

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 83-47

## AGREEMENT NO. 10467: LATIN AMERICAN CHARTER AGREEMENT; AGREEMENT NO. 10468: LATIN AMERICAN DISCUSSION AGREEMENT

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Five carriers operating between U.S. Atlantic and Gulf ports and ports and points in five South American countries filed a space-charter Agreement and a discussion Agreement seeking approval under section 15 of the Shipping Act, 1916. The Agreements generated four protests on the grounds that they were not necessary and were not justified and could be harmful in connection with South American cargo reservation laws. Proponents withdrew the discussion Agreement but contended that the space-charter Agreement was justified by trade conditions and would benefit shippers and carriers. Proponents also agreed to amend the space-charter Agreement by adding certain clarifying language, following which all active protests were withdrawn and Hearing Counsel expressed support for the Agreement. It is held:

- (1) The space-charter Agreement is a simple, voluntary, open arrangement which does not authorize rate-fixing or joint activities of any kind and would have minimal anticompetitive effects.
- (2) There is evidence that the Agreement would benefit shippers and carriers by enabling the parties to provide service to shippers which would otherwise be disrupted and by enabling carriers to make better utilization of unused vessel space.
- (3) There is no countervailing evidence showing that the Agreement would harm any interest or would work in conjunction with South American cargo reservation laws to harm anyone and it appears that the protests were based upon misunderstandings and fears that the Agreement would operate with the withdrawn discussion Agreement to cause harm.
- (4) The Agreement is approved provided that proponents file certain clarifying amendments and furnish periodic reports which they have already agreed to do.

*Nathan J. Bayer* for proponents.

*Richard W. Kurrus* and *Paul G. Kirchner* for protestants Ecuadorian Line and CCT.

*Andrew M. Parish* and *Beth Ring* for protestant Florida Customs Brokers and Forwarders Association, Inc.

*Arturo J. Abascal* for protestant Navicon.

*John Robert Ewers* and *William D. Weiswasser* for Hearing Counsel.

INITIAL DECISION<sup>1</sup> OF NORMAN D. KLINE, ADMINISTRATIVE  
LAW JUDGE*Adopted June 12, 1984*

This proceeding began with the issuance of an Order of Investigation and Hearing by the Commission on October 5, 1983, in order to determine whether two agreements should be approved under the standards of section 15 of the Shipping Act, 1916, 46 U.S.C. §814. Both agreements had originally been filed with the Commission on January 31, 1983. The first agreement (No. 10467) was a relatively simple space-charter arrangement among five carriers operating in the trade between U.S. Atlantic/Gulf ports (and U.S. points) and ports and points in Bolivia, Chile, Peru, Ecuador, and Columbia. The five carriers were prominent operators in the trade, consisting of two U.S.-flag carriers, Delta Steamship Lines, Inc. (Delta) and Lykes Bros. Steamship Co., Inc. (Lykes), and three leading national-flag carriers of the South American countries involved, Compania Peruana de Vapores (Peruvian-flag), Transportes Navieros Equatorianos (Ecuadorian flag), and Compania Sud Americana de Vapores (Chilean flag). The purpose of the Agreement was to authorize each of the carriers to charter space to each other on vessels operated by them when needed on a space-available basis with no requirement that any party request space or reserve space for any other party. It was characterized by proponents of the Agreement as a "casual space charter" arrangement without any fixed requirements and was compared to another such arrangement, albeit one more complicated, Agreement No. 10420, the American Flag Common Carrier Charter Agreement, approved by the Commission. The subject Agreement would expire on June 30, 1987, unless four members withdrew earlier.

Proponents of this space-charter Agreement maintained that the Agreement was required by a serious transportation need, would secure important public benefits, and was in furtherance of a valid regulatory purpose. Specifically, proponents argued and presented evidence in support of their contentions that the subject trade was seriously overtonnaged, that cargo had declined, that severe rate instability existed in the trade, that costs of providing service had increased, that some carriers had suffered bankruptcies and had to withdraw from the trade, and that certain excessive competitive practices had severely destabilized the trade. Proponents contended that their Agreement would benefit the trade by allowing for maximum equipment utilization, conserve energy, maintain the quality and quantity of service that shippers had come to expect, add to stability in the trade, and have little anticompetitive effect since participation in the arrangement was entirely voluntary.

At the same time that the above five proponents filed their space-charter agreement (No. 10467) with the Commission, the same five carriers plus

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<sup>1</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).

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a sixth carrier, Flota Mercante Grancolombia, S.A., filed a so-called "discussion agreement" (No. 10468) by which the six carriers would confer for the purpose of developing, exchanging, and discussing trade data and information. The six carriers believed that this latter Agreement would serve as a forum to discuss the problems affecting the trade adversely, mentioned above, and would enhance their ability to reach helpful economic decisions on modernization and fleet deployment as well as commercial solutions to conflicting cargo promotion laws and policies.

The filing of the two Agreements generated four protests filed by three carriers and an association of customs brokers and freight forwarders, namely, Naviera Continental, NAVICON, C.A. (Navicon); Ecuadorian Line, Inc. (Ecuadorian); Coordinated Caribbean Transport, Inc. (CCT); and the Florida Customs Brokers and Forwarders Association (Brokers and Forwarders Association). These protestants disputed proponents' contentions that the trade was overtonnaged, contended that the space-charter Agreement was unjustified, extremely anticompetitive, and was a first step towards a consortium, and raised the question of possible impact of the cargo reservation laws in the various South American countries on the subject Agreement. Two of the protesting parties, CCT and the Brokers and Forwarders Association, also protested approval of the discussion Agreement (No. 10468) reiterating similar objections.

After consideration of the proponents' submissions seeking approval, the protests, and proponents' replies to the protests, the Commission determined that the nature of the contentions and factual disputes required that the Commission institute a formal proceeding in which these issues could be determined properly, consistent with the Commission's duty to examine competitive consequences of agreements, weigh the purported benefits against possible competitive harm, and determine whether the Agreements served needs or purposes which would offset their inroads on antitrust policies, as required by principles of law prevailing under the 1916 Act. See *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *United States Lines v. F.M.C.*, 584 F. 2d 519 (D.C. Cir. 1978); *Marine Space Enclosures, Inc. v. F.M.C.*, 420 F. 2d 577 (D.C. Cir. 1969).

The formal proceeding was launched, as noted above, by the service of the Commission's order on October 5, 1983. The Commission set forth the basic issue as to whether the two Agreements should be approved, disapproved, or modified under the standards of section 15 of the 1916 Act. In addition, the Commission framed three specific issues for determination relating to the competitive effects of the Agreements, either alone or together, the effects of South American cargo preference laws, the inter-

action of the two Agreements, and the scope of the second Agreement, No. 10268.<sup>2</sup>

#### Developments Following Issuance of the Commission's Order

The first major development occurring after institution of the formal proceeding was the withdrawal of Agreement No. 10468, the discussion agreement, by the parties thereto. This withdrawal was effectuated by letter of counsel dated November 3, 1983, and was confirmed by my ruling on November 7, 1983. The withdrawal of the discussion Agreement served to remove from the proceeding all issues pertaining solely to that Agreement, specifically an issue pertaining to joint competitive effects resulting from the interplay of the two Agreements, trade conditions and problems which might be alleviated by the discussion Agreement, interaction of the two Agreements, and the scope and membership limitations of the discussion Agreement. Justification for the remaining space-charter Agreement (No. 10467) of course, remained to be shown under the standards of section 15 of the 1916 Act.

Shortly after withdrawal of the discussion Agreement, the parties commenced to utilize the Commission's prehearing discovery processes. Proponents of the space-charter Agreement served interrogatories and requests for production of documents on protestants and Hearing Counsel and Hearing Counsel served corresponding materials on proponents. In addition, proponents took the deposition of the President of Protestant Ecuadorian Line. Several prehearing conferences were conducted in an effort to bring the proceeding to a prompt conclusion.

During the course of this prehearing activity, discussions began between proponents and the three active protestants, Ecuadorian Line, CCT, and the Brokers and Forwarders Association, in an effort to narrow or eliminate issues among these parties. (The remaining protestant, Navicon, although kept apprised of developments by counsel for proponents, by Hearing Counsel, and by notices which I issued, took no part in prehearing activity, did not appear at any of the prehearing conferences or at the hearing, and notified Hearing Counsel that it was declining participation because

<sup>2</sup>The specific issues framed in the Commission's Order (p. 4) were as follows:

1. What competitive effect will the Agreements, either individually or together, have on the trade, and what conditions in the trade (footnote omitted) would justify any anticompetitive effect the Agreements may be found to have?
2. What are the terms of the South American cargo preference laws that apply to the trades within the geographic scope of the Agreements, and what effect will these laws have on the implementation of the Agreements and the trade?
3. How will Agreement Nos. 10467 and 10468 interact with each other and other approved section 15 agreements in the trade? Why should Agreement No. 10468 membership be limited to the national flag carriers of the countries involved, and why should that agreement include matters that are within the scope of other approved section 15 agreements to which Proponents are party?

In the footnote to issue no. 1 omitted above, the Commission instructed proponents to submit evidence supporting their allegations that trade conditions were unstable and other matters and to show how the Agreements would alleviate such conditions.

it was being purchased by an Ecuadorian concern and had no instructions. I issued no sanctions against Navicon but noted its absence and cautioned that the proceeding could not be delayed and its allegations would not be proven by its continued lack of participation.)<sup>3</sup>

The result of the discovery and discussions among the parties concerned was the withdrawal of two protests, those by CCT and the Ecuadorian Line, in return for certain amendatory or clarifying language which proponents agreed to insert in their Agreement. (Later, as I discuss, a third protestant, the Brokers and Forwarders Association, also withdrew their protest in return for certain clarifying statements by proponents, and Hearing Counsel expressed support for approval of the Agreement on certain conditions relating to reporting requirements and minor language changes.)

Both CCT and the Ecuadorian Line had protested approval of the subject Agreement, contending that proponents had not shown the requisite need or justification for such an Agreement. They disputed proponents' contentions that there was an overtonnaging problem in the trade, that cargo had declined, and that severe rate instability existed and disputed proponents' contentions that activities at the Port of Miami causing shift of cargo to that port required any remedial action and were concerned that the subject Agreement might be aimed at diverting cargo away from Miami and harming carriers serving that port such as CCT and Ecuadorian Line. CCT was especially concerned that the subject space-charter Agreement might work in conjunction with the now-withdrawn discussion Agreement to create a consortium with monopolistic effects, and both CCT and Ecuadorian Line were worried about any possible effects of the subject Agreement on South American cargo reservation laws. (See affidavits of Vlada and Calderon, Attachments G and H to Ex. 1.) Furthermore, according to a deposition taken of Mr. Dennis A. Meenan, President, Ecuadorian Line, that Line also feared that the subject space-charter Agreement authorized joint rationalization of sailings, coordination of sailings, possible elimination of some ports of direct call, joint advertising and joint cargo solicitation, and did not provide for other carriers serving the trade to become parties to the Agreement. (Exs. 2 and 3).

Whatever the concerns of the two protestants, CCT and Ecuadorian Line, they appear to have been alleviated considerably by a further understanding of the Agreement which resulted from discussions with proponents and by proponents' willingness to amend the original Agreement with clarifying language. Specifically, to remove any ambiguity as to the meaning and intention of the parties to the Agreement, proponents submitted the following

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<sup>3</sup> See letter dated November 15, 1983, from Mr. Arturo J. Abascal, Marketing Manager of Navicon, to Hearing Counsel; Notice of Further Prehearing Conference and Related Rulings, March 2, 1984, p. 3 n. 1; transcript of prehearing conference, March 1, 1984, pp. 5-10. I note that the Commission has made clear that it expects parties protesting approval of agreements to come forward with information in support of the allegations in their protests and that failure to do so may result in approval of an agreement notwithstanding the protest. See, e.g., *Agreement No. 9955-1*, 18 F.M.C. 426, 470 (1975); *Agreement No. 9905*, 14 F.M.C. 163, 165 (1970).

clarifying language, adding new paragraphs "(d)" and "(e)" to Article 1 of the Agreement and a new paragraph "21." (Ex. 1A). The new language reads as follows:

(d) Carriers shall not agree among themselves nor jointly coordinate vessel sailings nor shall they arrange, except on a vessel-by-vessel basis, for the charter of space.

(e) A Carrier seeking to charter space from another carrier party to this agreement at a particular port must serve that port, through cargo solicitation and regular vessel calls at that port, in order to charter space on the vessel of a carrier party calling at that port.

21. Any common carrier by water operating vessels in the Trade may become a party to this agreement by signing a counterpart signature page to this agreement. Changes in membership shall be reported to the Federal Maritime Commission.<sup>4</sup>

As explained by Mr. David Flint, Director of Pricing for Delta, a party to the Agreement, parties to the Agreement met with representatives of protestants CCT and Ecuadorian Line in order to explain the proposed operation of the Agreement with the hope that the protestants would perhaps join the Agreement themselves or at least withdraw their protests. Proponents discussed the various concerns expressed by protestants, explained that the Agreement was not intended to operate in the manner feared by protestants, and agreed to furnish amendatory or clarifying language to the Agreement to make clear that protestants should no longer be concerned about the Agreement. (Ex. 2). Thus, the clarifying language quoted above is designed to answer and satisfy the various concerns. As seen by paragraph "(d)," the proponents specifically disable themselves from coordinating vessel sailings or engaging in joint activities. (Ex. 2, p. 4). Furthermore, to emphasize the fact that the Agreement is intended to be merely a casual space-charter arrangement when the need arises for a carrier to utilize space of another carrier's vessel calling at a particular port when the first carrier's vessel, for some reason, cannot call at that port, paragraph "(e)" specifically requires that the first carrier must regularly serve the port through solicitation and regular vessel calls in order to be able to charter space on another carrier's vessel. In order to allay any fears that the Agreement would be anticompetitive, new Article 21

<sup>4</sup>This last sentence regarding reporting of changes in membership to the Commission was added to the original amendatory language at the hearing held on April 19, 1984, at the request of Hearing Counsel, to which request counsel for proponents had no objection. Proponents agreed to certain other clarifying amendments to the language of the Agreement at the hearing on April 19, 1984. Thus, they agreed to delete the words "U.S. Flag and reciprocal national flag" from the preamble to the Agreement qualifying the parties so that the Agreement would ensure that it is open to all carriers serving the trade. In addition, in Article 17 of the Agreement (Reporting Requirements), proponents agreed to minor word changes to clarify the fact that they would be submitting periodic reports "detailing" rather than summarizing their carryings and would submit those reports "in the form set forth by the Federal Maritime Commission." Proponents agreed to amend their Agreement to insert these quoted words and phrases in Article 17.

to the Agreement specifically provides that membership in the Agreement is open to any carrier serving the trade.

After discussing their Agreement with the two protesting carriers, proponents believed that they had satisfied those carriers' concerns and expected the two carriers to withdraw their protests provided that the amending language quoted above would be included in the Agreement. (Ex. 2, pp. 3-4; Ex. 1A). Counsel for the two lines thereafter notified me that the amending language satisfied "many of the major concerns of the Ecuadorian" Line (Ex. 2A) or "the major concerns of CCT as to the possible injurious consequences of the Agreement." (Ex. 2B). Accordingly, both of these lines withdrew their protests although not supporting approval of the Agreement and still questioning some of proponents' arguments in favor of approval. (Exs. 2A, 2B).<sup>5</sup>

In addition to satisfying many or all of the major concerns of the two lines and of the Brokers and Forwarders Association, proponents made an effort to answer Hearing Counsel's concerns as well. Hearing Counsel's concern was that somehow the space-chartering Agreement could reduce the amount of cargo available to carriers not parties to the Agreement in conjunction with cargo reservation laws of the destination countries in South America and expressed certain other concerns about how the Agreement would operate as to compensation to the carrier leasing space to another carrier, as to reporting requirements, and as to explicit reference to the rights of other carriers to join the Agreement. These concerns were satisfied in the following manner.

As to clarification of the rights of other carriers to join the Agreement, as seen, new Article 21 makes clear that "any common carrier operating vessels in the trade may become a party . . ." Furthermore, in response to Hearing Counsel's request that the Commission be informed of changes in membership, proponents agreed at the hearing on April 19, to add language to Article 21 requiring the parties to notify the Commission of any such changes. Mr. Flint of Delta, furthermore, explained how the compensation provision of the Agreement was intended to operate. As explained by him, a carrier who charters space from another carrier under the Agreement will carry the cargo under the first carrier's bill of lading

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<sup>5</sup>Ecuadorian Line stated that it was withdrawing as a protestant because the "potential negative consequences of the Agreement for Ecuadorian do not justify the time and expense of further participation in this proceeding." (Ex. 2A). Ecuadorian expressed confidence that the Commission would review the Agreement and its justification under the Commission's statutory responsibilities and questioned proponents' contentions that certain activities at the Port of Miami justified approval of the Agreement. Similarly, CCT withdrew its protest but also questioned proponents' arguments that certain activities at the Port of Miami justified approval of the Agreement. (Ex. 2B). It is understandable why these two carriers, which serve Miami, would take exception to any aspersions cast upon that port. Another protestant, the Brokers and Forwarders Association, also serving Miami, took similar exception to proponents' adverse comments upon practices at that port. Later, however, at the hearing in this proceeding, counsel for proponents explained that proponents had no intention of singling out or criticizing law-abiding forwarders operating at Miami. Furthermore, since there is sufficient justification for the Agreement without casting aspersions at practices at Miami, it is not necessary to utilize any evidence relating to alleged practices at Miami to which any of these parties excepted in finding that the Agreement warrants approval.

and tariff rates. Furthermore, the carrier seeking the space on the other carrier's vessel will negotiate compensation with the carrier offering the space and the amount of compensation which the latter carrier will require will vary depending upon loading costs to the vessel-operating carrier at the particular port and other cost factors including the cost of shifting other cargo to accommodate the cargo booked by the carrier which obtained the space and any costs relating to the nature of the cargo itself. (Ex. 2, pp. 5-6).

The major concern of Hearing Counsel (and it was a concern of all the protestants, including the two carriers and Association who withdrew their protests) was that the cargo reservation laws of the five South American countries involved (Bolivia, Chile, Peru, Ecuador, Colombia) would somehow work in conjunction with the Agreement to oust non-member carriers from cargo carryings. Proponents have throughout the proceeding consistently and vehemently denied that their spacechartering Agreement had any relationship to cargo reservation laws or that the parties to the Agreement had any intention or any thought of using the Agreement to benefit themselves by means of rights granted under those laws. Nevertheless, because protestants had expressed concern over possible interrelationships between those laws and the subject Agreement, the Commission instructed the parties to address the issue, namely, what are the terms of the various laws and what effect will they have on the implementation of the subject Agreements, one of which, the discussion Agreement, as I have mentioned above, has been withdrawn.

Whatever the concerns of the original protesting parties and of the Commission regarding these laws, there is absolutely no evidence that the subject Agreement was designed to benefit from those laws, would benefit by them, or would give the parties to the Agreement any special privileges or advantages compared to carriers not parties to the Agreement. After several months were expended by Hearing Counsel in prehearing discovery in an effort to determine if these laws had any bearing on the subject Agreement, Hearing Counsel concluded that the laws in question are a veritable maze of confusion and inconsistent and uncertain application and that further time and effort in seeking to translate and analyze those laws in detail would be unwarranted.<sup>6</sup> Furthermore, not only is there no evidence whatsoever that the subject Agreement has anything to do with South American cargo reservation laws, but the record shows that all the carriers

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<sup>6</sup>A list of the various decrees and laws was provided by Hearing Counsel. (Ex. 5). Hearing Counsel, who is fluent in Spanish, stated that he could not justify consuming more time in litigation to furnish the translated texts of all of these laws and decrees in view of proponents' willingness to furnish periodic reporting of their activities under the Agreement. It was also Hearing Counsel's understanding that the various laws and decrees were not administered consistently. There is no evidence that these laws and decrees have anything to do with the subject space-charter Agreement. The evidence, especially that of Mr. Flint of Delta, who is experienced in the subject trade area, amply confirms this conclusion. Under the authority given me by the Commission to alter or delete issues that proved to be "irrelevant or immaterial to the ultimate question presented" (Order, p. 3 n. 7), as requested by Hearing Counsel, I ruled that the issue concerning cargo reservation laws would accordingly be considered to be deleted.

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serving the subject trade areas are either national-flag carriers or associates so that they are all generally eligible to carry cargo to particular South American countries involved, and there is no basis to fear that a carrier member of the Agreement would "waive" cargo to another carrier-member of the Agreement to the detriment of outside, non-member carriers. (Ex. 2, pp. 5, 6). Certainly the Agreement nowhere authorizes any such preferential treatment to carrier members, the parties stoutly deny that they ever intended any such thing, and any carrier member as well as non-member carrier has rights to carry cargo to the South American countries depending upon its flag or associate status and not by anything in the subject Agreement. In short, as Mr. Flint states:

With respect to the cargo reservation law issue, it is my understanding of these laws based on my personal experience in each country involved in the trade that this Agreement is neutral with respect to those laws. By that I mean that it neither enlarges nor restricts the rights of any carrier to serve any country in the trade. (Ex. 2, p. 6).

In lieu of pursuing the issue in further detail fruitlessly, Hearing Counsel stated that the Commission's time could be spent much more profitably by monitoring the Agreement to determine if any trends could be discerned in cargo carryings in the trade. Therefore, Hearing Counsel urged and proponents agreed that the parties should furnish periodic reports of utilization and bookings, which reports are almost identical to reports which carrier members of other spacecharter agreements have been required to furnish to the Commission on a semi-annual basis.<sup>7</sup> After proponents agreed to file the clarifying language to their Agreement, as quoted above, furnished explanations as to the operations of the Agreement, furnished additional evidence showing that the Agreement had nothing to do with South American cargo reservation laws, and agreed to provide the Commission with semiannual reports very similar to reports which members of other agreements have been furnishing so that the Commission can monitor operations under the Agreement, Hearing Counsel stated at the hearing on April 19, that they supported approval of the Agreement.

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<sup>7</sup>The semi-annual reports of utilization and capacity (Ex. 4) are adopted almost verbatim from reports which the Commission has required to be filed by the carriers who are members of the American-Flag Common Carrier Charter Agreement (No. 10420), a five-party space-chartering arrangement approved by the Commission on December 11, 1981. Utilization reports have also been required in much less complicated agreements such as Agreement No. 10254, a simple non-exclusive transshipment and chartering agreement between American Export Lines, Inc. and Zim Israel Navigation Co., Ltd., approved January 25, 1977, agreement canceled, August 27, 1982. See also the reports in *Agreement No. 10364*, 19 SRR 1323, 1327 (1980). Such reporting should enable the Commission to determine if overtonnaging or underutilization continues to be a problem since proponents offer overtonnaging as one of the reasons for the need for their Agreement. The reports, especially Table No. 3, which deals with a report of cargoes booked by one member with another member should help indicate whether the Agreement is being used casually as proponents state is intended rather than as a means for a particular party to cease serving a particular port. Thus, the reporting serves useful purposes.

The only other active party to the proceeding, the Brokers and Forwarders Association, as I briefly mentioned above, withdrew their protest although they did not withdraw from the proceeding, after counsel for proponents had assured the Association on the record at the hearing that proponents had no intention of questioning the reputation or impugning the valuable contributions of the law-abiding licensed forwarders serving the Port of Miami. As I mentioned above, furthermore, I find enough justification on the record for approval of the Agreement without having to evaluate proponents' original evidentiary submissions concerning alleged questionable practices at the Port of Miami and determining whether any such practices, even if they existed, were relevant to the question of approvability of the subject space-chartering Agreement, especially since that evidence seems far more relevant to the now withdrawn discussion Agreement (No. 10468). Suffice it to say that the record shows benefits that may reasonably be expected to flow from the space-chartering Agreement which outweigh any harmful effects, as to which the evidence of record is essentially speculative, as I briefly discuss below. Consequently, with no active protests, with the support of Hearing Counsel, and with the evidence of justification present in the record, which evidence is not refuted, I find the subject Agreement should be approved provided that the clarifying language quoted above is filed with the Commission and subject to the reporting requirements discussed.

#### DISCUSSION AND CONCLUSIONS

The ultimate issue to be determined is whether the space-chartering Agreement (No. 10467) meets the standards of approvability under section 15 of the Shipping Act, 1916. Subsidiary issues framed by the Commission are to determine what competitive effects the Agreement will have, whether there are any conditions in the trade which would justify any anticompetitive effects, and whether South American cargo preference or reservation laws have any effects on the space-chartering Agreement.<sup>8</sup>

As discussed above, proponents of the subject Agreement contended that their Agreement was justified because of problems in the trade relating to overtonnaging, unstable rates, decline in cargo, and purported questionable activities at the Port of Miami, and submitted that the Agreement was minimally anticompetitive and would produce benefits to the trade. As also discussed, four protestants, three who have withdrawn their protests and one of whom has been totally inactive in the proceeding, contended that the Agreement was unjustified, extremely anticompetitive, and of uncertain relationship with South American cargo reservation laws. They contested proponents' evidence concerning overtonnaging, cargo decline, rate instability and other matters and feared that the Agreement would harm

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<sup>8</sup>Withdrawal of Agreement No. 10468, the discussion Agreement, removes a third issue framed by the Commission from the proceeding concerning how the two Agreements would interact with themselves and other agreements and why the discussion Agreement was limited in membership and scope.

them or the Port of Miami and would authorize joint activities that would enhance the anticompetitive effects of the Agreement. Hearing Counsel also expressed some concern that the space-chartering Agreement might be used in conjunction with cargo reservation laws to give parties to the Agreement an advantage over non-parties.

As I discussed above, most of the concerns of the protestants and of Hearing Counsel were ameliorated or eliminated by clarifying language which proponents agreed to insert in their Agreement, by a better understanding of the intended operations of the Agreement, by the total lack of evidence that parties to the Agreement would enjoy any special privilege or advantage over any outside carrier because of cargo reservation laws, and, finally, by the proponents' agreeing to furnish reports periodically so that the Commission could monitor the operations under the Agreement, which reporting is customary in agreements of this type and is patterned after similar reporting required by the Commission in other such agreements. Consequently, as I discuss below, I find justification for the Agreement, no countervailing probative evidence of harm, and recommend approval provided that the clarifying language quoted above is filed with the Commission and that, as agreed, proponents furnish periodic reports to the Commission. I now explain.

#### Applicable Principles of Law

Under the standards of section 15 of the 1916 Act, proponents of agreements seeking approval must come forward with evidence of needs, benefits, or regulatory purposes which their agreements provide or serve, and the Commission essentially weighs the potential benefits against possible harmful effects of the agreements, considering, in addition, the extent to which the proffered agreements violate the policies of the antitrust laws. See *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, cited above, 390 U.S. 238; *United States Lines v. F.M.C.*, cited above, 584 F. 2d 519; *Marine Space Enclosures, Inc. v. F.M.C.*, cited above, 420 F. 2d 577; *Isbrandtsen Co., Inc. v. United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954); *Agreement Nos. 9718-3 & 9731-5*, 19 F.M.C. 351, 371 (1976).

Although proponents of agreements submitted under the 1916 Act are supposed to bring forward evidence justifying approval of their agreements in order to offset the fact that their agreements are normally contrary to the policies of the antitrust laws favoring free and open competition, the Commission has held that the degree and extent of their proof varies depending upon the extent to which the agreement invades those policies. In other words, a minimally anticompetitive agreement may require less proof than one which contains substantial anticompetitive or monopolistic effects. See, e.g., *Agreement No. 9955-1*, 18 F.M.C. 426, 462 (1975); *Agreement No. 8760-5*, 17 F.M.C. 61, 62 (1973). Finally, the Commission expects parties protesting agreements to come forward with evidence supporting their allegations and will not decide cases on the basis of "specula-

tive possibilities," i.e., in the absence of facts and reasonable deductions to be drawn therefrom. *Agreement No. 9955-1*, cited above, 18 F.M.C. at 470; *Alcoa SS. Co., Inc. v. Cia. Anonima Venezolana*, 7 F.M.C. 345, 361 (1962).

### The Evidence Favoring Approval

In the present case, I note at the outset that there are no active protests to the Agreement and that Hearing Counsel, after examining the various South American cargo reservation laws and obtaining clarifications to the Agreement and proponents' expression of willingness to furnish customary periodic reports of operations under the Agreement, support approval. Furthermore, in the absence of viable protests or evidence tending to show that the Agreement would have harmful effects, there is little or nothing to offset evidence of expected benefits. Furthermore, the Agreement appears to be what its proponents state it to be, namely, a simple, casual space-charter arrangement open to any carrier serving the trade with no fixed minimum or maximum requirements or obligations of a carrier to make space available if the carrier's vessel does not have available space. (Ex. 1, Attachment D, Affidavit of Joseph T. Lykes, pp. 9-10). It has nothing to do with rate-fixing, joint solicitation, or joint activities of any kind. Very simply, if a carrier who is a party to the Agreement books cargo at a port but for some operational reason<sup>9</sup> its vessel cannot call at the port, the carrier can seek to carry the cargo on another carrier's vessel calling at the port if space is available on that vessel. Thus, the shipper's cargo need not be left at the pier. Furthermore, rather than abandoning a particular port, if a carrier books cargo at that port but its vessel cannot call there, the carrier will arrange to carry it under its own booking and bill of lading on the space of another carrier-party's vessel which can call at the port, if space is available. Since the Agreement is open to any carrier who wishes to join and enables any party to provide service which it might not otherwise be able to provide if its vessel cannot make a direct call at a particular port and since there is no joint activity, i.e., no joint solicitation, advertising, coordination or rationalization of sailings, it is difficult to see how the effects of the Agreement on competition are more than minimal or how the policies of the antitrust laws are significantly contravened.<sup>10</sup> Furthermore, there is no evidence which would support

<sup>9</sup> According to Joseph T. Lykes, Vice President-Pricing of Lykes Bros., a party to the Agreement, cancellations or delays of vessel sailings occur for reasons such as severe weather during the hurricane season causing vessel deviation or because of congestion at the Panama Canal which may require alteration of sailing schedules. Such cancellations or alterations can have adverse effects on the businesses of shippers and consignees who book cargo long in advance of the sailings. The Agreement, however, would enable the parties to it to secure vessel space and serve the shippers or consignees who might otherwise be adversely affected. (Ex. 1, Attachment D, pp. 7-8.)

<sup>10</sup> To show how little the anticompetitive effects on the trade should be, evidence submitted by proponents showing overtonnaging also shows that there are 19 carriers serving the subject trade area, nine of whom

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any of the apprehensions of any of the protestants concerning possible harmful effects of the Agreement on any particular port or carrier or as to special privileges or advantages to parties to the Agreement that might arise under South American cargo reservation laws, as to which the Agreement is strictly neutral.

The record shows that there are operational benefits and that there is no probative evidence of harmful effects. It also indicates that the fears of possible harm are essentially speculative or are based largely upon previous misunderstandings of the intentions of the parties to the Agreement and upon misunderstandings as to how the Agreement is to operate as well as concern that the Agreement would work in conjunction with the now-withdrawn discussion Agreement (No. 10468) to lead to a "consortium" or other harmful entity in the trade. Significantly, once these misunderstandings were eliminated, the discussion Agreement was withdrawn, and proponents submitted clarifying language and other explanations, all the active protestants withdrew their protests. Thus, it would appear that there is as much or even more reason to approve this simple space-charter Agreement than there was in *Agreement Nos. 10186 et al.*, 25 F.M.C. 538 (1982), in which the Commission approved a more complicated space-charter agreement (No. 10364) which was also a chartering arrangement on a space-available basis without provision for rate-fixing, coordination of sailings or joint solicitation, but with a maximum limitation which is not present in the subject Agreement No. 10467. As the Commission stated in *Agreement Nos. 10186 et al.*, (25 F.M.C. at 547):

Agreement No. 10364 is nothing more than an arrangement whereby the parties charter space on each other's vessels on a space available basis subject to a maximum. There is no provision authorizing the fixing of rates, coordination of sailings, joint solicitation of cargo or joint bills of lading. The vessel owner retains full control over the vessel. In short, the space charter places little or no restriction on the competition between the parties. Nor has it been shown, to the extent it was even argued, (footnote omitted) that the agreement will adversely affect other operators in the trade competitively.

On the other hand, proponents of Agreement No. 10364 have come forward with evidence indicating that the agreement will allow for more direct calls, prevent the introduction of additional tonnage to the trade and result in a generally more efficient transportation service to the shipping public. The Commission is satisfied that these benefits outweigh any anticompetitive features of the agreement . . . It will, accordingly, be approved.

Even if the operational benefits enabling parties to serve shippers and ports under the Agreement when they would otherwise be disabled from

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entered the trade within the last four years. The subject Agreement, however, consists of only five carriers. (Ex. I, Attachments A, C, pp. 2-3, and table mentioned therein.)

doing so were not shown, however, there are other benefits and purposes of the Agreement which would justify approval, as proponents have shown. Thus, if a vessel sailing is cancelled for some operational reason, as mentioned above, a carrier-party to the Agreement may still be able to carry the cargo under its own bill of lading on another carrier's vessel. Because the evidence shows significant overtonnaging, a fact to which the parties at the April 19 hearing stipulated,<sup>11</sup> space on a vessel that might otherwise be unused could be utilized by a carrier whose vessel sailing at the port had to be cancelled. (Ex. 1, Attachment C, p. 5, Affidavit of John M. Dillon). The Agreement will therefore help promote better utilization of vessel space while at the same time providing service to shippers whose businesses might otherwise be disrupted because of vessel cancellation or delays. Furthermore, unrefuted evidence shows overtonnaging, the presence of numerous independent carriers, a certain degree of trade instability, and increased costs for carriers wishing to provide a high quality of liner services. The space-charter Agreement, however, will provide a greater degree of operating flexibility and enhance the capability of each party to the Agreement to satisfy the requirements of shippers and consignees without diminishing competition among carriers. (Ex. 1, Attachment C, p. 5). Thus, while the space-charter Agreement may not be the answer to all the problems besetting the trade (which problems it appears that the withdrawn discussion Agreement (No. 10468) was also intended to address), the voluntary space-chartering arrangement can help a member-carrier's utilization and reduce costs by avoiding the need to reschedule a vessel to call at a particular port for relatively small amounts of cargo when the vessel has otherwise been delayed or its itinerary has had to be changed. In such instances, the carrier-party to the Agreement can book the cargo on another carrier-member's vessel calling at the particular port if space is available.

#### ULTIMATE CONCLUSIONS

The space-charter Agreement appears to have negligible anticompetitive effects, and there is no evidence that it was intended to or would harm any port, shipper, or carrier, or confer any special privilege or advantage on parties to it because of South American cargo reservation laws. Opposi-

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<sup>11</sup> Proponents furnished a considerable body of evidence showing overtonnaging in the trade area and other conditions tending to promote unstable conditions. As noted earlier, 19 carriers serve the trade area. Other carriers have been forced to leave the trade for financial reasons. Southbound, evidence shows that 12 of the 19 carriers alone offer an aggregate capacity of approximately 224.2 million cubic feet whereas cargo moving comprises only 120 million cubic feet. If the remaining seven carriers' capacities were known and added, obviously the aggregate utilization factor would be considerably less than 50 percent. Northbound the situation is even worse (only approximately 36 million cubic feet of cargo moving compared to the same aggregate vessel capacity of 224.2 million cubic feet). (Ex. 1, Attachment C and tables mentioned therein; Attachment D). Evidence concerning capacity utilization for the five parties to the Agreement was also furnished on a confidential basis and tends to confirm significant underutilization of vessel capacity. (Confidential Ex. 1). On the basis of such evidence, the parties at the hearing (Hearing Counsel, proponents, and the Brokers and Forwarders Association) stipulated that considerable overtonnaging exists).

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tion to the Agreement has virtually disappeared now that the intentions of the parties to it have been clarified, a companion discussion Agreement has been withdrawn, and they have agreed to furnish the customary reports to the Commission to ensure that the authority conferred under it will be used as intended. Under such circumstances, applicable principles of law under the 1916 Act do not require an inordinate amount of evidence showing benefits to be gained by approval of the Agreement. However, the record does show benefits to shippers and ports which would result when a carrier member of the Agreement could serve the port even when its vessel could not call at the port and further benefits in the form of cost reductions and efficiencies derived from greater flexibility in vessel deployment. The space-chartering Agreement is extremely simple and voluntary among the parties and does not authorize joint solicitation, advertising, coordination or rationalization of sailings. It is thus less restrictive than or similar to numerous other space-chartering agreements which the Commission has approved after finding that expected benefits would outweigh any possible harmful effects. See, e.g., *Agreement No. 10186-3*, 19 SRR 1611 (1980); *Agreement Nos. 10186 et al.*, cited above, 25 F.M.C. 538; *Agreement No. 10364*, 19 SRR 1323 (1980).

Agreement No. 10467 is therefore approved provided that proponents file with the Commission and the Commission receives the amendatory language discussed above, signed by the parties or their duly authorized representatives, within 30 days of the date of service of the Commission's notice rendering this Initial Decision administratively final or such other time as the Commission may direct upon review of this Decision.

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