DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1974

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JAMES V. DAY, *Vice Chairman*
ASHTON C. BARRETT, *Member*
GEORGE H. HEARN, *Member*
CLARENCE MORSE, *Member*

FRANCIS C. HURNEY, *Secretary*

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FEDERAL MARITIME COMMISSION

DOCKET NO. 72–53

GENERAL MILLS, INC.

v.

STATE OF HAWAII, DEPARTMENT OF AGRICULTURE

The State of Hawaii is found to have charged and collected unjust, unreasonable, and discriminatory freight charges while operating SS CALIFORNIAN under charter, contrary to section 16 First of the Shipping Act, 1916.

Reparation granted.

Sylvester J. Jablonski for General Mills, Inc., complainant.

George Pai, Attorney General, and *R. Dennis Chong,* Deputy Attorney General, for State of Hawaii, Department of Agriculture, defendant.

David Fisher and *Donald J. Brunner,* Hearing Counsel.

July 3, 1973

REPORT

BY THE COMMISSION: (Ashton C. Barrett, James V. Day and Clarence Morse, *Commissioners*)

General Mills, Inc. (GMI) filed a complaint on September 14, 1972, alleging that the State of Hawaii, Department of Agriculture (State) charged and collected unjust, unreasonable and discriminatory rates in violation of sections 16 and 18(a) of the Shipping Act, 1916, while operating SS *Californian* under charter. The State answered, claiming its rates just and reasonable, and its tariff not discriminatory. The case was handled under the Rule 11 Shortened Procedure (46 CFR 502.181 et seq.).

Administrative Law Judge Ashbrook P. Bryant rendered an Initial Decision dismissing the complaint on February 21, 1973. Hearing Counsel thereafter petitioned for leave to intervene and file exceptions, and on April 2, 1973, the Commission granted intervention.

BACKGROUND

The Pacific Coast Longshoremen's strike of 1971 caused a critical shortage of food and sanitary products in Hawaii. The State chartered the SS *Californian* for carriage of vital shipments from Vancouver, B.C., to Hawaii.

On September 13, 1971, the State issued a "*Fact Sheet for Shippers and Consignees*"[1], which stated:

> The following information is provided to assist shippers and consignees in booking, stuffing, and payment of container cargo designated for SS *Californian*.
>
> Freight charges are to be collected and based on the existing West Coast Matson Tariff [2] plus additional charges which will be adjusted after the conclusion of the charter.

On September 20, 1971, the State filed its tariff[3] which became effective by special permission on September 24, 1971.[4] GMI, on the 17th, 20th, and 29th of September 1971, delivered eight containers totaling 322,594 pounds of stacked and baled unprepared flour from Great Falls, Montana to Vancouver, B.C., for shipment on SS *Californian* to Hawaii.[5] The State charged and collected $6,613.18 freight, based on its $2.05 per cwt (minimum weight 40,000 pounds) rate in Item 50 of the Hawaii tariff. Item 50 was the only rate in the Hawaii tariff applicable to GMI's shipment, and both parties intended that tariff to apply to the shipment.

However, GMI alleges that it had been unable to analyse and object to the Hawaii tariff in the brief interval between its filing and effective date, and contends that that tariff should have included a straight containerload rate, as did the Matson tariff.[6]

The $2.05 per cwt rate is 41 percent higher than the Matson tariff's per cwt rate.[7] The Hawaii tariff is much more limited in scope than the Matson tariff, and its straight containerload rates average 37 percent higher than the Matson tariff's; per cwt rates average 39 percent higher. The combination of the general increase in the Hawaii tariff with the shift from a containerload rate to a per cwt rate results in GMI's freight on the shipment in question being 85 percent higher than under the Matson tariff.

The theory of GMI's suit is that the relatively greater increase

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1 Attachment No. 6 to complaint.

2 Westbound Container Freight Tariff No. 14b F.M.C.-F No. 146, issued by H. O. Potter (the Matson tariff).

3 State of Hawaii Westbound Container Freight Tariff No. 1-F.M.C. F-1 (the Hawaii tariff).

4 Special Permission No. F-1349-N.

5 Attachments 1-5 to complaint (Bills of Lading).

6 Item 1155: $448 per container.

7 Item 205: $1.45 per cwt.

in the applicable rate on its shipment is unjust, unfair, and *unreasonable. Relief sought is reparation of $1,548.45.*[8]

Administrative Law Judge Bryant decided in favor of the State, dismissing the complaint on February 21, 1973. He stated that under section 18(a) no greater, lesser, or different freight could be charged or collected than that specified in the Hawaii tariff's only applicable rate, and that a lesser charge would have been unlawful. Further, he stated:

> The facts do not establish unreasonable preference or advantage or unreasonable prejudice or discrimination ... There is no showing of competitive damage to complainant or that any other shipper was charged a lower rate or that complainant was subject to unequal or unfair or unreasonable treatment. That no containerload rate for flour was included in the Erskine [Hawaii] tariff while such rates were included for other commodities is insufficient to establish violation of either section 16 or section 18(a) of the Act.[9]

The only exceptions filed are those accompanying Hearing Counsel's intervention petition. They are: That section 18(a) is inapplicable since there was no finding of interstate commerce, that the text of that section does not support the Administrative Law Judge's decision, that GMI's primary allegation of an unjust and unreasonable rate violative of that section was ignored, and that the conclusion of no section 16 violation is contrary to Commission precedent and unsound.

Section 18(a) begins "That every common carrier by water in interstate commerce shall ..." and each subsequent paragraph refers back to "such carrier". It is clear that the finding of a section 18(a) violation must be predicated on a finding that interstate commerce is involved. Were this the only violation asserted, we would remand for a decision on that issue; however, the section 16 claim provides a sufficient basis for our disposition of the case.

Section 16 First makes it unlawful for any common carrier or other person subject to the Act, alone or in conjunction with another, directly or indirectly to make or give any undue or unreasonable preference to any particular person, locality description of traffic, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Administrative Law Judge used a "competitive damage"

[8] The figure was arrived at as follows: "The $448 per containerload rate (Matson's Item 1155) converts to $1.11 per cwt (the average containerload was 40,400 pounds). If that figure is increased by the same amount as the per cwt rate, 41 percent w)from $1.45 to $2.05) the applicable rate would be $1.57 per cwt, and the total freight $5,064.73. The freight charged was $6,613.18 and the difference is $1,548.45."

[9] Initial Decision at 5.

test in concluding that section 16 First had not been violated. As there was only one unprepared flour rate in the Hawaii tariff, and no showing of any detriment to GMI vis-a-vis a competitor, no competitive injury was found.

We recently held in another "description of traffic" case, *Valley Evaporating Co.* v. *Grace Line, Inc.*, 14 F.M.C. 16 (1970):

> Without deciding the validity of respondent's allegation that no "competitive relationship" has [been] demonstrated herein, we find that the unlawful prejudice to which complainant and its shipments . . . have here been subjected is not dependent on the existence of such a relationship. (14 F.M.C. 21.)

In that case, a commodity rate was inadvertently omitted in a tariff revision designed to eliminate "paper rates" on non-moving items, and the shipper charged a higher N.O.S. rate. We required no proof of competitive damage, because of the carrier's duty to apply its criteria fairly and impartially, and awarded reparation under section 22.

The State has not indicated what, if any, criteria it used in determining which containerload rates to include in the Hawaii tariff, nor has it advanced any explanation of its action. Hawaii seeks to distinguish *Valley Evaporating, supra*, by arguing that since no criteria were disclosed, and the Hawaii tariff approved without the containerload rate, competitive disadvantage must be shown. However, it is fairness and impartially, not described criteria, which are determinative, and it would be nonsensical to award reparation for accidental discrimination while denying it for (apparently) deliberate prejudice.

The State propounds a formal argument that the per cwt rate applied to GMI's shipment was the same magnitude greater than that in the Matson tariff, and thus there was no discrimination. However, Hawaii had advised shippers its rates would be ". . . based on the West Coast Matson Tariff . . ."[10] which certainly implies a proportionate increase in rates. As indicated above,[11] there was a straight containerload rate in Matson's tariff which covered GMI's shipment. In the Hawaii tariff, there was no such rate, although there were numerous other straight containerload rates. There is no evidence indicating the added cost of handling GMI's shipments in containers was relatively greater than that of other shipments in containers. The shift from a containerload rate in the Matson tariff to a per cwt rate in Hawaii's, plus the generally higher rate level in the State's tariff, meant GMI paid 85 percent more, not 39 percent as Hawaii's argument implies.

[10] State of Hawaii, *Fact Sheet for Shippers and Consignees*, September 13, 1971. See note 1, *supra*.
[11] See note 6 and accompanying text, *supra*.

Accordingly, on the basis of the above, we find and conclude that:

1. Respondent's failure to include a containerload rate on stacked and baled unprepared flour in the Hawaii tariff was undue and unreasonable prejudice in violation of section 16 First of the Act; and

Reparation to GMI for injury caused by that violation of the Act is awarded as allowed by section 22 of the Act in the amount of $1,548.45.

An appropriate order will be entered.

Vice Chairman George H. Hearn, Dissenting; With Whom Chairman Bentley Joins

I dissent with respect to the grant of reparation in this case.

While I agree with the majority's discussion of section 16 First, I believe the majority has placed too much reliance on the State's "Fact Sheet For Shippers and Consignees", and too little weight on the particular conditions which existed.

The Fact Sheet made only the broadest possible statement that the State's tariff would be "based on the existing ... Matson tariff". From this the majority concludes that the State was bound to follow the Matson tariff by offering the same type of rate, e.g., per container or per cwt, for the same commodities as offered by Matson. With this I cannot agree.

The State of Hawaii was in a critical situation because of the Pacific Coast longshoremen's strike of 1971, and certain vitally needed commodities were in dangerously short supply. Consequently, the State undertook, at great expense to itself, to obtain those commodities by chartering a vessel and offering the required ocean transportation. For any shipper or consignee to now complain of the State's tariff, when otherwise the goods would not have moved at all, is to "bite the hand that feeds you."

The State's Fact Sheet was merely an announcement that waterborne service would be available, with the tariff structure to be based upon certain broad guidelines. The State did not thereby bind itself to offer any particular type or level of rate.

The *Valley Evaporating* case[12] is not determinative. There is no evidence that the State acted unfairly or with partiality, either accidentally or with apparent deliberateness. The State was reacting to an emergency affecting the well being of its residents, and under such circumstances cannot be attributed with discriminat-

[12] *Valley Evaporating Co.* v. *Grace Line, Inc.*, 14 F.M.C. 16 (1970).

ing against a particular shipper. To have done so would have been contrary to the State's purpose in providing vitally needed commodities for those cut off by the strike. I cannot ascribe such an action to the State under the then prevailing conditions.

Consequently, I would find no violation of section 16 First, or any other violation.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-53

GENERAL MILLS, INC.

v.

STATE OF HAWAII, DEPARTMENT OF AGRICULTURE

ORDER

This proceeding being at issue upon complaint, having been duly heard, and full investigation had, and the Commission on this day having made and entered a Report stating its findings and conclusions, which Report is hereby referred to and made a part hereof;

Therefore, it is ordered, That respondent be, and hereby is, directed to pay to General Mills, Inc. on or before 60 days from the date hereof, $1,548.45, with interest at the rate of 6 percent per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of section 16 First of the Shipping Act, 1916.

By the Commission.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–12

UNITED STATES OF AMERICA

v.

COLUMBIA STEAMSHIP COMPANY, INC.

Respondent found to have violated section 18(b)(3), Shipping Act, 1916, by charging a rate higher than the tariff rate published and on file with the Commission.

Award of reparation found not warranted.

Alfred H. O. Boudreau, Jr., for complainant United States of America.

Kennth E. Robert for respondent Columbia Steamship Company.

July 11, 1973

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 on respondent's exceptions to the Initial Decision of Administrative Law Judge Herbert K. Greer. In that decision, Judge Greer determined that notwithstanding a prior agreement between the parties fixing the rate to be charged, respondent had by error charged a rate not published or on file with the Commission in violation of section 18(b)(3) of the Shipping Act, 1916. Judge Greer further found that complainant was entitled to an award of reparation.

In excepting to the Initial Decision, respondent argues that neither the conclusion that respondent had violated the Act nor the award of reparation was warranted by the facts as found by Judge Greer.

Respondent's exceptions constitute nothing more than a reargument of the same issues, allegations and contentions considered by the Administrative Law Judge in his Initial Decision. After a careful review and consideration of the record in this proceeding, we conclude that with one exception the Administrative Law Judge's disposition of the issues was well founded and proper. Our disagreement with the Administrative Law Judge lies in his award of reparation to complainant.[1]

Since the decision in *Mueller* v. *Peralta Shipping Cor.*, 8 F.M.C. 361 (1965), the Commission has uniformly refused to deviate from a strict application of section 18(b)(3) except pursuant to statutory authority provided by the amendment to that section affected by P.L. 90–298. Heretofore, we have steadfastly refused to be tempted by applications for relief "addressed to some undefined well spring of equity in the Commission rather than to any basis in law. . . ." (*Mueller, supra,* at p. 364, fn. 10) However, we concur with respondent that this particular factual situation is, in some important respects, distinguishable from most cases following *Muller's* holding.

Here, complainant and respondent had agreed upon a certain negotiated rate at which complainant would ship the vehicles in question. This negotiated rate had no counterpart in any tariff of respondent on file with the Commission, not unlikke the situation in the *Swedish American Line—Application to Refund,* 8 F.M.C. 142 (1964) case. The negotiated rate was clearly intended by respondent (and expected by complainant) to be the rate filed with this Commission. In a clearly warranted determination, the Administrative Law Judge found that, because of administrative error, an inaccurate rate was filed on behalf of respondent—a rate which was not the negotiated rate expected by both parties. That application of the negotiated rate was a foregone conclusion by both parties is clearly shown by subsequent issuance of respondent's Bill of Lading No. 1, and the payment by complainant of the negotiated rate stated therein without demurrer. Further, when the discrepancy was found pursuant to audit six months after payment, this error was not brought to respondent's attention for an additional five months thereafter. Complainant here prays that it be awarded reparation. Pursuant to section 22 of the Act, the Commission is authorized to award this avenue of relief, ". . . and may direct the payment . . . of full reparation to the complainant for the injury caused by . . . violation [of the Act]."

This avenue of relief provided by section 22, however, as clearly stated and maintained, is discretionary and permissive, and the

[1] At this point, for an understanding of the facts of this case and our disposition of the question of reparation, we would recommend a reading of the Initial Decision, a copy of which is attached.

mere fact that a violation of the Act has been found "does not in itself compel a grant of reparations." (*Consolo* v. *Flota Mercante Grancolombiana*, 383 U.S. 607 (1965); *Ballmill Lumber* v. *Port of New York, et al.*, 11 F.M.C. 494, 510 (1968)). In this case, and limited strictly to the peculiar facts of this case, it is our determination that an award of reparation is not warranted. To permit complainant to collect reparation here would be to grant complainant a $10,384.50 windfall which it neither anticipated nor bargained for. A decision permitting this sort of windfall profit to be reaped does not commend itself to us. We are of the opinion that under the facts here presented to remedy one evil is to foster another and that the record shows that it would be inequitable to do so. In this regard, we note also that Judge Greer also found "respondent's argument that . . . no discrimination among shippers has been developed on the record is well taken."[2] Rather than permit this sort of unwarranted windfall, we prefer to leave the parties as they were found. (*Parsons & Whittemore, Inc.* v. *Johnson Line et al.*, 7 F.M.C. 720, 732 (1964)).

Our action does not, nor can it, excuse a party from any statutory penalties to which he may be subject, but simply indicates our disinclination to award reparation in light of the compelling facts of this case. Insofar as Judge Greer found the respondent violated section 18(b)(3) of the Act, we accept and adopt his finding. However, insofar as Judge Greer further concluded, *ipso facto*, that such a violation entitles complainant to an award of reparation, we do not adopt his conclusion. We find that while respondent violated section 18(b)(3) by charging and accepting payment of a rate other than the tariff rate on file, the compelling facts of this case militate against reparation. That grant of reparation awarded below is hereby overruled and the complaint in this proceeding is hereby dismissed.

Commissioner Clarence Morse, Concurring and Dissenting

I concur in the majority's conclusion that no deviation from a strict application of section 18(b)(3) except pursuant to the statutory authority provided by P.L. 90-298 is sound.

I dissent from the majority's conclusion to deny reparations.

In my judgment this Commission's "discretion" under Section 22 to grant or deny reparations is limited by the test whether in the exercise of its "sound judgment" the Commission may conclude to grant reparations or may conclude to deny reparations. The word

[2] I.D., p. 9.

"may" in Section 22 does not permit of the denial or grant of reparations in the mere whim of the Commission.

There are at least two factual situations involved where our sound discretion comes into play, one being the necessity of establishing to the sound satisfaction of the Commission that there has been a violation of the Shipping Act, 1916, as, for example, proof of an act of unjust discrimination under Section 17. But, having established the unjust discrimination, claimant must additionally establish, to the sound satisfaction of the Commission, that it has in fact been damaged and the actual monetary amount of that damage. *Ballmill Lumber* v. *Port of New York*, 11 FMC 494 (1968). In such case the Commission does exercise its sound discretion in concluding whether reparations should be denied or granted, but does so initially in determining whether claimant has proven a statutory violation and, secondly, in determining whether claimant has proven monetary damage and the actual extent thereof. Those are the only areas in which we have discretion to grant or deny reparations. Having scaled those two obstacles, a claimant, in my opinion, is entitled to reparations as a matter of right, not as a matter of our discretion.

In the instant case, an admitted or proven statutory violation exists and an undisputed proven amount of damage—here the spread between the rate as assessed claimant and the only lawful rate published in respondent's tariff. The majority conclude, under the circumstances, it would be a "windfall" to claimant and inequitable to the respondent to award reparations. I say we may not deny reparations under these circumstances. Difficult cases often make for bad law, and on the equities of the case alone I sympathize with the views of the majority. But, to me, to deny reparations is to do violence to Section 18(b)(3), for we, the appointed guardians of Section 18(b)(3), by our action in denying reparations, are permitting respondent to assess and retain a freight rate in excess of its valid and lawful rate on file with the Commission, all in direct violation of the statute. In my opinion, the need to protect the inviolability of a duly filed tariff rate clearly overrides the other grounds asserted by the majority for denying reparations.

To deny reparations here results in our permitting respondent to violate the stricture of Section 18(b)(3) which, in unequivocal language, compels the carrier to charge only the tariff rates lawfully on file with the Commission, and for violation thereof the Congress has seen fit even to impose a civil penalty. Section

18(b)(6). The effect of the majority decision is to make this Commission party to the violation.

Louisville & Nashville Ry. v. *Mottley*, 219 U.S. 467 (1911), at 479, in discussing whether deviation from a rail carrier's filed tariff rate, on the basis of equitable grounds, should be permitted, held:

> ... The court cannot add an exception based on equitable grounds when Congress forbore to make such an exception.

United States of America v. *Pan American Mail Line, Inc.*, 69 Civ. 2381 (SDNY, September 11, 1972), 1973 AMC 404, holds:

> The Supreme Court has held that the only lawful rate which a carrier may charge is that rate appearing in the carrier's filed tariff. *Dayton Coal & Iron Co.* v. *Cincinnati, New Orleans & Texas Pacific Ry.*, 239 U.S. 446 (1915); Louisville & Nashville Ry. v. *Maxwell*, 237 U.S. 94 (1915); *Louisville & Nashville Ry.* v. *Mottley*, 219 U.S. 467 (1911); *Texas & Pacific Ry.* v. *Mugg & Dryden*, 202 U.S. 242 (1906); *New York, New Haven & Hartford Ry.* v. *ICC*, 200 U.S. 361 (1906); *Gulf, Colorado & Sante Fe Ry.* v. *Hefley & Lewis*, 158 U.S. 98 (1895). This rate must be charged and paid regardless of seemingly innocent justifications for departure such as mistake, inadvertence or contrary intention of the parties. *Louisville & Nashville Ry.* v. *Maxwell, supra*, at 97 (1915); *Southern Pacific Co.* v. *Miller Abattoir Co.*, 454 F. 2d 357, 359–60 (3d Cir. 1972); *Johnson Machine Works, Inc.* v. *Chicago, Burlington and Quincy R.R.; 297 F. 2d 793, 794–95 (8th Cir. 1962). It has been recognized that such strict interpretation may work hardship. Louisville & Nashville Ry.* v. *Maxwell, supra; Southern Pacific Co.* v. *Miller Abattoir Co., supra; Silent Sioux Corp.* v. *Chicago and North Western Ry.*, 262 F. 2d 474, 475–76 (8th Cir. 1959); *Bull S.S. Lines* v. *Thompson*, 123 F. 2d 943, 944 (5th Cir. 1941); *Prince Line Ltd.* v. *Amer. Paper Exports, Inc.*, 45 F. 2d 242 (S.D.N.Y. 1930); *Central Warehouse Co.* v. *Chicago, Rock Island & Pacific Ry.*, 20 F. 2d 828 (8th Cir. 1927); *Feraco, Inc.* v. *Gerogia Pacific Corp.*, 313 F. Supp. 660, 662–63 (D. Del. 1970). It has also been recognized that such interpretation may require decisions which are the reverse of those which would have obtained had the principles of equity been applied to the suit. *United States* v. *Associated Air Transport, Inc.*, 275 F. 2d 827, 832–34 (5th Cir. 1960); *Armour & Co.* v. *Atchison, Topekka & Santa Fe Ry.*, 254 F. 2d 719, 723–24 (7th Cir.), *cert. denied*, 358 U.S. 840 (1950); *Bernstein Bros. Pipe & Machinery Co.* v. *Denver & Rio Grande Western R.R.*, 193 F.2d 441, 444 (10th Cir, 1951); *Prince Line Ltd.* v. *Amer. Paper Exports, Inc., supra; Feraco, Inc.* v. *Georgia Pacific Corp., supra.* Yet, the courts have adhered consistently to their strict reading of the tariffs in question in order to effectuate the congressional scheme against rebating and collusive pricing.
>
> Taking the last points first, the fact that many of the above-cited cases were not Shipping Act decisions is of no consequence in the instant context. The language and congressional intent of the regulatory statutes under consideration, notably the Interstate Commerce Act, Part I, 49 U.S.C. § 6, are sufficiently similar to 46 U.S.C. § § 817 to warrant congruent construction. See *United States Navigation Co.* v. *Cunard S.S. Co., supra*, at pp. 480–81; *City of Nome* v. *Alaska S.S. Co.*, 321 F. Supp. 1063, 1065 no. 5 (D. Alas. 1971); *Prince Line Ltd.* v. *Amer. Paper Exports, Inc. supra.* Compare 49 U.S.C. § § 6(1)–(7), 317, 1373, with 46 U.S.C. § 817(b)(1)–(3). See also 46 U.S.C. § 844; 49 U.S.C. § § 906(a)–(d), 1005. The fact that in many of the Commission decisions cited shippers were suing for refunds is also irrelevant to the construction of § 817(b)(3). It has been held many times that in an action

predicated on failure to comply with a published tariff the balance of equities as between the parties is not at issue; the principle to be vindicated is that of compliance with the filed tariff. See the *Louisville & Nashville R.R.* line of cases cited *supra*.

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

FEDERAL MARITIME COMMISSION

No. 71–12

UNITED STATES OF AMERICA

v.

COLUMBIA STEAMSHIP COMPANY, INC.

Reparation awarded.

Alfred H. O. Boudreau, Jr., for complainant.
Kenneth E. Roberts for respondent.

INITIAL DECISION OF HERBERT K. GREER, ADMINISTRATIVE LAW JUDGE[1]

Complainant United States of America, represented by the Department of Justice, seeks reparation from respondent Columbia Steamship Company, Inc., a common carrier by water engaged in the foreign commerce of the United States, alleging an overcharge on a shipment of unboxed trucks from San Francisco, California, to Pusan, Korea, in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act), which provides:

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

THE FACTS

1. On or about April 2, 1969, Mr. Kent Dodge, a transportation management specialist with complainant's General Services Administration (GSA) and acting on behalf of the Agency for International Development (AID), solicited Wall Shipping Company (Wall),

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission (Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227).

known by him to represent respondent, to obtain transportation of unboxed trucks from San Francisco, California, to Pusan, Korea.

2. Mr. Frank Swartz of Wall contacted respondent to ascertain whether vessels were available and the rate which would be applicable to the shipment. During Mr. Swartz's discussion with Mr. Dodge, Mr. Dodge had stated that he could not pay more than the rate of the Pacific Westbound Conference. Mr. Swartz responded that they were nonconference and could do better than the conference rate. He submitted a rate of $1150.50 per vehicle, which was lower than the conference rate of $48.25 W‘M.

3. By letter dated April 9, 1969, Mr. Swartz confirmed a telephone conversation with respondent's Mr. Irv Thayer that space had been reserved on COLUMBIA EAGLE for 76 unboxed trucks at the rate of $1150.50 per unit. This rate was accepted by Mr. Dodge and the booking confirmed at the agreed rate.

4. On about April 15, 1969, respondent, by teletype, requested Consolidated Steamship Agencies (Consolidated), an agent and steamship broker, to assist respondent in filing an amendment to its tariff. The teletype recited a rate of $1,000.00 per vehicle for Group 1 ports, which included Pusan, and a rate of $1,150.50 for Group 2 ports. Consolidated filed the tariff amendment (Westbound Freight Tariff No. 1, third revised page 12, correction No. 11).

5. On April 25, 1969, respondent issued a bill of lading for transportation of 69 unboxed trucks measuring 64,170 cubic feet and weighing 418,485 pounds, at the agreed rate of $1,150.50 per unit. GSA paid respondent a total of $79,384.50 in accordance with the terms of the bill of lading.

6. During December of 1969, GSA Transportation Division audited the shipment. This resulted in a claim for overcharges against respondent dated May 22, 1970. Respondent, on June 3, 1970, declined the claim, stating that the shipment had been carried at the rate accepted by GSA and:

> We do acknowledge to clerical error in tariff filing which involved a transposition. This rate was filed after cargo was booked. However, when this error became apparent we could not petition for correction because the entire tariff had been cancelled.

8. The rate on file with the Commission as of the date of the shipment was $1,000.00 per unit for Group 1 ports, which included Pusan.

POSITION OF THE PARTIES

Complainant

Complainant takes the position that section 18(b)(3) of the Act should be strictly construed and that regardless of an error or mistake in filing a rate, the rate as filed is the only lawful one.

Cited is *Louis. & Nash R.R.* v. *Maxwell,* 237 U.S. 94, 97 (1915), wherein the Court held:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for charging either less or more than the rate filed. This rule is undeniably strict and, it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Argument that the Commission has adopted the strict construction rule is supported by citing *Mueller* v. *Peralta Shipping Corp.,* 8 F.M.C. 361, 365 (1965), and *Ocean Freight Consultants, Inc.* v. *Bank Line Ltd.,* 9 F.M.C. 211, 215 (1966). In *Mueller,* the Commission overruled prior decisions which permitted a carrier to voluntarily refund freight charges, or waive collection of a portion of the charges, and held:

> In light of the rules recited in the *Maxwell* case, unless there is some other statutory basis for relief in these cases—and we can find none—the construction we have placed on section 18(b)(3) of the Act is dispositive of special docket applications grounded on rate or tariff deviations in our *foreign* trades.

Also cited is *Midstate Co.* v. *Penna. R. Co.,* 320 U.S. 356, 361 (1943), and the Court's statement that:

> Accordingly, in respect to many matters concerning which variation in accordance with the exigencies of particular circumstances might be permissible, if only the parties private interests or equities were involved, rigid adherence to the statutory scheme and standards is required.

With regard to the fact that there had been an agreement between complainant's representative and respondent to transport the shipment at the rate of $1,150.50, complainant argues that verbal agreements or negotiated rates are invalid. Cited is *Northern Transfer, Inc.* v. *I.C.C.* 192 F. Supp. 600, 604 (1961), and the Court's conclusion:

> It is conceded that the rates charged by Northern Valley for its shipments of wadding from Rockleigh, N.J. to New York, N.Y. from June 2, 1956 through January 16, 1957 were orally agreed upon by and between the carrier and the shipper, and that the rates charged pursuant to that agreement were not disclosed by the carrier's tariff on file with the Commission at the time the shipments were made. Such rates, so arrived at, were illegal. (Citations omitted).

Further, that in *Atchison &c Ry. Co.* v. *Robinson,* 233 U.S. 173, 181 (1914), it was held that:

To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the Act.

Respondent

Respondent delineates the issue as:

Whether the general rule of strict construction as embodied in Section 18(b)(3) ... of the Shipping Act, will preclude Columbia Steamship Company from charging a rate which is above the filed tariff rate but equal to the negotiated lawful rate where the rate filed was the result of a mere typographical error.

It is acknowledged that, generally, a carrier is held to the tariff rate as filed regardless of whether there was a mistake or clerical error which resulted in an incorrect filing. Respondent quotes from *Silent Sioux Corp.* v. *Chicago & North Western Ry. Co.*, 262 F. 2d 474, 475, the Court's determination that:

... The principle is firmly established that the rate of the carrier *as duly filed* is the only lawful charge. (Emphasis supplied by counsel)

Also quoted is the holding in *Johnson Machine Works, Inc.* v. *Chicago B. & Q. R. Co.*, 297 F. 2d 793, 794 (1962) that:

It is well-established when the shipper designated the routing, the rate set out in the published tariff covering such route is the only lawful charge that can properly be made.

Respondent argues that although these cases express the general rule of strict compliance, they are not directly in point as they did not involve an error made in the filing of a tariff. Additionally, respondent cites *Magnolia Provision Co.* v. *Beaumont, S. L. & W. Ry. Co.*, 20 F. 2d 384 (1927), aff'd 26 F. 2d 72 (1928); *Armour & Co.* v. *Atchinson, Topeka & Santa Fe Ry. Co.*, 254 F. 2d 719, 723 (1958); and *National Van Lines, Inc.* v. *United States,* 355 F. 2d 326 (1966), where the strict construction rule was applied, but argues that the rule was applied regardless of equities. It is pointed out that the Courts have recognized that the rule produces hardships but have applied it regardless of unfairness and regardless of the relationship between the carrier and the shipper. *Yazoo & M. Valley R. Co.* v. *Marx,* 135 So. 64 (1931), cited in 83 ALR at page 263, is said to represent an inroad into the doctrine of strict compliance. In that case an error in construction of a tariff by an agent of the railroad was held not to estop the railroad from applying the true rate. Respondent argues:

> ... that mistakes made in filing tariffs should be afforded the same treatment as errors in the construction of tariffs. If a carrier is not precluded from charging the lawful rate when an agent erroneously construed the nature of the shipment, the carrier should not be precluded [from charging the lawful rate] when its agent makes an inadvertent error in filing.

Respondent contends that complainant knew what rate was going to be filed because it had specifically agreed to the rate of $1,150.50 per unit and is now repudiating a contract which it freely negotiated and which was confirmed by the bills of lading. *United States* v. *Bloomfield Steamship Co.*, 359 F. 2d 507 (1966), is cited to support the contention that the United States should be held strictly to the contract. The argument that relief should be granted when a contract contains a unilateral mistake and the other party is aware of the mistake, is supported by citation of *United States* v. *Jones*, 176 F. 2d 278 (1949), and *Browser* v. *Hamilton Glass Co.*, 297 F. 2d 341 (1953).

Further, on the issue of strict compliance with section 18(b)(3) of the Act, respondent contends that the reason behind the rule is to assure equal treatment of all shippers and prevent discrimination; and that as no discrimination will result from application of the agreed rate, the strict construction rule should not apply. Reference is made to a recent amendment to section 18(b)(3) [Public Law 90–298] which authorized the Commission:

> ... for good cause shown [to] permit a common carrier by water in foreign commerce ... to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the chages from a shipper where it appears that there is an error in the 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 ...

Respondent sees in this amendment justification for the Commission to consider inequities when a rate is too low as well as when it is too high.

DISCUSSION

The record establishes that complainant's authorized representative agreed with respondent that the shipment would be carried at the rate of $1,150.50 per unit. The agreement was not unlawful Complainant's reliance on *Northern Transfer*, *supra*, to establish that an agreement of this nature is unlawful is not sound. In that case, the decision was based on the fact that no rate was on file at the time of the shipment. Here, a rate had been filed. *Midstate* v *Penna. R. Co.*, *supra*, did not involve an erroneous rate filing but rather applied the rule of strict construction set forth in *Louis.* v

Maxwell, supra, to a statute which limited the time in which claims against carriers must be filed and an agreement contrary to that statute. The Act does not prohibit agreements between shippers and carriers provided that, prior to shipment, a rate is filed in accordance with the agreement, which rate is available to all shippers.

The issue is simply whether the agreed rate is the lawful rate or whether the erroneously filed rate must be applied. It would strain reason to doubt that respondent did not intend to file a rate which would serve to carry out the terms of the agreement, and that due to administrative error, the rates for Group 1 and Group 2 were transposed. In effect, complainant has elected to repudiate its agreement with respondent. Regardless of the possible inequity of so doing, it seeks to recover reparation by applying the rule of strict construction to section 18(b)(3). Under that rule, respondent is in violation of the section by charging more than the rate on file.

The precedent which respondent would have applied here is found in *Martini & Rossi et al* v. *Lykes Bros. S. S. Co.*, 7 F.M.C. 453, 455 (1962), wherein the Commission stated:

> The paramount question in cases of this type is whether granting the requested relief will result in discrimination. This is because the primary purpose of the new tariff filing provisions of the Shipping Act, 1916, as with similar provisions on which it was based, is to prevent discrimination. If this purpose will not be defeated we think we are unquestionably clothed with discretion to permit corrective action under the rule. We have the responsibility for administering that Act and also the Intercoastal Shipping Act, 1933, and are empowered among other things to see that equity and justice are done in the matter of reparations.

In *Mueller* v. *Peralta, supra,* the Commission repudiated this doctrine, and in specifically rejecting its authority to accord relief on the basis of a bona fide rate mistake, held[2] (page 364):

> We are aware that our decision in these two cases will result in some hardship, but we adopt the position that strict adherence to filed tariffs is mandatory. Moreover, we believe that strict construction of the statute will result in more careful tariff administration and management by carriers and conferences, and the obviation of possible undue or unfair preferences or advantages and discriminations.

The only variation from published rates recognized by the Commission in foreign commerce is pursuant to Public Law 90–298, quoted above. This recent amendment to section 18(b)(3) satisfies the condition set forth in *Mueller* v. *Peralta,* that there

[2] The Commission has not disclaimed authority to exercise discretion in cases involving misfiled rates in the domestic offshore commerce because in that area if has statutory authority to establish reasonable rates, authority which it does not have in foreign commerce.

must be a statutory basis for relief from strict adherence to the rate on file.

Respondent applies too broad a purpose to Public Law 90–298. The legislative history[3] makes clear that its purpose is to permit voluntary refunds to shippers by carriers. It does not authorize the Commission to sanction a violation of section 18(b)(3) for any other purpose, or as here proposed, to enforce an agreement which provides for a rate other than the rate on file at the time of shipment. *United States* v. *Bloomfield, supra,* does not alter this conclusion, for it did not involve the issue here presented, that is, an erroneously filed rate and section 18(b)(3) of the Act.

Respondent's argument that a basic purpose of section 18(b)(3) is to prevent discrimination and that no discrimination among shippers has been developed on the record is well taken. But to permit a deviation from the plain language of the section in this proceeding would be to establish an exception to the rule of strict construction because of equitable considerations. As the law now stands, the Commission may permit deviation from the rates on file only when expressly authorized by statute. There is no statute authorizing an exception to section 18(b)(3) under the circumstances here appearing. The strict construction of the statute undoubtedly works a hardship on respondent but it is the result of its own error.

ULTIMATE CONCLUSIONS

Respondent violated section 18(b)(3) of the Act by charging a rate for the transportation of property different from that published in its tariff on file with the Commission.

Complainant is entitled to reparation in the sum of $10,384.50, which is the difference between the charges paid at the rate of $1,150.50 per vehicle and the rate of $1,000.00 per vehicle which was on file with the Commission at the time of the shipment.

Under the circumstances here appearing, interest is not awarded provided that respondent shall pay the sum due within 60 days of the final disposition of the proceeding. If not paid within that period, interest at the rate of 6 percent per annum shall thereafter apply.

(S) HERBERT K. GREER,
Administrative Law Judge.

WASHINGTON, D.C.,
March 2, 1973

[3] U.S. Code Congressional and Administrative News 90th Congress, Second Session, 1968, Volume 2 page 1911.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–39

EMPIRE STATE HIGHWAY TRANSPORTATION, INC.

v.

AMERICAN EXPORT LINES, INC. ET AL.

DOCKET NO. 65–46

TRUCK LOADING AND UNLOADING RATES AT NEW YORK HARBOR

ADOPTION OF INITIAL DECISION

August 14, 1973

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

These are two consolidated proceedings involving essentially the same subject matter. Docket No. 65–39 was initiated with the filing of a complaint by the Empire State Highway Association (Empire State), an association of motor carriers, alleging violations of sections 15, 16 and 17 of the Shipping Act, 1916. The complaint was prompted by a general rate increase in truck loading/unloading rates published by the New York Terminal Conference (Conference), an association of marine terminal operators organized under approved Commission Agreement No. 8005, in the amount of 17 percent.

The Commission initiated a companion investigation, Docket No. 65–46, into the same truck loading/unloading rates to determine whether these rates, and the practices and ratemaking activities of the Conference are lawful under sections 15, 16 and 17 of the Shipping Act, 1916, and also to determine whether Agreement No. 8005, under which the Conference issues its Truck Loading and Unloading Tariff, should be disapproved, cancelled or modified.

Administrative Law Judge Charles E. Morgan concluded that since the matters in the complaint in Docket No. 65–39 are no longer in controversy, and since the present rates for truck loading and unloading at the Port of New York had not been shown to be unlawful, the complaint in that proceeding should be dismissed. In so doing, he noted that Complainant Empire, which is also an intervener in Docket No. 65-46, no longer challenges the level of the rates for truck loading and unloading as now published in Respondents' Tariff No. 7 and that no other party to the proceeding questions the present level of those rates.

In his Initial Decision in Docket No. 65-46, Judge Morgan found and concluded that a proposed new tariff rule, which defines the composite hourly cost of labor and forklift truck for truck loading and truck unloading at the Port of New York is reasonable and lawful; that the present truck loading and truck unloading rates and the practices and ratemaking activities of the Conference pursuant to Agreement No. 8005 are not shown to be unlawful, and that Agreement No. 8005 insofar as it is in issue herein is lawful; and finally that the investigation should be discontinued.

The tariff rule which Judge Morgan found "reasonable and lawful" and accordingly approved was proposed by Hearing Counsel. This rule would be published in the Conference's tariff as an amendment to that item relating to "Disposition of Requests and Complaints", and would provide as follows:

Any shipper, consignee, or other ratepayer subject to the rates and charges published in this tariff may submit a statement in accordance with the procedures set forth in this rule requesting that a new rate be negotiated based upon costs in the amount of $12.71 per man hour and $3.25 per hour for forklift truck and the time spent in loading or unloading a particular volume of the particular commodity. In case the partie are unable to agree upon the time factor, this factor will be determined by a board of arbitration consisting of a representative of the ratepayer, a representative of the terminal operators, and a third party to be selected by the parties, or by an impartial arbitrator selected by the parties, or by the Federal Maritime Commission. Upon determination of the time factor, a new rate will be published in the tariff.[1]

Under the above proposal, the composite hourly cost for computing new rates would be the same for all commodities, but this cost would be multiplied by varying time factors resulting from negotiations, agreements or arbitration.

In summary, the Administrative Law Judge concluded and found that reasonable items of cost factors to be considered in arriving at the hourly costs in the proposed tariff are:

(1) Wages	$5.15
(2) Fringe benefits	1.65
(3) Payroll taxes at 8.85 percent of wages (item 1)	.46
(4) Waterfront commission assessment at 1.85 percent of wages	.09
(5) Insurance at 9 percent of wages	.46

[1] The per man-hour and forklift truck per hour cost figures which Hearing Counsel originally proposed in their suggested rule were *$10.10* and *$3.00*, respectively.

Subtotal of items 1, 2, 3, 4, and 5	7.81
(6) Overhead at 18 percent of wages	.93
(7) Dead time at 31 percent of the sum of items 1, 2, 3, 4, and 5	2.42
(8) Indirect labor at 20 percent of wages	1.03
(9) Profit at 10 percent of wages	.52
Total of factor per man-hour	12.71
Factor per lieft truck-hour	3.25

In directing that the above factors of $12.71 per man-hour and $3.25 per lift truck-hour should be included in the Conference's tariff, Judge Morgan reemphasized that these figures, effective September 30, 1972, are subject to changes, such as wage changes approved by labor contracts or the Pay Board, Social Security law changes, labor contract fringe benefit changes, etc.

Empire filed the only exceptions to Judge Morgan's decision to which replies were filed by the Conference and Hearing Counsel. Empire's exceptions voice a general opposition in principle to the proposed rule and to specific items comprising the composite cost factor to be included in the rule. Many of these exceptions advance arguments which have already been considered and properly rejected by Judge Morgan.

At the outset, Empire believes that costs utilized in establishing rates must be proven, presumably in every instance, and cannot be fixed by a tariff provision. Thus, the truckers fear that if the rule is adopted, the Conference would be absolved from justifying any future rate increases and that the public would be forbidden to contest the Conference's cost data. Also Empire contends that the rule in fixing a cost factor makes no allowances for changed facts such as increases in productivity.

Empire has obviously misinterpreted the effect and purpose of the tariff rule at issue here. The composite cost factor established in the tariff rule is designed, as Hearing Counsel have explained, to assist shippers and terminal operators in their negotiations and, hopefully, to obviate the necessity for litigation by providing to shippers more effective means to obtain acceptable rates. It is not designed to relieve terminal operators of their reasonable rate and practice obligations under the Shipping Act, 1916.

Nor are the specific items of cost which comprise the composite cost factor intended to be fixed in perpetuity, as has been suggested. All the component cost items are subject to change as conditions at the port itself may change and productivity improve.

This is not to suggest, however, that all component items of cost are subject to change under the same terms and conditions. Thus a change in a cost item which is by nature subject to an underlying collective bargaining agreement or to a particular law—i.e., wages, fringe benefits, payroll taxes, waterfront commission assessments, insurance—would be an automatic type of adjustment. For example, whenever the wage figures included in the contract between employers and members of the International Longshoremen's Association are changed by subsequently negotiated contracts, as they were on October 1 of last year, the hourly cost factor will be correspondingly adjusted.

Similarly, if payroll taxes should by law be increased, the composite hourly cost item could, without more, be adjusted, to reflect the change in that component item.

Improvement in operating conditions and/or productivity at the piers may also warrant adjustments in those component cost items which relate to overhead, profit, indirect labor and dead time. While these items of cost, unlike those which are readily determinable from prevailing contracts or statute, are not subject to automatic adjustment, they are nevertheless subject to revision where costs and productivity so dictate. The basis of such revision would of course be the terminal operators' own financial data. If the need for such revision arises, we believe that we can expect the full cooperation of the terminal operators who have been most cooperative with the Commission's staff in furnishing financial data and information in this proceeding.

Since the present cost factor is based only upon current operating conditions, it is obviously contemplated that all items of cost are subject to future adjustments. Clearly, and contrary to Empire's unwarranted fears, the shipping public will not be forever wedded to current costs and productivity despite future operational changes.

Moreover, Empire's opposition to the tariff rule on the grounds that the establishment of a cost factor does not allow for improvements in productivity ignores one very important fact. What Empire has obviously overlooked is that the established composite cost factor is only one element in the rule, the other being the negotiable time factor. Clearly, whatever changes in productivity occur will to some extent be reflected in the time factor. Thus, the final commodity rate arrived at under the rule will of necessity decrease as the volume of cargo handled per hour increases.

Empire, in addition to its general objection to the tariff rule at issue and its concurrent challenge to the component cost factor in principle, also takes exception to those specific items of cost which relate to overhead, profit, indirect labor and dead time, there presumably being no objection to the first five items of cost. On exception, Empire also questions the soundness of the accounting procedures followed in arriving at the challenged items of cost.

Most of the cost items excepted to were confirmed by experienced terminal accountants, while the remainder were properly established by the Administrative Law Judge on the basis of the evaluation of all relevant and probative evidence. All items of cost determined by Judge Morgan are clearly supportable on the record. Thus, we conclude that Judge Morgan's findings regarding the challenged items of cost were, under the circumstances, entirely proper and well founded, and Empire contentions to the contrary are rejected. While many of the specific exceptions raised by Empire constitute merely rearguments of objections already considered and properly rejected by the Administrative Law Judge, some of the contentions advanced merit further discussion.

Empire opposes the 10 percent profit factor found reasonable by Judge Morgan on the ground that "no regulatory agency has sanctioned a profit of 10 percent." This argument, in addition to being factually incorrect, reflects a lack of understanding regarding the application of the profit factor itself. While, as noted by the Conference and Hearing Counsel, the Commission in *Crown Steel Sales, Inc.* v. *Port of Chicago*, 12 F.M.C. 353 (1967), approved a 10 percent profit margin for a terminal and stevedoring operation, Empire's challenge fails for an even more fundamental reason. As Judge Morgan's initial decision clearly indicates, the so-called profit margin or factor constitutes only a percentage of *wages* and not a percentage of total costs. Expressed as a percentage of total cost, the profit margin would, as indicated by Judge Morgan, amount to only 3.7 percent.

As regards "dead time", Judge Morgan found that a factor of 31 percent was reasonable. In so doing, he found that 2.5 hours out of every eight-hour day were nonproductive at the piers, owing to such conditions as rainy days, early departures, late arrivals, extra lunch time and coffee breaks. Empire continues to oppose *any* factor for dead time, which it views as an unjustified expense. Essentially, Empire's position is that "there is no item of expense in the croporate books and records of the terminal operators for dead time" and that, in any event, the shipping public should not be made to subsidize the terminal operators' inefficiences.

We find Judge Morgan's allowance of a dead time factor, and the amount thereof, to be wholly proper and reasonable under the circumstances. While we certainly do not advocate idle labor time, the inescapable fact of the matter is that such nonproductive time does exist. And to the extent that terminal operators are paying wages for the full eight-hour day but are receiving something less than eight-hours of revenue producing work, dead time is a very real cost which must be recouped if a terminal rate is to be compensatory.

In conclusion, we find that Empire on exception has advanced no argument or proposition which would warrant our rejection of Judge Morgan's findings as they relate to the adoption of the proposed much needed tariff rule. Accordingly, we are adopting the Initial Decision in this proceeding subject only to its updating to reflect ILA wage rate increases to $5.55 which became effective on October 1, 1972, some two days after the issuance of Judge Morgan's decision. Applying the cost factor percentages of the Initial Decision and adjusting the composite cost factor to reflect current wages, we derive a figure of $13.53 per man-hour, which was computed as follows:

Wages	5.55
Fringe benefits	1.65
Payroll taxes (8.85 percent of wages)	.49
Waterfront commission assessments (1.88 percent of wages)	.10
Insurance (9 percent of wages)	.50
Subtotal	8.29
Overhead (18 percent of wages)	1.00
Dead time (31 percent of 1st 5 items)	2.57
Indirect labor (20 percent of wages)	1.11
Profit (10 percent of wages)	.56
Total cost per man-hour	13.53

The $3.25 per lift truck-hour cost, found proper by Judge Morgan, remains unchanged.

ULTIMATE CONCLUSION

The Administrative Law Judge's findings and conclusions in this proceeding being proper and well-founded, we are adopting his Initial Decision, updated as indicated herein to reflect increases in ILA wages, as our own and making it a part hereof. Thus the provision we are approving for publication in the Conference tariff as an amendment to Item 21, "Disposition of Requests and Complaints" would read as follows:

Any shipper, consignee, or other ratepayer subject to the rates and charges published in this tariff may submit a statement in accordance with the procedures set forth in this item requesting that a new rate be negotiated based upon costs in the amount of $13.53 per man-hour and $3.25 per hour for forklift truck and the time spent in loading or unloading a particular volume of the particular commodity. In case the parties are unable to agree upon the time factor, this factor will be determined by a board of arbitration consisting of a representative of the ratepayer, a representative of the terminal operators, and a third party to be selected by the parties, or by an impartial arbitrator selected by the parties, or by the Federal Maritime Commission. Upon determination of the time factor, a new rate will be published in the tariff.[2]

Commissioner Clarence Morse, Concurring and Dissenting, With Whom Chairman Helen Delich Bentley Joins

I concur in the majority opinion subject to the following reservation.

The Administrative Law Judge authorized 31% of labor costs to cover the item of "dead time" (I.D. 14). The main testimony on this item was that of Mr. St. John (Tr. 1474; Ex. 20, p. 16) who admitted that in New York there was at least two hours of nonproductive labor to cover late morning starts, early evening departures, extra lunch time, and morning and afternoon coffee breaks out of the eight hours of employment—i.e., 25%—and the testimony of Mr. Talbot (Tr. 1409–1410; Ex. 20, p. 17) who estimated an additional one hour of "dead time" (three hours out of eight hours)—i.e., 37½% to cover nonproductive time due to factors such as rainy weather, awaiting trucks, paper work, etc. The term "dead time" therefore encompasses both controllable and noncontrollable nonproductive labor time. Controllable nonproductive labor time includes late morning starts, early evening departure, extra lunch time, and morning and afternoon coffee breaks (I.D. 13–14). Controllable nonproductive time results in large part from failure of management to insist upon and obtain strict adherence by employees to the contract of employment.

The Administrative Law Judge allowed the full two hours of 25% for "dead time" covering controllable nonproductive time plus 30 minutes, or approximately 6%, to cover noncontrollable nonproductive time. To my thinking an allowance of 25% for controllable lost time is unjustified, compensates management for failing to demand and obtain strict adherence by employees to their terms of employment, and places that much additional, and unnecessary, burden on the commerce of the United States. In these days of

[2] The word "item" has been substituted for the "rule", as used in the rule approved by the Administrative Law Judge, to make it clear that the application procedures are those contained in Item 21.

spiraling inflation and deficits in our balance of payments, I would put management's "feet to the fire" to assure that they receive an honest day's work for an honest day's pay and therefore would limit "dead time" to a maximum of 25% inclusive of both controllable and uncontrollable nonproductive labor time.

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

FEDERAL MARITIME COMMISSION

No. 65–39

EMPIRE STATE HIGHWAY TRANSPORTATION, INC.

v.

AMERICAN EXPORT LINES, INC. ET AL.

No. 65–46

TRUCK LOADING AND UNLOADING RATES AT NEW YORK HARBOR

In No. 65–39, present truck-loading and truck-unloading rates at Port of New York found not shown to be unlawful; and the complaint should be dismissed. In No. 65–46, proposed new tariff rule, as modified herein, defining composite hourly cost for labor and machinery for truck loading and unloading at Port of New York found lawful; present truck-loading and truck-unloading rates, and the practices and rate-making activities of the New York Terminal Conference pursuant to Agreement No. 8005 found not shown to be unlawful; Agreement No. 8005 found lawful; and the investigation in No. 65–46 should be discontinued.

Elkan Turk, Jr., and *Joseph A. Byrne* for respondents New York Terminal Conference and its members.

Arthur Liberstein for complainant and intervener Empire State Highway Transportation Association, Inc.

Samuel H. Moerman and *Douglas W. Binns* for intervener The Port Authority of New York and New Jersey.

Seymour Granbard and *Michael H. Greenberg* for intervener American Institute for Imported Steel, Inc.

Robert C. Gawley for intervener Niagara Frontier Tariff Bureau, Inc.

Warren D. Mulloy for intervener Eastern Railroads.

Samuel W. Earnshaw for intervener International Latex Corporation, its subsidiaries and affiliates.

Bryce Rea, Jr., and *Thomas W. Knebel* for intervener Middle Atlantic Conference.

William F. Hoffman for intervener the Cooper Development Association.

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

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

These are two consolidated proceedings. In No. 65–39, the complainant, Empire State Highway Transportation Association, Inc. (Empire), by its complaint served October 28, 1965, alleged that the rates of the respondents, the New York Terminal Conference (the Conference) and its members, for truck loading and truck unloading at the Port of New York were unlawful. A cease and desist order, but not reparation, was sought.

In No. 65–46, by original order served December 14, 1965, the Commission instituted an investigation of the same truck-loading and unloading rates to determine whether these rates, and the practices and rate-making activities of the Conference are lawful under sections 15, 16, and 17 of the Shipping Act, 1916 (the Act). Also to be determined is whether Agreement No. 8005, under which the Conference issues its Truck Loading and Unloading Tariff, should be disapproved, cancelled, or modified.[2]

Many parties have been active in these proceedings as shown in the list of appearances and in footnote 2. In the more recent stages of these proceedings there have been fewer active parties.

In the earlier stages of these two proceedings certain hearings were held and challenges were made by the respondents against the subpenas issued by the former presiding officer, which subpenas had directed the respondents to produce certain data. Issuance of the subpenas was upheld by the United States District Court for the Southern District of New York on December 2, 1966, and affirmed by the United States Court of Appeals for the Second Circuit on February 15, 1967.

After the subpenas had been upheld, it was discovered that the production of the data required by the subpenas would not advance the purpose for which they were sought, which was a determination of the profit and loss results of the truck-loading and truck-unloading operations at the tariff rates.

At a meeting of representatives of the active parties, the respondents offered to have a profit and loss study made by a reputable firm of Certified Public Accountants. Price Waterhouse & Co. was engaged. It concluded that it would not be possible to

[1] This decision became the decision of the Commission August 14, 1973.

[2] *In a first supplemental order in No. 65–46, served April 14, 1966,* United States Lines and Cunard Steamship Company were made parties respondent; but these two parties were dismissed as respondents by orders, respectively, of January 13, 1970, and February 5, 1970. Previously in No. 65–39, Cunard Steamship Company and Packet Shipping Corporation (order of November 16, 1965), Hollard-America Line (order amending complaint of January 3, 1966), and Transoceanic Terminal Corporation (order of March 7, 1966) were dismissed as respondents.

produce a statement of past profit and loss because the records kept by the respondents for their own purposes did not allocate costs in such a fashion as to separate those costs attributable to truck loading and unloading from the aggregate costs of stevedoring and terminal operations. Price Waterhouse proposed a prospective study under test conditions to be established by Price Waterhouse. All active parties agreed with appropriate reservations. The study was for a period of six months. It showed that during this test period the respondents experienced costs of $1.25 for each $1.00 of truck-loading and unloading revenue earned.

The study then was sought to be impeached on the ground that it included the cost of certain services which should be charged to the ocean carriers for terminal services, rather than be charged to the shippers and receivers of cargo for truck-loading and unloading services. Price Waterhouse had used the existing tariff definition of truck-loading and unloading services in its study, but it was at this time asserted that the tariff definition itself was faulty.

The issue of the proper tariff definition of the truck-loading and unloading service was referred to the Commission, all parties having agreed to do so in order to progress the proceeding. By its decision served September 18, 1969, the Commission decided that the then existing tariff definition was, indeed, faulty to the extent that it included any movement of the cargo between the place of rest on the pier and a place reasonably adjacent to the tailgate of the truck. *Truck Loading and Unloading Rates at New York Harbor*, 13 F.M.C. 51, 60–61.

The respondents filed, in the United States Court of Appeals for the District of Columbia Circuit, a petition to review that decision. The respondents voluntarily dismissed this petition, subject to reopening upon the final decision of the Commission. *New York Terminal Conference* v. *Federal Maritime Commission, No.* 23,644, D.C. Circuit, *per curiam* order filed January 21, 1970.

Efforts next were made to determine whether it would be possible to make adjustments in the Price Waterhouse study so as to eliminate from it only such costs as were attributable to activities excluded from the tariff service as redefined by the Commission. Both Price Waterhouse and the Staff of the Commission concluded that this could not be done.

Also, it was evident that the books and records of the members of the Conference were maintained in such a fashion that by using only these books and records no determination could be made of costs and profit and loss data relative to truck loading and unloading as redefined.

Some other means of determining these costs appeared advisable. Furthermore, in view of the very substantial expense it was deemed impractical to undertake a second study of costs along the lines of the test study previously made by Price Waterhouse.

Also, it appeared virtually certain that any attempt to conduct the necessary time studies of the newly defined truck-loading and unloading services at the waterfront terminals would produce labor stoppages and efforts to distort the result of the time studies.

The parties and their counsel informally met from time to time and endeavored to reach some method or agreement to progress the proceedings, and, thanks to their most diligent efforts, the recent stages of the hearings herein commenced on May 5, 1971, before the presently presiding Administrative Law Judge. Generally, the parties now are agreed that the matters heard in the recent stages of these proceedings substantially should be the basis for decision on the present issues, and that a detailed review of the evidence in the earlier hearings is unnecessary for a proper resolution of the remaining issues.

In the recent stages of these proceedings and in the recent hearings the active parties have included the respondent Terminal Conference and its members, the complainant and intervener Empire, the Port Authority of New York and New Jersey (formerly known as The Port of New York Authority), the American Institute for Imported Steel, and Hearing Counsel. In addition, in the recent hearings a number of shippers were called as witnesses by Hearing Counsel. Although these shippers did not intervene as parties to the proceedings, they presented varying views as to what should or should not be done concerning the truck-loading and unloading rates and practices.

In the final stages of these proceedings briefs were filed by only three parties, namely, Empire, the respondents, and Hearing Counsel.

In fact, the complainant Empire, which is also an intervener in No. 65–46, at the present time does not question the level of the rates for truck loading and unloading as now published in respondents' Tariff No. 7. Nor does any other party on brief question the present level of these rates.

Accordingly, it is found that the matters in the complaint in No. 65–39 are no longer in controversy, and it is found that the present rates for truck loading and unloading at the Port of New York are not shown to be unlawful. The complaint in No. 65–39 should be dismissed.

In view of the above circumstances, the investigation in No. 65–

46 conceivably now might be discontinued without more. But, the respondents and Hearing Counsel urge that there should be some constructive result from the time and effort of all the parties, and that certain other findings should be made and a new tariff rule prescribed. Only Empire of the other parties still active in the proceedings opposes the procedure urged by the respondents and Hearing Counsel. The latter two parties disagree as to details of a proposed new tariff rule, and Empire contests certain details of the rule as well as opposing it.

Before settling on the now proposed solution of a new tariff rule there was another proposal. It was suggested that there be determined the composite hourly cost of the manpower and lift-trucks employed in truck loading and unloading, and thereupon the Conference's tariff was to have been revised to reflect a charge for truck loading and unloading based on time, in 15 minute increments. This proposed charge was intended to replace the existing tariff's individual commodity rates and charges, which of course vary with the quantities of cargo handled and the type of commodity handled.

Representatives of the respondents conferred with Hearing Counsel and Commission staff members, and a list of factors entering into a composite hourly cost was determined. It was agreed that Messrs. Robert A. St. John and Harry Chuback, of the Commission's Staff, would be allowed to examine the records of respondents to verify the suggested factors of the composite hourly cost, and to verify the values of the factors suggested by the respondents on the basis of confidential treatment of the underlying data.

Mr. St. John verified that the composite hourly cost should include, among others, the factors of wages, fringe benefits, payroll taxes, Waterfront Commission assessment, insurance, overhead, and standard lift-truck. Mr. St. John did not dispute the existence of factors of "dead time" and profit, but did not in his first testimony confirm any particular figures for these factors. The respondents had initially suggested a factor of 25 percent for dead time, or two hours out of each eight-hour day, computed on the basis of 15 minutes late arrival for work, 30 minutes morning coffee-break, 15 minutes early departure for lunch, 15 minutes late return from lunch, 30 minutes afternoon coffee-break, and 15 minutes early departure from work.

The respondents also initially suggested 26 percent of direct labor costs (wages) as a combination of the two factors of overhead and profit. Mr. St. John confirmed 18 percent as overhead, and thereby there was derived a factor of 8 percent for profit. Mr. St. John did not support either the 25 percent dead time factor or the 8 percent profit factor because he could not confirm the 25 percent figure from the records of the respondents, and because it was not within his area of competence to express an opinion as to what the profit should be.

It was assumed that the respondents would later offer substantiation of these two factors. Also, the respondents had asserted that there should be included a factor for indirect labor, that is, for supervisory employees at the piers, such as timekeepers and mechanics, who are not included in either the direct labor or overhead categories of costs. The records of the respondents were not broken down so as to identify this indirect labor cost or to provide a basis for its allocation. It was understood that the respondents would present evidence as to any differences from Mr. St. John's figures which they believed justified.

At subsequent hearings in New York a considerable amount of shippers' and consignees' testimony was adverse to the suggested time-based charge for truck loading and unloading. These shippers and consignees were concerned that their charges would be uncertain because of the uncertain element of the time of truck loading and unloading, which time obviously might vary even as between two identical shipments. Other shippers supported the suggested time-based charge. The trucking interests and the Port Authority of New York and New Jersey also opposed the suggested time-based charge for the same reason of uncertainty of charges, including the fact that different piers may vary in efficiency in their loading and unloading operations. Furthermore, a lawful tariff should provide definite and certain charges, so that any two shippers each shall pay the same charges if their shipments are identical.

At this stage of the proceedings, the time-based tariff suggestion was withdrawn, and several meetings of the active parties were held in February and March 1972 to consider other possible resolutions of these proceedings. These meetings culminated in the present proposal of a new tariff rule suggested by Hearing Counsel, and embodied in Exhibit No. 19.

Hearing Counsel propose divorcing the time element above from the composite hourly cost, and leaving the time element to future negotiations and determinations by the respondents, shippers, consignees, and truckers. Hearing Counsel retain in their proposal the composite hourly cost for truck loading and unloading. As seen, the Conference agrees in theory, but not in the cost details, and Empire on brief opposes this last proposal both as to the theory and as to cost details.

This composite hourly cost would be a composite cost of the labor and the machinery needed in the truck-loading and unloading operations.

Hearing Counsel propose that a rule be published in the Conference's tariff as an amendment to Item 20, "Disposition of Requests and Complaints." The proposed rule (Exhibit 19) is:

Any shipper, consignee, or other ratepayer subject to the rates and charges published in this tariff may submit a statement in accordance with the procedures set forth in this rule requesting that a new rate be negotiated based upon costs in the amount of $10.10 per man hour and $3.00 per hour for forklift truck and the time spent in loading or unloading a particular volume of the particular commodity. In case the parties are unable to agree upon the time factor, this factor will be determined by a board of arbitration consisting of a representative of the ratepayer, a representative of the terminal operators, and a third party to be selected by the parties, or by an impartial arbitrator selected by the parties, or by the Federal Maritime Commission. Upon determination of the time factor, a new rate will be published in the tariff.

The Conference supports the above rule, but would insert other figures in lieu of $10.10 and $3.00.

Under the above proposal, the composite hourly cost for computing new rates would be the same for all commodities, but this cost would be multiplied by varying time factors resulting from negotiations, agreements, or arbitrations. The time factor or "productivity" subject to negotiation and arbitration, etc. would be how long it takes to load, or to unload, a given quantity of a particular commodity. The resulting rates per 100 pounds reached by agreement or arbitration would be published in the tariff, and would from time to time change existing commodity rates presently in the tariff.

Presumably, a shipper satisfied with his present commodity rate would not avail himself of the proposed tariff rule, but a shipper or consignee of another commodity might seek action under the rule if he believed the provable time element would result in a rate in his favor as compared with the existing tariff rate on his commodity.

All parties are agreed that they are free to contest in these proceedings the actual figures of $10.10 and $3.00 suggested for listing in the proposed rule. However, it is the general concensus that once this rule were to be adopted the figures would be binding, except that individual component parts of the figures would be changed from time to time when labor contracts, social security laws, etc., change, as for example when longshoremen's wages were to be increased from $4.60 per hour to $5.15 per hour. On the other hand, there would be no changes allowed, for example, in the profit percentage resulting from findings in this proceeding. If each component part, such as the percentage for profit, or the percentage for overhead were to be renegotiated each time a commodity rate were to be changed, then the effect of the proposed rule would be a nullity.

Outside of Empire's general opposition to the proposed tariff rule, there is little or no disagreement about the first five items in the composite hourly cost. These five items are Wages, Fringe Benefits, Payroll taxes, Waterfront Commission Assessment, and Insurance.

The results of the Pay Board's action with respect to the new contract between employers and members of the International Longshoremen's Association (ILA) are known and the approved figure for wages as of September 1972 is $5.15 per hour for straight time wages, and $1.65 per hour for fringe benefits. Whenever these figures are changed by approved ILA contracts, or by pay-board action, the figures in the proposed tariff rule in these proceedings would be adjusted accordingly. This would be an automatic and non-controversial type of change in one of the component costs of the total man hour cost of $10.10 shown in the proposed tariff Item 20.

Insurance of nine percent of wages ($5.15 per hour) amounts to 46 cents per hour. Overhead of eighteen percent of wages amounts to 93 cents per hour. Waterfront Commission assessment of 1.82 percent of wages amounts to 9 cents per hour. Effective October 1, 1972, this assessment apparently will be increased to 1.88 percent of wages.

The respondents compute payroll taxes at 9.4 percent, and Hearing Counsel at 8.3 percent, of wages. Using the figure of $5.15 per hour for wages, payroll taxes as computed by respondents are 48 cents, and by Hearing Counsel they would be 43 cents. At the time of Mr. St. John's audit the payroll tax rate was 8.3 percent, and Hearing Counsel insist on this rate. On the other hand, respondent's witness stated, without going into details, that the 8.3 percent should be changed to 9.4 percent because 9.4 percent was the across-the-board average of payroll taxes for New York and New Jersey. Since the parties are not far apart on this item, and to resolve this relatively minor issue, a figure in between the above two figures will be used, namely 8.85 percent or 46 cents. This figure will be subject to further audit and agreement between respondents and Hearing Counsel. It is suggested that these two parties meet at their earliest convenience and resolve their differences as to the proper percent for payroll taxes, and advise the Commission of their conclusions.

As between respondents and Hearing Counsel there remain differences in calculations concerning the items of dead time and profit, and also whether or not there should be an item of indirect labor. Empire opposes any factor for dead time or for indirect labor and disagrees with the computation of the profit factor. Empire also disputes the factor for overhead.

Overhead is computed by Hearing Counsel and by respondents as 18 percent of wages. Overhead of 18 percent of direct labor was confirmed by Mr. St. John from the books and records of five terminal operators who represented about 84 percent of total revenues derived from truck loading and unloading by the Conference. Empire challenges the 18-percent figure for overhead on the ground that each item of overhead was not established as properly attributable to truck loading and unloading, as for example, the items of overhead of president's salary and of advertising. However, to the extent that Mr. St. John was cross-examined on overhead, each item was substantiated. The overhead factor herein was based on sound accounting procedures. Overhead by its nature is a general factor which cannot be related to any particular operation of an enterprise, and overhead must be distributed generally to all of the activities of the enterprise. It is concluded that the factor for overhead of 18 percent of wages is reasonable. Accordingly, the factor herein found proper for overhead, based on wages of $5.15, is 93 cents.

"Dead time" is computed by Hearing Counsel and by respondents as a percentage of the sum of the five items of (1) wages, (2) fringe benefits, (3) payroll taxes, (4) Waterfront Commission Assessment, and (5) insurance. Using $5.15 for wages, $1.65 for fringe benefits, 46 cents for payroll taxes, 9 cents for Waterfront Commission Assessment, and 46 cents for insurance, the sum of these five items as of September 30, 1972, would be $7.81.

Hearing Counsel support dead time of 25 percent of the above five items, and respondents contend that dead time should be 37.5 percent of the five items. Empire opposes any factor for dead time. Mr. St. John's opinion was that a total of two hours of dead time, or of nonproductive time, is a minimum at the Port of New York, for the morning and afternoon coffee breaks, late morning starts, early evening departures, and extra lunch time. Two hours out of an eight-hour day amounts to 25 percent.

Mr. Durel J. Talbot, an experienced terminal operator, agreed with the two hours of dead time described by Mr. St. John, but pointed out an additional element of dead time, in his opinion, composed of idle time when the direct labor employed for truck loading and unloading is idle, while other employees are completing paper work related to truck-loading and unloading jobs and while the truck-loading and unloading labor has nothing to do while a truck to which it is assigned is moving to the loading or unloading position, or when some of the trucks anticipated to present themselves for service on the day in question fail to appear. Mr. Talbot estimated one hour of idle time per day in addition to two hours for coffee breaks, lunches, early departures and late arrivals, or a total of three hours of dead time, or 37.5 percent of an eight-hour day. An experienced trucker, Mr. Genser, it was stipulated, would have testified that there has not been any delay in the loading or unloading of trucks at the piers in his experience as a trucker where one of his trucks was not available to receive or discharge cargo. Respondents point out, to back up Mr. Talbot's testimony of idle time while awaiting trucks, that in *Empire State HWY Transp. Ass'n* v. *American Export Lines*, 5 F.M.B. 565, 580 (1959), the Commission's predecessor found that in hiring longshoremen for truck loading and unloading the terminals had to estimate the following day's demand for truck-loading labor, and that the magnitude of this problem was indicated by the variation in the number of trucks loaded and unloaded per day at some of the terminals in July and August 1957, which was from none to 63, 1 to 10, 8 to 125, 11 to 35, 46 to 157, and 58 to 154. Respondents now contend that a condition shown to have existed is presumed to continue until the contrary is shown.

It is clear that at times on rainy days, for example, truck-loading and unloading labor is idled, and cannot be assigned to any other tasks on the piers or terminal areas. It is concluded that credence must be given to the testimony of Mr. St. John, Mr. Genser, and Mr. Talbot, and carefully weighing all their testimony as to dead time, it is concluded that there is about 30 minutes of time when truck loading labor is idle in addition to the two hours for early departures, late arrivals, extra lunch times, and coffee breaks. This amounts to a total of 2.5 hours of dead time, or about 31 percent of an eight-hour day. It is concluded that the factor for dead time should be computed as 31 percent of $7.81 (the sum of the five items above), or $2.42.

A profit factor of six percent at most is supported by Empire, eight percent is supported by Hearing Counsel, and 10 percent by the respondents. Empire would compare the Conference's truck loading and unloading operations with the operation of a public utility, and argues that historically the rate for a public utility would be at most six percent. This argument appears unrealistic in view of the present costs of borrowing money, and in any event the Conference's members are in a competitive business, not comparable with public utilities.

Hearing Counsel point out on brief that the profit of eight percent, which they propose, actually is not a profit margin in the usual sense, in that it is merely eight percent of wages (direct labor), or considerably less a margin of profit on the total cost per hour of the truck-loading and unloading operation. (The original cost of direct labor used in Exhibit 19 of $4.60 times eight percent would give a factor of 37 cents profit, out of the total cost including profit as per Exhibit 19 of $10.10. Thus the profit margin would amount on this basis to only 3.7 percent.)

Respondents urge that the eight percent profit figure derived by Mr. St. John from the books of five principal terminal operators is a minimum reasonable figure, that it is unduly depressed by competition, and that the risks involved and cyclical nature of the truck-loading and unloading business fully justify a figure of 10 percent for profit. Hearing Counsel counter that the terminal operators should not be given the 10 percent profit by regulation which they are unable to achieve in the competitive market place, and that the substitution of regulation for competition would result in a greater burden on rate payers, and that the 10 percent goal of the respondents is rarely likely to be attained in their overall terminal operations. In *Crown Steel Sales, Inc.* v. *Port of Chicago*, 12 F.M.C. 353 (1967), at pages 370 and 371, a finding as to profit margin was made:

> ... the terminal operators' 10 percent before-tax profit margin is found to become about 5.6 percent after federal income taxes. . . . resort to return on invested capital would not be appropriate as most of the terminals' facilities and equipment are rented. The fact that, over the past 3 years, these terminals have not been making 10 percent before taxes on their overall operations (including stevedoring) is not determinative, and the record does not otherwise show the allowance to be unjust or unreasonable for this type of business.

In examining certain contracts between the terminal operators and the ocean carriers, Mr. St. John saw an element of ten percent for profit. This ten percent appeared invariably on these stevedoring contracts. While the stevedoring and the truck loading and unloading are two different operations, and the same profit is not necessarily common to both, nevertheless there are substantial similarities, such as in the labor contracts. Also, in the earlier stages of this proceeding a representative of Price Waterhouse &

Co. stated that in his opinion a 10 percent before-tax profit was appropriate, based on 10 percent of gross income. Here we now are dealing with the cost of direct labor or wages only, and in all the circumstances, a ten percent add-on to direct wages does not appear unreasonably high. It is concluded that 10 percent of wages, or 52 cents, is not unreasonable for the so-called profit factor in this proposed tariff rule.

Indirect labor is one of the necessary costs of operation of the members of the Terminal Conference. Indirect labor costs result from the wages of personnel which are not reflected either in direct labor's wages or in wages and salaries listed as overhead. Indirect labor includes various categories of pier superintendents and of foremen, timekeepers, checkers, and mechanics. Mr. St. John made no attempt to verify an amount or percentage for indirect labor, inasmuch as he had been informed that there was no way of specifically allocating indirect labor to the truck-loading and unloading operation. The checkers, timekeepers, dock bosses, and tallymen usually are engaged in other activities in addition to their activities regarding truck loading and unloading. In other words, indirect labor at the Port of New York is an overall cost factor generally allocable to various operations, including the truck-loading and unloading operation.

In fairness to the respondents, if the composite hourly cost figure in the tariff rule now proposed is to reflect fully distributed costs, it must include as one component a factor for indirect labor.

Mr. Talbot caused a study to be made of gross payroll payments by International Terminal Operating Co., Inc. (ITO), a substantial terminal operator and stevedore in the Port of New York, to personnel in the indirect labor category for one year. The payroll expense of ITO for indirect labor for the entire terminal operation was 29.2 percent of payroll expense for all direct labor at the terminal.

In Mr. Talbot's opinion, a lesser degree of supervisory effort is required in connection with the loading and discharging of ships than is needed in connection with the direct labor engaged in truck loading and unloading. He concluded that a fair ratio of indirect labor expense to direct labor expense in connection with truck loading and unloading should be 33.33 percent.

Hearing Counsel acknowledge that 33.3 percent for indirect labor may be the experience of ITO, but question whether it may or may not be representative of the entire Conference membership, and whether the overall company payroll indirect labor cost is useful here in determining the cost of indirect labor for the truck-loading and unloading function, which comprises only four percent of ITO's total revenue.

Hearing Counsel also question whether the indirect labor, which respondents allocate to truck loading and unloading, is not reimbursed already by allocations to the costs of providing stevedoring and terminal services to the ocean carriers.

Substantial credence must be given to Mr. Talbot's testimony. It is concluded that there are indirect labor costs associated with the truck-loading and unloading operation. In accordance with sound accounting principles, general costs not allocable to particular operations may be allocated generally to all the operations of an enterprise on an equal percentage basis. This means 29.2 percent for indirect labor for ITO. But, since no studies or verifications were made of the five principal terminal operators, except for the study by ITO, it is concluded that a conservative figure for the Conference as a whole would be 20 percent for indirect labor. Mr. Talbot testified that he believed ITO to be the most efficient operator at the Port of New York. His statement may have been colored somewhat because he had been ITO's president for ten years until February 1972. It is concluded that the proper figure for indirect labor in the proposed tariff rule is 20 percent of direct wages, or $1.03 as of September 30, 1972.

For the hourly charge for a fork lift truck to be used in the truck-loading and unloading operation, Hearing Counsel support a charge of $3 and respondents support a charge of $4. Mr. St. John made a study of the actual charges billed to the ocean carriers by the terminal operators in the various contracts negotiated between these parties. He found that the charges varied from $3 to $4, that some contracts had gone as high as $4, one was $3.50, but that overall the operators as a whole felt at the time that the $3 figure would be appropriate. Respondents now contend in view of the lapse of time since the Staff study was made and in view of the general increase in costs of all kinds during that period, that the factor of $4 per hour for the use of a fork lift truck is reasonable. In all the circumstances giving some weight to the passage of time, it is concluded that the proper factor as of September 30, 1972, for fork lift truck is $3.25 per hour.

In summary, it is concluded and found that reasonable factors for the proposed tariff rule as of September 30, 1972 are:

(1) Wages	$5.15
(2) Fringe benefits	1.65
(3) Payroll taxes at 8.85 percent of wages (item 1)	.46
(4) Waterfront commission assessment at 1.85 percent of wages	.09

(5) Insurance at 9 percent of wages	.46
Subtotal of items 1, 2, 3, 4, and 5	7.81
(6) Overhead at 18 percent of wages	.93
(7) Dead time at 31 percent of the sum of items 1, 2, 3, 4, and 5	2.42
(8) Indirect labor at 20 percent of wages	1.03
(9) Profit at 10 percent of wages	.52
Total of factors per man-hour	12.71
Factor per lift truck-hour	3.25
Grant total per hour	15.96

The above factors of $12.71 per man hour and $3.25 per lift truck hour should be included in an amended Item 20, "Disposition of Requests and Complaints", in the Conference's tariff, again subject to the understanding that these figures are effective September 30, 1972, and are subject to changes, such as wage changes approved by labor contracts or the Pay Board, Social Security law changes, labor contract fringe benefit changes, etc., but also subject to the understanding that the percentages found reasonable above for overhead, dead time, indirect labor, and profit are not subject to change insofar as the proposed tariff rule item 20 herein is concerned.

It is concluded that the proposed tariff rule is consistent with the past history at the Port of New York insofar as the early tariffs of the terminal operators contained truck loading and unloading rates which were the results of negotiations between the terminal operators and the truckers. The proposed rule will continue to provide for rate negotiations, and help the parties to avoid future litigation. The proposed rule will have a firm base upon which to conduct these rate negotiations, in that there will be a firm figure for the hourly cost of loading and unloading trucks. Of course, there will remain in probable dispute the time element for any particular commodity. The negotiations and any agreements, and, if necessary, any arbitrations, as provided by the proposed rule, presumably will take care of remaining disputes as to the time elements.

It is concluded also that truck loading and truck unloading are labor intensive services, and that the usual ratemaking factors, applicable to rate making for the ocean portion of a transportation service, are not applicable in a substantial degree to rate making for the truck loading and unloading services, or that if such usual rate-making factors are applicable to the truck-loading and unloading services these factors are entitled to a much lesser weight. For the purposes of the proposed tariff rule it is concluded that it is reasonable and proper to rely on uniform cost factors per man hour and per lift truck hour for all commodities loaded and unloaded in and out of trucks at the piers at the Port of New York. The flexible time element will in the largest part take care of whatever differences in rates may be justified by the differences in the other rate-making elements associated with the various commodities.

ULTIMATE CONCLUSIONS AND FINDINGS

It is concluded and found in No. 65–39 that the present truck-loading and truck-unloading rates at the Port of New York are not shown to be unlawful, and the complaint should be dismissed. In No. 65–46, it is concluded and found that the proposed new tariff rule, as modified by previous findings herein, which defines the composite hourly cost for labor and fork lift truck for truck loading and truck unloading at the Port of New York is reasonable and lawful; and it is further concluded and found that the present truck-loading and truck-unloading rates, and the practices and rate-making activities of the New York Terminal Conference pursuant to Agreement No. 8005 are not shown to be unlawful, and Agreement No. 8005 insofar as it is in issue herein is lawful; and the investigation should be discontinued.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
September 29, 1972.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 457

COMMERCIAL PRINTING, INC.

v.

SEA RIDERS, INC.

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

August 29, 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 August 29, 1973.

It is ordered, That applicant is authorized to waive collection of $431.20 of the charges previously assessed Sea Riders, 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 in Special Docket 457 that effective June 2, 1973, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from June 2, 1973 through June 19, 1973, the rate on 'Phone Directories' is $32.00 W/M subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff.

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

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 457

COMMERCIAL PRINTING, INC.

v.

SEA RIDERS, INC.

Application to waive a portion of freight charges granted.

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

Pursuant to Public Law 90–298, 90th Cong. (section 18(b)(3), Shipping Act, 1916), Sea Riders, Inc., respondent, on July 10, 1973, applied for permission to waive $431.20, being a portion of freight charges for transporting telephone directories from Miami, Florida, to Jamaica.

On bill of lading No. 1847, dated June 2, 1973, Commercial Printing, Inc., complainant, shipped telephone directories measuring 2157 cubic feet which respondent rated at $32.00 per measurement ton (40 cubic feet) for a total of $1,725.60. At that time, respondent's applicable tariff rate was $40.00 per 40 cubic feet for the commodity. At $40.00 per 40 cubic feet the freight charge would total $2,150.80. However, two months prior to actual shipment a rate of $32.00 on phone directories was negotiated with the shipper but respondent inadvertently failed to publish the reduction, which could have become effective before shipment. Unmindful of the oversight, and believing the new lower rate was in effect, respondent billed and collected at the $32.00 rate.

Since the shipment, and prior to the filing of this application for waiver of a portion of the freight charges, respondent has filed 1st revised page 23–A to Sea Riders, Inc. Freight Tariff No. 2 (F.M.C. No. 2), effective June 19, 1973, which establishes a rate of $32.00 per 40 cubic feet for phone directories.

No shipments other than complainant's of the same or similar commodity moved via respondent during the same period of time at the rate applicable at the time of the shipment involved in this proceeding.

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

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 date of the shipment.

Good cause appearing, and applicant having complied with the provisions of Public Law 90–298, permission to waive collection of $431.20 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) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.
August 1, 1973.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 456

PLAZA PROVISION COMPANY AND PUEBLO SUPERMARKETS, INC.

v.

MARITIME SERVICE CORPORATION

Application to settle certain demurrage accounts, i.e., to waive collection from Plaza and Pueblo of 10 percent of certain demurrage charges, to allow certain ocean carriers to depart from the credit provisions of their tariffs and to make like arrangements with shippers in Puerto Rico similarly situated to Plaza and Pueblo, approved, subject to two conditions.

John Mason and *Paul J. McElligott* for Maritime Service Corporation.

Mario Escudero and *Dennis N. Barnes* for Plaza Provision Company, Inc.

Michael K. Stanton and *Neal Schwarzfeld* for Pueblo Supermarkets, Inc.

Donald J. Brunner and *Charges J. Haslup* as Hearing Counsel.

September 10, 1973

REPORT

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

This special docket application was filed by Maritime Service Corporation (MSC) in fulfillment of agreements with Plaza Provision Company (Plaza) and with Pueblo International, Inc., and Pueblo Wholesale (Pueblo). MSC seeks permission to: (1) waive collection of 10 percent of container demurrage charges assessed against Plaza and Pueblo before December 31, 1972;[1] (2) depart from the credit provisions of the applicable tariffs and allow installment payment of the remaining 90 percent of the accumulated charges; (3) make like arrangements with similarly situated shippers, receivers, and consignees in Puerto Rico; and (4) refund

[1] The amount due from Plaza is $169,597.50, and from Pueblo, $215,560.00. Attachments I and VI to application of MSC.

10 percent of the demurrage collected from shippers who paid promptly.

According to MSC's application, and in accordance with their agreements, Plaza and Pueblo joined in the application, but no appearances were filed for them. Hearing Counsel petitioned to intervene; MSC did not object, and leave to intervene was granted.

In general, the circumstances giving rise to this application are known to us from the records in No. 71–32, *Agreements DC–38 and DC–38–1, Puerto Rico Ocean Service Association,* No. 72–27, *Maritime Service Corporation* v. *Plaza Provision Company,* No. 72–28, *Maritime Service Corporation* v. *Pueblo Supermarkets, Inc.,* and No. 73–2, *Plaza Provision Company, Inc. and Pueblo Inc.—Possible Violations of Section 16.*

Uniformity in the practices of ocean common carriers in the allowance of free time and the collection of container demurrage, including the publishing of appropriate tariff rules relative to free time and container demurrage, is both desirable and necessary to insure that shippers and consignees are treated equally and fairly.

MSC was formed in the summer of 1970 to take over the task of billing and collecting container demurrage charges for the four carriers herein on all arrivals at, and all sailings from Puerto Rico on and after September 6, 1970.

MSC's first invoices were mailed in October 1970, but its collection efforts were met with widespread shipper and consignee resistance. It is not necessary herein to delve into the matter of whether or not such resistance was justified. By mid-1972, the situation was worse than ever before. As of June 30, 1972, container demurrage invoices presented by MSC but unpaid for 60 or more days totalled over $3,000,000.

A number of lawsuits were filed by MSC in Puerto Rico for recovery of container demurrage charges as invoiced. None have come to trial because of the crowded docket in the U.S. District Court for Puerto Rico. That Court had a backlog of nearly 2,000 cases as of January 31, 1982, and has been plagued by illnesses of sitting judges. Because of these and other circumstances, it appears unduly optimistic to expect an early liquidation of the backlog, which includes the lawsuits filed by MSC concerning container demurrage.

Plaza and Pueblo contend that 20 to 30 percent of all demurrage charges at issue were due to bunching, cancelled bookings, diverted shipping routes, and other shipping conditions. MSC contends that these things, per se, are not grounds for waiver of collection of container demurrage in whole or in part; MSC concedes, however, that a laborious and expensive container-by-container investigation would disclose some instances of things proximately caused by faults of the ocean common carriers or other conditions for which Plaza and Pueblo would not be responsible.

The massive scale of possible litigation herein is found in the fact that MSC's invoices to Plaza and Pueblo from October 1970 through December 1972 involved 808 invoices and 6,065 containers upon which demurrage was billed by MSC.

The parties have agreed to this application as a reasonable settlement of the measure of carrier fault in the outstanding demurrage accounts here at issue. The settlement also reflects the costs to all parties of investigating or litigating the issues.

MSC is not actually seeking to waive collection of amounts properly charged and due. Rather, MSC recognizes that certain amounts may not be due, and that the cost of ascertaining the exact due amounts is prohibitive.

The application covers demurrage invoices through December 31, 1972.

As to invoices presented on and after January 1, 1973, Plaza and Pueblo will promptly audit them, promptly pay undisputed items, and as to disputed items which cannot be resolved in negotiations with MSC, a review procedure will be resorted to promptly. The review procedure above includes a Review Committee of three members with the third member nominated by the other two members (these two consisting of one representative of MSC and one representative of the shipper or consignee).

Plaza and Pueblo join with MSC in asking for authority to depart from the carriers' tariff rules and settle for 90 percent of the unpaid demurrage balances as of December 31, 1972, in equal installments monthly with the last installment to be paid on or before June 30, 1974. If the payment of the above demurrage were to be made in a lump sum, this would seriously disrupt the business affairs of the companies, and in the circumstances the payment schedule of monthly installments ending June 30, 1974, appears reasonable and necessary.

To avoid the discrimination which would result if collection was waived of 10 percent of the December 31, 1972 accumulations of demurrage as to Plaza and Pueblo, but not as to other shippers and consignees in Puerto Rico similarly situated, the same arrangements will be made available to other shippers and consignees similarly situated. Likewise, the same extensions of credit or payment arrangements will be made to other shippers and consignees similarly situated. To this end, MSC has caused to be published in many ways its offer of equal treatment to these other shippers and consignees, by publishing the agreements between MSC, Plaza and Pueblo in the four main Puerto Rican newspapers, in magazines or periodicals of various shipper organizations and chambers of commerce, and on television and radio stations. (Letter to the parties dated June 8, 1973, with attachments).

The Commission's special docket procedure is, with respect to common carriers by water in interstate commerce, based on the last paragraph of section 18(a) of the Shipping Act, 1916.[2] The "reasonable rate" power granted in that paragraph, buttressed by section 4 of the Intercoastal Shipping Act, 1933,[3] has historically been interpreted as empowering the Commission to authorize carriers to waive or refund a portion of the tariff charges.[4]

Both Acts require, as a condition precedent to the order and enforcement of the lower, nontariff rate, findings of "unjust or unreasonable" rates, fares, practices, etc., and that the approved rate, fare, practice, etc. be just and reasonable. (See *Mueller* v. *Peralta Shipping Corp.*, 8 F.M.C. 361 (1965)).

As we recently said:

> Since the decision in *Mueller* v. *Peralta Shipping Corp.*, 8 F.M.C. 361 (1965), the Commission has uniformly refused to deviate from a strict application of section 18(b)(3) except pursuant to statutory authority provided by the amendment to that section affected by P.L. 90–298. Heretofore, we have steadfastly refused to be tempted by applications for relief "addressed to some undefined well spring of equity in the Commission rather than to any basis in law. . . . [*Mueller, supra,* at p. 364, fn. 10.][5]

Likewise, section 18(a) should be strictly applied.[6]

[2] Section 18(a) of this Shipping Act, 1916, reads as follows: "Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice." [46 U.S.C. 817(a)]

[3] Section 4 of the Intercoastal Shipping Act, 1933, reads as follows: "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: Provided, that the minimum rate provisions of this section shall not apply to common carriers on the Great Lakes." [46 U.S.C. 845(a)]

Section 5 of the Intercoastal Shipping Act, 1933, reads as follows: "The provisions of this Act are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 1 of the shipping Act, 1916." [46 U.S.C. 845(b)]

[4] Rule 6(b)(b), 46 CFR § 502.92(b), implements the two sections: "Common carriers by water in interstate or intercoastal commerce, or conferences of such carriers, may file application for permission to refund a portion of freight charges collected from a shipper or waive collection of a portion of freight charges from a shipper. All such applications shall be filed within the 3-year statutory period referred to in § 502.63 (Rule 5(c)) and shall be made in accordance with the form prescribed in Appendix II(5). Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complainaed of. If allowed, an order for payment of waiver will be issued by the Commission."

The record before us will support the necessary findings: MSC admits that it has billed Plaza and Pueblo, and inferentially, others similarly situated, for demurrage resulting from carrier fault and other conditions beyond its control. Some portion of the demurrage is therefore not properly charged and due, and the cost of determining that portion exactly would be prohibitive. The parties have agreed that 10 percent is a fair estimate of the invalid billings.

It is unnecessary to determine whether the demurrage rates themselves are unjust or unreasonable. Rather, it is the practice of billing for demurrage resulting from carrier fault which is unjust and unreasonable. This is a case of first impression: heretofore, we and our predecessors have only used the special docket procedure to declare rates or charges unjust or unreasonable, and then to set and order enforced just and reasonable ones. But the two sections[7] explicitly authorize the same action as to the regulations and practices of common carriers by water in interstate commerce. Thus, we think it clear that the special docket procedure extends to the adjustment of unjust and unreasonable rules and regulations as well as rates, always of course assuming a proper case for adjustment.

In view of the amounts involved and the resulting commercial dislocations, application of the tariff credit provisions[8] would work an injustice, and the installment arrangement would be just and reasonable. Finally, since the same arrangement will be available to others similarly situated, and refunds made to those who have already paid, no discrimination will be created.

Carrier	*Tariff*	*Item*	*Number of days*
Sea-Land Service, Inc.	No. 158, FMC-F No. 21	540	Not to exceed 15 d.
Seatrain Lines, Inc.	No. 1, FMC-F No. 1	70	Not to exceed 10 d.
Transamerican Trailer Transport.	No. 1 FMC-F No. 1	400	May extend credit in those cases where financial responsibility has been responsibility has been furnished.
Gulf-Puerto Rico Lines, Inc.	No. 1, FMC-F No. 1	540	Not to exceed 15 d.

[5] Report, *United States of America* v. *Columbia Steamship Company, Inc.*, Dokno. 71-12, July 12, 1973, at 2. Both *Columbia* and *Mueller* involve common carriers by water in foreign commerce and section 18(b)(3), rather than interstate commerce and section 18(a).

[6] Additionally, Commission Rule 13(e), 46 CFR § 502.225, requires: "All initial, recommended, tentative, and final decisions will include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and the appropriate rule, order, sanction relief, or denial thereof. A copy of each decision when issued shall be served on the parties to the proceeding."

[7] Section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933. Quoted *supra*, notes 6 and 7.

[8] The applicable tariff credit provisions of the ocean carriers are:

Hearing Counsel intervened in this proceeding, and in their reply to the application recommend conditional approval. Hearing Counsel propose two conditions:

(a) Production of the list of paid-up shippers mentioned in paragraph 9 (p. 16) of the application prior to approval and not at the time of approval.

(b) Submission to the Commission's Bureau of Compliance of the details of each settlement entered into pursuant to paragraph 8 of the application, as each settlement is concluded, and the details of each situation in which an application for similar treatment pursuant to that paragraph is denied.

The suggestion of Hearing Counsel as to their second condition, (b) above, appears appropriate and is approved.

The other condition suggested by Hearing Counsel relates to those shippers, such as Grand Union Stores, Sears Roebuck, and R. J. Reynolds Industries, which apparently have currently or periodically paid in full MSC's invoices. As to shippers and consignees, such as these, MSC proposes to refund 10 percent of the amounts already so paid. MSC states that upon approval of its application it will provide a listing of these paid-up shippers and consignees, and of the amounts involved.

Hearing Counsel, however, would condition approval of the application on the prior submission of this list. The list should be furnished as promptly as possible to the Commission, but in any event not later than 30 days after approval of the application. Prompt approval of this application appears desirable to bring some order and direction to a very chaotic situation existing regarding the payment of container demurrage in Puerto Rico.

This special docket application is hereby approved, subject to the two conditions:

(1) That a list of so-called paid-up shippers as per paragraph 9 of the application be furnished to the Commission's Bureau of Compliance as soon as possible, and not later than 30 days after the approval of this application; and

(2) That the details of each settlement entered pursuant to paragraph 8 of the application, and the details of each situation in which an application for such treatment pursuant to that paragraph is denied, be promptly furnished to the Commission's Bureau of Compliance.

The record in this proceeding will be held open pending full compliance with the above conditions.

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

FEDERAL MARITIME COMMISSION

NO. 73–31

ROHM AND HAAS COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

NOTICE OF ADOPTION OF INITIAL DECISION

September 20, 1973

This proceeding was instituted by complaint served May 30, 1973 seeking reparation as a result of alleged overcharges by respondent in the assessment of ocean freight rates.

In his initial decision served July 10, 1973 the Administrative Law Judge concluded that Marasperse N–22 and Toranil B are dry lignin pitch and entitled to classification as such per respondents tariff; which classification would result in an award of reparation to complainant in the amount of $2,489.18.

No exceptions have been filed. Upon review of the record, we conclude that the Administrative Law Judge's findings and conclusions were proper and well founded. Accordingly, we hereby adopt the initial decision* (a copy of which is attached to and made a part hereof).

By the Commision.

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

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*Our adoption of the Administrative Law Judge's finding as to Toranil B is based on the evidence of record in this proceeding and is not inconsistent with our decision in Docket 73–19, *Rohm & Haas Co.* v. *Moore McCormack Lines, Inc.* also served today, in which a contrary conclusion is reached by virtue of claimant's failure there to sustain its burden of proof as to the exact nature of the commodity shipped.

FEDERAL MARITIME COMMISSION

No. 73–31

ROHM AND HAAS COMPANY

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Reparation awarded.

Joseph S. Petralia for complainant.
G. Pavia Rizzo for respondent.

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

Complainant seeks reparation totalling $2,489.18 arising out of two shipments from New York to Barranquilla, Colombia. The first shipment was described on the bill of lading, dated June 3, 1971, as "700 Paper Bags Agricultural Chemical Formulation/ Chemicals NOS (Marasperse N–22)." The second shipment was described on the bill of lading, dated June 30, 1971, as "22 skids containing 704 Bags Agricultural Chemicals Formulation/Chemical NOS (Toranil B)." Respondent assessed the shipments as per 6th revised page 75, item class 9, Tariff No. 8 of the East Coast Colombia Conference.

Complainant contends that Marasperse N–22 and Toranil B are lignin pitch and as such should be rated as per item 685, 2nd revised page 52 of Tariff No. 8—Pitch, Lignin, Dry. The difference in the assessment between Chemical N.O.S. and Pitch, Lignin, Dry, for the two shipments is the amount of reparation sought.

Respondent defends its rating by reliance on the bill of lading description, "Chemical NOS." It says it is not incumbent on the carrier's clerk to consult reference works (such as a chemical dictionary) to augment the description provided by the shipper on the bill of lading.

Pursuant to request of camplainant, to which respondent does not object, this proceeding was conducted in accordance with the Commission's Rule 11 (shortened procedure).

Are Marasperse N–22 and Toranil B in fact lignin pitch and thus entitled to the specific commodity rate published in respondent's

[1] This decision became the decision of the Commission September 20, 1973.

tariff? the matter was carefully and thoroughly considered in *Rohm and Haas Company* v. *Moore McCormick Lines, Inc.*, Docket No. 73–19, Initial Decision served June 8, 1973. In that case it was held that Marasperse N–22 was lignin pitch but the claim for Toranil B failed for lack of sufficient proof to sustain complainant's heavy burden.

In this case, as in Docket No. 73–19, complainant has met his burden of establishing that Marasperse N–22 is dry lignin pitch. In addition, in the instant proceeding, the complainant has furnished a straight bill of lading from complainant's supplier under which said supplier shipped the goods from place of manufacture to respondent carrier (Attachment 11 to complaint). This document establishes that the commodity delivered to the carrier on behalf of complainant for transport to Barranquilla pursuant to the bill of lading dated June 30, 1971, was lignin pitch, dry. Accordingly, the evidence in this proceeding establishes that Toranil B is entitled to the rate for "pitch, lignin, dry."

ULTIMATE CONCLUSIONS

Marasperse N–22 and Toranil B are dry lignin pitch and entitled to classification as such per respondent's tariff. Complainant is awarded reparation totalling $2,489.18, with interest at the rate of six percent per annum if not paid within thirty days.

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

WASHINGTON, D.C.,
July 10, 1973.

FEDERAL MARITIME COMMISSION

No. 73–19

ROHM AND HAAS COMPANY

v.

MOORE MCCORMICK LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

September 26, 1973

This proceeding was instituted by complaint served April 19, 1973 seeking reparation as a result of alleged overcharges by respondent in the assessment of ocean freight rates.

In his initial decision served June 8, 1973 the Administrative Law Judge found:

(1) Having established that a shipment of a product known as "Marasperse N–22" consisted of "Lignin Pitch" and was misclassified by respondent as "Chemicals N.O.S.", complainant is awarded reparation in the sum of 2,208.19.

(2) Having failed to establish that a shipment of a product known as "Toranil B" consisted of "Lignin Pitch" and was thereby misclassified by respondent as "Chemicals N.O.S.", complainant is not entitled to reparation thereon.

No exceptions were filed. Upon review of the record, we conclude that the Administrative Law Judge's findings and conclusions were proper and well founded. Accordingly, we hereby adopt the initial decision* (a copy of which is attached to and made a part hereof).

By the Commission.

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

*Compare decision in Docket 73–31, *Rohm and Haas Co.* v. *Flota Mercante Grancolombiana, S.A.*, served today.

FEDERAL MARITIME COMMISSION

No. 73–19

ROHM AND HAAS COMPANY

v.

MOORE MCCORMICK LINES, INC.

Reparation awarded in part.

Joseph S. Petralia for complainant.
J. D. Straton for respondent.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

By complaint served April 19, 1973, complainant seeks reparation in the sum of $4,284.90 from respondent, claiming that respondent incorrectly classified and rated two shipments carried on respondent's vessels in June and August 1971 as "Chemicals N.O.S." rather than as "Lignin Pitch" with the result that complainant was assessed freight rates which were higher than those published in respondent's tariff, in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act).

In answer to the complaint, respondent admits that the two shipments were classified and rated as "Chemicals N.O.S." but contends that the shipments were correctly classified and rated because they actually consisted of "Lignin Sulfonates" for which no specific commodity rate was published in respondent's tariff.

Pursuant to request of complainant, to which respondent consents, this proceeding was conducted in accordance with the Commission's Rule 11 (shortened procedure).

The two claims are described as follows:

The first shipment consisted of 794 bags of chemicals which moved from New York to Santos, Brazil, on respondent's bill of lading dated June 25, 1971. The shipment was declared on the bill of lading as "Agricultural Chemical Formulation Chemical NOS" and was assessed a rate of $87.50 per 40 cubic feet, which was the rate applicable to "Chemicals N.O.S.", as per respondent's tariff.[2] Complainant contends that the shipment actually consisted of

[1] This decision became the decision of the Commission September 20, 1973.

[2] Inter-American Freight Conference, Section A, Tariff No. 3 (F.M.C. No. 7) 1st rev. page 92.

"Marasperse N–22, Lignin Pitch" and should have been rated on the basis of $74.000 per 2240 lbs, which was the applicable rate for "Lignin Liquor, Pitch or Powder", as per respondent's tariff.[3] Complainant claims that it was overcharged in the amount of $2,208.18, which is the difference between the freight computed at the $87.50 rate and the freight computed at the $74.00 rate.

The second shipment involved 1,059 bags of chemicals which moved from New York to Santos on respondent's bill of lading dated August 19, 1971. The shipment was declared on the bill of lading as "Agricultural Chemical Formulation Chemical NOS (Toranil B)" and was assessed a rate of $87.50 per 40 cubic feet, which was the rate applicable to "Chemicals N.O.S." as noted above. Complainant contends that the shipment actually consisted of "Toranil B Lignin Pitch" and should have been rated on the basis of $74.00 per 2,240 lbs., the rate applicable to "Lignin Liquor, Pitch or Powder" as noted above. Complainant claims that it was overcharged in the amount of $2,076.71 which is the difference between the freight computed at the $87.50 rate and the freight computed at the $74.00 rate.

In total the two claims amount to $4,284.90.

Discussion and Conclusions

The only issue raised by the pleadings and supporting documentation submitted by the parties is whether "Marasperse N–22" and "Toranil B", the commodities involved in the two shipments, are in fact "Lignin Pitch" and thereby qualify for the specific commodity rate published in respondent's tariff under that designation.

As mentioned, it is respondent's contention that these commodities are actually "Lignin Sulfonates", for which no specific rate is published in respondent's tariff.

In support of its contention that the commodities in question are in fact "Lignin Pitch" complainant relies upon descriptions contained in invoices, extracts from a chemical dictionary, and a telegram indicating that the "Toranil B" involved in the second shipment was shipped as a substitute for "Marasperse N–22."

Although complainant contends that both "Marasperse N–22" and "Toranil B" are in fact "Lignin Pitch" there is no definition contained in any of the supporting documents as to "Lignin Pitch". Indeed, in all of the basic source materials which complainant has furnished, the only reference to "Lignin Pitch" appears in the invoice of American Can Company, the manufacturer of "Marasperse N–22", which identifies this product as "Lignin Pitch" and in

[3] *Ibid*, 2nd rev. page 129.

the dictionary reference to "Toranil B" which states that this product is "similar to lignin pitch." The dictionary extracts furnished by complainant nowhere define "Lignin Pitch."

The supporting documentation conclusively establishes that "Marasperse N–22" is actually Sodium Lignosulfonate and that "Toranil B" is Calcium Lignosulfonate. This is shown both by the manufacturers' and complainant's invoices and in the case of "Toranil B" by the dictionary definition of that product. According to the dictionary, furthermore, "Lignosulfonates" are also identified as "Lignin Sulfonates", hence, respondent is correct in contending that the two shipments consisted of such chemicals. This does not, however, determine whether "Lignin Sulfonates" or "Lignosulfonates" are in fact "Lignin Pitch".

As to the commodity involved in the first shipment, "Marasperse N–22", the manufacturer's invoice clearly identifies this product to be "Lignin Pitch". Respondent does not specifically dispute this evidence but instead contends that the product consists of "Lignin Sulfonates" a fact which may be true but, as mentioned, is inconclusive.[4] Accordingly, it is found and concluded that "Marasperse N–22" is in fact "Lignin Pitch", thereby qualifying for the specific commodity rate published in respondent's tariff under that designation.

In the case of the second shipment, there is no clear and convincing evidence that "Toranil B" is in fact "Lignin Pitch." The manufacturer's invoice fails to identify it as such and the fact that it may have been shipped as a substitute for "Marasperse N–22", as complainant contends, does not necessarily mean that the two products are identical. As mentioned, "Toranil B" actually consists of Calcium Lignosulfonate unlike "Marasperse N–22", which is Sodium Lignosulfonate. The dictionary definition furnished by complainant do not establish that "Toranil B" is "Lignin Pitch". On the contrary, the dictionary specifically states that "Toranil B" is "similar to lignin pitch." "Similar" is not "identical".

It is true, as complainant contends, that a shipper is not forever bound by the description of the shipment contained in a bill of lading. The test is what a claimant can now prove based on all the evidence as to what was actually shipped. *Western Publishing Co., Inc.* v. *Hapag Lloyd A.G.*, 13 SRR 16 (1972). Where the shipment has left the custody of the carrier, however, and the carrier is thereby prevented from personally verifying the claimant's con-

[4] Respondent also states that the pertienent export declaration forms described the shipments in the same manner as did the bills of lading but also contained Schedule B numbers which relate to "Sulfite Lye" and "Tall Oil". These facts are inconclusive and in any event the forms were not furnished for the record.

tentions, as is the case herein, the claimant has a heavy burden of proof to establish the validity of his claim. *Ibid; Johnson & Johnson International* v. *Venezuelan Lines*, 13 SRR 586 (1973). In order to sustain this burden claimant must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. *United States* v. *Farrell Lines, Inc.*, 13 SRR 199, 202 (1972); *Colgate Palmolive Peet Co.* v. *United Fruit Co.*, 11 SRR 979, 981 (1970). A finding that a carrier has violated the Act should not be made lightly or perfunctorily. *Johnson & Johnson International* v. *Venezuelan Line*, 12 SRR 830, 833 (1972).

The evidence submitted by complainant does not establish with reasonable certainty and definiteness that "Toranil B" is in fact "Lignin Pitch". Accordingly it is found and concluded that complainant has failed to sustain its heavy burden of proof that this particular shipment was incorrectly classified and rated by respondent.

ULTIMATE CONCLUSIONS

Having established that a shipment of a product known as "Marasperse N-22" consisted of "Lignin Pitch" and was misclassified by respondent as "Chemicals N.O.S.", complainant is awarded reparation in the sum of $2,208.19, with interest at the rate of 6 percent per annum if not paid within thirty days.

Having failed to establish that a shipment of a product known as "Toranil B" consisted of "Lignin Pitch" and was thereby misclassified by respondent as "Chemicals N.O.S.", complainant is not entitled to reparation thereon.

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

WASHINGTON, D.C.,
June 8, 1973.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-57

AGREEMENT NO. 8760-5—MODIFICATION OF THE WEST COAST UNITED STATES & CANADA/INDIA, PAKISTAN, BURMA & CEYLON RATE AGREEMENT

ADOPTION OF INITIAL DECISION

September 21, 1973

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

This proceeding is before us on Hearing Counsel's exceptions to the Initial Decision of Administrative Law Judge Ashbrook P. Bryant. In his decision, Judge Bryant determined that the amendment to Agreement 8760 (making it No. 8760-5), providing explicitly for previously implicit general overland ratemaking authority should be approved and that such approval should be premised on a standard less stringent than a demonstration that the amendment is required by a serious transportation need, or in order to secure important public benefits.

In excepting to that Initial Decision, Hearing Counsel argue that justification of overland ratemaking authority on grounds of some lesser standard is not supported by any previous Commission decision, and particularly not by the decision in *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968).

As a result of the warranted adoption by Judge Bryant of various stipulations of the parties to this proceeding and the unopposed findings of Judge Bryant in the Initial Decision, there remained at the time of oral argument before us on exceptions only two issues for resolution:

1. Whether future approval of specific authority for India Group to discuss and agree upon overland rates must be justified on the basis of a showing by respondent of transportation need, public benefit, or furtherance of the regulatory purposes of the Shipping Act, 1916, or whether a lesser justification of a showing on the record as a whole of serving the transportation and competitive needs of respondent with no detriment to the public interest is acceptable; and

2. If the lesser standard is acceptable, do the facts in the record, taken as a whole, show adequate justification of continued overland ratemaking authority without detriment to the public.

Hearing Counsel, in exceptions to the Initial Decision, contend that Judge Bryant erred in applying the lesser standard, and further, that even were that lesser standard acceptable, the facts in the record do not show adequate justification for the need to perpetuate respondent's overland ratemaking authority.

After a careful review and consideration of the record in this proceeding, and having heard oral argument on the exceptions of Hearing Counsel, we are of the opinion that the applicable standards justifying continued overland ratemaking authority are spelled out in section 15 itself. As indicated by *Svenska*, the scope and depth of proof required from case to case may vary in relation to the degree of invasion of the antitrust laws. Here, and applying the section 15 standards to the record in this proceeding, we conclude that the burden of such a showing has been met by respondent.

VICE CHAIRMAN GEORGE H. HEARN, CONCURRING AND DISSENTING

I agree with the conclusion of the majority that the proper standards for approval of overland ratemaking authority are those of section 15 and the *Svenska* case; and, in applying those standards the conference has met its burden of justification.

However, I do not agree with the Judge's finding that the general overland ratemaking authority herein approved was previously implicit in the conference agreement. Such authority must be explicitly set forth in the agreement as it is now; and failing that, our original approval of the agreement did not encompass approval for overland ratemaking authority.[1]

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

[1] *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, 228–229 (1969).

FEDERAL MARITIME COMMISSION

No. 71–57

AGREEMENT NO. 8760–5—MODIFICATION OF THE WEST COAST UNITED STATES & CANADA/INDIA, PAKISTAN, BURMA & CEYLON RATE AGREEMENT

The proposed amendment to the preamble of Agreement No. 8760, as it relates to transshipment, covers foreign countries only. The language suggested by the Commission's staff should be approved.

The language enabling members of the agreement to agree on brokerage should be approved.

Authority to discuss and agree upon overland rates is an integral part of the operation and functioning of the India Group and should be approved.

No violations of the Shipping Act, 1916, have been established as to past operations of the India Group.

Eward D. Ransom for respondents and interveners.

Donald J. Brunner and *Charles L. Haslup III*, Hearing Counsel.

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

1. On May 14, 1971, the Commission instituted this investigation to determine (1) whether the preamble and Article 2(b) (1), (2) and (3) of Agreement No. 8760–5, incorporating specific grants of authority with respect to overland rates, brokerage, equalization, absorption, and transshipment arrangements should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (the Act), and (2) whether and to what extent the activities of the member lines in relation thereto are beyond the scope of Agreement No. 8760. Hearings were held in San Francisco, California, on July 11 and 12, 1972.

2. The original agreement (No. 8760) (the agreement) was entered into on January 19, 1962, by American Mail Line Ltd. (AML),[2] American President Lines Ltd. (APL), Java Pacific and Hoegh Lines (predecessor of Nedlloyd and Hoegh Lines (NLHL), and approved by the Commission on July 2, 1962. Great Eastern Shipping Co. Ltd. (Great Eastern) signed the agreement on June 22, 1963, Scindia Steam Navigation Co., Ltd., on March 6, 1968, and the Shipping Corporation of India, Ltd. (SCI), on June 15, 1969.

[1] This decision became the decision of the Commission Septebmer 21, 1973.

[2] AML no longer is a member of the India Group.

Collectively they constitute the West Coast United States & Canada/India, Pakistan, Burma & Ceylon Rate Agreement (the India Group). Four prior amendments of the agreement have been approved by the Commission. The present amendments were filed with the Commission for approval on December 17, 1970, and refiled December 31, 1970, and February 1, 1971.

3. On May 14, 1971, the Commission approved Articles 2(a) and 5 of the amended agreement clarifying the parties' rate-making authority and conforming to General Order 7 (Revised).

4. The arrangement enables the India Group to agree among themselves on the various rates, charges, classifications, practices, and related tariff matters in the India trade. Any party may alter for itself any rate or other tariff matter by giving 48 hours notice to the other parties of its intention to do so. Each carrier maintains and files its individual tariff.

5. The India Group, as the name implies, is involved in the maritime trade from the West coast of the United States and Canada to ports in India, Pakistan, Ceylon, and Burma. Its current members are APL, NLHL, Great Eastern, Scindia, and SCI.

6. The India Group differs structurally and operationally in several ways from an ordinary conference. Unlike a conference, which usually publishes a common tariff, each member of the India Group, as earlier stated, publishes and maintains its own tariff. In a conference there usually is uniformity of rates. Under the present agreement this may or may not be so. The India Group does not require uniformity of rates. The India Group meets about once a month to discuss matters of mutual interest within the purview of the agreement. Rates are agreed upon subject to the 48-hour rule referred to above. The secretary of the agreement performs no duties in connection with the tariffs published by the individual members, but does check to see whether they conform to the agreements reached among the members and whether they conform to the 48-hour rule. He also receives communications from the members, makes appropriate inquiry, and keeps the members advised with regard to matters within the agreement.

7. The amendments to the agreement presently under consideration were not initially proposed by the India Group. They were submitted following suggestions initiated by the Commission's staff as the result of examination of the applicable tariffs of the member lines which, according to the staff, involved certain variations between the rates and rules and regulations contained in the tariffs and the authority conferred by the terms and

conditions of the agreement, particularly with respect to overland rates and absorptions, brokerage, equalization, and transshipment arrangements. With regard to overland rates, the staff called attention to the Commission's report following investigation of overland/OCP rates.[2] The India Group was informed that if it intended to continue to use overland rates an "appropriate modification of [the Agreement must] be filed with the Commission for approval under Section 15 of the Shipping Act, 1916."

8. Also, it was pointed out that there "is no authority in Agreement 8760 under which the carriers may consider and agree on matters related to the payment of brokerage," and that if the members desired to provide for such authority, their understanding must be incorporated in the agreement.

9. In addition, if the members intended to continue to provide in their individual tariffs for equalization and absorption, "an appropriate modification" of the agreement must be filed for approval under section 15.[3]

[Each of the areas covered in the staff inquiry and in the subsequent Commission order of investigation on approval will be separately discussed.]

Stipulation of the parties

10. The parties, on May 3, 1971, entered into a stipulation which, on motion of Hearing Counsel, with the agreement of counsel for the respondents, was made a part of the record. The stipulation noted that upon request of the Commission's staff, the secretary of the India Group submitted for section 15 approval various clarifying amendments to the agreement, designated as No. 8760-5. The stipulation further noted that two basic issues were set down for investigation by the Commission:

a. Whether certain amendments should be approved for the future. These amendments were adding transshipment as well as direct call at foreign ports to the preamble, inclusion of a specific overland rate authorization [2(b)(1)], and inclusion of provisions with respect to equalization and absorptions [2(b)(2)] and brokerage [2(b)(3)].

[2] *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969). The commission found that overland/OCP rates were included in routine rate-making authority but added (pp. 208-209): "... we now wish to require that agreements become more explicit in order to avoid any confusion and to avoid lengthy litigation in the future, as in the case. Thus, we will require the conference to update their basic agreements to reflect the full structure of its rate making and absorptions practiced pursuant thereto. Accordingly, the conferences shall add language to their section 15 agreements to indicate that the general ratemaking authority includes the power to fix rates to or from interior points at levels different from those applicable otherwise, to absorb certain terminal costs, to enter into arrangements regarding such movements to or from interior points with inland carriers, and to conduct other functions incidental thereto. ..."

[3] In *Pacific Coast Port Equalization Rule*, 7 F.M.C. 623 (1963), the Commission held that port equalization is not "conventional or routine" rate making but is an arrangement for the regulation and control of competition which must be expressly approved pursuant to section 15 of the Act.

b. To what extent the respondent carriers' activities as reflected in their tariffs wth respect to overland rates, brokerage, equalization and absorption, and transshipment arrangements are beyond the scope of their existing Rate Agreement and hence whether there have been past violations of Section 15 with respect thereto.

Stipulations as to future approval

a. Hearing Counsel stipulates:

(a) That the proposed amendment adding transshipment language in the preamble is meant to cover transshipment in foreign countries only—that the language was suggested by the Commission staff and should be approved. Hearing Counsel will not contest its approval.

(b) That Article 2(b)(3), the clause enabling the carriers to agree on brokerage, is similar to that approved by the Commission in other Section 15 agreements and should be approved. Hearing Counsel will not contest its approval.

b. Counsel stipulated on behalf of respondents that: (a) The request for approval of authority of the amendment set forth in Article 2(b)(2) relating to authority for equalization and absorptions be withdrawn. (b) Each of the respondent carriers who are parties to the agreement, will file cancellation of provisions in their tariffs relating to equalization and absorptions promptly upon the signing and filing of this stipulation and in any event prior to date set for hearing. (c) American Mail Line has withdrawn and is accordingly unaffected by issues concerning future approval of the rate agreement.

Pursuant to the foregoing, it was stipulated that the "only remaining issue concerning future approval is with respect to Article 2(b)(1), the clarifying amendment involving overland rates."

The issues as to whether and to what extent the carriers' activities, as reflected in their tariffs, with respect to overland rates, brokerage, equalization, and absorption and transshipment arrangements, are beyond the authority granted by the presently approved agreement and therefore in violation of section 15 shall remain as issues to be tried and determined.

Overland/OCP rates and tariffs

11. The principal controversy is whether and to what extent the organic agreement permits establishment of overland/OCP rates, tariffs, practices, and regulations. A brief historical statement will be useful.

12. In February 1969, the Commission issued its report in its comprehensive investigation of overland/OCP rates and practices.[4]

[4] Note 2, pp. 189–204.

After reviewing the history and functioning of overland/OCP tariffs and practices—including absorptions in connection therewith—the Commission concluded that "competition is the basic, distinguishing factor in the establishment of overland/OCP rates," and that "overland OCP tariffs have been established pursuant to normal ratemaking factors" and "constitute routine ratemaking duly authorized" under conference agreements approved under section 15.

13. As overland/OCP rate-making authority traditionally is included within normal rate making, no specific agreements clothing a conference with authority to issue overland/OCP tariffs is required. As indicated earlier, the Commission initiated a requirement that conference agreements "add language" to indicate that the general rate-making authority include overland rates, absorptions, and arrangements to or from interior points with inland carriers, "and to conduct other functions incidental thereto." [5]

14. Overland rates are as common and indigenous in the inbound and outbound trades between the Pacific coast and the Orient as are local rates. Simultaneous offering of local and overland rates is the established and historical method of rate making throughout the Pacific Basin. It is "routine." The Commission and its predecessors were well aware when various conference agreements were approved that this method of rate making was the established practice in the Pacific trades. The Commission intended to "sanction these activities when the agreements were approved." [6] Approval was not based upon any language of the agreements other than the general "authorization to fix rates collectively," which would encompass all cargo moving within the conference trade.

15. As indicated above, in ordering conferences to update their agreement to make specific reference to the overland/OCP system, the Commission emphasized that no violations of section 15 were involved. [7]

16. The agreement from its inception has provided for independent action by the member lines. However, it also has contained authority for the parties to confer and to agree among themselves on the various rates, charges, classifications and related tariff matters to be charged or observed by each of them in the carriage of cargo in the India trade.

Rates prior to the agreement

17. Each respondent who formed or later joined the India Group

[5] Note 2, *ante*.
[6] 12 F.M.C. at 207–209.
[7] *Id.* at 210.

had both overland/OCP and local tariffs on file with the Commission before the agreement was approved or before those who subsequently joined became members.

18. *American President Lines.* APL had entered the Indian trade in 1932, resumed operations after the war in 1946, and has continued in the trade ever since. It published tariffs from the start which included overland (also called proportional rates) and local rates. Thus, APL has had overland rates in its tariff continuously from at least 1939[8] to the present.

19. *American Mail Line.* AML concurred in APL's tariff in the early period of its activity in the trade, 1948–1951, and again after it reentered the trade from 1958 until 1960. It issued its own tariff in November 1960, which also named local and overland rates and had rules and regulations applicable to each. Thus, AML has had local and overland tariffs, by concurrence in APL's tariff or by issuing their own tariffs, as early as 1948 and continuously from 1958 to the present.

30. *Nedlloyd.* Nedlloyd has had tariffs naming local and overland rates "for a long time." Its witness assumed that it had both local and overland rates from the time of their entry into the trade in the 1920's. Nedlloyd's tariff presently names both local and overland rates and has done so continuously since before the agreement was approved.

21. The following respondents joined the India Group after its formation:

a. *Scindia.* Scindia operated nonconference from 1964–1968 and joined the India Group in 1968. Its tariff, effective August 31, 1966, quotes overland/OCP rates. Scindia continued to have overland rates until April 7, 1972.

b. *Shipping Corporation of India.* SCI issued its first tariff in this trade on June 9, 1968, and it contained both a local and overland rate section. SCI became a party to the agreement on June 15, 1968. It canceled its overland rate section in June 1972, largely because it also serves India from the Atlantic and Gulf and thus was "competing with themselves" for overland cargo.

c. *Great Eastern Shipping Co.* Great Eastern issued its first tariff in this trade in September 1962, had its first sailing in January 1963, and joined the India Group in July 1963. It had five sailings before joining the India Group. Its tariff contained both local and overland rate sections continuously until March 1972, when they canceled partly because of this proceeding but also because their overland cargo dropped off.

[8] The earliest such tariff which APL could find and introduce as evidence was effective October 1, 1939.

22. Thus, each of respondents had local and overland tariffs before and at the time of the forming of or joining the agreement, and continuously thereafter to the present except for cancellations which occurred in 1972, after this proceeding commenced.

The agreement was intended to cover local and OCP rates

23. In the overland rate decision, the Commission said that an important factor for consideration was whether parties who filed their agreements for approval intended to encompass within their rate-making authorithy both local and overland rates.[9]

24. Two of respondents' witnesses participated in drafting the agreement in 1962. Morris of APL testified:

Q. What was your intention in getting approval? Insofar as what rates did you intend to get approval to discuss and agree?

A. Our intent was to be able to talk, discuss and agree on everything that was in the tariff.

Q. Did you have any distinction as to local and overland rates in that regard?

A. None whatsoever.

Q. Was any question raised when you filed the agreement?

A. Never entered our minds that there would be any question about it.

Q. Did you have, in fact, at that time your tariffs on file with the agency? I guess it was then the FMB?

A. Oh, yes. This was subsequent to the '61 amendments. They had to be filed, yes. We all had our tariffs on file. We have always filed our tariffs in the outbound trades.

Purnell of AML testified:

Q. Did you have both local and overland rates in your tariff before the agreement was formed?

A. Yes, sir.

Q. And you continued them after the agreement was formed?

A. Yes, sir.

Q. And when you formed the agreement, did you intend that it should cover all the rates in your tariff?

A. Yes, sir.

25. It is uncontroverted that those who formed the India Group agreement intended and understood that it conferred both local and overland rate-making authority.

Alleged past violations of the act

26. As stated earlier, the Commission's order requires determination as to past violations of the Act in several specific areas: (1) brokerage, (2) equalization and absorption, (3) transshipment arrangements, and (4) overland rates.

[9] 12 F.M.C. at 207.

27. In its briefs Hearing Counsel concedes that no violations of the Act have occurred. The record sustains that conclusion. The facts are substantially as follows:

28. Unlike conferences where concerted action is the normal method of handling even the smallest details affecting the trade, under rate agreements such as the present one, concerted action is the exception and individual action the norm. Even though the member lines as individuals, through their separate tariffs or otherwise, may have provided for brokerage, equalization, absorption, and transshipment, they never in fact gave consideration to these matters within the India Group, or took any concerted action with respect to them.

(a) Brokerage

29. There is at present no specific language enabling the parties to the greement to discuss or agree upon the payment of freight brokerage or freight forwarder compensation. Payment of brokerage and freight forwarding commissions and related matters are not included within the scope of the usual conference or rate agreement language authorizing agreement upon "rates and rules and regulations relating thereto." Thus, if members of a conference or rate agreement wish to agree upon brokerage matters and act pursuant to such agreement they must have separate, specific language enabling them to do so.[10]

30. The only evidence offered in support of agreement among the parties with respect to the payment of freight forwarder compensation or brokerage was the tariff pages of each of the six carriers concerning brokerage and freight forwarder compensation. However, no two are alike. Some duplicate in part the language of another carrier's tariff but bear no resemblance to others in language. Some refer to freight forwarder compensation, some to brokerage, and some to both.

31. Three of the lines adapted their language from the Pacific Westbound Conference (PWC) tariff, but there are differences. The PWC tariff was used only as a guideline. Other witnesses had no idea where the language came from; the language was already in their tariffs before the agreement was drawn. But the witnesses unanimously testified that there had been no agreement to have uniform brokerage language in their tariffs. Indeed, the variation in language tends to indicate lack of any agreement on uniformity.

32. It is true that the members uniformly pay 1¼ percent brokerage but this figure is standard and historical. The testimony

[10] *U.S. Pacific Coast/Australia, etc.—Unapproved Agreements*, 13 F.M.C. 139 (1969).

shows that there was never any agreement to pay 1¼ percent and that the member lines never had any agreement as to whether they would or would not pay any brokerage or provide for it in their tariffs. Payment of brokerage on particular commodities was not a subject of discussion. The secretary of the India Group and its staff never had anything to do with brokerage or with checking whether or not brokerage was or was not charged. With two exceptions noted below, there was never discussion or consideration of any kind on the subject of brokerage or freight forwarder compensation.

33. There were two occasions when brokerage came to the attention of the members to the agreement. One arose from an inquiry from Adnac International Forwarders Ltd. of Vancouver, B.C., as to what, if any, freight forwarder commissions were paid under "the conference regulations" on shipments from Vancouver to the ports served under the agreement. The India Group staff on reviewing the tariffs of the members found considerable variation both as to freight forwarder and brokerage and as to whether Vancouver was served at all. The matter was docketed to determine "the type of answer" to Adnac. The result was a letter advising Adnac that this subject was beyond the scope of the agreement and a matter for individual carrier consideration.

34. The other incident involved a request by AML for consideration by the parties to the agreement of 2½ percent brokerage commissions on Indian Government shipments. Before the matter could come up for discussion by the India Group the secretary was advised and in turn advised the members that one of them had independently determined to pay 2½ percent; at that point the subject was automatically terminated as a matter for India Group consideration.

(b) Equalization and Absorption

35. Until after this proceeding was initiated five of the member lines' tariffs contained rules concerning the payment of equalization at loading ports.

36. The equalization rules were largely adapted form PWC's tariff, but there was no agreement on or discussion within the India Group as to uniform language. The question whether an equalization rule should or should not be included in the tariffs of the individual lines was never brought up in the India Group. Testimony also shows that equalization was not commonly practiced by the members. Only APL, some years ago, had actually practiced equalization on a very small percentage of its cargo in

order to equalize between Oakland and San Francisco to compete with Nedlloyd, which loaded in Oakland.

37. Generally, when equalization is practiced by a conference it is carefully monitored and controlled by the conference staff to insure that the members' practices are uniform. In PWC, for example, equalization payments are without exception handled and carefully checked by the chairman of the conference or his staff. In contrast, under the present agreement, the secretary and his staff have had no duties concerning equalization and no knowledge whether the members have equalized.

(c) Transshipment Arrangements

38. Respondents and Hearing Counsel agree that the term "transshipment arrangements" refers to activities in foreign countries and not in American ports.

39. "Transshipment" takes place when the initial carrier arranges with another carrier to transport cargo from an intermediate port to the destination port named in the initial carrier's bill of lading. Such arrangements may involve an agreement between the two carriers for division of the total charge paid by the shipper (which agreement would be subject to section 15), or the initial carrier may simply act as a "shipper" and pay the tariff rate of the oncarrier without any special agreement. In either case the original shipper pays only the initial carrier's tariff rate to ultimate destination, which rate is not affected by any transshipment arrangements. These "transshipment arrangements" are never spelled out in the tariff of the initial carrier.

40. Respondents point out that transshipment arrangements should be distinguished from the "arbitrary" sections in the tariffs of the members of the India Group, which should more properly be called "outport" sections, for they involve rates charged between base ports and outports.

41. Respondents assert that two essential points must be understood with respect to the distinction between "transshipment arrangements" and "arbitrary" rates. First, the "arbitrary" or outport rate is a tariff rate offered to the shipping public just as much as the base port rate. The combination of the base port rate and the outport or "arbitrary" rate is the tariff rate paid to get the goods from loading port to ultimate destination port. Respondent contends that the agreement in authorizing agreement on rates was intended to and did include an authorization to agree upon the rates not only to base ports but also to outports, as well as the

rules and regulations pertaining thereto contained in the arbitrary sections of the tariff.

42. Second, the transshipment arrangements by which each carrier gets the cargo from base port to outport is a matter of his own cost responsibility just like fuel, provisions, wages, stevedoring, etc. Individual carrier's costs are not a matter of agreement under the agreement or any other rate agreement. Transshipment arrangements made by one carrier of the India Group for oncarriage of its cargo, whether by a division of a rate, by employing a carrier at its tariff rates, or in any other manner, are made by the individual lines, are not and never have been a subject of discussion with the India Group, and are treated as a private business matter and on the basis that "it is none of your business."

43. Transshipment provisions are not contained in the tariffs of the members of the India Group. To the extent that the carriers may choose to act as shippers and employ the same local oncarriers, they do so under the local carriers' tariffs and each presumably would pay the same rate, but that rate appears in the local oncarriers' tariffs and not in the India Group members' tariffs. The India Group has no say at all as to what the local oncarriers' tariffs contain.

44. In summary, the record establishes that neither equalization nor transshipment arrangements were ever the subject of group discussion or action. Similarity in tariff provisions relating to equalization was explained by the fact that they were adopted from the tariffs of other conferences, particularly the PWC. There are no transshipment "arrangements" reflected in the carriers' tariffs—only arbitrary rates, which usually apply to transshipments but may apply to a direct call if the volume warrants. Agreements between members to enter into a further transshipment agreement with, for example, a local Indian conference, have been found not to be subject to section 15.[11]

DISCUSSION AND CONCLUSIONS

There is no evidence of concert among the India Group in establishing rates for brokerage. There were two instances when brokerage was docketed for the attention of the India Group but neither involved violation of the Act.

As stated earlier, an inquiry from Adnac with regard to freight forwarder and brokerage rates was answered by a letter informing that rates were beyond the scope of the agreement and a matter

[11] *Transshipment Agreement. Indonesian/United States*, 10 F.M.C. 183, 196 (1966); *Transshipment Agreement Between Thailand and U.S.*, 10 F.M.C. 201, 215 (1966).

for individual carrier consideration. The inquiry as to the brokerage rate to be charged for Indian Government shipments referred to earlier herein was "terminated" before it could come up for discussion, when one of the members as an individual carrier agreed to pay the requested two and one-half percent rate.

The Commission has held that conference "arrangements" regarding brokerage are subject to section 15 approval.[12] However, no agreement or "arrangement" for payment of brokerage has been established on this record. There are no transshipment "arrangements" reflected in the carriers' tariffs—only arbitrary rates, and also, no discussions or agreements among members of the agreement to enter into further transshipment agreements have taken place. Hearing Counsel agree that such is the case.

The members to the agreement assert, Hearing Counsel concede, and the record herein establishes that authority to discuss and agree upon overland rates is included in the present agreement by virtue of the rationale of the overland/OCP decision. Thus, section 15 was not violated by discussion or agreement on that subject.

Hence, the record fails to establish past violations of section 15 of the Act with respect to overland rates, brokerage, equalization, absorption, and transshipment, and counsel agree. The sole questions remaining to be determined, therefore, are: (1) whether Article 2(b)(1) of the amended agreement requires approval before it may become effective, or whether, as respondent contends, it merely constitutes clarifying language which under the Commission's decision in the overland rate case does not require section 15 approval, and (2) if Article 2(b)(1) does require such approval, what standard or criteria should be applied in the determination.

Hearing Counsel say that the Commission's order of investigation leaves no doubt of the Commission's intention that the designated portion of the amendment be approved, disapproved, or modified in the light of the facts and circumstances disclosed by the record. Hearing Counsel further assert that the onus is upon respondents to justify continuance of discussion of and agreement on overland rates by the members of the India Group, and urge that on the record Article 2(b)(1) should not be approved because respondents have failed to meet the threefold test laid down by the Commission and approved by the Supreme Court in the *Svenska* case.[13]

[12] *U.S. Pacific Coast/Australia, etc.—Unapproved Agreements*, 13 F.M.C. 139, 143 (1969).

[13] *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968) (F.M.C. Docket No. 873—*Investigation of Passenger Travel Agents*, 10 F.M.C. 27 (1966)). The Commission siad at page 45: ". . .The tieing rule imposes restraints upon three groups not parties to the conference agreement, the agents, the

Respondents argue that the Commission's decision in the overland case is determinative of the issue, and that Article 2(b)(1) is similar in intent and overall effect to several of the conference agreements considered in the overland case. Here, as there, it is urged that the language in question is simply by way of clarification, which the Commission stated to be its sole purpose in the overland case. Respondents further contend, however, that if Article 2(b)(1) does require it, the record establishes ample basis for such approval under section 15.

There seems to be no doubt that the order in unmistakable terms requires a determination whether Article 2(b)(1) merits and, hence, should be accorded section 15 approval.

Respondents correctly assert that in the overland case the Commission "went out of its way" to emphasize that no violation of section 15 resulted from the failure of the conference agreements to clarify and explain the authority conferred with regard to overland/OCP rate making. As such authority traditionally and historically has been included within "routine rate making," respondents conclude that approval of conference agreements conferring rate-making authority *ipso facto* confers authority over overland/OCP rates. To facilitate the practical operation of the conference agreement and to inform shippers and other interested parties what authority the agreement encompasses in the area of overland/OCP rates, the Commission has required that each such agreement be clarified by addition of appropriate language to reflect and clarify the structure and application of overland rate making.[14]

There is nothing inconsistent or incompatible between the Commission's holding that routine rate-making authority normally includes overland/OCP rates and the exercise by the Commission in the present case of its duty under section 15 to exercise continuous surveillance over approved agreements and in appropriate cases to require justification for their continuance. Indeed, it is the statutory obligation of the Commission to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry."[15] If approval of rate-making authority in an original agreement foreclosed further consideration of that phase of the agreement in the light of

conference carriers, and the traveling public. The record here demonstrates that these restraints have operated against the best interests of all three of these groups. Once this was shown, it was encumbent upon the conferences to bring forth such facts as would demonstrate that the tieing rule was required by a serious transportation need, necessary to secure important public benefits or furthereance of a valid regulatory purpose of the Shipping Act."

[14] Note 2, *ante*.

[15] *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 276 (1968).

different or changed circumstances, the authority and duty of the Commission under section 15 to exercise continuing surveillance over maritime agreements—conference agreements, rate agreements, or otherwise—would be unduly restricted. Hence, to conclude, as respondents would have it, that the proposed amendment should be considered only as clarifying language as required in the overland case and not as an amendment or modification of the agreement would be to place an unwarranted and inadmissible interpretation on the plain language and specific direction of the Commission's order.

Nor may the implication be accepted that, once having approved an agreement which either implicitly or expressly authorizes a conference or a rate agreement to discuss and agree upon overland/OCP rates, etc., as part of "routine" rate-making authority, the Commission may not later require justification for the continuance of that authority. A mere reading of section 15 precludes such a conclusion. The second paragraph of that section provides in pertinent part:

> The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, *whether or not previously approved by it*, that it finds to be ... contrary to the public interest. (Emphasis supplied.)

The Commission has held that both *initial* and *continued* approval of *any agreement* under section 15 are dependent upon the "actual existence or reasonable probability" of circumstances in the trade which justify the agreement within the frame of reference set out by the Commission for the justification of anticompetitive agreements under section 15.[16] The fact that the agreement here under consideration deals with overland rates which have been held to be part of "routine" rate making, and that such agreements were merely required to be "clarified" by the Commission in the overland rate case does not negate the Commission's authority and perhaps duty to reexamine in a proper case its approval of any section 15 agreement including, of course, Agreement No. 8760. Therefore, in light of the express command of section 15 of the Act and of the Commission's order in this case, it must be concluded that the Commission not only was authorized to but in this case did require respondent to justify the need for Article 2(b)(1).[17]

[16] *Agreement 8765—Order to Show Cause*, 9 F.M.C. 333, 335 (1966); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 287-290 (1966); *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954), cert. den. sub. nom. *Japan-Atlantic & Gulf Cont.* v. *U.S.*, 347 U.S. 990 (1954).

[17] *Pacific Westbound Conference* v. *Federal Maritime Com'n*, 440 F. 2d 1303, 1312 (1971); cert. den. 440 U.S. 881 (1971).

It does not follow, however, that Article 2(b)(1) should be disapproved summarily unless respondents can demonstrate the need for continuance of authority to discuss and agree upon overland/OCP rates, etc. It is sufficient if, on the basis of the whole record, the authority to discuss and agree upon such rates may reasonably be expected to serve the transportation and competitive needs of the respondents and to be compatible with the public interest.[18]

Concededly, the agreement confers upon respondents authority to discuss, agree upon, and for each to establish in its tariff overland/OCP rates pursuant to normal recognized rate-making factors and hence to constitute a part of routine rate making. Respondents' contention that the burden of proving a negative—i.e., that there is not adequate justification for authority to agree on overland/OCP rates in these circumstances—shifts to Hearing Counsel in these circumstances is not valid.

The history of overland/OCP rates and the Commission's actions with regard to them indicate that while the burden of justification rests on respondents, a less stringent quantum of proof may be accepted in their justification than in the case of other anticompetitive agreements. Respondents' contention that the amendment or "clarification" here involved is different both in kind and its potential effect on commerce and the public interest from the particular agreement considered in *Svenska* is well taken. It is important to distinguish between the kind of proof necessary to justify approval of a "routine" rate-making agreement and that required for approval of a "particular" agreement with antitrust overtones. The Commission's discussion in *Svenska* points up this difference. Agreements on rates are indigenous to the conference system in maritime commerce.[19] "Particular" rules or collateral agreements of a highly anticompetitive type such as that considered in *Svenska* are subject to a different and more exacting evidentiary standard of justification than the amendment before us, which simply continues existing authority presently contained in the agreement to discuss and agree *inter se* on overland/OCP rates and regulations, which, as has been said, have traditionally be considered as part of routine conference rate making.

Justification for continuation of overland rate making

As stated earlier, respondents produced evidence to justify approval of the amendment. Respondents say that although in

[18] *Svenska, supra.*

[19] *Seatrain Lines, Inc.* v. *F.M.C.*, 8 SRR 715 at 755 (1971); *Latin America/Pacific Coast Steamship Conference* v. *F.M.C.*, 8 SRR 20,807 at 20,819. *Transshipment Agreement, Indonesia/United States*, 10 F.M.C. 183 (1966); *Agreements Nos. T-2108 and T-2108A*, 12 F.M.C. 110 (1968).

general the quantity of overland cargo in the trade is considerably less than local cargo,[20] it is generally "good" and "profitable" cargo, and is of sufficient quantity and quality to be important to carriers in the India trade as well as shippers who are furnished this service. It is a traditional service offered to shippers and they expect it; also, it provides shippers with a greater choice of transportation routing and a flexibility not otherwise available.

Respondents say experience in the trade shows that it is important not only for the individuals to continue to quote overland rates [which Hearing Counsel concedes] but that the members of the India Group have the right to discuss and agree on overland rates. This they argue is true even though only two lines in the India Group provide such rates at present.

A principal purpose of the agreement, as any other agreement or conference, respondents say is to provide stability for the benefit of shippers and carriers alike. According to respondents, irrespective of whether agreement is reached, stability is attained by the right to have discussion. It is important if one line changes a rate for the others to know the reasons for doing so in order to determine whether both carriers' and shippers' needs are best served by that rate. Control of competition within the India Group is a strong stabilizing factor.

At present there is only one independent carrier in the trade, other than AML, quoting overland rates, namely, the newcomer National Shipping Corporation of Pakistan. But AML being now outside the India Group is itself a strong reason to continue overland rates as part of the agreement. AML made it quite clear that if it resumed active, direct service in this trade, it would not rejoin the India Group unless the Group was authorized to consider overland rates.

Overland and local rates, respondents say, are not based on the same principles because the former are aimed at competition with services from the Atlantic and Gulf, but there is necessarily an interraction or "effect" between the two types of rates. According to respondents, a disproportionately low overland rate would affect the ability of the local territory exporter of the same or similar commodities to move his cargo and vice versa.

Hearing Counsel, while agreeing that overland/OCP rates may

[20] According to respondent, that the quantity of overland cargo is less than local cargo does not alter the basic need to include both within the authority of the agreement. If quantity were to be the test of when the conference system is desirable or not then it could be contended that only the predominant cargoes in the trade ought to be under the conference system and that where statistics show only a small quantity of particular type of cargo moves, that commodity would be removed from conference rate making.

be proper and economically justified in the tariffs of the individual carrier, assert they are no longer justified and should not be approved as matters for discussion and concurrence by the India Group under the agreement. They assert that free competition is the rule and anticompetitive agreements are the exception which require justification. This basic rule is well established by both Commission and court decisions.[21] Also, the Commission has a statutory responsibility to keep continuous supervision and control over section 15 agreements initially approved by it.[22] The applicable standards and thus respondents' burden of demonstrating that the agreement is required by a serious transportation need or to secure important public benefits, are identical whether respondents are seeking initial or continued approval under section 15.[23]

Hearing Counsel concede that the authority presently granted by the agreement, as amended, encompasses the right to discuss and agree upon overland rates,[24] and that all of the carriers had overland rates as well as local rates in their tariffs when they become parties to the agreement.

According to Hearing Counsel, respondents have failed to show that authority to discuss or agree upon overland rates is necessitated by the circumstances of this trade, for the following reasons: First, overland traffic constitutes but a small percentage of this trade's cargo and the amount and percentage are decreasing. Second, three of the five current members of the agreement have canceled the overland portions of their tariffs since becoming members of the agreement. One carrier explained that its overland cargo had dwindled to an inadequate amount, a second testified that its overland tonnage had always been nominal, and a third witness did not know why his company had canceled its overland section. According to Hearing Counsel, transportation circumstances have changed dramatically since approval of the agreement in 1962. The present situation is not one in which five carriers would be cutting each other's throats for cargo should the right to agree be denied, but rather one in which there would be competition between the two carriers who were originally in this trade with no rate agreement whatsoever for an increasingly less significant segment of the cargo. Third, and probably most conclusive of the stability issue according to Hearing Counsel, is the fact that the level of rates charged overland customers is competitively

[21] *Calif. S & B. Co., et al.* v. *Stockton Port Dist.*, 7 F.M.C. 75, 84 (1962); *Mediterranean Pools Investigation, supra; Svenska, supra.*

[22] *In Re: Pacific Coast European Conference*, 7 F.M.C. 27, 32 (1961); *Agreement No. 9025: Dockage Agreement*, 8 F.M.C. 381, 386 (1965).

[23] *Investigation of Passenger Travel Agents, supra.*

[24] *Overland/OCP Rates, supra.*

governed by the rates charged by the Atlantic and Gulf coast carriers for this traffic. Thus, Hearing Counsel say, the type of rate fluctuations connoted by the word "instability" cannot take place between West coast carriers unless Atlantic and Gulf carriers join in this type of rate war. Otherwise, the very real possibility exists that all of this cargo would be lost to Atlantic and Gulf carriers.

Hearing Counsel state that although respondents stipulated that AML is unaffected by the issues concerning future approval, respondents now argue that Article 2(b)(1) should be approved because, ". . . if AML resumed active direct service in this trade, it would not join the Group unless the Group was authorized to consider overland rates," and point out that the Commission has previously rejected the argument that a possible future need should justify section 15 approval.[25] In *Agreement 8765—Order to Show Cause, supra,* the Commission said at page 336:

> Respondents, however, urge that the circumstances may recur and that they should not be forced to seek approval of a new agreement in that event. But who is to judge when they do? Respondents would have themselves be the judge for continued approval if the agreement would permit respondents to invite each independent to become a signatory as it entered the trade without the necessity of securing our approval. We think it clear that the statute will not permit this. Continued approval of Agreement 8765 would constitute nothing but a delegation of authority in derogation of our responsibility under the Shipping Act to protect the public interest by fostering competition insofar as compatible with the regulatory purposes of that Act. (Citations omitted.)

Hearing Counsel conclude that Article 2(b)(1) should be disapproved, and that the agreement should be restricted to those matters affecting local rates. Should circumstances hereafter change whereby the members can demonstrate the need for this overland authority, their agreement could be amended at that time after proper showing of its need. Meanwhile, the authority to discuss or agree upon these rates where no transportation benefits have been shown would be contrary to the public interest.

In rejoinder, respondents say that the contention that instability in overland rates cannot exist because the rate level is dependent on competition with East and Gulf coast operators is illusory. While such competition sets a ceiling within a range it does not prevent the West coast carriers from dropping the rate below East coast parity and conducting a rate war among themselves which could ultimately embroil West, Gulf, and East coast carriers.

[25] *Rates on U.S. Government Cargoes*, 11 F.M.C. 263, 286–287 (1967).

Also, respondents say that stability at the present time under the agreement is no indication that it would continue if overland rates were excluded from consideration under the agreement. Without an agreement the same potential for instability exists as with any trade having two or more competing ocean carriers. Nor would it be wise to adopt a "wait and see" policy; to do so would be to let the "horse out of the barn before closing the door." That, respondents say, is not the position which the Commission has taken in approving or disapproving conference agreements.[26]

Respondents argue that to eliminate overland rates from the agreement would not only create the usual potential for instability of these rates but would "seriously jeopardize the existence of the agreement" and hence threaten stability of local rates as well. APL, one of the two original operators in this trade and a mainstay of the conference, would "undoubtedly resign" if overland rates would not continue to be covered by the agreement. While Nedlloyd's agent could not speak as to whether his principals would withdraw, he left no doubt of the importance he placed on overland rates as a subject of the agreement.

The risk, according to respondents, of leaving the entire trade wide open without the stabilizing effect of any rate agreement if overland rates were expunged from its coverage is a matter to be taken seriously, and alone outweighs whatever minimal detriment anyone could conceive by continuing to authorize discussion and permissive agreement on overland rates with right of independent action under the agreement.

In summary, respondents have presented evidence and put forward arguments which sustain the following conclusions:

(1) Overland rates generally constitute a traditional service offered to shippers in the United States/Pacific trades who expect it. Such rates provide shippers with a greater choice of transportation routing and a flexibility not otherwise available to them. (2) Overland rates aid in meeting competition from the Atlantic/Gulf carriers. It would be much more difficult for West coast carriers to compete for cargo with Atlantic/Gulf carriers if they did not offer overland rates and absorptions. (3) Authority to discuss and agree on overland rates and absorptions provides the India Group with stability for the benefit of shippers and carriers alike. Such stability is to some degree influenced by discussion among the members although no actual agreement is reached. Also, it is

[26] See *Rate Agreement United States/Persian Gulf Trade*, 8 F.M.C. 712, 724 (1965): "The Commission, by favoring 'anticipated rate stability' where rate stability exists, accepts the theory that predictability of rates over a foreward term is desirable, and by approving rate-fixing agreements, on such ground, agrees that some limitations on market forces are essential for this purpose."

useful and important for one carrier/member to know the reasons for another carrier/member changing his rates. Control of competition within the India Group is a strong stabilizing factor. Although overland and local rates are not based on the same principles there is an interaction of effect between them. (4) If the agreement continued to provide authority to discuss and agree upon local rates without the right to consider overland rates, there would be the ever-present problem of how to insure that the discussion would be limited to local rates. This would place a substantial burden upon the functioning of the India Group. (5) Overland rates have been considered an integral part of rate making and the India Group has been operated on that assumption. (6) Discussion and agreement at the level of the India Group of local rates is desirable. So equally is a similar procedure with regard to overland rates. (7) To deny discussion and agreement with regard to overland rates to the India Group would create the potential of instability of overland rates without any off-setting benefit to the public. (8) There is no evidence of damage to the public interest flowing from the right of members to the India Group to discuss and agree upon overland rates. (9) Authority to discuss and agree upon overland rates has been exercised by the India Group since the inception of the agreement and is an essential part of the operation of the India Group.

ULTIMATE CONCLUSIONS

(a) The proposed amendment adding transshipment language to the preamble was intended to and does cover transshipment in foreign countries only. It should be approved.

(b) Article 2(b)(1) of the agreement regarding overland rates should be approved as filed.

(c) Article 2(b)(3), enabling agreement on brokerage, is conceded by counsel to be similar to that approved by the Commission in other section 15 agreements and should be approved.

(d) Respondents are not guilty of any past violations of section 15 with respect to overland rates, brokerage, equalization and absorption, or transshipment arrangements.

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

WASHINGTON, D.C.,
March 1, 1973.

FEDERAL MARITIME COMMISSION

No. 73-51

ROHM AND HAAS COMPANY

v.

SEATRAIN LINES, INC.

Complainant found not entitled to have three shipments of synthetic resin assessed a containerload rate because of failure of the shipments to meet the value and measurement criteria required by respondent's tariff.
Reparation denied.

Joseph S. Petralia for complainant.
Harvey M. Flitter for respondent.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

By complaint served August 10, 1973, complainant Rohm and Haas Company seeks reparation in the amount of $243.92, alleging that respondent Seatrain Lines, Inc. overcharged complainant on three shipments of synthetic resin by failing to apply containerload rates published in respondent's tariff to the shipments in question, in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act).

Respondent denies that the shipments were improperly rated, contending that, for the most part, they did not qualify for the containerload rates.

Pursuant to request of complainant, to which respondent consents, this proceeding was conducted in accordance with the Commission's Rule 11 (shortened procedure).

The first shipment consisted of a container loaded with drums and pails of synthetic resin which moved from Philadelphia, Pennsylvania, to Rotterdam, the Netherlands, under respondent's bill of lading dated September 2, 1971. This shipment weighed 41,073 pounds. Respondent rated the shipment in two portions, the first portion, weighing 12,156 pounds, at $38 per weight ton, the

[1] This decision became the decision of the Commission October 11, 1973.

second portion, weighing 28,917 pounds, at $42.75 per weight ton. The $38 rate applied to synthetic resin valued under $750 per long ton, measuring up to and including 100 cubic feet per long ton. The $42.75 rate applied to synthetic resin valued over $750 up to and including $1,500 per long ton, measuring up to and including 100 cubic feet per long ton. These rates were published in respondent's tarrif in effect at the time of the shipment.[2] Complainant contends that the entire shipment should have been rated at $34 per weight ton, which was the rate applicable to a minimum containerload weighing 44,800 pounds.[3] Under such a rate, complainant would have saved $68.16 in freight.

The second shipment consisted of a container loaded with drums of synthetic resin which moved from New York, N.Y., to Rotterdam under respondent's bill of lading dated August 19, 1971. The shipment weighed 44,680 pounds. Respondent rated the shipment in two portions. The first portion, weighing 4,410 pounds, was rated at $45.75 per weight ton. The second portion, adjusted to 44,800 pounds, was rated at $34.[4] The $45.75 rate applied to synthetic resin valued over $1,500 up to and including $4,000 per long ton, measuring up to and including 100 cubic feet per long ton.[5] The $34 rate applied to a minimum containerload of 44,800, as noted above. Complainant contends that the entire shipment should have been rated at $34 per weight ton. Under such a rate, complainant would have saved $95.94 in freight.

The third shipment consisted of a container loaded with drums of synthetic resin which moved from New York to Rotterdam under respondent's bill of lading dated August 6, 1971. The shipment weighed 43,557 pounds. Respondent rated the shipment in two portions. The first portion, weighing 39,432 pounds, was rated at $38 per weight ton. The second portion, weighing 4,125 pounds, was rated at $50.25 per weight ton. The $38 rate applied to synthetic resin valued under $750 per long ton, measuring up to and including 100 cubic feet, as noted above. The $50.25 rate applied to synthetic resin valued over $750 up to and including 140 cubic feet per long ton.[6] Complainant contends that the entire

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[2] North Atlantic Continental Freight Conference Tariff No. 28, FMC-3, 3rd Revised Page 233-B, Item Nos. 2928 and 2929. The rates include a 10 percent increase as provided in Note (A).

[3] Ibid, Item No. 2928-1.

[4] Although this portion of the shipment weighed under 44,800 pounds and thus apparently did not meet the minimum weight requirement, and adjustment is permitted which results in increasing the actual weight to the minimum if failure to do this would result in a shipper paying more freight for a smaller quantity of goods shipped under a higher less-than-containerload rate. See Rule 4 D. 1 of respondent's tariff, cited above, 3rd Revised Page 6. See also Docket No. 72-19, the proposed revision to the Commission's General Order 13, 46 CFR 536.4 (b) 11 (viii).

[5] Ibid, Item No. 2930.

[6] Respondent's tariff, cited above, Item Nos. 2929-1, 2, 3.

shipment should have been rated at $34 per weight ton, i.e., the minimum containerload rate. Under such a rate, complainant would have saved $79.82 in freight.

DISCUSSION AND CONCLUSIONS

There are two issues raised by the pleadings and supporting documentation: (1) whether respondent's minimum containerload rate, $34 per weight ton, could properly be applied to shipments without regard to valuation of particular portions of the shipments, and (2) if valuation criteria were applicable to such rate, whether the shipments did in fact comply with these criteria.

Complainant contends that the minimum containerload rate should have been applied to the three shipments without regard to valuation and in the alternative, that if valuation requirements were applicable, the shipments did in fact comply with such requirements. Respondent, on the other hand, contends that the shipments in question were not entitled to the minimum containerload rate because such rate was applicable only to synthetic resin valued under $750 per long ton and portions of the shipments exceeded that value.

Analysis of the pleadings and supporting documentation submitted by the parties demonstrates that complainant's contentions lack merit and that complainant's claims must accordingly be denied.

As shown in respondent's tarrif in effect at the time of the shipments in question, a shipment of synthetic resin was entitled to a containerload rate of $34 per weight ton ($31 plus 10 percent) if the shipment weighed a minimum of 44,800 pounds per container. (Item No. 2928–1)[7] However, this tariff item appears directly below a description of synthetic resin valued "up to and including $750 per 2240 lbs. net weight, up to/incl. 100 cft. per 2240 lbs." (Item No. 2928). Below the minimum containerload rate were published a number of items applying to synthetic resin at various categories of value and cubic measurement ranging between $751 to $4,000 per $2,240 pounds and 100 to 160 cubic feet per 2,240 pounds. No minimum containerload rates were published applicable to synthetic resin in these categories. There is therefore no basis to complainant's contention that any shipment of synthetic resin qualified for the minimum containerload rate if it weighed 44,800 pounds regardless of value and measurement, for clearly such a rate was applicable only to resin valued up to and including

[7] For ready reference the governing tariff page is attached as Appenidx A.

$750 per long ton, measuring up to and including 100 cubic feet per long ton. In interpreting a tariff neither shippers nor carriers are permitted to engage in strained and unnatural constructions. *United States* v. *Farrell Lines, Inc.* 13 SRR 199, 203 (1972).

Even if respondent's tariff did not clearly show that the minimum containerload rate was restricted in its application to the lowest category of synthetic resin in terms of value and measurement, this fact became clear when the tariff was later amended on April 4, 1972, long after the time of the shipments in question. By this amendment the minimum containerload rate, now $38.75 per weight ton, was published in a position below all the value and measurement categories of synthetic resin (Item No. 581.0001.588).[8] It was now clearly respondent's intention to apply the containerload rate to any shipment of synthetic resin weighing 44,800 pounds of whatever value and measurement. As respondent correctly contends, therefore, complainant is attempting to have shipments which moved during August and September of 1971 rated under a provision which was not published in the tarrif until April 4, 1972.

Accordingly, it is found and concluded that complainant was not entitled to the containerload rate published in respondent's tariff without regard to valuation and measurement criteria applicable to synthetic resin.

Although complainant's contentions and supporting documentation are devoted almost exclusively to its contention that the containerload rate should have been applied to all three shipments of synthetic resin without regard to value and measurement, complainant makes brief reference to an alternative argument, namely, that each shipment did in fact qualify for the containerload rate since they were all valued at less than $750 per net ton and measured less than 100 cubic feet per 2,240 pounds. This argument accepts the proposition that the containerload rate was restricted to synthetic resin falling within that category of value and measurement.

Respondent denies that each shipment is valued under $750 per long ton in its entirety. Thus, one portion of the first shipment, according to respondent, weighing 26,775 pounds, is valued at $784.20 per 2,240 pounds, one portion of the second shipment, weighing 4,050 pounds, is valued at $2,160.44 per long ton, and one portion of the third shipment, weighing 3,750 pounds, is valued at $1,299.40 per 2,240 pounds.

[8] For ready reference the governing tariff page is attached as Appendix B.

Apparently complainant is ignoring the differences in valuation attached to the particular types of synthetic resin shipped inside the containers and in some fashion is attempting to determine average value of the containerload. There is no explanation by complainant in support of its conclusory statement that each shipment value less than $750 per ton.

The documentary materials submitted by complainant support respondent's contentions that portions of the shipments in question exceeded the $750 per ton limitation in value and thereby failed to qualify for the containerload rate. Regarding the first shipment, for example, a Rohm and Haas document acknowledging an order for 51 drums of the subject resin shows that 26,775 pounds net of resin were valued at $9,371.25. This converts to $784 per 2,240 pounds. Regarding the second shipment, a similar Rohm and Haas document shows that 9 drums contained resin weighing 4,050 pounds net, valued at $3,888, or $2,150.40 per 2,240 pounds. On the third shipment, respondent's bill of lading shows 25 drums of resin, weighing 3,750 pounds net, valued at $2,175, or $1,299.20 per 2,240 pounds. Since respondent's tariff clearly provides a graded scale of rates for resin according to value and cubic measurement, attention must be given to the component parts of containerized shipments if the carrier is to rate the shipments in conformance with its tariff. There is, therefore, no justification for the practice on which complainant appears to be basing its argument, namely, that the entire shipment should be valued and measured on an average basis without regard to the fact that different varieties of resin were included in the shipment. Such a system of rating would constitute an outright nullification of respondent's tariff which provides a series of rates based upon a graduated scale of values and measurements.

Accordingly, it is found and concluded that complainant was not entitled to the minimum containerload rate on the three shipments in their entireties since some portions of the shipments consisted of synthetic resin which was valued too highly to qualify for the containerload rate under the provisions of the governing tarifff.

As a final matter, mention should be made of the fact that the third shipment in question moved under a bill of lading dated August 6, 1971, which was more than two years prior to the filing of the complaint on August 10, 1973. Section 22 of the Act requires that a complaint seeking reparation must be filed within two years after the cause of action accrued. A cause of action accrues at the time of shipment or payment of the freight, whichever is later.

Tyler Pipe Ind., Inc. v. *Lykes Bros. Steamship Co., Inc.*, 15 F.M.C. 28, 30 (1971). There is no indication as to the exact date when payment was made, however, the documents furnished by complainant indicate that freight was prepaid. Under such circumstances, complainant's third claim could not be entertained as being time-barred even if such claim were not otherwise defective on the grounds discussed above. *U.S. Borax & Chem. Corp.* v. *Pac. Coast European Conf.*, 11 F.M.C. 451, 471 (1968).

ULTIMATE CONCLUSIONS

Complainant was not entitled to have three shipments of synthetic resin rated on the basis of a minimum containerload provision in respondent's tariff because certain portions of the shipments exceeded the permissible value limitation published in the tariff. Accordingly, the claims for reparation, which are based upon the contention that the minimum containerload rate was applicable to the shipments in their entireties, are denied and the complaint is dismissed.

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

WASHINGTON, D.C.,
September 14, 1973.

APPENDIX A

Printed in U.S.A.

North Atlantic CONTINENTAL Freight Conference
Tariff No. (28) FMC–3

Orig./Rev.	Page
3rd Rev.	233–B
Cancels	Page
2nd Rev.	233–B
Effective Date	
June 25, 1971	
Correction	1866

FROM: EASTPORT, MAINE/HAMPTON ROADS RANGE TO: ANTWERP/ROTTERDAM/AMSTERDAM HAMBURG/BREMEN/BREMERHAVEN

Except As Otherwise Provided Herein, Rates Apply Per Ton of 2,240 Lbs. or 40 Cubic Feet, Whichever Produces the Greater Revenue. Commodity Description and Packaging	Rate Basis	Rates SERVICE 1	2	3	Item No.
OPEN RATES SECTION (Continued)					
SEATRAIN LINE'S FILINGS (Continued)					
Resin, Synthetic, N.O.S., including Plastic Monomers—Rates only apply to Raw Materials in volume form, that is, Liquid, Powder, Chips, Lumps or Pellets. Articles or Materials manufactured therefrom are NOT to be assessed these rates.					
Up to and including $750. per 2240 lbs. net weight					
Up to/incl. 100 cft. per 2240 lbs.	W	34.75	36.75	38.75	29.28
→Minimum 44,800 lbs. per Container	W	31.00	—	—	2928–1
Over 100 cft. up to/incl. 110 cft. per 2240 lbs.	W	41.75	44.00	46.50	2928–2
Over 110 cft. up to/incl. 120 cft. per 2240 lbs.	W	42.50	44.75	47.25	2928–3
Over 120 cft. up to/incl. 130 cft. per 2240 lbs.	W	42.50	44.75	47.25	2928–4
Over 130 cft. up to/incl. 140 cft. per 2240 lbs.	W	42.50	44.75	47.25	2928–5
Over 140 cft. up to/incl. 150 cft. per 2240 lbs.	W	49.00	51.75	54.50	2928–6
Over 150 cft. up to/incl. 160 cft. per 2240 lbs.	W	49.00	51.75	54.50	2928–7
Over 160 cft. per 2240 lbs.	W	49.00	51.75	54.50	2928–8
Over $750. up to incl. $1500. per 2240 lbs. net weight					
Up to/incl. 100 cft. per 2240 lbs.	W	39.00	41.25	43.50	2929
Over 100 cft. up to/incl. 110 cft. per 2240 lbs.	W	45.75	48.25	51.00	2929–1
Over 110 cft. up to/incl. 120 cft. per 2240 lbs.	W	45.75	48.25	51.00	2929–2

Over 120 cft. up to/incl. 130 cft. per 2240 lbs.	W	45.75	48.25	51.00	2929–3
Over 130 cft. up to/incl. 140 cft. per 2240 lbs.	W	45.75	48.25	51.00	2929–4
Over 140 cft. up to/incl. 150 cft. per 2240 lbs.	W	52.25	55.25	58.25	2929–5
Over 150 cft. up to/incl. 160 cft. per 2240 lbs.	W	52.25	55.25	58.25	2929–6
Over 160 cft. per 2240 lbs.	W	52.25	55.25	58.25	2929–7
Over $1500. up to/incl. $4000. per 2240 lbs. net weight					
Up to/incl. 100 cft. per 2240 lbs.	eW	41.75	44.00	46.50	2930
Over 100 cft. up to/incl. 110 cft. per 2240 lbs.	W	48.25	51.00	53.75	2930–1
Over 110 cft. up to/incl. 120 cft. per 2240 lbs.	W	48.25	51.00	53.75	2930–2
Over 120 cft. up to/incl. 130 cft. per 2240 lbs.	W	48.25	51.00	53.75	2930–3
Over 130 cft. up to/incl. 140 cft. per 2240 lbs.	W	48.25	51.00	53.75	2930–4
Over 140 cft. up to/incl. 150 cft. per 2240 lbs.	W	55.00	58.00	61.25	2930–5
Over 150 cft. up to/incl. 160 cft. per 2240 lbs.	W	55.00	58.00	61.25	2930–6
Over 160 cft. per 2240 lbs.	W	55.00	58.00	61.25	2930–7
Over $4,000. per 2240 lbs. net weight	WM	42.75	45.00	47.50	2931

(A) Effective August 1, 1971 All OPEN Rates, as indicated above, will be increased ten percent (10%) Subject to a maximum of $5.00 per ton W/M as freighted, rounded off to the next lowest .25c per ton,

AS PER TELEGRAPHIC ADVICE TO FMC JUNE 25, 1971

For Explanation of Abbrevations, Reference Marks and Symbols see Page 4.

APPENDIX B

Printed in U.S.A.

North Atlantic CONTINENTAL Freight Conference
Tariff No. (29) FMC-4

Orig./Rev.	Page	
2nd Rev.	289A	
Cancels	Page	
1st Rev.	289A	
Effective Date		
April 4, 1972		
Correction	487	

FROM: EASTPORT, MAINE/HAMPTON ROADS RANGE TO: ANTWERP/ROTTERDAM/ AMSTERDAM HAMBURG/BREMEN/ BREMERHAVEN

Except As Otherwise Provided Herein, Rates Apply Per Ton of 2,240 Lbs. or 40 Cubic Feet, Whichever Produces the Greater Revenue. Commodity Description and Packaging	Rate Basis	Rates SERVICE 1	2	3	Item No.
OPEN RATES SECTION (Continued) SEATRAIN LINE (Continued)		Rates Adjusted As Per April 3, 1972 Conversion			
*Resin, Synethetic, N.E.S., including Plastic Monomers—Rates only apply to Raw Materials in volume form, that is Liquid, Powder, Chips, Lumps or Pellets. Articles or *Materials* manufactured therefrom are NOT to be assessed these rates.					
Up to and including $750 per 2240 lbs. net weight					
Up to/incl. 100 cft. per 2240 lbs.	W	45.75	48.50	51.25	581.0001.253
Over 100 cft. up to/incl. 110 cft. per 2240 lbs.	W	55.25	58.25	61.50	581.0001.254
Over 110 cft. up to/incl. 120 cft. per 2240 lbs.	W	56.50	59.25	62.50	581.0001.255
Over 120 cft. up to/incl. 130 cft. per 2240 lbs.	W	56.50	59.25	62.50	581.0001.256
Over 130 cft. up to/incl. 140 cft. per 2240 lbs.	W	56.50	59.25	62.50	581.0001.257
Over 140 cft. up to/incl. 150 cft. per 2240 lbs.	W	65.00	68.50	71.75	581.0001.258
Over 150 cft. up to/incl. 160 cft. per 2240 lbs.	W	65.00	68.50	71.75	581.0001.259
Over 160 cft. per 2240 lbs.	W	65.00	68.50	71.75	581.0001.260
Over $750 up to/incl $1500 per 2240 lbs. net weight					
Up to/incl. 100 cft. per 2240 lbs.	W	51.50	54.75	57.75	581.0001.261
Over 100 cft. up to/incl. 110 cft. per 2240 lbs.	W	60.75	64.00	67.75	581.0001.262
Over 110 cft. up to/incl. 120 cft. per 2240 lbs.	W	60.75	64.00	67.75	581.0001.263
Over 120 cft. up to/incl. 130 cft. per 2240 lbs.	W	60.75	64.00	67.75	581.0001.264

Over 130 cft. up to/incl. 140 cft. per 2240 lbs.	W	60.75	64.00	67.76	581.0001.265
Over 140 cft. up to/incl. 150 cft. per 2240 lbs.	W	69.25	72.75	76.50	581.0001.266
Over 150 cft. up to/incl. 160 cft. per 2240 lbs.	W	69.25	72.25	76.50	581.0001.267
Over 160 cft. per 2240 lbs.	W	69.25	72.75	76.50	581.0001.268
Over $1500 up to/incl. $4000 per 2240 lbs. net weight					
Up to/incl. 100 cft. per 2240 lbs.	W	55.25	58.25	61.50	581.0001.269
Over 100 cft. up to/incl. 110 cft. per 2240 lbs.	W	64.00	67.75	71.00	581.0001.270
Over 110 cft. up to/incl. 120 cft. per 2240 lbs.	W	64.00	67.75	71.00	581.0001.271
Over 120 cft. up to/incl. 130 cft. per 2240 lbs.	W	64.00	67.75	71.00	581.0001.272
Over 130 cft. up to/incl. 140 cft. per 2240 lbs.	W	64.00	67.75	71.00	581.0001.273
Over 140 cft. up to/incl. 150 cft. per 2240 lbs.	W	72.50	76.00	80.00	581.0001.274
Over 150 cft. up to incl. 160 cft. per 2240 lbs.	W	72.50	76.00	80.00	581.0001.276
Over 160 cft. per 2240 lbs.	W	72.50	76.00	80.00	581.0001.276
Over $4,000 per 2240 lbs. net weight	WM	56.75	59.75	63.00	581.0001.281
Resin Synthetic, including Plastic Monomers—Rates only apply to Raw Materials in volume form, that is, Liquid, Powder, Chips, Lumps or Pellets. Articles or Materials manufactured therefrom are NOT to be assessed these rates.					
→Minimun 44,800 lbs. per Container	W	(R)38.75	—	—	581.0001.588

*Value Rule 4 L 7 Applies.

As per Telegraphic Advice to F.M.C. April 4, 1972.

For Explanation of Abbreviations, Reference Marks and Symbols see Page 4.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–28

GENERAL INVESTIGATION OF PICKUP AND DELIVERY RATES AND PRACTICES IN PUERTO RICO

INTERPRETATION OF ORDER SERVED JUNE 6, 1973

October 18, 1973

Transamerican Trailer Transport, Inc. (TTT), a respondent in this proceeding, seeks an interpretation of our report and order served June 6, 1973 16 FMC 344 in which we ordered respondents to cease and desist from permitting shippers on consignees who use respondents' pickup and delivery service in Puerto Rico to designate the truckers to be used in such service. TTT inquires as to whether or not it may use F&B Trucking Co. (F&B) for pickup and delivery for Luis F. Caratini & Son, Inc. (Caratini), a TTT customer. Caratini asserts that F&B has performed pickup and delivery for it in an efficient manner.

The answer to the inquiry is as follows:

(1) TTT may select any trucker it wishes, including F&B, to perform the pickup and delivery service for which TTT makes itself responsible, so long as TTT does not select truckers in a manner which is unreasonable or unduly preferential. See *Portalatin Velazquez Maldonado* v. *Sealand Service, Inc.*, 10 F.M.C. 362, 371–373 (1967).

(2) So far as the Commission is concered, Caratini may use any trucker it wants, including F&B, to perform pickup and delivery for it, but it cannot designate *any* trucker if it uses TTT's pickup and delivery service.

As we pointed out in our report of June 6th:

> Since respondents' [pickup and delivery] 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 respondent's tariff . . .; or (3) to avail themselves of the pickup and delivery service offered by respondents. (at page 7)

* * * * * * *

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. (at page 11)

There would be nothing necessarily improper in TTT's using F&B to furnish pickup and delivery service for Caratini where Caratini chose to utilize's TTT's pickup and delivery service. The question of who the shipper may or may not have selected, had he the right to select the trucker, is irrelevant. The only relevant consideration is that all truckers used by TTT to furnish its pickup and delivery service be used in a manner which is lawful under the Shipping Acts.

On the other hand, if Caratini chose not to use TTT's pickup and delivery service, there would be nothing improper, so far as we are concerned, in Caratini's exclusively retaining F&B to perform pickup and delivery of Caratini's cargo and informing TTT of this fact. TTT would then assess Caratini the rate listed in TTT's tariff for ocean transportion and F&B would assess Caratini F&B's applicable rate for pickup and delivery.

The only thing that TTT may not do is engage in a practice whereby TTT provides a service including both ocean transportation and pickup and delivery and at the same time allow Caratini to designate a trucker to be used by TTT in performing TTT's pickup and delivery service.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 69–21

TRANSCONEX, INC.—GENERAL INCREASE IN RATES IN THE U.S. SOUTH ATLANTIC/PUERTO RICO—VIRGIN ISLANDS TRADES

No. 69–29

CONSOLIDATED EXPRESS, INC.—GENERAL INCREASES IN RATES IN THE U.S. NORTH ATLANTIC/PUERTO RICO TRADE

On remand, respondents Transconex, Inc. and Consolidated Express, Inc., Nonvessel Operating Common Carriers in the trade between United States Atlantic Ports and Puerto Rico, found to have sustained their burden of proving their rates to be just and reasonable.

Arthur Liberstein for respondents.

Mario F. Escudero, Edward J. Sheppar IV, and *Dennis N. Barnes* for the Commonwealth of Puerto Rico.

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

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

These proceedings were instituted by orders of the Commission served April 28 and June 6, 1969, to determine the lawfulness of rate increases which had been filed by respondents Tansconex, Inc. (Transconex) and Consolidated Express, Inc. (Consolidated), nonvessel operating common carries by water (NVOCCs), pursuant to sections 18(a) and 22 of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The Commonwealth of Puerto Rico intervened to oppose the Transconex increases and filed a protest to the Consolidated increases.

On August 27, 1970, the Commission issued its decision, affirming the initial decision of Examiner Herbert K. Greer, who had found that the increased rates had not been shown to be unjust and unreasonable. 14 F.M.C. 35. Although the Commission had found evidence that tended to support its conclusion that the rate increases were just and reasonable because of cost increases and other factors, the basis for the decision was the holding that the parties contesting the rate increases had failed to sustain their burden of proving such increases to be unlawful. 14 F.M.C. at page 45. The Commonwealth of Puerto Rico appealed this

[1] This decision became the decision of the Commission October 23, 1973.

decision to the U.S. Court of Appeals for the District of Columbia Circuit, contending that the burden of proving the lawfulness of the subject rate increases remained upon the carriers, whether or not the Commission had suspended the increases at the time the investigation was instituted. The Court agreed with the Commonwealth and on September 29, 1972, remanded the matter of the Commission for further proceedings not inconsistent with the Court's opinion. *The Commonwelath of Puerto Rico* v. *Federal Maritime Commission*, 468 F.2d 872.

On October 17, 1972, the Commission reopened these proceedings "for the purpose of allowing for the submission of whatever matter respondent carriers wish to present in justification of their rates here under investigation." In addition, the Commission expanded the investigation to include the question of the lawfulness of further rate increases which were filed by Consolidated and Transconex and became effective on December 14, 1971, and April 7, 1972, respectively. Finally, the Commission ordered that these proceedings include the issues of "(1) the proper standard to be applied in determining the reasonableness of respondents' rates, with particular reference to the concept of operating ratio; (2) the expenses to be allowed prior to calculation of such ratio; and (3) the existence and degree of need on the part of respondents for additional capital and revenue."

In response to the Commission's order allowing for the submission of matter by respondents in justification of their rate increases, respondents submitted financial statements and underlying data which were reviewed and analyzed by the staff of the Commission and were used by the staff to compute operating ratios and returns on rate base pertaining to the operations of both respondents over several years' period of time. These computations are shown in table form in the appendix attached hereto. They show that Consolidated experienced operating ratios varying between 97.69 and 107.18 percent over a period extending from March 21, 1968, to March 31, 1973, and earned a return on rate base, before taxes, of 2.41, 19.95, and 7.81 percent in 1968, fiscal 1970, and fiscal 1972, respectively. Transconex was shown to have experienced operating ratios varying between 98.82 and 100.03 percent over a period extending from December 1, 1967, to September 30, 1972, and to have earned a return on its rate base, before taxes of 19.13, 20.59, and 21.08 percent in fiscal 1970, 1971, and 1972, respectively.

In addition to the financial material submitted into the record, all parties stipulated that certain factual findings made by the Commission in its decision of August 27, 1970 (14 F.M.C. at page 44), are valid at the present time. Specifically, it was stipulated that respondents have experienced increased costs but operate efficiently, that their operations are increasing, that competition in the trade is sharp, and that the value of the services rendered by respondents to small shippers is substantial.

DISCUSSION AND CONCLUSIONS

Respondents contend that the evidence which they have submitted leaves no doubt that the rates under investigation are just and reasonable and, accordingly, that they have sustained their burden of proof as required by law. Respondents contend specifically that the high operating ratios experienced by Consolidated in fiscal 1972 and 1973 (98.68 and 107.18 percent) and by Transconex for fiscal 1971 and 1972 (99.03 and 98.82 percent) demonstrate *beyond question* that the rates are lawful, expecially considering the fact that these computations were made in a manner least favorable to respondents because of the omission of certain items of expense. Similarly, if return on rate base is considered, although the Commission held that such a standard should not be the sole criterion (14 F.M.C. at page 44), the same conclusion regarding the lawfulness of respondents'rates must be reached, again considering the fact that the computations were made by the Commission's staff in a manner least favorable to respondents.

Hearing Counsel do not take issue with respondents' contention that the rates under investigation have been shown to be just and reasonable. They contend essentially that although operating ratio alone does not ordinarily determine the reasonableness of the rates of an NVOCC, the evidence in these proceedings demonstrates such an unfavorable operating ratio for respondents, i.e., approximately 99 percent or higher, that any reduction of revenues would push respondent Transconex into a loss position and increase the losses of respondent Consolidated. Hearing Counsel argue, therefore, that it is unnecessary to look beyond operating ratio into the rate of return standard.

The Commonwealth of Puerto Rico similarly takes no issue with respondents' contentions regarding the reasonableness of their rates and furthermore agrees with Hearing Counsel that these proceedings are not the appropriate vehicle for determining general ratemaking standards applicable to NVOCCs in view of respondents' unfavorable financial situation.

Operating ratio, which has been defined as the ratio of operating expenses to operating revenues, is recongized as a useful standard to employ in determining the reasonableness of rates of carriers such as NVOCCs which have little investment in equipment. 14 F.M.C. at page 44; *General Increase, Middle Atlantic & New England Territories*, 332 I.C.C. 820, 837 (1969); *Increased Common Carrier Truck Rates in the East*, 42 M.C.C. 633, 647, note 5 (1943). The objective in rate regulation, however, is not merely to determine legitimate expenses but to ascertain whether a carrier's rates will generate sufficient revenues so as to assure confidence in its financial integrity, thereby maintaining its credit and attracting capital. *Bluefield Co.* v. *Public Serv. Comm.* 262 U.S. 679 (1923); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). The operating ratio standard is notably deficient with regard to determining the existence and degree of need for additional capital and revenue. 14 F.M.C. at page 44; *General*

Increase, Middle Atlantic and New England Territories, cited above, at pages 837–838 (1969); *D.C. Transit System* v. *Washington Metro. Area Trans. Com'n*, 350 F. 2d 753, 778, 779 (D.C. Cir. 1965). Therefore, in the ordinary case, consideration must be given as Hearing Counsel contend, both to operating ratios and to methods which determine capital needs, such as return on investment.

Similarly, in the ordinary case, evidence would be adduced establishing meaningful standards against which the operating ratio and return on investment of the particular NVOCC whose rates were under investigation could be tested. This could be done, for example, by examining the experience of NVOCC industry as a whole or, perhaps, the experience of businesses having comparable risks.[2] *Federal Power Commission* v. *Hope Natural Gas Co.*, cited above, at page 603. All parties concur, however, that on the present record there is no justification for the continuance of these proceedings for the purpose of adducing such evidence. The Presiding Judge agrees.

The record shows that Consolidated suffered a loss of $193,302 in fiscal 1973 and that Transconex, despite two rate increases and efficient operations, was able to earn a profit of only $25,420 before taxes, out of revenues amounting to $2,159,807 in fiscal 1972. These calculations, moreover, were made in a manner least favorable to the carriers since income taxes and financial costs were disallowed as expenses, although the Commission has held that income taxes, at least, are allowable as expenses in calculating operating ratios. 14 F.M.C. at page 43. As Hearing Counsel observe, furthermore, the cost to respondents of presenting economic witnesses to testify as to appropriate standards and their application to the present case might well eliminate even the slim profit which Transconex was able to enjoy in 1972. There is, furthermore, no question but that respondents have demonstrated a need for additional revenue which the subject rate increases were designed to satisfy. Under such circumstances, it seems clear that these proceedings are not the appropriate vehicle to examine or establish general ratemakng standards and that it would be an injustice to burden these respondents, one already in a loss postition, the other operating at a wafer-thin margin of profit, with further costs of litigation.

[2] The Commission has instituted a proceeding in which it proposes to promulgate a rule which would require all NVOCCs to file periodic financial reports. Docket No. 73-15, *Financial Reports by Non-Vessel Operating Common Carriers by Water in the Domestic Offshore Trade*, Federal Register notice published April 18, 1973. Should such a rule be issued, the Commission's staff would acquire pertinent information which could be used to calculate operating ratios and returns on investment on an industry-wide basis, thereby enabling the Commission to develop standards against which to test the reasonableness of the rates of any individual NVOCC.

ULTIMATE CONCLUSION

Respondents have sustained their burden of proving that the subject rate increases are just and reasonable, as required by law. Accordingly, the proceedings are hereby discontinued.

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

WASHINGTON, D.C.,
September 27, 1973.

ATTACHMENT 1

APPENDIX

Consolidated Express, Inc.—Docket No. 69–29, operating ratio computation—for period indicated

	8 mo. to Nov. 30, 1968	Fiscal year ended Mar. 31,				
		1969	1970	1971	1972	1973
Gross revenue from sales	$1,679,018	$2,262,879	$2,705,650	$2,669,119	$3,180,082	$2,685,849
Adjustment prior years	1,198	2,116	—	(420)	1,935	6,257
Miscellaneous income	639	9,314	—	60	10,161	440
Uncollected checks	—	—	—	1,240	—	—
Total	1,680,855	2,274,309	2,705,650	2,669,999	3,192,178	2,692,646
Cost of operations	1,677,696	2,316,788	2,636,663	2,793,226	3,169,282	2,936,324
(Gain) loss on equipment disposal	1,140	952	—	—	41	(33,459)
Loss on bad accounts	—	4,606	—	—	—	—
Miscellaneous	—	—	13,060	—	—	—
Less financing cost	(4,332)	(5,336)	(6,461)	(15,073)	(19,212)	(16,917)
Total	1,674,777	2,317,010	2,643,262	2,778,153	3,150,111	2,885,948
Profit (loss) before Federal tax—(with financing cost eliminated)	6,078	(42,701	62,388	(108,154)	42,067	(193,302)
Operating ratio (percent)	99.63	101.88	97.69	104.05	98.68	107.18

ATTACHMENT 2

Consolidated Express, Inc.—Docket No. 69-29, computation of return on rate base—for period indicated

	8 mo. to Nov. 30, 1968	Mar. 31, 1969	Mar. 31, 1970	Mar. 31, 1971	Mar. 31, 1972	Mar. 31, 1973
Property and equipment—less depreciation	$155,580	$138,247	$155,953	$215,991	$340,921	$219,892
Leasehold improvements—less amortization	24,568	22,798	18,871	24,122	11,018	—
Total	180,148	161,045	174,824	240,113	351,939	219,892
Prepaid expenses	14,478	9,212	17,831	31,126	25,211	14,374
Deposits and bonds	2,200	2,200	1,700	3,971	2,840	25,590
Deferred auto and truck plates municipal license	—	—	—	1,912	2,711	2,215
Deferred workmen compensation insurance	—	—	—	1,905	4,426	12,834
Assets without working capital	196,826	172,457	194,355	279,027	387,127	274,905
Working capital	55,158	—	118,429	—	151,635	—
Assets with working capital	251,984	—	312,784	—	538,762 —	
Profit with financing cost eliminated	6,078	—	62,388	—	42,067	—
Return on Rate Base (percent)	2.41	—	19.95	—	7.81	—
Working capital computation: Total costs	$1,679,109	—	$2,649,723	—	$3,169,323	—

Eliminate:						
Marine freight:						
Southbound	481,228	—	735,035	—	859,722	—
Northbound	169,544	—	232,784	—	153,730	—
Virgin Islands	1,927	—	2,560	—	14,786	—
Inland freight	93,616	—	138,210	—	157,853	—
Cartage	270,903	—	119,984	—	163,612	—
Total costs eliminated	1,017,218	—	1,228,573	—	1,349,703	—
Working capital base	661,891	—	1,421,150	—	1,819,620	—
Jan. 12	55,158	—	118,429	—	151,635	—

Transconex, Inc.—Docket No. 69-21, operating ratio computation for period indicated

			Pro forma			
	Dec. 1, 1967 to Sept. 30, 1968	Oct. 1, 1968 to June 30, 1969	Oct. 1, 1968 to Sept. 30, 1969	Oct. 1, 1969 to Sept. 30, 1970	Oct. 1, 1970 to Sept. 30, 1971	Oct. 1, 1971 to Sept. 30, 1972
Revenues	$1,332,115	$1,081,458	$1,481,197	$1,612,953	$1,882,744	$2,159,807
Costs:						
Direct costs	846,232	929,949	1,267,526	1,370,607	1,612,879	1,800,481
Other operating costs	301,645	—	—	—	—	—
General and administrative costs [1]	178,934	126,391	184,576	203,363	217,434	288,563
Less: Interest expense	(2,728)	(1,508)	(4,749)			—
Selling expenses	—	23,195	34,342	29,116	29,284	42,833
Other expenses	—	—	—	3,117	4,856	2,510
Total costs	1,324,083	1,078,027	1,481,695	1,606,203	1,864,453	2,134,387
Profit (loss) before Federal income tax—(with interest cost eliminated)	8,032	3,431	(498)	6,750	18,291	25,420
Operating ratio—costs as percent of revenue	99.40	[2] 99.68	[3] 100.03	99.58	99.03	98.82

[1] Interest listed in general and administrative costs through Sept. 30, 1969, listed separately for fiscal year 1970 ($8,114); fiscal year 1971 ($4,897); and fiscal year 1972 ($5,467).

[2] 9 mo. report.

[3] Pro forma report.

Transconex, Inc.—Docket No. 69–21, computation of return on rate base for periods indicated

	Dec. 1, 1967 to Sept. 30, 1968	Oct. 1, 1968 to June 30, 1969	Oct. 1, 1968 to Sept. 30, 1969	Oct. 1, 1969 to Sept. 30, 1970	Oct. 1, 1970 to Sept. 30, 1971	Oct. 1, 1971 to Sept. 30, 1972
Fixed Assets—less depreciation	$3,888	(1)	(1	$19,691	$27,647	$42,917
Deposits and bonds and sundry	1,450	(1)	(1)	2,868	2,333	5,445
Prepaid expenses	2,471	(1)	(1)	2,885	4,753	6,122
Assets other than working capital	7,809	—	—	25,444	34,733	54,484
Working capital	43,705	$30,559	$11,182	9,848	54,101	66,114
Computed rate base	51,514	—	—	35,292	88,834	120,598
Profits before Federal income tax	8,032	3,431	(498)	6,750	18,291	25,420
Return on rate base (percent)	15.59	—	—	19.13	20.59	21.08
Working capital computation:						
Total costs	1,324,083	1,078,027	1,481,695	1,606,203	1,864,453	2,134,387
Eliminate:						
Marine Freight:						
Southbound	542,823	455,914	807,325	1,119,321	626,017	666,510
Northbound	90,264	44,550	60,148	94,847	53,605	24,909
Inland freight	132,675	108,261	143,787	—	144,509	—
Cartage	33,864	92,954	310,674	—	288,561	321,540

Virgin Islands:						
Marine freight	—	6,276	20,411	116,776	88,774	123,034
Inland freight	—	2,399	3,916	8,920	13,773	24,813
Cartage	—	959	1,251	—	—	—
Advance charges:						
Inland freight	—	—	—	—	—	—
Southbound	—	—	—	130,954	—	142,146
Northbound	—	—	—	17,208	—	7,649
St. Martin-Miami:						
Marine freight	—	—	—	—	—	19,892
Inland freight	—	—	—	—	—	373
St. Martin-New York:						
Marine freight	—	—	—	—	—	10,043
Inland freight	—	—	—	—	—	106
Total costs eliminated	799,626	711,313	1,347,512	1,488,026	1,215,239	1,341,015
Working capital base	524,457	366,714	134,183	118,177	649,214	793,372
Jan. 12	43,705	30,559	11,182	9,848	54,101	66,114

[1] Nobalance sheet for the periods found in FMC files.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–19

INTERMODAL SERVICE TO PORTLAND, OREGON

October 23, 1973

Agreement of Trans-Pacific Freight Conference of Japan (Agreement No. 150) as approved at time of hearing did not authorize indirect service to Portland, Oregon, from Far Eastern ports in which cargo is discharged from vessel at Seattle, Washington, and transported by overland carrier to Portland as port of destination at ocean carrier's expense. Agreement No. 150–49 specifically providing for such service, approved. Agreement of Trans-Pacific Freight Conference (Hong Kong) (Agreement No. 14) does authorize such service. Agreement 14–32 "updating" Conference agreement with respect to indirect overland service has been lodged in Commission's files in interest of clarity to avoid future problems.

Upon approval of Agreement No. 150–49, indirect overland service found la.. under sections 15, 16 and 17 of Shipping Act, 1916, on condition that ea member of Conferences providing such service to Portland serves Portlanc directly by water with a frequency no less than alternate sailings, absent emergency situations such as strikes, weather conditions, or port congestion.

Conference members' regular indirect overland service to Portland, if provided as conditioned above, found not inconsistent with section 8, Merchant Marine Act, 1920, and not rendered unlawful by section 205, Merchant Marine Act, 1936.

Prior to agreement approval granted herein, tariff of Trans-Pacific Freight Conference of Japan unlawful since regular indirect service to Portland unauthorized by approved agreement. Tariffs of both Conferences formerly unlawful under section 18(b), Shipping Act, 1916, as not plainly showing when and in what manner absorptions or indirect service would apply but lawful as amended to require absorption of overland transportation costs by water carriers when regular indirect service is provided.

Quarterly reports detailing direct and indirect service at Portland required for three-year period.

Charles F. Warren and *John H. Caldwell* for respondents, Trans-Pacific Freight Conference of Japan, Trans-Pacific Freight Conference (Hong Kong), and member lines of these two conferences.

John Mason, Warren Price, Robert L. Dausend and *Bradley R. Coury* for respondent and intervener Sea-Land Service, Inc.

Gerald Grinstein, Michael B. Crutcher and *Richard D. Ford* for intervener Port of Seattle.

Edward Schmeltzer, Edward Aptaker, Dennis N. Barnes, Thomas P. White and *Norman E. Sutherland* for petitioner City of Portland, Oregon.

Francis A. Scanlan and *Leo F. Glynn* for interveners Philadelphia Marine Trade Association, The Port of Philadelphia Marine Terminal Association, and Boston Shipping Association, Inc.

Martin A. Heckscher and *George F. Mohr* for intervener Delaware River Port Authority.

Neil L. Lynch and *Chester H. Gourley* for intervener Massachusetts Port Authority.

Philip G. Kraemer for intervener Maryland Port Administration.

Albert E. Cronin, Jr., and *J. Richard Townsend* for intervener Stockton Port District.

John J. Hamlyn, Jr., for intervener Sacramento-Yolo Port District.

Joseph D. Patello for intervener San Diego Unified Port District.

J. Kerwin Rooney for intervener City of Oakland, California.

J. Robert Bray and *Arthur W. Jacocks* for intervener Virginia Port Authority.

Arthur L. Winn, Jr., Paul M. Donovan and *Douglas W. Binns* for intervener The Port of New York Authority.

Richard W. Kurrus and *Howard A. Levy* for intervener American Export Isbrandtsen Lines, Inc.

Donald J. Brunner, Paul J. Kaller and *Stephen T. Rudman* as Hearing Counsel.

REPORT

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

Our purpose in this proceeding is to determine whether the establishment of a regular service to Portland, Oregon, from Far Eastern ports under which cargo destined to Portland is discharged from a vessel at Seattle, Washington, and transported by inland carrier to Portland, Oregon, at ocean carrier's expense:

1. Is authorized by the approved agreements of the Trans-Pacific Freight Conference of Japan (TPFC-Japan) (Agreement 150), and the Trans-Pacific Freight Conference (Hong Kong) (TPFC-Hong Kong) (Agreement No. 14), and if so whether the agreements, to the extent they authorize such practice, should be disapproved, cancelled or modified pursuant to section 15, Shipping Act, 1916 (the Act);

2. Violates section 16 of the Act by subjecting a person, locality or description of traffic to undue or unreasonable prejudice or disadvantage;

3. Violates section 17 of the Act by resulting, through the absorption of inland transportation costs, in demanding, charging or collecting rates or charges which are unjustly discriminatory between shippers or ports;

4. Violates section 18(b) of the Act by providing services not authorized by the Conferences' tariffs; or

5. Is contrary to the policy of section 8, Merchant Marine Act, 1920, of encouraging the movement of cargoes through the United States ports through which they would naturally pass.[1]

Our order of investigation named the two conferences and their member lines as respondents. The City of Portland (Portland), which had, prior to the issuance of the order of investigation, petitioned the Commission to investigate the challenged service, became a party petitioner. Numerous persons representing for the most part port interests in various sections of the United States intervened, responding to our declaration in the order that:

> The determination of these matters is of prime importance for the guidance of the shipping industry and should be made the subject of a full hearing.

Those hearings were held in Washington, D.C. before Administrative Law Judge Charles E. Morgan, who issued an initial decision in which he found the challenged service unlawful, but held that such service would be lawful (1) if respondents' tariffs were modified to indicate unambiguously whether and to what extent the carriers will absorb the cost of inland transportation from Seattle to Portland, and (2) if the rate of any ocean carrier not scheduling direct service to Portland for its service to Portland indirectly from Seattle is differentially higher than the same carrier's rate for direct water service to Seattle by $1.50 per revenue ton.

Pursuant to a petition of Portland, we reopened the proceeding for the receipt of additional evidence with respect to container movements in the Pacific Northwest after December 11, 1970. Following a hearing in the reopened proceeding in Washington, D.C., Administrative Law Judge Morgan issued an "Initial Decision on Reopening and Remand", in which he affirmed his findings and conclusions in his earlier decision. Exceptions to the Adminis-

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[1] While section 8 is not specifically administered by the Commission, it is properly considered in Commission deliberations since, as an act of Congress it reflects a legislative pronouncement of the public interest. See e.g., *Port of New York Auth.* v. *Federal Maritime Com'n.*, 429 F. 2d 663, 670 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971); *Delaware River Port Auth.* v. *United States Line, Inc.*, 311 F. Supp. 441 (E.D. Pa. 1971).

trative Law Judge's decisions were filed by Portland, Sacramento-Yolo Port District (Sacremento), Stockton Port District (Stockton), Delaware River Port Authority (Delaware), Maryland Port Administration (Maryland), the Conferences, Sea-Land Service, Inc. (Sea-Land), a member of both Conferences, and Hearing Counsel; and replies thereto by Portland, Seattle, the Conferences and Hearing Counsel. We have heard oral argument.

FACTS

The Port of Portland is located on the Columbia River about 90 miles east of the Pacific Ocean. The Columbia River lightship is about seven to eight miles out in the open sea, and it marks the entrance to the Columbia River from the sea. The Columbia River bar extends about five miles in from the lightship as the water changes from a deep sea depth of 1,200 feet to a river mouth depth of 48 or 50 feet. During some storm conditions, particularly in winter months during ebb tide periods, the bar is considered impassable for an average time of about six hours. From the lightship at the Columbia River bar it is 101 miles to Portland. Similarly, from Cape Flattery, Washington, where the Pacific Ocean abuts Juan de Fuca Strait, it is 132 miles to Seattle. Seattle and Portland are closer by land than by water. Portland is 175 highway miles, 182 rail miles, and 359 nautical miles, from Seattle.

Water service to Portland after calling at Seattle in the Seattle/Japan trade involves 422 extra nautical miles, computed as follows: 151 miles from Cape Flattery, Washington, to Astoria, 83 miles to Portland, 83 miles to Astoria, and 105 miles from Astoria to a point in the Pacific Ocean equidistant with Cape Flattery to Japan.

The 166 miles total up and down the Columbia River to and from Portland are traversed at restricted speeds and with the services of a river pilot who comes aboard near Astoria. Approximately 12 miles of the Columbia River channel are dredged to only 35 feet below mean water level. In time this will be increased to 40 feet. About 108 course changes are required in piloting the vessel up the Columbia River to Portland. In certain areas the river must be traversed at reduced speeds. Average transit time on the Columbia River between the Columbia River lightship and Terminal No. 2 at Portland is about nine hours inbound and seven hours outbound. The Columbia River is also subject to periodic bar closures, and crossing the bar requires the service of a bar pilot who comes aboard near the lightship.

A vessel destined to Seattle and entering the Puget Sound from the Juan de Fuca Strait would pick up a pilot who comes aboard near Port Angeles, Washington. Because of the confined area of the Columbia River more skill is required to transit it than is required to transit Puget Sound, but pilots skilled in navigating the Columbia River tend to offset any differences in hazards of the River and the Puget Sound.

The Port of Portland has two container terminals. Terminal No. 2, the newer container facility, was completed in February 1970 at a cost of over $8,000,000, not including specialized container equipment. This terminal has two ship berths, one of which is designed for full container vessels. The other berth can handle container or breakbulk vessels. On the apron of Terminal No. 2 are three cranes, including one Hitachi container crane which cost $850,000, and two revolving gantry cranes which cost $250,000 each. The yard area of Terminal No. 2 has rail facilities and a shed at which containers are stuffed and unstuffed. For handling containers at this site, the Port of Portland owns four 33½-ton straddle carriers which cost a total of $532,000, and two 25-ton straddle carriers costing about $46,000 each, and a container lift truck of 26-ton capacity. Also, a mobile crane of 175-ton capacity costing $400,000 can handle containers and other large units of cargo at any of Portland's facilities.

Portland's container facility, Terminal No. 4, was completed in November 1968, and is presently subject to a preferential use by Matson Navigation Company. Terminal No. 4 has a Hitachi container crane similar to the one at Terminal No. 2. Portland maintains over 1,300,000 square feet of covered storage space, and about 70,000 square feet of U.S. Customs bonded warehouse area.

The Port of Seattle has four major terminals to handle container cargo. Terminal 5 is used by Sea-Land on a preferential basis and has three bridge-type container cranes. Terminal 18 is used by six Japanese lines and by Matson Line. Terminal 18 has two Hitachi bridge-type cranes. Terminal 20 is a combination container and break-bulk facility used by numerous ocean carriers. It has two whirley cranes and two lifting cranes. Terminal 46 services American Mail Line, the Johnson Line and Foss Alaska Line, and has two whirley cranes. All four terminals have rail and numerous other facilities. The Port of Seattle has a deep harbor, all-weather port with unlimited access at all tides and at all times of the year.

Portland operates the largest grain elevator, capacity 8,000,000 bushels, on tidewater west of the Mississippi River. Wheat and grain are the largest volume items among bulk commodities handled. Portland's total export and import harbor commerce to and from all areas of the world in 1969 was 5,484,739 short tons, of which 4,377,538 tons or about 80 percent were bulk cargoes, and 1,107,201 tons or about 20 percent were general cargoes, including breakbulk and container general cargoes. About half of Portland's world commerce, or 2,791,553 tons, in 1969, was to and from the Far East, defined as Japan, Korea, Okinawa, Taiwan and Hong Kong. Japan's share of this commerce in 1969 was 1,824,022 tons.

Principal exports of Portland to Japan in 1969 in short tons were wheat, logs, and scrap metal, respectively, amounting to 844,368 tons, 492,300 tons, and 54,462 tons, or a total of these three exports of about 95 percent of all exports of Portland to Japan. Wheat, logs, and scrap metal moved in bulk from Portland to Japan.

In Portland's total export and import trade with Japan bulk also predominates, amounting in 1969 to 1,436,933 tons, or about 79 percent of the total Portland-Japanese commerce of 1,824,022 tons. Most of the Portland trade with Japan are exports. Total Portland exports to Japan in 1969 were 1,465,675 tons, of which 1,393,635 tons were bulk cargoes, and only 72,040 tons were general cargoes.

Eastbound total imports from Japan to Portland in 1969 were 358,347 tons of which 43,298 tons were bulk cargoes, and 315,049 tons were general cargoes. Portland's general cargo trade with Japan in 1969 amounted to 387,089 tons, of which 315,049 tons were eastbound to Portland and 72,040 tons were westbound to Japan.

Only eastbound to Portland from Japan has there been a high percentage of general cargo. In 1969, some 221,897 tons of eastbound general cargo from Japan to Portland, consisted of heavy, low-rated, iron and steel articles not moving in containers.

The Conference carriers principally serving Portland in the trades here under consideration consist of a six-line Japanese consortium (a full containership service), American Mail Lines (AML), Barber Lines A/S (Barber), Knutsen Line (Knutsen), and States Steamship Company (States). Prior to December 11, 1970, when the first call was made by a consortium containership at Portland, there had been no direct full containership service from Japan to Portland, and when this record was closed there was still no direct full containership service to Portland from Hong Kong. The consortium now serves Portland directly about every 20 days and provides indirect overland service via Seattle about every 10 days. In the past, AML has served Portland both to and from Japan each way about three sailings per month; AML has sailed between Portland and Hong Kong on most of these same voyages to and from Japan; States has served Portland eastbound from

Japan about two sailings per month on the average, plus about one or two sailings from Hong Kong per month, and States has served Japan westbound from Portland about one or two sailings per month, and Hong Kong westbound about one sailing per month from Portland; Barber has offered no westbound service from Portland to Japan, but provided about two eastbound sailings per month from Japan and two eastbound from Hong Kong, as well as two westbound to Hong Kong; Knutsen provided Portland service eastbound from Japan and Hong Kong with sailings about twice a month, but no westbound service to Japan. AML intends in time to have four full containerships, and at that time would provide weekly service to and from Japan, with all vessels calling at Seattle, and probably every other voyage calling at Portland. Its actual operating plan, however, will depend upon its exeperience in developing sufficient cargo to and from Portland. Those vessels not calling at Portland on a particular voyage would handle containers at Seattle for movement overland to and from Portland. Knutsen and Barber have increased the container capacity of eight of their vessels, and during the period December 1970 to June 1971, called at Portland with all of these ships.

On or about April 20, 1971, Sea-Land discontinued the indirect overland service to Portland via Seattle, which it had maintained since the beginning of 1969. Sea-Land plans to serve Portland in the future by means of one or two small-class containerships in a relay or feeder service between Pacific Coast ports.

There were 125 consignees in the Portland area who utilized Sea-Land's indirect container service from Japan via Seattle. In general, the consignees in the Portland area prefer direct container service by water to Portland because this eliminates trucking and custom delays at Seattle, and because these consignees can communicate directly with the personnel at the Portland public docks and at the Portland customs, whereas long distance communication with Seattle people is comparatively undesirable. But, many consignees in the Portland area, as seen from Sea-Land's success in obtaining their cargoes, deemed Sea-Land's indirect service very useful, if not essential, to their businesses. Sea-Land provided a weekly direct service to Portland; and because Sea-Land cargoes from Japan to Portland moved in containers, there resulted a minimum of damages and a minimum of losses due to pilferage. Portland consignees generally prefer and would patronize regular and frequent container service direct to Portland, over a comparable indirect service at the same transportation costs, but their main concern is to obtain a frequent and regular container service which is necessary to their operations.

In 1969, TPFC-Japan Conference members carried 504,656 revenue tons of cargoes between Japan and Seattle and 160,384 revenue tons between Japan and Portland. Totals for the Puget Sound gateway, including Tacoma, Washington, were 519,711 tons, and for the Columbia River gateway including Longview and Vancouver, Washington, were 309,333 tons. In 1969, the above totals included 346,675 revenue tons of OCP cargo carried through Seattle, and only 20,327 tons of OCP cargo through Portland, and also 124,015 tons of OCP cargo through Longview. These figures show that in this trade, Seattle cargoes exceeded Portland cargoes, and very much so in the case of OCP cargoes, i.e., cargoes destined for points generally east of Denver, Colorado.

In 1969, Seattle handled both inbound and outbound a total of 93,724 containers. For the same year Portland handled 11,037 containers. In the first six months of 1970, Seattle handled 64,599 containers, while Portland handled only 7,178. The major type of cargo moving in containership service has been OCP cargo. Seattle attracts vastly more OCP traffic than does Portland. Very little of the overland container traffic is transhipped at Portland.

When Sea-Land provided its indirect service to Portland via Seattle, it handled about 22 containers to Portland per sailing during its 22 voyages in the first six months of 1970, and also 40.9 containers per sailing indirectly to Vancouver, B.C. (via water to Seattle, thence overland via railroad to Vancouver). Similarly, containers discharged by Sea-Land at the Port of Seattle in the first six months of 1970, and handled overland to other destinations, averaged 1.23 to Anacortes, Washington, 1.86 to Tacoma, Washington, 3.2 Longview, Washington, and 7.6 to Astoria, Oregon. On these same 22 sailings in 1970, out of total containers to all destinations of 4,349, there were 2,657 containers destined for Seattle delivery including 825 local and 1,832 OCP, or an average per sailing to Seattle of 120.8 containers.

In the first five months of 1970, Sea-Land cargoes from Japan to Portland were 9,719 tons local and zero tons OCP. Commencing in December 1969, Sea-Land was precluded by Portland from moving freight into Portland's public warehouses unless handled by water to Portland. In the same five months of 1970, Sea-Land's cargoes to Seattle were 10,894 tons local and 44,774 tons OCP. Sea-Land served Vancouver, B.C., in these five months of 1970, with 9,300 local tons and 10,556 OCP tons.

Total container cargo figures for all members of the TPFC-

Japan show that for 1969, there were 7,641 containers discharged at Seattle by other than Japanese member lines, and 2,496 containers discharged at Seattle by the Japanese lines, or a total of 10,137 containers handled eastbound from Japan to Seattle in 1969 by all conference members.

Corresponding figures to Portland are only 123 containers by non-Japanese lines and only 36 by Japanese line members, or a total of only 159 containers discharged at Portland eastbound in 1969 carried by all members of TPFC-Japan. The containers eastbound to Vancouver, B.C., in 1969 were 1,080 by non-Japanese lines, plus 1,060 by Japanese lines, or a total of 2,140. Eastbound containers to Portland increased moderately in 1970. During the first three months of 1970, containers handled from Japan to Seattle totalled 2,756, and those to Portland totalled only 341. The figure to Vancouver, B.C., for the same three months was 870.

For the period December 1970 through June 1971, inclusive, in the two trades in issue herein, the total of loaded containers (20-foot equivalents) handled inbound and outbound at Seattle was 40,891. On the other hand, at Portland the total is 5,739 containers, of which the Japanese six lines handled 4,992; AML, States and Knutsen, 574; and Barber about 200 containers. AML, States and Knutsen carried a total of 386 containers inbound.

During the period from December 8, 1970 through June 27, 1971, the Japanese six-line consortium vessels made 22 calls at Seattle. Eleven of these same vessels (every other one of the twenty-two) also called at Portland during the period from December 11, 1970 through June 24, 1971. For the same period at Seattle, the number of loaded containers (20-foot equivalents) totalled 9,319 eastbound or inbound, and 5,587 westbound or outbound. For the same period at Portland, the loaded containers totalled 1,168 eastbound or inbound, and 3,824 containers outbound or westbound. The Japanese six-line consortium vessels handled, via Seattle, containers to or from Portland totalling in the period in issue 362 containers eastbound or inbound, and 182 containers westbound or outbound. When these last figures are added to the totals of containers handled by water directly to or from Portland, the grand totals of Portland containers handled by the Japanese six lines in the December 1970-June 1971 period are 4,006 westbound or outbound, and 1,530 eastbound or inbound, and the averages per voyage, using 22 voyages, are 182 containers westbound or outbound, and 70 containers eastbound or inbound.

In the Hong Kong trade alone, between December 1970 and

June 1971, AML, States and Knutsen carried a total of 59 containers to and from Portland, 58 inbound and 1 outbound.

During the year 1970, the member lines of TPFC-Japan carried a total of 614, 792 revenue tons of general cargo to Seattle, of which 161,166 was local cargo and 453,662 was OCP cargo, and a total of 148,199 revenue tons of general cargo to Portland, of which 128,731 was local cargo and 19,468 was OCP cargo. During the first ten months of 1971, the member lines of TPFC-Japan carried a total of 581,277 revenue tons of general cargo to Seattle, of which 130,522 was local cargo, and 450,755 was OCP cargo, and a total of 71,030 revenue tons of general cargo to Portland, of which 64,851 was local cargo and 6,179 was OCP cargo.

THE ADMINISTRATIVE LAW JUDGE'S DECISIONS

A. The initial decision

The Administrative Law Judge found the indirect overland service to Portland via Seattle to be authorized by the Conference agreements and tariffs, but held that the provisions of the tariffs relating to the absorption of overland expenses in connection with the indirect service to Portland are not in conformity with section 18(b) of the Shipping Act, 1916, since they do not plainly show what charges will apply. He would require that the tariffs be modified to indicate unambiguously whether and to what extent the carriers will absorb the cost of inland transportation from Seattle to Portland. Administrative Law Judge Morgan determined that container service from Japan and Hong Kong to Portland was inadequate prior to December 11, 1970, and that the indirect service was therefore at the time lawful. He additionally found that since that time container service at Portland in both the Japan and Hong Kong trades did not appear to be inadequate and that the Conferences' indirect services were unlawful under sections 15, 16 and 17 of the Shipping Act, 1916. He held, however, that the services would be lawful if the rate of any ocean carrier not scheduling direct service to Portland for such indirect service as it provides via overland movement from Seattle were differentially higher than the same carrier's rate for direct water service to Seattle by $1.50 per revenue ton. Finally, Administrative Law Judge Morgan concluded that the indirect Portland service was not contrary to the policy of section 8, Merchant Marine Act, 1920, if subjected to the tariff clarifications and rate differentials which he required.

B. The initial decision on reopening and remand

After considering the operations at Pacific Northwest ports with respect to container movements after December 11, 1970, the Administrative Law Judge affirmed his earlier findings and conclusions.

DISCUSSION AND CONCLUSIONS [2]

I. Authorization for indirect service to Portland via inland carrier from Seattle to Portland with absorption of inland transportation costs under the presently approved conference agreements

Hearing Counsel, Portland and Maryland maintain that the Administrative Law Judge erred in holding that a regular indirect service to Portland via overland transportation from Seattle with absorption of inland transportation costs is authorized by the Conferences' presently approved agreements. More specifically, Hearing Counsel assert that the agreements prohibit absorptions unless a tariff provision authorizing absorptions is agreed to by the Conference members, and that there has been no showing that any tariff rules of the Conferences were intended to authorize such service at the time they were adopted. Portland maintains that the Conferences' indirect service to Portland is a type of "port equalization" which is not authorized because it is not specifically provided for in the Conference agreements, which Portland maintains do not authorize the absorption of inland freight charges, but only the absorption of charges assessed for functions, such as wharfage and storage, which are confined to the ocean terminal. It bases this contention upon the use in the Conference agreements of language restricting the rates and charges to which they apply to those "for or in connection with ... transportation ... *in vessels*" (emphasis supplied), and indicating that absorption is to apply to "wharfage, storage, or other charges against cargo. ..." Portland also asserts that the fact that the Conferences filed, during the course of this proceeding, changes in their agreements which specifically referred to overland freight absorptions constitutes an

[2] The City of Oakland (Oakland) intervened and participated in the hearings. Although it filed no briefs with the Administrative Law Judge, nor exceptions or replies to this initial decisions, Oakland did support the initial decisions at the oral argument. The Philadelphia Marine Trade Association, Port of Philadelphia Marine Terminal Association and Boston Shipping Association, Inc. (Philadelphia and Boston) maintained before the Administrative Law Judge that the indirect service to Portland by means of the absorption of inland transportation costs was unlawful because it artifically diverted cargo which should have moved through the Port of Portland by water in violation of sections 15, 16 and 17 of the Shipping Act, 1916, and contrary to section 8 of the Merchant Marine Act, 1920. Although Philadelphia and Boston did not except to the initial decisions, they reiterated this position at oral argument.

admission by the Conferences that indirect overland service to Portland is unauthorized by the Conferences' presently approved agreements.

Only the Conferences respond to these exceptions, maintaining that their indirect overland service to Portland is authorized by their approved agreements.[3] The Conferences contend that similar language in Conference agreements with respect to absorptions was found to authorize "port equalization", which they contend is indistinguishable from the overland absorption practices here in issue. They assert that the language "for or in connection with . . . transportation in vessels" is broad enough to cover the Conference service, which involves continuous movements to Portland on Portland bills of lading, and that "wharfage, storage, or other charges against cargo" include absorption of the costs of inland transportation since wharfage and storage, like charges for inland transportation, are generally assessed "by persons other than the ocean carrier." Finally, the Conferences maintain that the modifications which they made in their agreements were not "admissions" that the service here under investigation is not authorized but were made only "in the alternative", and in the event that the Commission found that the present language in the agreements needed "updating" or in fact did not authorize the service.

The mere fact that the Conferences have filed amendments to their agreements which contain language specifically authorizing overland transportation at the Conference members' expense does not, of course, constitute a recognition by the Conferences that authority for assumption of the expenses of such transportation is presently lacking in the Conferences' approved agreements. Not only did the Conferences, in filing the amendments, represent that they were filed for approval only if they were found to be necessary to authorize their overland service to Portland, but is clear that the question of whether certain concerted activity requires approval not already granted by the Commission is not a question to be determined by the parties to the agreement. It is a matter to be determined by the Commission itself, in the exercise of its regulatory responsibilities.

An agreement approved pursuant to section 15 is "not simply a private contract between private parties, the intent of the parties is only one relevant factor, and the [Commission] not only can, but must, weigh such considerations as the effect of the interpretation on commerce and the public. Moreover, the agreement existed

[3] Seattle specifically takes "no position on the issue of whether the Conference agreements authorized the service under investigation."

legally only because approved by the [Commission]. The [Commission] must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval." *Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277, 281 (D.C. Cir. 1962).

The language of the presently approved agreements of the Conferences in the light of the standards which we have evolved for determination of the scope of a prior approval demonstrates that TPFC-Japan (Agreement No. 150) does not authorize the service here at issue. In general, authorization for particular types of anticompetitive conduct requires specific language in an agreement. The proper performance of the Commission's duty to scrutinize agreements prior to approval to insure that they do not invade the antitrust laws to a greater extent than is necessary for the effectuation of a legitimate regulatory purpose[4] requires that adquate notice be given on the face of agreements as to the activities which they will cover to allow all interested parties to participate in an informed manner in pre-approval proceedings. See *Pacific Coast European Conference—Rules 10 and 12*, 14 F.M.C. 266, 278 (1971); *Joint Agreement—Far East Conf. and Pac. W.B. Conf.*, 8 F.M.C. 553, 558 (1965); *Agreement 7700—Establishment of a Rate Structure*, 10 F.M.C. 61, 65–66 (1966), *aff'd sub nom. Persian Gulf Outward Freight Conf.* v. *Federal Mar. Com'n*, 375 F.2d 335, 341–342 (D.C. Cir. 1967). Specific authorization is required for any conference system under which members wish to serve a port by other than a vessel call at such port, i.e. by assumption of the cost of overland transportation. See *Pacific Coast Port Equalization Rule*, 7 F.M.C. 623 (1963), *aff'd sub nom. American Export Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185 (9th Cir. 1964).[5]

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[4] *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954), *cert. denied. sub nom. Japan-Atlantic & Gul Conf.* v. *U.S.*, 347 U.S. 990 (1954).

[5] *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184, *aff'd sub nom. Port of New York Auth.* v. *Federal Maritime Com'n.*, 429 F. 2d 663, 670 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971), is not authority for the proposition that specific language in a conference agreement is unnecessary to authorize a practice like that here in issue. The *OCP* case merely held that conferences operating between the United States Pacific Coast and the Far East did not require approval in addition to their general ratemaking authority to establish as a group lower ocean rates for cargo moving to and from the midwest portion of the United States (overland/OCP rates) than for cargo moving to and from areas west of the Rocky Mountains (local rates). Cases like the present one, which involve the question of the authority of individual conference lines to assume the expense of inland transportation between ports, were distinguished on the ground that the practice of assumption of inland transportation expenses, unlike OCP rates, did not involve conventional competitive concerted ratemaking on the parts of all conference members to obtain cargo, but rather constituted "an exception to the ratemaking process, which gives the individual conference member a discretionary power to divert cargo from a port which is served by the same conference on the same trade route, at the same rates, as the port to which the cargo id diverted." (12 F.M.C. at 212.)

The language of Agreement No. 150 does not authorize assumption by Conference members of the cost of overland transportation as a part of a regular indirect service. Agreement No. 150 does not contain any language with respect to Conference activities relating to charges for overland transportation. The only wording the Conferences can point to as alleged support for such authority relates to the "absorption of wharfage, storage, or other charges against cargo . . ." (Article 3(a)). In the light of the requirement of specific authorization with respect to expenses for overland transportation, such language can hardly suffice, even were it not the case that the more normal reading of such language would seem to indicate that it relates solely to charges pertaining to terminal facilities.

Agreement No. 14 of the TPFC-Hong Kong, unlike Agreement No. 150, does contain reference to absorptions of charges relating to overland transportation, explicitly providing for ". . . absorption at loading or discharging ports of rail or coastal steamer freights or other charges . . ." when agreed to by the Conference members (Article 6(c)). While the quoted language does not specifically mention freights relating to transportation "by truck", a method frequently used to provide the indirect overland service here under consideration, the words "other charges" read in conjunction with the words "rail or coastal steamer freights" are certainly broad enough to be interpreted as including such truck freights, and the Commission has consistently acted in accord with such interpretation. (See e.g., *City of Portland* v. *Pacific Westbound Conference,* 4 F.M.B. 664, 667 (1955), modified 5 F.M.B. 118 (1956), *aff'd sub nom. Pacific Far East Line* v. *United States,* 246 F. 2d 711 (D.C. Cir. 1957); *Pacific Coast Port Equalization Rule,* 7 F.M.C., *supra,* at 630–631.)

During the course of the proceeding, the Conferences filed with us agreement language relating to indirect overland service to Portland, which we will act upon here.[6] Notice of these filings was published in the *Federal Register,* and Portland alone commented upon them, maintaining that the Commission should not act upon the filings until a decision had been reached in this proceeding, and that any action on them should be taken within the "context

[6] TPFC-Japan proposes to add to Article 3(a) of Agreement No. 150 the italicized words: "The absorption of wharfage, storage, or other charges against cargo (*including absorptions at loading and discharging ports of rail, truck or water freights*), is prohibited except as may be agreed between the parties hereto, and shown in the Conference tariff." (Agreement 150–49.)

TPFC-Hong Kong proposes to insert the word "truck" in its Article 6(c) so that it would read ". . . absorption at loading or dishcarging ports of rail, truck or coastal steamer or other charges . . . ." (Agreement 14–32.)

of the formal proceeding", there being "no need for the record to be reopened . . . for consideration of the proposed modifications." We will, therefore, approve the modification to Agreement No. 150 because, as we have seen, such modification is necessary to authorize the indirect overland service, and because, as we shall demonstrate hereinafter, such Conference service is not otherwise unlawful. Having found that Agreement No. 14 presently authorizes the indirect overland service, we will not approve the filing made by TPFC-Hong Kong but will lodge the filing in our agreement files as an "updating"[7] of the Conference agreement to make it more explicit and avoid problems in the future.[8]

II. Lawfulness under section 15, 16 and 17 of the shipping Act, 1916, of regular indirect service to Portland involving ocean carriers' absorption of cost of inland transportation from Seattle to Portland

A. All parties taking issue with the Administrative Law Judge's decisions object to his conclusion, aside from the question of section 15 authorization, with respect to the lawfulness of the indirect service to Portland. On the one hand, Portland, Hearing Counsel, Sacramento, Sea-Land, Stockton, Delaware River, Philadelphia, Boston, and Maryland assert that the indirect overland service to Portland, at least as it has been carried out in the past, is not only unlawful under the Shipping Act, 1916 as Administrative Law Julge Morgan found, but in addition cannot be legalized by the imposition for such service as he suggested, of a differentially higher rate than that assessed for direct water service to Seattle. The Conferences, on the other hand, contend that the indirect overland service to Portland is lawful, even without a differentially higher rate for such service than for direct water service to Seattle.

1. The fundamental ground of those (other than the Conferences) objecting to establishment of a differential rate as a condition for a lawful indirect overland service to Portland is that a rate differential system is contrary to the standards which this Commission and its predecessors have evolved for determining the

[7] Cf. *Investigation of Overland/OCP Rates and Absorptions*, *supra*, at 208–209, where we required respondent conferences to "upadate" their agreements to add language dealing with OCP rates, even though we found that the general ratemaking authority of these conferences already covered the fixing of such rates.

[8] Hearing Counsel's contention that the presently approved Conference agreements do not authorize indirect overland service because the Conferences have filed no tariffs which can be shown to have been intended by the Conferences to be used for such service goes not to the question of basic authority to provide a conference service, but to the matter of whether or not tariff provisions are sufficient in law to allow Conference members to provide indirect overland service. Accordingly, it will be treated in our discussion of tariff problems relating to the indirect service in Part V, *infra*.

lawfulness of the conditions under which carriers may provide service to ports without actually making vessel calls at those ports. They contend, moreover, that even if a rate differential system were a proper means of determining the legality of an indirect overland service, the particular system here adopted by the Administrative Law Judge has no support in the record. They maintain that no reason is given by the Administrative Law Judge for the adoption of the $1.50 rate differential other than that "it is proposed now in the absence of any other firm figure for such a differential", and that no evidence of record dealt in any way with the propriety of a $1.50 rate differential or indeed any rate differential. Thus, it is urged that adoption of the differential would violate the requirements of the Administrative Procedure Act that agency decisions be supported by "substantial evidence" and set forth the "basis" for their conclusions. 5 U.S.C. § § 557(c); 706(2)(E).

Those challenging the differential contend that the proper standards to be applied in determining the validity of any system designed to allow carriers to provide service to ports without actually making vessel calls there are the adequacy of service at the port at which carriers desire to avoid calling directly, and the economic and natural relationships between the port at which carriers desire to call and that at which they do not. If service at the latter is adequate, and if that port is not in the same harbor complex or geographic area as the port at which direct calls are made, or does not serve an area which is centrally, economically and naturally served by the direct-call port, then, these parties maintain, any absorption of the expense of inland transportation is unlawful.

The Administrative Law Judge erred, it is contended, in failing to find that Portland and Seattle are separate gateways in the Pacific Northwest from the standpoint of actual traffic movements, geography and history, and that Portland is a significant general cargo as well as bulk cargo port and hence is able to generate amounts of containerized cargo sufficient to justify regular water service to the Port. It is asserted that the paucity of record evidence supporting the validity of indirect service to Portland subjects the Port of Portland, the shippers who would use the Port and the traffic which would move through it in the absence of adsorptions to undue disadvantage and prejudice in violation of section 16, and unjustly discriminates against Portland and the shippers who would use the Port in violation of sections 15 and 17. Continuation of the indirect service will be detrimental to the commerce of the United States, it is asserted, since the overland routing of traffic to Portland will cause the port facilities to "dry up". This in turn will result in loss of government and private investment in these facilities, loss of employment to those in water transportation related occupations, and congestion at the water facilities of the ports at which vessels call. Finally and ultimately, after the "drying up" of ports like Portland is complete, even the absorptions themselves will be eliminated since the alternative of water transport through such ports having been foreclosed, they would no longer be necessary.

Stockton takes an approach somewhat different from that of the other parties objecting to the conclusion that the indirect service to Portland would be lawful if conditioned upon the $1.50 rate differential. Stockton asserts that the major error of the initial decision is its failure to distinguish between "transshipment" and "port equalization". Port equalization, Stockton maintains, occurs when a carrier calls inbound at a port other than that nearest the consignee, provides for transportation of the cargo overland to the consignee, and absorbs that portion of the cost of inland transportation which exceeds what the consignee would have paid had the cargo been delivered at the port nearest him. Transshipment, Stockton asserts, occurs when inbound cargo is discharged at a port other than that named as the destination port in the bill of lading and transported at the ocean carrier's expense to the port facilities of the destination port by another carrier by water, or by truck or rail. According to Stockton, the Conferences' tariff rules authorize both transshipment and equalization. The conclusion, Stockton contends, that the Conferences' present practice (which Stockton says is equalization) is unlawful, is proper, but the Administrative Law Judge should have found that the assessment of the $1.50 charge for the indirect service only served to aggravate the unlawfulness of the practice. If, however, Stockton maintains, the Conference "transships" rather than "equalizes", i.e., transports the cargo by land or water to the terminal facilities at Portland rather than to the consignee at his premises or a place other than the Portland terminal facility, and does so at the same rates which apply to its direct service to Portland, the Conferences' activities will be lawful since they would not then discriminate against or in any way prejudice the Port of Portland.

2. The Conferences quite understandably praise the initial decision as an attempt to develop new standards for determining the validity of water carrier services to a port by means other than direct vessel call. They maintain that the thesis of the initial

decisions is "not so much whether under 'the old standards' the cargo is 'naturally tributary' to a port but whether in the container era a ban on the absorption of inland transportation costs or inland feeder operations 'would be unduly restrictive.' "

The Conferences except, however, to the condition of a differentially higher rate. The rationale for the differentially higher rate, the Conferences assert, is the need to protect the Port of Portland and the consignees who receive cargo there from diversion away from the Port through the use of the absorption of overland transportation costs where water service to Portland is adequate. No Conference member now schedules an indirect Portland service without also scheduling a regular direct call service. Therefore, the needs of Portland and Portland consignees are fully protected, they maintain, if Conference lines which regularly call at Portland are allowed to provide an indirect service at the same rates. Portland consignees "would derive great benefit from the availability of continuous direct and indirect service, as they would have unrestricted freedom to choose which carriers and type of service best satisfy their varying needs." The Port of Portland will benefit from both direct and indirect conference service to Portland since carriers providing a direct service will endeavor to fill their vessels to offset the high costs of making direct vessel calls.

TPFC/Hong Kong also excepts to the conclusion that as of December 1970, water service from Hong Kong to Portland has been adequate, and thus no absorptions of the cost of inland transportation from Seattle absent rate differentials would be lawful. That Conference contends that Portland is an inadequate container port in the Hong Kong trade since direct full containership service has never been available to Portland from Hong Kong. Further, the Conference asserts, there is no showing in the record in this proceeding that TPFC-Hong Kong members are presently providing overland deliveries via Seattle in the Hong Kong-Portland trade.

Lastly, the Conferences except to the failure to find that all cargo moving on Portland bills of lading, including cargo destined for local points near Portland, is naturally tributary to Seattle as well as Portland. Seattle, the Conferences maintain, is the container load center in the Northwest, which the record shows is used by Portland as well as Seattle consignees. The close land proximity of Portland and Seattle, the heavy container volume at Seattle, past and present, Seattle's ability to service the Pacific Northwest as the Northwest's container load center, the use of Seattle shown in the record by Portland as well as Seattle consigness, and the treatment by the maritime regulatory agency of the Pacific Northwest as one inseparable geographic area all show, the Conferences assert, that any cargo destined for Portland or nearby points is naturally tributary to Seattle as well as Portland. Furthermore, the Conferences maintain, import cargo does not move "naturally" in the direction of any particular port, and the Commission and its predecessors have never so held.

B. Of the parties addressing themselves to the initial decision, only Seattle maintains that the Administrative Law Judge was correct in holding that indirect service to Portland would be proper if conditioned upon a rate differentially higher than that assessed for direct water service to Seattle. Seattle argues that the suggestion of the differential rate "offers the most hope of resolving the many conflicting interests which appear in this case."

Seattle contends that with respect to container movements, it is the "natural" port as between Portland and Seattle, since even during the period which Portland claims shows the rapid increase in the percentage of containerized cargo moving to Portland, nearly all containerized cargo moved through the Port of Seattle. Both Seattle and Portland, moreover, Seattle asserts, are, for container purposes, in the same "gateway". The differential rate approach, Seattle asserts, will itself determine when service is adequate and hence absorption of inland transportation costs are no longer justified.

The $1.50 figure for the differential is supported, Seattle contends, by testimony with respect to the differential between ocean rates for cargo imported to the area in the immediate vicinity of Portland (local cargo) and ocean rates for cargo destined for points further inland (OCP cargo). The differential may be adjusted by the Commission if a few years' experience shows that the $1.50 figure is too high or too low to achieve the result of terminating indirect service to Portland where direct water service is adequate. In the meantime, Portland "has little to fear from equalization" since only a "paltry number of containers [was] equalized during the period of December, 1970, through June, 1971, when there was no additional surcharge on equalized traffic."

Finally, Seattle, while favoring the differential rates established for indirect overland to Portland, objects to the present course of action of the Conferences' member lines in limiting indirect overland service to Portland to those lines also providing direct water service there. Seattle asserts that to restrict indirect overland service to Portland to those lines serving only Portland directly by water would have the undesirable effect of depriving Portland shippers who desired to use the overland service of a carrier which called only at Seattle of the ability to do so. Moreover, the restriction would raise factual problems with respect to the frequency with which a carrier would have to serve Portland directly before it could provide an indirect overland service.

The distinction made by Stockton between "transshipment" and "equalization", Seattle contends, is a distinction without a difference for the purposes of this proceeding. Since, Seattle asserts, the absorption of inland freight as conditioned by the $1.50 differential is justified, it makes no sense to require that such absorption apply only with respect to transportation to the port facilities at Portland and not the consignees' premises or other inland location.[9]

This proceeding places squarely before us the issue of the extent to which the peculiar features of large, highly specialized containerships should alter the criteria which we have evolved for examining the lawfulness of practices under which carriers serve ports without making direct calls by means of the assumption of inland transportation expenses.[10] In determining the validity of such practices, we of course recognize our regulatory obligation to be flexible in adopting our procedures to new developments in the transportation art. As the Supreme Court has observed:

> ... this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.[11]

The difficult problem is, of course, determining how much of our present approach is still of value and, to the extent it is not, how

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[9] Hearing Counsel and Portland assert that the absorption of inland transportation expenses which Stockton would allow with respect to "transhipment" to Portland's terminal facilities would be unlawful as unduly prejudicial and unjustly discriminatory to the Port of Portland since Portland would not have advantages of direct water service but would be relegated to the status of an "inland terminal".

[10] While, as indicated by our order of investigation, we shall attempt to provide guidance for the shipping industry generally in our analysis of the indirect overland service here involved, we cannot adopt the position of Maryland that this proceeding should be treated as a rulemaking proceeding, and that we should use it as a vehicle to establish rules with respect to all kinds of indirect water and land services to and from all ports. As all other parties recognize, this proceeding is designed to investigate only the lawfulness of certain practices of certain conferences at a certain port. To change the nature of the proceeding in the way sought by Maryland would be contrary to the language of the order of investigation and violative of the notice requirement established with respect to rulemaking proceedings by the Administrative Procedure Act. See 5 U.S.C. 553; *Pacific Coast European Conference* v. *United States*, 350 F. 2d 197, 204-206 (9th Cir. 1965), *cert. den.* 382 U.S. 958.

[11] *American Trucking Associations, Inc.* v. *Atchison, Topeka, & Santa Fe Railway Co., et al.*, 387 U.S. 397, 416 (1967).

much of it we may discard "within the limits of law and of fair and prudent administration."

It is obvious at the outset that a certain tacit assumption which seems to have been made with respect to the concept of "naturally tributary" cargo is not warranted. Both parties arguing in favor of the application of the concept to this proceeding and those arguing in opposition to it, or maintaining that Portland and Seattle serve the same "tributary area", appear to assume that the concept extends to all cargo moving in or out of a port. In actuality, however, the concept does not apply to the type of cargo which the record herein shows to be the kind which constitutes the vast majority moving through Pacific Northwest ports for which Portland and Seattle wish to vie.

The concept of naturally tributary cargo has as its purpose the maintenance of the movement of cargo through those ports which, because of a combination of geographic, commercial, and economic considerations, would naturally serve such cargo. See e.g., *Stockton Port District* v. *Pacific Westbound Conference*, 9 F.M.C. 12 (1965), *aff'd sub nom., Stockton Port District* v. *Federal Maritime Commission*, 369 F. 2d 380 (9th Cir. 1966), *cert. den.* 386 U.S. 1031 (1967); *Sea-Land Service, Inc.* v. *South Atlantic and Caribbean Line, Inc.*, 9 F.M.C. 338 (1966); *Pacific Coast European Conference—Rules 10 and 12*, 14 F.M.C. 266, 285–288 (1971). It cannot rationally be applied, and has in fact been specifically rejected, in a situation in which the cargo for which ports compete is destined for or moving to the central United States, i.e. OCP/overland cargo. As we observed in *Investigation of Overland/OCP Rates and Absorptions, supra*, "The naturally tributary concept based upon section 8 of the 1920 Act has to do with the territory *locally* tributary to a particular port; not with the general territory which an entire range of ports, or more than one range or seaboard, may serve competitively." (at 224.)[12] The Court of Appeals for the Fifth Circuit affirmed this approach to the "naturally tributary" concept, stating ". . . we are not prepared to hold that the mid-western portion of the United States is naturally tributary to petitioner ports. No authority has been called to our attention which would extend the natural tributary scope of § 8 to such limits." *Port of New York Authority* v. *Federal Maritime Commission*, 429 F. 2d, *supra*, at 670.

With respect to the relatively small amount of "local cargo" moving through the Port of Portland, the concept of naturally tributary cargo retains its validity. We have applied the concept in

[12] See also *Beaument Port Commission* v. *Seatrain lines, Inc.*, 2 U.S.M.C. 699, 708 (1943).

the past to containerized cargo geographically, commercially, and economically related to a particular area. See e.g., *Sea-Land Service, Inc.* v. *South Atlantic & Caribbean Line, Inc., supra.* Cargo does not cease to be naturally tributary to an area merely because it is containerized. The interest of developing ports which the Congress sought to foster in section 8 and the protection of ports from unjustly discriminatory or unduly prejudicial treatment under sections 16 and 17 of the Shipping Act cannot be thwarted simply by placing cargo in containers. Nor, as the Conferences contend, does the "naturally tributary" concept apply only to outbound movements. There is no indication in section 8 of the Merchant Marine Act, 1920, the source of the concept, that it is to apply only to outbound cargo, and no reason in logic why it should. Surely, the development of port facilities depends a much upon inbound cargo as it does cargo moving outbound. Cargo destined for the "local" area around a port does not cease to be naturally tributary within the meaning of section 8 merely because of the direction in which it moves.

Contrary to the Conferences' contention, moreover, there is an area which can historically, geographically, economically and commercially be considered naturally tributary to Portland and not equally tributary to Seattle. The geography of the two ports, as outlined *supra,* clearly demonstrates that they constitute two separate and distinct harbor complexes, one situated on the Columbia River about 90 miles from the Pacific Ocean and another, separated by nearly 200 land miles and over 350 nautical miles, located on Puget Sound about 132 miles from the ocean. Historically, cargo from the surrounding area of each port has moved through that port, and this has been recognized by our predecessor. See e.g., *City of Portland* v. *Pacific Westbound Conference, supra.* The record in this proceeding, moreover, establishes that a separate economic and commercial hinterland exists for cargoes moving to and from areas near each of the two ports, areas where the proximity of local industries and lower inland mileages suggest the "naturalness" of movements through one rather than the other port.

[13] The Conferences are incorrect in contending that *City of Portland* shows that the Pacific Northwest constitutes one inseparable geographic area. That proceedings involved attempts by a conference to avoid calling at Northwest Pacific Coast ports generally by absorbing inland transportation expenses to San Francisco. It thus contains general language concerning discrimination against the Pacific Northwest. To the extent that proceeding examined the geographic, commercial and economic structure of specific ports within the Pacific Northwest area, it indicated an awareness that Seattle and Portland constituted separate port areas, that certain commerce naturally flowed through one as distinct from the other port, and that the pattern of costs of inland transportation to and from areas near each of these two ports created a separate economic "hinterland" for each port. See especially 4 F.M.B. 667, 669, 673, 675–677; 5 F.M.B. 130, 134.

The only justification which has been recognized for drawing away cargo from ports to which it is naturally tributary is inadequacy of steamship service at such ports to handle that cargo. See e.g., *City of Portland* v. *Pacific Westbound Conference, supra; Proportional Commodity Rates on Cigarettes and Tobacco,* 6 F.M.B. 48 (1960); *Stockton Port District* v. *Pacific Westbound Conference, supra; Sea-Land Service, Inc.* v. *South Atlantic and Caribbean Line, Inc., supra.* Surely there can be no serious contention that the present quantity of steamship service is inadequate to handle even the relatively small amount of "local" Portland cargo, and indeed no party to this proceeding so contends.

As we have stated above, we have applied the naturally tributary concept to containerized cargo in the past and would continue to do so here were only local cargo involved. But, as shown by the *OCP* case, *supra,* the concept has no materiality to cargo moving to or from the central United States. Such cargo cannot be said to move "naturally" through any particular ocean gateway. The problem with respect to such cargoes is not one of determining through which gateway they would naturally move, but rather one of attempting to define the extent to which carriers may adopt various practices designed to enable them to compete for these cargoes.

In the *OCP* case, we held that a system of lower rates for water transportation between the Far East and U.S. Pacific Coast ports than the rates obtaining for transportation between the Far East and U.S. Atlantic and Gulf Coast ports was a legitimate means of competing for cargo from the central portion of the United States. Our holding was based upon our findings that the system of OCP/overland rates acted to allow ports to maintain their competitive positions, to preserve for shippers an alternate transportation route, and to provide carriers calling at Pacific Coast ports with the means to obtain additional traffic. (See *Investigation of Overland/OCP Rates and Absorptions, supra,* at 221–222.)

The same considerations which led us to permit the system of OCP/overland rates in that proceeding convince us that a regular indirect service to Portland by the member lines of the Conferences would not be violative of the Shipping Act, 1916, if subjected to certain conditions. Evidence of record in this proceeding indicates that consignees in the Portland area find an indirect overland service very useful to their businesses, and the Conference lines find it economically preferable to serve Portland indirectly some of the time. A type of indirect service may be prescribed which will adequately protect the Port of Portland's legitimate competitive interests.

Although we cannot here devise a neatly precise formula which will definitively solve the problem of the extent to which carriers at ports generally may compete for containerized OCP cargo, the evidence of record indicates a method which we feel will adequately protect the carrier and shipper interests in the Pacific Northwest for the foreseeable future, while at the same time allowing Portland fully to develop its ability to function as a load center for containerized cargo moving to the centeral United States. The extent to which the approach we here follow can be applied to other cases will, of course, depend upon the facts and circumstances of those cases.

First of all, we wish to make clear that we do not here require that any line serve Portland at all if it does not wish to do so. The naked authority to require a carrier to call, or to continue to call, at a particular port is one which we do not possess. See e.g., *Lucking* v. *Detroit-Cleveland Nav. Co.*, 265 U.S. 346 (1924); *McCormick Steamship Co.* v. *U.S.*, 16 F. Supp. 45 (N.D. Cal. 1936); *Gulf-Puerto Rico Rates*, 2 U.S.M.C. 410 (1940); *San Diego Harbor Commission* v. *Matson Navigation Co.*, 7 F.M.C. 394 (1962). We do, however, possess the power to insure that ports are not unduly or unreasonably prejudiced or disadvantaged (*West-Bound Intercoastal Rates to Vancouver*, 1 U.S.M.C. 770, 773–774 (1938)), particularly through the collective force of an agency-approved agreement (*Investigation of Prac.—Great Lakes/Japan Trade*, 8 F.M.C. 270, 274–275 (1964)). To insure that Portland is not subjected to such prejudice or disadvantage, we will require that to the extent any of the Conference lines desires to serve Portland via indirect overland service, it provides a certain level of direct service. The record herein shows that Portland generates substantial amounts of local cargo and that the present level of water service is adquate to handle such cargo. Thus, the Conference carriers cannot obtain access to local cargoes by refusing to call directly at Portland by water.

Secondly, the record in this proceeding shows that all interests will be amply protected, at least in the foreseeable future, by a requirement that each line serving Portland by means of an indirect overland service serve that port by direct water service,[14] with the frequency of at least alternate sailings. A major consider-

[14] "Direct water servie", as used herein, encompaases any system whereby carriers move cargo between ports solely by water, and includes, but is not limited to, small-class containerships in a relay or feeder service of the type which the record shows is contemplated by Sea-Land. Use of such small-

ation in this proceeding, aside from the matter of the rights of Portland with respect to naturally tributary local cargo, is the extent to which each port should be allowed to develop into a so-called container "load center". We have always striven to administer our regulatory authority in a manner most conducive to the development of the full potential of newly emerging transportation phenomena. See e.g., *Disposition of Container Marine Lines*, 11 F.M.C. 476, 482–483 (1968); *Freight Rates and Practices—Florida/Puerto Rico Trade*, 7 F.M.C. 686, 694–695 (1964); *Reduction in Rates—Pac. Coast-Hawaii*, 8 F.M.C. 258, 264 (1964). The record before Administrative Law Judge Morgan, particularly in the reopened proceeding, shows an increasing demand for container services at Portland, and a response to this demand in the increase of container service provided at Portland. For the seven-month period beginning on December 11, 1970 alone, when direct full containership service was instituted at Portland by the first call there of the Japanese six-line consortium, over 5,000 containers and more than 70,000 revenue tons of containerized general cargo were generated in the two trades involved in this proceeding. The Japanese consortium handled 1,530 containers eastbound for this period (including 362 transported overland via Seattle), as compared with only 159 containers discharged at Portland eastbound in 1969 carried by all members of TPFC-Japan and 341 by all members for the first three months of 1970. The cargo with respect to which competition between Portland and Seattle is properly directed, namely OCP cargo, is, as Administrative Law Judge Morgan found, the cargo most likely to move in containers in the subject trades. When general cargo moving to Portland from Japan during the period between December 1970 and 1971 is examined, it appears that containerized cargo represents 41 percent of all such cargo. When the proportion of containerized cargo moving to Portland from Japan during this period is compared with the respective proportion for the year 1969, the last whole year for which the record contains data, the result is an increase of over 22 times. Moreover, during the period from December 1970 to June 1971, additional direct container service at Portland was instituted by AML, Knutsen and Barber.

While such statistics certainly suggest a great increase in the ability of Portland to generate containerized cargo, they do not necessarily indicate the ability of Portland to attract cargo to such

class vessels by member lines cannot be prevented by Conference action (see Docket No. 70–18, *Sacramento-Yolo Port District* v. *Pacific Coast European Conference, et al.*, report served August 10, 1971). Moreover, whatever the problems inherent in the use of such relay or feeder ships may be, they are a matter outside the scope of the present proceeding.

an extent that it is likely to overtake Seattle as the dominant general cargo facility in the Pacific Northwest. In fact, the record herein shows that, while the percentage of containerized cargo at Portland is increasing, for the first ten months of 1971 at any rate, the amount of total general cargo, the source from which containerized cargo is drawn, moving to Portland in the Japanese trade, reveals a fairly strong downward trend when compared to the amount of total general cargo moving to Portland in that trade in 1970, a trend, moreover, which is particularly marked in the case of OCP cargoes. The significance of this downward trend is emphasized when it is noted that during the first 10 months of 1971, Seattle continued to expand the amount of general cargo handled over the 1970 level, particularly with respect to OCP cargoes.

The concept of adequacy of service is a troublesome one. In a very real sense, it is the ocean carriers themselves who, because of a desire to serve a port indirectly, can theoretically make service "inadequate" merely by refusing to serve that port directly, and then unlawfully divert cargo from that port by an indirect service. Our requirement here that no carrier can absorb inland transportation costs to Portland who does not directly serve Portland by water on alternate sailings should remove this theoretical possibility.

Adequacy of service is a general, rather than a particularized, concept, and the mere fact that service at Portland may not be completely adequate with respect to all cargoes and all trades does not adversely affect a finding of adequacy of service. Cf. *Sea-Land Service, Inc.* v. *S. Atlantic & Caribbean Line, Inc.*, 9 F.M.C., *supra*, at 349–350; *Stockton Port District* v. *Pacific Westbound Conf., et al.*, 9 F.M.C., *supra*, at 33–34. Whatever may have been the condition of service at Portland prior to the institution of full containership service at Portland, we agree with Administrative Law Judge Morgan that the present level of service in the subject trades now appears to be adequate. When the expansion of direct containership calls at Portland in the subject trades is viewed together with the small amount of local cargo moving through Portland and the decreasing trend with respect to containerizable, if not containerized cargo, moving through that port, there is certainly ample foundation for a finding of adequacy. In fact, Portland itself contends that if adequacy of service is used as a standard for determining the lawfulness of an indirect overland service, the present level of service at Portland should be found to be adequate.[15]

Administrative Law Judge Morgan's attempt at a determination of adequacy of service through utilization of a formula which could be applied in a manner which would be largely self-effectuating is understandable, but unfortunately unsupported by the record. As the Administrative Law Judge himself recognized, there is no evidence upon which the $1.50 differential can be grounded. The fact that the $1.50 is, as indicated by Seattle, one-half the average differential between local and overland/OCP rates has no significance with respect to a differential which might be established between rates for an overland vis-a-vis a direct water service.

A more fatal defect, however, is that such a differential penalizes a shipper who uses the indirect service. Shippers should be free to choose between the member line's direct and indirect services in order to elect the one which best suits their needs. Moreover, to allow the Conference to impose an additional $1.50 for the indirect service would be violative of the mandate of section 205, Merchant Marine Act, 1936, forbidding carriers collectively to prevent service at Portland at the same rates which apply to service at Seattle. See e.g., *Pacific Coast European Conference—Rules 10 and 12, supra; Sacramento-Yolo Port District* v. *Pacific Coast European Conference, et al., supra; Stockton Port District* v. *Pacific Westbound Conference*, 9 F.M.C., *supra*, at 29.[16]

The distinction made by Stockton between "transshipment" and "equalization" is one without a difference, insofar as this proceeding is concerned. As we observed in *Sea-Land Service, Inc.* v. *S. Atlantic & Caribbean Line, Inc.*, 9 F.M.C., *supra*, at 344–346, "equalization" and "transshipment" are merely variations on the common theme of serving a port without directly calling there. To the extent such practices act to deprive a port of naturally tributary cargo or subject it to undue prejudice or unjust discrimination, they are unlawful. See *Sea-Land Service, Inc.* v. *S. Atlantic & Caribbean Line, Inc., supra*, at 346. Where the indirect service is not unlawful, to deny the use of "equalization" but permit "transshipment" would merely serve to deny the consignee a service under which a carrier would transport cargo to a consignee's premises and require him to pick up cargo at the Portland docks. Since the cost of the transportation between the Portland docks and the consignees' premises would be borne by the consignees

[15] See also *Agreement No. 9835*, 14 F.M.C. 203, 204, 208 (1971), in which Portland withdrew its exceptions to approval of the service agreement of the six-line Japanese consortium following the lines' decision to serve Portland in the trade from Japan on direct sailings every 20 days.

[16] As we have held in *Sacramento-Yolo*, section 205 applies to indirect as well as direct service.

under the Conference tariffs, the denial of such service, would foreclose a significant benefit to consignees.[17]

Although we certainly agree with Portland that the "drying up" of port terminal facilities is to be prevented if possible, there is absolutely no indication on the record in this proceeding that such is even remotely likely. As we have seen, and as Portland itself admits, the present level of service is adequate to meet the needs of consignees desiring to use Portland as a destination port. The absolute prohibition of absorption with respect to the indirect service by Conference members, while not helping Portland in any concrete way, would deprive consignees of a valuable service which many of them desire to use. Portland must bear in mind that although its interest is one which we are bound to protect (and we feel our decision here does so), the carriers and consignees also have interests which we must strive to protect and that "the public interest is much larger than the needs or desires [of a particular port area]." *Stockton Port District* v. *Pacific Westbound Conference*, 9 F.M.C., *supra*, at 28.

Similarly, the Conferences must realize that there is more at stake in making determinations with respect to the public interest than the profitability of carrier operations. Alternate direct calls at Portland as a condition to indirect service should not endanger the financial position of the carriers, as they themselves appear to admit.[18] No conference member now schedules an indirect Portland services without also scheduling a regular direct call service (see page 24, *supra*), and alternate direct calls in conjunction with indirect calls is the form of service which the lines themselves appear to provide and, in their managerial discretion, seek to provide (see pages 8–9, *supra*). In any event, we do not here require any carrier to call at Portland if, in its managerial discretion, it feels it should not do so.

III. Consistency with section 8, Merchant Marine Act, 1920, of regular indirect service to Portland

Portland, Hearing Counsel and Delaware River except to Administrative Law Judge Morgan's conclusion that the indirect overland service to Portland is consistent with the policy of section 8, Merchant Marine Act, 1920. They contend that the policy enunciated in this section requires that cargo be routed through the ports to which it is naturally tributary so long as service at

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[17] As Stockton recognizes, the present Conference tariffs authorize both "transshipment" and "equalization" (see page 138, *infra*, fn. 22, for text of relevant tariff provision).

[18] Accordingly, we find it unecessary to make a finding with respect to the so-called "break-even" point, *i.e.* the point at which it is as economical for the carrier to provide a direct service as it is for it to provide an indirect service.

such ports is adequate, and that since service at Portland is adequate, absorptions of all or any part of the inland transportation expenses from Seattle are unlawful. Hearing Counsel specifically contend that although there may in fact be some conflict between the goals of promotion of development of ports and promotion of development of intermodal transportation, such conflict is properly reconciled by Congress, and that unless and until Congress makes a determination that development of intermodal transportation is to be favored over preservation of our present port structure, we are bound by the current Congressional declaration of policy embodied in section 8 which favors the promotion, encouragement and development of ports.

The Conferences and Seattle, on the other hand, assert that section 8, Merchant Marine Act, 1920, only enunciates a general policy of developing ports and transportation facilities, and does not require that such policy be followed if the result hinders the development of container technology. They contend that broad powers are granted to the Commission to develop rational and meaningful standards for the development of intermodal transportation, and section 8 is but one of those standards. Seattle maintains, moreover, that the differential rate system for indirect service to Portland is fully consistent with the policy of section 8 since it encourages the use of Seattle, which provides the most adequate service of Northwest ports and through which container cargo would "naturally" pass.

As will appear from our discussion in Part II, *supra*, we feel that the impact of the policy embodied in section 8, Merchant Marine Act, 1920, upon this proceeding is slight because of the relatively small amount of "local" or "naturally tributary" cargo involved in this proceeding. Moreover, as observed by the Court of Appeals for the Fifth Circuit in *Port of New York Auth.* v. *Federal Maritime Com'n.*, 429 F.2d, *supra*, at 670, section 8 is only "a statement of congressional policy . . . to be given weight by the Commission . . . ." It does not, unlike section 205, Merchant Marine Act, 1936, for example, proscribe any particular conduct. See *Pacific Coast European Conference—Rules 10 and 12*, 14 F.M.C., *supra*, at 280–281. In such circumstances, we feel that the policy of section 8 is amply served in this proceeding by our requirement that Conference carriers serving Portland call there directly by water on at least every other sailing. This will prevent carriers not calling at Portland by water from absorbing any inland transportation costs and insure a level of water service by those calling there sufficient, so far as the record here appears, to handle local Portland cargoes.

IV. Effect of section 205, Merchant Marine Act, 1936, upon regular indirect service to Portland

Sacramento, Portland and Stockton except to Administrative Law Judge Morgan's failure to find the overland service to Portland as presently provided by the Conference lines, contrary to section 205, Merchant Marine Act, 1936, and hence unlawful. This statutory provision, they contend, is an overriding statement of Congressional will and, by its own terms, invalidates such overland service, irrespective of "the power and authority otherwise vested in the Commission." Section 205, they maintain, requires that the Conferences refrain from collective action which prevents or attempts to prevent service at Portland at the same rates for service at Seattle. Sacramento and Portland maintain that any conference line indirect service prevents direct service to Portland, and that the differential rate aggravates the violation of section 205 by resulting in higher rates for service to Portland than for service to Seattle. Stockton maintains that indirect overland service via Seattle to the water terminal facilities at Portland is lawful under section 205 of the Merchant Marine Act, 1936, since it would constitute service at the Port, but that indirect overland service to a consignee's premises or other place away from Portland's terminal facilities would be unlawful as preventing service "at the Port". Stockton also contends that the indirect service to the Port of Portland must be at the same rates as those assessed for the direct service at Portland or Seattle to be consistent with section 205.

The Conferences and Seattle, on the other hand, maintain that indirect overland service to Portland via Seattle is completely consistent with the requirements of section 205. Commission decisions, they contend, show that section 205 was intended to encourage indirect as well as direct service, and the record contains no evidence that anyone has been prevented by the indirect service from providing a direct water service to Portland.

Section 205, Merchant Marine Act, 1936, does, as noted *supra*, present an absolute prohibition against collective action preventing service to a port or service to a port at the same rates as those applicable to the "next regularly served port." As we have seen, a Conference-imposed rate differential between direct water service and indirect overland service would be violative of such prohibition. Absent such rate differential, however, there is nothing in the manner of serving Portland by the indirect overland service here under consideration which would be contrary to section 205.

First of all, the rates applicable to service at Portland and Seattle for both the indirect overland service and direct water service would be the same.[19] Moreover, the system of indirect service which we here authorize does not prevent service to Portland, but in fact provides for an increase in service by requiring any carrier serving Portland indirectly by overland service also to make direct water calls at Portland.

Lastly, section 205 relates not to conditions imposed by agency regulation, but to voluntary agreements between carriers. Even if section 205 were applicable to an indirect service of the type here involved, there is nothing in that statutory provision which would make it applicable to the imposition of requirements respecting service when made by the Commission rather than by consensual arrangement between carriers.

V. *Tariff problems under section 18(b), Shipping Act, 1916, relating to the regular indirect service to Portland involving ocean carriers' absorption of cost of inland transportation from Seattle to Portland*

Hearing Counsel and Maryland maintain that Administrative Law Judge Morgan erred in failing to find that the indirect service here in issue is unauthorized by the Conferences' tariffs. More specifically, Hearing Counsel contend that the absorptions of the cost of inland transportation involved in the indirect Portland service are not lawfully provided for in the Conference tariffs since there is no indication that the tariff provisions with respect to absorptions were intended by the Conference members to authorize absorptions in connection with a regular indirect service like that here involved. Hearing Counsel also maintain that since the service involves an intermodal movement under a through rate, the tariffs are deficient for failing expressly to describe the nature of the service provided and failing separately to state the inland and ocean portions of the rate as is required by the Commission's General Order 13 (46 CFR § 536.16).

The Conferences, on the other hand, assert that their tariffs provide for the service here at issue. With respect to Hearing Counsel's argument that the Commission's General Order 13 requires a separate statement of the rates and services with respect to ocean and inland transportation, the Conferences main-

[19] As we have held in *Stockton Port District* v. *Pacific Westbound Con., et al.*, 9 F.M.C., *supra*, at 30, equalization of inaland transportation charges does not result in "different" rates.

tain that no such separate statements are required because (1) their rates are not through intermodal rates, but simply port-to-port rates; (2) there is no single-factor rate arrangement between Conference members and connecting land carriers; and (3) there is no holding out of service to points beyond port terminal areas. The Conferences do not except, however, to the Administrative Law Judge's holding that tariffs indicate unambiguously whether, and to what extent, carriers will absorb the cost of inland transportation from Seattle to Portland and have submitted tariff revisions requiring absorptions on all commodities transported in regular indirect overland service to Portland via Seattle.

In light of the result we have reached with respect to the issue of the authorization *vel non* in the basic agreements of the two Conferences to provide an indirect overland service (see Part I, *supra*), we need not dwell at any great length upon the matter of tariff authorization for such service. To the extent such service has been outside the authorization furnished by the basic Conference agreement (as is the case with respect to the Trans-Pacific Freight Conference of Japan), no tariff provision can be used as a basis for the indirect service. See e.g., *Agreement 7700—Establishment of a Rate Structure*, 10 F.M.C., *supra, aff'd sub nom. Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F. 2d, *supra*. Moreover, to the extent that indirect overland service is provided in the future, it will be lawful if performed in accordance with the modification to the Conference agreement which we have here approved and the tariff requirements which we here impose. To the extent, on the other hand, that a conference's approved agreement has always authorized the establishment of an indirect overland system (as is the case with the Trans-Pacific Freight Conference (Hong Kong)), the fact that a tariff provision may not have originally been designed to apply to the type of service here in issue is irrelevant if in fact the language in the tariff can be reasonably read to cover such service. See e.g., *Aluminum Products of Puerto Rico, Inc.* v. *Trans-Caribbean Motor Transport, Inc.*, 5 F.M.B. 1, VI–VII (1956); *National Cable and Metal Co.* v. *American-Hawaiian S.S. Co.*, 2 U.S.M.C. 470, 473 (1941); *Thomas G. Crowe, et al.* v. *Southern S.S., et al.*, 1 U.S.S.B. 145, 147 (1929).[20] We feel that the language may reasonably be construed as broad enough to cover an indirect service, whether performed on a regular or irregular basis.

[20] The situation here is not to be confused with that in which tariff provisions are construed against their draftsmen because of ambiguity. The wording of the tariff is clear. The problem with the tariff is not the meaning of unclear language, but how far it can reasonably be construed to cover an indirect overland service.

As Administrative Law Judge Morgan found, however, the tariffs relating to the indirect service were unlawful inasmuch as they failed to show with certainty what charges would apply with respect to the indirect service. The tariff provisions allowed absorption at the carriers' option, and thus both failed to comply with the mandate of section 18(b)(1) of the Act requiring a "plain" and "separate" statement of carriers' charges and opened the door to possible discrimination among consignees desiring to use the indirect service.[21]

As indicated in the Conferences' exceptions to Administrative Law Judge Morgan's decision, tariffs have now been filed which eliminate any uncertainty or possibility for discrimination by making mandatory the absorption of inland transportation expense whenever the indirect service is provided.[22]

Contrary to Hearing Counsel's contention, our regulation with respect to the filing of through routes and through rates was not intended to apply to a service like that here under consideration. As will appear from a reading of the regulation, its coverage is limited to arrangements "for the continuous carriage of goods between points of origin and destination, either or both of which lie *beyond port terminal areas*" (46 CFR § 536.16(a)) (emphasis supplied), and does not apply to situations where, as here, carriers merely provide services between two ports.

CONCLUSION

We are confident that the result we have reached in this proceeding will adequately protect all interests, while allowing for the fullest possible development of the use of these interests of the transportatation benefits to be derived from the container revolution. Both Portland and Seattle will, so far as appears from the record in this proceeding, have adequate direct water service to handle their local cargo, as well as to allow them to compete for OCP cargoes to the extent that it appears herein they are, or will

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[21] Cf. *Intercoastal Rates of Amer.—Hawaiian S.S. Co.*, 1 U.S.S.B.B. 349, 351 (1934).

[22] The relevant tariff rules now provide: "When the ocean carrier discharges cargo at a terminal port other than the port named in the ocean Bill of Lading, the ocean carrier shall arrange at its expense for movement via rail, truck or water of the shipment from port of actual discharage only as indicated hereunder:

"(1) To the carrier's terminal dock at port of destination declared on the Bill of Lading in the case of cargo which has been entered through customs at the port of discharge.

"The carrier may forward such cargo direct to a point designated by the consignee, provided the consignee pays the cost which he would normally have incurred either by rail, truck or water, to such point if the cargo has been discharged at the terminal port named in the ocean Bill of Lading.

or—

"(2) To the terminal of the bonded On-Carrier nearest to the port of destination declared on the carrier's Bill of Lading in the case of cargo which has not been entered through Customs at the port of discharge."

in the foreseeable future, be able. The Conference carriers will retain their managerial discretion with respect to whether or not to serve either Seattle or Portland and the amount of service to be provided at each port, but the requirement that lines serving Portland call at Portland directly on at least alternate sailings will prevent unlawful overland diversion of local Portland cargoes and adequately preserve the right of Portland to compete for OCP cargoes. Finally, Portland and Seattle will have, so far as appears from this record, entirely adequate service to meet their transportation needs, and Portland consignees, moreover, will have the flexibility of choosing between the direct and indirect services based upon their particular transportation requirements.

We realize, however, that nothing, especially conditions with respect to an industry as dynamic as water transportation has become in recent years, remains immutable. We will, therefore, require quarterly reports from the Conferences with respect to the circumstances relating to the performance of the direct and indirect services to Portland over the next three years in order to allow us to maintain continuing surveillance over the effects of the indirect service and its concomitant absorptions in order that we can take any further steps which may in the future appear appropriate. Specifically, we shall require a listing of the total number of containers and amount of tonnage, together with the proportions of such totals represented by "local" and "OCP" cargoes, for each direct sailing to Portland, and a listing, for each sailing on which Portland is served indirectly by overland service, of the total number of containers and amount of tonnage transported to Portland, together with the proportions of such totals represented by "local" and "OCP" cargoes, and the total cost of absorptions on each indirect vessel call.

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: (1) approving Agreement No. 150–49 of the Trans-Pacific Freight Conference of Japan authorizing a regular indirect overland service; (2) requiring that to the extent an indirect overland service is provided to Portland by any Conference line, that line also call directly by water at Portland on at least alternate sailings, except when it is unable to do so because of emergency situations such as strikes, weather conditions, or port congestion; (3) requiring that to the extent an indirect service is provided, it is offered pursuant to the tariff provisions which insure that it be granted to all consignees who are similarly situated insofar as transportation conditions are concerned; and (4) ordering the filing of quarterly reports for the three-year period beginning January 1, 1974, and ending December 31, 1977, due 45 days after the end of each quarter, detailing the operations of the direct and indirect services to Portland.

VICE CHAIRMAN GEORGE H. HEARN AND COMMISSIONER CLARENCE MORSE, CONCURRING

The current facts of the Portland situation are that by a combination of judicial and commercial action the parties to this case immediately affected have satisfied their difficulties by the carriers agreeing to provide alternate direct calls to Portland. No conference member now schedules an indirect Portland service without also making direct calls. Thus, the alternate direct calls which the majority is requiring in conjunction with indirect calls is the form of service the lines appear to provide as a managerial choice.

The majority discuss the "naturally tributary" concept in respect both to local and to overland cargo. For the purposes of this discussion, we may assume the reasoning of the majority is sound, but even were we to apply this concept here we nevertheless find and conclude that the direct service being provided to Portland by the Japanese lines on alternate voyages defeats any claim by Portland of undue preference or undue prejudice in respect to indirect service provided by those lines. Likewise, if any other line in that trade elects to provide direct service to Portland on alternate voyages, such direct service would defeat any claim by Portland of undue preference or undue prejudice by such line in respect to its indirect service to Portland.

Hence, we find it unnecessary to enter into discussions of the concepts of "adequacy of service" or "naturally tributary", or to establish any standards or guidelines which would indicate that indirect service would be found either lawful or unlawful in other situations unless direct service of some kind is also offered.

In all events, we should encourage activities which are in the public interest and "... within the limits of the law and fair and prudent administration ... [We] are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Assn.* v. *AT&SF Ry Co.*, 387 U.S. 397 at 416 (1967).

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–19

INTERMODAL SERVICE TO PORTLAND, OREGON

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:

1. Agreement No. 150–49 of the Trans-Pacific Freight Conference of Japan be, and it hereby is, approved;

2. To the extent an indirect overland service is provided to Portland, Oregon, by any member line of either the Trans-Pacific Freight Conference of Japan or the Trans-Pacific Freight Conference (Hong Kong), that line also call directly by water at Portland on at least alternate sailings, except when it is unable to do so because of emergency situations, such as strikes, weather conditions, or port congestion;

3. To the extent an indirect service is offered by the member lines of the two aforesaid Conferences, the tariff provisions relating to such service must not allow such member lines an option with respect to whether such service will be afforded, but must insure that it be granted to all consignees who are similarly situated insofar as transportation conditions are concerned; and

4. The Trans-Pacific Freight Conference of Japan and the Trans-Pacific Freight Conference (Hong Kong) each file quarterly reports for the period beginning January 1, 1974, and ending December 31, 1977, due 45 days after the end of each quarter, separately listing the total number of containers, total amount of tonnage, and proportions of such totals represented by "local" and "OCP" cargoes for each direct sailing to Portland, and the total number of containers, and total amount of tonnage transported

overland to Portland on each sailing on which Portland is served indirectly by overland service, together with the proportions of such totals represented by "local" and "OCP" cargoes and the total cost of absorptions on each indirect vessel call.

By the Commission.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–39

OCEAN FREIGHT CONSULTANTS

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY

ADOPTION OF INITIAL DECISION

October 23, 1973

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge Stanley M. Levy served September 26, 1972, in which the Administrative Law Judge, in dismissing the complaint, determined that the claimant had failed to sustain its case. He concluded that any mistake in description in this instance was made by the shipper, not the carrier, and the shipper (claimant) was on notice to describe its merchandise to conform with the merchandise descriptions appearing in the tariff or be assessed the cargo N.O.S. rate. Accordingly, the Administrative Law Judge found no inadvertent misdescription; rather, he determined the cargo to be properly rated according to the commodity description selected by the shipper, equating this case to the facts in Informal Docket 261(I) served November 18, 1971, which claim was rejected for the same reasons.

On exception, claimant takes issue with the Administrative Law Judge's findings and urges that his conclusions in the case open the door to the "very discriminations and prejudices that section 18(b) of the Shipping Act was designed to preclude." OFC cites pertinent portions of the Harter Act in an attempt to show that the carrier has certain responsibilities to determine that what is actually shipped is in fact described on the bill of lading, arguing that the carrier should not be permitted to profit from its failure to assure that the bill of lading properly describes the shipment.

Claimant argues that it has shown uncontroverted evidence as to what was shipped, since respondent has not raised any issues as to the proof of what was actually transported.

Lastly, claimant cites the practices of another conference in rating this cargo as silicon dioxide as further proof of its case.

Respondent maintains the position that the applicable provision in the Conference's tariff provides that on articles described by trade names the carrier can only assess the cargo N.O.S. rate.

The single issue, whether the cargo as described should have been rated other than cargo N.O.S. turns on whether claimant has proved its case.

Informal Docket 261(I), *Johnson & Johnson International* v. *Prudential Grace Lines*, served March 18, 1971, is the identical case. In that case the Administrative Law Judge found against the claimant, stating at page 2 of his Initial Decision:

> The Commission has held that claims for reparation involving alleged errors of weight, measurement or description of necessity involve "heavy burdens of proof" once the shipment has left the custody of the carrier. It is often the case, as it is here, that the carrier in classifying and rating a shipment must look to the information given him by the shipper or freight forwarder. Fairness would seem to entitle the carrier in most cases to rely on such information and to charge and collect freight in accordance with the description provided by the shipper. Nor, in these circumstances, can it be expected that the carrier's clerk will make a detailed and expert independent investigation by use of a chemical dictionary or otherwise to attempt to supplement or clarify the commodity description provided by the shipper. It is the claimant, not the carrier, who must bear the "heavy burden of proof" and establish "sufficient facts to indicate with reasonable certainty or definiteness the validity of the claims."* Also, while not controlling in all cases, the provision found in many tariffs (such as the one here involved) that trade names will not be recognized as valid for classification and rating purposes may be presumed to be known to the shipper and should be given weight in evaluating the validity of a claim for reparation.

More recently, in Docket No. 71–81, *Ocean Freight Consultants, Inc.* v. *Italpacific Line*, the Commission adopted the Administrative Law Judge's Initial Decision. On page 5 of that decision, the Administrative Law Judge stated:

> 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.

It is undisputed by the parties that the shipper initiated the commodity description used on the bill of lading. It is also obvious

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**Colgate Palmolive Company* v. *United Fruit Company*, Informal Docket No. 115(I), Commission Order served Stptember 30, 1970.

that the carrier charged the rate as specified in the tariff for that commodity as described by a trade name on the bill of lading. It is further apparent that the consignee had taken possession of the cargo without voicing any claim at that time.

Claimant also attempts to show that the carrier has a responsibility to assure that the bill of lading properly describes the commodity actually shipped, citing what it believes are pertinent portions of the Harter Act to this end.

The Harter Act requires, *inter alia,* that the carrier issue a bill of lading to the shipper, such bill to contain "the marks necessary for identification number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to or received by ... the vessel ...." We take no issue with this duty; however, counsel would urge that when the shipper prepares the bill of lading and presents it to the carrier, as actually happened here, the carrier has some further duty to go beyond the shipper's own description to determine if the shipper is in fact properly describing his own shipment.

This Commission at one time attempted to place a similar burden of further investigation into what was actually shipped upon a carrier, but such approach was rejected by the Courts. In *Royal Netherlands Steamship Co.* v. *Federal Maritime Board,* 304 F. 2d 938 (1962), the United States Court of Appeals for the District of Columbia reversed that portion of the Board's order which found a duty upon the carrier to "rely on their own processes of discovery and on their own personnel ...." The Board found that the carrier had by intent avoided this duty and had placed "complete reliance on shippers or forwarders who have an incentive to conceal", and had thus violated section 16 of the Act.** The Court, in rejecting that conclusion, found that the carrier did not have "anything like adequate notice that the shipper and freight forwarder had made false and improper classifications." (at 943) Furthermore, the Interstate Commerce Commission, in a letter opinion L-308-172976, March 25, 1946, has established the position that if the misdescription is attributable to the shipper, that shipper has the burden of showing the proper description.

Additionally, we can give little weight to a letter detailing the treatment given this cargo by another conference for rating purpose as proving that silicon dioxide was in fact shipped. Neither this carrier nor the carrier involved in 261(I) were mem-

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**See generally, *Misclassification and Misbilling of Glass Articles,* 6 F.M.B. 155 (1960).

bers of that latter conference at the times in question and hence would have no knowledge of the other conference's practices.

One additional matter requires our attention. On page 2 of his Initial Decision, the Administrative Law Judge reemphasizes respondent's tariff provision providing for the assessment of a cargo N.O.S. rate for commodities described by trade names. We do not decide to place emphasis on that tariff provision, but deny the claim on the basis of Informal Docket No. 261(I) (to which the Administrative Law Judge refers on page 1 of his decision), which case we have previously discussed.

In summation, 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 with the comments hereinbefore stated.

VICE CHAIRMAN GEORGE H. HEARN DISSENTING, WITH WHOM COMMISSIONER CLARENCE MORSE JOINS

As correctly stated by the majority, the single issue is whether the claimant has proved his case. I believe he has done so.

In denying the claim, the Administrative Law Judge relied on two factors. First is the tariff rule of respondent relating to the application of the N.O.S. rate to trade name descriptions. The majority correctly rejects that basis for the decision. The second factor is an earlier Initial Decision which the Commission determined not to review, Docket No. 261(I). It is in its reliance on that ground for decision that the majority errs.

In the instant case, the respondent presented no defense other than the tariff rule rejected by the majority. (Respondent's letter of August 28, 1972). There was no denial of the assertions made by the claimant or refutation of claimant's evidence. Rather, it was the Administrative Law Judge who asserted that this case could be decided upon the record of another, No. 261(I).

In No. 261(I), the respondent (a different one than here) answered and refuted the claimant's assertions and evidence. (Respondent's letter of June 10, 1971). Thus, the Administrative Law Judge concluded:

> It is the claimant, not the carrier who must bear the "heavy burden of proof" and establish "sufficient facts to indicate with reasonable certainty or definiteness the validity of the claims."

* * * * * * *

In all the circumstances herein it must be concluded that the claimant herein has not established the validity of his claim with "reasonable certainty or definiteness."

In the instant case, the Administrative Law Judge made no such conclusion, as indeed he could not because the claimant did introduce new evidence unrefuted by the respondent. Consequently, the presiding Judge could only cite the lack of sufficient evidence in No. 261(I) and say:

The claim [in No. 261 (I)] was rejected for the reasons set forth in the decision. Those reasons lead to the rejection of the claim herein.

A mere cursory reading of the brief record in both cases reveals that they are not so similar as to warrant the same conclusion.

First, in No. 72–39 there is a letter from the manufacturer of the commodity, Cab-O-Sil, which clearly and unequivocally states that Cab-O-Sil is 99% silicon dioxide, the tariff commodity description which claimant would apply. That letter also refutes much of respondent's substantive defense in No. 261(I), i.e., as to dictionary definitions.

Second, the remaining substantive defense in 261(I) is refuted by another letter in No. 72–39, one from a conference chairman stating that Cab-O-Sil should be rated as silicon dioxide. The majority gives short shrift to that letter because the respondents in Nos. 72–39 and 261(I) were not members of that conference. However, the letter was not introduced as evidence of what the respondents should have known about the commodity involved. The letter is, rather, evidence as to whether Cab-O-Sil is silicon dioxide, i.e., as to what was actually shipped.

The Administrative Law Judge in No. 261(I) rejected evidence of the practice of other conferences because no examples were offered. Now, in No. 72–39, there is such an example.

Thus, as demonstrated by the foregoing, the two cases, Nos. 72–39 and 261(I), while similar, contain different offers of proof. While the respondent in No. 261(I) met its burden of disproving the claimant's *prima facie* case, the respondent herein has not done so. The evidence in this case clearly refutes the defenses of the respondent in No. 261(I), and the respondent herein has offered no rejoinder. Had the evidence here been introduced in No. 261(I), I would have found for the claimant there as well.

The majority rejects any adherence to procedural formality in order to uphold the claim herein. As I have shown, the failure of the present respondent to deny the facts of the claim and supporting evidence does in fact warrant an award to the claimant. The majority cites our obligation to look beyond procedure and administer justice and equity. It is not just or equitable to adhere blindly to the formality of precedents when we should acknowledge that similar cases may indeed be different.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 72–39

OCEAN FREIGHT CONSULTANTS, INC.

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY

Claim denied.

Henry S. Wegner for complainant.
A. J. Rosner for respondent.

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

Complainant, Ocean Freight Consultants, Inc., as assignee, claims $383.44 from Royal Netherlands Steamship Company, respondent, arising out of a shipment of 27 bags of Cab-O-Sil aboard respondent's ship *Chiron* from New York to Puerto Cabello, Venezuela on April 23, 1971.

Respondent rated the shipment as Cargo N.O.S. at $86.00 per cubic feet whereas complainant alleges it should have been rated as Silicon Dioxide at $53.00 per 2000 pounds.[2] As Cargo N.O.S. the charges totalled $395.60; for Silicon Dioxide the charge would be $12.16.

Except for the volume, date and carrier involved the facts herein are identical with the claim in Informal Docket No. 261(I), served November 18, 1971. In that case the claim was supported by reference to a chemical dictionary and a letter from the manufacturer of Cab-O-Sil supporting the contention that the product was silicon dioxide. The claim was rejected for the reasons set forth in the decision. Those reasons lead to the rejection of the claim herein.

[1] This decision became the decision of the Commission October 23, 1973.

[2] United States Artlantic and Gulf-Venezuela and Netherlands Antilles Conference, Freight Tariff F.M.C. No. 2.

In rejecting the claim herein it is desirable to re-emphasize the provision of the tariff which supports the rate assessed by respondent.

Item 2(n) of the tariff provides:

Bills of lading describing articles by trade name are not acceptable for commodity raing. Shippers are required to describe their merchandise by its common name to conform to merchandise descriptions appearing herein. Bills of Lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo N.O.S. as minimum.

This provision clearly provides that trade names are not acceptable for commodity ratings and that bills of lading reflecting only trade names will be rated as Cargo N.O.S. Shippers are specifically warned to describe their merchandise to conform to merchandise descriptions appearing in the tariff otherwise, they are told, the rate applicable is that specified for Cargo N.O.S. To allow a commodity rate for cargo described by trade name in the bill of lading would not only be in derogation of the published tariff but would confer a higher status on one part of the tariff to the derogation of another.

This is not a case of an erroneous rating. The cargo was rated in accordance with the tariff provision. It is not a case of inadvertent misdescription. The choice of description was clearly before the shipper. It elected a particular description. The tariff provided different rates in accordance with the description selected by the shipper.

Claim denied.

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

WASHINGTON, D.C.,
September 26, 1972.

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–9

BOLTON & MITCHELL, INC.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 516

SUPPLEMENTAL REPORT

November 5, 1973

BY THE COMMISSION: (George H. Hearn, *Vice Chairman*; James V. Day, Clarence Morse, *Commissioners*)

On June 9, 1972, the Commission issued its decision in this proceeding, finding that Bolton & Mitchell, Inc. (BMI):

1. Was not independent of shipper connections, as required by section 1 of the Act;

2. By retaining a proprietary interest in the merchandise and collecting compensation from the carrier for shipment thereof, did willfully obtain transportation by water at less than the rates or charges than would otherwise be applicable, violating section 16, opening paragraph, of the Act;

3. Violated certain sections of General Order 4, to wit:
   - § 510.5(e)—failing to show license number on invoices and shipping documents;
   - § 510.23(d)—imparting false information to its principals;
   - § 510.23(e)—withholding information as to actual price of merchandise;
   - § 510.23(f)—failing to promptly account to its principals;
   - § 510.23(h)—filing false documents;
   - § 510.23(j)—failing to use invoices which stated separately the actual amount of ocean freight, price of merchandise; and
   - § 510.9(c)—willfully making false statements in connection with an application for a license or its continuance in effect.

Although not revoking respondent's ocean freight forwarder license No. 516, we did order respondent to:

1. cease and desist from the activities found to have violated the Act, and the specific sections of General Order 4, if it desires to maintain its license; and
2. submit within 90 days from the date of service of the Report and Order a full report to the Commission on the manner in which it has complied with the requirements to cease and desist.[1]

Pursuant to this order respondent filed with the Commission an affidavit of compliance, setting forth the procedure it intends to use in its freight forwarding activities and which it believes will be in compliance with the Commission's order. The individual violations and the proposals of BMI to correct them are discussed below, seriatim.

BMI's shipper connections

We found that BMI had acted as a principal, purchasing merchandise, marking up its value and retaining a profit on received income from the mark-up, and subsequently transferring its proprietary interest in the commodities to the consignee. From this activity, we concluded that BMI was "not independent because it acted either as a purchaser of shipments to foreign countries (as purchasing agent of the consignee) or as a person having a beneficial interest in shipments (as a financier of shipments) or a seller and shipper of shipments to foreign countries (as one who has exercised proprietary rights over the merchandise)."

From a reading of BMI's affidavit we find that BMI views our decision as condemning only the "secret profit" which BMI made on those shipments from which BMI pocketed the "mark-up". Consequently, BMI's "compliance" with the Commission's order consists in the main of clearly revealing to its "principals" all charges imposed by BMI. Thus:

BMI states that it will no longer retain any discount nor will it increase the American suppliers' price of the goods for the purpose of being compensated for its start-up[2] service. Instead, BMI will show in its invoice to its overseas principal the net price of the merchandise as charged by the American supplier and it will also show a charge, either as a percentage or on a fixed fee basis, for its service in furnishing start-up information to our principals.

While BMI will make "every effort to persuade its overseas principals to place purchases in their own name with American suppliers", it will nevertheless continue to act as a purchasing agent when those efforts fail and a principal specifically requests that it act as agent. When it does act as a purchasing agent:

[1] On March 8, 1973, the Commission issued its Report on Reconsideration, approving and adopting verbatim its Report and Order of June 9, 1972.

[2] Start-up service consists of canvassing markets, furnishing information which permits a consignee to start a manufacturing or selling process in a foreign country, gathering sales literature, trade journals, etc., and obtaining samples for testing etc.

> BMI states that on all purchase orders in the future it will not only include its FMC number on the purchase order form and on all communications with the American supplier, but to be doubly sure that the supplier understands that BMI is not a principal, at the outset of each transaction BMI in a separate letter will advise the American supplier that it is acting as an agent only for an overseas customer, that it is not a principal in the transaction and that it has no equity or other beneficial interest in the goods.

BMI takes the position that it is entitled to compensation for time and effort spent in arranging for the purchase of the goods as agent for the overseas principal, just as it is entitled to be paid for its services in arranging for the forwarding, insurance, cartage, etc. To BMI purchasing is merely another supplemental service performed at the customer's request.

Finally, BMI would still in some instances finance the purchase of the shipments. The reasons for this are:

> BMI does not seek from its consignees the right to advance the purchase price. On the contrary, BMI prefers that its principals deal directly with American suppliers and either pay for the goods on delivery or arrange for payment under usual letter of credit procedure. But the situation in international sales is not so simple. As the attached Delaney letter conclusively shows, consignees, particularly those in South American countries, are unable in many instances to deal directly with American suppliers. Consignees frequently cannot obtain the necessary dollar funds prior to the shipment of the goods because of complicated currency regulations and often the delay and expense in obtaining American dollars in advance of exportation or in arranging for a letter of credit is not justified by the value of the merchandise purchased. Furthermore, even under letter of credit transactions, many American suppliers are, in DeLaney's language, "extremely reluctant to become involved in international transactions."
>
> Because of these and other reasons, BMI is frequently asked to confirm to the American supplier that it will pay for the goods on shipment from the plant or upon exportation. Suppliers are willing to enter into such an arrangement since they are dealing with an American firm, BMI, there is no risk involved to them, and a new sales market is being opened. BMI has been confirming payment to suppliers for *35 or more years* and there have been no difficulties whatsoever in the purchase and shipment of the goods. It is of immeasurable benefit to our foreign commerce if BMI and other forwarders are permitted to render this service.

BMI contends that neither the Shipping Act nor General Order 4 prohibits BMI from being a "financier of merchandise", as that language was used by the Commission. It is BMI's position that even when it finances the purchase of the goods for an overseas customer, it has no beneficial interest in the goods because it "does not retain any lien or other security for the repayment of its advance." BMI "ships on an open account and in due course receives payment from its principal overseas."

In order to satisfy the Commission that it has no equity, ownership or other beneficial interest in the goods when it acts as purchasing agent, BMI proposes that:

> . . . BMI will in each instance where it is asked to confirm payment or advance the purchase price obtain prior written confirmation from its overseas principal that BMI is being requested to render this service, that the principal owns the goods, that BMI has no ownership or security interest in them, and that the compensation for BMI's service in confirming payment to the supplier is not a profit on the sale of the goods but interest for the use of its money. Thirdly, in confirming payment to the supplier, BMI will indicate in writing that it is acting only as a forwarder on the transaction and as agent for an overseas customer and that it has no interest, equity or lien in the goods. Fourthly, the charge that BMI makes to its principal will be an interest charge only at usual bank rates and will not be a profit or mark-up on the goods itself. Finally, in transmitting the shipping documents overseas, BMI will state to the collecting bank in the foreign country and all other parties concerned that it is not the owner of the goods and has no beneficial interest or security in them for payment.

We disagree that BMI has no beneficial interest in the goods.

Section 1 of the Shipping Act defines an "independent ocean freight forwarder" as:

> . . . 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.

The term "beneficial interest" 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 any agreement, express or implied, provided, however, that any obligation arising in favor of the licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest. (Italic ours.)

BMI will no longer profit by pocketing the mark-up; it will, however, continue to enjoy financial benefit from the "financing of the shipment" since, by its own admission when it advances funds for the purchase of goods, "the charge BMI makes to its principal will be an interest charge only at usual bank rates and will not be a profit on the mark-up on the goods itself." Accordingly, it is our view that BMI, so long as it continues to guarantee payment or actually finances the purchase of the goods in return for bank rate interest, has, by definition, a beneficial interest in contravention of section 1 of the Shipping Act and Rule 510.21(L).

BMI's proposed compliance with our order would appear to be based on the misconception that a "lien" is the only form of beneficial interest prohibited and that only common law liens are prescribed. The legislative history of Rule 510.20(L)[3] of General Order 4 and pertinent case law,[4] clearly show that statutory liens are also incorporated within the term "lien". However, it would appear that BMI would in fact waive any lien interest in shipments forwarded by it by (1) denying any interest, "equity or lien", in the goods to the supplier, and (2) by informing the collecting bank and all other parties concerned that it is not the owner of the goods and "has no beneficial interest" or security in them for payment. BMI still would retain a beneficial interest within the meaning of General Order 4, however, because of its interest charges, discussed *supra.*

Additionally, by accepting brokerage while being shipper connected, BMI is obtaining transportation by water at less than the rates or charges as would otherwise be applicable in violation of section 16 First of the Act.[5]

We see nothing improper or incompatible in BMI's receiving compensation for services rendered in furnishing "start-up" information and the services being performed by BMI as an independent freight forwarder so long as the consignee is both aware of and agrees to pay for such services.

§ *510.5(e)—failing to show license number on invoices and shipping documents*

BMI states it will in the future show its license number on all documents in accordance with the rule.

§ *510.23(d)—imparting false information to its principals*

BMI will henceforth "in its invoice to the principal at all times show the actual merchandise value and its fee for the [start-up] service as a separate charge."

§ *510.23(e)—withholding information as to actual price of merchandise*

BMI will hereafter comply.

§ *510.23(f)—failing to promptly account to its principals*

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[3] See Sen. Rept. No. 691, 87th Cong., 1st Sess., -. 4, wherein Congress in order to prevent the collection of compensation from a carrier by persons who have any interest in the goods shipped, deleted the phrase "other than a lien" from the words "beneficial interest therein other than a lien" (as originally proposed)' and thus defined beneficial interest to include "any lein interest" of a forwarder "arising by financing of the shipment".

[4] See *New York Foreign Freight F & B Assn.* v. *F.M.C.*, 337 F. 2d 289, 297 (1964). wherein the court, in clearly distinguishing a lien arising from financing, state, that the financing of export shipments belongs primarily to the exporter or a financial instituion, not the freight forwarder.

[5] See *Port of N.Y. Freight Forwarders Investigation*, 3 U.S.M.C. 157, 164 (1949), wherein the Commission's predecessors stated that a forwarder may be a resident buyer for a foreign purchaser; however, if he has *any* beneficial interest in the shipment and accepts brokerage thereon, he is guilty of accepting a rebate in violation of section 16 of the Act. (Emphasis added.)

BMI will hereafter comply.

§ 510.23(j)—failing to use invoices which state separately the actual amount of ocean freight, price of merchandise

Discussed under § 510.23(h) *infra.*

§ 510.9(c)—willfully making false statements in connection with an application for a license or its continuance in effect

Compliance in part. See discussion under § 510.23(h) *infra.*

§ 510.23(h)—filing false documents

Evidence of record shows that on occasion BMI had, upon request of its principals, inflated the ocean freight and insurance rates on invoices. BMI does not specifically state that it will never again inflate such charges; but BMI merely implies that its pledge of complete "honesty" with its principals in such things as the actual purchase price of the goods and start-up fees will extend to insurance and freight rates. However, BMI's proposed procedure of "re-invoicing" casts considerable doubt on the extent of its compliance with section 510.23(h). As to "re-invoicing", BMI states:

On occasion, its overseas principals request that BMI show itself as the seller of the goods to the principal's overseas customer at a price higher than the amount that the principal through BMI pays the American supplier. Re-invoicing in this fashion is frequently done not only by BMI but by many other forwarders whose principals are overseas. In the trade this is known as "consignee routed traffic." Re-invoicing is requested by the principal in order that it be protected on the price, the source of supply or to prevent the principal's local competitors from knowing how much the principal is paying for the goods in the United States. The practice is so common with forwarders that it is covered in a legal text, *The Ocean Freight Forwarder, The Exporter and the Law* (pp. 45–46), written by BMI's counsel.

BMI engages in the re-invoicing procedure to accommodate its principal and derives no revenue from the addition to the American supplier's invoice price. The difference between the invoiced and re-invoiced price will be remitted to the principal, as it always has in the past. As an added protection and in order to satisfy the Commission that BMI is not a seller of the goods, BMI will not re-invoice unless it has a written request from the principal to do so and after it re-invoices, BMI will confirm in writing to the principal that it has re-invoiced and it will indicate the difference between the American supplier's price and the re-invoiced price. BMI believes that with this procedure and confirming documents in each file, the Commission will have strong assurance that there is no profit to BMI as a seller of the merchandise in a re-invoicing transaction.

Section 510.23(h) in its entirely reads:

No licensee shall file or assist in the filing of any claim, affidavit, letter of indemnity, or other paper or document with respect to a shipment handled or to be handled by such licensee which he has reason to believe is false or fraudulent

While in our Report we did not dwell at length on the reason behind BMI's inflating of the merchandise price, the freight rate and insurance rate, the Administrative Law Judge dwelt at some length on this reason:

> Respondent argues that since Spencer at all times was candid with respondent's consignees in Latin America and since the ocean freight and insurance was misstated on specific instructions of its consignees, they were not deceived and the Commission's regulation was not violated. But third parties, who might have acted entirely differently had they known the true facts in the transaction were deceived. These are the banks which honored letters of credit which included the inflated ocean freight and insurance, and the customs officials in Latin American countries and others who approved the transactions in connection with their currency control regulations. The Commission's regulation is not aimed entirely at consignees but is for the protection of third parties as well. The Examiner finds that respondent failed to use invoices with respect to the involved shipments which stated separately the actual amount of ocean freight assessed by the common carrier, the actual insurance rate, and the actual price of the merchandise purchased for its consignees.
>
> Some further discussion is warranted. Spencer testified that for periods of up to 20 years respondent believed that certain of its consignees were engaged in violation of their respective country's laws (currency exchange regulations). Respondent believed that one of the methods used by its consignees to violate their respective country's laws (currency exchange regulations) was the use by respondent of invoices which failed to state the actual amounts for ocean freight and insurance involved in these transactions.

Thus, at the very least it would appear that BMI is *assisting* its principals in the filing of false documents and perhaps in the violating of the currency exchange laws of other countries.

We think it highly improper for the Commission to lend itself to violations of currency exchange laws of other countries as it would be doing if it sanctions BMI's "re-invoicing" practice. Moreover, we again concur with the Administrative Law Judge when he noted that General Order 4 [specifically section 510.23(h)] is for the protection not only of BMI's principals but also for third persons and cannot be waived merely by agreement between the forwarder and his principal that both understand the "clandestine character of the operations".

Consequently, BMI will be allowed to retain its license, provided that BMI in conducting its future forwarding operations:

(1) waives any and all liens on the goods being shipped;

(2) does not finance the shipments;

(3) discontinues its practice of "re-invoicing"; and

(4) gives assurance to the Commission that it (BMI) will not inflate the charge(s) for ocean freight, insurance and accessorial services.

The record in this proceeding will be held open for thirty days within which respondent is to apprise the Commission of his acceptance of these conditions.

HELEN DELICH BENTLEY, CHAIRMAN, AND ASHTON C. BARRETT, COMMISSIONER, DISSENTING

We adhere to the view expressed in our dissenting opinion in the Commission's Report on Reconsideration of March 8, 1973, that BMI's license should be revoked.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-23

KRAFT FOODS

v.

PRUDENTIAL-GRACE LINE

ADOPTION OF INITIAL DECISION

November 5, 1973

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

This proceeding is before us on exceptions to the August 13, 1973, Initial Decision of Administrative Law Judge James F. Reilly, in which the Administrative Law Judge concluded that complainant's bills of lading, showing only the separate weights of the pallets and the articles shipped thereon, are not to be considered compliance with the "mandatory provisions of the legally filed applicable tariff"; and, consequently, denied reparation. Complainant excepted to the Initial Decision.

We find that the exceptions of complainant are essentially a reargument of contentions which were considered by the Administrative Law Judge in his Initial Decision. Upon careful consideration of the record, exceptions, and reply thereto, we conclude that the Administrative Law Judge's factual findings and ultimate conclusions with respect thereto were correct. While the Administrative Law Judge summarily dismissed the complaint for the complainant's failure to "strictly adhere" to the requirements of respondent's tariff, we believe a further elaboration in support on denying reparation is in order.

The crux of the complainant's quarrel with the Initial Decision is its conclusion that the failure of complainant to include the measurements, as well as the weight of the pallets on which the cargo was shipped, constituted a failure to comply with the requirements of respondent's tariff, which failure precluded complainant's recovery of reparation. To the complainant, since the cargo was freighted on a weight basis, any requirement that the bill of lading include the measurements as well as the weight of the shipments, called for the performance of a useless act. On this record, we think not.

A tariff should be considered in its entirety when assessing freight charges on a commodity. See *Storage Practices at Longview, Washington*, 6 F.M.B. 178, 182 (1960). To do otherwise would result not only in discrimination towards the carrier, but also would defeat the purpose of Item 26 which is to insure the ability of the carrier to verify that palletized shipments conform to the requirements of Items 26(e), (g) and (h).

Thus, Item 26, when read as a whole, sets forth the conditions under which the pallet allowance [Item 26(e)] and rate deduction [Item 26(g)] will be granted; i.e.:

(1) that the minimum accepted pallet dimensions are 32″ x 40″ (2′8″ x 3′4″) [Item 26 paragraph 4];

(2) that the gross weight of the cargo and pallet shall be not less than 1,500 pounds or the overall cubic measurement of the cargo and pallet shall not be less than 40 cubic feet [Item 26(b)].

(3) In assessing freight charges for pallets containing a single commodity, when cargo is freighted on a measurement basis, the actual height of the pallet, but no more than 6 inches will be deducted from the overall height of the package when computing the cubic measurement; however, this allowance is to be limited to not more than 10% of the overall height of the entire package. When cargo is freighted on a weight basis the actual weight of the pallet shall be deducted, but not in excess of 10% of the gross weight of the cargo and pallet. Shipper must furnish at the time of shipment the weight and measurements of the pallets [Item 26(e)].

(4) Provided pre-palletized cargo complies in all respects with the rules set forth herein, the carrier will allow a discount of $2.50 per ton weight or measurement, on the same basis as cargo is being freighted, except on pre-palletized cargo moving via The Sea-Land Joint Service, this discount will be allowed only when cargo is loaded on four-way pallets with dimensions of 40″ x 48″ [Item 26(g)].

(5) If the height of the pallet exceeds 6 inches, shipments freighted on a weight basis will be assessed on the gross weight of pallet and cargo, and the discount of $2.50 as per sub-paragraph (g) will not be allowed [Item 26(h)].

The record is void of facts to conclude that the complainant has submitted evidence as to the measurements of the pallets in question. We agree with respondent that such information is an essential ingredient if the carrier is to determine if the pallets are of the accepted dimensions to qualify for a pallet deduction pursuant to Item 26(h); i.e., whether a pallet has exceeded the maximum height when the commodity is freight on a weight basis so as not to qualify for a rate deduction provided for in Item 26(g). Consequently, we have no alternative but to disallow any pallet allowance or rate deduction asked for by complainant. To conclude otherwise would give the complainant a deduction not provided for in the tariff, contrary to the provisions of section 18(b)(3) of the Shipping Act, 1916.*

Accordingly, we hereby adopt the Initial Decision, as modified herein, as our own and make it a part thereof.

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

*Section 18(b)(3) of the Shipping Act, 1916, provides: "No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and effect at the time; . . . ."

FEDERAL MARITIME COMMISSION

No. 73–23

KRAFTS FOODS

v.

PRUDENTIAL-GRACE LINE

Reparation denied and complaint dismissed.

John J. Lavaggi and *William Levenstein* for complainant.
Lilly, Sullivan & Purcell, P.C., for respondent.

INITIAL DECISION OF JAMES FRANCIS REILLY, ADMINISTRATIVE LAW JUDGE;[1]

Complaintant, Kraft Foods, Division of Kraftco Corporation, is a Delaware corporation, with its principal offices in Chicago, Illinois; and it is engaged in the business of distribution of foodstuffs.

The respondent is a common carrier by water engaged in transportation of cargo from U.S. Atlantic and Gulf ports to ports in Panama Canal Zone, Colon, Panama City, and as such is subject to the provisions of the Shipping Act of 1916.

Pursuant to agreement of complainant and respondent, this proceeding was conducted in accordance with the Commission's Rule 11 (shortened procedure).

Complainant seeks reparation totaling $579.85, involving three shipments from New York to Cristobal/Panama, under bills of lading dated July 16, 1971 (alleged overcharge $249.19), December 31, 1971 (alleged overcharge $88.72), and January 21, 1972 (alleged overcharge $241.94).

Complainant's claim is based solely on the alleged failure of respondent to apply S.B. PAN, 10 Rule 26 of a filed tariff to the three shipments and allow the pallet allowance and the $2.50 discount to each shipment, stating that all three shipments fully qualified for the pallet allowance in respondent's tariffs.[2]

[1] This decision became the decision of the Commission November 5, 1973.

[2] Complainant alleges that under the provisions of Item 26, 7th revised page 22–A of the Conference

There is a plethora of Commission decisions that the respondent's contention that the claim of complainant did not complain within six months is without merit, and requires no discussion here.

However, respondent's contention that complainant failed to furnish dimensions and weights of the pallets *prior* to shipment as required by Items 26(e) and 26(g) of S.B. PAN, 10 are crucial to the disposition of the complaint.

Respondent points out that (1) S.B. PAN 10, Item 26(e) provides as follows:

In assessing freight charges for pallets containing a single commodity, when cargo is freighted on a measurement basis, the actual height of the pallet, but no more than 6 inches will be deducted from the overall height of the package when computing the cubic measurement; however, this allowance is to be limited to not more than 10% of the overall height of the entire package. When cargo is freighted on a weight basis the actual weight of the pallet shall be deducted, but not in excess of the 10% of the gross weight of the cargo and pallet. *Shipper must furnish at the time of shipment the weight and measurement of the pallets.* (Italic supplied.)

and (2) S.B. PAN 10, Item 26(g) provides as follows:

Provided pre-palletized cargo complies in all respects with the rules set forth herein, the carrier will allow a discount of $2.50 per ton weight or measurement, on the same basis as cargo is being freighted, except on pre-palletized cargo moving via The Sea-Land Joint Service, this discount will be allowed only when cargo is loaded on four-way pallets with dimensions or 40″ x 28″.

Admittedly, complainant did not comply with the mandatory provisions of 26(e) of the aforesaid tariff in not one of the three shipments; but in its complaint attempts to exculpate itself from such failures by pointing to the bills of lading (copies of which are attached to the complaint) as showing the separate weights of the pallets and the articles shipped thereon. This is not a compliance with the duly, legally filed tariff of the carrier under consideration herein.

The filing of tariffs is a mandatory, statutory requirement; and the Commission under this statutory mandate and the Commission's rules and regulations issued thereunder are a proper legal implementation of its congressionally delegated authority. The tariffs are a matter of public record, readily available to all. And we are not concerned here with a naive, occasional shipper but

tariff applying S.B. PAN-10 there are pallet allowances provided for shipments that are pre-palletized cargo, the unit loads weighing not less than 1500 lbs. or the unit load overall measurements not less than 40 cft. In 26(e) of Item 26, the tariff allegedly provides that the commodity rate listed should be applied against the gross weight or gross measurement less the weights or measurements of the pallets not to exceed 10 percent of the gross weight or measurement of the unit loads. Item 26(g) of the tariff ellegedly states further that a $2.50 discount off the listed commodity rate shall be allowed for pre-palletized cargo that qualifies.

with a large distribution company whose personnel undoubtedly work daily with all forms of transportation—rail, water and air—and who, necessarily must be continuously aware of the tariffs of each form of transportation and their provisions. These personnel must in the best interest of its company attain and maintain an expertise in all tariffs of each transportation media.

And while it has hereinabove been ruled that the six months limitation needs no discussion, it is difficult to understand why this experienced, knowledgeable complainant waited almost two years from date of first shipment (July 16, 1971—complaint filed May 1, 1973) to file this complaint.

The failures of the complainant here to comply with the mandatory provisions of the legally filed applicable tariff in and of themselves are sufficient to require dismissal of its complaint. Legal tariffs should either be strictly adhered to [3] or the filing and maintaining of tariffs become an act of futility and make a mockery of the will of Congress and of the Commission; and put the public interest in constant jeopardy and at the mercy of the carriers.

In view of the above, it is unnecessary to discuss the evidentiary questions which might be raised with respect to certain pages attached to the complaint; that is, that fairness and due process of law might require respondent be given an opportunity to cross-examination, if it so desired.

ULTIMATE CONCLUSION

The claim of the complainant for reparations should be denied and its complaint in its entirety be dismissed.

(S) JAMES FRANCIS REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
August 13, 1973.

[3] As Chief Justce Hughes said for the majority in *Louisville & N.R.R. Co.*, v. *Maxwell*, 237 U.S. 94: "Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent discrimination." (See *Ludwig Mueller Co. Inc.* v. *Peralta Shipping Corporation, Agents for Torm Lines*, 8 FMC 361, 365 (1965).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 174(I)

COLGATE PALMOLIVE COMPANY

v.

MOORE MCCORMACK LINES, INC.

ORDER ON REVIEW OF INITIAL DECISION

November 12, 1973

This proceeding involves a claim for reparation said to be due as a result of an alleged incorrect measurement of a shipment. The Examiner denied the claim of $11.13 on the basis of insufficient evidence inasmuch as the measurement figures contained on the bill of lading and export declaration submitted in support of the claim are not legible.

Upon review of the evidence, the Examiner's denial on grounds of insufficient evidence seems proper and accordingly the initial decision is hereby adopted.

Copy of initial decision attached.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 174(I)

COLGATE PALMOLIVE COMPANY

v.

MOORE MCCORMACK LINES, INC.

Complaint dismissed.

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

Claimant Colgate Palmolive Company alleges incorrect measurement of a shipment carried on a vessel operated by respondent Moore McCormack Line and an overcharge of $11.93. The bill of lading submitted with the claim as well as the export declaration show a measurement that is unclear and may be read 9 cubic feet, the measurement used by the respondent in assessing the freight. While those documents could be read either "3" or "9" cubic feet, such evidence is insufficient to support the alleged mismeasurement beyond a reasonable doubt. Further, the applicable tariff rate is based on valuation of the cargo and value is not shown on the bill of lading. The rate charged is consistent with the valuation shown on the export declaration submitted with the claim.

Complaint dismissed.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
February 10, 1971.

[1] The parties consented to the informal procedure of Rule 19, 46 CFR 502.301–304, and this decision shall be final unless the Commission elects to review it within 15 days from the date of service hereof.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 198(I)

COLGATE PALMOLIVE COMPANY

v.

MOORE MCCORMACK LINE

ORDER ON REVIEW OF INITIAL DECISION

November 12, 1973

In this proceeding claimant Colgate Palmolive Company alleges an overcharge on an ocean freight shipment carried by Moore McCormack Line, claiming that on 49 pallets of chemicals respondent failed to make an allowance of 100 pounds for each pallet when computing the gross weight. The Examiner denied the claim based on the claimant's failure to prove that the conditions set forth in the applicable tariff for entitlement to the pallet allowance were complied with.

The tariff provides that cargo loaded on pallets is entitled to an allowance when, subject to other requirements, "the unit load shall not be less than 1800 pounds *nor* cube less than 45 ft." [Emphasis added]. The Examiner correctly found that this condition has not been met inasmuch as claimant has not shown the measurement of the unit.

Inasmuch as claimant has not provided measurement of the unit, either to the carrier or to the Commission in pursuing its claim, it cannot be determined that the shipment qualifies for the pallet allowance. Accordingly, the Examiner should be upheld and the initial decision is hereby adopted.

Copy of initial decision attached.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 198(I)

COLGATE PALMOLIVE COMPANY

v.

MOORE MCCORMACK LINE

Complaint dismissed.

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

Claimant Colgate Palmolive Company claims an overcharge on a shipment made on a vessel operated by respondent Moore McCormack Line, alleging that on 49 pallets of chemicals respondent failed to make an allowance of 100 pounds for each pallet when computing the gross weight. The tariff of Inter-American Freight Conference, of which conference respondent is a member, provides as to pallet allowance that the unit load shall not be less than 1,800 pounds nor cube less than 45 feet and maximum weight of 4,480 pounds. The claimant has not shown the measurement of the unit load. In the absence of proof that the conditions set forth in the tariff as a basis for pallet allowance were complied with, the claim must be denied.

Complaint dismissed.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
February 11, 1971.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 239(I)

COLGATE PALMOLIVE COMPANY

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY

ORDER ON REVIEW OF INITIAL RECISION

November 12, 1973

This proceeding involves claims by Colgate Palmolive Company alleging that Royal Netherlands Steamship Company overcharged Colgate in the amount of $148.80 for the carriage of certain commodities described on the bills of lading as "Vel, Ajax, Detergent, Liquid". Respondent acknowledged error in applying its tariff and the Examiner recognized the validity of these claims.

The Examiner, nevertheless, denied reparation because the bills of lading submitted with the claims ... "reveal that respondent apparently undercharged claimant ..." on other commodities included in the same shipments.

Our review of the record in this proceeding discloses no valid basis for concluding that undercharges existed on other commodities on the bill of lading. The Examiner found that commodities described as "Fab, Ajax Detergent Dry," and "Fab Ajax Cold Power, Detergent Dry" should have been rated as "Detergent, N.O.S." at the rate of $41.00 and were incorrectly rated at $32.00W. This conclusion is speculative. The record shows these commodities were assessed a $32.00W rate, but nowhere does the record show under what *description* the commodities were actually rated. Without knowing what description was applied it cannot be concluded that "Detergent N.O.S." would be a more applicable description.

Accordingly, since no undercharges are proven to exist complainant is entitled to reparation on the proven overcharges of $148.80. It is so ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 239(I)

COLGATE PALMOLIVE COMPANY

v.

ROYAL NETHERLANDS STEAMSHIP COMPANY

November 12, 1973

Reparation denied.

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

This proceeding involves four claims by Colgate Palmolive Company against Royal Netherlands Steamship Company. A portion of the shipments concerned a commodity described on the bills of lading as "Vel, Ajax, Detergent, Liquid" and on this commodity respondent assessed a rate of $53.00 per 40 cubic feet applicable to "Soap, Liquid, N.O.S." The applicable tariff set forth an item at the lesser charge of $41.00, weight, on "Detergent N.O.S." As to these commodities, respondent has acknowledged error in applying the tariff and has agreed to pay reparation "on confirmation from your Office." The total amount involved is $148.80 overcharge on that commodity.

However, the bills of lading submitted with these four claims, insofar as legible, reveal that respondent apparently undercharged claimant. On February 8, 1971, the parties were advised of this apparent undercharge and their comments solicited. Claimant was requested to furnish a legible bill of lading on its claim No. 8044. More than two months have elapsed and the parties have failed to respond. It is therefore found that the commodities carried described as "Fab, Ajax Detergent Dry," and "Fab Ajax Cold Power, Detergent Dry," were incorrectly rated at $32.00, weight, and should have been rated as "Detergent, N.O.S." and the

[1] Both parties having consented to the finformal procedure under Rule 19, 46 CFR 502.301–304, this decision shall be final unless the Commission elects to review it within 15 days from the date of service hereof.

rate of $41.00 applied. Undercharges on these commodities amounted to a total of $683.13; thus, on the shipments set forth in the complaint, $489.33 is due respondent. Whether the bill of lading attached to claim No. 8044 would add or detract from the amounts set forth herein cannot be determined.

In this situation, it cannot be found that claimant is entitled to reparation on the shipments set forth in the claims. Respondent is admonished that section 18(b)(3) of the Shipping Act, 1916, requires the charging of the rates set forth in the applicable tariff and that charging less than the applicable rate is a violation of that section. Respondent will report to the Examiner within 60 days of the date of the service of this decision what action has been taken to effect compliance with section 18(b)(3).

Reparation denied.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
April 13, 1971.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 240(I)

UNION CARBIDE CORPORATION

v.

PORT LINE LTD.

ORDER ON REVIEW OF INITIAL DECISION

November 12, 1973

This proceeding involves a dispute as to the proper description and thus proper ocean freight rating which should be applied to a commodity which had been listed as "Methyl Isoamyl Ketone" on the bill of lading in question. Claimant contends that the commodity was a solvent and that the rate of $63.00 on "solvents N.O.S." should have been applied. In support of its contention, claimant submits an extract from a chemical dictionary defining Methyl Isoamyl Ketone as a solvent.

Respondent had rated the commodity in accordance with the $73.00 rate for "chemicals N.O.S." Respondent did not reply to the merits of the claim.

The Examiner upheld respondent's classification and dismissed the claim on the basis that it was the claimant who originally improperly described the cargo and that claimant's "exercise in semantics" in its supporting documenation fails to meet the burden of proof standards required for claims based on misdescription.

We chose to review the Examiner's decision to insure consistency with another decision previously endorsed by the Commission. (See Informal Docket No. 217(I), Union Carbide Corporation v. Columbus Line, Inc. served March 3, 1971; determined not to review March 16, 1971).

In 217(I) the Examiner awarded reparation to the claimant for a shipment of the identical commodity (Methyl Isoamyl Ketone), which had incorrectly been rated as "cargo N.O.S." As in this proceeding, claimant there contended the commodity shipped should have been rated as a solvent and submitted a similar chemical dictionary description of the properties of the commodity in support of its claim.

While the Commission has imposed a "heavy burden of proof" on claims of this nature, it has also attempted to insure that whenever justly possible what is actually shipped must determine the applicable rate. Having authorized reparation in 217(I) under essentially identical circumstances we conclude that the Examiner must be reversed in this proceeding and reparation be awarded ($54.40) It is so ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 240(I)

UNION CARBIDE CORPORATION

v.

PORT LINE LTD.

Complaint dismissed.

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

Union Carbide Corporation seeks reparation from Port Line, Ltd., alleging misapplication of the tariff on a shipment from Newport News to Melbourne, Australia, under a bill of lading dated September 21, 1969, which described the goods as Methyl Isoamyl Ketone, measurement 64 cubic feet, weight 2,520 pounds. Claimant alleges that "We find no authority in the tariff for the rates as applied", said to be $77.00 per 40 cubic feet. Respondent states that the rate applied was $97.00 per 40 cubic feet for chemicals N.O.S. The rate applied was as stated by respondent.

Claimant now contends that the commodity was a solvent and that the rate of $63.00 on "solvents, N.O.S." should have been applied. In support of this contention, it submits an extract from a chemical dictionary which defines Methyl Isoamyl Ketone as:

METHYL ISOAMYL KETONE (5-methyl-2-hexanone; MIAK) $CH_3COC_2H_4CH(CH_3)_2$.

Properties: Colorless, stable liquid; pleasant odor. Sp. gr. 0.8132 (20/20 C); refractive index 1.4062 (n 20/D); b.p. 144 C; f.p. –73.9 C; wt/gal 6.77 lbs.; flash pt. 110 F (open cup). Slight soluble in water; miscible with most organic solvents.

Grade: 97.5%

Containers: Drums; tank cars.

Uses: Solvent for nitrocellulose, cellulose, acetate butyrate, acrylics, and vinyl copolymers.

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

The gravamen of any complaint filed pursuant to section 22, Shipping Act, 1916, which includes informal claims, is that the carrier has violated the Act, here section 18(b)(3), by failure to charge and collect the applicable rate set forth in the tariff on file with the Commission. To find a carrier in violation of the Act is not a matter to be lightly treated in view of the penalties which may be involved. In recognition of this implication, the Commission has held:

> 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. *Colgate Palmolive Company* v. United Fruit Company, Informal Docket No. 115(I), Order served September 30, 1970.

This claim being based on misdescription requires a "heavy" burden of proof. Claimant engages in an exercise in semantics to discharge this burden, citing an exerpt from a chemical dictionary to show that a commodity classified as a "Chemical, N.O.S." was a solvent, that is, one of the innumerable chemicals which may be used as a solvent.

It appears that the shipper, a large organization engaged in shipping its products on a large scale, prepared the bill of lading. The shipper, or its agent, had detailed knowledge of the nature of the commodity shipped. The bill of lading was signed by both parties.

A bill of lading is a contract and here the shipper seeks to avoid the terms of the contract which he prepared by reason of a failure to set forth therein something within his peculiar knowledge. It is especially true that when a shipper during a long period has been preparing bills of lading involving chemical products, he may be charged with knowledge of the nature of the shipments. (See Carriers, 13 Am. Jur. at page 781). While, as a general rule, certain matters set forth in a bill of lading may be shown to have been in error, the circumstances here appearing do not warrant an award of reparation. The claimant made frequent shipments of chemicals and no doubt, as a large shipper, employed experts in shipping matters who frequently prepared bills of lading involving chemicals. A shipper preparing a bill of lading is charged with the responsibility for furnishing the carrier a proper description of the commodity shipped. The carrier was informed that the commodity was a chemical. There are innumerable chemicals the nature and properties of which are known only to chemists or other experts engaged in handling or manufacturing them. Respondent's tariff

(U.S. Atlantic & Gulf/Australia-New Zealand Conference) does not set forth a rate on Methyl Isoamyl Ketone. Insofar as the bill of lading and respondent's tariff disclosed, it was a chemical N.O.S. The fact that the commodity could be used as a solvent for certain compounds was a matter pecularily within complainant's knowledge. The exercise in semantics upon which this claim is founded is deemed insufficient to support the burden imposed on claimant to establish that respondent has violated section 18(b)(3) of the Act.

Complaint dismissed.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
April 15, 1971.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 251(I)

UNION CARBIDE CORPORATION

v.

AMERICAN AND AUSTRALIAN STEAMSHIP LINE

ORDER ON REVIEW OF INITIAL DECISION

November 12, 1973

This proceeding involves two overcharge claims alleging misapplication by respondent of its published ocean freight tariff. The items shipped were described on the bills of lading as "solvent N.O.S. F. P. 120° F." Claimant contends that both shipments should have been rated under tariff item No. 825, for "solvents N.O.S., Flash Point over 80° F." at $63.00 instead of under item No. 752, for "chemicals N.O.S., not drugs or medicines" at the rate of $97.00.

Respondent replied and the Examiner held that whereas the complainant's bill of lading did not provide the *specific name* of the solvent in accordance with item No. 825 of the tariff of the U. S. Atlantic and Gulf/Australian-New Zealand Conference, of which respondent is a member, the complainant was not entitled to the lower rate for "solvents N.O.S., Flash Point over 80° F.", but was correctly charged a rate of $97.00 under item No. 752.

The Commission has frequently stated in informal dockets that it will adhere to the concept that it is not the declaration on the bill of lading but what is actually shipped that determines the applicable rate, so long as a reasonable standard of burden of proof is upheld between the shipper and the carrier (see Docket No. 70–47, Union Carbide Inter-America v. Norton Line, 14 FMC 262). This result has been accomplished while recognizing, at the same time, that whenever reasonable, a conference's tariff's rules should be upheld and enforced by the Commission.

The tariff rule in question provides "Specific name of the solvent (not trade name) must be shown on the bill of lading". While the requirement appears reasonable enough and was properly invoked at the time of rating, it should not constitute an absolute bar against later recovery upon a showing of proper proof in a complaint before this Commission.

In the present case it appears unreasonable to deny reparation based on the tariff rule. The bills of lading in question describe the goods shipped as "solvent N.O.S. F.P. 120° F." The attached invoices specifically describe the item as Diisobutyl Ketone and the claimant, through its documentation, shows Diisobutyl Ketone to be a solvent. Therefore, it would seem unreasonable in this case for the Commission to sanction the assessment of a rate for which it has been rather conclusively shown the carrier would not be entitled other than on the basis of the shipper's failure to include the specific name of the solvent on the bill of lading.

In Informal Docket No. 223(I), Union Carbide Inter-America v. Grace Line, Inc., served on January 13, 1971, the Commission determined not to review the Examiner's denial of a claim which involved a similar tariff description requirement. However, the present case is distinguishable in light of the degree of information which was provided on the bill of lading and the documentation submitted by the claimant in support of its claim. The claimant here appears to have met the required burden of proof for reparation involving alleged errors of description on shipments which have left the custody of the carrier. To deny recovery would be contrary to the concept that charges must be based on what is actually carried. Therefore, we conclude that claimant is entitled to reparation in the amount of $272.86. It is so ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 251(I)

UNION CARBIDE CORPORATION

v.

AMERICAN AND AUSTRALIAN STEAMSHIP LINE

Complaint dismissed.

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

This proceeding involves two claims submitted by Union Carbide Corporation against American and Australian Steamship Line, a member of the U.S. Atlantic & Gulf/Australia-New Zealand Conference.

The first claim involves a shipment pursuant to a bill of lading dated October 10, 1969, which describes the shipment as "10 Drs Solvent NOS F. P. 12° F." The second claim is on a shipment also made pursuant to a bill of lading dated October 10, 1969, and which described that portion of the shipment upon which the claim is based as "20 Drs Solvents NOS F. P. 120° F." Claimant contends that both shipments consisted of "Diisobutyl" and should have been rated at $63.00 instead of $97.00 which rate the carrier applied.

The tariff of the conference of which respondent is a member contain an item, No. 825, for "Solvents NOS, Flash Point over 80° F" at $63.00; however, this item provides that the specific name of the solvent (not the trade name) must be shown on the bill of lading. The tariff also sets forth an item, No. 752, for "Chemicals NOS, not drugs or medicines" at the rate of $97.00. Respondent contends that as complainant's documentation did not give the name of the solvent as required by item 825, the $63.00 rate was not applicable.

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304, this decision shall be final unless the Commission elects to review it within 15 days from the date of service hereof.

It appearing that claimant failed to provide the name of the solvent, which was a prerequisite under the tariff for obtaining the $63.00 rate, the rate of $97.00 under item 752 was the applicable rate.

The complaint is dismissed.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
May 12, 1971.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 256(I)

UNION CARBIDE INTER-AMERICA

v.

VENEZUELAN LINE

ORDER ON REVIEW OF INITIAL DECISION

November 12, 1973

This proceeding involves a claim for overcharge of ocean freight on a shipment carried on respondent's vessel. The cargo in question was described as "Synthetic Resin" and was rated as Synthetic Resin N.O.S. at $49/2000 lbs. Claimant now seeks to have applied a rate of $37/2000 lbs, the rate for "Polyvinyl Chloride Resin".

The Examiner denied the claim "not only because the proof is deficient ... but also because it would be inequitable to award reparation under the circumstances appearing".

The Examiner's equity theory is that even if a misrating is proven before the Commission it would be inequitable under the circumstances to award reparation because the carrier is without fault in regard to the misrating. Claimant, a large corporation, engaged in marketing products as to which the exact technical description is known to it, furnished the carrier with the "synthetic resin" description. The carrier, relying on this information, applied the rate appearing in its tariff for this exact description. The carrier then, according to the Examiner, should not be penalized for the mistake or negligence of a knowledgeable shipper in failing to provide the proper or more exact description.

While we are not without sympathy for the carrier it is submitted that the Examiner's theory breaks down when he concludes that the carrier is being penalized. In this case, for example, the carrier held itself out of carry Polyvinyl Chloride Resins at a rate of $37. This becomes the lawful rate for that commodity. If it is shown in a proceeding here that the commodity actually shipped was Polyvinyl Chloride Resin, the carrier is not penalized in having to refund the overcharge. Rather, the carrier is merely being required to adhere to its lawful rate. To permit the carrier to retain the overcharge would in fact provide the carrier a windfall.

Accordingly, we hereby disavow the Examiner's equity theory and reiterate our position that what is actually shipped determines the rate to be applied. Equities of the kind involved here of course can be and are taken into consideration in determining whether enforcement penalties are sought against the carrier.

The Examiner would also deny the claim on the basis of lack of proof as to what was actually shipped. Claimant has submitted a commercial invoice dated April 16, 1969 in its attempt to show that the shipment consisted of Polyvinyl Chloride Resin. Marks and numbers on the bill of lading are identical to those on the invoice. Union Carbide's order number 184599–2 appears on both documents. Each document lists the quantity as 440 bags. The Examiner found that the weight on the invoice differed from that on the bill of lading (22,000 lbs v. 22,880 lbs.). However, our examination shows that while the 22,000 lbs. figure does appear on the invoice as the net weight the same invoice also shows a gross weight of 22,880 lbs. the same as on the bill of lading.

It must therefore be concluded that the invoice and bill of lading refer to the same shipment.

The invoice describes the commodity as "Union Carbide Vinyl Resin QAHR". Claimant correctly points out that the Commission in Informal Docket 93(I) determined that a Union Carbide Vinyl Resin, Q series, qualified to be rated as "Polyvinyl Chloride Resin", the rating sought here by claimant.

Under these circumstances we conclude that the burden of proof has been met and the claim should be awarded. ($147.57). It is so ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 256(I)

UNION CARBIDE INTER-AMERICA

v.

VENEZUELAN LINE

Complaint dismissed.

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

Complainant Union Carbide Inter-America asks for an award of reparation, alleging misapplication of the rate on a shipment carried by respondent Venezuelan Line from Philadelphia to La Guaira pursuant to bill of lading dated June 8, 1969, which described the commodity shipped as "440 bags Synthetic Resin, N.O.S." weighing 22,880 pounds. The rate set forth in the tariff of U.S. Atlantic and Gulf-Venezuela and Netherlands Antilles Conference, of which respondent was a member, for Synthetic Resin was $49.00 per 2,000 pounds. Respondent rated the shipment in accordance with that tariff item.

Complainant contends that the correct bill of lading description should have been "440 bags Polyvinyl Chloride Resin," that the rate of $37.00 per 2,000 pounds for that commodity should have been applied, and that respondent is required to refund the difference between that rate and the rate on Synthetic Resin.

It is well established that carriers must charge the rate applicable to a commodity actually shipped and that a failure to do so is a violation of section 18(b)(3) of the Shipping Act, 1916. A review of the decisions issued under the Informal Docket Procedure indicates a trend to award reparation where possible, and at times on highly technical tariff interpretations, where there is evidence that a commodity was misrated, but without regard to equitable considerations. However, it is proper to consider the equities in-

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

volved in a complaint proceeding. In discussing a remand by a Federal Court, the Commission stated in *Parsons & Whittemore, Inc.* v. *Johnson Line et al.*, 7 F.M.C. 721, 731 (1964):

> The Court, while agreeing with the Board's finding of violations, remanded the case to this Commission to consider "whether under all the circumstances, it is inequitable to force Flota to pay reparations." The Court explained it was taking this action because, *inter alia*, "The Board may have erroneously believed (1) that it was required to grant reparations once it found a violation of the Act."

The fair and equitable treatment of both shipper and carrier has no doubt been the motivation for decisions heretofore issued in Informal Docket proceeding, but the question has not been fully treated. The Commission has held that claims based upon error in weight, measurement, or description are subject to a heavy burden of proof when submitted after the goods have left the carrier's possession. The equitable implications of that requirement are evident. Claims based on error in weight, measurement, or description are filed months, in some cases as here, almost two years after the carrier has lost possession of the cargo. The carrier is practically defenseless, having no way of checking the nature, weight, or measurement of the cargo other than as set forth in the bill of lading which is prepared by the shipper itself. Here, the carrier rated the cargo in accord with the description furnished by the shipper, who later comes in to allege that although he was in error the carrier is responsible.

Equitable considerations to be applied when the shipper is a small concern, inexperienced in transportation matters, may well differ from such considerations when related to large corporations with broad experience in shipping and either employing individuals with expertise in the field or forwarders who are experts. Practically all of the Informal Docket proceedings involve large corporations, the small shipper seldom filing a claim. Carriers publish their tariffs and knowledge of the tariff provisions may be imputed to the shipper or its agent. Although a tariff is to be interpreted against the carrier who prepared it, it is frequently not only the tariff interpretation which is involved, but a highly technical interpretation of the nature of the commodity in relation to a tariff item. When a shipper who manufactures an item which may be variously described, and who has knowledge of the exact technical description of that commodity and also has a carrier's tariff available, a failure to inform the carrier of the proper desciption of the commodity to say the least is negligence, particularly where an experienced shipper is involved.

There are other factors which should not be overlooked when considering informal claims. It was stated in the decision issued in Docket No. 240(I) that the matter of finding a carrier in violation of the Act was not to be taken lightly because of the penalties involved. It is also evident that each claim must be be carefully dealt with from not only the standpoint of tariff interpretation but also in view of the legal principles involved. Section 18(b)(3) must, of course, be considered but section 16 Second cannot be overlooked. A decision ordering a carrier to refund an alleged overcharge when it is not shown beyond a reasonable doubt that the claim stands on firm ground, might constitute an order requiring the allowance of transportation at less than the established rate.

The claim here under consideration fails not only because the proof is deficient, as respondent contends, but also because it would be inequitable to award reparation under the circumstances appearing. Complainant, a large corporation, engaged in marketing products as to which the exact technical description is known to it, furnished the carrier with a description which was applicable to an item set forth in the tariff. Insofar as may be determined, the carrier had no reason to doubt the veracity of that description. That carrier was without fault. Complainant was solely responsible for the error, if an error was made, a matter as to which doubt arises. An invoice dated April 16, 1969, is presented, which purports to describe a shipment made under a bill of lading dated June 8, 1969, as "Vinyl Resin," not "Polyvinyl Chloride Resin," the description which complainant seeks to substitute. The weight in the invoice is stated as 22,000 pounds whereas the weight in the bill of lading is stated as 22,880 pounds. The photostatic copy of a letter which is also relied upon to prove the nature of the commodity shipped (the writer's affiliation or position not shown) refers to another letter, not attached, in which allegedly a reference was made to "PVC Resin."

To deem the evidence submitted as proving beyond a reasonable doubt that the commodity shipped was misdescribed would strain reason. To grant reparation on a claim submitted almost two years after the shipment had been made because of an alleged error in description made by the shipper, well acquainted with this product and matters relating to ocean shipments, would offend equitable principles.

The complaint is dismissed.

(S) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
May 25, 1971.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 262(I)

ABBOTT LABORATORIES

v.

PRUDENTIAL-GRACE LINES

ORDER ON REVIEW OF INITIAL DECISION

November 12, 1973

This proceeding involves a dispute as to the effect the following tariff provision regarding the use of trade names in a bill of lading will have on a claim before this Cimmission for alleged ocean freight overcharges.

Trade names—Bills describing a commodity by trade name only are not acceptable. Shippers are required to describe their merchandise by its common name but may in addition include trade name.

Claimant herein used the trade name Nacconal on the bill of lading, and the carrier subsequently rated the shipment as "cargo N.O.S." Claimant now alleges that Nacconal is a dry detergent and seeks to have the shipment rated according to the description of "detergent, not liquid for industrial use". Respondent carrier, relying on the above tariff provision, denies the validity of the claimed reparation. The Examiner upheld the carrier's position in his decision and dismissed the claim on the basis of the tariff provision.

We believe that the above quoted tariff provision cannot be used to bar recovery in this case. The tariff clearly states that *bills of lading* describing commodities by trade name only, are not acceptable. Thus, if the carrier chooses to invoke this provision, it would be incumbent upon the carrier to return the lading prior to shipment as not acceptable per the tariff item. Otherwise, the carrier by accepting a lading with a trade name description waives the right to use the item for declining claims. The item states that the bills are unacceptable, not the trade names, but the entire bill.

Accordingly, the claim must be considered on its merits. Claimant has rather conclusively shown, through chemical dictionary and manufacturer's statements, that Nacconal is in fact a trade name for a dry detergent commonly used industrially. Respondent does not dispute on the merits.

According, we conclude that the initial decision should be reversed and an award of reparation is due on the merits ($199.60). It is so ordered.

B the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 262(I)

ABBOTT LABORATORIES

v.

PRUDENTIAL-GRACE LINE

Complaint dismissed.

DECISION OF ASHBROOK P. BRYANT, PRESIDING EXAMINER[1]

Abbott Laboratories claims $199.60 reparation from Prudential-Grace Line for alleged freight overcharge on a shipment from New York, New York to Istanbul, Turkey, moving vis SS *Biddeford Victory* on bill of lading dated May 19, 1969 (claim No. 7392[2]). The bill of lading describes the consist of the shipment: Nos. 150/151, Item 2; 1/24; 13 FD [No. of Pkgs.]; LC No. 294635/KAR Advice 9/3221; 968.06 KG. NACCONOL NRSF [Description of Packages and Goods]; 134.0 Measurement; 2358 Gross Weight in pounds. Shipment was rated by carrier on Bill of Lading as "134 ft. at 88– per 40 cu. ft. $294.80" based on classification as "Cargo N.O.S." listed in tariff No. 10 of the North Atlantic Mediterranean Freight Conference.

Claimant asserts that nacconol is a trade name for dry detergent for industrial use, as shown on page 774 of the Chemical Dictionary and which, it is alleged, describes the item shipped and its various uses. Also submitted by claimant is a statement signed by R. D. Young, Intl. Distribution Analyst of Abbott Laboratories, which certifies "that the Nacconol shipped on the *Biddeford Victory*, B/L 46 dated May 19, 1969 is Detergent, not liquid for industrial use." At the time of shipment the rate for that item as listed on the tariff was $90.75 per 2240 lbs.: total for the shipment

[1] Both parties having consented to the informal procedure of Rule 19 (CFR 502.301–304) this decision shall be final unless the Commission elects to review it within 15 days from the date of service hereof.

[2] By letter of December 10, 1970, respondent deneid this claim among others as made more than 6 months after sailing, in accordance with the filed tariff.

of 2350 lbs. was $95.20, instead of $294.80 as rated by the carrier. [This includes a rate differential of $1.50 per ton weight or measurement for shipment destined to Turkish ports, as listed on pages 68 and 44(g) of tariff No. 10.]

Prudential-Grace points out that item 5(K) of the applicable tariff contains the following provision:

(K) Trade names—Bills describing a commodity by trade name only, are not acceptable. Shippers are required to describe their merchandise by its common name but may in addition include trade name.

Prudential-Grace takes the position that it is not incumbent on their rate clerks to "seek definitions from outside source such as chemical dictionaries, etc." but may rely on the description provided by the shipper and incorporated in the bill of lading. It has been so held in prior cases.*

The Commission has uniformly held that claims for reparation involving alleged errors of weight, measurement, or description of necessity involve "heavy burdens of proof on the part of the shipper once the shipment has left the custody of the carrier." To recover, claimant must establish "sufficient facts to indicate with reasonable certainty or definiteness the validity of his claim." Also, as one subject to the Shipping Act, the carrier is obligated by law to assess and collect the applicable freight charges as established by the filed tariff.[3] If a carrier charges a different amount for freight, be it more or less than the tariff permits, it has violated the law.

The carrier in determining the proper tariff rate for a particular shipment is almost uniformly dependent on the commodity description provided him by the shipper or his agent. In the usual case, the carrier must rely upon the description in the bill of lading in assessing and collecting the correct and lawful amount of freight. Hence, at a later time (when the facts are often in substantial dispute and evidence not practicably available) absent the clearest proof that the actual shipment was different and that an illegal charge has been made, the description in the bill of lading must stand. Nor is it incumbent on the carrier's clerk to consult reference works (such as the Chemical Dictionary) to augment the description provided by the shipper and incorporated in the bill of lading.[4]

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*Note 4, post.

[3] See *inter alia Colgate Palmolive Co.* v. *United Fruit*, Informal Docket No. 115(I), Commission order served September 30, 1970, *Upjohn Inter American Corporation* v. *Venezuelan Line*, Informal Docket No. 244(I) Commission order served July 16, 1971.

[4] *Inter alia* see *Union Carbide Inter-America* v. *Prudential-Grace Lines, Inc.*, Informal Docket No. 241(I), Commission order served March 29, 1971.

As stated above, the applicable tariff specifically provides that a description of a "commodity by trade name only" renders the bill of lading "not acceptable." There is no doubt that NACCONOL is a trade name for a series of alxyl sodium sulfate detergents.[5]

The tariff indicates that trade names should not be used as the basis for rating cargo. That is precisely what claimant here insists that the carrier should be required to do. If the carrier were to accept claimant's contention, it would do so in derogation of the express provision of the tariff and might well involve a violation of law.

Complaint dismissed.

(S) ASHBROOK P. BRYANT,
Presiding Examiner.

WASHINGTON, D.C.,
September 24, 1971.

[5] See copy of page 774 Chemical Distionary, submitted by claimant.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 274(I)

ABBOTT LABORATORIES

v.

MOORE-MCCORMACK LINES, INC.

ORDER ON REVIEW OF INITIAL DECISION

November 12, 1973

Claimant Abbott Laboratories seeks to recover for the alleged misapplication of a rate on an ocean shipment described on the bill of lading as Animal and Poultry Feed Supplement, and rated by Moore-McCormack under the tariff rate applicable to "chemicals, N.O.S." The rate sought here is that applicable to "Fodder and feed supplements, animal . . ."

The evidence shows that the shipment consisted of Arsanilic Acids and that the primary, if not sole, use of Arsanilic Acid is as an animal and poultry feed supplement.

The Examiner denied the claim based on the following rule appearing in the conference tariff on "Clarification of Commodity Description":

> Description of commodities shown on all copies of bills of lading shall be verified by comparison with the Export Declaration. In the event descriptions are dissimilar and not analogous, the description including the export Schedule "B" classification shown on the Export Declaration shall govern the rate to be applied. Supplementary guarantee of any kind shall not be sufficient to warrant application of rate other than that required by description of Export Declaration.

The Examiner reasoned, that although the export declaration was not furnished for the record the correspondence furnished showed that the Schedule "B" number used by claimant was 512.0325, which number appears in Schedule "B" under the heading of "chemical" and refers to Arsanilic Acid, Medicinal Grade.

Based on the quoted rule, the Examiner found the "Chemical N.O.S." rating applicable and denied the claim.

We conclude that the Examiner erred in applying the quoted tariff rule and denying the claim. The Commission has attempted to insure that whenever reasonable burden of proof standards are met, a commodity will be rated for transportation purposes according to what is actually shipped. In the present case there is no question that what was shipped was "Arsanilic Acid" and that Arsanilic Acid *is an animal and poultry feed supplement.* FMC and ICC precedent establish the idea that where a commodity is represented in more than one tariff description, the more specific description will apply. Here "fodder and feed supplements, animal" is more specific than "chemical N.O.S.". Here the description in the bill of lading correctly designates what was in fact shipped, and it should have been rated accordingly. Actually, the cargo was initially rated by the carrier as feed supplement. The rating under "chemicals N.O.S." was a subsequent change by the carrier. The cited tariff rule should not be used to deny a claim where it is so clearly shown what was actually shipped.

Additionally, it is questionable whether the cited rule should in any event apply to this situation. The rule is to take effect, "In the even descriptions are dissimilar and not analogous. . . ." Even if the export declaration described the commodity only as "Arsanilic Acid" (the Export Declaration was not attached to the claim and thus the alleged description cannot be verified), it is questionable whether that description is "dissimilar" or "not analogous" to the bill of lading description of "Animal and Poultry Feed Supplement". "Analogous" is defined in the dictionary as meaning "similar or comparable in certain respect". On the evidence submitted here there is no basis for arguing that Arsanilic Acid is not "similar or comparable" to an animal food supplement. In fact they appear to be one and the same.

Accordingly, the Examiner's denial should be reversed and the feed supplement rate be found applicable resulting in an award to complainant of $469.63. It is so ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 274(I)

ABBOTT LABORATORIES

v.

MOORE-MCCORMACK LINES, INC.

November 12, 1973

Claim denied.

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

Claimant Abbott Laboratories seeks reparation from respondent Moore-McCormack Lines, Inc., a member of the Inter-American Freight Conference (conference), alleging misapplication of a rate on a shipment transported from Brooklyn, New York, to Sao Paulo, Brazil. The bill of lading, dated July 24, 1969, set forth the description furnished by claimant as a shipment of "Animal and Poultry Feed Supplement, 578 cubic feet, 13310 pounds." The conference tariff provides a rate of $55.00 W/M on "Fodder and Feed Supplements, Animal, with or without vitamin or anti-biotic contents, N.O.S. (not including Phosphoric Acid): value up to $3,000.00 per 2400 lbs. gross weight." Respondent originally applied the $55.00 rate but upon checking the invoice found that the shipment consisted of "acid arsanilic" and rerated the commodity at $87.50 W/M, applicable to chemicals, N.O.S.

Claimant contends that the end use of the commodity was an animal feed supplement and that the $55.00 rate was applicable. Attached to the claim is claimant's catalogue definition of Arsanilic Acid to include:

> USES: Arsanilic Acid is recommended for use in feeds for swine, turkeys, and chickens at 45 to 90 grams per ton.

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

The conference tariff at the time of the shipment also set forth the following rule:

Clarification of commodity description: Description of commodities shown on all copies of bills of lading shall be verified by comparison with the Export Declaration. In the event descriptions are dissimilar and not analogous, the description including the export Schedule "B" classification shown on the Export Declaration shall govern the rate of the applied. Supplementary guarantee of any kind shall not be sufficient to warrant application of rate other than that required by description of Export Declaration.

Claimant did not attach the Export Declaration to the claim, but the correspondence furnished shows that the Schedule "B" number used by claimant was 512.0325, which number appears in Schedule "B" under the heading of "Chemicals" and refers to Arsanilic Acid, Medicinal.

Pursuant to the above quoted rule, respondent properly applied the Chemical, N.O.S. rate as the tariff did not provide a specific rate for Arsanilic Acid.

The claim is denied.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
November.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–38

THE CARBORUNDUM COMPANY

v.

VENEZUELAN LINE

November 9, 1973

ON REVIEW OF INITIAL DECISION

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

This proceeding is before us upon respondent's exception to the May 18, 1973, Initial Decision of Administrative Law Judge Norman D. Kline. Pursuant to the request of complainant, all parties agreed to a shortened procedure without oral argument [Rule 11] as set forth in 46 CFR 502.181.

On July 28, 1972, Carborundum Company filed a complaint with the Commission seeking recovery of reparation in the amount of $505.11 from Venezuelan Line. The basis of the complaint alleges an overcharge on four shipments from New York to Puerto Cabello, Venezuela, carried on respondent's vessels between September 1970 and June 1971, such overcharge being in violation of section 18(b) (3) of the Shipping Act, 1916. [1]

We concur in the Judge's denial of respondent's argument of lack of jurisdiction. Upon carefuly consideration of the record and the exceptions, 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. Accord-

[1] Section 18(b)(3) of the Shipping Act, 1916, provides: "No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time;. . . ."

ingly, with those exceptions we hereby adopt it as our own and make it a part hereof.

We find that the record reflects no valid reasons to justify departing from the firmly established rule that a tariff should be considered in whole and not in part when applying freight charges on a commodity. See *Storage Practices at Longview, Wash.*, 6 F.M.B. 178, 182 (1960). Pursuant to the latter rule of law, a reading of respondent's tariff reveals that prior to the granting of either a pallet allowance or rate deduction certain conditions must be met, i.e.: (1) that the minimum acceptable pallet dimensions are 32″ x 40″ (2) that the gross weight of a single pallet plus the cargo stowed thereon shall not be less than 1,500 lbs.: and (3) that the overall cubic measurement of cargo and pallet shall not be less than 40 cubic feet. Both Items 26(f) and (i) must, therefore, be read in conjunction with the latter conditions.

Hence, with the latter in mind and as detailed *infra*, we do not agree with the Judge's conclusions in the following respect.

Judge Kline, with reference by claim No. 3, agreed with complainant's contention that since the bill of lading for the three pallets of fluorspar (claim No. 3) showed the gross weight of the shipment (6,150 lbs.) and the net weight of the cargo (6,000 lbs.),[2] the respondent could by subtracting one from the other arrive at the weight of the pallets (150 lbs.), and by dividing the gross weight of the shipments by three, the respondent should have concluded that the minimum weight requirement of Item 26(i) had been met as to each palletized shipment.

The basic flaw in such a contention is that although the complainant did furnish the carrier with the weight of both the pallets and cargo thereon, there is no evidence of record to suggest that the pallets in question subscribe to the "minimum acceptable pallet dimensions" under either Item 26(f) or Item 26(i). Consequently, the carrier has no way of knowing whether all of the requirements of Item 26 have been met.[3] This would also apply to the Administrative Law Judge's treatment of claim No. 4, where he used the average gross weight of the 27 shipments to conclude that they met the minimum weight requirement of Item 26(i).

Moreover, we find that the assumption that each of the 27

[2] The bill of lading reveals that each of the three pallets was loaded with 20 100-pound bags of fluorspar.

[3] In its brief on exception, the respondent submits, for the first time, that Item 26, Note 2, Item 1000 (6th Rev. page 22–B, Corr. 970–22B, effective July 3, 1973) of its tariff specifically excludes fluorite or fluorspar from the $2.50 per ton pallet discount provided for in Item 26(i). Although Judge Kline did not have an opportunity to rule on respondent's reference, we are not precluded from taking judicial notice of the aforementioned tariff provision to conclude that this deduction as it relates to claim No. 2 should be disallowed.

individual shipments meet the minimum weight requirements cannot be sustained by simply dividing the gross weight of the cargo by 27. We interpret Item 26 to require that each pallet receiving the rate deduction must meet the minimum weight requirement of not less than 1,500 pounds. Computing the average load unit falls short of such requirement. Also, because the record is void of facts to the contrary, and assuming the shapes were all of the same size and weight, it can be strongly argued that at least two of the twenty-seven pallets were under the minimum weight requirement.[4] And thus, the shipper is getting a deduction not provided for in the tariff. Consequently, for us to approve such a faulty interpretation of respondent's tariff would be to render meaningless the phrases "shipper must furnish ... the actual weight and measurements of the pallet" of Item 26(f) and "provided prepalletized cargo complies in all respects with the rules set forth herein ..." of Item 26(i).

As a result of the above reasoning, we conclude that the refund due the complainant should be reduced to !422.76, which represents $108.43 (claim No. 1); $239.93 (claim No. 2); and $74.40 (claim No. 3). We have computed the amount of claim No. 3 on the assumption (from a reading of the pertinent shipping documents) that there is assessed against the shipper, for each pallet, a $1.25 and a $.03 surcharge-package charge.

However, because of the possibility that these charges may not be precisely the same on the shipment in question, we will leave the record open for 30 days to allow the parties to provide the precise charges, if any. Absent any correction by the parties, reparation as hereinafter ordered will be paid within 45 days from the date of service with interest thereon at six percent per annum if not paid within said 45 days.

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

[4] The bill of lading reflects that of the 27 pallets, 25 were loaded with 238 shapes each, while 2 were loaded with only 150 shapes each; and thus, these latter 2 pallets could not qualify for the rate deduction because they would weigh less than the 1,500 pounds each (56,876 pounds/6250 shapes = 9.1 pounds per shape differed in weight and measurement, there is no basis upon which an average unit load can be established, or, in fact, the actual weight of any single loaded pallet.

FEDERAL MARITIME COMMISSION

No. 72–38

THE CARBORUNDUM COMPANY

v.

VENEZUELAN LINE

Claims filed within two years of accrual cannot be barred by carrier's imposing a six-month time limitation.

Complainant, having furnished requisite information relating to weight of pallets, is entitled to pallet allowances prescribed by respondent's tariff regulations; however, where such information was not furnished, complainant is entitled only to a partial allowance.

Reparation awarded.

H. A. Harrington for complainant.

G. E. McNamara and *Ivan DeAngelis* for respondent.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

By complaint served August 1, 1972, complainant seeks reparation in the sum of $505.11 from respondent, claiming that on four shipments carried on respondent's vessels between September 1970 and June 1971 it was assessed freight rates which were higher than those published in respondent's tariff, in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act).

In answer to the complaint, respondent states that the four claims were denied because complainant failed to file its claim within the six-months' period prescribed by respondent's tariff Item 11, and because, on two occasions, involving prepalletized shipments, complainant failed to provide information relating to the weight of the pallets as required by tariff Items 26(f) and (i).

Pursuant to request of complainant, to which respondent, consents, this proceeding was conducted in accordance with the Commission's Rule 11 (shortened procedure).[2]

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission (Rule 13(g), Rules of Practice and Procedure, 46 CFR 502,227).

[2] By letter of May 7, 1973, respondents both to the shortened procedure as prescribed by Rule 11 (46 CFR 502.181) and to the informal procedure set forth in Subpart S, 46 CFR 502.301. Since complainant has not consented to the Subpart S procedure, the Rule 11 procedure was followed.

The four claims are described as follows:

1. This shipment consisted of 7 pallet cartons of fluorspar moving from New York to Puerto Cabello, Venezuela, bill of lading dated September 11, 1970. The shipment was rated on the basis of $53.00 per 2,000 lbs., which was the applicable rate for "Chemicals, N.O.S.," Class rate 7, according to the respondent's tariff in effect at that time.[3] The shipment, according to complainant, should have been rated on the basis of $31.00 per 2,000 lbs., the applicable rate for "fluorspar."[4] The shipment weighed 9,857 lbs. Complainant claims that it was overcharged in the amount of $108.43, which is the difference between the freight computed at the $53.00 rate ($261.42) and the freight computed at the $31.00 rate ($152.99).[5]

2. This shipment consisted of 16 cartons of nonclay firebrick and 2 cartons high temperature bonding "motar," and moved from New York to Puerto Cabello, bill of lading dated May 7, 1971. Complainant does not question the description and rating of the high temperature bonding "motar." However, it alleges that the nonclay firebrick was incorrectly classified as "Glass Brick" and assessed a rate of $43.50 per 2,000 lbs. whereas it should have been classified and rated as "Brick or Bricks, viz: Fire, including plastic, packed or skidded" as per respondent's tariff at a rate of $27.00 per 2,000 lbs.[6] The shipment weighed 29,082 lbs. Complainant claims that it was overcharged in the amount of $239.93, which is the difference between the freight computed at the $43.50 rate ($632.53) and the freight computed at the $27.00 rate ($392.60).

3. This shipment consisted of 3 pallets of fluorspar declared as "Crude Abrasives (Fluorspar)" and moved from New York to Puerto Cabello, bill of lading dated May 7, 1971. The shipment was rated on the basis of $57.50 per 2,000 lbs., which was the applicable rate for "Grinding Compounds," as per respondent's tariff.[7] The shipment, according to complainant, should have been rated on the basis of $33.50 per 2,000 lbs., which was the rate applicable to "flourspar," as per respondent's tariff.[8] In addition, it is alleged that the shipment was entitled to special allowances for prepalletized cargoes amounting to $2.50 per 2,000 lbs., applied against the weight of the shipment less pallets, as provided in tariff Item 26. The net rate would therefore amount to $31.00 per 2,000 lbs. The

[3] U.S. Atlantic and Gulf-Venezuela and Netherlands Antilles Conference, Freight Tariff No. 2, S.B. Ven.–11, Rev. page 82.

[4] *Ibid*, 3rd Rev. Page 94.

[6] Page 79.

[7] Page 85.

[8] Page 94.

gross weight of the shipment was 6,150 lbs. Complainant claims that it was overcharged in the amount of $84.41, which is the difference between the freight computed at the $57.50 rate ($181.25) and the freight computed at the $33.50 rate plus the pallet allowances ($96.84).[9]

4. This shipment consisted of 27 pallets "Refractory Shapes" declared as such and rated as such. The shipment moved from New York to Puerto Cabello, bill of lading dated June 4, 1971. The gross weight of the shipment was 56,876 lbs. Complainant alleges that the shipment was entitled to a partial pallet allowance in the amount of $2.50 per 2,000 lbs., as provided in Item 26 of the tariff.

The shipment was assessed total charges in the amount of $989.03 on the basis of 56,876 lbs. at a rate of $33.50 per 2,000 lbs., plus surcharge and packing charge. Complainant claims that the correct freight should have been $916.69 on the basis of 56,876 lbs. at $31.00 per 2,000 lbs. ($33.50 less $2.50 pallet allowance), plus surcharge and packing charges. Complainant claims that it was overcharged in the amount of $72.34 ($989.03 less $916.69).

In total the individual claims amount to $505.11.

Discussion and Conclusions

As mentioned, respondent does not dispute the fact that the commodities involved in Claims 1, 2, and 3 (flourspar and nonclay firebrick) were misclassified. However, respondent states that it denied all claims because they were not submitted to the carrier within six months of date of shipment, and furthermore, as regards Claims 3 and 4, for the additional reason the complainant did not furnish information relating to the weight of the pallets.

Respondent's tariff Item 11 provides in pertinent part as follows:

> Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment.

Item 26(f) provides in pertinent part as follows:

> When cargo is freighted on a weight basis, the actual weight of the pallet shall be deducted, but not in excess of 10% of the gross weight of the cargo and pallet. Shipper must furnish at the time of shipment the actual weight and measurements of the pallet.

Item 26(i) provides in pertinent part as follows:

> Provided prepalletized cargo complies in all respects with the rules set forth herein, the carrier(s) will allow a discount of $2.50 per ton weight or measurement of the cargo as freighted.

[9] These computations also include a small amount representing a surcharge and packing charge.

The pleadings and supporting documentation submitted by the parties raise the following issues:

(1) whether complainant's failure to comply with the tariff regulation imposing a six-month's time limitation on the filing of claims involving alleged errors of weight, measurement, or description, constitutes a valid defense to a complaint filed within the two-year period prescribed by section 22 of the Act;

(2) whether, as regards Claim No. 3, complainant furnished sufficient information relating to the weight of the pallets as required by respondent's Item 26 (f) and (i), thereby qualifying the shipment for the pallet allowances prescribed therein;

(3) whether, as regards Claim No. 4, complainant's falure to furnish information relating to the weight of the pallets disqualifies the claim both as to the allowance prescribed by Item 26(i) ($2.50 per ton) as well as to the prescribed by Item 26(f), which allows a deduction for the weight of the pallets.

(4) whether, as regards Claims 3 and 4, the shipments involved can be found not to have qualified for pallet allowances under Item 26, either in whole or in part, because of the use of an improper type of pallet.

It is now well settled that claims filed within two years of accrual cannot be barred by tariff regulations imposing a shorter time limitation but must be considered on their merits. In *Proposed Rule-Time Limit on Filing Overcharge Claims*, 12 F.M.C. 298, 308 (1969), the Commission stated:

> Furthermore, once a claim has finally been denied by a carrier, the shipper may still seek and in a proper case recover reparation before the Commission at any time within 2 years of the alleged injury, and this is true whether the claim has been denied by the carrier on the merits or on the basis of a time limitation rule.

See also *Colgate Palmolive Company* v. *United Fruit Company*, 11 SRR 979 (1970).

Respondent's Contention that all four claims should be denied because of failure of the complainant to submit them to the carrier within six months must be rejected. This conclusion does not completely dispose of the matters in controversy, however, since as regards claims 3 and 4 respondent contends that complainant failed to qualify for the pallet allowances prescribed by Items 26 (f) and (i) because the requisite information relating to the weight and measurement of the pallets was not furnished to the carrier and because the type of pallets involved might have been improper.

As can be seen from the provisions of Item 26 (f) and (i), a shipper is entitled to two allowances on prepalletized shipments, the first on the weight of the shipment and the second on the rate. Thus, in the case of a shipment freighted on a weight basis, as is here involved, Item 26(f) allows a reduction for the weight of the pallets so that the ocean rate is applied only against the weight of the cargo. Item 26(i) provides a further reduction against the ocean rate itself, in this case, $2.50 per weight ton.

In the case of Claim No. 3, respondent contends that complainant is not entitled to the pallet allowances because it did not furnish at the time of shipment the actual weight and measurement of the pallets as required by Item 26(f) and has not complied in all respects with the requirements of Item 26(f). Furthermore, respondent contends that there is a reasonable doubt as to the type of pallet involved and that it cannot verify this point since the pallets have left its custody.

Contrary to respondent's contention, an examination of the documentation submitted by complainant indicates that the data necessary to determine the weight of the pallets was furnished to the carrier at the time of shipment. The applicable bill of lading under which the shipment in question moved clearly indicates both the gross weight of the shipment (6,150 lbs.) and the weight of the cargo (3 loads consisting of 20 100 bags per load). The weight of the pallets is easily determined to be 150 lbs. (6,150 less 6,000 lbs.).

As to the contention that the pallet allowances should be disallowed because there is "reasonable doubt as to the type of pallet involved," respondent offers no evidence in support thereof. Instead, it refers to Claim No. 1, where complainant did not seek the pallet allowances, and states that Claim No. 3 "is of a similar nature." However, Claim No. 1 involved a shipment which could not qualify for the pallet allowances since it failed to meet the minimum weight requirement (1,500 lbs. per palletized load), as prescribed by Item 26(b).[10] Claim No. 3, on the other hand, is clearly distinguishable since the shipment consisted of three palletized loads amounting of 6,150 lbs. or 2,050 lbs. per load, thereby meeting the minimum weight requirement.

It is found and concluded that, as regards Claim No. 3, complainant furnished the requisite information regarding the weight of the pallets as required by Items 26(f) and (i) and did otherwise meet the requirements of Item 26.

In the case of Claim No. 4, complainant admits that it failed to provide the weight of the pallets as required by Item 26(f) but nevertheless claims it is entitled to the discount provided in Item

[10] As noted previously, Claim No. 1 consisted of 7 palletized loads weighing a total of 9,857 lbs., or 1,408 lbs. per load.

26(i) ($2.50 per ton), citing Informal Docket No. 268(I), *Union Carbide Inter-America* v. *Prudential-Grace Line*, the decision in which was served August 20, 1971.

Respondent raises the same defenses to this claim as it did in the case of Claim No. 3, and further contends that complainant "may not interpret Item 26 to suit his own convenience in order to claim a self-calculated allowance while admitting that the weight of the pallets was not provided."

Again, as in the case of Claim No. 3, it would appear that the shipment involved in Claim No. 4 qualifies for the palletized allowance, insofar as it was a prepalletized shipment which met the minimum weight requirement.[11] Furthermore, the rate discount provided under Item 26(i) ($2.50 per ton) is a separate allowance applicable to the ocean rate which can be determined without regard to the information required by Item 26(f) concerning the weight of the pallets. There is therefore no reasonable basis to deny the allowance provided by Item 26(i) because of failure to comply with requirements which relate to a separate allowance provided by Item 26(f). Respondent's contention could only be sustained by interpreting Item 26 in a manner most favorable to the carrier. It is well settled, however, that in questions of tariff interpretation any ambiguity is construed most strongly against the carrier. *United Nation's Children's Fund* v. *Blue Sea Line*, 12 SRR 1067, 1069 (1972).

Even if respondent's contentions were not untenable for the foregoing reasons, it would appear that they could not be sustained in view of *Union Carbide, supra.* In that case complainant sought reparation, alleging that it should have received the pallet allowance provided in respondent's tariff, which were virtually identical to those provided by Items 26 (f) and (i). As in the present case, however, complainant had failed to provide information relating to the weight of the pallets, although in every other respect the shipment had qualified under the applicable regulations. It was held that the shipment was entitled only to the rate discount, which, as in the present case, amounted to $2.50 per ton, and the reparation was awarded on that basis.

It is found and concluded that, as regards Claim No. 4, complainant, having failed to provide information relating to the weight of the pallets, as required by Item 26(f), is not entitled to the allowance prescribed therein. Complainant is entitled, however, to

[11] As noted previously, cno. 4 involved 27 palletized loads weighing a total of 56,876 lbs., or 2,107 lbs. per load.

the allowance prescribed by Item 26(i) ($2.50 per weight ton), applied against the gross weight of the shipment.

ULTIMATE CONCLUSIONS

The claims having been filed within two years of accrual, cannot be barred by the carrier's tariff imposing a six-month time limit but must be considered on their merits.

Having furnished information relating to the weight of the pallets involved in connection with Claim N. 3, complainant complied with the provisions of Item 26 (f) and (i) and is therefore entitled to the pallet allowances prescribed therein.

Having failed to furnish information relating to the weight of the pallets involved in connection with Claim No. 4, complainant is not entitled to the pallet allowance prescribed in Item 26(f) but is entitled to the allowance prescribed in Item 26(i).

Complainant is awarded reparation in the sum of $505.11, with interest at the rate of 6 percent per annum if not paid within thirty days.

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

WASHINGTON, D.C.,
May 18, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–18

POSSIBLE BREACH OF PACIFIC COAST EUROPEAN CONFERENCE RATE AGREEMENT

Dispute between Pacific Coast European Conference and certain dual rate contract signatory shippers as to whether such shippers had the legal right to select the carrier at the time certain shipments of cotton were made on non-Conference vessels directed to be submitted to arbitration pursuant to the terms of Conference's Shippers Rate Agreement.

Pending the outcome of arbitration, Conference ordered to cease and desist from (1) assessing or attempting to assess penalties against the cotton shippers under the Agreement; and (2) suspending or threatening to suspend any of those shippers' rights under the Agreement.

Conference also directed to refrain from circulating any notices to its contract merchants which may be interpreted to require such merchants to ship *all* of their goods on Conference vessels, even to the extent of foregoing sales where the right to select the carrier is vested in another person.

Leonard G. James for Respondent Pacific Coast European Conference.

Robert E. Patmont for Intervenor Calcot Ltd.

Alex C. Cocke, Sr. for Intervenor Geo. H. McFadden & Bro., Inc.

Thomas D. Wilcox for Intervenor Starke Taylor & Son Incorporated.

Donald J. Brunner and *David Fisher*, Hearing Counsel.

REPORT

November 20, 1973

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

By order served April 18, 1973, the Commission directed the Pacific Coast European Conference to show cause why (1) a dispute between it and five specified cotton shippers, arising under the Conference's Shippers Rate Agreement (dual rate contract)[1] and involving the issue of whether such shipper-signatories had the legal right to select the carrier at the time certain shipments of cotton were made on non-Conference vessels, should not be submitted to arbitration; (2) it should not be ordered to cease and desist from suspending and/or threatening to suspend its Shipper Rate Agreement with such shipper signatories, as well as any other shipper signatories who may be smiliarly situated; and (3) the Commission should not disapprove the Conference's Shippers Rate Agreement for failure to abide by its terms as required by section 14b of the Shipping Act, 1916.

The "facts" leading up to the initiation of this proceeding, as recited in the Commission's Order to Show Cause, are substantially as follows.

On January 8, 1970, the Conference circulated a "Notice to All Contract Shippers", in which it was stated that contract rates would be granted "only to shippers whose cargoes are tendered to Conference vessels, exclusively." This unilateral interpretation was to apply, "regardless of the shippers' terms of sale, whether FOB, FAS, C & F, CIF or otherwise."

Thereafter, on November 28, 1972, the Conference circulated a "Notice to Shippers of Cotton", in which it "ADVISED" all contract shippers "THAT SHIPMENT ON ANY VESSEL OF THE SPANISH LINE, IN ITS PRESENT STATUS [that of a non-Conference carrier], WILL CONSTITUTE A VIOLATION OF THE SHIPPER'S OBLIGATOINS UNDER [the Agreement]." This latter notice was prompted by the announcement of the inauguration of an independent monthly service by Spanish Line from U.S. Pacific Coast ports to ports in Spain, France, and Italy.

Subsequently, and in response to this latest "Notice", certain signatory cotton shippers—namely, Geo. H. McFadden & Bro. (McFadden), Starke-Taylor & Son (Starke-Taylor), Jess Smith & Sons, Calcot Ltd. (Calcot), and the Allenberg Cotton Co. (hereinafter collectively referred to as "Shippers")—notified the Conference pursuant to Article 2(c) of the Agreement[2] that certain shipments

[1] This Shipper Rate Agreement was approved by the Commission pursuant to section 14b of th Shipping Act, 1916, and the Commission's decision in *The Dual Rate* Cases, 8 F.M.C. 16 (1964) or December 9, 1966. With the exception of one modification not material or relevant here, this Agreemen has remained unchanged since its approval. The Agreement is a form of ocean rate contract by whic signatory shippers agree to confine the carriage of this cargo in certain designated trade area exclusively to Conference member lines in return for rates lower than the published tariff rates.

[2] Article 2(c) requires signatory shippers to notify the Conference of any shipment, with which they ar involved, made on a non-Conference vessel where the legal right to select the carrier is vested in anothe person.

of cotton were to be carried by non-Conference vessels.[3] The terms of sale of these shipments were allegedly FOB, and the routing via non-Conference vessels was, according to the Shippers, "dictated by the Spanish consignees pursuant to a Spanish decree." As such, the Shippers took the position with the Conference that they did not have the "legal right", within the meaning of the Agreement, to select the carrier at the time of the shipments in question, and therefore the non-Conference shipments were not made in violation of such Agreement.

The Conference, however, has held to the interpretation announced in its circular letter of January 8, 1970, claiming that regardless of the terms of sale, the Shippers were obligated under the Agreement to utilize Conference vessels on all their shipments of cotton. As a result, during January 1973, the Conference sent similar letters to the Shippers in which it demanded certain enumerated money damages for the loss of cotton shipments to non-Conference vessels. In addition, the Conference has announced its intention to suspend the Shippers' contract privileges and apply noncontract rates to all future shipments of those signatories unless the requested damages were forthcoming.

DISCUSSION AND CONCLUSION

Section 14b of the Shipping Act, 1916, in authorizing ". . . ocean common carriers and conferences thereof . . . to enter into effective and fair dual rate contracts . . ." requires that such contracts contain certain specified safeguard clauses. Thus, under the third numbered provision of section 14b, all approved dual rate contract forms must embody a clause which expressly limits their coverage to:

> . . . only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: Provided, however, that it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract.

The question of the shipments to be encompassed by a contract system was one of the most difficult and troublesome problems

[3] The following cotton shipments have admittedly been made on non-Conference vessels:
Starke-Taylor & Son, Inc., 3152 bales loaded on SS STAR HERANGER, on November 17, 1972, 6148 bales loaded on SS STAR TARNAGER, December 28, 1972.
Jess Smith & Sons, 1999 bales loaded on MS HOLSTENBANK, December 15, 1972.
Colcot, Ltd., 2000 bales loaded on SS STAR HERANGER, November 21, 1972.
McFadden, 3604 bales on MS HOLSTENBANK, December 12 & 15, 1972.

faced by the drafters of section 14b. Prior to the enactment of the new section, the terms of dual rate contracts varied widely as to the type of shipments covered by the contract. Most, however, were all-inclusive, which meant that the contract merchant was required to first offer *all* of his shipment to the contract carrier or conference, regardless of whether the merchant was actually vested with the right to select the carrier.

Thus, in attempting to define for the future the specific area of contract coverage and the circumstances under which the merchant would be restricted to the use of the contract carrier for the goods he purchases or sells, the legislators were confronted with two opposing considerations. While Congress did not want to make dual rate contracts so rigid as to permit the carrier or conference to "dictate the terms upon which one merchant must sell to another", it also did not wish to make them so loose or flexible as to invite evasion by the contract merchants. The latter consideration gave recognition to the argument advanced during the Congressional hearings that unless specifically legislated against, some "unscrupulous shippers would use conference vessels at the contract rates when it suited them or ship by non-conference lines without loss of contract rights merely by changing the terms of sale." [4]

The "legal rights" clause ultimately adopted by Congress and embodied in section 14b(3) was intended to strike a fair balance between both carrier and shipper interests. By prohibiting dual rate contracts from covering shipments of goods where the merchant has no legal right to select the carrier, section 14b(3) assures that contract merchants will not be held to a breach of contract for doing business with anyone who will not surrender his right to make his own shipping arrangements.

Alternatively, this section affords the carrier or conference ample protection from "unscrupulous shippers' by making it a breach of contract for the merchant, with the intent of evading his contractual obligation, to change the terms of sale or otherwise improperly divest himself of the right to select the carrier. If the contract merchant actually has the legal right to select the carrier, he is duty bound under section 14b(3) to select the contract carrier and he may be penalized for failure to do so.

Thus, as the House Committee on Merchant Marine and Fisheries explained when it wrote the "provided, however" clause into legislation:

Fundamentally, what the committee sought was a provision

[4] H. Rep. No. 498, 87th Cong., 1st Sess. 9 (1961).

that specified the good faith of the parties—neither too rigid or *susceptible of manipulation. The committee feels that if a contract* shipper is in a legal position to control the routing, good faith requires him to do so. [On the other hand], ... the provision prohibits a conference or carrier from requiring a contract signatory to forego a sale unless shipment is made via conference vessels. [5]

It was in the light of this statutory background that the Commission in *The Dual Rate Cases, supra,* prescribed the following clauses for use in approved dual rate contracts:

1. If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of any agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.

2. If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.

3. It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

4. For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment.

(a) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(b) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.

5. Nothing contained in this Agreement shall require the Merchant to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

The first three clauses set forth above are uniformly required in all dual rate contracts and define, consistent with the provisions of section 14b(3) and the legislative history thereof, the circumstances under which a signatory merchant is restricted to the use of the contract carrier for the transportation of his shipments. Clause 5 of the foregoing provision, also made mandatory by the Commission, was prescribed pursuant to the House Committee Report's directive that nothing in any approved contract shall require "a contract signatory to forego a sale unless shipment is made via [contract carrier or] conference vessels."

[5] *Ib*

The fourth numbered clause prescribed by the Commission was made optional for use by those carriers and conferences which desired a provision which raised a presumption that the signatory merchant had the legal right to select the carrier where his name appeared on certain shipping documents or where he otherwise participated in the ocean routing or the selection of the ocean carrier. In so doing, the Commission rejected the proposed use of a *conclusive presumption* to the same effect for the stated reason that "the statute does not appear to permit a presumption ... which would preclude the proof of the true situation." *The Dual Rate Cases, supra,* p. 30.

Thus, the Commission made it clear that a signatory merchant's legal right to select the carrier is ultimately a question of fact to be gleaned from all the circumstances surrounding a shipment and is never to be presumed conclusively. In this manner did the Commission give form to the clear legislative intent of section 14b, and more specifically the third numbered provision thereof, that a merchant's obligation under a dual rate contract depends upon whether he has *in fact* the power to select the carrier and does not necessarily hinge on the terms of shipment, or the fact that the merchant's name appears on the shipping documents.

The dual rate contract approved for use by the Pacific Coast European Conference to which the Shippers here are signatories contains verbatim all of the clauses, including the optional one relating to presumptions, prescribed by the Commission under section 14b(3). To this extent at least, the Conference's Agreement complies fully with the requirements of section 14b as interpreted and implemented by us in *The Dual Rate Cases, supra.* [6]

With all the above principles firmly in mind, we move now to a consideration of the matters placed at issue in this proceeding. The first matter raised in the Commission's Order directs the Conference to show cause why:

> ... (1) the dispute between it and ... [the Shippers] as to whether such shipper-signatories had the legal right to select the carrier at the time certain

[6] *In so finding, we specifically reject Strake-Taylor's contention that the Conference's approved dual rate contract form is "not in compliance with the statute" because it does not expressly* contain the *specific* language of section 14b(3). "Expressly", as used in section 14b, refers only to the subject matter of the required contractual provisions and was not intended to indicate the precise wording of such provisions Thus, all that section 14b requires, insofar as the third provision thereof is concerned, is that an approved dual rate contract contain a provision which *expressly* ".. covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier ...", etc. It does *not* require that such contract expressly embody the quoted language Since the mandatory "legal rights" clause prescribed by the Commission and contained in the Conference's Agreement sets forth with suffifient explicitness the statutory requirement of section 14b(3), we see no merit in the argument that such Agreement does not comply with that section

shipments of cotton were made on non-Conference vessels should not be submitted to arbitration pursuant to Article 12 of the Conference's .. Agreement[7]

The Conference does not question the validity and/or enforceability of the arbitration agreement. Quite to the contrary, Respondent relies as a matter of law upon the terms of the U.S. Arbitration Act, which is invoked in Article 12 of its Agreement, and also upon the long line of decisions thereunder upholding agreed arbitration provisions as binding and enforceable upon contracting parties. Thus, the Conference allegedly stands ready to submit the disputed matter of breach to arbitration and agrees to be bound by whatever decision the board of arbitrators hands down.

Only Starke-Taylor actively opposes the submission of its dispute with the Conference to private arbitration. This intervenor believes that since this is the first known public dispute arising under the so-called "legal right clause", the Commission should decide the factual situation here involved and establish general rules for the future guidance of the shipping industry and private arbitrators.

Were we dealing here with a dispute requiring a *legal* interpretation of one of the contractual provisions of the Conference contract, we might well be inclined to agree with Starke-Taylor. See *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962). As it is, however, the matter in dispute between the Conference and the Shippers raises, at least at this juncture, a purely factual issue which may appropriately be resolved by a board of arbitrators, i.e. whether the Shippers had the legal right at the time of the challenged shipments to select the carrier. In fact, this is precisely the type of dispute the Commission had in mind when it approved arbitration clauses for use in dual rate contracts generally. Thus, as the Commission explained in *The Dual Rate Cases, supra*, p. 44:

> Arbitration has developed as an efficient means of settling disputes under commercial contracts and would appear to be an appropriate means of disposing of routine disputes which arise under dual rate contracts.

While the matter in dispute is obviously of some consequence to the principals, it nevertheless represents, to the extent it involves

[7] Article 12 of the Conference Agreement provides that: "In case of dispute, the Shipper and the Carrier(s) each agree to submit the matter under dispute to arbitration, each appointing an arbitrator and the two so chosen shall select an umpire to which Arbitration Committee all data requirested in connection with the matter in dispute shall be made available. Decision of two or more members of the said Committee shall be binding on the parties and the arbitration shall be made under and pursuant to the terma and conditions of the United States Arbitration Act, 9 U.S.C 1 et seq., all of which terms and conditions shall be binding upon the parties hereto."

a purely factual issue, a "routine dispute". Indeed, we cannot imagine a contract dispute which might be more amenable to the arbitral procedure than the one before us here. For the Commission then to now adjudicate the merits of that dispute would not only be to totally ignore the clear requirements of Article 12 of the Conference Agreement but would also serve to frustrate the purpose and intent of such approved arbitration clauses generally. Or, as we stated in *Firestone International Co.* v. *Far East Conf., et al.,* 9 F.M.C. 119, 128 (1968), in upholding the arbitration clause under consideration therein,

> Arbitration provisions have a long history in both Commission approved Conference agreements and dual rate contracts, and they have met with our approval. In this manner, the Commission has given to the parties of those dual rate contracts the opportunity to settle their differences between themselves. Although cases do arise where recourse to the Commission can be had notwithstanding arbitration provisions, this is the exception rather than the rule. We will not nullify arbitration clauses without serious cause.

On the basis of the foregoing, we are directing that the dispute between the Conference and the aforenamed Shippers as to whether such Shippers had the "legal right", within the meaning of Article 1(c) of the Conference Agreement and the context of this Report to select the carrier at the time certain aforementioned shipments of cotton were made on non-Conference vessels, be submitted to arbitration in accordance with the requirements of Article 12 of that Agreement. Of course, if the Shippers are found not to have had the legal right at the time of shipment to select the carrier, the arbitration board must of necessity also determine, consistent with Article 1(c)(3) of the Agreement, whether the Shippers prior to the time of shipment divested themselves or permitted themselves to be divested of that right with the intent of avoiding their obligations under the contract.

Pending the outcome of the arbitration prescribed above, the Conference is ordered to cease and desist from: (1) assessing or attempting to assess penalties against the Shippers under the Agreement, and (2) suspending or threatening to suspend any of the Shippers' rights under that Agreement. Failure of the Conference to observe this directive and thus comply with existing law and Commission regulations will be deemed to constitute a violation of section 14b of the Act.

To do otherwise would be tantamount to allowing the Conference to unilaterally adjudicate the fact of breach and thereby effectively circumvent the clear intent of the arbitral process. Breach of a dual rate contract, much like a contract merchant's right to select the carrier, is never a matter to be presumed conclusively by a carrier or conference. Where, as here, assertion of a breach is challenged by a contract signatory, no penalizing action [8] can be taken against that signatory under this contract until such time as the fact of breach is formally determined, either by the Commission in the first instance or, where so provided in the contract by an arbitration board. [9]

Whether the Conference would be authorized to suspend the Shippers' rights and obligations under the Agreement for failure to pay the damages adjudged by a proper body to be due and owing, notwithstanding the fact that it has failed to include in its Agreement the Commission prescribed suspension clause, [10] is a matter that need not be reached at this time since to do so would require the Commission to assume that: (1) the arbitrators will find for the Conference, and (2) the Shippers will subsequently refuse to pay the adjudged damages. Rather than indulge in such speculation, the Commission will defer any decision on that issue until such time as the need arises. Resolution of that question at this time would at best be premature since there is no reason to presume that the parties will not live up to their contractual obligations.

While Intervenors Calcot and McFadden are not actually opposed to submitting their dispute with the Conference to arbitration and stand ready to abide by the decision of the board, they feel that nothing can be accomplished by such arbitration unless the Conference intends to retreat from the position taken by it in its circular letter of January 8, 1970, i.e., that its dual rate contract applies to "*all* shipments to covered destinations regardless of the terms of sale." Given what these parties characterize as the Conference's refusal "to recognize a shipper's lack of any legal right to select the carrier as an exception to the Agreement", they believe that "no meaningful purpose can be served from the standpoint of the Conference by an arbitration proceeding [held] to determine who actually had the legal right to select the carrier."

[8] The Senate Committee was clear in its statement that punitive suspensions or terminations by the conferences of merchants' contracts are not permitted under the statute. *The Dual Rate Cases, supra*, at pp. 36–37.

[9] The Commission, of course, always retains the right of review of any decision reached by an arbitration panel convened pursuant to an approved contract. As we stated in *The Dual Rate Cases*, Order Granting the Deletion of Certain Clauses, 8 F.M.C. 267, 268 (1964), citing the court's decision in *Swift & Co.* v. *Federal Maritime Commission, supra*, "the Commission may upset the decision of the arbitrators where the decision is not in conformity with the Shipping Act, notwithstanding the absence of any provision to that effect in the contract."

[10] Although the Commission in *The Dual Rate Cases, supra*, did not *require* that contracts contain an express provision giving the carrier or conference the right to suspend a merchant's right under the contract for failure to pay adjudged damages, it did prescribe an optional suspension provision for use by those carriers or conferences who desired coverage of the subject.

While there is some merit to this argument, we find that the Conference's "interpretation" of the "legal rights clause" contained in its Agreement, as reflected in its "Notice to All Contract Shippers" of January 8, 1970, and its "Notice to Shippers of Cotton" of November 28, 1972, is not so much erroneous as it is misleading.

Contrary to the assertions made by Intervenors herein, the aforementioned notices circulated by the Conference do not constitute an outright denial of the effectiveness of the legal rights clause. Nor has the Conference in this proceeding taken any position which *necessarily* contravenes the requirements of that clause. What the Conference has done by its notices, however, is to convey certain false impressions to its contract shippers as to their rights and obligations under the Agreement and specifically Article 1(c) thereof. Short of actually advocating any unlawful interpretation of the Agreement, these notices, through the use of subtle and ingenious language, impart the mistaken notion that a contract shipper is always bound and obliged to ship conference *all* of the goods which he owns and sells, regardless of the circumstances surrounding the sale.

Thus, there appears to be a conscious attempt on the part of the Conference to mislead its shippers as to their legal obligations under their contracts and coerce them into taking action not intended by such contracts. Whether intentionally or not, however, the notices in question are drafted so as to leave the impression that contract signatories are required to forego all sales of their goods where the right to select the carrier is vested in the buyer— a result clearly prescribed by Congress and this Commission. Absent an intent by the merchant to avoid its contractual obligations to the carrier, neither the statute nor the Commission-prescribed clauses allow for the suggestion that a contract merchant may be penalized or denied of contract rights for failure to ship his goods via the contract carrier or conference where such merchant is obliged to sell to a buyer on terms which give the buyer the legal right to select the carriers (or there will be no sale).

In view of the above, we are directing that the Conference henceforth refrain from circulating any notices to its contract merchants which may be interpreted to require such merchants to ship *all* of their goods on Conference vessels even to the extent of foregoing sales where the right to select the carrier is vested in another person. To this end, any future Conference notice issued to apprise contract signatories of their rights and obligations under the Agreement will categorically state, consistent with

Article 1(c)(5) thereof, that "Nothing in the Shippers Rate Agreement requires a contract signatory to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person."[11] Future failure of the Conference to fully apprise its contract signatories of their rights under the Agreement will be taken as an attempt by the Respondent to deny such signatories of those rights and will be dealt with accordingly by this Commission.

This brings us to the final matter raised in the Commission's Order to Show Cause, to wit, whether:

> (3) the Commission should ... disapprove the Conference's ... Agreement for failure to abide by its terms as required by section 14b of the Shipping Act, 1916.

We see no reason at this time to disapprove the Agreement, especially in view of the fact that the Conference has stated on the record that it is agreeable to submitting to arbitration the dispute which fostered this proceeding. With the possible exception of the shipper "notices", which have been found herein to be of questionable propriety, if not legality, and prospectively proscribed, there is no evidence in this proceeding that the Conference might have failed to abide by the terms of the Agreement. A final determination on this issue, however, will be withheld pending the outcome and aftermath of the arbitration proceeding.

An appropriate order will be entered.

COMMISSIONER CLARENCE MORSE, CONCURRING

I concur in the report. I find the use of the word "false" and the phrase "through the use of subtle and ingenious language" in the second full paragraph on page 13 is unnecessary to the ultimate conclusions and therefore gratuitously offensive to a degree with which I do not wish to be associated.

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

[11] Nothing we have stated herein, however, prevents the Conference from also reminding its signatory shippers, consistent with Article 1(c)(3) of the Agreement, that: "It shall be deemed a breach of this Agreement, if before the time of shipment, the Shipper, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto."

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–18

POSSIBLE BREACH OF PACIFIC COAST EUROPEAN CONFERENCE RATE AGREEMENT

ORDER

This procceding 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 by reference;

Therefore, it is ordered, That the Pacific Coast European Conference cease and desist from (1) assessing or attempting to assess penalties under its Shippers Rate Agreement against Geo. H. McFadden & Bro., Starke-Taylor & Son, Jess Smith & Sons, Calcot Ltd., Allenberg Cotton Co. and all other similarly situated contract signatories, (2) suspending or threatening to suspend any of those shippers' rights under the Conference's Shippers Rate Agreement.

Further, it is ordered, That the record in this proceeding remain open pending the outcome of the arbitration proceeding specified in our Report.

Finally, it is ordered, That the Petition of American Cotton Shippers Association for Leave to Intervene is denied as being untimely filed.

By the Commission.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–94

EQUALITY PLASTICS, INC. AND LEADING FORWARDERS, INC., POSSIBLE VIOLATIONS OF SECTION 16, FIRST PARAGRAPH, SHIPPING ACT, 1916

Respondent Equality Plastics, Inc., as consignee, found to have violated section 16 First of the Shipping Act, 1916, as evidence sufficient to show a knowing and willful consenting to misdescriptions by foreign shippers of various commodities on the bills of lading in order to obtain transportation by water of those commodities at rates less than those which would otherwise be applicable.

Respondent Leading Forwarders, Inc. found not to have violated section 16 First of the Shipping Act, 1916, as evidence of Leading's indifference to apparent discrepancies of description between shipping documents insufficient to constitute such violation by knowingly and willfully, indirectly, by means of false classification, attempting to obtain transportation by water of property at less than the rates or charges which would otherwise be applicable, and thus continues to qualify to be licensed as an ocean freight forwarder.

Rosemary Boyd Avery for respondent Equality Plastics, Inc.

Edward Schmeltzer and *E. J. Sheppard IV* for respondent Leading Forwarders, Inc.

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

Timothy J. May and *Richard A. Earle* for intervenor National Customs Brokers & Forwarders Association of America, Inc.

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

November 26, 1973

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 Equality Plastics, Inc. (Equality) and/or Leading Forwarders, Inc. (Leading)[1] violated section 16 of the Act by obtaining or attempting to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

We also ordered that the proceeding determine whether Leading, who acted as the customhouse broker for Equality on certain shipments consigned to Equality, continues to qualify as a licensed ocean freight forwarder, or whether its license should be revoked or suspended pursuant to section 44 of the Act and section 510.9(a) and (e) of the Commission's rules for licensing of independent ocean freight forwarders (rules)?[2]

The National Custom Brokers and Forwarders Association of America, Inc. (NCBFAA) and the New York Foreign Freight Forwarders and Brokers Association, Inc. (Association) intervened in the proceeding.

Exceptions were taken to the initial decision, in which Administrative Law Judge Stanley M. Levy concluded that respondents violated section 16 by knowingly and willfully, indirectly by means of false classification, attempting to obtain transportation by water of property at less than the rates or charges which would otherwise be applicable. Oral argument was heard.

FACTS

The Administrative Law Judge's findings of fact, to which no exceptions were taken, are set forth below.

Leading was established in 1924 and now employs approximately 35 people. It is an independent ocean freight forwarder licensed by the Commission, and a customhouse broker licensed by the Bureau of Customs, Department of the Treasury. The large majority of its business is as a customhouse broker. Equality has been a client of Leading since about 1964.

Leading acted on behalf of Equality as a customhouse broker for the cargo covered by Sea-Land Service, Inc. (Sea-Land), Bill of Lading Nos. 955–453374, 955–453375, 955–453788, 955–453555, 905–401313, and 905–401494. For each shipment Leading prepared the Consumption Entry and filed with the Bureau of Customs this

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[1] Both Equality and Leading are sometimes collectively referred to as "respondents".

[2] 46 CFR 510.9 states that a license may be revoked, suspended, or modified after notice and hearing for any of the following reasons:

"(a) Violation of any provision of the Shippin g Act, 1916, as amended, or of any other statute related to carrying on the business of forwarding.

* * * * * * *

"(e) Such conduct as the Commission shall find renders the licensee unfit or unable to carry on the business of forwarding."

document along with the Special Customs Invoice, Commercial Invoice, Packing List, and Bill of Lading.

The shipments which are the subject of this proceeding were typical of the Equality shipments handled by Leading. Leading never had any physical contact with the shipments in question, its function being concerned with the documents relating thereto. Equality is no longer actively engaged in the import business though the parent organization may be carrying on the business under another name.

Equality purchased from the manufacturers the cargo covered by Nos. 955–453374, 955–453375, 955–453788, 955–453555, 905–401313, and 905–401494. The cargo covered by Nos. 955–453374, 955–453375, 955–453788, and 955–453555 was shipped by Forda Mfg. Co. Ltd. of Hong Kong. The cargo covered by No. 905–401313 was shipped by Taiyo Corporation of Osaka, Japan. The cargo covered by No. 905–401494 was shipped by the manufacturer Okura Kogyo, Ltd. of Osaka, Japan. All the bills of lading were to the order of Fidelity Bank as consignee. The arrival notice of each shipment, except that relating to No. 905–401313, was addressed to both Equality and Leading; the arrival notice relating to No. 905–401313 was addressed to Leading. On the shipments covered by Nos. 955–453374, 955–453375, 955–453788, and 955–453555, Leading paid the collect ocean freight charges applicable to "Toys".[3] The shipment covered by No. 905–401313 was prepaid and ocean freight charges were based on a shipment of "Toys".[4] The shipment covered by No. 905–401494 was prepaid and ocean freight charges were based on a shipment of "Bags and Luggage N.O.S."[5]

No. 955–453374 covered the shipment of 176 cartons listed on the bill of lading as "Plastic Toys" from Hong Kong to Elizabeth, N.J. An inspection of the cargo at Elizabeth by employees of Sea-Land and the Commission revealed that it was Plastic/Glass Battery-Operated Mix-O-Matic Pourers. The Bureau of Customs' Consumption Entry described the cargo as 176 cartons containing "Battery Operated Mixer-Other", and Forda's invoice to Equality described it as "Plastic Toys" and "Plastic Glass Battery Operated Mix-O-Matic Pourers".

No. 955–453375 covered the shipment of 176 cartons listed on the bill of lading as "Plastic Toys" from Hong Kong to Elizabeth. An inspection of the cargo at Elizabeth by employees of Sea-Land and the Commission revealed that the cargo was Plastic Car Vacuum

[3] New York Freight Bureau Tariff No. 23, FMC–4.
[4] Sea-Land Service, Inc., Tariff No. 145, FMC No. 27.
[5] *Ibid.*

Cleaners. The Bureau of Customs' Consumption Entry decribed the cargo as 176 cartons containing "Plastic Car Vacuum Cleaners Portable, Battery Operated", and Forda's invoice to Equality described it as "Plastic Toys" and "Plastic Car Vacuum Cleaners".

No. 955–453788 covered the shipment of 225 cartons listed on the bill of landing as "Plastic Toys" from Hong Kong to Elizabeth. An inspection of the cargo at Elizabeth by employees of Sea-Land and the Commission revealed that the cargo was Best Ever Drink-O-Matic Cordless Electric Power/Mixer-Battery Operated. The Bureau of Customs' Comsumption Entry described the cargo as "Mix-O-Matic pourers, as other electro-Mech.h.h. appliances, other", and Forda's invoice to Equality described it as "Plastic Toys" and "Plastic/Glass Battery Operated Mix-O-Matic Pourers".

No. 955–453555 covered the shipment of 648 cartons listed on the bill of lading as "Plastic Toys" from Hong Kong to Elizabeth. An inspection of the cargo at Elizabeth by employees of Sea-Land and the Commission revealed that the cargo was Vacuum Cleaners and Mix-O-Matic Pourers. The Bureau of Customs' Consumption Entry described the cargo as "Mix-O-Matic pourers, as other electric-mech.h.h. appliances" and as "vacuum Cleaners; portable hand held type", and Forda's invoice to Equality described it as "Plastic Goods", "Plastic/Glass Battery Operated Mix-O-Matic Pourers", and "Plastic Car Vacuum Cleaners".

No. 905–401313 covered the shipment of 84 cartons listed on the bill of lading as "Toys" from Kobe, Japan, to Elizabeth. An inspection of the cargo at Elizabeth by an employee of the Commission revealed that the cargo was Electric Immersion Heaters. The Bureau of Customs' Consumption Entry described the cargo as "Electric Immersion heaters, other", and Taiyo's invoice to Equality described it as "Electric Immersion Heaters, 3 coiled, AC/DC, each in vinyl bags with header card".

No. 905–401494 covered the shipment of 203 cartons listed on the bill of lading as "Bags" from Kobe to Elizabeth. An inspection of the cargo at Elizabeth by employees of Sea-Land and the Commission revealed that the cargo was Plastic Garment Bags. The Bureau of Customs' Consumption Entry described the cargo as 203 cartons containing "Garment bags etc., as h.h. art, nspf, of plastic other". Okura Kogyo Ltd.'s invoice to Equality described the cargo as 300 dozen "suit bags, made of 0.048 mm. silky embossed clear vinyl film. Size: 24″ x 42″ with 34 1/2″ zipper", 1,206 dozen "Dress Bags, 24″ x 54″ with 34 1/2″ zipper" made of the same material as the suit bags, and 462 dozen pastel colored "Ladies'

Shoe Bags, made of Roman embossed 0.2 mm. vinyl. Size: 17″ x 30″ with 12 pockets".

Leading made no attempt to correlate or justify the differences in the descriptions which existed on the various documents supplied to them, such as the bills of lading, invoices, and packing lists other than was necessary for the purpose of customs entries.

After inspection of the shipments Sea-Land billed and Perfect Film and Chemical Corp., the parent of Equality, paid an additional $1,696.36 for ocean freight charges attributable to Nos. 955–453375, 955–453555, and 955–453788. Sea-Land also billed and Perfect Film paid $290.20 for additional ocean freight charges. However, because the referenced bill of lading relates to a shipment of Mix-O-Matic pourers and the waybill refers to auto vacuum cleaners, it cannot be established to which shipment the bill and payment relate.

The battery operated drink mixers which were shipped as "Plastic Toys" consisted of a glass jar on which was embossed the recipes for various cocktails calling for alcoholic beverages. Attached to the glass jar was a plastic top which contained batteries and two switches, one for a spout for dispensing the beverage and the other for the operation of a stirring rod. Equality did not consider the battery operated drink mixers to be an electrical appliance since, with new batteries, it would just barely stir water. However, it was not considered a children's toy by Equality but more of a novelty item. Similarly, the plastic car vacuum cleaners were not considered by Equality as electrical appliances or toys. They were believed to be novelty items.

Equality did not question the freight rate applied to the battery operated drink mixers until after they were contacted by Sea-Land. For a number of years Equality had purchased the battery operated drink mixers from a large importer, J. Gerber & Co., Inc., New York. When Equality decided to enter their own orders direct with the manufacturer in order to save money, no specific instructions were given to the manufacturer concerning the manner in which the item should be declared to the ocean carrier. The item had been shipped as "Toys" for years and though improvements had been made to the item through the years, no change had been made in the bill of lading declarations by the exporters.

Equality did not sell its imports to children's toy stores, nor did it solicit business from children's toy buyers.

Discussion and Conclusion

We shall first dispose of the threshold question of our authority under section 22 of the Shipping Act, 1916, to institute this proceeding. Section 22 provides in relevant part:

That any person may file with the [Comission] a sworn complaint setting forth any violation of this Act by *a common carrier by water, or other person subject to this Act*.... If the complaint is not satisfied the [Commission] shall ... investigate it in such manner and by such means, and make such order as it deems proper....

The [Commission], 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.

It is the Association's position that the words "in a like manner" and "with the same powers" of the second paragraph of section 22 limits the Commission's authority to investigate violations as only allowed by the first paragraph of section 22 , i.e. since a complaint may be filed only against a "common carrier" by water or "other person subject to this Act",[6] the Commission can only investigate violations by the same persons who may be the subject of a complaint proceeding; namely, carriers, terminal operators, and forwarders.[7]

We agree with Hearing Counsel and the Administrative Law Judge that the qualifying words "in a like manner and with the same powers", appearing in the second paragraph of section 22, are directed only to the procedural framework which appears in the first paragraph of section 22.

We think it clear that since the second paragraph of section 22 empowers the Commission to concern itself with all violations of the Shipping Act, 1916, we have jurisdiction to investigate violations of section 16 by persons or entities named in that section, whether or not they are "other persons subject to [the] Act".[8] Were this not the case, there would have to be attributed to Congress a particularly anomalous piece of legislative draftsmanship. A violation of law was created, but the agency entrusted with the administration of the statute could not even investigate possible infractions.

The Association further argues that no anomaly exists because Congress intended to leave section 16 violations to the courts. The contention is that because section 16 does not specifically direct

[6] Section 1 of the Act defines "other person subject to this Act" 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."

[7] The Administrative Law Judge entertained serious doubt as to whether the Association, as an intervenor, could raise this issue since Rule 5 (L) prohibits in intervenor from enlarging the proceeding. However, rather than to deny the motion of this procedural ground, he treated it on its merits, and so shall we.

[8] *Hohenberg Brothers Company* v. *Federal Maritime Com'n*, 316 F. 2d 381 (D.C. Cir. 1963), wherein the court upheld the Commission's finding that both a shipper and carrier had violated section 16 of the Act.

the Commission to proceed "administratively", as contrasted with the Commission's specific directions to take a particular action found in section 14, 17 and 18(a)(46 U.S.C. 813, 816 and 817), the Commission lacks "primary jurisdiction" under section 16. From this it is somehow said to follow that it is for the courts, not the Commission, to determine whether either of the respondents violated section 16. [9]

In support of this contention, the Association relies on *United States* v. *American Union Transport, Inc.*, 232 F. Supp. 700, 702 (D.N.J. 1964). in that case, the Justice Department charged the defendants with some 20 counts of violating section 16 of the Act. Two of the defendants moved to dismiss the case on the ground that the:

> ... Federal Maritime Commission has exclusive primary jurisdiction to determine whether Carrier's alleged acceptance of Shipper's measurements (a) constituted a "knowing" acceptance of Shipper's allegedly false measurements, and (b) resulted in an undue and unreasonable preference and advantage being given to Shipper.

The court denied the motion, concluding that the Commission did not have exclusive primary jurisdiction over what the court found was "a relatively simple factual situation, and a legal question of the construction of [section 16]." From this conclusion, the Association argues that the Commission is without any jurisdiction whatsoever over violations.

The *American Union Transport* case is altogether too narrow. While it is correct that the court in that case found that the Commission did not have "exclusive primary jurisdiction" over section 16, the Association rather conveniently ignores the court's own acknowledgement that the court's jurisdiction is concurrent with that of the Commission. The court noted section 22:

> ... empowers the Commission to *investigate*, on the complaint of any person, or *on its own motion, any violation of the Shipping Act, 1916, including § 815* [§ *16*], and to make, after a hearing, an order to remedy any violation found. [Emphasis added.] 232 F. Supp. at 702.

That is precisely what was done in this case. The court concluded that the Act did not authorize the Commission to assess penalties for violations of section 16 First. But to say that such exclusion prohibits the Commission from investigating and eliminating conduct which involves the evasion of the proper applica-

[9] Section 14 contains two specific references to actions which the Commission may take after "notice and hearing". Section 17 commands the Commission to "prescribe ... a just and reasonable regulation" whenever an existing regulation is found unjust or unreasonable. Section 18(a) authorizes the Commission to prescribe just and reasonable maximum rates in domestic commerce. Section 16 merely declares certain conduct unlawful and imposes penalties on those found guilty of such conduct.

tion of the rates which would otherwise be applicable is frivolous at best.

Additionally, the Association questions the validity of Rule 510.23(L) of General Order 4 (46 CFR 510.23(L)), which provides that licensed freight forwarders shall make their records available upon request to representatives of the Commission.[10] The association argues that sections 43 and 44 only grant general rulemaking authority and not, as the Administrative Law Judge found, specific authority to issue Rule 510.23L[11] Relying on *Federal Maritime Com'n* v. *Anglo-Canadian Shipping Co.*, 335 F. 2d 255 (9th Cir. 1964), wherein the court struck down a Commission's prehearing discovery rule founded upon its then rulemaking authority pursuant to section 204(b) of the 1936 Merchant Marine Act, the Association rationalizes that since there is nothing explicit in sections 43 and 44 concerning the right of inspection any more than there was section 204(b) on discovery, both authorities are similar; and therefore, the court's reasoning in *Anglo-Canadian*, *supra*, is equally applicable to this proceeding.

As the Administrative Law Judge found, the Association's reliance on the *Anglo-Canadian* case is misplaced. There, the court was concerned with the Commission exercising what had traditionally been an exclusive function of the judicial branch of government (i.e. discovery) without a specific grant of authority from Congress. In rejecting the Commission's discovery rule, the court concluded that the rule:

> . . . does more than to merely fill in details within the framework of existing legislation. It adds thereto, and hence is without authority in law. [335 F. 2d at 258.]

Rule 510.23(L) is designed to insure the availability to the Commission of information upon which it may base a determination that the duties and obligations of freight forwarder licensees are being appropriately discharged, and that is of course "necessary" if the Commission is to discharge its responsibilities under the Shipping Act. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642–643 (1950). Moreover, section 43 was intended to and did give the Commission authority beyond that which it may have had

[10] Rule 510.23(L) states: "Each Licensee shall make available promptly all records and books of account in connection with carrying on the business of forwarding, for inspection or reproducing or other official use upon the request of any authorized representative of the Commission."

[11] Section 43 states: "The Commission shall make rules and regulations as may be necessary to carry out the provisions of this Act."

Section 44 requires that a forwarder must be: ". . . willing and able . . . to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder . . . The Commission shall prescribe reasonable rules and regulations to be observed by independent ocean freight forwarders . . . ."

under section 204 of the 1936 Act. *Alcoa Steamship Company* v. *Federal Maritime Commission,* 348 F. 2d 756, 760, 761 (D.C. Cir. 1965); *New York Foreign Frgt. F. & B. Ass'n* v. *Federal Maritime Com'n,* 337 F. 2d 289 (2nd Cir. 1964).

In the alternative, the Association argues as erroneous the Administrative Law Judge's finding that Leading voluntarily consented to the giving up of its shipping documents. In support of this contention it is urged that since Rule 510.23(L) applies only to records "in connection with carrying on the business of forwarding" and the documents received pertained to Leading's customhouse broker activties, the information was obtained as a result of an illegal search and seizure under color of authority in violation of the Fourth Amendment.

We can only dismiss this argument as groundless since the record shows that Leading voluntarily made the information available to the Commission with no evidence of coercion. As Mr. Shayne testified:

> Mr. Johnston of the F.M.C. called [Leonard Shayne, President of Leading] in November of 1969, and requested that I provide him with certain documents in connection with an investigation he was making ... I told Mr. Johnston that I would cooperate with his investigation and that I would look for the documents. I provided the documents to Mr. Johnston in December 1969.

The fact that the records requested related to Leading's activities as a broker does not render the request invalid. Our jurisdiction over Leading lies in the standard of conduct required by a licensed freight forwarder which is an "other person" within section 16. And thus, as the Administrative Law Judge found, it is irrelevant as to the capacity in which a licensee acts as his license is still subject to revocation or suspension if he willfully violates any provision of the Act. We could not properly discharge our responsibility to the shipping public if we interpreted our statutory authority to permit a licensee to avoid the requirements under the Act simply by allowing a freight forwarder to don a broker's hat, as in this case, and thereby claim he no longer is bound by his forwarder obligations.

Leading, pointing out that it committed no positive act of procurement of transportation for the cargo in question, urges us to reject the Administrative Law Judge's conclusion that its mere completion of the paper work to get the shipments through customs falls within the ambit of "obtaining transportation by water" within the meaning of section 16. It is Leading's position that since it did not obtain, possess or transport the goods in that it had no contract with those who prepared the shipping documents and contracts, it has been found "guilty by association", i.e. since Equality "obtained transportation" so did Leading as its agent.

We must reject Leading's argument on two grounds. First, *Investigation of Stockton Elevators*, 8 F.M.C. 181 (1961), relied on by Leading, is iapplicable since it is not involved with obtaining transportation, but only concerned with wharfage from a terminal. Second, the legislative purpose bethind the 1936 Amendment (section 16 First) was to extend coverage of the Act beyond carriers and to any party who participates in the transportation. The virtually all-inclusive language of the section makes this abundantly clear; it provides:

That it shall be unlawful for any *shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof*, knowingly and 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.]

All parties agree, and we concur, that the Administrative Law Judge applied the proper standard for determining whether a party has "knowingly and willfully" violated section 16. He relied primarily on *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954), where it was stated:

[T]he phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is *plainly indifferent* to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act. [Emphasis added.]

To the Administrative Law Judge, Leading's failure to make "diligent inquiry" to insure that the bill of lading accurately described the goods shipped constituted "plain indifference" such as to constitute a knowing and willful violation of section 16.

We think the term "plainly indifferent", as used by our predecessors in *Misclassification of Tissue Paper, supra*, [12] means something more than casual indifference, and equates with a wanton disregard from which an inference can be drawn that the conduct was in fact purposeful; a standard somewhat analogous to the tort concept of "gross negligence". For this reason, we must disagree, in part, with Judge Levy that the facts of the record demonstrate an intentional disregard of or plain indifference by respondents comparable to what our predecessors have described as "willful conduct tantamount to an outright violation".

[12] *Ibid.*

Consequently, for the reasons that follow, we find that only Equality (and not Leading) did knowingly and willfully, indirectly, by means of false classification, attempt to obtain transportation at less than applicable rates in violation of section 16.

The crux of this proceeding and the key issue to be resolved is whether respondents were in possession of sufficient facts to raise a doubt as to the accuracy of the bills of lading descriptions.

The Tariff Schedule of the U.S. (TSUS) was used by Leading to prepare the Customs' Consumption Entries. The car vacuum cleaners were listed under TSUS report number 683.3010 being the number for "vacuum cleaners, portable hand-held type"; the drink mixers were classified under 683.3000 designated as 686.3200 "other"; the immersion heaters were classified under TSUS reporting number 684.4000 "Furnace, heaters, ovens, and parts thereof". All three of these TSUS designations were listed under Part 5—"Electrical Machinery and Equipment" of Schedule 6—"Metals and Metal Products". We are further made aware that, in contrast, the custom entry for toys (TSUS number 737.9000) was never used by Leading. On the basis of this, Hearing Counsel ask us to conclude that Leading did not believe the commodities to be toys. The Administrative Law Judge concluded that at the very least, the variations placed respondents on notice of possible misclassifications, and thus required them to conduct an investigation "however modest" to ascertain whether a misclassification had in fact occurred.

This conclusion would seem to presuppose that the preparation of Customs' Consumption Entries require the examination and knowledge of the bill of lading, and that the ocean carrier tariff has a relationship to the TSUS. However, the evidence of record and the testimony by witnesses of respondents is a good deal less than clear on this point. The evidence indicates that variations in commodity descriptions among shipping documents are more or less routine and not cause for suspicion; that customhouse brokers consider the bill of lading as evidence only of the title to the shipment, and thus do not use the bill of lading to prepare its custom entry form; that ocean carrier tariffs have no real relationship to the TSUS, and therefore there is no need to make a comparison between the two; and that consumption entries are not prepared based on knowledge of the actual contents of the shipments. All of which in our view justifies the finding that respondents were not put on notice to check on why the cargo was shipped as "toys".

Additionally, it is urged that the dictionary definition of "novelty items" and "toys", in addition to the customs' tariff schedules definition of "toys", substantiates the bills of lading descriptions of the commodities in issue.[13]

The Administrative Law Judge rejected this contention on the ground that the articles in question, in terms of utilization, have a more practical use than one chiefly for amusement.

We can agree with the Administrative Law Judge insofar as the vacuum cleaners and immersion heaters are concerned, but we think the "drink mixers" are another matter. While we claim no particular expertise in the art of "drink mixing", we think everyday experience dictates the conclusion that the "drink mixers", as the type involved here, are "toys" or at least "novelty items".

Leading at no point in time actually got involved with the shipments, and Leading's only contact with the shipments was through their respective documents. Also, the record does not show basic questions as to how many documents are handled daily by Leading, as a customhouse broker, whether one or several persons handled the shipping documents in question, and whether the papers involved were part of a package or separately received by Leading are neither asked nor explored by Hearing Counsel.

Accordingly, on the basis of the record before us, we conclude that as to Leading, there was no violation of section 16.

While it may eventually prove true that a licensed freight forwarder acting as a customhouse broker will be required to consult tariffs to determine proper classifications, and to compare documents for possible misclassifications, we will impose such a requirement only after a thorough investigation of the terms, conditions and circumstances surrounding the handling of imported cargo, including the duties and responsibilities of exporters and carriers, facts missing from this proceeding. We are persuaded that an investigation should be instituted to determine the feasibility of establishing a general standard of conduct for persons in the situation of Leading; a standard heretofore lacking.

Finally, Hearing Counsel urge that the subsequent rebilling and payment to Sea-Land of the supplemental freight charges leads to the inference that both respondents knew or should have known that the articles were subject to a higher freight rate. Leading says that its payments were no more than a courtesy for its clients. Equality says that since the supplemental charges were

[13] *Webster's Third New Dictionary* (1966) defined "novelty items" as "... a small manufactured article intended mainly for decoration or adornment and marked by unusual or novel design"; "toys" are defined as "... something designed for amusement or diversion rather than practical use ...."

The TSUS definition of toys is "... any article chiefly used for amusement of children or adults."

minimal, its lack of protest was due to the desire to maintain the relationship between shipper and consignee and avoid litigation. As to Leading, any such inference does not strike us as unwarranted. However, Equality presents a different situation. That a long-time importer of such low-priced merchandise in a highly competitive market would, without protest, pay additional charges implies to us a recognition that the shipments were improperly rated. Equality, as an importer, was quite aware that the "vacuum cleaners" and "immersion heaters" would receive a lower freight rate if classified as "toys". But, Equality did not seek or solicit these items as toys but as what they in fact were, vacuum cleaners and immersion heaters. The evidence leads us to the inescapable conclusion that Equality has willfully and knowingly consented to these misdescriptions by the foreign shippers.

Accordingly, we conclude that Equality has violated section 16 of the Act with reference to the "vacuum cleaners" and "electric immersion heaters"; as to Leading, we conclude that the record does not show that it has violated section 16 of the Act. The proceeding is hereby discontinued.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 458

COMMODITY CREDIT CORPORATION

v.

LYKES BROS. STEAMSHIP CO., INC.

December 11, 1973

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

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 11, 1973.

It is ordered, That applicant is authorized to waive collection of $51.70 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 458 that effective April 29, 1973, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from April 20, 1973 through October 15, 1973, the rate on "Wheat (Bulk with BNT)" including discharging and bagging at Beirut, is $32.35 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 will be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commision.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 458

COMMODITY CREDIT CORPORATION

v.

LYKES BROS. STEAMSHIP CO., INC.

Permission to waive a portion of freight charges granted.

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

Lykes Bros. Steamship Co., Inc. (Lykes), a common carrier by water in the foreign commerce of the United States within the meaning of section 1 of the Shipping Act, 1916, as amended (the Act), 46 U.S.C. 801, has filed an application pursuant to section 18(b)(3) of the Act (46 U.S.C.817(b)(3)) for permission to waive a portion of the freight charges on a shipment carried for the Commodity Credit Corporation from Corpus Christi, Texas, to Beirut, Lebanon, referred to below.

Pursuant to a bill of lading dated April 20, 1973, Lykes transported a shipment of 33,206 pounds of bulk wheat, including bags, needles, and twine (BNT), via its S.S. *Howell Lykes*, at an agreed rate of $32.35 per ton (rate includes BNT and cost of discharging and bagging at Beirut), and a confirmation of this booking was made by Lykes. However, through inadvertence the rate on BNT was not timely filed with the Commission. The error resulted from the failure of Lykes to notify the conference tariff filing agent of the BNT matter. BNT, when they accompany a bulk shipment, are open-rated in the tariff of Gulf/Mediterranean Ports Conference, of which respondent is a member. At the time of shipment the applicable rate was $36.50 per ton (Gulf/Mediterranean Ports Conference Tariff No. 13, FMC-15).

On October 15, 1973, prior to submission of this application, the conference amended its tariff to include the $32.35 rate.

[1] This decision became the decision of the Commission December 11, 1973.

Applicant now seeks permission to waive collection of $51.70, that being the difference between the rate in effect at the time of shipment and the agreed rate.

Section 18(b)(3) of the Act 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 where 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 as alleged in the complaint indicate an inadvertent failure to file the agreed rate prior to shipment. The agreed rate was filed prior to the application, which was filed within 180 days of the shipment as required by the statute. The waiver will not result in discrimination among shippers.

Good cause appearing, permission to waive collection of $51.70 is granted. Applicant shall publish in its tariff the notice required by the statute. The waiver of the charges herein authorized shall be effectuated within thirty days of service of notice, and applicant shall, within five days thereafter, notify the Commission of the date and manner of effectuating the waiver.

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

WASHINGTON, D.C.,
November 16, 1973.

FEDERAL MARITIME COMMISSION

No. 73–65

UNION CARBIDE INTER-AMERICA, INCORPORATED

v.

VENEZUELAN LINE

Reparation awarded.

L. F. Leonard for complainant.
F. Lozada and *G. E. McNamara* for respondent.

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

Union Carbide Inter-America, Inc., complainant, seeks reparation of $1,434.49 from Venezuelan Line, respondent, arising out of a shipment of 102 drums of polyethylene synthetic resin from New York to Puerto Cabello, Venezuela,[2] aboard respondent's ship La Guara on October 6, 1972.[3]

Pursuant to request of complainant, to which respondent does not object, this proceeding was conducted in accordance with the Commission's Rule 11 (shortened procedure).

Complainant challenges the classification of: 102 drums Polyethylene Synthetic Resin value $7,586.25 as Synthetic Resin, N.O.S. in other packing. Actual value over $500 but not over $700 per freight ton. The freight rate assessed was $73.50 per 40 cubic feet for a total of $2,226.88. It contends the correct rate should be $56.50 per 2,000 pounds for a total of $729.39.

The claim was rejected by respondent solely on the basis that it was "time-barred" per tariff rule, item 11. 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

[1] This decision became the decision of the Commission December 11, 1973.

[2] Item 495, 13th revised page 62, tariff No. 11, U.S. Atlantic and Gulf Venezuela and Netherlands Antilles Conference.

[3] Bill of Lading No. 92.

Conference rule, if the claim is filed with the Commission within two years of its accrual. This claim has been filed within two years and, consequently, must be considered on its merits.

Both the Union Carbide Invoice No. 8–30398–2 PT2 and the Venezuelan Line Bill of Lading No. 92, dated October 6, 1972, read: "102 DRMS POLYETHYLENE SYNTHETIC RESIN." These documents clearly specify that the commodity was Polyethylene Synthetic Resin, and that it was shipped in drums. The governing tariff has a specific provision for RESINS, SYNTHETIC POLYETHYLENE in fibre drums, actual value over $500 but not over $700 per 2,000 lbs. at $56.50 per 2,000 lbs. The bill of lading failed to specify whether these drums were fibre on metal drums. Respondent assumed they were steel drums and selected the higher rate for Synthetic Resin, N.O.S. in other packing.

It was an inadvertent error of omission on the part of complainant to leave out the word "fibre" on the Bill of Lading. The evidence establishes that the drums used in this shipment were indeed fibre drums. It is further established, by actual calculation, that the value of the shipment was $555.04 per 2,000 lbs. and qualifies for the rate on Polyethylene Resin in Fibre Drums, actual value over $500 but not over $700 per 2,000 lbs. as follows: 27336 lbs. (gross weight) ./. 2000 lbs. = 13.668 tons $7586.25 (value as shown on B/L) ./. 13.668 tons = $555.04 per 2000 lbs.

It is concluded that the record in this proceeding substantiates that an error did exist, that an overcharge was inadvertently made, and that this is a fully valid and supported claim. Reparation is awarded in the amount of $1,434.49, with interest at the rate of six percent per annum if not paid within thirty days.

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

WASHINGTON, D.C.,
November 20, 1973.

FEDERAL MARITIME COMMISSION

No. 73–25

SEATRAIN LINES, CALIFORNIA, GENERAL INCREASES IN RATES IN THE U.S. PACIFIC COAST/HAWAIIAN TRADE

Respondent Seatrain Lines, California, found to have sustained its burden of proving its general rate increases to be just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933.

S. S. Eisen for respondent.

George Pai, R. Dennis Chong, and *Richard S. Sasaki* for the State of Hawaii.

Alan F. Wohlstetter and *Ernest H. Land* for Household Goods Forwarders Association of America, Inc.

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

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

This proceeding was instituted by order of the Commission served May 4, 1973, to determine whether certain rate increases filed by respondent Seatrain Lines, California, to become effective on May 12, 1973, are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. The subject increases, generally in the amount of 12.5 percent, were published in respondent's tariff FMC–F No. 4 applicable between U. S. Pacific coast ports and ports in Hawaii.

Protests to the subject increases were filed by six parties who were named as complainants in the Commission's order, namely, the State of Hawaii, American Home Products Corporation, The National Small Shipments Traffic Conference, Inc., Drug and

[1] This decision became the decision of the Commission December 20, 1973.

Toilet Preparation Traffic Conference, Household Goods Forwarders Association of America, Inc., and The Wine Institute.[2]

Hearing was held in San Francisco, California, on October 23 and 24, 1973. At the conclusion of the hearing, the parties in attendance, i.e., respondent and Hearing Counsel, requested permission to waive the filing of briefs on the grounds that their respective ultimate positions were not essentially adverse and that the preparation of briefs would be superfluous in view of the clarity and brevity of the record. Permission was granted to these parties to waive the filing of briefs on the grounds stated. By Notice served October 30, 1973, all parties not in attendance at the hearing were advised of this ruling and given an opportunity to request permission to file briefs. No party has so requested.

FACTS

1. Respondent Seatrain Lines, California, is a California corporation established by Seatrain Lines, Inc., to be a separately operating domestic off-shore entity. Respondent instituted Pacific coast-Hawaii service with an initial sailing on September 25, 1969.

2. In its initial operations, respondent utilized the vessels S.S. *Transoneida* and S.S. *Transchamplain*, which were converted T–2s, originally constructed as tankers for use during World War II, each with a nominal capacity of 435 27-foot containers. The two vessels were and are time chartered from Hudson Waterways, Inc., an affiliated company. During the first six months of operation, respondent offered 22 sailings between Oakland and Honolulu, or just short of one round trip sailing per week.

3. During the period July 3, 1970, until May 1, 1971, the aforementioned vessels were joined by two other vessels, the S.S. *Georgia* and the S.S. *Louisiana*, each with a nominal capacity of 304 containers, serving not only Hawaii but Guam, Mariana Islands. After May 1, 1971, these two vessels were withdrawn from the Hawaiian service, and in lieu thereof, respondent introduced the S.S. *Transontario*, a converted T–2 with a nominal capacity of 392 27-foot containers. This vessel, like the S.S. *Transoneida* and S.S. *Transchamplain*, was time chartered from Hudson Waterways. On August 9, 1972, the S.S. *Transontario* was removed from service and in lieu thereof respondent substituted the *Transindi-*

[2] Complainants did not attend the hearing or file briefs. The State of Hawaii advised that it would not participate at the hearing but did not withdraw its protest to the rate increases. The Household Goods Forwarders Association of America, Inc., which had protested the increases as they applied to rates on household goods and had filed a petition to the Commission for clarification or amendment to the Commission's order so as to make sure that issues pertaining to those particular rates would be litigated, withdraw its petition and advised that it would not actively participate in the proceeding.

ana, a converted C–4 vessel, originally constructed as a World War II troopship, having a nominal capacity of 506 containers, also time chartered from Hudson Waterways. Respondent's present Hawaiian fleet, therefore, consists of two converted T–2's, the S.S. *Transoneida* and the S.S. *Transchamplain*, and one converted C–4, the *Transindiana*. In the aggregate this fleet has a capacity of 1,286 units, a unit consisting of a 27-foot container, a 40-foot container, or a 40-foot auto rack. With this fleet respondent can maintain a sailing every five days to Hawaii.

4. Respondent's headquarters terminal is located at 1395 Middle Harbor Road, Oakland, California. The terminal consists of 48 acres and has a parking capacity for 1,100 27-foot containers and 460 40-foot containers. Respondent can load and unload two ships simultaneously at this terminal. The terminal also has an office building housing administrative, operations, and maintenance personnel. The terminal and building are owned by the Port of Oakland and are leased to respondent under a 20-year renewable lease.

5. Respondent operates a terminal at Sand Island Access Road, Honolulu, Hawaii, which consists of 41 acres with storage space for 900 containers and chassis. A permanent office building is on the premises housing administrative, operations and maintenance personnel. The terminal building was constructed at a cost of approximately $600,000 by Seatrain Terminals of California, Inc., one of respondent's affiliates, whose sole function is to operate and maintain terminals for respondent.

6. Respondent's Hawaiian operations consist basically of two types of service. The first and by far the larger category consists of joint services in conjunction with rail or motor carriers establishing routes and rates applicable between California, Oregon, and Washington on the one hand, and Hawaii on the other. This service is subject to regulation by the Interstate Commerce Commission (I.C.C.). Respondent also maintains joint rail/water routes and publishes in connection therewith, joint rates applicable between large areas of the United States mainland and Hawaii. The remainder of respondent's Hawaiian service consists basically of port-to-port transportation between Oakland and Honolulu subject to the jurisdiction of the Federal Maritime Commission. This latter category includes the transportation of agricultural products exempt from I.C.C. regulation by section 203(b)(6) of the Interstate Commerce Act. For the calendar year 1972 the I.C.C.-regulated portion of the Hawaiian service comprised 74.65 percent of total Hawaiian revenue as compared to 6.68 percent for that portion

regulated by this Commission. The remaining 18.67 percent of total revenue consisted of military and mail cargoes.

7. Respondent has generally experienced rather high utilization of its vessel capacity in the subject trade. Since the Oakland/Honolulu trade is predominantly westbound, the ratio being three loaded containers westbound to each loaded container eastbound, the westbound rather than eastbound data are significant. For the years 1970, 1971, and 1972, respondent experienced an average vessel utilization of 88, 93, and 89 percent respectively, based upon the ratio of container spaces used to total available container positions per voyage.[3] This high utilization continued during 1972 even after the substitution of the S.S. *Transindiana* for the S.S. *Transontario* in August 1972, which had the effect of increasing fleet capacity by at least 114 27-foot container slots. Average utilization seems to have declined somewhat for the period January through June 1973, falling to an overall ratio of 81 percent, although the voyages of the S.S. *Transindiana* continued to enjoy utilization at the upper 80 and 90 percent levels, except for one voyage. These data, however, understate utilization to some extent since on many voyages non-containerizable cargoes moved on deck or in garage space and for reasons relating to safety factors and vessel stability, 5 percent of nominal capacity is not always usable. In 1972, furthermore, 28 percent of the total sailings were loaded to 95 percent or more of capacity, 52 percent were loaded to 92 percent or more of capacity, and 61 percent to 90 percent or more.

8. Since 1961, there had been no general rate increases in the Pacific coast/Hawaii trade until March 6, 1971, when Matson Navigation Company published a general revenue increase of 9 percent followed on June 20, 1971, by an additional 3 1/2 percent. Respondent likewise increased its rates first by 9 percent on May 15, 1971, and then by 3 1/2 percent on July 9, 1971. These rate increases were investigated both by the I.C.C. and this Commission in accordance with their respective spheres of jurisdiction. Matson's increased rates were found just and reasonable by this Commission in *Matson Navigation Company—General Increase in Rates in the U.S. Pacific/Hawaiian Trade*, 13 SRR 542 (1973). Respondent's rate increases subject to I.C.C. jurisdiction were found just and reasonable by Administrative Law Judge George

[3] These figures are based upon actual calculations derived from the data shown in Exhibit 1 B. The 1971 utilization factor shown on page 4 of Exhibit 1 B, i.e., 89 percent, should actually be 93 percent, based upon 19247 units divided by 20717 total container positions. These figures are expressed in terms of 27-foot equivalent slots, although the units carried consisted at 27 and 40-foot containers as well as 40-foot auto racks.

A. Dahan in an initial decision served May 9, 1973. No exceptions were filed.[4] In view of the present investigation into the lawfulness of respondent's rates, the Federal Maritime Commission's investigation of respondent's 1971 rate increases, Docket No. 71–59, *Seatrain Lines, California—General Increases in Rates in the U.S. Pacific Coast/Hawaiian Trade,* was discontinued on June 7, 1973.

9. The current 12 1/2 percent general rate increases became effective on May 12, 1973. Excepted from the general increases are Military Sealift Command cargo, mail, and lumber and paper products from Portland, Oregon, and Seattle, Washington. The military and mail traffic are handled under contract, not tariff rates. The holddown on lumber and paper products is due to competition from barge lines and from Matson Navigation Company which published a reduction on those rates, now under investigation and suspension by the Commission.[5] Effective September 7, 1973, respondent removed the increase applicable to eastbound pineapple, again in order to maintain parity with Matsoin, which had removed its proposed rate increase on this commodity.

10. The Hawaiian trade is extremely competitive. Three carriers now compete for West coast/Hawaii traffic, namely, respondent, Matson Navigation Company, and United States Lines.[6] All three carriers offer comparable physical transportation services with the result that the Hawaiian traffic is extremely susceptible to rate fluctuations. Since traffic will gravitate to the carrier offering a rate advantage, no one carrier can in general afford to maintain rates at a level above those of its competitors. For respondent to retain its fair share of the Hawaiian traffic, therefore, it must publish and maintain competitive rates irrespective of revenue consequences. In effect, no carrier serving the trade can unilaterally effectuate rate increases unless all three are permitted to do so by the regulatory authorities concerned.

11. Because of the rate holddowns described above, respondent estimates that the 12 1/2 percent rate increases will actually produce an increase of only 8.97 percent against total revenue for the

[4] The I.C.C. is also investigating respondent's present rate increases applicable to those services subject to that Commission's jurisdiction. *Increased Rates and Charges, Seatrain Lines, Claifornia,* Docket No. 35834 (Sub-No. 1).

[5] Docket No. 73-22, *Matson Navigation Co.—Proposed Changes in Rates Between the U.S. Pacific Coast & Hawaii,* order served April 20, 1973. Also included in this case is an investigation into the lawfulness of Matson's 12.5 percent general rate increases.

[6] Respondent estimates that in terms of revenue, Matson carries roughly 65 present of Hawaiian traffic, respondent, 25 percent, and United States Lines, just under 10 percent, the remainder handled by barge lines.

period May 1, 1973, through April 30, 1974. This amounts to an additional $2,109,271 in revenue for all of respondent's Hawaiian services and compares with an estimated loss of $3,292,399 for the same time period which would result without the subject increase.[7] For that portion of its services regulated by this Commission, respondent estimates additional revenue of $227,199 for the same time period as compared with a projected loss of $191,810 which would result without the subject increases.

12. Spiraling costs have already dissipated the benefits of respondent's 1971 rate increases and promise to have the same effect on the subject increases as well. Three items alone, which represent better than 50 percent of respondent's operating costs, have increased substantially since 1971. The basic wage rate for ILWU labor has increased from $6.321 per hour in 1971 to $9.080 in 1973, charter hire from $5,700 to $7,807 per day, and pickup and delivery costs from $13.50 to $15.50 per load. The effect of these three increases on respondent's total Hawaiian operations has been an aggregate cost increase of $4,762,569 for the year 1973 as compared with an anticipated increase in revenue of only $2,109,271. This calculation, furthermore, does not even consider increases in other cost items, such as ship pilotage, container and auto parts, and minimum office salaries, which increased 25.1, 19 and 17.6 percent respectively during the period 1971 to 1973. In addition, Oakland terminal rental increased 4.9 percent.

13. Uncontroverted evidence of record demonstrates that respondent's operations in the Hawaiian trade, both in their entirety and for that portion subject to regulation by the Federal Maritime Commission, have never been profitable and will not be profitable in the immediate future even with the additional revenue generated by the subject rate increases. The following tables illustrate the financial results of respondent's operations from their inception through the projected period May 1, 1973 through April 30, 1974:

Profit or (loss) in the Hawaiian trade (all Hawaiian services)

September 1969–Dec. 31, 1969	($43,23
1970	(940,14
1971	(446,37
1972 (including related companies)[8]	(4,813,16
Projected 1973–74 (including rate increases) (including related companies)[8]	(1,190,01

[7] It also compare with an actual 1972 loss of $4,813,163 for all of the respondent's Hawaiian services.

[8] Seatrain Terminals of California, Inc., Ocean Equipment Corp., and Hudson Waterways Corp.

Profit or (loss) in the Hawaiian trade (FMC-regulated portion)

September 1969–Dec. 31, 1969	($3,255)
1970	(70,793)
1971	(33,612)
1972	(319,860)
Projected 1973–74 (including rate increases)	[9](78,440)

14. Statements filed by respondent in accordance with the requirements of the Commission's General Order 11, 46 CFR 512, for the periods of time shown, indicate comparable results as follows: [10]

Profit or (loss) in the Hawaiian trade (FMC-regulated portion)

July 1, 1969–June 30, 1970	(103,371)
July 1, 1970–June 30, 1971	(181,562)
July 1, 1971–June 30, 1972	(463,554)
Calendar year 1972	(270,427)
Projected 1973–74 (including rate increases)	[11](2,673)

Discussion and Conclusions

The ultimate issue is whether the subject rate increases are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933. Respondent is required by law to sustain the burden of proving that its prospsed increases comport with the standards enunciated in the cited statutes. *The Commonwealth of Puerto Rico* v. *Federal Maritime Commission,* 468 F. 2d 872 (D.C. Cir. 1972).

[9] Originally respondent had projected a small profit of $32,793 for the period May 1, 1973, through April 30, 1974. The original projection, however, did not account for two additional cost increases relating to fuel and wages, which, when allocated to the FMC-regulated service, amounted to $96,659. It this added cost is deducted from net income before related companies, shown on Exhibit 3 D-2, and income taxes (48 percent) plus losses of related companies are deducted, respondeno would suffer a net loss of $78,440.

[10] Under General Order 11 procuedures, interest is not allowed as an expense in calculating net income. In the preceding table interest was included, to be consistent with I.C.C. procedures. A slight discrepancy may therefore appear between the two tables with corresponding periods of time are shown. The data in the preceding tables relating to the years 1969, 1970, and 1971 are drawn from exhibits which employ a revenue allocation with regard to administrative and general expenses and to allocation among I.C.C., F.M.C. and non-regulated services. Such a method is not normal General Order 11 proceudre, 46 CFR 512.7 (c)(4). General Order 11 does, however, permit the use of alternative methods if the carrier furnishes explanations. 46 CFR 512.3 (f). There is no evidence that the data furnished in conformance with the reporting requirements of General Order 11 and shown in the final table depart from the methodologies prescribed in that general order.

[11] Originally respondent has projected a net income of $47,589 for the period May 1, 1973, through April 30, 1974. This would have represented a return on rate base of $1,638,914 in the amount of 2.9 percent. If additional cost increases relating to fuel and wages, which had not been included in the original projection, are included, however, the projected net income becomes a net loss in the amount of $2,673, using the same method employed in footnote No. 9 above (transcript, page 165).

Uncontroverted evidence of record demonstrates convincingly that the subject rate increases are lawful. Respondent's operations in the Hawaiian trade, both in their totality and with regard to that portion regulated by this Commission, have never turned a profit and, as far as can be seen from this record, will not do so in the reasonably foreseeable future. Evidence of record indicates that respondent's total Hawaiian operation has produced operating losses from the first year of service (1969) through 1972 and will continue to do so for the period May 1, 1973, through April 30, 1974, when total losses, including those of related companies serving the trade, will amount to an estimated $1,190,015 even with the rate increases. That portion of respondent's services subject to regulation by this Commission has similarly produced losses continuously over a corresponding period of time and will continue to do so for the period May 1, 1973, through April 30, 1974, in an amount estimated by different accounting methods to be either $78,440 or $2,673 even wth the rate increases.

Spiraling costs have long since consumed the additional revenue generated by respondent's previous rate increases filed in 1971 and promise to have the same effect on the subject increases as well. Three expense items alone, comprising better than 50 percent of respondent's operating costs, i.e., ILWU wages, charter hire, and pickup and delivery costs, have increased costs for the year 1973 by $4,762,569 although anticipated additional annual revenue generated by the subject rate increases is estimated to be only $2,109,271. This calculation, furthermore, does not even consider additional cost increases relating to ship pilotage, container and auto parts, and minimum office salaries.

The record is utterly void of any evidence that respondent has demonstrated "grave mismanagement, gross inefficiencies, serious inadequacies of service, or indifference to the public need." *Matson Navigation Co.—General Increase in Rates in the U. S. Pacific/Hawaiian Trade*, 13 SRR 542, 545 (1973); *D.C. Transit Sys. Inc.* v. *Washington Met. A. Transit Com'n*, 466 F. 2d 394 (D.D. Cir. 1972), cert. denied, 94 S. Ct. 688. Nor is there any indication whatsoever that respondent's rate increases are necessitated by excess vessel capacity. On the contrary, evidence of record demonstrates that respondent has enjoyed rather high vessel utilization while it has operated in the Hawaiian trade, experiencing load factors averaging around 90 percent per voyage for the period 1969 through 1972 and 81 percent for the first six months of 1973, without taking into account additional cargoes which moved on deck or in garage space.

ULTIMATE CONCLUSION

Respondent has sustained its burden of proving that its general rate increases in the amount of 12 1/2 percent are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933.

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

WASHINGTON, D.C.,
November 28, 1973.

FEDERAL MARITIME COMMISSION

No. 73–59

MERCK SHARP & DOHME INTERNATIONAL, A DIVISION OF MERCK & COMPANY, INC.

v.

ATLANTIC LNES

Complainant found not to have sustained its burden of proving with reasonable certainty and definiteness that a commodity described on respondent's bill of lading as "Dextrose Anhydrous USP (Glucose)" was in fact dry corn sugar which should have been rated as such instead of "Cargo N.O.S."

Reparation denied.

Manuel Blasco for complainant.
Edwin Longcope for respondent.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

Complainant Merck Sharp & Dohme International is a division of Merck & Company, Inc., whose principal business is the manufacture and distribution of chemicals and chemical products. Respondent Atlantic Lines is a common carrier by water engaged in the transportation of cargo between U. S. Atlantic coast ports and ports in Bermuda and as such is subject to the provisions of the Shipping Act, 1916 (the Act).

By complaint served September 26, 1973, complainant seeks reparation in the sum of $1,170.70 from respondent, claiming that respondent overcharged complainant on a shipment of a commodity described on respondent's bill of lading as "Dextrose Anhydrous USP (Glucose)," in violation of section 18(b)(3) of the Act. Complainant alleges that the overcharge resulted because of the fact that respondent incorrectly classified the shipment as "Cargo N.O.S." rather than "Corn Sugar, Dry."

In answer to the complaint, respondent contends that if the

[1] This decision became the decision of the Commission December 28, 1973.

cargo in question was misdescribed, that was the fault of complainant, that respondent's tariff did not publish a specific rate for a commodity such as that described in the bill of lading, and that complainant has not shown that the commodity in fact was "Corn Sugar, not liquid" which would entitle it to the assessment of the rate published in respondent's tariff under that designation.

In reply to respondent, complainant contends that evidence of record shows that the commodity actually shipped was dry corn sugar and that respondent made an offer of settlement, which fact, according to complainant, demonstrates that the claim is valid.

Pursuant to request of complainant, to which respondent consents, this proceeding was conducted in accordance with the Commission's Rule 11 (shortened procedure).

The shipment in question consisted of 390 drums of a chemical described on respondent's bill of lading as "Dextrose Anhydrous USP (Glucose)," measuring 2,200 cft. and weighing 82,290 lbs. The shipment moved from New York, N. Y., to Hamilton, Bermuda, on respondent's bill of lading dated September 29, 1971. Respondent classified the shipment as "Cargo N.O.S.," for which the applicable rate published in respondent's tariff was $1.20 per cft. [2] Complainant contends that the shipment should have been assessed the rate applicable to "Sugar, Corn, not liquid," which was $1.80 per 100 lbs. as per respondent's tariff. [3] The resulting overcharge, according to complainant, amounts to $1,170.70.

Discussion and Conclusions

In cases involving alleged overcharges arising under section 18(b)(3) of the Act, the Commission has determined that the controlling test is what the complainant can prove based upon all the evidence as to what was actually shipped. Informal Docket No. 256(I), *Union Carbide Inter-America* v. *Venezuelan Line,* Order on Review of Initial Decision, November 12, 1973; *Western Publishing Co., Inc.* v. *Hapag Lloyd A.G.*, 13 SRR 16 (1973). Where the shipment has left the custody of the carrier, however, and the carrier is thereby prevented from personally verifying the complainant's contentions, the Commission has held that the complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. *Western Publishing Co., inc.* v. *Hapag Lloyd A.G.*, cited above; *Johnson & Johnson International* v. *Venezuelan Lines,* 13 SRR 536 (1973); *United States* v. *Farrell Lines, Inc.*, 13

[2] Atlantic Lines Ltd. Freight Tariff No. 13, FMC No. 11, page 11.
[3] *Ibid*, 1st revised page 24.

SRR 199, 202 (1973); *Colgate Palmolive Peet Co.* v. *United Fruit Co.*, 11 SRR 979, 981 (1970).

In support of its contention that the subject commodity was in fact dry corn sugar, complainant cites the bill of lading description, the relevant invoice, a chemical dictionary definition, a Schedule B Classification, a verified statement authorized by itself, and a letter offering to settle. None of this evidence, however, establishes the validity of its claim.

Both the bill of lading and invoice describe the subject commodity as "Dextrose Anhydrous USP (Glucose)." Such a description does not establish that the subject commodity was in fact corn sugar. Further inquiry as to the nature of "Dextrose" and "Glucose" is obviously necessary.

The chemical dictionary definition for "Dextrose" furnished by complainant is not determinative. The dictionary defines "Dextrose" to include "grape sugar" as well as "corn sugar" and furthermore states that "Dextrose" is the "sugar found in the blood of animals and occurring widely in plants." The Schedule B number by which the subject commodity was classified pursuant to Bureau of the Customs regulations is similarly not conclusive. The particular classification number in question, 061.9010, refers to "Dextrose, *including* corn sugar, except pharmaceutical..." (Underscoring added for emphasis.) The classification goes on to include, among other things, "grape sugar," "mild sugar," and "sorghum grain sugar." To further confuse the issue, the next Schedule B number, 061.9020, applies to "Glucose, including corn sirup, except pharmaceutical and dextrose..." and specifies a variety of substances under the general heading of "Glucose" such as "corn sirup solids," "potato sirup," "Starch sugar," and "wheat sirup."

None of the foregoing items establishes with reasonable certainty and definiteness that "Dextrose Anhydrous USP (Glucose)" is in fact dry corn sugar. It is at least as reasonable to conclude from the above evidence that the subject commodity was in fact grape sugar, for which respondent's tariff provided no specific commodity rate.[4]

In its reply to respondent, complainant cites two additional items which, it contends, establishes the validity of its claim. The first is a notarized statement in which complainant certifies that

[4] Other authortieis appear to support the same conclusion. Thus, for example, "Dextrose" is defined by Webster's Third New International Dictionary as follows: "dextrorotatory glucose obtained usu. by acid hydrolysis of starch as sweet crystals of the anhydrous compound or of the monohydrate ... and used chiefly in foods and beverages ... called also corn sugar, *grape sugar*." (added for emphasis.)

"Glucose (dextrose or *grape sugar*)" ... (added for emphasis.)

the subject commodity was corn sugar. The second is the fact that at one time respondent made an offer of settlement. Neither fact, however, constitutes probative evidence establishing the validity of the subject claim. The notarized statement is merely a self-serving reiteration of allegations by complainant's rate analyst who filed the complaint and verified the same information therein. The offer of settlement, incorporated in a letter of October 17, 1973, merely indicates that respondent desired to avoid further litigation, not that respondent admitted to a violation of law.[5] The law, of course,encourages settlements and every presumption is indulged in which favors their fairness, correctness, and validity generally. *General Discount Corp.* v. *Schram*, 47 F. Supp. 845 (D. Ct. E.D. Mich. 1942); *Florida Trailer & Equipment Company* v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). Parties would hardly be encouraged to enter into settlements if their efforts to settle were to be used against them subsequently as admissions of liability.[6] Accordingly, the law considers the settlement of a claim not as an admission that the claim is valid but merely as an admission that there is a dispute and that an amount is paid to be rid of the controversy. 15A C.J.S. Compromise & Settlement s.22.

ULTIMATE CONCLUSION

The Commission has determined that where the goods have left the custody of the carrier, a complainant alleging a misclassification and an overcharge has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. Complainant, having furnished evidence which is uncertain and indefinite, or otherwise lacking in probative value, has failed to sustain this burden. Accordingly, the claim for reparation is denied and the complaint is dismissed.

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

WASHINGTON, D.C.,
December 3, 1973.

[5] In pertinent part the letter from respondent's agent states as follows: "We have however discussed this matter in detail and in view of the time that has already been consumed and in the effort to bring this matter to a swift and satisfactory conclusion are ready to offer the complainant, without prejudice to our case, settlement . . . As you can see from the enclosed answer to the complainant chrage we are fully prepared to further contest this matter before the Commission but for the sake of time and good order are prepared to make the foregoing settlement."

[6] Under the Commission's Rules, offers of settlement are considered without prejudice to the rights of the parties and are not admissible in evidence if any party objects. Rule 6(a), 46 CFR 502.91.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 459

A. B. BARONE FORWARDING FOR INTERLAKE, INC.

v.

DELTA STEAMSHIP LINES, INC.

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

March 9, 1974

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on January 9, 1974.

It is ordered, That applicant is authorized to refund $1,030.89 of the charges previously assessed Interlake Inc.

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

Notice is hereby given, as required by the decision in Special Docket 459 that effective June 12, 1973, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from June 12, 1973 through July 23, 1973, the rate on "Wire, Plan" and "Wire Seals", is $32W subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff.

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

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 459

A. B. BARONE FORWARDING FOR INTERLAKE, INC.

v.

DELTA STEAMSHIP LINES, INC.

Permission to refund a portion of freight charges granted.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

On November 27, 1973, respondent Delta Steamship Lines, Inc., a common carrier by water in the foreign commerce of the United States within the meaning of section 1 of the Shipping Act, 1916, as amended (the Act), 46 U.S.C. 801, filed an application pursuant to section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3), for permission to refund a portion of the freight charges collected in connection with the shipment carried for the shipper Interlake, Inc., on respondent's vessel S.S. *Del Rio*, as described below.

The shipment in question consisted of 38 packages of galvanized steel wire and metal seals, and one wire working machine. In the aggregate the shipment weighed 47,855 lbs. and measured 382.47 cubic feet. The shipment was transported by respondent from New Orelans, Louisiana, to Santo Tomas de Castilla, Guatemala, under a bill of lading dated June 12, 1973.

When the shipment was booked, on or about May 8, 1973, respondent's tariff published no specific rate for galvanized steel wire or wire seals. Under such circumstances the applicable rate was that published for "Cargo N.O.S." at $75 per 2,000 lb. or 40 cubic feet.[2] Respondent agreed, however, to carry these commodities at a rate of $32 per 2,000 lbs. and intended to file an appropriate amendment to its tariff prior to the sailing of the vessel providing for specific commodity rates in that amount. Through inadvertence, however, respondent neglected to do so with the result that the shipment was billed and the freight collected at the $75 rate.

Since the shipment and prior to the submission of this applica-

[1] This decision became the decision of the Commission March 9, 1974.

[2] Delta Line Tariff F.M.C. No. 6, 3rd rev. page 52.

tion, respondent did file an amendment to its tariff so as to specify a rate of $32 per 2,000 lbs. applicable to "Wire, Plain" and "Wire Seals." [3]

Respondent now seeks permission to refund a portion of the freight collected on that portion of the shipment which comprised galvanized steel wire and metal seals so that the original agreement to carry those commodities at the rate of $32 per 2,000 lbs. may be consummated. The amount of refund necessary to accomplish this objective is $1,030.89.[4]

No shipments other than complainant's of the same or similar commodities moved via respondent during the same period of time at the rate applicable at the time of the shipment involved in this proceeding.

Section 18(b)(3) of the Act, as amended by 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 refund a portion of freight charges collected 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 will not result in discrimination among shippers. The facts demonstrate an inadvertent failure by the carrier to file a new rate prior to shipment. Such rate was, however, filed prior to this application, which was filed within 180 days of the shipment as required by the statute. The refund, furthermore, will not result in discrimination among shippers.

Good cause appearing, and respondent having complied with the relevant provisions of section 18(b)(3) of the Act, permission to refund $1,030.89 of the freight charges collected in connection with the subject shipment is granted. Respondent shall publish in its tariff the notice required by the statute. The refund of the charges herein authorized shall be effectuated within 30 days of the service of the notice and within 5 days thereafter respondent shall notify the Commission of the date and manner of effectuating the refund.

[3] *Ibid*, 5th rev. page 53.

[4] This represents the difference between the freight collected on the seals and wire at the $75 W/M rate ($1,788.93) and the freight on these commodiites calculated at the $32 W rate ($757.44). In its original application respondent had mistakenly calculated the latter freight to be $763.03 and the refund to be $1,025.31 but has since advised that these figures are in error and has requested that it sapplication be amended accordinly.

NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
December 14, 1973.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–32

AGREEMENTS NOS. DC–38 AND DC–38–1 ASSOCIATION, PUERTO RICO TRADES—1968

Agreement No. DC–38 granted continued approval for one year subject to the parties' adoption of certain procedures and submission of reports.

John Mason and *Paul J. McElligott* for respondent Association, Puerto Rico Trades.

Edward J. Sheppard, IV, Edward Schmeltzer, and *Mario Escudero* for petitioner Commonwealth of Puerto Rico and for intervenor Star-Kist Foods, Inc.

Amadeo I. D. Francis for petitioner Puerto Rico Manufacturers Association.

J. J. Teale for intervenor Import and Export Council of Puerto Rico.

Rafael Rivera Rodriguez for intervenor The Chamber of Commerce of Puerto Rico.

Donald J. Brunner, Margot Mazeau, and *Charles L. Haslup, III,* Hearing Counsel.

January 22, 1974

REPORT

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

The Commission instituted this proceeding pursuant to section 15 of the Shipping Act, 1916, to determine whether Agreement No. DC–38, between Gulf-Puerto Rico Lines, U.S.A. (GPRL), Sea-Land Service, Inc. (Sea-Land), Seatrain Lines, Inc. (Seatrain), and T-ransamerican Trailer Transport, Inc. (TTT), should be permanently approved, disapproved or modified.

Agreement No. DC–38 creates the Puerto Rico Ocean Service

Association (PROSA) and provides generally for the establishment of self-policing procedures and uniform tariff rules, regulations, provisions and practices, except ocean freight rates, between carriers serving the trade between Atlantic and Gulf ports and ports in Puerto Rico. The agreement was approved by the Commission conditionally for a period of 24 months on April 2, 1969. In its conditional order of approval, the Commission noted that it was "aware that certain problems including, but not limited to demurrage, detention of trailers, credit and claims, exist[ed] which require[d] prompt attention" and directed the parties to notify the Commission at least four months prior to the agreement's termination should they desire to extend the agreement beyond the 24-month period, submit a full report setting forth actions taken under the agreement, and indicate the positive transportation needs and the public interest benefits which have resulted from operations under the agreement.

Thereafter, in compliance with the Commission's order of conditional approval, PROSA submitted a "Report of Activities", designated Agreement No. DC–38–1, wherein it set forth the Association's activities and accomplishments under conditionally approved Agreement No. DC–38, and requested its permanent approval. Following the filing of comments and protests by the Commonwealth of Puerto Rico and the Puerto Rico Manufacturers Association against permanent approval of the Agreement, the Commission instituted this proceeding.

The Commission's Order of Investigation directed that the proceeding address itself to whether: (1) the parties to Agreement No. DC–38 have fulfilled, or made reasonable efforts to fulfill, the terms of the agreement; (2) the actions taken by PROSA satisfy a transportation need; and (3) Agreement No. DC–38 is detrimental to the commerce of the United States, contrary to the public intrest or otherwise violative of the Shipping Act, 1916. Under the "public interest" criteria, the Commission advised that it was particularly intersted in determining whether an agreement between carriers in the domestic commerce of the United States is, in fact, needed and whether there are problems in Puerto Rico with respect to demurrage practices, congestion, terminal charges, and other related matters which can be best solved by the carriers through permanent approval of Agreement No. DC–38.

The Commonwealth of Puerto Rico (Commonwealth) and the Puerto Rico Manufacturers Association (PRMA) were designated as petitioners in said Order. Interventions were filed by and granted to Star-Kist Foods, Inc. (Star-Kist), Import & Export

Council of Puerto Rico (IEC) and the Chamber of Commerce of Puerto Rico (Chamber).

Following extensive hearings and the filing of briefs by all parties, Administrative Law Judge Herbert K. Greer issued an Initial Decision in which he ultimately concluded that Agreement No. DC–38 should be permanently approved. Exceptions to the Initial Decision have been filed by the Commonwealth, the Chamber, IEC, PRMA, Star-Kist and Hearing Counsel, to which PROSA has filed a Reply.

THE AGREEMENT

Agreement No. DC–38, whose stated purpose is the promotion of stability in the Puerto Rican trade, encompasses:

> ... the establishment of all Tariff Rules, Regulations and Provisions or Terminal or Accessorial charges, except ocean freight rates, and the establishment of self-policing procedures in connection with the common carriage of property by water by the parties hereto between U.S. Atlantic and Gulf ports and ports in Puerto Rico. [1]

Terminal and accessorial charges are defined as those:

> ... related to or connected with the receiving, handling, pick-up and delivery, and storing of property, within the areas covered by this agreement; but shall exclude ocean freight rates and charges which are directly related to ocean freght rates such as surcharges, heavy lift and long length charges.

Specifically excluded from the Agreement's rulemaking authority were:

> ... provisions for controlling, regulating, preventing or destroying competition either between the parties or as between the parties and carriers not parties; allotting of ports or restricting or otherwise limiting the number and volume or character of sailings between ports; or the limiting or regulating in any way the volume or character of freight to be carried.

Under the Agreement, the business affairs of PROSA are vested in the Executive Officers Committee, which consists of one officer

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[1] The tariff rules and regulations include:

"1. Rules and practices relating to terminal services, privileges or facilities granted or allowed by the carriers.

"2. Rules and practices relating to the issuance and the substance of bills of lading, the manner of presenting, marking, packing, delivering, receiving, handling or storing of property within the meaning of section 18(a) of the Shipping Act, 1916.

"3. Rules and practices relating to the extension of credit, the payment of claims for cargo loss or damage, free time and demurrage on cargoes and containers/trailers.

"4. Rules and practices designed to avoid preferences or prejudices on other matters prohibited by and within the meaning of section 16, First, Shipping Act, 1916."

[2] In this regard, it must also be remembered that the PROSA members presently maintain a near monopoly on the containerized trade between Puerto Rico and continental United States. Being a protected domestic trade, there is no foreign flag competition, and the only other U.S. carriers in the trade, primarily barge operators, have been described as "marginal carriers".

from each member line. The Traffic Committee considers all matters subject to the Agreement involving tariff rules, regulations and charges and submits its proposals to the Executive Officers Committee, which takes into consideration the views of individual members prior to arriving at a decision.

Meetings of PROSA members are to be held two or more times each year and meetings at which the public is invited to participate are to be held at least four times each year. Minutes of all PROSA meetings are to be kept, and copies mailed to the Secretary, Federal Maritime Commission, and the Executive Director, Puerto Rico Port Authority, within fifteen days of such meetings.

Provision is made for the establishment and maintenance of a PROSA office and the appointment of chairman to be in charge. The chairman is to adopt and maintain procedures for promptly and fairly hearing shippers' requests and complaints which relate to rules, regulations, and provisions or terminal or accessorial charges established under the agreement. Copies of tariffs are to be maintained for the convenience of shippers.

The parties may, under the Agreement, appoint a joint agent to collect terminal and accessorial charges. Self-policing rules are established. Membership is available to any qualified carrier regularly engaged in the trade. Any party to the agreement can withdraw upon thirty days' written notice.

THE INITIAL DECISION

In approving Agreement No. DC-38, the Administrative Law Judge found that the Agreement: (1) did not invade the prohibitions of the antitrust laws more than is necessary to serve the purposes of the Shipping Act, 1916, and (2) was not contrary to the public interest, or otherwise in violation of the Act. Judge Greer also concluded that actions taken by PROSA under the subject Agreement have served, and will continue to serve, a transportation need and that while the parties to the Agreement have "not entirely fulfilled" the terms thereof, they have made "reasonable efforts to do so".

All the parties excepting to the Initial Decision, save Hearing Counsel, take the position that the Initial Decision should be reversed and that Agreement No. DC-38 should be disapproved. As an alternative to total disapproval, however, the Commonwealth and PRMA would accept approval with certain restrictive conditions. These conditions include a limitation of the scope of the

Agreement to include only demurrage activities, a three-year limitation on approval, open PROSA meetings, and the requirement that PROSA adopt certain demurrage rules and regulations.

Hearing Counsel are of the opinion that PROSA's actions under the Agreement during the two-year trial period do not warrant its permanent approval. They accordingly except to Judge Greer's decision in this proceeding, as well as to the "ultimate conclusions" on which this decision was based, and to his failure to impose certain recommended conditions. Hearing Counsel urge the Commission on exception to temporarily approve Agreement No. DC–38 for a period of three years, subject to certain conditions.

DISCUSSION AND CONCLUSIONS

Agreement No. DC–38 is, by PROSA's own admission, an "anticompetitive" type of arrangement subject to section 15 of the Shipping Act, 1916. While the Agreement excludes ocean freight rates, it permits the member lines jointly to establish rates and charges in every other area. In fact, as one party to this proceeding has pointed out, Agreement No. DC–38 presently authorizes the parties thereto to agree upon and fix uniform rates and regulations in two of the three areas involved in the movement of cargo from a point of pickup in the continental United States to a point of delivery in Puerto Rico and vice versa. Thus, while the PROSA members may well remain competitive in the "service aspects" of the trade, as they have indicated, in all other areas, Agreement No. DC–38 clearly represents an all but absolute elimination of competition as between the member lines.[2] And those other areas are, as one of PROSA's own witnesses has testified, "a significant consideration in the total picture of ocean transportation."

Agreement No. DC–38, in allowing the parties to act in concert in establishing rules, regulations and charges in every transportation area, except ocean freight rates, which alone remain susceptible to competitive pressures, is clearly an anticompetitive arrangement subject to section 15 of the Act, which, if permitted at all by this Commission, must be scrutinized "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 policies of the regulatory statute." *Isbrandtsen Co., Inc.* v. *United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954). Thus, the law requires that a balance be struck between the antitrust policies of this nation as reflected

[2] In this regard, it must also be remembered that the PROSA members presently maintain a near monopoly on the containerized trade between Puerto Rico and continental United States. Being a protected domestic trade, there is no foreign flag competition, and the only other U.S. carriers in the trade, primarily barge operators, have been described as "marginal carriers".

in its antitrust laws and the regulatory considerations which underlie the Shipping Act, 1916.

The specific test for assessing whether an anticompetitive agreement may be approved was established by the Commission in *Investigation of Passenger Travel Agents*, 10 F.M.C. 27 (1966), and approved by the U.S. Supreme Court in *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238 (1968), and provides that agreements which violate the antitrust laws may be approved only if the proponents can show that the agreements are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." In so doing, consideration must of necessity be given to the circumstances and conditions existing in the particular trade involved. *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290 (1966).

When considering whether the circumstances and conditions in the Puerto Rican trade justify the approval of the Agreement now before us, it must be remembered that the domestic trades are unique as regards the need for ratemaking conferences. [3] The lack of foreign flag competition, in the domestic trades, coupled with the Commission's more extensive rate and other regulatory authority in those trades, generally precludes the existence of conditions and factors which normally give rise to the need for conferences and other ratemaking groups.

This is not to suggest, as some parties to this proceeding believe, that the Commission has an established policy of "excluding" ratemaking agreements in the domestic trades or even looks with "disfavor" upon such agreements. In fact, the Commission has on occasion sanctioned ratemaking agreements in the domestic trades. Nevertheless, because the conditions in the domestic trades are generally what we might call "controlled" as a result of the Commission's broad regulatory influence, the proponent of a rate-fixing agreement in those trades must clearly demonstrate a greater need or justification for such concerted activity than would normally be the case were the agreement in the foreign trades.

The record in this proceeding makes it abundantly clear that demurrage practices, congestion and related matters have long been a nagging problem in the Puerto Rico trade. In this regard, there is considerable evidence that before the advent of PROSA, there were serious abuses in the Puerto Rico trade regarding the

[3] While Agreement No. DC-38 does not cover "ocean freight rates", it does permit the joint fixing of accessorial charges in connection with terminal operations, pickup and delivery, and, generally, *all* charges other than freight rates. To the extent, at least, Agreement No. DC-38 may clearly be classified as a "ratemaking agreement".

collection of demurrage. As Judge Greer found in his Initial Decision:

> . . . prior to PROSA, demurrage malpractices "abounded." Consignees were accustomed to use the leverage of their ocean freight business to coerce carriers into settling demurrage claims for less than the tariff rate. There was "whipsawing" between carriers.

To eliminate the practice of shipper favoritism which naturally flows from a system where compromises and concessions on demurrage are obtained by playing one carrier against another, PROSA has, among other things, established the Maritime Service Corporation (MSC), a central collection agency, which handles the billing and collection of all the demurrage charges due the member lines. Agreement No. DC–38, in permitting the consolidation of demurrage in a central agency, has served to eliminate a very real demurrage related malpractice which flourished when the individual carriers billed and collected their own demurrage. In so doing, Agreement No. DC–38 not only fulfills a positive transportation need, but, to the extent it serves to curtail shipper discrimination, provides valuable shipper benefits as well.

Demurrage collection, however, is but one of a series of problems endemic in the Puerto Rican trade since the advent of containerization. As originally conditionally approved by the Commission, Agreement No. DC–38 was intended to remedy problems which include not only "demurrage" but "detention of trailers, credit and claims" as well. It was because we agreed with PROSA that these problems could best be resolved "in a concerted manner under section 15", that we conditionally approved Agreement No. DC–38 and authorized the parties thereto to jointly establish:

> . . . all Tariff Rules, Regulations and Provisions or Terminal or Accessorial charges, except ocean freight rates . . . in connection with the common carriage of property by water . . . between U.S. Atlantic and Gulf ports and ports in Puerto Rico.

Under this authority granted it, PROSA has to date promulgated a number of needed uniform rules, regulations and provisions which have contributed to the maximum utilization of the carrier's equipment and also served to help reduce congestion at the piers. Thus, in addition to establishing revised and uniform New York area pickup and delivery charges, the PROSA membership has acted jointly to eliminate the absorption of such charges in New York and Puerto Rico. Other examples of PROSA activities include a uniform 10:00 a.m. rule for return of trailers, an averaging provision which benefits receivers of four or more containers, and a uniform free time rule for containers in trailer pools.

PROSA's stated goals in seeking the reapproval of its agreement such as insuring the maximum utilization of carrier's equipment and elimination of pier congestion through the adoption and enforcement of uniform tariff rules and practices are clearly responsive to a serious transportation need, especially in this time of a continuing energy crisis. And if a solution to the congestion and malpractice problems can be reached through an organization like PROSA, then the public interest is, we believe, decidedly in favor of the continuation of Agreement No. DC–38.

As framed in our Order instituting this proceeding, the critical issue here, at least insofar as the public interest is concerned, is whether the problems existing in the Puerto Rican trade "with respect to demurrage practices, congestion, terminal charges and other related matters" can best be solved by the continued approval of Agreement No. DC–38. The Administrative Law Judge found in the affirmative. Short of accepting his recommendation for permanent, unconditional approval, as opposed to temporary, conditional approval, a matter which we shall consider more fully later, we concur in his finding that "the problems in the trade may best be solved through the joint efforts of PROSA members." For, as Judge Greer reasoned in reaching that conclusion:

> The agreement permits adoption of uniform rules and regulations which, as above found, will benefit shippers. Without the agreement, uniformity could not be achieved. Elimination of malpractices such as the use of demurrage as a sales tool, may best be accomplished by joint effort. Pier congestion is a problem requiring cooperation between carriers. PROSA objectives such as establishing uniform credit practices and policies, free time at North Atlantic ports, resolution of issues raised by shippers at public meetings, including notification of receivers, elimination of export declarations, uniform trailer inspection reports, as well as the development of United States markets for Puerto Rican products, may best be carried out under the agreement. Trailer pools and their improvement is a common problem .... To cancel the agreement would be to deprive the parties to the agreement of a fair opportunity to accomplish the purposes for which it was organized.

Thus, while joint action under the PROSA agreement may not be a panacea for all the ills that have plagued the Puerto Rican trade since the coming of containerization, it continues to be the most promising method of remedying abuses and bringing stability to the trade. Certainly, nothing presented in this proceeding convinces us otherwise. In fact, to cancel Agreement No. DC–38 at this time would not only be to deny the parties thereto an opportunity to accomplish its much needed objectives through the best means available, but would also force those parties to return to a system under which shippers can take advantage of their continued patronage to obtain concessions at variance with established carrier tariffs.[4] Such a system, which is wholly unacceptable from an operational standpoint and inevitably leads to violations of the shipping statutes, must obviously be avoided.

The Agreement we are approving here today is only a means to an end, however, and is not an end in and of itself. Thus, we will expect PROSA to make more serious efforts to fulfill the terms of the Agreement, not only regarding the collection of unpaid demurrage and the promulgation of more extensive uniform rules and regulations, but also with respect to the enforcement of the self-policing obligations contained therein, which in the past have been, to quote the Initial Decision, "less than desirable".

While the record does demonstrate that PROSA, under the Agreement, has alleviated certain demurrage related abuses, and thereby served a meaningful service, the record also indicates, as Hearing Counsel has argued, that PROSA has not made every reasonable effort to collect demurrage and also that it has failed to take reasonably prompt action against shippers who have arbitrarily refused to pay such demurrage.

At the time the record in this proceeding was closed, possibly as much as $2,000,000 was due and owing the PROSA membership. Organized shipper resistance to PROSA, MSC's inefficient and inaccurate demurrage billings, discriminatory enforcement of demurrage rules, internal strife and dissension have been variously cited as contributing factors for PROSA's dismal demurrage collection record. Whatever be the reason or reasons behind PROSA's past failure to enforce demurrage, it is nevertheless clear, as the Administrative Law Judge found, that PROSA has "not entirely fulfilled the terms of the agreement" and that its efforts, through its agent MSC, to collect demurrage "have been less than desirable".

This is not to suggest the PROSA has not been sincere in its desires to accomplish the objectives of the Agreement. While it is not our intention here to sanction PROSA's less than satisfactory collection record, we realize that factors may exist, such as initial organizational problems and shipper resistance to a new system, which, while they may not excuse PROSA's past record, may serve to explain it, at least in part. Nevertheless, there can be little question that PROSA's past demurrage collection record leaves much room for improvement.[5]

[4] Testimony in the record here indicates that shippers in the trade were withholding demurrage payments hoping that the Commission's disapproval of Agreement No. DC-38 will relieve them of their demurrage obligation and will enable them "to try to cut [their] own deals again".

[5] In this regard, it should be noted that the record does indicate that since December 10, 1970, the filing date for permanent approval, the demurrage collected by MSC has increased considerably, and when compared with the first few months of the trial period, the figures are most encouraging.

Moreover, while we recognize that PROSA's failure to generate more activity in the area of uniform tariff rules, regulations and practices may be attributable in large measure to the fact that most of PROSA's efforts in the past have been specifically directed toward the demurrage problems and the establishment of a joint collection agency, we will expect PROSA in the future to take fuller advantage of the broad mandate initially awarded it by the Commission. Thus, with the grant herein of continued approval of Agreement No. DC-38, we will look to the PROSA membership to adopt forthwith whatever joint and effective measures are necessary to achieve its stated objectives and goals.

Therefore, having carefully reviewed and examined the record in this proceeding, and the many pages of testimony contained therein, and in light of general conditions existing in the Puerto Rico trade, we conclude that Agreement No. DC-38 does provide the best means of solving the problems existing in the trade between United States Gulf and Atlantic ports and ports in Puerto Rico. In this regard we find, as Judge Greer did, that Agreement No. DC-38 is required by a serious transportation need and is necessary to secure important public benefits.[6]

We cannot, however, concur in the Presiding Officer's grant of unconditional permanent approval. Such a wholesale reapproval is simply not justified by PROSA's record during the probationary period or warranted by conditions existing in the trade. Therefore, because PROSA has not entirely proven its merit during the trial period, we are permitting continued approval of Agreement No. DC-38, but only for an additional period of one year. This grant of temporary approval is made without prejudice, however, and the parties to Agreement No. DC-38 may apply for reapproval at the end of the one-year period.

The additional one-year period, we believe, is sufficient to allow PROSA to take whatever steps are necessary to refine its demurrage collection system, eliminate any faults inherent therein, and otherwise accomplish the objectives of the Agreement. Permanent approval or approval for longer than one year might not only serve to perpetuate the present inadequate system, but could well generate new shipper resistance to the complete frustration of the Agreement's objectives.

Consistent with the Commission's continuing jurisdiction over any approved agreement, and in order to enable it to determine,

[6] In reaching this conclusion, we support Judge Greer's reasoning that "actions which may benefit the shipping public are to be considered as potential when determining whether or not the agreement should have continued approval."

on a continuing basis, whether PROSA is making reasonable efforts to fulfill the terms of Agreement No. DC–38, as approved herein, we are requiring, as conditions to its continued approval, that PROSA adopt certain demurrage procedures and submit to the Commission on a quarterly basis, various reports relating to its demurrage collection activities. These are essentially the same conditions that Hearing Counsel has herein recommended be imposed on any continued approval, modified to provide for quarterly rather than monthly filings.

The Administrative Law Judge refused to impose any conditions,[7] either in terms of time limitations or reporting requirements, on the continued approval of Agreement No. DC–38 on the theory that since the Commission under section 15 of the Act retains jurisdiction over any approved agreement, it "may at any time . . . cancel or modify the agreement" and "will have access to MSC's records." This reasoning ignores the fact that the Commission originally limited PROSA's approval to a two-year trial period and that PROSA's record during that period clearly does not now warrant permanent approval. Furthermore, as we have mentioned earlier, permanent approval, without conditions, might easily perpetuate the present unsatisfactory system and, based on the testimony of record here, could certainly result in strong shipper resistance.

While the Commission realizes that the mandatory periodic filing of reports on demurrage activities under the Agreement might cause PROSA some burden and inconvenience, we nevertheless believe that it is important to place a positive duty on PROSA to keep the Commission informed of its progress in fulfilling the objectives of the Agreement, especially in view of its past record in this regard. Thus, we agree with Hearing Counsel that while it may be desirable at times to have local Commission representatives inspect the original records, such inspection should not be in lieu of properly prepared and verified reports by PROSA itself.

There is one final but rather important matter that we must consider in disposing of the exceptions now before us. The Commonwealth, through its attorney, has suggested that it has been deprived of a fair hearing in this proceeding because of the

[7] There is one proposed condition rejected by the Administrative Law Judge with which we agree, and that is the proposal that *all* PROSA meetings be open to the public. Such a condition is, as Judge Greer properly concluded, "ill-founded as it would be difficult, even impossible, for the members to transact business if nonmembers could disrupt executive meetings by interjecting demands and arguments." The public meetings already provided for in the Agreement afford shippers ample opportunity to present their views.

Administrative Law Judge's "bias", his "personal displeasure with the opposition to PROSA raised by shipper interests", and his general "predisposition to approva PROSA regardless of the evidence of record". In support of this serious and potentially damaging charge, the Commonwealth refers to certain passages in the hearing transcript and to alleged "*ex parte* communications with the [Commission's] office of the Secretary".

We have carefully and dutifully considered all of the matters relied upon by the Commonwealth in its attack on the Presiding Officer, and we find that it falls far short of substantiating its charges. While we have herein departed from Judge Greer's findings and conclusions in a number of respects, there is absolutely no credible evidence, either in the matters cited to us, or in the record taken as a whole which would indicate that the Commonwealth's right to a fair and impartial hearing was in any way compromised by the Presiding Officer. In short, we are singularly unimpressed by the Commonwealth's allegations.

ULTIMATE CONCLUSION

On the basis of all of the foregoing, we find and conclude that PROSA's record under the Agreement, during the original trial period, has been less than satisfactory, especially as to demurrage and related activities. In view of the fact, however, that Agreement No. DC-38 has, to some extent, fulfilled a positive transportation need and provided important shipper benefits, we are granting it continued approval for an additional one-year period subject to the conditions set forth in the Appendix attached hereto.

An appropriate order will be entered.

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

APPENDIX

CONDITIONS ATTACHED TO TEMPORARY CONTINUED APPROVAL OF AGREEMENT NO. DC–38

I. PROSA shall submit the following on a quarterly basis:

A. A copy of MSC's aged demurrage account trial balance.

B. A status report of all pending suits for demurrage brought by MSC. This status report shall list:

1. parties to the suit;
2. amount involved;
3. court and docket number; and
4. disposition.

C. A list of adjustments made by MSC in demurrage billings.

D. A list of MSC's billings and collections, by carrier.

II. PROSA shall adopt and implement the following:

A. A uniform trailer interchange receipt (to be implemented by all carrier members of PROSA).

B. A procedure which will guarantee that all Trailer Interchange Receipts are surrendered by MSC promptly.

C. A procedure requiring that a copy of each applicable Trailer Interchange Receipt be mailed to the customer along with his bill from MSC with all pertinent spaces completely and accurately filled in. The date and hour set out and in should be machine stamped.

III. PROSA shall, if it has not already, conduct a complete study and investigation of the present demurrage rules in light of the specific complaints disclosed in this proceeding and submit a report to the Commission, setting forth the facts justifying the retention of the rules or indicating the charges made, if any, and the reasons therefor. This study and investigation should address itself to the following shipper complaints:

A. Assessment of demurrage on Saturdays and Sundays.

B. Failure to grant free time credits for refrigerated containers on the same basis as for other containers.

C. Computation of free time from receipt of container by consignee if container moves in carriers' delivery service and consignee has not designated a preferred trucker.

D. Credits for early return of trailers.

E. Toll demurrage to permit shipper to retain a partially loaded van when a sailing has been advanced or delayed. The evidence shows that Sea-Land has, in the past, given permission to retain a container for additional loading where a sailing was delayed.

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–32

AGREEMENTS NOS. DC–38 AND DC–38–1 ASSOCIATION, PUERTO RICO TRADES—1968

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether Agreement No. DC–38 should be granted continued approval pursuant to section 15 of the Shipping Act, 1916, and the Commission having this date made and entered its Report stating its findings and conclusions, which Report is made a part hereof by reference:

Therefore, it is ordered, That Agreement No. DC–38 is approved for a period of one year subject to the conditions contained in the Appendix to said Report.

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

By the Commission.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-76

BETHLEHEM STEEL CORPORATION

v.

INDIANA PORT COMMISSION

Respondent's assessment of a "Harbor Service Charge" on every vessel entering the Burns Waterway Harbor where no services are provided, nor benefits conferred on every vessel entering the harbor is an unreasonable practice relating to or connected with the receiving, handling, storing or delivering of property in violation of section 17 of the Shipping Act, 1916.

Paul V. Miller for Complainant Bethlehem Steel Corporation.

Theodore L. Sendak, Timothy J. May and *Richard A. Earle* for Respondent Indiana Port Commission.

Scott H. Elder for Intervenor Lake Carriers Association.

Wesley A. Rogers for Intervenor Waterways Freight Bureau.

March 1, 1974

REPORT

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

This proceeding was instituted by Complaint from Bethlehem Steel Corporation, alleging that a Harbor Service Charge assessed by the Indiana Port Commission (IPC) on every vessel entering the Burns Waterway Harbor, including those proceeding to private docks, is unlawful.

Specifically, Bethlehem Steel Corporation (Bethlehem) alleges that the Harbor Service Charge is an unjustly discriminatory charge resulting in an undue and unreasonable prejudice and disadvantage to Complainant and the assessment of the charge is an unjust and unreasonable practice relating to or connected with the receiving, handling, storing or delivering of property and is, therefore, in violation of sections 16 and 17 of the Shipping Act, 1916. Complainant also contends that IPC may not lawfully collect the charge because it has not been filed with the Commission, as required by section 17 of the Shipping Act, 1916, and by the Commission's General Order No. 15. Finally, Complainant alleges that the charge is unconstitutional in that it is a "duty on tonnage" in violation of Article 1, Section 10, Clause 3 of the United States Constitution; it would interfere with interstate and foreign commerce and unduly burden same in violation of Article 1, Section 8, Clause 3 of the United States Constitution; it would be a denial of Complainant's property without due process of law and would deny to Complainant equal protection of the laws contrary to the United States Constitution Amendment 14, Section 1. Waterways Freight Bureau (WFB) and Lake Carriers Association (LCA) intervened.

A motion to dismiss the case for lack of jurisdiction was denied by the Commission on November 10, 1972.

Prior to the filing of this complaint, IPC brought suit in County Court against Bethlehem to compel payment of the Harbor Service Charge. Bethlehem removed the action to the U.S. District Court for the Northern District of Indiana, and at the same time filed this complaint. The action at the District Court has been stayed pending the outcome of this proceeding.

Administrative Law Judge Herbert K. Greer issued an Initial Decision in which he found the Harbor Service Charge to be in violation of section 17 of the Shipping Act, 1916. Exceptions and Replies to the Initial Decision were filed.

FACTS

Complainant Bethlehem, a Delaware corporation, is engaged in steel manufacture. It operates a plant at Burns Harbor in the State of Indiana and in connection therewith, owns and operates a dock for the receipt of raw materials and the shipment of steel products to points on the Great Lakes and on the Mississippi.

Intervenor WFB is a nonprofit association of common carrier barge companies operating barges in interstate commerce to and from Respondent's docks.

Intervenor LCA is a nonprofit corporation representing 21 steamship companies engaged in trade in the Great Lakes, including Burns Waterway Harbor, Indiana.

Respondent IPC is an instrumentality of the State of Indiana, created to, among other things, construct a port on Lake Michigan.

The pertinent portion of the Harbor Service Charge in issue (referred to hereafter as the charge) levied by the IPC on every vessel entering Burns Waterway Harbor, with certain exceptions not herein relevant, reads as follows:

All commercial vessels entering the physical limits of the Port of Indiana—Burns Waterway Harbor engaged in import, export and/or lake traffic shall be assessed a Harbor Service Charge to assist in defraying the expense of the administration and maintenance of the Port and Harbor, including the supervision of the shipping of the Port, with the view of preventing collisions and fires, policing the harbor and dock areas, aiding in the extinguishing of fires in vessels and their cargoes, on wharves and in other facilities and equipment.

Through December 1972, Complainant has been assessed nearly $35,000 under this charge and has not paid this to IPC.

The facts relevant to the lawfulness of this charge may be placed under two general headings, construction of the harbor and operation and maintenance of the harbor.

Construction of Burns Waterway Harbor

Burns Waterway Harbor was initiated early in the sixties when the State of Indiana, Bethlehem, and Midwest Division of National Steel Corporation (Midwest), also having a steel plant and dock on the waterway, formed a sort of loose partnership to create the Burns Waterway Harbor. Together they created a design which met the approval of the Army Corps of Engineers. However, in order to secure the recommendations of the Army Corps of Engineers and their participation in the project, certain elements of "local cooperation" were required of each of the three parties. The salient elements were:

1. Provide and maintain at local expense adequate public terminal and transfer facilities open to all on equal terms.
2. Provide depths in access area of berthing terminals.
3. Construction of steel plants.

Additionally, in the contract between the United States and the State of Indiana dated September 15, 1969, providing for the reimbursement to the State by the Corps of Engineers for certain construction done by the State, the State agreed, among other things, to:

c. Provide at its own expense and without cost to the Government, all lands, easements, and rights-of-way, including dredge disposal areas, required by the construction and dredging of said portions of the project, and subsequent maintenance thereof, and for necessary aids to navigation.

For its part, the United States has agreed to reimburse Respondent for some costs pursuant to the Rivers and Harbors Act, P.L. 89–298, Sec. 301, 79 Stat. 1091 (1965), which authorizes the Secretary of the Army to reimburse the State of Indiana to the extent of $25,000,000 for the expenditure of funds used to construct such portions of the project as approved by the Chief of Engineers and constructed under his supervision. In addition, the Corps of

Engineers will maintain and dredge the federal parts of the harbor.

In 1962, IPC and Bethlehem entered into an agreement entitled *Agreement between the Indiana Port Commission, the Indiana Department of Conservation and Bethlehem Steel Corporation.* This agreement set forth the responsibilities of each party with respect to the construction of the harbor. Among the features of this agreement were ones involving Respondent purchasing some of Complainant's land, Respondent granting a request of Complainant for riparian rights to extend its land holding out into the Lake, Respondent waiving in perpetuity its right to condemn Complainant's land and an agreement to allow Complainant's vessels access to and across the waters of the outer harbor under the same terms and conditions extended to all other vessels using the harbor. This, in addition to the other undertakings of Respondent and the other parties, appears to be consideration for Bethlehem agreeing to build much of the east harbor arm and for other undertakings by Bethlehem.

The harbor was initially constructed by the efforts of IPC, Bethlehem and Midwest. IPC owns most of the land, some of which was acquired by the State's use of eminent domain powers, including that under the harbor. The harbor is bounded on the north by a breakwater, constructed by IPC, which encloses the outer harbor area. The west end of the harbor is secured by a bulkhead constructed by Midwest, which runs from the southwest end of the harbor north to the western extremity of the north breakwater. The east end of the harbor is secured by a bulkhead constructed by Bethlehem, running from the southeast end of the harbor north to the harbor entrance. Within the harbor is a center pier. This pier and the bulkheads and rubble mound surrounding it were constructed by IPC. In addition, IPC dredged the harbor, constructed a highway overpass bridge at a cost of $820,000, a sewage disposal plant and distribution system for the collection of sewage and sanitary waste and ships' bilge water, a transit shed of 6,000 square feet and six acres of paved area for open storage. An office building has been erected to house IPC's administrative staff. Service islands have been installed, two in the east harbor arm and two in the west harbor arm, which are used to collect sewage, supply potable water, electrical power, and to provide fire protection. These items are on IPC's property and relate to the public terminal. Lastly, the IPC has deeded to the Corps of Engineers the land under the north breakwater and has extended an easement to the Corps of Engineers to dredge the harbor and place the spoils thereof on a 20-acre spoil area, south of the west harbor arm, valued at $400,000.

Pursuant to their promises, Bethlehem and Midwest have constructed steel mills adjacent to the harbor.

Since 1965, the General Assembly of Indiana has appropriated approximately $27,540,000 for its part of the construction of this harbor. Of this amount, about $23,000,000 has been expended by the State for construction and purchase of the items above and about $13,000,000 has been reimbursed by the Corps of Engineers under the Congressional authority previously alluded to. The reimbursement has been for the following work:

1. Construction of the north breakwater.
2. All dredging except for a 100-foot strip immediately adjacent to IPC's pier.[1]

The unreimbursed items thus aggregate roughly $10,000,000. The record fails to disclose how much of this$10,000,000 is attributable to the cost of constructing the public terminal facilities and its appurtenances and how much of the $10,000,000 is attributable to the cost of constructing the "harbor".

Under the Indiana legislation, IPC is expected to repay to the State unreimbursed appropriated money except:

> That no repayment need be made by the Commission in any event for such funds used for the construction and dredging of the Harbor or the construction of the outer breakwater, if, and to the extent that, the Congress of the United States fails to reimburse the Commission or the State of Indiana for such costs as are otherwise eligible for such reimbursement.

Hence, IPC must reimburse the State for expenditures (a) to construct the public terminal facility and its appurtenances, and (b) the cost of construction and dredging of the harbor and outer breakwater, etc., except that no reimbursement to the State of the "(b)" items is required to the extent the Congress fails to reimburse the State or IPC for such portion thereof as may be eligible for reimbursement.

Prior to the construction of Burns Waterway Harbor, the waters in the vicinity were not navigable. It was the entering of IPC, Bethlehem and Midwest into an enterprise to build this harbor, and the aid of the Corps of Engineers, that made this area navigable.

Operation and maintenance of the harbor

The harbor has an administrative staff composed of nine peo-

[1] IPC, Bethlehem and Midwest are each responsible for dreding this 100-foot strip adjacent to their respective piers. The Corps of Engineers will not dredge these areas.

ple.[2] The cost of operation of the harbor in 1972 was about *$350,000*[3] *and the harbor revenue in that year was about $200,-*000—hence there was a loss of about $150,000. In addition, there is testimony that shortly 16 more people will be provided for harbor security. There is further testimony to the effect that the administrative staff is necessary to operate the harbor as a public harbor, and the Corps of Engineers would not have expended money for the construction of the harbor and would not now maintain it, were it not operated as a public harbor.

As for supervising shipping entering the harbor and movement of shipping in the harbor with an eye to avoiding accidents, IPC has not issued any regulations aimed at controlling shipping, has not exercised its authority in regulating vessel movement, and has incurred no expense in this area. Additionally, it appears that at this time IPC does not have the capability to regulate vessel movement into and within the harbor[4] for it has not established facilities to communicate with vessels, and is not always aware of their presence.[5] In this regard it should be noted that detailed supervision and regulation of harbor movements is not yet necessary.

As for the maintenance of the harbor, the Corps of Engineers will maintain the breakwater and will do the dredging in those parts of the harbor now a federal waterway as long as the harbor is a public one. The parties are responsible to maintain their respective facilities.

IPC plans several things in the future. A police security force is to be provided, boats to police the harbor are also to be provided as well as a communication facility and oil spill clean-up gear.

DISCUSSION AND CONCLUSIONS

The issue presented is whether or not the Harbor Service Charge assessed by the Indiana Port Commission on every vessel entering the Burns Waterway Harbor, now a public federal waterway, is violative of section 17 of the Shipping Act, 1916. That is, whether or not it is a just and reasonable practice relating to or connected with the receiving, handling, storing or delivering of property. The first question, and in this case the determinative one, to be asked in resolving this issue is whether or not the

[2] A Port Director, a Deputy Port Director, a Director of Operations, a Port Engineer, a Comptroller, a Maintenance Engineer, and three Secretaries.

[3] Of this general administrative expense, about $300,000 was allocable to construction in progress.

[4] Respondent apparently has on order some patrol boats which might be used to effect this authority.

[5] Tariff Item 202 of the Harbor Tariff provides that vessel owners are to give advance notice of vessel entry to the harbor, including information sufficient to bill the Harbor Service Charge.

Indiana Port Commission has demonstrated any basis on which this charge may be assessed.

As the following cases indicate, the basis for a charge can be found either in an actual service performed for, or some benefit conferred upon the person assessed the charge. In *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935), the Supreme Court upheld a charge assessed on vessels 500 tons and over entering Mobile harbor to help defray the expense to have a harbor master regulate vessel movement in the harbor. The Court found the regulating and policing of the harbor a service inuring to the benefit of every vessel entering the harbor, hence a reasonable basis on which to assess the charge. Additionally, the Court stated that "... [c]harges levied by state authority to defray the cost of ... *facilities* afforded in aid of interstate or foreign commerce have consistently been held to be permissible." *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 267 (1935). (Emphasis added.) See also *Huse* v. *Glover*, 119 U.S. 543 (1886), where the Court upheld a toll imposed by the State of Illinois on vessels passing through locks the State constructed. The *facilities* in *Clyde Mallory Lines* and the *locks* in *Huse* v. *Glover* clearly are benefits.

In *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968), the Court discussed the reasonableness under section 17 of a charge assessed to aid in building a "Mech fund" to mitigate the harm of mechanization to longshoremen. In the discussion the Court stated:

> The question under § 17 is not whether the petitioner has received some substantial *benefit* ... but whether the correlation of that benefit to the charges imposed is reasonable. ... [t]he Commission [has] found violations of § 17 even though the benefits received were clearly substantial. The proper inquiry under § 17 is, in a word, whether the charge levied is reasonably related to the service rendered. *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 282 (1968). (Emphasis and parentheticals added.)

Thus, if a "basis" exists, and the charge is reasonably correlated to the benefit received by the person charged, and is appropriately described in the tariff, then the charge is reasonable under section 17.

Of the two possible bases for a charge under section 17 which have been discussed, services and benefits, only benefits is relevant to this proceeding. The Administrative Law Judge found, and the Indiana Port Commission admits, that no "services" are provided which could be a basis for the charge here in issue. There is some mention that in the future the Indiana Port Commission will provide, perhaps with some aid from Complainant and Midwest, police security on the docks, boats to police the harbor, communications facilities and oil spill clean-up gear. Whatever the situation might be with regard to the charge in issue if these items are provided will have to be determined in a future proceeding. They cannot be a basis for the charge presently assessed. However, Respondent offers several theories under which Complainant has received "benefits" which justify the charge in question.

The first theory is that the State, in the construction of the harbor, has spent $10,000,000 which will not be reimbursed by the federal government. Respondent argues that these expenditures, and other less tangible items, have conferred a benefit on every vessel using the harbor in that these expenditures and contributions have enabled navigation to occur where it could not before. Respondent contends that it has a statutory duty to repay this money to the State, and therefore this is an "administrative" cost within the literal language of the tariff.

A large portion of this $10,000,000, exactly how much is unclear, went to the construction of the public terminal operated by the Port Commission. This includes the money expended in the construction of the bulkheads and rubble mound enclosure surrounding the public wharf, the money expended on the transit shed, open storage areas, administrative building, the service islands for vessels calling at the public terminal and the overpass serving the terminal. The revenues to repay these expenditures ought to come from dockage, wharfage, warehouse fees and the like assessed to vessels, shippers and others using the terminal who receive a service or benefit therefrom. These expenditures do not confer a benefit on every vessel entering the harbor. Additionally, these expenditures are not, in our opinion, converted somehow into a benefit to every vessel entering the harbor (hence a basis for the Harbor Service Charge) because the public terminal was one of the elements of local cooperation required by the Corps of Engineers in return for its participation in the project. The public terminal was not the only element of local cooperation required; it was part of a larger "quid pro quo" arrangement.

The remainder of the $10,000,000 and other less tangible items consist of the deed to the Corps of Engineers of the land under the north breakwater, the easements to dredge the harbor and place the spoils thereof on a 20-acre plot near the harbor, the value of the State's eminent domain powers to the project, the fact that the State initially made available the funds necessary to construct the harbor and that but for these expenditures, and the expenses in building and administering a public terminal, the Corps of Engineers would not have participated in the project. We find these contributions, including the amounts expended on the public terminal, part of a quid pro quo arrangement and, therefore, not a basis for the charge.

As the facts indicate, the construction and administration of a public terminal and the granting of the deeds and easements were elements of local cooperation required by the Corps of Engineers for their participation in the project. However, other elements of local cooperation were required, among them the construction of two steel plants by Complainant and Midwest in the harbor vicinity. Were these other "local contributions" not made, the Corps of Engineers might not have participated in the project. Additionally, Complainant and Midwest undertook to construct bulkheads and enclosure walls, as necessary, in their respective arms of the harbor which were an integral part of the overall construction of the harbor. From this it seems that the entire Burns Waterway Harbor project was made possible by the efforts of four parties, each contributing something and receiving benefits in return. Complainant and Midwest receive, among other things, benefits from the harbor which give ready access to their new steel mills. The State benefits mainly from the creation of a new deep water harbor on which IPC operates a public terminal and which, in conjunction with the new steel mills, should serve to generate commerce and bring industry to the State. Hence, there was consideration, a quid pro quo, for the undertakings of each party. The State, and all the parties involved, have received bargained-for consideration in return for their contributions toward creating this new harbor. To allow these contributions by the State to be a basis for the Harbor Service Charge would in effect allow the State to have a double recovery. Therefore, these contributions of the State cannot be a basis for the charge in issue.

It might also be noted that no party's contribution would have been of value without the contributions of each of the other parties. Therefore, the benefits flowing to vessels because of the existence of the harbor flow not from the individual contributions, but from the whole. For this additional reason, it is impossible for us to find any separate identifiable benefit conferred by Respondent on vessels entering the harbor because of Respondent's contribution to the project.

The second alleged basis for the charge is the expenditures incurred by the IPC in administering the harbor as a "public port". This, Respondent states, is necessary for Corps of Engineers' participation in the project and is an "administration and maintenance' cost within the terms of the tariff.

There is no evidence in the record that operating the harbor as a "public harbor" involves anything more than operating and maintaining a public terminal on the harbor. There is no evidence that the nine employees of the Port Commission need do anything that would not be done were this a private terminal, except, perhaps, administer the various charges of the harbor. In other words, the "administration" of the harbor as a "public port" should require no expenses, except to collect the various charges, that would not be incurred were this a private terminal. Hence, the expenses incurred by the Port Commission in this regard confer no benefit on every vessel entering the harbor. They should be met by revenues from dockage, wharfage, warehousing and like charges imposed on vessels, shippers and others using IPC's terminal facilities. That this revenue may be insufficient to meet these expenses, and the capital expenses mentioned earlier in constructing the public terminal facilities can be no basis to assess a charge to every vessel entering the harbor, for as this Commission said in *Pittston Stevedoring Corp.* v. *New Haven Terminal, Inc.*, 13 F.M.C. 33, 44 (1969):

> The fact that respondent may lose an opportunity to earn revenue and profit thereby does not relieve it from the statutory requirement that it must establish and maintain just and reasonable practices (rates) in connection with receiving property. Nor is that fact justification for escape from the Supreme Court's mandate that a charge must be reasonably related to the services rendered.

As for the "maintenance" of the harbor, the Corps of Engineers dredges the harbor and maintains the breakwater and the other parties maintain their respective facilities. Respondent, then, does nothing in the nature of "maintenance" which could be a basis for this charge.

A third alleged benefit conferred on every vessel entering the harbor is the capability and authority of the Indiana Port Commission to regulate the movement of vessels into and within the harbor. Assuming that the Port Commission has such authority, this should not be a basis for the charge. The Port Commission has done nothing to exercise this authority; vessels control their own movement. Indeed, the Port Commission has not the capability at this time to exercise this authority,[6] and has incurred no expense in this regard. No regulations are issued, and additionally it is admitted that at the present time there is no need to exercise this authority. In *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935),

[6] It has no communication facilities, no patrol boats, and has not always been aware of the presence of vessels in the harbor. The only capability that the Port Commission even alleges it has is that the present staff of nine could assume this responsibility.

one of the reasons the Court upheld the charge in issue was because:

> The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 266 (1935).

At Burns Waterway Harbor no effort is made to regulate vessels in the harbor, there are no regulations and at present they would be difficult to enforce; hence, how can there be any benefit inuring to every vessel entering the harbor which could be a basis for this charge? The Court also said in that case, "... [c]harges levied by state authority to defray the cost of regulation ... afforded in aid of ... commerce ... have consistently been held to be permissible." *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 267 (1935). If there is no regulation, there is, of course, no cost of regulation, and the State cannot have a charge based thereon. This is true even if the State has the authority to issue and enforce regulations sometime in the future. In *Huse* v. *Glover*, 119 U.S. 543 (1886), the Supreme Court, in discussing the locks built by Illinois increasing a river's navigability, stated, "For outlays caused by such works the State may exact reasonable tolls." *Huse* v. *Glover*, 119 U.S. 543, 548 (1886). Where there is no outlay, as in this proceeding, to regulate vessel movement and no regulation is done, no charge can be assessed. We agree with the Administrative Law Judge's decision on this issue and find that naked authority to regulate vessel movement into and within a harbor, unexercised and incapable of being exercised, where no regulations are issued and no expense is incurred in regulating vessel movement, is not a benefit to every vessel entering the harbor and is not a basis for the Harbor Service Charge in issue.

Finally, the Port Commission states that in the 1962 agreement which set forth the understanding of Bethlehem and the Port Commission with respect to the construction of the harbor, it gave valuable rights to Bethlehem and it thereby owns the benefits flowing to every vessel from Bethlehem's work as well as its own. This argument is specious. If the Port Commission wanted to own the benefits of Bethlehem's construction, it should have purchased it from Bethlehem or not entered into an agreement with the steel companies and built all the docks and terminals itself. Respondent did neither, and does not own the benefits flowing to the harbor from Bethlehem's work. The rights relinquished to Bethlehem and Bethlehem's undertakings were all part of the cooperative undertaking by the parties to this project whereby each party received its quid pro quo.

Having found that the State of Indiana and the Indiana Port Commission confer no benefits on every vessel entering the Burns Waterway Harbor, it is not necessary to consider whether there is any language in the Harbor Service Charge which could be said to include the benefits alleged. Nor is it necessary to discuss the reasonableness of the Harbor Service Charge.

In the initial complaint it was alleged that the Harbor Service Charge was also violative of section 16 First, Shipping Act, 1916, in that it subjected Complainant to an undue and unreasonable disadvantage. The Administrative Law Judge found the Harbor Service Charge not violative of section 16 because, had the Harbor Service Charge been otherwise lawful, it would have been applicable to all vessels using the harbor. No exceptions having been taken to this finding of the Administrative Law Judge in this proceeding, and the Commission having determined not to review same, this finding is adopted as the finding of the Commission.

ULTIMATE CONCLUSION

For the reasons discussed, it is concluded that the Harbor Service Charge assessed by the Indiana Port Commission, Items 348–356 of Tariff No. 1 issued by the Port Commission is an unreasonable practice relating to or connected with the receiving, handling, storing or delivering of property, and is therefore unlawful as a violation of section 17, Shipping Act, 1916.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–76

BETHLEHEM STEEL CORPORATION

v.

INDIANA PORT COMMISSION

ORDER

The Federal Maritime Commission has this day served its Report in the subject proceeding, which we hereby incorporate herein, in which it found unlawful the Harbor Service Charge assessed by the Indiana Port Commission.

Therefore, for the reasons enunciated in said Report,

It is ordered, That the Indiana Port Commission cease and desist in every way from assessing or collecting the Harbor Service Charge.

It is further ordered, That Items 348–356 of the Port of Indiana Burns Waterway Harbor Port Charges Tariff No. 1 filed by the Indiana Prt Commission, the Harbor Service Charge, be deleted from said tariff.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 194(I)

COLGATE PALMOLIVE COMPANY

v.

THE GRACE LINE

March 17, 1974

ORDER ON REVIEW OF INITIAL DECISION

This proceeding involves five separate overcharge claims, each claim arising under a separate bill of lading covering ocean carriage furnished complainant by respondent.

In the original initial decision in this proceeding, the examiner* denied reparation. The examiner found in respect to Claim#7252 the undercharges exceeded the overcharges by a net $505.03. In respect to Claim#7257 he found the undercharges exceeded the overcharges by a net $1,175.04. On Claims#7263 and#7264 he found neither undercharge nor overcharge. In respect to Claim #7265 he found an undercharge of $17.33 and no overcharge. In some manner he concluded the undercharges aggregated $1,192.37 and directed that "appropriate adjustment as between shipper and carrier should be made." On review of this decision, on November 30, 1970, we remanded the proceeding for reconsideration in light of our decision in Informal Dockets Nos. 139(I) through 156(I), *MacMillan Company* v. *United Cargo Company*, which spoke to the issue of offsetting undercharges and overcharges.

We now have the decision on remand before us for review. The examiner on remand finds aggregate overcharges totaling $144.15 and aggregate undercharges amounting to $1,839.85. He thus determines the net undercharges to be $1,695.70, and directs respondent to take suitable action to collect from claimant the net amount of undercharges. No reparation is awarded for proven overcharges.

*No Administrative Law Judge.

We agree in part with the examiner's conclusions. We recognize that our conclusions vary somewhat from our previous decisions, and, to the extent they do so, prior decisions in conflict with this decision are overruled. Further comment is appropriate.

Section 22 of the Shipping Act, 1916, provides for an award of reparation for (1) violation of the Act and (2) injury caused thereby. The five claims involved here are brought under section 22. Each claim in effect alleges a violation of section 18(b)(3) of the Act which requires carriers to adhere to published tariff rates. Claimant alleges it is injured to the extent that the carrier charged a *greater* compensation than the rates specified in its tariff.

Each of the five claims involved represents a separate shipment and is covered by a separate bill of lading. Each bill of lading is a separate transaction, and the merits of each claim must be considered in toto and independent of claims under any other bill of lading. Analysis of the claims indicates that certain overcharges exist on portions of two of the shipments—Claims #7252 and #7257. To this extent claimant has shown a violation of the Act by the carrier. As indicated above, however, section 22 also requires a showing of injury before reparation can be awarded. We conclude that claimant has not been injured by the violation because on Claim #7252 the proven undercharges exceeded the proven overcharges by $503.33, on Claim #7257 the proven undercharges exceeded the proven overcharges by $1,175.04, and on Claim #7265 there was a proven undercharges of $17.33 and no proven overcharge.

Our action here of offsetting overcharges and undercharges under a given bill of lading does not constitute an award of reparation against the shipper. We are merely considering all elements of the total transaction—i.e., the overcharges and undercharges under a single bill of lading—in determining whether injury to the shipper resulted from the carrier's violation.

We hold that if proven overcharge under a single bill of lading exceeds proven undercharge under that bill of lading then an award of reparation is authorized for an amount by which the overcharge exceeds the undercharge. Conversely, if the proven undercharge under a single bill of lading exceeds the proven overcharge under that bill of lading, then the carrier is directed to collect from the shipper an amount by which the undercharge exceeds the overcharge. The net overcharge as just described and arising under a single bill of lading constitutes the "injury" under section 22 which claimant has suffered. As indicated in *MacMillan*

Company, we do not and will not permit undercharges and overcharges arising under separate bills of lading to be lumped together and netted out, for we conclude that each bill of lading constitutes a separate transaction and must be treated as such. By rejecting such a netting out we avoid statute of limitation problems arising under separately issued bills of lading and problems of ownership of the claims under negotiated bills of lading as well as the problem of our jurisdiction to award reparations for undercharges.

The remaining two claims contain no proven overcharges or undercharges.

Under the circumstances, no award of reparation can be made *against* the carrier in this proceeding. Neither can an award be made *to* the carrier for undercharges as the statute does not permit it under the circumstances of this case. We do, however, reiterate the examiner's direction that respondent take suitable action to collect the net undercharges from claimant aggregating $1,695.70.

By the Commission.

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

FEDERAL MARITIME COMMISSION
Washington, D.C.

INFORMAL DOCKET NO. 194(I)

COLGATE PALMOLIVE COMPANY

v.

THE GRACE LINE

ORDER OF REMAND

In his initial decision in this proceeding, the Examiner determined that various overcharges assessed by respondent should be offset by undercharges determined to have been made on other items involved in the same claim.

In Informal Docket Nos. 139(I) through 156(I) *MacMillan Company* v. *United Cargo Corporation*, we endorsed the Examiner's conclusion that the Shipping Act would not permit an award of relief to a carrier for undercharges since to do so would require an award of reparation against the shipper, a person not subject to the Shipping Act.

Accordingly, we conclude that the Examiner erred in this proceeding by assessing the shipper for undercharges of the carrier.

Therefore it is ordered, That this proceeding is remanded to the Examiner for reconsideration in light of the Commission's decision in Informal Docket Nos. 139(I) through 156(I) *MacMillan Company* v. *United Cargo Corporation*.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 194(I)

COLGATE PALMOLIVE COMPANY

v.

THE GRACE LINE

November 12, 1970

Set-off of undercharges authorized.

DECISION OF RICHARD M. HARTSOCK, PRESIDING EXAMINER[1]

This complaint involves several claims, the first of which is claimant's Claim No. 7252 which involves the shipment of 100 cartons of toilet soap (value over $400 but not over $800 per ton which information was set forth on the bill of lading) measuring 41 cubic feet and weighing 20,121 pounds, 450 cartons Fab Ajax detergent measuring 848 cubic feet, weighing 15,318 pounds, 175 cartons Ajax scouring cleanser, measuring 244 cubic feet and weighing 8,028 pounds, and 120 cartons Vel Ajax detergent, liquid, measuring 110 cubic feet and weighing 2,810 pounds which moved from New York, New York, to Curacao, Netherlands Antilles, on October 11, 1968, in respondent's vessel *Santa Paula.* The freight rate assessed on the soap was $84 per 40 cubic feet, on the Ajax detergent $36 per 2,000 pounds, on the scouring cleanser $41 per 40 cubic feet, and on the detergent liquid $53 per 40 cubic feet, producing total revenues of $757.67. Complaint contends that the soap should have carried the rate of $58 which is a valuation rating for soap of a value $400 but not over $800 per ton; that the detergent should have been rated as powder, washing or soap; that the scouring cleanser should have been rated on a weight basis and that the detergent liquid should have been rated as detergents n.o.s.

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

Respondent contends that this and the other involved claims discussed later are based on claimant's allegations that shipments of detergents should have been assessed the lower rate for washing powder despite the fact that a rate was provided for detergents and that this is the same claim as covered by Informal Docket No. 125(I), involving these parties, and should be denied for the reasons stated therein. Further, respondent states that it appears that the claims involving liquid detergents and scouring cleanser are in order and instructions have been given to its billing department to refund on the claims presented.

The applicable tariff provisions do not support respondent's contentions and the basis and ratings of the commodities as contended by claimant are incorrect in fact and not supported by the applicable tariff provisions. The commodities will be rerated.

The involved tariff[2] provides that charges will be assessed on a weight or measurement basis whichever produces the higher revenue. With respect to the soap, the bill of lading correctly included the valuation involved and the applicable rate was $58, and extending the measurement produces charges of $59.45, $26.65 less than assessed. With respect to the Fab Ajax detergent, this cannot be rated as a powder, washing or soap, as the tariff specifically provides a rate for detergents of Class 11 which here provides a rate of $41. Extending this figure to the measurement involved which produces the higher revenue, the charge should have been $869.20 rather than $275.72 as assessed or a difference of $613.48 undercharge. With respect to the scouring cleanser, it cannot be rated as alleged on a weight basis because the bill of lading was not properly annotated to show the valuation. It should properly be rated on a measurement basis at $36 which here produces revenues of $201.30 or an overcharge of $48.80 over that assessed. The rate here is Class 13 as used for powders, viz. cleansing or scouring, household, n.o.s. The liquid detergent was rated for freighting purposes at $53 but should have been rated at $41, which is the rate on detergents n.o.s. Extended, this produces revenues of $112.75 or an overcharge of $33. On this claim overcharges aggregate $108.45 and undercharges $613.48 or a net undercharge of $505.03.

In Claim No. 7257, complainant shipped 45 cartons of Fab Vel detergent, dry, measuring 1,760 cubic feet and weighing 31,942 pounds, 275 cartons Ajax scouring cleanser, measuring 388 cubic feet and weighing 12,670 pounds, and 200 cartons Vel Ajax detergent, liquid, measuring 180 cubic feet and weighing 4,870 pounds

[2] U.S. Atlantic and Gulf-Venezuela and Netherlands Antilles Conference, SB Ven.-11 Freight Tariff FMC No. 2.

from New York, New York, to Curacao, Netherlands Antilles, on respondent's vessel *Santa Paula* on November 8, 1968. The freight rate assessed on the Vel detergent was $36 per 2,000 pounds, on the scouring cleanser $36 per 40 cubic feet, and on the liquid detergent $53 per 40 cubic feet. Complainant contends that the Vel detergent should have taken the rate of $32 per 2,000 pounds, the scouring cleanser $36 per 2,000 pounds, and the liquid detergent $41 per 40 cubic feet. The detergent n.o.s. rate in the applicable tariff is Class 11 or for this destination $41 rather than $36 as assessed. Thus, the Fab Vel detergent on a measurement basis would have produced revenues of $1,804 rather than the $574.96 as assessed or an undercharge of $1,229.04. The scouring cleanser, claimant contends, should have been rated on a weight basis (value not over $300 per 2,000 pounds); however, no valuation was stated on the bill of lading as required in the tariff and the weight or measurement basis therefore applies. Respondent applied the correct rate of $36 producing revenues of $349.20. With respect to the liquid detergent, respondent applied the rate of $53 producing revenues of $238.50. However, the n.o.s. rate on detergent in the applicable tariff is $41 which produces revenues of $184.50 or a difference of $54. Thus, in this claim there is a net undercharge of $1,175.04.

The remaining claims, Claim No. 7263, No. 7264, and No. 7265, each involve the contention that Fab detergent, dry, is a washing or cleaning powder which should take a rate of $32 per 2,000 pounds. As here seen, the tariff provides a rate on detergent, n.o.s., of Class 11 or $41 per 40 cubic feet. No reparations are awarded in these three claims. However, it is noted in Claim No. 7265 that claimant shipped 40 cartons of Fab detergent, dry, measuring 77 cubic feet and weighing 1,378 pounds from New York, New York, to Aruba, Netherlands West Indies, on December 3, 1968, on respondent's vessel *Santa Paula* and assessed a rate of $32 per 40 cubic feet. At the applicable tariff rate of $41 W/M the correct freighting charges should have been $78.93 on a measurement basis or an undercharge of $17.33.

As seen, the above claims involve undercharges of $1,192.37 and appropriate adjustment as between shipper and carrier should be effected.

Complaints dismissed.

(S) RICHARD M. HARTSOCK,
Presiding Examiner.

WASHINGTON, D.C.,
November 12, 1970.

FEDERAL MARITIME COMMISSION

DOCKET NO. 72–24

IN THE MATTER OF AGREEMENT NO. T–2598

Agreement No. T–2598, as amended by Agreement No. T–2598–1, is the complete understanding or arrangement between respondents.

The oral franchise agreement is subject to section 15 of the Shipping Act, 1916. No memorandum of this franchise has been submitted for approval.

Respondents have entered into and implemented agreements or arrangements subject to section 15 of the Act.

Neither Agreement No. T–2598, as amended by Agreement No. T–2598–1, nor the franchise agreement grants an undue preference or subjects another to undue or unreasonable prejudice or disadvantage in violation of sections 15 and 16 First.

CPA has not established unjust and unreasonable regulations and practices relating to the receiving, handling, storing or delivering of property in violation of section 17.

Agreement No. T–2598, as amended by Agreement No. T–2598–1, is approved.

Edward M. Jackson for Canaveral Port Authority and *Thomas D. Wilcox* for Eller and Company, respondents.

David C. G. Kerr and *Stuart C. Law* for Luckenbach Steamship Co., Inc., petitioner.

Donald J. Brunner and *Patricia E. Byrne*, Hearing Counsel.

March 20, 1974

REPORT

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

By Order served June 16, 1972, and amended by Order of December 12, 1972,[1] the Commission instituted this proceeding to

[1] By supplemental Order of December 12, 1972, the scope of this proceeding was broadened to encompass an amended agreement (T–2598–1), filed with the Commission after the initial order of investigation was filed. As used herein, reference to "Agreement T–2598" or "the Agreement" therefore is reference to the original agreement, as amdned. This amendment does not alter the portions of the original agreement in any way relevant to issues currently being argued, and was accomplished as a "clarification" of the original rather than as a substantive modification of the terms of the original Agreement T–2598.

determine whether Agreement T-2598 and a preexisting "franchise agreement" between the Canaveral Port Authority (CPA) and Eller and Company (Eller) were subject to section 15 of the Act, and if so whether such agreements were in violation of sections 16 First and 17 of the Act. At issue initially also was whether or not, if found subject to the Act, these agreements should be exempted from the coverage of the Act pursuant to section 35.

Hearings in these matters were held in Washington, D.C. from October 31 to November 2, 1972, and in Port Canaveral, Florida from December 12 to December 14, 1972. The Initial Decision of the Administrative Law Judge was issued on July 16, 1973, and Exceptions thereto were duly filed by Hearing Counsel and Respondents CPA and Eller on July 31, 1973. Replies to Exceptions were filed on August 15, 1973 by Hearing Counsel and Respondents, and on August 17, 1973 by Protestant Luckenbach Steamship Company, Inc. By Order of October 5, 1973, the Commission scheduled oral argument on these Exceptions to be held on November 14, 1973. This proceeding comes before the Commission on those Exceptions and Replies.

FACTS

The Port of Canaveral (Port), a "person subject to the Act," is located in Canaveral, Florida and was created in 1953 by the State of Florida. The Port is governed by the Canaveral Port Authority, consisting of five elected Commissioners. The CPA is a body politic and corporate of the State of Florida. The CPA, pursuant to the instrument creating it, is vested with broad powers, among which are the power to own and operate warehouses and other terminal facilities, establish storage and terminal charges, enfranchise warehouse operations, license stevedores as independent contractors and appoint all other persons necessary to the proper transaction of shipping business at the Port.

The size of the Port in terms of cargo passing through it can be seen by these figures:

	Tons per annum
1966	9,599
1967	10,582
1968	18,000
1969	23,080
1970	28,284
1971	36,191

For the first ten months of 1972, 40,711 tons of cargo passed through the Port facilities.

At present, and for all relevant times involved, virtually all incoming cargo passing through the Port is newsprint used by newspapers in Cocoa and Orlando—5 and 65 miles, respectively, west of the Port. (The next nearest port to Canaveral is Tampa, 85 miles away on the Florida Gulf Coast.) There is, and has been, virtually no outbound cargo from the Port except for a neglible number of empty cores on which newsprint is rolled.

From its creation in 1953 and unitl July 28, 1965, CPA itself performed all required terminal operations at the Port.[2] In July 1965, these operations were turned over to Respondent Eller, also a "person subject to the Act", on a contractual basis which is in dispute (the so-called franchise agreement). Nonetheless, from July 1965 to the present, no person other than Eller has performed these terminal operations at the Port of Canaveral (with the exception of small amounts of import cargo requiring special handling). It its providing of such terminal services, Eller employed one terminal representative permanently stationed at the Port and provided, initially, two forklifts which it purchased from CPA in an apparently arm's-length transaction.

Stevedoring[3] continuously has been performed at the Port by any stevedoring company selected by the shipper or vessel owner. CPA in no way has directly interfered with or restricted the number of such stevedore companies to whom it has granted authority to perform stevedore operations at the Port. Since the demand for stevedoring services at the Port has been small, such stevedoring companies do not have personnel or equipment permanently assigned to the Port but transport personnel and equipment to the Port on an "as necessary" basis from other ports served by them, such as Miami, Port Everglades and Fort Lauderdale.

The stevedoring charges at the Port for newsprint are unpublished contract prices individually negotiated between the stevedore and the shippers of the newsprint, and generally represent about 83 percent of the total stevedore-terminal charge for newsprint. The remaining 17 percent of this combined cost is attributable to the $1.30 per ton terminalling charge levied by Eller and appropriately filed by Eller in a tariff with this Commission. At present, the major stevedoring companies active in the Port are

[2] As used herein, "performance of terminal operations", "terminalling", "providing terminalling services" and "handling", all denote the performance of the service of the physical handling and loading out of cargo from the CPA warehouses or open storage areas onto trucks for transportation from the port facilties to inland destinations.

[3] As used herein, "stevedoring" means the physical handling of incoming cargo from the vessel to point of rest in a warehouse or in open storage.

Shaw Company (Shaw), the stevedoring division of Luckenbach Steamship Company (Luckenbach), and Strachan Shipping Company (Strachan), which together do virtually all stevedoring at the Port. Luckenbach (Shaw) stevedores approximately 80 percent of the inbound cargo and Strachan approximately 20 percent.

In 1969, Shaw became the Shaw Division of Luckenbach when it was acquired by Luckenbach. Thereafter, in December 1970 or January 1971 (the date is in dispute), Luckenbach, on behalf of Shaw as its Florida stevedoring division, sought out the Port manager to inquire into possible authorization from CPA allowing Shaw to perform terminalling services on a nonexclusive basis with Eller. At this point in time, terminalling had only just become a break-even or possibly a profitable undertaking at the Port. For the previous years, during which Eller only provided terminal services, terminal operations were conducted by Eller at a loss.

Negotiations between CPA and Luckenbach proceeded from early 1971 until approximately July 1971. During that period, CPA repeatedly made it clear to Luckenbach that in its judgment neither the volume of traffic nor sound administration of a port limited in space and capabilities justified authorization by CPA of competing terminal agents. Luckenbach, however, persisted in its request for terminalling authorization by correspondence, conversations and appearances before CPA at its regular meetings. As a result, the CPA, at its July 28, 1971 meeting, further discussed Luckenbach's request and decided that it was in the best interest of port management to adopt a "single operator" concept with regard to terminal services. As a result of the decision of that meeting, Luckenbach was informed that CPA would adopt such a position and would select its single terminal agent at the regular meeting of October 13, 1973. This sequence of events lies at the heart of the main issue in dispute on exceptions to findings of the Administrative Law Judge.

The record discloses that the decision to adopt a single operator concept was premised on the following grounds:

(1) Traffic volume was so low it was susceptible to satisfactory service by a single man operation used to 60–70% capacity;

(2) A single operation could economically employ one full-time warehouseman representative permanently stationed at the Port to render daily—and if necessary holiday—delivery service required by the nature of the cargo;

(3) The cargo involved was of such volume that a single operator would receive sufficient business to enable it to keep terminal charges low and thus attract business to the Port;

(4) Division of the business between or among terminal agents would result in insufficient business to all with consequential deterioration of the quality of service or increased costs or both;

(5) A single agent would permit single responsibility and accountability for overall terminal operations including supervision and security of cargo;

(6) Multiple terminal agents would require CPA to employ a warehouse superintendent; and

(7) There had been a history of satisfactory results through use of a single terminal operator.[4]

The validity of these conclusions by the Commissioners of CPA was challenged by Luckenbach and is at issue before us.

At the regular Port Commission meeting of October 13, 1971, the single terminal operator was selected. That operator was Eller. Among the reasons cited in the record for the selection of Eller at that time are the following:

(1) Past history of satisfactory service by Eller.

(2) The low cost of the Eller services (attributable in part to non-union labor use);

(3) The belief on the part of CPA that since Eller had provided such services previously when no one else wanted to do so and suffered losses in the process, Eller deserved to be maintained as the terminal operator when there was a possibility for a terminal operator to make a profit from these services.

As a result of this selection of Eller as the exclusive operator, CPA and Eller thereafter, on December 8, 1971, executed the exclusive franchise now known as Agreement T–2598. (That agreement was later amended on November 29, 1972 in a manner not here relevant.) By that franchise (as now amended), Eller was granted the following authority:

1. ... exclusive franchise for the following ... terminal operations at Port Canaveral, Brevard County, Florida:

> (a) Moving freight at rest in the open on the unleased property of [CPA] ... either into the warehouse facilities of [CPA] ... or onto motor carrier facilities.
>
> (b) Moving freight at rest in the warehouse facilities on [CPA] ... out of said warehouse facilities onto motor carrier facilities.
>
> (c) Moving freight to a place of rest in the warehouse facilities of [CPA] ... or moving freight from one place of rest in the said closed storage facilities to another place of rest in the same.

2. ... the incident of exclusiveness of this franchise is characterized by the condition that [CPA] ... will not grant to another terminal operator a franchise to carry on the aforementioned terminal operation segment without first having public hearing showing a convenience and necessity therefore as determined by [CPA]. ...[5]

This franchise was granted in return for satisfactory performance of the duties by Eller and payment by them to CPA of a certain annual fee. The duration of this franchise was set at "a period of

[4] Initial Decision (I.D.), at p. 19.

[5] *Franchise Agreement*, as amended, Exhibit No. 84, Docket No. 72–24.

one (1) year from the execution of this Agreement"[6] and "to continue from year to year thereafter until terminated by either party"[7] pursuant to provisions in the Agreement.

Throughout the period January 1971 to October 1971, during which Luckenbach sought terminalling authorization, it had consistently protested the "single operator" concept. Its application to provide services at the Port had consistently been intended to allow multiple terminal operators rather than to substitute itself for Eller as the sole operator at Canaveral.[8]

With the October selection of Eller and the execution in December of the written franchise, Luckenbach removed its protests from CPA and directed them to this Commission.

This December Agreement was brought to the attention of this Commission and was informally protested by counsel for Luckenbach in December 1971. This letter was followed by another in which a copy of the Agreement was forwarded to the Commission[9] for review. Thereafter, on January 21, 1972, the Director of Bureau of Compliance notified counsel for Luckenbach that on that date the Commission had notified CPA of Luckenbach's informal complaint; of the FMC staff opinion that the Eller/CPA Agreement was subject to section 15; and of its determination that CPA should immediately file the Agreement.[10] The FMC Bureau of Compliance did in fact so notify the Port Manager of CPA by letter of January 21, 1972, that the Agreement must be filed and that "it is illegal for CPA and Eller to carry out the agreement prior to its approval by the Commission."[11] Correspondence between FMC and CPA ensued, until on March 7, 1972 this Commission informed CPA that the staff had been informed that the parties may be carrying out the Agreement in violation of the Act, and stating that it is illegal for the parties to carry out the Agreement prior to its approval by the Commission. Thereafter, on March 8, 1972, CPA suspended the Agreement and considered the situation to have reverted to that which had been in effect prior to the execution of

[6] *Id.*

[7] *Id.*

[8] Also during this period, Strachan evinced an interest in being granted authority to provide services on a multiple-operator basis. However, there is no record evidence which shows that this was anything more than a hypothetical interest. On the contrary, the record indicates that while Strachan supports the multiple operator concept it would not be likely to provide the terminal services, even were authorization granted. As a result, their participation in this proceeding for purposes of this analysis may be absorbed in the positions espoused by Luckenbach.

[9] Letter of December 11, 1971, from David C. G. Kerr, Esq., attorney for Luckenbach to N. Thomas Harris, Exhibit#66C, *Id.*

[10] Letter of January 21, 1972, from N. Thomas Harris to David C. G. Kerr, Exhibit#66D, *Id.*

[11] Letter of January 21, 1972, from N. Thomas Harris to George J. King, Port Manager, CPA, Exhibit #66E, *Id.*

the Agreement—i.e. from 1965–1971 under the oral "franchise agreement".

Matters stood as described above at the time the Order of Investigation was published and this proceeding was commenced.

Because of the many exceptions to the Administrative Law Judge's factual findings, in deciding this case we shall set forth individually our findings of fact and conclusions of law. The fundamental determinations to be made involve the following issues:

1. Whether or not the 1965 franchise agreement is subject to section 15 of the Shipping Act, 1916;

2. Whether or not if that agreement is found subject to the Act it has been implemented by the partise without having received prior approval of this Commission;

3. Whether or not Agreement No. T–2598 is subject to section 15 of the Act;

4. Whether or not Agreement No. T–2598 encompasses all understandings and agreements between the parties;

5. Whether or not Agreement No. T–2598, if subject to the Act, should be disapproved:

(a) Because it grants undue preference to one party and subjects another to unjust or unreasonable prejudice or disadvantage in violation of section 16 First of the Shipping Act, 1916; and

(b) Because CPA has established unjust or unreasonable regulations and practices relating to the receiving, handling, storing or delivering of property in violation of section 17 of the Shipping Act, 1916.

Issue 1—Whether or not the 1965 franchise agreement is subject to section 15 of the Shipping Act, 1916

It was determined by the Administrative Law Judge that both CPA and Eller were persons subject to the Shipping Act within the meaning of that term as defined in section 1 of the Act. There is before us no dispute as to this determination nor, in our opinion, could there be. We adopt that conclusion as our own.

The arrangement or oral agreement of 1965 between Eller and CPA permitted Eller to take over from CPA all terminalling operations at Port Canaveral previously performed by the Port. At that time (1965), no other firms had evinced any interest in assuming these duties and responsibilities. While the specific understandings pertaining to the arrangement are rather vague on the record, it is clearly shown that the parties interpreted the Agreement to provide that Eller was to assume the duties of terminal operator rather than CPA, and CPA would agree to refrain from competing with Eller as to these services. This arrangement was to be renewable on a year-to-year basis with respect to the parties. Whether or not during these annual periods other parties would be prevented from competing with Eller in providing terminal services is not clear from the record.

Much argument was heard both in hearing and before us as to whether or not this arrangement was an "exclusive" franchise whereby Eller alone was permitted to provide terminal services. We are of the opinion that the determination of that question is unnecessary with regard to the arrangement in effect from 1965 to 1971. We therefore decline to reach this issue. The fundamental issue is, rather, whether or not this arrangement, exclusive or not, is one which provides for the:

> . . . giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; . . . or in any manner providing for an exclusive, preferential or co-operative working arrangement,

within the meaning of section 15. We find it to be beyond argument that at least as between Eller and CPA, two persons heretofore found subject to the Act, the understanding that CPA would not attempt to compete with Eller in providing terminal services falls squarely within the confines of section 15. Clearly, the 1965–1971 arrangement is at the very least a "cooperative working arrangement" between the parties which controls competition as between them if not with reference to others.

Issue 2—Whether or not the franchise agreement of 1965 has been implemented by the parties without having received prior approval of this Commission

Having determined that the franchise arrangement between CPA and Eller is subject to the Act pursuant to section 15, the issue as to its implementation is easily disposed of. Nowhere in this proceeding has it been contended by any of the parties that the oral arrangement in question was not put into effect and continued in effect from 1965 to 1971. Consequently, the implementation of this oral agreement, no memorandum of which has been filed for Commission approval, constitutes a clear violation of the requirements of section 15 of the Shipping Act, 1916.

Issue 3—Whether or not agreement No. T–2598 is subject to section 15 of the Shipping Act, 1916

As quoted above, the pertinent provisions of Agreement No. T–2598 (as amended) provide Eller with the following authority:

1. ... exclusive franchise for the following ... terminal operations at Port Canaveral, Brevard County, Florida:

(a) Moving freight at rest in the open on the unleased property of [CPA] ... either into the warehouse facilities of [CPA] ... or onto motor carrier facilities.

(b) Moving freight at rest in the warehouse facilities on [CPA] ... out of said warehouse facilities onto motor carrier facilities.

(c) Moving freight to a place of rest in the warehouse facilities of [CPA] ... or moving freight from one place of rest in the said closed storage facilities to another place of rest in the same.

2. ... the incident of exclusiveness of this franchise is characterized by the condition that [CPA] ... will not grant to another terminal operator a franchise to carry on the aforementioned terminal operation segment without first having public hearing showing a convenience and necessity therefore as determined by [CPA]. ...[12]

By its very terms, this Agreement between two persons heretofore found subject to the Act provides "exclusive" terminal operation rights to Eller. As such, it is clearly one providng for an "exclusive, preferential, or cooperative working arrangement" within the meaning of section 15 which must be filed for approval pursuant to that section prior to effectuation.

Issue 4—Whether or not agreement No. T-2598 encompasses all understandings and agreements between the parties

In his Initial Decision, the Administrative Law Judge found that the 1965 franchise arrangement and Agreement T-2598, as amended, represent all understandings, arrangements and agreements between CPA and Eller regarding terminal operations. He also concluded that Agreement No. T-2598 superseded the 1965 franchise. He held that since CPA and Eller have reverted to the arrangement under the 1965 franchise pending action by this Commission on Agreement No. T-2598 and are currently implementing that franchise arrangement, Agreement No. T-2598 does not represent all understandings or arrangements between the parties. With this ultimate determination we are unable to agree.

Agreement No. T-2598 in essence provides for precisely the same authorizations to Eller as were granted orally to Eller in 1965 with one important addition. The 1971 agreement provides not merely that CPA will not compete with Eller, but explicitly grants Eller the terminal operation exclusive of competition from other terminal operators as long as the Agreement is not rescinded pursuant to its terms. In short, Agreement No. T-2598 embodies all the understandings reached between Eller and CPA

[12] *Franchise Agreement*, as amended, Exhibit No. 84, Docket No. 72-24.

in 1965 but adds specific provisions not made clear or explicitly provided for in the 1965 arrangement. As such, we are unable to conclude as a matter of fact or law that this Agreement does not represent all understandings between CPA and Eller.

It is argued that the reversion to the status quo which prevailed prior to the execution of Agreement No. T-2598 constitutes the reinstitution of an agreement not contemplated in Agreement No. T-2598. While in a technical sense this may be accurate, our adoption of so nice a distinction would serve no valid regulatory purpose. CPA has not implemented a new arrangement—one not contemplated under T-2598—nor has it implemented Agreement No. T-2598 prior to our action here. It has merely continued to provide for the necessary minimum services while refraining from implementing an exclusive agreement which awaits our action. The practical reasons which underlie this reversion to the status quo, and which we do not see fit to gainsay, will be discussed below. For purposes of this issue it is sufficient that we conclude that Agreement No. T-2598 for all practical purposes encompasses all understandings and agreements between CPA and Eller.

Issue 5—Whether or not agreement No. T-2598 should be disapproved: (a) because it grants undue preference to one party and subjects another party to unjust or unreasonable prejudice or disadvantage in violation of section 16 first of the act; and (b) because CPA has established unjust or unreasonable regulations or practices relating to the receiving, handling, storing, or delivering of property in violation of section 17 of the act.

For its determination, this issue relies upon conclusions as to the validity and reasonableness of the decisions made by CPA on which it based its adoption of an exclusive terminal operator concept and upon the effects of that adoption. The decision made by CPA in its adoption of the single operator concept was premised upon the seven grounds recited above in the Facts and others discussed herein. We will here scrutinize each of the grounds in order to determine its reasonableness and its meaning relevant to allegations that the resultant Agreement violates sections 16 First and 17 of the Act.

Traffic volume at Port Canaveral

The record herein shows this Port has experienced increased traffic throughout its history since 1965. The rate of growth of traffic (inbound) is shown to have been from approximately 9,600 tons per annum in 1966 to 40,700 tons for the first 10 months of

1972. It has been further shown that a single person with appropriate equipment, working at 60–70 percent capacity can efficiently handle the volume of cargo. Also shown in the record is the fact that only inbound traffic is here involved with the exception of negligible amounts of outbound cores of empty newsprint rolls.

In view of the history of growth at the Port, it is tempting to allow a certain amount of speculation to enter our consideration of the need for or desirability of more than one operator here. However, this is a luxury we deem both inadvisable and inappropriate. At issue is the soundness of a decision made in 1971 with regard to conditions prevailing then. We, therefore, restrict our consideration to those conditions.

Protestants Luckenbach/Shaw have urged consistently that the current volume of traffic, the consistent growth, and the forecasted further growth all mandate the use at the Port of multiple terminal operators. Respondents CPA and Eller conversely maintain that it is unreasonable to reach that conclusion when the record shows that a single representative of one terminal operator can, and does, efficiently handle all cargo by using only 60–70 percent of his available time.

We conclude that Respondents' position is the more realistic in light of the facts shown on record. Our conclusion here does not, however, ignore the future growth potential of the Port or the likelihood that at some future time the conclusion reached herein may no longer be valid. We are of the opinion, however, that any public interest involved at the Port in the future is amply protected by two separate procedures. Having determined Agreement No. T–2598 to be subject to section 15 of the Act, we have assumed continuing jurisdiction over that Agreement and its implementation. Any future abuse, which we do not foresee, could be corrected readily by our continuing supervision.

Further, since the Agreement provides for termination without cause of Eller's favored position, we must assume that CPA, a public body charged with public trust, will honor that trust were future traffic to indicate a need for use of additional terminal operators. The Agreement permits, and CPA's duty demands, that CPA act in the best interest of the Port and the public. We cannot conclude that, should future increased traffic volume so require, CPA would arbitrarily renege on its duties and responsibilities by disallowing additional terminal operators to work the Port.

Quality of service

The parties involved here are in sharp disagreement as to the future quality of services at Port Canaveral under a multiple terminal operator system. Protestants strongly urge that it is academic that increased competition necessarily results in maintenance of quality services. In a business such as terminal operations, it is urged, the central factor of differentiation between capable operators is the quality of the services one provides vis-a-vis any other. Therefore, it is argued, increased competition begets increased quality of service.

Respondents acquiesce to the general principle as to the effects of competition on services quality, but urge that that principle must here be applied to an actual set of circumstances and cannot be espoused in a factual vacuum. They urge that given the amount of business available at Port Canaveral, competition for terminal services would, in fact, result in a deterioration of quality of services with concomitant increases in rates for those services. Respondents claim that on the basis of current traffic volume, the introduction of competing terminal operators would result in a winner-take-all battle for traffic which would not support two concurrent operators. This is urged to be so because multiple terminal operators would cause economic loss to one and, of those competing, the one least able to sustain losses would be forced out. In the process, it is urged, the quality of service to customers would suffer from neglect and rates would be increased to cushion impending losses. Avoidance of this sort of risk is urged as a legitimate concern of the Port Authority, in whom rests the duty and responsibility to maintain stable service capability at the Port.

We find Respondents' argument persuasive. We are of the opinion that under such circumstances as currently prevail at Port Canaveral, the duly authorized Port Authority is the proper body to weigh and evaluate business risks related to that Port's efficiency in the first instance. It is not our function to gainsay the day-to-day economic decisions of this Port, nor would it be appropriate for us to do so. Given our continuing surveillance of the Agreement under which Port Canaveral and its operator must conduct their terminal operations, we see no danger in leaving the fiscal and business determinations in the first instance with the duly authorized Port Authority. Clearly, it is not the function of this agency to substitute its judgment for that of the Port. It is, however, our duty to direct appropriate changes upon finding that the Port's action or inaction based on its own judgment is contrary to the statutes we administer.

Level of charges

Determination of the effect on rate levels caused by use of a multiple terminal operator system at Port Canaveral has been alluded to above with regard to its relationship to the quality of services provided. The discussion there as to whether or not current business volume would support two or more terminal operators need not be belabored further. However, additional factual questions regarding Port Canaveral's cost of operations require attention here. The record reflects that in addition to cost factors discussed earlier, in the case of at least one possible competitor for the operation of terminal service, union personnel would be used in Port Canaveral by that firm were it to be granted authorization to provide those services. Use of union personnel, by virtue of certain union work rules, would entail a multiple-man operation to accomplish the same work now done by one nonunion terminal operator. The additional manning requirement would, it seems clear, increase the cost of operations.

Additionally, the record indicates that union pay scales for such workers would further increase costs. With higher costs to the operator even were he to handle *all* cargo it is reasonable to conclude, as did CPA, that one operator could barely make even a marginal profit at Port Canaveral and that, therefore, two or more could hardly be expected to operate profitably. The current operator using nonunion labor and a single man has been shown to have attained only very modest profits from the current traffic. Thus, the fear expressed by CPA that this lack of profitability could result in increases in rates charged for terminal services seems to us to be, if not irrefutable, at least a reasonable concern of the Port Authority and one to be left to its peculiar competence as the body charged with sound management of the Port.

Responsibility and accountability

It has been urged by Protestants and accepted by the Administrative Law Judge that the use of multiple terminal operators would neither reduce nor enhance the responsibility of CPA for such concerns as cargo security and accountability, damage to facilities, storage reporting and proper cargo dispatch. We are unable to follow the logic which leads to that conclusion.

In the conduct of terminal storage and dispatch of cargoes, it seems inescapably clear that the fewer parties involved the greater the ease of accounting for damage, reporting and dispatching of goods. While this conclusion, of course, is not sufficient alone to justly maintenance of a single operator at Port Canaveral, it is at least a reasonable conclusion for CPA to reach. Further, with regard to increased costs of operation, the record shows that multiple terminal operators presence at the Port would require the Port Authority to hire additional supervisory personnel in order to ensure proper accountability, etc. This would also increase the cost of operation of the Port. It is surely reasonable for the CPA to take this into account in its deliberations and we must admit to some difficulty in accepting any premise which asserts the error of the stance taken by CPA in this regard.

Expansion of facilities

This issue is the subject of sharp controversy. In his Initial Decision, the Administrative Law Judge determined that the central roadblock to further growth of Port Canaveral is the lack of warehouse space at the Port. While the Administrative Law Judge found that there "is no reason to believe that the CPA will fail to construct facilities to keep up with and indeed to even anticipate growth", he somehow concluded that:

> Whatever reasons for an exclusive operator agreement, it cannot be accepted that a party thereto can be permitted to enter into such arrangement and continue it in force on the ground that facilities are limited when it itself is able to control facility expansion. If such ground is accepted, the CPA can always restrain competition by always keeping facilities construction one step behind cargo growth.

We fail to follow the logic of Judge Levy's reasoning. His conclusion is not only clearly inconsistent with his own findings but is also generally unsupported by the record. Furthermore, the Administrative Law Judge's determination unjustifiably calls into question CPA's motives in operating the Port.

What the Administrative Law Judge appears to be saying is that CPA is retarding port growth by its failure to expand facilities and by its refusal to allow multiple operators who would increase traffic through the Port. To accept such a surmise first presupposes that CPA is financially or otherwise capable of expanding its facilities at this time and then imputes to CPA a refusal to allow multiple operators to work the Port even though condiditions favored such a move. Neither of these suppositions are established by this record. On the contrary, we find considerable merit in CPA's argument that *current* traffic does not warrant such expansion—even in the face of solicitations by them of new business—and that the locality of Port Canaveral in an area of economic depression is not such as would attract great cargo import increases even if facilities were expanded.

In any event, we believe that the economic conditions in the geographic locality in which the Port is situated are first concerns of, and peculiarly within the judgmental competence of, CPA. In this regard, whether or not increased terminal operators would increase traffic volume in such a locality, and whether or not traffic volume and available funds for facilities justify expansion of terminal capabilities are likewise concerns validly within the mandated authority of CPA. Absent a showing in the record that CPA has abused its prerogatives, we cannot impute to CPA a willful intent to restrain competition in the face of increased traffic and required expansion. Nor do we see any purpose to be served by specualting as to the future conduct of CPA in these regards. In light of the lack of any record evidence showing that CPA had failed to expand when volume required expansion or that CPA had arbitrarily imposed restraints on competition which were unwarranted, we must conclude that CPA's judgments were responsibly reached by them as businessmen attuned to the economic climate of the Canaveral area.

In light of our finding that CPA has acted reasonably as to each of these considerations, we cannot conclude that there has been shown such undue preference, undue or unreasonable prejudice or disadvantage, unjust or unreasonable practices to the detriment of Prostestants as warrants a finding of violation of section 16 First or 17 of the Act.

As we stated in *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966):

> As used in section 17 and as applied to terminal practices, we think that "just and reasaonble practice" most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.

We are of the opinion that with regard to the actions of CPA in discharging its public responsibilities, this definition of "just and reasonable practice" is particularly appropriate. The managerial decisions by CPA which led to adoption of an exclusive terminal operator concept are on this record "fit and appropriate to the end in view" to provide satisfactory and responsible terminalling services at minimum cost to the public.

With regard to the alleged violations of section 16, while we forthrightly admit that the exclusive terminalling rights of Eller constitute a preference and advantage to it over others, we have not been shown that under these peculiar facts those characteristics are either undue or unreasonable. What *has* been shown is a small but growing Port whose primary concern is stability of terminal services to perpetuate the meager traffic volume it has been able to attract through its facilities. The introduction of a discomfiting competitve atmosphere which could prove disastrous to the Port—in the judgment of its managing authority—would certainly seem to be adequate justification for disallowance of such disruption under these prevailing circumstances. When proper administration and continued existence of a small new port is weighed against the disadvantage to competitors of Eller and preferential treatment of Eller, necessitated by existing conditions at the Port, we think the public interest is best served by allowing this Port to ensure its survival by the means adopted.

This is not to say that conditions at Port Canaveral are static or that this conclusion would be perpetually valid. As limited to the prevailing conditions at the time of acts in controversy here, however, we find no violation of section 16 First to have been shown.

ULTIMATE CONCLUSIONS

Based on our considerations discussed above, it is hereby concluded that:

Agreement No. T–2598, as amended by Agreement No. T–2598–1, is the complete understanding or arrangement between respondents.

The oral franchise agreement is subject to section 15 of the Shipping Act, 1916. No memorandum of this franchise has been submitted for approval.

Respondents have entered into and implemented agreements or arrangements subject to section 15 of the Act.

Neither Agreement No. T–2598, as amended by Agreement No. T–2598–1, nor the franchise agreement grants an undue preference or subjects another to undue or unreasonable prejudice or disadvantage in violation of section 15 and 16 First.

CPA has not established unjust and unreasonable regulations and practices relating to the receiving, handling, storing or delivering of property in violation of section 17.

Agreement No. T–2598, as amended by Agreement No. T–2598–1, is approved.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71–89

IN THE MATTER OF AGREEMENT FF 71–7 (COOPERATIVE WORKING ARRANGEMENT)

Agreement FF 71–7, among independent ocean freight forwarders, the subject matter of which, in part, concerns ocean commerce and competition among persons subject to the Shipping Act, 1916, required to be filed with the Commission.

Agreement disapproved insofar as it is concerned with indefinite and uncertain proposed operations.

Agreement will result in increased competition between independent ocean freight forwarders and customhouse brokers and is not contrary to antitrust policies.

Agreement, as modified, is approved.

The Bernard-Customs agreement for the purchase of Bernard's Part IV rights is subject to section 15 of the Shipping Act, 1916.

Respondents have failed to file and have carried out an agreement subject to section 15, Shipping Act, 1916, without Commission approval.

Substitution of one new member to an agreement for a previous member, when such substitution has no competitive impact, does not require separate hearings to be held regarding the substituted member.

Harold E. Spencer for respondents, Customs Forwarders, Inc.

Abraham A. Diamond for petitioner, C. S. Green and Company and intervenor D. C. Andrews International, Inc.

Harold E. Mesirow for petitioner, Alltransport, Incorporated.

H. Neil Garson for petitioners, Lyons Transport, Inc., and Import Freight Carriers, Inc.

Donald J. Brunner and *C. Douglass Miller*, Hearing Counsel.

March 20, 1974

REPORT

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

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge Herbert K. Greer. As a result of protests and requests for hearing filed by Lyons Transport, Inc. (Lyons), Import Freight Carriers, Inc. (Import), Alltransport, Inc. (Alltransport) and C.S. Greene and Company (Greene), the original investigation was instituted. That investigation was designed to determine (1) whether Agreement FF 71-7 was a true and complete copy of all agreements and arrangements among the parties; (2) whether the parties carried out any agreements or arrangements subject to the Act without Commission approval; and (3) whether FF 71-7 or any other agreements or arrangements should be approved, disapproved, or modified under section 15. D.C. Andrews International, Inc. and Universal Carloading Co., Inc. subsequently intervened.[1]

Administrative Law Judge Greer issued his Initial Decision on December 19,1972. Exceptions to this Initial Decision were filed, appropriate replies to exceptions were duly filed, and oral argument was heard.

FACTS

J.E. Bernard & Co., Inc., Quast & Co., Inc., E. Besler & Co., Inc., K.S.A. Illinois, Inc., Nettles & Co., Inc. and William A McGinty Co., are all independent ocean freight forwarders (IOFF's) licensed by this Commission. They entered into a pre-organization subscription agreement for the purpose of forming a corporation to be named Customs Forwarders, Inc. (Customs), in which the signatories would be stockholders to the extent set forth in the agreement. Customs was incorporated under the laws of Illinois on August 3, 1970, with the stated purpose of engaging in the business of international and domestic freight forwarding. On September 1, 1970, Customs entered into an agreement with Bernard for the purchase by Customs of Bernard's domestic forwarder rights issued it by the Interstate Commerce Commission (ICC) pursuant to Part IV of the Interstate Commerce Act. Subsequently, on September 23, 1970, Customs & Bernard applied to the ICC for authority to consummate this purchase. This application is currently pending before the ICC.

In early 1971, the Commission's staff became aware that respondents, persons subject to the Act, had entered into an agreement which had not been filed. Respondents were advised that

[1] Following the prehearing conference, Universal withdrew and did not participate further in this proceeding. For the sake of convenience, petitioners Lyons, Import, Alltransport and Greene, and intervenor Andrews are sometimes collectively referred to as protestants herein.

they could be in violation of section 15, and after an exchange of correspondence FF 71–7 was prepared and filed with the Commission. The pertinent portion of FF 71–7 provides:

> ... the signatories hereto entered into a preorganization subscription agreement for the purpose of forming an Illinois corporation to be named Customs Forwarders, Inc. ... in which the signatories hereto will be stockholders to the extent set forth in that agreement. The stated purpose of Custom is "to engage in the business of international and domestic freight forwarding". Said agreement also provided that, upon its incorporation, Customs would enter into an agreement with J.E. Bernard & Co., Inc. ... one of the signatories hereto, to purchase, upon the terms and conditions therein set forth, the domestic forwarding rights of the latter, issued pursuant to part IV of the Interstate Commerce Act by the Interstate Commerce Commission (ICC) in its docket No. FF–119, and subnumbered dockets. Customs was incorporated under the laws of Illinois on August 3, 1970. On September 1, 1970, it entered into an agreement with Bernard for the purchase of the Bernard rights. By application filed with the ICC on September 23, 1970 ... Bernard and Customs applied for authority to purchase the Bernard rights. This application is presently pending before the ICC. Up to the present time, Customs has conducted no operations nor does it propose to do so unless and until the ICC authorizes the transfer to it of the Bernard rights.

The understandings and agreements set forth are:

> 1. When and if the ICC approves purchase of the Bernard rights by Customs, Customs will institute and conduct operations pursuant to such rights as a domestic freight forwarder subject to regulation under part IV of the Interstate Commerce Act and will operate in the usual manner in which such freight forwarders operate.
>
> 2. The operations of Customs will be managed and directed by its duly elected officers and directors, there being no understandings or agreements between the signatories hereto as to such matters, except as set forth herein and in the presubscription agreement.
>
> 3. When and if the ICC approves the purchase by Customs of the Bernard rights, or at such other time as its board of directors may determine, the board will consider whether, to what extent, and in what manner, Customs shall institute additional operations within the scope of its corporate purposes, including, but not limited to, the expansion of its operations under the regulatory jurisdiction of the ICC or the institution of operations under the regulatory jurisdiction of the FMC or CAB.
>
> 4. Customs will not engage in operations as an independent ocean freight forwarder, or non-vessel-owning common carrier by water, or any other activity subject to regulations by the FMC, ICC, or CAB without first having obtained all necessary approvals and authorizations of such agencies, having filed all tariffs or other documents necessary to such operation, and having complied with all regulations applicable thereto.

Of the parties to FF 71–7, Bernard is the only one holding domestic freight forwarder rights under Part IV of the Interstate Commerce Act. All of the parties also act as customhouse brokers, and for these activities they are under the jurisdiction of the Treasury Department.

Greene, Alltransport and Andrews are freight forwarders licensed by this Commission. Lyons and Import hold Part IV forwarder rights broader in scope than those held by Bernard. Alltransport has limited Part IV rights. Andrews and Alltransport has limited Part IV rights. Andrews and Alltransport also operate as customhouse brokers, that being Alltransport's principal activity.

Green operates as a nonvessel operating common carrier (NVOCC) and is affiliated with several other firms which operate in various fields of transportation. One affiliate, C. S. Green & Company, Inc., an Illinois corporation (Greene-Illinois), holds Part IV forwarding rights broader in scope than those of Bernard.

Lyons and Import are owned by Lyons Container Services, which also owns other transporation related firms, including Cargo in Containers, Inc., an NVOCC. Lyons handles only export traffic and Import handles only import traffic. Lyons receives traffic from most of the IOFFs in the Chicago area, including the parties to FF 71-7. Import receives substantial traffic from Besler, Schroff, Bernard, Nettles and McGinty in connection with their customhouse operations.

Except for Bernard, the parties to FF 71-7 are regularly requested by their customers to arrange inland transportation with other firms. This has caused problems. They dislike referring traffic to inland forwarders who compete with them because of the risk of losing their IOFF customers. Some inland forwarders handling their business are unfamiliar with the requirements of international traffic and make no effort to tailor their services to meet the needs of the traffic or the shippers. Difficulty has also been encountered in tracing shipments.

An IOFF and customhouse broker who is affiliated with an inland forwarder has an advantage over one without such an affilation because of the growing trend of shippers to deal with firms who can provide multiple service. Respondents will, therefore, enhance their own competitive positions if they may offer their customer inland forwarding services.

DISCUSSION AND CONCLUSIONS

In his Initial Decision, the Administrative Law Judge concluded that while the ultimate agreement, FF 71-7, as modified by him, was subject to section 15, Shipping Act, 1916, the underlying previous agreements were not so subject. Judge Greer analyzed these various agreements, concluding that they were subject neither to the Act nor to the Commission's jurisdiction because

Greene, Alltransport and Andrews are freight forwarders licensed by this Commission. Lyons and Import hold Part IV forwarder rights broader in scope than those held by Bernard. Alltransport has limited Part IV rights. Andrews and Alltransport has limited Part IV rights. Andrews and Alltransport also operate as customhouse brokers, that being Alltransport's principal activity.

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DISCUSSION AND CONCLUSIONS

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As the single operative factor among respondents' subsidiary agreements which, upon execution, would have a considerable effect upon the capabilities of the parties in commerce, we are of the opinion that the agreement to purchase these Bernard rights is appropriately subject to this Commission's jurisdiction. If no other of the subsidiary agreements underlying FF 71-7 does so, this agreement to purchase Part IV forwarding rights, without question, is one the consummation of which gives Customs the special accommodations, privileges and advantages inherent in the acquisition of expanded forwarding activities. As a result, we find that such an agreement must fall within the board scope of section 16, Shipping Act, 1916.

While not in complete consonance with our conclusion as to this agreement, the Administrative Law Judge, in his Initial Decision, did conclude that the prime purpose of Agreement FF 71-7 was the enhancement of respondent's competitve positions by acquisition of rights allowing them to offer inland forwarding services in conjunction with their operations as ocean freight forwarders. With this conclusion we agree. We simply extend the logic of that finding to the agreement which provides the vehicle for that competitive advantage. If acquisition of inland forwarding rights were the prime purpose of Agreement FF 71-7, then the agreement providing for that acquisition must be found to be within the scope of section 15. Moreover, as to this purchase agreement we find section 33 to be no bar to our assumption of jurisdiction. That section may not be used here to foreclose our jurisdiction over the agreement because the Interstate Commerce Commission's jurisidiction over Part IV rights is in no way infringed upon by our jurisdiction over the formation of Customs as to which this purchase is crucial. Of course, if this Commission were to disapprove this agreement and thereby block the formation of Customs, there could be no application by Customs before the Interstate Commerce Commission. Yet it may not be admitted that such action would frustrate ICC regulation of inland forwarders. Customs' application is not that of an inland freight forwarder and

Customs is not an inland freight forwarder until so authorized by ICC. Whether or not Customs may be formed to seek that authorization is a matter over which we may appropiately exercise jurisdiction. This action in no way infringes upon the province of a sister regulatory agency, nor is it to be so construed.

As a result of our determination that the agreement for the purchase of Bernard's Part IV rights is subject to our jurisdiction, it must therefore follow that respondents have not filed it as required and have implemented that agreement without Commission approval. This conclusion is inescapable from the record. Customs has filed its request with the ICC.

In his Initial Decision, the Administrative Law Judge concluded that while Customs' possible operation as an NVOCC was considered by the parties, the record was insufficient to determine whether this joint operation would be lawful or unlawful. The agreement itself (paragraphs 3 and 4 above) is vague and indefinite on this question and is eqally vague on what other operations might be conducted by Customs in the future. Citing *Mediterranean Pools Investigation*, 9 F.M.C. 264, 294 (1966), the Administrative Law Judge concluded that it would be "contrary to effective regulation to approve an agreement which is subject to various interpretations and involves uncertainties." As a result, he recommended modification of FF 71-7 by disapproval of paragraphs 3 and 4, thereby limiting respondent Customs' operations to Part IV forwarding. This recommended mofification was not challenged at oral argument, and we agree with the determination of this matter reached by Judge Greer. Agreeing as we do with the modification of Agreement FF 71-7, we must analyze the reminder of that agreement to determine whether or not it is subject to section 15 of the Act, and, if so, whether or not it should be approved.

It is evident that a central purpose of this agreement relates to competition among persons subject to the Act. The aims and purposes of the parties to such an agreement are found in facts and circumstances surrounding that agreement's creation; they are properly relevant to the issue of applicability of section 15. *York Forwarding Corp. et al.*, F.M.C. Docket No. 70-4, mimeo report served March 3, 1972, page 10.

Respondents' testimony is:

The reasons for formation of Customs Forwarders are found in the vast changes which have been taking place in the field of international transportation in recent years, and which are now accelerating at a very rapid rate. These result from the efforts of the industry of offer a "total service" to U.S. importers and exporters. Importers and exporters want a fast, coordinated, responsible service and to get it they want to deal with the fewest possible number of persons. The entire industry is rapidly moving in that direction. The big companies, steamship lines, foreign and domestic, rail carriers, motor carriers, and freight forwarders, have moved and are moving with great rapidity to acquire subsidiaries and afiliates so they can offer in one package a total transporation service.

They seek control of:

> ... an inland forwarder we can use to secure inland transportation which can be relied upon as an integral, coordinated part of the services which we, as ocean freight forwarders and customhouse brokers, can offer our exporter and importer customers.

and:

> ... to respond to the highly competitive atmosphere of international transportation by a group of IOFFs faced with the choice of joint participation in the increasingly important area of international trade [or limited participation].

They refer to the interrelationship between protestants and other transportation-related firms as well as the growing number of firms which, through affiliates or associates, are able to offer multiple transportation services and are:

> ... moving into areas served by independent ocean freight forwarders and customhouse brokers and are taking business away from them.

Protestants Alltransport, Greene, and Andrews are IOFFs who compete with respondents. They also hold Part IV forwarding rights. Their ability to offer shippers a combined IOFF and inland forwarding service affords them a competive advantage, an advantage which other firms enjoy because they also furnish multiple transportation services. Respondents, "a group of IOFFs," seek Part IV forwarding rights to respond to the competitive situation which exists in the Chicago commercial zone. The competitive impact of their agreement will not only affect IOFFs who have Part IV forwarding rgiths, individually or by association, but will affect as well their competitve position vis-a-vis Chicago IOFFs who have no such rights or associations.

Intermodal transportation and the growing practice of transportation-related firms to furnish multiple services by obtaining the necessary authority from all agencies concerned with each phase of the services, or by affiliation or association with other firms which have the necessary authority, has brought about jurisdictional problems. In *Atlantic & Gulf/West Coast and South America*

Conference, 13 F.M.C. 121, 130-1 (1969), this Commission considered the question of dual jurisdiction and held:

In the absence of a showing that the two sister agencies claim jurisdiction over the same particular activity, the two agencies may exercise concurrent jurisdiction over the same *persons.* (See, e.g., *Alabama Great Southern Railroad Company* v. *Federal Maritime Commission,* 126 D.C. Cir. 323, 379 F. 2d 100, 102 (1967)).

As discussed above, this Commission has jurisdiction over the parties to FF 71-7 who are the co-owners of Customs. The ICC has jurisdiction over them because, through a jointly owned corporation, they are seeking Part IV forwarding rights. The fact that the ICC has jurisdiction over a portion of the subject matter of FF 71-7 would not exempt the agreement from the requirements of section 15 or deprive this Commission of its jursdiction and duty to determine the lawfulness of that portion of the subject matter which relates to competition between persons subject to the Act or the joint operation by such persons of an NVOCC.

It would, therefore, seem clear that this Commission is amply warranted in asserting its jurisdiction pursuant to section 15, Shipping Act, 1916, over both the parties to and the subject matter of this agreement. Whether or not this agreement is to be be approved by the Commission, however, is a determination which must be made in light of the agreement's status vis-a-vis the antitrust policies of the United States.

Section 15 provides:

The Commission shall by order, after notice and hearing, disapprove . . . 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 . . . .

The competitive philosophy embodied in the antitrust laws is to be considered when determining whether an agreement is contrary to the public interest. *Investigation of Passenger Travel Agents,* 10 F.M.C. 27, 34 (1966). In *FMC* v. *Svenska America Linien,* 390 U.S. 238, 245 (1968), the Court confirmed this policy and held:

Congress has, it is true, decided to confer antitrust immunity unless the agreement is found to violate certain statutory standards, but as already indicated, antitrust concepts are intimately involved in the standards Congress chose. The Commission's approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification for it exists. Nor does the Commission's test, by requiring the conference to come forward with a justification for the restraint, improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but 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 Commission's authority to exempt agreements between persons subject to the Act from the antitrust laws would have little meaning if, in fact, a violation has not been demonstrated. Protestants view FF 71–7 as anticompetitive "per se," "presumptively," or "by its very nature," and thus contrary to the antitrust policies. They argue that as respondents have failed to justify their agreement, it must be disapproved. They further contend that it violates section 7 of the Clayton Act [15 U.S.C. 18] which provides in part:

No coporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Respondents' position is that no violation of the antitrust laws has been shown, and in the absence of evidence to support such a violation they do not have the burden to adduce justification. They contend that because the agreement does not permit Customs to operate as an IOFF or permit respondents to combine their individual IOFF operations in any manner, the effect of FF 71–7 is not to reduce the number of IOFF competitiors available to the shipping public but to the contrary, competition for IOFF business will be intensified since respondents, as indivudal IOFFs, will for the first time be in a position to offer an affiliated inland freight forwarder service to their international customers. They would limit the Commission's consideration of the competitive impact of the agreement to IOFFs. Protestants and Hearing Counsel argue that the consideration of the public interest and the commerce of the United States requires that the competitve situation must be related not only to IOFFs but also to customhouse brokers and inland forwarders.

The agreement not having been effectuated, the possibility that it will, or will not, result in a violation of the Clayton Act or otherwise offend antitrust policies and the public interest is the test to be applied. *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 177 (1964); *FTC* v. *Consolidated Foods*, 380 U.S. 592, 595 (1965). The contention that it is *per se* in violation of those policies is not well founded. The fact that a group of corporations has acquired the stock of another corporation is sufficient to cause inquiry but it must also appear that competition is lessened thereby, or as provided in section 15, competition is controlled, regulated, prevented, or destroyed.

Respondent corporations have formed a new corporation which is to be a joint venture and in that respect it is within the purview of the Clayton Act. In *Penn-Olin, supra,* the Court, in holding the Clayton Act to have been violated, found that (at p. 168):

> The test of the section is the effect of the acquisition. Certainly the formation of a joint venture and purchase by the organizers of its stock *would substantially lessen competition—indeed foreclose it—as between them,* both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. (Emphasis suppled.)

and (at page 169):

> The joint venture, like the "merger" and the "conglomeration," often creates anticompetitve dangers. It is the chosen competitive instrument of two or more corporations previously acting independently and usually competitive with one another. ... If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that *neither will compete with the progeny in its line of commerce.* (Emphasis supplied.)

Respondents are IOFFs and customhouse brokers, who compete with one another, and how have formed a corporation which is to engage in inland forwarding. Thus the appropriate inquiry is whether the agreement will serve to foreclose or substantially lessen competition between the parties to the agreement or whether absent the joint venture they would compete with each other in the line of commerce the agreement concerns. Also to be considered is the impact of the agreement on protestants and others who may be competitively affected, and whether the resulting competitive impact is contrary to the provisions of section 15.

At present Andrews and Alltransport compete with the individual respondents as IOFFs and customhouse brokers. Both firms are Part IV forwarders. Greene, not a customhouse broker, competes with respondents as an IOFF. It furnishes Part IV forwarding through an affiliated firm. There are other firms able to offer multiple services including customhouse brokerage, inland and coean forwarding. To what extent and whether individually or through affiliation with other firms is not fully demonstrated on the record. The fact that there is a trend toward shipper preference to obtain needed services by dealing with the fewest number of transporation-related firms is undisputed. Respondents seek to meet this trend by extending the scope of services they now offer to include Part IV forwarding. They are not in immediate danger of losing business or going out of business. All are operating at a profit. Nor may it be found that protestants will be forced out of business if FF 71-7 becomes effective. They are too well established and too well affiliated. There is no basis to support a finding that a monopoly will created in the fields of customhouse brokerage, inland, or ocean forwarding if FF 71-7 is approved. The question is whether competition will be lessened, or, as respondents contend, increased.

Under the agreement as modified, respondents' joint interest is limited to Customs, a Part IV forwarder. Their testimony is that they will remain as competitive as they now are as customhouse brokers and IOFFs. The contention that they will not do so assumes that this testimony is contrary to their actual intent. It is not so found. Respondents' principal source of revenue is from customhouse brokerage. A motive to divide that income or to lessen it by reason of failure to compete with each other as well as with customhouse brokers not privy to the agreement is not reasonably apparent. Under the agreement as modified, should they in any manner resort to concerted action or pool their resources in the areas of customhouse brokerage or ocean freight forwarding, they would violate the Act by extending their activities beyond the scope of the agreement. Comparison indicates that protestants have been able to attract a substantial portion of the IOFF business in Chicago because, as individual firms or through affiliated firms, they furnish both inland and ocean forwarding. Disapproval of FF 71-7 would serve to preserve their favorable competitive position and prevent respondents from offering to the shipping public both inland and ocean forwarding. Approval would permit respondents, as IOFFs, to overcome their present competitive disadvantage. Protestants and other IOFFs offering both services would be faced with six new competitors, as respondents would compete as individual firms because they are prohibited from acting jointly as IOFFs.

In the field of customhouse brokerage, respondents are not at a competitive disadvantage. Collectively, they handle approximately 50 percent of the import traffic moving through Chicago. They have competed successfully with other customhouse brokers without the availability of an inland forwarding operation in which they have a joint interest. They have been required to use inland forwarders who, in some instances, compete with them as customhouse brokers and/or IOFFs. But this has not adversely affected their customhouse brokerage business to a significant extent.

Although there is no apparent necessity for them to have an affiliated inland forwarder to remain healthy, the question is whether they may be prevented from so enhancing their competitive position, and thereby perhaps increasing their share of the customhouse brokerage business. They are prohibited from acting jointly as customhouse brokers. In this endeavor and as IOFFs they must compete individually. In having available an inland forwarder, they may offer their customers and the shipping public a combined IOFF, inland and ocean forwarding service. Andrews and Alltransport furnish that combination of services. Greene is not a customhouse broker but there are an undetermined number of firms which also compete in the multiservice area affected by the agreement. The requirement that respondents may not act in concert as customhouse brokers under the agreement as amended requires the conclusion that they must compete in that area as individuals. Alltransport and other firms who furnish similar services would be faced by six additional individual competitors. Competition would be increased, not lessened.

The impact of the agreement on the small operator is also offered as a reason for disapproval of the agreement. Alltransport, operating as an IOFF, customhouse broker, and inland forwarder, would prevent respondents from attaining the same advantageous competitive position vis-a-vis the small operator which Alltransport now enjoys. This is related to respondents' "pooling of resources in Customs", and a concentration of their competitive efforts on others rather than as between them. As this record will not support a finding that competition between respondents will be lessened in any endeavor in which they have engaged prior to the agreement, the argument is not persuasive.

To summarize, in the areas of customhouse brokerage and ocean forwarding, respondents must continue to operate as individual firms. The agreement will not serve to foreclose or lessen competition between them. The record permits only the conclusion that they will, as they have testified, continue to compete in these areas in the same manner they now do. Their individual competitive positions as customhouse brokers and IOFFs will be enhanced by the ability to extend the scope of their services to include inland forwarding but only to the extent that they will have a comparatively equal position with other firms who now offer a similar combination of services. In such a competitve situation, the retention or loss of patronage will depend primarily on salesmanship, the qualifty of the services rendered, and shipper needs. There may be a shift in the market share from protestants to respondents, but not among respondents because of a lessening of competition among them in the fileds in which they have operated prior to FF 71–7. *Penn-Olin, supra*, is not interpreted as precedent which requires disapproval of the agreement. For a firm to attempt to increase its market share in an endeavor in which it engages is an essential element of competition, provided, of course, in so doing it does not violate the antitrust laws.

It is to be re-emphasized that respondents are forbidden from operating jointly or coordinating customhouse or IOFF operations. No intent to divide these markets appears. Inasmuch as they are to remain competitive in those areas, they will individually compete with other customhouse brokers and IOFFs who also furnish inland forwarding, as individuals or through associates. The agreement will result in increased, not lessened, competition in the multiple service field. It is this increased competition which would be precluded if FF 71–7 is disapproved.

It is concluded that approval of the agreement would not be contrary to antitrust laws, the public interest, or be detrimental to the commerce of the United States insofar as competition between ocean forwarders and customhouse brokers may be affected. Therefore, we conclude the Agreement FF 71–7, as modified, should be approved.

There remains for our disposal only one other issue. At oral argument, counsel for Customs advised that Nettles had sold its interest in Customs to a firm then understood to be called Chicago Consolidators, Inc. Upon learning this fact, petitioners and one intervenor attempted to ascertain the location and corporate character of Chicago Consolidators, Inc., but were unsuccessful in these attempts. As a result, petitioner Alltransport filed a motion on May 14, 1973, requesting the production of additional data regarding "Chicago Consolidators" so as to allow it and the Commission to discover the nature of that company and its operations.

Lyons Transport, Import Freight Carriers, C.S. Greene and Co., Inc., and D.C. Andrews filed a separate motion requesting a stay of the proceeding and further hearing.

The petition of Alltransport merely requested that Customs be required to provide full information regarding the new entity of Customs and that the Commission postpone consideration of Agreement FF 71–7 until such time as that information shall be forthcoming.

The motion of Lyons, *et al.*, however, alleged that the substitution of one member of Customs for another:

> . . . may completely alter that impact of the agreement, thereby requiring the

proceeding to be stayed and a further hearing granted so that petitioners and the Commission will have a full and fair opportunity to investigate and determine the effect of the modification upon the petitioners and the public interest.

Petitioners further alleged that section 15, Shipping Act, 1916, requires that upon modification of an agreement subject to that section, such modification must be filed immediately with the Commission. They argued that until the complete identity of the new member of Customs is known, the agreement may not be acted upon by the Commission because the new company may be one not subject to the Act, thereby destroying jurisdiction. As a result, these petitioners requested a complete investigation and further hearing to ascertain the identity and character of the new entity.

In its response to the two motions described above, Customs acknowledges error in its designation of its new member. Rather than Chicago Consolidators, Inc., the true name of the entity involved is claimed by Customs to be Chicago Container Services, Inc. (hereinafter Services). Included in the reply of Customs were appendices which identify specifically the nature of Services, its ownership and principal officers, and their business interests. Notwithstanding the assertion of Customs that it had previously notified all protestants as to this relevant information—a contention disputed by protestants—Customs, in its reply, contended that having now provided this information, nothing shown thereby requires further hearings or proceedings.

It is our opinion that Customs is correction its contention that a further hearing is unwarranted.

The information as to the corporate identity and characteristics of the new entity, Services, is provided by respondent's reply to protestants' motions. By that information, it is shown that Services is a Delaware corporation authorized to do business in Illinois and that Chicago, Illinois is its principal and only place of business.

Further, Services is not a common carrier, an independent freight forwarder, or an "other person" subject to the Shipping Act or the Interstate Commerce Act, nor is it a customhouse broker. The sole function of Services is stuffing and unstuffing containers of freight moving to and from overseas points, loading and unloading rail cars, and miscellaneous packing services.

As a result of the corporate nature of Services and of its functions, it seems clear that the substitution of Services for Nettles as a member of Agreement FF 71-7 does not further complicate the issues as to competitive effects of Customs with regard to other freight forwarders in the area. The issue of competitive impact has been determined by our finding that Customs' existence would enhance competition rather than degrade competition among freight forwarders. That one member of Customs has been removed and another entity substituted for it would appear to further enhance competition if it were to have any different effect at all when viewed with respect to the corporate nature of the substituted entity.

We are reminded of various judicial admonishments which, it has been urged, compel us to grant further hearings with regard to the substitution of Services for Nettles. Specifically, our attention has been drawn to *Marine Space Enclosures, Inc.* v. *FMC*, 420 F. 2d 577 (1969). It is urged upon us that the holding therein places upon this Commission the burden to justify any departure from the hearing process mandated by section 15 of the Shipping Act. While we agree that we must, indeed, shoulder such a burden generally, we are of the opinion that *Marine Space Enclosures* is inaptly cited for the principle in light of the vastly differing fact situation facing us here as opposed to that facing us in that case. There, at issue was a 70-year restrictive contract with consequent extremely serious antitrust ramifications. Clearly, a hearing of more than *pro forma* proportions was there required.

Here, however, we are urged to hold full evidentiary hearings, or some other sort of hearing, to assist in a determination made on full hearing already held. We have found no serious anticompetitive effects when Nettles (a freight forwarder) was a member of this arrangement. Since we found no serious anticompetitive effects when Nettles (a freight forwarder) was a member of this arrangement, we are unable to fathom how substitution of an entity of more limited capability than Nettles could be more unfavorable to the competitive atmosphere.

The substitution of Services for Nettles introduces no new dimensions. Services simply performs the limited functions which would otherwise be served by the agent. We are, therefore, unable to conclude that the substitution of a member whose capacity is strictly limited to container stuffing and unstuffing could result in graver anticompetitive repercussions than membership of a freight forwarder. As noted above, we are constrained to find from the record of hearings already held, that, if any effect of the substitution is felt, it will be rather, a further enhancement of competition.

Substitution of a party as here accomplished would not necessarily oust Commission jurisdiction over the agreement. The situation here is distinguishable from *Agreement No. 9431, Hong*

Kong Tonnage Ceiling Agreement, 10 F.M.C. 134 (1966) and *Inter-American Freight Conference—Cargo Pooling Agreements Nos. 9682, 9683, and 9684*, 14 F.M.C. 58 (1970). In the latter two cases, after the agreements were filed for approval, but prior to Commission action, one or more parties not only withdrew from the agreements but also opposed their approval. The Commission concluded in both cases that we could no longer exercise our section 15 authority because no agreements remained before us.

The present situation is different. The agreement herein is a subscription agreement in which the parties are shareholders in a new corporate entity. The withdrawal of one party did not result in an agreement or situation involving any changed relationship among remaining parties. Instead, the withdrawing shareholder sold its interest to a new party with the concurrence of the other parties, leaving the overall relationship among the originally fixed number of shareholders unchanged; and all proponents of the agreement continue to urge approval.

In the *Inter-American Freight Conference* case we said that the withdrawal of party "presents a whole new pciture and requires that the remaining parties present the Commission with the new agreement representing the *readjustments made necessary by the change in relationships*" (emphasis added, at 61–62). The present case involves no change in relationships and requires no readjustments in the agreement. No issues having been raised by the substitution of parties other than that fact itself, we see no value in reinstituting hearings to replow the same earth.

Therefore, it is hereby ordered:

That Agreement FF 71–7, among independent ocean freight forwarders, the subject matter of which, in part, concerns ocean commerce and competition among persons subject to the Shipping Act, 1916, is required to be filed with the Commission.

That the agreement is disapproved insofar as it is concerned with indefinite and uncertain proposed operations.

That the agreement, as modified, is approved.

That the Bernard-Customs agreement for the purchase of Bernard's Part IV rights is subject to section 15 of the Shipping Act, 1916.

That respondents have failed to file and have carried out an agreement subject to section 15, Shipping Act, 1916, without Commission approval.

That substitution of one new member to an agreement for a previous member, when such substitution has no competitive impact, does not require separate hearings to be held regarding the substituted member.

COMMISSIONER CLARENCE MORSE, DISSENTING

I dissent on three grounds.

First. The agreement, as filed, was between six persons, including Nettles, each of whom were "other persons subject to this Act." The withdrawal of Nettles and the substitution of Services terminates the agreement as filed and creates a new association and a new agreement. That new agrement was never called to the attention of the Administrative Law Judge and was first mentioned during oral argument to the Commission on exceptions to the Initial Decision. I need only quote from *Inter-American Freight Conference*, 14 F.M.C. 58 at 61 (1970):

> Thus, when prior to our approval of an agreement one of the parties thereto repudiates or withdraws from the agreement, a completely new set of relationships arises, and normally a new beginning is required. Should the remaining parties to the agreement desire approval even without the withdrawing party, it is incumbent upon them to reformulate the terms of the agreement so that it may be tested under the criteria of section 15.

Second. If Services is a party, the agreement is not approvable as a section 15 agreement because Service is neither a common carrier by water nor "an other person subject to this Act" and thus we have a "mixed membership" agreement. See my concurring and dissenting opinions in *United Stevedoring Corporation* v. *Boston Shipping Association*, Docket 70–3, August 25, 1972, 16 FMC 7, 13 SRR 257 (1972), and *NYSA–ILA Man-Hour/Tonnage Method of Assessment*, Docket 72–51, June 14, 1973, 16 FMC 381, 13 SRR 955 (1973).

Third. While *Marine Space Enclosures*, 420 F. 2d 577 (CA–DC, 1969) may not require us to provide a hearing *every* time a protest is filed to the approval of a section 15 type agreement, no matter how deficient the protest is in form a substance, nevertheless, absent an appropriate administrative proceedings and determination that the class of agreement is of such a de minimis or routine character as to be exempt from the hearing process of section 15, the burden is placed on this agency to justify a departure from the hearing requirement of section 15. In my opinion, we have not met that burden by the simple recital of the pleadings and correspondence addressed to this "new agreement" issue. A casual reading of *Marine Space Enclosures* establishes that the least we should have done was to have afforded interested parties an opportunity to submit affidavits and an outline of controverted issues that could be profitably explored in an evidentiary hearing. This was denied to the petitioners. *Marine Space Enclosures* mandates that minimum procedure. See also *Persian Gulf Outward Freight Conference* v. *FMC*, 375 F. 2d 335, 341 n. 4 (1967).

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–44

KRAFT FOODS

v.

MOORE MCCORMACK LINES, INC.

Reparation denied.

John J. Lavaggi for complainant.
J. D. Stratton for respondent.

March 20, 1974

REPORT

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

This proceeding involves a claim by Kraft Foods for reparation from Moore McCormack Lines, Inc. as a result of an alleged overcharge on cargo shipped by Kraft Foods from New York to Mombasa on a vessel owned and operated by Moore McCormack Lines, Inc. Administrative Law Judge James Francis Reilly has issued an Initial Decision in which he found that: (1) the claim was not time barred; and (2) an award of reparation was not warranted on the record. Exceptions to that decision have been filed by Kraft Foods.

FACTS

The shipment from which the complaint arose was transported on the *S.S. Mormacbay* of Moore McCormack which sailed from New York on December 31, 1972, arrived in Mombasa on February 3, 1973, and left Mombasa on February 10, 1973. Between February 3 and February 10, 1973, the disputed cargo was unloaded and accepted by the consignee/customer of Kraft Foods.

The transporation charges levied in this case were based upon a measurement of 284 cubic feet, shown on the reverse side of the dock receipt and on the bill of lading. As a result of these charges, the consignee notified Kraft Foods by letter of February 12, 1973, that it seemed that the freight had been overcharged. Thereafter, on February 23, 1973, complainant Kraft Foods notified Moore McCormack of the suspected overcharge and Kraft Foods' challenge to the measurements on which the charges were based. Complainant contended that the accurate measurement of the shipment was 145.01 cubic feet as shown on various documents including the face of the dock receipt. Respondent countered by asserting: (1) that the 145.01 cubic foot measurement was not that observed upon delivery of the cargo to the loading pier but that the 284 cubic foot measure shown on the bill of lading and the reverse side of the dock receipt was the measure observed upon delivery; and (2) that Kraft Foods' complaint must be denied because the shipment had left the custody of the carrier and therefore the applicable tariff rules (rule 16) precluded entertainment of the claim.

DISCUSSION AND CCONCLUSION

Complainant alleges, on exception, that while paying lip service to the rule that the two-year statute of limitations provided in section 22 of the Shipping Act, 1916 [1] may not be foreshortened by the shorter limitation period provided by a tariff rule, the Administrative Law Judge, in essence, barred consideration of the merits of this case on the ground that complainant's challenge was not timely even though filed within the statutory period. Further, complainant alleges that, on the merits of the case of record, it has sustained its burden of proof, no matter the heft of that burden.

We have reviewed this proceeding on these exceptions raised and conclude that reparation should be denied. The Administrative Law Judge denied reparation on the premise that complainant had failed to sustain its heavy burden of proof on the merits of the claim. In so doing, he relied on prior decisions of this Commission. [2] We deny reparation because complainant failed to comply with Tariff Rule 16 and therefore need not consider whether

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[1] Section 22 provides, in pertinent part: "The [Commission], if the complaint is filed within two years after the cause of action accrued, may direct the payment . . . of full reparation to the complainant for the injury . . . ."

[2] For example, *Ocean Freight Consultants, Inc., v. Royal Netherlands Steamship Company*, Docket No. 72–39 (1973), 14 SRR 139; *Abbott Laboratories v. Prudential-Grace Line*, Informal Docket No. 262(I) (1973), 14 SRR 165. Compare *The Carborundum Co. v. Venezuelon Line*, Docket 72–38, 14 SRR 166 (1973).

complainant did or did not sustain its burden of proof as to the correct measurement or weight of the shipment.[3]

South and East Africa Conference South Bound Freight Tariff No. 1, F.M.C. No. 2, Original Page 110, provides in part:

16. OVERCHARGES

Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier. Any expenses incurred by the carrier in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found by the claimant . . .

(1) For purpose of uniformity in handling claims for excess measurements, refunds will only be made as follows:

(a) Where an error has been made by the dock in calculation of measurements.

(b) Against re-measurements at port of loading prior to ship's departure.

(c) Against re-measurement by steamer's agent at destination.

(d) By joint re-measurement of steamer's agent and consignee.

(e) By re-measurement of a marine surveyor when requested by steamer's agent.

(f) Re-measurement fees and cable expenses in all cases to be paid by party at fault.

Section 18(b)(3), Shipping Act, 1916, provides in pertinent part:

No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs. . . .

Section 18(b)(3) makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates

[3] An agency may modify or even reverse its past policies and announcements, *Atlantic Seaboard Corp. v. FPC*, 404 F. 2d 1268, 1273 (CA-DC, 1968); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *FCC v. W.O.K.O.*, 329 U.S. 223, 228 (1946); and should do so to correct inconsistent holdings.

themselves.[4] Likewise, unless in an appropriate proceeding we find tariff rules and regulations to be in violation of the Shipping Act, 1916, they must be strictly applied by us. This, of course, does not apply to tariff rules which attempt to limit to less than two years the filing of appropriate reparation actions with the Commission, explicitly provided by Congress in section 22 of the 1916 Act.

Applying this mandate to the case before us, it can be seen that Moore McCormack had no alternative here but to comply with the rules of its tariff on file. Therefore, in order that Kraft Food's claim be considered, it was required to furnish its claim to Moore McCormack prior to the time the shipment left Moore McCormack's custody. The provisions of Rule 16 above are a reasonable attempt to eliminate a prime cause of dispute as to weight or measurement by requiring that any re-weighing or re-measuring be conducted in a certain way and before the shipment at issue leaves the custody of the carrier. This rule represents a term and condition of the tariff on file to which the carrier has no choice but to adhere scrupulously. Because Kraft Foods did not comply with these terms, reparation here could not be granted.

This conclusion in no way restricts the right of any perons to file a complaint pursuant to the provisions of section 22 of the Shipping Act, 1916, within two years after the cause of action accrues. However, unless the shipper submits a claim involving contested weight or measurement prior to the shipment leaving the custody of the carrier (Rule 16), the merit of any such claim must be governed by the weights and measurements shown on the document used to bill the shipper and/or consignee for the transportation and the applicable tariff rates. In this case, the shipper should have sought re-weighing or re-measuring prior to the shipment leaving the custody of the carrier as required by Rule 16 of the Moore McCormack tariff.

COMMISSIONER GEORGE H. HEARN, DISSENTING

I disagree with the majority decision both on the ground that I would not reverse the law of our prior decisions concerning overcharge claims, and I find that the complainant has met the burden of proof test established in those cases.

First, as to the question of whether we should entertain the

[4] "The shipper's knowledge of the lawful rate is conclusively presumed", *Kansas City Southern Ry. Co.* v. *Carl*, 227 U.S. 639 (1913). The same presumption is applicable to tariff rules and regulations. Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, rules and regulations in the carrier's filed tariff. *Louisville & Nashville Ry.* v. *Maxwell*, 237 U.S. 94 (1915); *Boston & Maine R.R.* v. *Hooker*, 233 U.S. 97, 112 (1914); *United States of America* v. *Pan American Mail Line, Inc.*, 69 Civ. 2381 (SDNY, September 11, 1972), 1973 AMC 404.

claim regardless of the merits, I find the majority view contrary to law, good sense, and the public interest in positive regulation.

Section 18(b)(3) of the Shipping Act states in relevant part:

> No common carrier ... shall ... collect or receive *a greater* or less or different *compensation* for the transportation of property ... *than the rates* ... specified *in its tariffs.* (Emphasis added)

If this provision extends, as the majority contends, to tariff rules as well as to rates, its application to rates must be strict. The rates must first be fixed before rules can create conditions, limitations or other qualifications on the applicability of the basic rates; and the words of the statute must be read to mean exactly what they say: a carrier may not charge a shipper an amount greater than the tariff provides for carriage of a specific quantity of a certain cargo.

If the carrier's "weight/measurement claim" rule is allowed to bar all claims *ipso facto,* the carrier will be complying with the law by rejecting the claim, but violating the statute by receiving a sum greater than his tariff allows for the service performed. Therefore, by disallowing such claims as herein, we will be compelling the carrier to violate the law in those cases in which the shipper's allegation is well founded. Every time a shipper's claim is rejected because of the tariff rule, the Commission will need to charge the carrier with violating the law by charging a greater rate than on file, by charging different rates to different shippers for the same service, and by charging a rate which is not on file. The law cannot have been intended to produce such an absurd result.

The majority seeks to distinguish this case from those involving tariff rules limiting the time for submission of shipper claims to less than two years. In fact both that type of rule and the instant one involve time limitations. The claim must be submitted to the carrier before the expiration of a certain period or the occurrance of a specific event. The majority says that its decision here will not restrict the right of shippers to file claims within the two year provision of section 22, despite tariff rules limiting the claim filing period. Thus the majority will permit carriers to accomplish by indirection what they cannot do directly: prevent a shipper from utilizing the full two year period.

The majority contends that the distinction between the weight/measurement claim rule here and the time limit rule is that the two year statutory period is explicitly provided by Congress. There is, however, no less explicitness in the Congressionally provided mandate that the carrier not "collect ... a greater ... compensation for the transportation of property ... than the rates ... *specified in its tariff.*"

It is no answer to say that the shipper is presumed to know the tariff rules. The carrier is presumed to know the law; but the majority would let him defend against the shipper's "neglect" by averring his own, i.e., the carrier's failure to assess the proper rate for the quantity actually shipped. There is a "wealth of cases ... which require carriers to charge and collect only that amount stated in their tariffs." [5] *U.S.* v. *Pan American Mail Line, Inc.*, 359 F.Supp. 728, 735 (1972).

It is the Commission's obligation to apply the shipping statutes so as to achieve the Congressionally intended result. It is not for us to create contradictory circumstances which require a carrier to violate the law in order to abide by it, leaving the shipper having a supportable case but with no remedy. In this case the applicable law is designed to ensure that shippers are on notice as to the available rates and to prevent carriers from treating shippers unfairly or unequally through the use of hidden charges or rebates.

If the majority wishes to adhere strictly to the statute then we must end with the anomalous result of the carrier simultaneously adhering to and violating the law, and of the shipper being unable to rely on the published tariff rate.

Further, if the carrier wishes to collect an undercharge from the shipper for cargo allegedly under-measured, the majority decision provides no answer to the question of whether the shipper may plead the same defense as the carrier in overcharge cases. In either event, we would have the same anomaly of the carrier violating the law in order to comply with it.

Thus, the majority view of the tariff rule involved in this case will have undesirable ramifications. Although in a certain situation a shipper will be unable to obtain redress for overcharges and may avoid liability for undercharges, the carrier in the same case will be liable for collecting those overcharges and for discriminating or may be liable for collecting those undercharges and for discriminating. If that is to be the statutory interpretation, then the Congressional intent must have been to encourage negative regulation which places both the carrier and shipper between the Scylla of a strict tariff construction and the Charybdis of an incorrect rate application.

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[5] See, e.g., footnote 4. "The lawful rate is that which the carrier must exact and which the shipper must pay." *Kansas Southern Ry.* v. *Carl*, 227 U.S. 639, 653 (1913). "... [The] rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext." *Louis. & Nash. R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915).

The majority will permit the carriers to discourage some shippers' claims by maintaining a time limit rule, but will accept claims from shippers who are aware of their two-year rights under section 22. The majority will not, however, follow the same process with respect to the weight/measurement claim rule: shippers' claims are not only to be discouraged by the rule but unacceptable to the Commission, even from shippers who seek the aid of the two-year period under section 22. Only the shippers' claims in the latter instance will be time barred before the two-year period expires. I believe both the time limit rule and the weight/measurement claim rule now have a salutary effect which should be maintained and increased.

Shippers are on notice that they bear a heavy burden to prove their claims of overcharges; and the Commission is cognizant of the burden to carriers of defending claims brought long after the transaction or after the carrier has released the cargo. We should permit the shipper to pursue his claim so long as it is filed within two years, but require not only the heavy burden of proof of prior cases, but also a strong justification for failure to abide by relevant tariff rules. This would encourage shippers to follow those rules knowing that unjustified failure to do so might be self-defeating, thereby discouraging litigation of claims with scant chance of success.

The majority, by rejecting shipper claims and charging the carrier with violating the tariff statute, will force the Commission to establish the legitimacy of the shipper's claim in order to prove the violation. The shipper, however, will be unable to avail himself of that proof to make himself whole because the carrier will have had the forethought to provide "insurance" in the form of a claim submission limitation unrelated to the validity of the claim. Carriers will consequently have an incentive to devise all manner of tariff rules to short change the shipper at the risk only of a possible slap on the wrist from the Commission. The final probable result will be excessive litigation and cargo congestion. Shippers will be encouraged to file claims automatically on all shipments while still in the carrier's possession in order to protect themselves, preventing an expeditious flow of cargo. The Commission should not engage in such negative regulation.

Finally, I find that the complainant here has met his burden of proof. (We should not hold this shipper to a new requirement of strong justification for failure to abide by the tariff rule. Its application should be prospective only.) The carrier admitted the number of packages in the shipment to be as the claimant contends; and the claimant has proven that it uses only certain size cases for the products shipped, a fact not disputed. Therefore, for all the foregoing reasons I would reverse the decision of the Administrative Law Judge and grant reparation in full.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 70–9

BOLTON AND MITCHELL, INC.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 516

SECOND SUPPLEMENTAL REPORT

May 21, 1974

BY THE COMMISSION: (George H. Hearn, *Vice Chairman*; James V. Day, Clarence Morse, *Commissioners*)

In its Report of June 9, 1972, 15 FMC 248 the Commission found that Bolton & Mitchell, Inc. (BMI):

1. Was not independent of shipper connections, as required by section 1 of the Act;

2. By retaining a proprietary interest in the merchandise and collecting compensation from the carrier for shipment thereof, did willfully obtain transportation by water at less than the rates or charges than would otherwise be applicable, violating section 16, first paragraph, of the Act;

3. Violated certain sections General Order 4, to wit:

§ 510.5(e)—failing to show license number on invoices and shipping documents;

§ 510.23(d)—imparting false information to its principals;

§ 510.23(e)—withholding information as to actual price of merchandise;

§ 510.23(f)—failing to promptly account to its principals;

§ 510.23(h)—filing false documents;

§ 510.23(j)—failing to use invoices which stated separately the actual amount of ocean freight, price of merchandise; and

§ 510.9(c)—willfully making false statements in connection with an application for a license or its continuance in effect.

Without revoking respondent's ocean freight forwarder license No. 516, the Commission did order respondent to:

(1) cease and desist from the activities found to have violated the act, and the specific sections of General Order 4, if it desires to maintain its license;

(2) submit within 90 days from the date of service of the Report and Order a full report to the Commission on the manner in which it has complied with the requirements to cease and desist. [1]

Respondent filed an Affidavit of Compliance, setting forth the procedure it intended to use in its freight forwarding activities and which it believed would be in compliance with the Commission's order.

Upon a review thereof, the Commission issued its Supplemental Report, served November 8, 1973, stating that BMI would be allowed to retain its license, on the condition that BMI:

(1) waive any and all liens on the goods being shipped;

(2) not finance the shipments;

(3) discontinue its practice of "re-invoicing"; and

(4) assure the Commission that it (BMI) will not inflate the charge(s) for ocean freight, insurance and accessorial services.

BMI notified the Commission that it would comply with all of the aforementioned enumerated conditions *except* as concerns the practice of "re-invoicing" (No. 3). With its agreement not to finance shipments (No. 2), BMI coupled thereto a request that it be allowed a 90 day grace period in order to complete the exportation of those shipments which were already in process on which confirmation has been made or advances promised. Further BMI asked the Commission that BMI's principals be allowed an additional 90 days from the time of BMI's notification that it will not finance the shipments to find other means of payment. Because sufficient time has elapsed between the date of the Commission's order for BMI to terminate the practice of financing shipments and the requested time frame, any discussion in this area is moot. Suffice to say, however, that to acquiesce to such requests would not only defeat the whole purpose to finding BMI in violation of the Act, in the first instance, but also undermine the foundation of the Commission's regulatory authority. Thus, we need only address BMI's "re-invoicing" practice.

In our Supplemental Report, pages 9–10, we rejected BMI's arguments advanced in support of its so-called "re-invoicing" procedure, and set forth the Administrative Law Judge's remarks to conclude that BMI seemingly is assisting its principals in the filing of false documents "and perhaps in the violating of the currency exchange laws of other countries." BMI presently argues

[1] On March 8, 1973, the Commissionissued its Report on Reconsideration approving and adopting verbatim its Report and Order of June 9, 1972.

that the language relied on by the Commission has no relationship to "re-invoicing" but is solely concerned with BMI's failure to use invoices which state separately the actual amount of ocean freight, insurance and merchandise value as required by section 510–23(j) of the Commission's rules. BMI insists that the subject of "re-invoicing" was never before the Judge but arose for the first time in BMI's Affidavit of Compliance of June 4 , 1973, "in order to prevent any problems in the future." [2]

BMI submits that there is a clear distinction between the practice of "re-invoicing" and BMI's past activities of inflating ocean freight rates, insurance and merchandise value, since with the former, which is alleged to be an accepted practice, there is no intent to deceive third persons but only a means by which BMI's principal can make a profit on the resale of the goods. To illustrate its point, BMI cites as an example a Peruvian principal who buys an American radio from the American supplier through BMI for $100 and subsequently resells it in Peru to his customer for $150 pursuant to BMI's invoice of the same amount ($150). Thus, BMI states:

> The ultimate purchaser from our Peruvian principal would open up a letter of credit providing for payment at $150.00 per radio which is the actual purchase price he has agreed to pay. He is not deceived. The letter of credit provides for a price of $150.00 per radio and in processing the BMI invoice for this amount the bank is not deceived. Similarly, the customs officials in Peru have not been deceived. The shipment is declared for customs purposes at the price being paid by the ultimate purchaser, $150.00 per radio, and the appropriate duty in the South Armerican country is being paid on this price. Finally, there is no wrongdoing with respect to currency control regulations since the ultimate purchaser will obtain an exchange for the price he is paying for the radios.

BMI's conclusions are misleading. General Order 4 is for the protection of third persons as well as consignees. While the Judge may not have had "re-invoicing" per se in mind when making his observations, they apply equally as well to the practice of "re-invoicing"; that is, BMI is assisting its principal via deception on third persons, in a possible violation of its country's laws. Just as BMI supplies the false information so that the principal's bank will be paying out more to BMI than what was actually expended, with part of the difference being returned to BMI's principal, "re-invoicing" allows BMI and its principal, as a team to induce the ultimate purchaser to unwittingly aid BMI's principal to circumvent its country's currency exchange regulations.

[2] A description of BMI's "re-invoicing" procedure as well as the contested language used by the Commission can be found in our Supplemental Report served November 8, 1973, pp. 8–10.

[3] Section 23 of the Act reads, in pertinent part: "Order of the Board relating to any violation of this Act shall be made only after a full hearing, and upon a sworn complaint or in proceedings instituted of its own motion."

Relying on BMI's Peruvian example, the essence of the transaction only involves $100. And thus, viewing "re-invoicing" from its inception and carrying the possible fraud to its proper conclusion, we find that the ultimate purchaser draws a $150 letter of credit on a Peruvian bank to BMI's principal who, upon receipt thereof, transfers such letter of credit to BMI. Thereupon, BMI deposits the sum total of the letter of credit in its own account using only $100 thereof to satisfy the American supplier returning $50 to BMI's principal. Under the circumstances the bank and Customs officials might have acted entirely different with the knowledge of the true facts.

We agree with the Administrative Law Judge that those protected by General Order 4 include banks and customhouses whose services are indispensable to a foreign consignee. By necessity, they become an integral part of the overall ocean transportation process, and as such, of concern to the Commission.

The Commission should be concerned with any and all activities of a licensed freight forwarder which may detract from its fitness, willingness and/or ability to carry out the business of forwarding as required by the Act. If a freight forwarder were found to have acted illegally in concert with his clients it may not be "fit" to assume the responsibilities of a freight forwarder; i.e., using deceptive practices which violate the currency exchange regulations of any country.

While there is no direct and specific evidence of record to conclude that BMI's "re-invoicing" is, in fact, assisting BMI's principal in violating its country's currency exchange laws, the possibility that such is happening and the fact that persons are being deceived in the process are sufficient for the Commission to prohibit BMI's "re-invoicing" activities.

More important, BMI does not seem to realize that the Judge's remarks were not the only basis for prohibiting BMI's practice of "re-invoicing." Section 510.23(h) of the Commission's rules regulating ocean freight forwarders reads:

> No licensee shall file or assist in the filing of any claim, affidavit, letter of indemnity, or other paper or document with respect to a shipment handled or to be handled by such licensee which he has reason to believe is false or fraudulent.

The explicit purpose of section 510.23(h) is to forbid a licensee from filing a "document with respect to a shipment handled" which is false. Here, no matter how one views such operations there still exists the glaring fact that the mechanics of BMI's "re-invoicing" involve the filing of false documents in direct contravention to section 510.23(h). Because such documents, by themselves, are enough to constitute a violation of section 510.23(h), the intent behind the completion of these false documents is irrelevant.

BMI alternatively submits that because the practice of "re-invoicing" is common to the industry and that aside from BMI's own reference to "re-invoicing" no arguments or briefs were submitted by any party to this proceeding with reference to "re-invoicing," the Commission has promulgated a standard of conduct to be observed by licensees without granting the industry the right to be heard; in effect, to enforce the cease and desist order against BMI's "re-invoicing" operations is an action contrary to section 23 of the Act. [3]

We disagree. The Commission has given a thorough and "full hearing" to BMI's forwarding activities. Just because it was BMI, in the first instance, who introduced the subject of "re-invoicing" is of no consequence to the procedural due process of this proceeding. The Commission is fulfilling its obligation to protect the general public from unfair designs of any forwarder so inclined by prohibiting "re-invoicing" within the factual context as described by BMI from being put into effect. Hence, the only precedent being set is that which concerns what is being done by BMI. Additionally, to delineate each and every document falling within section 510.23(h) would require the Commission to devote unnecessary time to clarifying that which is already explicitly prescribed on its face.

Moreover, the question of a violation of 510.23(h) was specifically included in the Commission's Order of Investigation that initiated this proceeding. Nothing could be added that has not already been presented. It must be remembered that the Commission based its cease and desist order on the accepted facts as related by BMI.

Accordingly, we affirm our cease and desist order which calls for BMI to discontinue its practice of "re-invoicing."

If within 30 days of the issuance of this Report the respondent does not apprise the Commission of his compliance with our requirement to cease and desist as heretofore set out, respondent's ocean freight forwarder license will be revoked.

HELEN DELICH BENTLEY, CHAIRMAN, AND ASHTON C. BARRETT, COMMISSIONER, DISSENTING

We adhere to the view expressed in our dissenting opinion in the Commission's Report on Reconsideration of March 8, 1973, 16 FMC 284 that BMI's license should be revoked.

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

TABLE OF COMMODITIES

INDEX DIGEST

[Numbers in parentheses following citations indicate pages in which the particular subjects are considered] providing for "an exclusive, preferential, or cooperative working arrangement", within the meaning of section 15 which must be filed for approval pursuant to that section prior to effectuation. Id. (294).

An agreement among independent ocean freight forwarders, entered into for the purpose of forming a corporation in which the signatories would be stockholders and the corporation would engage in the business of international and domestic freight forwarding, with the single operative factor being approval by the ICC of the purchase by the corporation of the domestic freight forwarder rights under Part IV of the Interstate Commerce Act of one of the signatories, is subject to the jurisdiction of the Maritime Commission. The agreement to purchase the Part IV rights is one which gives the corporation special accommodations, privileges and advantages inherent in the acquisition of expanded forwarder activities. Such an agreement falls within the broad scope of section 15 of the 1916 Shipping Act. As to the purchase agreement, section 33 of the Shipping Act is not a bar to the Maritime Commission jurisdiction. The ICC's jurisdiction over Part IV rights is in no way infringed upon by the Maritime Commission's jurisdiction over the formation of the corporation as to which the purchase is crucial. Agreement FF 71-7 (Cooperative Working Arrangement), 302 (306, 309).

Provision of an agreement among independent ocean freight forwarders, creating a corporation to be owned by the forwarders and to purchase domestic freight forwarding rights under Part IV of the Interstate Commerce Act of one of the signatories, that relate to the possibility of the corporation engaging in operations which would be subject to the Maritime Commission's jurisdiction must be disapproved as vague and indefinite and subject to various interpretations and uncertainties. Id. (307).

Agreement among independent ocean freight forwarders and customhouse brokers, entered into for the purpose of forming a corporation in which the signatories would be stockholders and the corporation would engage in the business of international and domestic freight forwarding, if it received ICC approval of the Part IV domestic freight forwarder rights of one of the signatories, is approved (as modified). The question is whether competition will be lessened or, as provided in section 15, controlled, regulated, prevented or destroyed. The signatories to the agreement will remain as competitive as they now are as customhouse brokers and IOFFs. Protestants to the agreement have been able to attract a substantial portion of the IOFF business in the relevant area because, as individual firms or through affiliated firms, they furnish both inland and ocean forwarding. Disapproval of the agreement would serve to preserve their favorable competitive position and prevent respondents from offering to the shipping public both inland and ocean forwarding. Approval would permit them to overcome their present competitive disadvantage. Competition in the field of customhouse brokering would be increased since the agreement requires that the parties must compete in that area as individuals. Id. (308-314).

The Commission is not required to hold further hearings because a corporation which was not an entity subject to the Shipping Act was substituted as one of the owners of a corporation created by and owned by independent ocean freight forwarders who were parties to the agreement which created the corporation. Since the Commission had found no serious anticompetitive effects when the freight forwarder substituted for was a member of the arrangement, the Commission was unable to fathom how substitution of an entity of more limited capability (stuffing and unstuffing containers of freight moving to and from overseas points, loading and unloading of rail cars, and miscellaneous packing services) than the freight forwarder could be more unfavorable to the competitive atmosphere. Id. (315–317).

—Antitrust policy

An agreement between carriers, in allowing the parties to act in concert in establishing rules, regulations and charges in every transportation area, except ocean freight rates, which alone remain susceptible to competitive pressures, is clearly an anticompetitive arrangement subject to section 15 of the 1916 Act, which if premitted by the Commission must be scrutinized to make sure that the conduct legalized does not invade the prohibitions of the antitrust laws more than is necessary to serve the policies of the regulatory statute. Agreements Nos. DC–38 and DC–38–1 Association, Puerto Rico Trades—1968, 251 (255).

Agreements which violate the antitrust laws may be approved only if the proponents can show that the agreements are required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act. Consideration must of necessity be given to the circumstances and conditions existing in the particular trade involved. Id. (256).

Stated goals in seeking reapproval of an agreement between carriers in the Puerto Rican Trades, such as insuring the maximum use of carrier's equipment and elimination of pier congestion through the adoption and enforcement of uniform tariff rules and practices, are clearly responsive to a serious transportation need, especially in this time of a continuing energy crisis. And if a solution to the congestion and malpractice problems can be reached through such an agreement then the public interest is decidedly in favor of continuation of the agreement. Id. (258).

While joint action under an agreement between carriers may not be a panacea for all the ills that have plagued the Puerto Rican Trade since the coming of containerization, it continues to be the most promising method of remedying abuses and bringing stability to the trade. To cancel the agreement at this time would not only be to deny the parties thereto an opportunity to accomplish its much needed objectives through the best means available, but would also force those parties to return to a system under which shippers can take advantage of their continued patronage to obtain concessions at variance with established carrier tariffs. Such a system must obviously be avoided. Id. (258–259).

Agreement between carriers in the Puerto Rico trade provides the best means of solving the problems in the trade, and the agreement is required by a serious transportation need and is necessary to secure important public benefits. However, wholesale approval of the agreement is not justified and continued approval is granted for one year, with conditions relating to certain demurrage procedures and submission of reports to the Commission. Id. (260–261).

—Domestic trades

The Commission does not have a policy of excluding ratemaking agreements in the domestic trades nor does it look with disfavor on such agreements. In fact, the Commission has on occasion sanctioned ratemaking agreements in the domestic trades. Nevertheless, because the conditions in the domestic trades are generally "controlled" as a result of the Commission's broad regulatory influence, the proponent of a rate-fixing agreement in those trades must clearly demonstrate a greater need or justification for such concerted activity than would normally be the case were the agreement in the foreign trades. Agreements Nos. DC-38 and DC-38-1 Association, Puerto Rico Trades—1968, 251 (256).

—Overland rates

The applicable standards justifying continued overland rule making authority are spelled out in section 15 itself. As indicated by *Svenska*, the scope and depth of proof required from case to case may vary in relation to the degree of invasion of the antitrust laws. Agreement No. 8760-5—Modification of the West Coast United States & Canada/India, Pakistan, Burma & Ceylon Rate Agreement, 61 (62).

The record establishes that authority to discuss and agree upon overland rates is included in the present India Group Agreement by virtue of the overland/OCP decision. Thus, section 15 was not violated by discussion or agreement on that subject. Id. (74).

The record failed to establish past violations by the India Group of section 15 of the 1916 Act with respect to overland rates, brokerage, equalization, absorption and transshipment. Id. (74).

There is nothing inconsistent or incompatible between the Commission's holding that routine ratemaking authority normally includes overland/OCP rates and the exercise by the Commission in the present case of its duty under section 15 to exercise continuous surveillance over approved agreements and in appropriate cases, to require justification for their continuance. If approval of ratemaking authority in an original agreement foreclosed further consideration of that phase of the agreement in the light of different or changed circumstances, the authority and duty of the Commission under section 15 to exercise continuing surveillance over maritime agreements would be unduly restricted. Id. (75-76).

It may not be concluded that, once having approved an agreement which either implicitly or expressly authorizes a conference or a rate agreement to discuss and agree upon overland/OCP rates, etc., as part of "routine" ratemaking authority the Commission may not later require justfication for the continuance of that authority. Section 15 itself provides to the contrary. Id. (76).

Both initial and continued approval of any agreement under section 15 are dependent upon the "actual existence or reasonable probability" of circumstances in the trade which justify the agreement within the frame of reference set out by the Commission for the justification of anticompetitive agreements under section 15. The fact that the agreement here involved deals with overland rates which have been held to be part of "routine" ratemaking and that such agreements were merely required to be "clarified" by the Commission in the overland rate case does not negate the Commission's authority and perhaps duty to reexamine in a proper case its approval of any section 15 agreement. Id. (76).

Inclusion of specific overland rate authorization in a conference agreement should not be summarily disapproved unless carriers can demonstrate the need for continuance of authority to discuss and agree upon overland/OCP rates. It is sufficient, if on the basis of the whole record, the authority to discuss and agree on such rates may reasonably be expected to serve the transportation and competitive needs of the carriers and to be compatible with the public interest. Id. (77).

The history of overland/OCP rates and the Commission's actions with regard to them indicate that while the burden of justification rests on respondents, a less stringent quantum of proof may be accepted in their justification than in the case of other anticompetitive agreements. Id. (77).

Respondents justified inclusion in their agreement of specific overland rate authority. Overland rates generally constitute a traditional service offered to shippers in the United States/Pacific trades who expect it. (1) Such rates provide shippers with a greater choice of transportation routing and a flexibility not otherwise available to them. (2) Overland rates aid in meeting competition from the Atlantic/Gulf carriers. (3) Authority to agree on overland rates provides the India Group with stability for the benefit of shippers and carriers. (4) If the agreement continued to provide authority to discuss and agree on local rates only, there would be the problem of how to insure that the discussion would be limited to local rates. (5) Overland rates have been considered an integral part of ratemaking and the Indian Group has been operated on that assumption. (6) Discussion and agreement at the level of the India Group of local rates is desirable. So equally is a similar procedure for overland rates. (7) To deny discussion and agreement on overland rates would create the potential of instability of overland rates with no off-setting benefit to the public. (8) There is no evidence of damage to the public interest flowing from the right of India Group members to discuss and agree on overland rates. (9) Authority to discuss and agree on overland rates has been exercised by the India Group since the inception of the agreement and is an essential part of the operation of the Group. Id. (81–82).

—Port equalization

The record establishes that neither equalization nor transshipment arrangements were ever the subject of group discussion or action by the India Group. Similarity in tariff provisions relating to equalization was explained by the fact that they were adopted from the tariffs of other conferences. There are no transshipment "arrangements" reflected in the carriers' tariffs—only arbitrary rates which usually apply to transshipments but may apply to a direct call if the volume warrants. Agreement No. 8670–5—Modification of the West Coast United States & Canada/India, Pakistan, Burma & Ceylon Rate Agreement, 61 (73).

The record failed to establish past violations by the India Group of section 15 of the 1916 Act with respect to overland rates, brokerage, equalization, absorption and transshipment. Id. (74).

Agreement of the Trans-Pacific Freight Conference of Japan as approved at the time of hearing did not authorize indirect service to Portland, Oregon, from Far Eastern ports in which cargo destined to Portland is discharged at Seattle, Washington, and transported by inland carrier to Portland at the ocean carrier's expense. The Agreement did not authorize the service. In general, authorization for particular types of anticompetitive conduct requires specific language in an agreement. The proper performance of the Commission's duty to scrutinize agreements prior to approval to insure that they do not invade the antitrust laws to a greater extent than necessary for the effectuation of a legitimate regulatory purpose requires that adequate notice be given on the face of agreements as to the activities which they will cover. Specific authorization is required for any conference system under which members wish to serve a port other than a vessel call at such port, i.e., by assumption of the cost of overland transportation. Intermodal Service to Portland, Oregon, 106 (118).

BROKERAGE

Payment of brokerage and freight forwarding commissions and related matters are not included within the scope of the usual conference or rate agreement language authorizing agreement upon "rates and rules and regulations relating thereto". Thus, if members of a conference or rate agreement wish to agree upon brokerage matters they must have separate, specific language enabling them to do so. Agreement No. 8760-5—Modification of the West Coast United States & Canada/India, Pakistan, Burma & Ceylon Rate Agreement, 61 (70).

The Commission has held that conference "arrangements" regarding brokerage are subject to section 15 approval. However, no agreement or "arrangement" for payment of brokerage was established on this record. Id. (74).

The record failed to establish past violations by the India Group of section 15 of the 1916 Act with respect to overland rates, brokerage, equalization, absorption and transshipment. Id. (74).

DEMURRAGE: See Free Time

DISCRIMINATION

Failure of the State of Hawaii to include a containerload rate on stacked and baled unprepared flour in its tariff, covering operation of a chartered vessel to carry vital shipments from Vancouver, B.C., to Hawaii, constituted undue and unreasonable prejudice in violation of section 16 First of the 1916 Shipping Act and, accordingly, reparation is awarded to the shipper who was charged a per cwt rate, the only unprepared flour rate in the tariff. Proof of competitive damage was not required. The state had not indicated what, if any, criteria it used in determining which containerload rates to include in its tariff, nor did it advance any explanation of its action. Fairness and impartiality, not described criteria, are determinative. The state contended that the per cwt rate applied to the shipment was the same magnitude greater than in the Matson tariff, and thus there was no discrimination. However, the State had advised shippers that its rates would be "based on the West Coast Matson Tariff", which implied a proportionate increase in rates. However, there was a straight containerload rate in Matson's tariff which covered the shipment here involved. There was no evidence indicating the added cost of handling the shipments in containers was relatively greater than that of other shipments in containers. General Mills, Inc. v. State of Hawaii Department of Agriculture, 1 (4-5).

Cargo does not cease to be naturally tributary to an area merely because it is containerized. The interest of developing ports which the Congress sought to foster in section 8 of the 1920 Act and the protection of ports from unjustly discriminatory or unduly prejudicial treatment under sections 16 and 17 of the 1916 Act cannot be thwarted simply by placing cargo in containers. Nor does the naturally tributary concept apply only to outbound movements. Intermodal Service to Portland, Oregon, 106 (127).

Distinction between "transshipment" and "equalization" is one without a difference insofar as the matter of indirect service to Portland from Seattle via overland carrier is concerned. "Equalization" and "transshipment" are merely variations on the common theme of serving a port without directly calling there. To the extent that such practices act to deprive a port of naturally tributary cargo or subject it to undue prejudice or unjust discrimination, they are unlawful. Where the indirect service is not unlawful, to deny the use of "equalization" but permit "transshipment," would merely serve to deny the consignee a service under which a carrier would transport cargo to a consignee's premises and require him to pick up cargo at the Portland docks. Since the cost of the transportation between the Portland docks and the consignees' premises would be borne by the consignees under conference tariffs, the denial of such service would foreclose a significant benefit to consignees. Id. (132–133).

Complainant's claim that its failure to include the measurements, as well as the weights of pallets on which the cargo was shipped, should not bar reparation, is rejected. A tariff should be considered in its entirety when assessing freight charges on a commodity. To do otherwise would result not only in discrimination towards the carrier, but also would defeat the purpose of the tariff item which is to insure the ability of the carrier to verify that palletized shipments are of the accepted dimensions to qualify for a pallet deduction. Since measurements were not provided, any pallet allowance or rate reduction must be disallowed. Kraft Foods v. Prudential-Grace Line, 159 (160–161).

DUAL RATE CONTRACTS

The "legal rights" clause of section 14b(3) of the Shipping Act was intended to strike a fair balance between both carrier and shipper interests. By prohibiting dual rate contracts from covering shipments of goods where the merchant has no legal right to select the carrier, the section assures that contract merchants will not be held to a breach of contract for doing business with anyone who will not surrender his right to make his own shipping arrangements. Alternatively, the carrier or conference has ample protection from unscrupulous shippers by making it a breach of contract for the merchant with the intent of evading his contractual obligation, to change the terms of sale or otherwise improperly divest himself of the right to select the carrier. Possible Breach of Pacific Coast European Conference Rate Agreement, 205 (208).

A signatory merchant's legal right to select the carrier is ultimately a question of fact to be gleaned from all the circumstances surrounding a shipment and is never to be presumed conclusively. The merchant's obligation under a dual rate contract depends on whether he has, in fact, the power to select the carrier and does not necessarily hinge on the terms of shipment, or the fact that the merchant's name appears on the shipping documents. Id. (210).

Dispute between a conference and dual rate signatory shippers as to whether such shippers had the legal right to select the carrier at the time certain shipments were made on non-conference vessels must be submitted to arbitration pursuant to the terms of the rate agreement, and will not be decided by the Commission. The matter in dispute raises a purely factual issue which may appropriately be resolved by arbitration. For the Commission to now adjudicate the merits of the dispute would not only be to totally ignore the clear requirements of the arbitration clause, but would also serve to frustrate the purpose and intent of such arbitration clauses generally. Pending the outcome of arbitration, the conference must cease and desist from assessing or attempting to assess penalties against the shippers under the agreement, and from suspending or threatening to suspend any of the shippers' rights under the agreement. The conference must henceforth refrain from circulating any notices to its contract merchants which may be interpreted to require such merchants to ship all of their goods on conference vessels even to the extent of foregoing sales where the right to select the carrier is vested in another person. Id. (211–212, 214).

FREE TIME

Uniformity in the practices of ocean common carrier in the allowance of free time and the collection of container demurrage, including the publishing of appropriate tariff rules relative to free time and demurrage, is both desirable and necessary to insure that shippers and consignees are treated equally and fairly. Plaza Provision Co. v. Maritime Service Corp., 47 (48).

Application of a company, formed to take over the collection of container demurrage charges for four carriers on arrivals at and sailings from Puerto Rico, to waive collection from certain shippers and consignees of 10 percent of container demurrage charges, to depart from the credit provisions of applicable tariffs and allow installment payments of the remaining 90 percent of accumulated charges, and to make like arrangements with similarly situated shippers, receivers and consignees in Puerto Rico, and to refund 10 percent of the demurrage collected from shippers who paid promptly, is approved, provided a list of so-called paid-up shippers is submitted to the Commission as soon as possible, and that details of each settlement and denial be submitted to the Commission. The application was subject to the "reasonable rate" power granted by section 18(a) of the 1916 Act, buttressed by section 4 of the 1933 Act. The record supported the necessary statutory findings: The company admitted that it had billed complainants, and inferentially others similarly situated, for demurrage charges resulting from carrier fault and other conditions beyond its control. Some portion of the demurrage was, therefore, not properly charged and due, and the cost of determining that portion would be prohibitive. The parties agreed that 10 percent is a fair estimate of the invalid billings. It is the practice of billing for demurrage resulting from carrier fault which is unjust and unreasonable. Id. (49-51).

Agreement between carriers in the Puerto Rican Trades (allowing the parties to establish rates, regulations and charges in every transportation area, except ocean freight rates), in permitting the consolidation of demurrage in a central agency, has served to eliminate a very real demurrage-related malpractice which flourished when the individual carriers billed and collected their own demurrage. In so doing, the agreement not only fulfills a positive transportation need, but, to the extent it serves to curtail shipper discrimination, provides valuable shipper benefits as well. Agreements Nos. DC-38 and DC-38-1 Association, Puerto Rico Trades—1968, 251 (257).

FREIGHT FORWARDING

The Commission does not agree that a freight forwarder has no beneficial interest in goods shipped where it will continue to enjoy financial benefit from the "financing of the shipment" since, by its own admission when it advances funds for the purchase of goods, "the charge [it] makes to its principal will be an interest charge only at usual bank rates and will not be a profit on the mark-up in the goods itself." Accordingly, so long as the forwarder continues to guarantee payment or actually finances the purchase of goods in return for bank rate interest, it has a beneficial interest in contravention of section 1 of the Shipping Act and Rule 510.21(1) of General Order 4. Bolton & Mitchell, Inc.-Freight Forwarder License, 151 (154).

By accepting brokerage while being shipper connected, a freight forwarder is obtaining transportation by water at less than the rates or charges that would otherwise be applicable in violation of section 16 First of the 1916 Act. Id. (155).

A freight forwarder may receive compensation for services rendered in furnishing "start-up" information and the services being performed by it as an independent freight forwarder so long as the consignee is aware of and agrees to pay for such services. Id. (155).

A freight forwarder's proposed procedure of "re-invoicing" casts considerable doubt on the extent of its compliance with Rule 510.23(h) of General Order 4 (filing of false documents). At the very least it would appear that the forwarder is assisting its principals in the filing of false documents and perhaps in the violating of the currency exchange laws of other countries. It is highly improper for the Commission to lend itself to violations of such laws as it would be doing if it sanctions the forwarder's "re-invoicing" practice. Id. (156–157).

Freight forwarder will be allowed to retain its license if it waives any and all liens on the goods being shipped; does not finance the shipments; discontinues its "re-invoicing" practice; and assures the Commission that it will not inflate charges for ocean freight, insurance and accessorial services. Id. (157).

Section 510.23(l) of General Order 4 which provides that licensed freight forwarders shall make their records available upon request to representatives of the Commission is a valid regulation. The rule is designed to insure the availability to the Commission of information upon which it may base a determination that the duties and obligations of freight forwarder licensees are being appropriately discharged and is necessary if the Commission is to discharge its responsibilities under the Shipping Act. Moreover, section 43 of the Act was intended to and did give the Commission authority beyond that which it may have had under section 204 of the 1936 Merchant Marine Act. Equality Plastics, Inc. and Leading Forwarders, 217 (224–225)

The Commission adheres to its view that a freight forwarder may not retain its license if it continues its "re-invoicing" practice. The forwarder is assisting its principal via deception on third persons. "Re-invoicing" allows the forwarder and its principal, as a team, to induce the ultimate purchaser to unwittingly aid the forwarder's principal to circumvent its country's currency exchange regulations. The possibility of this happening is sufficient for the Commission to prohibit the practice. The mechanics of the practice also involve the filing of false documents in direct contravention of Rule 510.23(h). Bolton and Mitchell, Inc.—Freight Forwarder License, 328 (329–331).

GENERAL ORDER 4: See Freight Forwarding

JURISDICTION OF THE COMMISSION

Since the second paragraph of section 22 of the 1916 Shipping Act empowers the Commission to concern itself with all violations of the Act, the Commission has jurisdiction to investigate violations of section 16 by persons or entities named in that section, whether or not they are "other persons subject to [the] Act." Equality Plastics, Inc. and Leading Forwarders, Inc., 217 (222).

Contention that violations of section 16 of the 1916 Act are matters for the court, not the Commission, is rejected. The court in *American Union Transport* recognized the concurrent jurisdiction of the Commission. The court concluded that the Act did not authorize the Commission to assess penalties for violations of section 16 First. But to say that such exclusion prohibits the Commission from investigating and eliminating conduct which involves the evasion of the proper application of the rates which would otherwise be applicable is frivolous at best. Id. (223–224).

An agreement among independent ocean freight forwarders, entered into for the purpose of forming a corporation in which the signatories would be stockholders and the corporation would engage in the business of international and domestic freight forwarding, with the single operative factor being approval by the ICC of the purchase by the corporation of the domestic freight forwarder rights under Part IV of the Interstate Commerce Act of one of the signatories, is subject to the jurisdiction of the Maritime Commission. The agreement to purchase the Part IV rights is one which gives the corporation special accommodations, privileges and advantages inherent in the acquisition of expanded forwarder activities. Such an agreement falls within the broad scope of section 15 of the 1916 Shipping Act. As to the purchase agreement, section 33 of the Shipping Act is not a bar to the Maritime Commission jurisdiction. The ICC's jurisdiction over Part IV rights is in no way infringed upon by the Maritime Commission's jurisdiction over the formation of the corporation as to which the purchase is crucial. Agreement FF 71-7 (Cooperative Working Arrangement), 302 (306, 309).

MERCHANT MARINE ACT OF 1920: See also Ports

Section 8 of the Merchant Marine Act of 1920 is not specifically administered by the Commission, but it is properly considered in Commission deliberations since, as an act of Congress, it reflects a legislative pronouncement of the public interest. Intermodal Service to Portland, Oregon, 106 (108).

MERCHANT MARINE ACT OF 1936

An attempt at a determination of adequacy of service at Portland, Oregon through use of a formula which could be applied in a manner which would be largely self-effectuating is not supported by the record. There is no evidence on which a $1.50 differential can be grounded. The fact that $1.50 is one-half the average differential between local and overland/OCP rates has no significance with respect to a differential which might be established between rates for an overland vis-a-vis a direct water service. A more fatal defect is that such a differential penalizes a shipper who uses the indirect service from Seattle, Washington. Shippers should be free to choose between the conference line's direct and indirect services in order to elect the one that best suits their needs. Moreover, to allow the conference to impose an additional $1.50 for the indirect service would violate the mandate of section 205 of the Merchant Marine Act, 1936, forbidding carriers collectively to prevent service at Portland at the same rates which apply to service at Seattle. Intermodal Service to Portland, Oregon, 106 (132).

Section 205 of the 1936 Merchant Marine Act presents an absolute prohibition against collective action preventing service to a port or service to a port at the same rates as those applicable to the "next regularly served port." A conference-imposed rate differential between direct water service and indirect overland service would violate such prohibition. Absent such rate differential, however, there is nothing in the manner of serving Portland, Oregon, by indirect overland service from Seattle, Washington, which would be contrary to section 205. The rates applicable to service at Portland and Seattle for both the indirect and direct services would be the same. Section 205 relates not to conditions imposed by an agency regulation, but to voluntary agreements between carriers. Id. (135-136).

MISDESCRIPTION OF GOODS

As to a violation of section 16, the phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe one who intentionally disregards the statute or is "plainly indifferent" to its requirements. The term "plainly indifferent" means something more than casual indifference and equates with a wanton disregard from which an inference can be drawn that the conduct was, in fact, purposeful. Thus, it is found that respondent Equality Plastics, Inc., as consignee, violated section 16 First by knowingly and willfully consenting to misdescriptions by foreign shippers of various commodities on bills of lading in order to obtain transportation by water at rates less than those which would otherwise be applicable. However, respondent Leading Forwarders did not violate the section, as evidence of its indifference to apparent discrepancies of description between shipping documents was insufficient to constitute a knowing and willful violation. Equality Plastics, Inc. and Leading Forwarders, 217 (227–229).

OVERCHARGES: See Reparation

PICKUP AND DELIVERY SERVICE

The Commission interprets its prior report and order (16 FMC 344) in which respondents were ordered to cease and desist from permitting shippers or consignees who use respondents' pickup and delivery service in Puerto Rico to designate the truckers to be used in such service. Respondent, Transamerican Trailer Transport, Inc., may select any trucker it wishes to perform the pickup and delivery service for which respondent makes itself responsible, so long as it does not select truckers in a manner which is unreasonable or unduly preferential. Caratini may use any trucker it wants to perform pickup and delivery for it, but it cannot designate any trucker if it uses TTT's pickup and delivery service. Pickup and Delivery Rates and Practices in Puerto Rico, 93.

PORTS

The concept of naturally tributary cargo has as its purpose the maintenance of the movement of cargo through those ports which, because of a combination of geographic, commercial, and economic considerations, would naturally serve such cargo. It cannot rationally be applied, and has, in fact, been specifically rejected, in a situation in which the cargo for which ports compete is destined for or moving to the central United States. The naturally tributary concept based on section 8 of the 1920 Act has to do with the territory locally tributary to a particular port, not with the general territory which an entire range of ports may serve competitively. Intermodal Service to Portland, Oregon, 106 (126).

Cargo does not cease to be naturally tributary to an area merely because it is containerized. The interest of developing ports which the Congress sought to foster in section 8 of the 1920 Act and the protection of ports from unjustly discriminatory or unduly prejudicial treatment under sections 16 and 17 of the 1916 Act cannot be thwarted simply by placing cargo in containers. Nor does the naturally tributary concept apply only to outbound movements. Id. (127).

There is an area which can historically, geographically, economically and commercially be considered naturally tributary to Portland, Oregon, and not equally tributary to Seattle, Washington. The geography of the Ports demonstrates that they constitute two separate and distinct harbor complexes. Historically, cargo from the surrounding area of each port has moved through that port. The record, moreover, establishes that a separate economic and commercial hinterland exists for cargoes moving to and from areas near each of the ports. Id. (127).

The only justification which has been recognized for drawing away cargo from ports to which it is naturally tributary is inadequacy of steamship service at such ports to handle that cargo. Id. (128).

A regular indirect service to Portland, Oregon, by member lines of conferences would not violate the 1916 Shipping Act if subjected to certain conditions. Consignees in the Portland area find an indirect overland service (from Seattle, Washington) very useful to their businesses, and conference lines find it economically preferable to serve Portland indirectly some of the time. A type of indirect service may be prescribed which will adequately protect the Port of Portland's legitimate competitive interests. The Commission does not require that any line serve Portland at all if it does not wish to do so. To insure that Portland is not subject to undue or unreasonable prejudice or disadvantage, the Commission will require that to the extent any conference line desires to serve Portland via indirect overland service, it provides a certain level of direct service. Each line must serve Portland by direct water service with the frequency at least of alternate sailings. Id. (129).

An attempt at a determination of adequacy of service at Portland, Oregon through use of a formula which could be applied in a manner which would be largely self-effectuating is not supported by the record. There is no evidence on which a $1.50 differential can be grounded. The fact that $1.50 is one-half the average differential between local and overland/OCP rates has no significance with respect to a differential which might be established between rates for an overland vis-a-vis a direct water service. A more fatal defect is that such a differential penalizes a shipper who uses the indirect service from Seattle, Washington. Shippers should be free to choose between the conference line's direct and indirect services in order to elect the one that best suits their needs. Moreover, to allow the conference to impose an additional $1.50 for the indirect service would violate the mandate of section 205 of the Merchant Marine Act, 1936, forbidding carriers collectively to prevent service at Portland at the same rates which apply to service at Seattle. Id. (132).

Distinction between "transshipment" and "equalization" is one without a difference insofar as the matter of indirect service to Portland from Seattle via overland carrier is concerned. "Equalization" and "transshipment" are merely variations on the common theme of serving a port without directly calling there. To the extent that such practices act to deprive a port of naturally tributary cargo or subject it to undue prejudice or unjust discrimination, they are unlawful. Where the indirect service is not unlawful, to deny the use of "equalization" but permit "transshipment," would merely serve to deny the consignee a service under which a carrier would transport cargo to a consignee's premises and require him to pick up cargo at the Portland docks. Since the cost of the transportation between the Portland docks and the consignees' premises would be borne by the consignees under conference tariffs, the denial of such service would foreclose a significant benefit to consignees. Id. (132–133).

The policy of section 8 of the 1920 Act with respect to naturally tributary cargo is amply served by the requirement that conference carriers serving Portland, Oregon, call there directly by water on at least every other sailing. This will prevent carriers not calling at Portland by water from absorbing any inland transportation costs from Seattle, Washington, and insure a level of water service by those calling there sufficient to handle local Portland cargoes. Id. (134–135).

To the extent that indirect overland service to Portland, Oregon, from Seattle, Washington is provided in the future, it will be lawful if performed in accordance with the modification to the conference agreement as approved by the Commission and the tariff requirements imposed. The Commission's regulation with respect to the filing of through rates and through routes was not intended to apply to such a service; it does not apply to situations where carriers merely provide services between two ports. Id. (137–138).

PRACTICE AND PROCEDURE

—Special docket procedure

Heretofore, the Commission and its predecessors have only used the special docket procedure to declare rates or charges unjust or unreasonable and then to set and order enforced just and reasonable ones. But section 18(a) of the 1916 Act and section 4 of the 1933 Act explicitly authorize the same action as to the regulations and practices of common carriers by water in interstate commerce. Thus, it is clear that the procedure extends to the adjustment of unjust and unreasonable rules and regulations as well as rates, always, of course, assuming a proper case for adjustment. Plaza Provision Co. v. Maritime Service Corp., 47 (51).

PREFERENCE AND PREJUDICE

Failure of the State of Hawaii to include a containerload rate on stacked and baled unprepared flour in its tariff, covering operation of a chartered vessel to carry vital shipments from Vancouver, B. C., to Hawaii, constituted undue and unreasonable prejudice in violation of section 16 First of the 1916 Shipping Act and, accordingly, reparation is awarded to the shipper who was charged a per cwt rate, the only unprepared flour rate in the tariff. Proof of competitive damage was not required. The state had not indicated what, if any, criteria it used in determining which containerload rates to include in its tariff, nor did it advance any explanation of its action. Fairness and impartiality, not described criteria, are determinative. The state contended that the per cwt rate applied to the shipment was the same magnitude greater than in the Matson tariff, and thus there was no discrimination. However, the State had advised shippers that its rates would be "based on the West Coast Matson Tariff", which implied a proportionate increase in rates. However, there was a straight containerload rate in Matson's tariff which covered the shipment here involved. There was no evidence indicating the added cost of handling the shipments in containers was relatively greater than that of other shipments in containers. General Mills, Inc. v. State of Hawaii Department of Agriculture, 1 (4–5).

Cargo does not cease to be naturally tributary to an area merely because it is containerized. The interest of developing ports which the Congress sought to foster in section 8 of the 1920 Act and the protection of ports from unjustly discriminatory or unduly prejudicial treatment under sections 16 and 17 of the 1916 Act cannot be thwarted simply by placing cargo in containers. Nor does the naturally tributary concept apply only to outbound movements. Intermodal Service to Portland, Oregon, 106 (127).

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Consignees in the Portland area find an indirect overland service (from Seattle, Washington) very useful to their businesses, and conference lines find it economically preferable to serve Portland indirectly some of the time. A type of indirect service may be prescribed which will adequately protect the Port of Portland's legitimate competitive interests. The Commission does not require that any line serve Portland at all if it does not wish to do so. To insure that Portland is not subject to undue or unreasonable prejudice or disadvantage, the Commission will require that to the extent any conference line desires to serve Portland via indirect overland service, it provides a certain level of direct service. Each line must serve Portland by direct water service with the frequency at least of alternate sailings. Id. (129).

Adequacy of service is a general, rather than a particularized concept, and the mere fact that service at Portland, Oregon, may not be completely adequate with respect to all cargoes and all trades does not adversely affect a finding of adequacy of service. When the expansion of direct containership calls at Portland in the subject trades is viewed together with the small amount of local cargo moving through Portland and the decreasing trend with respect to containerizable, if not containerized cargo, moving through that port, there is ample foundation for a finding of adequacy. Portland itself contends that if adequacy of service is used as a standard for determining the lawfulness of an indirect overland service, the present level of service at Portland should be found to be adequate. Id (131–132).

Distinction between "transshipment" and "equalization" is one without a difference insofar as the matter of indirect service to Portland from Seattle via overland carrier is concerned. "Equalization" and "transshipment" are merely variations on the common theme of serving a port without directly calling there. To the extent that such practices act to deprive a port of naturally tributary cargo or subject it to undue prejudice or unjust discrimination, they are unlawful. Where the indirect service is not unlawful, to deny the use of "equalization" but permit "transshipment," would merely serve to deny the consignee a service under which a carrier would transport cargo to a consignee's premises and require him to pick up cargo at the Portland docks. Since the cost of the transportation between the Portland docks and the consignees' premises would be borne by the consignees under conference tariffs, the denial of such service would foreclose a significant benefit to consignees. Id. (132–133).

RATES

Heretofore, the Commission and its predecessors have only used the special docket procedure to declare rates or charges unjust or unreasonable and then to set and order enforced just and reasonable ones. But section 18(a) of the 1916 Act and section 4 of the 1933 Act explicitly authorize the same action as to the regulations and practices of common carriers by water in interstate commerce. Thus, it is clear that the procedure extends to the adjustment of unjust and unreasonable rules and regulations as well as rates, always, of course, assuming a proper case for adjustment. Plaza Provision Co. v. Maritime Service Corp., 47 (51).

Operating ratio, which has been defined as the ratio of operating expenses to operating revenues, is recognized as a useful standard to employ in determining the reasonableness of rates of carriers such as nonvessel operating common carriers which have little investment in equipment. The objective in rate regulation, however, is not merely to determine legitimate expenses but to ascertain whether a carrier's rates will generate sufficient revenues so as to assure confidence in its financial integrity, thereby maintaining its credit and attracting capital. The operating ratio standard is notably deficient with regard to determining the existence and degree of need for additional capital and revenue. Therefore, in the ordinary case, consideration must be given both to operating ratios and to methods which determine capital needs, such as return on investment. Transconex, Inc.—General Increase in Rates in the U.S. South Atlantic/Puerto Rico—Virgin Islands Trades, 95 (97-98).

In the ordinary case involving the determination of the reasonableness of rates, evidence would be adduced establishing meaningful standards against which the operating ratio and return on investment of the particular nonvessel operating common carrier whose rates were under investigation could be tested. This could be done, for example, by examining the experience of the NVOCC industry as a whole or the experience of businesses having comparable risks. However, on the present record there is no justification for the continuance of the proceedings for the purpose of adducing such evidence. One NVOCC involved had suffered a loss in 1973 and the other, despite two rate increases and efficient operations, had earned a profit of only $25,420 before taxes, out of revenues of $2,159,807 in 1972. These calculations, moreover, were made in a manner least favorable to the carriers. The carriers sustained their burden of proving that the subject rate increases were just and reasonable. Id. (98-99).

Carrier's general rate increases in the U.S. Pacific Coast/Hawaiian Trade are just and reasonable within the meaning of section 18(a) of the 1916 Act and sections 3 and 4 of the 1933 Act. The carrier's operations have never turned a profit and will not do so in the reasonably foreseeable future. Spiraling costs have long since consumed the additional revenue generated by previous rate increases and promise to have the same effect on the subject increases as well. The record is devoid of any evidence that the carrier has demonstrated "grave mismanagement, gross inefficiencies, serious inadequacies of service, or indifference to the public need." Nor is there any indication that the increases are necessitated by excess vessel capacity. Seatrain Lines, California, General Increases in Rates in the U.S. Pacific Coast/Hawaiian Trade, 235 (242-243).

REPARATION

Failure of the State of Hawaii to include a containerload rate on stacked and baled unprepared flour in its tariff, covering operation of a chartered vessel to carry vital shipments from Vancouver, B. C., to Hawaii, constituted undue and unreasonable prejudice in violation of section 16 First of the 1916 Shipping Act and, accordingly, reparation is awarded to the shipper who was charged a per cwt rate, the only unprepared flour rate in the tariff. Proof of competitive damage was not required. The state had not indicated what, if any, criteria it used in determining which containerload rates to include in its tariff, nor did it advance any explanation of its action. Fairness and impartiality, not described criteria, are determinative. The state contended that the per cwt rate applied to the shipment was the same magnitude greater than in the Matson tariff, and thus there was no discrimination. However, the State had advised shippers that its rates would be "based on the West Coast Matson Tariff", which implied a proportionate increase in rates. However, there was a straight containerload rate in Matson's tariff which covered the shipment here involved. There was no evidence indicating the added cost of handling the shipments in containers was relatively greater than that of other shipments in containers. General Mills, Inc. v. State of Hawaii Department of Agriculture, 1 (4–5).

Since the decision in *Mueller* v. *Peralta Shipping Corp.*, 8 FMC 361, the Commission has uniformly refused to deviate from a strict application of section 18(b)(3) of the 1916 Shipping Act, except pursuant to the amendment made by P.L. 90–298. However, where the shipper and carrier agreed upon a certain negotiated rate at which the shipper would ship the commodities in question; this rate had no counterpart in any tariff of the carrier on file with the Commission; the negotiated rate was clearly intended to be filed; because of administrative error, an inaccurate rate was filed; and the carrier accepted payment on the basis of the negotiated rate, the carrier violated section 18(b)(3) by charging and accepting payment of a rate other than the tariff rate on file. However, reparation, which is a discretionary and permissive matter, would not be awarded, since permitting complainant to collect reparation would be to grant it a windfall which it neither anticipated nor bargained for. United States v. Columbia Steamship Co., Inc., 8 (9–10).

Carrier was granted permission to waive a portion of freight charges for transporting telephone directories from Miami to Jamaica. A rate had been negotiated between the shipper and carrier, but the carrier inadvertently failed to publish the reduction, which could have become effective before shipment. The carrier filed the negotiated rate prior to applying for waiver. No shipments other than complainant's of the same or similar commodity moved via the carrier during the same period of time at the rate applicable at the time of shipment here involved. Commercial Printing, Inc. v. Sea Riders, Inc., 44 (45).

Complainant met its burden of proving that Marasperse N–22 and Toranil B are dry lignin pitch and entitled to classification as such per the carrier's tariff, and complainant is entitled to reparation in the amount of the difference in the assessment between chemical N. O. S. and Pitch, Lignin, Dry. Rohm and Haas Co. v. Flota Mercante Grancolombiana, S.A., 53 (54–55).

Complainant met its burden of proving that Marasperse N–22 is lignin pitch and entitled to classification as such per the carrier's tariff, and reparation is awarded in the amount of the difference in the assessment between Chemicals N. O. S. and Pitch, Lignin, Dry. However, complainant failed to establish that Toranil B is lignin pitch and was thereby misclassified as Chemicals N. O. S. The manufacturer's invoice clearly identified Marasperse N–22 to be Lignin Pitch. The manufacturer's invoice did not identify Toranil B as Lignin Pitch and the fact that it may have been shipped as a substitute for Marasperse N–22 does not necessarily mean that the two products are identical (which they are not). "Similar" is not "identical." The shipment had left the custody of the carrier and the shipper failed to meet its resulting heavy burden of proof. Rohm and Haas Co. v. Moore McCormick Lines, Inc., 56 (58–60).

Complainant was not entitled to have three shipments of synthetic resin assessed a minimum containerload rate in their entireties, since the shipments did not meet the value and measurement criteria required by respondent's tariff and, accordingly, reparation was denied. A shipment of synthetic resin was entitled to a containerload rate of $34 per weight ton if the shipment weighed a minimum of 44,800 pounds per container. However, this tariff item appeared directly below a description of synthetic resin valued "up to and including $750 per 2240 lbs. net weight, up to/incl. 100 cft. per 2240 lbs." Below the minimum containerload rate were published a number of items applying to synthetic resin at various categories of value and cubic measurement ranging between $751 to $4,000 per 2240 lbs. and 100 to 160 cft. per 2240 lbs. No minimum containerload rates were published applicable to synthetic resin in these categories. There was, therefore, no basis for complainant's contention that any shipment of synthetic resin qualified for the minimum containerload rate if it weighed 44,800 lbs. regardless of value and measurement, for clearly such a rate was applicable only to resin valued up to and including $750 per long ton, measuring up to and including 100 cft. per long ton. Portions of the shipments in question exceeded the $750 per ton limitation in value and thereby failed to qualify for the containerload rate. Rohm and Haas Co. v. Seatrain Lines, Inc., 83 (85–87).

Reparation claim was time-barred where the shipment in question moved under a bill of lading dated August 6, 1971, which was more than two years prior to the filing of the complaint on August 10, 1973. A cause of action accrues at the time of shipment or payment of the freight, whichever is later. Here, the freight was prepaid. Id. (87–88).

Claim that a shipment of Cab-O-Sil should have been rated as Silicon Dioxide rather than as cargo N. O. S. is denied on the basis of the failure of claimant to carry its heavy burden of proof where, as here, the shipment has left the custody of the carrier. The shipper initiated the commodity description used on the bill of lading. The carrier charged the rate as specified in the tariff for that commodity as described by a trade name on the bill of lading. The consignee took possession of the cargo without voicing any claim at that time. Ocean Freight Consultants v. Royal Netherlands Steamship Co., 143 (144–145).

Complainant's claim that its failure to include the measurements, as well as the weights of pallets on which the cargo was shipped, should not bar reparation, is rejected. A tariff should be considered in its entirety when assessing freight charges on a commodity. To do otherwise would result not only in discrimination towards the carrier, but also would defeat the purpose of the tariff item which is to insure the ability of the carrier to verify that palletized shipments are of the accepted dimensions to qualify for a pallet deduction. Since measurements were not provided, any pallet allowance or rate reduction must be disallowed. Kraft Foods v. Prudential-Grace Line, 159 (160–161).

Overcharge claim based on an alleged incorrect measurement of a shipment was denied where the bill of lading as well as the export declaration show a measurement that is unclear and may be read 9 cubic feet, the measurement used by the carrier in assessing the freight. The documents could be read either 3 or 9 cubic feet, but such evidence is insufficient to support the alleged mismeasurement beyond a reasonable doubt. Furthermore, the applicable tariff rate is based on valuation of cargo and the value is not shown on the bill of lading. The rate charged is consistent with the valuation shown on the export declaration. Colgate Palmolive Co. v. Moore McCormack Lines, Inc., 165 (166).

Since the record disclosed no valid basis for concluding that undercharges existed on other commodities on the bill of lading, complainant was entitled to reparation on the proven overcharges. Colgate Palmolive Co. v. Royal Netherlands Steamship Co., 169.

While the Commission has imposed a "heavy burden of proof" on claims involving classification of goods, it has also attempted to insure that whenever justly possible what is actually shipped must determine the applicable rate. Where the commodity shipped was listed as "Methyl Isoamyl Ketone" on the bill of lading and claimant submitted an extract from a chemical dictionary defining the product as a solvent, the shipment should have been rated "solvents, N. O. S." rather than "chemicals, N. O. S.", and claimant was entitled to reparation. Union Carbide Corp. v. Port Line, Ltd., 172 (173).

The Commission has frequently stated in informal dockets that it will adhere to the concept that it is not the declaration on the bill of lading but what is actually shipped that determines the applicable rate, so long as a reasonable standard of burden of proof is upheld between the shipper and the carrier. While a tariff rule providing that the specific name of a solvent (not trade name) must be shown on the bill of lading is reasonable and was properly invoked at the time of rating, it should not constitute an absolute bar against later recovery upon a showing of proper proof in a complaint before the Commission. In the present case it was unreasonable to deny reparation based on the rule. The bills of lading described the goods shipped as "solvent N. O. S. F. P. 120° F." The attached invoices specifically described the item as Diisobutyl Ketone which claimant showed to be a solvent. Claimant was entitled to the rate for "solvents N. O. S., Flash Point over 80° F." rather than the higher rate for " chemicals N. O. S.," not drugs or medicines. Union Carbide Corp. v. American and Australian Steamship Line, 177 (178).

Theory that it would be inequitable to award reparation where the carrier applied the rate appearing in its tariff for the exact description of the goods provided by the shipper breaks down on the conclusion that the carrier would be penalized for the mistake or negligence of the shipper. In this case, for example, the carrier held itself out to carry Polyvinyl Chloride Resins at a rate of $37. This becomes the lawful rate for that commodity. If it is shown that the commodity shipped was Polyvinyl Chloride Resin, the carrier is not penalized in having to refund an overcharge. Rather, the carrier is merely being required to adhere to its lawful rate. To permit the carrier to retain the overcharge would, in fact, provide the carrier a windfall. In the present case, the shipper proved that the shipment in question which was described as "Synthetic Resin" was, in fact, qualified to be rated as "Polyvinyl Chloride Resin". Union Carbide Inter-America v. Venezuelan Line, 181 (182).

A tariff provision that bills of lading describing a commodity by trade name only are not acceptable cannot be used to bar an overcharge claim where the claimant used a trade name on the bill of lading and the carrier applied its "cargo N. O. S." rate. If the carrier chooses to invoke the tariff provision, it would be incumbent upon it to return the lading prior to shipment as not acceptable per the tariff item. Otherwise, the carrier by accepting a lading with a trade name description waives the right to use the item for declining claims. The item states that the bills are unacceptable, not the trade names, but the entire bill. On the merits, claimant showed rather conclusively, through chemical dictionary and manufacturers' statements that Nacconal is a trade name for a dry detergent commonly used industrially and the shipment should have been rated accordingly, Abbott Laboratories v. Prudential-Grace Lines, 186 (187).

The Commission has attempted to insure that whenever reasonable burden of proof standards are met, a commodity will be rated for transportation purposes according to what is actually shipped. A tariff rule that description of commodities shown on bills of lading shall be verified by comparison with the export declaration and, if they are dissimilar and not analogous, the description including the export Schedule "B" classification shall govern the rate to be applied, should not be used to deny a claim where it is very clearly shown what was actually shipped. Even if, as here, the export declaration described the commodity only as "Arsanilic Acid", it is questionable whether that description is "dissimilar" or "not analogous" to the bill of lading description of "Animal and Poultry Feed Supplement." On the evidence there was no basis for arguing that Arsanilic Acid is not "similar or comparable" to an animal food supplement. Abbott Laboratories v. Moore-McCormack Lines, Inc., 191 (192).

Claims filed within two years of accrual cannot be barred by tariff regulations imposing a shorter time limitation but must be considered on their merits. Carborundum Co. v. Venezuelan Line, 195 (201).

A tariff should be considered in whole and not in part when applying freight charges on a commodity. Where a tariff provided for a pallet allowance or rate deduction if minimum acceptable pallet dimensions were met, and if the gross weight of a single pallet plus the cargo stowed thereon was not less than 1,500 lbs., and if the overall cubic measurement of cargo and pallet was not less than 40 cubic feet, it was error to conclude that the minimum weight requirement had been met as to each of three palletized shipments, on the basis that since the bill of lading for the pallets showed the gross weight of the shipment (6,150 lbs.) and the net weight of the cargo (6,000 lbs.), the carrier could by subtracting one from the other arrive at the weight of the pallets (150 lbs.) and by dividing the gross weight of the shipments by three, the carrier should have concluded that the minimum weight requirement had been met as to each palletized shipment. The basic flaw is that although complainant furnished the weight of both pallets and cargo thereon, there was no evidence to suggest that the pallets subscribe to the minimum acceptable pallet dimensions. Consequently, the carrier had no way of knowing whether all of the requirements of the tariff item had been met. Similarly, as to another claim involving 27 pallets, the average weight of the shipments could not be used to determine whether the individual shipments met minimum weight requirements. The tariff item required that each pallet receiving the rate deduction must meet the minimum weight requirement. Carborundum Co. v. Venezuelan Line. Id. (196–197).

Carrier was permitted to waive a portion of freight charges on a shipment foreign where, through inadvertence, the agreed rate was not timely filed with the Commission. Commodity Credit Corp. v. Lykes Bros. Steamship Co., 230 (231).

A claim arising from an overcharge cannot be barred from a determination on the merits by a conference rule, if the claim is filed with the Commission within two years of its accrual. On the merits, the record substantiated that an error exists, that an overcharge was inadvertently made, and that the claim was a fully valid and supported one. Union Carbide Inter-America, Inc. v. Venezuelan Line, 233 (234).

Claim for reparation based on an allegation that respondent overcharged complainant on a shipment of a commodity described on respondent's bill of lading as "Dextrose Anhydrous USP (Glucose)" by classifying the shipment as "Cargo N. O. S." rather than "Corn Sugar, Dry," was denied. The bill of lading and the invoice described the commodity as "Dextrose Anhydrous USP (Glucose); the chemical dictionary defines "Dextrose" to include "grape sugar" as well as "corn sugar"; the Schedule B number was also inconclusive as it refers to "Dextrose, including corn sugar, except pharmaceutical", and the classification goes on to include, among other things, "grape sugar", "mild sugar", and "sorghum grain sugar"; and the next Schedule B number applied to "Glucose, including corn syrup, except pharmaceutical and dextrose". None of the foregoing items established with reasonable certainty and definiteness that "Dextrose Anhydrous USP (Glucose)" is, in fact, dry corn sugar. A notarized statement in which complainant certified that the subject commodity was corn sugar, and the fact that at one time the carrier made an offer of settlement, did not constitute probative evidence establishing the validity of the subject claim. Merck Sharp & Dohme International v. Atlantic Lines. 244 (245–246).

Carrier was permitted to refund a portion of charges collected for a shipment foreign of galvanized steel wire and wire seals. The carrier had agreed to carry the commodities at a certain rate and intended to file a tariff amendment prior to the sailing of the vessel. Through inadvertence, however, the carrier neglected to do so with the result that the shipment was billed and the freight collected at the higher tariff rate. The carrier then filed a tariff amendment to reflect the agreed upon rate. A. B. Barone Forwarding for Interlake, Inc. v. Delta Steamship Lines, Inc., 248 (249–250).

Each bill of lading is a separate transaction and the merits of each overcharge claim must be considered in toto and independent of claims under any other bill of lading. Thus, where overcharges existed on portions of two shipments (two claims), claimant showed a violation of the Act by the carrier. However, section 22 also requires a showing of injury before reparation can be awarded. Claimant was not injured by the violation because undercharges on other portions of the shipments exceeded overcharges. The offsetting of overcharges and undercharges under a given bill of lading does not constitute an award of reparation against the shipper. Colgate Palmolive Co. v. The Grace Line, 279 (280).

If proven overcharge under a single bill of lading exceeds proven undercharge under that bill of lading, then an award of reparation is authorized for an amount by which the overcharge exceeds the undercharge. Conversely, if the proven undercharge under a single bill of lading exceeds the proven overcharge under that bill of lading, then the carrier is directed to collect from the shipper an amount by which the undercharge exceeds the overcharge. The net overcharge as described and arising under a single bill of lading constitutes the injury under section 22 which claimant has suffered. The Commission does not and will not permit undercharges and overcharges arising under separate bills of lading to be lumped together and netted out. Id. (280–281).

Claim for reparation was denied on the basis of a tariff rule which provided, as pertinent to the case, that overcharge claims based on an alleged error as to measurement will not be considered unless presented to the carrier before the shipment leaves the custody of the carrier. A carrier is strictly bound to adhere to the terms of the tariff as filed. This applies not only to rates, but to various terms, rules and regulations and conditions. Here, the carrier had no alternative but to comply with the tariff rules. The claim was not presented in accordance with the provisions of the tariff. The provisions of the rule are a reasonable attempt to eliminate a prime cause of dispute as to weight or measurement by requiring that any re-weighing or re-measuring be conducted in a certain way and before the shipment leaves the custody of the carrier. Kraft Foods v. Moore McCormack Lines, Inc., 320 (321–323).

TARIFFS: See also Reparation

Complainant was not entitled to have three shipments of synthetic resin assessed a minimum containerload rate in their entireties, since the shipments did not meet the value and measurement critèria required by respondent's tariff and, accordingly, reparation was denied. A shipment of synthetic resin was entitled to a containerload rate of $34 per weight ton if the shipment weighed a minimum of 44,800 pounds per container. However, this tariff item appeared directly below a description of synthetic resin valued "up to and including $750 per 2240 lbs. net weight, up to/incl. 100 cft. per 2240 lbs." Below the minimum containerload rate were published a number of items applying to synthetic resin at various categories of value and cubic measurement ranging between $751 to $4,000 per 2240 lbs. and 100 to 160 cft. per 2240 lbs. No minimum containerload rates were published applicable to synthetic resin in these categories. There was, therefore, no basis for complainant's contention that any shipment of synthetic resin qualified for the minimum containerload rate if it weighed 44,800 lbs. regardless of value and measurement, for clearly such a rate was applicable only to resin valued up to and including $750 per long ton, measuring up to and including 100 cft. per long ton. Portions of the shipments in question exceeded the $750 per ton limitation in value and thereby failed to qualify for the containerload rate. Rohm and Haas Co. v. Seatrain Lines, Inc., 83 (85–87).

Complainant's claim that its failure to include the measurements, as well as the weights of pallets on which the cargo was shipped, should not bar reparation, is rejected. A tariff should be considered in its entirety when assessing freight charges on a commodity. To do otherwise would result not only in discrimination towards the carrier, but also would defeat the purpose of the tariff item which is to insure the ability of the carrier to verify that palletized shipments are of the accepted dimensions to qualify for a pallet deduction. Since measurements were not provided, any pallet allowance or rate reduction must be disallowed. Kraft Foods v. Prudential-Grace Line, 159 (160–161).

A shipment did not qualify for a pallet allowance where the tariff provided that cargo loaded on pallets was entitled to an allowance when "the unit load shall not be less than 1800 pounds nor cube less than 45 ft.," and claimant failed to show the measurement of the unit. Colgate Palmolive Co. v. Moore McCormack Line, 167.

A tariff should be considered in whole and not in part when applying freight charges on a commodity. Where a tariff provided for a pallet allowance or rate deduction if minimum acceptable pallet dimensions were met, and if the gross weight of a single pallet plus the cargo stowed thereon was not less than 1,500 lbs., and if the overall cubic measurement of cargo and pallet was not less than 40 cubic feet, it was error to conclude that the minimum weight requirement had been met as to each of three palletized shipments, on the basis that since the bill of lading for the pallets showed the gross weight of the shipment (6,150 lbs.) and the net weight of the cargo (6,000 lbs), the carrier could by subtracting one from the other arrive at the weight of the pallets (150 lbs.) and by dividing the gross weight of the shipments by three, the carrier should have concluded that the minimum weight requirement had been met as to each palletized shipment. The basic flaw is that although complainant furnished the weight of both pallets and cargo thereon, there was no evidence to suggest that the pallets subscribe to the minimum acceptable pallet dimensions. Consequently, the carrier had no way of knowing whether all of the requirements of the tariff item had been met. Similarly, as to another claim involving 27 pallets, the average weight of the shipments could not be used to determine whether the individual shipments, met minimum weight requirements. The tariff item required that each pallet receiving the rate deduction must meet the minimum weight requirement. Carborundum Co. v. Venezuelan Line, 195 (196–197).

TERMINAL OPERATORS: See also Truck Loading and Unloading

The basis for a charge can be found either in an actual service performed for, or some benefit conferred upon the person assessed the charge. If a "basis" exists, and the charge is reasonably correlated to the benefit received by the person charged, and is appropriately described in the tariff, then the charge is reasonable under section 17 of the Shipping Act. Bethlehem Steel Corp. v. Indiana Port Commission, 266 (272).

Assessment of a harbor service charge on every vessel entering the Burns

Waterway Harbor is an unreasonable practice in violation of section 17 of the Shipping Act. The Port Commission admits that no "services" are provided. As to "benefits" conferred on vessels, expenditures (a large portion of $10,000,000) for construction of the public terminal operated by the Port Commission, the revenues to repay these expenditures ought to come from dockage, wharfage, warehouse fees and the like assessed to vessels, shippers and others using the terminal who receive a service or benefit therefrom. These expenditures do not confer a benefit on every vessel entering the harbor. The remainder of the $10,000,000 and other less tangible items consists of the deed to the Corps of Engineers of the land under the north breakwater, the easements to dredge the harbor and place the spoils thereof on a 20-acre plot near the harbor, the value of the state's eminent domain powers to the project, the fact that the State initially made funds available necessary to construct the harbor and that but for these expenditures, the Corps of Engineers would not have participated in the project. These contributions, including the amounts expended on the public terminal are part of a quid pro quo arrangement and, therefore, not a basis for the charge. Expenditures incurred by the Port Commission in administering the harbor as a "public port" are not a basis for the charge. There is no evidence that operating the harbor as a "public harbor" involves anything more than operating and maintaining a public terminal on the harbor. As to "maintenance" of the harbor, the Corps of Engineers dredges the harbor and maintains the breakwater and the other parties maintain their respective facilities. The Port Commission does nothing in the nature of "maintenance" which could be a basis for the charge. Assuming the Commission has authority to regulate the movement of vessels into and within the harbor, this is also not a basis for the charge. Vessels, in fact, control their own movements. Id. (273–275).

Agreement between a port authority and a terminal operator, granting the operator an exclusive franchise to operate terminal services, does not grant an undue preference or subject another to undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Shipping Act and there has been no showing of practices in violation of section 17. *Inter alia,* a single representative of one terminal operator can, and does, efficiently handle all cargo by using only 60–70 percent of his available time; the agreement provides for termination without cause of the operator's favored position, and it must be assumed that the authority will terminate if a need for additional terminal operators arises in the future; the authority argument that given the amount of business available at the port, competition for terminal services would result in a deterioration of quality of services with concomitant increases in rates, is persuasive, and it is not the function of the Commission to substitute its judgment for the business judgment of the port authority; the fewer parties involved in terminal services, the greater is the ease of accounting for damage, reporting and dispatching of goods; and it cannot be concluded that the port authority is retarding port growth by failure to expand its facilities and refusal to allow multiple operators, but, on the contrary, there is considerable merit in the port's argument that current traffic does not warrant expansion. Agreement No. T–2598, 286 (295–301).

TRUCK LOADING AND UNLOADING

Tariff rule which defines the composite hourly cost of labor and forklift truck for truck loading and unloading rates at the Port of New York is reasonable and lawful, as updated to reflect increases in ILA wages. The rule is designed to assist shippers and terminal operators in their negotiations and to obviate the necessity for litigation. It is not destined to relieve the operators of their reasonable rate and practice obligation. All the component cost items are subject to change as conditions at the port itself may change and productivity improve. Empire State Highway Transportation, Inc. v. American Export Lines, Inc., 21 (23–26, 42).

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