character from that of Matson that the parent's capital-attraction rate provides no reliable indication of the return required to attract capital to Matson's ocean freight business.

Mr. Roseman's approach was, first, to examine the actual returns on common equity earned by enterprises in a wide range of businesses, and then to consider the elements of risk in Matson's business as compared with the risks of the other industries. His

[14] *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U.S. 679 (1923); *Power Comm'n* v. *Hope Gas Co.*, 320 U.S. 591 (1944).

conclusion was that in a wide range of both regulated and unregulated industries the average rate of return on common equity is generally above 12 percent. In some cases it is 15 percent or more for unregulated industries. These returns are actual earnings, however, and should not be construed as earnings allowed by regulatory bodies in rate-of-return cases. In many cases, actual earnings exceed the estimated earnings which underlie rate-of-return decisions. The next step was to consider the risks faced by Matson. In addition to competition of other steamship lines, the company is subject to some risk of competition from its own shippers, some of whom are large enough to threaten to provide vessels of their own. Matson also has various other risks, the existence and effect of which are reflected in the variability of its earnings. Between 1947 and 1969, it experienced an extraordinary degree of volatility in earnings. During this period, its rate of return ranged from minus 6.52 percent in 1949 to 19.60 percent in 1964. Year-to-year fluctuations are significant, though less dramatic than the extremes. Labor costs are a major element in Matson's operating expenses and these costs can escalate sharply and suddenly and may bear no relation to the trend in revenues. One cause of fluctuation in its earnings is strikes, a very serious example of which lasted from July 1, 1971, to February 1, 1972.

Mr. Roseman was of the opinion that the risks faced by Matson are of a greater order of magnitude than those faced by the electric utilities, who have been averaging returns on equity in excess of the 8.75 percent sought herein.

The risks faced by the airline industry are more comparable to those of Matson and this is reflected in the fairly close comparability of variation in earnings experienced by the airlines and by Matson. The airlines on average earned 12 percent on equity in 1965–1969 and the Civil Aeronautics Board (CAB) has approved rates designed to yield 16.75 percent on common equity. However, it would be misleading to construe the approved 16.75 percent as approximately double the rate of return Matson is contending for in this proceeding. This is because the capital structures of the airlines differ radically from Matson's; the CAB allowed the 16.75 percent on an "optimum" capital structure substantially different from the airlines' actual capital structure. It is reasonable to conclude, nevertheless, that on a reasonable basis of comparison, the rate of return permitted airlines indicates that 8.53 percent sought herein is on the low side.

The State questions Matson's "true" rate of return. Mr. King, for the State, pointed out that in early years when the investment is new, net investment will appear quite high and the rates of return will seem very low. Later, when the investment has become largely depreciated, the same income will provide a much higher rate of return. The solution proposed by Mr. King is that the investment base against which the rate of return is computed be "normalized." That is, the rate of return be computed on the average long term level of outstanding net investment. He noted that of Matson's claimed rate base of $69,320,000, some $66,386,000 is in depreciable vessels of which $46,597,000 is less than two years old. As a result, 70 percent of the depreciable fleet is less than six percent depreciated. As these vessels age, the return on investment will increase and thus a return of 8.53 for the constructive year will generate a very much higher return a few years hence. From this, he ultimately determined that Matson would earn 16.85 percent with the proposed rate increases and 11.50 percent even without a rate increase. These returns, however, are based on and adjusted for excess fleet capacity as reflected by witness Tucker, who thereupon postulated increased revenues. Inasmuch as not even Mr. Tucker suggested Matson would actually realize his postulated revenues of $76 million, Mr. King's return projections, to the degree they are premised on such revenues, exaggerate the return which Matson would earn. If a normalized reduced rate base of $63,515,000 as proposed by Mr. King is utilized—and the projected constructive year net income of $5.9 million is utilized rather than Mr. Tucker's inflated traffic base—the result is an overall rate of return of 9.3 percent.

There is much merit in Mr. King's approach, but Matson objects to normalization because in the early years it reflects a rate base somewhat less than the actual net investment. It has no objection to earning between rate cases a rate of return based on a previously established net rate base which base may be higher then actually exists subsequently. If additions to rate base uniformly offset annual depreciation, no distortions of rate of return would occur between rate cases. The realities of the shipping industry are such, however, that new investments are "lumpy"—that is, in large amounts at uneven intervals —whereas depreciation is more even over the useful life. Hence, a distortion occurs which "normalization" seeks to eliminate. Nevertheless, there is insufficient evidence to warrant adoption of the normalization theory in the present case.

It is not inappropriate to consider how the return which the proposed rates would produce compares with the return which the Commission found to be not unreasonable in Matson's last rate case, decided in 1962.[15] The Commission there found that a 10.59 percent return on rate base would not be excessive, without making a separate determination of what would be a reasonable or nonexcessive return on common equity. Matson's capital structure at that time was about 67 percent equity and 33 percent debt—quite similar to the present structure—and its debt had an imbedded cost of 5.5 percent. With this capital structure, a 10.59 percent return overall would produce 13.1 percent on common equity.[16]

In light of all the foregoing and considering the Commission's decision in 1962, it is concluded and so found that on a rate base of $69,320,000, an overall return of 8.53 percent, with a resulting return on common equity of 8.75 percent, as sought herein, would not be excessive.

RATE INCREASES

In support of its need for rate increases, Matson introduced evidence that it earned only 1.77 percent on its rate base in 1969 and that the return was 6.38 percent for 1970. The revenues and return for 1970 were higher because a substantial quantity of cargo that was strikebound in late 1969 moved in the first quarter of 1970. But if the strike inflated the 1970 return, it also decreased the 1969 return. On balance, the two years averaged 4.08 percent return. For the constructive year July 1971–June 1972, without the rate increases, the rate of return on rate base would be 4.59 percent.

Minimum bill of lading charges

Matson proposes to increase its minimum bill of lading charge from $6.86 to $25.00 (FMC-F No. 146, Rule 5). Hearing Counsel objects to such increase on the ground that Matson did not offer any cost justification for the increase and further objects that the increase is for the purpose of placing an embargo on small shipments.

While Matson introduced no specific cost evidence it did introduce evidence that only very small shipments moved under

[15] *General Increases in Rates (1961)*, 7 F.M.C. 260.

[16]
Debt :	.33 × 5.5 %	= 1.815%
Equity:	.67 × 13.10%	= 8.775
	100%	10.59 %

minimum bill of lading charges and that the problems inherent in handling such shipments were highly disproportionate to revenues realized. Its witness pointed out that a variety of alternatives were available to the shipper of very small packages, such as use of freight consolidating NBOCC's, parcel post, and air freight.

Matson alone of all the containership carriers in the trade offers a service in handling and transporting less-than-containerload shipments. It should not be required to charge a rate which encourages what are essentially troublesome shipments when adequate alternative means are available to the shipping public. It would be doubly ironic to preclude Matson from discouraging these types of shipments by raising the minimum charge at the same time that its competitors do not offer an LCL service at any price and could not be required to offer such service. Thus, if these small shipments are deemed to be embargoed, it is not Matson who has done so.

The increase in minimum bill of lading charges will undoubtedly discourage traffic moving under such charge and probably cause it to utilize other available services but, in consideration of the physical difficulty of handling very small shipments, the high incidence of damage and loss and disproportionately large claims which such traffic generates, the increase is found not to be unjust, unreasonable, or otherwise unlawful.

Containerized cargo

Matson's witnesses testified that rising costs were the primary cause of the request for rate increases, although other factors were increased investment in new vessels and competition from Seatrain. Because the request was selective rather than across the board, Matson introduced evidence to support its holddown position. For example, rates for refrigerated cargoes had not been increased even though they have been in effect since 1961 because there is still a wide disparity in the net-to-vessel contribution of dry and reefer cargoes. During the pre-increase year, 1970, the average revenue from a refrigerated container was $850 as compared to an average revenue of $623 percontainer of nonrefrigerated cargo. After deducting variable expenses and certain fixed expenses which are analogous to handling expenses,[17] refrigerated cargo yielded a net-to-vessel contribution of $526 per container as compared to $376 per container for nonrefrigerated cargo, a difference of $150 per container.

[17] Matson has no commodity cost studies. It computed overall costs on the number of containers handled.

After increasing dry cargoes and holding down the rates on refrigerated cargoes, refrigerated cargo makes a net-to-vessel contribution of $520 per container as compared to $416 for a dry cargo container, a difference of $104. Thus, even after the increases to dry cargoes, the refrigerated cargoes without an increase are still significantly more profitable. This despite rising costs since 1961.

The holddown on iron or steel articles applies only on long-length iron or steel tendered for shipment in 40-foot "half high" flatrack containers. This is a new item in the tariff, having first become effective on November 15, 1970. Since this is comparatively a new rate no new factors arose in the short period until the filing on January 5, 1971, of FMC-F No. 146, which Matson deemed would warrant increasing it. As for tinplate, the rates thereon were increased by about 45 percent less than three years ago. Accordingly, an additional 12½ percent at this time was not sought.

The most controversial of the holddown items are eastbound container cargoes, principally canned pineapple, the rate for which has not been increased since 1961. Matson's vice president and chief marketing officer explained that the decision to hold down eastbound container rates was a business judgment based on the backhaul nature of those cargoes. The great preponderance of container cargoes in the trade moves westbound. This results in intense competition for the limited volume of eastbound container cargoes. Matson's share of the eastbound pineapple market is approximately 77 percent (19,000 containers a year). It could handle in excess of twice that amount. The business judgment to increase westbound rates[18] was made independently of and without regard to what competitors might do and whether they might reap the harvest by maintaining lower rates. In fact, the principal competitor, Seatrain, did enjoy a competitive advantage for a short period of time but then it also filed for a rate increase comparable to Matson's and thus lost its competitive advantage. The testimony was to the effect that the factor of price to service is 9 to 1. The cheaper tariff is persuasive to most shippers. Customers with time-sensitive cargo may place service considerations first and price second. But this applies only to a small fraction of the total cargo. If prices are compara-

[18] The 12½ percent increase was arrived at as a "business judgment." It was not reached on the basis of any cost studies or other "scientific" analyses. Nor were there any specific cost studies or scientific analyses prepared with regard to the holddown. Matson officials had concluded its net was too low and that a 12½ percent increase would improve the financial picture. The management decision to seek a 12½ percent increase was reached in late 1970. Matson's tonnage forecasts and rate of return evidence were prepared subsequently.

ble, then service becomes paramount in the eyes of customers.

The same witness testified that the eastbound dry container business was profitable on an incremental basis but that no fully distributed cost studies had ever been made on this phase. The need for additional revenue is predicated upon a myriad of rising expenses, such as "interest on secured debt," "reasonable dividend requirements," "cost of fuel oil," "the amount we annually pay the state of use of its port facilities," and "increases in labor costs." Quite obviously, these expenses as well as other factors which caused Matson to seek rate increases are attributable to the movement of all freight, not just westbound dry containers. It is conceded that the incremental costs of moving a container eastbound are very much the same as moving one westbound.

Matson never conducted a cost study with respect to any specific commodity encompassed within tariffs under which it is seeking rate increases. Only a general cost study, applicable to all carriage, supports its contention for the rate of return. The average projected composite handling cost per westbound container, dry or reefer, is $156 per container. This includes the cost of returning empty containers eastbound. It also includes approximately $70 for stuffing.

The westbound cargoes are more consumer oriented and the eastbound cargoes more industry oriented. Thus, raising the westbound and holding down the eastbound rates means that the Hawaiian consumer must subsidize Hawaiian industry on the theory, apparently, that what is good for Hawaiian industry is good for Hawaiian consumers.

The witness for PGA testified that the pineapple growers were already chartering vessels for carriage of canned pineapple to the U.S. East coast. He said that if Matson's rate for eastbound pineapple were increased by 12½ percent, tonnage now moving to West coast ports and thence by rail to midwestern destinations would be diverted to the growers' chartered vessels going to East coast ports. This could occur if the overall costs of transportation were thereby lower, but the evidence on this point is not conclusive or persuasive. At stake are approximately 132,000 tons of canned pineapple which are now moving via Pacific coast ports but which formerly moved via eastern or Gulf ports.

Mr. Roseman, for Matson, stated that the risk of loss of business to proprietary carriage in the event rates are increased would be self-defeating if it were not based on corresponding cost increases. Clearly, if there are corresponding cost increases

—and Matson has put in a strong case that its costs have increased substantially since 1961—then any person who might want to carry his own goods would, of course, be subject to these same cost increases. There is no evidence that the pineapple growers could own and operate, or charter operators could operate, more efficiently and at lower cost than Matson. Nor is there any evidence that such threatened charter alternative would be available with the frequency, reliability, and speedy transit now made available by Matson to the pineapple growers.

Although both Matson's witness and the PGA's witness testified as to the economic detriment which the industry would suffer if eastbound container rates were raised, there is insufficient evidence for concluding that this industry is less able to pass on added shipping costs, or in the alternative to absorb them, any more than industries which are involved in westbound shipments are able to pass on or are required to absorb the increased rates. It is concluded from the evidence that eastbound dry container rates are not based on fully allocated costs and that westbound cargo to that degree subsidizes eastbound cargo (see page 34).

On the basis of the tariff increases, including raw bulk sugar, Matson projects operating revenues for the constructive year totalling $69,594,000, resulting in an overall rate of return of 8.53 percent on the rate base. Of the $69,594,000, Matson projects $36,272,000 for westbound general cargo. Of this westbound revenue, $4,030,022 is attributable to the increase in rates and presumably, at least as far as containerized general cargo is concerned, is the revenue necessary to achieve the rate of return requested.[19] Respondent also projects revenues for eastbound containerized general cargo and canned pineapple totalling $4,792,000. This eastbound cargo is not subject to any rate increase. Hence, the gross revenues required to be realized from containerized general cargo, including pineapple, in order to achieve the requested rate of return, is $41,064,000.

It is readily apparent, as seen by the following chart—

[19] Westbound general cargo would amount to $32,241,978 without the increase. $32,241,978 plus 12½ percent thereof = $36,270,000.

PROJECTIONS FOR CONSTRUCTIVE YEAR
JULY 1, 1971–JUNE 30, 1972

	Revenue	*Revenue tons*	*Containers*
Gen. cargo westbound	36,272,000	816,193	64,059
Gen. cargo eastbound—including pineapple	4,792,000	309,371	26,384
Percentage—eastbound to westbound	13%	38%	41%
Gen. cargo	41,064,000	1,125,564	90,393
Gen. cargo westbound	36,272,000	816,163	64,059
Percentage—westbound to total trade	88.3%	72½%	71%

—that the proportion of revenue raised eastbound is grossly disproportionate to the volume. Put another way, to increase westbound rates while holding down eastbound rates unjustly and unreasonably burdens westbound cargoes to the detriment of westbound shippers and Hawaiian consumers for the benefit of eastbound shippers.

The disparity in charges is evident from the fact that the number of weight or measurement tons in a container does not materially affect Matson's cost in handling, carrying, or discharging that container. There is a difference in costs for stuffing, the average cost for stuffing dry or reefer containers being $70. Yet the average revenue for eastbound pineapple is $252 per container as opposed to other eastbound commercial dry cargo of $324. As previously noted, westbound, the average is approximately $600 for commercial dry cargo.

Without the increase the westbound and eastbound projected revenues for containerized general cargo would amount to $37,032,128. As noted above, Matson says revenues totaling $41,964,000 arising out of containerized general cargo are necessary, when combined with other projected revenues, to achieve its requested rate of return. An increase of $4,032,822 in the combined westbound and eastbound general cargo revenues would realize this goal. An increase of 11 percent on both westbound and eastbound general cargo, including pineapple, would realize additional revenues of $4,073,539. By reducing the 12½ percent increase on westbound to 11 percent and increasing eastbound 11 percent, Matson could achieve its requested rate of return and at the same time not unduly burden westbound cargo.

To the extent that westbound general cargo rate increases exceed 11 percent they are unjust, unreasonable, and otherwise unlawful. To the extent that eastbound rates have been increased in the same amount as westbound, as in the case for automobiles, the foregoing rationale is not applicable and those increases in excess of 11 percent are not unjust, unreasonable, or otherwise unlawful. Recognizing that a rate increase has not been filed for eastbound general cargo, no increases can here by granted for such cargo. A rate of return which would be realized by an increase of 11 percent on the westbound cargo only would be less than 8.53 percent. If rates on eastbound general cargo, however, were also increased 11 percent, the rate of return would be raised to 8.53 percent. If the rate of return were thus raised to 8.53 percent, such return, previously discussed in greater detail elsewhere, would not be excessive.

ULTIMATE CONCLUSIONS

The increased rates which are the subject of this investigation are not unjust or unreasonable or otherwise unlawful except to the extent that westbound general cargo is increased more than 11 percent.

STANLEY M. LEVY,
Presiding Examiner.

WASHINGTON, D.C.
March 9, 1972

FEDERAL MARITIME COMMISSION

DOCKET NO. 69–56

AGREEMENT NO. 9827 BETWEEN UNITED STATES LINES, INC. AND SEA-LAND SERVICE, INC. (AND WALTER KIDDE & CO., INC. AND R. J. REYNOLDS TOBACCO CO., GUARANTORS)

DOCKET NO. 70–51

AGREEMENT OF MERGER NO. 9827–1 AMONG R. J. REYNOLDS TOBACCO COMPANY, RJI CORPORATION, SEA-LAND SERVICE, INC.; AND WALTER KIDDE & COMPANY, INC. UNITED STATES LINES, INC.

Decided February 8, 1973

Amended Order March 22, 1973

Agreement to merge United States Lines, Inc., and RJI Corporation is subject to the approval of the Commission under section 15 of the Shipping Act, 1916.

Agreement No. 9827–1, as modified herein, that RJI Corporation shall acquire United States Lines, Inc., and that United States Lines, Inc., shall continue as an independent carrier in all respects in competition in the ocean commerce of the United States is subject to the approval of the Commission under section 15 of the Shipping Act, 1916, and is so approved subject to the conditions set forth herein, said approval conditional upon the filing of evidence of acceptance by all signatories to said agreement.

Supplemental agreement attached to the merger agreement, but not filed for approval under section 15, found subject to section 15 and disapproved in view of our approval of Agreement No. 9827–1 as modified herein.

Promissory note of Reynolds to Kidde for the purchase of United States Lines, Inc., attached to the merger agreement, but not filed for approval under section 15, found subject to section 15 and approved.

John Mason, *John W. McConnell, Jr.*, *Edward M. Shea*, *William F. Ragan*, and *Paul J. McElligott* for R. J. Reynolds Tobacco Company, RJI Corporation, and Sea-Land Service, Inc.

Edward Schmeltzer, *Robert A. Peavy*, *James R. Withrow, Jr.*, *Sanford M. Litvack*, and *John J. McGrath, Jr.*, for Walter Kidde & Company, Inc., and United States Lines, Inc.

Warner W. Gardner and *Mark L. Evans* for American Mail Line Ltd. and American President Lines Ltd.

Richard W. Kurrus, *Howard A. Levy*, *Milton Handler*, *David Klingsberg*, *Lawrence S. Feld* and *Theodore J. Fischkin* for American Export Isbrandtsen Lines, Inc.

Marvin J. Coles, *Paul M. Tschirhart*, and *Neal Mayer* for Seatrain Lines, Inc.

Richard W. McLaren, *Joseph J. Saunders*, *Richard Favretio*, *Robert T. Stern*, *Bernard Wehrman*, *Norman Seidler*, *and Donald Flexner* for United States Department of Justice.

Abraham E. Freedman, *Stanley B. Gruber*, and *George J. Capiello, Jr.*, for National Maritime Union of America, AFL-CIO.

Louis Waldman and *Seymour M. Waldman* for International Longshoremen's Association, AFL-CIO, National Marine Engineers Beneficial Association, AFL-CIO, and International Organization of Masters, Mates and Pilots, AFL-CIO, *Howard Shulman* for Seafarers International Union of North America, *H. Clayton Cook, Jr.*, for Maritime Administration, Department of Commerce, *Marshal P. Safir* for himself, and *Arnold Weisberger* for himself, interveners.

Donald J. Brunner, *Margot Mazeau*, and *Joseph B. Slunt*, Hearing Counsel.

REPORT

BY THE COMMISSION: (George H. Hearn, *Vice Chairman*, James V. Day* and Clarence Morse, *Commissioners*. Helen Delich Bentley, *Chairman*, and Ashton C. Barrett, *Commissioner*, dissenting and concurring.)

We instituted these separate proceedings to determine whether, *inter alia*, three agreements and a promissory note involving United States Lines, Inc. (USL), Sea-Land Service, Inc. (Sea-Land), Walter Kidde and Company, Inc. (Kidde), R. J. Reynolds Tobacco Co. (Reynolds), and RJI Corporation were subject to our jurisdiction and, if so, whether they should be

*Commissioner James V. Day holds that the Commission is without jurisdiction over the agreements and promissory note submitted to us, but since the majority of the Commission votes affirmatively on that issue, he joins Vice Chairman Hearn and Commissioner Morse in their findings of fact and ultimate conclusions.

approved, disapproved or modified pursuant to the provisions of section 15 of the Shipping Act, 1916.[A1]**

In Docket No. 69–56, dealing with the Charter Agreement (Agreement No. 9827), Paul D. Page, Jr., then Chief Examiner (since retired), concluded that we have jurisdiction[A2] over the agreement and that it should be approved pursuant to the provisions of section 15 of the Shipping Act. Before exceptions were filed, USL announced a new service between the east and west coasts of the United States and the Far East via Hawaii. The Commission reopened the proceeding for further hearing on the new service. In his Supplemental Initial Decision the Examiner adhered to the conclusions contained in his earlier decision. Prior to the issuance of the aforementioned Supplemental Initial Decision, Agreement No. 9827–1 (an agreement to merge USL and Sea-Land) was filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916. We suspended the time for filing exceptions in the charter case, instituted an investigation (Docket No. 70–51) into the approvability of the merger agreement and denied requests by

**Since we have included in this decision the complete initial decision of the Chief Administrative Law Judge in Docket No. 70–51 and finding it necessary to distinguish the footnotes in each, we have prefixed our footnotes with the letter (A).

[A1] Section 15, as amended, provides as far as pertinent:

Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations * * *.

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

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

[A2] The Charter Agreement basically provided for the time charter to Sea-Land of 16 containerships owned by U.S. Lines for a 20-year period, with an option for Sea-Land to purchase the vessels at the end of the charter period. Comprehensive treatment of the Agreement and the issues involved appear in the decisions of the Chief Examiner. (See 11 S.R.R. 759 (1970) and 11 S.R.R. 1122 (1970).

certain opponents to the charter agreement to discontinue *Docket No. 69–56.*[A3]

In his Initial Decision served on October 21, 1971, in Docket No. 70–51, 16 FMC 142, Chief Administrative Law Judge C. W. Robinson (Presiding Examiner at the time of issuance of his decision) concluded that the merger agreement is subject to the jurisdiction of the Commission and that the agreement should not be approved.[A4] He also found that the supplemental agreement between Kidde and Reynolds and the promissory note to Kidde (described later) are not subject to Commission jurisdiction (he suggested that if we found such jurisdiction, the supplemental agreement should not be approved and that the amount of the promissory note is fair and reasonable). The positions of those opposing the approval of the agreements, by and large, have remained consistent in both proceedings.[A5]

The merger agreement was approved by the respective Boards of Directors and was filed with the Commission on November 9, 1970. It is in the form of an amendment to the Charter Agreement. Attached to the merger agreement as exhibits, but not part thereof, were a document entitled the supplemental agreement and an unsigned copy of Reynolds' promissory note in the principal sum of $65 million drawn to the order of Kidde and dated November 9, 1970.

The Charter Agreement, which the merger agreement amends, provides for (a) the time charter to Sea-Land of the 16 Lancer and Leader containerships owned by USL for a 20-year period, with an option for Sea-Land to purchase the vessels at the end of the charter period; (b) the lease and sub-lease to Sea-Land of containers and related equipment used in connection with the chartered vessels; (c) the transfer to Sea-Land of certain USL facilities located in the Far East; and (d) the guarantee of USL and Sea-Land's obligations under the Agreement by their respective parents, Kidde and Reynolds.

In addition to certain amendatory changes to the Charter, the merger agreement provides that on the effective date of the merger (ten days after the last required approval) RJI will be merged into USL, and that U.S. Lines will be the surviving

[A3] In denying the request, we considered:

* * * it advisable to keep proceedings open in the charter case to permit consideration of the charter (Docket No. 69–56) when the merger agreement proceeding (Docket No. 70–51) is ready for Commission decision. (12 S.R.R. 93, 94 (1971)).

[A4] He specifically found the merger agreement anticompetitive in character and not "required by serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."

[A5] Hearing Counsel, however, urged approval of the Agreement considered in the Charter case and disapproval of the Agreement in the Merger case.

corporation. Kidde, upon delivery of the outstanding shares of USL to Reynolds, will receive a promissory note from Reynolds in the amount of $65 million.

The merger agreement is expressly conditioned upon the receipt of approvals from this Commission, the Interstate Commerce Commission, and such approval of the Maritime Administration as may be required. The agreement provides that the merger will be consummated ten days after receipt of the last required approval unless (a) the agreement has been terminated prior to that time by the mutual consent of the parties; (b) the required approvals shall have been granted upon terms or conditions unacceptable to Reynolds and Reynolds shall have elected not to consummate the transaction; or (c) the consummation of the merger shall have been enjoined by a court of competent jurisdiction.

The merger agreement modifies the Charter in that it eliminates the guarantees by the parent stockholders of their subsidiaries' obligations under the time charter and provides that the effective date for the implementation of the Charter will be the effective date of the merger. The merger agreement also provides that if the merger is approved and the Charter is disapproved, then the Charter is automatically cancelled, unless such cancellation would adversely affect the approval of the merger. The merger agreement also provides that if the merger is disapproved, the time charter and related agreements shall be cancelled.

By the terms of the merger agreement, Kidde and USL are obligated to operate USL "in a reasonably prudent, competitive, businesslike manner consistent with business practices generally prevailing in the shipping industry at all times subsequent to the date of this agreement and prior to the effective date of the merger."

The supplemental agreement, attached as an exhibit to the merger agreement, is an agreement solely between Reynolds and Kidde. The supplemental agreement provides that if the merger agreement does not receive the required approvals, or if the merger is enjoined by a court of competent jurisdiction, or if required approvals are not received prior to November 9, 1975, an independent financial institution will have the responsibility of making an alternative disposition of USL, with Reynolds guaranteeing Kidde that it will receive $65 million for its interest in USL.

If consummation of the merger becomes impossible for any reason, the supplemental agreement provides that "neither *Reynolds nor any subsidiary or affiliate* shall have any control over the finding and designation of any substitute party. . . ." Reynolds will have no standing to object to a substitute purchaser chosen by the independent financial institution unless Kidde requests a Reynolds' guaranty of the substitute purchaser's credit, and Reynolds has a good faith doubt as to the credit-worthiness of the substitute purchaser, or the price offered by the substitute purchaser is determined to be below the fair market value of USL as a going concern.

If a substitute purchaser is located by the independent financial institution, then the sale to that purchaser would be consummated. Of course, if disposition pursuant to the supplemental agreement results in a sale to another common carrier by water or other person subject to the Act, such a transaction would be subjected to Commission scrutiny under section 15. If the value paid by the substitute purchaser to Kidde is less than $65 million, the difference between the sales price and $65 million will be made up by Reynolds.

If the independent financial institution is unable to locate a substitute purchaser, the institution is obligated to make an alternative disposition of USL. In that event, the institution may arrange a public underwriting of USL's stock, it may distribute USL's stock on a pro rata basis to Reynolds' shareholders, or, as a last alternative it may sell USL's assets at competitive bidding. The supplemental agreement provides that the independent financial institution shall make every possible effort to assure that USL continues as a going viable shipping company.

The promissory note is a note drawn by Reynolds to Kidde in the principal sum of $65 million. Although the note bears an annual interest rate of 8 percent and the computation of interest commences on November 9, 1970, the interest is payable only after the note has been delivered to Kidde. The due date to be inserted on the promissory note is the effective date of the merger (ten days after the last required approval) or November 9, 1974, whichever is later. If the effective date of the merger does not occur prior to November 9, 1975, the date to be inserted as the payable date of the note will be November 9, 1976.

By our action herein we are taking jurisdiction over the merger, supplemental agreement and promissory note, in addition to the charter agreement. We are not, however, approving the charter or the proposed merger. What we are doing is modifying the proposed agreement and approving the acquisition of USL by Reynolds upon certain conditions to permit continued Federal Maritime Commission surveillance over the acquisition, reserving to ourselves the authority the Commission has over all agreements approved by us under section 15 of the Shipping Act, 1916. In addition, and as part of our approval of that acquisition, we disapprove the supplemental agreement and approve the promissory note.

We are formulating herein a maritime decision in light of the overall domestic and international merchant marine situation of the day, and we were giving notice as to what the Commission will accept in furtherance of the effort to enable the American merchant marine to compete with the merchant fleets of other countries who espouse and utilize consortia, mergers and other cartel-type activities in this industry. Although we appreciate the position of the Department of Justice, as well as the other interested parties to this proceeding, we find that our decision herein is required by our overriding duty to protect the foreign waterborne commerce of the United States; and a very important tool in the implementation of that responsibility is an American merchant marine which is permitted to have active companies as strong financially as the commercially or governmentally mandated conglomerates of foreign merchant marines.

The Department of Justice has not taken a position when foreign countries and their merchant marines have formed corporate combinations which are contrary to our antitrust policy and laws. It appears that while such is permissible for foreign participants in our ocean commerce, when the same is engaged in by our own carriers, the arsenal of federal antitrust weapons is leveled against it. For the Justice Department to acquiesce in actions taking place in other countries which have a direct effect on our foreign commerce and then attempt to restrain American firms from competing with the same tools, in our opinion, is not in the best interests of the foreign commerce of the United States. This negative approach by the Department of Justice and the other parties to this case will seriously hamper and limit the competitive thrust of the American merchant marine and negate the mandate of our shipping laws for equal treatment of all flag carriers. Such a result is especially odious when the balance is weighted against our own merchant fleet, particularly at a time when our country is attempting to do everything possible to alleviate trade deficits and place American corporations, which must compete internationally, in a viable competitive position.

Kidde has made no attempt to develop the field of waterborne transportation and now gives evidence of intending to dismember USL if prevented from a complete divestiture of the whole. On the other hand, we see Reynolds wishing to acquire United States Lines, having experience in the foreign waterborne commerce by the U.S. by virtue of its ownership of Sea-Land, and willing to inject financial life into USL with a fresh approach to the operation of USL as a viable member of our merchant marine.

The proponents have stated that they will keep USL independent of Sea-Land in all ways, and we are attaching conditions under which Reynolds, through RJI, can operate USL and implement their willingness to keep USL's identity in all respects separate from Sea-Land's. The conditions will permit us to follow the progress of the acquisition and, at any time in the future, demand Reynolds' divestiture of USL if operations are not in character with our original approval. We are insuring this, among other ways, be requiring that all types of concerted action between USL and Sea-Land receive prior approval of the F.M.C. In addition, Reynolds has a history of control over independent competing interests, as in the tobacco industry.

The agreement we are approving is not the type merger as were the Prudential-Grace or the proposed APL/PFEL/AML mergers, whereby independent identities were either effectively blended into one or the same result reserved by the parties to accomplish. We are empowered to keep and are intent upon keeping a very close regulatory watch on the relationship of Sea-Land and USL, following their activities as the Congressionally established trustee for the public interest in the foreign waterborne commerce of the United States.

With respect to the primary Justice Department concern, that being the carriage of military and other government cargo, in our approval of a modified acquisition, we are placing regulatory restraints on the carriers' dealings with the Military Sealift Command including the requirement that the parties submit reports to the Commission and grant the Commission access to their records. Also, other types of information may be required to be filed with the F.M.C. to insure against the government being charged unreasonably high rates.

In consideration of Reynolds' willingness to help ensure that USL will remain a continuing viable company, in the absence of any other financial interest coming forward, and with the knowledge that Kidde wants to be rid of USL and may in frustration dismantle the company, we are taking an action which will permit Reynolds to infuse new private money into USL and the merchant marine.

While our ultimate conclusions differ from those of the Chief Administrative Law Judge, our examination of his findings of fact and the exceptions thereto convince us that those findings were well founded and proper and we adopt them as our own. In order to place our discussion and conclusions in their proper context we set forth immediately below the initial decision in its entirety.[A6]

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

The agreement here involved (the agreement or merger agreement), dated November, 9, 1970, was filed with the Commission on the same date for approval under section 15 of the Shipping Act, 1916 (the Act).[2] The agreement provides, among other things, that RJI Corporation (RJI), a newly formed corporation wholly owned by Reynolds Tobacco Company (Reynolds), shall be merged into United States Lines, Inc. (USL), wholly owned by Walter Kidde Company, Inc. (Kidde), and that RJI shall cease as a corporate organization. In exchange for Reynolds' promissory note (see second paragraph below), Kidde will deliver to Reynolds all the outstanding stock of USL, and USL will be a wholly owned subsidiary of Reynolds. Upon failure of approval by this Commission, the Interstate Commerce Commission, or the Maritime Administration, or approval on terms and conditions not acceptable to Reynolds, the agreement shall be automatically canceled, as will the proposed charter by Sea-Land Service, Inc. (Sea-Land), wholly owned by Reynolds, of USL's vessels under Agreement No. 9827 (Docket No. 69–56).[3] If both the charter and the

[A6] Only the style of the case, headnotes, appearances, etc., have been omitted. We have not renumbered his footnotes.

[1] This decision became the decision of the Commission Feb. 8, 1973.

[2] Approval also is sought from the Interstate Commerce Commission and the Maritime Administration of the Department of Commerce.

[3] Agreement No. 9827, dated October 27, 1969, and filed with the Commission for approval under section 15 of the Act, proposed that USL will charter to Sea-Land 16 containerships and related equipment for a period of 20 years, with the option to purchase at the end of the charter. The total payment to USL would be over $1 billion. The matter proceeded through hearing, an Examiner's initial decision, a reopening by

merger agreements are approved, the effective date of the charter is to be deferred until consummation of the merger, in which case the charter will be an intra-corporate transaction between two wholly owned subdivisions of Reynolds.

A supplemental agreement attached to the agreement sets forth the duties and obligations of Reynolds to Kidde should the merger not be consummated (more details later). The supplemental agreement will not be affected by the disapproval of the agreement, or approval on terms and conditions not acceptable to Reynolds.

A second attachment to the agreement is an 8-percent promissory note of Reynolds to Kidde for $65 million, dated and bearing interest from November 9, 1970, and maturing either in 1974 at the earliest or in 1976 at the latest.

By order served December 16, 1970, the Commission instituted this proceeding to determine whether the agreement should be approved, disapproved, or modified. The order states that the supplemental agreement and the promissory note, although attached to the agreement, "were not specifically filed" (for approval). The parties are directed by the order to address themselves to the following matters (verbatim):

1. The transportation needs which necessitate the merger and the derivative benefits to the public of any approval;
2. Whether the Commission has section 15 jurisdiction over the parties and the Merger Agreement;
3. Whether the Supplemental Agreement and the promissory note are section 15 agreements, and if so, should they be approved;
4. The nature, scope and characteristics of the presently competing transportation systems;
5. The impact of approval upon container, breakbulk, commercial and military movements;
6. The impact of approval on proponents' competitors, both U. S. and foreign;
7. Reynolds' plans for merging USL into its corporate structure and its plan for the operation and control of USL;
8. The effect on the current USL and Sea-Land vessel deployments of the merger;
9. The future service intentions of Reynolds, Sea-Land and USL assuming approval and disapproval of the merger;
10. The possible loss of benefits from the maintenance of an independent USL which would have existed under the charter, but would not exist if the Merger is effectuated;
11. The impact of approval upon labor;

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the Commission, and a supplemental initial decision. The charter was approved by the Examiner. The Commission suspended the time for filing exceptions to the initial decisions and denied a motion to discontinue the proceeding in order "to permit consideration of the charter * * * when the merger agreement proceeding * * * is ready for Commission decision." It is agreed that reference may be made in the present proceeding to the evidence in No. 69-56.

12. The relevant market;

13. The basis for determining the amount of payment under the merger; and

14. Alternatives available for satisfying any asserted transportation needs, realizing any asserted public benefits, or facilitating Kidde's disposal of USL.[4]

The following intervened: Maritime Administration of the Department of Commerce, International Longshoremen's Association, AFL-CIO (ILA), National Marine Engineers Beneficial Association, AFL-CIO (MEBA), International Organization of Masters, Mates and Pilots, AFL-CIO (MMP), Marshal P. Safir, and Arnold Weisberger. Although named as parties in the order of investigation, neither Pacific Far East Line, Inc. (PFEL), nor Prudential-Grace Lines, Inc. (P-G), participated in the hearing or filed briefs.

The hearing consumed 26 whole or partial days; 25 witnesses testified; 193 exhibits were received or marked for identification; and the transcript totaled 3676 pages.

BASIC FACTS[5]

Preliminary

1. The house of Reynolds, one of the country's largest business concerns, wholly owns McLean Industries, Inc., which in turn wholly owns Sea-Land. Kidde is also a many-faceted company, with about 80 subsidiaries in the United States and abroad. Kidde first acquired a stock interest in USL late in January 1967; in January 1969 complete ownership was accomplished. At the end of 1970 Kidde's assets were $514 million; its net sales and operating revenue for that year were $818 million.

2. From the deposition taken of him on January 21, 1970, the chairman of Kidde, Fred R. Sullivan, seemed pleased with the performance of USL. One month later Sullivan and the president of Kidde informed USL's president, John J. McMullen, that USL's results were unsatisfactory and that they would consider the sale of USL. McMullen expressed an interest in buying the company, but after considerable dickering the matter fell through. In the meantime, Kidde enlisted the services of several investment firms to explore the possibility of sale, but again the efforts were unavailing. Kidde was advised by these firms that the charter was not the answer to the problems of Kidde and USL.

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[4] The discussion and conclusions will not always correspond with the exact wording of the order, but all subjects will be covered.

[5] Other facts will be found under the hearing "DISCUSSION AND CONCLUSIONS."

3. In October 1970, at breakfast in Sullivan's home, Sullivan and *Malcolm McLean, a director of RJI and president of* McLean Industries, Inc., initiated discussions on what very shortly became the merger under consideration. Whether McLean had previously telephoned Sullivan to find out about the status of the charter proceeding—as is McLean's recollection—or whether he telephoned to ask whether Kidde was interested in selling USL to Reynolds—as Sullivan recalls—is wholly immaterial. Neither the president nor vice president of USL was aware of the negotiations.

4. As already seen, in case the merger is disapproved, or approved on terms not acceptable to Reynolds, the supplemental agreement comes into play. Under it Reynolds is obligated, not later than November 9, 1976, to find a substitute buyer who will assume Reynolds' obligations under the merger agreement. The substitute has a choice of merger, stock acquisition, or purchase of assets and liabilities. Selection by Reynolds of a substitute is vested in a financial institution of Reynolds' choice, subject to veto by Reynolds if Kidde exercises its right to secure a guarantee by Reynolds of the substitute's note or if the fair value of USL, in Reynolds' judgment, is in excess of the price offered by the substitute. The financial institution is to credit any proceeds received from the disposition of USL as a part payment of the Reynolds note, which, unless fully satisfied, will be delivered to Kidde. Disposition may be accomplished by public sale of USL stock, distribution of the stock to Reynolds stockholders, public auction of USL's assets, or a combination of these alternatives, but there is a preference for preserving USL as an operating entity so long as this is not materially disadvantageous to Reynolds.

U. S.-flag container services

5. For many years USL, as a subsidized line, operated a large number of breakbulk vessels in the North Atlantic/Europe and Atlantic coast/Far East trades. Its subsidy contract, under which it had received about 18 percent of the total subsidy paid to all operators, expired in 1969. The renewal application was never carried through, and a temporary extension on one route ended in 1970.

6. In 1968–69 USL put into service in the North Atlantic trade its eight "Lancer" class containerships, having individual capacity of about 1200 20-foot container equivalents and

a speed in excess of 23 knots. The company also converted eight Mariner vessels into containerships (now referred to as "Leader" vessels), with individual capacity of 929 20-foot container equivalents and a speed in excess of 20 knots. These two types are excellent vessels and constitute the second largest containership fleet in the world. Six Leaders are used in two weekly services between Atlantic ports and western Europe, and represent the largest containership operation in this sphere. The other two Leaders, together with the eight Lancers, operate on a six-day schedule between east and west coast ports, on the one hand, and the Far East, on the other hand, in what is known as the "Seabridge" or tricontinental service, established in September 1970. Transshipment at New York, eastbound and westbound, enables USL to supply a through service between Europe, the North Atlantic, the west coast, Hawaii, and the Far East, as well as an intercoastal service. Both the North Atlantic and the Far East services are connected with feeder services at their foreign destinations.

7. In addition to its containership fleet, USL, has 14 "Challenger" class breakbulk vessels under charter to the military. These have a speed in excess of 22 knots and an average deadweight capacity of 13,500 tons; 11 have an above-deck capacity for about 128 20-foot container equivalents each.

8. USL operated profitably until 1966. In 1967 it sustained an operating loss of $2 million; in 1968, a loss of $9 million; in 1969, the first full year in which the Lancer vessels were used, a profit of $8 million; and in 1970, a year of transition when subsidy had expired, a loss of $3 million. The 1968 loss is accounted for to some significant extent by write offs. The profit for 1969 would have been only $600,000 without reserves, and in 1970 the loss would have been $12.6 million without reserves. The company's net cash outflow in 1970 was about $5.7 million, excluding the cost of long-term debt. In the last quarter of 1970 the company was unable to meet day-by-day expenses and obligations. Losses for the first two months of 1971 were estimated at $1 million before taxes and application of reserves; for the entire year, the estimate was that operating revenue would exceed cash requirements by $35 million.

9. As of the time of the hearing, the principal bank debt of USL approximated $27.6 million and was to mature on March 31, 1971 (subsequent to the completion of the hearing). The company being unable to make payment, negotiations were under way among Kiddie, USL, and the banks looking toward

an acceptable refinancing program in place of 30-day extensions, the latest of which expired on May 31, 1971. Late-filed exhibit no. 193, a letter from Kidde's attorney to the Examiner, dated May 27, 1971, states that a further extension was expected until June 30, 1971. In May, USL secured $15 million from another source, secured by a mortgage on two unencumbered Lancer vessels, plus a guarantee by Kidde to advance $2 million additional collateral in case of USL's default, or in the alternative, at Kidde's option, for Kidde to purchase USL's total obligations under the mortgage agreement. As of the time of hearing Kidde had advanced to USL a total of $9 million. After allocating to Kidde $2 million from the new loan, the balance of $13 million was applied as follows: approximately $5.3 million for USL operating working capital, and approximately $7.6 million as payment to the banks, which reduced bank loans to $20 million.

10. Sea-Land, an unsubsidized company, began a coastwise containership service in 1956. This was expanded in due course to Puerto Rico, the intercoastal trade, Alaska, the Dominican Republic, Jamaica, and other Caribbean islands. More relevant to the present proceeding, however, are the services between the U. S. North Atlantic and northern Europe and the Mediterranean, and between the Pacific coast and the Far East, about which more will be said hereafter. Suffice it to say at this point, Sea-Land is the world's largest containership operator.

11. The carriage by Sea-Land of military cargo in containerships began in 1966, from the Pacific coast to the Far East. There followed, at the end of 1968, an eastbound commercial service to the Pacific coast from the Far East with vessels which carried military cargo westbound. Finally, in early 1971, a westbound commercial service in that trade was started in order to fill space not used for military cargo. In January 1971 the North Atlantic/northern Europe commercial service was twice weekly; to the Mediterranean, once weekly. The various U. S.-foreign services utilize chartered foreign-flag feederships and U. S.-flag feederships are used in the domestic relay system (a total of 15 ships with a capacity of over 2700 20-foot container equivalents).

12. At the time of hearing Sea-Land either owned or chartered 63 linehaul containerships,[6] two of which, with a speed in

[6] This number has been settled upon after examination of the whole record. The parties do not agree on a number. Sea-Land's exhibits 49 and 125 are not compatible, as understood by the Examiner.

excess of 22 knots, were under construction in Germany in 1970 for Matson Navigation Company and purchased at that time for $30 million by a Reynolds subsidiary on behalf of Sea-Land (a third may be acquired).[7] The capacity of the 63 ships is 34,644 20-foot container equivalents, plus 646 40-foot containers. To be added to the foregoing are eight vessels financed by Reynolds and under construction in Germany and the Netherlands, each with a capacity of 1948 20-foot container equivalents and geared to 33 knots, and will be chartered by Sea-Land. These will be the largest and fastest containerships in the world. Delivery is estimated to commence in January 1972, the last one to be received in September 1973 or shortly thereafter.

13. The two Matson ships and the eight ships being built in Europe will offer more container capacity than that of any other American-flag operator. The 17 vessels used in the domestic trades also exceed the number of ships operated by any other U. S.-flag operator in both the foreign and domestic services. Aside from the Matson vessels, the presently owned fleet is composed principally of vessels constructed during World War II (and later converted) and are slow and of limited capacity. From four to six of the oldest vessels may be retired by 1974.

14. The commencement by USL of the Seabridge service in 1970 made that company the only direct competitor of Sea-Land in the total U. S. foreign commerce. As already noted, the two companies are the largest containership operators in the North Atlantic. Now served by relay via Puerto Rico, Sea-Land has been considering a direct service between the Atlantic coast and the Far East.[8] There also are expansion plans for that trade irrespective of the outcome of the present proceeding. Sea-Land and USL are highly competitive for the carriage of military cargo. For instance, under RFP 500 (July 1970 - June 1971) USL underbid Sea-Land in five of the seven transpacific trade zones, and the same was true in all three North Atlantic/Mediterranean zones. In June 1971 Sea-Land received a two-year $71 million contract to carry military cargo to Vietnam.

15. Sea-Land's marketing methods are extensive and designed to take advantage of all trade possibilities in the United

[7] One was chartered to Sea-Land on December 31, 1970, for a term of five years; the second is to be delivered in 1971 under a 5-year charter.

[8] Official notice is taken that Sea-Land became a member of the Far East Conference (Route 12) on August 20, 1971.

States and abroad. Its domestic relay activities provide a vast and unique opportunity to gather cargo for its linehaul ships in the foreign trade; no other U. S.-flag containership operator is able at present to match these competitive efforts. This exertive force will be further expanded through 1975 even should the merger not be approved.

16. For the first three quarters of 1970, Sea-Land's profit (or loss) for its various services here concerned was as follows:

North Atlantic	$ 363,000
Mediterranean	(3,793,000)
Viet Nam	18,802,000
Okinawa/Philippines	5,043,000
Far East commercial	4,632,000
Foreign commercial	1,202,000
Military contracts	23,845,000

The profit of $1,202,000 on foreign commercial shipments was derived from revenues of $70,045,000, and is a rather low return. In contrast, the profit of $23,845,000 on military contracts was predicated on revenues of $74,999,000.

17. American Export Isbrandtsen Lines, Inc. (AEIL), has a weekly service on Trade Route 5–7–8–9, utilizing three new "Seawitch" class containerships with an individual capacity of 928 20-foot container equivalents and a speed of 21 knots. This is the most important route in American foreign commerce (North Atlantic/U. K, Ireland, the Continent (Germany south of Denmark to northern border of Portugal)); it also has the largest percentage of cargo moving in containers (about 60 percent in 1969), which has brought U. S.-flag breakbulk operations to a virtual halt.

18. There also is an AEIL weekly Mediterranean service on Trade Route 10 (North Atlantic/Mediterranean), in which there are utilized four modern "Seabridge" class roll-on-roll-off containerships, recently purchased from Moore-McCormack Lines, Incorporated, with an individual capacity of 824 20-foot container equivalents and a speed of 24 knots, and one converted containership; also a fortnightly service with four breakbulk ships. This route has been the company's basic area of operation and is the oldest American-flag service in the area. About 30 percent of the cargo on the route is tied in to foreign-flag vessels, and only about 30 percent of the general liner cargo is containerized because of the underdeveloped economy of the area. Sea-Land entered the trade several years ago as the result of a low bid on military cargo; its financial results therefrom have been so unsatisfactory that it recently

announced a switchover to foreign-flag vessels. AEIL also operates on two other trade routes: a fortnightly service on No. 18 (Atlantic and Gulf/India, Persian Gulf, Red Sea) with nine breakbulk ships, and a 12-day service on No. 12 (Atlantic/Far East) with seven partial containerships about 10 years old.

19. Three more Seawitch vessels are scheduled for delivery to AEIL in 1972-73. The company also must take further steps to upgrade its fleet in order to fulfill obligations under operating-differential subsidy contracts with the Maritime Administration. If the Seabridge vessels are jumboized their container capacity would be nearly doubled. There are a few breakbulk vessels which could be converted to containerships.

20. American President Lines, Inc. (APL), operates three all-freight subsidized services, competitive to some extent with Sea-Land and USL. A weekly transpacific service between California and the Far East utilizes five new breakbulk vessels with ondeck container capacity, two largely containerized vessels, and usually one additional such vessel; this service is profitable. The round-the-world service operates on fortnightly frequency, using seven Mariner vessels capable of carrying containers on deck and in the square of the hatches; there are marginal results from this service. The Atlantic/Straits service serves the Atlantic coast, California, the Far East, and Malaysia with seven breakbulk vessels on a 15-day frequency, and is not profitable.

21. There are under construction for APL four "Pacesetter" class containerships, having an individual capacity of 1209 20-foot container equivalents and a speed of 23 knots. Delivery is called for between July 1972 and March 1973, and they are scheduled for the transpacific service. Five "Sea Master" class vessels in the transpacific service are to be converted to containerships having a speed of 23 knots and an individual capacity of 876 containers; these are planned for delivery between February and August 1972 and eventually will be used in the Atlantic/Straits service. The Mariner vessels probably will be converted to full containerships for the round-the-world service. There will be containership operation in some form in all three services by 1973.

22. Completely owned by APL,[9] American Mail Line Ltd. (AML) has two subsidized services, both competitive with Sea-Land and USL. One service, between the Pacific Northwest and the Far East, utilizes five C–5 vessels and two

[9] This has come about since the hearing.

Mariner breakbulk vessels on a 9–10 day frequency. The C–t's can carry 469 containers on deck and in the hatch wings, and at the time of hearing they were the largest freighters in the world. The other service, on a monthly schedule, originates in the Pacific Northwest and proceeds to Southeast Asia, turning at Calcutta and East Pakistan and returning via California. Three Mariners, which can carry some deck containers, ply this route; the service is unprofitable. The company is converting three Mariners to full containerships, with an individual capacity of 892 20-foot container quivalents, to be used between the Pacific Northwest and Japan. Four of the C–5's will be kept on the Far East run and one may join the other two Mariners in the Southeast Asia-Bay of Bengal service.

23. In addition to its domestic container services (Atlantic/Puerto Rico, west coast/Hawaii, and Guam), Seatrain has an Atlantic/North Europe container service, and is considering a west coast/Far East service. Its North Atlantic fleet is being replaced with four containerships having individual capacities of 1900 20-foot container equivalents and a speed of about 25 knots, under construction in Germany for operation under the British flag. The company has no long-range plans to operate under the American flag on the North Atlantic. In addition to its common carrier services, Seatrain owns and operates tankers and bulk vessels, some under foreign flag, under charter for the carriage, principally, of oil and grain. Another endeavor is the operation of the ex-Brooklyn Navy Yard. The company's assets have increased from $72 million in 1966 to $206 million in 1969.

24. Although, as mentioned, PFEL and P-G were named as parties to the proceeding, they did not participate in the hearing and did not file briefs. PFEL operates a weekly subsidized service on Trade Route 29 (transpacific, broadly speaking) with nine breakbulk vessels. Recently it purchased from The Oceanic Steamship Company four ships which had been operated on Trade Route 27 (Pacific coast/Australia and New Zealand) and two containerships under construction, the latter having an individual capacity of about 1450 20-foot container equivalents and a speed of 23 knots; these should enter service in 1972–73 and it is contemplated that they will ply Route 29 in exchange for two vessels now operating thereon. In addition to the above, PFEL has six LASH-type ships on order or under construction, with an individual capacity of about 1500 20-foot container equivalents and a speed of 23 knots, to be used on Route 29.

25. P-G, a subsidized operator, is acquiring five LASH-type vessels for operation on Route 10 (at least one has been delivered), with an individual capacity of about 1500 20-foot container equivalents and a speed of 23 knots. Since consolidation of Prudential and Grace there is a subsidized service between the Atlantic and Pacific, respectively, and the Caribbean and east and west coast of South America, which have no U.S.-flag competition.

26. Not a party to the proceeding, Lykes Bros. Steamship Co., Inc., has under construction three "Seabee"-type vessels with an individual capacity of 1800 20-foot container equivalents and a speed of 20 knots, for probable operation on Route 21 (Gulf/western Europe). In addition, there are nine units scheduled for conversion to part containerships, with an individual capacity of fewer than 200 20-foot containers and a speed of under 18 knots. The company also operates in other important trades.

27. Another line not made a party to the proceeding, Farrell Line Incorporated, operates a subsidized service on Route 16 (Atlantic-Gulf/Australia and New Zealand), rather recently purchased from USL, for which it has under construction four containerships with an individual capacity of 978 20-foot container equivalents and a speed of 23 knots, for delivery in 1971–72. The company also has two newish part containerships with an individual capacity of 232 20-foot containers and a speed of 21 knots. In addition to the southwest Pacific run, there is a service to South and East Africa from the Atlantic (Route 15–A), which is the company's original area of operation.

28. Moore-McCormack Lines, Incorporated, not a party to the proceeding, formerly operated a service on Route 5–7–8–9, but its four new roll-on-roll-off ships in that service were sold recently to AEIL, as previously mentioned. It owns six part containerships about five years old, with an individual capacity of 301 20-foot containers and a speed of 21 knots, and five older and slower part containerships.

29. The last of the U. S-flag containership operators to be here mentioned—also not a party to the proceeding—is States Steamship Company.[10] This line has five ships with an individual capacity of 200 20-foot containers and a speed of 23 knots, plus six which can carry 167 20-foot containers each at a

[10] Delta Steamship Lines, Inc., a subsidized operator, has services from the Gulf to South America and to Africa, but the record contains no information as to it which is comparable to that of the other lines.

speed of 20 knots. Both classes of ships serve the transpacific trade *(in its broad connotation)*.[11]

Foreign-flag competition

30. Without going into detail, the record is replete with the many combination and individual company operations of foreign-flag containerships in direct competition with U. S.-flag counterparts. The principal areas of this competition are Atlantic/North Europe, Atlantic/Mediterranean, Pacific/Far East, and Atlantic/Far East. These operations continue to grow as new and efficient vessels are added.

31. It was estimated by the economic witness for APL-AML that by mid 1971 the one-way annual container capacity on the routes just mentioned would be as follows:

	U.S. Flag	*Foreign Flag*
No. 5–7–8–9	240,452	344,003
No. 10	62,882	38,189
No. 12	46,147	None
No. 29	152,756	108,426
Total	502,237	490,618

Relevant market

32. As already seen, the routes where competition between U.S.-flag and foreign-flag containership services are most acute are Atlantic/North Europe, Atlantic/Mediterranean, Atlantic/Far East, and Pacific/Far East. Responsible witnesses for Sea-Land and USL agree that vessels carrying only containers are the most economically practical for a container service. Furthermore, containership operation is generally considered to be one that is apart from other types of service.

33. Almost hopelessly irreconcilable are the statistics pertaining to the available containerable[12] commercial cargo on the relevant routes. Here, as in most cases where cargo estimates are made, there is a technical battle between the preparers of the estimates, representing as they do opposing interests in the matters at issue. The Examiner does not propose to enter this mental arena as he believes it to be unnecessary for present purposes. It is sufficient, under the circumstances, to conclude that in 1970 a reasonable estimate of such cargo

[11] Some of the information concerning the carriers referred to has been obtained from "Essential United States Foreign Trade Routes," December 1969, published by the Maritime Administration of the Department of Commerce.

[12] The Examiner prefers this spelling to "containerizable".

was in the general magnitude of 8,000,000 long tons (in and out) on Route 5–7–8–9; 2,000,000 long tons (in and out) on Route 10; 4,000,000 long tons (in and out) on Route 12; and 3,000,000 long tons (in and out) on Route 29—or a total of 17,000,000 long tons.[13]

Containerized cargo carried

34. In 1969, the only year of record, and limited to routes 5–7–8–9 and 29 (the two largest areas), 3,078,257 long tons (in and out) of containerized cargo were carried by U. S.-flag and foreign-flag lines on the former, the U. S.-flag vessels accounting for 60 percent; on Route 29 there were 2,093,379 long tons (in and out) of containerized cargo, with 61 percent handled by U. S.-flag vessels. The figures for both routes include commercial, military, and mail cargo. Limited to commercial cargo, 2,769,097 tons were carried by all flags on No. 5–7–8–9, 56 percent of which was on U. S.-flag vessels; on No. 29, 1,206,703 tons of commercial cargo were carried, 34 percent of which was on U. S.-flag vessels.

Cargo reserved to U. S. flag

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Cargo reserved to U. S. flag

35. Certain cargoes are reserved by law to vessels flying the U. S. flag. One such type is military cargo, the other is government-impelled commercial cargo. These two classes are very important to the welfare of the American lines.

36. In 1969, on Route 5–7–8–9, military cargo amounted to

[13] To enable the reader to avoid plodding through a mass of data, see Exhibit 423, table B-44 (as corrected), in Docket No. 69–56.

36 percent of all U. S.-flag outbound traffic; on Route 29, 81 percent. Outbound and inbound, 19 percent of the U. S.-flag container cargo on No. 5–7–8–9 was military; on No. 29, 66 percent. Government-impelled cargo constituted 21 percent of the commercial liner exports in 1969, 61 percent of which was carried by U. S.-flag vessels.

37. Sea-Land carries about 95 percent of the transpacific military cargo. Receipts of about $91 million in 1969 from military cargo were nearly twice that of any competitor. In the same year, military and government-impelled cargoes amounted to 62 percent of the revenue tons handled by Sea-Land in its foreign services. For the first three quarters of 1970, Sea-Land's revenues from military cargo represented about 60 percent of the company's total revenues and about 50 percent of its cash return. For APL and AML, military and government-impelled cargoes were about 70 percent of their outbound transpacific volume in 1969 and 1970.

Cargo wedded to foreign flag

38. A part of the cargo in the foreign commerce of the United States moves by foreign-flag vessels because of nationalistic preference. This is quite easily understood and appreciated.[14] About 40 percent of the desirable liner cargo from the Pacific coast to Japan finds itself in Japanese vessels. Sea-Land, in its projections, estimates that 45–50 percent of the U. S.-Japanese trade will be garnered by the Japanese lines. USL agrees that the Japanese lines will predominate. The Japanese situation is largely the result of immense business combines that include steamship companies. To a lesser extent the flag-conscious situation exists in other transpacific trades. It was estimated that about 30 percent of the Atlantic-Europe trade is safely within the province of foreign-flag lines.

Plans of Reynolds, USL, Sea-Land

Item 7 of page 3 of the order of investigation, as seen earlier, calls for "Reynolds' plans for merging USL into its corporate structure and its plan for the operation and control of USL," and item 9 seeks "The future service intentions of Reynolds, Sea-Land and USL assuming approval and disapproval of the merger." As it would be quite difficult to divorce the two items

[14] There seems to be a growing feeling in this country that a modicum of U.S.-flag preference is emerging.

in any discussion, they will be handled together for convenience and comprehensive understanding. The statements below, unless indicated to the contrary, are those of the respective parties and are not necessarily the conclusions of the Examiner.

39. *If merger is approved.* Following approval, Reynolds would maintain USL as a wholly owned subsidiary, with continued operation under the existing name, and independent of Sea-Land. USL would have its own management, accounting, labor relations, and construction funds. If the charter between Sea-Land and USL is approved (Docket No. 69–56), USL will man and operate its 16 containerships for the account of Sea-Land for a 20-year period, subject to all the terms of the charter agreement. As pointed out earlier, approval of the charter would mean more than $1 billion for USL over the 20-year period ($30 million annually), and Reynolds would negotiate with the Maritime Administration for a tax-deferred fund under the Maritime Act of 1970 to enable construction of various types of ships. Should there be competing operations, Sea-Land vis-a-vis USL, this would be eliminated to ensure dependable service to shippers.

40. It has been the policy of Reynolds to contribute its resources and skills to assist acquired concerns in order to place them on a sound financial basis. Furthermore, Reynolds sees to it that its subsidiaries are operated in a reasonable and prudent business and financial manner. In the case of USL, Reynolds would render assistance through capital advances, renegotiation of outstanding debts, and whatever else would be necessary to assure that USL would have a current debt status.

41. USL would expand its operations into other areas, and would operate its 14 Challenger breakbulk vessels under the merger regardless of whether the charter is approved; furthermore, they will not be used by or for Sea-Land. Reynolds would accept as a consideration for approval of the merger that it would obtain prior approval of the Commission should it decide to transfer the use of the Challengers from USL to Sea-Land. As another concession, Reynolds would obtain approval of the Commission before a change is made in the charter. Now under charter to the military, as previously mentioned, USL would prefer to keep the Challengers on military charter. Should the military terminate the charters, USL could operate all or some of the ships in commercial breakbulk

services, convert all or some to containerships, charter all or some to other operators, or sell one or more.

42. Sea-Land will obtain the use of the 16 USL containerships upon approval of both the merger and the charter. These vessels will upgrade Sea-Land's fleet of vintage ships, and will be integrated into Sea-Land's worldwide system of terminals and services to achieve high productivity. As of the time of the hearing, Sea-Land had not established fixed deployment of USL's containerships for the 20-year charter period. Although there was a suggestion as to how the combined Sea-Land and USL fleets might be used by 1973–74, the prognostication is of little value inasmuch as many factors would have to be considered in the meantime. As for its own ships, it was stated that the first two of the eight large SL–7 vessels building or on order in Holland and Germany would be used in the trans-Atlantic trade, and that the next several would be used in the transpacific trade. After the implementation of the charter Sea-Land would maintain basically the same level of service in each trade as did USL.

43. *If merger is disapproved.* In this event, USL would continue to operate its containerships as at present, pending eventual disposition of the company in accordance with the supplemental agreement. The principal witness for Reynolds testified that, following disapproval, USL would be sold "as a going concern." As already pointed out, an independent financial institution will dispose of USL, but the operation of the company will not be affected and Reynolds will have no legal right to interfere with USL's general competitive capability. Reynolds can only take steps to protect itself against guaranteeing the credit of a poor-risk purchaser, and seeing to it that the price received for the sale of USL is reasonably related to fair market value at the time of sale.

44. Sea-Land would follow through with plans to broaden its operations both as to sailings and areas served, and would take whatever steps necessary for an aggressive and well-run company to maintain its place in the sun. Between 1973 and 1975 the following deployment of its vessel is either proposed or contemplated:

> In 1973 five additional SL–7s and one additional Matson type vessel will become part of the fleet. One SL–7 will be added to the North Atlantic, joining the earlier SL–7 vessel placed in this trade providing weekly service in each direction with these high speed ships. The remaining SL–7 ships will be placed in the Far East service. With a call every week in the Far East, four additional feeders will be necessary to collect the cargo from the outports to fill these vessels.

With the expected drop in military cargo, the six C-4J vessels will be transferred from the Viet Nam service to the Intercoastal service where they will serve New York directly. The added space will be necessary to handle the expected East Coast/Far East commercial freight in both directions.

A shuttle service will be instituted on the West Coast to collect and distribute the SL-7 cargo and the Texas service will increase capacity from 225 vans per week to 360 vans per week to handle the extra freight needed for Europe.

The two Matson ships released from the North Atlantic and an additional vessel of similar characteristics, which will have to be acquired, will be placed in the Mediterranean service. Feeder capacity will have to be expanded to three vessels in order to fill the weekly capacity of the Matson type vessels.

With the additional capacity delivered and redeployment of the fleet to provide maximum competitive service six C2 vessels (with cranes) and two C2X vessels (without cranes) will be excess and are not included in the deployment schedules. Such vessels can then either be sold, sub-chartered, or used to develop market opportunities not yet fully explored.

45. Although Sea-Land's deployment, by its very nature, must be tentative and flexible in the next few years, the foregoing excerpt represents management's best judgment; no reason appears why it should not be accepted for what it is, namely, an educated forecast.

Impact upon labor

46. *ILA* is the longshore union whose members load and unload vessels serving Atlantic and Gulf ports, irrespective of flag. It also performs terminal functions such as stuffing and stripping containers and loading and unloading trucks. Regardless of whether the merger is approved, this union will continue to perform those functions. Its principal concern is that the proposed merger would reduce the number of longshoremen needed to handle the traffic. Sea-Land and USL use different terminals; if the merger is approved, and to the extent possible, Sea-Land would consolidate its operations in each port at a single terminal and USL terminals would cease to be utilized. As a consequence, Sea-Land projects a loss of several million dollars in longshore wages a year in loading and unloading operations. There also is another factor: the number of longshoremen has decreased with the advent and development of containerization, and as breakbulk transportation lessens, it is likely that fewer longshoremen will be needed. This could be counteracted to some extent, of course, if port coverage is increased and increased foreign-to-foreign cargo is transshipped at American ports.

47. *MEBA and MMP* supply the licensed officers and engineers for both Sea-Land and USL, and to that limited extent,

would not be affected by the merger. There is some slight indication, however, that if the merger is approved Sea-Land would cut back on its own replacement program, which could mean a reduction in the number of ships in the combined fleet, bearing in mind that Sea-Land intends in the not too distant future to rid itself of a number of older ships. If this chain of events takes place, it could result in a decrease in the use of MEBA and MMP personnel. This would be true even though the merger technically is not between Sea-Land and USL. But a fair and reasonable appraisal of the entire record leads to the probability that the premise is not true even though, as one of Sea-Land's principal witnesses testified, "it would obviously be a tremendous advantage to Sea-Land to be rid of USL." Furthermore, it is possible that at the end of the charter period USL will have enlarged its fleet—perhaps by as many as 20 vessels.

48. *NMU* unlicensed personnel man USL's vessels, container and breakbulk. To allay any fears that the union might have if the merger is approved, Reynolds and Sea-Land agree that USL would be bound by all collective bargaining agreements in effect at the time of change of ownership, and that under the charter USL would continue to operate its containerships with NMU personnel. These conditions are also acceptable to Kidde and USL.

49. *Seafarers International Union* furnishes the unlicensed personnel for Sea-Land vessels. It is informally agreed by Reynolds and the union that the latter's members would not lose any of their traditional work under the merger and charter agreements, and that there would be no jurisdictional disputes in the menning of the two fleets.

50. *Shoreside personnel* of Sea-Land and USL is another factor to consider. USL already has reduced its personnel considerably, a situation which naturally concerns the rest of the organization under the proposed merger. It cannot be determined at this time what the real effect would be on USL personnel if the merger is approved—or, for that matter, whether USL would be forced to further reduce its clerical force if the merger is not approved (but see later the discussion as to USL's financial condition and general competency of USL's operations). One thing can be said, however: any USL employee who might be released would have, under the Reynolds corporate policy, a preference for employment at Sea-Land or other Reynolds subsidiaries. In that connection, Sea-Land has

plans in the next few years for a "rather substantial increase in people." The charter agreement provides that USL personnel in the Far East would be retained by Sea-Land.

Container capacity and containerable cargo by 1974

51. The parties have centered their thoughts on the year 1974 as the outermost period for comparative purposes, both as to container capacity and as to the volume of containerable cargo. In that year, Sea-Land may well have been on its way toward completion of its expansion program, as outlined in the five-year forecast (1971–1975) of McLean Industries, Inc. Also, much if not all of the building by foreign-flag lines will have been put into service by that time.

52. *Container capacity.* The predictions of the economic witness for Sea-Land and USL as to containership capacity by 1974, on the principal trade routes here involved, is shown in Table 1.

TABLE 1

Trade Route	*No. of ships*		*Annual voyages*		*Annual capacity one way 20-ft. cont. equivs.*	
	U. S.	*Foreign*	*U. S.*	*Foreign*	*U. S.*	*Foreign*
5–7–8–9						
	* 11	35	208	494	246,190	496,156
	** 9		169		205,409	
10						
	* 11	8	152	104	189,058	66,300
	** 14		178		186,423	
12						
	* 14	18	86	100	67,576	95,000
	** 12		78		79,768	
29						
	* 50	33	435	269	387,654	184,218
	** 33		323		316,084	

* — No merger.
** — Merger.

53. In comparison with Table 1, the economic witness for APL-AML predicts the container capacity by 1974 as shown in Table 2

TABLE 2

Trade Route	No. of ships		Annual voyages		Annual capacity one way 20-ft. cont. equivs.	
	U. S.	Foreign	U. S.	Foreign	U. S.	Foreign
5-7-8-9						
	* 19	28	253	416	339,438	392,756
	** 11		221		312,317	
10						
	* 11	8	156	100	135,622	63,500
	** 14		182		132,987	
12						
	* 19	7	110	52	86,461	89,490
	** 19		117		95,741	
29						
	* 47	21	443	231	406,745	177,144
	** 40		376		339,111	

* — Without merger.
** — With merger.

54. Because of the differences in the basic approaches of the respective witnesses, the answer to the container capacity by 1974 probably lies somewhere between the extremes shown in the two tables; however, in view of such faraway estimates, complete accuracy is neither required nor expected for present purposes.

55. *Containerable cargo*. In Docket No. 69–56 the economic witness for some of the lines opposing the Sea-Land/USL charter estimated the volume of containerable cargo by 1974 on the trade routes here principally involved. These estimates were based on a review of liner cargo movements for which data was then available through 1968. Since the time of that estimate the actual data for 1969 have become available. These confirm, says the witness, the accuracy of the projections made in No. 69–56. The economic witness for Sea-Land/USL also has made a similar computation in the present proceeding. The two estimates are shown in Table 3 (the figures are approximate).

TABLE 3

Trade Route	*Opposing Merger*	*Sea-Land/USL*
5-7-8-9	4,174,000	4,869,000
10	2,205,000	2,128,000
12	3,498,000	3,688,000
29	4,075,000	6,870,000

56. There is relatively little difference between the two projections except for Route 29. The reasonable estimate for that route is somewhere between the two extremes.

Containerable cargo vis-a-vis capacity, 1974

57. Table 4 shows the estimated containerable cargo and container capacity on the principal routes in 1974.[15]

TABLE 4

Trade Route	*Containerable cargo (long tons, approximate)*	*Container capacity (long tons, approximate); eight tons per container, average*	
		Total	*U. S.*
5-7-8-9	4,500,000	* 5,800,000 ** 5,600,000	* 2,700,000 ** 2,450,000
10	2,200,000	* 1,550,000 ** 1,550,000	* 1,000,000 ** 1,000,000
12	3,500,000	* 1,400,000 ** 1,450,000	* 700,000 ** 725,000
29	5,500,000	* 4,600,000 ** 4,100,000	* 3,000,000 ** 2,500,000
Total	15,700,000	* 13,350,000 ** 12,700,000	* 7,400,000 ** 6,675,000

* — No merger.
** — Merger.

[15] The cargo figures are a reasonable compromise between those given in Table 3.

58. From Table 4, the figures in which are, naturally, quite fluid since they represent estimates three years hence, it can be seen that only Route 5–7–8–9 would be overtonnaged in 1974 if the combined U. S. and foreign capacities are considered. Insofar as U. S.-flag totals are concerned, the capacity would be considerably below the available cargo on Route 5–7–8–9, about half on Route 10, far below on Route 12, and respectable on Route 29. The total capacity on the four routes would be approximately 85 percent of the containerable cargo available in 1974.[16]

DISCUSSION AND CONCLUSIONS

Jurisdiction

Merger agreement. As might reasonably be expected, the Department of Justice (Justice) takes the position that the Commission has no jurisdiction under section 15 to entertain applications for approval of ocean-carrier mergers. The Examiner feels that he need not go into this phase in depth as he is bound by prior rulings that the Commission *does* have such jurisdiction. *Merger–American Mail Line and Pacific Far East Line*, 11 F.M.C. 53 (1967), aff'd *sub nom Matson Navigation Co.* v. *Federal Maritime Com'n*, 405 F. 2d 796 (9th Cir., 1968); *Agreement No. 8555*, 7 F.M.C. 125 (1962); and denial by the Commission of motion to stay the present proceeding, served February 17, 1971. With due respect, the Examiner, under all the circumstances, declines to be bound by the opinion of the United States District Court for the District of New Jersey, filed April 7, 1971, in *United States of America* v. *R. J. Reynolds Tobacco Company et al.*, Civil Action No. 1668–70, 325 F SUPP 656 which held that the Commission does not have jurisdiction under section 15 to pass upon the instant application. As of this writing, the Commission has not been ordered by the Court to refrain from the further processing of the matter (see Commission's denial of appeal, served May 17, 1971).[17]

Supplemental agreement. As previously stated, the supplemental agreement comes into play only if the merger is disapproved, or approved on terms and conditions not acceptable to Reynolds.

[16] The Examiner is not unaware of statements made publicly in the past few months that certain trades either are or will be overtonnaged. He can only say that if the figures here used do not coincide with those of others, he is bound by what this record shows.

[17] Jurisdiction is not defeated simply because some of the parties to the agreement are not carriers or other persons subject to the Act. *N. Atlantic Mediterranean Frt. Conf. and United Arab Co.*, 9 F.M.C. 431, 436 (1966).

Reynolds/Sea-Land and Kidde/USL take the position that the supplemental agreement is not subject to approval under section 15, for the following reasons: first, it is not an agreement between common carriers by water or other persons subject to the Act; second, it does not control, regulate, prevent, or destroy competition; and third, it does not fit into any of the other kinds of agreements contemplated by section 15. Justice supports this view.

APL and AML maintain that the supplemental agreement is subject to section 15 because it has a "shipping effect," irrespective of the fact that the parents of Sea-Land and USL, signatories thereto, are neither common carriers nor other persons subject to the Act. They further argue that the supplemental agreement has been carried out without the requisite approval. Hearing Counsel concede that Reynolds and Kidde are not common carriers or other persons subject to the Act, as traditionally understood, but insist that the real parties to the supplemental agreement are Sea-Land and USL, and that all agreements controlling, regulating, or destroying competition must be filed for approval, whether they be made directly by carriers or other persons subject to the Act or through the interposition of other parties having effective control over the carriers or other persons involved. Hearing Counsel further argues that the approvability of the supplemental agreement is premature since it has not been filed as an agreement requiring Commission action.

Whether the supplemental agreement is subject to section 15 is a close question; one which can be argued with equal facility on both sides. In approaching the problem the following, among other factors which probably could be mustered, must be considered: (1) the supplemental agreement cannot be implemented, in some respects, except through the action of USL under Kidde's orders; (2) Reynolds' primary consideration is to secure the USL fleet for the use of its subsidiary, Sea-Land; (3) the supplemental agreement is a means by which Reynolds—and more importantly, Sea-Land—could acquire USL (and all that goes with it) upon disapproval of the merger; (4) the supplemental agreement (section 14) provides that "This Agreement, the Merger Agreement, and the Related Documents embody the entire agreement and understanding between all of the parties hereto relating to the subject matter hereof"; (5) Reynolds has been actively behind Sea-Land's operations, including its building program; (6) Reynolds and Kidde have undertaken considerable financial and managerial responsibilities on behalf of their subsidiaries; (7) Reynolds has certain veto powers over the sale of USL; (8) according to witness McLean, Reynolds would expect to be heard should USL be disposed of by an institution selected by Reynolds; and (9) USL would continue to be an operating entity to the extent it would not be materially disadvantageous to Reynolds.

Much could be said for the contention that the supplemental agreement is part and parcel of, and inextricably interwoven with, the merger agreement, and that it would be unrealistic to hold that the supplemental agreement is not subject to section 15. This theory must depend, however, upon the further theory that, although signed neither by carriers nor by other persons subject to the Act, nevertheless the document really has been executed by Reynolds and Kidde as the alter egos of Sea-Land and USL. This position would, of course, take care of any situation where legal parents or other relatives execute documents or perform acts permitting carriers or other persons subject to the Act to escape the responsibilities cast upon them by the Act. Whereas this would fit neatly into the general scheme of regulation, the Examiner is of the opinion that it stretches the skein too far under the facts here involved.

The fact that an agreement has a "shipping effect" does not mean necessarily that it automatically comes within the purview of section 15. Although Sea-Land and USL would be affected to some extent by the supplemental agreement, they are not the real parties in interest thereunder. Should the merger not be approved the supplemental agreement comes into full bloom, the charter application is abandoned, and Reynolds/Sea-Land terminate their interest in USL.[18,19]

Promissory note. Although the order of investigation calls for a review of the promissory note, both as to the Commission's jurisdiction thereof and as to whether approval should be given thereto, there is a dearth of briefing on the jurisdictional point. Kidde-USL merely give a short summary of the terms of the note and then state later, in bold type: THE SUPPLEMENTAL AGREEMENT AND THE PROMISSORY NOTE ARE NOT SECTION 15 AGREEMENTS. There is no discussion as to whether the note comes within section 15. Justice states that the note does not fall within section 15 as Reynolds and Kidde are not common carriers, that it is not a

[18] The Examiner's decision in *Agreement No. DC-27*, 10 SRR 725, 727 (1968), cited by the parties, has been considered but is not persuasive in view of the dissimilarity of facts.

[19] Should the Commission disagree with this conclusion, the discussion found in APPENDIX "A" is submitted as an aid to the Commission in its determination as to whether the supplemental agreement should be approved.

working agreement of the type covered by section 15, and that it is not related to the operation of shipping companies; on the contrary it is a contract creating "rights and obligations between two parties not subject to FMC jurisdiction in the event that the Agreement of Merger is frustrated by agency or court disapproval." Finally, Hearing Counsel states simply that the note "raises no legal issues other than those discussed in connection with the Merger Agreement and the Supplemental Agreement."

If the premise is correct—namely, that the supplemental agreement is not subject to section 15—it follows that the promissory note is not subject to section 15, and it is so found.[20]

Impact of merger on U.S. competitors

APL-AML. These two companies, which have served the transpacific trade for some years, and which have close relationships with their shippers, both in the United States and in the Orient, are troubled by the thought that the merger could blanket their spheres of operation. This could be accomplished, it is said, by deploying six to eight SL–7's or eight Lancers in the various segments of the Pacific coast/Far East trade. Both lines have been and still are proceeding with their expanded containership program, a costly step which they would hardly take were they too much concerned with the approval of the merger. Referring to tables 1 and 2, and irrespective of whose estimates are used, APL, AML, Sea-Land, and USL agree that there will be fewer U. S.-flag containerships on Route 29 in 1974 if the merger is approved.

It cannot be overlooked that APL and AML have elected to accept operating differential subsidies, which contain them somewhat as far as concerns their independent flexibility and maneuverability.

If the merger is approved, Sea-Land and USL will accept the following conditions relating to Route 29:

> * * * two sailing per week originating and terminating on the West Coast of the United States (but only one sailing per week if the entire service is performed by SL–7 class vessels).

APL-AML are not satisfied with these conditions. They say that (1) Sea-Land offers no substantial outbound commercial service on Route 29; (2) USL has only a top-off service on the

[20] Should the Commission disagree with this conclusion, the discussion found in APPENDIX "B" is submitted as an aid to the Commission in its determination as to whether the amount of the note is fair and reasonable.

Pacific coast in its Route 12 service (Atlantic(Far East); (3) the proposal would allow two sailings a week, plus a maximum of two calls a week by Route 12 vessels; and (4) though Sea-Land now offers two inbound commercial sailings a week with vessels that sail outbound with military cargo, the proposal would leave the military service unrestricted and add two round-boyage commercial sailings a week. This situation, they argue, would sanction from three to six times the sailings and capacity of its largest competitor.

APL-AML want the Route 12 sailings from the Atlantic to be confined to the basic route and not be used to double the two-sailings-a-week limitation on Route 29. They will accept two sailings a week "in the thought that it is probably coming anyway," but will "not accept the added service of the returning military carriers, which at the present level would double the inbound commercial service on T R 29." Since, it is stated, "the ordinary practice of the full-military carriers, such as States Marine, is to ballast inbound * * * Sea-Land should do the same if it wants to continue as the dominant military carrier in the Pacific while also maintaining the largest commercial service in the Pacific."

Limitation II, porposed by Reynolds and as here pertinent, is as follows:

> * * * Reynolds' subsidiaries shall average in any given year (computed from the date of consummation of Agreement 9827-1 through the 364th day thereafter) no more than the number of weekly round commercial containership sailings ("round commercial containership sailings" shall not include sailings where either the outbound or the inbound portion thereof is devoted 90% or more—by measurement tons—to the carriage of Department of Defense or other Government impelled cargo) designated in the four trade areas noted below.

There would be no opposition by APL-AML to the merger if (1) the foregoing provision is amended to read as follows:

> * * * Reynolds' subsidiaries shall average in any given year (computed from the date of consummation of Agreement 9827-1 through the 364th day thereafter) no more than the number of weekly commercial containership sailings in either direction designated in the four trade routes noted below.

(2) the description of Route 12 were amended to preclude calls at Pacific coast ports, and (3) condition E, here quoted, were amended to add at the end the words "after hearing"—

> * * * the 14 Challenger class vessels owned by USL shall not be transferred to Sea-Land or converted into containerships without prior application to, and approval by, the Commission.

These suggestions by APL-AML seem a small price to pay by Reynolds for transpacific operations after the merger, particularly since Limitation II provides that Sea-Land may re-apply to the Commission, on and after January 1, 1974, "to either abolish or modify the sailing limitations set out hereinabove on a permanent basis."

AEIL. This carrier is awed by what the size of Sea-Land would be if the merger is approved, and believes that approval would allow Sea-Land to blanket sailings and arrivals, particularly in the North Atlantic trade. Especially is it worried by the possible diversion through Canada of cargo originating in such States as Illinois, Michigan, Wisconsin, and Minnesota, which could be handled by Sea-Land's proposed service via Halifax on the two Matson vessels and one USL Mariner vessel. From this area, in 1970, AEIL obtained cargo which accounted for 17½ percent of its outbound house-to-house container traffic. Furthermore, there is concern lest its cargo moving from the southeast and the Rocky Mountain areas, destined for its Norfolk-based vessels, be lost to Sea-Land because of the latter's additional direct Baltimore-Norfolk/North Atlantic service with three USL Mariners. The southeast quadrant accounted for 29 percent of AEIL's outbound house-to-house North Atlantic container traffic in 1970. There is a positive feeling by the carrier that even its latest-built vessels and those recently acquired are not and will be too slow to offer effective competition.

The result of the Sea-Land service just mentioned, according to AEIL, would result in severe competitive inroads at its European ports of call which Sea-Lane would not serve directly without the merger. Thus, each of Sea-Land's three new weekly services would call at and blanket AEIL's once-weekly service at Felixstowe, England, and would affect its service to Le Havre, France.

It is pointed out by AEIL that in No. 69–56 the evidence showed that Sea-Land's revenue projections for 1974, for the charter service, would attain the magnitude on Route 5–7–8–9 of 87 percent of the total potential realistically obtainable by all containership operators, U. S. and foreign, and that under its projected deployment in 1974, under the merger, it would have over 30 percent more annual capacity than under the charter. Under these circumstances, it is concluded, AEIL would be destroyed.

In spite of its pessimism, AEIL has committed itself to new construction and acquisitions. Another development should blunt somewhat the fears of the company. It is common knowledge in the shipping industry that the containership operators in the North Atlantic trade are working on an agreement to pool revenues. As soon as the matter comes to fruition the agreement will be submitted to the Commission for its approval. As understood by the Examiner, U. S.-flag operators will receive 55 percent of the revenues. The Examiner feels, under the circumstances, that he can afford to be optimistic that the proposal, if approved, would have a very stabilizing effect upon AEIL's position. Another encouraging angle is the fact that Sea-Land and Reynolds, if the merger is approved are receptive to a maximum of three sailings a week on Route 5–7–8–9, as contrasted with four weekly sailings presently offered by Sea-Land and USL.[21]

Under all the circumstances, it is concluded that the merger would not be unduly harmful to AEIL on Route 5–7–8–9. Especially is this true since the responsible witness for Reynolds stated that the merger would not be used as an instrument to take unfair advantage of U. S.-flag competitors. If these assurances should prove unreliable, the Commission has plenary authority to intervene.

In the Mediterranean trade (Route 10), the traditionally operating area for AEIL, Sea-Land admittedly has found the going pretty rough, and as stated earlier, presently is using foreign-flag vessels in that service. As in the case of the North Atlantic, AEIL fears that the merger would enable Sea-Land to blanket the area, to AEIL's detriment, since there is little carto subject to diversion from the breakbulk and foreign containerships. On this route, U. S.-flag preference cargo accounts for about 40 percent of AEIL's carriage and military cargo produces 30 percent of its revenue. It is stated by AEIL that Sea-Land's low bid enabled it to start service on this route with an immediate base of 75 percent of its eastbound Mediterranean capacity, and that Sea-Land's ability under the merger to absorb increasing levels of military cargo would threaten AEIL's "viability" since such cargo is essential to an economically feasible U. S.-flag service on the route. As previously noted, Prudential-Grace, a subsidized operator, is acquiring a fleet of LASH-type vessels for its Mediterranean service.

AEIL's three Bath containerships, scheduled for delivery in 1973, are destined for use on Route 10 with the present Sea-Bridge vessels, making seven of the ten existing or projected containerships for operation on this route. Sea-Land's plan to

[21] See, however, the first paragraph under heading "Diversification of direct service", page 45 hereof.

use four USL Mariners on the route in 1974 under the proposed charter would have earned Sea-Land 41 percent of the potential revenues available to containership operators, says AEIL, and the revenue left to the latter would be small because foreign lines would not be affected by the merger and because a substantial portion would not be realized by an containership carrier since not all potential containerable cargo would move in containers.

Here again, however, AEIL should not be too much concerned since Reynolds agrees—although unwillingly—to limit the sailings of its subsidiaries to one a week on Route 10 if the merger is approved.

AEIL also is concerned lest USL's 14 Challengers, under the merger, might be used as competition on Route 18 (Atlantic and Gulf/India, Persian Gulf, and Red Sea), or converted to containerships for use in other trades served by AEIL. Neither the merger agreement nor the charter agreement provides for the use of these vessels by or for Sea-Land, and Reynolds does not intend to authorize a lease or transfer of them to Sea-Land. Furthermore, Reynolds has agreed that the Challengers will not be transferred to Sea-Land or converted into containerships without prior application to, and approval by, the Commission (see discussion heretofor as to the APL-AML suggestion that there should be no Commission action until after a hearing).

Seatrain. As already observed, Seatrain, an American company, is building large containerships abroad for operation under foreign flag (two already are in service). At the same time, it has applied for construction aid on at least one vessel to be built in its shipbuilding facility at the former Brooklyn Navy Yard. This hot-and-cold practice is not a very edifying spectacle, and very little consideration should be given to the future of the company's position in the North Atlantic containership competition should the merger be approved. In any case, any possible harm to the company in that area certainly would be tempered by the porposed pooling agreement and the agreement of Sea-Land to confine itself to three sailings a week in that trade, both already mentioned. Seatrain does not serve the transpacific trade but is "considering" such a service; in spite of this, its general complaint and fear of the merger covers this trade as well. At this point, then, the discussion of the effect of the merger on Seatrain will be directed to the company's domestic services, in which areas it has a more palatable standing.

As already seen, Seatrain has domestic containership services in the Atlantic/Puerto Rico, west coast/Hawaii, and Guam trades. Although it states that the domestic trades are overtonnaged, Seatrain has no intercoastal or coastwise services. In the Atlantic/Puerto Rico trade Sea-Land's southbound carryings are about 60 percent of the total; northbound, about 75 percent. Sea-Land does not have a great deal of competition in the coastwise, Alaska, or Gulf/Puerto Rico trades. USL has a faster intercoastal service. It is contended by Seatrain that dominance of the domestic trades affects the foreign trade because a domestic service frequently feeds traffic in a carrier's foreign operation, which ties the shipper to one carrier; furthermore, the domestic service acts as a reserve fleet for deployment as the competitive situation demands.

Seatrain argues that Sea-Land should be prohibited from transferring into the domestic trades its vessels which would be released from the foreign trades if the merger is approved. In the absence of Seatrain witnesses (although in the early stages of the proceeding Seatrain's counsel stated that there would be witnesses), there has been no real opportunity to probe the effect on that company's domestic services if the merger is approved. That the other domestic operators have not intervened or otherwise expressed opposition to the merger would seem to indicate no real fear on their part that the merger would be injurious to them.

Impact of merger on foreign competitors

As already seen, there has been a rapid growth of containership consortia among the foreign-flag lines in the North Atlantic and transpacific trades. Each member of the Japanese consortia builds, owns, and operates its vessels, and in spite of joint scheduling to eliminate duplication of sailings, each line is free to compete for cargo for its own vessels or to fill space chartered on the vessels of the other members. This increases competition. Although the foreign-flag containership competition in the Atlantic/Far East trade is presently of little moment, this will change drastically by 1972, when five Japanese lines, in a consortium, will enter the trade with probably seven large and fast containerships offering a weekly service. Furthermore, there is some talk of an agreement among one or more Japanese lines and English and/or West German operators.

It is interesting to note that no foreign-flag containership operator (with the exception of Seatrain, whose peculiar situation already has been mentioned) contests the merger. There is another angle to consider at this point, however. By 1974 Sea-Land alone will have about twice the capacity on Route 5–7–8–9 and three times the capacity on Route 29 of the largest consortium serving those areas. This might stimulate the consortia to further growth (see more on this later on herein). Based upon the statistics reproduced above, and bearing in mind his many years in the regulation of ocean transportation, it is extremely difficult for the Examiner to believe that the merger would have any appreciable effect on foreign-flag containership competition, except, as stated, possible incentive for the foreign interests to step up their competition.

Impact of merger on breakbulk movement

Sea-Land claims that the merger would enable it to attract cargoes now carried by foreign-flag lines, particularly breakbulk operators. Shippers generally prefer containerization over breakbulk because of the expanding idea of door-to-door service, speed, and a reduction in damage and pilferage.

Routes 5–7–8–9 and 29 have the heaviest movements of containerized cargo. Containerable cargo on those routes is in the general area of 75 percent of the total. For the last six months of 1969, 41 percent of the total cargo on those routes was containerized. On 5–7–8–9 the effect of containerization on U. S.-flag breakbulk operators has been very telling, to such extent that this type of service is almost a thing of the past (finding no. 18). The total volume handled by U. S.-flag breakbulk operators on the route decreased from 680,000 tons in 1968 to 33,000 tons in 1969. At the same time, the volume moving on foreign-flag breakbulk ships increased by 15 percent. As earlier mentioned, a substantial amount of Mediterranean cargo goes on breakbulk vessels because of the relatively underdeveloped economy of the area.

The Maritime Administration reports that at least 70 recently built vessels or scheduled for 1972 delivery will be fitted to handle containers as well as breakbulk cargo. The new LASH and Seabee vessels are capable of handling both types of cargo. AEIL's official recognized that there may be a reasonable future for his company with semicontainerships, basically breakbulk. RJI's witness sees no commercial trade which could be profitable for USL's completely breakbulk Challengers. USL probably is correct when it says that it is not possible to foresee, with accuracy, the lengths to which changes and improvements in ocean transportation will go, and what will be the "future interface between breakbulk, container and LASH systems."

It is generally agreed that the expansion of containerization has made sizeable inroads into the volume of breakbulk cargo which normally would move on conventional style ships. Whether, and to what extent, the merger would result in Sea-Land being able to penetrate the foreign-flag breakbulk competition is anyone's guess, but the Examiner ventures the thought that it will not be considerable, as far as this record shows. It would seem reasonably clear that a nucleus of breakbulk vessels is highly desirable for the national defense of this country. Unloading facilities may not be available or adequate for containerships in the early stages of an international emergency situation. If the merger would result in the weakening of the basic breakbulk reserve of vessels, that would be a high price to pay. Furthermore, much of the world is not yet prepared or equipped to handle containerships in peacetime, a fact which makes it all the more necessary to protect adequate breakbulk services.

Impact of merger on military movements

Seatrain maintains that one of the troubles with the merger is that it would permit the straddling of bids for military cargo, and that Seatrain would be faced with a low bid and a high bid, which would enable the combined companies to obtain cargo at different rates, depending on the competitive situation. In other words, Sea-Land's capacity could be shifted between the two companies to meet the military's entire need. Furthermore, it is argued, Sea-Land's flexibility and fleet size would enable it to deploy its vessels wherever the military cargoes are available, to the detriment of other carriers. To forestall these possibilities, Seatrain suggests a requirement, if approval is given, that Sea-Land alone be permitted to bid for military cargo. Sea-Land does not address itself to this question in its reply brief.

APL-AML say that by 1974, and in view of its size and sailing frequency, Sea-Land, alone and without the merger, would be in a position to bid low and get virtually all the military cargo or bid in the middle ranges with reasonable assurance of cargo at the higher rate. These opponents of the merger point out that in the transpacific trade the inbound volume is considerably larger than the outbound, that the operator with substantial military cargo might have a balanced service, and that Sea-Land's plan to employ, under the American flag, the large and fast containerships now under construction abroad, is to qualify them for military cargo.

In view of the fact that Sea-Land is the only U. S.-flag carrier able to bid on Vietnam cargo (and has been awarded contracts) because it has cranes, a fleet of trucks, and a sizeable shore organization at destination, APL-AML contend that USL, which sumitted a bid, would have had to abandon or severely curtail its other services in order to fulfill the contract; after merger, Sea-Land would eliminate its only competitor. Some of the unions add that Sea-Land would be able to submit higher bids and be certain that it would be successfull, with a possible increased cost to the Government.

Any present advantage to Sea-Land in being able to bid successfully for military cargo is the result of sheer size, and the company quite likely will continue to grow even without the merger. Advantages derived from size alone are not generally censurable, absent some legal violation. Merger with its largest competitor, however, might enable Sea-Land to further enhance its position at the expense of its competitors, a situation which should not be allowed in the absence of well-bottomed reasons. All the avowed separation following merger would not prevent an understanding of some kind between the two companies if it was desirable or expedient to have bids at different levels. Without some conditions attached thereto, the merger would put Sea-Land in a very favorable spot in bidding on military cargo.

Justification of the merger

Section 15 of the Act, as here pertinent, provides:

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

Although this proceeding is not strictly antitrust in nature, nonetheless it has a strong anticompetitive flavor. In the words of Sea-Land's counsel, the elimination of competition between itself and USL "is the anticompetitive nut." He further says: "The jurisdictional question aside, all parties agree that approval hinges upon whether or not the anticompetitive effects in the negative cup of the *Svenska* scale are outweighed by public benefits, transportation needs, and/or valid regulatory purposes in the positive cup of the *Svenska* scale."

In *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 245 (1966), the Supreme Court said that "once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest', unless other evidence in the record fairly detracts from the weight of this factor." The Court quoted with approval the pronouncement of the Commission in the proceeding that proponents must "bring forth such facts as would demonstrate that the * * * [agreement] was required by serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." 10 F.M.C. 45. The merger must therefore be tested in the light of *Svenska* and the Commission's declaration just quoted. The following discussion is not necessarily in the order of importance of the particular subject.

More effective vessel utilization. It is generally recognized that Sea-Land has made rapid and expansive strides in containership operation, so much so, and as previously noted, that it is the largest such operator in the world. Sea-Land is not quite satisfied, however, with the status quo, and believes that the merger would make for a more effective utilization.

On an average round voyage in the North Atlantic trade USL handles about 400 more containers than Sea-Land; on an average transpacific eastbound voyage, about 200 more containers. Comparing the utilized capacities of the two lines in the transpacific trade, USL filled its larger vessels 96 percent at the commencement of the Seabridge service in 1970 as contrasted with 94 percent for Sea-Land with smaller ships that had commenced its service a year earlier.

In the North Atlantic trade Sea-Land and USL carried 88 percent of all U.S.-flag container cargo during the first half of 1969 and 55 percent of the total commercial container cargo. By 1974, after merger, the two companies would have 71 percent of all U.S.-flag container capacity and 36 percent of all-flag capacity.

It was estimated that during 1971 Sea-Land would carry 21 percent of the U.S.-flag container cargo without merger and 60 percent with the merger on Route 5–7–8–9; on Route 10, 26 percent without the merger and 35 percent with the merger; on Route 12, no cargo without the merger and 100 percent with the merger; on Route 29, 51 percent without the merger and 87 percent with the merger. In 1974, the estimates were as follows: Route 5–7–8–9, 29 percent without the merger and 66 percent with the merger; Route 10, 33 percent without the merger (data unavailable under the merger); Route 12, none without the merger and 59 percent with the merger; and Route 29, 41 percent without merger and 53 percent with the merger.

Sea-Land states in its brief that the "evidence overwhelmingly shows that, based on past performance, Sea-Land will be able to increase the productivity of these vessels." This gratuitous assertion cannot be accepted at face value. The foregoing statistics present a good picture of the services of both Sea-Land and USL, but whereas the lines may think a better utilization of vessels would result from the merger, that would be a matter primarily for their benefit and does not satisfy the pronouncement of the Commission that an agreement such as this must be "required by serious transportation need, necessary to secure important public benefits."

New direct port services. Sea-Land suggests that the merger would permit new direct services between Europe and the ports of Houston, New Orleans, and Halifax, and between Asia and the ports of San Juan and Balboa. There is no evidence, however, that such new services are either needed or desired by shippers, importers, or ports, or that the suggested services would be superior to those now offered. Direct calls would be eliminated at Baltimore, Norfolk, and Los Angeles, now called by USL in its Seabridge service. And it must be recalled that Sea-Land has agreed to make one fewer calls on Route 5–7–8–9 if the merger is approved.

It has not been shown that the possible direct services are "required by serious transportation need, necessary to secure important public benefits."

Diversification of direct service. It is contended that, through redeployment, Sea-Land would be able to reduce the number of direct sailings between such "over-directly" served places as New York, Rotterdam, Norfolk, Antwerp, and German and U.K. ports. It is all right to say that sailings will be reduced, but that does not take into consideration the fact that Sea-Land's new large and fast containerships probably will wipe out any advantage to be gained by reduction in the number of sailings. This type of reduction would not, of course, redound to the benefit of the public; on the contrary, it would simply enable Sea-Land to use fewer ships.

Increased feeder and relay services. Sea-Land plans, under the merger, to redeploy its war-built fleet in strictly foreign-to-foreign and domestic-to-domestic ports, thus, it is urged, adding substantially to its relay and feeder system and improving the balance of payments of the United States. This would contemplate the tying of 20 U.S. ports into services reaching 12 European ports and 14 Asian ports.

The use of Sea-Land's older vessels for foreign-to-foreign trading has little relevance in a proceeding of this kind, and it is doubtful besides that this type of operation can be beneficial in any significant extent to the foreign commerce of the United States. No substantial reason has been given as to how it would assist in improving the balance of payments of the United States. Sea-Land admits that it now carries foreign-to-foreign container cargo and believes it has the capability to handle Europe/Far East cargo without regard to the charter or the merger.

As some of the unions point out, the proposal to use older vessels in foreign-to-foreign trading "is an admission that there is no crying need for this merger in American foreign commerce," and that this service would be primarily for the financial benefit of Sea-Land. Another possible result would be the loss of jobs for American longshoremen and seagoing personnel; there is no indication as to whether the ships to be so used would continue to fly the U.S. flag or be transferred foreign. The Examiner already has stated that he is not particularly enamoured of the practice of American companies operating under foreign flags for convenience and cheaper cost; the present suggestion would be particularly unsavory if the vessels were transferred foreign, considering the fact that Sea-Land seeks to merge with its largest competitor, with possible adverse effects on other U.S. competitors. The proposal would not satisfy a serious transportation need and is not necessary to secure important public benefits.

The redeploying of some of its war-built ships following the merger, Sea-Land says, would: permit the expansion of its already highly efficient relay system to new ports, increase the frequency at ports presently served, and bring the benefit of container services to a wider range of commodities and shippers. But the record is convincing that USL itself has a well-working relay system, possibly more effective than that of Sea-Land, and designed to enable shippers "anywhere within the total network" to ship to "any other place within the overall service."

USL also has a door-to-door service that permits inland shippers in the United States, Europe, and Asia to deliver their goods to an inland consignee in those areas. One of Sea-Land's principal witnesses concedes that the Seabridge service of USL serves the same purpose as Sea-Land's relay system. The intercoastal service of USL is faster than that of Sea-Land, and Sea-Land recognizes it as highly competitive. Even USL's Seabridge service, with more direct calls than Sea-Land, can reduce the number of relays necessary to move containers from the Far East to Europe. A customhouse broker in Baltimore was quite emphatic that Sea-Land's relay system, in his experience (and as gathered from shipping interests elsewhere), is uncertain and confusing. The only other cargo-connected witness, a shipper produced by Sea-Land on rebuttal, did not comment on this matter.

Sea-Land's deployment plan, without the merger, calls for relay service to those ports that Sea-Land now feels would be added by using some of its older vessels following consummation of the merger. That being so, Sea-Land would accomplish nothing more in that respect under the merger than what has already been contemplated without the merger. There thus appears to be no public need for the merger on that score, or that any benefit would result therefrom except possibly to Sea-Land itself. It is questionable, too, whether it would be fully practical for Sea-Land to interchange USL's 20-foot and 40-foot containers with its own standard 35-foot containers.

Additional domestic service. Overall, Sea-Land proposes to increase its domestic frequency by 27 percent and container availability by 63 percent.

(a) In the Atlantic/Puerto Rico trade it is well known that competition is severe, and a Sea-Land witness testified in No. 69–56 that his company had withdrawn vessels from the service late in 1969 because "it became obvious that we had too much space." In Docket No. 71–43, now in process of hearing, Seatrain's general traffic manager testified that in the Puerto Rico trade "it is difficult to foresee any appreciable gain in cargo at this time."

(b) It is contemplated that the capacity in the South Atlantic/Puerto Rico trade will be more than doubled. There has been no showing that there is a pressing need for this step; on the other hand, some of this cargo may simply be lured away from other gateways. It seems reasonably clear that the merger would bring no needed improvement to this trade.

(c) A direct service will be started to Ponce. There is no evidence that this is so essential as to justify approval of the merger.

(d) Between the Gulf and Puerto Rico Sea-Land has a new service, contrary to its position in No. 69–56 that such a service could not start unless the charter was approved. There has been no showing that the merger would be of any particular benefit to this trade.

(e) A study sponsored by the Department of Commerce in 1970 showed that the service from the Pacific coast to Hawaii is "especially over-tonnaged." The Examiner has been quite familiar with this trade over the years and has watched the constant coming and going of new services, of various forms and types, and this record certainly does not support the need of expansion of service by Sea-Land at the expense of other carriers if the merger is approved.

(f) The intercoastal trade, as previously noted, is more satisfactorily served at present by USL than by Sea-Land. With or without merger, Sea-Land proposes to transfer to this trade by 1973 six vessels from its Far East service. The evidence does not show that the intercoastal trade needs or would benefit by the merger. On the contrary, it is entirely possible that the trade would be harmed by the curtailment of USL's service.

(g) The east coast shuttle service of Sea-Land would be affected adversely by the merger in that there would be a net decrease of about 300 35-foot containers a week.

(h) With or without the merger, there will be no change in Sea-Land's Alaska, Texas/New York, and west coast shuttle services.

Cross trading. It is Sea-Land's thought that the merger would afford the opportunity to start a direct service between Halifax and Europe, and would present a greater opportunity to participate in cargo movements between Europe/Asia and Canada/Caribbean areas. This, in Sea-Land's nomenclature, is "cross-trading." The record does not show whether the Canada services would involve strictly foreign-to-foreign cargo or cargo originating in or destined to the United States, and using a Canadian port or ports as a gateway. If the latter, this would require a full-blown evaluation of the possible benefits to Sea-Land and/or shippers/consignees vis-a-vis the loss of such cargo to U.S.-flag competitors serving Atlantic or Gulf ports. This cannot be done on the present record.[22] To conclude,

[22] See the discussion, *supra*, on the Halifax question as it might affect AEIL.

there is no worthwhile evidence that the suggestions of Sea-Land on the possibilities of cross-trading would in any positive way be required by a public need to be gained from the merger.

Greater capacity and frequency, faster time. According to it, effectuation of the merger would mean that virtually every port now served by Sea-Land would receive a higher quality of service, either by more regular or more frequent calls, or in terms of faster vessels with greater capacity. This would enable the linking up of a given port with nearly every important port in the United States, Europe, and Asia in a competitive manner. Of the 720 port pairs served by Sea-Land, 527 (or 73 percent) are served by direct, one-relay, or two-relay services. In 1973, if the merger is approved, Sea-Land says that 898 out of 1040 port pairs (or 86 percent) would be served by such services.

There of course is another phase to be considered in analyzing Sea-Land's position. As pointed out by APL-AML, the merger would not be entirely serene insofar as full utilization of USL equipment—ships and containers—is concerned. To use Sea-Land's 35-foot containers on USL vessels, which handle 40-foot and 20-foot containers, probably would require revamping of USL vessels to some extent. The plugging of some cells to accommodate 35-foot containers would result in the loss of about 1/8 of underdeck capacity. Furthermore, Sea-Land's containers are 8½ feet high as compared with 8 feet for USL. The difference in sizes caused Reynolds to lower by 20 percent its projected revenues to be received from USL. USL's Lancers would decrease in capacity from 1200 20-foot equivalents to 1122, and the Mariners from 929 to 851. On these calculations the overall loss in use would be about 1248 20-foot equivalents, or about the capacity of one Lancer.

The foregoing is not the whole story, however. For several years Sea-Land has been adding 40-foot containers to its inventory, principally for light-weight but higher-measurement cargo, at the same time recognizing that containers of the same size are not desirable or practical for all shippers and that there is a continuing trend away from port-to-port service to point-to-point service. Furthermore, the new European-built vessels of Sea-Land are designed to carry 40-foot as well as 35-foot containers. Instead of being eight feet high, however, they are nine feet six inches high. Whether this would make a significant difference when used on USL vessels does not appear of record, but presumably that would be the case. In any event, some of the possible difficulties and results interposed by the opponents of the merger, as pointed out in the paragraph next above, may not be as great as predicted. On the other hand, the difference in the height of the 40-foot containers might present more of a problem than supposed.

There is little if any evidence of real value to support Sea-Land's contention that the merger would provide faster service. USL's vessels would not increase their speed, and the ports standing to lose direct calls by the merger—such as Baltimore—would not be as well off as at present under separate operation.

Cargo savings. Sea-Land/USL say that the merger would result in economies of nearly $24 million with respect to vessel equipment utilization and container yard operations; will have a tendency to permit decreases in rates; will weigh against future rate increases; better earnings will afford the companies the opportunity to deposit earnings for new vessels to be constructed in American years; there will be an American-flag operator capable of meeting the scope, frequency, and regularity of foreign-flag consortia; will contribute to the balance of payments of the United States; equipment as well as terminal and container operations will be cheaper; and lower-value and marginally containerable cargo will be carried economically at present rate levels.

(a) Although Sea-Land's witness stated that the cost per box on a Lancer or a Mariner is substantially less than the cost of one using war-built converted ships, the company admits that any such savings produced by the merger cannot be quantified, but concludes that this result is "axiomatic." When it is considered that Sea-Land plans to use its older vessels on other routes, the "axiomatic" argument loses much of its weight. The merger, in this respect, would not result in an ascertainably public benefit or solve a transportation need.

(b) A witness for Sea-Land estimated that the merger would produce savings of over half a million dollars annually to USL because of reduced interest expense, on the assumption that the interest rate upon renewal of notes would be 8 percent. Another witness stated that the banks were thinking in terms of a rate of 1½ percent over the prime rate if they agreed to renew on due date. Interest savings, by admission, however, would benefit only the stockholders of USL. Furthermore, whatever lower interest rate there might be would be illusory since USL would be operating no vessels to which the savings could be passed on. Whether USL, without the merger, could borrow money at less than 8 percent, is presently conjectural, especially since the earnings of USL have taken a turn for the better (see later herein). Also, there is no assurance that USL, under the merger, could borrow from Reynolds at 6 percent—as suggested by Sea-Land—because this figure is less than that on any indebtedness of Sea-Land to Reynolds.

(c) There are estimated annual savings of $20 million on stevedoring expenses by reason of the merger. This comes about, says Sea-Land, from a comparison of the past performances of both carriers. The witness for Sea-Land, prior to preparing his comparison, did not discuss with anyone from USL the latter's stevedoring costs per container and did not know what expenses were included in USL's cost data. The USL data was prepared by the company's planning group and not by its financial department, the former being only one of the sources from which the latter draws its information. The president of USL believes that the planning group's projections are not wholly reliable. Sea-Land's witness is of the view that the USL figures for the latter's cost per container are too high.

There is an unwarranted assumption that Sea-Land will operate the USL vessels under the same deployment that USL contemplates without the merger. Whether stevedoring costs for USL vessels would be reduced by the merger cannot be told from the record. The evidence is to where and at what cost USL vessels would be serviced in the United States, following the merger, is hazy and generally unsatisfactory, as is the cost of handling mixes of 20-, 35-, and 40-foot containers. As previously seen, the whole question of how Sea-Land would cope with multisize containers is far from clear. Just how the conversion of USL vessels to accommodate 35-foot containers will be accomplished has not been shown, nor the cost thereof, or whether alleged stevedoring economies will be offset by such costs. Finally, in appraising the validity of the contention that the cost of handling containers decreases as the number of units increases, the evidence shows that, at the same Atlantic ports served by USL on two of its services, this premise is incorrect.

(d) Sea-Land estimates that the merger would result in a saving of about $1,000,000 a year in advertising. Based on USL's 1970 costs, the witness conceded that no account was taken of the fact that USL incurred high expenses in promoting the Seabridge service announced in August and commenced in September of that year. While he assumed that his company's budget would cover all USL vessels without added cost, he agreed that additional advertising would be necessary in the case of a Sea-Land Atlantic/Far East service.

It is reasonable to assume that *some* advertising expenses would or could be eliminated by reason of the merger, but the record does not show with any reasonable certitude what they would be; indeed, it would be difficult at this time to do so. In any case, the small saving would not, standing alone, be enough to justify approval of the merger.

(e) The witness for Sea-Land compared his company's past container space utilization with USL's own projected slot utilization, and estimated that an annual saving of over $2 million would accrue from the merger by virtue of Sea-Land's better vessel utilization. This, of course, does not take into consideration the possibility of a different deployment by Sea-Land of USL's vessels under the merger. As already noted, *any* deployment plans, on a scale as large as here contemplated after merger, can be nothing more than well-intended guesses inasmuch as many things could warrant a change in Sea-Land's plans between approval date and the end of a reasonable period of trial and error. Again, there might well be problems arising from the various sizes of containers. This latter brings forward once more the fact that Sea-Land offered no positive plans for alterations to the configuration of USL vessels to suit the needs as well as convenience of Sea-Land.

What was said in connection with acknowledged possible savings in advertising expenses applied equally well to savings in vessel utilization, namely, *some* savings could very well follow the merger even though they cannot now be pinpointed. The subject is nebulous by its very nature. It can be said, however, that any such savings would be more for Sea-Land's benefit than to satisfy a public need.

(f) USL's president thinks the present rate structures are too low and sees no early prospect for decreases in rates after the merger. Reynolds' principal witness said that he has no plans to reduce rates. Sea-Land speaks of rate-level increases in 1971 and makes projections based on general rate increases of 5 percent a year for 1972–1975. A Sea-Land witness admitted that, while cost savings could not be translated at once into reduced rates directly benefiting the public, nevertheless, since such savings increase the return on investment, and since a carrier having a satisfactory return has no incentive to increase rates, indirect benefit to the public would result. The logic of this view does not coincide entirely with the general history of business, which shows fairly conclusively that management ordinarily is not very mindful of the public interest.

Considering the available testimony, the hope that shippers might receive a rate break from the merger is quite dim.

(g) Proponents of the merger contend that cost savings resulting from the merger will permit the carriage of lower-value and marginally containerable commodities at present rate levels. Sea-Land has shown very little inclination to obtain low-rated cargo, even though its ships do not always run full, and one of its witnesses testified that much of this type of cargo would continue to be carried by breakbulk vessels. Based upon the fact that Sea-Land has given every indication that it is going to raise rates periodically for the next few years, it is hardly likely that it will seek low-rated cargo or that increased rates would attract low-value cargo.

Efficiency of USL. Since its entry into the field of containership operation just a short time ago, USL has become a very efficient and respected operator, with a strong following of shippers and importers, and its president is of the opinion that the competence and expertise of the company's managerial staff compare quite favorably with that of Sea-Land. Although he concedes that Sea-Land's marketing personnel, because of longer experience, may be better attuned to intermodal operations, this gap is expected to be bridged in short order. Personnel is being added to increase the overall capability of the company. There is no denying that the company has been at a disadvantage to some extent by lack of terminal facilities at certain ports; the situation is rapidly improving and more and better equipment is being acquired. One of AEIL's top officials does not agree that Sea-Land's operations are more efficient than that of other U.S.-flag operators; the company simply has been in business longer. He is inclined to the thought that size and flexibility, not efficiency, are the crucial factors in the success of a competitor.

All in all, and considering the financial wringer through which it has been but now seems to have overcome to an appreciable extent (see elsewhere herein), there is no reason to believe that USL, with its long background, will not in time be as relatively efficient as Sea-Land, albeit on a more modest scale.

USL as a viable company. It is urged that under the merger USL will continue as a viable company. This position must be taken with a grain of salt. On the one hand it is maintained that USL will go on its merry way after the merger, buttressed by financial help from Reynolds, but on the other hand Reynolds let it be known at the hearing that if USL got in the competitive way of Sea-Land it would have to yield. Reynolds' witness did say that the company would accept as a condition to approval the requirement that USL be continued as a viable company. It is very doubtful, however, that it would be practical to police this type of situation to complete satisfaction of everyone, including the Commission. It does not seem, therefore, that the prospects for a viable USL would be too bright.

One of the reasons given in support of the merger is that it would assure that USL's container fleet "would be utilized by a carrier having the ability and competence to maximize the effectiveness of its participation in foreign and domestic commerce." It already has been mentioned that how this would come about is somewhat hazy in view of the possibility of countless changes made necessary through trial and error. As also noted, USL generally is considered to be a good and efficient operator.

There is the assertion by Sea-Land that the record shows that the only U.S.-flag operators opposing the merger "are interested only in maintaining their relative market share vis-a-vis other U.S.-flag operators." In addition, it is claimed that such lines do not seriously intend to compete with foreign-flag lines. As already seen from the data, the opponents, in their smaller way, *are* seriously trying to keep abreast of the foreign competition. The fact that they are also trying for a share of the U.S.-flag market takes nothing away from their efforts directed at foreign-flag competition.

Mention already has been made that USL, after termination of the hearing, took certain steps to improve its financial position. Recently, in the companion proceeding before the Interstate Commerce Commission (intercoastal operations), the president of USL said that the company was now operating in the black. Official notice is taken of the report in the Wall Street Journal of an interview with Kidde's chairman Sullivan, published on September 22, 1971, wherein he said, in part, as follows:

> * * * I think U.S. Lines is stronger than before. It is making a small profit. Most of the capital expenditures needed for the next few years have already

been made. And there are signs that there will be greater stability in the freight rates in the near future. Obviously, though, we don't want it back because of the earnings uncertainty, the high capital requirements and the specialized skill it requires.[23]

USL is now forging ahead but Kidde wants to rid itself of the child because the return of the latter do not satisfy the financial requirements of the parent (this position is quite normal in the business world). It must not be overlooked, in appraising USL's difficulties, that the principal reasons for its money bind were the capital requirements involved in the new containerships, inability to obtain the vessels on time, and the nonresumption of operating differential subsidy. USL of course is not completely out of the financial woods; far from it. But it is hard to believe that one of America's oldest and best-known ocean common carriers, given what appears to be good leadership, plus the improvement in its resources, should be considered such a bad risk that the public would be benefited by merger with its largest competitor. Granted that the position of Reynolds is such that it could be of real assistance in helping USL to tide itself over the shortage of capital, all indications are that USL can and will eventually extricate itself from its present financial morass and remain a formidable —and therefore a highly desirable—competitor of Sea-Land.

Generation of new commerce. Sea-Land believes that the increased container capability brought about by the merger would stimulate "expanded marketing concepts by shippers through opening the accessibility and convenience of new world markets. The increased productivity of the combined U.S. Lines/Sea-Land fleet will give the shipping public ready access to a broad spectrum of markets which had not been considered in the past, resulting in the generation of new ocean commerce."

Since no studies have been made or economic facts presented, it cannot be known whether the rates to be structured by Sea-Land would be such as to induce new shippers to seek foreign markets, or whether the rates to be charged would produce enough revenue to justify the effort. There is no proof—indeed, it probably would be very difficult to prove —that the "maybe" results here proclaimed would offset the effect of removing a most important competitor from the field.

The argument of Sea-Land, while intriguing, is suppositive by nature and therefore not basically strong enough to support

[23] In accordance with Rule 13(f), any party, upon timely request, will be afforded an opportunity to show the contrary.

the conclusion that such efforts by Sea-Land in respect to possible new markets are "required by serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose."

The critical period/need of USL ships. One of the reasons Sea-Land is anxious to have the merger approved is the fear that foreign-flag competition will become so strong in 1971-1972 that traffic patterns will be set in such fashion as to cause Sea-Land to lose a large part of the market before its own superior European-built vessels are delivered and the Matson vessels which it purchased will be ready. This general belief was shared by other witnesses, for and against the merger. It might be added that the new U. S.-flag vessels also would appear on the competitive scene.

About half of the so-called "critical period" is gone and Sea-Land appears not to have lost stature in the world-wide containership field. By the nature of the judicial process, most of the critical period will have elapsed before a final determination is made as to the approvability of the merger. In the meantime, Sea-Land's new vessels will be coming into the service, as will the two Matson vessels. One of Sea-Land's top officials admitted that the new highspeed European vessels would neutralize any competitive disadvantages that might otherwise accrue to the company during the "critical period." The president of USL admitted that shippers no longer blindly utilize particular carriers. The "critical period", if it were a valid argument at all, does not retain much of its vigor and might be likened to the subsidence of a hurricane.

As already pointed out, one of the possible reasons for the rapid development of foreign containership operation is the position attained by Sea-Land so quickly in world trade. Competition sometimes can get out of hand and thus defeat the very purpose for which it is intended. The fact that Sea-Land is building very large and fast containerships, plus the purchase of the two Matson ships (with the third a distinct possibility), plus the possible acquisition of USL, might be an incentive for further foreign-flag consortia. This kind of maritime merry-go-round might be injurious, in the long run, to the American merchant marine.

It can be appreciated that Sea-Land's position might be improved by the acquisition of USL's new vessels for at least partial replacement of Sea-Land's old vessel. But the USL vessels will continue in the foreign trade without the merger. Sea-Land and Reynolds would be the principal beneficiaries from the turn-over to them of USL's fleet. Naturally, there might be *some* benefit to the public and/or the American merchant marine, but the degree thereof would not be to the extent necessary to satisfy the requirements of the *Svenska* doctrine and the Commission's guidelines.

Increased American shipbuilding. One of the arguments advanced by Sea-Land is that the proceeds (over $1 billion) from the charter of USL vessels of Sea-Land (No. 69–56) would enable USL to construct new American-flag vessels.[24] This would include specialty vessels for use in nonliner trades where about 98 percent of the service is furnished by foreign-flag vessels. USL's president believes this to be a good opportunity, as did his predecessor. It is said that the Alaska oil strike will call for vessels to transport oil and liquid natural gas. Sea-Land says that any future building by USL would not interfere with Sea-Land's construction plans.

There is no gainsaying that the above suggestion has some appeal, even though the thinking thereon has not been crystalized by Sea-Land and USL. Suffice it to say here that the argument will be put in the plus column when, at the end of this decision, a final determination is made as to whether the merger will be approved.

Possible loss to USL, charter vis-a-vis merger

Item 10 of the order of investigation calls for an inquiry into the "possible loss of benefits from the maintenance of an independent USL which would have existed under the charter, but would not exist if the merger is effectuated."

USL claims that the merger would mean the continuation of the company as a viable, on-going shipping organization; that it is not possible to determine the precise fate of USL if the merger is not approved; that the funds received by USL under the charter would be invested in new ships; that, as a subsidiary of Reynolds, it would have access to the resources of Reynolds, which would mean stability and the ability to expand its shipping services; and that USL's fleet would be utilized by a carrier having the ability and competence to maximize the effectiveness of its participation in foreign and domestic commerce.

Each of the foregoing contentions already has been discussed, so there need be no repetition thereof at this point. The

[24] The Examiner feels that, under the order of investigation in the present proceeding, he is without authority to approve or disapprove the charter, albeit the two proceedings have an undoubted affinity.

principal loss to USL from the merger would be the $1 billion charter hire over a 20-year period (if Sea-Land charters the vessels after approval of the merger, it would seem that USL would still lose its independence). This must be balanced against a free and unfettered USL if the charter is not approved, leaving the company as a first-class competitor of Sea-Land.

Valid regulatory purpose

Sea-Land is of the belief that disapproval of the merger "surely would guarantee the continued balkanization (with the accompanying vulnerability to the economic ups and downs of the industry) of the American Merchant Marine." USL argues that approval "will assure the operation of an efficient and productive American-flag carrier in all the major foreign trades. This will, in turn, assure that America's best interests will be represented effectively by a substantial member of the international shipping conferences. This Agreement will enhance to some extent the Commission's ability to monitor and regulate the activities of all carriers serving the U. S. foreign commerce." It further says that the absence of strong American-flag competition would lessen the Commission's "voice" in the international shipping field; that foreign lines are rationalizing and improving their competitive positions, with no hindrance from their governments; and that unless American companies are permitted to do likewise, the Commission and the American merchant marine will lapse into secondary roles in this country's foreign commerce.

There is no indication that failure to approve the merger would have a pernicious effect on the American merchant marine. On that contrary, it would simply allow the American-flag containership operators to remain in a healthy competitive state. Nor are there substantive prospects that approval of the merger is needed to stiffen American-flag competition against foreign-flag services. To repeat what already has been noted, the merger might even stimulate further foreign-flag competition by consortia or otherwise. Furthermore, with Reynolds' backing, there certainly is no well-founded reason to believe that Sea-Land would be placed in a precarious position if the merger is disapproved.

ULTIMATE CONCLUSION

It is important to distinguish between the kind of proof necessary to justify approval of an ordinary run-of-the-mill agreement and the proof required for approval of an agreement with antitrust overtones and therefore possibly against the public interest. *Svenska,* and the Commission's decision there under review by the Supreme Court, point up the difference. Although it cannot be denied, as pointed out, that some of the arguments advanced in support of the merger may possibly have merit, within the guidelines set out by the Commission, most of the results claimed as favorable are in reality for the benefit of Sea-Land alone.

The single plausible ground for the merger is the protection of USL's financial stability. But a fair comparison of the company's recent troubles with its apparent renascence in that respect leads to the conclusion, in the Examiner's judgment, that USL has weathered its monetary crisis to the point where its independent position in the foreign commerce of the United States outweighs the desirability or necessity of its takeover by Reynolds.

The proceeding is discontinued.

C. W. ROBINSON,
Presiding Examiner.

Washington, D. C.
October 21, 1971

APPENDIX "A"

Kidde/USL contend that the supplemental agreement does not violate any part of the Act, that its provisions would be beneficial to the shipping industry and the commerce of the United States, and that it would assure the continuation of USL as a strong competitor and a major factor in the shipping industry. Without it, they further maintain, Kidde would be obliged to again find a way to dispose of USL and Kidde might be forced to liquidate USL if it could not promptly find a buyer. They conclude that the agreement would relieve the pressure on all parties.

The supplemental agreement would permit Kidde and Reynolds to achieve what they would be denied if the merger is disapproved. Denial would place Reynolds in the driver's seat in determining the future of USL. It could chose any financial institution to find a purchaser, and McLean agrees that Sea-Land's voice would be heard in that connection. The agreement permits the disposal of USL by public auction of its assets, or sale of its stock, or by distribution of the stock to Reynolds' stockholders. Neither Reynolds nor Sea-Land could be prevented from bidding at any public auction or from purchasing USL's stock to protect the $65 million investment, a possibility which a Reynolds witness said would be seized upon, if lawful, inasmuch as Sea-Land would like the use of the USL ships. The agreement certainly contains the seeds of possible control, prevention, or destruction of competition. Furthermore, the agreement is primarily for the benefit of Kidde and Reynolds, not for the benefit of the public.

The supplemental agreement, as now composed, should be disapproved.

APPENDIX "B"

In the nine years prior to its acquisition by Kidde, the value of USL in the open market was not in excess of 55 percent of book value. No responsible buyer other than Reynolds was found for USL by investment bankers, and the latter conveyed to Kidde the opinion that the underwriting and public sale of USL stock was well-nigh impossible because of poor market conditions and the poor operating results of the company.

During the discussions between Mr. Sullivan of Kidde and Mr. McMullen of USL, looking toward the sale of the company to the latter, the initial figure mentioned was approximately $50 million in cash, cash equivalents, and notes, plus delivery to Kidde of 816,000 shares of Kidde stock. This general basis was carried forward in the meetings between Mr. Sullivan and Mr. McLean. The final consideration was $65 million, with no stock transfer. Kidde was advised by a financial analyst specializing in the maritime industry that the price was just, reasonable, and prudent.

Whereas Mr. McMullen, when testifying, declared that the value of USL, an organization close to his heart, was worth considerably more than the price agreed upon, the financial facts of life cannot be ignored—actual market value had to prevail over possible value were the company one of sound financial standing at the time the agreement was made.

Discussion and Conclusion

The opponents to the agreements under consideration in both proceedings have consistently argued that approval of either the charter of merger agreements would produce overwhelming competitive advantages to Sea-Land and a disastrous effect upon the U.S.-flag competitors. Most of the opponents did not file exceptions to the Examiner's decision in the Charter case principally because Commission affirmation of the Chief Administrative Law Judge's decision in the Merger Case (wherein he determined it should not be approved) would operate as a simultaneous termination of the Charter Agreement.[A7] On the other hand, some of the opponents viewed the decision in the Merger Case as correct in its conclusions; but argued that it should have included a stronger antitrust case; that it failed to appreciate the full impact of the merger upon the competitors, and that the decision that the supplemental agreement and the promissory note are not subject to section 15 was wrong. The proponents of the agreements are in accord with the conclusions that the merger agreement falls within the purview of section 15 and that the supplemental agreement and promissory note do not. They except to the Chief Administrative Law Judge's conclusion that the merger should be disapproved and the suggestion that, if the supplemental agreement is within section 15, the merger agreement, as now composed, shoud be disapproved.

1. *JURISDICTION*

The Chief Administrative Law Judge found jurisdiction in this case on the basis of Commission precedents. Continuing arguments as to the propriety of those precedents compels us to expand somewhat on their rationale.

As we said in an earlier report, the threshold issue here is

[A7] Article 6.3 of the proposed merger agreement provides:

6.3 The parties hereto agree that (a) if this Agreement or the Merger is disapproved, or approved on terms and conditions not acceptable to Reynolds and Reynolds shall have so notified Kidde, this Agreement, the Basic Agreement, the Time Charter and the Equipment Lease (the "Related Documents") shall be automatically cancelled but the Supplemental Agreement shall remain in full force and effect; and (b) if this Agreement and the Merger are approved on terms and conditions acceptable to Reynolds but the Basic Agreement, the Time Charter or the Equipment Lease are disapproved, such disapproved instrument shall be automatically cancelled or if any such instrument is approved on terms or conditions unacceptable to Reynolds and Reynolds shall have so notified Kidde, this Agreement shall remain in effect but the Basic Agreement, Time Charter or the Equipment Lease (as defined in the Basic Agreement) or whichever of them is approved on terms unacceptable to Reynolds, as the case may be, shall be automatically cancelled unless under the terms of any of the Required Approvals such cancellation would adversely affect the approval of this Agreement or the Merger, but the Supplemental Agreement shall remain in full force and effect.

"that of our jurisdiction over the agreement to merge."[A8] Judicial developments since our decision in the *AML* merger case make it necessary to treat the jurisdictional issue once again. Since the Court of Appeals for the Ninth Circuit upheld our finding of section 15 jurisdiction over "merger agreements"[A9] two other United States courts have considered the issue and reached the opposite conclusion. In *United States* v. *R.J. Reynolds Tobacco Company*, 325 F. Supp. 656 (U.S.D.C.N.J. 1971), Judge Garth concluded that all of the agreements alluded to in section 15 of the Shipping Act are of an "on-going" nature and that a "single discrete event" such as a merger is not within the intended coverage of section 15. In *Seatrain Lines, Inc.* v. *F.M.C.*, 460 F. 2d 932, 947 (D.C. Cir. 1972), the United States Court of Appeals for the District of Columbia Circuit found that the word "agreements" as used in section 15 "did not include 'mergers,' 'acquisitions' and like."[A10]

It is hardly necessary to say that we find ourselves aligned with the majority of the Ninth Circuit Court of Appeals in *Matson* and in respectful disagreement with Judge Garth in *Reynolds* and the D.C. Circuit Court of Appeals in the *Seatrain* case. That court, speaking through Judge Wilkey, considered the specific language of section 15; The language of contemporary statutes; the legislative history of the Shipping Act and the administrative and judicial construction of section 15 since its enactment and, as already noted, concluded that mergers are not within the ambit of the section.

For the discussion of those basic considerations which prompted us to find merger jurisdiction within the scope of section 15, we refer to our earlier report in the *AML* case (*Supra*, note A8). We shall in this report confine ourselves to an application of that earlier discussion to those considerations which led Judge Garth and the court in *Seatrain* to conclude that jurisdiction over mergers is not to be found in section 15.

A. *The Language of Section 15*

Section 15 vests in the Commission jurisdiction over all "agreements":

[A8] *Merger-American Mail Line, American President Lines and Pacific Far East Line*, 11 F.M.C. 53 (1967) (hereafter the *AML* case). See also the discussion of our jurisdiction contained in the Initial Decision of Chief Examiner Page in Docket No. 69-56. We agree with his well reasoned discussion and his application of legal principles. Accordingly, we will not repeat here the arguments thoroughly covered therein. (11 S.R.R. 759, 763-773) (1970).

[A9] *Matson Navigation Co.* v. *F.M.C.*, 405 F. 2d 796 (9th Cir. 1968).

[A10] The FMC's petition for certiorari in *FMC* v. *Seatrain Line, et al.*, No. 71-1647, was granted by the Supreme Court on December 11, 1972.

1. fixing or regulating transportation rates or fares;
2. giving or receiving special rates, accommodations, or other special privileges or advantages;
3. controlling, regulating, preventing or destroying competition;
4. pooling or apportioning earnings, losses or traffic;
5. allotting ports or restricting or otherwise regulating the number and character of sailings between ports;
6. limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;
7. or in any manner providing for an exclusive, preferential or cooperative working arrangement.

Under the provisions of the section, all such agreements must be filed with the Commission and the Commission is empowered to approve, disapprove, cancel or modify agreements filed with it, with all agreements approved by the Commission being exempted from the antitrust laws. From a literal reading of the third category, an agreement to merge would clearly seem embraced within its language, for what better way to work the destruction of competition than through a merger. The Court in *Seatrain*, while admitting this, nevertheless concluded that both the language and context of section 15 itself and the legislative history accompanying it demonstrate that an agreement calling for the "single discrete event" (a merger) is not included among those agreements which "destroy competition."

This, of course, attaches to the word "agreement" a meaning distinctly different from that understood in common usage. However, this result is said to be dictated by the context of section 15 and the section's legislative history. To the court in *Seatrain*, the first six categories of agreements covered by section 15 of necessity imply the continued existence of the parties and their participation in such agreements over time (e.g., fixing or regulating rates; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting sailings between ports, etc.) (*Seatrain, supra*, at 934–935). We agree that the fixing of rates, the apportioning of earnings and the restriction of sailings presuppose operations over time; but the destruction of competition (that category with which we are here concerned) can be more readily accomplished by the single discrete event—the merger—than by an on-going agreement, and the inference that continuous operations are required in agreements destroying competition is not justifiable.

Inherent in the argument that our jurisdiction is restricted to agreements involving continuous operations is the assumption that the Commission labors under some disability not found in the Department of Justice or the courts should the need arise for a post-approval dissolution of a merger. Thus, the court in concludes: "In the case of arrangements of a more permanent nature . . . the sale of all the assets of one common carrier by water to another, subsequent Commission cancellation or modification of such a previously approved agreement would be very difficult if not impossible to implement." (*Seatrain, supra,* at 935) The relevance of this difficulty to the question of our jurisdiction, particularly if applied to the instant case, is obscure.

To begin with, there is nothing in the relevant statutes which in any way limits the manner in which the Commission may implement its disapproval of an agreement. Section 15 states that "The Commission shall by order . . . disapprove, cancel or modify any agreement . . . whether or not previously approved by it" that it finds violative of any of the standards set forth in that section. Consequently, there being no limitation on the latitude of the Commission's authority to disapprove, cancel or modify an approved agreement, there can be no justifiable restriction on the scope of approval agreements based upon the availability of an adequate remedy for violation of the approval. As we said in our earlier opinion in the *AML* case:

> We are necessarily given the power to stop or modify any continuing practice if we find that it has become detrimental to the commerce of the United States or contrary to the public interest even though we have previously approved the practice. But even here our disapproval or modification is only prospective; we cannot undo what has already been done. We are now concerned with the approval of a merger of three steamship lines, approval of which is to be granted unless we find that the merger would operate to the detriment of the commerce of the United States, be contrary to the public interest or unfair as between carriers; or otherwise in violation of the Shipping Act, 1916. It does not follow, of course, that our approval of the agreement once granted can never be withdrawn or that we cannot order the agreement modified.

The Supreme Court has specifically addressed itself to this point. In *California* v. *U.S.*, 577, 584 (1944) the Court said:[A11]

> Finding a wrong which it is duty-bound to remedy, the Maritime Commission * * * may, within the general framework of the Shipping Act, fashion the tools for doing so.

[A11] See also the *Matson* case, *supra*, note 7, citing *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 273–275a note 23 (1968); and *Pan American World Airways, Inc.* v. *U.S.*, 371 U.S. 296, 312, n.17 (1963).

There is, therefore, no lack of authority in the Commission to devise the appropriate remedy for the situation in which the terms of a merger approval are violated; and because we can provide such a remedy, it is irrelevant whether there are "continuous" operations as defined by the court in *Seatrain*. Certainly, moreover, we cannot see how others may accomplish the same result with any less of the "difficulty" suggested by the *Seatrain* court.

Further, this case is sufficiently different from *Seatrain* to render the court's argument inapposite. First, there is a fundamental difference in the nature of the agreements for which approval was in *Seatrain* and is now sought. The *Seatrain* situation was described by the court as follows:

> This sale comprises all of Oceanic's assets, although Oceanic * * * retains, its corporate existence and is not restricted by the agreement from reentering the * * * trade.[A12]
>
> * * *
>
> * * * the type of agreement here at issue [is] the acquisition of all the assets of one common carrier by water by another carrier.[A13]

The court then concluded that:

> * * * Section 15 does not provide for FMC jurisdiction over a sale of ships, absent either a provision limiting competition among the parties or a provision of some other type requiring continuing supervision.[A14]

Consequently, the court in *Seatrain* was concerned with an agreement very different from the proposed merger herein, and certainly from the agreement as modified and conditioned by us. The proposed agreement is a total merger of one carrier into the other. As modified and conditioned, the agreement we are approving (and as is discussed fully, *infra*) requires both the continued existence of USL (the acquired carrier) and the retention by USL of all its assets, thereby necessitating continuing Commission supervision to ensure that the approved anticompetitive activity remains within bounds of the enabling agreement.

The import of *Seatrain* is, therefore, that either a more anticompetitive agreement or one not finite as there at issue would be within the ambit of section 15. As the court said:

> Thus it is not * * * the complexity of the antitrust issues involved, which determines if the FMC has jurisdiction.[A15]

[A12] *Seatrain, supra*, at 933.
[A13] *Id.*, at 938.
[A14] *Id.*, at 945.
[A15] *Id.*, at 946.

For example:

> * * * a * * * contract coupled with an agreement not to compete, which may involve more complicated antitrust issues than the more simple sale contract, is required to be filed and the Commission may have jurisdiction to pass on all questions, including antitrust issues.[A16]

In the instant case what is involved is not, as in *Seatrain*, a sale of assets without a sale of the corporate identity. Here it is rather a sale of the corporate equity with the requirement that the acquiring company (Reynolds) maintain both the assets and stock of the acquired company (USL) identifiable to insure the continuing operativeness of the assets and the constant availability of the stock for such disposition as we might order as a remedy for violation of the terms of the acquisition. Needless to say, such a transaction requires continuous regulatory oversight to ensure the conservation of USL's assets and prevent the total absorption of USL by Sea-Land, a result which we conclude must not be permitted under the approved agreement.

By our act of approval, therefore, neither of the principal parties herein (Sea-Land and USL) will vanish forever. The acquired company (USL) will remain intact as a competitive entity, retaining its assets in operative form; and the obligation of ensuring the continuation of this status between Sea-Land and USL, and of assessing the subsequent and continuing competitive impact of the approved agreement, is specifically assigned by Congress to this Commission under section 15 which gives us the responsibility for day-to-day surveillance of the activities of common carriers by water in our foreign commerce. Should future circumstances warrant, we are expressly empowered to disapprove any agreement previously approved; or should something less than disapproval be called for, we can modify such an agreement even if the particular modification would require divestiture of previously merged or acquired assets or companies.

B. *The Legislative History of Section 15*

It is said, however, that the construction of section 15 which would limit the Commission's jurisdiction to "on-going" agreements is reinforced by the legislative history behind its enactment.

The Shipping Act, 1916, was primarily the result of the work of the House Committee on the Merchant Marine and Fisheries of the 63rd Congress under the direction of its

[A16] *Id.*, at 945.

Chairman, Representative J.W. Alexander. A selective reading of the Committee's report might lead one to the view that the Committee was basically concerned with those arrangements which fixed rates, or rotated sailings, or apportioned earnings, etc.—all of which called for operations "over time." Thus, the court in *Seatrain* quotes with approval the Supreme Court's characterization of the Committee's work as "an exhaustive inquiry into the practices of *shipping conferences.*" (*supra*, at 938) To be contrasted with this rather restricted description of the Committee's area of concern is the designation which the Committee itself gave to the report which embodied the results of its efforts: House Committee on the Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63rd Cong., 2d Sess. (1914). This report, called the Alexander Report after the Committee's Chairman, makes it clear that the Committee was indeed concerned with more than "understandings" and "arrangements" to the exclusion of "mergers" and "acquisitions." In fact, Congressman Alexander himself introduced H. Res. 587 which broadened the scope of the investigation to include ownership "by other ship lines or companies."[A17]

Reprinted at pages 10–17 of the Alexander Report are a number of questionnaires sent by the Committee to steamship lines in both the foreign and domestic trades. As might be expected the questionnaire sent to "domestic water carriers" sought much more detailed information on stock ownership "control" and affiliations than did the questionnaire sent to "steamship lines engaged in the American foreign trade." Nevertheless, U.S.-flag carriers had to answer the same questions concerning understandings and arrangements as did the foreign-flag carriers. Additionally, American diplomatic and consular officers abroad had to respond to a questionnaire which included the question, "Report any instances known to you where steamship lines and companies engaged in the foreign commerce of the United States are owned or controlled by railway companies or by the same interests owning or controlling railway companies?"

The responses to the questionnaires formed the basis for the conduct of the Committee's hearings, and citations to the Report could be multiplied to show the degree of the Committee's concern with the problem of the merger device as one of the

[A17] The resolution is included at page 9 of the Alexander Report.

major methods to control or destroy competition.[A18] Perhaps more importantly, Congressman Alexander himself in a speech reprinted in the Congressional Record characterized the situation as follows:

> To sum up the entire situation, investigation will prove that over 90% of the regular line coastwise and practically the entire foreign-American shipping is allied through interlocking directorates with the National City Bank, United States Trust Company, National Bank of Commerce, Guarantee Trust Company, all of which have for their fountainhead the Rockefeller-Morgan-Perkins interests. [52 Cong. Rec., Appendix 112 at 118.]

It seems clear, therefore, from the Chairman's comments and the conduct of the Committee's activities, that the Committee and its Chairman thought something more (and different?) than fixing rates or allocating ports was involved whereby competition was being controlled or destroyed; and the Committee was aware that concentration of control in the shipping industry was a major problem.

The opponents of our merger jurisdiction, however, take a peculiar view of the work of the Committee. They virtually ignore all but the last nine pages of the four volumes which comprise the total of the Committee's "report." In these nine pages, the "Recommendations of the Committee" appear, and it is primarily on the basis of a supposed dichotomy in the recommendations for domestic and those for foreign commerce that the opponents of merger jurisdiction rely most heavily. Additionally, both Judge Garth in *Reynolds* and the court in *Seatrain* find in the Recommendations of the Alexander Committee an intention to use the word "agreement" in a special or restricted sense; i.e., to include only those understandings or arrangements of an on-going nature. Thus, the court in *Seatrain* concludes:

> * * * the subject of the Committee's investigations was "agreements, conference arrangements, [and] gentlemen's understandings," all of which envision the continued existence of the parties and their participation in such agreements (e.g., in fixing rates, apportioning traffic, pooling earnings, etc.). There is no intention on the part of the Committee to include, nor is there any language in fact so including, the type of arrangements in the case at bar—the acquisition of all the assets of one steamship line by another. The Committee employed terms other than the word "agreement" to refer to transactions not of a continuing nature:
>
> The numerous methods of controlling competition between water carriers in the domestic trade referred to in the preceding pages may be grouped under three headings viz., (1) control through acquisition of water lines or the owner-

[A18] See, e.g., *Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations Under H. Res. 587*, at Vol. I, 90–93, 128, and 351.

ship of accessories of water lines; (2) control through agreements or understandings; and (3) control through special practices.

It would be superfluous then, for the Committee to have made this distinction if the Commission were correct in asserting that the Committee used the term "agreement" to encompass transactions other than those constituting cooperative working arrangements. (*Seatrain, supra,* at 939).[A19]

There are several difficulties with these contentions as to the work of the Committee. To begin with, the asserted distinction between agreements and mergers or acquisitions is not tenable; and the Committee did, in fact, use the term "agreement" in discussing mergers, acquisitions, etc. Equally untenable is the opponents' attempted distinction between the Report's applicability to domestic and foreign shipping. The Report indicates a clear intention to regulate mergers and acquisitions in the domestic trades; but the Committee is equally clear in its extensive interest in corporate combinations in the foreign trades. This, combined with the fact that section 15, which was enacted about two years after the Committee's work, makes no domestic/foreign distinction, negates the dichotomy suggested by the opponents.

The Committee dealt specifically with the International Mercantile Marine Company, sometimes referred to as the "Shipping Trust," the most notorious of the companies dominating our foreign trade.[A20] As Congressman Alexander said:

Let me give you a chapter from the recent investigation of the so-called Shipping Trust * * *. The same interests are associated in both the foreign and coast-wise shipping. The most prominent shipping corporation controlled by American interests are owned by the International Mercantile Marine * * *.[A21]

The distinction between agreements and acquisitions drawn by the *Seatrain* court cannot be sustained upon close examination of some of the methods of "control" allegedly excluded from the meaning of "agreement." (It is, of course, to be remembered that section 15 requires the filing of agreements "controlling competition.")

Twenty-eight methods of "control" are set out at pages

[A19] In a similar vein, Judge Garth concluded: "The agreements represented in the Report are all 'on-going' in nature. Most of these 'agreements' describe practices or regular activities in which two or more shipping companies have agreed to participate over a considerable period of time. None of the 'agreements' studied by the Alexander Committee bears the slightest resemblance to an agreement of merger, which is essentially a single discrete event, which transforms the relationship of the merging parties at the instant of merger." [325 F. Supp. 656, 658–659]

[A20] See Alexander Report, Vol. III, at p. 139. Congressional investigations into shipping in the foreign trade began in 1910 with a resolution to investigate the "Shipping Trust" (H. J. Res. 23). The text of the resolution can be found in 47 Cong. Rec. 8108 (1910).

[A21] 52 Cong. Rec., Appendix 112–118 (1915).

409–412 of the Report, and under the heading of "Control through acquisition . . ." there appear such methods as:

(3) Control by lease * * *.

* * *

(5) Joint control of a water line by several railroads.

(6) Control * * * by one or more officers in common or by common representation on the board of directors * * *.

(7) Control indicated by a community of interest through influential stockholders.

(8) Railroad control of competing water or canals through the ownership or control of forwarding companies, thus diverting traffic to their own rail or water lines by refusing to exchange through freight with independent water lines, the latter are thus forced to depend upon local business, which is too limited to maintain the efficiency of the line.

* * *

(10) Ownership or control of bulk carriers by producing and trading companies, which, while controlling a large portion of the traffic in a given commodity also act as common carriers. These companies may also *charter* boats of independent lines on such favorable terms as to induce such lines to observe a certain policy in the fixing and maintenance of rates. [Emphasis added.]

Such methods of controlling competition are as much in the nature of cooperative working arrangements ("on-going" agreements) as in the nature of corporate acquisitions. The Committee, therefore, was concerned with establishing the fact of controlled combinations by uncovering and examining the various devices employed.

Thus, the exclusion of mergers, acquisitions, etc., from the meaning of "agreements" as used in section 15 based upon a supposed distinction between the on-going understanding or arrangement on the one hand and the single discrete merger acquisition, etc., on the other, is not one which existed with the Committee.

Moreover, the Committee itself sometimes used the word "agreement" in its broad commonly accepted sense. For example, in Volume III of the Proceedings,[A22] at page 140, a merger is described as an "agreement":

[An] *Agreement* was concluded between Mr. J. Pierpont Morgan, the famous American financier and organizer of the Shipping Trust, for the purchase of Oceanic shares. The basis of the *agreement* was that the shareholders of Oceanic Co. should receive cash and securities representing 10 times the net profits of that company * * *. The terms of the *agreement* were published in the Daily Mail of May 9 and October 31, 1902. [Emphasis added.]

Again, in Volume I of the Proceedings at page 351, we find the Hamburg American Line-Union Line merger called an "agreement":

[A22] See note A18, *supra*.

Union Line was practically, under an *agreement*, acquired by the Hamburg-American Line. [Emphasis added.]

We think the attempted distinction between "agreements" and consolidations is too imprecise and undefined to form any part of a statute designed to do no less than regulate the gamut of anticompetitive conduct of an entire industry. Having devoted considerable attention to concentrations in shipping, both in the foreign and domestic trades, it seems unfair to attribute to the Committee an intent to ignore the problem and concentrate solely on "agreements" to fix rates, apportion earnings or rotate sailings. That the Committee did not have any such thing in mind is demonstrated by its specific allusion to the then recently enacted Panama Canal Act [Aug. 24, 1912, ch. 390, 37 Stat. 560]:

Section 11 of the [Panama Canal] Act also provides for the divorcing of common carriers by water from the railroads under certain conditions. These legislative requirements go far towards eliminating some of the undesirable practices which were found by this Committee to exist in the domestic commerce of the United States. [Report, p. 422]

As for the remaining undesirable practices, the Committee's specific recommendations included:

(2) that water carriers be required to file for approval with the Interstate Commerce Commission all agreements or arrangements affecting interstate transportation whether written or oral and all modifications or cancellations thereof, with water carriers with railroads or other transportation agencies or with shippers. [Report, p. 423]

* * *

(12) that all interstate traffic on canals be placed under the supervision of the Interstate Commerce Commission; and that the railroads be prohibited in the future from acquiring, either directly or indirectly ownership or control in interest in canals, or water lines, forwarding companies and other navigation facilities on such canals when the same are used in interstate transportation. [Report, p. 424]

No clearer indication is needed to show the Committee's understanding that effective legislation would have to include regulatory or supervisory control over acquisitions and transfers of ownership; and, as has been discussed, *supra*, no distinction between domestic and foreign mergers or acquisitions can be engrafted upon section 15 based upon the Alexander Report or the work of the Committee.

Additional clarification is available, moreover, in the legislative history between the Alexander Report issued in February 1914 and the enactment of the Shipping Act, 1916.

The Alexander Report revealed not only that the American merchant marine was becoming heavily monopolized but also that there was a severe shortage of U.S.-flag shipping. With Europe at war by August of 1914, Congress became even more aware of the need for rebuilding the merchant marine and thus the first shipping bills introduced after the Alexander Report were concerned only with promotion of the merchant marine. Thus, in September of 1914, Congressman Alexander introduced H.R. 18666, which proposed government ownership and operation of merchant vessels acting through a shipping board. Government ownership was sought to promote the merchant marine and was expected to have a *de facto* regulatory effect on conference rates. However, in 1915, Congressman Alexander introduced a bill which contained both regulatory and government ownership provisions. Congress adjourned before any action was taken, and the bill was introduced in the next Congress as H.R. 450. Almost immediately thereafter, Alexander introduced another proposal, H.R. 10500, and hearings were held on it in February, March and April of 1916. As introduced, H.R. 10500 had no antitrust exemptions and contained no requirements for the filing of agreements. However, section 9 of the bill incorporated by reference the Interstate Commerce Act, making that Act applicable to the Shipping Board, giving the Board complete power to regulate rates in the industry.[A23] Section 10 of the bill required licensing by the Board of vessels in both domestic and foreign commerce. After hearings, the Committee rejected the philosophy of sections 9 and 10 of H.R. 10500,[A24] and in April of 1916, Alexander introduced H.R. 14337. Finally in May, Alexander synthesized all previous legislative proposals into a single bill, H.R. 15455, and it was this bill that was finally passed by Congress.

Section 16 of H.R. 15455 (enacted verbatim as section 15) was a redrafting of section 3 of H.R. 14337, which latter section required the filing of every agreement, understanding, conference or arrangement "and such agreements, understandings, conferences, and arrangements if approved were exempt from the antitrust laws." Section 16 of H.R. 15455 and section 15 of the Shipping Act merely use the word "agreement" and at the end of the first paragraph, a sentence was added: The term "agreement" in this section includes "understandings, conferences and other arrangements." Thus, the significance of the only amendment concerning "agreement" appears to be in the

[A23] 53rd Cong. Rec. 8077 (1916).

[A24] The Interstate Commerce Act at that time contained no antitrust exemptions. It was not amended to provide for antitrust exemptions of any sort until 1920.

restoration to it of its commonly accepted meaning as originally used in H.R. 14337, and a specific provision that it include such novel things as "conferences" and the less formal terms "understanding and arrangements." The term "agreement" was understood to include the other terms which, therefore, became redundant. We think that commonly accepted and used meaning included agreements which called for mergers, acquisitions, and the like.

C. *Legislative History—The 1961 Amendments*

It was not until 1961 that the first really comprehensive reexamination of "antitrust" problems in the shipping industry was undertaken by Congress. The genesis of this reexamination was the supreme court's decision in *FMC.* v. *Isbrandtsen*, 356 U.S. 481 (1958), which declared conference dual rate systems unlawful. It was the original intention of the Antitrust Subcommittee of the House Committee on the Judiciary, under the Chairmanship of Congressman Celler, to restrict the scope of its inquiry to abuses of the dual rate system; however, the initial investigation:

> * * * revealed such diverse and widespread anticompetitive practices in the industry that the Chairman decided to expand the subcommittee inquiry to embrace within its scope not only the problem of dual rates and pricing practices but the entire gamut of antitrust problems in the ocean freight industry.[A25]

This expansion in turn resulted in an exhaustive and comprehensive study extending over a period of three years, consuming nine volumes containing about 12,000 pages of testimony and exhibits.[A26]

To place the work of the Antitrust Subcommittee in its proper context two facts should be noted. First, Congressman Celler was co-author of the 1961 amendments, and the investigation by his committee is part of the legislative history of the amendments; and second, although the Celler Report was not printed and generally distributed until 1962, it was made available to the drafters of the bill (the House Merchant Marine and Fisheries Committee) in unpublished form.[A27]

There is abundant support in the Celler Report for the inclu-

[A25] H.R. Rep. No. 1418, The Ocean Freight Industry, Report of the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 2d Sess. (1962) [the Celler Report].

[A26] Hearings Before Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st and 2d Sess., pt. 1, Vols. I-V and pt. 2, Vols. I-II (1959–60); *id.*, 87th Cong., 1st Sess., pt. 3, Vols. 1-11 (1961) [the Celler Hearings].

[A27] See Sen. Rep. No. 760, 87th Cong., 1st Sess. (1961), U.S. Code, Cong. & Admin. News, 87th Cong., 1st Sess. (1961), 3108 at 3116–3117; also 107 Cong. Rec. 10065 (1961).

sion of merger jurisdiction under section 15. The Antitrust Subcommittee's use of the word "agreement" clearly and specifically included agreements of merger. Additionally, and the Court in *Seatrain* notwithstanding, the word "agreement" was also used in connection with the acquisition of the stock of one carrier by another. Thus, at page 47 of the Celler Report we find:

> In the fall of 1960 Isbrandtsen acquired a controlling interest in American Export through the purchase of approximately 26 percent of the latter company's outstanding stock * * *. Under an *agreement* recently approved by the Federal Maritime Commission this purchase constitutes the initial step in a program leading to the consolidation of the maritime operations of the two companies. The 14 vessels owned or operated by Isbrandtsen are to be transferred to its subsidiary, Isbrandtsen Steamship Co., for about $6 million in promissory notes. Isbrandsten Steamship Co. will then be sold to American Export for about $11 million. [Emphasis added.][A28]

Congress was well aware that section 15 had been construed to include merger jurisdiction, yet it made no attempt to redefine the word "agreement."

Congress was repeatedly informed that the administrators of section 15 considered mergers to be included within their jurisdiction under that section. By Reorganization Plan No. 7 of 1961 (75 Stat. 840), President Kennedy proposed the establishment of an independent Federal Maritime Commission exclusively charged with responsibility for regulation of the shipping industry. During the hearings on the Reorganization Plan, Admiral Ralph E. Wilson, a member of the Federal Maritime Board, expressed his concern of possible administrative problems in handling transactions that required approvals by both the Commission under the Shipping Act and the Maritime Administration under the Merchant Marine Act of 1936. He stated:

> For example there is an important matter now pending before the Board which involves, *merger of assets*, determination of the adequacy of American flag shipping on certain essential trade routes, the granting of additional operating subsidy and the legality of intent which would require distinct determination by both the Commission and the Maritime Administration. [Emphasis ours.][A29]

[A28] See Celler Report 48 dealing with a protest to this "agreement." It is interesting to note that the Department of Justice was quite aware of this assertion of merger jurisdiction by the Commission and yet Justice never once suggested that the meaning of "agreement" be clarified so as to leave mergers, etc., at large under the antitrust laws. See Celler Hearing, Part III 1245–1263. The Department's silence before Congress then is indeed to be contrasted with its vociferous opposition in the courts now.

[A29] Hearings Before a Subcommittee of the House Committee on Government Operations, "Reorganization Plan No. 7 of 1961—Maritime Functions," 87th Cong., 1st Sess. (1961), at 46. Congressman Emanuel Celler was the first witness to appear at these hearings.

The reference was to the then pending American Export-Isbrandtsen merger agreement. Two members of this subcommittee, Edward A. Garmatz and F. Bradford Morse, also sat on the House Merchant Marine and Fisheries Committee. Appearing before the committee, Admiral Wilson reiterated his comment on the merger issue:

> We have now pending an important matter which involved a *merger of assets*, an additional operating subsidy as part of this whole package and a determinatory freezing out of competition and that sort of thing. [Emphasis added.][A30]

Thus, two different committees with an interest in the particular functions to be exercised by the newly proposed Federal Maritime Commission were informed that at least one of those functions would be the exercise of merger jurisdiction.

Congressman Celler, who was quite instrumental in bringing about the creation of the new Commission,[A31] and his subcommittee held hearings in 1962 to review the regulatory efforts of the Commission after its first year of experience under the newly amended Shipping Act. At the opening of these hearings, Chairman Celler made the following statement characterizing the functions and purpose of regulatory agencies such as the Federal Maritime Commission:[A32]

> When the Congress created administrative agencies to supervise the industrial and commercial machinery in certain areas of our economy, it acted in the belief that these specialized commissions would be effective at the same time in protecting the consumer from the self-same evils which the Sherman and Clayton Acts were designed to eliminate. In many instances these regulatory bodies were given the power and authority to exempt certain conduct from the antitrust laws—that is to say, to approve agreements, activities or *acquisitions* that would otherwise run afoul of the antitrust statutes. *Thus, the agency may, to an extent, substitute regulation for competition by permitting competitors to merge or collaborate in ratemaking for example.* [Emphasis ours.][A33]

Lest it be thought that the Commission was not one of those regulatory agencies to which had been given the "power and authority" to substitute regulation for competition by permitting mergers, etc., the following colloquy between the Subcommittee and the Commission's Chairman, Thomas Stakem,

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[A30] Hearings before the House Committee on the Merchant Marine and Fisheries, Reorganization Plan No. 7 of 1961, 87th Cong., 1st Sess., 91-92 (1961).

[A31] His personal intercession by letter to President Kennedy and his other endeavors on behalf of reorganization are set out at page 3 of the Celler Report.

[A32] These hearings can be placed in their proper context only by keeping in mind the active participation of Chairman Celler, the membership and the staff of the Subcommittee in drafting and enacting the legislation amending the Shipping Act.

[A33] Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, "Progress Report from the Federal Maritime Commission," 87th Cong., 2d Sess., Ser. No. 34 at 2 (1962).

leaves no doubt that the Commission itself thought it had this power and authority:

Mr. Appel. Turning to another topic in the section 15 category, I would like to ask you a few questions about the implications of the Commission's approval of the Isbrandtsen-American Export merger under the mechanism of section 15 of the 1916 Act.

Prior to the time that this case went to the Maritime Administration for subsidy consideration the Federal Maritime Commission in February of this year upheld its initial decision, did it not?

Mr. Stakem. Yes it did.

Mr. Appel. And, in this case, it granted approval under section 15 of the Act to an agreement between the Isbrandtsen Co. and American Export, the overall effect of which was, in the words of the Commission—

for Isbrandtsen to transfer its liner fleet of some 14 ships and its entire business to American Export, agreeing as part of the transaction not to compete without Export's consent.

The Commission concluded that this constituted an agreement "controlling, regulating and destroying competition," that the agreement which had been filed with the predecessor Board fell squarely within the "clear unqualified language of section 15" requiring action by the Commission to either "approve or disapprove, cancel or modify."

And the Commission further held that the agreement was not in violation of any proscription of the Act, is that not so?

Mr. Stakem. Yes. The Commission felt that the language of the law clearly gives it an interest in this sort of an arrangement. . . .[A34]

Mr. Johnson. Mr. Stakem let me cut in there for a moment for just one question. The Celler-Kefauver Act of course provides that where an agreement is approved, to the extent that the Commission can give it immunity from the antitrust laws, it receives that immunity does it not?

Mr. Stakem. Yes sir.

Mr. Johnson. In passing on a merger, does the Commission take into account the standards of the Celler-Kefauver Act; namely, whether the merger will tend to substantially lessen competition or to create a monopoly in any line of commerce?

Mr. Stakem. I would like to have counsel answer that if you will.

Mr. Pimper. Of course. I think the answer to that is yes. . . . [A35]

Mr. Appel. Does the Commission's approval of the Isbrandtsen-Export merger grant to these parties the same antitrust exemption accorded to all other parties who have their agreements approved under section 15 of the Act?

Mr. Stakem. Yes. I think it carries with it the immunity, but I think we must also keep in mind that if upon a complaint that this was operating to the detriment of U.S. commerce, that there is always the possibility of complaint and review by the Commission.[A36]

[A34] *Id.*, at 40.

[A35] *Id.*, at 21.

[A36] *Id.*, at 21–22. Of course, it is argued that the key to the Commission's jurisdiction in the Isbrandtsen-Export merger was the "non-complete" clause. Aside from the fact that the Commission's decision was not based on any such clause (see 11 F.M.C. at 62–63), the notion that jurisdiction turns on "non-complete" clauses can only make possible "agency-shopping" much like the kind of forum shopping so deplored by the courts. The "clause" can be either put in or left out, depending upon whether the parties to the agreement desire to deal with the Commission or the Justice Department. We cannot underestimate the ingenuity of the industry in producing apparently valid non-compete clauses in merger situations.

We think the foregoing discussion of the legislative history of section 15 both before and after 1916 shows something more than jurisdictional "wishful thinking" on our part.[A37] It shows that in 1916 Congress was well aware of the problems of concentration in the Merchant Marine, and that the term "agreement" was used in section 15 in its generally accepted sense—it was also defined to include the rather specialized term "conferences." To define agreement so as to exclude single discrete events is to attribute to Congress the intent to ignore a major problem in the industry after having devoted considerable time to the study and discussion of it.

Additionally, the meaning of the term agreements was reexamined in both the period preceding the 1961 amendment and reenactment of section 15 and in the period immediately thereafter. During this time, Congress was on a number of occasions specifically informed that the agency to which it had entrusted the administration of section 15 considered that its jurisdiction under that section included agreements to merge.

Thus, as has been discussed and as will be developed more fully, the Commission's jurisdiction herein is being applied not to a "single discrete event" merger, but to an agreement which is within the jurisdiction of the Commission whether or not our section 15 authority applies to the "mergers" which Justice tries to distinguish from other agreements. Nevertheless, even if the agreement we are approving is a "merger," it is our conclusion that merger agreements are among those over which we have jurisdiction under section 15. In either event, all the agreements involved, the charter, the proposed merger, the supplemental agreement and the promissory note, are subject to Commission jurisdiction as indispensible parts of a whole arrangement. The supplemental agreement and promissory note are discussed fully, *infra*.

2. *Merits*

Our decision and order is founded on approval of an on-going agreement under statutory continuing surveillance by the Commission with a system of policing and review of the activites of Reynolds/Sea-Land and USL based upon an amplification of our Congressional mandate.

We have accomplished this by the binary nature of our action herein. First, we are approving the proposed agreement in a form so modified as to continue USL as an independent car-

[A37] *Seatrain Lines, Inc. v. F.M.C., supra.*

rier entity. Second, we are attaching conditions to our approval to assure the intended result.

The conditions, which are set forth and discussed further, *infra*, are designed to prevent the disappearance of USL into the corporate structure of Reynolds and insure our ability to maintain our surveillance and policing functions mandated under section 15 with respect to all agreements approved by the Commission.

Conditions I.A. and B. require that the USL stock be neither transferred nor encumbered by RJI, the Reynolds subsidiary which will acquire the stock. This assures that the stock will always be intact and reachable in the event we should subsequently disapprove or further modify the agreement. In addition, with respect to USL, the corporate ownership pattern among Reynolds, RJI and USL may not be altered without our approval.

This is important because in condition I.D. we include divestiture of USL stock as one of the possible remedies available to the Commission in the event we should at some time find it necessary to disapprove the agreement.[A38] As provided in this condition, a breach of any of the conditions could provide grounds for disapproval and divestiture. Further, condition III, first paragraph, provides for constant Commission scrutiny of the parties' activities to insure that any alteration in competitive circumstances is consistent with the conditions as a whole. An investigation into that aspect of the parties' activities may be initiated by the Commission on its own motion or on petition to the Commission by a person having an interest therein.

Although our general obligation to exercise continuing Commission surveillance is required by the Shipping Act under section 15, we nevertheless restate that obligation in condition I.C., additionally providing for specific review of the approved agreement and activities thereunder at least every five years. To aid us in pursuing this responsibility, other conditions are included which will constantly provide us with information on the parties' actions. Condition III.A.1. requires that one corporate director of USL and one corporate director of Sea-Land be a "public member." These directors are to be appointed by an independent and neutral source, and are to report to us on, *inter alia*, the parties' decisions relating to matters of competition. There is also to be a semiannual reporting to the Commis-

[A38] See note A54, *infra*. See, also, text accompanying note A11, *supra*.

sion by the parties with respect to their adherence to all the conditions, and the Commission is to have access to all the records of the parties. This is required in conditions IV. and IV.A.

Other conditions (e.g., III.C, D., E., and F.) contemplate the need for further specific Commission action. These listed conditions prohibit various activities by the parties (e.g., common terminal facilities, pooling, service rationalization) without our prior authorization. Thus there will be a continuum of permissible activity under the approved agreement, subject to change and modification only by order of the Commission.

The remaining conditions contain, generally, additional restrictions on the activities of the parties and supplement those just discussed. Taken *in toto* the conditions require constant activity on the part of the Commission to ensure compliance by the parties, to enable us to further modify the agreement if required by changed circumstances, and to disapprove the agreement if the situation warrants.

It is argued by the Agreement's opponents, however, that regardless of the defensibility of our philosophy, conclusions and methodology, we may not take the action herein. It is contended that because the agreement being approved was proposed in our Order Reopening Proceeding for Limited Purposes (served June 7, 1972) it was therefore not subjected to evidence at the hearing to enable the making of the necessary supporting findings of fact.

First, it would hardly have been in keeping with the Commission's responsibilities for us to have simply disapproved the agreement on the ground that its original terms were inadequate to achieve the full measure of the agreement's benefits. Such an action would be an exercise in negative regulation, a condition totally unacceptable for progressive regulation in an age of intermodal transportation modernity. The Commission has rejected such an attitude, as exemplified by the Commission's decision in *Disposition of Container Marine Lines*, 11 F.M.C. 476 (1968), and cases cited therein.

In that case the Commission was presented with an innovative and controversial tariff filing which was acceptable in principle but unacceptable by reason of technical deficiencies. Consequently, we set forth in our report the manner in which the tariffs could be made suitable to the desired result and accepted the filings upon condition that the faults be remedied in the manner prescribed. In reaching that result we said:

* * * the Commission need be ever mindful of its responsibilities as a body to which Congress has delegated certain responsibilities. The exercise of that delegated authority was intended by Congress, and must be interpreted by us, to be performed in the most judicious manner in our quasi-judicial capacity and in our best discretion. The administration of the Commission's duties requires flexibility of action and purpose when necessary and possible.[A39]

Second, there was no denial of due process rights relating to a fair hearing on the conditions and the agreement as herein approved. The issue of alternatives to the agreement as filed and the issue of an acquisition and/or merger without a charter were always in this proceeding,[A40] explored at the hearing and considered by the Chief Administrative Law Judge.[A41] In our Order of June 7, 1972, we provided the parties an opportunity to comment on the conditions we proposed[A42] and invited them to offer their own additional conditions.

One other preliminary matter is also pertinent here. That is the relationship between antitrust and Shipping Act considerations in cases before the Commission concerning section 15 agreements.

Essentially, it is the duty of the regulatory agencies and the courts to accommodate or harmonize antitrust and regulatory principles. See *Seaboard Airlines V.V.* v. *U.S.*, 382 U.S. 154, 156 (1965). Regulatory agencies have long used the antitrust laws to give "understandable content to the broad statutory concept of 'the public interest' contained in their statutory standards."[A43]

In the instant case, even though the antitrust laws embody at least a part of the public interest which this Commission considers in acting on section 15 agreements, in the last analysis the regulatory laws must take precedence. A regulatory agency which, like the Federal Maritime Commission, while reconciling its policies with antitrust philosophy, nevertheless must apply its own laws and standards, not those of the antitrust laws.[A44] The Commission must use its expertise

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[A39] *Disposition of Container Marine Lines*, 11 F.M.C. 476, 482–483 (1968). See also *American Trucking Assns., Inc.* v. *A.T. & S.F. Ry Co.*, 387 U.S. 397, 416 (1967) cited at p. 489 of the *Container Marine Lines* case.

[A40] See list of issues contained in our Order of Investigation, *supra*, at p. 143.

[A41] *Supra*, at p. 185 and, *infra*, at pp. 228.

[A42] In fact we have been persuaded by the comments of the opponents as to certain conditions and we have rejected certain of proponents' suggested changes, especially in dealing with all important conditions relating to the competitive relationship among the corporations. See pp. 146–148, *infra*.

[A43] *F.M.C.* v. *Svenska Amerika Linien*, 390 U.S. 238, 244 (1966); *Volkswagenwerk Aktiengesellschaft* v. *F.M.C.*, 390 U.S. 261, 274 n. 20 (1968); *Denver & Rio Grande Western R.R. Co.* v. *U.S.*, 387 U.S. 485, 492–94 (1967); *California* v. *F.P.C.*, 369 U.S. 482, 484–85 (1962); *U.S.* v. *RCA*, 358 U.S. 334, 351 (1959); *McLean Trucking Co.* v. *U.S.*, 321 U.S. 67, 79–80 (1944); *City of Pittsburgh* v. *F.P.C.*, 99 U.S. App. D.C. 113, 237 F. 2d 741 (1956).

[A44] *F.M.C.* v. *Svenska Amerika Linien*, *supra*, at 243; *Minneapolis & St. Louis R. Co.* v. *U.S.*, 361 U.S.

in its specialized field to give viability to the antitrust laws in the area of the Commission's ocean trade jurisdiction.

The Federal Maritime Commission provides the nexus for our basic national antitrust philosophy and the national maritime policy as expressed in our shipping statutes. Although the Commission is not the agency that exercises primary jurisdiction over our antitrust laws, the principles embodied in those laws are always present in Commission deliberations concerning, especially, agreements filed for approval under section 15. The Congress, when drafting the Shipping Act and establishing the Commission, mandated this responsibility by permitting agreements approved by the Commission to be exempt from application of the antitrust statutes.[A45] Thus because of this consequence of its approval of a section 15agreement, the Commission pursues its obligation to consider the anticompetitive implications of such action. We strike a balance by determining whether the public interest as set forth in our governing statutes will be served by sanctioning an anticompetitive activity in the interest of our maritime policy.

We must, therefore, approach the merits of this case from two convergent lines of reasoning: One involving shipping statute considerations and those of the antitrust laws.

To begin with, and as we said at the outset, the agreements at issue must be tested against the standards for approvability set forth in section 15.[A46] Additionally, the Commission must examine the agreements to determine whether they meet those standards as amplified by the Commission with the affirmation of the Supreme Court in *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968). In our report precursing that Supreme Court decision we said that proponents of an agreement must "bring forth such facts as would demonstrate that the . . . [agreement] was required by serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."[A47]

The Chief Administrative Law Judge, utilizing this test, re-

1973, rehearing den'd, 361 U.S. 945 (1960); *Seaboard Airlines R.R. Co.* v. *U.S.*, *supra*, and on remand *sub. nom. Florida East Coast Ry. Co.* v. *U.S.*, 259 F. Supp. 993 (M.D. Fla. 1966).

[A45] Section 15 provides, in pertinent part:

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

[A46] For the text of section 15 as far as pertinent, see note A1, *supra* at p. 136.

[A47] *Investigation of Passenger Travel Agents*, 10 F.M.C. 27, 45 (1966).

jected the agreements. This we believe is a concession to the philosophy that FMC jurisdiction is narrow and restrictive. We, however, reach the opposite conclusion, and find that the standards of section 15 and *Svenska* are fully met. The Chief Administrative Law Judge rejected the plans of the proponents as being more self-serving than accruing to the public benefit in the form of a "transportation need" or "public benefits." It is apparent, therefore, that although we generally accept the findings of fact in the initial decision, we view some in an entirely different perspective. Our view is that of an overall approach to all the agreements at issue and alternatives to the proposed merger agreement, as opposed to a limited and particularized view of various facets of the proponents' plans. This can best be seen in the Commission's Order Reopening Proceeding for Limited Purposes of June 7, 1972,[A48] (hereinafter sometimes "Order") and in the comments of the parties filed pursuant thereto.

The Order, which was served following oral argument,[A49] reopened the proceeding and announced our preparedness to approve the acquisition by Reynolds of all the outstanding common stock of USL held by Kidde subject to proposed conditions which assure the maintenance of USL as a viable independent corporation with Reynolds providing financial assistance to maintain USL as such a corporation. We stated in the Order that:

> *We are disposed to make this determination to help create continued substantial American-flag participation in international maritime competition. Our approach is with a view toward maintaining USL as a strong independent U.S.-flag carrier, and precluding its dismemberment. The latter possibility is very real under the intent of the Supplemental Agreement as indicated by its terms; and to permit such an eventuality would be a disservice to the American merchant marine and a severe detriment to the public interest in a strong and competitive American merchant fleet.*
>
> Under the current and developing structure of international ocean commerce, there is a great need to assure the continued operation of efficient and productive U.S.-flag carriage in all major trades. Consequently, our inclination to approve the acquisition would not result in an approval of the type of corporate consolidation wherein one company survives and the other does not. Our desire is rather to ensure the survival of existing American-flag service by permitting the infusion of new and private capital into our merchant marine fleet. What we envision here are two independent companies to be operated under a continuing Sec. 15 agreement.
>
> As a result we envision stronger U.S.-flag competition in international maritime markets; vigorous competition for United States military and gov-

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[A48] Chairman Bentley and Commissioner Barrett voted against the issuance of the Order.

[A49] In view of our action herein the Motions to Strike Portions of the Oral Argument are denied.

ernment controlled cargo; and FMC access to carrier data used in arriving at rates for government cargo.

On the strength of the conditions to approval set forth below and others which may be suggested, the Commission will be able to assure the above benefits, and we will be able also to prevent any restraint of trade without need or justification; to assure our continuing surveillance and review of Reynolds/Sea-Land and USL activities through receipt of periodic reports; and to retain a practicable option to dissolve the acquisition upon breach of any conditions attached to the acquisitions. (Emphasis added.)

We also posed numerous conditions geared to obtain the desired result and ordered the parties to submit memoranda and replies to those conditions, including any other conditions to be suggested by the parties.

The underscored language of our Order, *supra*, is crucial to our disagreement with the Chief Administrative Law Judge, and the philosophy expressed forms an essential part of the basis for our ultimate conclusions.

Some opponents to our Order point to the *Svenska* case and the doctrine that agreements must be justified by public benefit or serious transportation need sufficient to outweigh any injury to competition. They claim that the Commission's Order would serve to approve a merger while rejecting all grounds for approval. In that respect, it is argued that all the claims of record for approval will have evaporated since USL would be maintained as a "viable independent corporation" and not the combination sought through the proposed merger.

Proponents counter by claiming there is an abundance of evidence to support *Svenska* tests, that the single greatest transportation need is the accomplishment of rationalization obtained through approval and by providing USL with a stable financial base to provide shippers with effective and dependable service.

It is argued by some opponents that the decision to approve the acquisition in order to prevent the "dismemberment" of USL is a "fabricated strawman" since that possibility, they claim, exists only because of the supplemental agreement. They contend that since the Commission concluded that it has jurisdiction over the stock acquisition, it should also have jurisdiction over the supplemental agreement and prevent dismemberment by disapproving it; or, alternatively, the dismemberment could be stopped by injunctive relief. It is also claimed that dismemberment isn't even necessary in view of recent profitable operations of USL.

The status of the supplemental agreement and the significance of USL's financial condition are problematic matters. Yet, the opponents' attempt to employ an interconnection between them to dissuade us from our conclusions is not supported by the record. It arises from a misinterpretation of the reasoning in our Order and out of a misunderstanding of the nature of the supplemental agreement. What the opponents fail to recognize is the relationship among the premise of the supplemental agreement, our jurisdiction over it, and our approval of the proposed agreement in a modified form.

The parties fully intend, by virtue of the supplemental agreement, the destruction, liquidation, or dismemberment of USL as a single common carrier entity to be a possible result of this entire proceeding if the Commission disapproves the merger as proposed.[A50] This much is indisputable.

Reynolds/Sea-Land and Kidde/USL argue, however, that the supplemental agreement (which is intended to take effect if the proposed merger is disapproved) is not subject to section 15 since it is not an agreement between common carriers or persons subject to the Act (Reynolds and Kidde are the only parties signatory), and does not affect competition or otherwise come within the boundaries of the Act. APL and AML claim that it is subject to the Act because of its "shipping effect" and, further, that it has been carried out without the required approval. Hearing Counsel argue that the real parties to the agreement are Sea-Land and USL.

Justice agrees with the proponents' view that the supple-

[A50] The supplemental agreement provides, in part, as follows:

Section 3. Unless the acquisition shall have been accomplished as provided in the Merger Agreement or as provided in Section 1 above, the financial institution selected as provided in Section 2 above shall be authorized and empowered to make disposition of U. S. Lines, its Common Stock or assets (together with assumption of its liabilities) in public or private sale or sales or otherwise, in the manner hereinafter specified in Section 4. Kidde agrees to cooperate fully to effect such disposition and to use its best efforts to obtain all necessary approvals.

* * *

Section 4. In order to effect the disposition of U. S. Lines as desired by Kidde in the event that neither Reynolds nor a substitute party as provided in Section 1 is available and able to accomplish its acquisition, the financial institution chosen as provided in Section 2 hereof shall:

(i) Cause a public sale of all of U. S. Lines Common Stock to be made; or

(ii) Cause a distribution of the U. S. Lines Common Stock to be made to the stockholders of Reynolds and promptly thereafter deliver, or cause to be delivered, to Kidde the Note; or

(iii) Cause the vessels and related containers, chassis and other equipment necessary in the operation of such vessels of U. S. Lines to be sold at competitive bidding and cause the other assets of U. S. Lines to be sold, in each case at prices acceptable to Reynolds and resulting in the satisfaction of all liabilities of U. S. Lines or their assumption by a purchaser or purchasers with credit acceptable to Kidde;

(iv) Utilize any combination of the methods set forth in (i), (ii) or (iii) hereinabove in order to dispose of the U. S. Lines Common Stock or the assets and liabilities of U. S. Lines, as the case may be, and to ensure to Kidde's satisfaction consideration to Kidde of a value equal to the Note, it being understood that, if not materially disadvantageous to Reynolds, it is intended that such disposition shall be by one of the methods set forth in (i), (ii) or (iii) in order to preserve U. S. Lines as an operating entity . . .

See, also, Initial Decision, Appendix "A," *supra*, at p. 191, and footnote A7, *supra*.

mental agreement is not subject to Commission jurisdiction under section 15, and, consequently, can be governed by court action under the antitrust laws.

Although the Chief Administrative Law Judge concluded that the supplemental agreement is not subject to section 15, he did state:

> Should the Commission disagree with this conclusion, the discussion found in Appendix "A" is submitted as an aid to the Commission in its determination as to whether the supplemental agreement should be approved.[A51]

In Appendix "A" he noted, "The agreement certainly contains the seeds of possible control, prevention, or destruction of competition. Furthermore, the agreement is primarily for the benefit of Kidde and Reynolds, not for the benefit of the public." Accordingly, he concluded that it should be disapproved.

The Chief Administrative Law Judge pointedly recognized that "The supplemental agreement would permit Kidde and Reynolds to achieve what they would be denied if the merger were disapproved. Denial would place Reynolds in the driver's seat in determining the future of USL."[A52] AEIL has argued that "the so-called Supplemental Agreement now looms as the important tactical device whereby Reynolds/Sea-Land can destroy Sea-Land's major competitor, U.S. Lines." They also conclude that, "Viewing the matter properly, there is an agreement *between Reynolds and Kidde* whereunder Reynolds had agreed to take U.S. Lines off of Kidde's hands, irrespective of any Federal Maritime Commission approval."

We agree with some of the possibilities inherent in these observations. We are also impressed with the argument that "Kidde would be obliged to again find a way to dispose of USL and Kidde would be forced to liquidate USL if it could not promptly find a buyer."[A53]

Consequently, if we were to simply terminate the matter by disapproving the basic merger agreement, we would nullify the benefits which we conclude will result from the activities authorized by our approval of the modified agreement as set forth herein. In practice, most section 15 agreements are not approved as initially presented to the Commission. It is after consultation between the parties or applicants and the Commission, resulting in modifications, that the section 15 agreement is approved in final and different form.

[A51] *Supra*, at p. 165, note 19.
[A52] *Supra*, at p. 191.
[A53] *Id.*

The dismemberment of USL as an end result of these proceedings is a possible, if not probable, consequence of all the various alternatives which we could reach, except the one herein proposed by us if accepted by the proponents.

Thus, regardless of our disposition of the charter and proposed merger, and regardless of any action we and/or the Justice Department might take with respect to the supplemental agreement, it is still open to Kidde to relieve itself of the USL assets which Kidde apparently regards as an expendable and unnecessary burden to its corporate operations. Whether jurisdiction over the supplemental agreement is ultimately found to be with the Commission or the courts, Kidde could easily select a method of disposing of USL's physical assets which offends neither the Shipping Act standards, on the one hand, nor the antitrust policy of Justice on the other.

In either event, the net result would be the disappearance of USL as a single common carrier entity. The immediate and primary beneficiary would be Reynolds/Sea-Land who would lose USL as a hetherto significant competitor. A similar effect would, of course, be felt by the various common carrier opponents of the proposed merger. These benefits, however, obviously do not inure to the overriding public interest in the maintenance of healthy competition in the merchant marine industry. Our action, by keeping USL afloat, provides our merchant marine with tools to insure the viability of the industry.

The Chief Administrative Law Judge premised his disapproval of the agreement on his finding that the results of the porposed merger would redound foremost to the benefit of the proponents. Yet, disapproval will have the same result, permanently. Once dismantled, neither we, nor Justice, nor "all the king's men," will be able to put USL "together again."

Contrarily, with the approval we grant herein, the Commission will maintain continuing surveillance, not over fragments of carriers, but over whole entities operating under improved competitive circumstances; and, if future activities under the approved agreement should fall short of our judgment and expectations, or if the parties should violate any of the conditions of approval, it will be possible for the Commission to disapprove the agreement already approved or fashion any other appropriate remedy. As has been said by the Supreme Court:

Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of national interest, may, within the general framework of the Shipping Act, fashion the tools for doing so.[A54]

In the same case, the Supreme Court also said as follows:

> It can hardly be suggested that the protection of the national interest in interstate and foreign commerce or even the convenience of the parties would, as a matter of sensible and economic administration, limit the Commission to * * * negative means of dealing with the evils revealed on this record * * *.[A55]

Although that case dealt with the evils of violations of sections 16 and 17 of the Shipping Act, the reasoning may be applied with equal vigor to preventing evils which would result from a negative Commission decision, culminating in our failure to take appropriate action. The ultimate result would be contrary to the public interest and the general welfare.

Consequently, the Commission is obligated not only to prevent implementation of the supplemental agreement by disapproving it, we are equally obligated to approve an agreement which will both produce the benefits of the proposed corporate consolidation and also prevent the evil which might result with or without use of the supplemental agreement. Our ultimate conclusion herein—approval of the basic agreement with certain conditions—is dedicated to that purpose.

From the foregoing it can be seen that there are ample grounds for our conclusion that the supplemental agreement is within the Commission's jurisdiction. Additionally, however, the Chief Administrative Law Judge, although arriving at the opposite conclusion, based his decision upon findings which we believe upon careful analysis cast more weight toward our point of view. Recognizing that it is a "close question" he posed the following considerations about the supplemental agreement: (1) it cannot be implemented, in some respects, except through the action of USL under Kidde's orders; (2) Reynolds' primary consideration is to secure the USL fleet for the use of its subsidiary, Sea-Land; (3) it is a means by which Reynolds—and more importantly, Sea-Land—could acquire USL upon disapproval of the merger; (4) it states that it embodies the merger agreement and related documents between the parties; (5) Reynolds has been actively behind Sea-Land's operations, including its building program; (6) Reynolds and Kidde have undertaken considerable financial and managerial responsibilities on behalf of their subsidiaries; (7) Reynolds has certain veto powers over the sale of USL; (8) according to a

[A54] *California* v. *U.S.*, 320 U.S. 577, 584 (1944).
[A55] *Id.*, at 582.

witness, Reynolds would expect to be heard should USL be disposed of by an institution selected by Reynolds; and (9) USL would continue to be an operating entity to the extent it would not be materially disadvantageous to Reynolds.[A56]

In viewing the above considerations and the arguments of the parties, he concluded that in this instance he could not agree with the theory that the document really has been executed by Reynolds and Kidde as the alter egos of Sea-Land and USL; and the fact that there is a "shipping effect" does not necessarily bring it within the purview of section 15 since Sea-Land and USL, even though affected to some extent, are not the real parties in interest. He concluded, "Should the merger not be approved the supplemental agreement comes to full bloom, the charter application is abandoned, and Reynolds/Sea-Land terminate their interest in USL."[A57]

To this last statement we cannot subscribe. As discussed, *supra*, Reynolds/Sea-Land will not terminate their interest in USL if the proposed merger is disapproved;[A58] and thus the proposed merger and supplemental agreement are inextricably related.

We will not permit corporate devices to prevent us from recognizing that the real parties in interest in the supplemental agreement are the two common carriers by water—USL and Sea-Land. The very reasons cited by the Chief Administrative Law Judge in finding no jurisdiction persuade us that the supplemental agreement is within our jurisdiction under section 15, and, further, that it should not be approved.[A59]

[A56] *Supra*, at p. 164.

[A57] *Supra*, at p. 165.

[A58] The supplemental agreement provides, in part, as follows:

Section 2. It is understood and agreed that neither Reynolds nor any subsidiary or affiliate of Reynolds shall have any control over the finding or designation of any substitute party pursuant to Section 1 above or as hereinafter provided. Such control shall be vested in such financial institution as shall be designated by Reynolds within thirty days after it becomes obligated under Section 1 to cause a substitute party to be found. Neither Reynolds nor any subsidiary or affiliate of Reynolds shall have any standing to object to any substitute party under Section 1 designated by such financial institution and acceptable to Kidde *unless such purchaser represents a credit with respect to its note in the principal amount of $65,000,000 which is determined by Kidde to be unacceptable without the guaranty of Reynolds or the fair value of U. S. Lines is in the judgment of Reynolds in excess of the price offered by such substitute party.* (Emphasis added.)

* * *

Section 4. In order to effect the disposition of U. S. Lines as desired by Kidde in the event that neither Reynolds nor a substitute party as provided in Section 1 is available and able to accomplish its acquisition, the financial institution chosen as provided in Section 2 hereof shall:

* * *

(iv) Utilize any combination of the methods set forth in (i), (ii) or (iii) hereinabove in order to dispose of the U. S. Lines Common Stock or the assets and liabilities of U. S. Lines, as the case may be, and to ensure to Kidde's satisfaction consideration to Kidde of a value equal to the Note, it being understood that, *if not materially disadvantageous to Reynolds*, it is intended that such disposition shall be by one of the methods set forth in (i), (ii) or (iii) in order to preserve U. S. Lines as an operating entity * * *. (Emphasis added.)

[A59] *Supra*, at p. 191.

As noted earlier, one of the arguments of the opponents is that our ultimate conclusion in this case is not justified to prevent dismemberment of USL because of the recent improved financial condition of USL.

The Chief Administrative Law Judge stated his views as follows:

> The single plausible ground for the merger is the protection of USL's financial stability. But a fair comparison of the company's recent troubles with its apparent renascence in that respect leads to the conclusion, in the Examiner's judgment, that USL has weathered its monetary crisis to the point where its independent position in the foreign commerce of the United States outweighs the desirability or necessity of its takeover by Reynolds.[A60]
>
> * * *
>
> Granted that the position of Reynolds is such that it could be of real assistance in helping USL to tide itself over the shortage of capital, all indications are that USL can and will eventually extricate itself from its present financial morass and remain a formidable—and therefore a highly desirable—competitor of Sea-Land.[A61]

We disagree with that conclusion based primarily on the same reasoning we have applied with respect to the supplemental agreement. The perspective of the Chief Administrative Law Judge was limited to consideration of the various issues in their relationship to the total merger proposed in the filed agreements. Thus, his evaluation of both the financial condition of USL and the significance of the supplemental agreement was made only within the framework of the proposed merger.

As we have said, our view is much broader. The Chief Administrative Law Judge considered any indications of an improvement of USL's financial structure to present a more desirable alternative to the proposed merger. With that we do not totally disagree, except that a financially sound USL is not, under existing circumstances, a viable alternative. The Chief Administrative Law Judge gave insufficient weight to the possibility that regardless of USL's financial posture, Kidde (as evidenced by the agreements) is determined to be rid of USL. Consequently, we have opted for a result which will include both a financially sound USL (whether or not the record establishes that to be the fact now) and the acquisition of USL by Reynolds. Contrary to the conclusion of the Chief Administrative Law Judge we find these two results not to be mutually exclusive, but mutually dependent.

In arriving at a conclusion opposite to that of the Commis-

[A60] *Supra*, at p. 190.
[A61] *Supra*, at p. 186.

sion, the Chief Administrative Law Judge took official notice of certain material outside the record[A62] to make the following observations:

> USL is now forging ahead but Kidde wants to rid itself of the child because the returns of the latter do not satisfy the financial requirements or the parent (this position is quite normal in the business world). It must not be overlooked, in appraising USL's difficulties, that the principal reasons for its money bind were the capital requirements involved in the new containership, inability to obtain vessels on time, and the nonresumption of operating differential subsidy. USL of course is not completely out of the financial woods; far from it. But it is hard to believe that one of America's oldest and best-known ocean common carriers, given what appears to be good leadership, plus the improvement in its resources, should be considered such a bad risk that the public would be benefited by merger with its largest competitor. Granted that the position of Reynolds is such that it could be of real assistance in helping USL to tide itself over the shortage of capital, all indications are that USL can and will eventually extricate itself from its present financial morass and remain a formidable—and therefore a highly desirable—competitor of Sea-Land.[A63]

Predictably, the use of official noticed material generated motions and pleadings culminating in proponents not availing themselves of a Commission opportunity to rebut the noticed materials on the basis of the "restrictive limitations" placed therein.

The record, however, provides sufficiently detailed evidence casting doubt upon a conclusion that USL can continue as a viable participant in the American merchant marine; and we disregard and exclude from our findings and conclusions the material officially noticed by the Chief Administrative Law Judge.

Although it has been argued that the financial condition of USL is not a factor relevant to our considerations, we think this view negates a considerable portion of the record. The issue was extensively litigated.[A64]

The record on the financial condition of USL reflects that from 1968 through 1970 (excluding accounting reserves) USL lost approximately $22 million, had defaulted on a bank loan of $27 million, and Kidde was required to advance it $9 million ($7 million of which was applied toward current obligations for a four-month period). For 1971 USL would have a negative cash-flow of approximately $35–$36 million. Two new Lancer

[A62] A report in the *Wall Street Journal* of an interview with Kidde's chairman published on September 22, 1971, and his conclusory characterization of a portion of testimony of the president of USL before a companion proceeding before the Interstate Commerce Commission. See, *supra*, at p. 186.

[A63] *Supra*, at p. 186.

[A64] During the course of the hearing, 29 exhibits were received in the record concerning the financial structure and condition of USL.

vessels were mortgaged with the proceeds utilized as partial payment on the overdue bank loan and to make up cash deficits attributed to operations. And despite the many variations on the theme on the actual financial condition of USL raised by the opponents, the record supports a finding that USL's financial instability is basic and might very well continue as such in the future.[A65]

Furthermore, Kidde wants to sell its holdings in USL; and even assuming an improvement in USL's financial condition, such improvement is not likely to be considered sufficiently promising to justify a reversal of Kidde's intention. Certainly we would not be dissuaded from our conclusions as to the prospects for USL's financial stability by any such possible temporary improvement.

Even, however, assuming a substantial improvement in USL's financial condition, there is no assurance either that the improvement will continue or that USL's financial health will be maintained. We are acutely aware of the historic cycle of "peaks and valleys" in the financial condition of U.S.-flag carriers; and the Chief Administrative Law Judge found this condition to exist with respect to USL.[A66]

Our resolution of this case, whereby we combine an independent USL with the acquisition by Reynolds, looks toward avoiding such vagaries in our merchant marine industry or at least alleviating their effects. In addition, regardless of USL's actual and/or potential financial soundness, we must also weigh Kidde's determination to dispose of USL. Our consideration of the financial circumstances of USL relates not only to the alternatives considered by the Chief Administrative Law Judge, but even more to our determination of whether alleged anticompetitive consequences resulting from our approved alternative are offset by *Svenska* and public interest standards.

It must be remembered that the Chief Administrative Law Judge concerned himself primarily with a proposed merger which would permit USL's fleet of containerships to be at the disposal of another company, specifically Sea-Land. Our decision eliminates that concern by tying the independence of USL to the prospects of its financial stability, and under strict conditions designed to help ensure the maintenance of that result. The framework (i.e., that of the proposed merger) within which the Chief Administrative Law Judge and the opponents viewed

[A65] *Supra*, at pp. 146–147.

[A66] Chief Administrative Judge's finding of fact No. 8, *supra*, at p. 146.

USL's financial condition is modified so as to restrict the parties' permissible sphere of activity. This has been accomplished through a series of conditions to our approval which are fully explained, *infra*.

Finally, in response to a request of the Commission, USL submitted its certified financial statement for the year ending December 31, 1971; and, the unaudited financial statement for the three-month period ending March 31, 1972. In so doing they stated:

> This material is being tendered at this time solely because it has been requested by the Commission, and not in support of the Commission's approval of these agreements. The record developed in these proceedings,—specifically the portion of the record dealing with the financial condition and posture of U.S. Lines,—provides ample justification for approval of these agreements.

This submission of USL led to the following observations from the opponents: either USL has had a spectacular improvement in net revenues or the statements are incompatible and unreliable; it has not been subjected to cross-examination, but, on its face, shows improvement in USL financial situation; it can in no way support any conclusion that the company is in financial difficulty; rather, the financial future of the line would seem to be one of the brightest in the American merchant marine. Without specifically commenting on the most recent data submission, Justice observed that USL is second to none competitively; has sufficient resources and management skill to deal with its temporary cash shortages, and has worked out a refinancing program with the banks.

To the proponents:

> The record which was developed on this issue * * * and which must form the basis from the Commission's findings * * * shows that USL's financial instability is basic and will continue until adequate rationalization is forthcoming.

USL's long term debt is tremendous, and unfortunately, international trade and commerce does not wait for the rainbow around the corner. American commerce and industry at this time in our financial and economic history cannot and should not be hampered by unrealistic impediments and unnatural fears.

Regardless of the conclusions which USL's submission permits, we agree, generally, with the preliminary observations of USL, *supra*, with respect to the evidentiary status of the latest USL financial data. We therefore disregard that officially noticed material in our findings and conclusions.

In summary, even if the prognosis were that USL could remain a formidable competitor of Sea-Land, it is abundantly clear that Kidde "wants to rid itself" of USL. Certainly, Reynolds with its resources can contribute to the establishing of a financially sound and stable USL to the benefit of the shipping community, with both Sea-Land and USL operated as equal subsidiaries but separate and competitive entities owned by Reynolds—a willing and experienced company.

In addition, we have developed conditions to our approval which will ensure the separation and competitiveness of Sea-Land and USL; and if the parties should fail to fulfill the obligations under our conditioned approval, we can subsequently disapprove the agreement.

Another point on this issue which was argued by the parties is the relevance of the "failing company" principle. First of all, this is not an antitrust case in which we must measure the evidence to the strict standards of that principle, if indeed it is applicable here. Although we do find on the record that USL's financial problems are fundamental, in view of our reasoning set forth, *supra*, our conclusions would not be materially altered by a finding that USL is in sound financial condition.

Such a circumstance bears no guarantee as to its longevity and would not alter Kidde's intentions as to its holdings in USL. Furthermore, the record establishes that for Kidde the only options have been the sale to Reynolds or disposition of the USL assets under the provisions of the supplemental agreement. Investment bankers searched for a buyer for USL but found no responsible buyer other than Reynolds. The bankers "conveyed to Kidde the opinion that the underwriting and public sale of USL stock was well-nigh impossible because of poor market conditions and the poor operating results of the company [USL]."[A67] Thus, no other realistic offer to purchase USL as an operating entity has been made available so as to lead the Commission to any different view as to the significance of USL's financial condition.[A68]

As we said earlier, although the Commission does approve agreements of the kind before us solely on the basis of section 15 considerations, in all such cases there are mixed questions of shipping and antitrust law and policy. We must weigh the balance between Shipping Act and antitrust considerations and determine whether the activities to be approved "do not invade the prohibitions of the anti-trust laws any more than is

[A67] *Supra*, at pp. 192.
[A68] *Id.*

necessary to serve the purposes of the regulatory statues."[A69] A further consideration is whether there is an alternative course of action which would accomplish the same purpose with comparable benefits, but with lesser anticompetitive effects.

In the end, however, the balance must be weighed in favor of Shipping Act considerations. The Celler Report,[A70] in discussing the anticompetitive practices in the shipping industry, dealt specifically with this subject:

> The Anti-trust Subcommittee recognizes the unique character of the ocean shipping industry with respect to the application of the anti-trust laws. No other governments inhibit their carriers by anti-trust laws, and American ocean carriers must compete, not within the framework of our domestic anti-trust laws, but in jungle world of ocean shipping. The Alexander Committee [when drafting the Shipping Act of 1916] recognized this difficulty and granted a limited exemption to the industry from certain provisions of the anti-trust laws, conditioned upon submission to regulation by the * * * Federal Maritime Commission.[A71]

And further:

> * * * our traditional antitrust concepts cannot be fully applied to this aspect of international commerce * * * [and] any attempt to affect regulation of this commerce in a measure comparable to that applied to our domestic commerce would be highly detrimental to our essential American Flag Merchant Marine.[A72]

The proponents of the agreements have never argued that the agreements would not eliminate "some" competition between USL and Sea-Land. They claim, however, that the initial decision never comes to grips with the issue of whether any anticompetitive impact would be produced by effectuating the agreements and, if so, the magnitude of the impact. Predictably the opponents have argued that the merger would threaten economic disaster for Sea-Land's other U.S.-flag competitors.

The main thrust of argument in this area is the consideration of the relevant markets within which to assess the impact of the proposed merger. We agree to some extent with the market share analysis provided in the initial decision wherein the relevant markets were identified as full containerships' service on each of the major U.S. foreign trades and the

[A69] *Isbrandtsen* v. *U.S.*, 211 F. 2d 51, 57 (1954).

[A70] *The Ocean Freight Industry, Report of the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 2d Sess.* (1962) [The Celler Report].

[A71] *Id.*, at 382. See, also, note A45, *supra.*

[A72] *Op. cit.*, at 13.

U.S.-flag submarket within each of these markets.[A73] Certainly, one of the advantages of containership service is that it is generally preferred carriage over breakbulk. Obviously the advantages offered by a merger approved (without restrictive competitive conditions) would undoubtedly lead to sailing frequencies producing an advantage in cargo carriage affecting other U.S.-flag lines. Our point here is that the unmistakable thrust of the findings contained in the initial decision is that the merger *as proposed* would result in the elimination of the competition of USL and would insure Sea-Land's position as a dominant carrier in the U.S. foreign trades, with the same rationale applying equally to the arrangements under consideration in the Charter proceeding. For example, in discussing Sea-Land's containership operation (generally recognized as the largest in the world) the Chief Administrative Law Judge stated:

> It was estimated that during 1971 Sea-Land would carry 21 percent of the U.S.-flag container cargo without merger, 60 percent with the merger on Route 5–7–8–9; on Route 10, 26 percent without the merger and 35 percent with the merger; on Route 12, no cargo without the merger and 100 percent with the merger; on Route 29, 51 percent without the merger and 87 percent with the merger. In 1974, the estimates were as follows: Route 5–7–8–9, 29 percent without the merger and 66 percent with the merger; Route 10, 33 percent without the merger (data unavailable under the merger); Route 12, none without the merger and 59 percent with the merger; and Route 29, 41 percent without the merger and 53 percent with the merger.
>
> * * * The foregoing statistics present a good picture of the services of both Sea-Land and USL, but whereas the lines may think a better utilization of vessels would result from the merger, that would be a matter primarily for their benefit and does not satisfy the pronouncement of the Commission that

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[A73] The Department of Justice 1968 Merger Guidelines provides the following standards:

3. *Market Definition.* A rationale appraisal of the probable competitive effects of a merger normally requires definition of one or more relevant markets. A market is any grouping of sales (or other commercial transactions) in which each of the firms whose sales are included enjoys some advantage in competing with those firms whose sales are not included. The advantage need not be great, for so long as it is significant it defines an area of effective competition among the included sellers in which the competition of the excluded sellers is, *ex hypothesi*, less effective. The process of market definition may result in identification of several appropriate markets in which to test the probable competitive effects of a particular merger.

A market is defined both in terms of its product dimension ("line of commerce") and its geographic dimension ("Section of the country").

(i) *Line of Commerce.* The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality, and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality, and use. In this latter case, however, it may be necessary also to include in that market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality, and use from the standpoint of that group of purchasers for whom the two products are interchangeable. (Department of Justice Merger Guidelines, issued May 30, 1968 § 3.)

an agreement such as this must be "required by serious transportation need, necessary to secure important public benefits."[A74]

With this conclusion we do not entirely disagree; and we also agree with most of the findings and conclusions in the initial decision relating to the justifications offered for the proposed merger. The salient point is, however, that we are not approving the "proposed merger."

What the Chief Administrative Law Judge did was to test the proposed merger in light of the *Svenska* case, and he found the criteria of that case not to be met. What he did not do was to test an alternative course, e.g., the modified agreement we are approving herein. Although there is some discussion in the initial decision of the possibility of an independent USL under the merger as proposed, the Chief Administrative Law Judge dismissed that result as unfeasible. He observed:

> It is urged that under the merger USL will continue as a viable company. This position must be taken with a grain of salt. On the one hand, it is maintained that USL will go on its merry way after the merger, buttressed by financial help from Reynolds, but on the other hand Reynolds let it be known at the hearing that if USL got in the competitive way of Sea-Land it would have to yield. Reynolds' witness did say that the company would accept as a condition to approval the requirement that USL be continued as a viable company. It is very doubtful, however, that it would be practical to police this type of situation to complete satisfaction of everyone, including the Commission. It does not seem, therefore, that the prospects for a viable USL would be too bright.[A75]

We arrive at the opposite conclusion.

We find the benefits to be derived from the agreement as modified and conditioned by us to be sufficiently desirable as to render it acceptable where the Chief Administrative Law Judge found the proposed agreement unapprovable.

We find a substantial transportation need for such an approved agreement which will, in turn, secure important public benefits for the commerce of the United States.

By virtue of the agreement in the form herein approved, and the conditions we attach thereto and for the reasons the Chief Administrative Law Judge found the benefit inuring mainly to proponents, we find the public interest to be the main beneficiary to the agreement as we approve it.

In weighing the balance between the benefits to be derived from the proposed merger and the anticompetitive effects, the Chief Administrative Law Judge found the latter to be the

[A74] *Supra*, at pp. 175–176.
[A75] *Supra*, at p. 185.

weightier. He concluded further that the benefits claimed would inure more to the proponents than to the public interest. Our differences with him are not in his judgment as to that balance, but rather as to the alternatives placed in the scale. Whereas the Chief Administrative Law Judge rejected any third possible result, we consider three possible outcomes of this proceeding: disapproval, approval of the proposed merger agreement, and approval of the agreement as modified and conditioned herein by us. Inasmuch as we reject the agreement in the form proposed, the comparison for us is between disapproval and the modified agreement.

As we discussed at length earlier, simple disapproval is completely unacceptable. The ramifications of such an action are totally antithetical to the attainment and maintenance of healthy competition in our foreign waterborne commerce. We conclude that the public interest will best be served by the continuance of USL as a whole entity, able, through willing and available financial assistance from Reynolds, to achieve financial stability. The result will be the participation in our commerce of USL as a company with the resources to offer competitive services to the shipping public. Mere disapproval of the proposed agreement will create a void in the American merchant marine and in the field of international competition in general which will increasingly leave the American im porter and exporter at the mercy of well financed foreign maritime consortia and reduce the available competition for our government-controlled cargo.

Accordingly, our decision and the reasoning set forth in our Order of June 7 represents our determination to provide for our commerce the benefits to be derived from an agreement maintaining USL as a strong, independent and competitive U.S.-flag carrier.

Our approval herein is coupled with the imposition of restrictive conditions which will ensure that result and effectuate our resolve to prevent any possible dismemberment of USL.

We therefore approve the agreement as modified and conditioned herein and hold that the supplemental agreement is within the purview of section 15 but, because of our other action herein, it is disapproved.

With respect to the promissory note[A76] the Chief Administrative Law Judge concluded that, if he were correct in his

[A76] This is in an eight percent note of Reynolds to Kidde for $65,000,000, dated and bearing interest from November 9, 1970, and maturing either in 1974 at the earliest, or in 1976 at the latest.

premise regarding the supplemental agreement (i.e., that it is not subject to section 15), it follows that the promissory note is not subject as well. Again, he offered his thoughts on the question should the Commission disagree. In Appendix "B" he concluded that the " . . . actual market value had to prevail over possible value were the company one of sound financial standing at the time the agreement was made."

The promissory note is an integral part of the transactions of the proponents. As such it, too, is within the purview of section 15. For the reasons stated in Appendix "B" to the initial decision and because if is an indispensible part of the modified agreement approved herein, the promissory note is approved also.

It should be understood that our reasons for approval of the proposed agreement as modified by us with the restrictive conditions attached, apply to our consideration of the charter agreement (No. 9827). As we have explained and as shall be shown further, *infra*, our determination that USL continue as a viable and independent carrier obviously precludes approval of the charter arrangement which was under consideration primarily in Docket No. 69–56.

As noted above, our Order of June 7, 1972, set forth numerous conditions which we proposed to attach to the approval we were prepared to give to a modified agreement, and afforded the parties an opportunity to file memoranda containing their views on those conditions as well as suggestions for other conditions.

In response many of the opponents collectively demonstrated a fear that USL would not be maintained as a strong and independent U.S.-flag carrier. They implied generally that any proposed common ownership of USL and Sea-Land by Reynolds, in and of itself, is sufficient to destroy the competitive independence of USL; that Reynolds as a common parent of both lines must consider the competitive impact of the operations and plans of the one subsidiary on the other; that it strains credulity to believe that Reynolds can own 100 percent of the stock of both lines and yet provide each benevolent encouragement to take cargo from the other, and that the Reynolds/Sea-Land goal is to dominate those markets which Sea-Land serves and to move into new markets. They warned us that the Board of Directors of Reynolds will be as closely attentive to the plans and operations of USL as it has been to those of Sea-Land and surely would be aware of those instances where the competitive plans of one threaten to diminish the market shares and revenue levels of the other. It was even argued that any assumption that the independence of USL from Sea-Land can be maintained by Commission supervision, plus a court-appointed director, "are a testament to a faith in mankind not usually shown by a regulatory agency."

Here we find the oft stated, broad, generalized an unproven arguments that private American enterprise is inherently predatory, greedy and destructive of its own, best, enlightened, long-range interests.

The view is glibly stated that the competitive American system will simply gobble up its own children to fatten its coffers no matter how talented, productive or profitable those children may be as members of the family. This we do not accept.

Proponents, on the other hand, tell us that it is the intention of Reynolds to operate USL as an energetic and effective competitor not only with foreign competition but with American-flag as well, including Sea-Land. Both Sea-Land and USL, we are told, will be operated as equal subsidiaries without preferences between them and without serious problems to Reynolds. USL adds that "the assurance that [it] will be maintained as a competitive, independent steamship company, which will receive financial support and stability, more than outweighs any possible anticompetitive effect."

The conditions which we are attaching to our approval we conclude are sufficient to allay the fears expressed by the opponents and to insure that the proponents implement their professed intentions. Further, our conditions provide that a breach of any of the conditions may provide grounds for disapproval of the agreement and divestiture of Reynolds of USL stock; and our disapproval of the supplemental agreement prevents its implementation upon such an eventuality.

Justice views the goals of our Order as (1) the financial revitalization of USL; (2) continuation of U.S.-flag participation in international competition; and (3) the preclusion of USL's dismemberment through the terms of the supplemental agreement. They claim the first two objectives are based on assumptions unsupported by substantial evidence of record and the final point will be governed by future activity in the courts.

As to the first point, we find there is sufficient evidence in the record to support the conclusion that USL's financial condition is not secure.[A77] Further, however, the financial plight of

[A77] See notes A64, A65 and A66, *supra*, and accompanying text.

USL is not crucial to our decision, because as we said, *supra*, Kidde is determined to terminate its interest in USL and is unlikely to reverse its position based upon an improvement, possibly transitory, in USL's posture. Consequently, there is no doubt that USL must either stand on its own, receive financial support from another source or be dismembered.

The latter possibility must be avoided or all the contentions in this case in support of strong competition within the U.S. merchant marine will be vitiated. Dismemberment is utterly unacceptable and would produce the contrary result to that desired by all parties — continued healthy competition.

As to the first possibility — USL being self-contained — we have shown that the probability of success is not sufficiently favorable; but in any event, USL's stock must be purchased from Kidde, and the offer by Reynolds herein is the one substantive offer which has been made to purchase USL and maintain it as a competitive entity.

The second point made by Justice in response to our Order is perplexing. The purport of Justice's entire case is that the outcome of this proceeding must be such as to preserve a proper level of competition among U.S.-flag carriers. At the same time, however, Justice repeatedly argues that the status of U.S.-flag competition in international ocean commerce is either of no importance or irrelevant to this case. Justice contends that one of the fundamental considerations is the scope of competition for U.S. government controlled or impelled cargo for which the competition of foreign-flag carriers is strictly limited by law.[A78]

Granted that U. S. government cargo provides a substantial and vital source of revenue for our carriers, the availability of commercial cargo for our merchant fleet is vital not only to our vessel operators but to the overall trade and commerce of the United States. Section 15 of the Shipping Act is not so limited as to permit the Federal Maritime Commission, when acting on an agreement, to disregard all interests except those in "captive" government cargo. Our authority to approve, disapprove, or modify an agreement is based upon a broad range of interests and considerations: carriers, shippers, exporters, importers, ports and, above all, the public interest in the general welfare of a viable American merchant marine and its ability to serve competitively in the foreign waterborne trade and commerce of the United States.[A79]

[A78] See, e.g., U.S. Department of Justice Reply to Exceptions to the Examiner's Initial Decison, Docket No. 70-51, March 6, 1972, pp. 9-10.

[A79] Section 15, second paragraph, states in pertinent part as follows:

The trade and commerce of the United States depends greatly on the ability of our commercial enterprises to compete in foreign markets and to obtain the use of certain foreign products. A great part of this is accomplished by use of ocean transportation. If we are forced to rely on foreign-flag operators and resulting conferences of foreign-flag composition, the effects may be highly inimical to the commerce of the United States, and our regulation of our foreign waterborne transportation will be increasingly the regulation solely of foreigners whose overwhelming major concern, too often, is different from that of the United States. Some of the most intense competition in ocean commerce is that for commercial liner cargo; and there are strenuous competitive efforts being made in that area, especially by foreign-flag carriers operating not individually but in the form of consortia, mergers, and other types of corporate combinations involving large-scale aggregations of capital. Furthermore, these consolidations are precipitated both by commercial action and at the direction of foreign governments.

Consequently, we cannot concede our ocean trade to foreign-flag interests by eliminating factors of international competition from our consideration under section 15 of what is best for the competitive well being of the American merchant marine. The maritime policy of the United States is not formulated by the Congress and our courts with such an intention. We need only look at the Merchant Marine Act of 1970[A80] and the circumstances surrounding its enactment to understand the import of our nation's philosophy in this area.[A81] This is but one of a series of congressional enactments.

We do, however, recognize the importance of maintaining healthy competitive conditions with respect to the carriage of

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The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between *carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest,* or to be in violaton of this Act, and shall approve all other agreements, modifications, or cancellations * * *.

[A80] Public Law 91-469, 84 Stat. 1018. Earlier government aids provided by Congress to the U. S. merchant marine include The Shipping Act, 1916 (39 Stat. 728); Merchant Marine Acts of 1920 (41 Stat. 988) and 1928 (45 Stat. 689); Merchant Marine Act, 1936 (49 Stat. 1985); Merchant Ship Sales Act of 1946 (60 Stat. 41); and see also *The Ocean Freight Industry* (House Report No. 1419, 87th Congress, 2d session), pages 18 to 26. The need for an American flag merchant fleet was highlighted in the early part of World War I when "the breakdown in shipping facilities * * * produced tremendous increases in ocean freight rates," *The Ocean Freight Industry*, page 19. "* * * in the late summer of 1914, the United States, which had depended on foreign flag vessels to carry roughly 90% of its foreign trade, was confronted with a critical shipping crisis." *Ocean Transportation*, McDowell & Gibbs, 1954, page 412.

[A81] "The restoration of our merchant fleet to a position of leadership on the world's oceans is one of our most urgent tasks. Our merchant ships are essential parts of our economic and defense systems * * *." *Presidential Proclamation No. 3976*, April 6, 1970; Fed. Reg. Vol. 35, No. 68, April 8, 1970.

government impelled cargo; and in the conditions to our approval we deal specifically with this matter. Condition III.B. prohibits USL and Sea-Land from placing any limitation on competition between them for government cargo, and Condition IV.A. reminds the parties of the seriousness of our intention to insure against variance from that restriction.

The third point made by Justice with respect to our June 7 Order is that the preclusion of the dismemberment of USL can be accomplished through court action. What we have already said concerning the supplemental agreement is a full response to this contention. Our approval herein of the modified agreement and disapproval of the supplemental agreement resolves the problem completely. Surely injunctive relief may be issued, as well as other legal restraints, against the supplemental agreement. But our main concern is that of a maritime nature and the continuance of USL through commercial management and economic decisions, and they should preclude actions in the courts.

One further contention in response to our Order needs to be mentioned here. The opponents allege that our proposed action amounts to an approval of the proposed merger but a rejection of all grounds for approval. It is said that the asserted claims for approval will be negated because the result will be a viable independent USL and not the combination originally sought.

The discussion, *supra*, of our disagreement with the conclusions of the Chief Administrative Law Judge lays that argument to rest. It suffices to say at this point that, as demonstrated by the entire foregoing elucidation of our reasoning, there is ample basis in law and fact for our ultimate conclusions.

Before proceeding to a discussion of the conditions to our approval, several additional issues raised by the parties warrant comment.

Both Hearing Counsel and AEIL raise a jurisdictional question claiming, in substance, that the proposed conditions would result in Sea-Land ceasing to be a party to the agreement and, consequently, the agreement would no longer be one between common carriers by water and subject to Commission scrutiny.

The proponents correctly point out that the merger agreement provides that if the charter agreement is disapproved, the merger agreement continues in full force and effect.[A82] Both Sea-Land and USL are parties to these agreements. The

[A82] See note A7, *supra*, for the text of Article 6.3 of the proposed merger agreement.

fact that the charter is not approved here does not impair the *obligations and duties under the merger agreement* (9827–1) of Sea-Land and USL who, under the common control of Reynolds, will be indispensable parties to the *res* of the merger agreement which is approved but modified and subject to conditions imposed by us.

Further, whether or not Sea-Land is technically a party to the agreement is not relevant. As we have already noted with respect to the supplemental agreement,[A83] the fact that Reynolds and/or Kidde may be the only apparent parties does not preclude us from either looking beyond the signature and determining the true parties in interest, or from finding Reynolds and/or Kidde to be persons subject to our jurisdiction in view of their immersion in shipping matters.

Seatrain raises a question about the participation in the substantive issues by Commissioner Day. The contention revolves around his position that the Commission lacks jurisdiction over the agreements under consideration; however, the Commission has initially voted 4–1 on this issue and we are not cited to any legal support which would bar Commissioner Day from then proceeding to participate in proper conclusions on the merits. The Commission has a responsibility to reach for clear-cut conclusions on all matters that are brought before it for adjudication and guidance.

Whatever an individual's view may be on jurisdiction, he may well contribute to the effort of his colleagues to resolve the paradoxes and dilemmas which are the everyday fare of the judicial process.

The "jury" in this case has labored long and arduously and it has reached, despite a wide variety of differences, a majority opinion that offers a solution in keeping with logic and responsibility. Certainly this is far more to be desired in the service of justice through law than would be an insoluble impasse among the members of the Commission.

Certain unions [A84] responded to our Order in the same vein as opponents. NMU[A85] submitted conditions for our consideration;[A86] SIU[A87] filed a motion for leave to intervene

[A83] See, *supra*, at pp. 216–221.

[A84] International Longshoremen's Association, AFL-CIO; National Marine Engineers Beneficial Association, AFL-CIO; and International Organization of Masters, Mates and Pilots, AFL-CIO.

[A85] National Maritime Union of America, AFL-CIO.

[A86] Their proposed conditions are:

1. It is further ordered that USL will continue to recognize NMU as the exclusive bargaining representative for the unlicensed personnel employed aboard its vessels including any replacements or additions thereto, subject to any appropriate rulings by the NLRB or courts of appropriate jurisdiction.

2. It is further ordered that USL will continue to operate its vessels under the terms and conditions of the collective bargaining agreement now in effect between NMU and USL and at the expiration of said

(they were a party to the charter proceeding), arguing that the Commission lacks jurisdiction to impose provisions dealing with labor relations. NMU attacked the motion of SIU on the basis that it fails to demonstrate a substantial interest and is untimely. Some of the positions raised by the labor interests were covered in the initial decision[A88] and were similar to those posed by opponents in response to our Order or are unnecessary for resolution in this proceeding.

As to those conditions[A89] proposed by NMU, the first two seek to insure the continued status of that union as the collective bargaining representative for USL's unlicensed seamen. Although proponents have no objection to them, both are "subject to any appropriate rulings by the NLRB or courts of appropriate jurisdiction." We think that these proposed conditions are unnecessary since jurisdiction over these particular matters would primarily rest with the NLRB or the courts. The third condition proposed would preclude any USL vessel from being transferred, sold or chartered to Sea-Land. We have adequately covered such a contingency in the conditions required for approval. The fourth proposed condition simply invites issues of conflicting jurisdictional problems between the NLRB and the Commission. In any event, proponents have stated to us ". . . it has been and is our position that the acquisition should have no adverse impact on NUM or any other union." In view of the arguments raised we hold that it is unnecessary to impose any restrictive conditions affecting the unions. It is our opinion that union leadership and the rank and file merchant marine are eminently in a better position with an existing USL, viable and active as an employer and contributor to union sponsored retirement and other union welfare funds or activities.

In summary, we have fashioned in our conditions precise limitations upon the future intercorporate relationships among Reynolds, USL and Sea-Land while reserving our jurisdiction to provide a continuing surveillance over their op-

collective bargaining agreement, upon receipt of proper notice, USL will bargain with NMU with respect to terms and conditions of subsequent collective bargaining agreements, subject to appropriate rulings by the NLRB or courts of appropriate jurisdiction.

3. In no event shall any USL vessel be transferred, sold or chartered to Sea-Land.

4. It is further ordered that in the event a subsequent determination of the NLRB or court of appropriate jurisdiction holds that NMU is not entitled to be lawfully recognized as the exclusive bargaining representative for the licensed seamen employed aboard USL vessels, this matter will revert to the Commission for the purpose of adopting appropriate protective provisions which will prevent economic harm to the affected seamen and their pension fund.

[A87] Seafarers International Union of North America, Atlantic, Gulf Lakes and Inland Waters District.

[A88] Initial Decision, pp. 160–162, *supra*.

[A89] See note A86, *supra*.

erational and other activities. In addition to those reasons stated in our Order of June 7, 1972, we are recognizing the dramatic effects of the new technologies in ocean shipping. By our imposition of restrictive conditions we are offering an assurance that USL will be maintained as a competitive, independent steamship company with financial support. It will free USL from the Kidde influence which has not shown an interest or desire to advance the economic assistance necessary to benefit USL or show an effort to actively participate in our waterborne commerce.

If opponents' aim is to perpetuate a financially distressed competitor we find and conclude such is not in the public interest. If opponents' aim is to achieve a dismemberment of USL as a viable competitor we find an conclude such aim is not in the public interest. If opponents' aim is to prevent a consolidation of the operations of Sea-Land and USL into a massive, single operation, we agree with that aim and have adopted conditions and restrictions which will effectively prevent that result. If opponents are sincere in their statements that they welcome competition from a financially healthy and independent USL then we have effectively assured that desired result.

3. *THE CONDITIONS TO BE IMPOSED*

After reviewing the submissions by the parties to our proposed conditions we will approve the acquisition by RJI as a presently wholly-owned subsidiary of R. J. Reynolds Industries, of all of the outstanding common stock of USL, subject to the following conditions:

I. The Stock of USL transferred to RJI is to be held by RJI to insure the independence of USL.

A. There shall be no substitution for RJI as the owner of USL stock without FMC approval. Reynolds/RJI shall not sell, pledge or in any way encumber the USL stock.

B. The corporate ownership among Reynolds, RJI and USL shall be irrevocable except as may be ordered by the FMC.

C. This approval shall be subject to constant surveillance and to review by the Commission at least every 5 years with records and reports remaining confidential.

D. Reynolds/RJI acknowledge that the FMC can and may require them to divest themselves of USL stock upon order of the FMC for breach of any condition herein and agree to comply with any such order of divestiture.

E. Reynolds/RJI shall not sell or otherwise dispose of, or encumber by lien, mortgage, or otherwise, the assets of USL except upon approval of the FMC.

F. No scheme or device may be adopted by USL, RJI, or Reynolds which would result in the distribution or dissipation of the assets or revenues of USL, except that reasonable cash dividends on USL stock may be paid but in no event to exceed net operating profits of USL for the prior corporate fiscal year, based upon sound accounting principles and after adequate provision for debt servicing.

II. All expenses, debts and financing of USL operations existing at the time of the consummation of this transaction shall be assumed by Reynolds; and Reynolds in the spirit of presentation made in this proceeding will assist USL in future financing.

A. No loans or advances of funds by Reynolds to USL or RJI for the benefit of USL may be secured by the existing assets or future revenues of USL, or by USL voting stock or evidence of voting interest in USL, and USL shall notify the FMC of any inter-company loans and the terms thereof.

III. USL is to be operated as an independent carrier in all respects in competition with Sea-Land. Upon the adoption by USL and/or Sea-Land of any alteration in their competitive relationship, the FMC, on its own motion, or on petition of a party or person having an interest, may institute a proceeding to determine whether such alteration is consistent with the terms and conditions herein.

A. McLean Industries and Sea-Land shall not have any employees, officers or directors in common with RJI and/or USL, except with respect to "public members" of the Boards of Directors.

1. One director of USL and one director of Sea-Land shall be a "public member": persons experienced in maritime transportation and corporate finance, who shall be appointed by the Chief Judge of the U. S. Court of Appeals for the District of Columbia or another independent source to be selected by the FMC. These directors shall also be members of the Executive Committees of the Boards of Directors, and shall report to the FMC as to any and all competitive service decisions and as otherwise may be required by the FMC.

B. USL and Sea-Land shall establish and maintain separate bids and tariffs for the carriage of military or other United States Government-controlled or generated cargo.

C. USL shall be a member in its own name in conferences, pools, and other agreements approved by the FMC or hereafter filed for approval except as otherwise authorized by the FMC.

D. USL and Sea-Land may not have common soliciting or general agents, attorneys or accountants, except to the extent authorized by the FMC.

E. USL and Sea-Land shall not share in any pool percentages except as authorized by the FMC.

F. USL and Sea-Land shall not enter into any ship sale, ship charter, space charter, equipment interchange, transshipment, or any similar type of arrangement, or any type of service rationalization arrangement with each other without FMC approval.

IV. USL, RJI, Reynolds, Sea-Land and McLean Industries shall submit to the FMC, in form as prescribed by the FMC, semiannual reports verified by the president and the treasurer or secretary of such corporations with respect to the adherence to all the conditions contained herein.

A. The FMC shall have access at all times to all records of USL, RJI, Reynolds, Sea-Land and McLean Industries with respect to the maintenance of these conditions, particularly, but not limited to Condition III.B.

V. Any party or any person having an interest in the subject matter may at any time petition the FMC for modification of any of these conditions, and jurisdiction shall be retained by the FMC to amend, modify, or cancel these conditions in part or in whole pursuant to such petition or on the Commission's own motion after notice and hearing when required.

VI. As used in these conditions, "Reynolds," unless otherwise identified, means R. J. Reynolds Industries, Inc. Sea-Land, Reynolds Tobacco, Reynolds Industries, McLean Industries, RJI and USL mean those companies so identified; provided, that common employees among these companies shall not be prevented except as provided in Condition III.A. No subsidiary, parent, successor, or other organizations or corporations similarly or otherwise affiliated with Sea-Land, Reynolds Tobacco, Reynolds Industries, McLean Industries, RJI and USL shall be used or shall take any action to obstruct, prevent or otherwise impair the requirements of these conditions.

VII. Reynolds undertakes to place all eight SL7s under United States documentation as rapidly as the vessels are delivered. With the exception of the eight SL7s, and with the exception of other vessels now owned by Reynolds or Sea-Land already built or converted outside the United States and now documented under the laws of the United States, United States Lines and Sea-Land shall operate only vessels built and/or converted in the United States, documented under the laws of the United States, and manned by American crews, provided that existing operations of foreign-flag vessels may be continued but not beyond a period of two years from date. Further provided, subject to Federal Maritime Commission approval, Sea-Land and United States Lines shall not be precluded from using foreign-flag vessels for feedership or like operations under circumstances where, because of the economics of the situation or the laws of other countries, the use of such foreign-flag vessels is required.

For the most part, these conditions speak for themselves. In some respects, however, they require amplification.

Condition III as originally proposed to the parties was that "USL is to be operated by RJI as an independent carrier in all respects in full competition with Sea-Land."

Proponents consider that amplification of the words "full competition" is necessary.[A90]

We think the opponents correctly view some of the amplifications posed by proponents as a reservation on their part to decide when competition between Sea-Land and USL is "wasteful duplication." Under these views proponent can conceivably reach into activities contrary to the very concept of our approval; and, their independent action would affect the very es-

[A90] To this end, they construe those words to include:

1. Full competition means giving USL the full ability to compete in every way.

2. Full competition does not necessarily mean ship-for-ship or type of ship for type of ship on each and every service that Sea-Land operates.

3. USL would not be required or prohibited from instituting a new service just because Sea-Land was already in that particular service, assuming of course the institution was consistent with good business judgment; for example, Sea-Land now serves Alaska—USL does not and full competition does not require USL to serve Alaska. However, if it is conceived that the judgment of USL, Alaska proved an attractive market albeit in competition with Sea-Land, USL would not be prohibited from instituting such a service simply because Sea-Land was serving that area also.

4. Full competition does not mean wasteful duplification merely to maintain competition.

5. Full competition will be consistent with revenue pooling agreements and conferences.

6. If a service is available, which neither carrier now serves and two carriers can serve, this should present no problem if both desire the service. If, however, it is patently obvious that the route will support only one carrier, a business judgment will be necessary considering all factors if both carriers seek the same route. Otherwise wasteful and perhaps suicidal competition could result contrary to the best interest of the commerce of the United States.

7. Where both carriers serve the same Trade Route, it will not be necessary for each carrier to serve each and every port.

8. This clause does not "lock" either company, at the present time into any particular service posture. The key to success and the advantage of operating without subsidy is flexibility. It has been agreed that no routes now served by the carrier will lose service as a result of the acquisition.

9. Full competition will not be deemed to prevent elimination of wasteful duplification of service and effort that can be approved under condition III.D.

sence of our decision to require that USL be maintained as a viable and independent entity.

As is made clear in our previous discussion of the merits and in the specific conditions, we are approving a modified agreement which is subject to the continuing scrutiny of the Commission. This may seem to be a statement of the obvious in view of our statutory obligations under section 15. In view, however, of the contentions of opponents as to our basic jurisdiction, we repeat here what we set forth more fully, *supra*. Not only do we have jurisdiction over the proposed agreement, but regardless of the definition of our jurisdiction over "mergers," we are approving an agreement herein which is of a continuing nature and clearly within at least the conceded scope of section 15.

Consequently, we intend to exercise, as a condition of our approval, surveillance to insure that USL is to be operated as an independent carrier in *all* respects in its competition with Sea-Land.[A91]

Accordingly, we do not adopt *any* amplifications of "competition" as construed by proponents. We are reserving to our discretion all decisions "upon the adoption . . . of any alteration in (the) competitive relations," with, of course, notice and opportunity for all parties to be heard.

As to the matter of notice and hearing, some parties raised questions as to its applicability with respect to certain of the conditions. It should be fully understood that whereever an action by the Commission is contemplated by the conditions, we will act pursuant to the notice and hearing requirement as required by law. Authorizations by the FMC required in any of the conditions will not be unreasonably withheld, provided only that they do not unreasonably impair the intent or effect of this acquisition.

Our failure to address ourselves to any particular comment in response to our Order of June 7 is neither an agreement with nor disapproval of such comment as it may seek to amplify or interpret the conditions we have adopted.

Finally, we have carefully weighed all of the positions of the many parties to these proceedings, and consider it unnecessary to repeat the extensive findings and conclusions of the Chief Administrative Law Judge. We find, in the main, that those differences are primarily only judgment factors. Our principal difference, of course, is that we would permit the ac-

A91 We have further provided in condition III.A1 that the public members to be appointed report to us any and all competitive service decisions, *supra*, at p. 238.

quisition but *only* with the restrictive conditions imposed. The nature of this departure makes it unnecessary to point sentence by sentence to differences in our decision which may be in conflict with some findings or conclusions contained in the initial decision. In addition, we find it equally unnecessary to repeat the many detailed arguments contained in the numerous pleadings we have considered in reaching our decision (many of which are reptitious and covered in the initial decision). Upon careful examination of the record, and the briefs and argument of counsel, we conclude that the Chief Administrative Law Judge's disposition of those issues is well founded and proper.

Again, we depart from his ultimate conclusion only to the extent that on the basis of the record, we have modified Agreement No. 9827-1 and, as modified, given it our approval conditioned upon proponents' evidence of acceptance within 30 days.

Accordingly, except as noted herein, we adopt the Chief Administrative Law Judge's initial decision as our own and make it a part hereof. This decision is not a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

DISSENTING AND CONCURRING OPINION OF CHAIRMAN HELEN DELICH BENTLEY AND COMMISSIONER ASHTON C. BARRETT

The majority would approve the "merger," but only upon the imposition of "conditions" which in their view are designed to "enable USL to remain a viable and independent company." In doing so, the majority ignores the lengthy record before it, misapplies the governing principles of the applicable law and ultimately proffers a "solution" that is at best exceedingly impractical and at worst totally unworkable. Based upon a relatively few questions posed during the course of the hearing, the majority have thrust aside a carefully compiled record and decided to approve a stock acquisition by Reynolds which leaves it as the parent of two presumably independent and competing subsidiaries — a probable "first" in the realm of mergers.

It is unnecessary to burden our discussion here with undue length since we agree with virtually all of the findings of the Chief Administrative Law Judge, and commend him for his patient and painstaking sifting of the facts in this case.

Carefully considered, the record amply demonstrates that *the Chief Administrative Law Judge correctly concluded that* the proposed merger should not be approved. He tested the proposal in light of *FMC* v. *Svenska Amerika Linien,* 390 U.S. 238 (1966)[A92] and ultimately found that most of the results claimed as justification for the proposal "are in reality for the benefit of Sea-Land alone." (See p. 190.)

These very same considerations were summarily ignored by the majority. Indeed, in an easy, quick way they put these crucial considerations to one side.[A93] The majority puts out of sight, as it were, what is basic to a disposition of this case, namely the required public benefits, transportation need, and/or valid regulatory purposes needed for justification for the proposed merger. What emerges in their decision is the completely unwarranted expansion of a concept — that of making USL a separate and viable company under Reynolds into a vehicle used to justify their actions. The very way in which the "concept" entered the case — by way of a suggestion by counsel at oral argument[A94]—is enough to characterize it as an "afterthought" by proponents of the merger. Without further investigation to determine the impact of the suggestion upon the public interest, the majority has seized this "bootstrap" in an attempt to squeeze an overly large foot into a very small shoe.

While the lack of record support alone is sufficient ground to reject the majority's decision, a few observations on the majority's reasons for their action will seem to place in proper perspective the magnitude of their error.

The majority is convinced, although without supportive findings, that USL is in financial distress and requires financial backing, which in its view can only be supplied by Reynolds. But, the fact is that USL is a very efficient and respected operator who enjoys "a strong following of shippers and importers." The record clearly establishes that USL is second to none competitively with sufficient resources and management

[A92] In that case the Court upheld the Commission's requirement that conference restraints which interfere with the policies of antitrust laws be approved only if the conference can bring forth such facts as would "demonstrate that the (restraint) is required by a serious transportation need, or in order to secure important public benefits." All parties to the merger proceeding herein agreed that the Commission's test applied (See p. 174.)

[A93] As the majority puts it, "It is apparent, therefore, that although we generally accept the findings of fact in the initial decision, we view some in an entirely different perspective." (See p. 214.)

[A94] As counsel for the proponents put it, ". . . this Commission should come out with a ruling in the future which would allow Reynolds to acquire U. S. Lines and would require Reynolds to continue to operate U. S. Lines as a viable company in its existing service as a competitive company with Sea-Land, as an equal subsidiary with Sea-Land, then Reynolds would agree to accept this condition." (Transcript, Oral Argument, pp. 223–224.) This statement was the subject of motions to strike which were, like so many other parts of the record, apparently ignored by the majority.

capability to deal with "peaks and valleys" of temporary cash shortages. If USL were in true financial straits, banks would not have carried out negotiations for mortgage refinancing programs if they were not convinced that USL was a viable company with a prosperous future. The conversion from a breakbulk to full container operator in less than three years; the creation of the finest full containerships presently operating; the initiation of the first tri-continental or seabridge service linking Europe, the United States and the Far East—all indicate that USL has sufficient resources and management skills to extricate itself from its present or future short term cash shortages.

The majority decision is devoted chiefly to the task of explaining why it will not decide any of the substantive issues raised by this case, and consists mainly of the extended repetition of the proposition that affords the real motivation for their approval, i.e., "Kidde wants to rid itself of USL." (See, e.g., pp. 221, 223, 225, 231, 237.) The majority has seized upon the Chief Administrative Law Judge's statement that, "Kidde wants to rid itself of the child because the returns of the latter do not satisfy the financial requirements of the parent."[A95] We cannot agree to decide this case, let alone reach the majority's unsupported "alternative solution" on any such slim ground.[A96]

Moreover, in our view the majority's alternative solution goes too far. The majority say, "Consequently, there is no doubt that USL must either stand on its own, receive financial support from another source or be *dismembered.*" (See p. 232, emphasis ours.) So far as this record is concerned, USL still maintains a healthy competitive position, and its so-called dismemberment can readily be prevented by the disapproval of the supplemental agreement alone. That agreement as found by the Chief Administrative Law Judge "is primarily for the benefit of Kidde and Reynolds, not for the benefit of the public." (See p. 191.) The majority disapproved that agreement, and it should have stopped there.

Furthermore, the majority as grounds for approval are concerned over the protection of U.S. flags from the "intense" competition offered for commercial liner cargo by the foreign-flag interests operating in the forms of consortia, mergers and other types of corporate combinations. (See p. 233.) If this is of

[A95] See p. 166.

[A96] As late as December 1970, Kidde was claiming that it could not and would not make any further loans to USL or guarantee the obligations of that line. However, since then Kidde has made advances of $9 million to USL.

real concern, the obvious answer would be the *unconditional* approval of the merger which would have placed the USL fleet at the disposal of Reynolds and Sea-Land, thereby creating a single entity for use against foreign competition. The majority, instead, seems far more concerned with the preservation of competition *between* U.S.-flag lines—a course which does not quite square with its preoccupation with foreign-flag competition. Be that as it may, the Chief Administrative Law Judge found that even if the proposed merger were approved and Sea-Land were provided the added strength of USL's fleet, the resulting combination would not have any appreciable effect on the foreign-flag containership competition—which finding affords yet another instance of the majority's ability to ignore or distort salient portions of the record in this case. The majority's ultimate conclusion that, "Consequently, we cannot concede our ocean trade to foreign-flag interests by eliminating factors of international competition from our consideration under section 15 of what is best for the competitive well being of the American merchant marine" is somewhat suspect. (See p. 233.) We simply cannot see how the competitive well being of the American merchant marine viz-a-viz its foreign-flag competition can be preserved by having both Sea-Land and USL operating as separate entities competing with each other.

The majority also seem to think they can "ensure" the survival of USL by placing it under the financial umbrella of Reynolds. This type of reasoning can only charitably be termed as naive. There is neither positive evidence of record nor any commitment by Reynolds that it will provide the capital requirement for acquisition by USL of new ships, additional containers or new terminal facilities. We can only wonder how much financial aid and comfort any parent can be expected to expend to finance internecine warfare within its own family. It blinks reality to argue that Reynolds, as owner of 100 percent of the stock of both lines, would encourage either one to competitively seek cargo from the other.

Even were the majority's alternative solutions desirable, the "conditions" which the majority feel are necessary to its adoption pose insurmountable administrative difficulties. How can this Commission with its limited staff not only police the day-to-day activities of the companies involved but also authorize the innumerable dealings with common soliciting or general agents, attorneys or accountants. (See condition III.D, p. 237.) What clearly emerges from a careful review of these conditions is that the majority is trying to convert this Commission into a bureaucracy for the operation of a steamship line. Neither Congress nor the Courts have ever sanctioned such an extension of our current statutory authority. In view of the degree of "surveillance" required by the "conditions" of the majority, it is simply not enough to provide for public directors for USL and Sea-Land to act as "watchdogs" over the day-to-day operations of the companies involved. This is particularly true when we consider the Chief Administrative Law Judge's serious misgivings over the practicability of devising effective policing measures when he was considering the far less complex situation of USL merely stripped of its containerships. (See p. 185.) The already noted lack of staff and the myriad problems posed by the "alternative solution" of the majority would when more realistically appraised leave the Commission physically unable to cope with the inevitable steps toward cooperative operation between Sea-Land and USL. In sheer numbers alone the foreseeable mass of decisions on future cooperative matters would preclude active protest by interested parties or careful analysis and surveillance by the Commission.

While we share the majority's enthusiasm in striving to implement "progressive regulation," as spelled out in *Disposition of Container Marine Lines*, 11 F.M.C. 476 (1968) (See p. 211), we cannot let our enthusiasm for progress lead us into a misapplication of the statutes we administer. Much more is at stake than a tariff filing here. Since we view as inevitable the ultimate cooperation between USL and Sea-Land, there is a risk of gigantic proportions here. As each aspect of a self-contained USL operation is relinquished in favor of joint operations with Sea-Land, the propsect of restoring USL to an independent status disappears—the loser being not only USL but the public as well.

Furthermore, there is no indication that disapproval of the merger would have a pernicious effect on the American merchant marine. The Chief Administrative Law Judge found that, "On the contrary, it would simply allow the American-flag containership operators to remain in a healthy competitive state." (See p. 189.)

Like the majority, we too are committed to the concept of preserving competition. Competition has fostered the development by USL of the second largest containership fleet in the world. The stimulus of competition led USL to becoming a pioneer in establishing the intermodal processes which characterize today's shipping community, and it is because we simply cannot argue that the alternative solution of the majority will insure the continuance of that competition that we would disapprove the merger.

To summarize our discussion, a close study of the record fails to lend any support to the action by the majority. The pronouncements contained in the *Svenska* case, *supra,* have been ignored by the majority who have fashioned an approval of the proposed merger agreement with "conditions" that are neither workable, justified by the record, or supported by realistic application.

We would disapprove the proposed merger on the basis of the findings and conclusions contained in the Chief Administrative Law Judge's initial decision.

We concur in the decision of the majority that we have jurisdiction over the agreements under consideration and would disapprove the supplemental agreement.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-56

AGREEMENT NO. 9827 BETWEEN UNITED STATES LINES, INC. AND SEA-LAND SERVICE, INC. (AND WALTER KIDDE & CO., INC. AND R. J. REYNOLDS TOBACCO CO., GUARANTORS)

DOCKET NO. 70-51

AGREEMENT OF MERGER NO. 9827-1 AMONG R. J. REYNOLDS TOBACCO COMPANY, RJI CORPORATION, SEA-LAND SERVICE, INC.; AND WALTER KIDDE & COMPANY, INC. UNITED STATES LINES, INC.

ORDER

As Amended March 22, 1973

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof, the Commission has found that Agreement No. 9827-1, as modified in the Report, is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports or between exporters from the United States and their foreign competitors, nor detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916, if the conditions set forth in the Report are met.

Therefore, it is ordered, That Agreement No. 9827-1, as modified in this Report and subject to the conditions contained therein, is approved; that proponents of the approval of Agreement No. 9827-1 granted herein need not refile the Agreement with the modifications and conditions in conformity with our Report, unless further ordered to do so.

By the Commission.

It is further ordered, That the promissory note described in the Report is found subject to section 15 of the Shipping Act, 1916, and is approved.

It is further ordered, That the supplemental agreement described in the Report is found subject to section 15 of the Shipping Act, 1916, but is disapproved.

By the Commission.

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

FEDERAL MARITIME COMMISSION

Washington, D.C.

SPECIAL DOCKET No. 446

COMMODITY CREDIT CORP.

v.

HELLENIC LINES LIMITED

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

February 9, 1973

No exceptions having been taken to the initial decision of the presiding judge 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 9, 1973.

It is ordered, That applicant is authorized to waive collection of $25,626.50 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 No. 446 that effective June 22, 1972, the rate on "Rice, in Bags" to Bangladesh for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from June 22, 1972 through August 11, 1972 is $68.00 w plus 15% surcharge, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, That waiver of the charge 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] FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 446

COMMODITY CREDIT CORP.

v.

HELLENIC LINES LIMITED

Respondent is permitted to waive $25,626.50 in freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

This is an application by respondent under Public Law 90–298, 90th Cong. (Section 18(a) 3, Shipping Act, 1916) for permission to waive collection of $25,626.50 freight charges for transportation of the cargo referred to below.

On June 22, 1972, complainant shipped rice in bags totalling 1,122,589 lbs. from Lake Charles, Louisiana to Chittagong/Chalna, Bangladesh, Consignee UNROD; United Nations Relief Operations, Dacca, Bangladesh, via respondent's steamship *M/S Hellenic Pioneer*. Aggregate freight charges of $39,190.38 were actually collected by respondent on September 1, 1972 as per bill of lading No. 1, issued on June 22, 1972 at New Orleans, Louisiana. Freight was assessed and paid on the basis $68.00 w plus 15% surcharge. The rate applicable at the time of shipment for cargo N.O.S. was $90.00 w/m plus 15% surcharge according to Hellenic Lines, Atlantic & Gulf/India, Pakistan, Ceylon & Burma Freight Tariff FMC No. 28. The difference is accounted for by the fact that due to inadvertency the appropriate tariff had not been filed. An amended tariff establishing the lower rate was filed (22nd Rev., page 29, U.S. Atlantic & Gulf/India, Pakistan, Ceylon & Burma Tariff FMC No. 28) effective August 11, 1972. Due to an overload of traffic, vacations and insufficient personnel this matter had been turned over to a clerk who delayed in following through as instructed in filing with the FMC. As soon as the error became evident, steps were taken to rectify the mistake and the revision of the tariff was duly filed. Application for waiver was filed with the Commission within 180 days from the date of shipment.

[1] This decision became the decision of the Commission February 9, 1973.

Section 18(b)(3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to waive a portion of freight charges collected where it appears that there is an error in a tariff of a clerical or administrative nature, and that such refund will not result in discrimination among shippers. The application herein discloses facts and circumstances which fall within the purview and intent of the statute. Having complied with the requirements of the statute, and good cause appearing, applicant is permitted to waive collection of the sum of $25,626.50. The notice required by the statute shall be published in the appropriate tariff and waiver shall be made within 30 days of such notice. Within five days thereafter applicant shall notify the Commission of the date of the waiver and the manner in which it was made.

ASHBROOK P. BRYANT,
Administrative Law Judge.

Washington, D.C.
JANUARY 17, 1973

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

SPECIAL DOCKET NO. 447

COMMODITY CREDIT CORP.

v.

HELLENIC LINES LIMITED

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

February 9, 1973

No exceptions having been taken to the initial decision of the presiding judge 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 9, 1973.

It is ordered, That applicant is authorized to waive collection of $523.80 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 447 that effective May 5, 1972 the rate on 'soybean salad oil in cases' to Calcutta for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 5, 1972 through September 15, 1972 is $62.00 W including surcharge, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further ordered, that waiver of the charge 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.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 447

COMMODITY CREDIT CORP.

v.

HELLENIC LINES LIMITED

Respondent is permitted to waive the sum of $523.80 freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

This is an application under Public Law 90-298, 90th Congress [Sec. 18(a)(3), Shipping Act, 1916], for permission to waive the sum of $523.80 as part of freight for transportation of the cargo referred to below.

On May 5, 1972, complainant shipped 64,422 lbs. of soybean salad oil in cases from New Orleans, Louisiana, to Calcutta, India, via *M/S Hellenic Challenger* on bills of lading Nos. 3 and 4 dated May 5, 1972. Freight charges of $1,713.10 were assessed and actually collected on September 1, 1972, on the basis of $62.00 w. including surcharge. The applicable rate at time of shipment was $69.75 plus 15 percent surcharge as contained in Hellenic Lines U. S. Atlantic & Gulf/India Pakistan, Ceylon & Burma Freight Tariff FMC No. 28. Through inadvertency, revised tariff rates had not been timely filed. Due to overload of traffic, vacations and insufficient personnel, this matter was turned over to a clerk who delayed in following through as instructed in filing tariff revision with the F.M.C. As soon as the error was discovered, steps were immediately taken to rectify the error [25th Revised page 28, effective April 11, 1972]. Application for waiver was made after the filing had been made and within 120 days of the shipment as required by the statute.

Section 18(b)(3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit

[1] This decision became the decision of the Commission February 9, 1973.

a common carrier by water in foreign commerce, or a conference of such carriers, to waive a portion of freight charges collected where it appears that there is an error in a tariff of a clerical or administrative nature, and that such refund will not result in discrimination among shippers. The application discloses a set of facts and circumstances which fall within the purview and intent of the statute. Having complied with the requirements of the statute, and good cause appearing, applicant is permitted to waive collection from complainant $523.80 freight charges. The notice required by the statute shall be published in the appropriate tariff and refund shall be made within 30 days of such notice. Within five days thereafter applicant shall notify the Commission of the date of the waiver and the manner in which waiver has been made.

(S) ASHBROOK P. BRYANT
Administrative Law Judge

Washington, D. C.
JANUARY 17, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-15

HARRY KAUFMAN D/B/A INTERNATIONAL SHIPPERS CO. OF N.Y.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 35 AND FORWARDING ACTIVITIES OF IRVING BETHEIL AND STEPHEN M. BETHEIL

DOCKET NO. 71-47

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION—SUPREME SHIPPERS, INC.

ADOPTION OF INITIAL DECISION

February 9, 1973

BY THE COMMISSION: (Helen Delich Bentley, Chairman; Ashton C. Barrett and James V. Day, Commissioners)

The proceeding in Docket No. 71-15 was instituted by a Commission issued Order of Investigation and Hearing, dated February 18, 1971, to determine whether freight forwarder license No. 35, issued to Harry Kaufman d/b/a International Shippers Co. of New York (International), should be revoked on the grounds that the licensee (1) had failed to notify the Commission of a change in ownership and had transferred the license without prior approval by the Commission; (2) had permitted Irving and/or Stephen M. Betheil to use International's name and license; and (3) had accepted employment with Irving Betheil (Betheil) and permitted Betheil to control and direct the business of International in violation of General Order 4 [46 CFR 510.5(c), 510.8(d), 510.23(a), and 510.23(b)], after the freight forwarder rights and privileges of Betheil had been revoked. It was further ordered that a determination be made whether Betheil and/or Stephen M. Betheil (son of Irving), in carrying on the business of forwarding after January 1, 1969, without a license from the Commission, violated 46 CFR 510.3(a) and section 44 of the Shipping Act, 1916 (the Act) [46 USC 481(b)].

On November 12, 1970, Supreme Shippers, Inc. (Supreme) applied for a license as an independent ocean freight forwarder. The application shows that Stephen M. Betheil is Treasurer and 50 percent owner and Kaufman is Vice President and Secretary and 50 percent owner of the corporation, and asks that FMC license No. 35 be transferred from Harry Kaufman d/b/a International Shippers Co. of New York to Supreme. On May 3, 1971, the Commission ordered, pursuant to sections 22 and 44 of the Act, that a proceeding be instituted to determine whether the application of Supreme should be denied (Docket No. 71-47). Inasmuch as the grounds alleged for denial included several which were under investigation in Docket No. 71-15, the proceedings were consolidated. Also at issue was the question of whether Stephen M. Betheil furnished to the Commission's staff conflicting and misleading documents and statements regarding the acquisition and operation of the freight forwarder business of Kaufman by Stephen M. Betheil and/or Irving Betheil and/or Kaufman, and the establishment of Supreme.

A hearing was held in New York on January 24, and 25, 1972, presided over by Administrative Law Judge Ashbrook P. Bryant.

In his Initial Decision served June 29, 1972, the Administrative Law Judge found as follows:

(1) Harry Kaufman violated section 44 of the Act and section 510.23(a) of the Commission's Regulations (General Order 4) by permitting and assisting Irving Betheil to use Kaufman's license [FMC License No. 35] in performing freight forwarding services.

(2) Harry Kaufman transferred his freight forwarder license to Irving Betheil without the prior approval of the Commission, in violation of section 44 of the Act and section 510.8(d) of the Commission's Regulations (General Order 4).

(3) Harry Kaufman accepted employment to perform forwarding services on export shipments as an associate and/or employee of Irving Betheil, after Betheil's license as an independent ocean freight forwarder had been revoked by the Commission, in violation of General Order 4 (510.23(b)).

(4) Stephen M. Betheil, Treasurer and 50 percent stockholder of Supreme Shippers, Inc., applicant herein, has failed to demonstrate that he is a person

fit, willing, and able to properly carry on the business of freight forwarder in that (a) he has knowingly assisted Irving Betheid and Harry Kaufman in a course of conduct to enable Irving Betheil to engage in the business of ocean freight forwarder without a license, in violation of 46 CFR 510.3(a) and section 44 of the Act, and (b) that in the event the application is approved, he intends to associate Irving Betheil in the freight forwarder business of Supreme, in violation of section 510.23(b) of the Commission's Rules and Regulations.

(5) Harry Kaufman, Vice President, Secretary and 50 percent stockholder of Supreme, for the reasons stated herein is found not to be fit, willing, and able properly to carry on the business of freight forwarder.

The Administrative Law Judge thus concluded that freight forwarder license No. 35, issued to Harry Kaufman d/b/a International Shippers of New York, should be revoked, and the application of Supreme for a freight forwarder license should be denied.

With regard to the question of whether Stephen M. Betheil furnished to the Commission's staff conflicting and misleading documents and statements regarding the acquisition and operation of the freight forwarder business of Kaufman by Stephen M. Betheil and/or Irving Betheil and/or Kaufman and regarding the establishment of Supreme, the Administrative Law Judge concluded that there was not sufficient evidence upon which to base a finding of deliberate and willful misrepresentation by Stephen M. Betheil to the Commission's staff. He further stated that it appeared that Stephen M. Betheil was not a principal in International, but that his role seemed quite clearly to have been that of a subordinate or employee acting under his father's direction.

Respondents excepted to the Administrative Law Judge's finding of fact that Irving Betheil's application for an ocean freight forwarder's license, under the name of International American Forwarding Corporation (IAFC), was denied and the grandfather rights of S & C Forwarding Corporation (S&C) of which Irving Betheil was formerly President and sole stockholder, were revoked, inasmuch as Rule 13(f)(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.226(a)) requires that official notice may not be taken of a material fact not appearing in the record unless the fact of official notice is stated in the decision and opportunity is allowed the parties to show the contrary.

Respondents further contended that there was no evidence that Supreme had ever operated as an ocean freight forwarder.

Respondents excepted to the Administrative Law Judge's findings that Stephen Betheil knowingly assisted his father and Kaufman in a course of conduct that enabled his father to engage in the business of forwarding without a license.

Finally, Respondents denied that Harry Kaufman permitted his license to be used by Irving Betheil, transferred his license to Irving Betheil without prior Commission approval, and accepted employment to perform forwarding services as an associate and/or employee of Irving Betheil after the latter's license had been revoked.

Hearing Counsel's reply acknowledged that the Administrative Law Judge's third finding of fact, wherein he quoted from a letter written in 1964 by which the Commission notified Irving Betheil of its intent to deny his application for a freight forwarder's license and revoke the grandfather rights of his wholly-owned forwarding company, was entered without the Administrative Law Judge's taking official notice thereof as required by Rule 13(f)(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.226(a)). Hearing Counsel contended that the Administrative Law Judge's third finding of fact and the first sentence of the fourth finding of fact[1] should be stricken, and that a finding of fact which reflects the admissions of Respondents in their Answer to Request for Admissions dated November 29, 1971, be substituted.[2] This substituted finding would reflect the fact that Irving Betheil's wholly-owned and half-owned corporations had had, respec-

[1] The Administrative Law Judge in his Initial Decision (266) stated:

> 3. On April 28, 1964, the Commission revoked the grandfather rights of S&C and denied the ocean freight forwarder application of Betheil in connection with IAFC. On May 13, 1964, Betheil was informed that the grounds for the Commisison's action were:
>
> (1) you knowingly and wilfully made false statements on your application for an independent ocean freight forwarder license in violation of 18 U.S.C. 1001;
>
> (2) you knowingly and wilfully carried on the business of ocean freight forwarding on the basis of falsely obtained grandfather rights during the period August 1962, through December 1962 in violation of Section 44(a), Shipping Act 1916, (46 U.S.C. 841(b)).
>
> Betheil was advised that unless, within twenty days, he requested "opportunity to show at a hearing that denial of the application and the revocation of the grandfather rights is unwarranted," such denial and revocation would be fine.'
>
> 4. Betheil did not request a hearing and on June 9, 1964, he was notified that the application of IAFC was denied and the grandfather operating rights of S&C were revoked . . . .

[2] On June 9, 1964, the "grandfather rights" of S&C Forwarding Corp. (FMB Registration No. 1414) were revoked and the ocean freight forwarder application of International Amercian Forwarding Corp. was denied. Irving Betheil was President and sole stockholder of S&C Forwarding Corp. at the time its "grandfather rights" were revoked. He was also President and 50 percent owner of International American Forwarding Corp. and managed its daily operations at the time its license application was denied.

tively, grandfather rights revoked and license application denied on June 9, 1964.

Inasmuch as the Administrative Law Judge did not find that Supreme had operated as an ocean freight forwarder, Hearing Counsel argued in reply that Respondents' exceptions based upon this contention were unfounded.

Further, Hearing Counsel contended that the Administrative Law Judge correctly found that Stephen Betheil asssisted Irving Betheil and Harry Kaufman in a course of conduct that would enable Irving Betheil to continue in the forwarding business after Irving Betheil's license had been revoked.

Finally Hearing Counsel submitted that the Administrative Law Judge correctly found that Harry Kaufman permitted his license to be used by Irving Betheil, transferred his license to Irving Betheil without prior Commission approval, and accepted employment to perform forwarding services as an associate and/or employee of Irving Betheil after Betheil's license had been revoked.

With regard to the first exception based upon Rule 13(f)(a) of the Commission's Rules of Practice and Procedure, we conclude that the Administrative Law Judge erred in including in his findings of fact matters not of record and of which he had failed to properly take official notice. We therefore serve official notice upon Respondents that we adopt as a substituted finding the following:

> On June 9, 1964, the "grandfather rigthts" of S&C Forwarding Corp. (FMB Registration No. 1414) were revoked and the ocean freight forwarding Application of International American Forwarding Corp. (IAFC) was denied on the grounds that Irving Betheil (1) knowingly and willfully made false statements on the application of IAFC for an independent ocean freight forwarder's license in violation of 18 U.S.C. 1001 and (2) knowingly and willfully carried on the business of ocean freight forwarding on the basis of falsely obtained grandfather rights during the period August 1962, through December 1962, in violation of Section 44(a), Shipping Act, 1916 (46 U.S.C. 841(b)). Irving Betheil was President and sole stockholder of S&C Forwarding Corp. at the time its "grandfather rights" were revoked. He was also President and 50 percent owner of International American Forwarding Corp. and managed its daily operations at the time its license application was denied.

Respondents shall be afforded thirty (30) days to show the contrary.

Upon review of the remaining exceptions, we conclude that they are but a restatement of the contentions already advanced before the Administrative Law Judge and that his findings and conclusions on these contentions were proper and well founded. Accordingly, we adopt the Initial Decision (a copy of which is attached to and made a part hereof), revised to the extent of inclusion of the substituted finding of fact set forth in the preceding paragraph.

We would also include the following proviso with respect to the application of Supreme Shippers, Inc. for an independent ocean freight forwarder license, that being that Supreme be allowed to reapply for a license at such time as the defects leading to this denial are cured.

Vice Chairman George H. Hearn concurring and dissenting, with whom Commissioner Clarence Morse joins.

I dissent from that portion of the majority report which adopts the Administrative Law Judge's conclusion that the application of Supreme Shippers, Inc., be denied. Supreme's application for a freight forwarder license should be granted now upon certain conditions.

The majority report finds defects in the application which require denial. At the same time, however, the majority announces that it will entertain a renewed application when those defects are cured. I cannot see how the applicant would be in any better position upon such reapplication than he could be if the application were granted now upon condition that the defects be cured within a specified time. Furthermore, it is now more than two years since Supreme filed its application; and the applicant has thus been compelled to suffer a delay sufficient to serve the purpose the majority seems to pursue in its action.

In addition, it appears that the only reason for finding Stephen M. Betheil unqualified to hold a license is that he would permit his father, Irving Betheil, to continue in the freight forwarding business. The Administrative Law Judge concluded that Stephen's "role seems quite clearly to have been that of a subordinate or employee acting under his father's direction." (Initial Decision at 275.) Consequently, the majority decision is finding Stephen M. Betheil guilty by association.

There is no reason why that association cannot be dissolved forthwith, thus curing the defects in Supreme's application and rendering it approvable upon that event. To now deny the application and require that it be filed anew will result in a redundant exercise of regulatory activity.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-15

HARRY KAUFMAN D/B/A INTERNATIONAL SHIPPERS CO. OF N.Y.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 35 AND FORWARDING ACTIVITIES OF IRVING BETHEIL AND STEPHEN M. BETHEIL

DOCKET NO. 71-47

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION—SUPREME SHIPPERS, INC.

ORDER

The Commission having fully considered the above matters and having this date made and entered of record a Report containing its conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That independent ocean freight forwarder License No. 35, issued to Harry Kaufman d/b/a International Shippers of New York, is hereby revoked pursuant to section 44, Shipping Act, 1916, effective 30 days from the service date of this order, during which time respondent is directed to terminate his current business obligations, but shall not be authorized to solicit or accept any new business; and

It is further ordered, That the application for license of Supreme Shippers, Inc., is hereby denied pursuant to section 44, Shipping Act, 1916.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

No. 71-15

HARRY KAUFMAN D/B/A INTERNATIONAL SHIPPERS CO. OF N.Y.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 35 AND FORWARDING ACTIVITIES OF IRVING BETHEIL AND STEPHEN M. BETHEIL

No. 71-47

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION—SUPREME SHIPPERS, INC.

Supreme Shippers, Inc., found not to be fit, willing, and able to carry on the business of freight forwarding. The ocean freight forwarder license of Harry Kaufman d/b/a International Shippers Co. of N.Y. should be revoked because (1) he permitted the use of his license by another person, (2) he transferred his license to another person without Commission approval, and (3) he performed independent ocean freight forwarder services as an associate and/or employee of another person whose license as ocean freight forwarder had been revoked by the Commission.

Maurice A. M. Edkiss for respondents.
C. Douglass Miller and *Donald J. Brunner* as Hearing Counsel.

INITIAL DECISION OF ASHBROOK P. BRYANT, PRESIDING EXAMINER[1]

On February 18, 1971, the Commission served an order of investigation and hearing pursuant to sections 22 and 44 of the Shipping Act, 1916 (the Act), to determine whether freight forwarder license No. 35, issued to Harry Kaufman d/b/a In-

[1] This decision became the decision of the Commission February 9, 1973.

ternational Shippers Co. of N. Y. (International), should be revoked on the ground that the licensee (1) had failed to notify the Commission of a change in ownership and had transferred the license without prior approval by the Commission; (2) had permitted Irving and/or Stephen M. Betheil to use International's name and license; (3) that the licensee had accepted employment with Irving Betheil (Betheil) and permitted Betheil to control and direct the business of International, after the freight forwarder rights and privileges of Betheil had been revoked; in violation of General Order 4 [46 CFR 510.5(c), 510.8(d), 510.23(a) and 510.23(b)]. It was further ordered that a determination be made whether Betheil and/or Stephen M. Betheil (son of Irving), in carrying on the business of forwarding after January 1, 1969, without a license from the Commission, violated 46 CFR 510.3(a) and section 44 of the Act [46 USCA 841(b)].

On November 12, 1970, Supreme Shippers, Inc. (Supreme), the stock of which is owned in equal shares by Harry Kaufman (Kaufman) and Stephen M. Betheil, applied for a license as an independent ocean freight forwarder. The application shows that Stephen M. Betheil is Treasurer and Kaufman is Vice President and Secretary of the corporation, and asks that FMC license No. 35 be transferred from Harry Kaufman d/b/a Intenational Shippers Co. of N.Y. to Supreme. On May 3, 1971, the Commission ordered pursuant to sections 22 and 44 of the Act that a proceeding be instituted to determine whether the application of Supreme should be denied (Docket No. 71-47). As the grounds alleged for denial included several which were under investigation in No. 71-15, the proceedings were consolidated. Another facet of No. 71-47 concerns the question of whether Stephen M. Betheil furnished to the Commission's staff conflicting and misleading documents and statements regarding the acquisition and operation of the freight forwarder business of Kaufman by Stephen M. Betheil and/or Betheil and/or Kaufman, and the establishment of Supreme.

THE FACTS

1. When treasurer and 25 percent owner of the outstanding stock of Arista Shipping Co., Inc., Betheil with others were arrested in 1956 and charged in the U. S. District Court, Southern District of New York, with violation of the Bills of Lading Act (49 USC 81-124). When arraigned, Betheil pleaded

guilty to conspiracy, and on April 14, 1959, a sentence of a year and a day against him was suspended.

2. At or about the above time, Betheil was president and sole stockholder of S&C Forwarding Corp. (S&C), a forwarder operating with "grandfather rights" of the Federal Maritime Board, the Commission's predecessor. He formed a second corporation, International American Forwarding Corporation (IAFC), and applied for a license as an independent ocean freight forwarder in that name. He was President, Manager, and 50 percent owner of IAFC, and his wife Sylvia was Vice President, Secretary and 50 percent owner. Sylvia never took an active part in the day-to-day management of the company's affairs.

3. On April 28, 1964, the Commission revoked the grandfather rights of S&C and denied the ocean freight forwarder application of Betheil in connection with IAFC. On May 13, 1964, Betheil was informed that the grounds for the Commission's action were:

(1) you knowingly and wilfully made false statements on your application for an independent ocean freight forwarder license in violation of 18 U.S.C. 1001: (2) you knowingly and wilfully carried on the business of ocean freight forwarding on the basis of falsely obtained grandfather rights during the period August 1962, through December 1962 in violation of Section 44(a), Shipping Act 1916, (46 U.S.C. 841(b)).

Betheil was advised that unless, within twenty days, he requested "opportunity to show at a hearing that denial of the application and the revocation of the grandfather rights is unwarranted," such denial and revocation would be final.

4. Betheil did not request a hearing and on June 9, 1964, he was notified that the application of IAFC was denied and the grandfather operating rights of S&C were revoked. Since June 9, 1964, Betheil has not applied for nor held an ocean freight forwarder license issued by the Commission.

5. During the latter part of 1968, Betheil was hired by Kaufman. Kaufman had operated International for about ten years when he became 65 years of age and he wanted to retire. On January 1, 1969, he entered into a contract to sell his business to Betheil. Jacob S. Schulman, an attorney who had previously represented Betheil, drew the contract of sale. Kaufman did not employ an attorney to represent him but relied on Schulman. The contract in effect transferred responsibility for the operation of the forwarding business to Betheil, who was to hold Kaufman harmless for any debts or obligations

of the business arising out of any transaction after January 1, 1969. All income after that date was to belong to Betheil, who was to pay all debts incurred after that date. The contract did not provide for the transfer of the license. Kaufman agreed, however, to cooperate in its "transfer" to the buyer by the Commission. The transfer was not guaranteed by Kaufman. There was no provision which would delay application for "transfer" of the license until the purchase price had been paid. The agreement provided that the buyer might assign it to a corporation already formed or to be formed, in which event the buyer "will deliver to his attorney all the stock certificates in the said corporation to be by him held in escrow until the said purchase price is fully paid."

6. The "first contract," dated January 1, 1969, shows the purchase price of Kaufman's business to be $25,000.00; $4,500.00 paid in January 1969; $4,500 to be paid before January 1970; $10,000.00 in weekly installments of $200.00; and $6,000.00 in 20 monthly installments of $300.00. It makes no mention of employment of Kaufman by Betheil and does not speak of salary. The 50 weekly installments of $200 each are clearly stated as part of the purchase price. The second contract which bears the same date shows the purchase price as $15,000.00 and provides for a weekly salary to Kaufman of $200.00 for one year.

7. The "first contract" was supplied by Betheil to the Commission's staff at the outset of the investigation. In this proceeding, respondents denied that this "first" contract expressed the whole agreement. The "second contract," which was identified by respondents as containing the entire agreement, among other things contained the following provision:

3. The Buyer hereby hires the Seller, and the Seller agrees to work for the Buyer, for one year from the date hereof, at a weekly salary of $200.00. The said seller will advise the Buyer as to operating the business herewith sold and will assist him in every way. Said Seller will devote his full time and attention to the operation of the business herewith sold and will not, while employed by said buyer, work anywheres (sic) else. After April 1st, 1969, either party to this contract may elect to terminate the said employment. Said cancellation shall be in writing addressed to the other party, and shall be sent by registered or certified mail, return receipt requested. Upon said cancellation there shall be no further obligation on the part of the Seller to work for said Buyer, or for said Buyer to employ said seller.

8. As of the date of the staff's investigation, Betheil had not paid the entire purchase price, but the accounts indicated

that initially, in January 1969, $4,500.00 was paid, and subsequently there were some other payments; Kaufman also received the $200.00 weekly payments as salary in addition to some monthly payments of $300.00. Betheil occasionally withdrew money for personal items such as clothing and automobile expenses.

9. In April 1970, Kaufman told the Commission's staff, in response to inquiry as to who was "running" his business, that he had entered into an agreement with Betheil to sell the business. About the same time, Betheil told the same staff representative that, as of January 1, 1969, he (Betheil) was the owner of the business. The staff representative testified that during a three-week period in April 1970 he visited the offices of Supreme about eight or nine times. On each occasion Betheil was in charge. The representative testified that:

> When I first went in I contacted Harry Kaufman. . . . There was an office in the front or on my right as I went in, and in the back was a desk that Harry had. There was another desk immediately outside the office which Stephen Betheil worked on it and a young lady, whom I believe is Lillian Alonzo.
>
> Irving was the one who would answer the telephone when it rang, would give the instructions to these people (who) were working in the office.
>
> Mr. Kaufman was in the back and you very seldom heard from him. In fact, after my initial contact on April 15, I no longer dealt with him. It was always Irving. Anyone that came in—always dealt with Irving Betheil and that give (sic) you the impression that this was Mr. Betheil's operation, that he ran it.

10. Betheil brought approximately 23 clients with him when he became associated with International. In April 1970, International had a total of 53 clients including those brought in by Betheil. Betheil told the Commission's investigator that in the year prior to April 1970 the company "handled three thousand shipments approximately" and that he himself handled about 1,300. Betheil determined how the work would be apportioned among those employed in the office, assigning the "commercial accounts" to his son Stephen, and the "GSA accounts" to Lillian Alonzo, a woman in his employ. Betheil would prepare shipping documents when he had time from his "other activities" in managing the business. A typical shipment involved preparing the bill of lading, presenting the invoice to the customer for freight forwarding charges, and preparing the shipper's export declaration.

11. Kaufman entered into a contract with General Services Administration (GSA) on July 1, 1969, to perform freight forwarding services. As the holder of the license from the Commission, Kaufman signed the contract as required by GSA. But the agreement was negotiated by Betheil. Stanley Wamil of GSA was in charge of making arrangements with International for processing shipments under the agreement. Although Miss Alonzo normally handled GSA shipments, Wamil dealt with Betheil when he had any problems under this agreement.

12. As previously mentioned, Stephen M. Betheil is the son of Irving Betheil and had from time to time been employed by International. He had recently graduated from business school. On July 24, 1970, the Commission received an application for an ocean freight forwarder's license in the name of Stephen M. Betheil d/b/a International Shippers Co. of N.Y., in which it was stated in answer to Item 11:

> We are buying a going business: The name is International Shippers Co. of NY FMC #35, 120 Liberty Street, New York, NY 10006.

In response to a request by the Commission's staff, Stephen M. Betheil wrote on August 17, 1970:

> I am purchasing from Mr. Harry Kaufman a foreign freight forwarding business known as International Shippers of NY. Mr. Kaufman operated under FMC No. 35. . . .
>
> I have very recently attempted to incorporate the above mentioned firm. Due to a name conflict, I have been unable to do so. Thus, please be advised that the ocean freight forwarding license I seek should be applied for under the name of Supreme Shippers Inc. This corporation of which I am president, was incorporated in 1969 under the laws of the state of New York, and will assume the business of International Shippers.

13. An agreement dated October 9, 1970, recites that Kaufman had agreed to sell International to Irving Betheil for $15,-000.00, payable in installments, and that title to said business would remain with Kaufman until full payment of the purchase price. Under this agreement Kaufman acknowledged receipt of the full purchase price and stipulated that title to the freight forwarder business would transfer to Supreme "one day after the Federal Maritime Commission, transfers to said corporation the Independent Forwarders License (IATA & License #35) heretofore held by said Harry Kaufman or issues another license to said Supreme Shippers Inc. whichever is sooner." There is no specific provision in either of the two contracts of January 1, 1969, that title to the business would remain with

Kaufman until the full purchase price was paid. However, each contract does provide that in the event the contract is assigned to a corporation "already formed or to be formed" the buyer (Betheil) will deliver "to his attorney all the stock certificates in said corporation to be by him held in escrow until the entire purchase price is fully paid." This is the only mention in either the "first" or "second" contract of an escrow arrangement; the stock certificates do not appear to have been delivered to the attorney.

14. At the staff's request, Stephen Betheil met with them on November 12, 1970, to further explain the arrangements. At that time he filed a new application in the name of Supreme. The officers and directors shown on the application were Sylvia Betheil, President, Harry Kaufman, Vice President and 50 percent stockholder, and Stephen M. Betheil, Treasurer and 50 percent stockholder. The articles of incorporation of Supreme, attached to the application, showed that they were filed with the State of New York on February 13, 1969. The minutes of the first meeting of the board of directors of Supreme recite that it was formed to purchase International's freight forwarding business. They also reflect that Betheil assigned the business to Stephen Betheil on February 13, 1969, and he, in turn, assigned it to Supreme on the same day. The written assignment from Irving to Stephen is dated February 13, 1969, but the assignment from Stephen to Supreme is dated February 13, 1970. Stephen stated that the written assignment from his father to him had not been executed on February 13, 1969, but had only recently been written down to confirm a prior oral agreement. No explanation was made by respondents as to Kaufman's 50 percent stock interest in Supreme.

15. Stephen told the staff that he was running the business but that he would need his father's advice and participation in the business for an indeterminate time if and when the Commission approved the transfer of license No. 35.

16. Neither Kaufman, Irving Betheil, nor Stephen Betheil notified the Commission of any transfer of the business or license between January 1, 1969, and July 22, 1970.

17. The agreement of January 1, 1969, appears to have taken effect at the date of execution. Irving Betheil stated to the Commission's investigator that the reason he had not notified the Commission of the contract and his purchase of the business was because title had not passed. He said the "papers"

regarding the transfer were being held in escrow by attorney Jacob Schulman until the entire purchase price was paid. Schulman was asked during the investigation in the spring of 1970 to identify the "papers" which he was holding. He replied that he had only a copy of the contract and made no reference to stock being held in escrow. However, at the hearing, Schulman testified that he advised Betheil and Kaufman that the transaction could not be completed until the full purchase price was paid and that he agreed to act "as a sort of escrow agent" first to "hold the papers until the consideration had been paid" and "if the corporation was formed, to hold the stock of the corporation until the consideration was paid." Schulman "believes" that later he formed the corporation and held the stock in escrow.

Discussion and Conclusions

Section 44 of the Act imposes the duty on the Commission to see that access to the profession of freight forwarding is limited to those licensees who are found to be "fit, willing and able" to conduct their business in accordance with high standards of conduct. *Independent Freight Forwarder Application, Guy G. Sorrentino,* Docket No. 71-48, (15 FMC 127) March 3, 1972. See also section 44 of the Act. It is crucial to his "fitness" that it appear that the applicant intends to and will in good faith adhere to such "high standard" of conduct and that he intends to and will obey the Commission's rules and policies for the conduct of licensed freight forwarders. In *Dixie Forwarding Co., Inc., Application for License,* 8 F.M.C. 109 (1964), the Commission said at page 118:

> The business integrity of one who occupies the position of freight forwarder should be above reproach, and he should clearly demonstrate a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes. * * * the philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder.

The record in this case does not provide the necessary basis for an implied assertion to the public and the shipping community that the Commission has examined the applicant's conduct and found applicant "fully competent and qualified" to act in a forwarding capacity.

A freight forwarder's license may be revoked if the Commission finds that because of a "change of circumstances" he no longer is qualified, or that his conduct has rendered him unfit to carry on the business of freight forwarding. A license may be revoked for willful failure to comply with any provision of the Act or any rule or regulation promulgated by the Commission thereunder. The record herein establishes that Harry Kaufman is no longer "fit, willing, and able" properly to carry on the business of freight forwarder.

As stated earlier, since June 9, 1964, when his license was revoked, Betheil has not applied for, or obtained, a freight forwarder license. However, since at least January 1, 1969, he has been actively engaged in ocean freight forwarding using the name of International Shippers Co. of N.Y., the trade name of Harry Kaufman. His formal relationship with Kaufman is not entirely clear, but there appears to be little doubt that Betheil has for all practical purposes been the controlling person of International and has conducted and directed that business as if it were his own. He has made use of Kaufman's license with Kaufman's knowledge, assistance, and cooperation.

Respondents seek to explain and justify Betheil's management and control of International as those of a general manager and that Kaufman retained title to and control of the business until the full purchase price was paid. This is, of course, inconsistent with the claim that Kaufman became Betheil's employee. There is substantial doubt that either was the case. Kaufman's status in the business seems to have been purely formal.

As above stated, in April 1970, the Commission's representative interviewed both Kaufman and Betheil in detail as to the ownership, control, and operation of International. He was not told by either Kaufman or Betheil then or at any other time during the "approximately eight" visits he made to the company's offices over a three week period that Kaufman was an employee of Betheil. To the contrary, Betheil told him that International was "his business," that he owned it, that he had purchased the business from Kaufman; he produced the "first contract" dated January 1, 1969. No mention was made of any arrangement between Kaufman and Betheil other than that of seller and buyer as described in the "first contract" until, in response to Hearing Counsel's request for admissions in December 1971, Betheil provided a copy of the so-called "second contract." Be that as it may, the real situation appears to have been that Kaufman's connection with the business after January 1, 1969, was a pure formality presumably to enable Betheil to conduct an ocean freight forwarder business on the strength of Kaufman's license.

That such was the case is further indicated by the fact that, under the first contract as well as the second, Kaufman was relieved of responsibility for the debts of the business incurred after January 1, 1969, and was not to participate in the profits subsequent to that date. Betheil directed the day-to-day operations of the business during all of the period involved herein subsequent to January 1, 1969; he managed the office, made arrangements with prospective shippers, solicited accounts, and generally carried on business relationships. He brought a substantial number of his shipper-clients into the business, directed operations and policy, and apportioned the work in the manner heretofore mentioned. Betheil performed the executive duties usually associated with proprietorship and management. Kaufman was present in the office until he had a heart attack, but the record does not disclose that he performed any function in connection with the business other than to sign a freight forwarder agreement with GSA on which International had been the successful bidder. Kaufman acted because GSA required a licensed freight forwarder to sign. Except for this one occasion, which was the only contract of its kind entered inot by International since January 1969, the record does not disclose that Kaufman did more than sit in the back of the office.

In neither contract did Kaufman guarantee the transfer of his license to Betheil. He did agree to "cooperate" in the transfer of the license to Betheil or "his nominee" and to "sign all documents and consents required by" Betheil to "expedite" the transfer. Kaufman considered his customers "his greatest property right" in the business, but he was aware that "without the license, you can't operate the freight forwarding business." Kaufman testified that his understanding was that he would not turn over the business to Betheil until payment had been completed. There is nothing in either written agreement, however, to bear this out, or to indicate that ownership of the business did not pass at the time of execution of the contract on January 1, 1969, except possibly the provision that in the event the contract was *transferred to a corporation* its stock would be placed in escrow until the purchase price was fully paid. This provision, however, would appear merely to have been a means of securing the debt owing to Kaufman and did not impinge or confine Betheil's activities as an ocean freight forwarder. Indeed, such arrangement would appear to be entirely cosnistent with the assumption of operational and directional control and responsibility of International's business by Betheil.

At the time of his testimony on January 25, 1972, Kaufman had been paid the full purchase price and the only "condition" of the transaction which is "lacking" is the transfer of the license by the Commission. If the Commission does not approve the transfer of the license, Kaufman does not know what would happen to the freight forwarder business which he sold to Betheil. Either he (Kaufman) would have to "take it back or it is abandoned or something." In any event, however, he would not repay the purchase price to Betheil. It is apparent that in order to effectuate the agreement under consideration and to operate the business as contemplated by the contract, Betheil required a freight forwarder license which he did not have and presumably could not get. Betheil regularly drew money from the firm's account for his personal expenses and paid Kaufman $200.00 per week from the company's monies.

Whether the $200.00 weekly payments are considered to be installments on the purchase price of the business, under the "first contract," or as "salary" for services rendered as "employee" as described in the second contract, there can be no doubt that the business on or about January 1, 1969, was transferred from Kaufman to Betheil and that the business operations were carried on under License No. 35, issued to Harry Kaufman d/b/a International Shippers Co. of N.Y., with Kaufman's knowledge, cooperation, and consent. The arrangement was not disclosed to the Commission and constituted a transfer of the license to Betheil without prior consent of the Commission.

Stephen Betheil's role in the freight forwarding business of International was to assist his father. He was attending college during much of the time covered by the inquiry herein; he was present in the office during this period—on a part time basis at least some of the time; and he actively participated in the freight forwarder business being conducted and managed by his father. As above indicated, when asked by the Commission's staff for an explanation of his purchase of International, he simply said that he was purchasing the going business of Harry Kaufman operated under FMC License No.

35. He added that he had tried to incorporate but had encountered a name conflict. He said that he would apply in Supreme's name and would assume International's business. Stephen M. Betheil does not appear to have been a principal and the extent of his competence to take managerial control of the business cannot be resolved on the basis of the record herein. However, it appears that Irving Betheil, if the application were granted, would continue to exercise a predominant influence in the business. Stephen made it clear that he will employ his father and it may be assumed—indeed, it is contemplated—that for a substantial period Irving Betheil will continue in his present role as chief executive officer and real party in interest in the business. No adequate explanation was made by respondents to account for the lapse of a year between the assignment of the contract of sale from Irving to Stephen and the assignment from Stephen to Supreme. But, the close relationship between the parties and their intent to continue that relationship indicates the real nature of the transactions here involved. Their principal objective appears to be to enable Irving Betheil to continue in the freight forwarding business.

There is not sufficient evidence upon which to base a finding of deliberate and willful misrepresentation by Stephen M. Betheil to the Commission's staff. As above indicated, it appears that he was not a principal in International. His role seems quite clearly to have been that of a subordinate or employee acting under his father's direction.

SUMMARY

Harry Kaufman, Stephen M. Betheil and Irving Betheil have engaged in a course of conduct, the object and result of which was to enable Irving Betheil to engage in the freight forwarder business without a license. In particular, (1) the ocean freight forwarder license No. FMC 35, issued to Harry Kaufman d/b/a International Shippers Co. of N.Y., in practical effect was transferred with the knowledge, cooperation, and consent of the licensee to Betheil and/or his nominee without the knowledge or prior approval of the Commission; (2) Kaufman permitted his license to be used by Betheil, a person not employed by him; (3) Kaufman associated Betheil with himself in an ocean freight forwarder business conducted under a Commission license after the license of Betheil as ocean freight forwarder had been revoked; (4) Stephen Betheil acted in concert with his father Irving Betheil and Kaufman to enable Irving Betheil to conduct and to continue to conduct an ocean freight forwarder business without a license as required by section 44 of the Act and Commission General Order 4; and (5) if an ocean freight forwarder license is granted to Supreme, Stephen Betheil intends to employ his father in the business.

ULTIMATE CONCLUSIONS

(1) Harry Kaufman violated section 44 of the Act and section 510.23(a) of the Commission's Regulations (General Order 4) by permitting and assisting Irving Betheil to use Kaufman's license [FMC License No. 35] in performing freight forwarding services.

(2) Harry Kaufman transferred his freight forwarder license to Irving Betheil without the prior approval of the Commission, in violation of section 44 of the Act and section 510.8(d) of the Commission's Regulations (General Order 4).

(3) Harry Kaufman accepted employment to perform forwarding services on export shipments as an associate and/or employee of Irving Betheil, after Betheil's license as an independent ocean freight forwarder had been revoked by the Commission, in violation of General Order 4 (510.23(b)).

(4) Stephen M. Betheil, treasurer and 50 percent stockholder of Supreme Shippers Inc., applicant herein, has failed to demonstrate that he is a person fit, willing, and able to properly carry on the business of freight forwarder in that (a) he has knowingly assisted Irving Betheil and Harry Kaufman in a course of conduct to enable Irving Betheil to engage in the business of ocean freight forwarder without a license, in violation of 46 CFR 510.3(a) and section 44 of the Act, and (b) that in the event the application is approved, he intends to associate Irving Betheil in the freight forwarder business of Supreme, in violation of section 510.23(b) of the Commission's Rules and Regulations.

(5) Harry Kaufman, Vice President, Secretary, and 50 percent stockholder of Supreme, for the reasons stated herein is found not to be fit, willing, and able properly to carry on the business of freight forwarder.

Freight forwarder license No. 35, heretofore issued to Harry *Kaufman d/b/a International Shippers of N.Y., should be re*voked, and the application of Supreme for a freight forwarder license should be denied.

(S) ASHBROOK P. BRYANT
Presiding Examiner

Washington, D. C.
JUNE 28, 1972

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

SPECIAL DOCKET NO. 450

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

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

February 23, 1973

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 23, 1973.

It is ordered, That applicant is authorized to waive collection of $78,983.77 of the charges previously assessed the U.S. Department of Agriculture.

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 450 that effective August 8, 1972, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 8, 1972 through January 8, 1973, the rate from Houston to Aqaba on 'Bulgar Wheat, in bags' is $51.15 W, subject to 25% surcharge, plus $3.00 per ton bunker surcharge, plus 3½% currency surcharge, and 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.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 450

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

Respondent is permitted to waive $78,983.77 in freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE[1]

This is an application by respondent under Public Law 90-298, 90th Cong. [Section 18(a)(3), Shipping Act, 1916] for permission to waive collection of $78,983.77 freight charges for transportation of the cargo described below.

On August 8, 1972 complainant shipped 14,332 pkgs. of Bulgar Wheat aggregate weight 721,976 lbs. (Est. measurement 28,764 cu. ft) from Houston, Texas to Aqaba, Jordan, consignor Commodity Credit Corporation (USDA), consignee UNDP Resident Representative, via SS *Noonday* of Waterman Steamship Corporation on B/L No. 3 dated August 8, 1972.

On May 30, 1972 respondent booked the movement of the cargo above described and agreed to establish a rate of $51.15 w plus 25 percent surcharge, plus bunker surcharge of $3.00 per ton and currency surcharge of 3½ percent to be applied to this shipment. Through error respondent failed to file the appropriate amendment to its tariff (Waterman Steamship Corporation Freight Tariff No. 18—U.S. Atlantic and Gulf Ports/Red Sea Gulf of Suez, Aqaba and Aden Base Ports). It is not until after billing had been submitted to the Department of Agriculture for freight charges that the error was discovered.

The only applicable tariff rate on the commodity in question at the time this shipment moved was $106.50 W/M for Cargo, N.O.S., as published in said Tariff No. FMC 18, plus surcharges as above stated. Respondent says the Cargo N.O.S. rate is unquestionably high for this carge.

[1] This decision became the decision of the Commission February 23, 1973.

Effective July 7, 1972 through July 31, 1972 a rate of $51.15 was established on flour from Houston to Aqaba. Respondent intended to establish the same rate on Bulgar Wheat from Houston to Aqaba to cover the August 8 shipment here involved.

On January 8, 1973, Revised Page 119 of the said tariff was duly filed establishing the rate of $51.15. On January 26, 1973 this application was made to the Commission to waive collection of the difference between the rate of $51.15 (plus surcharge) and the Cargo N.O.S. rate of $106.50 W/M.

Section 18(b)(3) of the Shipping Act as amended by Public Law, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to refund or waive a portion of the freight charges where it appears that there is an error in the tariff of an administrative or clerical nature, or an error due to inadvertance in failing to file a new tariff, and that such waiver or refund will not result in discrimination among shippers. The application herein discloses facts and circumstances which fall within the purview of and intent of the statute.

Having complied with the requirements of the statute and good cause appearing is permitted to waive collection of the sum of $78,983.77. The notice required by the statute shall be published in the appropriate tariff and waivers shall be made within 30 days of such notice. Within five days thereafter respondent shall notify the Commission of the date of the waiver and the manner in which it was made.

(S) ASHBROOK P. BRYANT
Administrative Law Judge

Washington, D.C.
JANUARY 31, 1973

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

SPECIAL DOCKET NO. 451

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

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

February 23, 1973

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 23, 1973.

It is ordered, That applicant is authorized to waive collection of $21,961.41 of the charges previously assessed the U.S. Department of Agriculture.

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 451 that effective September 8, 1972, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from September 8, 1972 through January 8, 1973, the rate from New Orleans, La. to Aqaba on 'Flour, in bags' is $55.42 W, subject to 25% surcharge, and 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.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 451

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

Respondent is permitted to waive $21,961.41 freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

This is an application by respondent under Public Law 90-298, 90 Cong. [Sec. 18(a)(3), Shipping Act, 1916], for permission to waive collection of $21,961.41 freight charges for transportation of the cargo described below.

On September 8, 1972, complainant shipped 4,000 bags of flour, aggregate weight 201,320 lbs. (estimated measurement 8,000 cu. ft.), from New Orleans, Louisiana, to Aqaba, Jordan, consignee UNRWA c/o Port Officer, consignor Commodity Credit Corporation (U.S.D.A.), via respondent's steamship SS *Citrus Packer* on B/L No. 4 issued by respondent dated September 8, 1972.

On July 24, 1972, respondent booked the above shipment on the understanding that the ocean freight rate would be $55.42 per 2,240 lbs. plus 25 percent surcharge. Based on this understanding and in good faith, complainant moved the cargo to respondent's piers where it was loaded on the above vessel and transported to destination. However, through error respondent failed to establish the rate agreed upon with complainant. Through inadvertance, respondent failed to file an appropriate revision of its tariff [Waterman Steamship Corporation No. 18B]. However, respondent billed freight at the new agreed rate.

It was not until after the billing had been made that it was discovered that respondent had failed properly to amend its tariff to provide for the rate of $55.42 w. plus surcharge. The only applicable rate on the commodity in question, at the time of shipment, due to respondent's error, was the Cargo N.O.S. rate of $112.75 W/M, as provided in Waterman Tariff 18A, FMC 69, which, respondent states, constitutes an unreasonable rate for this movement.

Respondent filed effective January 8 [Item 4602 of its Freight Tariff 10-B, FMC 73, Page 119], an appropriate amendment to its tariff establishing the rate agreed upon with complainant. The complaint was filed on January 26, 1973.

From August 9, 1972, through September 13, 1972, respondent had in effect a rate of $55.42 (plus surcharge) on flour from Galveston to Aqaba and subsequently that rate was extended to apply from Galveston, Beaumont and Houston to Aqaba. It had been the intention of respondent to provide the same rate from New Orleans but, as above stated, through inadvertance, this was not accomplished.

Section 18(a)(3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to waive 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 inadvertance in failing to file a new tariff, and that such refund will not result in discrimination among shippers. The complaint herein discloses facts and circumstances which fall within the purview and intent of the statute.

Having complied with the requirements of the statute and good cause appearing, complainant is permitted to waive collection of the sum of $21,961.41.

The notice required by the statute shall be published in the appropriate tariff and waiver shall be made within 30 days of such notice. Within five days thereafter respondent shall notify the Commission of the manner in which it was made.

(S) ASHBROOK P. BRYANT
Administrative Law Judge

Washington, D. C.
JANUARY 31, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-9

BOLTON & MITCHELL, INC.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 516

REPORT ON RECONSIDERATION

March 7, 1973

BY THE COMMISSION: (George H. Hearn, Vice Chairman; James V. Day and Clarence Morse, Commissioners)

On June 9, 1972, the Commission issued its decision in this proceeding and allowed respondent, Bolton & Mitchell, Inc. (BMI), subject to certain conditions, to retain its license as an independent ocean freight forwarder. BMI was required to cease and desist from certain activities and to submit a timely report to the Commission setting forth the manner of compliance. On July 28, 1972, respondent filed a petition for reconsideration urging, *inter alia,* that the Commission reconsider and reverse its findings that:

1. BMI is not independent of shipper connections.
2. BMI violated section 16 First of the Shipping Act, 1916, by obtaining transportation by water at less than the applicable rates.
3. BMI violated various provisions of General Order 4. (46 CFR 510)

Alternatively, respondent requested clarification of the reasoning behind the Commission's conclusion that BMI was shipper-connected. Respondent urges that in reaching this conclusion, the Commission in rejecting the testimony of BMI's only witness, Spencer, gave no indication in the report that the Commission had considered the written and sworn evidence and exhibits corroborating of Spencer's testimony.

On July 25, 1972, Hearing Counsel also filed a petition for reconsideration of the Commission decision in this case.

Hearing Counsel's total argument, simply stated, is that the Commission correctly determined that BMI was guilty of all specifications as cited, but erred in (1) concluding that respondent acted in good faith on advice of counsel when it violated the pertinent statutes, and (2) allowing respondent BMI to retain its license.

The Commission granted both the petitions and directed the filing of appropriate replies. Respondent's request for further oral argument was denied.

The facts and applicable law in this case are set forth in our prior report served June 9, 1972, and will not be repeated here. The issues here are the same as were previously considered and resolved by the Commission in that report. They are:

1. Does BMI's conduct render it free from shipper connections as required by statute?
2. Does BMI's conduct merit retention or revocation of its license as an independent ocean freight forwarder?
3. Has respondent violated section 16 First of the Act by obtaining transportation by water at less than the applicable rates as a result of its receiving compensation on its own shipments?
4. Has respondent violated certain portions of General Order 4, to wit:

   Sec. 510.5(e)—failing to show license number on invoices and shipping documents;

   Sec. 510.23(d)—imparting false information to its principals;

   Sec. 510.23(e)—withholding information as to actual price of merchandise;

   Sec. 510.23(f)—failing to promptly account to its principals;

   Sec. 510.23(h)—filing false documents;

   Sec. 510.23(j)—failing to use invoices which stated separately the actual amount of ocean freight, price of merchandise; and

   Sec. 510.9(c)—willfully making false statements in connection with an application for a license or its continuance in effect.

In our opinion, nothing has come to light upon reconsideration of this case to materially alter the conclusions we reached and the position we adopted in our previous report; we still find respondent in violation of all sections of the Shipping Act, 1916, as previously determined, and we also continue to be constrained not to revoke respondent's license because we feel that BMI has acted in good faith on advice of counsel in this matter. We do, however, order respondent to cease and desist from the activities complained of and submit the proper report as required in the order accompanying our report of June 9, 1972.

Accordingly, we approve and adopt verbatim our report and order of June 9, 1972, (15 FMC 248) and make it a part hereof.

Helen Delich Bentley, Chairman and Ashton C. Barrett, Commissioner, dissenting

We dissent.

The reconsideration of this case presented the Commission with an unique opportunity to rectify an error in judgment fraught with potential for future harm.

We have here a freight forwarder who fails to even approach the statutory definition.*

We have no complaint with the majority's opinion as far as it went, but unfortunately it did not go far enough. The majority found respondent guilty of nine separate violations of the Act, yet they were somehow "constrained" not to take BMI's freight forwarder license. It is with this conclusion we take issue. The facts in this case speak for themselves. A Commission investigator found respondent's books to indicate that for the period reviewed fully 63 percent of BMI's total cash disbursements went for merchandise purchases totalling 1.2 million dollars. At the same time, respondent's account ledgers showed that 66 percent of its total sales disbursements were for merchandise—an obvious buy-sell business operation.

In the various transactions surveyed in this case, a series of "constants" show up regularly. The most unwholesome practice appearing regularly is the retention by respondent of the discount it received on the bulk purchases, while invoicing the full individual price to the consignee—and the record demonstrates this without the consignee's positive knowledge or acquiescence. Another interesting practice is respondent's charges for "start up" service which consisted of nothing more than placing the order and processing same for the consignee.

Along with that charge, respondent assessed his principles a "finders fee" and required payment for "purchasing work". The only distinction between a start up charge and a finders fee is that the latter was acceptable to Peruvian officials for dollar exchange arrangements and allowed the foreign consignees to obtain U.S. dollars at a more favorable rate of exchange.

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* Section 1, Shipping Act, 1916, specifies the criteria for independent ocean freight forwarders as follows:

> An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

Interestingly, the moneys paid and collected from the consignees for the "finders fee" were redeposited in the consignee's private account or refunded "under the table", thus effectively assisting the consignee to possibly violate International Currency Exchange laws.

Respondent also charged its customers a "finance" fee for the funds it utilized in purchasing allegedly for the clients account. Additional charges crop up from time to time, fees for "purchasing services", "technical services" and "buying commissions" which were all charged to consignees.

Additionally, nowhere on any of the documents used in the transactions does this forwarders FMC license number appear, making virtually certain that BMI's suppliers had no inkling that BMI might be purchasing for anyone but its own account. Perhaps if they had, they would not have been as inclined to grant the discounts to BMI.

Throughout the testimony and transcript of interviews, there are inconsistent statements by Spencer, BMI's president, which attempt to explain away the proven facts of record and which indeed strain the limits of our credulity. The majority would appear equally unimpressed with them.

Lastly, there is the admission of Spencer that in addition to the buying, selling, financing and retaining secret profits, BMI collected ocean freight brokerage on the same shipments. The only explanation for this is that the company could not sustain itself on sales commissions alone and needed the additional revenue from the freight forwarding operation. And, as if all this were not enough, Spencer further admitted giving false statements to the Commission's investigators.

With all of this the majority, of course, does not quarrel; indeed it cannot since the record stands uncontroverted. How then can the majority allow BMI to retain its license? By the simple expedient of shifting the responsibility for the violations to respondent's counsel, the majority concludes that BMI acted in good faith upon "advice of counsel" and should be allowed to retain its license and incidentally to continue its relationship of trust with its clients. The Shipping Act, of course, does not excuse violations committed on advice of counsel; but we presume that the majority is unable to find the requisite "willfullness" on the part of BMI and thus is constrained to continue its license in effect. We have no such difficulty.

BMI when licensed by the Commission was found "fit, willing and able". That BMI was "willing" is amply demonstrated by its zeal in concocting schemes to exact "fees" from its shipper clients; but it is the presumed "fitness" that should give the majority pause as it does us. A freight forwarder holds a unique position of trust and responsibility. He must act as a fiduciary, and in that capacity his conduct and integrity must be above reproach. The Commission addressed itself to that responsibility in *Dixie Forwarding Co., Inc. Application for License,* 8 F.M.C. 109 at 115 when it said:

> The record in this proceeding reveals that forwarders frequently have in their possession large amounts of their clients' funds. They also frequently hold negotiable documents for others. Moreover, forwarders have access to confidential business secrets. Anyone acting in such a fiduciary capacity should of his own initiative, seek to attain the highest degree of business responsibility and integrity.

(See also, *Compania Antonima Venezolana De Navigacion* v. *A. J. Perez Export Company,* 303 F.2d 692 (CA 5, 1962) cert. den., 371 U.S. 942 (1962).)

When we review the record, we do not find that the respondent has displayed the high degree of business responsibility and integrity required of a freight forwarder. Therefore, it is our view that Bolton & Mitchell is not fit to carry on the business of freight forwarding.

We are also troubled concerning BMI's "ability" to remain in business. A licensee of this Commission is charged with the ability to carry on the business of forwarding and no small part of the proper conduct of that business is sufficient knowledge of the law to insure that the business is carried on within the confines of that law. How then can lack of knowledge and acceptance of erroneous advice by counsel excuse violations of the kind here spread over the record? We, of course, think it cannot for ignorance of the law is not now and has never been an excuse. More seriously perhaps to allow BMI to retain its license appears to us to forever foreclose this Commission's ability to police the industry. How do we hereafter find any freight forwarder guilty of any violations of sufficient gravity to warrant revocation of a license? Under the majority's doctrine violations will not result in revocation, for if and when a forwarder is charged with a violation he need only plead "advice of counsel".

We, of course, did not take this stand in the earlier Commission report. We could have refrained from doing so now if it were not for our sober reconsideration of this case and our grave concern for future efforts by the Commission at regulating the forwarder industry. We would revoke the license.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 452

ASIATIC PETROLEUM CORPORATION

v.

STATES MARINE LINES

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

March 8, 1973

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 8, 1973.

It is ordered, That applicant is authorized to waive collection of $21,477.30 of the charges previously assessed Asiatic Petroleum 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 452 that effective November 29, 1972, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from November 29, 1972 through December 22, 1972, the rate to Mena Al Fahal on 'steel casing, subject to a minimum tonnage of 1,000 payable tons from one shipper on one vessel' is $40.50 W/M (including 17½% surcharge), 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.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 452

ASIATIC PETROLEUM CORPORATION

v.

STATES MARINE LINES

Application to waive a portion of freight charges granted.

INITIAL DECISION OF HERBERT K. GREER, ADMINISTRATIVE LAW JUDGE [1]

States Marine Lines, Inc. (applicant), a common carrier by water in the foreign commerce of the United States, has applied for permission to waive collection of a portion of the freight charges on a shipment of steel casings carried for Asiatic Petroleum Corporation (shipper) from New Orleans, Louisiana, to Mena Al Fahal, Sultanate of Muscat and Oman, pursuant to a bill of lading dated November 29, 1972. At the time of the shipment applicant's tariff on file with the Commission for the commodity shipped was $52.50 W/M plus a surcharge of 17½ percent ("8900" Rate Agreement No. 2, FMC-2). The shipment measured 37,398 cubic feet and weighed 2,270,402 pounds.

Prior to the shipment and on November 3, 1972, the Secretary of the "8900" Group advised the shipper that a special rate of $34.50 W/M plus a 17½ percent Cape Surcharge was offered through December 31, 1972. On November 6, 1972, booking of the cargo on applicant's vessel was confirmed. On November 29, 1972, a forwarder acting on behalf of the shipper presented documents to applicant's agent in New Orleans, Louisiana, covering the cargo and at a rate of $34.50 W/M plus the surcharge. The agent was unable to verify this

[1] This decision became the decision of the Commission March 8, 1973.

rate in the "8900" Group tariff and by telephone contacted applicant's office at Stamford, Connecticut. The tariff was checked by that office and as the rate change was not in the files, it was assumed that the correction pages had been delayed by mail. The $34.50 rate was nevertheless confirmed.

The cargo was loaded aboard applicant's vessel which sailed on November 30, 1972. During December of 1972, applicant discovered that the shipper had failed to advise the "8900" Group of its booking and that the agreed reduced rate on steel casings had not been filed with the Commission. The records further disclosed that the shipper had paid $41,164.92, the charges applicable at the reduced rate, the rate which applicant had intended to apply but had inadvertently failed to timely file.

Public Law 90-298 authorizes the Commission, for good cause shown, to permit a common carrier by water in the foreign commerce of the United States to waive collection of a portion of the freight charges when there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in filing a new tariff. The facts demonstrate an inadvertent failure to file the rate of $34.50 W/M plus a 17½ percent surcharge, a situation within the purview of Public Law 90-298. The application was filed within 180 days of the date of the shipment and no other shipments of the same or a similar commodity moved on applicant's vessels during approximately the same time as the shipment here involved. No other proceeding involving the same rate situation is now pending.

Good cause appearing, and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of $21,477.30, the difference between the rate inadvertently not filed and the rate on file at the time of the shipment, is granted. The waiver of the charges here authorized shall be effectuated within 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. Applicant shall publish the proper notice in its tariff as required by the statute.

(S) HERBERT K. GREER
Administrative Law Judge

Washington, D. C.
FEBRUARY 8, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-71

AGREEMENT NO. 9932—EQUAL ACCESS
TO GOVERNMENT-CONTROLLED CARGO AND
INTERIM COOPERATIVE WORKING ARRANGEMENT

AGREEMENT NO. 9939—POOLING, SAILING AND EQUAL ACCESS
TO GOVERNMENT-CONTROLLED CARGO AGREEMENT

March 20, 1973

Agreement No. 9939 not found to be discriminatory or unfair as between carriers, shippers, exporters or ports, or between exporters from the United States and their foreign competitors, or detrimental to the commerce of the United States, or contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

Agreement No. 9939 approved.

Odell Kominers and *Stephen F. Eilperin* for Prudential-Grace Lines, Inc.

Richard G. Ashworth and *John J. Reilly* for Compania Peruana de Vapores S. A.

Gilbert C. Wheat, Thomas E. Kimball and *Richard E. Gutting, Jr.* for Westfal-Larsen & Co. A/S.

Donald J. Brunner and *Paul J. Kaller* as Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; George H. Hearn, *Vice Chairman*; Ashton C. Barrett and James V. Day, *Commissioners*)

This proceeding is before us upon exceptions to the Initial Decision of Administrative Law Judge Ashbrook P. Bryant (ALJ). The proceeding was instituted to determine whether Agreement Nos. 9932 and 9939 should be approved under section 15 of the Shipping Act, 1916.[1] The Administrative Law Judge would disapprove Agreement 9939. Exceptions to the Initial Decision were filed by the parties to Agreement No. 9939, Prudential-Grace Lines (PGL) and Compania Peruana de Vapores (CPV), and by Hearing Counsel.

FACTS [2]

Agreement No. 9939 between PGL and CPV covers sailing requirements, equal access to government cargoes, and pooling of revenue (with certain cargo excluded) carried southbound under local bills of lading from U.S. West Coast ports to ports in Peru. This U.S. West Coast/Peru trade is but a part of the overall U.S. West Coast/South America trade.

PGL serves the West Coast/Peruvian trade by alternating six C-3 vessels via the East and West Coasts of South America. The southbound West Coast of South American service (which includes Peru) serves British Columbia, the full range of U.S. West Coast ports, Mexico, Central America, the West Coast of South America and the East Coast of South America to Rio de Janiero, where the vessels turn homebound and serve the same range of ports in reverse order northbound. PGL, under an operating-differential subsidy contract, operates the only U.S.-flag liner service between the U.S. West Coast and Peru and has been in this trade for close to one hundred years. PGL's plans for the future call for 12 to 18 sailings a year, substituting modern C-4 vessels for the C-3's now in service.

CPV, the other party to Agreement 9939, is owned by the Peruvian government and is an instrument of Peruvian governmental policy. It is not primarily profit motivated. CPV owns and operates twelve modern cargo vessels and has additional vessels under time charter. It became active in the southbound trade in about March of 1971. CPV's U.S. West Coast to Peru service is part of a triangular Japan/California/Peru service in which CPV employs three vessels southbound

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[1] Agreement No. 9932 was an "interim" agreement filed with the Commission in the form of a letter of intent. No. 9932 expired by its own terms and was superseded by No. 9939. Its approval is no longer sought, and No. 9932 will be discussed only insofar as it sheds light on the provisions of 9939.

[2] Exceptions to certain of the Administrative Law Judge's findings were taken by PGL. However, they were directed to the failure of the Administrative Law Judge to "detail" or amplify certain matters presented by PGL. Our findings take care of the basic objections of PGL, and in view of our decision, it is unnecessary to deal in detail with the factual exceptions of PGL.

to Peru on a monthly schedule. It would appear that CPV has now placed two vessels in a monthly shuttle service between Peru and the full range of U.S. West Coast ports.[3]

Westfal-Larsen & Co. A/S (WL) is a Norwegian company which owns seven tankers, seven bulk carriers and nine dry cargo vessels. Under a general agency agreement with General Steamship Company, Ltd., WL maintains a liner service in the southbound U.S. West Coast/South America trade with six dry cargo vessels comparable in speed and cubic capacity to the vessels now operated by PGL and CPV. WL's voyage pattern in the U.S./South America trade includes calls at British Columbia and U.S. West Coast ports, thence to Mexico, down the West Coast of South America through the Straits of Magellan, then northbound to East Coast of South America ports, returning through the Panama Canal to U.S. West Coast and British Columbia ports. WL does not offer a northbound service from Peru. In its southbound service, WL covers the same general range of ports as PGL, and in addition WL regularly serves Coos Bay, Oregon, where it picks up 80 percent to 90 percent of its lumber cargoes to Peru. Lumber represents about half of its U.S. West Coast/Peru cargo.

The U.S. West Coast to Peru trade has generated an estimated $3,000,000 annually in freight revenues on a movement by liner vessels of from 44,000 to 48,000 tons of cargo. The respective participation of the three active carriers (PGL, CPV and WL) for the period available has been as follows:

	1968	1969	1970
PGL	60.8%	52.3%	48.1%
WL	24.9%	31.7%	44.8%
Flota [4]	13.8%	10.5%	7.0%

The best estimate is that the current level of traffic will continue with perhaps a modest increase. Among the principal commodities shipped from U.S. West Coast ports are lumber,

[3] This is based on advertisements appearing in the Pacific Shipper (Nov. 15, 1971 and March 27, 1972). We are asked by PGL to take official notice of them. WL and Hearing Counsel object, arguing that Rule 13(f) (46 CFR 502.226) does not permit official notice of a "mere advertisement" apparently because CPV should have introduced "evidence" at the hearing of its then future plans. We will take official notice of the advertisements themselves—their existence is not questioned. Our experience shows that a line rarely, if ever, advertises sailings that it does not intend to make, and a reasonable inference is that CPV will in all probability expand its service as advertised. However, this inference is not necessary to our conclusions in this decision.

[4] Prior to CPV's entry into the trade, Flota Mercante Grancolumbiana provided liner service in the trade.

wood pulp, alkane, mining machinery, newsprint, beans, peas and lentils, and flour and wheat. More than 75 percent of the lumber moves through Coos Bay, destined to Callao, Peru; there is a lesser volume to Paita, Peru. Portland accounts for virtually all of the remainder of the lumber traffic to Peru.

The U.S. West Coast/Peru segment is but a part of WL's overall Pacific Coast/South America trade. WL's revenues from this segment were eight and nine percent, respectively, of its service revenues in 1969 and 1970.

Since 1962, the Government of Peru has sought to maintain a program for the development of a national-flag merchant marine. This was done through the issuance of a series of decrees, which culminated in the conditions instrumental in producing Agreement 9939. On January 9, 1962, Peruvian Law No. 13836 declared the shipbuilding industry a public utility and enacted a variety of promotional measures, including the establishment of a ship construction fund aimed at fostering the construction of a national-flag fleet. In February of 1962, Law No. 13996 established a Peruvian National Commission, among the duties of which was that of periodically proposing to the Executive Power the percentages of import and export cargo to be carried in Peruvian national-flag ships. On January 25, 1966, by Supreme Decree No. 3, there was established a requirement reserving 20 percent of all import and export cargoes to Peruvian ships, with provision for increasing that percentage to 50 percent as Peru's fleet increased. These percentage restrictions were restated in May of 1966 by Supreme Decree No. 12. Other measures designed to promote the Peruvian merchant marine were soon to follow.

Supreme Decree No. 13, issued in August of 1967, provided that contracts with the government and government-controlled entities contain a provision requiring the contractor to comply with cargo reservations in favor of the Peruvian merchant marine. Supreme Decree 221-H of September 1, 1967, required that all purchases by government-controlled entities be carried by Peruvian ships unless none were available. Next, Supreme Decree No. 2-H of January 5, 1968, authorized exemptions from custom duties on private import cargoes provided they were brought in aboard CPV ships or any other Peruvian vessel. If national-flag ships were not available, ships of "associated" lines could be used.[5]

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[5] Associated lines are those that have an agreement with CPV approved by the Peruvian government.

The earlier decrees were modified and amplified by Supreme Decree No. 016-69-TC, issued in December of 1969. This decree established the order of vessel precedence for cargoes exonerated from customs duties: (1) vessels of Peruvian national lines; (2) foreign-flag vessels chartered by Peruvian-flag lines; (3) where ships of the first two categories were unavailable on ships of foreign lines associated with Peruvian-flag lines. Exempted from this decree were cargoes from ports in geographical areas not regularly served by Peruvian ships or when there were international agreements on flag preferences. Supreme Resolution No. 003-70-TC/AC included within the meaning of "international agreements" on flag preference an "equal access" agreement if approved by Peru's Minister of Transport and Communications.

As matters stood in December 1970, just prior to CPV's entry into the trade, 50 percent of the import cargoes were reserved to Peruvian vessels, and for the most part only cargoes shipped on those vessels could be exonerated from customs duties. On the other hand, and by another decree, an indeterminate percentage of the cargo apparently could be exonerated in full, or relieved in part, from customs duties through decision of the Peruvian Ministry of Industry and Commerce (PMIC). These requirements were not mutually exclusive, however. The extent of the customs relief and the conditions upon which such relief would be granted might change from time to time. According to PGL, this was well illustrated when PMIC ruled in September 1971 that the Peruvian-flag preference requirements for customs exoneration affected only imports exonerated completely from customs duties. Since, under the Peruvian industrial law, no cargoes are exonerated in full from Peruvian customs duties, but rather on a sliding scale of 20 to 90 percent, based on an evaluation made by the Peruvian Minister of Transport and Communications of the commodity's end use, the decree requiring cargo exonerated from Peruvian customs duties to be carried on Peruvian-flag ships currently has no impact. In any event, however, Peruvian decrees now require 50 percent of Peru's imports to be carried by Peruvian-flag vessels. In addition, if the customs exoneration decrees become effective through changed interpretation by the Minister of Transport and Communications, some 60-65 percent of the imports would require routing on Peruvian-flag vessels. The 50 percent reservation affects talc and purchases by Peruvian government-controlled companies and contractors. Beyond this, the record does not identify particular commodities included in the 50 percent reservation decrees, nor does it identify which commodities would receive a customs duties advantage should the Minister of Transport and Communications rescind its present interpretation of the customs exoneration decrees.

PGL first felt the impact of the Peruvian decrees not in the trade here involved, but in the U.S. Atlantic/Peru trade and the U.S. Gulf/Peru trade, and in 1967 PGL and the Gulf and South American Steamship Company (G&SA), the two U.S.-flag carriers in these trades, negotiated an equal access agreement which this Commission approved on October 17, 1967. Peru, however, failed to act on the agreement. The situation in Atlantic and Gulf/Peru trades worsened as CPV's service increased. Further attempts were made to secure Peru's approval of the equal access agreement, and on February 24, 1970, the approval was granted for 150 days, during which time two pools were negotiated. Agreement No. 9849, between PGL and CPV in the U.S. Atlantic/Peru trade and Agreement No. 9865, between G&SA and CPV in the U.S. Gulf/Peru trade, were approved by this Commission and the Government of Peru in July of 1960.

Six months after the approval of Agreements 9849 and 9865, PGL learned of CPV's intention of establishing a direct service between Peruvian and Japanese ports, calling homeward from Japan at U.S. West Coast ports to lift cargo for Peru. CPV had by then taken delivery of its 12 new ships and had additional tonnage under time charter. This, together with the decrees effecting cargo reservations, created the climate in which the agreement in issue was negotiated. In such a climate, PGL could have either negotiated a pool or sought some sort of counter-balancing regulations from the Commission under section 19 of the Merchant Marine Act of 1920 (46 U.S.C. 876). Of course, PGL could have done nothing, thereby possibly suffering fatal detriment; and consequently, PGL felt some positive action was called for. PGL felt that the issuance of regulations under section 19 would "exacerbate the already tense diplomatic relations between Peru and the United States" and chose the agreement as the less troublesome alternative.

As above stated, Agreement No. 9939, between PGL and CPV, covers sailing requirements, equal access to government-controlled cargo and pooling of revenue on all cargo (with certain cargo excluded) carried southbound under local bills of lading from West Coast U.S. ports to ports in Peru. The cargo is to be freighted and carried in accordance with the contract/noncontract rates, rules and regulations of the Latin America/Pacific Coast Steamship Conference (Agreement No. 8660, as amended), of which both PGL and CPV are members. The agreement has the obvious bilateral characteristics which have become familiar in similar agreements in Latin American trades. PGL is a party to several agreements of this type.

PGL is accorded the status of a Peruvian-flag line southbound; CPV shall have the right to participate equally with U.S.-flag carriers in the carriage of cargo controlled by the U.S. government; and PGL agrees to support applications for waivers to place CPV on a basis of equal opportunity with PGL with respect to such cargo. The parties agree to request that the competent authorities of their respective countries publicize among their representatives the status of the association of these carriers which are accorded equal access to cargo by the agreement.

Each party may transfer part of its pool share, sailing, and space requirement to other national-flag carriers. Pool accounting arrangements, exchange of manifests and/or freight lists, and provisional and final statements of pool revenues are to be prepared and delivered by each party to the other.

Nothing contained in the agreement shall limit the right or duty of either carrier to provide service at any U.S. Pacific port or Peruvian port where suitable cargo is offered or available, or to carry all of the cargo offered or available. The carriers will use their best efforts to encourage and promote commerce in the trade, and to resolve any differences that may arise under the agreement; they agree to consult at least once a year. Any controversy or claim arising under the agreement will be settled by binding arbitration in Lima or San Francisco in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission.

The pool shares of PGL and CPV shall be 50 percent each of the total cargo carried (with certain cargo excluded). If either party should earn a gross revenue in excess of its pool share, then, subject to a $50,000 deductible, the overcarrying party shall pay over to the other party 20 percent of the gross revenue obtained in excess of its pool share. These pooling arrangements were included at the insistence of CPV on prompting by its government. Without inclusion of the "pool" it appears highly improbable that there would have been any agreement.

Article 10 embodies the "equal access" agreement and provides in pertinent part:

EQUAL ACCESS TO CARGO

10) a. As a condition of this agreement, PGL shall be accorded the status of a Peruvian-flag line with respect to the carriage of southbound cargo in the foreign commerce of Peru from the West Coast of United States.

* * * *

c. In view of the fact that the United States government has granted to carriers of other naitons the right to carry government controlled cargo exported from the United States, CPV has the right, subject, to any act or policy of the government of Peru, to participate equally with United States flag carriers in the carriage of government controlled cargo moving from United States ports in the Pacific Coast of USA to ports in Peru, which include charitable cargoes and those cargoes controlled by the following firms:

Agency for International Development AID
Care Inc.
Catholic Relief Services
Church World Services
Lutheran World Relief, Inc.
Seventh Day Adventist Welfare Service Inc.
World Food Program
World Relief Commission Inc. or others.

PGL will support, and will not contest, applications for waivers which shall place Peruvian flag vessels owned or operated by CPV on a basis of equal opportunity with PGL vessels with respect to the total carriage of such cargo.

U.S. government-controlled cargoes approximate 10 percent of the U.S. West Coast southbound cargoes to Peru. Quite naturally the predicted effect of the agreement on the trade and the lines in it is hotly disputed. On the one hand, WL urges that the agreement will leave it with little if anything but its lumber carryings (something less than half of its past carryings) and that it cannot survive in the trade without a reasonable "mix" of cargoes. On the other hand, PGL vigorously contends that the agreement will have little or no effect on WL's position in the trade. We will deal with this question when we discuss the reasons behind our approval of the agreement.

The ALJ also found that WL "produced evidence tending to show" that the agreement between CPV and PGL as to the associate status of the latter had been effectuated prior to approval *by the Commission.* (Initial Decision, pages 13, 14.) However, he neither discusses the evidence nor draws any conclusions from it. Our review of the record demonstrates that this evidence can more readily be interpreted as showing unilateral action on the part of the Peruvian government in routing cargoes pursuant to its decrees.

In the order instituting this proceeding, the inclusion of a reporting requirement as a condition of approval was suggested. The requirement would provide that copies of all quarterly provisional and final pool statements, pursuant to Article 8 of the agreement, be furnished the Commission; also that a new Article 18 be included to read as follows:

Further Agreement of the Parties—Any further agreement or understanding of the parties, pursuant to or giving effect to Articles 5, 11 and 17 shall not be effective or implemented prior to the time that an appropriate amendment with respect thereto has been filed with and approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 1916.

The parties have stipulated to its inclusion, and it will be so ordered.

DISCUSSION AND CONCLUSION

Section 15 of the Shipping Act, 1916, requires that we disapprove Agreement 9939 if we find that it will be discriminatory or unfair as between carriers or shippers, operate to the detriment of the commerce of the United States, be contrary to the public interest or otherwise be in violation of the Shipping Act. If the agreement is approved, those activities of the parties which are within its scope are exempted from the antitrust laws. This exemption has given rise to an "antitrust test" to be used in determining whether to approve a given agreement. Under this test we must

. . . scrutinize the agreement to make sure the conduct thus legalized does not invade the antitrust laws any more than is necessary to serve the purposes of the regulatory statute. (*Isbrandtsen Co.* v. *U.S.*, 211 F.2d 51 (C.A.D.C. 1954)).

This scrutiny of course requires information or data if it is to produce an intelligent judgment on the approvability of the agreement; and

Almost uniformly the kind of information necessary to this judgment is in the hands of those seeking approval of the agreement . . . it is incumbent upon those in possession of such information to come forward with it. (*Mediterranean Pools Investigation,* 9 F.M.C. 264, 289-90 (1966)).

Once the proponents of the agreement have produced their case it is equally incumbent upon any person protesting approval of an agreement to come forward with all relevant information in his possession which would bear upon the agreement's disapproval. The weighing of the case presented by the proponents of approval against the case made by those protesting approval, of course, resolves the question of whether the ultimate burden of proof has been sustained. In this case, the ALJ concluded that the parties to Agreement 9939 had failed to "clearly demonstrate" that the agreement was not "discriminatory as between carriers or shippers, was not detrimental to the commerce of the United States and was in the public interest." The key to this conclusion would appear to lie in two general propositions: (1) the "nationalistic" nature of Agreement 9939; and (2) the "finding" that it "appears reasonably probable" that approval of No. 9939 would have a "substantial adverse effect on the carryings and opportunities" in the trade.

No one seriously challenges the motives of CPV and the Government of Peru [6] in negotiating the agreement. It is designed to bring to some fruition Peru's cherished aspirations to status as a maritime nation by securing a larger portion of the carriage of its imports and exports for CPV. To achieve this, Peru has utilized the medium of "government-controlled" or "government-impelled" cargo which can be loosely defined as any cargo over which and for whatever reason the government controls the routing or booking. There is nothing novel in this concept. It is utilized by virtually all the Latin American maritime countries; and in our own country Public Resolution 17 and section 901(b) of the Merchant Marine Act, 1936 give the government control over the routing and booking of certain government-impelled cargoes. Agreement 9939 is designed to give each of the parties "equal access" to the cargoes controlled by their respective governments.

The Administrative Law Judge found the "bilateral intent" of the agreement clear, noting that CPV "made no bones" about its wanting a "bilateral" pooling agreement, thereby "excluding" WL from the pool. The Administrative Law Judge concluded that "bilateralism" or national intent was not a proper "fulcrum" for approving an agreement. Bilateralism is currently a much used and frequently abused tag in some segments of our foreign trade, and it bears some reexamination in view of the misconceptions apparently attending it.

[6] To all intents and purposes, they are one and the same.

Complete bilateralism would mean simply that all cargo moving in a trade is by some means (probably governmental) reserved for carriage by the national-flag lines of the trading partners, i.e. the countries at either end of the trade. No U.S. trade has yet become so bilateralized. Bilateralism is considered a panacea by developing countries and as an anathema by maritime nations whose carriers are traditionally third-flag lines or cross-traders. Whatever the economic or political merit of bilateralism, our concern is the validity and extent of its application under the statutes we administer. Of more relevance, however, is the role of bilateralism as a product of the "national interest factor" in the development of a particular commercial agreement.

In this foreign trade, as in many foreign trades, there are two "pools" of cargo moving. One pool consists of cargo moving in normal commercial trade channels, and all common carriers engaged in the trade normally have access to that commercial cargo. The other pool consists of government-owned or government-controlled cargo, and only those common carriers in the trade selected or designated by that government have access to that cargo. In the United States we have government-controlled cargo under PR 17, PL 664, and PL 480, which moves in our foreign commerce on liner vessels. The government of Peru, as elsewhere detailed herein, has identified certain categories of import cargo which it declares is government-controlled cargo. The routing of government-controlled cargoes can be and is directed by the government(s) involved. If the involved government decrees that a third-flag vessel shall not participate in the carrying of that government-controlled cargo, then that cargo ceases to be a part of the commercial pool and is no longer accessible to third-flag vessels. That is the problem and "facts of life" confronting WL. Peru, by decrees and otherwise, has reduced the pool of commercial cargo to which WL once had access and has placed much of that cargo in the government "pool" to which WL does not have access. Whether we approve or disapprove the agreements before us does not decrease or have any effect on the pool of cargo inaccessible to WL.

We are told, by WL quite naturally, that approval of the agreement here will "involve the United States in 'national interest' discrimination." This particular piece of hyperbole is grounded on a poor choice of words. By approving Agreement 9939 we are not adopting bilateralism as part of the maritime policy of the United States (see *Revenue Pools, U.S./Brazil Trade,* 14 F.M.C. 149 (1970)); and neither are we giving our endorsement to another government's expression of national interest in the carriage of its cargo for the purpose of enhancing its merchant marine. WL's concern is its exclusion from the carriage of the cargoes covered by the agreement. But this may not be unlawful discrimination. As we understand discrimination, there must first be a right enjoyed and that right abrogated before there can be discrimination. We can find no such right of WL to the cargo covered by Agreement 9939. WL certainly has no right to cargo controlled by the Peruvian government, unless that government says it has, and of course Peru has expressly denied any such right. The same holds true for cargoes controlled by our own government. Public Resolution 17 authorizes the Maritime Administration to grant waivers for cargoes shipped under it to the national-flag carriers of the countries receiving those cargoes. Indeed, to the extent that Public Resolution 17 restricts waivers to those granted to the national-flag carriers of the recipient nations, it embodies a form of bilateralism. Section 901(b) of the 1936 Act leaves to the discretion of the Maritime Administration the grant of waivers to particular flags. Discretionary action vests no rights. Since WL enjoys no right to the cargoes in question, there can be no discrimination as between carriers, in the statutory sense at least. Consequently, all we are doing here is judging an agreement under the criteria of section 15 of the Shipping Act. If the agreement meets those criteria, it should be approved, whatever nationalistic motives may have engendered it.

We are also told that approval of Agreement 9939 would be detrimental to the commerce of the United States within the meaning of section 15. This detriment would come from the elimination of WL from the U.S. West Coast/Peru trade, which WL says is the purpose of the agreement and the possible result of any approval of it. WL reminds us that our duty to accord all carriers, regardless of flag, equal treatment under the Shipping Act demands that we preserve WL's service in this trade. *Inter-American Freight Conference,* 14 F.M.C. 58 (1970). In other words, WL has a "right" to preserve its "share" of the trade. Even if any nation's carriers can be said to enjoy a right to participate in the commerce of another sovereign nation, such a right is in no sense an unlimited one.

Any right granted to WL to participate in this country's commerce is enjoyed subject to the limitations imposed by the Shipping Act and any other relevant federal law. It stems from the proposition that since carriers as well as cargoes are part of the commerce of the United States, anything detrimental to carriers may be detrimental to that commerce. But this proposition is grounded upon a very practical reality. Rarely, if ever, has any one country had a merchant fleet sufficient to carry its total foreign commerce. The insufficiency is made up from ships of the fleets of other maritime nations. It is for this reason that third-flag or cross traders are considered an important part of the commerce of the United States. And what we say here should not be taken as demonstrating any diminishing of our concern for their well being. It is simply that they are but one of many interests, all of which are owed our concern and protection. It is impossible to completely satisfy all of those interests. All that this Commission can do is balance the interests and reach our best judgment under the laws we administer.

Under section 15 we must and do give the same measure of fair protection to a third-flag vessel that we do to an American-flag vessel. This does not necessarily mean that the third-flag vessel always receives identical treatment, for that third-flag vessel may be burdened by handicaps or impediments not burdening an American-flag vessel. Thus, WL cannot qualify to become an "associated" line of CPV because it, WL, unlike PGL, cannot assist CPV in obtaining access to U.S. government-controlled cargo, whereas PGL can do so. In this, we find nothing startling for even vessels under U.S. flag do not operate with identical rights and privileges. Thus, foreign-built vessels (with minor exceptions) may not operate in our coasting trades (46 U.S.C. 11). Thus, foreign-flag vessels which are placed under U.S. flag must be documented under U.S. flag for a period of three years before they become eligible to carry government-impelled cargo (46 U.S.C. 901(b)(1)).

We think it abundantly clear that the Shipping Act is not an insurance policy granting unqualified protection to all carriers serving our commerce at any given point in time. The Act only affords protection to a carrier from those statutorily prohibited actions of others. Agreements between carriers are, of course, permitted by section 15 of the Act, and it is an agreement which WL asserts may cause its elimination from this trade. While we do not from the record before us think that WL will leave the trade, WL asserts that its departure standing alone would create such a detriment to commerce as would warrant disapproval of the agreement. We think not. "Detrimental to the commerce of the United States" is but one of the criteria of section 15. While a contrary finding under any one of the four criteria of section 15 can support disapproval, all of the parts make a legislative whole and must be considered. The Shipping Act itself and section 15 especially is the prime example of this necessary balancing of interests. The antitrust laws represent a national policy of this country which is considered to be in the public interest. Section 15 provides an exemption from those laws, but only if the agreement exempted is not found, *inter alia,* detrimental to the commerce of the United States. And so, any grant of the exemption must be scrutinized to insure that it does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the Shipping Act. Just so must detriment to commerce be tested against the public interest.

The public interest in intergovernmental harmony is clear. That Agreement 9939 is a factor in continuing harmonious relations between our government and the government of Peru seems equally clear. But it is nevertheless asserted by WL that the agreement is contrary to the public interest because it will reduce competition without any showing that the agreement is designed to secure important public benefits.

In this case we have a series of decrees patently demonstrating that Peru has embarked upon the same course as that taken by most other Latin American maritime nations. Our experience has shown that, absent commercial resolution through agreements such as No. 9939, or otherwise, governmental confrontation follows. When no agreement can be reached between the carriers, the trade is disrupted, malpractices ensue and virtually everybody suffers. The public interest dictates that this state of affairs is to be avoided wherever possible. Here, the agreement between the national-flag carriers has been reached. The prospects for continued harmony are good, thus the agreement would appear to be in the public interest. Certainly, this result is not contrary to the public interest.

The Administrative Law Judge's conclusion that the agreement would have a substantial adverse effect on WL is based on the testimony of WL's witnesses, all of whom admitted that control over the future of WL was in the exclusive control of the home office in Norway. No witness from the home office testified. The same witnesses agreed that in a reasonably accurate forecast of WL's future in the Peru trade consideration must be given to the overall operation of WL, i.e. not only the southbound Peru trade, but the southbound trade to all of South America plus the wayport cargo between South American countries plus the northbound trade. No such evaluation of the overall trade had been made by any of the witnesses. The conclusion that WL would be harmed appears to be based on the testimony quoted at page 15 of the Initial Decision:

> It is I think a fairly safe statement that no line serving in this trade around South America could survive on nothing but base cargo . . . any line that operates must have a reasonable mix of base cargoes and the higher rated cargoes which are available in order to make a reasonable return.
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> * * * *
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> . . . in order to maintain our service we are going to have to be able to participate in the other cargoes that do move, the other better paying cargoes that move.

One can hardly quarrel with this truism; the difficulty lies in finding support in the record for the forecasted exclusion of WL from the better paying cargoes. The Administrative Law Judge admits that the record here is insufficient to allow an accurate forecast as to what cargoes will be left to WL if the agreement is approved, and we agree with him. We do not, however, agree that the reasonable probability of substantial adverse effect on WL has been shown. That there will be some cargo lost to WL everyone seems to admit, but on how much there is wide disagreement. On balance, we conclude that WL has failed to demonstrate such a reasonable probability of harm sufficient to warrant disapproval when weighed against the benefits gained by approval of the agreement. In sum, we cannot find from this record that approval of Agreement 9939 will be discriminatory or unfair as between carriers, detrimental to the commerce of the United States or contrary to the public interest.

However, our Brother Morse, notwithstanding his arrival at this same conclusion, doubts WL's future survival in the trade and would condition his approval on "the requirement that PGL obligate itself to initiate and maintain adequate and regular service to those shippers of lumber and woodpulp now served by WL in the event WL withdraws from the trade during the existence of Agreement No. 9939." We think the imposition of any such future operational requirement ill advised. We see no difference between the disapproval of agreements because of future "speculative possibilities" [7] and the imposition of operational requirements as a condition to approval because of "doubts" as to what the future holds for a line in the trade. But more importantly perhaps, we do not see, and neither would it appear does our Brother Morse,[8] the nexus between approval of No. 9939 and the future "demise" of WL. If it should turn out that WL withdraws from the trade for reasons other than the agreement, it is hardly just to require PGL to undertake the abandoned service without regard to either PGL's operational needs and desires or the needs and desires of the shippers under the guise of "conditioning" our approval of the agreement. If, on the other hand, the reasonable likelihood arises that WL is to be forced out of the trade because of the future impact of the agreement (an event we view as entirely unlikely) then is the time to reexamine the agreement and take whatever action is required.

The Administrative Law Judge further concludes that if approved, Agreement 9939 would subject the "particular traffic involved to undue or unreasonable prejudice or disadvantage" in violation of section 16 of the Shipping Act. Presumably, this conclusion is grounded on some detriment to shippers of the traffic involved who are now using WL and would not be able to do so if the agreement is approved. This in turn is presumably predicated, at least in part, upon WL's abandonment of the trade. We say presumably because the Administrative Law Judge does not preface this conclusion with any of his reasons for it. However, we do not think on the basis of the record before us that any particular traffic will be unduly prejudiced by approval of the agreement.

There remains the issue of whether approval of the agreement would be contrary to the terms of the 1928 Treaty of Friendship, Commerce and Navigation between the United States and Norway, Article 7 of which provides in relevant part:

> All articles which are or may be legally imported from foreign countries into ports of the United States or are or may be legally exported therefrom

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[7] See *Alcoa S.S. Co. Inc.* v. *Cia. Anonima Venezolana*, 7 F.M.C. 345 (1962); *West Coast Line, Inc.* v. *Grace Line, Inc.*, 3 F.M.B. 586 (1951).

[8] In his concurring opinion, Commissioner Morse says, "Whether Agreement No. 9939 is approved or disapprover, I am not convinced W-L will be unable to survive in the trade provided the existing level of 'unreserved' cargo is not materially reduced."

in vessels of the United States may likewise be imported into those ports or exported therefrom in Norwegian vessels, *without being liable to any other* or higher duties or charges whatsoever than if such articles were imported or exported in vessels of the United States; . . . .

We conclude that our approval of the agreement does not violate the Treaty. Our obligations under the Treaty are not enlarged by the action of the Peruvian government in establishing cargo preference rules. The Treaty provisions are limited to prohibiting restrictions imposed by the signatory governments, and do not prevent this Commission from approving a commercial agreement although it may be precipitated in part by restrictions of another trading partner. WL's status in the oceanborne commerce of the United States is effected not by the Commission's action on the agreement, but by the action of the government of Peru. In any event, there is another controlling factor. While treaties and federal statutes are on equal footing under the Constitution as the supreme law of the land, the latest action expresses the controlling law. *Tag v. Rogers,* 267 F.2d 664 (C.A.D.C. 1959). The treaty with Norway was proclaimed in 1932, while Public Resolution No. 17 was enacted in 1934, and section 901(b)(1) of the Merchant Marine Act, 1936, was enacted in 1954. Thus, the latter two control and the treaty is not violated by our approval.

On the basis of the foregoing, we conclude that Agreement 9939 should be approved under section 15 of the Shipping Act, 1916. An appropriate order shall be entered.

Commissioner Clarence Morse concurring.

In concurring with the majority to approve Agreement No. 9939, I do so subject to the following comments and conditions.

It is to be noted that Agreement No. 9939 is so drawn that W-L, as a third-flag operator, cannot qualify for admission.

The aggregate tonnage carried annually in the years 1968, 1969, and 1970 ranged from 44,000 to 48,000 tons. In 1970, lumber aggregated 11,122 tons, and therefore all other cargo constituted 36,811 tons. The record does not disclose which commodities were "reserved cargo", but, bearing in mind that W-L carried nearly 90% of the lumber in 1970, it is reasonable to assume that little or no lumber was in the "reserved cargo" category. Accordingly, if we apply the 50% (the minimum estimate) for "reserved cargo" to the 36,811 ton figure, it is obvious that no more than 18,405 tons of cargo is not "reserved". This 18,405 tons of unreserved cargo which is fully accessible on a competitive basis to all three competing lines is to be compared with W-L actually carrying in 1970 11,357 tons of cargo exclusive of its lumber carrying, and it is unlikely that W-L will be able to obtain this high proportion of the unreserved cargo if Agreement No. 9939 is approved.

We are faced with the question whether the Agreement under consideration is *unjustly* discriminatory or unfair to W-L. Section 15 does not authorize us to disapprove an agreement merely because the agreement is discriminatory or unfair to an American-flag vessel or is discriminatory or unfair to a Norwegian-flag vessel. Section 15 authorizes disapproval only if the agreement is *unjustly* discriminatory or unfair. Here the *unjust* discrimination or unfairness stems immediately from the Peruvian laws and decrees—not from our approval of Agreement No. 9939. Here undoubtedly there will be some additional minor discrimination or unfairness to W-L if we approve Agreement No. 9939, but in my opinion neither the pooling of revenues nor the provision obligating PGL to assist CPV in obtaining access to U.S.-impelled cargoes nor the provisions relating to sailings constitute *unjust* discrimination or unfairness to W-L. The revenue pooling affects only CPV and PGL, not W-L. The sailings provisions of Agreement No. 9939 do affect W-L, but not in an unjust degree. They confront W-L with a more rationalized competition, but not with a substantially greater degree of competition. Heretofore W-L has had access to such "reserved" cargo which CPV itself was unable to carry. CPV is now placing additional vessels in the trade, and thus CPV will carry more "reserved" cargoes itself, so that prospectively there would be much less opportunity for W-L to gain access to any such cargo even absent Agreement No. 9939. Hence, enabling PGL to become an associate of CPV may prejudice W-L, but it does not unduly prejudice W-L. The access by CPV to U.S.-impelled cargoes affects W-L only in a minor way, for all U.S.-impelled cargoes are but 10% of the trade and, at most, W-L has had access to but half thereof.

Lumber and wood pulp. Because of the possibility that W-L may withdraw from the trade and thereby leave a void insofar as shipping services to U.S. exporters of lumber and wood pulp are concerned, I condition my approval of Agreement No. 9939 with the requirement that PGL obligate itself to initiate and maintain adequate and regular service to those shippers of lumber and wood pulp now served by W-L in the event W-L withdraws from this trade during the existence of Agreement No. 9939.

Over the years W-L has provided a needed and efficient service to this Pacific Coast export commerce of the United States. Its elimination from the trade could impair that commerce. Until the Congress or the Executive Branch adopts the principle of bilateralism as a policy, it is my view that this Commission should endeavor to make some accommodations to assure the opportunity of established third-flag vessels in our trades to survive. The majority makes no attempt toward such an accommodation. That accommodation exists, by agreement of the involved parties, in Agreements 10027, 10028, and 10029, covering the trades from Brazilian ports to U.S. Atlantic and Gulf ports, which we approved on January 30, 1973. That type of accommodation would be consistent with the philosophy of section 15.[9]

We would be "buying a pig in a poke" to accept the Peruvian decrees as a fact of life and to unconditionally approve an agreement granting to the two national-flag carriers equal access to Peruvian "reserved" (U.S. export commercial) cargo, the tonnage of which and the commodities covered determined or to be determined solely by existing or by future Peruvian decrees and actions. I would reconsider my approval if I thought that the Peruvian laws and decrees are or will be so implemented that substantially less than 50% of the aggregate cargo

[9] Agreement No. 9939, in my mind, is inextricably intertwined with Peruvian laws and decrees and is one of the means utilized to accomplish Peruvian shipping goals. But equal access to our commercial cargoes is the shipping philosophy the Congress has expressed in our many treaties of friendship, commerce, and navigation. We are not here dealing with a simple agreement between two commercial interests. We are dealing with an agreement virtually dictated by the Peruvian Government acting through CPV (See Footnote 6). It is unlawful to carry out that agreement absent our approval. When this Commission approves an agreement under section 15, it places the Government's "thumb of (approval) upon the scales." *PUC* v. *Pollak*, 343 U.S. 451, 462 (1952). Hence, when this Commission approves that agreement we are not too far removed from establishing a government-to-government agreement. Thus, the question arises whether this Commission, at its level in Government, is authorized to take action which would appear to run counter to our treaty obligations. Hence, the question arises whether this Commission, at its level in Government, has jurisdiction under section 15 to approve an agreement which departs from our treaties' shipping philosophy or, alternatively, whether that philosophy is but one of many factors, as, for example, the antitrust laws, which we must take into consideration under section 15 in reaching a decision to approve or disapprove. *Sacramento-Yolo Port District* v. *PCEC*, 15 F.M.C. 15, DKT 70-18 (1971). *Isbrandtsen Co.* v. *U.S.*, 211 F.2d 51, 57 (CA DC 1954).

is classed as "unreserved" cargo accessible to W-L and the other two carriers. The concept of full bilateralism by the unilateral action of one of two trading partners to the exclusion of third-flag operators is one which I am not prepared to accept as a basis for approval of section 15 agreements. Our concept of equal access to commercial cargoes should compel some reasonable accommodation between the desires of countries striving to build up their national merchant fleets and the rights of U.S.-flag and third-flag operators.

We must grant the same even-handed justice to W-L which we would grant to an American-flag line or to a Peruvian-flag line. We must do this not only because of the directives of the Shipping Act, 1916, but also because of our Treaty with Norway. In actions taken under section 15, we need not treat W-L any more favorably than we would treat an American-flag operator suffering under the same impediments which apply in this trade to W-L, i.e., the inability to assist CPV in gaining access to carry U.S. Government-controlled cargo. Hence, I ask myself, "Would I approve Agreement No. 9939 if the opponent were an American-flag operator subject to the same impediments which are applicable to W-L?" My answer to that question, for the reasons herein stated, is "Yes, subject to the condition and the reservation herein mentioned."

It must always be remembered that the major impediments to W-L are the increased number of Peruvian-flag vessels in the trade and the Peruvian laws and decrees—not Agreement No. 9939. Whether Agreement No. 9939 is approved or disapproved, I am not convinced W-L will be unable to survive in the trade provided the existing level of "unreserved" cargo is not materially reduced. It is urged by PGL that if we approve the Agreement the Peruvian laws and decrees will be enforced in a manner not seriously impairing the opportunities of W-L. That remains to be seen. We have little control over the increase in the number of Peruvian-flag vessels in the trade. Likewise, the Peruvian laws and decrees are actions taken by a sovereign in its self interest. But we do have available to us section 26, Shipping Act, 1916 (46 U.S.C. 825), which could be utilized on behalf of PGL, and we also have available section 19, Merchant Marine Act, 1920 (46 U.S.C. 876) which enables us to make rules and regulations to "adjust or meet general or special conditions unfavorable to shipping in the foreign trade . . . and which arise out of or result from foreign laws, rules, or regulations . . ." The options available to us are to approve the Agreement (with or without conditions or modifications) or to disapprove the Agreement and resort to sections 19 or 26. I have opted to approve the Agreement, but with the caveat that Peruvian laws and decrees be not implemented in a manner which burden W-L beyond that degree which in practice presently exists. We, by our actions, must not unjustly worsen the position of W-L, and this with reservations I conclude we do not do.

Attached as an Appendix to the Initial Decision (Apr. 5, 1972) is a listing of approved pooling agreements. With the exception of Agreements 9020, 9233, 9847, and 9848, the Agreements were not protested. A few of these agreements are true bilateral agreements—others are multi-party agreements including third-flag lines. In my opinion, the approval of a pure bilateral agreement, absent any protest, does not establish, ipso facto, Commission policy to approve all such agreements. Such agreement, had protest been filed, would have proceeded through a contested hearing in which facts and circumstances may have been developed, and which were not developed where no protest was filed, compelling disapproval under section 15. Hence, I find policy is not necessarily established by an approval, absent any protest.

If my condition relative to W-L is not adopted I would disapprove Agreement No. 9939.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-71

AGREEMENT NO. 9932—EQUAL ACCESS
TO GOVERNMENT-CONTROLLED CARGO AND
INTERIM COOPERATIVE WORKING ARRANGEMENT

AGREEMENT NO. 9939—POOLING, SAILING AND EQUAL ACCESS
TO GOVERNMENT-CONTROLLED CARGO AGREEMENT

ORDER

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That Agreement No. 9939 is hereby modified to add to Article 8 a requirement that copies of all quarterly provisional and final pool statements, pursuant to Article 8 of the agreement, be furnished the Commission; also that a new Article 18 be included to read as follows:

Further Agreement of the Parties—Any further agreement or understanding of the parties, pursuant to or giving effect to Articles 5, 11 and 17 shall not be effective or implemented prior to the time that an appropriate amendment with respect thereto has been filed with and approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 1916.

It is further ordered, That Agreement No. 9939, as so modified, is hereby approved under section 15 of the Shipping Act, 1916.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 455

MAGNOLIA FORWARDING COMPANY

v.

DELTA STEAMSHIP LINES, INC.

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

April 10, 1973

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 10, 1973.

It is ordered, That applicant is authorized to waive collection of $2,513.00 of the charges previously assessed Magnolia Forwarding 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 455 that effective February 19, 1973, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 19, 1973 through February 26, 1973, the rate on 'Boats, viz. Aluminum' is $32.50 W/M, 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.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 455

MAGNOLIA FORWARDING COMPANY

v.

DELTA STEAMSHIP LINES, INC.

Application to waive a portion of freight charges granted.

INITIAL DECISION OF HERBERT K. GREER,
ADMINISTRATIVE LAW JUDGE[1]

Delta Steamship Lines, Inc., a common carrier by water in the foreign commerce of the United States, has applied for permission to waive a portion of the freight charges on a shipment of aluminum boats for Magnolia Forwarding Company from New Orleans, Louisiana, to Puerto Cortez, Honduras, pursuant to a bill of lading dated February 19, 1973. The shipment weighed 2,868 pounds and measured 2,365.18 cubic feet.

Prior to the shipment, applicant's tariff on file with the Commission provided no specific rate for boats and the Cargo N.O.S. rate of $75.00 W/M was applicable. On or about February 1, 1973, Magnolia Freight Forwarding Company offered applicant 16 aluminum boats destined for Puerto Cortez but stated they were unable to pay the $75.00 W/M rate which would result in an exhorbitant charge. Applicant, realizing that the rate applied to the commodity involved would be excessive, agreed to carry the boats at a rate of $32.50 W/M. Applicant intended to file this rate with the Commission but through inadvertence it failed to do so, and the applicable rate on file at the time of the shipment was $75.00 W/M. When applicant became aware of its oversight, it promptly filed 3rd revised page 57, effective February 26, 1973, to its tariff which specified:

[1] This decision became the decision of the Commission April 10, 1973.

Boats, viz:

Aluminum	W/M	32.50

The difference between the freight collectible at the rate on file at the time of the shipment and the freight which would be collected at the rate applicant intended to file is $2,513.00, the sum sought to be waived.

The facts demonstrate a situation within the purview of Public Law 90-298 which authorizes the Commission, for good cause shown, to waive collection of a portion of the freight charges when there is an inadvertent failure on the part of a carrier to file a new tariff. The application was filed within 180 days of the days of the date of the shipment and no other shipments of the same or a similar commodity moved on applicant's vessels during approximately the same time as the shipment here involved. No other proceeding involving the same rate situation is now pending.

Good cause appearing, and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of $2,513.00 of the freight charges on the shipment above described is granted. Applicant shall publish notice in its tariff as required by the statute. The waiver of the charges here authorized shall be effectuated within 30 days of the service of the notice and within 5 days thereafter applicant shall notify the Commission of the date and manner of effectuating the waiver.

(S) HERBERT K. GREER
Administrative Law Judge

Washington, D.C.
MARCH 21, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-6

IN THE MATTER OF AGREEMENT NO. T-2719

Louis Dreyfus Corporation determined not to be an "other person" subject to the Shipping Act, 1916, within the meaning of section 1 of that Act. Accordingly, Agreement No. T-2719 found not to be agreement between two persons subject to the Shipping Act, 1916, which must be filed for approval under section 15 of that Act.

William E. Stapp, Clifford W. Youngblood and *Max Hendrick III* for Port of Houston Authority.
John H. Perkins, Jr. for Louis Dreyfus Corporation.
Judah Best for Cook Industries, Inc.
Robert Eikel for West Gulf Maritime Association.
Donald J. Brunner and *Patricia E. Byrne* as Hearing Counsel.

REPORT

April 20, 1973

BY THE COMMISSION: (George H. Hearn, Vice Chairman; Ashton C. Barrett, James V. Day and Clarence Morse, Commissioners)

By Order served February 26, 1973, the Port of Houston Authority (PHA) and the Louis Dreyfus Corporation (Dreyfus) were directed to show cause why (1) Dreyfus should not be found to be an "other person subject to the Act", as defined in section 1 of the Shipping Act, 1916, and (2) Agreement No. T-2719 between PHA and Dreyfus should not be found subject to section 15 of the Act. The Commission's Order to Show Cause limited the proceeding to the submission of affidavits and memoranda of law and replies thereto and, further, the procedure to be followed by any party requesting an evidentiary hearing.

Respondents Dreyfus and PHA have now filed memoranda of law and affidavits of fact to which Cook Industries, Inc. (Cook) and Hearing Counsel have replied. Cook, in accordance with the procedure set forth in the Commission's Order, has also submitted a request for an evidentiary hearing,[1] to which PHA and Dreyfus have filed responses in opposition.[2]

FACTS

This proceeding was prompted by the filing of an agreement, subsequently designated Agreement T-2719, between Dreyfus and PHA, whereby PHA will lease the grain elevator facilities at Houston, Texas, to Dreyfus for a period of ten years.

The lease provides, *inter alia,* that Dreyfus will operate these facilities as a grain elevator in connection with shipments to and from Houston, will receive prior right to use the berths and breathing facilities in conjunction therewith, will not be required to hire PHA employees, or to assume any employee agreement that pre-existed the lease, and will establish rules and regulations governing the operation of the grain elevator and the use of the berths and berthing facilities.

Finally, the Agreement is subject to a prior lease of a portion of the facilities to the I. S. Joseph Company (Joseph), which is engaged in pelletizing ". . . a number of different soft or powdery substances or ingredients" and in exporting the pelletized product. Presently, PHA loads this pelletized product into vessels, including common carriers, calling at the elevator facility.

Dreyfus has heretofore filed a proposed tariff provision which provides, *inter alia,* that:

> Common carriers by water, as defined by the Shipping Act of 1916, shall not be accepted for loading at the elevator.

Mr. Burton M. Joseph, President of the I. S. Joseph Company, has filed an affidavit on behalf of his company advising that "it would be bound by the provision in the proposed

[1] West Gulf Maritime Association (WGMA) has filed a document in support of Cook's request for evidentiary hearing and has, alternatively, requested permission to intervene herein. While the petition to intervene was not timely filed we will nevertheless grant it. Accordingly, any discussion directed to Cook's request for evidentiary hearing will apply equally to WGMA.

[2] To the extent Dreyfus' "Response to Request for Evidentiary Hearing" improperly constitutes a reply to the formal Replies filed by Cook and Hearing Counsel, it is stricken from the record and not subject to consideration by the Commission in its disposition of this proceeding.

Dreyfus tariff that common carriers are excluded from the elevator facility" and that, accordingly, it "will *not* use common carriers for shipping its products from this elevator facility" once the lease between Dreyfus and PHA becomes effective.

DISCUSSION AND CONCLUSION

Section 15 of the Shipping Act, 1916, requires, in pertinent part, that:

> Every common carrier by water, or other person subject to . . . [the Act] . . . shall file immediately with the Commission a true copy . . . of every agreement with another such carrier or other person subject to this Act . . . to which it may be a party . . . .

An "other person" subject to the Act is defined in section 1 thereof as being:

> . . . 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.

The Port of Houston Authority is clearly such an "other person". It operates terminal facilities at Houston, including at the present the grain elevator in question here, and as a result furnishes wharfage and other services in connection with common carriers for which it has terminal tariffs on file with this Commission.

Since there is no reason to believe that Dreyfus is a "common carrier by water" the basic issue to be resolved in this proceeding remains whether Dreyfus is an "other person" within the meaning of the Act. If Dreyfus is in fact such an "other person", then Agreement No. T-2719 between it and PHA, is one between two "persons" subject to the Act which must be filed and approved by the Commission pursuant to section 15 prior to its effectuation. Thus, the jurisdictional issue presented here is very narrow and turns entirely on Dreyfus' status under the Act.[3]

[3] In making this determination we have rejected as being wholly without merit Dreyfus' alternative contention that even were it found to be a "person" subject to the Act, the Commission nevertheless lacks jurisdiction over the agreement under section 15 because the agreement is a "simple landlord tenant lease" and does not contain and provisions which would require Dreyfus to act in a restrictive, discriminatory or anticompetitive fashion. In cases too numerous to mention, the Commission has found arrangements of the type reflected in the lease between PHA and Dreyfus to be subject to the requirements of section 15.

Section 15 requires, *inter alia*, filing of the agreements which provide for:

[Footnote continued]

On this point we find the Commission's decision in *New Orleans Steamship Association* v. *Bunge Corporation,* 8 F.M.C. 687 (1965) to be controlling. In that case the Commission held that an operator of a terminal grain elevator who had filed a tariff indicating that common carriers would not be served at that facility was, as a result, no longer subject to the Act, because it was not furnishing services "in connection with a common carrier by water", and therefore was not required to file certain agreements for Commission approval. The situation here closely parallels the one existing in *Bunge,* and the distinctions that might be drawn between the two are not, we believe, material.

The determinative factor here is that neither Dreyfus, nor Joseph, the holder of a lease to which Agreement T-2719 is made subject, intends to serve common carriers by water at the grain elevator facilities under consideration herein. Under the proposed tariff filed by Dreyfus, to which Josephs has stipulated it would be bound, common carriers "shall not be accepted for loading at the elevator". Since this is the identical wording of the exclusionary tariff provision which was found to oust this Commission of jurisdiction in *Bunge,* and since we see no reason to distinguish the two cases on other grounds, we conclude that Dreyfus is *not* an "other person" subject to the Act within the meaning of sections 1 and 15 thereof. As we have heretofore indicated, this determination alone is disposi-

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[3] [Continued]

> . . . fixing or regulating transportation rates or fares: giving or receiving special rates, accommodations or other special privileges or advantages: . . . or in any manner providing for an exclusive, preferential or cooperative working arrangement.

Agreement T-2719 falls squarely within the three above listed catagories determinative of section 15 agreements.

As Hearing Counsel have so succinctly pointed out, since the agreement at issue provides for (1) an *exclusive arrangement* whereby only Dreyfus will occupy and operate the grain elevator at Houston, and (2) a *preferential* arrangement whereby Dreyfus is given prior right to use the berthing facilities at such elevator, it is clearly one providing for "special accommodations or privileges" and for an "exclusive" or "preferential working arrangement" within the meaning of section 15. Moreover, since PHA under the Agreement agrees not to "increase dockage fees at the Leased Premises above its published dockage fee applicable at all public wharf facilities" at the Port, Agreement T-2719 would also appear on its face to provide for the "fixing or regulating of transportation rates" as used in that section. In addition, the Commission has by interpretative rule (46 CFR 530.6(c)) required the filing of agreements between persons subject to the Act which, *inter alia,* deviate from established tariff charges through fixed rental in lieu of tariff rates. Since the rentals provided in the lease here are fixed and are in lieu of the otherwise applicable terminal tariff rates, Agreement T-2719 would under the Commission's own clear and unambiguous ruling be required to be submitted for approval, given two persons subject to the Act.

Thus, contrary to Dreyfus' assertions, the Commission's jurisdiction over the *subject matter of the Agreement* at issue here is supported by any one of a number of reasons.

tive of the jurisdictional issue before us. Accordingly, Agreement T-2719 is found not to be one subject to the provisions of section 15 which must be submitted to the Commission for approval.

The fact that Agreement T-2719 does not itself preclude Dreyfus from serving common carriers at the leased facilities does not sway us from this view. There is nothing in the Shipping Act, 1916, or, specifically, section 15 thereof, which militates against our going outside the provisions of an agreement to determine the status of the parties thereto. Indeed, in *A. P. St. Philip, Inc.* v. *Atlantic Land & Improvement Co.*, 13 F.M.C. 166 (1969), the Commission, in reviewing a terminal lease agreement, found it "necessary to go beyond the specific provisions of the lease" to ascertain whether Atlantic, one of the parties thereto, was a "person" subject to the Shipping Act. Although the lease under consideration in *A. P. St. Philip, supra,* indicated on its face that Atlantic was not a furnisher of terminal facilities within the meaning of section 1 of the Act and therefore not an "other person" subject to the Act, the Commission, relying on "Atlantic's own admissions and its actual activities" found that Atlantic was in fact such an "other person".

Dreyfus here has posted an appropriate exclusionary tariff provision and otherwise made it clear that common carriers by water will not be served at the lease facilities. The Commission simply cannot ignore this tariff nor the affidavits which have been submitted, indicating that common carriers will not be served at the lease premises. These matters are determinative of Dreyfus' status under the Act upon which our jurisdiction is dependent, and, therefore, must be considered by the Commission along with the Agreement itself. Certainly, if the Commission can, as it did in *A. P. St. Philip, supra,* go outside the provisions of an agreement to find a party therto a "person" subject to the Act, the obverse also applies and the Commission should consider matters extrinsic to an agreement, even if they should serve to oust it of jurisdiction.

While it may conceivably be argued that the Commission cannot take into consideration in this proceeding the proposed tariff provision that no common carriers will be served at the subject grain elevator because Dreyfus presently lacks the control over the lease facility necessary to issue such a tariff, such an argument clearly evades the issue. The fact is that

Dreyfus and Joseph, which has elected to be governed by Dreyfus' tariff provision, have served notice that common carriers will *not* be accommodated at the grain elevator. The obvious intentions of these parties in this regard can not be disregarded. To do so and require the Agreement under consideration to be subjected to a hearing solely because it does not, on its face, preclude the serving of common carriers at the leased facilities is not only to overlook the realities of the situation but also to impose on the Commission the performance of a meaningless act. Since Dreyfus and Joseph have already formally advised that they do not intend to load common carriers at the elevator facility, we fail to see why the parties to this proceeding and the Commission should be subjected to the lengthy and costly hearing,[4] which the approval of Agreement T-2719 might entail, only to have Dreyfus *subsequently* oust the Commission of section 15 jurisdiction through the filing of an appropriate tariff. In this era of enlightened regulation, we can conceive of no purpose to be served by such an exercise.

While not conceding that the Dreyfus tariff or the Joseph affidavit are relevant to the Commission's consideration of Agreement T-2719, Cook has taken the position in this proceeding that even if these matters are considered, they are not sufficient to support the conclusion that the terminal facilities will not be open to common carriers by water. In support of its argument that the matters indicating that Dreyfus is *not* an "other person" subject to the Act are inconclusive, Cook contends that the jurisdictional question presented herein raises "disputed material issues of fact" which can only be resolved in a full evidentiary hearing. Accordingly, we have been requested to consolidate this proceeding for hearing with the investigation now under way in companion Docket No. 73-7.[5] Specifically, the disputed "material issues of fact" which Cook maintains can only be resolved through an evidentiary hearing

[4] This is not to mention the possible needless hardship and financial detriment which a delay in reaching the necessary conclusion in this proceeding occasioned by any unnecessary evidentiary hearing might inflict on the parties o the Agreement.

[5] The Commission instituted Docket No. 73-7 to determine:

1. Whether Agreement T-2719, if found subject to the requirements of section 15, should be approved, disapproved, or modified pursuant to that section;

2. Whether the implementation of Agreement T-2719 will result in any practice which will subject any person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act, 1916, and/or;

3. Whether the implementation of Agreement T-2719 will result in any practice which is unjust or unreasonable in violation of section 17 of the Shipping Act, 1916.

are whether, under the Agreement, the subject terminal facilities (1) are open to use by common carriers by water, or (2) will be used by common carriers by water. In support of the proposition that the terminal facilities are open to common carriers and will be used by such carriers, Cook states that it intends to prove that (1) PHA's residual rights under Agreement T-2719 to use the berths will keep the subject terminal facilities open to common carriers; (2) the Joseph Lease "will require" or "will in fact result in" use of the elevator by common carriers; (3) the rights of PHA or Dreyfus under the subject Agreement "will inevitably result in" use by common carriers; and (4) there is sufficient likelihood that Dreyfus itself will resort to common carriers, notwithstanding its own tariff.

We cannot agree that an evidentary hearing is necessary to resolve the narrow jurisdictional issue presented in this proceeding. We have carefully reviewed the basis of Cook's request for evidentiary hearing, and we find that the matters which it would allegedly develop at a hearing are either already established to the contrary, irrelevant to the present inquiry [6] or wholly speculative in nature and not "facts" which could be adduced at a hearing.

The matters upon which Cook urges the need for a hearing are for the most part not "facts" at all, but rather challenges directed to the intentions of Dreyfus, as expressed in its proposed tariff provision, and to the veracity of the Joseph affidavit. Thus, Cook, in questioning the bona fides of the parties to Agreement T-2719, is in effect presenting facts not yet in existence, and then disputing them. In this regard, we agree with Dreyfus that "[n]o issue of fact is presented by Cook's bald assertion that Dreyfus does not intend to do what it has bound itself to do." We find, therefore, that Cook has identified no material issue of fact upon which a hearing is necessary. To direct such a hearing then would be wholly unjustified under the circumstances. Accordingly, we remain of the opinion that the facts are such that the Commission

[6] Thus, one of the "material facts" which Cook "intends to prove" if a hearing is held is that PHA's right to use the berths adjacent to the elevator will keep the subject terminal facilities open to common carriers. An examination of Agreement T-2719, and the map annexed thereto and made a part thereof, clearly indicates that the berths are *not* part of the leased property. Since the facility in question is the grain elevator and the berths referred to by Cook are not part of those leased premises, no hearing is necessary to establish that fact, and any suggestion that the leased facilities *will* be open to common carriers is purely speculative.

can, as it has, resolve the jurisdictional question presented as a matter of law.[7]

We might point out, however, that in finding that Dreyfus is *not* an "other person" subject to the Act, we have done so with the understanding that Dreyfus will in fact place in effect its proposed tariff provision excluding common carriers from the lease facilities and abide thereby. If it should happen, however, that the tariff provision upon which our decision herein is primarily based, is cancelled or common carriers are served, either directly or indirectly,[8] at the lease facility in question, notwithstanding that tariff provision, then the Commission will take appropriate action as it does in any case involving an unapproved section 15 agreement.

An appropriate order will be entered.

Chairman Helen Delich Bentley dissents.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

Chairman Helen Delich Bentley, dissenting:

The ultimate result reached by the majority in this proceeding, i.e., that Agreement T-2719 need not be filed with the Commission for approval pursuant to section 15, is based on the singular finding that Dreyfus, one of the parties to the terminal lease agreement, is not an "other person" subject to the Act within the meanings of sections 1 and 15 thereof. While it may well be that in the final analysis Dreyfus is in fact not an "other person", I cannot agree that this determination can be made on the basis of the facts and information presently before the Commission.

I cannot agree with the majority decision as I believe it is based on an unduly strict and narrow interpretation and application of section 15. The logic of the majority appears to be that if a lessee of a terminal facility announces in a *proposed* tariff that common carriers will not be served at the facility once the lease agreement is executed, this is, without

[7] In view of our findings and conclusion herein, Cook's request for an evidentiary hearing and its request for oral argument are both denied.

[8] This should serve to allay the fears implicit in Hearing Counsel's support of Cook's request for hearing that common carriers who are not served directly at the grain elevator may be served indirectly elsewhere at the Port.

adducing any further probative evidence as to the lessee's status, sufficient to remove such person from the regulatory ambit of section 15. With all deference to my fellow Commissioners, there are, in my opinion, sufficient material issues of fact in this proceeding regarding Dreyfus' status under the Act to necessitate a full evidentiary hearing.

It has long been the established policy of this country that full and open competition is to be encouraged and that concerted action by members of all segments of our business community is to be avoided, but if permitted, strictly and strongly regulated. In enacting section 15 and thereby permitting certain forms of concerted activity which would otherwise be unlawful under the antitrust laws, Congress confided in this agency extensive powers of approval and control as the condition precedent to the carry out of any of such concerted activities covered by the section's rather all inclusive language.

While section 15 admittedly had for its primary purpose the recognition of anticompetitive combinations of common carriers in our waterborne foreign commerce along lines which would eliminate the evils flowing therefrom, the legislative history of the Shipping Act makes it clear that Congress was also seriously concerned with terminal lease agreements. Indeed one of the specific recommendations of the so-called "Alexander Committee", which recommendations were generally followed in framing the Shipping Act, 1916, was that terminal owners "be required to make their terminal facilities available to water carriers on equal terms. . . ."

Section 15, therefore, in investing terminal leases (and this would particularly apply to those involving *public* facilities) with a strong public interest clearly imposed on us the duty of insuring that those who are permitted to enter into such agreements, and thereby engage in activities which would otherwise be unlawful, satisfy its statutory standards at the time that they file as well as continuously thereafter. *In Re: Pacific Coast European Conference,* 7 F.M.C. 27, 35 (1961). As the court explained in *Isbrandtsen Co. Inc.* v. *United States,* 211 F.2d 51 (D.C. Cir. 1954):

> The condition upon which such authority [under section 15] is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute. (211 F.2d at page 57)

To now hold, as the majority has done, that a party to a terminal lease agreement can avoid the Commission's scrutiny over such leases by the single simple expedient of proposing a so-called "exclusionary tariff clause" is to emasculate one of the very powers which Congress intended the Commission to have in order to more properly supervise the shipping industry. I submit that more is required to oust this agency of jurisdiction over an agreement which on its face meets the applicability criteria of section 15. To rule as the majority has done here is to provide a vehicle for parties to agreements otherwise subject to section 15 to manipulate the Commission's authority under that section. To the extent that it will allow for such manipulation, I am seriously concerned with the breadth of the majority's action.

As I interpret today's action by the majority, it means that mere representations by a party will be conclusive as to that party's status under the Act regardless of the fact that such status is not supported by the clear and uncontested language of the agreement in question or otherwise established on the record. The Commission has afforded Dreyfus in this proceeding ample opportunity to supply whatever facts and/or information were necessary to support its position regarding its nonperson status under the Act. Rather than responding in particulars, Dreyfus has been content to rely on its exclusionary tariff provision and the Joseph affidavit, which states that Joseph will not use common carriers at the grain elevator facility. While Joseph in that same affidavit also indicates that it "will, in all likelihood, continue to make some use of common carriers at Houston . . .", "intend[s] to load such vessels at other facilities in the Port," absolutely no explanation is offered as to how this will be accomplished. As noted by the Commission's own Hearing Counsel, "[w]ithout this factual information, the Commission cannot determine whether Dreyfus will be obligated to serve common carriers by water because its lease is subject to the Joseph lease."

Clearly, if Joseph intends to service common carriers by loading grain from the Dreyfus elevator into such carriers elsewhere at the Port, then such action will reflect on Dreyfus' status under the Act. Confronted with this possibility, the majority summarily dismisses it with the threat of future "appropriate action" if the situation turns out to be different than what it "understands" it to be. Thus, rather than investigating the matter thoroughly before denying jurisdiction, the majority is content to adopt a "wait-and-see" attitude and indulge in some "Monday morning quarterbacking". Somehow I don't believe that this regulation-in-retrospect approach is what Congress contemplated when it enacted section 15 and vested its administration in this agency. The mandates of section 15 are not to be taken so lightly.

In conclusion, therefore, I must reiterate that while I do not necessarily disagree with the conclusion reached by the majority, I do disagree with the means used to achieve that result. My opinion is that there exists in this proceeding material issues of fact, as yet unresolved, which require a full evidenitary hearing for their ultimate disposition. Absent the information that this hearing would elicit, especially the effect of Joseph's operations on Dreyfus' status under the Act, the Commission cannot make the necessary findings and determinations in this proceeding.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-6

IN THE MATTER OF AGREEMENT NO. T-2719

ORDER

This proceeding having been initiated by the Federal Maritime Commission and the Commission having this day made and entered a report stating its findings and conclusions herein, which report is made a part hereof by reference,

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

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

SPECIAL DOCKET NO. 454

COLORADO BEVERAGE CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

May 8, 1973

NOTICE OF ADOPTION OF INITIAL DECISION

No exception 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 8, 1973.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 454

COLORADO BEVERAGE CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

May 8, 1973

Application to waive a portion of freight charges granted.

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

This application filed February 26, 1973, by respondent Lykes Bros. Steamship Co., Inc., asks permission to refund a portion of the ocean freight charges on 2,925 cases of rosé wine, listed on three bills of lading, shipped in three forty-foot containers (975 cases in a container), from Bilbao, Spain, via Bremerhaven, Germany, to Houston, Texas, on August 31, 1972. From Houston the wine was transported by rail piggyback to the complainant, Colorado Beverage Co., at Denver, Colorado. The charges for inland transportation are not in issue.

The applicable rate on wine when the three shipments moved was on the weight basis of $70.15 per ton of 1,000 kilos. But, this rate was subject to rule 18.2C of the tariff, which provided that the minimum ocean freight per container was $27.00 per cubic meter based on the inside measurement of the container in the case of transshipped cargo (as distinguished from direct call cargo where the similar container minimum was $21 per cubic meter). The cargo in issue herein was precarried by the SS *Cometa* from Bilbao to Bremerhaven, and there transshipped onto the SS *Ashley Lykes*.

[1] This decision became the decision of the Commission May 8, 1973.

The three containers were furnished by Lykes Bros. Two of the containers apparently each measured about 67.3 cubic meters, and the third container measured about 66.9 cubic meters, all being inside measurements. The bills of lading indicate freight charges, on the basis of rule 18.2C, respectively, of $1,817.10, plus 5.5 percent currency surcharge of $99.94, or a total of $1,917.04 for each of two of the containers; and $1,806.30 plus $99.35, or a total of $1,905.65 for the third container. The total charges for the three containers based on the bill of lading figures is $5,739.73. The application, however, states that the aggregate freight charges actually collected were $5,702.70.

The consignor of the wine was Hiram Walker Europa, S.A. The consignee of the wine is the complainant. At the time of the rate quotation, the consignee-complainant was not informed of the existence of rule 18.2C above and of the consequent minimum container charge in the tariff. Complainant based its costs and sales prices for the wine erroneously on the rate of $70.15 per 1,000 kilos.

Since the complainant's shipments moved, the rate on wine has been reduced, in that there became effective on December 11, 1972, a lump sum minimum of $1,450 per container when the wine is shipped in carrier supplied forty-foot long containers. This new minimum applies to the same rate of $70.15 per 1,000 kilos.

The application seeks a refund based on the new $1,450 container minimum, which makes charges of $4,350 on three forty-foot containers of wine. The refund sought is $1,352.70, the difference between $5,702.70 and $4,350.

This is not an instance of an inadvertent error in the tariff, but it is a situation where the tariff has been changed after the shipments moved. The present application is not the type provided for under section 18(a)(3) of the Shipping Act, 1916. Carriers must charge their lawfully published rates.

Accordingly, the application for permission to refund a portion of the ocean freight charges is denied.

(S) CHARLES E. MORGAN
Administrative Law Judge

Washington, D. C.
APRIL 12, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-9

ROSS PRODUCTS, A DIVISION OF NMS INDUSTRIES, INC. AND TAUB, HUMMEL & SCHNALL, INC.—POSSIBLE VIOLATIONS OF SECTION 16, FIRST PARAGRAPH, SHIPPING ACT, 1916

ADOPTION OF INITIAL DECISION

May 30, 1973

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge John Marshall, served October 16, 1972, in which the Administrative Law Judge concluded that the record did not demonstrate that the practice of Taub, Hummel & Schnall, Inc. (Taub) of showing indifference to apparent discrepancies of descriptions as between shipping documents was of such a degree to constitute a violation of section 16 First of the Shipping Act, 1916, 46 U.S.C. 815 (the Act). Further, the Administrative Law Judge found that the record did reveal that Ross Products (Ross), as a consignee, did violate section 16 First of the Act, indirectly, by knowingly and willfully consenting to the misdescription by the foreign shippers of various commodities on the bills of lading in order to obtain transportation by water of those articles at rates less than those which would otherwise be applicable.

Hearing Counsel excepted to the Initial Decision, while Taub supported the Administrative Law Judge's decision. Ross did not file an exception to the Initial Decision.

The exceptions fall into three distinct categories. The first is a disagreement with the conclusion of the Administrative Law Judge that there is no evidence of record to substantiate that Taub (being the expert) was not in possession of sufficient facts that a misclassification of cargo may have resulted in an improper assessment of freight rates.

The second relates to the standard of duty imposed on Taub. Hearing Counsel contend that Taub, who holds itself out to be qualified to render valuable service to an importer, would have the working knowledge of Customs' tariff schedules and definitions to conclude that the commodities in question should not have been classified as "toys".

The third is directed at Taub's assertion that it is a large corporation with many clerks who simply do not compare information on various documents which were handled by them. Hearing Counsel argue not only is the case law clear that a corporation (such as Taub) is not exculpated because the action which resulted in a violation of law was performed by its employees, but also that the record reflects no evidence presented by Taub that it is a large corporation with many clerks or that more than one such clerk prepared and/or filed documents on behalf of Ross by "simply copying" information from one document to another without knowledge as to the documents' contents.

We find that the exceptions of Hearing Counsel are essentially a reargument of contentions which were exhaustively briefed and considered by the Administrative Law Judge in his Initial Decision. Upon careful consideration of the record, and the exceptions, we conclude that the Administrative Law Judge's factual findings and his conclusions with respect thereto were well supported and correct. Accordingly, we hereby adopt the Initial Decision as our own and make it a part hereof.

Therefore, it is ordered, That this proceeding, as to Taub, will be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

No. 71-9

ROSS PRODUCTS, A DIVISION OF NMS INDUSTRIES, INC. AND TAUB, HUMMEL & SCHNALL, INC.—POSSIBLE VIOLATIONS OF SECTION 16, OPENING PARAGRAPH, SHIPPING ACT, 1916

Ross Products found to have violated section 16, opening paragraph, of the Shipping Act, 1916. Taub, Hummel & Schnall, Inc., not so found.

Seymour Kligler and *David R. Kay for respondent* NMS Industries, Inc.

Albert Adams for respondent Taub, Hummel & Schnall, Inc.

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

INITIAL DECISION OF JOHN MARSHALL, ADMINISTRATIVE LAW JUDGE [1]

By Notice of Investigation and Hearing, served January 22, 1971, the Commission initiated this proceeding pursuant to sections 16 and 22 of the Shipping Act, 1916 (46 USC 815, 821), to determine whether Ross Products, a division of NMS Industries, Inc., and/or Taub, Hummel & Schnall, Inc., violated section 16, opening paragraph, of the Shipping Act, 1916 (the Act), by obtaining transportation by water for shipments of mirrors, immersion heaters, photo albums, glass animals, window chimes, and grass beach mats, at less than the applicable rates by misclassifying the shipments as toys.

THE FACTS

1. Ross Products (Ross), an importing firm located in New York City, was the consignee of the nine shipments here in-

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[1] This decision became the decision of the Commission May 30, 1973.

volved. NMS Industries, Inc. (NMS), is a corporation of which Ross is a division. Taub, Hummel & Schnall, Inc. (Taub), is a customhouse broker and independent ocean freight forwarder (FMC License No. 143), who entered and endeavored to clear these shipments with the Bureau of Customs (Customs).

2. The bills of lading, all of which were within the period April through October 1969, and all of which described the contents of the nine shipments involved in the Commission's Order of Investigation and Hearing as "toys," were prepared in Japan by either Kansai Glass Industries Co., Ltd. of Osaka, Japan, or Far East Trading Corp. of Osaka, Japan, and/or their foreign freight forwarders Rengo Tsuun Co., Ltd. of Kobe, Japan, and Daido Soko Unyu K.K. of Kobe, Japan. As all of these parties are domiciled in Japan, they are, of course, outside the direct jurisdiction of the United States.

3. The Consumption Entry or C.E. and the Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit, otherwise known as the I.T., are the documents Customs uses for inspection. The C.E. is evidence of payment of the duty and is therefore required by Customs for release of the mechandise. The I.T. is a description of the merchandise and a statement as to the quantity in the shipment.

4. Taub prepared and filed the C.E. with Customs from information received from Ross. All of the C.E.s described the shipments as specific commodities and not as toys. The carrier prepared and filed the I.T.s with Customs from information contained in the bills of lading. All of the I.T.s with Customs form information contained in the bills of lading. All of the I.T.s therefore described the shipments as toys and not as specific commodities.

5. Customs does not inspect the cargo until the I.T. is received. Customs verifies the bill of lading description as conforming to the description in the C.E. when the billing covering payment of the duty is given back to the broker. However, Customs' examination of a shipment revealed that it consisted of specific commodities whereas the I.T.s described the merchandise collectively as toys. While the record is not conclusive as to the exact amount, it is clear that the proper rates applicable to specific commodities contained in the nine shipments totaled between $1,800 and $2,000 more than for toys.

DISCUSSION

Preliminarily, reference should be given to respondents' joint motion seeking the dismissal (actually discontinuance) of this investigation on the grounds that the Commission lacks authority to investigate violations of section 16 by consignees and/or customhouse brokers. Although the motion, which was coupled with a contingent request for leave to appeal to the Commission, was denied in its entirety by ruling of the Examiner prior to the hearing herein, and has not since been renewed, on brief or otherwise, the substance and arguments remain of some relevance.

The opening paragraph of section 16 provides as follows:

> That it shall be unlawful for any shipper, consignor, *consignee*, forwarder, *broker*, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. (Emphasis added.)

Section 22 provides:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a *common carrier by water, or other person subject to this Act,* and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, or full reparation to the complainant for the injury caused by such violation.
>
> The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act. (Emphasis added.)

By definition contained in section 1 it is provided that:

> The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.
>
> The term "other person subject to this act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

Respondents reason that since the shipments were consigned to Ross and since Taub was the customhouse broker, they are encompassed within the section 16 reference to "consignee" and "broker," respectively. It is then contended that section 22, in setting forth the Commission's jurisdiction in regard to investigations of alleged violations of the Act, permits a complaint to be filed only against "a common carrier by water" or "other person subject to this Act." As neither consignees or brokers are within the section 1 definitions of such common carriers or other persons, respondents conclude that they are not subject to complaints filed with the Commission pursuant to the first paragraph of section 22 and that the same jurisdiction limitation is applicable to the Commission's power to investigate a violation of the Act under authority of the second paragraph of section 22.[2]

Formal adjudication proceedings of the Commission, which include all section 22 proceedings, fall within two categories.[3] (1) There are *complaint cases* which are instituted by any person filing with the Commission a complaint in proper form setting forth alleged violations of one or more sections of the Act and usually, though not necessarily, seeking reparation for injury caused thereby, and (2) there are *investigation cases* which are instituted by order of investigation issued by the Commission. Such orders are customarily, as in this case, upon the Commission's own motion. This is the practice even though reference may be directed to protests filed by others.

Complaint cases originate, are processed and finally concluded in accordance with the provisions of the first paragraph of section 22. Investigation cases are completely and exclusively governed by the second paragraph of section 22. The fact that the second paragraph is spared needless repetition by using the proviso that the Commission "may in like manner and . . . with the same powers [as in the first paragraph] investigate

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[2] The single case cited by respondents, *United States* v. *American Union Transport, Inc.*, 282 F. Supp. 700 (1964), is not relevant here insofar as it is addressed to the absence of exclusive primary jurisdiction in the Commission over conduct on which criminal charges are based. However, this decision, at page 702, does offer a severable finding which is in point, i.e., that "Sections [22 through 30 of the Act] empower the Commission to investigate, on the complaint of any person or on its own motion, any violation of the Shipping Act, 1916, including section [16], and to make, after a hearing, an order to remedy any violation found." Respondents' reliance on a portion of the legislative history of Public Law 87-346, as drawn from Senate Document No. 100, 87th Cong. 2d Sess., at page 185, is also misplaced. The reference there was to complaints claiming reparation against shippers. Moreover, the Commission's proposed legislation cited by respondents was, as found by the above mentioned prior ruling herein, for the purpose of obtaining clarifying legislation as to existing authority and not enabling legislation with respect to new authority.

[3] Special Dockets, which concern applications unrelated to section 22, are authorized by special legislation and are therefore not included.

any violation of this Act" does not result in the incorporation into the second paragraph of any further requirements or restrictions from the first paragraph. Had the second paragraph been written to provide that "the [Commission], upon its own motion, may investigate any violation of this Act in such manner and by such means, and, except as to orders for the payment of money, make such order as it deems proper" it would say nothing more or nothing less than it now says. It would apply, as it now does, to any violation of any section of the Act, including the opening paragraph of section 16, by anyone, including shippers, consignees and brokers,[4] perhaps more patently but no more certainly than in its present form.

Continuing emphasis must, however, be given to the equally certain fact that the *second paragraph* has no concern with complaint cases or provisions for the award of reparation. Reliance upon decisions or legislative histories having to do with such matters are therefore misplaced when applied to Commission investigations under this paragraph. At the time of the violations here in issue, decisions and legislative histories concerning penalties for violations were likewise inappropriate because the Commission had no authority to impose penalties. It was required to forward all cases involving findings of violations appearing to deserve penalties to the Department of Justice for whatever action the Department deemed fit.[5]

Beyond further question, the Commission's jurisdiction under the opening paragraph of section 16 and the second paragraph of section 22 extends to shippers, consignees, brokers and any and all "other persons." This is emphatically but unnecessarily confirmed by the cited amendment.[5]

The Evidence of Violations

By way of confession and avoidance, Ross argues that even if its actions are found to be within the Commission's jurisdiction, there would be no culpability because on the basis of the record there is no proof that it misclassified the shipments

[4] See *Luis (Louis) A. Pereira—Collection of Brokerage*, 5 F.M.B. 400 (1958); *Misclassification and Misbilling of Glass Articles*, 6 F.M.B. 155 (1960), aff'd in part, rev'd in part *sub nom Royal Netherlands Steamship Co.* v. *Federal Maritime Bd.*, 304 F.2d 938 (D.C. Cir. 1968); and *States Marine-Hohenberg Bros., Sec. 16 Violation*, 7 F.M.C. (1961).

[5] Public Law 92-416, 92nd Congress, HR 765, approved August 29, 1972, amends the Act by converting certain criminal penalties into civil penalties and providing that these may be either compromised by the Commission or recovered by the United States in civil actions. Section 16, in pertinent part, is specifically included.

knowingly and willfully. The record is typically diffuse and encumbered with irrelevancies regarding this legalism. Nevertheless there is sufficient evidence to find that Ross did violate the Act. This is because the Commission's interpretations of scienter as set forth in the statute require strict business propriety. It has been held that "persistent failure to inform or even attempt to inform himself by means of normal business resources might mean that a shipper (consignee) . . . was acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by shippers (consignees) . . . in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation." (Parenthetical references added.) *Misclassification of Tissue Paper,* 4 F.M.B. 483, 486. Ross has indicated that it was familiar with the applicable rates. In the exhibits herein some of the Consumption Entries are copies from the files of the United States Customs Court, New York, N. Y. Decisions of this court are subject to official notice by this Commission. This includes decisions concerning protests instituted by importers of merchandise to challenge the appraisement or classification of imported goods or other decisions of the Bureau of Customs arising out of the administration of the tariff laws and schedules.

Appeals from the Customs Court are to the Court of Customs and Patent Appeals. A number of decisions of these Courts [6] indicate that Ross has been an established importer doing business since 1932 [7] and that it has had long and profound experience with the problems of classification of cargoes.

The penchant for making a decision in one's own favor as the fundament of business "ethics" was legislatively recognized and is the essence of the offense here concerned. Regulatory recognition of this goes as far back as the year following the establishment of the Interstate Commerce Commission.

> Underbilling, in its devices and its fruits, must necessarily be participated in by the owner of the goods . . . . *Re Underbilling,* 1 I.C.R. 813, 821 (1888).

[6] *Ross Products, Inc.* v. *United States,* 62 CCR 688, CD 3849 (1969); *Ross Products, Inc.* v. *United States,* 52 CCR 51, CD 2485 (1964); *Ross Products, Inc.* v. *United States,* 45 CCR 290, Abs 64603 (1960); *Ross Products, Inc.* v. *United States,* 43 CCR 186, CD 2124 (1959); *Ross Products, Inc.* v. *United States,* 43 CCR 74, CD 2106 (1959); *Ross Products, Inc.* v. *United States,* 41 CCR 550, RD 9225 (1958); *Ross Products, Inc.* v. *United States,* 40 CCR 168, CD 1976 (1957); *Ross Products, Inc.* v. *United States,* 39 CCR 197, CD 1927 (1957); *Ross Products, Inc.* v. *United States,* 15 CCR 227, Abs 50329 (1957).

[7] Mr. Hyman Ross was a partner in a partnership which he established in 1932. It was incorporated in 1948 as Ross Products, Inc., and he became Chairman of the Board. 62 CCR 688, supra, at 689.

Title 19 USC 1202, Customs Duties, Tariff Schedules of the United States, Sched. 7, Part 5, 2, *indicate*: "*For the purposes* of the tariff schedules, a '*toy*' is any article chiefly used for the amusement of children or adults." If Ross had a doubt as to the proper tariff designation of its commodity, it had "a *duty* to make diligent and good faith inquiry of the carrier or conference publishing the tariff." (Emphasis added.) *Rubin, Rubin & Rubin Corp. et al.,* 6 F.M.B. 235, 239 (1961). "If [these questions are] presented, they have been brushed aside, in the race for business which absorbs the entire community." *Re Underbilling, supra,* at page 814. On this record, it is a fair conclusion that Ross has disregarded those means which normal business resource and acumen dictate as requiring reference in determining proper classifications. *Rates from Japan to United States,* 2 U.S.M.C. 426, 434 (1940). This is buttressed by the fact that where discrepancy was found, supplemental billing was paid without objection by Ross, or NMS. Moreover, Ross Products had imported mirrors FOB factory in Japan at over $1.20 a dozen for approximately the preceding two years. After such extensive and regular business experience, complete familarity with the applicable tariffs and proper interpretation thereof must be a certainty. It is beyond cavil that mirrors, immersion heaters, photo albums, glass animals, window chimes, and grass beach mats are no more toys than glass tumblers would be jars or glass cooking ware would be bottles. A construction which does such violence to the clear meaning of a tariff, at best, manifests such an indifference and lack of care in construing the tariff as to constitute a deliberate violation of section 16. See *Rates for United States to Philippine Islands,* 2 U.S.M.C. 535, 542 (1941). Otherwise stated, Ross knowingly and willfully . . . by means of false classification . . . obtained transportation by water at less than the rates or charges which would otherwise have been applicable.

With respect to Taub, however, there is insufficient evidence to sustain a finding that it violated the Act.

By definition, a customhouse broker is an agent who acts for merchants in entering and clearing goods and vessels. *Webster's Third New International Dictionary, of the English Language Unabbridged, 1967.* Customhouse brokers are licensed by the Secretary of the Treasury. Title 19 USC 1641. Licensing requires among other things that qualification to render valuable service to importers and exporters be considered. Licenses may be revoked or suspended on grounds of incompetency, disreputableness, or refusal to comply with the rules and regulations issued under the section, or with intent to defraud, to willfully and knowingly deceive, mislead or threaten any importer, exporter, claimant, or client, by word, circular, letter or advertisement.

As observed before, Taub is also a licensed independent ocean freight forwarder. While there is authority vested in the Commission over freight forwarders, there is no such authority over customhouse brokers. Nevertheless the functions of customhouse broker and freight forwarder overlap and blend into each other, i.e., "good and valuable service to importers." Moreover, in General Order 4 (Rev.), 46 CFR 510, 510.2(c), "Definitions," the term "freight forwarding service . . ." means a service which includes, among many other things, clearing shipments in accordance with United States Government regulations, etc. Accordingly, a customhouse broker's functions in this situation are congruent with those of a freight forwarder and it is this nexus or "area of concern" that settles the question of the Commission's jurisdiction in the affirmative, at least in this instance. See *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968).

Testimony of the Customs witness indicates that Taub had the bills of lading in their possession. The record also indicates that the bills of lading were in the possession of the carrier. The source of information used by Taub in the preparation of the Summary of Entered Values is not revealed by the record. The C.E.s were prepared by Taub from information furnished by Ross. The Request for Return of the B/L was prepared by Taub from the B/L. It has been observed that:

> A freight forwarder, in following written instructions from its principal, is not thereby insulated from a finding of a violation of section 16 of the Act as to the forwarder. A registered freight forwarder holds itself out to the shipipng public as an expert in the handling of ocean freight, and its expertise includes a knowledge of applicable tariffs. . . . The forwarder has a duty to take reasonable steps to inform itself as to the nature of the cargo it is handling and to act lawfully with respect thereto. *Hazel-Atlas Glass So.—Misclassification of Glass Tumblers*, 5 F.M.B. 515, 520.

As observed in *Misclassification and Misbilling of Glass Articles, supra,* at page 159, "Section 16 is violated by shippers and forwarders if the false classification and the false billing were knowingly and willfully made." Whether Taub is considered as customhouse broker or freight forwarder, the outcome is the same. The record is insufficient to show that Taub was in *pari delicto* with Ross or that its acts were other than honest inadvertance or oversight. There is then no showing of scienter on the part of Taub. Hence, Taub did not knowingly and willfully participate in the false classifications of the shipments involved.

ULTIMATE CONCLUSIONS

Upon consideration of all the foregoing facts, it is concluded and found:

(1) that Ross Products, a division of NMS Industries, Inc., violated section 16, opening paragraph, of the Shipping Act, 1916, and

(2) that the record does not show that Taub, Hummel & Schnall, Inc., violated the Act.

(S) JOHN MARSHALL
Administrative Law Judge

Washington, D. C.
OCTOBER 16, 1972

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-28

GENERAL INVESTIGATION OF PICKUP AND DELIVERY RATES AND PRACTICES IN PUERTO RICO

June 5, 1973

Carriers' rate increases for pickup and delivery services in Puerto Rico found just and reasonable since they covered only the increase in carriers' fixed costs.

The practice of permitting shippers or consignees who elect to use the pickup and delivery service offered by the ocean carriers in Puerto Rico to select the truckers who will transport the shipments between ocean terminals and inland points found unlawful as constituting an unreasonable practice within the meaning of section 18(a), Shipping Act, 1916 and section 4 of Intercoastal Shipping Act, 1933, and respondents ordered to cease and desist from such practice.

Ambiguous tariff provisions with respect to area included within pickup and delivery point "Catano" found unlawful under section 2 of Intercoastal Shipping Act, 1933 and tariff amendment ordered.

A tariff provision which constitutes an offer to arrange pickup and delivery on behalf of shippers and consignees for shipments not accorded respondents' pickup and delivery service found not unlawful.

Transamerican Trailer Transport, Inc. and Sea-Land Service, Inc. found to have violated section 2 of the Intercoastal Shipping Act, 1933 by waiver of their tariff forced delivery rules.

Tariff provisions defining a trailerload as less than the capacity of a full trailer for pickup and delivery purposes found not unlawful.

Transamerican Trailer Transport, Inc. found to have violated section 2 of the 1933 Act by carrying out a special arrangement with a shipper contrary to its tariff; in providing service to a shipper contrary to its stop-off rule; and in failing to set forth in its tariff a description of the service whereby it arranges as shippers' agent for pickup and delivery for shipments not accorded the carriers' pickup and delivery service.

Warren Price, Jr., R. L. Dausend and *Frank Hiljer, Jr.* for respondent Sea-Land Service, Inc.

S. S. Eisen and *Joseph Hodgson, Jr.* for respondent Seatrain Lines, Inc.

George F. Galland, Amy Scupi and *David T. Stitt* for respondent Transamerican Trailer Transport, Inc.

Mario F. Escudero and *Dennis Barnes* for petitioner Commonwealth of Puerto Rico.

Amadeo I. D. Francis for intervener The Puerto Rico Manufacturers Association.

Donald J. Brunner and *Margot Mazeau,* Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; George H. Hearn, *Vice Chairman*; Ashton C. Barrett, James V. Day and Clarence Morse, *Commissioners*)

We instituted this proceeding to determine whether certain increased pickup and delivery charges in Puerto Rico, filed by respondents Sea-Land Service, Inc. (Sea-Land), Seatrain Lines, Inc. (Seatrain), and Transamerican Trailer Transport, Inc. (TTT) are unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916 (the 1916 Act) and/or sections 3 and 4 of the Intercoastal Shipping Act, 1933 (the 1933 Act); and further, to determine whether the charges and practices of the respondents, related to their pickup and delivery services in Puerto Rico, may be in violation of section 18(a) of the 1916 Act and/or sections 2, 3 and 4 of the 1933 Act.

Administrative Law Judge Herbert K. Greer issued an initial decision in which he found that the carriers' rate increases for pickup and delivery services in Puerto Rico were not unjust, unreasonable, or otherwise unlawful, but held that certain practices of respondents relating to the services were unlawful. Exceptions to the initial decision have been filed by Sea-Land and Hearing Counsel, and replies thereto by Sea-Land, Hearing Counsel, TTT, and Seatrain. We have heard oral argument.

FACTS [1]

1. TTT, Sea-Land and Seatrain are common carriers by water, and in connection with ocean transportation they offer pickup and delivery service (the service) in Puerto Rico be-

[1] No exceptions were filed to the Administrative Law Judge's findings of fact, and we hereby adopt them as our own, omitting only quotation marks for convenience.

tween their terminals and the places of business of shippers or consignees, their tariffs providing charges for the service separate and apart from the ocean transportation rates.

2. Trailerload (TL) service, where not restricted by tariff, is optional; however, Sea-Land and TTT make delivery mandatory for certain less than trailerload (LTL) shipments.

3. The service is performed by independent Puerto Rican truckers, and the practice is to permit the shipper or consignee to designate the trucker.

4. Truckers performing the service are required by respondents to execute Trailer Interchange Agreements under the terms of which the trucker is required to carry (a) liability insurance, (b) comprehensive fire, theft, and damage, plus collision and upset insurance covering respondents' trailers, and (c) cargo insurance. The insurance under (b) and (c) may be provided by respondents under their own policies, and if so provided, a combined rate of 3% is deducted from payments due the truckers.

5. The rates for the service, as set forth in respondents' tariffs, vary according to zones on the island, which are numbered 1, 1A, 2, 3, 4, 5, 6, and 7. Prior to December 10, 1970, the rates ranged from $30.00 to $50.00 per trailerload depending upon the zone in which the pickup or delivery point is located. A "point" or "station" refers to a particular city, town, village, or other area, which is treated as a unit in applying the charges.

6. Respondents' tariffs provide for base points at San Juan, Ponce, or Mayaguez; however, they provide a substituted service through San Juan for cargo rated for Ponce and Mayaguez and absorb the cost of the substituted service.

7. For years after the institution of the service, the trucking of containerized cargo was stabilized by an agreement whereby respondents paid the charges assessed by truckers and in turn filed these charges with this Commission; however, as time passed truckers increased their charges for zones 3, 4, 5, 6, and 7, and until the increased rates here at issue were filed, respondents absorbed the excess over rates paid to truckers and the charges assessed by them to shippers or consignees.

8. The rate increases here under consideration are for the purpose of eliminating respondents' absorptions of trucker charges to zones 3 to 7, inclusive.

9. The Puerto Rico Public Service Commission requires truckers to file pickup and delivery tariffs; however, the requirement is not enforced. Machinery to enforce the requirement is being established and it is anticipated that in approximately one year trucker tariffs and cost information will be on file.

10. Pickup and delivery charges by Puerto Rico truckers, including the organized truckers, are not uniform. Truckers may provide the service at the rates set forth in respondents' tariff or may, and at times do, compete against other truckers by negotiating rates directly with the shippers/consignees, which are lower than respondents' rates.

11. The pickup and delivery charges for TL and LTL exceeding 8,000 pounds, which have been negotiated between truckers and shippers/consignees, were generally lower than the corresponding rates set forth in respondents' tariffs, truckers charging the lower rates considering volume, contract terms, and availability of backhaul.[2]

Discussion and Conclusions

The Increased Rates

No exceptions were taken to the Administrative Law Judge's disposition of the issue of the reasonableness of respondents' rate increases. We adopt the Administrative Law Judge's conclusions as our own. His discussion of the issue is set out below, and again quotation marks have been omitted.

There is no contention that the increased rates have been shown to be unlawful. Hearing Counsel point out that the failure of the Puerto Rico Public Service Commission to require submission by truckers of cost information is the reason this Commission has no basis for determining the reasonableness of the underlying trucker charges. However, the rates and practices of Puerto Rican truckers are matters over which this Commission has no jurisdiction since it has not been shown that the truckers engage in an activity covered by section 1 of the 1916 Act, which in part 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 for-

[2] To avoid undue repetition, the Administrative Law Judge made further findings of fact in the discussion portion of his opinion. Where necessary, we have adopted the same course.

warding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

Portalatin Velasquez Maldonado v. Sea-Land Service, Inc., 10 F.M.C. 362 (1967). The pickup and delivery charges and the zones to which they apply are negotiated by respondents with four trucking associations representing the Puerto Rican truckers. As Hearing Counsel state, citing *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480, 492 (1963), a rate established by means over which this Commission has no jurisdiction becomes a fixed charge to the ocean carrier. As the increased rates were filed for the purpose of equalizing the charges paid to the truckers by respondents and the amounts collected under the tariffs by respondents from shippers or consignees, it is concluded that they are not unjust or unreasonable or otherwise unlawful.

Pickup and Delivery Practices

1. *Designation of Truckers by Shippers and Consignees*

When shippers or consignees elect to use respondents' service, the practice is to permit them to select the Puerto Rican trucker who will transport the shipments between the ocean terminals and inland points. Hearing Counsel urge that the Commission order respondents to discontinue this practice because "it tends to foster and facilitate rebating between shippers/consignees [3] and truckers", and is thus in violation of section 18(a) of the 1916 Act [4] and section 4 of the 1933 Act.[5] The Administrative Law Judge, however, concluded that no violation existed. He found that elimination of the practice "would result in curtailment of the door-to-door service offered by respondents, an

[3] Unless otherwise specified or unless the context requires, "shippers" as used herein includes "consignees".

[4] Section 18(a) provides in pertinent part: "That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto . . . . Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

[5] Section 4 provides in pertinent part: "Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded, charged, collected, or observed by any carrier subject to the provisions of this Act is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice . . . ."

intermodal system of transportation beneficial to Puerto Rico's commerce." The Administrative Law Judge found that the truckers were not the agents of respondents, and thus what Hearing Counsel was seeking to accomplish was the elimination of "rebating involving persons not subject to the shipping acts." We disagree with the Administrative Law Judge.

Respondents offer pickup and delivery service in Puerto Rico between their terminals at San Juan, Ponce and Mayaguez and the places of business of shippers/consignees pursuant to comprehensive tariff rules, regulations and charges. Since respondents' service is optional, shippers/consignees, in effect, have three choices: (1) to perform the pickup and delivery themselves, using their own equipment and personnel; (2) to hire independent truckers and pay them directly for the service, frequently at lower rates than those charged in respondents' tariff (Ex. 27, p. 3); or (3) to avail themselves of the pickup and delivery service offered by respondents. Shippers who choose to use respondents' pickup and delivery service are permitted to designate the trucker to be engaged by respondents to perform the service. Under the present practice, the shipper may reduce his overall transportation cost by designating a trucker who will agree to perform the pickup and delivery service at less than the respondents' tariff rates. The trucker then "refunds" to the shipper a portion of the charge paid him by the respondent carrier. Thus, respondents are "absorbing" a portion of the pickup and delivery charge; or, to put it another way, the shipper is receiving a "rebate" of a portion of the pickup and delivery charge.

We agree with Hearing Counsel that respondents' practice of providing for the designation by shippers and consignees of truckers to furnish the P/D (pickup and delivery) service which respondents are obligated under their tariffs to perform and for which they are responsible is an unreasonable practice within the meaning of section 4 of the 1933 Act and section 18(a) of the 1916 Act, and that respondents should be ordered under these statutory provisions to establish the reasonable practice of disallowing shipper or consignee designation of truckers who furnish a part of respondents' services.

Respondents' contention that the truckers furnishing respondents' pickup and delivery services are not their "agents" and thus they are not responsible for any "rebates by the truckers" is clearly erroneous. First of all, the significant consideration in this proceeding is not whether the truckers furnishing respondents' pickup and delivery service are "agents" in some abstract sense or for all purposes, but only whether they are agents in the sense that respondents must bear the responsibility of insuring that no portion of the rates paid for the pickup and delivery service is refunded or remitted.[6]

Respondents need not furnish any pickup and delivery service. However, if they choose to do so, such service is subject to the Commission's jurisdiction, and respondents must adhere to tariff rates filed with us for the service. *Sea-Land Service, Inc. v. Federal Maritime Commission,* 404 F.2d 824, 827 (D.C. Cir. 1968); *Alaska Steamship Company v. Federal Maritime Commission,* 399 F.2d 623, 627 (9th Cir. 1968); *Matson Navigation Co.—Container Freight Tariffs, supra; Certain Tariff Practices of Sea-Land Service,* 7 F.M.C. 504 (1963). Common carriers who undertake to perform a service cannot lawfully escape the responsibility for the proper performance of the service by the simple expedient of designating the person actually performing the service the agent of the shipper or consignee. *Bank of Kentucky* v. *Adams Ex. Co.,* 93 U.S. 174, 182 (1876). Respondents' tariffs covering their pickup and delivery services in fact state on their face that they are applicable only when respondents or their *agents* perform the pickup and delivery service. Respondents cannot insulate themselves from the responsibility for the proper performance of the service by attempting to relieve themselves of accountability for their agents' acts. *Unapproved Sec. 15 Agreements—Spanish/Portuguese Trade,* 8 F.M.C. 596, 609 (1965); *Hellenic Lines, Ltd.—Section 16 (First) and 17 Violations,* 7 F.M.C. 673, 676 (1964). The fact that remittances resulting in the obtaining of transportation at less than tariff charges may be made "indirectly" by agents who are not authorized to make them and even of whose conduct the carriers may be ignorant is immaterial to the question of the lawfulness of the carriers' conduct. Docket 68-44, *Malpractices—Brazil/United States Trade,* December 13, 1971, 15 FMC 55.

The fact that the interchange agreements which respondents have entered into with truckers who furnish P/D services state that the trucker "is not the agent or employee of the Lessor

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[6] Section 2 of the 1933 Act forbids carriers to "refund or remit in any manner or by any device any portion of the rates, fares, or charges . . . specified [in their tariffs filed with the Commission]."

[respondent] for any purpose whatsoever" is inconsistent with both respondents' obligations and the wording of their own tariffs. The reason for this language in the interchange agreements appears to be that the same agreements are required by respondents from all truckers who pick up or deliver in Puerto Rico cargo carried by respondents, whether or not the pickup and delivery is performed as a part of respondents' transportation obligation. In other words, identical interchange agreements are executed by truckers who furnish respondents' P/D services, shippers and consignees who provide their own pickup and delivery using their own equipment and employees, and truckers who do not furnish P/D services under respondents' tariffs but are hired directly by shippers and consignees. Obviously, shippers and consignees and truckers who do not furnish pickup and delivery as part of respondents' P/D services are not respondents' agents for P/D purposes.

To insure that confusion does not arise in the future with respect to respondents' responsibility for the P/D services they undertake to perform, we will require that respondents amend the form of those interchange agreements they require of truckers who furnish P/D services respondents undertake to perform as part of their transportation obligations to remove any language which indicates that such truckers are not respondents' agents for the purpose of insuring that the rates paid by shippers and consignees for respondents' pickup and delivery services are those contained in respondents' tariffs.

Respondents' contention that the record does not show that rebating has actually occurred misses the mark. Where, as here, the practice is "potentially capable" of resulting in violations of our statutes, our role is "remedial and not punitive", and we need not wait until the potential evil has actually occurred. *Rates, Hong Kong-United States, Trade,* 11 F.M.C. 168, 175 (1967); Introductory Statement to F.M.C. Rules requiring filing of tariffs by terminal operators now contained in 46 CFR 533, printed at 30 F.R. 1268; Cf. *North Atlantic Mediterranean Freight Conference,* 11 F.M.C. 202, 220 (1967), reversed on other grounds *sub nom. American Export Isbrandtsen Lines, Inc. v. F.M.C.,* 409 F.2d 1258 (2nd Cir. 1969). It is, furthermore, well settled that activities which tend to foster and facilitate rebates of carriers' tariff rates are practices which we can and must order terminated. *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 414 (1935).[7]

Finally, we are not persuaded by the argument that even if trucker designation is removed as a source of potential rebating, shippers and consignees will still find a way to employ truckers who will perform the pickup and delivery service at less than the tariff rates, and thus continue the practice under another guise which is entirely lawful.[8] Shippers and consignees are and should remain, insofar as this Commission is concerned, fully free in the matter of contracting for the services of any trucker they desire or to furnish their own trucking services for pickup and delivery purposes. We are not here concerned with pickup and delivery services performed by shippers and consignees or by truckers for them. We are rather concerned with the pickup and delivery service offered by respondents and have outlawed trucker designation when used as a part of that service because it facilitates a rebating for which respondents are, in law and under their own tariff representations, responsible.

The suggestion that shippers/consignees may devise other ways to achieve rebates of part of the rates for pickup and delivery service is hardly a reason for us to sanction the trucker designation practice. Having found the existence of the unreasonable practice, we are empowered to fashion the tools to correct it. *California v. U.S.*, 320 U.S. 577, 583-584 (1944). We believe that the elimination of trucker designation by shippers and consignees as a part of respondents' pickup and delivery service is a reasonable means of eliminating the rebates which can now occur. Shippers and consignees will no longer be able to utilize a feature of respondents' transportation service which we have found facilitates obtaining transportation at less than respondents' tariff rates for such service.

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[7] That the present practice of respondents allowing shippers and consignees to designate the truckers they wish respondents to use in furnishing P/D does facilitate rebating cannot be seriously questioned. The Administrative Law Judge's finding that under the present practice the "[shipper or consignee] may reduce . . . [the] overall cost of transportation by engaging a trucker who will agree to perform the service at less than respondents' tariff rate and refund a portion of the charge paid to him by the ocean carrier" is also unchallenged. The record, moreover, in addition to this acknowledged "potential capability" of the practice of shipper and consignee designation of truckers respondents are to use in their P/D srvice, does reveal some evidence (in the form of a letter to the Commission and testimony by the then chairman of PROSA, a Commission-approved agreement concerned with, *inter alia*, enforcement of respondents' tariff rates for P/D services) indicating that the practice had actually resulted in such rebates.

[8] Presumably, they would use one of the two other options available to them.

Our action will not, moreover, result in any improper limitation of respondents' door-to-door intermodal system of transportation to and from Puerto Rico. Intermodal transportation with through rates and through responsibility is a goal which we encourage but one which we cannot allow to be achieved at the expense of a practice which is unreasonable under the statutes we administer. In ordering this practice abated we but adhere to the requirement we have made of those offering through intermodal service that the manner in which such service is offered is fully consistent with the dictates of our regulatory obligations.[9]

2. *Pickup and Delivery Service for Bacardi*

The Bacardi plant is located within the limits of the Municipio of Catano but outside the limits of the town of Catano. Respondents' tariffs designate "Catano" as the pickup and delivery point, with no distinction between the town and the municipio. The point for zone 3 is "Palo Seco". The Bacardi installation is physically situated in both Catano and Palo Seco. A trucker entering the installation through the main gate remains in zone 1A unless he picks up or delivers a shipment at a building located in zone 3. The back gate is in zone 3, but a shipment may be picked up or delivered in either zone. Bacardi insists that the zone 1A rate of $35.00 per trailer is applicable to its shipments, but the truckers demand the zone 3 rate of $45.00. For many years, respondents have acceded to both contentions and absorbed the $10.00 per trailer difference between the rate charged Bacardi and the amount paid to the trucker.

The Administrative Law Judge found respondents' tariff ambiguous and applied the rule that tariff ambiguities are to be resolved in favor of the shipper. He then concluded that there were no refunds or extensions of privileges contrary to the respondents' tariffs; nor were respondents violating section 2 by charging Bacardi a different compensation than required by their tariffs. The Administrative Law Judge also found the

[9] Thus, e.g., in *Disposition of Container Marine Lines*, 11 F.M.C. 476, 484-485, 492 (1968) we refused to sanction a through, intermodal service until the carrier providing such service had filed a specimen bill of lading, all the articles of which provided for common carrier liability for the through movement consistent with the holding out in the remainder of the carrier's tariff filing.

practice reasonable under section 18(a) of the Shipping Act, 1916. Hearing Counsel except to these conclusions.[10]

The fact remains, however, that the word "Catano" as used in respondents' tariffs is ambiguous since it fails to indicate whether the pickup and delivery point designated as "Catano" is intended to be the town or the municipio. Although we agree with the Administrative Law Judge that because of such ambiguity Bacardi was properly assessed the lower P/D rate, i.e. the rate for zone 1A, the ambiguity in the tariff itself is unlawful under section 2 of the 1933 Act. See e.g., *Intercoastal Lumber Rate Charges*, 1 U.S.M.C. 656, 658 (1937); *Puerto Rican Rates*, 2 U.S.M.C. 117, 129, 130, 132 (1939). Accordingly, we will require that language be added to respondents' tariffs to clarify the meaning of "Catano" as used therein.

3. *Definition of Trailerload*

The Administrative Law Judge found no violations resulting from the alleged disparity between respondents' tariff definition of "trailerload" and their actual practices when applying the definition to particular shipments. No exceptions were taken, and we adopt the Administrative Law Judge's conclusions as our own. They are set forth below.[11]

Prior to recent amendments, TTT's tariff defined a trailerload for purposes of the service as:

> . . . a shipment wherein the shipper loads the contents of the trailer and the consignee unloads the contents of the trailer, and the shipment weighs 8,000 pounds or more or measures 700 cubic feet or more.

Hearing Counsel refer to the definition as amended by Second Revised Page 69, FMC-F No. 1, note 2, effective August 16, 1970, which provides:

> A trailerload shipment is defined for purposes of this Rule as (a) a shipment that weighs 8,000 pounds or more or measures 700 cublic feet or more . . . .

This amendment further provides that TTT is not liable if loading or unloading is performed by the shipper or consignee. Hearing Counsel argue that:

[10] Subsequent to oral argument, Sea-Land informed the Commission and all the parties to the proceeding that the trucker used by respondents to serve the Bacardi plant had agreed that "the Bacardi plant is located in Catano (zone 1A)" and that all absorptions have been eliminated.

[11] Quotation marks have been omitted.

TTT's recent amendment which deletes the loading and unloading requirement solves the specific problem, but creates a new one instead. The amendment is ambiguous in that it lends support to an argument that the carrier will load and unload *any* shipment as long at it exceeds the minimum weight and volume requirement. Hearing Counsel doubt that it was TTT's intention to provide free loading and unloading for all TL shipments.

TTT replies to this argument by reference to note 3 of an amendment effective January 10, 1971, prior to the close of the hearing, which provides:

The truckload (per trailer) charges named herein include only the setting of the trailer by the carrier at a site designated by the shipper or consignee for loading or unloading . . . by the shipper or consignee.

This amendment, in providing that TL shipments will be loaded or unloaded by the shipper or consignee, removes the ambiguity alleged by Hearing Counsel.

The definition of a trailerload in the tariffs of Seatrain and Sea-Land are similar to TTT's present definition, and provide that the TL rate includes only the setting of the trailer at a site designated. Should any respondent load or unload a trailer, charging the TL rate would be contrary to the tariff. Hearing Counsel contend that, in practice, respondents so violated their tariffs, and thus failed to observe just and reasonable practices as required by section 18(a) of the 1916 Act. The record does not disclose incidents involving relieving a shipper or consignee of loading or unloading trailers.[12] The testimony referred to by Hearing Counsel does not establish such violations, but shows that for shipments of less than 8,000 pounds, which are LTL under the definition, the TL rate has been charged for delivery of a partial trailerload to a consignee when the consignee does unload the trailer. Seatrain, handling rail car shipments which at times exceed the capacity of one trailer, has a tariff provision that:

When a shipment (see item 192, Note 3) subject to a rate predicated on a minimum quantity is loaded by the carrier or his agent, and such shipment equals or exceeds the minimum quantity specified, the rate will apply on the actual weight or measurement of the shipment without regard to the number of containers or trailers used.

The transaction of record was not in violation of this provision, but in accord with it.

[12] The allegation that The Stanley Works paid only TL rates but was accorded delivery is hereinafter discussed.

Hearing Counsel's position is:

If, as the record suggests, practical considerations in performing the pickup and delivery service make it impossible to abide by the tariff requirements, the obvious answer is to change those requirements rather than to ignore them.

The record "suggests" difficulties. Under the tariff definition of a trailerload, a trailer with a capacity of 40,000 pounds may contain more than one trailerload or a trailerload mixed with LTL shipments. Several shipments may be loaded into one trailer at respondents' mainland terminals. When such a trailer is unloaded from the ship, it could be necessary to strip it at the terminal in Puerto Rico and make delivery on a trucker's equipment to various destinations. In that event, truckers would charge according to the service performed, applying the LTL rate and loading or unloading the shipment. As to actual practices, much is left to assumptions and speculations. There is, of course, the possibility that shippers or consignees may be charged the TL rate by respondents although, contrary to the definition, the truckers will load or unload the shipments.

Hearing Counsel propose that the Commission require respondents "to bring their practices in conformity with the tariff, either through a change in practice or change in tariff." Had the evidence persuasively demonstrated that it is respondents' practice to load or unload shipments carried in the service at TL rates, a cease and desist order would be justified. Various modifications of the definition of a trailerload are possible, but any increase in weight or measurement would serve to increase the cost of the service for shippers of more than 8,000 pounds or 700 cubic feet, but less than a full trailerload.

The definition as it now stands benefits smaller shippers, and the possibility, or even probability, that violations may occur is insufficient to warrant a finding that it is unreasonable.

4. *Forced Delivery Rule*

TTT and Sea-Land provide in their tariffs that all LTL shipments weighing less than 3,000 pounds and measuring less than 700 cubic feet must be accorded delivery service. Sea-Land began the practice of exempting Westinghouse Company from the rule and TTT adopted the practice for competitive reasons, extending it also to Pantasia. No monetary advantage accrued to the shippers. TTT admits that the practice of exempting

Westinghouse and Pantasia was in violation of its tariff but *states that the violation is only "technical" and that the waivers* were motivated by serious considerations of business efficiency. Sea-Land did not deny the exemption as to Westinghouse but sets forth similar reasons for the practice. TTT has withdrawn the rule.

The Administrative Law Judge concluded that Sea-Land and TTT violated section 2 of the 1933 Act in exempting Westinghouse from the forced delivery rule and ordered Sea-Land to cease and desist from continuing the practice. Sea-Land has excepted to the Administrative Law Judge's conclusions.

Sea-Land maintains that it did not exempt Westinghouse from the rule but merely held the shipments for Westinghouse's preferred trucker, paying the trucker the same amount it collects from Westinghouse. The only evidence that it excepted Westinghouse from its forced delivery rule, Sea-Land contends, is a statement by a TTT witness which is pure hearsay and not of probative value and thus should be disregarded. On the other hand, Hearing Counsel assert that the facts of record are sufficient to support the Administrative Law Judge's finding that Sea-Land unlawfully exempted Westinghouse from its forced delivery rule. However, Hearing Counsel urge, should we find that Sea-Land's practice with respect to Westinghouse does not constitute a violation, it should also exonerate TTT for its Westinghouse practice.

Both the language of TTT and Sea-Land's forced delivery rules and our treatment of Sea-Land's rule in *Charges, Delivery, Atlantic-Gulf/Puerto Rico Trade,* 11 F.M.C. 222 (1967), convince us that shippers do not have the power under these rules to utilize their own truckers, nor demand that shipments be held for truckers which the shippers wished respondents to use. The purpose of the forced delivery rule was to require removal of cargo subjected to such rule by the first available trucker. We therefore agree with the Administrative Law Judge's finding that TTT and Sea-Land's activities under their forced delivery rules were violative of section 2 of the 1933 Act, whether the carriers allowed shippers and consignees to arrange for their own pickup and delivery or only, as Sea-Land alleges it had done, requested that cargo be held for a certain trucker. In any event, however, our action with respect to trucker designation should remove any further problems with respect to forced delivery. To the extent respondents provide for any pickup and delivery service, including forced delivery, shippers and consignees who use such service will have no voice with respect to utilization of any particular truckers.

TTT has withdrawn its forced delivery rule from its tariff, and Sea-Land is free to do the same. We note, however, in this connection that in *Charges, Delivery, Atlantic-Gulf/Puerto Rico Trades, supra,* where we found Sea-Land's practice of providing forced delivery of minimum shipments to be lawful, we observed that the forced delivery rule "goes a long way toward eliminating a problem of congestion". (at 236). The choice is one we leave to the exercise of Sea-Land's operational judgment.

5. *TTT's Insurance Charges*

TTT was alleged to have violated section 18(a) of the 1916 Act by collecting from truckers a charge for insurance which in fact TTT did not provide. The Administrative Law Judge, over the objection of Hearing Counsel, accepted TTT's commitment to stop the practice. Hearing Counsel's concern was that TTT's commitment while "commendable" was not "legally enforceable". We, like the Administrative Law Judge, think the commitment sufficient.

6. *Abraham Nieves—Special Arrangement with TTT*

In the absence of exceptions, we adopt the Administrative Law Judge's conclusions on this issue as our own. They are set out below.

This shipper's plant is located at Guayama, which is between San Juan and Ponce but 15 miles closer to Ponce. TTT carries trailerloads of freight all kinds (FAK) for Nieves. The tariff restricts FAK delivery to zones 1, 1A, and 2, and if San Juan is the base port of destination, Nieves would be in zone 7 and not entitled to delivery. Nieves, like any other shipper, may designate either Ponce or San Juan as the port of destination. If Ponce is designated, Nieves would be required to transport the trailer to its place of business at a cost of $65.00. TTT, as do other respondents, utilizes a substituted service from San Juan to pick up and deliver cargo to inland points. If Ponce is the port of destination, the cost of trucking from San Juan to Ponce is $95.00. Thus the total trucking costs involved for a trailer destined for Ponce would be approximately $160.00.

In this situation, TTT and Nieves entered into an arrangement whereby Nieves would designate San Juan as the port of destination and TTT, acting as Nieves' agent for delivery of trailerloads, would arrange for a trucker to deliver the trailer direct to Guayama. The trucker would bill TTT for $50.00 which TTT would not charge Nieves. The trucker would bill Nieves for $25.00, TTT not being involved in that transaction. TTT saved $45.00 per trailerload under this arrangement; Nieves also made a saving.

Hearing Counsel contends, and TTT acknowledges, that this special arrangement violated section 2 of the 1933 Act. Nieves has been billed for the undercharges resulting from the arrangement and the bill has been paid by Nieves. The arrangement has been abandoned and a cease and desist order is unnecessary. Nevertheless, it is found that TTT violated section 2 of the 1933 Act when carrying out the special arrangement with Nieves.

7. *TTT's Stop-Off Rule*

Again, no exceptions were filed to the resolution of this issue by the Administrative Law Judge, and we adopt his conclusions as our own.

TTT's tariff provides:

B. Puerto Rico:

* * * (2) Delivery service as provided herein will be made on portions of a single truckload shipment to more than one address but not more than four different addresses, at destinations named herein, taking the same basing point, upon payment of the highest rated zone rate at which delivery is made, plus an additional charge of $14.56 for each delivery except the last. * * *

C. No stopoffs for partial loading or unloading will be made unless all pickup points or all delivery points lie in a direct route over which operations are generally conducted between the carrier's terminal and the pickup or delivery point farthest from that terminal. * * *

TTT admits that, contrary to this rule, Plaza Provision received the service at TL rates although the delivery points did not lie in a direct regular route and were not from the same basing points. It considers the situation as showing only a "technical violation hurting no one" and resulting from geographic happenstance, with only one shipper and short distances involved, and questions "whether any regulatory benefits flow from regulation on this level of zealotry." The purpose of this investigation is to determine whether any respondent has violated specified sections of the shipping acts and not whether violations are merely "technical" or of such gravity as to warrant imposition of penalties. It is found that TTT violated section 2 of the 1933 Act.[13]

8. *Improper Rating of Bills of Lading by TTT for Stanley Works*

The Administrative Law Judge found that TTT's alleged unlawful charging of the Stanley Works the trailerload ocean rate rather than the less-than-trailerload ocean rate was outside the scope of this proceeding as this proceeding is limited to the rates and practices related to P/D service and does not concern rates and practices pertaining to water transportation. We agree with this conclusion and hereby adopt it as our own.

9. *Arrangements for Pickup and Delivery for Shipments not Entitled to the Service Under TTT's Tariff*

TTT's tariff provides that certain shipments are entitled to only limited pickup and delivery service or none at all. However, upon request of a shipper or consignee, TTT will arrange with a trucker to pick up or deliver the exempted shipments, advance the trucker's charge, and collect the amount advanced from the shipper or consignee, either by direct billing or by addition of the charge to the bill of lading. The trucker's charge may be less than the charge set forth in TTT's tariff for pickup and delivery to the zone involved. Prior to January 10, 1971, TTT's tariff did not include a provision for this service. Hearing Counsel contended that although TTT did not profit from the service, it had violated section 2[14] of the 1933 Act by rendering a service not provided for in its tariff. *Intercoastal Investigation, 1935, supra* at 440, 447.

The Administrative Law Judge concluded that TTT had violated section 2 of the 1933 Act and we agree. However, TTT

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[13] The Administrative Law Judge ordered TTT to cease and desist from charging Plaza Provision less than required by the rule quoted above and related tariff provisions. Since, however, there is no evidence of continuing violation and since the language of the rule in the tariff has been modified substantially since the initial decision herein, we will enter no cease and desist order with respect to this matter.

[14] ". . . no person shall engage in transportation as a common carrier by water in intercoastal commerce unless and until its sechedules as provided by this section have been duly and properly posted . . . ."

in an amendment to its tariff filed to become effective January 10, 1972, adopted the following rule:

SHIPMENTS NOT AFFORDED PICKUP AND DELIVERY SERVICE IN PUERTO RICO

Transamerican Trailer Transport, Inc. on request of shippers or consignees will arrange for pickup and delivery of shipments which by specific rule or reference mark are not provided pickup and delivery service as provided in this tariff.

TTT will advance the charges to the motor carrier performing such pickup and delivery service, which charges will be billed for the account of the shipper or consignee ordering the service. TTT as carrier will have no responsibility for the cargo on which such pickup or delivery service is arranged while such cargo is in the possession of the motor carrier performing such services. Transamerican Trailer Transport, Inc. Freight Tariff No. 1, FMC-F No. 1, Rule 565.

Hearing Counsel challenged the rule on the ground that "it permits shippers of cargo, which is accorded restricted or no delivery, to obtain lower rates than those charged for cargo moving in TTT's P/D service." Hearing Counsel would have amended the rule so as to provide that the rates under the rule would in any case be no lower than those charged under TTT's P/D service.

We see nothing wrong in principle, however, with tariff provisions whereby a carrier, as agent, offers to arrange for services in addition to those for which it is responsible. No legal obligation has been imposed upon respondents to furnish P/D services for all cargo, and they may, in the absence of unreasonable preference or prejudice to a particular description of traffic, limit the categories of cargo for which they provide such services. See *Charges, Delivery, Atlantic-Gulf/Puerto Rico Trades, supra.* As we have stressed in our discussion of the practice of shipper designation of truckers as a part of respondents' P/D services, there is a great difference between pickup and delivery offered as a part of respondents' services and pickup and delivery made by or on behalf of shippers and consignees. In the former, respondents bear the legal obligation of insuring that their tariff rate for such service is paid by shippers and consignees. In the latter, shippers and consignees bear the responsibility of paying whoever performs the service whatever he lawfully charges for such service. There is no reason in law why respondents should be obligated with respect to adherence to charges made for a service they do not undertake or why respondents may not offer to arrange for such service as agents. So long as respondents offer transportation under a system of rates which excludes, as well as under another system of rates which includes, P/D services, and so long as they publish and file tariff provisions indicating clearly what services are offered under each type of rate, no difficulty should arise.

Any matters raised by the parties to this proceeding not specifically discussed herein have been considered and rejected as immaterial or unnecessary for purposes of decision.

An appropriate order will be entered directing that respondents, within 60 days of the date of service of such order, cease and desist from engaging in certain practices herein found to be unlawful and include in their container interchange agreements and published tariffs filed with the Commission such amendments therein as we have here required.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-28

GENERAL INVESTIGATION OF PICKUP AND DELIVERY RATES AND PRACTICES IN PUERTO RICO

ORDER

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof;

Therefore, it is ordered, That within 60 days of the date of service of this order:

1. Respondents, Sea-Land Service, Inc. (Sea-Land), Seatrain Lines, Inc. (Seatrain), and Transamerican Trailer Transport, Inc. (TTT), cease and desist from the practice of permitting shippers or consignees who elect to use the pickup and delivery services in Puerto Rico which such respondents offer as a part of their transportation obligations to designate the truckers as such shippers or consignees wish to transport shipments between ocean terminals and inland points;

2. Respondents, Sea-Land, Seatrain and TTT amend the form of the Trailer Interchange Agreements which they use when entering into arrangements with truckers who furnish the pickup and delivery services such respondents undertake to perform as part of their transportation obligations to remove from the final sentence of paragraph 3.4 of such interchange agreements, as well as other places in such agreements, any language which indicates that such truckers are not respondents' agents for

the purpose of insuring that the rates paid by shippers and consignees for respondents' pickup and delivery services are those contained in respondents' tariffs; and

3. Respondents, Sea-Land, Seatrain and TTT amend their tariffs specifically to indicate whether the pickup and delivery point designated therein as "Catano" is intended to be the town or the municipio of that name.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

Docket No. 70-45

Norman G. Jensen, Inc.—Independent Ocean Freight Forwarder License No. 800

June 11, 1973

Respondent independent ocean freight forwarder found to control or be controlled by a person who is a shipper by virtue of its beneficial interest in shipments to foreign countries. Respondent allowed to retain forwarder license upon condition that it relinquish all control of or terminate all control by shipper within time specified.

Joe A. Walters and *Howard G. Feldman* for respondent.
Joseph B. Slunt and *Donald J. Brunner,* Hearing Counsel.

REPORT

By the Commission: (Helen Delich Bentley, Chairman, Ashton C. Barrett and James V. Day, Commissioners)[1]

This proceeding is before us upon respondent's exceptions to the June 19, 1972, Initial Decision of Administrative Law Judge John Marshall, to which Hearing Counsel replied. Oral argument was heard on March 15, 1973.

On November 24, 1970, the Commission served Notice of Investigation and Hearing to determine basically whether the financial connection between Norman G. Jensen, Inc. (respondent), a licensed independent ocean freight forwarder, and International Traders & Counsellors, Inc. (ITC) leaves respondent in the position of independence from shippers, or from those having a beneficial interest in shipments, to foreign countries, required by section 1 of the Shipping Act, 1916 (the Act) (46 U.S.C. 801). An ancillary issue is whether respondent willfully falsified its license application by failing to divulge the questioned financial connection.

[1] Commissioner Clarence Morse did not participate.

In his Initial Decison, Judge Marshall concluded that respondent is not independent, inasmuch as it controls and/or is controlled by ITC, a person both shipper connected and having a beneficial interest in shipments to foreign countries in violation of section 16 of the Act (46 U.S.C. 815). He further concluded that respondent had willfully concealed this relationship from the Commission by falsification of its license application, and thus that respondent's license should be revoked.

Respondent excepted to the entire Initial Decision, as well as to the Judge's ruling of April 29, 1971, denying its motion to dismiss the proceeding. Hearing Counsel replied in support of the Initial Decision.

Thereafter, on November 20, 1972, respondent filed a motion submitting an offer of settlement and termination of the proceeding. This offer of settlement contained the following provisions:

1. Gordon W. Jensen will resign as an officer and director of ITC, and he and his wife will sell to Bent Jensen or ITC all of their ITC stock.
2. Bent Jensen will resign as an officer and director of Norman G. Jensen, Inc. (Jensen).
3. Bent Jensen will retain his two shares of stock in Jensen, but will execute an irrevocable proxy to vote his stock the same way Gordon W. Jensen votes his stock.
4. An agreement will be entered into between Gordon W. Jensen and ITC whereby Gordon agrees not to compete with ITC for a 10-year period.
5. An employment contract will be executed between Jensen and Bent Jensen whereby Bent will be employed in a sales capacity. Bent Jensen will have no managerial duties and will be engaged solely in sales promotional activities.

Hearing Counsel filed a reply to this motion urging rejection because of the remaining connections between respondent and ITC as set forth in Items 3 and 5 above.

By Commission order, served January 9, 1973, the motion was denied and the proceeding continued.

Respondent's exceptions are essentially a reargument of contentions that were exhaustively briefed and considered by Judge Marshall in his Initial Decision. We concur in the Judge's denial of respondent's motion to dismiss, and upon careful consideration of the record, the exceptions, briefs, and argument of counsel, we conclude that the factual findings and conclusions with respect thereto as set forth in the Initial Decision were, except as hereinafter noted, well supported and correct. Accordingly, except as noted hereinafter, we adopt the Initial Decision as our own and make it a part hereof.[2]

We do not, however, agree with the Judge's conclusions in the following respect. Judge Marshall found that "respondent's relationaship with ITC was willfully concealed from the Commission by falsification of its application for the license." (I.D. 16 FMC 378) Although we consider the status of ITC to be that of a shipper and respondent's connection with ITC as an example of illegal, shipper-connected forwarding operations, we do not find sufficient evidence of record to warrant a conclusion that respondent was aware that the relationship was illegal, and therefore, that it intentionally withheld information pertaining to the existence of the relationship from the Commission. We, therefore, do not find that the record of the proceeding would justify a conclusion of "willful" falsification of the license application.

During oral argument before the Commission, counsel for respondent revealed that the transfer of stock which it had proposed in its offer for settlement had indeed been consummated. The remaining connection between respondent and ITC, according to counsel for respondent, is the two shares of stock in respondent owned by Bent Jensen, who is now the sole stockholder of ITC, in addition to the services of Bent Jensen as a director and compensated employee of respondent. As previously stated, the Commission has denied respondent's motion for settlement based upon this arrangement by an earlier order. Our decision with respect to that divestiture plan has not changed.

We are of the opinion, however, that respondent should be allowed the opportunity to totally eradicate the remaining connections between itself and ITC as an alternative to revocation of its license. Inasmuch as we have found that the respondent's failure to divulge the relationship between itself and ITC was not willful, we conclude that respondent should be allowed ninety (90) days in which to terminate all current relationships between its operations and those of ITC. This would include the transfer of the two shares of respondent's stock currently owned by Bent Jensen to some entity not connected with ITC or of similar persuasion, as well as the resignation of Bent

[2] That portion of the attached Initial Decision containing the headnotes and appearances has been omitted.

Jensen as both a director and an employee of Norman G. Jensen, Inc. This condition for retention of respondent's forwarder license meets the requirements of section 9(b) of the Administrative Procedure Act, which requires that a licensee be accorded the opportunity to achieve compliance with the lawful requirements of the applicable licensing statute before its license can be revoked in cases where, as here, the licensee's act or omission was not willful.

Should respondent fail to submit an affidavit witnessing compliance with the conditions set forth herein within the prescribed period, its license will be revoked.

An appropriate order will be entered.

Vice Chairman George H. Hearn, dissenting:

I do not agree with the majority's conclusion that the status of ITC is that of a shipper; and I would permit the respondent to continue its initial or voluntarily revised relationship and activities with ITC.

To find under the facts here that ITC has a beneficial interest in foreign shipments is to stretch the scope of the statute beyond any reasonable purpose behind its enactment. When the application of the statute becomes such as to hinder the commerce intended to be protected, it must be concluded that the statute is being applied in an arbitrary manner, inconsistent with our statutory obligations. We must not apply statutory provisions as if they operate in a vacuum, but rather as part of a statutory framework with an overriding public interest in the well being of the foreign waterborne commerce of the United States.

It is apparent from the record that ITC is performing a service valuable to the expansion of our foreign trade, and that in the absence of such services being available, our export trade efforts would be hampered. This, of course, is no reason to countenance a violation of the law should one exist. On the other hand, we should not seek to find violations where there are none, especially when to do so requires a strained statutory application, an overextension of the beneficial interest rule, and ultimately the creation of an obstacle to our foreign trade.

Furthermore, the evidence herein does not establish to my satisfaction that ITC has a beneficial interest in foreign shipments. There is no evidence at all that ITC promotes sales, develops markets, negotiates sales or obtains any right, title or other interest in the shipments of its clients.

None of the cases cited by the majority are in point, but involve relationships directly between a forwarder and shipper. The Judge was compelled, therefore, to say that merely because ITC provides a remunerative service to its clients with respect to foreign shipments, it profits from the shipments. When carried to its logical extreme, that reasoning can be seen to require an unnatural application of the beneficial interest rule. If fully extended, the reasoning would prohibit a forwarder from also being a customhouse broker who provides services for the same client. Thus, if a shipper's exportation of manufactured goods deepnds on his importation of raw materials, then the customhouse broker profits from the export shipments by virtue of his being paid for brokerage services for imports which would not exist if the shipper did not have an export market.

This result is absurd, but necessarily follows from the majority's conclusion, and demonstrates the statutory overreaching exercised in the majority report.

Consequently, I would reverse the Administrative Law Judge on all issues.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-45

NORMAN G. JENSEN, INC.—INDEPENDENT [1]
OCEAN FREIGHT FORWARDER LICENSE NO. 800

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER [2]

By Notice of Investigation and Hearing, served November 24, 1970, the Commission initiated this proceeding pursuant to sections 22 and 44 of the Shipping Act, 1916 (46 USC 821, 841b) (the Act), to determine:

(1) whether Norman G. Jensen, Inc. (respondent), continues to qualify as an independent ocean freight forwarder and whether its license should be continued in effect or revoked pursuant to section 44 of the Act and the Commission's General Order 4 (46 CFR 510.9);

(2) whether respondent is in fact independent of connections with shippers, consignees, sellers, or purchasers of shipments to foreign countries as defined by section 1 of the Act;

(3) whether any violation of section 16 of the Act was incurred by virtue of the relationship between respondent and International Traders & Counsellors, Inc. (ITC); and

(4) whether respondent willfully falsified its application for the forwarder license.

Restated, the basic questions go to whether respondent, through its connection with ITC, had or has any direct or indirect relationship with shippers, consignees, sellers, purchasers

[1] This proceeding was discontinued February 26, 1971, as to World Freight Forwarders, Inc., also named respondent in the Commission's Notice of Investigation and Hearing, upon finding that it had divested itself of all interest in other specified forwarders.

[2] This decision became the decision of the Commission June 11, 1973.

of shipments to foreign countries, or has any beneficial interest in such shipments.

Hearing Counsel, in accordance with Rule 13(a) of the Commission's Rules of Practice and Procedure, and at the request of respondent, filed a clear and specific statement of proposed findings of fact and conclusions. This was done for the purpose of enabling respondent to know with certainty the relevant facts and legal issues to which it should devote its defenses. Thereafter, simultaneous opening and reply briefs were filed by respondent [3] and Hearing Counsel.

THE FACTS

(1) Respondent, a Minnesota corporation, incorporated in 1942 and registered with the Commission in 1950, is a freight forwarder but primarily a U.S. custom house broker. It is connected with ITC, also a Minnesota corporation, incorporated in 1954, through common ownership and officers. It acts as the freight forwarder for ITC's ocean shipments except in those instances where, from past experience, ITC knows that another forwarder is involved.

(2) Gordon W. Jensen is the president and treasurer of respondent. Jointly with his wife he owns 74 of 150 shares of its stock. He also is the secretary and treasurer of ITC and, again jointly with his wife, owns 50 percent of its stock. Bent Jensen is the vice president and secretary of respondent. He owns 2 shares of the stock and, also jointly with his wife, owns 50 percent of the stock of ITC. Norman G. Jensen and his family own 74 of the outstanding 150 shares of respondent's stock.

(3) ITC states that "[i]n general terms [its] services consist of preparing certain documents required by importers or exporters and also translations of documents and correspondence." Further testimony indicates that it also advises its clients as to inland shipping arrangements. Export declarations and consular invoices are prepared by either the freight forwarder or ITC depending upon the circumstances of the shipment or the regulations of the consignee's country.

(4) ITC has four main clients, all located in Minnesota. These are the Lindsay Company, a manufacturer of water softening

[3] Respondent's reply was in the form of a letter.

and purifying equipment, the DeZurik Corporation, a manufacturer of industrial valves and controls for paper mills, Watkins Products, Inc., a manufacturer of feed supplements, spices, cosmetics and patent medicines, and Polaris Industries, a manufacturer of snowmobiles. The services performed for these clients are detailed hereunder.

(5) Ordinarily, ITC is compensated for services performed for its clients in one of two ways. One is pursuant to a retainer arrangement and the other a service fee per shipment computed on the basis of a percentage of the sales price of the merchandise. In either instance, it is reimbursed for certain out-of-pocket expenses.

(6) Respondent, or its correspondent forwarder at the port city, prepares the bills of lading, and books the cargo for shipment. It also arranges for inland transportation, marine insurance, and letters of credit if those services are requested by ITC. Gordon Jensen has a "general idea" but does not know what services, other than the above, may remain to be performed in an export shipment.

(7) Sixty to 70 percent of respondent's gross revenues are derived from custom house brokerage, while 5 percent is related to ocean freight brokerage and ocean freight forwarding fees combined, and the remaining 35 to 25 percent to air freight forwarding. It had total gross revenues in 1970 of $1,200,000. ITC related shipments constitute 5 percent of respondent's ocean forwarding activities. In 1969, it collected ocean brokerage payments of $1,490 and in 1970, $2,490. The ocean brokerage payments resulting from ITC related shipments were under $100 in 1969 and under $185 in 1970.

(8) Lindsay shipments: ITC performs, or has respondent perform, all required services in connection with the export of Lindsay products to its warehouse in Antwerp, Belgium. This includes the transportation from interior points in the United States; the completion of all necessary export documents; the submission of invoices, packing lists and serial numbers to Lindsay's European warehouse. In addition, ITC maintains records as to Lindsay's warehouse inventory and the value of the merchandise in the warehouse. While in the warehouse, the property, which usually moves in full container lots, remains the property of Lindsay.

(9) In 1969, Lindsay paid ITC 10 percent of the value of the goods exported. ITC paid respondent's full invoice and was

then reimbursed by Lindsay for ocean freight and miscellaneous charges. However, ITC did absorb respondent's forwarding fees on all Lindsay shipments. Lindsay currently pays ITC a retainer fee of $30,000 per year plus out-of-pocket expenses. ITC sends respondent's freight forwarder charges to Lindsay who remits a check to ITC which ITC in turn forwards to respondent.

(10) DeZurik shipments: ITC handles DeZurik exports when special forms or special handling is required. It also provides translation services, including the translation of DeZurik's replies to potential customers into Spanish. It then sends these replies direct to the customer using DeZurik's name but ITC's address. Thereafter, it receives the orders and forwards them to DeZurik. It also sends out the invoice to the customer, using DeZurik's name, and receives payment which it forwards to DeZurik.

(11) ITC makes the export arrangements for some, but not all, of the shipments it handles for DeZurik. DeZurik does not know which documentation and transportation functions are performed by ITC and which are performed by respondent or other ocean freight forwarder. ITC selects respondent as the ocean freight forwarder if the consignee does not designate another freight forwarder.

(12) ITC pays the ocean freight forwarders for their services and expenses. DeZurik reimburses ITC for these forwarder fees and expenses and, in addition, pays ITC a fee based on 10 percent of the value of the goods exported.

(13) Polaris shipments: Most of ITC's services for Polaris are related to the importation of engines from Japan for the snowmobiles which Polaris manufactures. It also performs export services and makes all arrangements in connection with the shipment of Polaris parts to Norway. Again ITC selects respondent as the ocean freight forwarder unless the consignee designates another. Polaris is not aware of which services ITC performs and which services the freight forwarder performs in connection with any particular shipment.

(14) ITC invoices the customers in the name of Polaris for the cost of the goods exported, and remits the payments to Polaris. If a payment is not received, Polaris consults ITC, and either ITC or Polaris then writes to the customer. ITC is paid a retainer fee of $7,200 per year by Polaris.

(15) Watkins shipments: ITC receives orders from buyers of Watkins products. It investigates the credit, size, and potential ability of prospective distributors for these products, but final decision rests with Watkins. Exports are handled in the same way it handles those of other clients. It makes all the necessary export arrangements and turns the shipments over to an ocean freight forwarder for further processing.

(16) It bills the customer for the cost of the exports, and receives payments therefor from which it deducts forwarding fees, forwarders' expenses, distributors' commissions, and its own fee. It then pays these fees and expenses to the appropriate parties and remits the balance to Watkins. Watkins pays ITC a $20 service fee plus 10 percent of the net proceeds of each sale.

(17) Bent Jensen receives a salary from and participates in the profit sharing plans of both respondent and ITC. He was active in both from 1958 to 1965. Gordon Jensen is paid a salary by both respondent and ITC. He participates in profit sharing plans of both companies. Richard E. Gudmundson, presently respondent's controller and general manager, worked for both ITC and respondent from early 1964 until late 1967. He was paid by both firms. ITC now has two employees, in addition to Bent Jensen. One performs export work for its clients and the other is a secretary.

(18) Respondent's application for a license as an independent ocean freight forwarder was prepared January 10, 1962, by Norman Jensen, at that time its chief operating officer. ITC was functioning substantially as at present.

(19) In its application, respondent denied that any officer, director, or stockholder was an owner of, in control of, or associated or connected with any shipper, consignee, seller, or purchaser of shipments to foreign countries, or that any of the above persons carried on any activities related to shipping, selling or purchasing of exports to foreign countries.

Discussion and Conclusions

Respondent contends (1) that it is an independent ocean freight forwarder,[4] (2) that it does not control ITC nor does

[4] The Act, at 46 USC 801, defines the term "independent ocean freight forwarder" as follows:

> An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser

ITC control it, (3) that although both companies are controlled by the same individuals, they are operated and managed independently of each other, have their own employees and keep separate books and records, (4) that ITC is not a shipper or consignee or purchaser of shipments to foreign countries nor does it have a beneficial interest[5] in such shipments, (5) that ITC is neither directly nor indirectly controlled by or in control of a shipper or consignee or by a person having a beneficial interest in shipments, (6) that ITC does not perform any service involving or relating to sales promotion, sales representation or sales negotiations, and (7) that there is no evidence indicating that respondent willfully falsified its freight forwarder application or that its relationship with ITC has been employed to violate section 16 of the Act.

On October 6, 1969, Norman Harris, then District Investigator and now Deputy Director with the Commission's New Orleans office, interviewed Bent Jensen and Richard E. Gudmundson, the latter now General Manager and Controller of respondent.

Harris' abbreviated notes, made at the time of the interview, show that Gordon Jensen described the substance of ITC functions as sales promotion, sales representation and those of a shipper's export department. Compensation for such services was on a commission basis, usually a percentage of the sales or invoice value. At his request, Gordon Jensen was furnished a copy of Harris' notes made at the time of the investigation and raised no question as to any reference. However, at the hearing, he denied describing the functions of ITC as noted but testified, "I really don't have a clear recollection because it is a long time ago." Gudmundson testified that he learned how to handle sales correspondence while working for ITC. Having heard and observed all witnesses, and following study of the entire record, this Examiner accepts the testimony of Harris.

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of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

[5] Beneficial interest is defined by the Commission's General Order 4 (46 CFR 510.21(1)) as follows:

> (1) The term "Beneficial interest" for the purpose of these rules includes, but is not limited to, any lien interest in; right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising by financing of the shipment or by operation of law or by agreement, express or implied, provided, however, that any obligation arising in favor of a licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest.

Respondent urges that the prohibition of section 1 of the Act regarding the independence of forwarders disqualifies only those who are shippers, consignees, sellers, or purchasers of shipments or who have a beneficial interest therein. Thus, while confirming ITC's direct relationship with its shipper clients engaged in export trades, respondent takes the position that "what is off limits to an ocean freight forwarder is for the forwarder to be a shipper, consignee, seller, or purchaser of shipments or to have a beneficial interest in such shipments."

The Commission's definition of beneficial interest is held by respondent to be "so vague and indefinite and susceptible to different interpretations as to be violative of the Due Process Clause of the Fifth Amendment to the Constitution and the Sixth Amendment. *U. S. v. Cohen Grocery Store,* 255 U.S. 81, 89 (1921); *A. B. Small Co. v. American Sugar Refinery Co.,* 267 U.S. 233, 239 (1925); *Cline v. Frink Dairy Co.,* 274 U.S. 445 (1927)."

As Hearing Counsel point out, the issue involving the alleged vagueness of the Commission's definition of beneficial interest was resolved seven years ago in *New York Freight F & B Ass'n v. Federal Maritime Commission,* 337 F. 2d 289, 297 (1964), wherein the court stated:

Although the challenged rule may limit some benign financing activities by forwarders, it provides a means to curb an evil Congress sought to correct—the collection of compensation from carriers by persons who have *any interest* in the goods being shipped. We hold that the rule is reasonable and necessary to prevent forwarders from selling goods under the guise of "financing" and then using this subterfuge to receive a discounted freight rate. Cert. denied 380 U.S. 910 (1965). (Emphasis added.)

The rule is not restricted to financing but applies to *any interest,* including the right to profit from shipments in foreign commerce. ITC clearly profits from, and therefore has a beneficial interest in, such shipments under its retainer and commission agreements. Because of its relationship with ITC, respondent shares this beneficial interest. Respondent further benefits from the freight forwarding business flowing from shippers served by ITC.

On opening brief, Hearing Counsel detail the history and background of section 44 of the Act (PL 87-254) for the purpose of emphasizing the intent of Congress to ban anyone not completely independent from being licensed, or maintaining a license, as an independent ocean freight forwarder. In conclusion, *License No. 790—North American Van Lines,* 14 F.M.C. 215, 221 (1971), is cited as follows:

All of the legislative history points out clearly that exceptions to the clear and unambiguous language of the statute were to be excluded and that the inherent prohibition vis-a-vis control is absolute and we have so held in numerous proceedings. (See: *Application for Freight Forwarding License—Louis Applebaum,* 8 FMC 306 (1964); *Application for Freight Forwarding License—Wm. V. Cady,* 8 FMC 352 (1964); *Application for Freight Forwarding License—Del Mar Shipping Corp.,* 8 FMC 493 (1965); *Application for Freight Forwarding License—York Shipping Corp.,* 9 FMC 72 (1965).

In view of the above-found overlapping of officers and ownership between ITC and respondent, the contention that there is no present active or actual inter-company control, direct or indirect, cannot be accepted as satisfying the statutory requirement for independence. The Commission has consistently held that the mere possibility of control, which most certainly exists here, is sufficient to remove a forwarder from an independent status. Respondent's nonconformance with the Act in this regard is not cured by going through the motions of operating the two companies independently and maintaining separate books and records. It is settled law that corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose. *Schenley Corp. v. United States,* 326 U.S. 432, 437 (1945).

Going to the significance of nonexercise of control, the Commission held in *Cady, supra,* at 360, that:

To license Cady . . . would continue the same structure, susceptible at any time of use in flagrant violation of the purpose of the statute. The present intentions of Cady and his employer are immaterial, since the statute makes licensing depend upon the existence of control and not upon its exercise or nonexercise.

In further urging that the Commission has ruled that the requirement that forwarders must be completely independent, regardless of the actual exercise of control, Hearing Counsel cite *Del Mar Shipping, supra,* at 497, a case quite parallel to the situation here at bar, wherein it was held that:

In determining the applicable law, the principal fact herein is that Waldeck, the owner of an exporting firm, owns 50 percent of the stock of the respondent freight-forwarder. As owner of 50 percent of the stock Waldeck is in a position where he might exercise control over the forwarder. . . . Accordingly, it is concluded and found that respondent is not an independent ocean freight forwarder. The application should be denied.[6]

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[6] See also *York Shipping, supra,* at 76.

Thus, the ban against the licensing of forwarders whose independence is subject to breach, either actual or potential, is absolute. There must be complete independence and respondent is not independent.

Respondent also contends that its relationship with ITC does not violate section 16 of the Act as it does not result in rebates to shippers. The fact, however, is that direct payment to the shipper or owner of the goods is not necessary. A forwarder who has any beneficial interest in a shipment and accepts brokerage thereon is guilty of accepting a rebate in violation of section 16. *New York Freight Forwarder Investigation,* 3 U.S.M.C. 157, 164 (1949). Also see *Brokerage on Ocean Freight —Max Le Pack, et al.,* 5 F.M.B. 435, 439-440 (1958), re the absence of evidence of payment to the shipper and the use of a corporate form or veil to evade a statute.

In *United States v. Braverman,* 373 U.S. 405, 406 (1963), the Supreme Court, in interpreting the Elkins Act as prohibiting rebates by rail carriers, as does section 16 by ocean carriers, held that:

> . . . the Elkins Act outlaws solicitations of rebates by any person whatever, no matter for whose benefit the rebate is sought. . . . Nowhere does the section [section 1 of the Elkins Act] say or imply that rebates are unlawful only it they are given to or are for the benefit of a shipper.

Despite respondent's generalized contention that it did not knowingly or willfully conceal from the Commission information a reasonable man could assume the Commission sought by its application form, the record herein requires the above findings of fact numbered 18 and 19 and offer no basis for finding that the false representations concerned were other than knowing and willful.

ULTIMATE CONCLUSIONS

1. Respondent is not independent in that it directly and indirectly controls and/or is controlled by ITC, a person who is shipper connected and, in addition, has a beneficial interest in shipments to foreign countries.

2. Respondent's relationship with ITC is in violation of section 16 of the Act.

3. Respondent's relationship with ITC was willfully concealed from the Commission by falsification of its application for the license.

4. Respondent's license as an independent ocean freight forwarder should be revoked pursuant to section 44 of the Act and the Commission's General Order 4 (46 CFR 510.9).

(S) JOHN MARSHALL
Presiding Examiner

Washington, D. C.
JUNE 19, 1972

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-45

NORMAN G. JENSEN, INC.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 800

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine *inter alia* whether Norman G. Jensen, Inc. continues to qualify as an independent ocean freight forwarder and whether its license, No. 800, should be continued in effect or revoked, and the Commission has fully considered the matter and has this date made and entered of record a Report containing its findings and conclusions thereon; which Report is hereby referred to and made a part hereof. The Commission found that Norman G. Jensen, Inc. did not possess the required independence from shipper connections necessary to be an ocean freight forwarder but declined to revoke Norman G. Jensen, Inc.'s license as an independent ocean freight forwarder due to mitigating circumstances, but subjected the retentions of said license to certain specific conditions.

Therefore, it is ordered, That Norman G. Jensen, Inc. be allowed to retain its license as an independent ocean freight forwarder subject to the following conditions:

1. Norman G. Jensen, Inc. shall immediately terminate all relationships between its operations and those of International Traders and Counsellors, Inc. found in the Report to violate the Shipping Act, 1916, and certain Commission regulations or orders; and

2. Norman G. Jensen, Inc. shall submit in the form of an affidavit a full report to the Commission on the manner in which it has complied with the requirements to so terminate, as heretofore set out, within 90 days of service of the Report and Order. If Norman G. Jensen, Inc. fails to submit the required report, its license as an independent ocean freight forwarder will be revoked without further proceedings.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-51

NEW YORK SHIPPING ASSOCIATION—
NYSA-ILA MAN-HOUR/TONNAGE METHOD OF ASSESSMENT;
POSSIBLE VIOLATION OF SECTIONS 15, 16, AND 17,
SHIPPING ACT, 1916

June 12, 1973

The assessment formula agreement between the New York Shipping Association and the International Longshoremen's Association is subject to the jurisdiction of the Federal Maritime Commission under section 15 of the Shipping Act, 1916.

The assessment formula agreement is not "labor exempt" from the requirements of section 15, Shipping Act, 1916.

No violations of sections 16 and 17, Shipping Act, 1916, appear from the record in this show cause proceeding.

C. P. Lambos, Donato Caruso, Thomas W. Gleason, Jr. and *Julius Miller* for New York Shipping Association, Inc. and International Longshoremen's Association, AFL-CIO.

John S. Rogers for Union Minerals and Alloys Corporation.

Alan F. Wohlstetter for Wallenius Line.

Marvin J. Coles and *Neal Michael Mayer* for Seatrain Lines, Inc.

Mario F. Escudero and *Robert J. Hickey* for the Commonwealth of Puerto Rico.

Ronald A. Capone and *Stuart S. Dye* for Transamerican Trailer Transport, Inc.

Joseph F. Kelly, Jr. for Daniels & Kennedy, Inc. and The Madden Corporation.

Philip Elman and *Bernard J. Wald* for Wolfsburger Transport-Gesellschaft.

Norman D. Kline and *Donald J. Brunner* as Hearing Counsel.

Gerald A. Malia for Sea-Land Service Inc.

Stanley O. Sher and *Paul M. Tschirhart* for Prudential-Grace Lines, Inc.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; George H. Hearn, *Vice Chairman*; Ashton C. Barrett and James V. Day, *Commissioners*)

The New York Shipping Association and the International Longshoremen's Association [1] were ordered to show cause why the latest man-hour/tonnage formula,[2] contained in their collective bargaining agreement, was not subject to section 15 of the Shipping Act, 1916, and not in violation of sections 16 and 17 of that Act as well. Both the NYSA [3] and the ILA were made respondents in the proceeding.[4]

FACTS

Two affidavits furnish the background of this proceeding: (1) the affidavit of James J. Dickman, President of the NYSA; and (2) the affidavit of Thomas H. Gleason, Sr., the President of the ILA. The facts set forth below are drawn from the two affidavits.

The issue of assessments to fund collectively bargained fringe benefit programs has plagued the longshore industry since its advent in the 1968 collective bargaining agreement. Until July of 1971, the voting members of the NYSA were exclusively carriers, agents and charterers. The disputes between the voting members over the methods of assessing the various types of cargoes were frequent and bitter. This "internecine warfare" between competing modes of cargo movement during the last 2½ years of the 1968-71 labor contract almost "bankrupted" the longshoremen's fringe benefit fund. During the last contract period, several "monetary crises" developed which impaired and almost prevented the various fringe benefit funds from meeting their obligations to the employees.

In July of 1971, the NYSA passed a resolution transforming the NYSA from an association controlled by the carriers into

[1] They are variously referred to as NYSA or the Association; and the ILA or the union.

[2] The assessment formula is the agreement under which the monies necessary to fund the various fringe benefits agreed to by the Assoication and the union will be raised.

[3] The NYSA is a nonprofit, multi-employer bargaining association made up of both direct and indirect users of longshore labor in the Port of New York.

[4] Intervenors are Transamerican Trailer Transport, Inc.; Wolfsburger Transport-Gesellschaft m.b.H.; Union Minerals and Alloys Corp. d/b/a River Development Co., and Lipsett Steel Products, Inc., jointly; Wallenius Line; Seatrain Line, Inc.; Daniels & Kennedy, Inc., and The Madden Corp., jointly; Commonwealth of Puerto Rico; and Sea-Land Service, Inc.

an association where the voting power reposed in the major stevedores. The NYSA, as it is now structured, is a non-profit membership corporation of a "bipartite" nature consisting of the major stevedoring companies, which are full-voting members, and ocean carriers, carrier agents, terminal operators and other maritime concerns operating in the Port of New York, which are nonvoting associate members.[5]

The NYSA hoped that the stevedores, as the direct employers of ILA labor, could bring "order out of chaos." The stevedores were deemed to be more intimately aware of the industry's labor problems, and thus better equipped to deal with the ILA in controlling the skyrocketing labor costs, especially in the area of the Guaranteed Annual Income (GAI). It was also hoped that the stevedores being neutral entities could develop a "fair and equitable formula" for allocating the fringe benefit costs. By this time, the ILA had made up its mind that when negotiations began on the new contract, it was going to demand full participation in the formulation of the assessment formula because, "Hard workers on the docks [were] going to have their welfare, clinics and GAI benefits protected." The ILA was determined to become "a full partner" in the assessment method.[6]

The bargaining began in September of 1971, and among the goals of the NYSA were: (1) finding some method of curtailing GAI costs, and (2) eliminating the "shortfall" concept and the forty million man-hour guarantee. To these ends, the NYSA proposed the end of "casual hiring" and demanded that every ILA employee become a "permanent employee" of some direct employer in the Port. The NYSA's primary objection was the payment of GAI benefits to the "indolent" worker who "would not accept work when work was available." Initially, the ILA vehemently opposed the "new employment system" and in turn demanded that the assessment formula itself become an issue of bargaining.

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[5] It is virtually impossible to categorize the members of NYSA. Some stevedore members are also terminal operators. Some carrier members perform their own stevedoring functions. Suffice it to say that the members of NYSA consist of pure stevedores, pure carriers, pure terminal operators, pure agents, pure watching agencies, as well as hybrid organizations engaged in various maritime functions.

[6] Under the old collective bargaining agreement, the construction of a formula by which the NYSA would assess its members for the monies necessary to finance the fringe benefit programs was left in the exclusive province of the NYSA.

In November of 1971,[7] both sides agreed to certain basic principles which included: (1) GAI benefits would be available only to those employees who would accept work when it was available, and (2) the assessment issue would become the subject of bargaining with full ILA participation. Subsequently, the assessment formula presently before us was agreed to.

DISCUSSION AND CONCLUSIONS

This case is before us as a result of the Supreme Court's decision in *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U.S. 261 (1968). Some understanding of that decision, its background and subsequent events is necessary to place the jurisdictional issues presented here in their proper perspective.

In late 1960, the Pacific Maritime Association (the PMA), a multi-employer bargaining association, and the International Longshoremen's and Warehousemen's Union (the ILWU) reached a milestone agreement, which it was hoped, would end a long history of labor discord on the West Coast waterfront. The ILWU agreed to the introduction of labor saving devices and the elimination of certain restrictive work practices. In return, the PMA agreed to create over the period from 1961 to 1966 a "Mechanization and Modernization Fund" of $29,000,000 (the Mech Fund), to be used to mitigate the impact upon employees of technological unemployment. The agreement specifically reserved to the PMA alone the right to determine how to raise the Fund from its members at the rate of some $5,000,000 a year. An assessment formula based solely on tonnage was ultimately adopted by PMA.

Volkswagen filed a complaint with this Commission,[8] alleging that the PMA was dominated by common carriers who had agreed upon the formula in order to shift a disproportionate share of the Mech Fund assessment onto Volkswagen, who did not patronize those common carriers. Volkswagen alleged that the Mech Fund assessment agreement was subject to the

[7] A strike was called by the ILA on October 1, 1971, which affected Atlantic and Gulf Coast ports, including the Port of New York. The strike continued for 57 days, until it was ended by injunctions under the Taft-Hartley Act.

[8] Originally, a member of the PMA brought an action in a Federal court against Volkswagen seeking to collect assessments against Volkswagen, which it had refused to pay. Volkswagen obtained a stay of the action to permit it to invoke the primary jurisdiction of the Commission.

provisions of section 15 [9] of the Shipping Act, 1916 (46 U.S.C. 814), and had not been filed with the Commission, nor approved by it, and that the assessments on Volkswagen under the agreement violated sections 16 and 17 of the Shipping Act (46 U.S.C. 815, 816).

The Commission held that although the Mech Fund assessment formula was a "cooperative working agreement" within the plain language of section 15, it nonetheless was not the kind of agreement required to be filed under that section. The agreement, it was thought, did not "affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives." The Commission concluded that:

> What must be demonstrated before a section 15 agreement may be said to exist is that there was an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by terminal operators. (9 F.M.C. at 83)

The Supreme Court, in overturning the Commission's decision, thought that "too narrow a view had been taken of a statute that uses expansive language" and that the assessment formula was subject to section 15. The Court found that most, if not all, of the members of the PMA had "passed on" the assessments, and that competition was affected within the meaning of section 15. In concluding that the assessment formula was subject to section 15, the Court felt that it was necessary to emphasize that the only agreement before it was the one between the members of the PMA, and that:

> We are not concerned here with the . . . collective bargaining agreement between the Association [PMA] and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board . . . But in negotiating with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be

[9] Section 15 requires every common carrier by water or other persons subject to the Shipping Act to file with and have approved by the Commission "every agreement . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carrier; or in any other manner providing for an exclusive, preferential or cooperative working arrangement." The term "agreement" includes "understandings, conferences, and other arrangements."

assessed . . . That assessment arrangement, affecting only relationships among Association members and their customers, is all that is before us in this case . . . (390 U.S. at 278)[10]

In Docket No. 69-57, *Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement* (15 FMC 259) (June 14, 1972), the agreement of the NYSA membership providing for an assessment formula generically indistinguishable from the PMA agreement before the Court in *Volkswagen, supra,* was before the Commission.[11] However, in that case the question of the Commission's jurisdiction never arose.

However, in Docket No. 70-3, *United Stevedoring Corporation* v. *Boston Shipping Association* (16 FMC 7) (August 25, 1972), the Commission was confronted with another agreement involving a multi-employer bargaining association, except that this time the agreement in issue was a part of the collective bargaining agreement itself. Briefly, it was alleged that pursuant to Article 10 of the collective bargaining agreement between the Boston Shipping Association (BSA) and the ILA, the complainant, United Stevedoring, was being denied access to longshore labor. United charged that Article 10 and certain other agreements were subject to section 15, and since the agreements had neither been filed with nor approved by the Commission, they were unlawful. Activities under the agreement were also said to violate sections 16 and 17 of the Shipping Act.

In its first decision, served November 9, 1971, (15 FMC 33) the Commission found the BSA subject to its jurisdiction, and Article 10 and the other agreements subject to the provisions of section 15. That decision was appealed to the First Circuit Court of Appeals.[12] Seven maritime associations were granted leave to intervene, and the views of the Department of Labor and the National Labor Relations Board were presented to the Court in a brief filed by the Department of Justice, statutory respondent in the proceeding. Prior to oral argument, the Com-

[10] Justice Harlan, in a concurring opinion, discussed more fully the problem of reconciling multi-employer collective bargaining with the sometimes competing philosophies of Federal laws promoting and regulating competition, i.e. in the case of maritime labor regulations, the Shipping Act.

[11] The case involved the collective bargaining agreement and the assessment formula, which immediately preceded the one here under consideration.

[12] *Boston Shipping Assn., Inc.* v. *United States,* (No. 72-1004) decided May 31, 1972, U.S. Court of Appeals, First Circuit.

mission requested the Court to remand the proceeding to it for consideration of the views of the various government agencies and intervenors, none of which had appeared in the initial proceeding before the Commission. The motion was granted; and for the first time, the Commission was faced with the problem alluded to by Justice Harlan in *Volkswagen*—the problem of reconciling multi-employer bargaining with the sometimes competing policies of Federal laws promoting and regulating competition, i.e. the Shipping Act.

On remand, the Commission concluded that while the agreements were of a kind which fell within section 15, the national policy of fostering and protecting the collective bargaining process require that the agreements be declared "labor exempt". In that decision, served August 25, 1972, the Commission formulated a test for use in determining whether a labor exemption should be granted. Four criteria or rules of thumb were established:

1. The collective bargaining which gives rise to the activity must be in good faith. Other expressions used to characterize this element are "arms length" or "eyeball to eyeball".

2. The matter is a mandatory subject of bargaining, e.g. wages, hours, or working conditions. The matter must be a proper subject of union concern, i.e., it is ultimately related or primarily and commonly associated with a bona fide labor purpose.

3. The result of the collective bargaining does not impose terms on entities outside of the bargaining group.

4. The union is not acting at the behest of or in combination with non-labor groups, i.e. there is no conspiracy with management. (*BSA*, *supra*, at page 8)

We shall have more to say about these criteria later in this report; and with this background, we turn to the issues at hand.

A threshold we must cross before the disputed agreement itself can be dealt with is the question of jurisdiction over the parties to the agreement. The argument against our jurisdiction is two-pronged: (1) since the NYSA is an association with some members who are "stangers to the Act", it is not subject to the Shipping Act; and (2) since one of the parties to the collective bargaining agreement is a union (the ILA) over which we have no jurisdiction, there can be no jurisdiction over the agreement. Both of these arguments have already been rejected,[13] and both are based upon the language of section 15 that submits to our jurisdiction only agreements which are between common carriers by water and/or "other persons" subject to the Shipping Act.[14]

Our jurisdiction over the NYSA is not dependent upon each and every member of the Association being either a "common carrier" or "other person". What we said in the *BSA* case is equally applicable here:

> Aside from the fact that some members of the BSA may not be subject to our jurisdiction, there are members of the BSA which clearly are subject to the Act. Whether or not stevedoring contractors are subject to the Act, terminal operators and steamship lines clearly are; thus we find members of the Association in their individual capacities to be subject to our jurisdiction. To argue that these individuals can band together and form an association which, although as an entity does not do any of the things enumerated in the section 1 definition of "other person" but does otherwise engage in matters which are or may be of Shipping Act concern would frustrate the entire purpose of the Act. (*BSA*, *supra*, at page 4, footnote omitted)

A moment's reflection will show that acceptance of any "mixed membership" theory of jurisdiction would effectively end any regulation of the myriad restrictive agreements which characterize this country's oceanborne commerce. The conference system itself would elude all regulation by the simple expedient of each conference adding a stranger to the Act, say a pure steamship agent, to its membership. The difference between the addition of a "pure stevedore" as a party to an agreement and the inclusion of a pure agent in conference membership is merely one of degree. To hang regulation of our foreign waterborne commerce on so slender a thread was most certainly not the purpose of Congress, nor is it the result of any language in the Shipping Act.

The assessment formula before us is for jurisdictional purposes at least the same as was before us in Docket 69-57, *supra*, except for the presence of the union.

The introduction of the ILA into the situation does not, however, alter the picture. Here again, whether or not there is any conceivable Shipping Act jurisdiction over a labor union, our

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[13] See *United Stevedoring Corporation* v. *Boston Shipping Association*, *supra*.

[14] Section 1 of the Shipping Act defines the term "other person" as "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."

jurisdiction over the parties who are subject to the Act is sufficient. Thus, the inclusion of the ILA as a nominal party to the assessment formula agreement otherwise among persons subject to our section 15 jurisdiction, and the fact that there is a party on one side of the collective bargaining agreement who is not subject to such jurisdiction, are considerations of no legal significance. Our jurisdiction over those persons who are subject to the Act suffices so long as the agreement itself falls within one of those categories of agreements which section 15 submits to our regulation.[15] We cannot hold otherwise without emasculating the Congressional regulatory program for our waterborne commerce. If the agreement is not amenable to our surveillance (although within our section 15 jurisdiction), it will be because the national policy to encourage and protect collective bargaining requires the agreement to be declared labor exempt, not because it is included in a collective bargaining agreement with the union on one side or because the union is made a party.

The assessment formula before us was the product of negotiations between the union and the Association, and is incorporated into the basic collective bargaining agreement itself. This alone, it is urged, is enough to entitle the agreement to the labor exemption because *Volkswagen* is seminal authority for the principle that negotiated labor agreements ". . . reflecting the national labor policy of free collective bargaining . . . fall into an area of concern to the National Labor Relations Board . . ." (390 U.S. at 278), to the exclusion of any jurisdiction under the Shipping Act. Respondents' proposition, while valid in the abstract, must fail in the specific because of its inherent assumption that their particular agreement reflects, and is in furtherance of, the national policy of free collective bar-

[15] Several types of arrangements among persons subject and a person not subject to the Act have clearly been held subject to section 15; e.g., the incorporation papers of an association of carriers and stevedores, *United Stevedoring* v. *Boston Shipping Assn., supra;* understandings/agreements concerning interdependent rail/overland ocean rates between carriers and railroads, *Investigation of Overland/OCP Rates and Absorptions,* 12 F.M.C. 184, 216 (1969), affirmed *sub nom. Port of New York Authority* v. *F.M.C.,* 429 F.2d 663 (5th Cir. 1970); a requirements contract (not an interstitial operation under a conference agreement) between carriers and a shipper, *N. Atlantic Mediterranean Frt. Conf. and United Arab Co.,* 9 F.M.C. 431, 436, 437 (1966); a rate agreement (implementing an intercarrier dual rate system) between carriers and shippers, *Anglo Canadian Shipping Company* v. *United States,* 264 F.2d 405, 411 (1959). See also generally *Volkswagenwerk* v. *F.M.C.,* 390 U.S. 261, 275-76 (1967). Cf. *Wharfage Charges and Practices at Boston, Mass.,* 2 U.S.M.C. 245, 250, 251 (1940); *Agreement No. 7620,* 2 U.S.M.C. 749, 754 (1945); *Grace Line, Inc.* v. *Skips A/S Viking Line et al.,* 7 F.M.C. 432, 448 (1962); and *Portalatin Velazquez Maldonado* v. *Sea-Land Service, Inc.,* 10 F.M.C. 362, 363, 364 (1967).

gaining. *Volkswagen* does not stand for any absolute or total exemption of all collective bargaining agreements from other Federal laws. As Justice Harlan said in the *Volkswagen* case itself:

> Multi-employer collective bargaining must therefore be reconciled with the competing policies of Federal laws prompting and regulating competition, viz., the antitrust laws and, in this case of maritime labor relations, the Shipping Act. This is a problem on which Congress has provided relatively little guidance, but it is one of a kind that the Court has repeatedly grappled with since *Allen Bradley Co.* v. *Local Union No. 3, etc.*, 325 U.S. 797 . . . It is a problem of linedrawing.[16]

It was precisely in aid of the required "line drawing" that we set out the criteria or guidelines in the *BSA* case, *supra*. It is, of course, respondents' position and assurance that the assessment formula fully meet all the criteria of *BSA*. Intervenors and Hearing Counsel are equally sure that the agreement fails to meet some if not all of the criteria. Failure to meet any one of them is sufficient to consider withholding the exemption. We say "consider withholding" the exemption because, as we found in *BSA*:

> In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition and whether any such effect is direct or remote. Ultimately the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement.

This final analysis must await examination of the assessment formula under the criteria for the labor exemption.

Good faith in the bargaining between the NYSA and the ILA is somewhat grudgingly "assumed" by all the parties except Transamerican Trailer Transport, Inc. (TTT), who challenges the "good faith" of the respondents. TTT finds it inconceivable that certain members who have "with uncompromising" hostility fought and are still fighting Puerto Rico's "exempt" status under the old formula could have engaged in good faith, arms-length bargaining to preserve that status.[17] TTT

[16] Justice Harlan went on to say, "I see no warrant in assuming, in advance that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both."

[17] For a discussion of the "exempt" status of Puerto Rico under the old formula as modified by this Commission, see Docket 69-57, *Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement*, 15 FMC 259-261.

recognizes that resolution of the good faith issue would require an evidentiary hearing, and it requests one; but since our decision here does not turn on the issue of good faith, we will not order an evidentiary hearing and we reach no conclusions concerning the good faith of either the NYSA or the ILA during their negotiations.

Respondents seem inclined to skirt the question of whether the assessment formula is a mandatory subject of bargaining, i.e. whether the assessment formula itself concerns wages, hours or other terms and conditions of employment. Their whole argument appears to be included in the single sentence, "The Assessment Formula is a proper subject of bargaining of paramount concern since the ILA would be remiss if it permitted its members to lose the fringe benefits which they had obtained in the collective bargaining arena." The ILA's concern over the possible loss of fringe benefits stems from the NYSA members' failure to agree on a formula for the assessments necessary to fund the fringe benefits the Association was obligated to pay under the old collective bargaining agreement,[18] and the several "crises" which developed from the failure of the members to agree. Neither the amount nor character of the fringe benefits is at issue. They have already been negotiated and are not challenged by the NYSA. What is at issue between the ILA and the NYSA is the timely payment of the necessary monies, and the question remains whether that issue is a mandatory subject of bargaining.

The mandatory bargaining criteria stem from the proposition that Congress only intended to exempt from other Federal laws those collective bargaining agreements which dealt with legitimate employer-employee disputes, which in turn are subjects on which labor and management are required by law to bargain. This intention of Congress found expression in section 8(d) of the National Labor Relations Act (49 Stat. 452), which imposes the duty to bargain in good faith concerning "wages, hours, or other terms and conditions of employment." That unions and employers may bargain about other subjects is beyond doubt, but when they leave the area of the mandatory and enter other fields they run the risk that their agreements may violate other Federal laws. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). The assessment formula does not involve

[18] See our decision and the record in Docket 69-57, *supra*, note 16, for the lamentable history of disagreement under the old agreement.

wages and hours; nor does it, in our view, involve other terms and conditions of employment.

Fringe benefits themselves would, we think, quite clearly fall within "other terms and conditions of employment"; but, as we have already noted, we are not here dealing with the amount or kind of fringe benefits. What the ILA wants here is not some new agreement on fringe benefits as such, but a guarantee that fringe benefits already negotiated will in fact be timely paid. We have a great deal of sympathy for the ILA's concern—sympathy prompted by our experience with the old assessment formula—but we cannot let this sympathy lead us to grant a labor exemption to an agreement which is and should be subject to our jurisdiction.

In *Excello Dry Wall Company*, 145 N.L.R.B. 663 (1963), the union sought a security fund to insure the payment of wages and benefits because the need for such a fund had been clearly demonstrated by earlier evidence of delinquency on the part of the employer. The NLRB, citing over 20 years of precedent, found that the union had committed an unfair labor practice by insisting upon the security fund as a condition precedent to concluding a collective bargaining agreement. In short, security funds, performance bonds or other guarantees of payment are not mandatory subjects of bargaining.[19]

In this case the motivating factor in the union's (the ILA) demand of full participation in the assessment formula is solely its concern that the fringe benefits be paid for by the employer (the NYSA). We see nothing in the situation confronting us here to distinguish it from that confronting the NLRB in the *Excello* case, *supra*. Accordingly, we conclude that the assessment formula now before us did not result from negotiations concerning a mandatory subject of bargaining.

Respondents would also have us find that the assessment formula does not impose terms upon persons or entities outside the bargaining group because by its terms the assessment formula applies only to "cargo loaded or discharged by ILA members in the Port of New York." As respondents put it:

> The NLRB has certified that all longshore employees engaged in the loading and unloading of vessels in the Port of New York constitute the proper unit for collective bargaining. The assessment formula does not purport to apply to longshore employees in the Port of Philadelphia or any other port

[19] As the NLRB pointed out, "The statutory obligation to bargain is not just limited to financially responsible parties, whether employer or labor union." (145 N.L.R.B. at 664)

in the United States. It assesses only cargo that has enjoyed the services of ILA labor in the Port of New York, the area that the NLRB has certified to be the proper bargaining unit.

Of course, respondents completely miss the point, and in doing so misread *United Mine Workers of America* v. *Pennington et al.*, 381 U.S. 657 (1965). In the first place, the collective bargaining unit is not just the ILA. Nor is the whole Port of New York, regardless of who may be performing services there. The NLRB did not certify the area of the Port of New York itself, although the area covered by the bargaining unit is the Port of New York. It did certify both the ILA and the NYSA. These two associations taken together constitute the bargaining unit.

Pennington, supra, makes it glaringly clear that the bargaining group includes both sides of the table—the union and the employees. In *Pennington,* the union agreed to the rapid mechanization of the mines which would substantially reduce employment; and in return the large mining companies agreed, among other things, to increase wages as productivity increased. The wage increases were to be demanded from the smaller companies by the union, whether or not they were mechanized and without regard to their ability to pay. The purpose of the agreement was to eliminate the smaller companies. In concluding that the bargaining agreement was not entitled to a labor exemption under the antitrust laws, the Court said:

There is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry . . . The union's obligations to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant.

The persons or entities upon whom the terms and conditions of the collective bargaining agreement were being imposed were also employers, not just the union.

Clause H of the collective bargaining agreement, entitled "Settlement of Port of Greater New York Conditions", provides in part:

This agreement shall be executed by the ILA on behalf of itself and its affiliated locals and by the New York Shipping Association, Inc. for and on behalf of its employer members and by each contracting stevedore and vessel carrier who directly or indirectly utilizes the services of any employees covered by this agreement and who by such execution binds itself and its successors to each and every term and condition of the agreement, including without limitation, the contribution of its proportionate share of the hourly and tonnage contributions provided herein, and no contracting stevedore shall perform services for any carrier, private or govenmental, unless such carrier has subscibed to this agreement . . . .

Article 2 of the assessment formula provides:

Any direct employer who performs work for any carrier who is not a party to the collective bargaining agreement shall be responsible for the tonnage assessment that should have been paid by such carrier.

In order to enforce this provision, the ILA/NYSA Contract Board has directed the execution of an agreement between direct employers and carriers who are not members of NYSA or parties to the NYSA/ILA collective bargaining agreement which binds the nonmember carriers to each and every term of the collective bargaining agreement, and by which the nonmember carrier "agrees without limitation that it will contribute its proportionate share of its contributions and assessments required to be paid by the carrier under the collective bargaining agreement."

Many if not all of the direct employers referred to are terminal operators, and it is unnecessary to even allude to the vital importance of terminal services to the common carrier. Under the above provisions, a nonmember carrier must, as a condition precedent to receiving terminal services at the Port of New York, sign an agreement levying assessments under yet another agreement in the negotiation of which he had played no part. Thus, it is clear that entities outside the bargaining group must either submit to the terms of the collective bargaining agreement and the assessment formula or incur the sanctions contained therein.

No party to this proceeding alleges any "conspiracy" between the NYSA and the ILA. Even TTT, which as noted charges a lack of good faith on the part of certain members of the NYSA, does not argue that they conspired with the ILA. The conspiracy criteria is really a corollary of the good faith criteria, and here there is no evidence of record of any conspiracy. For the same reasons that we found it unnecessary to order an evidentiary hearing to establish good faith or its lack on the part of respondents, we find it equally unnecessary to order such a hearing to determine whether any conspiracy existed—our disposition of this case turns neither on lack of good faith nor the existence of a conspiracy.[20]

As for whether in the final analysis the activity under the assessment formula is the type of activity which affects competition under the Shipping Act, that question would appear to have been answered in the affirmative in the *Volkswagen* case, *supra.* Just as the PMA members passed on their assessments under the Mech Fund agreement, so must the members of the NYSA pass on their levies under their assessment formula. Competition is thus affected. This effect on competition is not remote—it is the direct result of the agreement which we here find subject to section 15. In this area we agree with Hearing Counsel, who points out that the impact assumes greater proportions than appear from the mere fact that a total fund of over $100 million must be raised by some form of cargo "tax". The difference in productivity in the shipping industry makes the particular formula adopted of crucial importance. For instance, if a straight tonnage rate is chosen, cargoes such as newsprint or automobiles which move a relatively large volume of tons would bear the heaviest burden. Similarly, highly productive containerized or roll-on/roll-off operators would bear a greater proportion of the total obligation than breakbulk operators under a tonnage assessment. Some of these carriers may be able to absorb the assessments, others may be forced to pass them on to their shippers. It is obvious that the formula chosen has a direct impact upon their respective competitive positions.

We do not view our assertion of jurisdiction over the assessment formula as an unwarranted intrusion into the collective bargaining process. Respondents view the collective bargaining agreement, including the assessment formula, as part of a "complete package". We, of course, do not dispute this view. They are perfectly free to view their agreement in any light they desire. What we do disagree with is respondents' assertion that our jurisdiction over the assessment formula would preclude implementation of any part of the collective bargaining package. Admittedly, the assessment formula, here found subject to section 15, has not been approved by this Commission, and until it is approved the NYSA may not collect assessments

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[20] It may well be that "conspiracy" is a misnomer. It is, of course, an antitrust test. Section 15, unlike the Sherman Act, speaks only of agreements, and it may be that something less than an actual conspiracy is needed under that section.

under it without violating section 15. The situation is a great deal like that which confronted us early in the proceedings of Docket 69-57, *supra,* where we granted an interim approval of Agreement T-2390 so as to allow the NYSA to continue to collect assessments necessary to fund the fringe benefits established in its contract with the ILA. The fact that the assessment formula in Docket 69-57 was not an actual part of the document comprising the collective bargaining agreement as it is here is of no significance. The assessment formula is severable.

We are not disposed to jeopardize relations between the NYSA and the ILA by withholding our approval of the assessment formula. If for no other reason, our experience under the old agreement would preclude such an action on our part. Labor peace is crucial to the well-being of our maritime industry, and we will take an action which disturbes that peace only when there are no other reasonable alternatives. Here, however, the course is clear, we will grant the assessment formula an interim approval just as we did in Docket 69-57, and we will condition our approval upon any adjustments which may be found necessary as a result of the proceeding which we have this day instituted.

We cannot accept intervenors' contention that the assessment should be disapproved because it violates sections 16 and 17 of the Act. In advancing this contention the intervenors point to the fact that the present assessment formula is in all essential respects the same as T-2390, which we found unlawful in Docket 69-57. It follows, therefore, to the intervenors at least, that the present assessment formula is also unlawful, and all we need to do is take official notice of the record in Docket 69-57 and find as a fact that the new agreement is indeed the same as the old T-2390, and thus conclude as a matter of law that the new formula is unlawful. It is not quite that simple.

Intervenors' theory rests upon an assumption which we think is clearly unwarranted—that the same circumstances and conditions in all the trades covered by the agreement as existed when we found T-2390 unlawful still exist today. This, although unlikely, may be the case; we would be remiss were we to assume such a crucial fact. Accordingly, any determination that the present assessment formula violates sections 16 and 17 under the circumstances and conditions existing in the various trades today must await the development of a fresh record clearly establishing those conditions and circumstances.

There remains only the charge that the assessment formula is within the exclusive jurisdiction of the National Labor Relations Board and thus beyond any jurisdiction under the Shipping Act. Respondents assert that we lack the "acute expertise and sensitivity in administering the National Labor Relations Act" which the NLRB has developed.[21] The Commission should not, we are told, usurp the jurisdiction of the NLRB; for should we impose another regulatory statute upon labor negotiations, we would present respondents with "problems which would almost be insurmountable." We must agree with the intervenors and Hearing Counsel in that we too find the respondents' arguments to be based upon several erroneous assumptions.

The basic misconception of respondents is that the NLRB has exclusive and unlimited jurisdiction over all matters which arise or may arise from collective bargaining. This is, of course, not the case as the Supreme Court has so clearly stated in *Meat Cutters* v. *Jewel Tea Co., supra.* In that case, the Supreme Court entertained the proposition that the question of what constituted a mandatory subject of collective bargaining was within the "exclusive primary jurisdiction" of the NLRB. In rejecting this contention, the Court said at page 687:

> . . . we must reject the union's primary-jurisdiction contention because of the absence of an available procedure for obtaining a Board determination. The Board does not classify bargaining subjects in the abstract but only in connection with unfair labor practice charges of refusal to bargain. The typical antitrust suit, however, is brought by a stranger to the bargaining relationship, and the complaint is not that the parties have refused to bargain but, quite the contrary, that they have agreed. . . . Agreement is of course not a refusal to bargain, and in such cases the Board affords no mechanism for obtaining a classification of the subject matter of the agreement. Moreover, even in the few instances when the antitrust action could be framed as a refusal to bargain charge, there is no guarantee of Board action. It is the function of the Board's General Counsel rather than the Board or a private litigant to determine whether an unfair labor practice complaint will ultimately issue. . . . And the six month limitation period of § 10(b)

[21] Respondents also would include the Department of Justice as one to whom jurisdiction over labor negotiation should be left; but the reason for this is unexplained. Obviously, respondents have in mind the inescapable fact that some labor agreements fall within the ambit of the antitrust laws which are under Justice Department jurisdiction. This, of course, weakens the basic premise that all labor negotiations and their consequences fall within the exclusive province of the NLRB.

of the Act . . . would preclude many litigants from even filing a charge with the General Counsel.

The analogy to *Jewel Tea, supra,* is clear. Here, strangers to the bargaining relationship are challenging the agreement; there can be no refusal to bargain charge; and it has been more than six months since the agreement was signed. There is no jurisdiction of the NLRB with which our decision here interferes.

The assessment formula embodied in Attachment B of the collective bargaining agreement entitled "Settlement of Port of Greater New York Conditions" is hereby assigned Commission No. T-2804, and is hereby approved; provided, however, the approval granted herein is subject to such additional adjustments as the ultimate decision in Docket No. 73-34, *New York Shipping Association—NYSA/ILA Assessment Formula Agreement,* demonstrates are required to render the assessment formula just and lawful under the Shipping Act.

Commissioner Clarence Morse, concurring and dissenting.

Concurring. Irrespective of the answer to the question whether, for section 15 purposes, NYSA is a "mixed membership" group, I concur in the majority's conclusion that the lawfulness of the assessment formula under sections 16 and 17 of the Shipping Act, 1916, must be tested under a fresh record establishing the conditions and circumstances as applicable thereto. It is implicit in such a conclusion that the assessment formula is not a mandatory subject of labor-management bargaining,[22] that labor-exempt status therefore does not automatically apply, and that whether we will or will not grant a labor exemption to the assessment formula turns on a resolution of a line-drawing problem as between the Shipping Act, 1916, and the National Labor Relations Act, which can be accomplished only after full exposure to the applicable facts.

[22] *Excello Dry Wall Company, supra.* Compare: *NLRB* v. *American Compress Warehouse,* 350 F.2d 365 (5 Cir. 1965), *cert. den.* 382 U.S. 982 (1965). *International Hod Carriers, Local 1082,* 150 NLRB 158 (1964), enf'd., *sub nom. International Hod Carriers* v. *NLRB,* 384 F.2d 55 (9 Cir. 1968), *cert. den.* 390 U.S. 920 (1968). *NLRB* v. *Davison,* 318 F.2d 550 (4 Cir. 1963). *Local 164, Brotherhood of Painters* v. *NLRB,* 293 F.2d 133 (D.C. Cir. 1961), *cert. den.* 368 U.S. 824. *Sylvania Electric Products, Inc.* v. *NLRB,* 291 F.2d 128 (1 Cir. 1961), *cert. den.* 368 U.S. 926 (1961); *Sylvania Electric Products, Inc.* v. *NLRB,* 358 F.2d 591 (1 Cir. 1966), *cert. den.* 385 U.S. 852 (1966).

If I were able to find the existence of proper parties to constitute a section 15 agreement, I would associate myself with the majority's statement that the assessment formula ". . . is hereby approved; provided, however, the approval granted herein is subject to such additional adjustments as the ultimate decision in Docket No. 73-34, *New York Shipping Association—NYSA/ILA Assessment Formula Agreement,* demonstrates are required to render the assessment formula just and lawful under the Shipping Act." Such review by the Commission compels a complete re-examination of the assessment formula in all its aspects, and as I view the matter the report in Docket No. 69-57, *Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement, supra,* is not controlling in such re-examination. Pending a final decision on the merits of the assessment formula, the parties must have this or some similar authorized vehicle under which they can be collecting funds with which to meet their contractual obligations. Otherwise there will be chaos.

Dissenting. This proceeding gives rise to two basic inquiries, one being our jurisdiction, and the other, assuming we find jurisdiction exists, whether we should grant labor-exempt status. The jurisdictional issue in turn has two aspects, one being whether an agreement exists which meets the standards of section 15 in respect to parties and subject matter, and the other being whether the agreement or the parties are subject to sections 16 and 17. It is clear to me that sections 16 First and 17 do apply. Hence, my difference with the majority exists only in respect to section 15. If we have jurisdiction under sections 15, 16, or 17, we are then confronted with the second basic inquiry, which is the question whether we should declare the matter is labor exempt as to one or all of those three sections of the Shipping Act. Docket No. 70-3, *United Stevedoring Corp.* v. *Boston Shipping Association, supra,* clearly and adequately declares our guidelines in determining whether to grant labor-exempt status.

There is little I need add relative to "mixed membership" and section 15 jurisdiction which I have not said in my concurring and dissenting opinions in Docket No. 69-57, *supra* (June 14, 1972) 15 FMC 285, and Docket No. 70-3, *supra* (August 25, 1972), 16 FMC 17-21 incorporated herein by reference.[23]

[23] The philosophy of *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (decided May 14, 1973), fortifies my views.

In the instant case, the majority asserts two propositions (mimeo decision—pages 10-11).[24] First, it states that the inclusion of the union as a nominal party to the agreement does not alter the application of section 15. That statement is misleading because it fails to distinguish between the labor-management agreement wherein NYSA and ILA are on opposing sides and the intra-NYSA agreement wherein the voting members of NYSA authorized NYSA to enter into the labor-management agreement with the ILA. The union is not a member of the intra-NYSA group or the agreement within that group. The union may be a party to the assessment formula agreement by reason of the inclusion of the formula in the NYSA/ILA contract, but the union is never a "party", nominal or otherwise, to the intra-NYSA group or agreement which preceded and authorized on behalf of NYSA the signing of the NYSA/ILA labor-management contract, and for our jurisdictional purposes this is the critical agreement. The intra-NYSA section 15 type agreement (See Docket 70-3, mimeo decision—footnote 8 on page 15 and footnote 11 on page 17) to enter into an agreement with the ILA can, itself, be a section 15 agreement provided only the intra-NYSA group is not "mixed membership" and the agreement meets any of the seven subject matter criteria of section 15.[25]

As I understand the majority report, the majority at no time contends that the collective bargaining agreement itself (the agreement to which the assessment formula is attached as Exhibit B) is a section 15 type agreement, because ILA is an essential party to that agreement and ILA is neither a common carrier by water nor another person subject to the Act. The majority contends that the intra-NYSA agreement to enter into the assessment formula (Attachment B of that agreement) is section 15 and the mere fact the assessment formula is a part of the collective bargaining agreement (thereby making ILA a

[24] At page 10 of mimeo decision it is stated: "The difference between the addition of a 'pure stevedore' as a party to an agreement and the inclusion of a pure agent in conference membership is merely one of degree." Not so. *Agreement No. 7602*, 2 USMC 749 (1945) and *In the Matter of Agreement No. T-2719* (Docket No. 73-6, mimeo decision served April 20, 1973). 46 CFR Part 522 and Part 523, our guidelines for filing of freight conference agreements, rate agreements, pooling agreements, etc., are clearly limited to filings of agreements between common carriers by water to the exclusion of "pure agents". In those instances where an agent has been accepted as a member of a section 15 type agreement, its acceptance has been on the sole premise that it is signatory thereto as alter ego for its principal, a common carrier by water or "other person".

[25] Compare *Transshipment Agreement, Indonesia/United States*, 10 FMC 183, 196. *Transshipment Agreement between S. Thailand and U.S.*, 10 FMC 199, 215.

"nominal party" to the assessment formula) does not alter the situation.

If one considers the entire membership of NYSA, both voting and non-voting members, it is obvious that there are some members who are neither common carriers by water nor "other persons subject to the Act." See Footnote 5, *supra*.[26] Hence, under such a test "mixed membership" exists. In my desire to find a controlling group to which "mixed membership" would not apply, I would even confine my examination to the members of NYSA which, after July 1971, were granted sole voting power for NYSA to approve or disapprove an agreement with ILA, namely, the major stevedores in the Port.[27] This is the furthest I am willing to go in seeking to find an approvable section 15 type membership. After July 1971, NYSA adopted a resolution transforming NYSA from an association controlled by the carriers into an association where the voting power reposed in the major stevedores in the Port. The seven voting stevedores are: International Terminal Operating Co., Inc., John W. McGrath Corporation, Maher Stevedoring Co., Inc., Nacirema Operating Co., Inc., Northeast Stevedoring Co., Inc., Pittston Stevedoring Corp., and Universal Terminal & Stevedoring Corp.[28]

Of the foregoing seven voting members, all but Northeast Stevedoring Co., Inc., have terminal tariffs on file with this Commission and therefore constitute "other persons" subject to the Shipping Act, 1916. Northeast Stevedoring does not have a terminal tariff on file with us and, unless it is operating a terminal without filing a tariff in violation of our General Order 15, there has been no showing that Northeast Stevedoring is "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection

[26] Affidavit of James J. Dickman, Appendix, page 3a, fn 3, Respondents' Joint Memorandum of Law and Appendix, filed October 10, 1972, after naming the seven stevedoring companies which comprise the voting members of NYSA, including Northeast Stevedoring Co., Inc., states in part:

> ". . . In addition to the voting major stevedores, NYSA's membership also consists of non-voting associate members, comprised of ocean carriers, carrier agents, terminal operators, sugar stevedores, watching agencies, other stevedoring companies and other maritime concerns operating in the Port. Some stevedore members are also terminal operators at some or all of their waterfront facilities. Others are pure stevedores. Moreover some carrier members perform their own stevedoring functions. NYSA is truly a 'mixed membership' association."

[27] *Id.*

[28] *Id.*

with a common carrier by water." (Section 1, Shipping Act, 1916, 46 U.S.C. 801). While the fact that Northeast has the term "Stevedoring" as part of its name is of little significance in establishing the nature and scope of its business activities, the absence of a terminal tariff filing is significant. Furthermore, it is my understanding that Northeast Stevedoring is wholly owned by Lester Wolff and performs stevedoring services at Northeast Marine Terminal's facilities, which latter company does conduct a terminal operation, has a terminal tariff on file with this Commission, and is 50% owned by Lester Wolff and 50% by Mitsui O.S.K. Lines, Ltd. Northeast Stevedoring and Northeast Marine Terminal have a common address and telephone number. Had these two companies had a common parent or had there been a parent/subsidiary relationship, I might even have disregarded the corporate fiction and concluded that Northeast Stevedoring is conducting a terminal business by reason of its affiliation with Northeast Terminal, but I am unwilling to take that step here because of the diverse stock ownership in the two companies. Hence, I conclude that the present voting power in NYSA is vested in six stevedoring companies which also conduct terminal operations and thereby qualify as "other person subject to the Act" plus one stevedoring company—Northeast Stevedoring Co., Inc.,—which is neither a common carrier by water nor an "other person subject to the Act" and therefore we have a classical case of "mixed membership". Hence, I conclude that there is no approvable section 15 agreement intra-NYSA because of "mixed membership", but that the agreement is subject to sections 16 and 17, unless by "line drawing" we should grant labor exemption.

The second point made by the majority (mimeo decision—page 10) is the stated fear that "'mixed membership' theory of jurisdiction would effectively end any regulation of the myriad restrictive agreements which characterize this country's oceanborne commerce." [29] That comment is unsupported by the

[29] In Docket No. 73-6, *In the Matter of Agreement No. T-2719* (16 FMC 318 served April 20, 1973), the Commission ruled (Chairman Bentley dissenting) that the lease of a public port grain elevator from Port of Houston Authority to Louis Dreyfus Corporation was not subject to section 15, Shipping Act, 1916, because lessee was ruled to be not an "other person subject to the Act." In that case, after the lease was executed and after it was filed for our approval, but before lessee took possession under the lease, the lessee filed with this Commission a proposed tariff provision which stated, *inter alia*, "Common carriers by water . . . shall not be accepted for loading at the elevator." Absent such tariff filing, lessee would have been ruled to be an "other person" because of operation of a port facility serving common carriers by water. Compare the consistency of the above stated fear with the majority's ready acceptance in Docket No. 73-6 of a proposed tariff provision as being adequate basis for permitting lessee to escape our regulatory supervision.

records at this Commission. Where parties think they are subject to section 15 and realize they may be able to obtain immunity from antitrust laws by having agreements filed and approved under section 15 they hasten to do so. I know of no instances where parties have knowingly and voluntarily conducted their affairs so they would expose themselves to antitrust instead of so conducting their affairs that they could assert the exemption which section 15 affords against antitrust. The experience before the Congress of the railroads,[30] airlines,[31] truckers,[32] labor unions,[33] agricultural co-ops,[34] export trade corporations,[35] and others seeking to obtain a section 15 type umbrella against the application of antitrust laws in their industries is persuasive against the possibility that common carriers by water and "other persons" in this industry will rush to add a stranger to the Act as party to a section 15 type agreement in order to get out from underneath the umbrella of section 15. All one need do is ask common carriers by water if they want to dispense with section 15 protection from antitrust, and, instead, subject all their anticompetitive agreements to antitrust, and the answer is a resounding "NO". And even if there were to be such a rush to escape the protection of section 15, then, absent a basis for granting "labor exemption", the parties and their anticompetitive agreements would still be subject to the other applicable provisions of the Shipping Act, 1916, and, to them, an even much more frightening prospect, they would be exposed to the surveillance of the Federal Trade Commission and the Antitrust Section of the Department of Justice, each of which treat anticompetitive agreements in a much more critical and restrictive atmosphere and philosophy than that existing in this Commission. Finally, even if such a rush away from section 15 jurisdiction should occur, and I am convinced it would not, then section 15 could be readily amended by the Congress should it consider such action desirable. Hence, let us not be influenced by such a frivolous contention.

[30] 49 U.S.C. 5.

[31] 49 U.S.C. 1384.

[32] 49 U.S.C. 5.

[33] 15 U.S.C. 17, 29 U.S.C. 52 and 105.

[34] 15 U.S.C. 17, 7 U.S.C. 291, 292.

[35] 15 U.S.C. 62.

I conclude that because of "mixed membership" the assessment formula is not a section 15 type agreement and would dismiss all section 15 issues from the proceeding.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-11

KRAFT FOODS

v.

PRUDENTIAL GRACE LINES

NOTICE OF ADOPTION OF INITIAL DECISION

June 13, 1973

No exceptions having been filed to the initial decision of the Presiding Judge in this proceeding, and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on June 13, 1973.

It is ordered, That respondent pay to complainant the sum of $180.92, plus 6 percent interest per year if not paid within 30 days;

It is further ordered, That respondent notify the Commission promptly of the date and manner of payment.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

No. 73-11

KRAFT FOODS

v.

PRUDENTIAL GRACE LINES

Reparation awarded.

William Levenstein for Complainant.
D. J. Hartigan for Respondent.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

Complainant claims reparation in the amount of $180.92 from respondent on account of alleged overpayment of freight on 100 cartons of shortening shipped on B/L No. 37 dated July 22, 1971 via SS *Santa Cruz* from New York to Curacao, Netherlands Antilles. The commodity was rated as shortening in accordance with second revised page 126 of U. S. Atlantic & Gulf Venezuela and Netherlands Antilles Conference Tariff No. Ven-11, and freight charges of $305.59 were assessed and collected on the basis of 174 cu. ft. at the applicable rate of $69.00 per 40 cu. ft., plus surcharge. Complainant contends that the commodity comes within Item 415 of 11th Revised page 42A of the tariff, the applicable rate of which was $44.50 per 2,000 pounds, plus surcharge. At this rate the total charges would have been $124.67, making a difference of $180.92 in complainant's favor.

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[1] This decision became the decision of the Commission June 18, 1973.

Complainant also has moved for summary judgment and asks for interest at 6 percent from date of payment of the freight.

The B/L describes the commodity as 100 CTNS. SHORTENING, GENERAL CARGO, and the shipper's export declaration likewise indicated simply that the shipment was 100 cartons of shortening. However, other evidence now submitted establishes that the commodity shipped was Kraft Red Label Shortening, and is composed of a mix of cottonseed oil and soyabean oil.

When presented respondent apparently denied the claim solely on the ground that it was "time barred" under the applicable provision of the conference tariff. Respondent points out that its rating personnel relied on the commodity description in the bill of lading and the dock receipt. Having no indication as to what type of shortening was involved in the shipment its personnel "had no choice but to assess the highest rate provided in the tariff for shortening."

The complaint was served on March 12, 1973, and, among other things, requested that the matter be heard under the Commission's shortened procedure provided by Rule 11 of the Commission's Rules of Practice and Procedure (46 CFR 502.181 to 187). On March 23, 1973, respondent, by letter, with a copy to "Kraft Foods", acknowledged receipt of the complaint and consented to the "claim being informally adjudicated in accordance with the provisions of Rules 19(a) to 19(d) (46 CFR 502.301 to 502.304)." By letter of March 26, 1973, to the presiding officer, respondent briefly stated its side of the story and submitted copies of relevant documents. Among other things it was said:

> We feel we rated the bill of lading correctly and we trust our explanation will assist you in determining if Prudential-Grace Lines, Inc. adhered to the rules and regulations in this respect.

On April 25, 1973, respondent was reminded by letter from the presiding officer that the complaint is a formal one and that complainant had requested that the matter be heard in accordance with the Commission's rules (46 CFR 502.181 to 502.187), which is a different procedure from that set out in Subpart S of the Rules—Informal Procedure for Adjudication of Small Claims (46 CFR 502.301 to 502.304)—to which respondent had consented in its letter of March 23. As a result, respondent agreed to the shortened procedure and submitted the appropriate verified consent.

Both parties having requested shortened procedure, and it appearing that this is an appropriate case for the use of that procedure, the request is granted and the matter has been considered and decided without oral hearing.

Discussion

Complainant's claim was originally denied by respondent on the basis that it was "time-barred" under the conference rule. However, the Commission has repeatedly held that in an action such as this which is brought under the Shipping Act, 1916, a claim arising from overcharge cannot be barred from a determination on the merits by a conference rule, if, as here, the claim is filed with the Commission within two years of its accrual. Hence, the actual description of the shipment as it appears now of record governs the determination of the issue.

The conference tariff has a listing in "Commodity Index" 2nd Revised page 126 of "SHORTENING viz: * * * Vegetable Oil (as Oil, Cottonseed, Peanut or Soyabean, Liquid, Packed, Item 415 N.O.S. as shortening, Vegetable Oil)." Item 415, 11th Revised page 42A, has a specific listing for oil with a special rate to Curacao, reading:

OIL, Packed, Liquid, Flaked, Solid or Hydrogenated, viz:

* * * *

Corn, Cottonseed or Soyabean to Aruba and Curacao only.

The commodity here involved comes within this item.

The evidence supports the conclusion that the shipment should have been rated under Item 415 of the tariff, subject to the applicable rate of $44.50 per 2,000 pounds. Complainant was overcharged $180.92, which respondent is directed to pay, plus 6 percent interest per year if not paid within 30 days. The motion for summary judgment is moot. Complainant's request that interest be allowed from the date of payment of the freight is denied.

(S) ASHBROOK P. BRYANT
Administrative Law Judge

Washington, D.C.
MAY 22, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-57

UNIROYAL INTERNATIONAL

v.

FARRELL LINES

NOTICE OF ADOPTION OF INITIAL DECISION

June 20, 1973

No exceptions having been filed to the initial decision of the Presiding Judge, and the Commission having determined not to review same, notice is hereby given that the Commission, on June 20, 1973, adopted the ultimate conclusion of the Presiding Judge in dismissing the complaint. Nothing herein shall be deemed to constitute adoption of the discussion or conclusion of the Presiding Judge with respect to assignment of the claim on which the complaint is based. The Commission takes no position in this proceeding on that issue.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

No. 72-57

UNIROYAL INTERNATIONAL

v.

FARRELL LINES

Complainant has standing as assignee to file claim.
Complaint dismissed.

William C. Whittemore for complainant.
Baldvin Einarson for respondent.

INITIAL DECISION OF STANLEY M. LEVY,
ADMINISTRATIVE LAW JUDGE [1]

This proceeding arises from a complaint filed by Uniroyal, Inc., through its Uniroyal International Division, served October 12, 1972. Complainant seeks reparation in the amount of \$7,546.88, the difference between the freight charges of \$21,-231.88 assessable on 7,000 cubic feet of Miticide (Omite 30 W) under the commodity classification pesticide [2] and charges of \$13,685.00 under the commodity classification insecticide.[3]

The position of respondent Farrell Lines, Inc., is that the complainant is not a real party of interest in this dispute and lacks standing to bring this complaint and further that the cargo involved was correctly rated as pesticide.

A hearing was held in Washington, D. C., on March 20, 1973.

[1] This decision became the decision of the Commission June 20, 1973.

[2] South and East Africa Conference Southbound Freight Tariff No. 1, F.M.C. No. 2, 3rd rev. p. 311, Item No. 2695.

[3] South and East Africa Conference Southbound Freight Tariff No. 1, F.M.C. No. 2, 3rd rev. p. 232, Item 1840.

Party in Interest

Respondent's argument that complainant is not the real party in interest is not well founded.

The shipper of the cargo was Fisons Pest Control. The terms of the sale of this cargo by Uniroyal were FAS. The assignment of the claim and Uniroyal's standing to bring this complaint was in the following terms:

> We hereby assign the claim and transfer all rights to claim for overcharges on shipment 600 fibre drums omite 30 which sailed on steamer SS African Dawn September 10, 1971 B/L number 2 from Baltimore USA to Capetown South Africa. . . .

This assignment is clearly sufficient for complainant to bring this action seeking reparation for the alleged overcharge. *Ocean Freight Consultants v. Bank Line Ltd.*, 9 F.M.C. 211 (1966). And this is so whether or not such assignment passes beneficial or equitable title since the assignee may recover damages in an action brought in his own name but for the benefit of an equitable owner of the claim. *Spiller v. Atchison, Topeka, and Santa Fe Railway Co.*, 253 U.S. 117 (1920).

The complainant having standing, the complaint is not dismissible for lack thereof, and accordingly, must be considered on its merits.

DISCUSSIONS AND CONCLUSIONS

The underlying shipping documents, i.e., the bill of lading and export declaration, described the product as "MITICIDE OMITE 30 W." The export declaration contained the additional description "(PESTICIDE PREPARATIONS)." Also contained on the export description was the United States Department of Commerce Schedule B Commodity Number "5992030." [4]

In the normal course of events Farrell's rate clerk rates the commodity based on the description on the bill of lading and when in doubt looks to the export declaration for aid and possible clarification. The bill of lading described the shipment as "Miticide Omite 30 W" without denominating it as either a pesticide or an insecticide. The export declaration described

[4] The commodity number, used as an aid in identifying product classifications, is titled "Chlorinated hydracarbon pesticidal preparations primarily for agricultural use, except aerosols, fly sprays and preparations containing DDT." Listed under this classification are some 19 different products under generic or trade names, many of which are insecticides, although the listing does not denominate the products as insecticides or pesticides or suitable as either.

the shipment as "Miticide Omite 30 W (Pesticide Preparations)." No conflict exists between the two documents, the export declaration merely containing a fuller description.

Pesticide is a broad generic term that means literally "to kill pests." As such it is a broader term than insecticide which is limited to insect pests.

Complainant in support of its position contends that *Webster's Third New International Dictionary of the English Language Unabridged* includes mites in its non-technical definition of insects although entomologically insects are limited to the class Insecta. It further contends that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 USC, Sec. 36, for the purposes of administering that Act defines insecticides as including all preparations intended for preventing, destroying, repelling, or mitigating "any member of the Class Insecta or any classes in the Phylum Anthropoda, for example, products intended for use against . . . mites."

Thus a miticide intended to destroy mites of the class Phylum Anthropoda which are not insects would at least for the purpose of administering that Act be identified as an insecticide.

However, considerations for administration under one statute are not controlling when another statute is specifically concerned with the matter in issue. Section 18(b)(3) of the Shipping Act, 1916, provides that no carrier shall charge other than the compensation specified in the appropriate tariff filed with this Commission. That tariff provides different rates for pesticides and insecticides and hence it is within that framework that evidence as to the particular properties of the shipment must be sought.

In its application for a patent for Omite 30-W, Uniroyal stated, in pertinent part, that:

> The new compounds of the present invention are useful as insecticides, particularly for the control of mites.
>
> * * * *
>
> This example illustrates the effectiveness of the chemicals of the present invention for controlling mites. . . . The control of mites by the chemicals of the present invention at various concentrations is shown in the following table. . . .
>
> The chemicals of the present invention may be applied in various manners for the control of insects. . . . may be applied directly to loci to be protected against insects. . . . may be applied to loci to be protected against insects by the aerosol method. . . .

The chemicals may be used admixed with carriers that are active of themselves, for example, other insecticides, fungicides, or bactericides.

Having thus described our invention, what we claim and desire to protect by Letters Patent is:

1. The method of protecting plants against attack by insects which comprises applying to the plants a compound represented by the formula. . . .

From the foregoing it appears that complainant clearly intended the compound to be primarily a specific against certain species of mites which, as heretofore set forth, are not insects. It further appears that complainant considered mites in the non-technical sense. Unquestionably complainant did not limit its application by specifically stating that its product was to be limited solely to combating mites but rather implying that it might well be utilized against other unnamed and unspecified insects either alone or in conjunction with other insecticides, fungicides or bactericides.

In seeking to determine the nature of the product in issue in this proceeding it is necessary to examine other material prepared by complainant. This material consists of the technical data sheet and advertising material circulated to potential users and the label placed on the product. These items refer only to Omite 30 W's utilization for the control of specified mite species. Thus, in a very real and practical sense, considering the patent application and other data prepared by complainant relating to Omite 30 W, complainant specifically produced and sold Omite 30 W for the control of mites.

Whether or not a miticide could be classified as an insecticide under tariff Item No. 1840, it certainly could be properly classified under tariff Item No. 2695 as a pesticide in that a mite is a pest within the class Phylum Anthropoda. In fact complainant so classified it in its shipping documents.

A shipper is not bound to pay the charges in a bill of lading without recourse, simply because they are based on a description provided by the shipper. The test is what a claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the description in the documents supplied to the carrier by the shipper. *Johnson & Johnson International v. Venezuelan Lines,* Docket Nos. 71-46, 71-67, 13 S.R.R. 305 (1972).

The tariff clearly intended to distinguish between products denominated insecticides and those denominated pesticides. Where a product might be utilized in either category its chief effectiveness and utilization is certainly a reasonable basis for determining its commodity rating for application of proper freight charges.

The Commission has required a complainant seeking reparation to sustain a heavy burden of proof. *Colgate Palmolive Co. v. United Fruit,* Informal Docket No. 115(I), 11 S.R.R. 979 (1970). Complainant herein has failed to meet its burden, nor indeed has it established by any preponderance of the evidence that the shipment should have been rated as an insecticide.

Complaint dismissed.

(S) STANLEY M. LEVY
Administrative Law Judge

Washington, D.C.
MAY 24, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-37

PURCHASE OF SHIPS—MATSON NAVIGATION COMPANY, SEA-LAND SERVICE, INC., REYNOLDS LEASING CORP.

June 20, 1973

Respondents' failure to file for Commission approval their agreements for the sale and purchase of two uncompleted containerships did not violate section 15 of the Shipping Act, 1916.

Francis T. Greene and *Brian D. Fix* for respondent Matson Navigation Company.

Gerald A. Malia, Edward M. Shea, and *Brian P. Murphy* for respondents Sea-Land Service, Inc. and Reynolds Leasing Corp.

James L. Malone and *Donald J. Brunner,* Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; George H. Hearn, *Vice Chairman*; Ashton C. Barrett, James V. Day and Clarence Morse, *Commissioners*)

PROCEEDING

This is an investigation on our own motion to determine whether an agreement to sell two container vessels under construction without Commission approval violates section 15 of the Shipping Act, 1916. We ordered respondents Reyonlds Leasing Corp. (Reynolds), Sea-Land Service, Inc. (Sea-Land) and Matson Navigation Company (Matson) to show cause why the agreements among them regarding the sale and purchase of the two containerships under construction did not require our approval. The proceeding was limited to affidavits of fact and memoranda of law, with oral argument if requested or deemed necessary by the Commission. The order initiating this proceeding was published in the *Federal Register* (36 F.R. 7621 (1971)), and interested persons were invited to petition for intervention; none did.[1] The parties submitted extensive memoranda and affidavits, urging that the agreements were not subject to section 15. Neither an evidentiary hearing nor an oral argument was requested or found necessary.

BACKGROUND

In mid-1968, Matson decided to expand its Hawaiian and Far East services, and, as a consequence, new vessels were required. On July 24, 1968, Matson's Board of Directors authorized its management to negotiate with Bremer Vulkan Schiffbau und Maschinenfabrik (Bremer Vulkan) for the construction of two containerships for the trans-Pacific trade. Matson and Bremer Vulkan concluded two contracts, each for the construction of one containership, on August 23, 1968. The ships, designated Builders Hulls Nos. 957 and 958, were to be delivered in late 1970.

However, in early 1970, Matson's operations were comprehensively reviewed, and the Board of Directors of Alexander & Baldwin, Inc., Matson's parent corporation, decided to abandon the expansion effort. Matson's Board, on June 30th, authorized A. L. Burbank & Co., Ltd. (Burbank), ship brokers, to sell the vessels under construction, subject to its approval of terms.

There had been preliminary contact between vice presidents of Matson and Burbank on June 15, 1970, and Burbank contacted potential buyers, including Sea-Land, before formal approval of the brokerage by Matson's Board. At that time, Sea-Land indicated it was not interested in the hulls. Thereafter, Burbank contacted about 460 brokers and owners in an attempt to reach all possible buyers. Several were interested, and in August, Zim Israel Navigation Co., Ltd. (Zim) agreed to purchase the hulls for $13,250,000 (if the German construction subsidy was available, or $13,750,000, if not) each. Zim was unable promptly to secure financing, and on September 11, 1970, formally notified Matson through Burbank that it was unable to make the purchase.

Burbank then renewed contacts with other prospects, and during a routine check, Sea-Land expressed interest. A meet-

[1] American Export Isbtandtsen Lines, Inc. attempted to file after the expiration of time allowed, and subsequently withdrew its petition.

ing was held on October 2nd between Burbank and Sea-Land officials, and on October 5th, Reynolds presented an option letter and a deposit of $100,000 to Burbank, which was accepted on behalf of Matson. Up to this point, there had been no direct contact between Matson and Reynolds or Sea-Land. The option was exercised October 9th, and an agreement of sale (at a price of $13,750,000 each if Matson did not receive the German construction subsidy, or $13,250,000 if it did) formalized on October 30, 1970. Under the agreement, Matson had no continuing responsibility to or relationship with Sea-Land or Reynolds following delivery of the ships. Nor were there any side agreements, operating agreements, exclusive or preferential agreements, or covenants not to compete, either in general or in a particular trade.

The original intent was to effect a novation, but Bremer Vulkan was reluctant to have a new buyer at a late stage of construction, and retention of the German construction subsidy was uncertain. As a result, Matson's rights under the construction contracts were assigned to Reynolds, and title to the ships passed directly from Bremer Vulkan to Reynolds on delivery.[2]

DISCUSSION

Section 15 of the Shipping Act, 1916, requires the filing of a copy of memorandum of any agreement between a common carrier by water or other person subject to the Act and any other common carrier by water or other person subject to the Act, if the agreement:

1. Fixes or regulates transportation rates or fares;
2. Gives or receives special rates, accommodations, or any other special privileges or advantages;
3. Controls, regulates, prevents, or destroys competition;
4. Pools or apportions earnings, losses, or traffic;
5. Allots ports or restricts or otherwise regulates the number and character of sailings between ports;
6. Limits or regulates in any way the volume or character of freight or passenger traffic to be carried; or
7. In any manner provides for an exclusive, preferential, or cooperative working arrangement.

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[2] Hull 957 was delivered December 31, 1970, and Hull 958 on March 16, 1971. The ships were chartered by Reynolds to Sea-Land for operation in the North Atlantic trade.

Prior to the recent decision of the Supreme Court in *Federal Maritime Commission* v. *Seatrain Lines, Inc., et al.*, 411 U.S. 726, May 14, 1973, section 15 arguably required the filing of the Matson-Reynolds agreement. The court in that case held the Commission without power to approve a one-time acquisition which left one party a paper corporation without physical assets. In so doing, the extent of the third and seventh section 15 categories was clarified, and limited to agreements which establish on-going activity requiring the Commission supervision.

While we recognize that the instant situation is not precisely equivalent to that in *Seatrain, supra,* we are convinced that the differences do not support the applicability of section 15. The absence of side agreements, covenants not to compete, or in fact, any obligation beyond the transfer of rights in the two incomplete vessels precludes Commission jurisdiction under the Supreme Court's reading of the Shipping Act, 1916, and its legislative history.

This proceeding is hereby dismissed.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-37

PURCHASE OF SHIPS—MATSON NAVIGATION COMPANY, SEA-LAND SERVICE, INC., REYNOLDS LEASING CORP.

ORDER

This proceeding was initiated to determine whether section 15 of the Shipping Act, 1916, required filing of agreements between Matson Navigation Company, Sea-Land Service, Inc., and Reynolds Leasing Corp. for the sale and purchase of two containerships under construction. Full consideration having been given to the matters herein involved, and the Commission this day having entered a Report of its findings and conclusions, which Report is made a part hereof;

It is ordered, That these proceedings be dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

SPECIAL DOCKET NO. 444

INTERNATIONAL PAPER COMPANY

v.

DELTA STEAMSHIP LINES, INC.

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

August 24, 1972

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on August 24, 1972.

It is ordered, That applicant is authorized to refund $1,040.01 of the charges previously assessed International Paper 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 444 that effective February 4, 1972, the rate basis on 'Tabulating Index Boards' for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 4, 1972, through May 10, 1972, is 'dollars per 2,240 lbs.', subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further ordered, That refund of the charge 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.

(S) JOSEPH C. POLKING
Assistant Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 444

INTERNATIONAL PAPER COMPANY

v.

DELTA STEAMSHIP LINES, INC.

Respondent is permitted to refund to complainant the sum of $1,040.01 as part of the freight charges assessed and collected for the transportation of tabulating index boards.

E. R. Mooney for complainant.
Robert G. Hughes, Jr., for respondent.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER [1]

This is an application by Delta Steamship Lines, Inc. (respondent), for permission to refund [2] $1,040.01, being a portion of freight charges for the benefit of International Paper Co. (complainant) in connection with a shipment of tabulating index cards from New Orleans to Lobito, Angola, aboard respondent's vessel Delta Paraguay, per Bill of Lading No. RL-6, dated February 4, 1972.

The rate applicable at the time of shipment was $64.50 per 2,240 pounds or 40 cubic feet per American West African Freight Tariff 13 FMC-13, effective January 2, 1972. The shipment weighed 131,088 pounds and aggregated 2,933 cubic feet. Respondent collected $5,168.66 on a measurement basis and seeks permission to refund $1,040.01 by charging on a weight basis.

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[1] This decision became the decision of the Commission August 24, 1972.

[2] Shipping Act, 1916, section 18(b) (3), as amended.

AWAFC Eastbound Tariff No. 13 FMC-13 became effective September 1, 1970, and for the goods of the type involved in this application the rate was assessed per 2,240 pounds only.

The conference on August 1, 1971, revised page 104 of its tariff. In so doing, inadvertently by printer's error and without intending to do so, the revision changed the rate from one computed on a weight basis only to a weight or measurement basis. As a consequence, computation on a measurement basis increased the cost for a shipment of the type involved herein by approximately 25 percent. The conference and shipper were unaware of the change and only when it was billed did the shipper realize what had occurred and brought it to the attention of the carrier. It was then recognized that the tariff should have continued to be based on weight only rather than on a weight or measurement basis. A new tariff was filed to eliminate measurement as a basis and restore weight as the sole basis for assessing charges [3] and waiver was applied for.

Section 18(b)(3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to refund a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature, and that such waiver will not result in discrimination among shippers. The application discloses a set of facts and circumstances which fall within the purview and intent of the statute. Having complied with the requirements of the statute, and good cause appearing, applicant is permitted to refund to complainant the sum of $1,040.01. The notice of waiver required by the statute shall be published in the conference tariff.

(S) STANLEY M. LEVY
Presiding Examiner

Washington, D. C.
JULY 26, 1972

[3] American West African Freight Conference, Eastbound Tariff No. 13 (F.M.C. No. 13), 4th revised page 104, effective May 10, 1972.

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

No. 72-56

UNITED NATIONS CHILDREN'S FUND

v.

THE DELTA STEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION
November 9, 1972

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 9, 1972.

Copy of initial decision attached.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

No. 72-56

UNITED NATIONS CHILDREN'S FUND

v.

THE DELTA STEAMSHIP LINES, INC.

Rate charged found so unreasonably high as to be detrimental to the foreign commerce of the United States, and no bar found to the refund of $2,080.

E. F. Kenny for the complainant.
Thomas E. Stakem for the respondent.

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

By complaint served October 6, 1972, the complainant, United Nations Children's Fund, alleges that the freight charges on a shipment of 150 drums of DDT insecticide made on November 12, 1970, from Houston, Texas, to Iquitos, Peru, via Belem, Brazil, were based in error on the rate of $108.50 weight or measurement, rather than on the rate of $108.50 per long ton, that the charges were unlawful, and that the amount of $2,080 should be ordered refunded.

The respondent, Delta Steamship Lines, Inc., admits the allegations in the complaint and further states that the only shipment of DDT transported by the respondent under the erroneous rate was that shipped by the complainant on November 12, 1970, and that no other shipper has been overcharged or will be discriminated against if a refund is awarded the com-

[1] This decision became the decision of the Commission November 9, 1972.

plainant. Respondent desires that this proceeding be handled without oral hearing, and that the Commission issue an order authorizing the refund of $2,080 to the complainant.

The shipment herein was made by a charitable organization endeavoring to assist the underprivileged children of the world.

The facts stated in the complaint and admitted in the answer are a sufficient basis for a decision in this matter. The shipment weighed 32,100 pounds and measured 1,340 cubic feet, or 33.5 measurement tons. Based on the measurement rate of $108.50 per ton, the charges assessed were $3,634.75. Based on the long ton rate of $108.50 per 2,240 pounds, the charges would have been $1,554.75.

On or about October 25, 1970, the respondent quoted to the complainant the rate of $108.50 per long ton, but this quote was incorrect. The respondent's tariff had been copied from a Booth Line tariff filed with the Commission, but in transcription the Delta tariff was converted inadvertently from the straight "weight" basis published in the Booth Line tariff to the erroneous "weight or measurement" basis. Effective December 10, 1970, the respondent amended its tariff by changing the rate to a "weight" basis only.

The complainant had urged the respondent to file an appropriate special docket application, but the respondent failed to act timely, and the present complaint therefore was filed.

It is concluded and found that the rate charged the complainant was based on an error in the tariff, and that permitting the respondent to refund a portion of the freight charges will not result in discrimination among shippers. A finding under section 18(b)(3) of the Shipping Act, 1916 (the Act), cannot be made because an appropriate application was not made within 180 days of the date of the shipment.[2]

Under section 18(b)(5) of the Act the Commission is required to disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States which after hearing it finds to be so unreasonably high as to be detrimental to the commerce of the United States. While there has been no "oral" hearing in this proceeding the matter has been heard in the sense that a formal complaint and formal answer have been filed, and the parties have relied on the facts therein adduced, and have waived further formal proceedings.

[2] Special Docket Application No. 429, *Oppenheimer Intercontinental Corp. v. Moore-McCormack Lines, Inc.*, December 2, 1971.

Accordingly, hearing having been had, in all the circumstances it is concluded and found that the rate charged the complainant herein was so unreasonably high as to be detrimental to the commerce of the United States and therefore unlawful. It is further concluded and found that under section 18(b) (5) there is no bar to the refund by the respondent of $2,080 to the complainant, and that such a refund would not be detrimental to the commerce of the United States.

(S) CHARLES E. MORGAN
Administrative Law Judge

Washington, D. C.
OCTOBER 17, 1972

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 453

PHILIPP BROTHERS

v.

AMERICAN MAIL LINE LTD.

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

April 3, 1973

Notice is hereby given that the Commission on April 3, 1973 determined to adopt the initial decision in this proceeding subject to the modification described hereinafter.

The initial decision authorized a refund of $1,521.49 based on a rate of $42.50/2000 lbs. said by applicant to be applicable to the carriage of "Manganese Metal". Review of the appropriate tariff indicates that the application and the initial decision are in error and that the correct applicable rate should be $40.50/2000 lbs. Computed on this basis the amount of refund would be $1,677.41.

It is ordered, That applicant is authorized to refund $1,677.41 of the charges previously assessed Philipp Brothers.

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 453, that effective August 23, 1972, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 23, 1972 through October 1, 1972, the rate from Japan on 'Manganese Metal' is $40.50W, 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 day thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 453

PHILIPP BROTHERS

v.

AMERICAN MAIL LINE LTD.

Respondent is permitted to refund $1,521.49 in freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

This is an application by respondent under Public Law 90-298, 90th Cong. (section 18(b)(3), Shipping Act, 1916), for permission to refund $1,521.49 freight charges for transportation of the cargo referred to below.

On bills of lading Nos. JY-WS-5002 and JK-WS-5201 dated August 23 and September 13, 1972, issued by respondent, complainant shipped Manganese Metal of an aggregate weight of 156,044.63 lbs. via SS *Japan Mail* and SS *Philippine Mail* of American Mail Line, from Kobe and Yokohama, Japan, to Seattle, Washington. Total freight charges actually collected by respondent were $5,169.04. At the time of shipment the effective tariff rate was $62.00 per 2,000 lbs. Tariff Trans-Pacific Freight Conference of Japan No. 34, F.M.C.-3.

The amount of freight charges actually collected was due to error. Item 8040 which set a rate of $42.50 per 2,000 lbs. was inadvertently deleted from Trans-Pacific Freight Conference of Japan Tariff No. 34, FMC-3, on August 1, 1972, and was not reinstated until October 1, 1972. Aggregate freight charges at that rate, now sought to be applied to the shipments of Manganese Metal here involved, would be $3,647.55. As above indi-

[1] This decision became the decision of the Commission April 3, 1973.

cated, respondents assert that the higher rate was charged and collected through inadvertence, that discrimination will not result if relief is granted, and that equity and justice warrant the relief requested.

Section 18(b)(3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to refund or waive, as the case may be, a portion of the freight charges collected or assessed where it appears that there is an error in a tariff of a clerical or administrative nature, and that such refund or waiver will not result in discrimination among shippers. The application herein discloses facts and circumstances which fall within the purview and intent of that section. Having complied with the requirements of the statute and good cause appearing, applicant is permitted to refund to complainant the sum of one thousand, five hundred and twenty-one dollars and forty-nine cents ($1,521.49). The notice required by the statute shall be published in the appropriate tariff and refund shall be made within 30 days of such notice. Within five days thereafter applicant shall notify the Commission of the date of the refund and the manner in which it was made.

(S) ASHBROOK P. BRYANT
Administrative Law Judge

Washington, D. C.
MARCH 9, 1973

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

ABSORPTIONS: See Pickup and Delivery Practices

AGREEMENTS UNDER SECTION 15: See also Terminal Leases

—In general

As to the articles of incorporation and by-laws (organic agreements) of maritime collective bargaining associations, the Commission concludes that no valid regulatory purpose would be served in requiring such agreements to be filed and approved pursuant to section 15 of the 1916 Shipping Act. However, to the extent that these agreements provide for purposes other than collective bargaining, no labor exemption from section 15 could apply to those portions of the agreements, and filing and approval of those provisions would be required. United Stevedoring Corp. v. Boston Shipping Assn., 7 (13–14).

Insofar as the Boston Shipping Association is primarily a collective bargaining unit, the labor exemption should be given effect and the organic agreements (articles of incorporation and by-laws) exempted from the requirements of section 15 of the 1916 Shipping Act. All other agreements concerning Shipping Act matters entered into by the members of the Association pursuant to its organic agreements must be filed for section 15 approval. Id. (14).

—Antitrust policy

The Commission adopts the following criteria for determining the labor exemption from the antitrust laws: (1) The collective bargaining agreement which gives rise to the activity in question must be in good faith; (2) the matter is a mandatory subject of bargaining, i.e., wages, hours or working conditions, and the matter must be a proper subject of union concern; (3) the result of the collective bargaining does not impose terms on entities outside of the collective bargaining group, and (4) the union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management. In the final alaysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. United Stevedoring Corp. v. Boston Shipping Asnn., 7 (12–13).

Since maritime employees are permitted to bargain as a group, and since they are required to bargain about certain subjects, the resulting agreements must have some exemption from the requirements of section 15. Further, each such agreement will be entitled to labor policy considerations on an ad hoc basis with respect to possible violation of sections 16 and 17 of the 1916 Shipping Act. Id. (13).

The original allocation of labor gangs following the "Final Shape," although that allocation of necessity had competitive overtones and effects, in actuality amounted to nothing more or less than the hiring by employers of employees. Because of the strong labor considerations involved and minimal and remote effects upon competition in the industry, the Commission finds that this unwritten allocation agreement between the Boston Shipping Association and the Union is exempt from the requirements of section 15 of the 1916 Shipping Act. Id. (14).

The mere fact that a certain agreement is part of a collective bargaining agreement does not automatically immunize it from the antitrust laws. In the same manner in which offensive collective bargaining agreements in general are challenged under the antitrust laws, collective bargaining agreements in the shipping industry can be challenged under the shipping laws, with due regard for labor policy considerations. However, first call-recall agreement as to allocation of labor gangs is entitled to a labor exemption from the provisions of section 15 of the 1916 Shipping Act. Although the agreement goes beyond the mere hiring of employees and provides for the assignment and reassignment of these employees strictly within the discretion of management and does in fact have some competitive effects and overtones, it nevertheless is a product of bona fide arm's length collective bargaining. Moreover, its subject matter is apparently a mandatory subject of collective bargaining, and no terms were imposed on entities outside the collective bargaining group. Id. (15).

Departure of a third-flag line, standing alone, due to an agreement between national-flag line carriers covering equal access to cargoes controlled by their government, would not create such a detriment to commerce as would warrant disapproval of the agreement. Detriment to commerce of the United States is but one of the four criteria of section 15. While a contrary finding under any of the criteria can support disapproval, all of the parts make a legislative whole and must be considered together. The antitrust laws represent a national policy of this country which is considered to be in the public interest. Section 15 provides an exemption from those laws, but only if the agreement is not found, inter alia, detrimental to the commerce of the United States. Any grant of the exemption must be scrutinized to insure that it does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the Shipping Act. Similarly, detriment to commerce must be tested against the public interest. Agreement No. 9932—Equal Access to Government—Controlled Cargo, 293 (306).

—Assessment formula

An assessment formula agreement contained in a collective bargaining agreement between the New York Shipping Association, an organization composed of various maritime industry interests, and the International Longshoremen's Association is subject to Commission jurisdiction under section 15 of the 1916 Shipping Act. Whether or not there is any conceivable Shipping Act jurisdiction over a labor union, the Commission's jurisdiction over the parties who are subject to the Act is sufficient so long as the agreement itself falls within one of these categories of agreements which section 15 submitted to Commission regulation. If the agreement is not amenable to Commission surveillance, it will be because the national policy to encourage and protect collective bargaining requires the agreement to be declared labor exempt. New York Shipping Associaion—NYSA–ILA Man-Hour/Tonnage Method of Assessment, 381 (388–389).

The fact that an assessment formula agreement between the New York Shipping Association and the International Longshoremen's Association was incorporated in the basic collective bargaining agreement is not enough, standing alone, to entitle the agreement to the labor exemption on the principle that negotiated labor agreements "reflecting the national labor policy of free collective bargaiuing . . . fall into an area of concern to the National Labor Relations Board," to the exclusion of any jurisdiction under the Shipping Act. Such proposition must fail because of the inherent assumption that the agreement reflects, and is in furtherance of, the national policy of free collective bargaining. Id. (389).

Assessment formula agreement, contained in the collective bargaining agreement between the New York Shipping Association and the International Longshoremen's Association, is not labor exempt where the issue between the parties was the timely payment of monies necessary to fund fringe benefits previously agreed to. That issue was not a mandatory subject of bargaining, since the formula did not involve wages and hours or other terms and conditions of employment. Id. (391–392).

Assessment formula agreement, contained in the collective bargaining agreement between the New York Shipping Association and the International Longshoremen's Association, is not labor exempt on the ground that terms are not imposed on persons or entities outside the bargaining group because by its terms the formula applies only to cargo loaded or discharged by ILA members in the Port of New York. The two associations taken together constitute the bargaining unit. Terms are imposed on nonmembers of the unit, e.g., a nonmember carrier must, as a condition precedent to receiving terminal services at the Port, sign an agreement levying assessments under yet another agreement in the negotiation of which it played no part. Id. (393–394).

Assessment formula agreement between the New York Shipping Association and the International Longshoremen's Association is subject to section 15 of the 1916 Shipping Act. Under tbe agreement the members of the NYSA must pass on their levies. Competition is thus affected which is the direct result of the agreement. The formula chosen has a direct impact upon the respective competitive positions of the carriers. Some carriers may be able to absorb the assessments, while others may be forced to pass them on to their shippers. Id. (395).

The Commission is not disposed to jeopardize relations between the New York Shipping Association and the International Longshoremen's Association by withholding approval of their assessment formula agreement contained in the collective bargaining agreement. The agreement will be granted interim approval, conditioned upon any adjustments which may be found necessary as a result of a further proceeding in the matter. Id. (396).

Assessment formula agreement between the New York Shipping Association and the International Longshoremen's Association, contained in the collective bargaining agreement, is not within the exclusive jnrisdiction of the National Labor Relations Board. The NLRB does not have exclusive and unlimited jurisdiction over all matters which arise or may arise from collective bargaining. Strangers to the agreement are challenging it; there can be no refusal to bargain charge; and it has been more than six months since the agreement was signed. There is no jurisdiction of the NLRB with which the Commission's decision here interferes. Id. (397–398).

—Government-controlled cargo

Complete bilateralism would mean simply that all cargo moving in a trade is by some means reserved for carriage by the national-flag lines of trading partners, i.e., the countries at each of the trade. Whatever the economic or political merit of bilateralism, the Commission's concern is the validity and extent of its application under the laws administered by the Commission. Agreement No. 9932—Equal Access to Government-Controlled Cargo, 293 (303).

By approving a pooling, sailing and equal access to government-controlled cargo agreement between a carrier owned by the Peurvian government and a U.S.-flag-carrier, covering government cargoes carried southbound from U.S. West Coast ports to Peruvian ports, the Commission is not adopting bilateralism as part of the United States maritime policy; nor is it endorsing another government's expression of national interest in the carriage of its cargo for the purpose of enhancing its merchant marine. Exclusion of a third-flag carrier from carriage of the cargoes involved may not be unlawful discrimination. There must first be a right enjoyed and that right abrogated before there can be discrimination. The excluded carrier has no such right to the cargo covered by the agreement. Thus, if the agreement meets the criteria of section 15 of the 1916 Shipping Act, it should be approved, whatever nationalistic motives may have engendered it. Id. (303–304).

A third-flag carrier has no right to cargo controlled by the Peruvian government in the U.S. Pacific/Peruvian trade, and the same holds true for cargoes controlled by the United States government. To the extent Public Resolution 17, which authorizes the Maritime Administration to grant waivers for cargoes shipped under it to the national-flag carriers of the countries receiving those cargoes, restricts waivers to those granted to the national-flag carrier of the recipient nations, it embodies a form of bilateralism. Section 901(b) of the 1936 Merchant Marine Act leaves to the discretion of the Maritime Administration the grant of waiver to particular flags. Discretionary action vests no rights. Since the third-flag carrier enjoys no right to the cargoes in question, there can be no discrimination as between carriers, in the statutory sense at least. Id. (304).

Under section 15, the Commission must and does give the same measure of fair protection to a third-flag vessel that it does to a U.S.-flag vessel. This does not necessarily mean that the third-flag vessel always receives identical treatment, for that vessel may be burdened by handicaps or impediments not burdening a U.S.-flag vessel. Thus, in reference to an agreement between a Peruvian government line and a U.S. line, covering equal access to government-controlled cargoes, the third-flag carrier cannot qualify to become an "associated" line of the Peruvian line because it, unlike the U.S. line, cannot assist the Peruvian line in obtaining access to U.S. government-controlled cargo, whereas the U.S. line can do so. Id. (305).

Departure of a third-flag line, standing alone, due to an agreement between national-flag line carriers covering equal access to cargoes controlled by their government, would not create such a detriment to commerce as would warrant disapproval of the agreement. Detriment to commerce of the United States is but one of the four criteria of section 15. While a contrary finding under any of the criteria can support disapproval, all of the parts make a legislative whole and must be considered together. The antitrust laws represent a national policy of this country which is considered to be in the public interest. Section 15 provides an exemption from those laws, but only if the agreement is not found, inter alia, detrimental to the commerce of the United States. Any grant of the exemption must be scrutinized to insure that it does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the Shipping Act. Similarly, detriment to commerce must be tested against the public interest. Id. (306).

As to the contention of a third-flag carrier that an agreement between a Peruvian government line and a U.S.-flag line, covering equal access to government-controlled cargoes, is contrary to the public interest because it will reduce competition without any showing that the agreement is degined to secure important public benefits, the Commission's experience has shown that, absent commercial resolution through such agreements, or otherwise, governmental confrontation follows. When no agreement can be reached between the carriers, the trade is disrupted, malpractices ensue and virtually everybody suffers. The public interest dictates that this situation should be avoided if possible. Here, an agreement has been reached. The prospects for continued harmony are good, thus the agreement would appear to be in the public interest. The third-flag carrier will lose some cargo, but how much is a matter of wide disagreement. On balance, it is concluded that the third-flag carrier has failed to demonstrate such a reasonable probability of harm sufficient to warrant disapproval of the agreement when weighed against the benefits to be gained by approval. In sum, the Commission cannot find from the record that approval will be discriminatory or unfair as between carriers, detrimental to United States commerce or contrary to the public interest. Id. (306–307).

The Commission will not condition its approval of an agreement between a Peruvian government line and a U.S.-flag line, covering equal access to government-controlled cargo, on the requirement that the U.S. line obligate itself to initiate and maintain service to those shippers of lumber and woodpulp now served by a third-flag line in the event the third-flag line withdraws from the trade during the existence of the agreement. The Commission sees no difference between the disapproval of agreements because of future "speculative possibilities" and the imposition of operational requirements as a condition to approval because of "doubts" as to what the future holds for a line in the trade. More importantly, the Commission does not see the nexus between approval of the agreement and the future "demise" of the third-flag carrier. If the third-flag carrier withdraws from the trade for reasons other than the agreement, it is not just to require the U.S.-flag carrier to undertake the abandoned service without regard to that carrier's operational needs and desires or the needs and desires of the shippers under the guise of "conditioning" approval. The agreement can be reexamined if the third-flag carrier is forced out of the trade because of the future impact of the agreement. Id. (307–308).

The 1928 Treaty of Friendship, Commerce and Navigation between the United States and Norway is not violated by approval of an agreement between a Peruvian government line and a U.S. line, covering equal access to government-controlled cargoes, and excluding a Norwegian line. The obligations of the United States are not enlarged by the action of the Peruvian government in establishing cargo preference rules. The treaty provisions are limited to prohibiting restrictions imposed by the signatory governments, and do not prevent the Commission from approving a commercial agreement although it may be precipitated in part by restrictions of another trading partner. The Norwegian line's status in our commerce is affected not by the Commission's action on the agreement, but by the action of the Peruvian government. In any event, there is another controlling factor. While treaties and federal statutes are on an equal footing under the

Constitution as the supreme law of the land, the latest action expresses the controlling law. The treaty with Norway antidates Public Resolution No. 17 and section 901(b) (1) of the Merchant Marine Act of 1936. Id. (308–309).

—Jurisdiction

The Boston Shipping Association, a nonprofit maritime trade association, is subject to the jurisdiction of the Commission under section 1 of the Shipping Act, 1916. The Association as an entity does not engage in any of the activities enumerated in the definition of "other person," but its individual members do. A court has rejected the theory that a conference is not an entity to which a section 21 order may be applied, holding that conferences are agents of their members. An "association" is indistinguishable from a "conference". Some members of the Association are terminal operators and steamship lines and thus are subject to Commission jurisdiction. United Stevedoring Corp. v. Boston Shipping Assn., 7 (9–10).

The New York Shipping Association, a nonprofit membership corporation consisting of stevedoring companies, ocean carriers, carrier agents, terminal operators and other maritime concerns, is subject to Commission jurisdiction, notwithstanding that some members are not common carriers or other persons subject to the 1916 Shipping Act. An opposite conclusion would lead to the result that conferences could elude all regulation by simply adding a stranger to the Act to their membership. New York Shipping Association—NYSA-ILA Man-Hour/ Tonnage Method of Assessment, 381 (388).

Matson-Reynolds agreement for the sale and purchase of two container vessels under construction did not require approval under section 15 of the 1916 Shipping Act. The absence of side agreements, covenants not to compete, or any obligation beyond the transfer of rights in the vessels precludes Commission jurisdiction. Purchase of Ships—Matson Navigation Co., Sea-Land Service, Inc., Reynolds Leasing Corp., 415 (418).

—Mergers

Section 15 of the 1916 Shipping Act vests in the Commission jurisdiction over all agreements "controlling, regulating, preventing or destroying competition." An agreement to merge would clearly seem embraced within the quoted language. The Court in *Seatrain* concluded that an agreement calling for a "single discrete event" (a merger) is not included among those agreements which "destroy competition." This attaches to the word "agreement" a meaning distinctly different from that understood in common usage. The destruction of competition can be more readily accomplished by the single discrete event than by an ongoing agreement, and the inference that continuous operations are required in agreements destroying competition is not justifiable. Agreement of Merger No. 9827–1 Among R. J. Reynolds Tobacco Co., et al., 184 (195).

There is nothing in the relevant statutes which in any way limits the manner in which the Commission may implement its disapproval of an agreement. There being no limitation on the latitude of the Commission's authority to disapprove, cancel or modify an approved agreement, there can be no justifiable restriction on the scope of approval agreements based on the availability of an adequate remedy for violation of the approval. There is no lack of authority in the Commission to devise an appropriate remedy for the situation in which the terms of a merger approval are violated.

The Court's argument in *Seatrain* that a merger of carriers is not subject to Commission jurisdiction because there is no on-going agreement is inapposite to the merger agreement herein. As modified and conditioned, the agreement which the Commission is approving requires both the continued existence of United States Lines (the acquired carrier) and the retention by that carrier of all of its assets, thereby necessitating continuing Commission supervision to ensure that the approved anticompetitive activity remains within the bounds of the enabling agreement. The instant case does not involve a sale of assets without a sale of the corporate entity as in *Seatrain*, but rather a sale of the corporate entity with the requirement that the acquiring company maintain the assets and stock of the acquired company identifiable to insure the continuing operativeness of the assets and the constant availability of the stock for such disposition as the Commission might order as a remedy for violation of the terms of the acquisition. Id. (197–198).

The Commission disagrees that the construction of section 15 which would limit the Commission's jurisdiction to "on-going" agreements is reinforced by the legislative history. Inter alia, the Alexander Report makes it clear that the House Committee on the Merchant Marine and Fisheries was concerned with more than "understandings" and "arrangements" to the exclusion of "mergers" and "acquisitions". The Committee investigation included ownership "by other ship lines or companies". Opponents of the Commission's merger jurisdiction virtually ignore all but the last nine pages of the Alexander Report. The Committee, in fact, used the term "agreement" in discussing mergers and acquisitions. Id. (198–201).

The exclusion of mergers, acquisitions, etc., from the meaning of "agreements" as used in section 15, based on a supposed distinction between the on-going understanding or arrangement on the one hand and the single discrete merger, acquisition, etc., on the other, is not one which existed with the Alexander Committee. The Alexander Report twice refers to a merger as an "agreement". The Committee understood that effective legislation would have to include regulatory or supervisory control over acquisitions and transfers of ownership; and no distinction between domestic and foreign mergers or acquisitions can be engrafted on section 15 based on the Report or the work of the Committee. Id. (202–203).

The legislative history of the 1961 amendments to the Shipping Act lends abundant support for the Commission's jurisdiction over merger agreements. The Antitrust Subcommittee's use of the word "agreement" clearly and specifically included agreements of merger. Additionally, the word "agreement" was used in connection with the acquisition of the stock of one carrier by another. Congress was aware that section 15 had been construed to include merger jurisdiction, yet it made no attempt to redefine the word "agreement". Id. (205–207).

As to the relationship between antitrust and Shipping Act considerations in cases before the Commission concerning section 15 agreements, in the instant merger case, even though the antitrust laws embody at least a part of the public interest which the Commission considers in acting on section 15 agreements, in the last analysis the regulatory laws must take precedence. The Commission must apply its own laws and standards, not those of the antitrust laws. Id. (212).

The Commission provides the nexus for our basic national antitrust philosophy and the national maritime policy as expressed in the shipping statutes. The principles embodied in the antitrust laws are always present in Commission deliberations concerning, especially, agreements filed for section 15 approval.

The Commission strikes a balance by determining whether the public interest as set forth in its governing statutes will be served by sanctioning an anticompetitive activity in the interest of our maritime policy. Id. (213).

A supplemental agreement between Reynolds and Kidde providing that if a merger agreement is not approved, United States Lines shall be sold or liquidated is subject to Commission jurisdiction. The real parties in interest in the supplemental agreement are the two common carriers by water, United States Lines and Sea-Land. Inter alia, the agreement cannot be implemented, in some respects, except through the action of USL under Kidde's orders; Reynolds' primary consideration is to secure the USL fleet for the use of its subsidiary, Sea-Land; the agreement is a means by which Reynolds—and more importantly, Sea-Land—could acquire USL upon disapproval of the merger; the supplement agreement states that it embodies the merger agreement and related documents; and Reynolds has certain veto powers over the sale of USL. These considerations persuade the Commission that the supplemental agreement is within Commission jurisdiction under section 15, and further that the agreement should not be approved. Id. (219–220).

The Commission disagrees with the conclusion that the merger agreement should not be approved because of the recent improved financial condition of United States Lines, the carrier to be acquired. A financially sound USL is not, under existing circumstances, a viable alternative. Insufficient weight was given by the presiding officer to the possibility that regardless of USL's financial posture, Kidde is determined to be rid of USL. Consequently, the Commission has opted for approval of the agreement (as modified) which will include both a financially sound USL and the acquisition of USL by Reynolds. As to the financial condition of USL, the record supports a finding that its financial instability is basic and might very well continue as such in the future. Id. (221–223).

CUSTOMHOUSE BROKER: See Jurisdiction

DEVICES TO DEFEAT APPLICABLE RATES

The Commission's interpretations of scienter as set forth in section 16 of the 1916 Shipping Act (with respect to "knowingly and willfully") require strict business propriety. Persistent failure to inform or even attempt to inform himself by means of normal business resources might mean that a consignee was acting knowingly and willfully in violation of the statute. Diligent inquiry must be exercised by shippers and consignees in order to measure up to the standards of the law. Indifference is tantamount to outright and active violation. Consignee of goods which had been an established importer since 1932 and had long and profund experience with the problems of classifications of cargoes; and which disregarded those means which normal business resource and acumen dictate as requiring reference in determining proper classifications, knowingly and willfully violated section 16 by misclassifying commodities. The goods involved were mirrors, immersion beakers, photo albums, glass animals, window chimes and grass beach mats which the consignee classified as toys. A construction of the tariff which does such violence to its clear meaning, at least, manifests such an indifference and lack of care as to constitute a deliberate violation of section 16. Ross Products, a Division of NMS Industries, Inc. and Taub, Hummel & Schnall, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916, 333 (340–341).

Customhouse broker and licensed ocean freight forwarder did not knowingly *and willfully participate* in false classifications of shipments. The record was insufficient to show that its acts were other than honest inadvertence or oversight. Id. (343).

DISCRIMINATION: See also Rates; Practices

Where the carrier charged a tariff rate for tank parts transported from New Orleans to Antwerp, Belgium, destined for use by the Swiss Army and a higher tariff rate for tank parts transported from New Orleans to Antwerp, destined for use by the Austrian Army, the rate on the shipment of the tank parts destined for use by the Swiss Army was unduly discriminatory in violation of section 17 of the 1916 Shipping Act, and claimant, the Embassy of Switzerland was awarded reparation. Embassy of Switzerland v. Lykes Bros. Steamship Co., Inc., 5 (6).

With respect to the issue of rates of a stevedore for loaned labor being excessive, arbitrary, unfair or unreasonable, and subjecting the stevedore loaning the labor to undue or unreasonable prejudice or disadvantage within the meaning of section 16 First, and also constituting an unjust and unreasonable practice within the meaning of section 17 of the 1916 Shipping Act, the langnage of section 16 is specifically directed against every form of unjust discrimination against the shipping public. This principle of equality forbids any difference in service. The mere possibility of a variance between regulation and practice render both regulation and practice unreasonable where the issue is the difference accorded by respondent to itself as a stevedore, on the one hand, as compared with the treatment of the complainant stevedore on the other hand. However, the record with respect to labor loan rates did not reveal undue or unreasonable prejudice or a practice which was unjust or unreasonable. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp., dba Hilo Transportation and Terminal Co., 49 (58–59).

FREIGHT FORWARDING

Respondent which engaged in the business of forwarding without a license over a substantial period of time beginning in December 1969 was not fit to carry on the business of forwarding, and its application for a license was denied. Explanation for the numerous instances of illegal forwarding between December 1, 1969, and January 28, 1971, as being unculpable, inasmuch as the forwarder appeared to be unaware of the Commission's licensing requirement, can be accepted. This is not to say that the illegal activities were excusable. However, on January 28, 1971, and again on March 31, 1971, respondent was cautioned about the illegal activities in which it was then engaged, yet it continued to illegally forward shipments until January 30, 1972. No business obligation that respondent felt it owed to its clients or their friends, by virtue of its warehousing activities, warrants an obvious disregard for provisions of the law. Alvarez Shipping Co., Inc.—Freight Forwarder License, 78 (81).

Section 44 of the 1916 Shipping Act imposes the duty on the Commission to see that access to the profession of freight forwarding is limited to those licensees who are found to be "fit, willing and able" to conduct their business in accordance with high standards of conduct. It is crucial to his "fitness" that it appear that the applicant intends to and will in good faith adhere to such "high standard" of conduct and that he intends to and will obey the Commission's rules and policies for the conduct of licensed freight forwarders. International Shippers Co. of N.Y.—Freight Forwarder License, 256 (271).

A freight forwarder's license may be revoked if the Commission finds that because of a "change of circumstances" the forwarder is no longer qualified or that his conduct has rendered him unfit to carry on the business of freight forwarding. A license may be revoked for willful failure to comply with any provision of the Act or any rule or regulation promulgated by the Commission. Id. (271–272).

Where a licensed freight forwarder (A) permitted and assisted another forwarder (B) to use his license in perfroming freight forwarder services; A transferred his license to B without prior approval of the Commission; A accepted employment to perform forwarding services on export shipments as an associate and/or employee of B, after B's license had been revoked; a 50% stockholder (B's son) of an applicant for a freight forwarder license, knowingly assisted A and B in engaging in the business of forwarding without a license and intends to associate B in the business of the applicant if the application is approved; and A is other 50% stockholder of the applicant, the license of A is revoked and the application for a freight forwarder license is denied, subject to reapplication if the defects leading to denial are cured. Id. (261, 276–277).

On reconsideration, the Commission continues to find respondent freight forwarder in violation of all sections of the 1916 Shipping Act, as previously determined [15 FMC 248], and also continues to be constrained not to revoke respondent's license because respondent has acted in good faith on advice of counsel. However, respondent is ordered to cease and desist from the activities complained of and submit a proper report as previously required. Bolton & Mitchell, Inc.—Freight Forwarder License, 284 (285).

The record did not support a conclusion of "willful" falsification of an application for a freight forwarder license where, although the forwarder's connection with a shipper was an example of illegal, shipper-connected forwarding operations, there was insufficient evidence to warrant a conclusion that the forwarder was aware that the relationship was illegal, and, therefore, that it intentionally withheld information pertaining to the relationship from the Commission. Norman G. Jensen, Inc.—Freight Forwarder License, 365 (367).

Arrangement under which the sole stockholder of a shipper would retain two shares of stock in a licensed freight forwarder and would be a director and compensated employee of the forwarder is not satisfactory as a divestiture by the forwarder of illegal shipper connections. However, the forwarder is given the opportunity to totally eradicate the connections between itself and the shipper. Id. (367).

Commission definition (in General Order 4) of "beneficial interest" in shipments to foreign countries applies to any interest, including the right to profit from such shipments. International Traders & Counsellors, Inc. clearly profits from, and therefore has a beneficial interest in, such shipments under its retainer and commission agreements with exporters. Because of the relationship with ITC, respondent forwarder shares this beneficial interest. Id. (376).

In view of the overlapping of officers and ownership between a corporation having a beneficial interest in shipments foreign and a freight forwarder, the contention that there is no present active or actual inter-company control, direct or indirect, cannot be accepted as satisfying the statutory requirement of independence of a freight forwarder from shipper connections. The mere possibility of control is sufficient to remove a forwarder from an independent status. Nonconformance with the law is not cured by going through the motions of operating the two companies independently and maintaining separate books and records. Corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose. Id. (377).

A forwarder who has any beneficial interest in a shipment foreign and accepts brokerage thereon is guilty of accepting a rebate in violation of section 16 of the 1916 Shipping Act. Id. (378).

GENERAL ORDER 4: See Freight Forwarding; Jurisdiction

JURISDICTION: See also Agreements under Section 15

The fact that the second paragraph of section 22 of the 1916 Shipping Act is spared needless repetition by using the proviso that the Commission "may in like manner and . . . with the same powers [as in the first paragraph] investigate any violation of this Act" does not result in the incorporation in its second paragraph of any further requirements or restrictions of the first paragraph. It applies to any violation of any section of the Act, including the opening paragraph of section 16, by anyone, including shippers, consignees and brokers. The Commission's jurisdiction under the opening paragraph of section 16 and the second paragraph of section 22 extends to shippers, consiguees, brokers and any and all "other persons". Ross Products, a Division of NMS Industries, Inc., and Taub, Hummel & Schnall, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916, 333 (338–339).

The Commission had jurisdiction in a case involving possible violation of section 16 First Paragraph, by a customhouse broker who entered and tried to clear shipments with Customs and who was also a licensed ocean freight forwarder. The Commission has no authority over customhouse brokers. Nevertheless, the functions of customhouse broker and freight forwarded overlap and blend into each other. Moreover, in General Order 4, the term "freight forwarding service" means a service which includes clearing shipments with U.S. government regulations. Accordingly, a customhouse broker's functions in the situation are in agreement with those of a freight forwarder and it is this nexus or "area of concern" that settles the question of the Commission's jurisdiction in the affirmative. Id. (342).

Rates and practices of Puerto Rican truckers are not subject to Commission jurisdiction, since it is not shown that the truckers are other persons engaging in any activity covered by section 1 of the Shipping Act, 1916. Pickup and Delivery Rates and Practices in Puerto Rico, 344 (347).

MISCLASSIFICATION OF GOODS: See Devices to Defeat Applicable Rates

OVERCHARGES: See Reparation

PICKUP AND DELIVERY PRACTICES

Carrier's rate increases for pickup and delivery services in Puerto Rico are not unjust or unreasonable or otherwise unlawful. The charges and the zones to which they apply are negotiated by the carriers with trucking associations representing the Puerto Rican truckers. A rate established by means over which the Commission has no jurisdiction becomes a fixed charge to the ocean carrier. As the increased rates were filed for the purpose of equalizing the charges paid to the truckers by the carriers and the amounts collected under the tariffs by the carriers from the shippers or consignees, they are not unlawful. Pickup and Delivery Rates and Practices in Puerto Rico, 344 (348).

Carriers' practice of providing for the designation by shippers and consignees of truckers to furnish the pickup and delivery service which the carriers are obligated by their tariffs to perform and for which they are responsible is an unreasonable practice within the meaning of section 4 of the 1933 Intercoastal Shipping Act and section 18(a) of the 1916 Shipping Act. Shippers who elect to use the carriers' service are permitted to designate the trucker to be engaged by the carriers. The shipper may reduce his overall transportation cost by designating a trucker who will agree to perform the service at less than the carriers' tariff rates. The trucker then "refunds" to the shipper a portion of the charge paid him by the carrier. Thus, the carriers are "absorbing" a portion of the charge paid him by the carrier. Thus, the carriers are "absorbing" a portion of the charge, or, the shipper is receiving a "rebate" of a portion of the charge. The carriers should establish the reasonable practice of disallowing shipper or consignee designation of truckers who furnish a part of the carriers' services. Id. (349).

Contention that the truckers in Puerto Rico furnishing carriers' pickup and delivery services are not "agents" of the carriers and thus the carriers are not responsible for any "rebate by the truckers" to shippers or consignees is erroneous. The significant consideration is whether they are agents in the sense that the carriers must bear responsibility of insuring that no portion of the rates paid for the services is refunded or remitted as prohibited by section 2 of the 1933 Intercoastal Shipping Act. Id. (349–350).

If carriers choose to furnish pickup and delivery service, such service is subject to the Commission's jurisdiction, and carriers must adhere to tariff rates filed with the Commission for the service. Common carriers cannot lawfully escape responsibility for the proper performance of the service by the expedient of designating the person (truckers) actually performing the service as the agent of the shipper or consignee. The fact that remittances made by the truckers to the shippers or consignees resulting in the obtaining of transportation at less than tariff rates may be made indirectly by agents who are not authorized to make them, and even of whose conduct the carriers may be ignorant, is immaterial to the question of the lawfulness of the carriers' conduct. Id. (350).

Carriers must amend the form of their interchange agreements with truckers who perform pickup and delivery services for the carriers to remove any language which indicates that such truckers are not the carriers' agents for the purpose of insuring that the rates paid by shippers and consignees for the services are those contained in the carriers' tariff (to eliminate rebates by truckers to shippers). Id. (351).

Where carriers' practice of permitting shippers or consignees, who elect to use pickup and delivery service offered by the carriers, to select the truckers is potentially capable of resulting in violation of the law, the Commission need not wait until such violation occur before ordering remedial action. Activities which tend to foster and facilitate rebates of carriers' tariff rates are practices which the Commission can and must order terminated. Id. (351–352).

Carriers' forced delivery rule (that all LTL shipments weighing less than 3,000 pounds and measuring less than 700 cubic feet must be accorded delivery service) convinces the Commission that shippers do not have the power to use their own truckers, nor demand that shipments be held for truckers which the shippers wished the carriers to use. The purpose of the rule was to require removal of cargo subject to the rule by the first available trucker. Activities of the carriers under the rule were violative of section 2 of the 1933 Intercoastal

Act, whether the carriers allowed shippers and consignees to arrange for their own pickup and delivery or only requested that cargo be held for a certain trucker. To the extent that carriers provide for any pickup and delivery service, including forced delivery (under the Commission's order that the carriers establish a practice of disallowing shipper or consignee designation of truckers who furnish a part of the carriers' services), shippers who use such service will have no voice with respect to the use of any particular truckers. The choice of whether to use a forced delivery rule is a matter of operational judgment of the carrier. Id. (356–358).

Carrier violated section 2 of the 1933 Intercoastal Shipping Act by carrying out a special arrangement with a shipper contrary to its tariff, with respect to inland delivery service in Puerto Rico. Id. (358–359).

Carrier violated section 2 of the 1933 Intercoastal Shipping Act by providing delivery service under its tariff stop-off rule at TL rates, although the delivery points did not lie in a direct regular route and were not from the same basing point, as required by the tariff rule. Id. (359–360).

Carrier violated section 2 of the 1933 Intercoastal Shipping Act where, at the request of a shipper or consignee, the carrier arranged with a trucker to pick up or deliver shipments, entitled to only limited pickup and delivery service or none at all, to advance the trucker's charge, and to collect the amount advanced from the shipper or consignee, either by direct billing or by addition of the charge to the bill of lading. The trucker's charge could be less than the charge set forth in the carrier's tariff for pickup and delivery to the zone involved. The carrier later amended its tariff to include these services, and there is nothing wrong in principle with tariff provisions whereby a carrier, as agent, offers to arrange for services in addition to those for which it is respousible. So long as carriers offer transportation under a system of rates which excludes, as well as under another system which includes, pickup and delivery, and so long as they publish and file tariff provisions indicating clearly what services are offered under each type of rate, no difficulty should arise. Id. (361–362).

PRACTICE AND PROCEDURE

—*Complaints and investigations*

Formal adjudication proceedings of the Commission, which include all section 22 proceedings fall within two categories: (1) complaints cases alleging violations of one or more sections of the Act and (2) investigations instituted by the Commission. Ross Products, a Division of NMS Industries, Inc. and Taub, Hummel & Schnall, Inc.—Possible Violation of Section 16, First Paragraph, Shipping Act. 1916. 333 (338).

—*Official notice*

The Administrative Law Judge erred in including in his findings of fact matters not of record and of which he had failed to take official notice. Accordingly, the Commission serves official notice on respondent of the adoption of a substituted finding and affords respondents 30 days to show the contrary. International Shippers Co. of N.Y.—Freight Forwarder License, 256 (260).

The Commissiion will take official notice of advertisements of sailings hy a carrier. Experience shows that a line rarely, if ever, advertises sailings that it does not intend to make, and a reasonable inference is that the carrier will in all probability expand its service as advertised. Agreement No. 9932—Equal Access to Government-Controlled Cargo, 293 (295).

—*Parties*

Under Rule 3(c) of the Rules of Practice and Procedure of the Commission, the presiding officer may (and does in this case) order an appropriate substitution of parties where it appeared that respondent was misnamed in a complaint. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp., dba Hilo Transportation and Terminal Co., 49 (60). **PRACTICES**: See also Pickup and Delivery Practices; Stevedores

Although the allocation of labor gangs and the first call-recall agreements give special accommodations or other special privileges to certain members of the Boston Shipping Association, the record does not support findings that the practices are unjustly discriminatory or otherwise in violation of sections 16 and 17 of the 1916 Shipping Act. The special accommodations or privileges appear to be justified on the ground that the Union refused to hire another "walking boss" which was the criterion for receiving more gangs. In order to show prejudice under section 16 or unfair or discriminatory practices under section 17, a stevedoring company would have to show that it has more than one vessel in port on a given day, thus establishing a need for additional gangs, that all other gangs are unavailable because they have been called or recalled, and that at least one of the company's competitors is working only one vessel with all of its seven gangs. United Stevedoring Corp. v. Boston Shipping Assn., 7 (15–16).

PREFERENCE AND PREJUDICE: See also Rates

Although the allocation of labor gangs and the first call-recall agreements give special accommodations or other special privileges to certain members of the Boston Shipping Association, the record does not support findings that the practices are unjustly discriminatory or otherwise in violation of sections 16 and 17 of the 1916 Shipping Act. The special accommodations or privileges appear to be justified on the ground that the Union refused to hire another "walking boss" which was the criterion for receiving more gangs. In order to show prejudice under section 16 or unfair or discriminatory practices under section 17, a stevedoring company would have to show that it has more than one vessel in port on a given day, thus establishing a need for additional gangs, that all other gangs are unavailable because they have been called or recalled, and that at least one of the company's competitors is working only one vessel with all of its seven gangs. United Stevedoring Corp. v. Boston Shipping Assn., 7 (15–16).

With respect to the allocation of a stevedore's workforce (the stevedore employed the whole workforce in a particular port) and the associated issue of self-preference by the stevedore that gives undue or reasonable preference or advantage to itself and subjects another stevedore to undue or unreasonable prejudice or disadvantage, within the meaning of section 16 First of the 1916 Shipping Act, it is well settled that the existence of undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. The record did not reveal such proof where the allegedly prejudiced stevedore could recall only one period, in the year and a half before the hearing, where it had to fly longshoremen in during labor shortages. Statements, inter alia, that "a good deal of difficulty was encountered with the cargo," combined with the fact that the average number of longshoremen on loan labor basis was 12 to 14 men a day for about 26 days a month, almost a third of the preferred stevedore's workforce, did not evidence "undue" or "unreasonable" advantage. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp, dba Hilo Transportation and Terminal Co., 49 (57).

With respect to the issue of rates of a stevedore for loaned labor being excessive, arbitrary, unfair or unreasonable, and subjecting the stevedore loaning the labor to undue or unreasonable prejudice or disadvantage within the meaning of section 16. First, and also constituting an unjust and unreasonable practice within the meaning of section 17 of the 1916 Shipping Act, the language of section 16 is specifically directed against every form of unjust discrimination against the shipping public. This principle of equality forbids any difference in service. The mere possibility of a variance between regulation and practice renders both regulation and practice unreasonable where the issue is the difference accorded by respondent to itself as a stevedore, on the one hand, as compared with the treatment of the complainant stevedore on the other hand. However, the record with respect to labor loan rates did not reveal undue or unreasonable prejudice or a practice which was unjust or unreasonable. Id. (58–59).

On the basis of the record the Commission does not believe that approval of an agreement between a Peruvian government line and a U.S.-flag line, covering equal access to government-controlled cargoes (excluding a third-flag carrier) will result in unduly prejudicing any particular traffic in violation of section 16 of the Shipping Act. Agreement No. 9932—Equal Access to Government-Controlled Cargo, 293 (308).

RATES: See also Pickup and Delivery Practices; Surcharges

Conference rate making is based on a number of factors in addition to costs, among which competition is of great significance. If every carrier's rates were geared only to its own costs, a conference system might be impossible. It is probable that for the sake of certain benefits in terms of frequency of service and stability of rates shippers may be paying higher rates than those which would exist if rate competition based on individual carrier's costs were to prevail. Rates, Practices, Rules and Regulations of North Atlantic Mediterranean Freight Conference Relating to the Movement of Heavy Lift Cargo, 68 (76).

Proposed new tariff rule providing that the total heavy-lift charges for pieces of cargo up to nine tones moving to certain ports will be fifty percent of the Conference's Rule 27 heavy-lift charges, and proposed rule providing for a positioning, lashing and securing charge equal to sixty-five percent of the heavy-lift charge to be assessed in lieu of heavy-lift charges on the carriage of wheeled or tracked road-building machinery and tractors to certain ports, notwithstanding the type of vessel used, are not contrary to the public interest, detrimental to U.S.-commerce, nor otherwise unfair, unreasonable, or unjustly discriminatory in violation of sections 15, 16, 17 and 18(b) (5) of the 1916 Shipping Act. The proposals are not an exact procedure calculated to pass on to ro/ro and container shippers the precise savings inherent in the carriage of heavy-lift cargoes on these new types of vessels. However, ro/ro and container shippers will benefit from the innovations present in these services as their heavy-lift charges will be reduced. In addition, all other conference shippers will share in the benefits of the new technology as all heavy-lift charges for cargoes nine tons and under will be reduced. Id. (69, 77).

The test of whether an improper rate has been charged and collected is not so stringent as to require proof "beyond a reasonable doubt". Rather, the proper test is for the claimant to sustain a "heavy burden of proof". Johnson & Johnson International v. Venezuelan Lines, 84 (85).

Proposed increased rates and charges of 12½ percent in the U.S. Pacific/Hawaiian Trade are not unjust or unreasonable or otherwise unlawful, including westbound general cargo (the Administrative Law Judge concluded that the increase on this cargo should be limited to 11 percent). Matson Navigation Co.—General Increase in Rates in the U.S. Pacific/Hawaiian Trade, 96 (97).

Assuming that Matson had the burden of proof for its entire rate increase in the U.S. Pacific/Hawaiian Trade, including that portion of the increased rates not under suspension, it demonstrated persuasively and with an abundance of evidence that the rates are justified. Id. (97).

As to the contention that Matson's rate increases in the Pacific Coast/Hawaiian Trade should be deemed unlawful because of fleet scheduling and vessel deployment, the Commission agrees that the record fails to support a claim of improper use of vessels. It was contended that Matson should operate direct shuttle service between Oakland and Honolulu rather than triangular service between Oakland, Los Angeles, and Honolulu. Cargo flow and port generated cargoes are not regular and triangulation is required. Furthermore, there are problems of possible congestion and shipper market disadvantages under the proposal for direct shuttle service. Id. (98, 113–115).

With respect to claims of mismanagement by Matson because of its decision in 1967 to build two new ships instead of one, allegedly resulting in the carrier turning to the rate payers for increased rates because the decision was a mistake producing excess capacity, the evidence produced by the carrier showed that even though there might be a slight overcapacity, it would only be a temporary situation because at the expected rate of traffic growth, the present fleet would be incapable of accommodating the demands of the trade involved by 1974. Id. (99, 117–118).

Automobiles that have to move in container slots are a legitimate factor in determining the overall container slot demand. Furthermore, even with the elimination of automobile carriage from container demand this would not result in establishing an excess capacity which could operate to burden the rate payer as to require a reduction of the rate base or adjustment of the rate of return for Matson in the U.S. Pacific/Hawaiian Trade. Id. (100, 121–122).

Matson should be allowed its requested 12½ percent rate increases on most westbound cargoes in the U.S. Pacific/Hawaiian Trade (rather than 11 percent as found by the Administrative Law Judge), and its hold down of eastbound container cargo rates (principally canned pineapple) was justified as a matter of business judgment on the back-haul nature of the cargo. Matson's decision not to increase eastbound general cargo rates was supported by the record evidence. Id. (103).

Although the establishment of a minimum load factor standard may be a useful tool to enable regulatory agencies to protect rate payers against situations where excess capacity and underutilization have developed over the years into serious problems, the record does not establish that a problem of such magnitude exists with regard to Matson in the Hawaiian trade. Even if the record had shown a history of excess capacity and underutilization which would constitute a significant burden on rate payers in the future, there was insufficient evidence to enable the Commission to determine a proper load factor. Id. (103).

Matson's rate increases in the Hawaiian trade were not subject to Price Commission regulations. The rates went into effect by operation of law prior to imposition of wage/price controls on August 15, 1971. A nine percent increase was approved by the Commission on March 6, 1971. The remaining three and a half percent increase became effective on June 20, 1971, at the expiration of the four-month suspension period. Id. (104).

Three factors are involved in determining fair rate of return: (1) what rate is necessary to attract and retain capital; (2) what rate is being earned by other enterprises; and (3) what are the relative risks of the subject company compared with other enterprises. On a rate base of $69,320,000, an overall return of 8.53 percent, with a resulting equity of 8.75 percent, as sought by Matson in the Hawaiian trade, would not be excessive. The Commission in 1962 found that a 10.59 percent return on rate base for Matson would not be excessive. Matson's capital structure at the time was about 67 percent equity and 33 percent debt—quite similar to the present structure—and its debt had an imbedded cost of 5.5 percent. With this capital structure, a 10.59 percent return overall would produce 13.1 percent on common equity. In a wide range of both regulated and unregulated industries the average rate of return on common equity is generally above 12 percent. As to the risks involved, in addition to competition of other carriers, Matson is subject to some risks of competition from its own ships, and has various other risks reflected in the variability of its earnings. The risks faced by the airline industry are comparable and they earned an average of 12 percent on equity in 1965–1969. The rate of return permitted airlines indicates that 8.53 percent, sought herein, is on the low side. Id. (124–127).

Matson's increase in minimum bills of lading charges in the Hawaiian trade ($6.86—$25.00) will undoubtedly discourage traffic moving under such charge and probably cause it to use other available services but, in consideration of the physical difficulty of handling very small shipments, the high incidence of damage and loss and disproportionately large claims which such traffic generates, the increase is found not to be unjust, unreasonable, or otherwise unlawful. Id. (128).

Carrier is permitted to refund to the shipper the difference between the rate charged for a shipment of $3,634.75 which was based on the tariff measurement basis and $1,554.75 which would have been the rate on a long ton basis which was quoted to complainant. A finding under section 18(b)(3) of the 1916 Shipping Act could not be made because an appropriate application was not made within 180 days of the date of shipment. However, under section 18(b)(5), the rate was so unreasonably high as to be detrimental to the commerce of the United States and the refund would not be detrimental to such commerce. United Nations Children's Fund v. Delta Steamship Lines, Inc., 423 (425–426).

REBATES: See Freight Forwarding; Pickup and Delivery Practices

REPARATION

Carrier is permitted to waive collection of freight charges in excess of the rate agreed upon with the shipper. While the parties violated the Act by not acquiring Commission approval of their action in settling the claim at the agreed rate, the application was in order and duly filed and was based on the type of administrative error, viz., inadvertent failure to file the agreed rate, contemplated by section 18(b)(3) of the Shipping Act, 1916. Commodity Credit Corp. v. San Rocco Line, 1 (3).

Where the carrier charged a tariff rate for tank parts transported from New Orleans to Antwerp, Belgium, destined for use by the Swiss Army and a higher tariff rate for tank parts transported from New Orleans to Antwerp, destined for use by the Austrian Army, the rate on the shipment of the tank parts destined for use by the Swiss Army was unduly discriminatory in violation of section 17 of the 1916 Shipping Act, and claimant, the Embassy of Switzerland was awarded reparation. Embassy of Switzerland v. Lykes Bros. Steamship Co., Inc., 5 (6).

Refund of a portion of freight charges was permitted where the carrier filed a tariff and failed, because of an administrative error, to reduce an arbitrary charge. The facts and circumstances fell within the intent and purview of section 18(b)(3) of the Shipping Act, 1916. Consul General of Indonesia v. Nedlloyd Inc., 38 (40).

Reparation was denied where a shipper failed to show with reasonable certainty that a shipment of plastic pipe should have been rated as plumbing supplies N.O.S., rather than cargo, general, N.O.S. The term "plumbing" appeared only in complainant's requisition of the articles shipped. The bill of lading referred to plastic pipe. The burden was on complainant to establish that the plastic pipe shipped may reasonably be included in the tariff item covering plumbing supplies, N.O.S. The fact that the individual preparing the requisition used the term "plumbing supplies", without more, would not constitute proof that the plastic pipe fell within that category, nor would the description in the GSA catalogue which demonstrates that the pipe is for use above or below ground in connection with cold water lines and many other uses including those obviously not properly classified as plumbing. The evidence relating to use of the pipe showed that it was intended for use for "village water systems". Whether the water system included indoor construction (the tariff item complainant would have applied included articles all clearly intended for indoor construction) and could reasonably be considered as plumbing was not established. On the contrary, evidence of a witness rendered doubtful that plumbing is found in a rural area such as that involved in the case. The shipment was not incorrectly described by the shipper as plastic pipe and the shipper was on notice of the provisions of the tariff and should have been aware that it did not provide a rate on such pipe. United States v. Farrell Lines, Inc., 41 (45–48).

A defense that the cause of action did not accrue within two years next before the filing of the complaint is insufficient to bar consideration of alleged violations of the Shipping Act two years or less antedating the filing of the complaint, which were of a continuing nature. Every time a stevedore did not receive the number of longshoremen it requested from another stevedore on a loan basis, that presumably constituted an accrual of action, with occurrences antedating two years being barred, and those subsequent thereto being a possible basis for award of reparation. However, the matter is academic since the practice of loaning labor was not found to be violative of the Act. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp., dba Hilo Transportation and Terminal Co. 49 (60–61).

Carrier was permitted to refund a portion of freight charges where the charges collected were based on measurement which resulted in a charge more than 350 percent in excess of previous charges under tariffs which prescribed weight rather than measurement as the rate basis. The charge was an oversight by the carrier which clearly fell within the purview of section 18(b)(3) of the 1916 Shipping Act. Overseas Impex, Inc. v. Lykes Bros. Steamship Co., Inc., 62 (63).

Carrier was permitted to waive collection of certain terminal charges and seaway tolls where, prior to booking of the cargoes for shipment, it was understood between the shipper and carrier that the effective freight rate was to include the transfer charges and seaway tolls. Through clerical error the carrier's tariff filing agent failed to carry out the carrier's instuctions to file the tariff corrections needed to permit absorption of the added charges and tolls. U.S. Department of Agriculture v. Tropwood Lines, 65 (66).

Complaints seeking reparations for alleged overcharges are dismissed. The bills of lading were prepared and the commodity description "Surgical Dressing" were provided by claimant or by its freight forwarder and the carrier charged the rate for "Dressings, viz. Surgical N.O.S." Claimant contended that the articles were gauze sponges and should have been charged the lower rate for "Gauze, viz. Surgical." The goods had left the carrier's custody and control and the claimant had to establish his claim by clear and convincing evidence. After all the evidence is weighed there remained at least reasonable doubt, if not certainty, that the products in question may not rationally be considered surgical gauze, but are, indeed, surgical dressings as the carrier contended. 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. Claimant failed to carry its heavy burden of proof to establish its claim. Johnson & Johnson International v. Venezuelan Lines, 84 (88–89, 93–94).

Carrier is permitted to waive collection of a portion of freight charges where, due to inadvertency, the appropriate tariff had not been filed. Due to an overload of traffic, vacations and insufficient personnel the matter had been turned over to a clerk who delayed in following through as instructed in filing with the Commission. Commodity Credit Corp. v. Hellenic Lines Ltd., 250 (251); 253 (254).

Carrier is permitted to waive collection of a portion of freight charges on a shipment of Bulgar Wheat from Houston to Aqaba, Jordon, where the carrier through error failed to file an agreed upon rate which was the same as the rate on flour to Aqaba. The carrier stated that the applicable rate at the time, the cargo N.O.S. rate, is unquestionably high for the cargo shipped. U.S. Department of Agriculture v. Waterman Steamship Corp., 278 (279).

Carrier is permitted to waive collection of a portion of freight charges on a shipment of flour from New Orleans to Aqaba, Jordan, where the carrier through inadvertence failed to file the agreed upon rate which was the same as the rate on flour from Galveston, Beaumont and Houston to Aqaba. U.S. Department of Agriculture v. Waterman Steamship Corp., 281 (282).

Carrier is permitted to waive collection of a portion of freight charges where the carrier inadvertently failed to file the rate which it had intended to apply to the shipment. Asiatic Petroleum Corp. v. States Marine Lines, 290 (291).

Carrier is permitted to waive a portion of freight charges where the carrier inadvertently failed to file the rate agreed upon for the shipment involved. Magnolia Forwarding Co. v. Delta Steamship Lines, Inc., 315 (316).

Carrier is denied permission to refund a portion of freight charges. Complainant, the consignee of the shipment was not informed of a tariff rule and of the consequent minimum container charge in the tariff, and based its costs and sales prices for the commodity involved on a lower charge. The case was not one of an inadvertent error in the tariff, but was a situation where the tariff was changed after the shipments moved. Carriers must charge their lawfully published rates. Colorado Beverage Co., Inc. v. Lykes Bros. Steamship Co., Inc., 330 (332).

Where the evidence established that the commodity shipped was a mix of cottonseed oil and soyabean oil and the carrier had a tariff item for oil with a special rate to the destination involved, reading "Oil . . . viz: Corn, Cottonseed or Soyabean," complainant was entitled to that rate rather than the higher rate collected for shortening, general cargo. Complaint was entitled to the difference in the amount involved, plus 6% interest per year if not paid within 30 days. Kraft Foods v. Prudential Grace Lines, 405 (407–408).

A claim arising from an overcharge cannot be barred from a determination on the merits by a conference rule if, as in the present case, the claim is filed with the Commission within two years of its accrual. Id. (408).

Assignee of the shipper of cargo had standing to seek reparation for an alleged overcharge. And this was so whether or not the assignment passed beneficial or equitable title since the assignee could recover damages in an action brought in its own name but for the benefit of an equitable owner of the claim. Uniroyal International v. Farrell Lines, 409 (411).

Carrier is permitted to refund a portion of freight charges collected where, in revising a page of its tariff, inadvertently by printer's error and without intending to do so, the rate on the cargo involved was changed from one computed on a weight basis only to a weight or measurement basis. International Paper Co. v. Delta Steamship Lines, Inc., 420 (422).

Carrier is permitted to refund to the shipper the difference between the rate charged for a shipment of $3,634.75 which was based on the tariff measurement basis and $1,554.75 which would have been the rate on a long ton basis which was quoted to complainant. A finding under section 18(b)(3) of the 1916 Shipping Act could not be made because an appropriate application was not made within 180 days of the date of shipment. However, under section 18(b)(5), the rate was so unreasonably high as to be detrimental to the commerce of the United States and the refund would not be detrimental to such commerce. United Nations Children's Fund v. Delta Steamship Lines, Inc., 423 (425–426).

Carrier is permitted to refund a portion of freight charges collected where the higher rate was charged through inadvertence. The lower rate which would have been applicable was deleted from the tariff inadvertently. Philipp Brothers v. American Mail Line Ltd., 427 (428–429).

STEVEDORES

Where stevedores engage in activities of a kind which independently makes them subject to the 1916 Shipping Act, such as operating a terminal facility, then such stevedores are deemed to be engaged in the furnishing of wharfage, dock, warehouse, or other facilities in connection with common carriers by water and are within the Commission's jurisdiction. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp., dba Hilo Transportation and Terminal Co., 49 (56).

The practice of lending longshoremen by a stevedore employing the whole workforce in a port to another stevedore in the port that is not so advantaged is subject to regulation by the Commission. Id. (57).

With respect to the allocation of a stevedore's workforce (the stevedore employed the whole workforce in a particular port) and the associated issue of self-preference by the stevedore that gives undue or unreasonable preference or advantage to itself and subjects another stevedore to undue or unreasonable prejudice or disadvantage, within the meaning of section 16 First of the 1916 Shipping Act, it is well settled that the existence of undue prejudice and preference is a question of fact which must be clearly demostrated by substantial proof. The record did not reveal such proof where the allegedly prejudiced stevedore could recall only one period, in the year and a half before the hearing, where it had to fly longshoremen in during labor shortages. Statements, inter alia, that "a good deal of difficulty was encountered with the cargo," combined with the fact that the average number of longshoremen on loan labor basis was 12 to 14 men a day for about 26 days a month, almost a third of the preferred stevedore's workforce, did not evidence "undue" or "unreasonable" advantage. Id. (57).

With respect to the issue of rates of a stevedore for loaned labor being excessive, arbitrary, unfair or unreasonable, and subjecting the stevedore loaning the labor to undue or unreasonable prejudice or disadvantage within the meaning of section 16 First, and also constituting an unjust and unreasonable practice within the meaning of section 17 of the 1916 Shipping Act, the language of section 16 is specifically directed against every form of unjust discrimination against the shipping public. This principle of equality forbids any difference in service. The mere possibility of a variance between regulation and practice render both regulation and practice unreasonable where the issue is the difference accorded by respondent to itself as a stevedore, on the one hand, as compared with the treatment of the complainant stevedore on the other hand. However, the record with respect to labor loan rates did not reveal undue or unreasonable prejudice or a practice which was unjust or unreasonable. Id. (58–59).

With respect to a stevedore's accusation that another stevedore had a monopoly over longshore labor at the Port of Hilo which was unreasonable, the decision in *Calif. Stevedore*, 8 FMC 97, which condemned an agreement between elevators and a port district that established a stevedoring monopoly in a national port, preventing carriers from selecting stevedores of their choice, as prima facie unjust and unreasonable, that decision must be regarded as inapplicable for the reason that labor negotiations are beyond the reach of the Shipping Act. *Calif. Stevedore* involved an agreement between persons subject to the Shipping Act and the practice resulting therefrom was also subject to the Act. Here, the agreement between the stevedore which controlled the whole workforce and the union is not between persons subject to the Act, although the practice involved, labor lending, may be subject to the Act. The aggrieved party remains free to seek whatever remedy it may have under the antitrust laws in United States courts. Id. (59–60).

SURCHARGES

Where a Shippers Rate Agreement provided that "In the event of . . . currency devaluation by governmental action, regulation of any governmental authority pertaining thereto, or any other official interferences," the conference could impose a surcharge on 15 days' notice, a tariff filing, imposing a currency devaluation surcharge on less than 90 days' notice, was properly rejected without a hearing. The surcharge was filed when the Australian government appreciated the Australian dollar as against the United States dollar and the conference contended that governmental action or authority includes actions by governments other than the United States. However, the currency devaluation clause was an amendment to the Rate Agreement and came some time after official British devaluation of the pound. This direct relationship of the clause to the British experience is strong ground for restricting the operation of the clause to a situation where a country devalues its own currency. The Rate Agreement and the tariff were written in terms of United States currency and it was therefore highly unlikely that the devaluation clause was meant to refer to devaluation of that currency by a government other than the United States. Were the action of any government sufficient to invoke such clauses shippers would be buffeted by an unforeseeable number of short-notice increases—a result grossly out of harmony with the avowed purpose of dual rate contracts. Australia/U.S. Atlantic & Gulf Conference. Proposed Imposition of Currency Adjustment Surcharge, 27 (30–31).

TARIFFS

Were there are no disputed facts, an evidentiary hearing is not necessary to a valid rejection of a tariff filing which is a patent nullity. Australia/U.S. Atlantic & Gulf Conference, Proposed Imposition of Currency Adjustment Surcharge, 27 (29–30).

Reparation was denied where a shipper failed to show with reasonable certainty that a shipment of plastic pipe should have been rated as plumbing supplies N.O.S., rather than cargo, general, N.O.S. The term "plumbing" appeared only in complainant's requisition of the articles shipped. The bill of lading referred to plastic pipe. The burden was on complainant to establish that the plastic pipe shipped may reasonably be included in the tariff item covering plumbing supplies, N.O.S. The fact that the individual preparing the requisition used the term "plumbing supplies", without more, would not constitute proof that the plastic pipe fell within that category, nor would the description in the GSA catalogue which demonstrates that the pipe is for use above or below ground in connection with cold water lines and many other uses including those obviously not properly classified as plumbing. The evidence relating to use of the pipe showed that it was intended for use for "village water systems". Whether the water system included indoor construction (the tariff item complainant would have applied included articles all clearly intended for indoor construction) and could reasonably be considered as plumbing was not established. On the contrary, evidence of a witness rendered doubtful that plumbing is found in a rural area such as that involved in the case. The shipment was not incorrectly described by the shipper as plastic pipe and the shipper was on notice of the provisions of the tariff and should have been aware that it did not provide a rate on such pipe. United States v. Farrell Lines, Inc., 41 (45–48).

Complaints seeking reparations for alleged overcharges are dismissed. The bills of lading were prepared and the commodity description "Surgical Dressing" were provided by claimant or by its freight forwarder and the carrier charged the rate for "Dressings, viz. Surgical N.O.S." Claimant contended that the articles were gauze sponges and should have been charged the lower rate for "Gauze, viz. Surgical." The goods had left the carrier's custody and control and the claimant had to establish his claim by clear and convincing evidence. After all the evidence is weighed there remained at least reasonable doubt, if not certainty, that the products in question may not rationally be considered surgical gauze, but are, indeed, surgical dressings as the carrier contended. 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. Claimant failed to carry its heavy burden of proof to establish its claim. Johnson & Johnson International v. Venezuelan Lines, 84 (88–89, 93–94).

Carriers' definition of a "trailerload" stands to benefit smaller shippers, and the possibility, or even probability, that violations may occur (so as to make the carriers' practices in applying the definition unreasonable under section 18(a) of the 1916 Shipping Act) is insufficient to warrant a finding that the definition is unreasonable. Pickup and Delivery Rates and Practices in Puerto Rico. 344 (355–356).

The word "catano" as used in carriers' tariffs as a pickup and delivery point is ambiguous since it fails to indicate whether the point is intended to be the town or the municipio in Puerto Rico. Such ambiguity is unlawful under section 2 of the 1933 Intercoastal Shipping Act. The language must be clarified. Id. (354).

Where the tariff provided different rates for pesticides and insecticides; *in its application for a patent for the commodity shipped, "Omite 30–W," com*plainant clearly intended the compound to be primarily a specific against certain species of mites which are not insects; the technical data sheet and advertising material circulated to potential users and the label placed on the product refer only to Omite 30–W's use for the control of specified mite species; and whether or not a miticide could be classified as an insecticide, it certainly could be properly classified as a pesticide and was so classified in the shipping documents, complainant failed to prove that the shipment should have been rated as an insecticide. The tariff clearly intended to distinguish between products denominated insecticides and those denominated pesticdes. Where a product mght be used in either category its chief effectiveness and use is a reasonable basis for determining its commodity rating for application of proper freight charges. Uniroyal International v. Farrell Lines, 409 (411 et seq.)

TERMINAL LEASES

Where the Port of Houston Authority entered into an agreement to lease the grain elevator facilities at Houston to a corporation; the agreement was subject to a prior lease of a portion of the facilities; the corporation filed a proposed tariff provision which provided that common carriers by water, as defined by the 1916 Shipping Act, would not be accepted for loading at the elevator; and the lessee of a portion of the facilities advised that it would be bound by the exclusionary provision, the corporation leasing the grain elevator facilities was not an "other person" subject to the Shipping Act, and accordingly, the lease agreement was not subject to the filing requirement of section 15 of the Act Agreement No. T–2719, 318 (321–322).

An agreement between a port authority and a corporation, under which the port leased grain elevator facilities to the corporation is subject to section 15 insofar as the subject matter is involved. The agreement provided for an exclusive arrangement, a preferential arrangement, and for the fixing or regulating of transportation rates. Id. (320–321).

The fact that a lease agreement covering graiu elevator facilities at a port did not preclude the lessee from serving common carriers at the leased facilities did not require a finding that the lessee was subject to the Shipping Act, 1916. Nothing in the Act or section 15 thereof, militates against the Commission going outside the provisions of an agreement to determine the status of the parties thereto. In this case, the lessee had posted a tariff excluding common carriers by water from using the facilities and an affidavit had been submitted indicating that common carriers would not be served at the leased premises. These matters were determinative of the status of the lessee (as not an "other person" subject to the Act) under the Act upon which the Commission's jurisdiction was dependent. Id. (322).

An evidentiary hearing was not required to resolve the question of the status of the lessee of a port's grain elevator facilities, as an "other person" subject to the Shipping Act or the question of approvability of the agreement, where the lessee had served notice that common carriers would not be accommodated at the facilities. Approval of the agreement would result in the lessee subsequently ousting the Commission of jurisdiction by filing an appropriate tariff. Id. (322–323).

TERMINAL OPERATORS: See Stevedores