FEDERAL MARITIME COMMISSION

DOCKET NO. 83–26

PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

A 120-day advance notice provision in the Conference Agreement is found to be contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916, and ordered to be deleted from the Agreement.

David C. Nolan for Pacific Coast European Conference.

Stuart James and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

January 18, 1984

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* James J. Carey, *Vice Chairman;* James V. Day and Robert Setrakian, *Commissioners;* Thomas F. Moakley, *Commissioner*, dissenting in part)*

This proceeding was initiated by Order of May 31, 1983, directing the Pacific Coast European Conference (PCEC) and its member lines to show cause why Agreement No. 5200 should not be modified to delete from the Agreement a 120-day advance notice provision on intermodal rate offerings, and if not so modified why the Agreement should not be found contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916 (46 U.S.C. §814), and disapproved pursuant to that section. The proceeding was limited to the filing of affidavits of fact and memoranda of law but allowed for requests for evidentiary hearing and discovery. PCEC filed a response with exhibits.[1] The Bureau of Hearing

* Commissioner Moakley's opinion dissenting in part is attached.

[1] PCEC submitted the following exhibits: a portion of the sworn statement, dated December 3, 1976, of Raymond A. Velez, a former PCEC Chairman (Exh. A); a statement dated November 16, 1976, of Manuel Diaz, the Executive Director of the Associated North Atlantic Freight Conferences (Exh. B); the sworn testimony, dated July 8, 1983, of Donald Thiess, the present PCEC Chairman (Exh. C); an affidavit, dated July 7, 1983, submitted on behalf of Johnson Scanstar (Exh. D); an affidavit, dated July 7, 1983, submitted on behalf of Scan Pacific Line (Exh. E); an affidavit, dated July 8, 1983, submitted on behalf of United Yugoslav Lines (Exh. F); an affidavit, dated July 8, 1983, submitted on behalf of Compagnie Generale Maritime (Exh. G); an affidavit, dated July 8, 1983, submitted on behalf of Intercontinental (ICT) B.V. (Exh. H); an affidavit, dated July 8, 1983, submitted on behalf of Hapag-Lloyd A.G. (Exh. I); an affidavit, dated July 11, 1983, submitted on behalf of d'Amico Societa Di Navigazione SpA (Exh. J); an affidavit, dated July 11, 1983, submitted on behalf of Italian Line (Exh. K); and an affidavit, dated July 11, 1983, submitted on behalf of Zim Israel Navigation Co. Ltd. (Exh. L).

Counsel (Hearing Counsel) filed a reply and one exhibit.[2] The parties did not request an evidentiary hearing or discovery.

BACKGROUND

Agreement No. 5200 is the basic agreement of the Pacific Coast European Conference. The members of the Conference are: Johnson Scanstar; Scan Pacific Line; United Yugoslav Line; French Line; Incotrans Line; Hapag-Lloyd; D'Amico Line; Italian Line; and Zim Container Line. The Conference was originally established in 1937 to provide all-water service in the trade from U.S. Pacific Coast ports to European destination ports.

In 1977, the Commission approved, subject to certain conditions, Agreement No. 5200–29 (Amendment 29), an amendment authorizing Conference service to inland points in Europe. *See Conditional Approval of Agreement No. 5200–29,* January 12, 1977. Amendment 29 required an individual member line to give the Conference 120 days advance notice before offering an intermodal service which is within the scope of the Agreement and which is not being served under a Conference tariff.[3] One of the conditions to approval imposed by the Commission required amendment of the notice clause to add a proviso that an individual intermodal tariff would be superseded only where the Conference tariff is no less favorable to the promotion and development of the intermodal service involved than the parallel provisions of the applicable individual tariff. The Conference accepted this condition of approval.

Subsequent to the approval of Amendment 29, the Commission, in addressing another conference's request for intermodal authority, ruled that an individual member of a conference may not be required to provide *any* advance notice to a conference where the member wishes to offer a new intermodal service that is within the scope of conference authority and that is not included in a conference tariff. *See Application for Approval of an Amendment to the American West African Freight Conference Agreement No. 7680–36,* 18 S.R.R. 339, 342 (1978) (*AWAFC*). The Commission found that advance notice provisions generally burdened the filing of indi-

[2] Hearing Counsel submitted the affidavit of Austin L. Schmitt, Chief Economist of the Office of Policy and Planning and International Affairs, Federal Maritime Commission (Schmitt Affidavit).

[3] The notice provision in the third paragraph of Article 1, as modified, provided that:

> In the event a member line desires to offer an intermodal service within the scope of this Agreement, but not being offered by the Conference under its tariff, it shall first present the matter to the Conference in writing for consideration and joint action. Only in the event the Conference does not, within one hundred twenty (120) days of such presentation, establish such service shall the proposing member, or any other member line, be free to act unilaterally in respect to the matter proposed. In the event the Conference shall, by such vote, subsequently adopt and effectuate a tariff or tariffs covering the service embraced by any such member's individual tariff, the member's tariff, to the extent of such duplication, shall be cancelled by said member or members which are parties thereto coincidentally with the effectiveness of such Conference tariff or tariffs. Provided, however, that such cancellation shall be required only to the extent the relevant tariff rates, rules or regulations so adopted by the Conference are no less favorable to the promotion and development of the intermodal service involved than the parallel provisions of the applicable independent tariff or tariffs.

vidual intermodal tariffs to an unreasonable degree and therefore held that the only notice period which an individual member line must observe is the 30-day statutory notice upon filing of a tariff required under section 18(b) of the Shipping Act, 1916 (46 U.S.C. § 817(b)).

The 120-day notice provision contained in Agreement No. 5200 came to the attention of the Commission in connection with the filing of Agreement No. 5200–40 (Amendment 40). This amendment divided the Conference into trade area groups and authorized each group to take independent action. Amendment 40 also restated the entire basic agreement. The Commission found that the previously approved 120-day notice provision was contrary to the policy and precedent established in *AWAFC* and therefore approved Amendment 40 on the condition that the 120-day notice provision be deleted from the Agreement. *See Modification of the Pacific Coast European Conference Agreement (Agreement No. 5200–40)*, Order of Conditional Approval, August 20, 1982.

Subsequently, and as a result of a petition filed by PCEC, the Commission modified its August 20, 1982 order and approved Amendment 40 as filed, without condition,[4] but, at the same time, initiated this proceeding by separate Order to Show Cause.[5]

DISCUSSION

In the Order commencing this proceeding, the Commission directed PCEC to show cause why its 120-day advance notice provision should not be deleted from Agreement No. 5200. Despite extensive briefing of general issues relating to advance notice, the Conference has not addressed the specific issue which caused the Commission to initiate this action. For reasons stated below, we adhere to established precedent on this issue and will require PCEC to delete the provision from its Agreement.

PCEC's advance notice clause must be analyzed under the principles expressed in the Commission's *AWAFC* decision. *AWAFC* stated as Commission policy that conferences generally may not require a member to observe a notice period prior to the filing of an individual intermodal tariff where the proposed service is within the scope of the conference agreement and is not being provided under a conference tariff. This policy is based on the Commission's finding that the practice of requiring a member line to provide advance notice to the conference prior to the publication of an intermodal tariff had not brought about the rapid development of intermodal transportation by conferences. The Commission adopted this policy in order to secure the development of innovative transportation services by protecting the initiative of an individual member line.

The Commission has in a number of instances required agreements which do not comply with the *AWAFC* policy to be modified. The Commission

[4] *See Modification of the Pacific Coast European Conference Agreement (Agreement No. 5200–40)*, Order, May 25, 1983.

[5] In its petition, PCEC indicated its willingness to defend the 120-day notice clause in a proceeding.

has required that any expansion of an agreement's intermodal authority be conditioned upon the deletion of advance notice provisions.[6] The Commission has also required the deletion of previously approved advance notice clauses.[7] In order to justify a departure from this policy, a conference must demonstrate the existence of specific trade conditions which require some specific period of notice (beyond that otherwise required of a member line by section 18(b))[8] prior to the filing of an individual intermodal tariff or otherwise adequately explain the need for any such notice.[9]

PCEC suggests that its advance notice provision should be judged under a legal standard which is similar to that applied in the case of independent rate action provisions.[10] PCEC believes that the independent naming of a new inland point is similar to the taking of an independent rate action and argues that a notice period should be permitted in both instances. The concept of notice prior to independent rate action, however, should not be confused with advance notice prior to the offering of an independent intermodal service. Notice of independent rate action and advance notice of a new intermodal service differ in terms of their manner of operation, and the particular interests which are at stake. The Commission, therefore, has formulated different policies with regard to each.

Independent rate action provides that a conference member may offer its own rate for a particular commodity which differs from an already existing conference rate. Some period of notice to the conference is generally required before the member may file its own tariff. In the case of independent rate action there is already a service being offered by the conference for a particular commodity at a particular rate. Independent rate action contemplates that the independent rate will co-exist with the conference rate. The purpose of an independent rate action provision is to introduce an element of flexibility into the conference ratemaking mechanism. Independent rate action may help to maintain conference stability by allowing enough flexibility to retain membership and by providing a means by which members compete more effectively with non-conference carriers. The Commission has recently announced an interim policy or presumptive approval of independent rate action authority which provides for a 30-day notice period. Such a period of notice is deemed to strike a proper balance between the conflicting interests of stability and flexibility, while at the same time taking into account the potential predatory effects of conference line independent action on non-conference carriers in the

[6] *Philippines North America Conference (Agreement No. 5600–42)*, 21 S.R.R. 345, 347 (1981).

[7] *Conditional Approval of Agreement No. 8090–16*, 19 S.R.R. 831, 833 (1979).

[8] Section 18(b) provides that a new rate or service may not become effective until 30 days after the filing of the tariff with the Federal Maritime Commission. This 30-day statutory waiting period would apply to the naming of a new inland point by a PCEC member.

[9] *U.S. Atlantic & Gulf/Australia-New Zealand Conference (Agreement No. 6200–20,—Intermodal Authority)*, 21 S.R.R. 89, 93 (1981); *Japan/Korea Atlantic and Gulf Conference Intermodal Amendment Agreement No. 3103–67*, 23 F.M.C. 941, 948 n. 24 (1981).

[10] Hearing Counsel takes the position that the Commission's decision in *AWAFC* is the controlling standard by which PCEC's advance notice clause must be judged.

trade. Shorter or more extended notice periods require explanation and justification in order to ensure that independent action is neither ineffective nor predatory.

A notice period prior to the offering of a new intermodal service by an individual conference member operates in a different manner and involves different concerns than independent rate action and calls for a different policy. Advance notice provisions with respect to intermodal service apply where an individual conference member wishes to offer an intermodal service that is within the scope of the agreement and that is not offered by the conference. Such provisions require the member to notify the conference and then wait for a specified period of time before filing an intermodal tariff with the Commission. In the event that the conference subsequently files a tariff which offers the same service, the individual tariff is automatically superseded by the conference tariff. The purpose of such a clause is to prevent the individual member from offering a new service until the conference has had an opportunity to consider, for example, the naming of a new inland point. Balanced against this collective desire for stability, however, is not only the interest of the individual member, but also a public interest in the development of new, efficient, innovative transportation services. The Commission has determined that the development of such new services by an innovative member should not be hampered in any way and that no notice, other than the 30-day statutory notice required by section 18(b) of the Shipping Act, need be given.[11]

Because of the different underlying interests, the Commission has established different policies with regard to intermodal service and advance notice on independent rate action. It is not correct, therefore, to treat intermodal notice provisions as if they were independent rate action clauses. Commission policy regarding independent rate action is not applicable to the question of whether PCEC's 120-day advance notice provision is justified. The relevant legal standard and policy by which that provision must be judged is that expressed in the *AWAFC* decision.

As support for its 120-day clause, PCEC relies upon the Commission's decision in *Atlantic & Gulf/West Coast of South America Conference Agreement No. 2744–30,* 13 F.M.C. 121 (1969) (*Atlantic & Gulf*). In the *Atlantic & Gulf* case, Hearing Counsel had urged that the grant of intermodal authority be linked to a provision which would allow an individual member to establish an independent intermodal service where the conference failed to do so. Hearing Counsel's position in that case was based upon its concern that a conference might refuse to file a conference intermodal tariff and thereby frustrate the desire of an individual member to establish an intermodal service on its own. Although it recognized the validity of Hearing Counsel's concern, the Commission required individual conference

[11] PCEC only argues that some advance notice is required. However, as noted above, section 18(b) already applies a 30-day notice period to the naming of a new inland point by a PCEC line. PCEC would, in fact, have such notice if it monitored the tariffs filed by its members with the Commission.

members to wait 12 months before negotiating their own tariffs. In this early statement of intermodal policy, the Commission favored collective action by the conference because of the novelty of intermodalism.[12] Subsequently, the Commission acquired additional experience in intermodal transportation[13] that led to a change from the view expressed in *Atlantic & Gulf*, and the adoption of the policy in *AWAFC*. The decision relied upon by PCEC has been superseded by *AWAFC* which is the present controlling policy.

PCEC takes exception to this change in policy and to the general application of the principles expressed in *AWAFC*. PCEC states that *Atlantic & Gulf* represents the correct determination on the issue of whether advance notice should be permitted and further states that it does not know what facts or evidence led to the change in policy. PCEC also believes that the general rule of "no-notice" enunciated in *AWAFC* should have been adopted by rulemaking rather than adjudication. PCEC claims that it had no opportunity to comment on the *AWAFC* policy at the time it was promulgated.

These objections are without merit. The *AWAFC* decision, itself, clearly articulates the background for the change in policy and discusses the early approaches that the Commission tried regarding intermodalism. What PCEC would prefer is an earlier, interim policy of the Commission. PCEC apparently would not object to the general application of the *Atlantic and Gulf* decision. PCEC cites *Patel* v. *INS*, 638 F.2d 1199 (9th Cir. 1980) (*Patel*) for the general proposition that the practice of adopting rules of general application through adjudication rather than rulemaking has been disapproved. However, the *Patel* decision itself acknowledges that an agency is not precluded from announcing new principles or policies in an adjudicatory proceeding and that the choice between rulemaking and adjudication lies primarily in the informed discretion of the administrative agency. *See NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *see also British Caledonian Airways, Ltd.* v. *C.A.B.*, 584 F.2d 982, 992–93 (D.C. Cir. 1978). PCEC has introduced nothing into the record which would in any

[12] The Commission stated in *Atlantic & Gulf*, 13 F.M.C. at 126–127, that:

> Current forms of the intermodal concept are new and their fruition will occur, undoubtedly, only after some experimentation and much give-and-take among the parties in interest. It can come about only through the cooperation of all concerned. Thus, if each member of a conference is free to pursue his own way at any point in the midst of conference efforts, the possibility is very real that successful conference action would be frustrated.

[13] *See*, for example, the Commission's summary of its subsequent experience as stated in *Application of the Far East Conference for Intermodal Authority*, 21 F.M.C. 750, 753 (1979):

> Statistical evidence in this record indicates that of the thirty-two intermodal amendments to conference agreements approved by the Commission, only six have even filed intermodal tariffs. Of those six, five conferences did not file tariffs until after individual members had instituted intermodal service. Overall, this evidence shows that conferences generally have not acted quickly to develop intermodal services after approval of their intermodal amendments, and the majority of those which did implement intermodal service did so only after an individual member pioneered in the field. The record here, therefore, tends to run counter to previous Commission findings regarding the expected public benefit of promoting intermodal development under conference authority.

way indicate that the Commission abused its discretion by adopting a new policy in the *AWAFC* decision.

Finally, PCEC argues that the *AWAFC* standard should not be applied where a conference has implemented its existing intermodal authority through the filing of an intermodal tariff, as it has done for its European intermodal service.[14] PCEC believes that such tariff filing is a sufficient indication that intermodalism has not been stifled.[15] Therefore, PCEC concludes that *AWAFC* should not apply and that its advance notice clause should not be deleted.

While the policy enunciated in *AWAFC* is based upon the Commission's finding that the practice of requiring advance notice had not brought about the rapid development of intermodal transportation by conferences, its objective is not limited to those cases where the conference has never implemented its intermodal authority through the filing of a tariff. The rationale of the *AWAFC* decision has a broader purpose—namely to ensure that the development of intermodalism is not hindered and that the transportation benefits achieved by such service are not arbitrarily restricted. An advance notice requirement is a mechanism that, on its face, restrains innovative action by an individual member.[16] In order to justify such a restraint the Conference must show trade conditions which require it or otherwise explain why such a restriction is necessary.

In this proceeding, the burden is on the Conference to justify the 120-day restraint. The mere fact that the Conference has filed an intermodal tariff does not justify an exception to the established policy. The purpose of the policy would be defeated were it possible to avoid its requirements by the mere filing of a tariff. The tariff might be a paper tariff under which no cargo moved. PCEC makes no effort to describe the services provided under its European intermodal tariffs by, for example, indicating how much cargo moves under these tariffs.

PCEC argues that Conference control over the inland portion of a physically intermodal movement is necessary in order to preserve Conference stability. Moreover, according to PCEC, unless such control is maintained,

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[14] PCEC refers to its European inland tariffs but does not further describe this service (Exh. C at 11). Hearing Counsel cites the following PCEC inland European tariffs: FMC Tariff Nos. 2, 3 and 18 (Hearing Counsel Reply at 3).

[15] The affidavits of PCEC members also state that, in their view, the development of intermodalism has not been inhibited by the 120-day rule (Exhs. D–L).

[16] The restraining effects of such a provision were described in *AWAFC*, 18 S.R.R. at 341, as follows:

> This procedure requires any member line of the Conference that wishes to offer an intermodal service to expend that member's time, money, and effort to research the points of origin of different commodities, negotiate agreements with land carriers, calculate the appropriate intermodal rates for various commodities, and fashion an intermodal tariff, and then, hand the result of those expenditures to its purported competitors in the Conference, who, after preventing the implementation of the proposal for 90 days, may adopt it as their own. The result would be to deny to the innovative carrier any reward for its efforts. There being no reward, it is not to be expected that the efforts will be expended.

Such a restraining impact would appear to be heightened in a trade where short season agricultural products are a significant portion of the commodities shipped.

competitive forces within the Conference will be unleashed which will hamper the ability of the Conference to stabilize the trade and which may even destroy the Conference.[17] PCEC contends that a notice requirement is necessary in order to prevent uncontrolled and reckless point naming. According to PCEC, some period of notice is needed in order to give other members of the Conference an opportunity to consider a proposed new point for possible collective action. Without the control provided by a notice period, PCEC believes that a proliferation of individual tariffs naming a host of inland points would result which would produce intense intra-conference competition and undermine Conference stability.[18]

Instead of offering evidence of actual conditions to support its instability argument,[19] PCEC offers a theory illustrated by hypothetical examples. One example posits that a PCEC member might establish a rate on pencil slats to Nuremberg while another might name a competing rate on pencil slats to Stuttgart. In another example, PCEC theorizes that Conference rates could be avoided by naming Monza rather than Milan on walnut shipments.

While we do not dismiss the possibility of a theoretical justification of an advance notice provision, we believe that a theoretical justification must go beyond the general assertion that a "no-notice" rule will increase intra-conference competition and that intra-conference competition is destabilizing. Some specific potential for this instability in the PCEC trade in the absence of a notice clause should be demonstrated. PCEC also might demonstrate the existence of destabilizing point-naming in a similar conference trade which does not have a notice provision. No attempt at submitting this kind of evidence was undertaken by the Conference.

PCEC also maintains that some period of advance notice is necessary in order to provide other members of the Conference with a fair opportunity to consider the naming of a new inland point and to compete with the proposed new service. PCEC states that the naming of new inland points involves substantial operational changes. Without sufficient notice of the naming of a point, an individual member who was the first to file a new tariff allegedly could obtain an unfair advantage over other Conference members in soliciting cargo. As a hypothetical example, PCEC describes a situation which might occur on a shipment of walnuts to Hanover, Germany. Walnuts, as do other agricultural products which make up a large part of the PCEC trade, have a short shipping season. Without any notice

[17] PCEC cites the reasons for its original application for European inland authority in Amendment 29, namely that without such authority Conference members would be able to undercut other Conference members by offering benefits or making concessions on the inland transportation arrangements beyond the terminal gate.

[18] Both the statement of the Conference Chairman and several member lines' statements express the belief that a "no-notice" rule would lead to intense intra-conference competition.

[19] We recognize that, in this instance, PCEC may not be able to introduce evidence of actual destabilizing point naming. The fact that PCEC is currently operating under the 120-day provision prevents actual impact of "no-notice" conditions from being established. This is to be expected because of the highly restrictive nature of a 120-day notice requirement.

requirement, an individual member allegedly could secretly make all of the necessary arrangements to support an independent intermodal rate to an inland point not named in the Conference tariff and then use this rate to undercut the Conference rate. On the hypothetical walnut shipment, it is alleged that a carrier could gain a competitive advantage over other Conference members and could solicit and obtain a significant portion of that cargo before other members could respond to the new point and complete the difficult and time-consuming arrangements for offering a competitive service (Exh. C at 8–10). According to PCEC, an advance notice provision prevents the possibility of such *sub rosa* bookings by which an individual member might gain an unfair competitive advantage.

This argument is, for the most part, based on the assumption that naming a new inland point involves a substantial amount of time and effort. PCEC offers no evidence to indicate how difficult it might be to name a new inland point or how much lead time might be required. Moreover, in a different context, PCEC maintains that there is no difficulty at all in naming a new inland point on walnut shipments.[20] Furthermore, in a short season market of 2–6 months, a long notice period such as appears in Agreement No. 5200 might effectively preclude an individual member from ever offering a new intermodal service. Finally, PCEC's argument overlooks the fact that the naming of a new inland point could not become legally effective until the 30-day statutory notice under section 18(b) is observed. An attentive Conference would be aware of the filing of any new intermodal service and would have 30 days notice before cargo could be carried under the new tariff. Other member lines would have an opportunity to match the proposed new service. The Conference could adopt the tariff of the individual member, thereby superseding that service and obviating any possible competitive advantage.[21]

PCEC maintains that the notice provision in its Agreement should not be deleted or modified in any way (Response at 8). PCEC therefore seeks to retain the full 120-day period of notice. Throughout its submission, PCEC, however, argues only that some period of notice is necessary. At

[20] *See* Response at pp. 3–4: "In this day and age of containerized shipping there is virtually no operational obstacle to delivering a container of, *e.g.*, California walnuts, to anywhere in Western Europe. If an individual PCEC member line wished to increase or reduce the walnut rate, it would have to go to the Conference, and, if the member line were out-voted, that would be the end of the proposal. Perhaps one could say its "innovative proposal" has been "stifled," yet the procedure represents the very essence of the steamship conference system, something which has not only been permitted, but encouraged in U.S. trades since 1916. Under the apparent view espoused in the Show Cause Order, however, that same member line could take that same container of walnuts at the same total rate proposed, not to Milan which the PCEC tariff covers, but to Monza, a few kilometers further, where the Conference does not (yet) have tariff coverage, all without any consideration, let alone democratic vote, by the other member lines. *No "costly service" is involved; all it takes is a booking.*" (Emphasis added).

[21] Nor would there necessarily be any lag time in the effective date of a superseding conference tariff because section 18(b)(2) (46 U.S.C. §817(b)(2)) empowers the Commission, in its discretion and for good cause, to allow a tariff change to become effective upon less than 30 days notice. The Commission's Rules allow for expedited means of filing such applications for special permission in emergency situations. *See* 46 C.F.R. §536.15(c).

one point, PCEC approaches the question of how long that period of notice should be, but does not expressly state that 120 days is needed (Exh. C at 7–8).

Hearing Counsel states that although PCEC should be allowed to retain some period of advance notice in its Agreement, the present 120-day period is excessive. It suggests 30 days as being sufficient to provide adequate notice to the Conference.

Neither Hearing Counsel nor PCEC discuss the effect of the statutory notice provisions of section 18(b). At least for the first filing of a rate to a particular inland point, a 30-day notice period prior to tariff filing would, in effect, result in a 60-day delay because of the additional 30-day statutory notice on new or initial rates required under section 18(b). With respect to short season commodities, such a waiting period can render meaningless the option to offer an independent service.

Finally, we note that it would not be inconsistent with Commission policy for PCEC, through amendment to its Agreement, to require members to notify the Conference at the time that an individual intermodal tariff is filed. Such a provision would relieve the Conference of the task of monitoring intermodal filings by its members and would ensure that the Conference and each of its members had 30 days actual notice before a new intermodal service became effective.

CONCLUSION

PCEC has failed to provide either evidence of actual trade conditions or an adequate rationale which would justify the highly restrictive 120-day notice requirement in its Agreement or the lesser 30-day period suggested by Hearing Counsel. Accordingly, we conclude that the 120-day advance notice provision is contrary to the public interest within the meaning of section 15.

PCEC shall have 60 days in which to file an appropriate modification which deletes the advance notice requirement from its Agreement. Otherwise the Agreement shall be disapproved pursuant to section 15, as contrary to the public interest.

PCEC is free at any time to seek to reinstate a notice period by showing actual or potential trade conditions which require it. Moreover, PCEC may, through appropriate amendment to its Agreement, require its members to give actual notice to the Conference of a new intermodal service simultaneously with the filing of an individual tariff.

THEREFORE, IT IS ORDERED, That the Pacific Coast European Conference shall, by March 19, 1984, file an amendment with the Secretary which deletes the 120-day notice provision from the third paragraph of Article 1 of Agreement No. 5200.

FURTHER, IT IS ORDERED, That if by March 19, 1984, the amendment required by the first ordering paragraph is not filed as required, then Agreement No. 5200 is disapproved pursuant to section 15 on March 20, 1984.

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

By the Commission.*

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

Commissioner Moakley, dissenting in part.

While I agree with the majority that 120 days' notice is an excessive time period for conference review of a member's proposal for new intermodal service, I disagree with their decision to permit *no* such notice. The reasons for this policy disagreement are essentially those set forth in my recent partial dissents in connection with *Agreement Nos. 93–30 and 93–31—North Europe-U.S. Pacific Coast Freight Conference Agreement* and *Agreement Nos. 9314–31, et al.—North Atlantic Intermodal Agreements.* However, the majority here have offered a rationale for this "no notice" policy which did not appear in those prior decisions.

In attempting to explain why the decision in *American West African Freight Conference (AWAFC)*[1] is better policy than earlier, contrary decisions upon which respondent PCEC relies, the majority opinion explains that additional experience with intermodal transportation between 1969 and 1978 led to this change in policy.[2] I wholeheartedly agree that regulation of intermodal transportation has been rapidly evolving since the late 1960's, but would strongly suggest that the pace of this evolution has *accelerated* since the late 1970's. Ritual adherence, in 1983, to an intermodal policy decision founded upon 1978 circumstances is therefore at least as questionable as such adherence would have been in 1978 to a policy founded on 1969 circumstances.

The Commission's concern expressed in *AWAFC* in 1978 and in *Far East Conference, supra,* in 1979, that some conferences had used their intermodal authority to stifle the intermodal initiatives of member lines was well founded and well documented. Today, however, most conferences must either offer meaningful and attractive intermodal services or face the risk of extinction. Shippers have become accustomed to the service, and independent carriers or individual conference members will offer such service if the conference is unwilling or unable to do so. The Commission had graphic evidence of this before it recently in connection with the applications by various North Atlantic Conferences for intermodal authority.[3]

In this case, PCEC has implemented its intermodal authority since 1977, without complaint from either carriers or shippers. There is no allegation,

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* Commissioner Thomas F. Moakley's dissent in part is attached.

[1] *Application for Approval of an Amendment to the American West African Freight Conference Agreement No. 7680–36,* 18 S.R.R. 339 (1978).

[2] Curiously, the only citation to a record in which facts were developed as the basis for this policy change is *Application of the Far East Conference for Intermodal Authority,* 21 F.M.C. 750, 753 (1979), decided the year *after* the *AWAFC* policy pronouncement.

[3] *Agreement Nos. 9314–31 et al.—North Atlantic Intermodal Agreements,* Order of Approval, served December 9, 1983.

much less any evidence, that this conference has used its authority to stifle the initiative of member lines. In fact, all of the member lines have submitted affidavits in support of retaining the present notice provision and the conference chairman states that he is aware of no instance where a member indicated that it was in any fashion inhibited from providing a proper service demanded by a customer because of this particular notice provision.

Thus, despite the majority's attempts to broaden the scope of the holding in *AWAFC,* the factual predicate for that policy pronouncement is not valid in this case, and I question whether it has any validity at all in today's intermodal environment.

As counsel for PCEC succinctly argued,

> "It is not the intent of the 'prior notice' requirement to inhibit any member line from developing new services or intermodal concepts, but only to have a *reasonable opportunity to discuss the same with a view toward adopting the proposal as a group,* exactly the same way as PCEC handles the yearly hundreds of other tariff modification requests and suggestions." (Response to Order to Show Cause, p. 3) (emphasis supplied).

I would not preclude this conference from adopting a reasonable notice period for discussion of members' proposals for new intermodal services.