

# FEDERAL MARITIME COMMISSION

DOCKET NO. 82-54

AGREEMENTS NOS. 9718-7, 9718-8, 9731-8, 9835-5, 9975-7,  
10116-4 AND 10274-1—SPACE CHARTER AND CARGO REVENUE  
POOLING AGREEMENTS IN THE UNITED STATES/JAPAN  
TRADES <sup>1</sup>

1. Where four space charter agreements have been amended and filed as a result of settlement negotiations between the Proponents and the Protestants, as well as the Hearing Counsel of the Federal Maritime Commission, and where the record evidences that such agreements are required by a serious transportation need, are necessary to secure public benefits and are in furtherance of a valid regulatory purpose, the requirements of section 15 of the Shipping Act have been satisfied and the agreements must be approved.
2. Where four space charter agreements have been amended and filed and two pooling agreements have been withdrawn as a result of settlement negotiations between the parties in a formal proceeding originating in the Federal Maritime Commission, and where their negotiations are on the record and the filed agreements fully reflect what the parties agreed to and intended, there are no other agreements which are required to be filed with the Federal Maritime Commission within the ambit of section 15.
3. Where a formal proceeding is begun as a result of a remand from a Circuit Court of Appeals which directs that a hearing be conducted on the "disputed material issues of fact," raised by the Protestants in this proceeding, and where the parties have agreed that there are no longer any "disputed issues of material fact," insofar as the amended agreements are concerned and Hearing Counsel also agrees, the specific issues on remand and in the Commission's Order of Investigation and Hearing need not be considered from the aspect of "disputed" issues of material fact. Instead the provisions of the agreements must generally satisfy the requirements of section 15 and the applicable case law.

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*Robert Basseches, David B. Cook and I. Michael Greenberger for Protestant American President Lines, Ltd.*

*William H. Fort and J. Alton Boyer for Protestant Lykes Bros. Steamship Co., Inc.*

*George F. Mohr for Intervenor Delaware River Port Authority.*

*R. Moriconi for Intervenor Massachusetts Port Authority.*

*J. Robert Ewers, Alan Jacobson and Stuart James as Hearing Counsel.*

<sup>1</sup> The Commission's Order of Investigation and Hearing on Remand originally related to the seven agreements that are enumerated in the caption in this case. As will be seen, as a result of settlement negotiations the Proponents of these agreements withdrew them from consideration. Two were not resubmitted at all and the others were proffered as amended agreements. The two agreements which were withdrawn are Agreement Nos. 10116-4 and 10274-1, respectively. The remaining agreements were revised to become 9718-10, 9731-10, 9835-7 and 9975-9.

INITIAL DECISION<sup>2</sup> OF JOSEPH N. INGOLIA, ADMINISTRATIVE  
LAW JUDGE

*Finalized June 15, 1984*

BACKGROUND INFORMATION

This proceeding began as an Investigation and hearing on remand instituted under the provisions of sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. §§ 814 and 821), to determine whether Agreement Nos. 9718-7, 9718-8, 9731-8, 9835-5, 9975-7, 10116-4 and 10274-1 should be approved, disapproved or modified.<sup>3</sup> The pertinent parts of the Order of Investigation and Hearing on Remand are set forth in the Findings of Fact. The Order listed the Proponents and Protestants as follows:

Proponents

Japan Line, Ltd.  
Kawasaki Kisen Kaisha, Ltd.  
Mitsui O.S.K. Lines, Ltd.  
Yamashita-Shinnihon Steamship Co., Ltd.  
Nippon Yusen Kaisha  
Showa Shipping Co., Ltd.

Protestants

Sea-Land Service, Inc.  
United States Lines, Inc.  
American President Lines, Ltd.  
Lykes Bros. Steamship Co., Inc.

After the Commission's Order was served there were two Motions to Intervene. As a result, the Delaware River Port Authority and the Massachusetts Port Authority were allowed to intervene for limited purposes subject to the discretion of the Administrative Law Judge.<sup>4</sup> Also, one of the original protestants, United States Lines, Inc., was allowed to withdraw as a party.<sup>5</sup>

Once the case was docketed there was extensive discovery. There were several motions filed regarding discovery which resulted in prehearing conferences that disposed of discovery problems and allowed for certain procedural scheduling to move the case forward. Also, there were several motions and much discussion regarding confidentiality which resulted in the adoption of an Order Regarding Confidential Materials.<sup>6</sup> The parties throughout the pendency of this proceeding have designated certain material as being confidential in accordance with the order of confidentiality.

Finally, after several prehearing conferences this proceeding was set down for hearing on December 6, 1983, at which time the parties indicated

<sup>2</sup>This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

<sup>3</sup>All of the agreements except 9718-8 were published in the *Federal Register* on April 29, 1980. 45 Fed. Reg. 28, 487 (1980). Agreement No. 9718-8 was filed because the Commission Order of January 16, 1981, limited the total container capacity sought in Agreement No. 9718-7. Agreement No. 9718-8 sought to raise that capacity and was published in the *Federal Register* on July 8, 1981. It became the subject of the Commission's Order of Investigation served on December 14, 1981. FMC Docket No. 81-74, *Agreement No. 9718-8—California-Japan/Korea Space Charter Agreement*, 46 Fed. Reg. 61723 (1981).

<sup>4</sup>The Orders granting the motions to intervene were served on March 11, 1983 and April 14, 1983, respectively.

<sup>5</sup>The Procedural Order was served on April 26, 1983.

<sup>6</sup>The Order was served on May 2, 1983.

a basis of settlement had been reached. Their subsequent actions were in furtherance of that settlement.

#### Findings of Fact

It is appropriate to note that the references to Exhibits 1, 2 and 3 in the following portions of these findings refer to the written testimony of K. Kawamura, Seiichi Hirano and Douglas C. Tucker, respectively, which is attached to the "Brief of Proponents" filed on March 7, 1984, and which is hereby made a part of the evidentiary record of this proceeding.

I. On November 19, 1982, the Federal Maritime Commission (the "Commission") served an Order of Investigation on Remand which reads in pertinent part, as follows:

On July 13, 1982, the U.S. Court of Appeals for the District of Columbia Circuit remanded the Commission's order of January 16, 1981 (January Order) conditionally approving, pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. § 814, a series of space charter and revenue pooling agreements among Japanese-flag lines in the United States/Japan trades. *Sea-Land Service, Inc. v. United States*, 683 F.2d 491 (D.C. Cir. 1982). The Court directed the Commission to conduct further evidentiary hearings on certain issues raised by four U.S.-flag carriers who had protested the agreements. This Order of Investigation and Hearing is issued in compliance with the Court's decision.

The Order, in pertinent part, directs that:

**THEREFORE, IT IS ORDERED**, That pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. §§ 814 and 821), a proceeding is hereby instituted to determine whether Agreements Nos. 9718-7, 9718-8, 9731-8, 9835-5, 9975-7, 10116-4 and 10274-1 are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916, and therefore, whether they should be approved, disapproved, or modified; and

**IT IS FURTHER ORDERED**, That the parties, in addressing the approvability of the Agreements under the standards of section 15, shall specifically address the following issues consistent with the discussion of them in this Order:

(1) whether the Japanese lines have engaged in bloc voting within the shipping conferences to which they belong and, if so:

- (a) the extent of such bloc voting;
- (b) whether such bloc voting occurred on significant conference matters;
- (c) whether such bloc voting was caused, directly or indirectly, by actions of the Japanese government;

- (d) whether such bloc voting was caused, in whole or in part, by economic relationships between the Japanese lines, on the one hand, and Japanese trading companies and other shipping interests, on the other hand; and
- (e) the effects of such bloc voting on the trades and other carriers;
- (2) whether the Japanese lines should be considered to operate as a joint service or joint services in some or all of the trades which they serve;
- (3) whether the Japanese lines have economic relationships with Japanese trading companies and other shipping interests which, when coupled with the Agreements under investigation, render the Agreements unjustly discriminatory or unfair between carriers or contrary to other section 15 standards;
- (4) whether the service market areas served by the Japanese lines should be measured by:
  - (a) each agreement considered individually;
  - (b) each of the four space charter agreements;
  - (c) each of the two pooling agreements;
  - (d) all six agreements considered collectively; or
  - (e) some variation of the above;
- (5) Whether the service market areas served by the Japanese lines should be measured in terms of:
  - (a) ports served;
  - (b) actual points of cargo origin and destination; or
  - (c) some combination thereof;
- (6) The market share held by the Japanese lines in those market areas;
- (7) The vessel utilization factors experienced by both the Japanese lines and the protestants in those market areas;
- (8) whether those market areas are overtonnaged and the potential impact of these Agreements on any such overtonnaging;
- (9) the projected rates of cargo growth over calendar years 1983, 1984 and 1985 in those market areas;
- (10) whether the geographic scope, pooling limits and reporting requirements in the Agreements are adequate and have been complied with;
- (11) whether provisions of the Agreements are unacceptably vague; and
- (12) whether there is inadequate forty-foot and reefer container service in the market area served by Agreements Nos. 9718-7 and 9718-8 and, if so, the potential impact of Agreement No. 9718-8 on this problem; \* \* \*

\* \* \*

IT IS FURTHER ORDERED, That the record developed in FMC Docket No. 81-74, *Agreement No. 9718-8—California*

*Japan/Korea Space Charter Agreement* is made a part of the record in this proceeding; and

\* \* \*

2. The Commission Order originally related to the seven agreements that are enumerated in the caption of this case. As a result of settlement negotiations between the parties, Agreement Nos. 10116 and 10274, respectively, which are pooling agreements, were completely withdrawn. The other agreements, which are space charter agreements were proffered as new agreements numbered 9718-10, 973110, 9835-1 and 9975-9, respectively.<sup>7</sup>

3. The remand mentioned in the Commission's November 19, 1982, Order is from the United States Court of Appeals for the District of Columbia Circuit. It is reported as *Sea-Land Service Inc., et al. v. United States*, 683 F.2d 491 (D.C. Cir., 1982). In reviewing the Commission's Order of January 16, 1981, wherein the Commission extended the agreements involved here through August 22, 1983, and concluded that a hearing was not necessary, the Circuit Court stated:

We disagree with the Commission's characterization of the issues here as questions of law or policy. Our review of the record convinces us that a number of issues raised by petitioners clearly involve questions of fact which require an evidentiary hearing. To illustrate this point we will briefly detail the material disputes presented by the parties.

and further:

Accordingly we remand to the Commission with directions to conduct a hearing on the disputed material issues of fact raised by the petitioners, including the following: (1) the occurrence and effects of bloc voting within conferences that include signatories to the agreements; (2) potential anticompetitive effects of the agreements resulting from preexisting economic relationships among the signatories; (3) the observance by the signatories of the geographic limitations, pooling limits, and reporting, requirements specified in the agreements; (4) the occurrence and effects of overtonnaging in the trades covered by the agreements and the potential impact the agreements will have on this problem; and (5) the extent and significance of any involvement of the Japanese government in formulating the policies and practices of the signatories. The Commission should also consider any other material issues of disputed fact raised by petitioners that constitute more than bare allegations.

4. On August 19, 1983, the Commission served an "Order Amending Order of Investigation and Conditionally Approving Certain Agreements

<sup>7</sup>The old and new agreements have been filed with the Commission's Secretary and have also been submitted by the Proponents as appendices to various documents. They are incorporated herein by reference.

Pendente Lite," wherein it approved the agreements in issue subject to certain conditions.<sup>8</sup>

5. Following many months of intensive litigative efforts and after several pretrial hearings, the case came on for hearing on December 6, 1983. At that time counsel for the Proponents indicated that, "the parties on both sides are in a position at this time to resolve their differences. The proponents accordingly have made the decision to revise their agreements forthwith, being of the view that if these revisions are appropriately made that they will satisfy the objections of the protestants." The Protestants agreed that the statement was correct.

6. In accordance with the agreement of the parties in this proceeding the Proponents filed four amended space charter agreements designated respectively, as Nos. 9718-10, 9731-10, 9835-7 and 9975-9. Also, in accordance with the agreement of the parties the Proponents withdrew their two revenue pooling agreements. Also, on January 16, 1984, 'the Proponents filed a motion in the United States Circuit Court of Appeals for the District of Columbia to dismiss their Petition for Review of the Commission's August 19, 1983, Order. The Proponents' Motion was granted by the Appeals Court on January 27, 1984. Finally, on February 13, 1984, the Proponents further amended their space charter agreements at the behest of Hearing Counsel. The agreements were not renumbered as a result of these further changes.

7. On February 22, 1984, the Proponents filed a motion with the Commission, entitled "Motion to Amend Order of Conditional Approval *Pendente Lite* and to Expedite Consideration Thereof." In the motion the Proponents requested that the Commission increase, pending final resolution of this proceeding, the limitations on total fleet capacities placed on them in the Commission's August 19th Order. At the same time Proponents withdrew various other motions that were then pending with the Commission.

8. On May 1, 1984, the Commission issued an "Order Further Amending Order of Investigation and Conditionally Approving Certain Agreements *Pendente Lite*." In its order the Commission terminated its prior *pendente lite* approval of Agreements Nos. 9718-9, 9731-9, 9835-6 and 9975-8, respectively, and then approved *pendente lite* Agreements Nos. 9718-10, 9731-10, 9835-7 and 9975-9, respectively, subject to certain conditions, including specific limitations on total liner container vessel capacities deployed in each trade. By amendments received on May 3, 1984, the Proponents complied with the conditions set down in the Commission Order regarding total liner container vessel capacities.

9. Agreement Nos. 9718-10, 9731-10, 9835-7 and 9975-9 (collectively, "the Agreements") are space chartering and vessel coordination arrangements which provide for the employment of containership vessels in the Japan-United States trades. In the case of Agreement No. 9718-10, vessels

<sup>8</sup>Reported at 22 Pike & Fischer, Shipping Regulation Reports (SRR) 307.

may also be employed in the Korean-U.S. trade. Ex. 1, para. 7; Ex. 2, paras. 7-8.

10. The Agreements contain virtually the same provisions, their earlier prototypes having been sequentially filed with, and approved by, the Commission over a period of years. Once the structure was devised for the first of the agreements in 1968, the basic format of that agreement was thereafter followed. Ex. 1, para. 8; Ex. 2, para. 6.

11. The article entitled "Sailings" authorizes the coordinated scheduling and advertising of sailings as to promote optimum utilization. The article entitled "Containerized Cargo" clarifies that only container cargo is the cargo subject to the Agreements, but that the parties are not precluded from carrying on their agreement vessels other available cargo. The article entitled "Solicitation" assures that the parties will solicit cargo only for their own separate accounts and not jointly. The article entitled "Bills of Lading" assures that bills of lading will be issued separately by each of the parties and not on a common basis. The article entitled "Charterage" authorizes the shipment of loaded and empty containers on each other's vessels and the chartering to and from each other equal blocks of space (in the case of Agreement No. 9731, "certain" blocks of space) on terms as the parties may agree. The article also authorizes the chartering to one another of additional space should a party need more space than the space it has on a particular vessel. The article entitled "Accountings" prohibits the pooling of revenues or sharing of operational expenses except, in the case of jointly-owned vessels, operational expenses may be shared. The article permits the sharing of administrative expenses. In view of the exchange of containers in equal blocks, no accountings are contemplated. Accountings are contemplated in respect to the chartering of additional space. Adjustments in accounts are also contemplated in the case of force majeure situations. The article entitled "Container Interchange" permits the interchange of empty containers and/or related equipment on terms as may be agreed. In addition, there are articles entitled "Modifications," "Withdrawal" and "Duration" which allow changes in the Agreement terms, withdrawal on 90 day's prior notice and provide for a five year term effective to and including August 22, 1988. Ex. 1, paras. 10-16, 18-19; App. 1; Ex. 2, paras. 8-13, 15, App. 1.

12. A final article entitled "Conditions" imposes maximum capacity levels, transshipment levels (except under Agreement No. 9975) and comprehensive reporting requirements. Paragraph (A) of the article sets forth the total annual capacity of the vessels which are to be operated in any calendar year, all of which may be cross-chartered among the parties. Beyond this space, which is based upon standard operating capacities, additional space may be used when operating conditions permit. Paragraph (A) also allows the parties, in their non-agreement containership services, to call at Japan and thus to compete to a limited extent with their Agreement services. Paragraph (B) explicitly clarifies what has long been an accepted

practice, the loading and discharging of transshipment cargo "irrespective of its origin or destination." The paragraph imposes limitations on the parties' carryings, however, in respect to cargo originating or terminating only in Indonesia, Malaysia, Singapore or Thailand (except under Agreement No. 9975). Paragraph (C) of the article imposes a comprehensive reporting requirement to be accomplished semiannually in accordance with an attached format. Ex. 1, paras. 17, 21; Ex. 2, paras 14, 15.

13. Japan Line, "K" Line, Mitsui-OSK and Y-S Line are parties to Agreement No. 9718-10; NYK and Showa are parties to Agreement No. 9731-10; all six Japanese lines are parties to Agreement No. 9835-7; and all but Showa are parties to Agreement No. 9975-9. Ex. 1, paras. 29, 34; Ex. 2, para. 5.

14. Agreement No. 9718-10 permits the employment of the parties' vessels in the trades between ports in Japan and Korea and California; Agreement No. 9731-10 permits the employment of the parties' vessels in the trade between Japan and California, Hawaii and Alaska; Agreement No. 9835-7 permits employment of the parties' vessels in the trade between Japan and Oregon and Washington ports; and Agreement No. 9975-9 permits the employment of the parties' vessels between ports in Japan and ports on the U.S. Atlantic Coast of North America. Additionally, it authorizes the utilization of U.S. documented feeder vessels and/or barges at U.S. Atlantic ports. Ex. 1, paras. 20, 29, 34; Ex. 2, paras. 7-8.

15. The sense of each Agreement is that the parties may agree to operate, utilize or substitute such vessels as they may see fit, but within, and not in excess of, the capacity levels as the particular Agreement sets forth. Ex. 1, paras. 21, 74-76, App. 1; Ex. 2, paras. 16, 41-42, App. 1.

16. As far back as 1968, the Agreements have been the subject of continuing governmental direction by the Japanese Ministry of Transport. The Ministry's role has been limited to assuring that its broad policy objectives are carried out, the basic objective relating to the achievement of stable trading conditions in the relevant Agreement trades. Ex. 1, paras. 55-57; Ex. 2, para. 34.

17. Originally, the Commission's approvals limited the number of vessels which could be operated on a coordinated basis. By order of January 16, 1981, the Commission discontinued this limitation on vessels and substituted a limitation on the TEU space which could be cooperatively chartered. Under the Commission's *pendente lite* order of August 19, 1983, an additional limitation was temporarily imposed on the parties' total vessel capacities, sized to the total capacities which had, at the time, been employed on the vessels operated under each Agreement. The latest agreements would in lieu thereof impose limits on the annual TEU capacity which could be operated under each Agreement during a calendar year. Ex. 1, para. 21, App. 1; Ex. 2, para. 6, App. 1.

18. The Agreements, as revised, differ from those which the parties initially filed in the following manner: A third Whereas Clause clarifies

that the vessels which may be operated are those which the parties may agree upon subject to the annual TEU capacity levels as stated in each Agreement. A fourth Whereas Clause provides that the services offered will be the parties' exclusive services in the Japan trade, subject to certain limited independent vessel callings at Japan. The group concept under Agreement Nos. 9718 and 9835 has been deleted. The authority under Agreement Nos. 9731 and 9835 reposed in NYK and Showa to share agents has been deleted. The authority to share operational expenses in the case of jointly-owned vessels has been clarified, and such authority has been added as a clarification under Agreement No. 9975. A requirement to report the essential terms of space chartering and, if requested, the level of compensation, has been added. The authority to substitute vessels in the event of labor disturbances has been deleted as unnecessary. A requirement to report the essential terms of interchanges has been added. A new provision, entitled "Conditions," has been added, specifying annual capacity levels under the Agreements and of Japan cargo which may be carried outside the Agreements calling at Japan. Also, under the provision, explicit clarifying authority to carry transshipment cargo has been provided, together with certain limits on the parties' transshipment carryings to or from certain named countries. Finally, the provision adds new comprehensive reporting requirements. Ex. 1, paras. 11-121, App. 1; Ex. 2, paras. 16, App. 1.

19. Some of the aforementioned revisions were prompted upon the parties' own initiative. Others were included upon the instance of the Commission's staff, including the Office of Hearing Counsel. And, still others were adopted by the parties in deference to the concerns of one or more of the protestants. The latter category of revisions followed informal discussions among the attorneys for proponents and protestants held for the purpose of identifying each party's particular concerns in the proceeding. As a consequence of revising the Agreements, each of the protestants no longer opposes the Agreements, and, therefore, does not contest the issues specifically assigned by the Commission for investigation resulting from the remand by the U.S. Court of Appeals for the District of Columbia Circuit, these being issues which had been raised by the protestants. Moreover, as proponents' revisions have also operated to satisfy the concerns of Hearing Counsel, the parties have agreed that other issues raised by the Commission are now moot. Ex. 1, paras. 22-23; Ex. 2, para. 17.

20. Although proponents have adopted revisions to the Agreements as initially filed, and although each protestant has elected not to oppose the revised Agreements, all parties to this proceeding agree that there is no continuing agreement among them, which would prevent the proponents from further modifying the agreements or from seeking authority to operate under new and different arrangements in the future. Ex. 1, para. 23; Ex. 2, paras. 17, 43.

21. Under Agreement No. 9718, the parties operate an eight vessel container service; under Agreement No. 9731, they operate a four vessel service; under Agreement No. 9835, they operate a six vessel service; and under Agreement No. 9975, they operate an eight vessel service—a total of 26 Agreement vessels in the U.S. trades. Ex. 1, paras. 24-25, 27-29; Ex. 2, para. 18.

22. Under their Government's 38th and 39th Shipbuilding Programs, the parties considered it essential to replace a number of their older vessels which were between 10 and 15 years old and which had been overtaken by technological advances and were no longer cost competitive in the trade with their major competitors. Plans were made and approvals and financing were obtained (from our Government through the Japan Development Bank) to replace a total of 10 vessels between 1981 and 1985. Five vessels were planned for Agreement No. 9718, two for Agreement No. 9731 and three for Agreement No. 9835. Subsequent review of capacity requirements and utilizations, however, have shown there is now a greater need for additional capacity under Agreement No. 9835. Hence, the present deployment calls for only three vessels for Agreement No. 9718, only one vessel for Agreement No. 9731, and a total of six for Agreement No. 9835 where current capacity is already fully utilized.

23. The capacity increases, which arise as a result of the replacement of larger, more economical vessels, and which are the first significant increase since 1974, are as follows:

Agreement No. 9718—2,815 TEU's  
Agreement No. 9731—971 TEU's  
Agreement No. 9835—2,982 TEU's

Although no replacements have been carried out in the case of Agreement No. 9975 operations, the capacity level stated in Article 14 of that Agreement represents a 15 percent increase over the current annual capacity level. Overall, capacity under the four Agreements will increase by approximately 30 percent by 1985, more than half of which is already in service *pendente lite*. Ex. 1, paras. 74-77; Ex. 2, paras. 36, 43.

24. By space chartering and vessel coordination, competitive service is made possible under each Agreement which would not be possible with the limited number of vessels absent the Agreements. The service frequency is as follows:

Agreement No. 9718—semiweekly  
Agreement No. 9731—weekly  
Agreement No. 9835—five days  
Agreement No. 9975—weekly

Ex. 1, paras. 24, 32, 33, 37; Ex. 2, para. 24.

25. The Agreements have materially reduced the need for adding additional vessels. Since 1974, no vessels have been added under the Pacific

Coast space charter operations, and only one vessel was added in 1976 for their Atlantic Coast operations, although older vessels have been, and are being, replaced from time to time. Service to shippers under the Agreements has been stable and unvarying since the parties' fleets were completed in the mid-1970's, the parties having uniformly provided reliable service levels to their customers:

- Agreement No. 9718—89-93 annual sailings
- Agreement No. 9731—46-49 annual sailings
- Agreement No. 9835—67-73 annual sailings
- Agreement No. 9975—48-52 annual sailings

Ex. 1, paras. 31-32, 34, 40-41, 74; Ex. 2, paras. 18, 21, 23.

26. The space chartering and vessel coordination features of the Agreements have also enabled the parties, using a limited number of vessels, to serve a large number of ports. Ports which have been served regularly and occasionally include:

- Agreement No. 9718—Oakland, Los Angeles/Long Beach—Kobe, Tokyo, Nagoya, Shimizu, Busan.
- Agreement No. 9731—Oakland, Los Angeles—Kobe, Tokyo, Nagoya, Shimizu.
- Agreement No. 9835—Portland, Seattle, Vancouver—Kobe, Tokyo (or Yokohama), Nagoya, Shimizu.
- Agreement No. 9975—Kobe, Tokyo, Nagoya, Shimizu—Baltimore, Boston, Jacksonville, New York, Norfolk, Philadelphia, Savannah, Wilmington.

Ex. 1, para. 29, App. 3,

Ex. 2, para. 20, App. 3.

27. The ability to charter a predetermined amount of space on one another's vessels under the Agreements produces a larger number of shipping opportunities with the deployment of a minimum of capital resources. For example, by space chartering, the individual carrier parties are thereby placed in a position to offer a frequency of service which they could not offer absent the introduction of a substantially greater number of vessels. This conservation of resources and offering of competitive service by six individual carriers is beneficial to the trade, as a whole. Similarly, the ability to coordinate the sailing schedules of the parties' vessels is indispensable to assuring regular and evenly-spaced competitive service frequency upon which shippers rely. These are the principles which underlie the chartering and vessel coordination provisions of the Agreements. Ex. 1, paras. 31-33, 35, 37-40; Ex. 2, paras. 23, 26, 28.

28. Experience, over many years, in implementing the current and earlier prototypes of the Agreements shows that under these provisions the parties have had a high degree of frequent and regular sailings and without major service interruptions, thereby holding any inconvenience to shippers at a

minimum. Efficient, frequent and regular service has thus been provided under the Agreements. Ex. I, paras. 31-34, 36-37; paras. 22-24.

29. Without the Agreements, many of the benefits-efficient, reliable and regular competitive service—could not be achieved absent the development of individual fleets sized to produce individual competitive services. As the parties cannot be expected to abandon their national trade with the United States if the Agreements were not approved, more ships would be added and this would produce more tonnage in the trade. Ex. 1, paras. 38, 40-42; Ex. 2, paras. 21-22, 26.

30. Despite a mild down turn in cargo in 1982 and a temporary decline in utilizations, the ability to rationalize through space chartering and vessel coordination has enabled the parties to remain committed to offering full service at a broad range of ports. Despite the "ups and downs," the Agreements help to provide a reliable service commitment. This is particularly made possible by the ability to schedule and coordinate sailings, as shippers can rely on fixed arrivals and departures, thus allowing them flexibility in planning their future transportation needs. The ability just to space charter is not enough, as there could be no assurance when a ship would arrive or depart. In these circumstances, the parties would be disadvantaged in competing against other carriers. Ex. 1, paras. 36-38, 59-60, App. 13; Ex. 2, paras. 28, 34.

31. Without vessel coordinating authority, a natural decision of a vessel owner would be to schedule its vessel late in the month at Japanese ports, thus causing a bunching of sailings with wide gaps at other times. This is because there is an established tendency of cargo from Japan to increase near the end of the month as letters of credit expire. Ex. 1, para. 39; Ex. 2, para. 28.

32. As Japan is an island nation with limited resources, the nation is extremely dependent on its national flag ocean liner services to assure that the lines of commerce will remain open. Therefore, any disruption in proponents' space chartering and vessel coordination would impact adversely upon these channels of commerce. Ex. 2, para. 33.

33. With fewer vessels, operations under the Agreements require less fuel to serve the same routes with the same schedules. Fuel savings are believed to be very substantial. The ability to utilize fewer vessels also serves to reduce marine and air pollution. Ex. 1, paras. 43-46; Ex. 2, paras. 22, 30-32.

34. The ability to coordinate sailings under the Agreements has served, and will serve, to reduce port and terminal congestion, as departures and arrivals at or about the same time would be eliminated. Terminal congestion has been, and will continue to be, reduced, as space chartering enables the use of a single terminal facility. Even if the same terminal facility were used, the impact on terminal use would be negative if there were no vessel coordination. In such a case, schedules would conflict and overlap, leading to delays in berthing and, at other times, the idleness of port

facilities. Reducing terminal and port congestion also decreases the risks of marine collisions. Under the Agreements, Portland and Oakland terminal facilities have experienced less congestion and greater efficiencies. Ex. 1, paras. 47-52, Apps. 9, 10, 10A; Ex. 2, paras. 22, 31-32.

35. Not only have and will the Agreements enhance the efficient deployment of vessels and the use of resources, the regularity and dependability of service they provide enable shippers to reduce their equipment inventory requirement, thus reducing the time that cargo sits idle while awaiting shipment. This, in turn, reduces problems with cash flow which shippers may experience while cargo remains idle. Ex. 1, para. 53; Ex. 2, para. 22, 32.

36. As a general principle, reducing capital expenditures encourages high-quality service and technological innovations. Ex. 1, para. 54; Ex. 22, para. 32.

37. The nature of U.S. ocean shipping is that, from time to time, the foreign waterborne trades are subject to overtonnaging in one degree or another. This is true in the case of the Japan-U.S. trade and the Far East-U.S. trade. The Far East-U.S. Pacific Coast trade is a very cyclical trade, particularly Eastbound. Beginning with 1979 and into 1980, declining cargoes coupled with capacity expansions resulted in depressed utilizations and serious overtonnaging. By late 1980 and through 1981 cargoes rebounded, capacity stabilized and utilizations improved. The second half of 1982 then witnessed more capacity increases and a slowing of growth. By 1983, however, strong cargo growth had again produced an equilibrium of capacity and cargo availability. Ex. 1, paras. 59-61; Ex. 2, paras. 34-39; Affidavit of Mr. Tucker (hereafter Ex. 3), pages 22-24.

38. The nature of the trade is such that shipowners must size their operations in a manner which will enable them to accommodate peak cargo situations, as well as foreseeable market growth. In this regard, all carriers, including parties operating under section 15 agreements, must be in a position to respond to trade fluctuations and improvements brought on by economic uprisings in the market. The parties' current inability under Agreement No. 9835 to meet the capacity needs of PNW (Pacific Northwest) shippers is a case in point. Ex. 1, paras. 61, 62, Apps. 11, 12; Ex. 2, paras. 34, 43; App. 7; Ex. 3, pp. 4, 19.

39. Currently (1983 second half), the parties' Eastbound carryings have strongly rebounded with the worldwide recovery:

Agreement	July-Dec., 1982	July-Dec., 1983	Increase
9718	40,386	55,088	36%
9731	18,538	25,405	37%
9835	36,220	45,344	27%

Ex. 1, para. 63; Ex. 2, para. 37.

40. A natural phenomenon of replacing a fleet with larger vessels is to experience some immediate decline in utilizations. This is what happened

when the parties began their replacement program in 1981. Had the vessels not been introduced, the parties would have been close to overbooked. Even so, by the second half of 1983, the parties' utilizations were strongly up, although five of their ten replacement vessels were already in place:

Agreement	Utilization
9718	85%
9731	80%
9835	98%

The remaining replacements will increase total Pacific Coast capacity by only 13.7 percent. Ex. 1, paras. 60, 75, App. 2-5; Ex. 2, para. 36; Ex. 3, p. 19.

41. A further factor in adjudging utilizations relates to the volume of cargo which may be carried on a particular leg of the movement. While in the California trades, Westbound utilizations have remained in the 60-70 percent range, the parties' Eastbound utilizations have, as indicated, been considerably higher. This is because there is a traditionally higher volume of cargo which moves from the Far East encouraged by the continued strength of the U.S. dollar. In considering utilizations and the need for replacing capacity, carryings on the dominant leg must be the controlling consideration, although this is moderated somewhat by the preponderance of heavy, dense cargoes Westbound which cause the parties' vessels to "Weigh out" prior to reaching their standard TEU capacity. In the PNW trade, Westbound utilizations have remained at 90 percent for the past four years despite the dollar's strength and the parties' replacement of two vessels under Agreement No. 9835. Ex. 1, para. 61; Ex. 2, para. 36; Ex. 3, p. 20.

42. In the period 1980-1982, APL, Sea-Land and U.S. Lines have all experienced relatively high utilizations in the Pacific trades, and, with the current cargo recovery, it is probable they and other carriers are continuing to enjoy increased carryings. Further, confidence in trade growth has been shown over the past year by several new carriers entering the trades and by a number of existing carriers, including APL, Lykes, U.S. Lines, Evergreen, Maersk and Zim, expanding their capacity or announcing plans shortly to do so. Ex. 1, paras. 66, 76; Ex. 2, para. 34; Ex. 3, p. 23.

43. As there has been less fluctuation in the Atlantic Coast trade under Agreement No. 9975, and as there are fewer carriers offering a direct all-water service to the Atlantic, the parties over many years have consistently been in a position to achieve Eastbound utilizations approaching 100 percent. Ex. 1, para. 65.

44. According to U.S. Maritime Administration statistics, Far East-U.S. cargo growth for 1983 should total between 10-15 percent. For 1984-85, Mr. Tucker, proponents' economist, has predicted 9 percent growth for the Far East Eastbound trades as a whole, but with Japan growth, after 1984, leveling off a 3.5 percent annually. After 1985, Far East origin

cargoes, other than Japan cargo, are expected to return to past growth factors or approximately 6 percent annually. Throughout, Pacific Coast cargoes are expected to outperform the Atlantic, as they have over the last decade. Comparing the cargo predictions of Mr. Tucker with the remaining capacity increases under the revised agreements, there is every indication proponents' utilizations should continue to improve in both the Eastbound and Westbound directions, and that a return to serious overtonnaging is not expectable. Ex. 1, para. 64; Ex. 2, paras. 38, 40; Ex. 3, pp. 5-19.

45. There is no overall coordination among the parties to the various Agreements, and so far as the record in this proceeding shows, the decisions that affect any one Agreement are made only by the parties to that particular Agreement, each Agreement involving different operational considerations, different trades (for the most part), and not all of the same parties. For market purposes, therefore, each Agreement must be viewed individually. Ex. 1, para. 69; Ex. 2, para. 40.

46. As much as one-third of the cargo moving Eastbound under the Agreements originates in the Far East other than Japan. This trend is expected to continue as non-Japanese Far East cargo develops. This non-Japanese cargo is carried on Agreement vessels on a transshipment basis, as has been the practice since inauguration of operations. These countries include Hong Kong, Taiwan, the Philippines and other Far East and South-east countries. The relevant market to measure the Agreements is, therefore, the entire Far East trading area which is served by the parties and which is the trading area of their competitors. As the parties compete in that trade not only with conference carriers but with other competitors who operate outside of conferences, the relevant Far East market necessarily includes the tradewide liner market. Ex. 1, paras. 70-72; Ex. 2, paras. 48-49; Ex. 3, p. 5-7.

47. As is shown in the Affidavit of Mr. Tucker, the Eastbound Far East-United States Pacific Coast market share of the parties under the Agreements steadily declined through 1981, as third flag and developing national flag fleets have emerged, but has stabilized since that time at 24-25 percent. Ex. 2, paras. 40; Ex. 3, pp. 20-22.

48. The primary purpose of the Agreements is to enable the parties to charter space on each other's vessels. This is how the Agreements were permitted to operate in the beginning before the Commission's January 16, 1981 order freezing the space which could be chartered at levels which had prevailed since 1974 in the Pacific and 1976 in the Atlantic. The replacement of Agreement vessels with larger vessels starting in 1981, however, and the inability to charter their full capacity has created operational problems for the individual vessel owners and has served to deny the parties the right to rationalize the full capacity of their vessels. The annual capacity levels under the Agreements are based upon the maximum number of sailings contemplated times the capacities of the vessels now

in operation, taking into consideration the vessels being replaced. This, in a very practical sense, may render it unnecessary to place limitations upon the space which can be chartered. Ex. 1, para. 78; Ex. 2, paras. 41.

49. The capacities of the vessels upon which the annual capacity levels are based are stated on the basis of the vessels' standard operating capacities which normally means loading up to the third tier. The Agreements permit the parties to use, however, the space above the third tier when operating conditions permit. This will enable an efficient use of the full capacity of the vessels. As the space above the third tier fluctuates from sailing to sailing depending upon operational considerations, it is not practical to include it in the annual capacity levels named in the Agreements. It is, moreover, an accepted industry practice to size the capacity of a vessel on the basis of its standard operating capacity, as it is to calculate utilizations on the basis of the containers which are loaded aboard a vessel as a percentage of the vessel's standard operating capacity. Ex. 1, paras. 81-85, App. 15; Ex. 2, paras. 44-46, App. 7.

50. During the period the space charter program has been in operation, no party has had a serious need to operate a containership in the Japan trade independent of the coordinated services, although several lines have introduced separate Far East-U.S. Pacific Coast services. For the future, however, one or more of the parties will call at Japan on an individual basis. However, in order to safeguard the benefits derived from space chartering, the parties have restricted the cargo which is carried outside of the Agreements to 3 percent of the capacity authorized under their space charter operations. Ex. 1, para. 86; Ex. 2, para. 47.

51. Although there is no TEU limitation on transshipment cargo carried to or from other Far East countries, the Pacific Coast Agreements limit such carryings of the parties in the Indonesia, Malaysia, Singapore and Thailand trades. The limits are based upon the parties' historical carryings and Mr. Tucker's projections of market growth in those trades. The parties decided to impose the limits in these trades because of the concerns identified by one of the protestants which actively serves these trades. Ex. 1, paras. 17, 21, 88-89, App. 1; Ex. 2, paras. 14, 16, 49, App. 1; Ex. 3, pp. 11-12, 13-14, 16-19.

52. Only a few Agreement vessels are jointly-owned by some of the parties. Certain instances of joint ownerships arose early in the formation of the Agreements and represented an effort to conserve capital resources. When other vessels were added and it became possible for each party to operate its own vessel, most of the joint ownerships were abandoned. There remain at present only six jointly owned vessels, four under Agreement No. 9731, one under Agreement No. 9835 and the other under Agreement No. 9975. Accordingly, clarifying authority to share operational expenses between the owning parties has been included under each Agreement, although the parties consider such expenses necessarily may be appropriately

shared between joint owners. Ex. 1, paras. 21, 87; Ex. 2, paras. 12, 16, 50.

### Ultimate Findings of Fact

53. On the basis of the record in this proceeding, the Proponents have sustained their burden of proof that the space charter and vessel coordination provisions of the agreements in issue will provide substantial public benefits which outweigh any possible negative antitrust considerations.

54. The discussions among Proponents' and Protestants' counsel, whose purpose was to reach a basis of settlement on the issues involved in this proceeding do not require a separate section 15 filing. Such discussions do not constitute new "agreements" within the meaning of section 15 of the Shipping Act, and are adequately explained in the record of this case.

55. Since the parties have agreed that there are no disputed material issues of fact the specific areas set forth on remand and in the Commission's Order of Investigation and Hearing need not be considered from the specific points of view set forth in the remand. Instead, the issue involved is whether or not on the record made the requirements of section 15 and the pertinent case law have been satisfied so as to warrant approval of the agreements.

### Discussion and Conclusions

#### I. Preliminary Matters

It should be noted at the outset that throughout the pendency of this proceeding both in the Commission and in the Circuit Court of Appeals there have been many actions of an interim nature, such as *pendente lite* orders, oral argument before the Commission, etc. To the extent we deemed them material and relevant to the decision made here we have included them in the findings of fact. However, we chose not to chronicle every action taken since to do so would unduly burden the record and was not necessary to the decision itself.

It is also important to note that on May 10, 1984, a Procedural Order was promulgated by the Administrative Law Judge wherein he ordered that the latest agreements filed by the Proponents in this proceeding be published in the *Federal Register* so as to allow, within 10 days, any comments, protests and requests for hearing *relating to those portions of the agreements which represent an expansion of the authority sought in the prior agreements* filed by the Proponents. This was done as a precaution to forestall any questions which might arise because of the holding in *Sea-Land Service, Inc. v. Federal Maritime Commission*, 653 F.2d 544

(D.C. Cir., 1981).<sup>9</sup> There, the Court held that where changes expand the authority sought notice is necessary, but where changes restrict rather than expand, additional notice is not necessary. In ordering the 10 day *Federal Register* notice we sought to avoid any potential problems that might later arise and to expedite this Initial Decision. Our action should not be construed as a determination that the new agreements represent an enlargement of the authority sought in the old agreements. That question only need be addressed if it arises within the 10 day notice period.

## II. Filing of Agreements Under Section 15

Section 15 provides that:

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

We hold that in this proceeding there are no agreements, other than those already on file, which need to be filed within the ambit of section 15. Specifically, we hold that the decision in *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82 (1970), is inapplicable to this proceeding because the record in the instant case is materially distinguishable from *Isbrandtsen* on the facts. In *Isbrandtsen, supra*, the Commission held that where parties to a case brought before the Maritime Subsidy Board of the Maritime Administration entered into a settlement agreement, the agreement was subject to section 15 jurisdiction because it provided for a cooperative working arrangement, constituted a special privilege or advantage and controlled or regulated competition. Here, unlike *Isbrandtsen*, the litigation originated in the Commission precisely because the original agreements were filed with the Commission and other parties protested their implementation. While the agreements have been amended since they were originally filed, the latest agreements reflect a settlement of a formal docketed Commission

<sup>9</sup> While the new agreements generally represent a diminution of requested authority, establishing capacity levels on an annual TEU basis, which total capacity limitations were required by the Commission in its *pendente lite* orders, does have the effect of increasing previous space charter capacities.

proceeding resulting from negotiations amongst counsel for the litigating parties. We hold that given those facts and the record in this proceeding the "agreements" which are subject to section 15 scrutiny here are the written agreements which already have been filed and not the discussions engaged in by counsel.<sup>10</sup>

### III. *The Remand From the D.C. Circuit Court of Appeals and the Order of Investigation and Hearing*

As is set forth in the Findings of Fact, this proceeding originated on remand from the Court of Appeals.<sup>11</sup> In its decision the Appeals Court listed a series of disputed factual issues on which it directed the Commission to conduct hearings. The Commission in turn, ordered that hearings be held by the Administrative Law Judge on specific issues which it felt were relevant to the disposition of the disputed factual issues raised by the Appeals Court. Of course, underlying any action was the Appeals Court's direction "to conduct a hearing on the *disputed material issues of fact raised by the petitioners.*" (Emphasis supplied.)

The present state of the record in this proceeding is that the Proponents of both pooling agreements, Nos. 10116 and 10274, respectively, have withdrawn them so as to make unnecessary determination of several of the "disputed" material issues referred to by the Appeals Court. Further, and more importantly, all of the Protestants have withdrawn any objection to the four space charter agreements now on file, and Hearing Counsel raises no objection to them, so that there are no "disputed" material issues remaining. We hold, therefore, that the issues raised on remand need not be specifically determined. Further, we hold that since the Circuit Court did not remand the record in the case to the Commission, it did not retain jurisdiction over the case.<sup>12</sup> In essence, the settlement amongst the parties and the filing of the new agreements renders inapplicable the issues raised in the remand from the District of Columbia Circuit Court of Appeals and the related issues contained in the Commission's Order of Investigation and Hearing. Such holding, of course, does not obviate the need to determine whether or not the agreements in question are approvable within the general standards set forth in section 15 and the applicable case law.

### IV. *The "Svenska" Criteria*

Section 15 of the Shipping Act, 1916, requires the Commission to disapprove agreements which are found "contrary to the public interest."

<sup>10</sup> See the Commission's "Order Partially Adopting Initial Decision," served on February 29, 1984, in Docket No. 83-28, *In Re Agreement Nos. 10457, et al.* 26 F.M.C. 191.

<sup>11</sup> *Sea-Land Service, Inc. v. USA and FMC et al.*, 683 F.2d 491 (D.C. Cir., 1982).

<sup>12</sup> See Rule 13(d), U.S. Court of Appeals for the District of Columbia Circuit. Further, the pertinent parties have indicated they did not dismiss the Circuit Court action as part of the overall settlement because they believed the Circuit Court did not retain jurisdiction over the matter.

In *FMC v. Aktiebolaget Svenska Amerika Linien*, 389 U.S. 816 (1967), the Supreme Court stated:

The antitrust standard imposed by the Commission in *Svenska* required the carriers to justify an anticompetitive agreement which was a *per se* violation of the anti-trust laws by demonstrating that it was “required by a serious transportation need, necessary to secure important public benefits, or in the furtherance of a valid regulatory purpose of the Shipping Act,” *U.S. Lines v. FMC*, 584 F.2d 519, 528 n. 28 (D.C. Cir. 1978). (Citations omitted.)

Once the proponents of agreements seeking approval do come forward with evidence to support their burden of proof the Commission generally weighs the potential benefits against the possible harmful effects of the agreements, and in the process must consider the extent to which the agreements violate anti-trust laws and policies. In weighing the pros and cons of agreements the Commission recognizes that the extent of the proponents burden will vary in accordance with the type and scope of the agreement under consideration. In *Agreement No. 57-96, Pacific Westbound Conference—Extension of Authority for Intermodal Services*, 19 F.M.C. 289, 300 (1976), the Commission stated:

[T]he extent of the justification that need be shown for such approval will, of course, vary from case to case with the intensity of the otherwise “illegal restraint” involved. Thus, the “legitimate commercial objectives” which the Commission will accept as evidencing the necessity for restraint will generally be determined by the type and scope of the agreement under consideration.

See also *Agreement No. 8760-5—Modification of the East Coast United States and Canada/India, Pakistan, Burma and Ceylon Rate Agreement*, 17 F.M.C. 61, 62 (1973).

In applying the above criteria to the instant proceeding, we begin by disregarding both pooling agreements which have been withdrawn. Their withdrawal removes the most objectionable and anti-competitive arrangements from our consideration altogether. What remains are four space chartering agreements which limit total capacity by inclusion of annual TEU capacity levels, and which impose other limits on transshipment and non-agreement carryings, eliminate sub-groups within an agreement, delete the right to share agents in certain cases, and require comprehensive semi-annual reporting.

The benefits accruing from the four agreements have been found as fact from the uncontroverted evidence submitted by Messrs. Kawamura (Ex. 1), Hirano (Ex. 2) and Tucker (Ex. 3). For example, by space chartering and vessel coordination, competitive service is made available, which service would not be possible with the limited number of vessels absent the agreements; the need for additional vessels has been reduced and service to

shippers under the agreements has been stable since reliable service levels have been provided; the parties have been able to serve a large number of ports using a limited number of vessels; despite normal "ups" and "downs" the agreements help provide a reliable service commitment. Further, the ability to coordinate sailings reduces port and terminal congestion and because fewer vessels are needed under the agreements less fuel is required to service the same routes. The regularity of service also enables shippers to reduce their equipment inventory and capital expenditures.

Finally, with respect to overtonnaging, it is true that the nature of U.S. ocean shipping is that from time to time declining cargoes coupled with capacity expansion result in overtonnaging. This was true in the case of the Japan-U.S. trade and the Far East-U.S. trade in the 1979-1980 period. Since 1981, however, cargoes rebounded, capacity stabilized and utilizations improved. By 1983, strong cargo growth had again produced an equilibrium of capacity and cargo availability. Given the cargo predictions of the Proponents' witness it is likely that their utilizations should continue to improve in both the Eastbound and Westbound directions, and that a return to serious overtonnaging will not occur.

In the face of the above, as well as many other factors which lead one to conclude the public benefits from these agreements far outweigh any anticompetitive consequences which might violate anti-trust laws or policies, the record in this case is devoid of any evidence which would justify any other conclusion. Indeed, all of the primary Protestants, who presumably are also the Proponents' major competitors, agree that the latest agreements should be approved. Sea-Land in its legal memorandum states:

The actions which Proponents took to satisfy the concerns of Sea-Land and/or other Protestants were detailed in Proponents' filing, and they need not be detailed again here. Briefly stated, those actions consisted of the following:

- imposition of effective and realistic capacity limitations upon each of the four space charter agreements;
- designation of the space charter agreement services as essentially Proponents' sole containership services in the Japan-U.S. trades;
- establishment of a limitation on the carriage of transshipment cargo to/from four important Far East markets in the three West Coast space charter agreements; and
- elimination of the revenue pooling agreements.

\* \* \*

In making the determination not to oppose the amended agreements, the key considerations for Sea-Land were, quite obviously, (1) the fact that the actions taken by Proponents will serve to diminish their competitive impact upon Sea-Land, and (2) the fact that continuing to oppose the agreements would involve a further expenditure of time, money and effort in a proceeding which has already been a lengthy and expensive one, and the

outcome of which is by no means certain. The first of these considerations was by far the more important of the two, and it should be elaborated upon, particularly from the point of view of how the actions taken by Proponents address Sea-Land's past concerns regarding their agreements.

b. Actions of Proponents Addressing Specific Sea-Land Concerns.

First, the prior filings of Sea-Land regarding Proponents' agreements are permeated with concern over overtonnaging in the Transpacific trades, and the fact that the space charter agreements under which Proponents had been operating did not contain any provision effectively limiting the amount of vessel capacity which Proponents could deploy thereunder.<sup>8</sup> The annual capacity limitations which Proponents have decided to include in each of their amended space charter agreements are real and effective ones, and thus they go a long way toward satisfying those concerns. The further step taken by Proponents of designating their agreement services as essentially their exclusive containership services in the Japan-U.S. trades serves to ensure that the capacity limitations will not be undermined by the initiation of non-agreement services in those trades. (Carriage of small amounts of cargo to/from Japan by non-agreement containerships is permitted to enable Proponents to meet extraordinary situations.)

While the capacity limitations included in the agreements would permit Proponents to deploy more capacity than they are now deploying, it must be kept in mind that the agreements have a five year term, through August 22, 1988. To be realistic, the limitations must take into account the amount by which cargo is expected to grow during the period that the agreements are in effect. In this connection, the affidavits submitted by Proponents' witnesses establish that the limitations are indeed realistic ones when their own forecasts of cargo growth are taken into account. Thus Mr. Kawamura, one of Proponents' company witnesses, states at ¶77 (p. 44) of this affidavit:

Based on our assessment of current and foreseeable market conditions, we anticipate these planned increases [in capacity] under Agreement Nos. 9731, 9835, and 9975 will be sufficient to enable us to carry our existing market share for the duration of the Agreements.

The affidavit of Mr. Hirano, Proponents' other company witness, includes a similar statement at ¶43 (p. 24). Those statements are fully confirmed by the comparison of projected cargo growth and the growth in Proponents' capacity done by Mr. Tucker,

<sup>8</sup>Capacity limitations of this nature were, however, required by the Commission's Order of August 19, 1983, in this proceeding as a condition of *pendente lite* approval of the space charter agreements. Those Commission-mandated limitations are currently in effect.

Proponents' economic witness, which appears at page 19 of his affidavit.

That testimony of Proponents' witnesses establishes, in our view, that Proponents will not have any need to seek any increase in the capacity limitations during the term of the agreements, unless cargo growth is greater than Mr. Tucker forecasts, or there is some other unforeseen change in market conditions. To be sure, as Messrs. Kawamura and Hirano also state in the above cited paragraphs, the parties have made no commitment not to seek further revisions in their capacities. Be that as it may, the addition of unwarranted capacity to the trades by Proponents would be contrary to their own and the trades' interests, and we expect the Commission would not countenance such significantly anti-competitive activity. To reiterate, Sea-Land's position in this regard is based on what Proponents have themselves said in their affidavits as cited above.

The capacity limitations, in addition to serving to mitigate overtonnaging, also provide Sea-Land with a benchmark by which it can plan its own operations in the Transpacific trades. Considering the highly influential role which Proponents collectively play in the Transpacific trades, the importance to other carriers of having this benchmark should not be understated. Put another way, the capacity limitations provide an important measure of certainty in an area in which there was none before, and thus they will also further stability in the Transpacific trades.

Another longstanding concern of Sea-Land has been Proponents' carriage in their space charter agreement operations of cargo to and from Far Eastern countries other than Japan. Because those operations are essentially limited to calls at Japan in the Far East,<sup>9</sup> nearly all of this carriage is done on a transshipment basis. Proponents' decision to amend their West Coast space charter agreements to include limitations on the carriage of transshipment cargo to/from Indonesia, Malaysia, Singapore and Thailand addresses this concern. While the limitations apply only with regard to those four Far Eastern countries, those countries are rapidly growing markets and are also ones which Proponents serve on a non-conference basis Eastbound. Also, those limitations, like the overall capacity limitations, provide Sea-Land with an important benchmark by which it can plan its own operations.

In the memorandum of American President Lines it states:

*Capacity limitations.* The limitations on agreement capacity and non-agreement Japan calls were central to APL's decision in that regard. APL believes that it would be clearly inconsistent with the stated purpose of restraining overtonnaging if proponents were to seek to amend their agreements during their five-year terms

<sup>9</sup>Only Agreement 9718 authorizes calls at a Far East country other than Japan, its scope having been expanded to include calls at Korea on a limited basis.

to allow the operation of greater capacity unless actual trade growth exceeds their expert economist's projections (which show a correlation between the capacity increases allowed under the revised agreements and trade growth through 1988).<sup>5</sup> As to the capacity increases authorized under the revised agreements, APL has, in contemplation of the following, determined that non-objection at this time is preferable to continuation of the litigation:

(i) Each of the three Pacific agreements has an annualized capacity limitation that is clearly derived from a maximum number of annual sailings by specifically identified vessels (albeit there is no prohibition on varying vessels or sailings within the annual limit).

(ii) Each of the vessels so identified is already in service in the Pacific or already under construction or firm order pursuant to the previously announced Japanese Government shipbuilding program.

(iii) While the identified vessels include all ten of the announced larger replacement vessels for the Pacific, the operation of half of those ships was allowed by the Commission's August 19, 1983 *pendente lite* Order and hence is, for practical purposes, a *fait accompli*.

(iv) The agreements have five-year terms (of which about four and one-half years remain).

(v) Proponents' expert economist has forecast that, given his projections concerning market growth and assuming no increase in proponents' market share, the allowed capacity should be sufficient through the end of the agreements' terms. See Proponents' Exhibit No. 3 at 18-19.

(vi) Proponents' designated spokesmen have similarly stated that, based on their assessment of current and foreseeable market conditions, the allowed capacity should be sufficient for the full term of the agreements (again assuming no increase in market share). See Proponents' Exhibits Nos. 1 (¶77) and 2 (¶43).

(vii) The capacity limitations apply to all standard operating capacity on the vessels; *i.e.*, they apply to space allocated to the vessel owner as well as to space allocated to other agreement parties.

(viii) There is a requirement that space in excess of standard operating capacity be identified for each vessel.

*Other factors.* In addition to the above-noted factors concerning agreement capacity, the following factors also were important to APL's determination that non-objection to the revised agreements is preferable to continuation of the litigation: (i) the limitation of non-agreement containership Japan cargo to 3% of allowed agreement capacity; (ii) the withdrawal of the pooling agreements,

<sup>5</sup> See Proponents' Exhibit No. 3 at 19.

thus to some extent lessening the unitary tendencies of the arrangements; (iii) a desire to avoid the costs, burdens, risks, and friction of further litigation; and (iv) the uncertainties created by the prospect—and now the eventuality—of new legislation governing future agreements among carriers.

In the Lykes Bros. Steamship Co., Inc., memorandum it is stated:

Among the important considerations which led Lykes to oppose the now-withdrawn agreements was Lyke's position that agreements of this nature had not in the past always served to ameliorate overtonnage, a principal justification advanced by proponents in support, and that for this and other reasons the Commission should adopt certain policies in approving such agreements, including (1) placing limits on the trade areas served and the capacity which may be offered under such agreements, (2) approving such agreements for limited durations, (3) imposing detailed reporting requirements on the parties, and (4) conditioning further extension of such agreements upon a demonstration that the trade served will grow sufficiently to absorb any proposed capacity increases.

Lykes notes that the amended agreements are in some measure responsive to each of these concerns. It notes particularly proponents' statements (*e.g.*, Kawamura Affidavit, ¶s 76 and 77; Tucker Affidavit, pp. 18-19; and Proposed Finding No. 36) to the effect that the capacity increases provided in the amended agreements compare favorably with proponents' projections of expected increases in the liner trade over the term of the amended agreements. The amended agreements thus provide a capacity limit for an extended period, consistent with proponents' planned vessel replacement program and expectations of trade growth. Lykes would regard with very serious concern any proposed increases in capacity beyond those currently provided, and would regard as objectionable future capacity increases under the agreements inconsistent with actual trade growth.

In arriving at its position on the amended agreements Lykes has also considered the existence of independent (*i.e.*, non-agreement) services operated by proponents in some of the same trade areas covered by the amended agreements (*see, e.g.*, Proposed Finding No. 42). Lykes's position of non-opposition to the amended agreements has been formulated in consideration of the present deployment and capacity offered in these non-agreement services, and on limitations in the amended agreements upon employment of these vessels in the Japan/U.S. trades. Should changes in these services occur or should new or different services be commenced by proponents, such action could significantly alter the competitive environment in the trade and would be cause for reassessment of Lykes's views on the amended agreements.

Finally, in its memorandum (reply) Hearing Counsel stated:

With the withdrawal of the two pooling agreements and the substantial modifications made to the space-charter agreements, the agreements currently before the Commission are significantly different than those agreements remanded to the Commission. So different, in fact, that the very Protestants, on whose behalf the court acted, have now announced they will not oppose the current agreements. Thus, Protestants are no longer pressing the issues they raised before the Court of Appeals.

Indeed, many of the issues listed on pages 16-18 of the Order of Investigation and Hearing on Remand have been rendered moot by Proponents' pooling agreement withdrawals and space charter agreement modifications. Thus, issues 1 (bloc voting), 2 (joint service), and 3 (trading house relations), relate more to the agreements as previously existed. Issues 10 and 11, relating to the terms of the agreements, have also been resolved by Proponents' modifications and extensive reporting provisions.

Now that new agreements are before the Commission and the Protestants do not press the issues they raised regarding the predecessor agreements, it only remains for Proponents to justify the new agreements under *Svenska* type standards. This, Hearing Counsel submit, Proponents have done in their March 6, 1984, Brief.

Accordingly, Hearing Counsel support approval of Agreements Nos. 9718-10, 9731-10, 9835-7, and 9975-9 as now on file.

In view of the above, we hold that the Proponents have sustained the burden that is theirs under *Svenska, supra*, of justifying the agreements involved here as required by a serious transportation need, necessary to secure important public benefits and in furtherance of valid regulatory purposes.<sup>13</sup> Since the record is devoid of any evidence to the contrary the agreements are approved.

#### V. Miscellaneous Conclusions

The parties in this proceeding have all expressed the view that despite their settlement of the issues in this proceeding as reflected in the filing of the latest agreements there is no tacit or express agreement among them as to future conduct or positions. The Proponents have made no commitment of any kind to refrain from seeking to amend their agreements in the future and the Protestants would be entirely free to oppose any such amendments in whatever manner it chooses to do so. We so hold.

The Protestants in this proceeding have also expressed some concern as to the application of the doctrine of *res judicata* or collateral estoppel to each or all of them. While the record in the case does not contain

<sup>13</sup> See *Agreement No. 9835*, 14 F.M.C. 203 (1971); *Agreement Nos. 9718-3, 973-5*, 19 F.M.C. 351, 365 (1976); *Agreement No. 10422 United States-East Asia Space Charter Agreement*, 21 SRR 686, 691 (FMC 1982), for cases where the Commission approved space charter and vessel coordination agreements because they afforded transportation benefits in terms of cost as well as ameliorating overtonnaging.

any written agreement to that effect the Proponents have orally agreed that in any future proceeding they would not invoke the doctrine of *res judicata* or collateral estoppel against any of the Protestants in this proceeding.

During the pendency of this proceeding certain intervenors were allowed to intervene for limited purposes, subject to the discretion of the Administrative Law Judge. As the case progressed toward settlement they did not appear at the prehearing conference or at the hearing itself. However, they did speak with the Administrative Law Judge by telephone and it is his understanding they have no objection to any of the latest agreements filed.<sup>14</sup> In any event should that not be the case, it is hereby held that any objection made by any intervenor is untimely, and in the discretion of the Administrative Law Judge such intervenor will no longer be allowed to intervene for that purpose.

With respect to the fact that the parties have expressed a desire to expedite this proceeding and to allow the Commission discretion in its review of the Initial Decision and related matters, it is hereby ordered that the parties to this proceeding advise the Commission in writing whether or not they intend to file any exceptions to the Initial Decision within five days of the date of service of the decision. Of course, since the parties have withdrawn their objections to the agreements it is hoped that no exceptions will be filed in which case the Commission may approve the agreements before June 18, 1984, which is the effective date of the Shipping Act of 1984, if it so desires.

Finally, in view of all of the above and the holding in this proceeding, it is hereby discontinued.

(S) JOSEPH N. INGOLIA  
*Administrative Law Judge*

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<sup>14</sup>The Delaware River Port Authority so indicated by letter dated March 23, 1984.