

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 79-83

## INVESTIGATION OF UNFILED AGREEMENTS IN THE U.S. NORTH ATLANTIC TRADES

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### ORDER OF CONDITIONAL DISCONTINUANCE

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*May 30, 1984*

This proceeding was instituted by Order of Investigation served August 14, 1979 (August 1979 Order). On December 30, 1983, Respondents<sup>1</sup> filed a Motion to Dismiss the proceeding on the ground that no useful regulatory purpose would be served by continuing it. The Commission's Bureau of Hearing Counsel filed a Reply supporting the Motion. On March 14, 1984, Administrative Law Judge Seymour N. Glanzer (Presiding Officer) certified the Motion and Reply to the Commission.

#### BACKGROUND

The August 1979 Order noted the filing by the Department of Justice on June 1, 1979 of criminal antitrust indictments in U.S. District Court in Washington, D.C. The indictments charged certain ocean common carriers in the North Atlantic foreign trades with conspiring to fix rates outside the scope of agreements approved by the Commission pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. §814. The charges concerned events that allegedly occurred from 1971 to 1975. The Order further noted the acceptance by a United States District Judge of *nolo contendere* pleas to those charges.

The August 1970 Order pointed out that if the allegations in the indictments were accurate, the defendants had also violated section 15 and were subject to civil penalties. The Order further stressed that the Commission is required by section 15 to oversee the operation of agreements previously approved by it and to disapprove, cancel or modify agreements that it finds to be operating in a manner contrary to the public interest or in violation of the Shipping Act. The Commission stated that:

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<sup>1</sup> Atlantic Container Line, Ltd., Dart Containerline Company Limited, Hapag-Lloyd A.G., Sea-Land Service, Inc., United States Lines, Inc., Continental North Atlantic Westbound Freight Conference, Germany-North Atlantic Port Rate Agreement, North Atlantic Baltic Freight conference, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, North Atlantic Westbound Freight Association, North Atlantic/West Europe Rate Agreement, Scandinavia Baltic U.S. North Atlantic Westbound Freight Conference, South Atlantic North Europe Rate Agreement and Associated North Atlantic Freight Conferences. Certain other respondents were dismissed during the proceeding.

In the fulfillment of its statutory responsibilities, the Commission must focus its attention on remedial matters raised by the indictments and subsequent *nolo contendere* pleas, in order to insure that the actions alleged in the indictments will not and cannot occur in the future. Accordingly, the Commission believes an investigation is necessary . . . both to adjudicate past violations while at the same time to develop an evidentiary basis for remedial action to prevent such occurrences in the future.

Because the Commission was attempting to obtain from the District Court the record of the grand jury proceedings, further proceedings in Docket No. 79-83 were deferred.

On May 26, 1982, the Commission issued a second Order of Investigation (May 1982 Order), which recited that following the entry of the *nolo contendere* pleas, a private treble damage action was brought on behalf of a class of shippers against the major carriers operating in the North Atlantic trades. The parties to that action had recently entered into a settlement agreement that provided for a total payment of over \$50 million to the shippers. The Order also noted that the Commission's efforts to obtain the record of the grand jury proceedings had been unsuccessful.<sup>2</sup> Recognizing that the monies paid under the settlement and the fines previously imposed by the District Court in the criminal proceedings were likely to provide sufficient deterrence, the Commission deleted civil penalties as an issue to be considered in this proceeding. The other issues described by the August 1979 Order remained intact. In this regard, the May 1992 Order reaffirmed the Commission's responsibility to monitor the implementation of agreements, to investigate alleged violations of the Shipping Act and to take remedial action as warranted.

Following the issuance of the May 1982 Order and pursuant to discovery procedures negotiated by Hearing Counsel and Respondents and approved by the Presiding Officer, Respondents made available to Hearing Counsel several hundred thousand pages of documents that had been produced pursuant to grand jury subpoenas. Hearing Counsel, with the assistance of the Commission's Bureau of Investigations,<sup>3</sup> reviewed the material supplied to determine whether a formal hearing was necessary. Those prehearing procedures culminated in Respondent's Motion to Dismiss and Hearing Counsel's Reply in support of the Motion.

#### DISCUSSION

The only remedy now possible in this proceeding, assuming violations were found, is the cancellation or modification of relevant section 15 agreements. The alleged activities that led to the indictments were primarily unapproved inter-conference rate-fixing. Respondents point out that many of the inter-conference discussion agreements approved by the Commission

<sup>2</sup> *United States v. Bates*, 627 F.2d 349 (D.C. Cir. 1980) (*per curiam*).

<sup>3</sup> At that time, the Office of Investigations of the Bureau of Hearings and Field Operations.

(that *arguendo* facilitated Respondents' alleged unlawful rate-fixing) already have been cancelled voluntarily by the parties<sup>4</sup> Other discussion agreements that were in effect during the relevant period have been modified substantially to limit their scope to matters such as self-policing.

In addition, since 1975, procedures for the conduct of conference business have been restructured in each of the seven North Atlantic conferences on the basis of advice from special antitrust counsel in order to insure strict compliance with all requirements of law. These procedures are described in detail by Bruce A. McAllister, chief officer of the seven conferences, in an affidavit attached to Respondents' Motion.<sup>5</sup> They include:

- (1) Strict demarcation of business conducted within any one conference from that conducted in any other conference;
- (2) Monitoring of conference activities by conference and carrier counsel;
- (3) Promulgation and implementation of guidelines for the preparation and conducting of conference meetings;
- (4) Review of minutes of conference meetings to insure their accuracy before they are filed with the Commission; and
- (5) Adoption and filing with the Commission of guidelines for dealing with shippers and shipper groups.

In their Reply to Respondents' Motion, Hearing Counsel state that the Commission's staff now has sufficient information regarding the activities of Respondents to meet any regulatory need. Obviously, it is impossible to be certain that Respondents will never engage in unlawful concerted activity in the future. However, given the substantial monetary fines and settlements already paid by Respondents, the cancellation or modification of most of the discussion agreements previously in effect, the adoption of the new conference procedures described above, the information obtained by the Commission's staff and the renewed emphasis by the staff on trade monitoring, we believe that the original purposes of this investigation have been substantially achieved and that the cost of further proceedings would not be justified.

An evidentiary hearing would be exceptionally costly and time-consuming, given that the unlawful rate-fixing described in the indictments allegedly occurred from nine to thirteen years ago. The age of the alleged violations also makes it unlikely that, even assuming the Commission could determine the precise extent of Respondents' malfeasance, such information would be useful in constructing a remedy relevant to present-day conference oper-

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<sup>4</sup>Those include: the North Atlantic Discussion Agreement, FMC No. 9899; the North Atlantic Talking Agreement, FMC No. 9R09; the All Coasts Agreement, FMC No. 10022; the Canadian American Discussion Agreement, FMC No. 10057; the Canadian American Working Agreement, FMC No. 10090; and the South Atlantic North Europe Rate Agreement, FMC No. 9984.

<sup>5</sup>In addition to his affidavit, Mr. McAllister was interviewed concerning conference procedures by representatives of the Commission's staff, including the Director, Bureau of Agreements and Trade Monitoring.

ations which, as noted above, are substantially different from their predecessors.

Respondent's Motion therefore will be granted. However, the Commission's action is conditioned upon the resignations of the Continental North Atlantic Westbound Freight Conference from Agreement No. 9427 and the North Atlantic Continental Freight Conference from Agreement No. 9552. These Agreements are "48-hour rate agreements" between the Conferences and independent lines. While the Agreements currently have only one independent party (Polish Ocean Line), other independents are free to apply for membership. Because these Agreements provide the means by which the Conference lines may meet with and engage in limited rate collaboration with independent lines, it is at least arguable that if the Conference lines did in fact engage in rate-fixing outside the bounds of their approved authority, these Agreements may have also facilitated such activities. For that reason, the Commission is unwilling to discontinue this investigation unless the Conferences resign from Agreements Nos. 9427 and 9552 and thereby render them nullities.

**THEREFORE, IT IS ORDERED,** That Respondents' Motion to Dismiss this proceeding is hereby granted on condition that, within 30 days from the date of this Order, Respondents Continental North Atlantic Westbound Freight Conference and North Atlantic Continental Freight Conference submit to the Commission appropriate notices of resignation from Agreements Nos. 9427 and 9552, respectively.

By the Commission.

(S) FRANCIS C. HURNEY  
*Secretary*