

**FEDERAL MARITIME  
COMMISSION**

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**31st  
ANNUAL REPORT**

**for**

**Fiscal Year**

**1992**





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FEDERAL MARITIME COMMISSION  
WASHINGTON, D.C. 20573-0001

March 31, 1993

To the United States Senate and House of Representatives:

Pursuant to section 103(e) of Reorganization Plan No. 7 of 1961, and section 208 of the Merchant Marine Act, 1936, as amended, I am pleased to submit the thirty-first annual report of the activities of the Federal Maritime Commission for fiscal year 1992.

Additionally, section V.N of this report contains an Update on Remote Access - February 1993, to comply with the request of Congress to be kept informed on developments of reasonable restrictions on remote access to the Commission's *Automated Tariff Filing and Information System ("ATFI")*.

Sincerely,

A handwritten signature in cursive script that reads "Christopher Koch".

Christopher L. Koch  
Chairman



# MEMBERS OF COMMISSION



*Christopher L. Koch  
Chairman  
Appointed 1990  
Term Expires 1995*



*Rob Quartel  
Commissioner  
Appointed 1990  
Resigned April 6, 1992*



*William D. Hathaway  
Commissioner  
Appointed 1990  
Term Expires 1993*



*Francis J. Ivancie  
Commissioner  
Appointed 1985  
Term Expired 1992*



*Ming C. Hsu  
Commissioner  
Appointed 1990  
Term Expires 1996*



# SENIOR COMMISSION OFFICIALS

- Secretary . . . . . *Joseph C. Polking*
- Chief Administrative Law Judge . . . . . *Norman D. Kline*
- General Counsel . . . . . *Robert D. Bourgojn*
- Director, Office of  
Equal Employment Opportunity . . . . . *Mary A. Jackson*
- Inspector General . . . . . *Tony P. Kominoth*
- Managing Director . . . . . *Edward P. Walsh*
- Deputy Managing Director . . . . . *Bruce A. Dombrowski*
- Deputy Managing Director . . . . . *John Robert Ewers*
- Director, Bureau of  
Trade Monitoring  
and Analysis . . . . . *Austin L. Schmitt*
- Director, Bureau of  
Tariffs, Certification  
and Licensing . . . . . *Bryant L. VanBrakle*
- Director, Bureau of  
Hearing Counsel . . . . . *Seymour Glanzer*
- Director, Bureau of  
Investigations . . . . . *Wm. Jarrel Smith, Jr.*
- Director, Bureau of  
Administration . . . . . *Norman W. Littlejohn*



# I

## THE COMMISSION

### A. HISTORY

The Federal Maritime Commission ("Commission" or "FMC") was established as an independent regulatory agency by Reorganization Plan No. 7, effective August 12, 1961. Prior to that time, the Federal Maritime Board was responsible for both the regulation of ocean commerce and the promotion of the United States ("U.S.") Merchant Marine. Under the reorganization plan, the shipping laws of the U.S. were separated into two categories -- regulatory and promotional. The responsibilities associated with promotion of an adequate and efficient U.S. Merchant Marine were assigned to the Maritime Administration, now located within the Department of Transportation ("DOT"). The newly-created FMC was charged with the administration of the regulatory provisions of the shipping laws.

The Commission is now responsible for the regulation of oceanborne transportation in the foreign commerce and in the domestic offshore trade of the U.S. The passage of the Shipping Act of 1984 brought about a major change in the regulatory regime facing shipping companies operating in the foreign commerce of the U.S.

### B. FUNCTIONS

The principal statutes or statutory provisions ("shipping statutes") administered by the Commission are the Shipping Act of 1984 ("1984 Act"), the Shipping Act, 1916 ("1916 Act"), the Intercoastal Shipping Act, 1933 ("1933 Act"), the Foreign Shipping Practices Act of 1988 ("FSPA"), and section 19 of the Merchant Marine Act, 1920 ("1920 Act").

During 1990, the 1984 Act was amended to provide for the bonding of non-vessel-operating common carriers (the Non-Vessel-Operating Common Carrier Amendments of 1990 - "1990 Amendments"), and section 19 of the 1920 Act was amended to provide for information gathering and other authorities.

The Commission's regulatory responsibilities include:

- **Protecting shippers and carriers engaged in the foreign commerce of the U.S. from restrictive or non-market-oriented rules and regulations of foreign governments and/or the practices of foreign-flag carriers that have an adverse effect on the commerce of the U.S.**
- **Protecting the rights of U.S.-flag shipping companies to transport cargoes in the U.S. foreign oceanborne and foreign-to-foreign trades.**
- **Reviewing and monitoring agreements of common carriers and other persons engaged in the U.S. foreign commerce. These agreements include conference, pooling, joint service and space charter agreements.**
- **Receipt and review of tariff filings (but not the regulation of rate levels) by common carriers engaged in the U.S. foreign commerce.**
- **Regulating rates, charges, classifications, rules, regulations and tariffs of controlled carriers to ensure that such matters are just and reasonable.**

- **Regulating rates, charges, classifications, practices and tariffs of ocean common carriers in the domestic offshore trades of the U.S.**
- **Licensing international ocean freight forwarders.**
- **Bonding of non-vessel-operating common carriers ("NVOCCs").**
- **Issuing passenger vessel certificates evidencing financial responsibility of vessel owners or charterers to pay judgments for personal injury or death or to repay fares for the nonperformance of a voyage or cruise.**
- **Investigating discriminatory rates, charges, classifications, and practices of ocean common carriers, terminal operators, and freight forwarders operating in the foreign and/or domestic offshore commerce of the U.S.**

The Commission is authorized by the FSPA, section 19 of the 1920 Act, and section 13(b)(5) of the 1984 Act, to take action to ensure that the foreign commerce of the U.S. is not burdened by non-market barriers to ocean shipping. The Commission may take countervailing action to correct unfavorable shipping conditions in U.S. foreign commerce and may impose penalties to address actions by carriers or foreign governments that adversely affect the operation of U.S. carriers in the U.S. foreign oceanborne trades and that impair access of U.S.-flag vessels to ocean trade between foreign ports.

The 1984 Act is applicable to the operations of common carriers and other persons engaged in U.S. foreign commerce. It exempts agreements that have become effective under the Act from the U.S. antitrust laws (as contained in the Sherman

and Clayton Acts). The Commission reviews and evaluates agreements to ensure that they do not exploit the grant of antitrust immunity, and to ensure that agreements do not otherwise violate the 1984 Act or result in an unreasonable increase in transportation cost or unreasonable reduction in service.

In addition to monitoring relationships among carriers, the Commission is also responsible for ensuring that individual carriers, as well as those permitted by agreement to act in concert, fairly treat shippers and other members of the shipping public. The 1984 Act prohibits carriers from unduly discriminating among shippers and other members of the shipping public. The 1984 Act also requires carriers to make their rates, charges and practices publicly available in tariffs that must be on file with the Commission. Carriers may only assess the rates and charges that are lawfully on file with the Commission. The Commission does not, however, have the authority to approve or disapprove general rate increases or individual commodity rate levels in the U.S. foreign commerce, except with regard to certain foreign government-owned carriers.

The 1916 and 1933 Acts regulate the activities of common carriers and other persons engaged in the domestic offshore trades of the U.S. In general, they provide for tariff filing and protect against unduly discriminatory practices in a manner similar to the 1984 Act. In addition, the 1933 Act provides for a more comprehensive scheme of regulation to ensure that the minimum and maximum rates and practices of common carriers in the domestic offshore trades are just and reasonable.

The Commission carries out its regulatory responsibilities by conducting informal and formal investigations. It also holds hearings, considers evidence and renders decisions, and issues appropriate orders and implementing regulations. The

Commission also adjudicates disputes involving the regulated community, the general shipping public, and other affected individuals or interest groups.

### **C. ORGANIZATION**

The Commission is composed of five Commissioners appointed for five-year terms by the President with the advice and consent of the Senate. Not more than three members of the Commission may belong to the same political party. The President designates one of the Commissioners to serve as Chairman. The Chairman is the chief executive and administrative officer of the agency.

The Commission's organizational units consist of: Office of the Managing Director; Office of the Secretary; Office of the General Counsel; Office of Administrative Law Judges; Office of Equal Employment Opportunity; Office of the Inspector General; Bureau of Trade Monitoring and Analysis; Bureau of Tariffs, Certification and Licensing; Bureau of Hearing Counsel; Bureau of Administration; and Bureau of Investigations. The Managing Director assists the Chairman in providing executive and administrative direction to the Commission's Offices and Bureaus. These Offices and Bureaus are responsible for the Commission's regulatory programs or provide administrative support.

In fiscal year 1992, the Commission was authorized a total of 231 full-time equivalent positions and had a total appropriation of \$17,600,000. The majority of the Commission's personnel are located in Washington, D.C., with field offices in New York, San Francisco, Los Angeles, New Orleans, Miami, Houston, and Hato Rey, Puerto Rico.



## II

### THE YEAR IN REVIEW

The Commission was very active in addressing its various statutory responsibilities in fiscal year 1992. The FSPA and section 19 continuously were used to address restrictive practices by foreign governments that were having a detrimental effect on U.S. commerce and U.S. ocean carriers. Similarly, our enforcement efforts regarding commercial malpractices were successful in both deterring illegal acts and encouraging fair competition in our oceanborne trades.

The Commission also responded vigorously to the President's request to reduce the burden of regulation and promote economic growth. All Commission regulations were reviewed, and numerous changes were implemented in an effort to produce a more efficient regulatory system for the ocean shipping industry.

Additionally, the Commission's automated tariff filing system moved closer to implementation (scheduled for February 1993), and we continued to provide data, information, and staff assistance in support of the review of the 1984 Act being conducted by the Advisory Commission on Conferences in Ocean Shipping ("Advisory Commission").

This Annual Report is essentially structured on an office-by-office basis and contains a synopsis of each unit's activities and accomplishments. Special sections are devoted to areas of particular concern. This section of the Report is a brief summary of the Commission's major accomplishments during the year.

## A. RESTRICTIVE TRADE PRACTICES

The Commission continued the priority program which addresses restrictive trade practices by foreign governments and other actions resulting in unfavorable conditions in U.S. shipping.

The Commission proposed a rule imposing a \$100,000 per-voyage fee upon certain Venezuelan-flag carriers, in response to Venezuela's exclusion of third-flag carriers from access to a substantial portion of U.S./Venezuela cargo. Venezuela subsequently removed this restriction, negating the need to finalize the proposed rule.

After having been assessed a \$50,000 per-voyage fee as a result of Ecuador cargo reservation laws, Maritima Transligna, S.A. ("Transligna") advised the Commission that it no longer operated an Ecuadorian-flag parcel tanker in the U.S./Ecuador trade. Accordingly, collection of the fee was not enforced. A petition for enforcement of the fee, however, alleged that Transligna was operating in the trade with a changed identity. The Commission, therefore, issued a Show Cause Order to examine the continued operations of Transligna in the trade. At the conclusion of fiscal year 1992, discussions for the settlement of this formal proceeding were progressing toward a satisfactory conclusion.

In the Republic of Korea ("ROK") trade, the Commission issued a final rule imposing a fee of \$100,000 per voyage on ROK-flag vessels calling at U.S. ports. This rule was in response to ROK restrictions on U.S. carriers' ability to operate trucking operations and directly deal with the railroads. This sanction was suspended until June 1994 in light of ROK commitments to eliminate the restrictions. The Commission also issued a final rule based on ROK laws which precluded U.S. companies from owning and operating an NVOCC service

in the ROK. This rule suspended freight forwarder licenses and tariffs of Korean entities, and prohibited carriers from paying freight forwarder compensation or brokerage on ROK shipments to the U.S. The effective date of these sanctions was delayed until September 1993, based on ROK commitments to remove the nationality-based restrictions of its laws.

A formal proceeding previously had been instituted regarding the Japan Harbor Management Fund ("Fund"), but was discontinued upon advice from the involved U.S. carriers and the Japan Government that collections under the Fund would cease. Collections did, in fact, end. The Commission continues to monitor this matter and review periodic reports from U.S. and Japanese carriers to determine compliance with assurances provided as the basis for discontinuing the FSPA proceeding.

The Commission previously initiated an FSPA investigation into alleged trade restrictions in the People's Republic of China ("PRC") trade. Commercial and governmental consultations subsequently occurred, and the proceeding was discontinued in February 1992, when the PRC made substantial concessions and commitments to remove the adverse effects of the restrictive practices. The Commission did require periodic reports from PRC and U.S. carriers concerning the status of each issue addressed in the FSPA proceeding.

The Commission initiated a formal FSPA investigation involving Taiwan trade restrictions in October 1991. The restrictive conditions subsequently were resolved to the satisfaction of the U.S. carriers, except for the issue of trucking in Taiwan. The Commission was advised that legislation to allow U.S. carriers to operate trucks for certain purposes was to be forthcoming. Accordingly, the proceeding was discontinued in May 1992. The Commission ordered additional reports to be submitted by the U.S. and Taiwan carriers, and continues to

monitor the status of legislation to remove restrictions on trucking in Taiwan.

## **B. ENFORCEMENT**

The Commission's enforcement program continues to operate as a collaborative effort among its trade specialists, economists, investigators, and prosecutors. These individuals work together to develop strategies for presentation to senior management. Relevant data and information then is developed, the necessary investigation and monitoring accomplished, and the appropriate enforcement action initiated. Agency resources are focused on carriers, commodities and malpractices that have the greatest impact on U.S. ocean commerce. Subsequent to the completion of any enforcement action, the appropriate level of follow-up monitoring is initiated to ensure that malpractices do not recur or shift to some new scheme.

The Commission collected \$653,712 in civil penalties during fiscal year 1992. Settlements were reached with entities from all segments of the industry, and covered the full range of U.S. foreign trades. The two previous years' collections of \$22,000,000 and \$25,000,000 had laid a strong deterrent foundation. We were able, therefore, to continue our efforts to assist carriers in various trades to police their own activities via the commercial approach they deem most appropriate. An example of such a program is the North Atlantic Compliance Agreement, where a neutral body polices carrier activities. The Commission meets periodically with the neutral body and the involved carriers to assess this program's success at curbing carrier malpractices. General trade monitoring and oversight by the Commission also continue in such circumstances. Additionally, pursuant to its cooperative agreement with the U.S. Customs Service ("Customs"), the Commission was provided access to Customs' Automated Commercial System ("ACS"), which should enhance the Commission's ability to

uncover and deter malpractices. The Commission also initiated a program to address misdescriptions, misdeclarations, and misuse of service contracts which are being accomplished via false bill-of-lading information being provided to ocean carriers.

From an overall enforcement perspective, the Commission's efforts remain guided by the primary objectives of obtaining statutory compliance and ensuring equitable trading conditions in our oceanborne trades.

### **C. SURVEILLANCE**

The Commission continually seeks to enhance the breadth and effectiveness of its monitoring and surveillance efforts. Systematic surveillance of carrier activity and trade conditions helps to ensure continuing compliance with statutory and regulatory requirements. It also serves as a logical adjunct to Commission enforcement activities, and assists in the identification of potentially unfavorable trade practices by foreign governments.

Our surveillance efforts integrate a number of factors, such as operator market share data, shipper identification, tariff rate levels and histories, review and analysis of agreements and periodic reports of agreement parties, investigation of possible malpractices or restrictions, etc.

Among the major projects completed this past year were: audits of selected major conference agreements under section 6(g) of the 1984 Act; an analysis and report on the operations of a major capacity reduction agreement; an annual report on controlled carrier activities; a report on the savings to U.S. carriers resulting from actions taken by the Commission under the FSPA during the year; an analysis of issues surrounding terminal handling charges and currency adjustment factors; development of information on various freight forwarder

practices; a report on coffee carryings in the South American trades; a report on vessel utilization in the transpacific and transatlantic trades; and the development of trade data for various investigative initiatives.

## **D. REGULATORY REVIEW**

The Commission conducted a comprehensive review of its regulations during fiscal year 1992 in response to the President's request that all federal agencies eliminate unnecessary regulations and promote economic growth. The Commission's efforts actually had begun the prior fiscal year, with the initiation of several rulemaking proceedings designed to refine, clarify or update existing regulations. This initial effort was woven into the full-scale review directed by the President, and resulted in numerous changes for the benefit of all segments of the ocean shipping industry.

A special working group of senior executives was formed to plan, direct, and monitor this review effort. Various staff members were involved in the review, analysis, and document preparation phase, and all recommendations were presented to the full Commission under a streamlined schedule. This approach ensured a comprehensive review and analysis, appropriate presentations to the Commission, and timely implementation of all actions.

In all, over twenty rulemaking proceedings were initiated by the Commission, covering the full range of Commission regulations. Some of the more important rules that were finalized included: permitting the amendment of service contracts; substantially deregulating marine terminal operator agreement filing requirements; liberalizing freight forwarder and passenger vessel regulations; decreasing the notice period for tariff increases in the domestic offshore trades from thirty to seven days; clarifying important independent action

regulations; permitting anti-rebate certificates to be filed every two years, as opposed to the existing yearly requirement; reducing the recordkeeping burden on agreement parties; and eliminating certain regulations that were no longer necessary.

Several rulemaking proceedings initiated under this effort did not result in the effectuation of final rules, e.g., NVO tariff filing, global service contracts, service contracts on a percentage basis, tariffs on excepted commodities, etc. Nonetheless, Commission consideration of these important matters permitted the industry to air its views and provide the Commission with current information that should facilitate future regulatory efforts.

The Commission's regulatory review effort eliminated certain costly burdens on the industry, and helped to secure regulatory improvements for the benefit of international shipping. We will continue to assess our regulations on an ongoing basis to identify necessary and beneficial changes.

## **E. TARIFF AUTOMATION**

The Commission moved closer this fiscal year to implementation of its system for automating the filing of tariffs. The Automated Tariff Filing and Information system ("ATFI") should expedite the filing process and facilitate the retrieval and review of tariff information by the Commission and the industry.

In late fiscal year 1991, the Commission added Part 514 to its regulations, which will serve as the sole CFR part covering tariffs and service contracts (previous Parts 515, 550, 580, and 581 will be removed). New Part 514 reiterated and/or rephrased traditional regulatory policy so that it could be adapted to the new electronic system. The proposed rule also had contained the following major features: use of the

Harmonized System of Commodity Coding for describing commodities; filing and maintaining essential terms of service contracts in database format, rather than in textual format; and expressing assessorial charges in algorithm format.

After review of comments and an oral comment session in May 1992, the Commission finalized Part 514 in an interim rule issued in August 1992. This rule changed the use of the Harmonized Code from mandatory to optional, permitted essential terms of service contracts to be filed in full text as opposed to database format (with some degree of standardization), and stated that algorithms need not be developed for assessorial charges that are not pre-determinable. The Commission invited further comments on this interim rule. At the close of fiscal year 1992, the Commission was analyzing these comments so that ATFI's basic functionality could be finalized in fiscal year 1993.

Also in fiscal year 1992, a Batch Filing Guide was modified to reflect system improvements and the registration form and user charge portions of the proposed rule dealing with Part 514 (Docket No. 90-23) were finalized. Certifications of firms for batch filing capability began late in fiscal year 1992.

In February 1992, the Commission announced that full implementation of ATFI, previously scheduled for July 1992, would have to be postponed as a result of a GSA-required relocation of FMC headquarters. A new implementation schedule, continuing the trade-area phase-in concept, calls for filing to begin under ATFI in February 1993. As the fiscal year ended, the Commission stood ready to meet this schedule and move successfully to the implementation of the ATFI system.

## F. SECTION 18 STUDY

In September 1989, the Commission forwarded its Section 18 Report on the Shipping Act of 1984 ("Report") to Congress and the Advisory Commission. The Report culminated five-years of study by the FMC and, as directed by Congress, presented data and information on tariffs, service, independent carriers, and the length, frequency, and costs of FMC proceedings. The Report also addressed the three topics specified by Congress: (1) the advisability of adopting a system of tariffs based on volume and mass; (2) the need for antitrust immunity for ports and marine terminals; and (3) the continuing need for the statutory requirement that tariffs be filed with and enforced by the Commission.

During fiscal year 1992, the Commission gathered additional data and information to update the Report. This information was provided to the Advisory Commission for use in its study. Additionally, several Commission staffers were detailed to the Advisory Commission to assist in the compilation and analysis of data, and the summarization of trends and activities in various U.S. trades.

The Advisory Commission's report was delivered to the President and Congress on April 10, 1992. The report does not include conclusions or recommendations; however, it provides a comprehensive review of the issues considered by the Advisory Commission based on the views of numerous representatives of the industry who testified before the Commission. Also, individual members of the Advisory Commission submitted separate statements highlighting issues they deemed to be significant along with any changes they believe necessary to the current regulatory structure.



### III

## SURVEILLANCE AND ENFORCEMENT

### A. SURVEILLANCE

An integral part of the Commission's mandate under the 1916 Act and the 1984 Act is the systematic surveillance of carrier activity and trade conditions to ensure continuing compliance with statutory standards and the requirements of the Commission's rules. The Commission administers a variety of surveillance programs designed to afford the necessary degree of oversight in these areas.

The 1984 Act provides for statutory effectiveness of filed agreements following a brief waiting period, unless a given agreement is rejected for technical reasons, or for failure to conform with the mandatory conference agreement provisions in sections 5(b) and 5(c), or is contrary to the general standard contained in section 6(g) of the 1984 Act, or raises issues under section 10 of the 1984 Act that require the submission of additional information. The Commission performs analyses of agreements under these standards. In addition, agreements subject to the 1916 Act, which are in the U.S. domestic offshore trades, are processed and analyzed in accordance with that Act's public interest standard. Once an agreement becomes effective, the Commission is responsible for maintaining surveillance over the parties' concerted activities to ensure compliance with the standards of the 1984 Act. The 1916 Act also empowers the Commission to investigate and order the disapproval, cancellation, or modification of an agreement that it finds to be in violation of the 1916 Act. To fulfill this statutory responsibility, the Commission has continued to direct its activities toward improving the breadth and effectiveness of its monitoring programs.

As in previous years, the Commission continued this past year to refine its programs for monitoring the behavior of agreement parties in the U.S. trades. These programs integrate a number of surveillance factors, including operator market share data, cargo tonnages of major-moving commodities, shipper identification, relevant tariff rate levels and rate histories, use of service contracts, agreement-document analysis, review of minutes of meetings held by agreement members and other reports required by the Commission's rules, and investigation for existence of possible malpractices.

During fiscal year 1992, the Bureau of Trade Monitoring and Analysis ("BTMA") produced a number of monitoring reports and analyses. These included: (1) 6(g) audits of selected agreements in major trade lanes; (2) an annual report on controlled carrier activities; (3) a rate-of-return analysis for a rate increase in the U.S./Hawaii trade; (4) an analysis of responses to a section 15 order concerning an agreement's restriction of its members from competing with each other (a possible violation of section 10(c)(6) of the 1984 Act); (5) an analysis of reports submitted by certain carriers regarding fees paid into the Japan Harbor Management Fund; (6) the development of trade data for investigative initiatives; (7) an update of utilization and average revenue figures for the Transpacific Stabilization Agreement; (8) an analysis of information regarding a possible unfiled agreement among several U.S. Gulf ports; (9) an analysis and report on the potential savings to U.S. carriers derived from the Commission's actions on unfair shipping practices; (10) the development of market share data on major-moving commodities in the ROK trade; (11) an analysis of operating results under key space chartering agreements; (12) a report on the status of the ex-Soviet Merchant Marine; (13) a report and analysis of service contracts filed by a controlled carrier; (14) an analysis of the issues surrounding currency adjustment factors and terminal handling charges; (15) the development of utilization data in

the transpacific and transatlantic trades; (16) a report on the use of independent actions by a major transpacific conference; (17) a report on coffee movements from Latin America to the U.S.; (18) a report on the impact of the Commission's filing exemption for marine terminal services agreements; and (19) the retrieval of carrier market share data in various trades.

During fiscal year 1992, the FMC continued to support the Advisory Commission. The FMC provided staff assistance to the Advisory Commission, continued to collect information on the impact of the 1984 Act to ensure that current facts and data are available to the Advisory Commission and Congress, and prepared reports updating certain information contained in the FMC's Section 18 Report.

Other projects BTMA was involved in during fiscal year 1992 included: (1) review of the Commission's financial filing requirements for domestic offshore carriers, agreement filing regulations, and requirements for NVOCC bonding, in order to determine where the Commission could lessen the regulatory burden on the industry; (2) preparation of a comprehensive report on the Commission's regulatory review process, including estimates on potential cost savings and increased employment that might result from proposed regulatory changes; (3) monthly reports on the activities of controlled carriers; and (4) agreement reporting audits. BTMA also (5) addressed service reductions in the Western Mediterranean trade, volume discounts in the Australian trade, and rate increases on meat in the New Zealand trade; and (6) monitored rate filings of a Russian carrier.

During fiscal year 1992, the Bureau of Investigations inaugurated an initiative to develop an understanding of ocean freight forwarder industry practices in a number of areas. These areas included the handling of LCL cargo (coloadng),

markups by freight forwarders of ocean freight or any ancillary services, and bookings with NVOCCs.

## **B. ENFORCEMENT**

Under the 1984 Act, the Commission placed greater regulatory emphasis on enforcement activity than existed under the predecessor statute. The enforcement functions are performed primarily by the Commission's Bureau of Hearing Counsel and Bureau of Investigations. (*See* Chapter VIII, I and J).

The Transpacific Malpractice Program is an example of a long-term program initiated by the Commission. The purpose of this program is twofold: (1) to obtain compliance with the 1984 Act; and (2) to establish an equitable trade environment for carriers, shippers and middlemen participating in the transpacific trades. The transpacific program involves both informal and formal investigations of violations of the 1984 Act. These investigations already have resulted in individual and comprehensive settlements with shippers, NVOCCs, vessel operating common carriers and freight forwarders. Many of these entities provided disclosures of additional 1984 Act violations. It is anticipated that the transpacific enforcement program will continue to have an important impact during the next fiscal year and beyond.

Another long-term program, the transatlantic trade enforcement initiative, which began in 1987, continued through fiscal year 1992. Neutral-body self-policing, established as one result of the program, continued to operate effectively in the trade. Members of the Commission staff meet regularly with the participating neutral body and annually with the carrier members. The Commission is advised that this initiative is having a substantial beneficial impact on the shipping community.

The Commission's liaison and enforcement activities involve cooperation and coordination with other Government agencies. A joint support program between the Commission and Customs has resulted in interagency coordination of effort on matters of mutual concern. This program was expanded during fiscal year 1992 to provide access for Commission staff to Customs' ACS. Access to Customs' ACS data will enhance the Commission's capability in uncovering and deterring malpractices.

During fiscal year 1992, the Bureau of Investigations initiated a new effort intended to combat malpractices involving false bills of lading information provided to ocean carriers in order to obtain unlawful ocean freight reductions. The principal malpractices targeted under this initiative are misdescription of commodity, misdeclaration of weight, measurement, and count, and misuse of service contracts.

The Commission's enforcement activity in fiscal 1992 resulted in the collection of civil penalties in the amount of \$653,712. (See Appendix E). It is anticipated that sustained enforcement activity will have an escalating deterrent effect on malpractices in the shipping industry.



## IV

# DEVELOPMENTS IN MAJOR U.S. FOREIGN TRADES

### A. TRANSATLANTIC

The transatlantic trade has long been a difficult trade in which to operate because of persistent overcapacity, fierce competition, and depressed freight rates. However, as a result of the U.S. economic recession, the bottom fell out from the inbound leg with cargo volumes plummeting 35 percent in 1991. The outbound trade's cargo volume also declined after a number of years of steady increases, falling 18 percent in 1991. There was some recovery in the first half of 1992, with cargo volumes up 3 percent inbound and 9 percent outbound. And for the first time in many years, the cargo flow across the Atlantic came into balance, i.e., the volume of cargo outbound equaled the cargo volume inbound.

The decline in cargo volumes led to capacity utilization rates as low as 60 percent for some carriers. Rate levels and carrier profitability also plunged, with many lines claiming large losses from operations in the transatlantic. Compagnie Generale Maritime ("CGM") left the trade due to large operating losses. Another carrier that has been operating for many years, and which only serves the U.S.-North Europe trade, Atlantic Container Lines ("ACL"), was put up for sale by its parent company after a series of losses.

With the difficulties of 1991 as a backdrop, key carriers in the trade forged a new agreement, the *Trans-Atlantic Agreement* ("TAA") (No. 202-011375). TAA replaced both the *USA-North Europe Rate Agreement* (No. 202-011241) and the *North*

*Europe-USA Rate Agreement* (No. 202-011242). The *Eurocorde Discussion Agreement ("Eurocorde")* (No. 202-010829), which has been active in the transatlantic since 1985, will remain in place.

TAA was originally filed with the Commission on April 15, 1992. However, the original TAA was withdrawn on April 30, 1992, because the Commission had concerns about the clarity of the agreement. TAA was refiled in amended form on May 7, 1992, and became effective August 31, 1992, but not before the TAA parties, in response to concerns expressed by the Commission's staff, removed certain articles in the agreement that appeared to be contrary to the provisions of the 1984 Act.

TAA contains a number of provisions that set it apart from both the former rate agreements in the transatlantic trade as well as agreements in other trades. First, TAA covers both the inbound and outbound trades. Second, TAA has a tiered membership structure consisting of two distinct groups of carriers. One group is subject to binding ratemaking authority while the second group is not. Those carriers bound by ratemaking authority interact in a traditional conference manner -- they have a common tariff, mandatory independent action ("IA") on ten days' notice, and service contracts are negotiated by the conference on behalf of its members. However, agreement members in the second tier may join in discussions on common rates if they wish, but are also free to arbitrarily change their rates. In addition, the second-tier members may enter into individual service contracts or have the option of joining in the conference contract. Third, TAA contains a Capacity Management Program that will only be active in the inbound trade. While there are agreements in other trade lanes that limit capacity, this is the first conference agreement that contains a provision for capacity limitation. The TAA Program is comprised of eight consecutive three-month accounting periods over a two-year term. While the individual

capacity commitments vary, overall the TAA members are planning to withhold 20 percent of their collective capacity from the market.

A number of carriers that had formerly been non-conference carriers joined TAA. These carriers are: Cho Yang Shipping Company ("Cho Yang"), DSR/Senator Joint Service, Mediterranean Shipping Company ("Med Shipping"), Orient Overseas Container Line (UK) Ltd. ("OOCL"), and Polish Ocean Lines ("POL"). As a result, the conference market share increased from 61 percent to 83 percent in the inbound trade and from 54 percent to 83 percent in the outbound trade. However, all these new conference members, with the exception of Cho Yang and DSR/Senator Joint Service, were formerly members of Eurocorde, a non-binding discussion agreement between the former North European/U.S. conferences and independent carriers serving the same trade. In addition, these carriers all joined TAA as second-tier members, allowing them to execute their own service contracts and to take IA on immediate notice. Thus, these carriers have retained, to a large degree, the pricing independence they enjoyed as non-conference carriers.

Other than TAA, there were few new significant agreements filed in the transatlantic during 1992. This was most likely a result of the carriers in the trade being occupied with negotiating TAA. However, during the summer of 1992, there were a number of reports of service changes being considered in the transatlantic trade. OOCL is considering removing its four vessels from the trade and chartering space on the VSA vessels, a vessel-sharing agreement between Sea-Land Service Inc. ("Sea-Land"), P&O Container Limited, and Nedlloyd Lines ("Nedlloyd"). In addition, Hapag-Lloyd AG ("Hapag-Lloyd") entered into cooperative working arrangement (No. 203-011387) with Nippon Yusen Kaisha ("NYK") and Neptune Orient Lines ("NOL") to provide a pendulum service

between Asia, North America, and Europe. A pendulum service "swings" back and forth between origins and destinations.

These changes reflect a long-term trend in reshaping service in the trade. The extreme overcapacity and resultant low rate levels have been forcing changes in the way the carriers operate. Cutting costs is paramount for survival, and one way carriers have lowered their operating costs has been to reduce excess capacity by sharing vessel space. This allows carriers to minimize the amount of unused slots on their vessels while maintaining the service frequency demanded by shippers. As a result, there has been a large number of space chartering agreements filed with the Commission over the last several years. One of the sections of TAA is, in fact, devoted to facilitating these types of arrangements between its members.

As an example of the pervasive nature of these agreements in the trade, it is interesting to look at the circumstances surrounding Hapag-Lloyd's decision to join into the agreement with NYK and NOL. When CGM decided to pull out of the trade, a joint service between ACL, CGM and Hapag-Lloyd to the U.S. West Coast was put in jeopardy. When Hapag-Lloyd then joined NYK and NOL in setting up a new arrangement, ACL was left without a partner in the West Coast trade. ACL's continued presence in the trade may hinge on whether it finds a suitable partner. With the cost of introducing new capacity high and rate levels low, carriers will continue to develop rationalization arrangements.

Another interesting trend is that the traditional distinctions between markets are being eroded. A number of carriers have abandoned the traditional loop service pattern on the North Atlantic, i.e., providing service solely between ports in the U.S. and Europe. Several carriers are putting together alliances that allow them to serve a number of markets. The

Hapag Lloyd/NYK/NOL agreement illustrates the trend. There are three carriers serving the North Atlantic as part of round-the-world services, Cho Yang, DSR/Senator Joint Service (operating under *The Tricontinental Service Agreement* (No. 203-011305)), and Evergreen Marine Corp. ("Evergreen") (a non-conference carrier). Additionally, Maersk Line provides a pendulum service between Asia, North America, and Europe. (As noted, the Hapag Lloyd/NYK/NOL combination will begin a similar service in 1993.) Since these three markets account for the majority of all liner cargo movements, a pendulum service allows carriers to serve the majority of liner traffic with fewer vessels than would be required in separate round-the-world services.

## B. MEDITERRANEAN

Most of the principal carriers serving the U.S. Atlantic/Gulf-Mediterranean trade are members of two conferences, which hold dominant market positions. The inbound trade is served by the *South Europe-U.S.A. Freight Conference* ("SEUSA") (No. 202-010676). The corresponding outbound trade is served by the *U.S. Atlantic and Gulf/Western Mediterranean Rate Agreement* ("AGWM") (No. 202-011102). AGWM has a companion pooling agreement, the *U.S.A./South Europe Pool Agreement* (No. 212-011234), that authorizes the parties to pool revenue and to cross charter space. The inbound/outbound U.S. Pacific-Mediterranean trades continue to be served by the *Mediterranean/North Pacific Freight Conference* (No. 202-008090).

Membership in the two Atlantic conferences declined during the course of the fiscal year. The Yugoslavian-based carrier, Jugooceanija, withdrew from SEUSA in April 1992. Additionally, the national French carrier, CGM, withdrew from both SEUSA and AGWM in August 1992. Furthermore, CGM announced plans to terminate its U.S.-Mediterranean services

by mid-November of the next fiscal year due to financial problems resulting from continued operating losses and escalating debt. CGM's operations remain uncertain pending the French Government's decision on the company's future.

As with the transatlantic trade, the Mediterranean trade suffers from overtonnaging. Several aspects inherent to the trade exacerbate the overtonnaging problem. As the continental European infrastructure continues to expand as a result of progress towards a unified European market and in response to shippers' needs, the availability of North European ports as alternatives to the Mediterranean market provides added competition. Additionally, the Mediterranean is a collection point for feeder cargo and attracts a number of carriers for cargo whose ultimate destination may be other than Mediterranean ports, further contributing to the available cargo space. Moreover, the Mediterranean is a natural link between the U.S. and the Middle and Far East; thus several worldwide carriers also operate in the Mediterranean trade, adding additional pressure to the overcapacity problem.

Despite its inherent problems, conditions in the Mediterranean trade showed marginal improvement from the previous fiscal year's recessionary slump. The depreciation of the U.S. dollar against European currencies boosted U.S. liner exports to the Mediterranean; however, reduced demand for European goods weakened U.S. liner import growth. For fiscal year 1992, the volume of U.S. liner exports to the Mediterranean grew by about 5 percent in comparison to the preceding fiscal year, while U.S. liner imports from the Mediterranean experienced only a slight gain of 1 percent. However, U.S. liner imports exceeded exports by more than 46,000 20-foot equivalent units ("TEUs").

An increase in service rationalization between carriers operating in the U.S. Atlantic-Mediterranean trade occurred

during the fiscal year. Italia di Navigazione, SpA ("Italian Line") entered into a space charter and sailing agreement (No. 232-011358) with the three members of VSA, the *P&O Container Limited/Nedlloyd/Sea-Land Agreement* (No. 203-011171). Italian Line's agreement authorizes the parties to charter space on each other's vessels and agree on service schedules. It also provides for the acquisition of additional tonnage from Evergreen. Italian Line maintains a separate space charter and sailing agreement with Evergreen in the same Mediterranean trade. Italian Line deploys its two largest vessels in its U.S. Atlantic-Mediterranean service, each with a capacity of 2,232 TEUs. The new arrangement enables Italian Line to make additional port calls and increase service frequency.

Italian Line also restructured its U.S. Pacific-Mediterranean operation by terminating its joint service agreement (No. 207-010482) with another Italian carrier, d'Amico Societa di Navigazione SpA. The two carriers now operate separate U.S. Pacific Coast services, and this has effectively added additional capacity to a trade that has been experiencing severe declines in cargo volume. The joint service existed for seven years, but the two carriers ended the partnership to pursue different market objectives.

### C. AFRICA

Several nations in Africa continued to impose flag-discriminatory measures on ocean shipping in their trades. These methods consisted of direct government controls on cargoes or indirect commercial restrictions on vessel transport, including requirements that cargoes be shipped under CIF/FOB terms. There were some indications that these practices gradually were being discarded and that a more amicable environment for shipping in Africa would emerge.

In West and Central Africa, nonetheless, national policies and practices of individual countries appeared unchanged during the year with little or no apparent relaxation of government controls over shipping. Shippers' councils in that region continued to enjoy exclusive rights to consult and negotiate with conferences to the detriment of their counterparts elsewhere. Shipping policies in most of Africa continued to be rooted in the United Nations Code of Conduct for Liner Conferences ("Code"). Moreover, African States generally interpreted the Code's cargo-sharing provisions as applicable to their entire trades, and not only to conference traffic as stipulated by the Code. These States justified their right to regulate the activities of non-conference carriers, and to enter into bilateral agreements, as necessary steps to ensure equitable cargo sharing in their trades. Despite such restrictive shipping policies and practices, ocean shipping reportedly was not unduly hampered in the African trades. It was expected that the West African regional market would benefit from increased cargo volumes generated under assistance programs instituted by the European Community in the developing countries, despite ongoing problems between liner operators and government authorities about poor shipping services and high rates in West Africa, especially at Lagos and other Nigerian ports.

The relaxation of trade restrictions against the Republic of South Africa ("South Africa") resulted in a significant increase in northbound cargo shipments from that country. European imports of South African fruit were an important part of this trend. Sustained growth in the volume of that nation's foreign trade was achieved during the year, and South Africa's neighbors were also expected to benefit from this development. In particular, conference carriers operating in the South African regional trades sustained their position in terms of market shares.

## D. TRANSPACIFIC

The strong 1991 levels of U.S. liner exports from the U.S. to the Far East continued as the dollar kept a relatively low value. A fall in the Japanese yen lowered exports to Japan during the second quarter of 1992 by 13 percent, decreasing total U.S. exports to Asia by about 2 percent.

Imports from Asia to the U.S. increased, despite concerns of a continuing U.S. recession, impacting all U.S. port ranges. Even with the loss of two all-water carriers, Kawasaki Kisen Kaisha, Ltd. ("K Line") and OOCL, and the consolidation of Nippon Liner System ("NLS") and NYK, East Coast volume from the Pacific Rim grew 20 percent. Eight of the remaining thirteen leading carriers each discharged at least 3,000 TEUs more than they did in the second quarter of fiscal year 1991.

Conference market share over the period 1988 through 1991 has been declining, both inbound and outbound. Both trades remain highly concentrated with the top ten carriers accounting for over 75 percent of the trade. During fiscal year 1992, conference market share from the largest U.S. trading partners remains somewhat higher on the import trades than for the export trades. More than half of the U.S. imports from Japan were carried by conference carriers (63%), while less than half of imports from Taiwan (49%), the PRC (41%), and the ROK (38%) were carried by conference carriers. In none of these trades was the market share of exports for conference carriers greater than 50 percent. The conference market share of exports to Japan was 49 percent; to Taiwan, 38 percent; to ROK, 34 percent; and to PRC, 37 percent.

The commodity mixture of exports from the U.S. primarily include primary materials used as inputs in the production of finished goods. Paper and paperboard, newspaper, raw cotton, chemicals, and lumber accounted for a large part of U.S.

exports. U.S. imports tended to be finished goods including shoes, toys, electronic equipment, furniture, auto parts, and sporting goods. Imported goods, therefore, tended to be higher valued than exported goods and were more likely to measure out a container than to weigh it out. The import trades, therefore, are considered "measure" trades, while the export trades are "weight" trades.

In December 1991, the *Transpacific Stabilization Agreement* ("TSA") (No. 202-011223) concluded a review of the eastbound trade between Asia and North America, and set rate restoration and capacity guidelines for 1992. The agreement established a cargo "setaside" of 14 percent of unused container space in early 1992, but reduced that figure to 8 percent in the spring of 1992, in anticipation of increased cargo volumes for the holiday shipping season.

In December 1991, the *Transpacific Westbound Rate Agreement* ("TWRA") (No. 202-010689) established the first set of freight rate increases in the group's "rate restoration program" for 1992. Increases for a group of major moving commodities were to average about 8 percent. TWRA also indicated that it would increase its fuel adjustment factor in response to increases in bunker prices. The TWRA also said that it would increase its currency adjustment factors to various Asian destinations. During a three-month period from February to the end of April, TWRA's vessels were running at near capacity from the Pacific Northwest and East Coast ports (96% to 98%) but somewhat less from Pacific Southwest ports (86% to 90%).

In December 1991, member shipping lines in the *Asia North America Eastbound Rate Agreement* ("ANERA") (No. 202-010776) endorsed a schedule of rate increases for dry and refrigerated cargoes as part of a 1992 overall rate program. A rate hike of \$270 per 40-foot container was scheduled to take

place for tariff cargo on March 1, 1992, and for service contracts on May 1, 1992. These rate hikes held for the most part, unlike in 1990 and 1991 when proposed rate increases were significantly eroded through IAs and service contract negotiations. Subsequently, in July 1992, ANERA members concluded a successful round of negotiations for the 1992-1993 service contract season, with strong growth in both the number and the minimum cargo volume commitments under those contracts. ANERA saw a 31 percent increase in overall contract applications with 967 initial offers from prospective customers.

In a trend continuing into 1992, the focus of individual carriers appears to be on expanding their networks and cooperating (or merging) with other carriers to be able to take advantage of economies of scale in marketing and cargo solicitation. NLS vessels now carry the red and white striped smokestack banner of their new owner, NYK. With this expansion, NYK leaps into the third place among the top carriers in the transpacific routes. American President Lines ("APL") is still number one in total volume in the transpacific, with Evergreen number two and Sea-Land number four. APL and Sea-Land carried almost twice as many import containers as export containers in the U.S./Asia markets (excluding military and household goods), while Evergreen and NYK split their lifts approximately fifty-fifty.

In February 1992, K Line and Mitsui O.S.K. Lines ("MOL") signed operating agreements (No. 232-011327 and No. 217-011331) affecting two of the lines' intra-Asian services, reportedly to further develop and strengthen the intra-Asian services offered to customers. As part of the joint service agreement, MOL agreed to charter space on K Line's Japan-Taiwan-Philippines-Singapore service.

APL has been aggressively pursuing cargo by going where the shippers are. Early in 1992, APL established a wholly-owned subsidiary to manage its ocean transportation services within the PRC. The new subsidiary, called American President Lines (China) Co. Ltd., will have the authority to solicit and book cargo, process and issue bills of lading, collect and remit freight and other charges in the PRC. APL also established a Mexico subsidiary to help the company capitalize on its international cargo transportation business south of the border. The new company, APC de Mexico, is based in Mexico City.

Consistent with the desire to establish and maintain facilities closer to their shipper customers, in September 1992, APL, OOCL, and the Eastern Sea Laem Chabang Terminal Co., Ltd. announced the signing of a tripartite agreement covering ocean carrier operations at Terminal Three in the Port of Laem Chabang, Thailand, which is about 85 miles from Bangkok. Upon commencement of the 12-year agreement, APL vessels will call at Laem Chabang on a weekly basis, starting in early fiscal year 1993. OOCL will begin using Terminal Three in March of 1993.

The transpacific carriers have also been active in establishing intermodal networks. In April 1992, Yang Ming Lines, a Taiwan carrier, signed a two-year agreement with Southern Pacific Lines to carry its intermodal traffic between Los Angeles and other major U.S. destinations. In February 1992, MOL launched a new U.S. double-stack train service out of Seattle and Los Angeles in partnership with Union Pacific, Southern Pacific, and Santa Fe Railroads.

Despite concerns reflected in TSA and elsewhere about overtonnaging, carriers are still expanding the average size of their vessels. In June 1992, Hanjin Shipping Company became the first of the ROK carriers, and the seventh carrier worldwide, to launch a 4,000-TEU class vessel into service, with

the departure of the *H.J. Osaka* from Hong Kong. This vessel is the first of six identical containerships to be deployed in the carrier's pendulum service linking the Far East with both North America and Europe.

Sea-Land has been as busy as APL setting up and expanding its network. Sea-Land and Maersk Line ("Maersk") filed an agreement (No. 203-011366) that establishes a cooperative working agreement in the trade between ports and points in Alaska and ports and points in Europe and Asia. Sea-Land and NYK filed an agreement (No. 203-011370), the *Hawaii-Asia Discussion Agreement*, that authorizes them to discuss, consider, exchange information, and voluntarily agree upon matters of mutual concern in the trade between ports and points in Hawaii and ports and points in Asia, the Indian Subcontinent and the Persian Gulf, excluding Japan.

Smaller carriers also recognize the need to develop cooperative working relations with other carriers to stay competitive. Transportacion Maritima Mexicana, S.A. and EAC Lines Trans Pacific Service, Ltd., filed an agreement (No. 232-011372) to permit the parties to charter space to one another, and to rationalize their respective services in the trade between U.S. West Coast ports and inland points via such ports, and ports and points in the Far East, including other Pacific Basin ports and points via transshipment. Similarly, the *NGPL-Joint Service Agreement* (No. 207-011386) was filed to increase the feeder traffic between Papua New Guinea, the Solomon Islands, and other Asian ports, and ports and points in the U.S. and its territories and possessions. Traffic collected from, or destined to, Asian ports will reach the U.S. via transshipment at ports in the Far East.

## **E. LATIN AMERICA AND THE CARIBBEAN**

Latin America and the Caribbean experienced continued growth in liner shipping during fiscal year 1992. Many carriers diverted capacity to this trade because it was growing much faster than the Atlantic and Pacific trades. This growth in trade was achieved because of steady growth in the economies of many countries of the region. In Argentina, for example, the economy grew at a rate of 7.5 percent, one of the largest growth rates in the world. Convertibility of its currency, which improved tax collection, and elimination of trade barriers are two of the reforms that contributed to its remarkable growth rate. In Brazil, reforms, which were implemented in 1991 by the administration of President Collor de Mello, continued to reduce impediments to trade. These reforms mainly involved the reduction of import tariffs and quotas and removal of restrictive trade practices such as cargo preference laws. Similar policies were implemented by other countries in the region.

Exports of high-tech and manufactured goods increased not only in Argentina and Brazil, but in the region as a whole. Net capital inflows of \$36 billion, more than double the level of 1991, contributed significantly to the region's growth in 1992. The Inter-American Development Bank reported that \$28 billion of this capital inflow was invested in the private sector, including \$11 billion in foreign direct investment in Argentina, Chile, Colombia, Mexico and Venezuela. In addition, the bank cited relatively high productivity of labor and natural resources industries, foreign exchange policies, and more sophisticated market techniques as reasons for growth in the trade sector of the Latin American and Caribbean economies.

In the first half of 1992, the volume of U.S. containerized exports from the U.S. to the Caribbean and Central America

increased by almost 20 percent over the same period of 1991. The increase in the South American trade during the same period was even more impressive, reaching 40 percent. Imports from the Caribbean and Central America for the first half of 1992 increased by 17 percent over imports for the same period of 1991. Imports from South America during the same period increased by 18 percent.

The growth in trade, which followed similar increases in 1991, encouraged many carriers to undertake new services or to deploy additional capacity in existing services. Zim Container Services initiated a new service in the U.S. East Atlantic/Brazil, Uruguay, Paraguay, and Argentina trades. Another new service was added by NaviLine between Colombia/Venezuela and U.S. Atlantic. In the Caribbean, Cari-Freight entered the trade to provide a new service from U.S. Atlantic ports to ports in the Caribbean.

Carriers which added capacity to existing services on the U.S. East Coast included: Navianca CSAV/FMG, Transroll/Sea-Land Joint Service, Nedlloyd Line, Columbus Line, Crowley Maritime Corporation, A/S Ivaran Rederi, and Lykes Brothers Steamship Company. On the West Coast, capacity was added by Trailer Marine Transport Corporation, Dole Fresh Fruit Company, and Companhia Sud-Americana de Vapores.

Two carriers, Nedlloyd and NYK, discontinued their services from the West Coast of South America to the U.S. West Coast. Meanwhile, Maersk planned to enter the U.S. East Coast to South America trade with three ships in January 1993. However, concerns of possible overtonnaging are now being expressed by some carriers.

Despite the increases in trade, two regional carriers experienced operating losses and are heavily in debt. Lloyd

Brasileiro was unable to put two new vessels in service because of the shortage of operating capital. Like last year, the company is in danger of having its vessels seized because of failure to pay debts. Another carrier, Empresa Lineas Maritimas Argentinas, also has large outstanding debts. The Government of Argentina has offered to sell the carrier at a lower price and more favorable terms than it requested last year.

In 1992, the U.S. and Mexico negotiated the *North American Free Trade Agreement*. This agreement, if implemented, will lead to a significant removal of trade barriers and increase trade in the region. This year also, the coffee growing countries of the region experienced a record drop in the prices of coffee, due largely to increased production both by countries of the region and by African countries and Indonesia. A new *International Coffee Agreement*, with quotas as part of the agreement, is currently being negotiated. This may restore price and stability in the coffee market.

Along with increased activity in trade, agreements filed by carriers serving the trade between U.S. and the Latin American/Caribbean region also increased in fiscal year 1992, as compared with the previous year. Fourteen new shipping agreements were implemented in 1992, including one conference agreement, the *Caribbean and Central American Credit Agreement* (No. 202-011353). Others implemented included five discussion agreements: *The Cayman Islands Agreement* (No. 203-011385); *The Inter-American Discussion Agreement* (No. 203-011369); *Venezuelan Discussion Agreement* (No. 203-011383); *Colombia Discussion Agreement* (No. 203-011367); and *Agreement for Settlement and Release of Claims re Amtrans and Columbus relating to the Brazil/U.S. Atlantic Coast Pooling Agreement for Pool Years 1987, 1988, 1989 and 1990* (No. 203-011350).

The following space charter/sailing agreements were filed: *DSR/Stinnes West Indies Services GmbH* (No. 207-011371); *Space Charter/Sailing Agreement between Concorde Line and Network Shipping Ltd.* (No. 217-011360); *Space Charter/Sailing Agreement between Concorde Line and Central America Shippers SA* (No. 217-011361); and *Space Charter Agreement between Frontier Liner Services, Inc. and Venezuela Transport Line, Inc.* (No. 217-011363). Other agreements signed were: *Sea-Land/Navieras Space Charter Agreement* (No. 232-011359); *CSAV/GWF Cooperative Working Agreement* (No. 203-011351); *Transportacion Maritima Mexicana, S.A. de C.V. ("TMM") and EAC Lines Trans Pacific Services, Ltd. ("EAC") Space Charter/Sailing Agreement* (No. 203-011372); and *United Yacht Transport Joint Service Agreement* (No. 207-011381).

## F. MIDDLE EAST

Ocean shipping in 1992 reflected a continuation of trade patterns achieved in the previous year that began with a war in the Middle East. A number of important developments were causes of concern to ocean shipping, including the Middle East turmoil; political changes elsewhere, especially Eastern Europe; poor economic performance in the industrial countries; widespread recessionary expectations; and the continuing oversupply of vessel tonnage in service. The trend toward rationalization and restructuring of shipping services accelerated in all major trades, including the Middle East.

Economic conditions in the Middle East were closely linked to developments arising from the Gulf War. The expected boom in cargoes in the aftermath of the conflict failed to develop. While progress was apparent in the reconstruction of Kuwait, the continued operation of United Nations trade sanctions against Iraq served to restrict Iraqi access to overseas markets. Trade to the Mediterranean region suffered severely from the

effects of the Gulf War and economic problems in the eastern and southern Mediterranean countries persisted.

Nonetheless, after a 30 to 40 percent reduction in cargo volumes on European routes to the Middle East, and equivalent declines in cargoes in other regional trades, economic prospects in the Middle East improved following restored peace prospects and a stabilization of world oil prices. This improvement in economic conditions in the Middle East, in turn, stimulated the movement of U.S. and European cargoes to the area, including shipments of construction materials, office machinery, foodstuffs, and consumer goods. Moreover, trade between Asia and the Middle East reportedly is expected to achieve a 5 to 6 percent growth rate by the end of 1993, due primarily to reconstruction in the region following the Gulf War.

One space charter agreement and three discussion agreements were implemented in the Middle East during fiscal year 1992. These were: *Jugolinija/Kesco Space Charter Agreement* (No. 217-011364) permits Kuwait Eastern Shipping Company to charter space on vessels operated by Jugolinija in the trade between U.S. ports and ports in the Arabian Gulf and Red Sea ports of Saudi Arabia; *The "8900" Lines/P&O Containers, Ltd. Discussion Agreement* (No. 203-011365) permits the parties to discuss and agree upon rates, terms and conditions of service in the trade between U.S. Atlantic and Gulf ports and all U.S. inland or coastal points via such ports and ports on the Arabian/Persian Gulf and Red Sea ports of Saudi Arabia and inland points via such ports; *The "8900" Lines/Lykes Lines Discussion Agreement* (No. 203-011368) is a cooperative working agreement between the parties in the trade from U.S. Atlantic, Gulf, and Pacific ports and inland points to Saudi Arabian, Persian Gulf and other Middle Eastern ports (excluding Aden and Karachi), and inland points via such ports; and *The United States/Middle East Independent Carriers Discussion Agreement* (No. 203-011378) permits any two or more

parties to discuss and agree upon rates, charges, practices, rules and regulations in the trade from U.S. ports and points to ports and points in the Red Sea and Arabian Gulf.

## **G. WORLDWIDE**

Throughout 1992, one-way traffic flows on many liner trade routes led to an unbalanced use of available tonnage, while in other trades the U.S. economic downturn and depreciation of the U.S. dollar lowered inbound cargo flows and brought them closer into balance with U.S. exports. The declining cargo volumes, as well as new and larger tonnage entering the world's liner trades, exacerbated overtonnaging in most of the major trades. As a result, many operators saw their profitability eroded. These developments led to an accelerated trend toward rationalization and restructuring of shipping services in all the major trades.

In response to these developments, conference and non-conference lines in the North Atlantic trade formed TAA as a means of balancing supply and demand for available cargo space. In light of the relative strength of non-conference carriers in the trade, it was considered indispensable for conference lines to cooperate with them in order to rationalize service and, in turn, increase profitability.

Changes in the Mediterranean trade were less dramatic than in the North Atlantic during 1992, as SEUSA and AGWM continued to occupy major market positions in the trade. Although overtonnaging continued to hamper the trade, a depreciation of the U.S. dollar led to a marginal improvement in U.S. exports over the previous fiscal year.

The transpacific trade generally remained characterized by lower-valued, large-volume westbound shipments, while eastbound movements tended to be higher valued and of lower

volume. As a result of growing eastbound shipments during 1992, TSA lowered its setaside of unused container space, thereby making available additional cargo space in the trade.

In Latin America and the Caribbean, rapid economic growth spurred demand in those trades for liner shipping. Economic reform and liberalized shipping regulations in several Latin American countries contributed to the increase in trade.

In the Middle East, reconstruction following the Gulf War led to modest, though lower than expected, trade growth during 1992.

In a new joint service agreement between Asia, the U.S. and Europe, NYK, NOL and Hapag-Lloyd will cooperate by sharing space aboard each other's vessels, bringing NYK and NOL into the transatlantic trade and enabling Hapag-Lloyd to return to the transpacific after a seven-year absence. The Asia/U.S./Europe pendulum service will provide shippers a wider choice of service, while permitting the carriers to have a wider market presence, as well as making it easier to shift containers from one trade to another.

In other trades, conference and non-conference carriers in the eastbound Europe to Asia trade worked throughout 1992 to forge a stabilization agreement known as the *Europe-Asia Trade Agreement* ("EATA"). EATA closely resembles TSA in having a voluntary agreement not to fill a certain percentage of their unused capacity. However, EATA is less ambitious than TAA, which combines supply/demand management with joint discussion of rate levels. EATA's debut places the last of the world's three major east-west trade lanes under a stabilization agreement. The objective of these agreements is to keep down overcapacity and, in turn, help bolster freight rates and carrier profitability.

## V

# AUTOMATED TARIFF FILING AND INFORMATION SYSTEM ("ATFI")

## A. INTRODUCTION AND BACKGROUND

The Commission administers, *inter alia*, the 1916 Act and the 1984 Act, which apply to domestic offshore commerce (e.g., between the mainland and Hawaii or Puerto Rico), and to foreign commerce, respectively, for both inbound and outbound waterborne transportation. The statutes require that common carriers by water in these trades file and keep open to public inspection their "tariffs." Also, the 1984 Act requires that service contracts be filed and that their essential terms be made available to the public in tariff format. See 46 U.S.C. app. §§ 817 and 1707.

A freight "tariff" filed at the Commission is a publication of a carrier or conference and contains a schedule of rates, charges, and rules applicable to its transportation of cargo.<sup>1</sup> A service contract is a special agreement between shipper(s) and carrier(s) that applies in lieu of the freight tariff. Mutual commitments are made in a service contract, with the shipper guaranteeing the carrier a minimum quantity of cargo over a period of time, in consideration for a commitment by the carrier to a certain rate and service level.

Additionally, terminal tariffs are required to be filed by persons engaged in carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities in

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<sup>1</sup> A Customs "tariff" is a publication of the Government containing a schedule of Customs duties.

connection with a common carrier by water in the foreign or domestic offshore commerce.

The statutes and implementing regulations require the Commission to ensure compliance with certain essential standards before tariff material is accepted for filing. For example, a tariff, or an amendment thereto, must not be unclear or indefinite and must not duplicate or conflict with other tariff provisions already in effect. Moreover, tariffs must contain effective date provisions in compliance with the statutes, e.g., a minimum of 30 days notice for an increase. If a tariff filing is defective in any of these respects, it is rejected and the filer must file again in the proper manner before the rate can go into effect. Similarly, service contracts may be rejected by the Commission if they do not meet certain statutory and regulatory requirements. *See* 46 CFR, Parts 515, 550, 580, and 581.

In order to facilitate compliance with the law, there are substantial penalties for not filing or, if properly filed, for not adhering to the provisions of a tariff or the essential terms of a service contract. *See, e.g.,* 46 U.S.C. app. §§ 812, 815, 818, 1708, and 1709.

In addition to enforcing these penalties, the Commission uses the filed tariff and service contract data for surveillance and investigatory purposes and, in its proceedings, adjudicates related issues raised by private parties. For Commission proceedings, as well as in any court case, the tariff or service contract provision, on file at the Commission and in effect, is official evidence of the applicable rate, charge or rule, when so "certified" by the Commission. While tariff and service contract information is used for regulatory purposes, the statutory scheme is primarily designed to provide rate information to the shipping public to promote competition and to facilitate the

flow of U.S. exports and imports. All such tariff data is filed with and maintained at the Commission in paper format.

While the first U.S. maritime regulatory body was established in 1916, it was not until 1961 that carriers in the U.S. foreign commerce were required to file tariffs containing all the rates, charges, and rules applicable to their shipments.<sup>2</sup> During fiscal year 1992, the Commission received 841,900 tariff pages and 6,364 service contract filings in the U.S. foreign commerce. At the end of the fiscal year, there were 5,105 foreign tariffs on hand at the Commission.

The enormous amount of paper to be processed by a limited number of employees led the Commission in the early 1980s to consider modern technology as a means of alleviating the paperwork burdens on both the government and the shipping industry, as well as enhancing the effectiveness of Commission regulation. A systematic exploration of this subject area by the Commission commenced with a series of studies.

## **B. EARLY STUDIES ON TARIFFS**

In 1981, the Commission conducted a study to examine the validity of the premises upon which the tariff filing requirements of the 1961 amendments to the 1916 Act were based. The study contained three parts.

The first part concerned the internal use of tariff data in the effectuation of non-tariff programs, such as agreements, formal decisions, enforcement, etc. That analysis, published on

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<sup>2</sup> A relatively small number of carriers in the domestic offshore commerce have been required to file tariffs since the enactment of the 1933 Act.

October 1, 1981, was based upon an internal staff questionnaire. It concluded that tariffs are of critical importance to many Commission statutory functions, and that they could be more effectively used if the data were more accessible.

The second part of the study, published on December 9, 1981, evaluated the impact of the tariff filing system on external users -- shippers and freight forwarders -- and was based on interviews with 25 importers and exporters and 9 freight forwarders. It revealed that, at that time, those groups believed that publicly available tariffs were a necessity and should be maintained at the Commission. Virtually all interviewees, however, agreed that the tariff system was too complex and could be simplified by implementing per-container rates, a class system of rates, computerized filing, and classification based upon the *US Foreign Trade Schedule B, Statistical Classification of Domestic and Foreign Commodities Exported from the United States ("Schedule B")*.

The third part of the study, published in January 1983, focused upon ten liner operations and five conferences. This segment of the maritime industry opined that tariffs should be publicly available and maintained at the Commission. Unlike those interviewed for the earlier part of the study, however, the carriers and conferences stated that the marketplace determines the contents of tariffs. A majority believed that the complexity of tariffs might be a necessary evil. Several interviewees stated that any program to simplify the tariff system should include tariff automation.

The overall conclusion of the three-part study was that retention of the requirement to file tariffs had widespread support in the maritime industry, but that the system was in need of modernization, particularly in the area of computerization.

While conducting this three-part study, the Commission also began an internal study of the impact of filing activity upon the Commission itself. The internal study revealed that during a six-month period, July-December 1981, a total of 212,458 permanent filings were received at the Commission. Thirty out of several hundred filers accounted for 47 percent of the total volume. The internal study also found that, based upon first quarter fiscal year 1982 actual expenses, the estimated annual cost of examining and maintaining the tariff filings of the 30 major filers was \$158,000.

With the results of these two studies in hand, the Commission explored the issue of tariff automation. Of particular interest to the Commission was the industry's views on the feasibility of, possible methods for, and implementation of an automated tariff system. In early 1983, the Commission interviewed seven carriers, five conferences, two freight forwarders, twelve shippers, and two transportation service firms.

The report of this survey was issued in March 1983, and revealed the overall belief of these parties that not only should the tariff system be automated, but that implementation of an automated system was overdue. Almost all interviewees said that there was a likelihood that they would use an automated system if it were more efficient and proved, over the long run, to be less costly than the existing system.

The various respondents were, themselves, at different stages of automation. A few carriers were highly automated, and a number of conferences and shippers had made substantial commitments to automation. Those respondents that were automated to some degree generally believed that automated tariffs would fit well into their systems.

## C. FIRST STEP IN TARIFF AUTOMATION: ISSUES

Recognizing that there was a need and apparent industry support for tariff automation, the Commission's next step was to determine if any parties were interested in developing an appropriate system. On November 14, 1983, the Commission published in the *Commerce Business Daily* a *Notice of Inquiry*, entitled "*Sources Sought for 'Paperless' Federal Maritime Commission Electronic Filing, Storage and Retrieval Systems for Tariffs.*" Of the 31 replies received, 15 were considered to be responsive or partly responsive to the notice (i.e., indicated interest in being considered to develop the automated tariff system and/or described their qualifications). The comments also raised questions of both a legal and policy nature which needed to be resolved before proceeding with additional phases leading to the eventual adoption of an electronic tariff system. The major questions raised were:

1. Does the filing and storage of tariff information with a private contractor off Commission premises comply with the statutory requirement that tariffs be filed with the Commission?
2. Can the Commission mandate 100 percent industry compliance with electronic filing?
3. What is an appointed vendor's right of ownership to vendor-developed software, external to Commission's own database requirements?
4. What copyrights are involved in tariff data?
5. What will be the "official agency record of tariff-filing," the data electronically stored or the hard copy that is either filed or produced from electronic filing? How long will

storage be required? To what extent will hard copy continue to be required?

6. Will the contractor have monopoly control over the use of the tariff information filed in the system?

7. What will be the financial impact of a system on carriers and other firms that already have tariff automation?

8. What is the minimum term of any possible contract with an appointed outside vendor?

9. What is the economic and political viability of Commission as a free system user?

10. What will be the number of outside vendors which will be ultimately selected?

11. What will be Commission's programming demands on the contractor?

12. To what extent will there be a need to put present tariff data into the electronic system database? How?

13. How will a system provide security for filed tariff data?

14. To what extent would a new system be compatible with other format standardizations?

## **D. THE SHIPPING ACT OF 1984**

On March 20, 1984, the 1984 Act was enacted. Even though the continued need for various tariff requirements had been questioned by certain government agencies and by the private sector during hearings on the Act, section 8 continued the requirements to file and abide by tariffs. Service contracts were authorized as an alternative to a tariff. While service contracts were required to be filed confidentially with the Commission, their essential terms had to be filed with the Commission in tariff format for availability to the general public.

## **E. THE TARIFF AUTOMATION TASK FORCE**

In August 1984, Commission Chairman Alan Green, Jr., appointed Vice Chairman James J. Carey as head of a special Tariff Automation Task Force. The Task Force gathered additional information, and in January 1985, sent questionnaires to 17 ocean carriers, 10 NVOCC's, 19 conferences, 52 freight forwarders and 20 shippers. The questionnaires focused on the use of tariff data and suggestions to improve the process. Sixty-three entities responded. Some of the results of these responses are synthesized as follows:

- **Tariffs were used by virtually all, usually on a daily basis, and mostly in paper form.**
- **Most, with the exception of shippers, were satisfied with the current tariff form. Those not satisfied indicated a desire for an automated system.**
- **Most of the respondents obtained data from commercial tariff services, but many used carrier/conference subscriptions. Carriers were the predominant users of Commission files, while a**

large number of freight forwarders, NVOCCs and shippers went directly to ocean carrier representatives for tariff information. They indicated that these sources met their needs; however, those suggesting improvements generally favored automation which could provide more timely and accurate data.

- A majority of the respondents used publicly available standardized commodity coding systems, e.g., *Schedule A, Tariff Schedules of the United States Annotated, Standard International Trade Classification, Schedule B, and Standard Transportation Commodity Code*. Most respondents did not use standardized geographic coding systems, nor did they see a need for them.
- Freight forwarder and shipper respondents showed the greatest degree of willingness to use more than one type of coding system.
- Practically all ocean carrier and conference respondents believed that it would be advantageous to file data with the Commission in an automated fashion. The NVOCC respondents thought it might be too expensive.

At about the same time as the 1985 industry surveys, an in-house survey was conducted at the Commission to ascertain its needs for tariff automation and perceptions about this concept. The survey results included the following findings:

- Most respondents in the Commission's operating bureaus felt that automated tariffs would increase the quality of their work, as well as their productivity.

- **Sixty-two percent of the respondents felt that hard copy was unnecessary if tariffs were accessible via machine-readable form. Reasons cited for paper copies were the need for evidence in court, exhibits for enforcement reports, and a backup system in case of computer malfunction.**
- **Forty percent said that a standard commodity classification code would increase both their efficiency and quality of work, while an additional 21 percent responded that it would increase only their efficiency but not their quality of work. Responses were similar regarding a standard geographic code.**

In August 1985, the Task Force issued a report entitled *Tariff Automation (A Functional Analysis)*. In addition to describing the results of the 1985 industry and in-house surveys, the report described the problems with manual tariff filing and review, and the Commission's need for automated filing and retrieval of tariff data. The objectives of an automated system were described to be as follows:

- **The automated system will operate in the private sector to the extent possible.**
- **The system will be financially self-sufficient through the assessment of user charges for access to the information.**
- **Access by the Commission will be without cost.**
- **The integrity of the system will be insured by the Commission through the development and ownership of software which will control entry into the system.**

- A means will be constructed to minimize the monopolistic control of a single company operating the system, and effort should be made to preserve existing satellite companies now engaged in dissemination of tariff data.
- Contractual arrangements for electronic filing may not curtail the ability of the public to have access to tariff documents now routinely available in public document rooms or otherwise.

The report recommended the conduct of a feasibility study which would evaluate the technical alternatives available and their costs, including a market analysis of the demand for tariff information and the likelihood that the Commission's costs could be recaptured. The Task Force report developed two primary options to be evaluated in the feasibility study:

1. Multiple private-sector databases which would require Commission control or oversight regarding the acceptance of tariff filing within the database; controls to prevent tampering with the data; and accessibility of the information in the database to the Commission and to the public through the Commission's public reference facility (Tariff Control Center). This might require some sort of certification process. This option would probably involve the least cost to the Commission and minimum government involvement, but legislative changes would likely be required to implement it.

2. Single database - one contractor designs and operates a single database of tariffs for the Commission. After review and acceptance of the data, tariff information would then be made available to users for a fee, a portion of which would offset the cost of the contract to the Commission. Rather than grant the contractor a total monopoly over tariff

information, however, the report indicated that it would seem more advisable for the contractor to supply only the raw data, perhaps on a subscription basis. The purchasers of the data would save on input costs to their system and obtain quicker access to the information in an electronically-usable form. Each purchaser could purchase electronic data, design its own software for providing the data in usable form, and sell the data to other users. Hard copy and/or microfiche pages could also be made available for sale by the contractor.

The report concluded that, since the Commission lacked the technical expertise, the feasibility study should be contracted out.

Because the Commission also needed to ensure that all future studies were unbiased, thorough, and accurate, it hired an industry consultant in August 1985 for technical assistance. The contract provided that the consultant must remain independent of the feasibility study contractor and could not become the contractor for the pilot/operating system.

## **F. ATFI: FEASIBILITY STUDY OF TARIFF AUTOMATION and THE ATFI ADVISORY COMMITTEE**

The Commission next turned to the General Services Administration ("GSA") for assistance with the feasibility study and entered into an interagency memorandum of understanding with GSA on August 1, 1985. Pursuant to this agreement, funds were transferred to a GSA fund and a Statement of Work for the development of a feasibility study was drafted, resulting in a contract for this task with a GSA-approved contractor.

Early in 1985, the Commission determined the need and importance of not only soliciting, but also considering in a public arena, the opinions of all interests that might be affected

by the automation of tariff filing. For that purpose and pursuant to the provisions of the Federal Advisory Committee Act, 5 U.S.C. app. I, 1-15, the Commission's ATFI Industry Advisory Committee was established.

The Commission's first step in the formation of the Advisory Committee was to draft a charter and submit it to the GSA Advisory Committee Secretariat with an explanation of the need for the Committee and the Commission's plan to obtain a balanced membership. Thereafter, candidates for membership on the Committee were solicited by *Federal Register* notice of April 12, 1987 (50 Fed. Reg. 14,453). Nominees were required to waive compensation for their services and acknowledge that they were ineligible to bid on any procurement solicitations resulting from the work of the Committee.

On November 11, 1985, the Commission published in the *Federal Register* (50 Fed. Reg. 47,447) its Notice of the Formation of the ATFI Advisory Committee and announced the first meeting on December 6, 1985 (50 Fed. Reg. 50,013). FMC Commissioner Edward J. Philbin was designated Chairman of the Committee. The nineteen industry members represented three ocean carriers, three steamship conferences, two NVOCCs, three freight forwarders and the National Customs Brokers and Forwarders Association, three ports and the California Association of Port Authorities, two exporters and importers and the American Association of Exporters and Importers, two information service firms, and the Information Industry Association.

FMC Chairman Edward V. Hickey, Jr., opened the first Advisory Committee meeting on January 23, 1986, by asking for guidance on the following policy questions about any proposed automated system:

- Is it desirable that it operate in the private sector?
- Can it be structured so as to be financially self-sufficient through the assessment of user charges for access to the information?
- Is it possible to achieve cost-free access to the system for the Commission?
- Can the integrity of the system be ensured by the Commission through the development and ownership of software which will control entry into the system?
- What means can be devised to minimize the possibility of monopolistic control by any single company that might operate the system, and to minimize interference with the operations of commercial companies currently engaged in the dissemination of tariff data?
- Can the system operation be structured to maintain public access to tariff information now routinely made available in public document rooms or otherwise?
- Can system operation be structured to complement public access under the Freedom of Information Act?
- Can a system be structured so that the burden imposed upon tariff filers to comply with the technical requirements of filing tariffs in an automated system will be minimized?

Chairman Hickey explained that four items were necessary to assure the integrity of the Commission's statutory mandates:

- **The Commission is to retain final authority to reject filings that do not comply with agency requirements, and is to determine the public availability of information pursuant to the Freedom of Information Act and other statutes.**
- **The system must permit the maintenance of historical records that can be retained, retrieved and reproduced for legal evidentiary purposes and to comply with requirements for retention of government records.**
- **The system must obviate unauthorized modification or tampering with data, yet allow the identification and authorized correction of errors.**
- **All fees for the use of the system (filing, retrieval or data reproduction) are to be reasonable and not prevent, deter or impair full public use.**

The critical objectives of the Advisory Committee were established as follows:

- **To allow each segment of the shipping industry to formulate and specify its needs and goals in the process of automating shipping tariffs.**
- **To educate each segment of the shipping industry about the needs and goals of the other segments in such a process.**

- **To investigate the possible applications of existing and foreseeable Automated Data Processing technology to accommodate such needs and goals.**
- **Then, if feasible, to formulate the necessary compromises of the needs and goals of each industry segment to design a system which is acceptable and beneficial to all industry segments.**

The Commission directed the Advisory Committee to make an in-depth and critical evaluation of the draft sections of the *ATFI Feasibility Study*, and to evaluate and comment on any implementation plan which may be formulated after completion of the *ATFI Feasibility Study*.

The ATFI Advisory Committee met in three two-day sessions from January to November 1986, in which it actively provided input to and review of the reports of the *Feasibility Study* Contractor. The final report of the Contractor, entitled *Comprehensive Study of the Feasibility of an Automated Tariff System, Federal Maritime Commission, October 28, 1986*, detailed the basic functionality for tariff automation, the necessary assumptions, the concept of a system, alternative concepts of operation, policy assumptions, delivery alternatives, costs and funding. This report was approved in principle by the Advisory Committee with a few suggested changes. In summary, the tariff automation requirements identified by the *Feasibility Study* were:

## **1. Key Tariff Filing Requirements**

- (a) Electronically create and transmit tariff filings to Commission.
- (b) Provide fault-tolerant filing (e.g., backup computer).

(c) Provide compatibility with existing systems (to the extent possible).

## **2. Key Commission Tariff Processing Requirements**

(a) Accept electronically filed tariffs (e.g., new tariffs; essential terms; amendments).

(b) Provide tickler capability (e.g., reminder to follow up on a letter of criticism).

(c) Perform computer-assisted conformity check of tariff filings (e.g., syntactic, validity, associative edits).

(d) Provide workload tracking functions (e.g., track status of new tariff filings).

(e) Generate Commission communications (e.g., letter of rejection).

(f) Route tariff filings.

(g) Collect workload statistics (e.g., number of new tariffs filed in a week).

## **3. Key Tariff Retrieval Requirements**

(a) It is expected that any value-added services built into this system will be for Commission's internal use, exclusively. Third-party vendors will provide value-added services to the public.

(b) Retrieve current tariff information with different keys (e.g., origin and destination).

(c) Retrieve historical tariff information with different keys (e.g., commodity code).

(d) Link tariff information to other data sources.

(e) Retrieve current tariff information in different formats (e.g., page).

(f) Retrieve historical tariff information in different formats (e.g., entire tariff).

(g) Provide computer-assisted identification of filed data (e.g., subscription service).

(h) Retrieve tariff information to support enforcement (e.g., re-rating).

(i) Retrieve tariffs to support special studies (e.g., rate indices).

#### **4. Key Functionality Requirements**

(a) Accuracy (e.g., amendments are properly applied to the database).

(b) Timeliness (e.g., quick turnaround on posting new rates).

(c) Security (e.g., user identification and passwords).

(d) Special analyses for Commission (e.g., rate indices).

## 5. Key Policy Assumptions

(a) Commission will provide public access to the system via terminals in a public terminal room at the Commission. Commission will make copies of the database available to third-party vendors, who could then resell the data (or value-added services) on a retail basis.

(b) Commission would not want the system to provide value-added services directly to the public; these services will be provided by third-party services. Any value-added services provided by the system would be available only to Commission users (e.g., for enforcement purposes).

(c) Commission would not want to restrict ownership rights to the database as a creative financing method.

The functions and requirements of tariff automation identified in the study have not changed and have become the backbone of subsequent efforts to procure the ATFI system. The system concept developed and recommended to the Commission by the Contractor had a total estimated cost of \$7.3 million and an estimated implementation time frame of 14 months. The cost estimate was based on a present value calculation for the five-year period, and the implementation time frame consisted of design and implementation phases, including training, data conversion and testing. The cost estimates were considered conservative in the sense that they were the costs for complete development, i.e., "building from scratch." Some of the commercial tariff services may have existing systems which could be adapted to meet a portion of the functional requirements of ATFI.

The *Feasibility Study* concluded:

Tariff automation appears to offer significant benefits to the maritime industry and to the Commission; tariff automation appears to be politically feasible; and the potential costs of tariff automation appear to be within the reasonable range, when balanced against the benefits that would accrue and the practical limits in the budgetary process.

The ATFI Advisory Committee, in approving the *Feasibility Study* in principle, made two further recommendations which the Commission adopted:

- First, the Commission should proceed with tariff automation as described in the study.
- Second, the Commission should conduct a cost/benefit study of tariff automation to ensure that the perceived benefits are not outweighed by the costs of the impact of automation upon the industry.

## **G. BENEFIT COST ANALYSIS and PROCUREMENT AUTHORITY**

In October 1987, a Benefit Cost Analysis was prepared by a commercial contractor and corroborated the economic feasibility of the project. This analysis was submitted to the Office of Management and Budget ("OMB").

In December 1987, a delegation of procurement authority for the project was obtained from GSA.

## **H. INQUIRY ON THE FUNCTIONALITY OF ATFI and PRESOLICITATION CONFERENCE**

In December 1987, the Commission began to develop a draft request for proposals ("RFP") which would yield comment from the vendor community on the project. At the same time, the Commission sought public comment on the proposed functionality of the system in a (first ATFI) Notice of Inquiry.

The purpose of this "outreach program" was to ensure that the regulated community and the potential user public were fully aware of the Commission's plans for tariff automation. Comments were requested from other than potential bidders on the basic functionality of the proposed ATFI system. This functionality, as set forth in the Notice of Inquiry, has remained constant throughout the project:

The electronic ATFI system, for which the Commission is seeking a prime contractor, will be run on the contractor's central computer with appropriate terminals at the Commission for tariff review, processing, and retrieval. The format of tariff data to be electronically filed is being developed in conjunction with the industry Transportation Data Coordinating Committee and will emphasize "tariff line items," vis-a-vis, tariff pages, as under the present system. "Tariff line items" are basically equivalent to commodity rate items in current paper tariffs and can be amended directly, without having to issue an entire revised page.

As recommended by the Commission's Advisory Committee, standardized commodity or geographic coding will not be mandated at the beginning, but the system must have the capability to provide for these functions at the appropriate time. The system will also include the essential terms of service contracts.

Full implementation of the system will be in phases to allow commercial firms time to adapt their operations. Exemptions, at least temporary, will be granted to some types of tariff filers who are not economically able to use the electronic system.

The system will be as compatible as possible with existing computer equipment through the use of software for full connectivity. Filing of tariffs will be done primarily by using asynchronous terminals or microcomputers, dialing in with a modem to the Commission's database. The filing software will provide on-line edit checks to ensure that the tariff information is correct and that basic statutory provisions are complied with before the tariff can be officially on file. Such edit checks, for example, will be able to electronically identify improper effective dates, such as a rate increase on less than 30-days' notice. Other problems for which rejection is warranted, such as unclear or conflicting tariff provisions, will still have to be handled by Commission staff and, if necessary, resolved at the Commission level. The system's computer capabilities, however, will facilitate this process also.

The ATFI system will have appropriate security mechanisms to protect the integrity of the database.

Tariff filers will be able to file and amend their tariff materials by remote access directly to the ATFI system by carriers or conferences almost any time of day. The carrier or conference will be able to screen-scan its tariff so that the appropriate item can be amended. Commercial tariff services can also continue to be used by carriers and conferences for filing, e.g., by direct input into the database, after creating tariffs on instruction from their clients, or transforming their paper tariffs into

electronic form. The Commission will encourage commercial tariff services to assist small firms who may find it difficult to file electronically.

Once the tariff data are officially on file, the Commission will download the entire database in "flat files," formatted onto computer tapes which will be sold to any person at the relatively inexpensive marginal cost of dissemination. This will satisfy the Commission's statutory duty of providing copies of tariffs at a reasonable charge. In order to keep up with a substantial number of rapidly changing freight rates in the shipping industry, however, interested persons must obtain these updated database tapes frequently. Commission will offer a subscription service to provide this capability.

The Commission will not perform any value-added processing of the tariff data for sale to the shipping public in competition with commercial tariff services. It is expected that those services will subscribe to the database tapes to facilitate their value-added services. The Commission must, however, use the system to process tariff data internally for investigative and other regulatory purposes and will continue to utilize appropriate and available, value-added services of commercial tariff firms for this purpose.

In order to carry out its other statutory function of making tariffs and essential terms of service contracts available for public inspection, the Commission will continue to have a public reference room at its headquarters in Washington, D.C. Here, interested persons can access a terminal on which information on a particular tariff will be brought up on the screen and scanned to find the necessary rates and rules. Paper copies of tariff data will still be available upon written

request, especially for certification to courts and other tribunals for proceedings involving disputes over historical tariff rates. [*Inquiry on Tariff Automation*, December 22, 1987, 52 Fed. Reg. 48,504.]

Explained in the Notice of Inquiry and contained in the draft RFP was remote access to the Commission database by modem, almost any time of the day, for retrieval of tariff information by any interested person. This is described in the October 28, 1986, *Feasibility Study Final Report* as follows:

b. Retrieval and Analysis by the Public

... Commission would also allow remote access whereby a member of the general public could access the automated tariff system from remote locations. For example, the system would enable a shipper on the West Coast to retrieve data from the automated tariff system using a terminal or microcomputer equipped with a device (i.e., a modem) to enable data communications over public telephone lines.

However, members of the general public would only be able to perform relatively rudimentary retrievals, and essentially no analysis of the data. Specifically, members of the public would only be able to retrieve one tariff at a time, in its full format. To retrieve a tariff, the public user would have to specify the specific tariff of a particular carrier that is desired: the public user would not be able to search by keys (e.g., by route or community).

Commission has imposed these restrictions based on a careful analysis of applicable federal policies and precedents. Commission does not want to compete with

third-party services for the provision of sophisticated retrieval and analysis of tariff data for shippers, carriers, and others in the private market. . . . In the absence of tariff automation -- i.e., the status quo -- Commission will make available copies of tariffs to members of the public only if they can specify the particular tariff desired. A user fee is assessed for this service. Commission would not expand these services after tariff automation is implemented. . . . However, Commission would help ensure that third-party services can provide such services. [Pages IV-8 and 9.]

While the Commission was waiting for public comment on the proposed features and functionality of the proposed ATFI system, a draft RFP was issued to the vendor community. Firms and individuals on the bidders list were requested to submit their questions on the proposed competitive acquisition and to attend a presolicitation conference for an opportunity for face-to-face questioning.

In April 1988, the Commission issued its *Report on Tariff Automation Inquiry* (53 Fed. Reg. 13,066) and detailed its rationale for the features and functions proposed for the system.

## I. REMOTE RETRIEVAL

While the Commission was in the process of finalizing the RFP, it became aware of concerns raised by both the House Subcommittee on Information, Justice and Agriculture, and by OMB. Their concerns revolved around the functionality of "remote retrieval." As noted earlier, this feature was intended to allow the shipping public to obtain telephone modem access to an individual tariff of a carrier or conference. It would give access to one tariff at a time, and would not provide for sophisticated searches. Questions about this feature were based

on an apparent perception that the Commission might compete with existing or intended value-added services offered by private sector firms. In June 1988, the Commission acknowledged its commitment to tariff automation, but placed the development of the system on "hold" to resolve the remote retrieval concerns (53 Fed. Reg. 22,048).

During the period June-December 1988, the Commission reassessed the functionality of the ATFI system, especially in the area of remote retrieval. This process involved a dialogue with officials of Congress and the Executive Branch. Technical revisions were made to the RFP to reflect new funding exigencies and legal requirements. In October 1988, the Commission issued to some 200 potential offerors a second draft RFP for comment on the technical revisions. However, the Commission remained concerned about the questions on remote retrieval and stated in the letter transmitting the second draft RFP:

The remote retrieval issue has not been finally decided. Accordingly, this draft RFP is issued with the remote retrieval question still open. That issue will be decided in the final RFP.

After much analysis and reconsideration, the Commission decided in December 1988, to retain the functionality of the system with remote retrieval. In its *Second Report on Tariff Automation Inquiry*, the Commission stated:

The controlling question is: In designing the functionality of its ATFI system, has the Commission properly considered and balanced competing interests, such as (1) the system's utility to shippers, carriers and other members of the shipping public, and (2) the future role of private-sector information services? The Commission believes it has.

In October, 1986, a year before the Commission heard of any complaints about "remote retrieval," its private-sector contractor issued "A Comprehensive Study of the Feasibility of an Automated Tariff System." This report accurately describes the proposed functionality of the ATFI system in terms sufficiently precise for private-sector firms to fully understand for the purpose of submitting proposals. This public report was considered and discussed by the Commission's Industry Advisory Committee at the time and there were no objections to "remote retrieval" . . . .

More importantly, with the approval of the Commission and the Advisory Committee, the Feasibility Study Report suboptimized ATFI's public retrieval functions as an accommodation to private-sector information firms.

Commission does not want to compete with third-party services for the provision of sophisticated retrieval and analysis of tariff data for shippers, carriers, and others in the private market. [Page IV-8.]

Accordingly, the self-imposed restrictions would allow the general public to perform only relatively rudimentary retrievals of tariffs, and essentially no analysis of the data.

In consideration of the statutory duties of the Commission and the available technology required for it to properly perform these functions, the 1986 accommodation appeared reasonable. It still does.

The shipping public should also benefit from this modern technology by being allowed to obtain basic, raw tariff data on a limited basis. For more sophisticated

services, the utilization of third-party vendors, both for filing and retrieval, continues to be encouraged. An efficient tariff filing and retrieval network will promote fair competition and facilitate trade.

Accordingly and after further analysis, the Commission believes that it has sufficiently considered all policies and conflicting interests involved in the proposed system and has struck a proper balance in retaining the functionality of ATFI as originally devised in the Feasibility Study, and as further refined in the RFP. [December 23, 1988 (53 Fed. Reg. 52,785).]

See also Section N, *Update on Remote Access - February 1993*, below.

## **J. CONTRACT AWARD and MAJOR CHANGES**

After receiving many technical comments on the two draft RFPs, and after resolving the "remote retrieval" issue, the Commission issued a final RFP in January 1989 to over 200 potential offerors on the bidders' list. Eight proposals were received in March 1989 and evaluated for technical quality and cost effectiveness.

On August 8, 1989, the ATFI contract was awarded for Phase I, System Concept (including verification of requirements), and Phase II, System Design, to Planning Research Corporation ("PRC Inc." or "Contractor") of McLean, Virginia, teaming with Data Exchange International ("DXI"), of Pittsburgh, Pennsylvania, which had the best technical, as well as the best cost proposal.

The contract for the five-year system life also contained options for each subsequent Phase, i.e., Development and

Testing, Prototype Operation, and each year of Full-scale Operation, the latter of which is scheduled to begin in fiscal year 1993. If all options are exercised, the contract will be worth approximately \$7M.

Work on Phase I began on September 5, 1989, and during fiscal year 1990 the Contractor finished Phases I and II, as well as Phase III - Development and Testing. Later in the fiscal year, Commissioner Donald R. (Rob) Quartel, Jr., was put in charge of the Commission's Committee on Automated Data Processing ("ADP Committee") and the ATFI project.

The system's Prototype Phase (Phase IV) began in April 1990. As required by Clauses C.3.3 and C.3.3.10 of the prime contract, the Contractor resurveyed existing software being developed by private industry, to see if there was any that could be incorporated into the ATFI system in order to improve it. The survey identified only one such software package, one being developed by DXI, that met the functionality requirements of the system. Analysis of this software promised that it would be a decided improvement.

At about the same time, as required by Clause C.3.5.4 of the contract, the Contractor and the Commission identified some other changes, mostly from new technology, that could improve the system. One such proposed change was the substitution of a new model minicomputer for the originally planned mainframe computer. This would continue to provide sufficient capacity but significantly improve user-friendliness in interface, screen navigation and key stroking. The Contractor submitted a proposed modification containing the desired changes and Delegation of Procurement Authority was obtained from GSA for the modification.

Since DXI contemplated a significant commercial market for its proprietary software, it could not be required to simply

donate the software to the Commission. However, DXI did agree to a "cosponsor" approach under the Federal Acquisition Regulation ("FAR," at 48 CFR 27.408), in return for funding of its enhancement and relinquishment of ownership by the Commission. Thus, the new contractual arrangement had to protect DXI's rights in this software through licensing and escrow arrangements. The Commission, in turn, will have a one-year warranty after it formally accepts the software, and complete access to the underlying documentation (source code) thereafter.

Under the license agreement, sign-on screens show the copyright notice, as follows: © 1990. *Data Exchange International, Inc. Unpublished. All rights reserved under the copyright laws of the United States. See 48 CFR §§ 27.408(b) and 52.227-14.* The Commission does not in any way endorse this or any other commercial product, and clause H.9.1 of the prime contract requires any commercial tariff services performed by an affiliate of the Contractor to be completely separate from contract performance. Accordingly, the cosponsored approach, allowed and encouraged by the FAR § 27.408, and as implemented by Commission's contractual arrangements, complied with the language in H. Rep. No. 31, 101st Cong., 1st Sess. 5-6 (1989): "In addition, the Commission, in establishing the ATFI system, should take all appropriate steps to ensure that the private contractor is precluded from gaining an unfair advantage over other private companies in the provision of value-added services." On July 19, 1990, the contract was modified to incorporate these changes.

## **K. DOCKET NO. 90-23**

On August 1, 1990, the Commission instituted Docket No. 90-23, in which it issued a second ATFI Notice of Inquiry ("NOI" - Advanced Notice of Proposed Rulemaking) requesting further public comment on some of the basic features being

considered for ATFI and how they may impact current paper tariff practices.

On September 5, 1990, a public demonstration of the system was held. After being provided the opportunity of seeing the system, public comments on the NOI were submitted by 22 firms in October 1990 and analyzed by the Commission. On December 26, 1990, the Commission issued a first Interim Report ("First Interim Report") which considered the comments and resolved the issues raised in the Notice of Inquiry.

On March 25, 1991, the Commission issued a Second Interim Report ("Second Interim Report") that responded to concerns of four Electronic Tariff Filer Firms, which were raised in their testimony at the Commission's fiscal year 1992 authorization hearing held on February 28, 1991, by the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries, and which were submitted to the Commission on March 8, 1991. The Second Interim Report clarified the matters raised, established a schedule (to the extent possible) and reiterated that the "Batch Filing Guide" is all that any person needs to begin immediate development of its own batch filing software.

The Commission's Third Interim Report ("Third Interim Report") in this proceeding was issued on July 23, 1991 (with notice of availability appearing on July 29, 1991, at 56 FR 35,847), and finalized most of the remaining issues listed in the August 1990 Notice of Inquiry, so that a Notice of Proposed Rulemaking could be issued. The additional comments of ten of the original commenters in this proceeding were addressed, and further comments were invited on the only outstanding matters of the modified approach to the Harmonized System and the proposed transition plan.

The proposed rule in Docket 90-23, *Tariffs and Service Contracts*, was issued on September 9, 1991 (56 Fed. Reg. 46,044), as a new Part 514 of Title 46 CFR, with the deadline for comments being October 31, 1991. The supplementary information to the proposed rule contains tables showing where the Commission's reports addressed and decided the major policy issues listed in the Notice of Inquiry and the sources in the current CFR of portions of proposed Part 514. Once ATFI is established and all tariff matter is being filed in electronic format, Part 514 will be the sole, all-inclusive CFR part covering tariffs and service contracts, and other CFR parts, currently governing various facets of tariffs and service contracts, will be removed from the CFR, i.e., Parts 515, 520, 550, 580 and 581.

The proposed new Part 514 reiterated and/or rephrased traditional regulatory policy, so that it could be adapted to the new electronic system. Also, in tracking the designed functionality, the proposed rule contained the following major features:

- **The Harmonized System of Commodity Coding, as modified for ATFI, had to be used for describing and codifying commodities.**
- **The essential terms of service contracts, as well as tariffs themselves, had to be filed and maintained in database format, rather than in textual format.**
- **Assessorial charges had to be expressed in algorithm (mathematical-formula) format.**

In order that the public could register in advance for use of ATFI for filing and/or retrieval, as well as obtain other important materials, the registration form and user-charge portions of the proposed rule were finalized in December of

1991 (56 Fed. Reg. 61,164), at about the same time as public comments to the entire proposed rule were submitted.

As suggested by the 1991 submissions, still further comments were invited and an oral comment session was conducted by the full Commission on May 19, 1992. After consideration of all the comments, the Commission finalized the proposed rule in an interim rule of August 12, 1992 (57 Fed. Reg. 36,248). The interim rule addressed three major policy issues as follows:

- **The Harmonized Code provision for commodities was changed from mandatory to optional (or preferred), without prejudice to future rulemakings.**
- **As suggested by the commenters, the essential terms of service contracts could be filed in full-text, *vis-a-vis* the database format of the proposed rule, with some degree of standardization (e.g., rule numbers) and with the final format to be developed after another round of comments from the public.**
- **Algorithms need not (cannot) be developed for all possible assessorial charges, e.g., those that are not pre-determinable. The interim rule clarified the algorithm requirement and provided another option for linking textual rules to Tariff Line Items ("TLI"), i.e., the "dummy algorithm" or "null linkage." Under the full-text format for essential terms, no algorithmization would be possible.**

Further comments were invited by the interim rule publication, especially on suggestions for full-text filing of essential terms.

## L. BATCH FILING GUIDE

The proposed refinements and resolution of tariff policy issues contained in the fiscal year 1990 contract modification also required revision of the File Transfer Formats and Code Reference Tables ("Transaction Set") originally issued in March 1990. The Notice of Inquiry in Docket No. 90-23 also provided that the Commission would not make available to the public batch-filing software, but would distribute file transfer formats and code reference tables (in a batch filing guide) to facilitate formatting and transfer of tariff data and, if private-sector firms desired, the development of their own software.

Accordingly, the First Interim Report of December 1990 in Docket No. 90-23 appended the ATFI "Batch Filing Guide" (containing, *inter alia*, transaction sets, file transfer formats, data dictionary, and code reference tables). On February 19, 1991, Supplement #1 to the "Batch Filing Guide" was released (and mailed out) in the form of an Information Bulletin ("IB" 3-91) and was also distributed to over 100 attenders of public ATFI demonstrations in Washington, D.C. On April 11, 1991, Supplement #2 to the "Batch Filing Guide" was issued as IB 11-91. Supplement #3 was issued on July 23, 1991, as IB 20-91. At the close of fiscal year 1992, another revision to the "Batch Filing Guide" was being prepared to reflect system improvements, many of which were suggested by industry.

## M. MISCELLANEOUS MILESTONES

IBs 9-91 and 24-91, both containing Technical Questions and Answers, were issued on April 10, 1991, and September 18, 1991 (after a September 12, 1991, technical meeting for the public), respectively. In fiscal year 1992, three more technical IBs were issued, i.e., IB's 05-92, 06-92 and 07-92.

Upon the resignation from the Commission of Rob Quartel in early fiscal year 1992, Commissioner Ming C. Hsu was appointed by Chairman Christopher L. Koch to be in charge of the Commission's ADP Committee and the ATFI project.

Certifications of firms for batch filing capability began in late fiscal year 1992 with the certification of seven firms.

On February 11, 1992, IB 04-92 announced that ATFI implementation, previously scheduled for July of 1992, would have to be postponed as a result of a GSA-required relocation of FMC headquarters. When it was learned that the move would take place in August 1992, Supplemental Report No. 2 and Report in Docket 90-23, issued on August 12, 1992, provided a new implementation schedule, with filing requirements phased in by trade-areas/operations of the filers, beginning in early 1993.

During fiscal year 1992, Chairman Christopher L. Koch's program to identify appropriate areas for regulatory improvement resulted in several rulemaking proceedings that changed portions of 46 CFR Part 514. These proceedings included Dockets 92-21, *Amendments to Service Contracts* (57 Fed. Reg. 46,318); 92-27, *Filing Requirements for Anti-Rebate Certifications* 57 Fed. Reg. 39,622; 92-34, *Domestic Offshore Filing Regulations -- Exemption Under Section 35 of the Shipping Act, 1916* (57 Fed. Reg. 44,697); and 92-36, *Reduction of Notice Requirement for Tariff Increases in the Domestic Offshore Trades -- Exemption Under Section 35 of the Shipping Act, 1916* (57 Fed. Reg. 44,504).

## N. UPDATE ON REMOTE ACCESS FEBRUARY 1993

Since the 1986 *Feasibility Study* (see sections F, H, and I, above), the Commission's ATFI system has been designed to accommodate remote filing and retrieval of tariff data through modems to and from the off-site host processor (minicomputer). However, to avoid competition with private-sector tariff services, the design originally contemplated restrictions on remote retrieval, such as the ability to retrieve only rudimentary information, "one-tariff-at-a-time."

Such a restriction was enacted into law [§ 2(b), Pub. L. 101-92]:

The Commission shall impose reasonable controls on the system to limit remote access usage by any one person.

Congress explained this provision as follows:

Concern has been expressed over the use and accessibility of the ATFI system by all interested parties. In particular, the remote retrieval function will permit the public to dial into the system (by modem) and obtain a particular carrier's rates on a requested commodity in a given trade.

\* \* \*

At the present time, no precise definition of "reasonable controls" in the limiting of access can be offered because the system has yet to be developed or implemented. However, the following non-exclusive possibilities are reasonable. First, members of the public could be limited to retrieving one tariff at a time in its

full format, and the use would have to specify the specific tariff of the particular carrier that is desired. In the alternative, specific limitations on access time could be imposed, and automatic log-off would then occur. Either limitation, or a combination of both, could satisfy the requirement discussed herein . . . . [H.R. Rep. No. 31, 101st Cong., 1st Sess.]

\* \* \* \* \*

. . . While the ATFI system has not yet been fully developed, the Committee expects that controls will be built into the design. These controls can be in the form of a limitation on access at any one time and a limit on the total amount of time on the system with an automatic log-off feature . . . [Some form of user identification] will assist in preventing circumvention of the limitation features and prevent a monopolization of the system by a single entity. [S. Rep. No. 71, 101st Cong., 1st Sess.]

Both the House Merchant Marine and Senate Commerce Committees also requested to be kept informed on developments on reasonable restrictions. Accordingly, a [March 1990] Update on Remote Access was included in the Commission's 28th Annual Report to Congress, and this section continues that practice.<sup>3</sup>

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<sup>3</sup> The *Update on Remote Retrieval* was included in the Commission's December 1990 *Interim Report* in Docket No. 90-23, *Notice of Inquiry on Ocean Freight Tariffs in Foreign and Domestic Offshore Commerce* (the second ATFI Notice of Inquiry), with appended *Batch Filing Guide*. In fiscal years 1991 and 1992, the Commission provided extensive opportunity for more public comment, as well as public demonstrations and training during the Prototype Phase.

In addition to the foregoing, similar language was contained in H.R. Rep. 173 to H.R. 2991, (Pub. L. 101-162), the Commission's fiscal year 1990 Appropriations Act:

. . . In implementing this system, the Committee expects the Commission to develop procedures that will ensure that ATFI will not \* compete with private sector providers of information services. As the Commission's 1986 Feasibility Study recommended, remote access to the system should be only rudimentary with essentially no analysis of the data. In addition, the procedures governing the system should provide that the user be able to access the system on a limited number of items before automatic log-off.

[\* S. Rep. No. 101-144 to H.R. 2991 added the word "unfairly," otherwise the language is identical.]

The ATFI Contractor, working with the Commission staff, had developed reasonable controls and procedures governing remote access to accommodate the intent of Congress, as described above. These, however, are subject to further modification as regulatory requirements change, even after experience during prototype and full operation.

It is intended that there be automatic log-off for any kind of modem access after five or ten minutes of inactivity. This is similar to many types of electronic, remote-access services.

For remote retrieval of tariff data, the design calls for specification by the user of a particular tariff desired to be accessed, after consulting a table of contents at log-on. To identify the sought-after TLI, there will also be various help functions, such as commodity indexes, before bringing up the item on the screen.

Because tariffs will continue to have separate "Rules" sections governing the applicability of the rate, these sections of the same tariff also may be accessed. Moreover, where the tariff filer has a separate "Rules" or "Bill-of-Lading" tariff, instead of an all-inclusive "section" in the same tariff, these types of governing tariffs also may be readily accessed during the same session. There is no artificial limitation to "one-tariff-at-a-time," other than the functionality of the system, itself.

The original design had intended that the retriever will be automatically logged-off a session after a particular time, such as 30 minutes. The period of time established would allow sufficient exploration of all the applicable rules and, perhaps, another TLI, if there was a mistake in selecting the first TLI. After experience, it was intended that this time limit would be adjusted upward or downward.

Software and instructional materials are being developed to assist in correcting as many problems as possible before tariffs are filed. This should minimize errors and rejections. In order that a carrier can determine that a filing session has been successful, however, it will be allowed access to (only) its own filing in the non-public review file and to consult a special message screen developed for this purpose. The fewer the errors, the easier it is for all concerned.

The ATFI system design will also provide for user identification and monitoring of utilization so that action can be taken to prevent access abuses by any individual or group.

The Commission's interim rule (issued on August 12, 1992) in Docket 90-23, *Tariffs and Service Contracts*, has addressed remote retrieval issues and comments submitted by the public.

On November 2, 1992, however, the President signed Pub. L. 102-582, section 502 of which (46 App. U.S.C. 1707a) repeals section 2 of the Act of August 16, 1989 (46 App. U.S.C. 1111c), and directs that most of the restrictions on public retrieval of tariff data be removed from the ATFI system.

Accordingly, on February 8, 1993, the Commission issued a notice of proposed rulemaking in Docket 93-03, *Implementation of Section 502 of Public Law 102-582*, with public comments due by March 10, 1993.

The Commission will continue to keep Congress apprised on the issue of remote retrieval.

## VI

### SECTION 18 STUDY

#### SECTION 18: THE MANDATE FOR A FIVE-YEAR STUDY OF THE IMPACT OF THE SHIPPING ACT OF 1984

In September 1989, the FMC submitted the Section 18 Report on the Shipping Act of 1984 ("Report") to Congress and the Advisory Commission on Conferences in Ocean Shipping ("Advisory Commission"). The Report presented a detailed evaluation, including supporting data and analyses, of the impact of the 1984 Act on the international shipping industry. It was the product of a five-year study by the FMC mandated by Congress in section 18 of the 1984 Act, and addressed a set of specific issues that Congress believed would be important in assessing the regulatory reforms embodied in the 1984 Act. In particular, the FMC was required by section 18(a) of the 1984 Act to collect and analyze data on (1) increases or decreases in the level of tariffs; (2) changes in the frequency or type of common carrier services available to specific ports or geographic regions; (3) the number and strength of independent carriers in various trades; and (4) the length of time, frequency and cost of major types of FMC regulatory proceedings.

Congress also identified three specific topics in section 18(c)(3) of the 1984 Act that the FMC should address in its Report: (1) the advisability of adopting a system of tariffs based on volume and mass of shipment; (2) the need for antitrust immunity for ports and marine terminals; and (3) the continuing need for the statutory requirement that tariffs be filed with and enforced by the FMC.

The Report was also transmitted to the Department of Justice ("DOJ"), DOT and the Federal Trade Commission. The three aforementioned agencies submitted their own analyses on the impact of the 1984 Act to Congress and to the Advisory Commission.

The Advisory Commission, which was comprised of 17 Commissioners ("AC Commissioners"), was charged with conducting a comprehensive study of, and making recommendations concerning, conferences in ocean shipping. The study specifically was to address whether the Nation would be best served by prohibiting conferences, or by having closed or open conferences. The Advisory Commission was to submit to the President and to Congress, within one year after its establishment, a final report containing a statement of findings and conclusions, including recommendations for such administrative, judicial and legislative actions as it deems advisable. The report was delivered on April 10, 1992.

After a considerable amount of discussion, debate and deliberation, the AC Commissioners recognized that no meaningful consensus on the major issues would be reached. Therefore, the report does not include conclusions or recommendations. The report does, however, provide a comprehensive review of the issues considered by the Advisory Commission based on the views and recommendations of shippers, carriers, conference, and intermediary representatives who testified before or were interviewed by the Commission. In addition, individual AC Commissioners provided separate statements highlighting certain significant issues in international liner shipping and changes, if any, they would recommend to the current regulatory structure.

# **VII**

## **THE FOREIGN SHIPPING PRACTICES ACT OF 1988**

### **A. THE STATUTE**

The Omnibus Trade and Competitiveness Act of 1988, enacted by Congress and effective with the President's signing on August 23, 1988, contains at Title X, Subtitle A, the Foreign Shipping Practices Act of 1988 ("FSPA").

The FSPA directs the Commission to address adverse conditions affecting U.S. carriers in U.S./foreign oceanborne trades, which conditions do not exist for carriers of those countries in the U.S., either under U.S. law or as a result of acts of U.S. carriers or others providing maritime or maritime-related services in the U.S.

### **B. ACTIONS TAKEN\*\*\*\***

On October 11, 1991, the Commission initiated an investigation under the FSPA into alleged Taiwan restrictions impeding U.S. carrier operations in such matters as trucking, off-dock terminal activities, container leasing, chassis registration and shipping agency authority. Comments filed

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\*\*\*\* Other actions and proceedings dealing with restrictive foreign trade practices were pursuant to section 19 of the 1920 Act, and are discussed in the following chapter, Significant Operating Activities by Organizational Unit, Office of the General Counsel.

indicated that substantial progress had been achieved on most issues but that the status and interpretation of legislation liberalizing Taiwan's Highway Law to permit U.S. carrier trucking operations remained unclear.

On May 13, 1992, the Commission discontinued the proceeding in light of the satisfactory resolution of the majority of issues and the pendency of apparently corrective legislation on the trucking issue. In comments submitted to the Commission, the U.S. carriers reported that they were satisfied with the status of most matters and believed sanctions were "unwarranted." However, the Commission determined that the situation required further monitoring to ensure progress on trucking matters, and on the same date issued a separate Order Requiring Information to be filed by the carriers by November 13, 1992. Those submissions, under review by the Commission, indicated that legislative activity on the trucking issue has not been completed and that the matter remains essentially unresolved. Further reports from the Taiwan carriers are to be submitted in fiscal year 1993.

In July 1991, the Commission initiated an investigation under the FSPA into alleged restrictions on U.S. carriers operating in the PRC Trade. At issue were concerns about branch office activities, feeder vessel operations, containeryard and container freight station operations, port and handling fees and trucking services. During the pendency of the investigation, commercial and governmental consultations occurred, and the Commission's review of the reports from those negotiations revealed substantial PRC concessions and commitments. At the request of the U.S. carriers, the Commission invoked section 10002(c)(2) of the FSPA and extended the completion date of the investigation 90 days to February 19, 1992, to allow the parties time to experience, assess and report on the PRC's implementation of its commitments.

Review of additional comments filed indicated that the PRC had made significant changes in most matters. The only unresolved issue remaining was trucking, and it appeared that no resolution was imminent. U.S. carriers reported that they were satisfied with the status of most matters and recommended termination of the proceeding. The Commission, therefore, discontinued the proceeding in February 1992. However, because of the Commission's interest in the remaining unresolved matter and in implementation and effectuation of PRC commitments and liberalizations to date, the Commission issued a separate Order Requiring Information directing all parties to report on future conditions on September 1, 1992, and again on March 1, 1993.

The U.S. carriers in their September 1 reports reiterated concern in two areas: PRC recognition of carrier tariffs and authority to undertake trucking operations within the PRC. The U.S. carriers also pointed out that new PRC legislation was imminent, which could affect maritime policy on a number of issues including trucking and tariff observance. Efforts continued to be made to arrive at a commercial resolution to the trucking issue.

Reports regarding Japan's Harbor Management Fund were received by the Commission throughout 1992, following the discontinuance of an FSPA investigation into practices concerning that Fund. See discussion in the following chapter, Significant Operating Activities by Organizational Unit, Office of the General Counsel.

### **C. TOP TWENTY U.S. LINER CARGO TRADING PARTNERS**

Section 10002(g)(1) of the Omnibus Trade and Competitiveness Act of 1988 requires the FMC to include in its annual report to Congress "a list of the twenty foreign countries

which generated the largest volume of oceanborne liner cargo for the most recent calendar year in bilateral trade with the United States."

The data used to derive the Commission's list of top twenty partners were furnished by the Bureau of the Census ("Census"). The Census data distinguish between liner, tramp, tanker, and dry cargo service. Census defines liner service as that "type of service offered by a regular line operator of vessels on berth. The itineraries and sailing schedules of vessels in liner service are predetermined and fixed." The data supplied to the Commission by Census are intended to exclude all non-liner shipments in accordance with this definition.

The export data are compiled primarily from Shipper's Export Declarations; the import data are compiled from the import entry and warehouse withdrawal forms. Both types of documents are required to be filed with U.S. Customs officials. These data are subsequently forwarded to Census. Both export and import statistics exclude: shipments between U.S. possessions, shipments of mail or parcel post, exports and imports of vessels themselves, and other transactions such as military household goods shipments, bunker fuels and other supplies, intransit shipments through the U.S., etc.

The most recent year for which Census data were available to the Commission is calendar year 1991. The table on the next page indicates the twenty foreign countries which generated the largest volume of oceanborne liner cargo in bilateral trade with the U.S. in 1991. The figures in the table represent each country's total U.S. liner imports and exports in thousands of long tons.

## Top Twenty U.S. Liner Cargo Trading Partners (1991)

<u>Rank</u>	<u>Country</u>	<u>Tons (000's)</u>
1	Japan .....	16,288
2	Taiwan .....	7,756
3	Republic of Korea .....	5,257
4	China (PRC) .....	4,773
5	Germany .....	4,461
6	United Kingdom (Incl. N. Ireland) .....	3,105
7	Hong Kong .....	2,784
8	Italy .....	2,661
9	The Netherlands (Holland) .....	2,574
10	France .....	2,391
11	Belgium .....	2,103
12	Thailand .....	1,989
13	Brazil .....	1,966
14	Australia .....	1,964
15	Indonesia .....	1,737
16	Spain .....	1,548
17	Philippines .....	1,180
18	Venezuela .....	1,113
19	Singapore .....	1,112
20	Saudi Arabia .....	1,089

*Source: U.S. Department of Commerce, Bureau of the Census.  
Figures listed above are based on monthly data provided by  
Census and are subject to revision.*

The same countries comprised the top ten U.S. liner cargo trading partners in both 1990 and 1991. Again in 1991, Japan, Taiwan, and the ROK ranked first, second, and third, respectively. The rankings of the 4th through 10th trading partners did, however, change in 1991. In this group, the ascending countries included China (PRC) (5th to 4th), United Kingdom (7th to 6th), and Hong Kong (9th to 7th). The descending countries included Germany (4th to 5th), Italy (6th to 8th), and the Netherlands (8th to 9th). France rounded out the top ten trading partners again in 1991.

Of the remaining top twenty U.S. liner cargo trading partners, only Belgium and Spain maintained their 1990 positions in 1991. In positions 12 through 15, two pairs of countries changed places in 1991: Thailand and Australia switched places with Brazil and Indonesia, respectively. The Philippines and Venezuela both moved up two positions, from 19th and 20th in 1990, to 17th and 18th in 1991, while Singapore slid back one position. Saudi Arabia entered the rankings in 1991, replacing India (ranked 17th in 1990).

**VIII**

**SIGNIFICANT  
OPERATING  
ACTIVITIES**

**BY**

**ORGANIZATIONAL UNIT**



# **A. OFFICE OF THE SECRETARY**

## **1. General**

The Office of the Secretary serves as the focal point for all matters submitted to and emanating from the members of the Commission. Accordingly, the Office is responsible for preparing and submitting regular and notation agenda of matters for consideration by the Commission and preparing and maintaining the minutes of actions taken by the Commission on these items; receiving and processing formal and informal complaints involving violations of the shipping statutes and other applicable laws; receiving and processing special docket applications and applications to correct clerical or administrative errors in service contracts; issuing orders and notices of actions of the Commission; maintaining official files and records of all formal proceedings; receiving all communications, petitions, notices, pleadings, briefs, or other legal instruments in administrative proceedings and subpoenas served on the Commission or members and employees thereof; administering the Freedom of Information, Government in the Sunshine, and Privacy Acts; responding to information requests from the Commission staff, maritime industry, and the public; issuing publications and authenticating instruments and documents of the Commission; compiling and publishing bound volumes of Commission decisions; and maintaining official copies of the Commission's regulations.

The Secretary's Office also participates in the development of rules designed to reduce the length and complexity of formal proceedings, and participates in the implementation of legislative changes to the shipping statutes. During fiscal year 1992:

- The Commission heard oral argument in 2 proceedings and issued decisions concluding 17 formal proceedings. Another 46 formal proceedings were discontinued or dismissed without decision, while 15 initial decisions of an Administrative Law Judge became administratively final without Commission review. The Commission also concluded 221 special docket applications, 15 informal dockets which involve claims sought against carriers for less than \$10,000, and 66 applications to correct service contracts. During the same period, the Commission issued final rules in 16 rulemaking proceedings.
- Nine rulemaking proceedings and three formal petitions were pending before the Commission at the end of the year. Final decisions in these matters are anticipated in fiscal year 1993.
- Responsibility for issuing initial decisions in special dockets was transferred to the office from the Office of Administrative Law Judges. Special Docket Officers issued 73 such decisions.

## **2. Office of Informal Inquiries and Complaints and Informal Dockets**

This Office coordinates the informal complaint handling system throughout the Commission. A total of 1,952 complaints and information requests were processed in fiscal year 1992. Recoveries to the general public of overcharges, refunds and other savings attributable to the complaint handling activities amounted to \$138,496. Since 1983, this Office has helped complainants recover over \$2,500,000.

The Office coordinated meetings between maritime industry representatives and Commission officials, and supplied materials and information requested by the general public. During fiscal year 1992, this Office responded to 835 such telephone requests and inquiries. The Office maintained liaison with members of the President's Consumer Affairs Council, in which it participated throughout the fiscal year.

In addition, the Office is responsible for the initial adjudication of reparation claims up to \$10,000 that are filed by shippers against common carriers by water engaged in the foreign and domestic offshore commerce of the U.S. These claims must be predicated upon violations of the 1916 Act, the 1984 Act, or the 1933 Act. Most claims received under this program constitute shippers' requests for freight adjustments arising from alleged overcharges by carriers. During fiscal year 1992, 18 claims were filed, while 5 pending cases were carried over from the previous year. During the same period, 12 informal docket claims were concluded by the Office, while 1 other became a formal docket. Also, three petitions for reconsideration were considered and denied. There were 10 pending cases at the close of the fiscal year.

During fiscal year 1992:

- **The Office continued to develop a cooperative interagency program designed to improve service to individuals with complaints against cruise operators. Streamlined procedures have added to our ability to assist the public in a timely manner.**
- **The Office played a major role in developing information concerning the activities of an untariffed NVOCC suspected of systematic violations of the governing statutes.**



## **B. OFFICE OF ADMINISTRATIVE LAW JUDGES**

### **1. General**

Administrative Law Judges preside at hearings held after the receipt of a complaint or institution of a proceeding on the Commission's own motion.

Administrative Law Judges have the authority to administer oaths and affirmations; issue subpoenas; rule upon offers of proof and receive relevant evidence; take or cause depositions to be taken whenever the ends of justice would be served thereby; regulate the course of the hearing; hold conferences for the settlement or simplification of the issues by consent of the parties; dispose of procedural requests or similar matters; make decisions or recommend decisions; and take any other action authorized by agency rule consistent with the Administrative Procedure Act.

At the beginning of fiscal year 1992, 88 proceedings were pending before Administrative Law Judges. During the year, 147 cases were added, which included 1 proceeding remanded to Administrative Law Judges for further proceedings. The judges held 11 prehearing conferences, held 3 formal oral hearings, formally settled 16 proceedings, dismissed or discontinued 29 proceedings, and issued 9 initial decisions in formal proceedings, and 149 initial decisions in special docket applications.

### **2. Commission Action**

The Commission adopted one formal decision, and two formal decisions became administratively final. Special docket

decisions in 148 proceedings became administratively final, and one special docket decision was affirmed.

### **3. Decisions of Administrative Law Judges (in proceedings not yet decided by the Commission)**

#### ***Memphis Forwarding Company, Inc.--Possible Violations of Section 19(d)(4) of the Shipping Act of 1984 [Docket No. 90-13].***

This proceeding was instituted by the Commission to determine whether Memphis Forwarding Company, Inc. ("Memphis"), which, during the relevant period of time, was a licensed ocean freight forwarder, had violated section 19(d)(4) of the 1984 Act by receiving payments from carriers for shipments in which it had a beneficial interest. The Initial Decision found that Memphis was controlled by or affiliated with the Government of Egypt and the consignee of the shipments and that it had, therefore, violated law by receiving payments from ocean carriers on shipments in which it had a beneficial interest. The forwarder was assessed a civil penalty in the amount of \$100,000.

#### ***Seacon Terminals, Inc. v. Port of Seattle [Docket No. 90-16].***

In this proceeding, complainant, a marine terminal operator, alleged that respondent Port refused to renew complainant's lease, engaged in unreasonable practices, and gave undue or unreasonable advantages to another company in violation of various provisions of section 10 of the 1984 Act. Complainant asked for reparations amounting to approximately \$12 million. The Initial Decision found that complainant had voluntarily surrendered its lease when it lost its only assured customer, that it was not entitled to money damages, that the

Port was not engaging in unreasonable practices, and that the Port had not set up a monopoly of terminal services for any one operator.

***Envirex, Inc. v. China Ocean Shipping Company (COSCO) et al. [Docket No. 91-05].***

In this proceeding, complainant shipper alleged that it had been charged a higher rate for a shipment of water treatment machinery which had been carried from Houston, Texas, to Shanghai, China, than the proper rate which, it alleged, should have been the rate for containerized shipments of the commodity. Complainant further alleged that it had tendered the shipment to respondent as a containerized shipment but that the carrier had handled the shipment as breakbulk and, therefore, had improperly charged the higher breakbulk rate. Complainant alleged that respondent had acted unreasonably and had violated various provisions of section 10 of the 1984 Act and asked for money damages. The Initial Decision found that the shipment was not entitled to the containerized rate, that respondent had correctly rated the shipment under a breakbulk rate, and that complainant was not entitled to damages.

***Orient Overseas Container Line, Inc. v. Espee Trading Corp. [Docket No. 91-10].***

In this proceeding, complainant, an ocean carrier, alleged that respondent shipper had failed to pay lawful freight charges on certain shipments of waste paper which respondent had carried from New York and Toronto, Canada, to Bombay, India, in violation of section 10(a)(1) of the 1984 Act. Complainant asked for \$97,200 as reparations. After respondent failed to reply to certain orders and notices, the Initial Decision ordered respondent to pay complainant \$61,000

of the claimed amount, which represented that portion of the shipments carried from New York to Bombay.

***Consumer Electronics Shippers Association, Inc. v. Asia North America Eastbound Rate Agreement, et al.***  
[Docket No. 91-17].

This is the first formal complaint in which a shippers' association has alleged that a conference of ocean carriers has violated the 1984 Act by failing to give a service contract to the association without imposing objectionable discriminatory terms. The Initial Decision found that the respondent conference had acted unfairly by discriminating against the association by imposing onerous burdens and discriminatory rate conditions on the association in violation of section 10(b)(12) of the 1984 Act, and that the conference should remove these unfair conditions when negotiating a service contract with the association in the future unless the conference could justify the different treatment on valid economic grounds.

Judges also issued initial decisions in **Special Docket Nos. 1964, 1965, 1985, 1986, 1987, 2002, 2007, 2009, 2015, 2016, 2022, 2023, 2027, 2028, 2029, 2030, 2031, 2035, 2040, 2045, 2046, 2047, 2048, 2049, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2062, 2063, 2065, 2066, 2067, 2068, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, and 2182**, described under "Decisions of the Commission."

#### **4. Pending Proceedings**

At the close of fiscal year 1992, there were 32 pending proceedings, of which 4 were investigations initiated by the Commission. The remaining proceedings were instituted by the filing of complaints or applications by common carriers by water, shippers, conferences, port authorities or districts, terminal operators, trade associations, and stevedores.



## **C. OFFICE OF THE GENERAL COUNSEL**

The General Counsel provides legal counsel to the Commission. This includes reviewing for legal sufficiency staff recommendations for Commission action, drafting proposed rules to implement Commission policies, and preparing final decisions, orders, and regulations for Commission ratification. In addition, the Office of the General Counsel provides written or oral legal opinions to the Commission, its staff, or the general public in appropriate cases. The General Counsel also represents the Commission before the courts and other agencies.

### **1. Decisions and Rulemakings**

The following are adjudications and rulemakings representative of matters prepared by the General Counsel's Office:

***Petition for Exemption from the NVOCC Tariff Filing Requirements Under the Shipping Act of 1984, [Petition No. P5-91], 26 S.R.R. 240 (May 1, 1992).***

The International Federation of Freight Forwarders Associations and 22 individual NVOCCs petitioned the Commission, pursuant to section 16 of the 1984 Act, for an exemption for NVOCCs from the tariff filing requirement of section 8 of the 1984 Act. The Commission published notice of the filing of the petition and requested comment by interested persons. To assist the Commission's consideration of the petition, commenters also were requested to address an attached list of questions relating to the issue of NVOCC tariff filing.

Sixty-eight comments were received in response to the Notice. After reviewing the petition and the comments, the Commission decided to deny the petition because petitioners had not met their burden of demonstrating that the petition met each of the four criteria in section 16. However, because of certain concerns raised during this proceeding, the Commission further decided to issue an Advance Notice of Proposed Rulemaking to explore possible methods of providing some relief from the tariff filing requirement to all or some NVOCCs.

***Puget Sound Tug & Barge Co. -- Application for Section 35 Exemption: Hawaii and Alaska Trades, [Petition No. P4-91], 26 S.R.R. 61 (November 29, 1991).***

The Commission granted a petition filed by Puget Sound Tug & Barge Co. ("Puget") seeking an exemption from the 30-day tariff notice requirement of section 2 of the 1933 Act. The Commission's action authorized Puget to put into effect on one day's notice any changes in its tariffs in the mainland/Hawaii and mainland/Alaska trades that do not increase shippers' costs. In addition to allowing shippers to benefit from rate decreases immediately, the Commission's order placed Puget on an equal competitive basis with other carriers with similar tariff authority.

***Notice of Inquiry Concerning Use and Effect of Surcharges by Common Carriers and Conferences, [Docket No. 92-14], 26 S.R.R. 108 (January 17, 1992).***

This inquiry was initiated to obtain information on the general subject of surcharges, in order to determine whether regulatory action is needed. Specific questions on the use and effect of surcharges were posed, and comments thereon received. The Commission concluded that there are confusing and complicating aspects of surcharge practices, but that these

should be obviated upon implementation of features introduced to its ATFI system, by which bottom-line as well as component part tariff information would be electronically retrievable with minimal effort. The Commission further concluded that concerns that surcharge usage results in higher overall shipper costs were not substantiated, and that in any event, rate reduction is not a statutory objective of the Commission, nor is rate regulation an authorized function.

***Service Contract Docket No. 92-2, 26 S.R.R. 320 (April 17, 1992).***

The United States/Central America Liner Association petitioned the Commission for permission to make an "administrative correction" to Service Contract No. 132. The Commission denied the petition because there was no proof that the parties intended that the requested changes be part of their initial, original contract.

***DSR Shipping Co., Inc. - Petition for Declaratory Order, [Docket No. 91-59], 26 S.R.R. 73 (December 17, 1991).***

DSR Shipping Co., Inc. ("DSR"), an NVOCC, filed a petition for declaratory order seeking the Commission's interpretation of a service contract between it and the Great White Fleet, Ltd. The Commission rejected the petition because DSR also had filed a complaint relating to the same dispute, and the Commission decided that the complaint process provided the better procedure to address the issues of law and fact.

***Tariff Filing Notice Requirements; Domestic Offshore Trades, [Docket No. 91-42], 26 S.R.R. 70 (December 16, 1991).***

The Commission amended its regulations to exempt all carriers in the domestic offshore trades from the 30-day notice requirements of the 1933 Act, for any new or amendatory tariff matter that does not increase the shipper's cost of transportation. Carriers now are free to publish such tariff matter on one-day's notice. The new rule broadened a series of individual exemptions granted by the Commission in recent years. The Commission found that this change would benefit both shippers, because carriers would be able to respond more quickly to their needs, and carriers, who would be able to move quickly to meet rate changes by competitors.

***Actions to Address Adverse Conditions Affecting United States Carriers in the United States/People's Republic of China Trade, [Docket No. 91-31], 26 S.R.R. 163 (February 19, 1992).***

The Commission initiated an investigation under the FSPA into certain conditions potentially adversely affecting the operations of U.S. carriers in the PRC. The issues designated were: full branch office status for U.S. carriers in the PRC; PRC recognition of U.S. carrier tariffs; port service issues; intermodal and related services; and "doing business" costs. Subsequent to the issuance of the Notice and Order of Investigation, commercial and intergovernmental discussions were held which resulted in apparent resolution of all issues of concern except for trucking rights. The U.S. carriers accordingly recommended termination of the proceeding, and chose not to pursue their prior complaints about trucking restrictions. The Commission terminated the investigation but issued a further Order Requiring Information pursuant to the

FSPA in order to monitor the remaining unresolved matters and the implementation and effectuation of the commitments and liberalizations made to date.

***Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Venezuela Trade, [Docket No. 91-22], 26 S.R.R. 204 (March 25, 1992).***

This proceeding was initiated under section 19 of the 1920 Act, in response to a Petition filed by Total Ocean Marine Services, Inc. ("Total Ocean"). Total Ocean claimed that the Government of Venezuela ("GOV") excluded third-flag carriers from access to a substantial portion of cargo in the U.S./Venezuela trade, and also prohibited operating by chartering third-flag vessels. On the basis of that and other supporting information, the Commission proposed a rule imposing a \$100,000 per voyage fee upon certain Venezuelan-flag carriers. A U.S.-GOV maritime agreement was reached in October 1991, making available to U.S. and Venezuelan carriers, including those operating third-flag chartered vessels, most of the reserved cargo of both nations. The Commission subsequently ascertained that Total Ocean had successfully entered the trade, and Total Ocean advised that the restrictions had been adjusted and requested that the rulemaking be discontinued. The Commission accordingly terminated the proceeding without finalizing the proposed rule.

***Actions to Address Adverse Conditions Affecting United States Carriers That Do Not Exist For Foreign Carriers in the United States/Japan Trade, [Docket No. 91-19], [Order Discontinuing Proceeding and Requiring Reporting], 25 S.R.R. 1505 (June 13, 1991).***

The Commission issued an order under the FSPA requiring Japanese and U.S. carriers serving the U.S./Japan

trade to provide information concerning charges imposed on carriers serving Japanese ports paid into a fund known as the Japan Harbor Management Fund ("Fund"). See Order Requiring Information, 25 S.R.R. 1187. Based on the responses to this order, the Commission subsequently initiated a formal investigation under the FSPA. The proceeding was discontinued on June 13, 1991, based on the U.S. carriers' representations that a new agreement had been reached which substantially removed the adverse effect of the Fund, along with a commitment by the Japanese Minister of Transport that the Fund would be discontinued after March 31, 1992. Parties to the proceeding were required to report quarterly on payments to the Fund through April 1992, with a final report in October 1992 as to whether funds were being collected. These reports currently are being reviewed by the Commission.

***Bonding of Non-Vessel-Operating Common Carriers,***  
**[Docket No. 91-1], 25 S.R.R. 1679 (October 8, 1991).**

On October 8, 1991, the Commission adopted a Final Rule to implement the Non-Vessel-Operating Common Carrier Amendments of 1990 ("1990 Amendments"). The Interim Rule had added a new Part 583 to Title 46 of the Code of Federal Regulations, and amended two existing Parts -- 580 and 581. New Part 583 established various requirements applicable solely to NVOCCs. All NVOCCs operating in the foreign commerce of the U.S., except those engaged exclusively in transporting used military household goods and personal effects, must obtain a surety bond of \$50,000. In addition, NVOCCs not domiciled in the U.S. must designate a resident agent for service of process. If that resident agent cannot be served, alternative service can be made on the Secretary of the FMC. The Final Rule further provided procedures for the suspension or cancellation of an NVOCC's tariff for failure to maintain a bond or resident agent. Appendix A to Part 583 contained Form FMC-48, the new bond form for NVOCCs.

A provision relating to NVOCCs that exclusively transport used military household goods and personal effects was clarified so that civilian Department of Defense ("DOD") employees are clearly included within the exemption. In addition, this provision was amended to indicate that these NVOCCs may be subject to other requirements, such as alternative surety bonding imposed by DOD.

Common carriers transporting cargo for a known NVOCC have an additional method by which to obtain proof that such NVOCC is in compliance with the tariff and bonding requirements of the 1984 Act. They can now consult a list of NVOCCs in compliance that will be published periodically by the Commission. The requirement in the Interim Rule that common carriers must ascertain the identity and status of every shipper tendering cargo was deleted from the Final Rule.

With respect to service contracts with NVOCCs, the Final Rule prohibits ocean common carriers and conferences from entering into service contracts with an NVOCC unless that NVOCC has a tariff and a bond as required by sections 8 and 23 of the 1984 Act. In addition, a shipper party to a service contract must certify its status on the signature page of the service contract. If this certification identifies the shipper as an NVOCC, the ocean common carrier or conference must obtain proof that the NVOCC is tariffed and bonded. Such proof can be obtained by consulting the list of NVOCCs in compliance which is published by the Commission or by reviewing a copy of the NVOCC's Rule 24. The Final Rule further provides that if an NVOCC joins a shippers' association during the term of a service contract, that NVOCC must indicate its compliance to the ocean common carrier or conference party to the contract.

***Bonding of Non-Vessel-Operating Common Carriers,***  
**[Docket No. 91-1], 26 S.R.R. 137 (January 29, 1992).**

In response to a Petition for Stay and Reconsideration or Clarification of the Final Rule, the Commission clarified its procedures for issuance of its list of NVOCCs in compliance with bonding and tariff filing requirements. In addition, the Commission further clarified that common carriers may rely on a copy of an NVOCC's Tariff Rule No. 24 as proof of compliance, and that once such proof is obtained, it may be relied upon for a period of six months.

***Inquiry Into Laws, Regulations and Policies of the Government of Ecuador Affecting Shipping in the United States/Ecuador Trade,***  
**[Docket No. 89-7], 26 S.R.R. 208**  
**(April 3, 1992).**

The Commission conducted a Fact Finding Investigation to look into the continued operations and corporate relationships of Maritima Transligras S.A. ("Transligras") and related companies, as well as the granting of waivers for shipments under the Ecuadorian cargo reservation decrees in response to a petition for enforcement of the Commission's Final Rule in this proceeding, filed in December 1990. The Final Rule had found unfavorable conditions to exist in the U.S./Ecuador trade as a result of certain laws and decrees of the Government of Ecuador reserving liquid bulk cargoes from the U.S. Gulf for Ecuadorian-flag vessels. The Final Rule assessed a fee of \$50,000 per outbound voyage from the U.S. to Ecuador on Transligras, an Ecuadorian-flag carrier. Although Transligras subsequently advised the Commission that it had sold the only Ecuadorian-flag parcel tanker it had been operating in the trade, the petition for enforcement alleged that Transligras continued to operate in the trade with a changed operating identity. The Commission issued a Report and Order on

April 3, 1992, requiring Andino Chemical Tankers, Inc. ("Andino") and its general agent, Chemical Tankers of America ("CTA"), to Show Cause why Andino should not be found to be the successor or substitute for Transligna and be subject to the sanctions imposed on Transligna. On November 16, 1992, the Commission approved a settlement agreement between Andino and CTA and the Commission's Bureau of Hearing Counsel under which Andino and CTA agreed, without any admission of wrongdoing, to pay \$10,000 in settlement of the Commission's charges that they had continued to benefit from the Ecuadorian cargo reservation system as successors to Transligna.

## **2. Litigation**

The General Counsel represents the Commission in litigation before courts and other administrative agencies. Although the litigation work largely consists of representing the Commission upon petition for review of its orders filed with the U.S. Courts of Appeals, the General Counsel also participates in actions for injunctions, enforcement of Commission orders, actions to collect civil penalties, and other cases where the Commission's interest may be affected by litigation.

The following are representative of matters litigated by the Office:

***Matson Navigation Company, Inc. v. Federal Maritime Commission, No. 91-1176, (D.C. Cir. March 27, 1992).***

In an order served October 29, 1990, the Commission held that a 3.6 percent general rate increase which had been filed by Matson Navigation Company ("Matson") was unjust and unreasonable to the extent it permitted Matson to achieve a rate of return in excess of 11.18 percent. The Commission's order directed Matson to refund to shippers that portion of the subject general rate increase which the Commission found

unjust and unreasonable, together with interest. Matson filed a Petition for Reconsideration of the Commission's order on the grounds that the Commission erred in making a .5 percent downward adjustment in the benchmark rate of return on account of current trends in rates of return. The Commission denied Matson's Petition for Reconsideration. Subsequently, Matson petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the Commission's order of October 29, 1990. Matson sought to overturn the Commission's downward adjustment of 1.25 percent to the benchmark rate of return on account of Matson's relative risk and contended that the allowable rate of return of 11.18 percent did not permit it to attract capital. The Commission's order of October 29, 1990, was affirmed in all respects by the D.C. Circuit.

***Merritt v. U.S.A. and FMC*, No. 91-4112, (2nd Cir. March 27, 1992).**

Martyn Merritt appealed from the assessment of penalties totaling \$1.2 million against him individually in the Commission's second proceeding charging Merritt, Ariel Maritime Group, Inc. and other Merritt-created and -controlled companies with multiple and repeated violations of the 1984 Act. The U.S. Court of Appeals for the Second Circuit ruled that the Commission was not obliged to grant a hearing to a respondent who refused to accept service of process and failed to appear or respond to Commission orders until after the close of the record, but vacated the penalty on grounds that the Commission had not produced or considered evidence of the respondent's ability to pay the penalties imposed. The case was remanded to the Commission. The Commission reopened the proceeding and remanded it to the Administrative Law Judge for further proceedings on the issue of an appropriate civil penalty.

***United States v. FMC, D.C. Cir. No. 92-1246.***

In FMC Petition No. P1-90, the Military Sealift Command ("MSC") of the DOD contended that certain actions by the Maritime Administration of the DOT constituted a "rule or regulation" affecting shipping in the foreign trades within the meaning of section 19 of the 1920 Act and, accordingly, should have been subjected to pre-implementation review and approval by the Commission pursuant to its powers under that statute. Comments in opposition to MSC's petition were filed by DOT and by four ocean carriers. The Commission ruled that the constitutional doctrine of separation of powers barred it, as a quasi-legislative independent agency, from asserting section 19 jurisdiction over rules issued by Executive agencies such as DOT. The Commission further ruled that, as a quasi-judicial agency, it was similarly barred from resolving legal disputes between two Executive agencies. 25 S.R.R. 1632 (September 20, 1991).

MSC filed a petition for reconsideration, which was denied by the Commission. 26 S.R.R. 217 (April 8, 1992). MSC then filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit. The case is pending establishment of a schedule for briefing.

***U.S. and FMC v. Merritt, 2nd Cir. No. 92-6123.***

In an action brought by the U.S. and the FMC, the U.S. District Court for the Southern District of New York entered an Order on May 24, 1990, enforcing the Commission's Order in Docket No. 84-38 assessing civil penalties totaling \$335,000 against Martyn Merritt, jointly and severally with Ariel Maritime Group, Inc. and other corporations created and controlled by Merritt for numerous violations of the 1916 Act. Following the Second Circuit's decision in *Merritt v. U.S.A.*, No. 91-4112, above, and upon entry of a judgment *nunc pro tunc*,

(no judgment on the order of enforcement having been timely entered by the clerk), Merritt appealed the District Court's Order. Merritt maintained that the District Court should have inquired into the Commission's consideration of his ability to pay the penalty assessed before determining that the Commission's Order was regularly made and duly issued, notwithstanding the exclusive jurisdiction of the U.S. Courts of Appeals to review such orders of the Commission. Oral argument in the case was heard on October 15, 1992. Decision is pending.

### **3. Significant Ongoing Activity**

*Petition of Korean Forwarders and Customs Brokers Association of Southern California: Conditions Unfavorable to Shipping in the United States/Korea Trade, [Petition No. P3-92], 26 S.R.R. \_\_ (June 29, 1992).*

On June 29, 1992, the Commission issued a Notice that the Korean Forwarders and Customs Brokers Association of Southern California ("KFCBA") had filed a petition seeking relief under section 19(1)(b) of the 1920 Act (46 U.S.C. app. § 876(1)(b)) and the FSPA (46 U.S.C. app. § 1710a) from efforts of the Government of the ROK to establish a transportation operation in the U.S.

The KFCBA maintained that the Korean Customs Administration was organizing ROK companies involved in the transportation industry to establish a transportation consortium offering customs brokerage, freight forwarder, NVOCC, trucking, and warehousing services in the U.S., with offices in Los Angeles, New York, Chicago, Houston, Seattle, and New York, to handle cargo moving from the U.S. to the ROK. The KFCBA warned that the ROK Customs Administration would

use its leverage as part of the ROK Government, including the ROK Government's role as a major stockholder in the banks which extend loans to all major ROK trading and transportation companies, to induce leading ROK businesses to fund and participate in the consortium. Once established, consortium members would be expected to turn to fellow members for needed services, leading to a loss of business for KFCBA's members.

The Commission concluded that the consortium was still an operation more on the drawing board than in reality and that the issue might be resolved in bilateral discussions of shipping issues between the Governments of the U.S. and ROK then scheduled for July 1992. The Commission, therefore, decided to hold further action on the petition in abeyance. Also a factor in the Commission's decision was the likelihood that the consortium would be affected by the Commission's action on the petition of Direct Container Line, in Docket No. 92-42 - *Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Korea Trade*.

*Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Korea Trade*, [Docket No. 92-42], 57 *Fed. Reg.* 54,311 (November 18, 1992).

In response to the Petition of Direct Container Line ("DCL"), a California NVOCC, for relief pursuant to section 19, the Commission issued a proposed rule to meet or adjust conditions alleged to be unfavorable to shipping in the U.S./ROK trade. DCL alleged that it and other U.S. firms were prevented from operating as NVOCCs or freight forwarders in the ROK as a result of the Korean Maritime Transportation Business Act. That Act prohibits the operation in the ROK of a maritime transportation business, such as an NVOCC or freight forwarder, which is less than 51 percent owned by ROK citizens or which is not represented by an ROK

citizen. The Commission issued a Final Rule finding the existence of conditions unfavorable to shipping as a result of the ROK Act. The Final Rule would suspend the license of each freight forwarder which is majority owned by ROK non-U.S. citizens; suspend the tariff of each NVOCC whose principal place of business is in the ROK; and prohibit carriers in the U.S./ROK trade from paying freight forwarder compensation or brokerage on shipments from the ROK to the U.S. However, based on commitments made by the ROK Government in bilateral shipping talks in August 1992 to remove nationality-based restrictions on direct operations of U.S. forwarders and NVOCCs in the ROK by June 30, 1993, the Commission delayed the effective date of the sanctions imposed in the Final Rule to September 1, 1993.

***Financial Responsibility for Non-Vessel-Operating Common Carriers, [Docket No. 92-37].***

On June 19, 1992, the Commission published an Advance Notice of Proposed Rulemaking ("Advance Notice") seeking comment on possible ways to implement its responsibilities under the Non-Vessel-Operating Common Carrier Act of 1991 ("1991 Act"). The 1991 Act amended the 1990 Amendments by permitting the Commission to accept, in addition to bonds, insurance or other surety as proof of an NVOCC's financial responsibility. The 1991 Act also deleted the \$50,000 minimum amount for a bond previously specified by the 1990 Amendments. The Advance Notice requested comments on the appropriateness of accepting certain types of surety as evidence of an NVOCC's financial responsibility, the best method for developing forms and procedures for certain sureties, guidelines for evaluating the acceptability of companies that issue sureties, and the appropriate amount and possible methods of protection to cover an NVOCC's liabilities.

Thirteen comments were received in response to the Advance Notice. Upon consideration of these comments, the Commission published a proposed rule on October 19, 1992, (57 Fed. Reg. 47,589) that would: (1) specify the conditions under which insurance or guaranties could be accepted to evidence an NVOCC's financial responsibility; (2) provide forms and procedures for accepting insurance and guaranties; (3) specify guidelines for evaluating the acceptability of insurance companies and guarantors; and (4) specify amounts and methods of coverage. The Commission subsequently modified the proposed rule based on comments received, and issued a Final Rule on January 15, 1993.

***Actions to Address Adverse Conditions Affecting United States Carriers in the United States/Taiwan Trade, [Docket No. 91-44], 26 S.R.R. 298 (May 13, 1992).***

This proceeding under the FSPA was initiated by the Commission to investigate the existence of conditions unfavorable to shipping in the U.S./Taiwan trade arising from Taiwan Authorities' restrictions on U.S. carriers' operations. Specifically, the proceeding addressed U.S. carriers' ability to operate off-dock container terminals, obtain trucking licenses and register chassis, lease empty containers and operate a shipping agency in Taiwan.

Substantial concessions were made by Taiwan Authorities during the course of the proceeding which resulted in liberalization of the container leasing, shipping agency and off-dock container terminal issues. The remaining restriction which was not resolved at the close of the statutorily-imposed time limit on the investigation was the lack of trucking authority for U.S. carriers. Accordingly, the Commission found that this restriction constituted an adverse condition under the FSPA, but declined to impose sanctions in reaching this decision. The Commission noted that legislation to address the trucking issue

was introduced by the Executive Yuan to the Legislative Yuan; that the majority of the issues raised in the proceeding were satisfactorily resolved; and that the U.S. carriers themselves requested that no sanctions be imposed.

The Commission ordered the U.S. and Taiwan carriers serving the trade to report on progress and developments in resolving this issue by November 13, 1992. After reviewing the carriers' reports, the Commission noted that anticipated legislation to remedy trucking restrictions that adversely affect U.S. carriers in Taiwan has not been enacted and, apparently, no definitive schedule for passage of such legislation exists. The Commission directed the U.S. and Taiwan carriers to submit further reports to the Commission by February 8, 1993. The information will be used to determine whether proceedings pursuant to the FSPA or other statutes administered by the Commission are warranted.

***Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Korea Trade, [Docket No. 91-24], 26 S.R.R. 585 (November 18, 1992).***

The Commission determined to initiate a rulemaking proceeding to address restrictions on U.S. carrier operations in the U.S./ROK oceanborne trade which are imposed by operation of ROK law. Specifically, U.S. carriers are precluded from engaging in trucking operations in the ROK and from directly contracting with railroads. In light of substantial commitments made by the ROK Government which potentially resolve most of the issues, the Commission on October 30, 1991, suspended further action in this rulemaking and solicited additional comments from the parties in February 1992 and May 1992. Additional comments due August 12, 1992, were solicited to address inter-governmental discussions held during the summer. The Commission decided, on the basis of those comments, that unfavorable ROK Government restrictions on

U.S. carrier trucking operations existed in the trade, and accordingly issued a final rule imposing fees of \$100,000 per voyage on ROK-flag vessels calling at U.S. ports. Those sanctions were suspended, however, until June 1, 1994, in light of ROK Government commitments to eliminate or adjust those restrictions. In the meantime, U.S. and ROK carriers will be subjected to periodic reporting requirements.

#### **4. Foreign Shipping Restrictions and Related Matters**

Several reports, recommendations and rules were prepared and submitted to the Commission on matters arising under section 19(1)(b) of the 1920 Act. Trade areas involved included Ecuador, Venezuela and ROK. (See Docket Nos. 89-7, 91-22, 91-24, 92-42 and P3-92, above.) In the U.S./Ecuador trade, the Commission concluded a fact finding investigation in connection with a request for the enforcement of its Final Rule issued pursuant to section 19 and issued a Report and Order to show cause why an ocean carrier should not be made subject to sanctions imposed in that Final Rule. A settlement between the Bureau of Hearing Counsel and the parties responding to the order to show cause was subsequently approved by the Commission. A proceeding regarding cargo reservation policies of the GOV was discontinued when apparent restrictions were eliminated. Issues under consideration by the Commission in the U.S./ROK trade include restrictions on U.S. carriers' ability to operate trucking and on U.S. companies' ability to own and operate an NVOCC service in the ROK, and allegations that certain efforts by the ROK to establish a transportation operation in the U.S. will result in irreparable harm to non-ROK freight forwarders and customs brokers located in the U.S. and doing business with the ROK.

A number of reports, recommendations and draft orders were prepared and submitted to the Commission on matters arising under the FSPA regarding shipping conditions in the U.S. trades with the PRC and Taiwan (*See* Docket Nos. 91-31 and 91-44). Issues in these FSPA investigations related to apparent restrictions on U.S. carriers' ability to conduct shipping and ancillary activities in U.S. trades with these countries or otherwise adversely affect U.S. carriers' operations. The Commission discontinued the proceeding in the U.S./PRC trade based on the elimination of certain restrictions and other assurances provided by the PRC Government. In order to monitor the removal of PRC restrictions, the Commission has required that reports be filed by certain carriers regarding such developments. Similarly, the FSPA investigation regarding the U.S./Taiwan trade was discontinued, but with additional reporting requirements imposed on the carriers in that trade to enable the Commission to monitor progress on the remaining unresolved restriction reported by the U.S. carriers.

Further, the Commission is analyzing reports required to be filed by certain carriers in the U.S./Japan and U.S./ROK trades. Carriers in the U.S./Japan trade were required to address the status of the Fund. Carriers in the U.S./ROK trade reported on the status of trucking restrictions on U.S. carriers operating in the ROK.

The Office of the General Counsel participated in interagency groups and international maritime discussions, particularly as technical advisors to the Interagency Maritime Policy Group, whose other members include representatives of the U.S. DOT, DOJ, Departments of State and Commerce, and the Office of the U.S. Trade Representative. The Office also coordinated and participated in briefings of foreign visitors, including European Commission representatives, to the Commission.

Finally, under the Commission's controlled carrier program, several common carriers were under consideration during the fiscal year for controlled carrier status.



## **D. OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY**

The Office of Equal Employment Opportunity ("EEO") applies knowledge of Federal EEO and personnel management concepts, procedures and regulations to develop and manage a comprehensive program of equal employment opportunity. The Office works independently under the direction of the Chairman to provide advice to the Commission's management in improving and carrying out its policies and program of non-discrimination and affirmative program planning.

The Office is responsible for affirmative program planning, special emphasis programming, and complaints processing and adjudication, with the assistance of collaterally-assigned EEO counselors and a Special Emphasis Program Coordinator.

The Office works closely with the Commission's Office of Personnel, managers and supervisors to:

- **Improve recruitment and representation of women, minorities and persons with handicapping conditions in the workforce.**
- **Provide adequate career counseling.**
- **Facilitate early resolution of employment-related problems.**
- **Develop program plans and progress reports.**

The Director, Office of EEO, arranges for counseling of employees who raise allegations of discrimination; provides for the investigation, hearing, fact-finding, adjustment, or early

resolution of such complaints of discrimination; accepts or rejects formal complaints of discrimination; prepares and issues decisions for resolution of formal complaints; and monitors and evaluates the program's impact and effectiveness.

Significant accomplishments in fiscal year 1992 include the following:

1. **Continued to provide EEO briefings for new employees;**
2. **Planned, developed and coordinated extensive internal and external special emphasis programs for FMC employee participation (in coordination with the Commission's Office of Personnel, implemented a month-long program for employees during National Disability Employment Awareness Month);**
3. **Provided workshops to special emphasis groups such as Blacks in Government, the Federal Asian Pacific American Council and Asian Heritage Council at major national conferences;**
4. **Reported to the Congress as accomplishments in several reports initiatives undertaken by the Office of EEO in its affirmative program planning arena;**
5. **The Director, Office of EEO, was invited to participate in the President's historical Access 2000 symposium for the purpose of setting new directions in the Federal Government regarding recruiting, hiring, training, and partnerships for people with disabilities. The symposium was co-sponsored by the Department of Education, the U.S. Equal Employment Opportunity Commission, the President's Committee on the Employment of People with Disabilities, and the Office of Personnel Management;**

- 6. Continued to utilize outside resources at no expense to the agency to upgrade the skills of Commission clerical and administrative staff and EEO Counselors;**
- 7. Resolved all complaints through the early resolution program which saved the agency monies in investigative and settlement costs;**
- 8. Provided extensive counseling assistance to managers, supervisors and employees; and**
- 9. Resolved several sensitive personnel problems throughout the Commission.**

During fiscal years 1993 and 1994, the Office will continue its existing programs and initiate activities designed to increase management and employee understanding of EEO principles and responsibilities.



## **E. OFFICE OF INSPECTOR GENERAL**

The Office of Inspector General ("OIG") at the Commission was established pursuant to the Inspector General Act of 1978, which was amended in 1988 to provide for additional statutory inspectors general at designated Federal entities, including the Commission.

It is the duty and responsibility of the OIG to:

- **Provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the Commission's programs and operations.**
- **Review existing and proposed legislation and regulations relating to the Commission's programs and operations and to make recommendations concerning the impact of such legislation or regulations on the economy and efficiency in, and the prevention and detection of fraud and abuse in, the administration of the Commission's programs and operations.**
- **Recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by the Commission for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, the Commission's programs and operations.**
- **Recommend policies for, and to conduct, supervise, or coordinate relationships between the Commission and other Federal agencies, state and local governmental agencies, and nongovernmental**

**agencies with respect to all matters relating to: the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered or financed by the Commission; and the identification and prosecution of participants in any fraud or abuse.**

- **Keep the Chairman and the Congress fully and currently informed by means of semiannual and other reports concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by the Commission, recommend corrective action concerning such problems, abuses, and deficiencies, and report on the progress made in implementing such corrective action.**

Fiscal year 1992 was the most productive for the OIG since its establishment. Seven audits were completed, including one done by the Defense Contract Audit Agency relating to the termination costs associated with the partial termination of a contract between the Commission and a major contractor. Other audits included reviews of the Commission's Bureau of Investigations; two district offices; the Office of Administrative Law Judges; the Commission's Representation Fund; and Lobbying Restrictions Certifications. Various operational reviews were also conducted. A number of formal and informal investigations were completed and referred to the appropriate authorities for further action.

The OIG, in conjunction with the Agency Audit Follow-up Official, established a tracking system to monitor corrective action plans for all audit recommendations. This system will

ensure that timely action is taken to implement appropriate recommendations arising out of audit reports.

The Inspector General participates as an active member of the Executive Council on Integrity and Efficiency ("ECIE"), and serves on a number of committees established by that body.

In fiscal year 1993 it is anticipated that a number of significant audits will be issued, as well as operational reviews, surveys and follow-up reviews. Investigations will be conducted as necessary. As part of the Office's ongoing program to inform employees of ways to improve the efficiency and effectiveness of government, as well as combat waste, fraud and abuse in Commission activities, informational circulars addressing specific topics will be issued. The Commission's Inspector General will continue his participation in the ECIE which provides a forum for the exchange of views for the inspector general community.



## **F. OFFICE OF THE MANAGING DIRECTOR**

The Office of the Managing Director, as a result of various Commission Orders, delegations of authority and other authorizations, is responsible to the Chairman for the direct administration and coordination of Commission staff activities and programs. This has been established to ensure the timely and proper achievement of Commission goals and objectives.

The Office provides direct administrative and technical supervision to the:

- **Bureau of Trade Monitoring and Analysis.**
- **Bureau of Tariffs, Certification and Licensing.**
- **Bureau of Hearing Counsel.**
- **Bureau of Investigations.**
- **Bureau of Administration.**

Additionally, the Office of the Managing Director furnishes administrative direction to the:

- **Office of the Secretary.**
- **Office of the General Counsel.**
- **Office of Administrative Law Judges.**
- **Office of Equal Employment Opportunity.**

The Office also provides administrative advice to the:

- **Office of the Inspector General.**

The Office of the Managing Director is also responsible for the Commission programs of Audit Follow-up and Management (Internal) Controls, and is coordinating the review and updating of all Commission Orders.

A significant achievement of the Office during fiscal year 1992 was the direction of the staff's increased emphasis on restrictive trade practices by foreign governments. Monitoring and surveillance were more focused on such cases, and the staff participated in several matters where the Commission reviewed the effects of a foreign government practice. This activity will continue as a high priority. Another notable accomplishment during the past fiscal year was the coordination of staff involvement in the preparation of numerous proposed and final rules related to the Commission's effort to reduce the burden of regulation on the shipping industry. While this effort continues in fiscal year 1993, all of the relevant rulemakings were initiated in fiscal year 1992, and many final rules were issued in fiscal year 1992. Additionally, the Office continued its coordination of an enhanced enforcement program involving all operating Bureaus. Plans were implemented for follow-up investigations based on disclosures in the transpacific trades malpractice program, and the preliminary investigative cycles for new enforcement programs were implemented. The Office also coordinated the efforts of the agency task force that drafted the Final Rule and related documents to implement the 1990 Amendments; and guided staff involvement for the relocation of the FMC's headquarters to 800 North Capitol Street, N.W., Washington, D.C.

A Deputy Managing Director is the Contracting Officer for the Commission's developing ATFI system. ATFI is coordinated by the ADP Committee, which is chaired by a member of the Commission. The Committee makes recommendations to the Managing Director for forwarding to the Chairman. In fiscal year 1992, the ATFI project was in Phase IV - Operation as a Prototype, and full operation will begin in fiscal year 1993.

The Office is currently:

- 1. Guiding the development of the agency's ATFI system under Commissioner Hsu's oversight;**
- 2. Coordinating staff involvement in the review and revision of Commission regulations in conjunction with the agency's Working Group on the Regulatory Environment;**
- 3. Managing staff efforts to implement recent statutory modifications which gave the Commission more flexibility in determining the financial responsibility of NVOCCs;**
- 4. Directing all staff efforts in cases involving restrictive practices of foreign governments; and**
- 5. Coordinating the review and updating of all Commission orders.**

The Office's key objectives for fiscal years 1993 and 1994 are the continued coordination of staff efforts regarding the development of ATFI, further development of staff efforts to address restrictive practices of foreign governments and the enhanced enforcement program; organization of staff assistance for Commissioner Hsu, the Investigative Officer in Fact Finding Investigation No. 20, *Service Contract Negotiations with Shippers' Associations and Non-Vessel-Operating Common Carriers*; and coordination of staff efforts with respect to the review and development of regulations.



# **G. BUREAU OF TRADE MONITORING AND ANALYSIS**

## **1. General**

The primary function of the Bureau of Trade Monitoring and Analysis is to plan, develop, and administer programs related to the oversight of concerted activity of common carriers by water under the standards of the 1984 Act and 1916 Act. The Bureau's major program activities include:

- **Administering comprehensive trade monitoring programs to identify and track relevant competitive, commercial, and economic activity in each major U.S. trade in order to keep the Commission and its staff apprised of current trade conditions, emerging trends, and regulatory needs impacting on waterborne liner transportation;**
- **Conducting systematic surveillance of carrier activity in areas relevant to the Commission's administration of statutory standards;**
- **Developing economic studies and analyses in support of the Commission's regulatory responsibilities;**
- **Processing and analyzing common carrier and marine terminal agreements;**
- **Providing expert economic testimony and support in formal proceedings, particularly regarding unfair foreign shipping practices and domestic offshore rate-of-return cases.**

## 2. Surveillance

An integral part of the Bureau's mandate under the 1916 Act and the 1984 Act is the systematic surveillance of carrier activity and trade conditions to ensure continuing compliance with statutory standards and the requirements of the Commission's rules. The Bureau administers a variety of surveillance programs designed to afford the Commission the necessary degree of oversight in these areas.

The 1984 Act provides for statutory effectiveness of filed agreements following a brief waiting period, unless a given agreement is rejected for technical reasons, or for failure to conform with the mandatory conference agreement provisions in sections 5(b) and 5(c), or is contrary to the general standard contained in section 6(g) of the 1984 Act, or raises issues under section 10 of the 1984 Act that require the submission of additional information. The Bureau performs analyses of agreements under these standards. In addition, agreements subject to the 1916 Act, which are in the U.S. domestic offshore trades, are processed and analyzed in accordance with that Act's public interest standard. Once an agreement becomes effective, the Commission is responsible for maintaining surveillance over the parties' concerted activities to ensure compliance with the standards of the 1984 Act. The 1916 Act also empowers the Commission to investigate and order the disapproval, cancellation, or modification of an agreement that it finds to be in violation of the 1916 Act. To fulfill this statutory responsibility, the Bureau has continued to direct its activities toward improving the breadth and effectiveness of its monitoring programs.

As in previous years, the Bureau continued this past year to refine its programs for monitoring the behavior of agreement parties in the U.S. trades. These programs integrate a number of surveillance factors, including operator market share data,

cargo tonnages of major-moving commodities, shipper identification, relevant tariff rate levels and rate histories, use of service contracts, agreement-document analysis, review of minutes of meetings held by agreement members and other reports required by the Commission's rules, and investigation for existence of possible malpractices.

During fiscal year 1992, the Bureau produced a number of monitoring reports and analyses. These included: (1) 6(g) audits of selected agreements in major trade lanes; (2) an annual report on controlled carrier activities; (3) a rate-of-return analysis for a rate increase in the U.S./Hawaii trade; (4) an analysis of responses to a section 15 order concerning an agreement's restriction of its members from competing with each other (a possible violation of section 10(c)(6) of the 1984 Act); (5) an analysis of reports submitted by certain carriers regarding fees paid into the Japan Harbor Management Fund; (6) the development of trade data for investigative initiatives; (7) an update of utilization and average revenue figures for the Transpacific Stabilization Agreement; (8) an analysis of information regarding a possible unfiled agreement among several U.S. Gulf ports; (9) an analysis and report on the potential savings to U.S. carriers derived from the Commission's actions on unfair shipping practices; (10) the development of market share data on major-moving commodities in the ROK trade; (11) an analysis of operating results under key space chartering agreements; (12) a report on the status of the ex-Soviet Merchant Marine; (13) a report and analysis of service contracts filed by a controlled carrier; (14) an analysis of the issues surrounding currency adjustment factors and terminal handling charges; (15) the development of utilization data in the transpacific and transatlantic trades; (16) a report on the use of independent actions by a major transpacific conference; (17) a report on coffee movements from Latin America to the U.S.; (18) a report on the impact of the Commission's filing exemption for marine terminal services agreements; (19) the

retrieval of carrier market share data in various trades; and (20) preparation of background materials for speeches and briefings for senior agency officials.

During fiscal year 1992, the Bureau continued to support the Advisory Commission. The Bureau provided staff assistance to the Advisory Commission, continued to collect information on the impact of the 1984 Act to ensure that current facts and data are available to the Advisory Commission and Congress, and prepared reports updating certain information contained in the FMC's Section 18 Report.

Other projects the Bureau was involved in during fiscal year 1992 included: (1) review of the Commission's financial filing requirements for domestic offshore carriers, agreement filing regulations, and requirements for NVOCC bonding, in order to determine where the Commission could lessen the regulatory burden on the industry; (2) preparation of a comprehensive report on the Commission's regulatory review process, including estimates on potential cost savings and increased employment that might result from proposed regulatory changes; (3) monthly reports on the activities of controlled carriers; (4) agreement reporting audits; and (5) comments on pending legislation. The Bureau also (6) addressed service reductions in the Western Mediterranean trade, volume discounts in the Australian trade, and rate increases on meat in the New Zealand trade; (7) monitored rate filings of a Russian carrier; (8) participated in the Commission's acceptance testing for ATFI; and (9) handled a variety of inquiries and complaints from shippers on a wide range of problems and issues, including antitrust issues, level of rates, surcharges and other accessorial charges, rate disparities between different coastal regions, and port service.

### **3. Types of Agreements**

#### **(a) Conference and Interconference Agreements**

Conference agreements provide for the collective discussion, agreement, and establishment of ocean freight rates and practices by groups of ocean carriers. These agreements are limited to a geographical area or trade route. Interconference Agreements are between two or more conferences.

During fiscal year 1992, the Bureau analyzed and processed 115 conference and interconference agreements, including modifications to existing agreements, under the 1984 Act. There were 59 conference agreements and 16 interconference agreements in effect at the end of the fiscal year.

#### **(b) Pooling and Equal Access Agreements**

Pooling agreements are commercial arrangements among carriers in given trades that provide for the pooling and apportionment of cargo and/or revenues in the interest of increased efficiencies through stabilizing competitive conditions. These agreements often set forth sailing requirements and other requirements aimed at improving overall service efficiency. Equal access agreements serve to formalize national-flag carrier access to cargo that is controlled by the governments of reciprocal trading partners under cargo preference laws, import quotas, or other restrictions.

Twenty-six pooling and/or equal access agreements and amendments to existing agreements were filed in fiscal year 1992, and there were 17 agreements of this type in effect at the end of the fiscal year.

### **(c) Space Charter and Sailing Agreements**

Space charter agreements authorize the chartering (or cross-chartering) of vessel space or container slots between or among vessel operators. The essential objectives of these agreements are: to facilitate access to vessel space on given trades routes beyond that which would be otherwise available; to facilitate the rationalization of overall fleet operations; and to reduce excess vessel capacity in given trades. These agreements also generally contain authority to rationalize sailings and to exchange equipment.

During fiscal year 1992, 33 space charter and sailing agreements and modifications were filed under the 1984 Act, and 122 were in effect at the end of the fiscal year.

### **(d) Joint Service Agreements**

Joint service agreements (also referred to as consortia agreements) generally establish a new and separate line or service to be operated by otherwise independent operators as a joint venture in a given trade. The joint service operates as a single carrier, establishes its own rates, publishes its own tariffs, and issues its own bills of lading; but its operation is strictly confined to the authority specifically set forth in its underlying agreement.

Seven joint service agreements and amendments were filed during fiscal year 1992, and 34 joint service agreements were in effect at the conclusion of the fiscal year.

### **(e) Cooperative Working Agreements**

Cooperative working agreements ("CWAs") run the gamut from discussion agreements, which permit the participants to discuss competitively-sensitive trade matters, to specialized

inter-carrier operational undertakings that do not precisely fit the other categories mentioned. This category also includes voluntary ratemaking agreements. Sixty-three CWAs and amendments to existing CWAs were filed in fiscal year 1992. There were 111 CWAs in effect at the end of the fiscal year.

**(f) Marine Terminal Agreements**

Marine terminals, operated by both public and private entities, provide facilities, services, and labor for the interchange of cargo and passengers between land and ocean carriers, and for the receipt and delivery of cargo from shippers and consignees. The Bureau is responsible for the review and processing of certain agreements related to the marine terminal industry.

During fiscal year 1992, the Bureau received 335 agreements and agreement modifications relating to port and marine terminal services and facilities. Of these, 327 agreements became effective upon filing under Commission rules that exempt certain classes of marine terminal agreements from the waiting period requirements of the 1984 Act or the approval requirements of the 1916 Act. Agreements not entitled to the Commission's exemption provisions were processed under applicable statutory requirements. Five agreements were considered not subject to the Commission's jurisdiction. At the end of the fiscal year, 833 terminal agreements were in effect.

**(g) Other Agreement Activities**

The Bureau's Agreement Profile System contains a wide range of data on each currently effective agreement. In addition to the agreement name and official Commission number assigned to the agreement, the database includes for each agreement expiration date, carrier participants, principal

authority contained in the agreement, geographic scope, and names and addresses of agreement officials. This system is continually updated during the year.

#### **4. Future Plans and Proposed Activities**

The Bureau's overall monitoring program will continue to focus on systematic oversight of carrier and trade activity with an emphasis on developing new, innovative programs and methods to enhance the Commission's effectiveness in administering the 1984 Act and the FSPA.

The Bureau will continue to assess the impact of key issues facing the industry, to monitor developments in major trades, and to analyze foreign agreements under the standards of sections 5, 6(g), and 10 of the 1984 Act and domestic agreements under the public interest standard of the 1916 Act.

The Bureau will continue to collect and analyze market share data in key conference trades. Using these data, the Bureau tracks trends in the various trades and anticipates areas ripe for closer scrutiny.

The Bureau plans to enhance its 6(g) auditing program refining the current framework and methodologies. This program is designed to evaluate the degree of anticompetitiveness generated by agreements within the context of their commercial environments, particularly those agreements containing capacity management programs.

The Bureau anticipates that its involvement in FSPA cases will continue in 1993. At the end of fiscal year 1992, FSPA cases were pending in the PRC and Taiwan trades, and a section 19 case was pending in the ROK trade.

The Bureau plans to continue to monitor closely the political developments in the Soviet republics and to assess the impact these developments may have on the Commission's controlled carrier program. The Bureau will continue monitoring the activities of all controlled carriers, in support of Commission activities under section 9 of the 1984 Act.

The Bureau anticipates further involvement in rulemakings during fiscal year 1993. At the end of fiscal year 1992, the Commission was reviewing rulemakings dealing with issues involving conference restrictions on members' right to take independent action, exemption of the filing of marine terminal agreements, and rules allowing more flexibility for ensuring the financial responsibility of NVOCCs.

The Bureau will continue pre-effectiveness analysis of newly-filed agreements to determine whether they are likely to raise issues and specific questions under sections 5, 6(g) and 10 of the 1984 Act, or raise general policy questions. The Bureau will continue to prepare recommendations to the Commission on more complex agreements or issues and to handle routine agreement matters under authority delegated by the Commission.

The Bureau will continue to analyze domestic offshore agreement filings under the public interest standards of the 1916 Act and make appropriate recommendations to the Commission for approval or disapproval.

In support of its monitoring efforts, the Bureau will continue to maintain the databases used for the Work-in-Process System and the Required Reports Profile System, as well as develop new programs for additional functions as needed. The Bureau will continue to refine its Electronic Filing of Agreements and Minutes system.



## **H. BUREAU OF TARIFFS, CERTIFICATION AND LICENSING**

### **1. General**

The Bureau of Tariffs, Certification and Licensing plans, develops, administers and analyzes programs and activities in connection with pricing by common carriers by water, conferences of such carriers and marine terminal operators in the foreign and domestic offshore commerce of the U.S.; reviews and maintains both new and amended tariff filings, rejecting those which fail to conform to the Commission's regulations; approves or disapproves special permission applications involving requests to deviate from tariff filing rules; administers the NVOCC bonding program by setting policies and guidelines and reviewing financial instruments that evidence financial responsibility; processes service contracts and essential terms publications filed by ocean common carriers and conferences of such carriers, issuing notices of intent to reject service contracts containing provisions which fail to conform to Commission regulations; prepares recommendations on requests to correct clerical or administrative errors in the essential terms of service contracts; and initiates recommendations, in collaboration with other offices of the Commission as warranted, for formal action and proceedings by the Commission.

The Bureau is also responsible for the licensing of ocean freight forwarders under the provisions of section 19 of the 1984 Act, and under Pub. L. No. 89-777, the certification of owners and operators of passenger vessels in U.S. trades with respect to the financial responsibility of such owners and operators to satisfy any liability incurred for nonperformance of voyages or death or injury to passengers or other persons. In addition, the Bureau assists in the planning and development of, and has

primary responsibility for, the program implementation of the Commission's ATFI system.

Thus, the Bureau is responsible for all tariffs filed by common carriers and marine terminal operators; financial responsibility for NVOCCs; service contracts; the licensing of ocean freight forwarders; and the certification of owners and operators of passenger vessels for financial responsibility.

The Bureau develops long-range plans, new or revised policies and standards, and rules and regulations with respect to its program activities. The Bureau also cooperates with other Commission components with regard to enforcement of the Commission's regulatory requirements.

## **2. Foreign Commerce**

### **(a) Service Contracts**

The 1984 Act permits ocean common carriers and conferences of such carriers operating in the foreign commerce of the U.S. to enter into service contracts with shippers and/or shippers' associations. A service contract is defined in the 1984 Act as:

[A] contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level - such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

Each contract entered into under section 8(c) of the 1984 Act must be filed confidentially with the Commission and, at the same time, a concise statement of its essential terms must be filed with the Commission and made available to the general public in tariff format. The essential terms must be offered to all similarly situated shippers.

The essential terms of a service contract include:

- \* The origin and destination port ranges or geographic area;
- \* The commodity involved;
- \* The minimum volume;
- \* The line-haul rate;
- \* The duration;
- \* Service commitments; and
- \* Liquidated damages for nonperformance, if any.

The variables which can be prescribed in service contracts are almost infinite, thereby giving carriers and shippers significant freedom to tailor transportation arrangements suitable to their commercial needs. Moreover, in fiscal year 1992, the Commission initiated a rulemaking proceeding to permit service contract essential terms to be amended on a commercial, mutual-agreement basis.

Service contracts filed with the Commission must meet the necessary statutory and regulatory requirements. Specifically, service contracts which fail to contain mutually binding service and cargo commitments, or which contain meaningless

liquidated damages provisions, are not accepted by the Commission. The Bureau also reviews service contracts to assess compliance with the commitment and liquidated damages standards set forth in Circular Letter 1-89 to ensure that service contracts do not contain so-called *force majeure* provisions which would allow the parties to terminate the contract, without appropriate damages, for virtually any reason. To the extent that *force majeure* provisions excuse the parties from the contract's commitments for unclear or unspecified reasons, no meaningful commitment exists in the first instance.

Shippers' associations were recognized for the first time under the 1984 Act as entities in international ocean transportation. They are defined in the 1984 Act as groups of shippers which, on a non-profit basis, consolidate their cargoes to secure volume rates or enter into service contracts. The 1984 Act expressly requires that carriers and conferences negotiate with shippers' associations. It also provides that associations can enter into service contracts on behalf of their members. Shippers' associations have not been granted antitrust immunity under the 1984 Act. During fiscal year 1992, 85 service contracts were filed on behalf of 36 shippers' associations. In fiscal year 1992, the Commission also solicited comments on whether a rulemaking was necessary to clarify carriers' and conferences' obligations with respect to negotiating service contracts with shippers' associations and NVOCCs, Docket No. 92-35, *Notice of Inquiry Concerning Various Regulatory Issues*.

In fiscal year 1992, the Bureau received 6,364 service contracts covering the entire scope of the U.S. foreign commerce, both inbound and outbound. The Bureau also prepared recommendations on 72 requests to correct clerical or administrative errors in the essential terms of service contracts. During fiscal year 1992, the Commission delegated authority to the Bureau Director to approve applications to correct

administrative or clerical errors in service contracts. Under this authority, 61 requests were approved in the fiscal year.

**(b) Controlled Carriers**

A controlled carrier is an ocean common carrier whose operating assets are directly or indirectly owned or controlled by the government under whose registry the vessels of the common carrier are operated. Section 9 of the 1984 Act (46 U.S.C. app. 1708) provides that no controlled carrier may maintain rates or charges in its tariffs filed with the Commission that are below a level that is just and reasonable, nor may any such carrier establish or maintain unjust or unreasonable classifications, rules or regulations in those tariffs. In addition, such rates, charges, classifications, rules or regulations of a controlled carrier may not, without special permission of the Commission, become effective sooner than the 30th day after the date of filing with the Commission. Exceptions to these proscriptions include rates of controlled carriers of a state whose vessels are entitled by a treaty of the U.S. to receive most-favored-nation treatment.

The Bureau monitors the tariff filings of controlled carriers to assure that the required notice for rate increases and decreases is given. The Bureau acted on two special permission applications filed by controlled carriers during fiscal year 1992.

**(c) Common Carrier Anti-Rebate Certification Program**

Every common carrier by water in the foreign commerce of the U.S. and licensed ocean freight forwarder is required by section 15(b) of the 1984 Act (46 U.S.C. app. 1714) and 46 CFR Part 582 to file a sworn *Certification of Company Policies and Efforts to Combat Rebating in the Foreign Commerce of the United States*. This certification is to be filed with the Secretary of the Commission on or before December 31 of each

even-numbered calendar year and is to be signed by the Chief Executive Officer of the common carrier or ocean freight forwarder. Section 15(b) of the 1984 Act and 46 CFR 582.1(b) provide that failure to file the required certification may result in a civil penalty of \$5,000 for each day the violation continues. In addition to the civil penalty provision, the Commission's regulations provide, upon 45-days' notice, for the cancellation of the tariffs of those carriers, and the suspension of the licenses of those ocean freight forwarders, who fail to file a certification. Furthermore, any application for an ocean freight forwarder license or initial tariff filing that does not include an anti-rebate certification in accordance with Part 582 shall be rejected.

A program supported by the Bureau's electronic databases is in place to ensure that common carriers and freight forwarders file their annual certifications. For fiscal year 1992, approximately 3,700 certifications were filed. The tariffs of 87 entities were canceled for failing to file the required certification.

#### **(d) Foreign Tariffs**

Section 8 of the 1984 Act (46 U.S.C. app. 1707) requires the filing of tariffs by all common carriers operating in the foreign waterborne commerce of the U.S.

During fiscal year 1992, 527 new foreign tariffs were received and reviewed. The Bureau rejected 20 of these new filings. In addition, approximately 795,000 pages amending existing tariffs were reviewed. The Bureau also acted on 114 foreign special permission applications. Canceled tariffs and canceled pages of active tariffs were prepared for microfiche.

### **(e) NVOCC Bonding**

During fiscal year 1991, Congress enacted amendments to the 1984 Act imposing a bonding requirement on NVOCCs operating in the foreign commerce of the U.S. The Commission's regulations require the filing of a surety bond in the amount of \$50,000 by every NVOCC operating in the foreign waterborne commerce of the U.S.

Surety bonds obtained pursuant to this requirement will be used to satisfy claims arising from transportation-related activities or penalties assessed by the Commission pursuant to section 13 of the 1984 Act. Under this program, approximately 1,750 bonds are on file. During fiscal year 1992, the Commission proposed amending its regulations in response to the 1991 Act, 106 Stat. 60. The 1991 Act amended section 23 of the 1984 Act, 46 U.S.C. app 1721, to permit the Commission to accept, in addition to bonds, insurance or other surety as proof of an NVOCCs financial responsibility. The proposed rule retains the \$50,000 minimum coverage.

## **3. Domestic Commerce**

### **(a) Domestic Tariffs**

Common carriers operating in the U.S. domestic offshore commerce are required pursuant to section 18(a) of the 1916 Act (46 U.S.C. app. 817) and section 2 of the 1933 Act (46 U.S.C. app. 844) to file tariffs of rates, charges and rules with the Commission. The Bureau must ensure that these tariffs comply with applicable statutory requirements. The Commission's regulations also require the filing of annual reports of financial and operating data by vessel operating common carriers in the domestic offshore trades.

During fiscal year 1992, 54 new domestic offshore tariffs were received and reviewed, of which 8 were rejected. In addition, 12 domestic special permission applications were processed. The Bureau also processed approximately 40,000 tariff pages amending existing tariffs, including 25,000 which were in a certain database format as part of the prototype testing for the Commission's ATFI system.

#### **(b) Financial Analysis**

The Bureau provides accounting and financial expertise to help ensure the reasonableness of rates for the transportation of cargo and other services provided by common carriers in the domestic offshore waterborne commerce of the U.S. The Bureau also provides technical assistance to other components within the Commission.

The Bureau continues to monitor the activities of carriers in the domestic offshore commerce of the U.S. The effort involved the receipt and review of financial and operating data submitted in compliance with 46 CFR Part 552.

During the year, the Bureau reviewed trade-wide increases in rates for the transportation of cargo between the U.S. Pacific Coast and Hawaii, as well as proposed rate increases for the transportation of livestock from Hawaiian ports to U.S. Pacific Coast ports. Financial expertise is also provided with respect to the passenger vessel certification program.

#### **4. Marine Terminal Activities**

Marine terminals, operated by both public and private entities, provide facilities, services, and labor for the interchange of cargo and passengers between land and ocean carriers, and for the receipt and delivery of cargo from shippers

and consignees. The Commission is responsible for the review of tariffs related to the marine terminal industry.

The Bureau carried out its responsibilities with respect to marine terminal tariffs by reviewing approximately 5,700 terminal tariff pages filed during fiscal year 1992. At the end of the fiscal year, 515 terminal tariffs were on file with the Commission.

## **5. Freight Forwarders**

The ocean freight forwarding industry is comprised of persons who, in effect, hold themselves out to shippers as export departments for hire. Ocean freight forwarders operate in the foreign commerce of the U.S. by arranging for the ocean transportation of cargo by common carriers, and by handling the paperwork, legal requirements, safety requirements and other incidentals related to the shipment of cargo. Ocean freight forwarders receive a fee from the exporter for handling an export shipment as well as compensation from the ocean carrier whose vessel is selected to carry the cargo.

During fiscal year 1992, the Commission approved 159 new license applications. In addition, the Commission approved 105 applications for transfers or other organizational changes. Also during fiscal year 1992, 70 ocean freight forwarder licenses were revoked. This was due primarily to the licensees' failure to maintain the required surety bonds on file with the Commission. At the end of the fiscal year, 1,679 licensed forwarders were operating under the Commission's jurisdiction.

On-site compliance investigations are conducted as part of the Commission's effort to ensure that licensed ocean freight forwarders comply with the provisions of the shipping statutes and the Commission's regulations. During the year, 177 investigative reports were received by the Bureau. Sixteen of

these reports resulted in the issuance of warning letters to licensees or referral to the Bureau of Hearing Counsel for the assessment of appropriate civil penalties, while 98 reports were determined to require no formal corrective action. The balance were pending review at the year's end.

In fiscal year 1992, Bureau personnel provided testimony and evidence in a Commission proceeding initiated by an Order of Investigation (Docket No. 90-13) served on April 19, 1990, to investigate the activities of Memphis Forwarding Co., Inc. ("Memphis"), a licensed freight forwarder. The proceeding was instituted to determine whether Memphis had violated section 19(d)(4) of the 1984 Act and 46 CFR § 510.23(h) by collecting freight forwarder compensation on shipments in which Memphis had a beneficial interest and whether, in the event Memphis violated section 19(d)(4) of the 1984 Act, Memphis' freight forwarder license should be revoked or suspended. A hearing schedule was established during fiscal year 1991 and representatives of the Bureau provided testimony during oral hearings in fiscal year 1992. An initial decision in this proceeding was served on June 10, 1992. A final decision should be issued in fiscal year 1993.

## **6. Passenger Vessel Certification**

The Commission is responsible for administering sections 2 and 3 of Pub. L. No. 89-777 (46 U.S.C. 817d and 817e), which have been implemented by the Commission's regulations found in 46 CFR 540 - *Security for the Protection of the Public*. Owners, charterers, and operators of American and foreign vessels having berth or stateroom accommodations for fifty or more passengers and embarking passengers at U.S. ports must establish financial responsibility: (1) to meet any liability incurred for death or injury to passengers or other persons on voyages to or from U.S. ports; and (2) to indemnify passengers

for nonperformance of transportation to which they would be entitled under ticket contracts.

Upon submission of evidence of financial responsibility in accordance with Subpart A of 46 CFR 540, the Commission will issue a *Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation*. Upon the submission of similar evidence in accordance with Subpart B of 46 CFR 540, the Commission will issue a *Certificate of Financial Responsibility to Meet Liability Incurred for Death or Injury to Passengers or Other Persons on Voyages*. The maximum coverage amount with respect to nonperformance of transportation, except for self-insurers, is \$15 million. The amount applicable to self-insurers could be greater.

During fiscal year 1992, the Commission processed 72 applications for passenger vessel certificates. Twenty-nine were new performance certificates, 24 were new casualty certificates, and 19 were amendments to existing certificates. Holders of Pub. L. No. 89-777 passenger vessel certificates have on file with the Commission evidence of financial responsibility in excess of \$330 million for nonperformance and \$1 billion for casualty.

During fiscal year 1992, the Commission concluded its advance notice of proposed rulemaking and notice of inquiry proceeding under Docket No. 91-32, *Passenger Vessel Financial Responsibility Requirements for Indemnification of Passengers for Nonperformance of Transportation*. This proceeding solicited public comment on the Commission's passenger vessel financial responsibility requirements for indemnification of passengers for nonperformance of transportation pursuant to section 3 of Pub. L. No. 89-777. Based on the comments received in Docket No. 91-32, the Commission conducted a rulemaking proceeding under Docket No. 92-19, *Revision of Financial Responsibility Requirements for Nonperformance of*

*Transportation*, and revised its rules at 46 CFR Part 540, Subpart A to, *inter alia*, institute a sliding-scale formula, provide that operators need meet only existing net worth standards to qualify as self-insurers, and to provide for certain treatment of "whole-ship" arrangements.

## 7. Automated Database Systems

The Bureau maintains several automated database systems. These are the: (1) Service Contract System; (2) Regulated Persons Index; (3) Tariff Profile System; (4) Microfiche System; and (5) Ocean Freight Forwarder System. The Service Contract System contains certain key service contract data, such as geographics, and shipper names, which are kept confidential. The Regulated Persons Index assigns a discrete number to each person the Commission regulates and contains the address, telephone number and trade name of the person. The Tariff Profile System lists key data contained in tariffs on file with the Commission. The Microfiche System provides a means of locating canceled tariffs which have been microfiched. The Ocean Freight Forwarder System contains certain information concerning licensees, including surety bond information.

The Bureau has also made significant contributions to the development and implementation of the ATFI system. The ATFI system is a computer-based system for the electronic filing, processing and retrieval of tariff data regarding the ocean transportation of cargo by common carriers in both the foreign and domestic commerce of the U.S. In the foreign commerce, in addition to tariff matter, the system provides for the electronic filing, processing and retrieval of the essential terms of service contracts. Bureau personnel have been involved in the "acceptance testing" and reviewing and designing numerous elements of the ATFI system.

## **8. Support Activities**

The Bureau acts as one of the primary information and data sources for other Commission activities and programs.

Investigative activities require substantial tariff research and supporting documentation which is provided by Bureau staff. Automated databases, such as the Regulated Persons Index and the Service Contract System, are utilized for initial data identification purposes. The hard copy of relevant material is retrieved and provided to the Bureau of Investigations and/or the appropriate field office.

The Commission's field offices are also provided with general data lists of regulated persons situated in specific field office jurisdictions. Information on the more than 1,600 licensed ocean freight forwarders and approximately 50 passenger vessel owner/operators is also provided to the field offices. This data assists not only with investigative efforts, but serves public needs for information concerning Commission-regulated entities.

## **9. Rulemaking and Docketed Proceedings**

The Bureau initiates or supports formal rulemakings and Commission docketed proceedings. During fiscal year 1992, the Bureau participated in, developed or completed the following matters:

Docket No. 87-14, *Banfi Products Corporation, et al. -- Possible Violations of section 16, Initial Paragraph, Shipping Act of 1916 and section 10(a)(1) of the Shipping Act of 1984*. It is alleged that Banfi Products Corporation ("Banfi") received rebates of compensation paid to its freight forwarder. The Commission heard oral arguments from the respondent in the case and the Commission staff presented expert testimony

concerning alleged Banfi violations. The matter is currently pending before the Commission.

Docket No. 91-20, *Exemption of Certain Marine Terminal Arrangements*. The Commission exempted certain marine terminal services agreements between marine terminal operators and common carriers from the Commission's tariff and agreement filing requirements.

Docket No. 91-32, *Passenger Vessel Financial Responsibility Requirements for Indemnification of Passengers for Nonperformance of Transportation*. This proceeding solicited public comment on the Commission's passenger vessel financial responsibility requirements for indemnification of passengers for nonperformance of transportation pursuant to section 3 of Pub. L. No. 89-777. The Commission proposed a rule that would, *inter alia*, institute a sliding-scale formula and provide certain treatment for whole ship contracts.

Docket No. 91-51, *Financial Reports of Carriers by Water in the Domestic Offshore Trades*. The Commission issued a proposed rule amending the waiver provision increasing the revenue limit to \$50,000 and deleting the percentage of trade provision. Further changes in Part 552 are being deferred until the impact of the change in the waiver provision is determined.

Docket No. 92-19, *Revision of Financial Responsibility Requirements for Nonperformance of Transportation*. The Commission revised its rules at 46 CFR Part 540, Subpart A, *inter alia*, to remove the working capital requirement and changed the reporting requirements for operators which qualify as self-insurers.

Docket No. 92-26, *Filing of Tariffs by Terminal Barge Operators in Pacific Slope States*, removed 46 CFR Part 520 and

exempted certain terminal barge operators from tariff filing requirements.

Docket No. 92-28, *Elimination of Certain Regulatory Provisions*, removed several obsolete requirements from the Commission's tariff rules.

Docket No. 92-29, *Notice of Inquiry -- Free Time and Demurrage Charges on Import Property at the Port of New York; Truck Detention at the Port of New York*, proposed to discontinue these regulations.



# I. BUREAU OF HEARING COUNSEL

The Bureau of Hearing Counsel participates as trial counsel in formal adjudicatory (docketed) proceedings, non-adjudicatory investigations, rulemaking proceedings when designated by Commission order, and other proceedings initiated by the Commission. Bureau attorneys serve as trial attorneys, where intervention is permitted and appropriate, in formal complaint proceedings instituted under section 22 of the 1916 Act (46 U.S.C. app. 821), section 11 of the 1984 Act (46 U.S.C. app. 1710), and in investigations instituted under the FSPA (46 U.S.C. app. 1701). Bureau attorneys also are designated Investigative Officers in non-adjudicatory formal proceedings. In addition to the formal proceedings in which the Bureau participates as a party, the Bureau monitors all other formal proceedings in order to ascertain that major issues affecting the shipping industry and/or the general public, as distinguished from issues deriving from private disputes between the litigating parties, are adequately developed. The Bureau also participates in an advisory capacity in the development of Commission rules and regulations. On occasion, the Bureau may participate in court litigation by or against the Commission.

On request, the Bureau furnishes legal advice to the staff. Bureau attorneys provide legal advice to the Bureau of Investigations during field investigations and review enforcement reports completed by that Bureau. When appropriate, the Bureau prepares and serves notices of violations of the shipping statutes and/or regulations, and may compromise and settle civil penalty allegations arising out of those violations. If settlement is not reached, the Bureau acts as prosecutor in formal Commission proceedings that may result in the assessment of civil penalties. The Bureau also participates, in conjunction with other bureaus, in special

enforcement initiatives such as the Transatlantic Enforcement Initiative and the Transpacific Malpractice Program.

At the beginning of fiscal year 1992, 44 civil penalty cases were pending final resolution by the Bureau. During the fiscal year, 49 new civil penalty cases were initiated through the investigative activity of the Bureau of Investigations and the Commission's formal fact finding investigations. Forty-five such cases were compromised and settled, administratively closed, or referred for formal proceedings. Forty-eight civil penalty cases were pending resolution on September 30, 1992.

At the start of fiscal year 1992, the Bureau was party to eight formal proceedings. During the fiscal year, the Bureau participated in ten new formal proceedings. Seven proceedings in which the Bureau participated were completed. Accordingly, the Bureau was involved in eleven formal proceedings at the end of the fiscal year.

At the beginning of fiscal year 1992, there were 56 requests for legal advice pending in the Bureau. One hundred requests for legal advice were received during the fiscal year, and 97 legal advice projects were completed. Accordingly, 59 legal advice matters were pending in the Bureau on September 30, 1992.

As a result of enforcement activity, the Commission collected \$653,712 in civil penalties in fiscal year 1992. Settlements were reached with many different segments of the industry (e.g., carriers, shippers, forwarders) operating in the U.S. foreign trades.

In fiscal years 1987 and 1989, the Commission instituted two non-adjudicatory proceedings to investigate rebating and other rate malpractices: Fact Finding Investigation No. 16 in the North Atlantic trades and Fact Finding Investigation No. 18

in the transpacific trades, respectively. Fact Finding Investigation No. 16 was instrumental in bringing about the North Atlantic amnesty agreement in fiscal year 1987 and in the establishment of an ongoing carrier self-policing program in the North Atlantic trades. Fact Finding Investigation No. 16 continues to pursue evidence of Shipping Act violations. Fact Finding Investigation No. 18 was instrumental in achieving major settlements with carriers in fiscal year 1990 and with Pacific cargo interests and NVOCCs in fiscal year 1991. Additional settlements with Pacific cargo interests were achieved in fiscal year 1992, and future civil penalty collections pursuant to Fact Finding Investigation No. 18 are anticipated.

In fiscal years 1993 and 1994, the Bureau will continue to pursue violations of the shipping statutes and to offer legal advice and support to the Commission staff as requested. In addition, the Bureau will be involved to a significant extent in formal proceedings or other actions instituted by the Commission under the FSPA.



## **J. BUREAU OF INVESTIGATIONS**

The Bureau of Investigations monitors the activities of, and conducts investigations of alleged violations by ocean common carriers, NVOCCs, freight forwarders, shippers, ports and terminals, and other persons to ensure compliance with the statutes and regulations administered by the Commission.

The Bureau maintains a headquarters office in Washington, D.C., and district offices in the major port cities of New York; Miami; Hato Rey, PR; New Orleans; Houston; Los Angeles; and San Francisco. In addition to investigative and surveillance functions, each district office represents the Commission within its jurisdiction, provides liaison between the Commission and the maritime industry and the shipping public, collects and analyzes intelligence of regulatory significance, and assesses industry-wide conditions for the Commission.

The Bureau investigates significant competitive practices pursuant to major Commission-approved malpractice programs. In addition, the Bureau investigates a full range of violations on a local level. These activities may also be carried out in conjunction with fact-finding, formal, or court proceedings.

The following practices are subject to ongoing investigations conducted by the Bureau:

- **Illegal rebating by carriers and receipt of illegal rebates by shippers, NVOCCs, and shippers' associations;**
- **Misdescriptions and misdeclarations of cargo or other malpractices of carriers, shippers, consignees, and other persons;**

- **Activities of ocean common carriers who are parties to agreements whenever it appears that such agreements and modifications have been implemented prior to filing with the Commission or are being carried out in violation of the shipping acts;**
- **Failure by common carriers to file appropriate tariffs covering their rates and charges or to charge rates that are in effect and on file with the Commission; and**
- **Operating as an ocean freight forwarder without a license issued by the Commission or contrary to statute or regulation.**

The Bureau's surveillance activities include:

- **Reviews of service contracts to determine compliance with statute and regulation.**
- **Audits of NVOCCs.**
- **Post-licensing and routine compliance checks of licensed freight forwarders to determine whether their operations conform with regulatory requirements.**
- **Audits of passenger vessel operators to ensure the financial protection of cruise passengers.**

Bureau liaison activities involve cooperation and coordination with other Government agencies, providing regulatory information and relaying Commission policy to the shipping industry and the public, and handling informal complaints within a district.

The Bureau assists the Bureau of Hearing Counsel in formal proceedings before the Commission, conducts studies and surveys for use in program development and program revision, reports trade information, and recommends remedial action.

During fiscal year 1992, the Bureau continued to investigate malpractices in the major trade routes, including the transatlantic, transpacific, Mediterranean, Central American and Caribbean trades. The Bureau also completed a number of major investigations that were still outstanding from the Transpacific Malpractice Program. In addition, the Bureau continues to monitor and investigate conditions in the North Atlantic trades as part of the Transatlantic Enforcement Initiative that began in 1987.

The Bureau conducted 341 investigations and special inquiries, including service contract audits, compliance checks, audits of NVOCCs and cruise line audits. Appendix F summarizes the Bureau of Investigations' activities. A total of 39 investigations were forwarded to the Bureau of Hearing Counsel for enforcement action. (See Chapter III.)

The Bureau has initiated two new major programs during fiscal year 1992. One is intended to take a comprehensive look at current practices in the forwarding industry, including markups to shippers, coloadng, and transactions with related NVOCCs. Investigators from the Bureau's district offices reviewed the operations of 162 freight forwarders. The other program is intended to combat malpractices involving false information provided to ocean carriers in order to obtain unlawful ocean freight reductions. The principal malpractices targeted under this program are misdescription of commodity, misdeclaration of weight, measurement, and count, and misuse of service contracts.

Coordination between the district offices of the Bureau of Investigations and Customs' Regional Offices continued in fiscal year 1992, as a part of the Memorandum of Understanding between the agencies for the exchange of enforcement information. During fiscal year 1992, the district offices increasingly accessed information contained in Customs' ACS through cooperative arrangements with Customs' Regional Offices. This exchange of investigative information should continue to increase in fiscal years 1993 and 1994 as both agencies advance in automation and promote the electronic filing of regulatory information.

During fiscal year 1992, the Bureau continued to provide its staff with training in the use of the Commission's ATFI system. Bureau personnel also continue to receive training from Customs in the use of the ACS to obtain ship manifest information. Training activities in fiscal years 1993 and 1994 will focus on management improvement, improved investigative skills, and the enhancement of computer skills for all Bureau personnel. The Bureau also plans to continue its participation in the Federal Law Enforcement Training Center's advance training programs.

Bureau resources in fiscal years 1993 and 1994 will continue to be directed toward malpractice programs in the major trade routes and the development of new efforts to deter unlawful shipping practices. The Bureau will also continue its numerous surveillance activities involving service contract audits, passenger vessel audits, freight forwarder compliance checks, NVOCC tariff audits and bonding compliance, and the collection of intelligence on industry practices.

The collection and analysis of intelligence provides the foundation for more efficient programs to uncover and deter increasingly sophisticated and deceptive malpractices. The Bureau will continue to seek to enhance its current level of

investigative capability in the increasingly automated environment of the shipping industry by emphasizing the use of automated systems in the conduct of investigations.



# **K. BUREAU OF ADMINISTRATION**

## **Office of the Director**

The Bureau of Administration is responsible for the direct administration and coordination of the:

- **Office of Administrative Services.**
- **Office of Budget and Financial Management.**
- **Office of Information Resources Management.**
- **Office of Personnel.**

Many of the functions and achievements of the Bureau of Administration are reflected in the narratives for these Offices, below.

The Office of the Director is responsible for directing and administering the Commission's Information Security Program, which includes an active oversight and security education program to ensure effective implementation of Executive Order 12356. The FMC training and development function is also administered within the Office, having been transferred to the Office from the Office of Personnel during fiscal year 1992. The Director is the Commission representative, as Principal Management Official, to the Small Agency Council ("SAC"), and is a member of SAC's Executive Committee.

### **1. Office of Administrative Services**

#### **(a) General Office Responsibilities**

The Office of Administrative Services directs and administers a variety of management services functions that principally provide administrative support to the regulatory

program operations of the Commission. The Director of the Office is the Commission's Contracting Officer.

The Office's support programs include communications, telecommunications, procurement of administrative goods and services, property management, space management, printing and copying management, mail and records services, forms and graphic designs, facilities and equipment maintenance, and transportation. The Office's major functions are to secure and furnish all necessary supplies, equipment and services required in support of the Commission's mission and to formulate regulations, policies, procedures, and methods governing the use and provision of these support services in compliance with the FAR, the Federal Property Management Regulations, the Federal Information Resources Management Regulation, and other appropriate Federal guidelines.

**(b) Objectives**

The objectives of the Office are to:

- **Develop, execute and administer Commission procurement actions and contracts that obligate the Government to an expenditure of funds;**
- **Control and administer the Commission's acquisition, utilization, inventory, maintenance, and disposition of property;**
- **Develop and coordinate a comprehensive voice telecommunications program for all Commission locations, to include installation and maintenance of telecommunications equipment and features;**
- **Plan and administer programs for improvement of the workplace environment and other space**

**utilization operations for all Commission locations, to include the assignment of office space and provision of office furnishings;**

- **Manage the receipt, storage, issuance and inventory of all supplies, forms and accessories required in support of Commission operations;**
- **Coordinate and fulfill all printing, duplication, copying and graphic service requirements;**
- **Regulate the receipt, distribution and dispatching of mail;**
- **Coordinate the use of the building's physical facilities with respect to maintenance, security and parking;**
- **Arrange for transportation services for all Commission locations;**
- **Conduct safety inspections and coordinate the Commission's emergency planning and evacuation plan;**
- **Manage the retention, transfer, and disposal of Commission records; and**
- **Direct the Commission's participation, development and goal setting under the Small Business Act.**

(c) **Achievements**

During fiscal year 1992, the Office:

- **Realigned and renegotiated copier contracts to increase versatility with a savings to present and future budget levels;**
- **Performed analysis and recommended removal of the FMC's telex service at a savings to the Commission;**
- **Completed all requirements and coordinated with the GSA for the relocation of the New Orleans District Office and the space reduction of the New York District Office;**
- **Revised policies and operating procedures relative to the Commission's mail services;**
- **Resolicited and awarded a new contract for provision of microfiche services;**
- **Coordinated and finalized an Inter-Agency Agreement with the DOT for performance of an evaluative study of the FMC's conversion to the ATFI system;**
- **Completed procurement actions to activate the FMC's drug testing program through an Inter-Agency Agreement with the Department of the Interior and its outside contractors;**
- **Coordinated the redesign of the New York District Office telecommunications system and the relocation**

of the Los Angeles District Office's telephone system;

- Revised the FMC's policies concerning overnight express mail service for better accountability and control;
- Worked with the FMC bureaus and offices to develop individual space requirements and floor plans for the headquarters relocation, and coordinated all relocation logistics with GSA, the other building tenants, and the new building owner; and
- Purchased and installed new voice and data telecommunications systems for the FMC's headquarters offices to coincide with the relocation effort.

**(d) Future Plans**

In fiscal year 1993, the Office plans to conclude matters incidental to the FMC's headquarters relocation effort. Other objectives include the following: complete the development and solicitation phases concerning outstanding contractual actions and award new contracts for court reporting services, ocean import and export data, and ADP equipment maintenance support; complete the development and revision of Standard Operation Procedures for all Office program areas; conduct studies and analyses of procurement activities in the areas of file maintenance and retention; restructure the Commission's acquisition numbering system; and conduct acquisition planning and staff training in accordance with the newly revised internal Commission Order on procurement.

## **2. Office of Budget and Financial Management**

### **(a) General Office Responsibilities**

The Office of Budget and Financial Management administers the Commission's financial management program and is responsible for optimal utilization of the Commission's physical, fiscal, and staffing resources. The Office is charged with interpreting government budgetary and financial policies and programs, and developing annual budget justifications for submission to the Congress and OMB. The Office also administers internal controls systems for agency funds, travel and cash management programs, and the Commission's imprest fund. The Director of the Office is the Commission's Chief Financial Officer.

### **(b) Objectives**

The objectives of the Office are to:

- **Submit annual budget justifications and estimates to OMB and the Congress;**
- **Execute the budget to ensure appropriated funds are properly expended;**
- **Prepare regular financial reports to aid management decisions;**
- **Administer the control system over workyears of employment;**
- **Collect all fees and forfeitures due the Commission;**
- **Process payments to vendors efficiently and in accordance with the Prompt Payment Act;**

- **Process travel orders and vouchers within established time limits, and in accordance with Federal Travel Regulations;**
- **Administer the Commission's imprest fund program and manage the Commission's cash management program;**
- **Ensure resources are used properly to avoid fraud, waste, error, and abuse; and**
- **Continually review internal controls and accounting procedures to ensure that they conform to existing regulations, and develop procedures to correct deficiencies.**

**(c) Achievements**

During fiscal year 1992, the Office:

- **Collected and deposited in the U.S. Treasury \$921,673 from user fees, fines, and penalty collections, and ocean freight forwarder license application, ATFI and passenger vessel certification fees;**
- **Coordinated and prepared budget justifications and estimates for the fiscal year 1993 Congressional budget and the fiscal year 1994 budget to OMB;**
- **Participated in OMB and Congressional budget hearings;**
- **Provided the Cash Management Division of the Department of Treasury with data on the agency's participation in the electronic funds transfer of**

employee paychecks and allotments, as well as the agency's participation in the Diner's Club Credit Card System;

- Assisted in the preparation of the Civil Monetary Penalty Report to the U.S. Treasury;
- Completed the report on obligations for Major Information Technology Systems to OMB;
- Prepared a variety of external reports such as: the Report on Financial Management Improvements (Joint Financial Management Improvement Program); the Annual Leave Year Report for 1992 (Office of Personnel Management - "OPM"); the Annual Report on Occupational Safety and Health Program; the Annual Prompt Payment Report (OMB); the Report on Workyears and Personnel Costs (OPM); and the Report on Cash Management Initiatives (Department of Treasury);
- Provided management with monthly status reports on workyears, funding, travel and receivables;
- Managed the Commission's travel and cash management programs; and
- ☞ Updated an internal Commission Order on cash management.

**(d) Future Plans**

During fiscal years 1993 and 1994, the Office will automate voucher preparation, continue to update financial control procedures, refine the financial management system, improve processing of payments, prepare OMB and

Congressional budget submissions, review the automated teller machine program, update user fees, and pursue initiatives leading to economy and efficiency in budget and financial operations.

### **3. Office of Information Resources Management**

#### **(a) General Office Responsibilities**

The major functions of the Office of Information Resources Management are: planning and contract administration; telecommunications/database management and application development; and records management and OMB clearances.

The Office is delegated responsibility to ensure that the Commission's information resources management ("IRM") program is administered in a manner consistent with the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, as amended by the Paperwork Reduction Authorization Act of 1986, Pub. L. No. 99-500, and other appropriate Federal guidelines.

The Office's responsibility for ensuring compliance with the National Environmental Policy Act of 1969 and the Energy Policy and Conservation Act of 1975, which includes determining whether the Commission's decisions will have an impact upon environmental quality or energy consumption, was transferred to the Bureau of Trade Monitoring and Analysis and the Office of the Secretary in the last quarter of fiscal year 1992.

(b) Achievements

During fiscal year 1992, the Office:

- **On ATFI, recommended and received Commission approval for acquisition, and monitored the installation and testing, of a computer which will serve as back-up to the Commission's ATFI host computer to test both new versions of ATFI software (prior to installation) as well as the maritime industry's software (to demonstrate that it is capable of electronically filing into the ATFI system); coordinated establishment of a Configuration Management Plan for the review and approval of ATFI software modification requests from the industry and Commission staff; continued extensive testing of ATFI systems software on the host computer at McLean, Virginia, the FMC back-up computer at Commission headquarters, and the subcontractor's development computer located in Pittsburgh, Pennsylvania; conducted ATFI source code validation in accordance with the license agreement between the Commission and the subcontractor, to ensure that it met stated requirements set forth in the agreement; coordinated and participated in ATFI software acceptance testing, review and acceptance of deliverables, and in ATFI demonstrations to various Federal agencies and Congressional committee staff; coordinated ATFI prototype training for the industry and FMC employees; and developed EDIFACT-like codes for ATFI transactions sets, thereby minimizing the potential impact on industry when the Commission migrates to the EDIFACT standard.**

- Coordinated and monitored aspects of the relocation of the Commission to a new headquarters site, including the design of a new local area network ("LAN") configuration, consisting of state-of-the-art technologies such as fiber optic and 10base-T cabling; the deinstallation, movement, reinstallation, and testing of the LAN configuration, and the design and construction of a computer room, computer training facility, magnetic media storage facility, and network control center at the new location.
  
- Continued to fine-tune the Commission's headquarters and district office LANs and established their interconnectivity with the ATFI host computer and back-up computer, as well as district office access to all headquarters LAN functions, to further expand and enhance the Commission's computing resources.
  
- Participated in coordinating policy and legal issues, and played a key role in coordinating and resolving technical, logistical, procedural and security issues related to ATFI and other database systems created, owned and maintained by the Commission, as well as systems to which the Commission requires access, such as Customs' ACS, for which the Office coordinated with Customs representatives with respect to Commission access and identifying connectivity requirements, and monitored acquisition and contractor installation and testing of applicable hardware, software and communications in each of the Commission's district offices.

- Provided the full range of OMB clearance support and guidance for the FMC to assure that the Commission's information collection requirements fully comply with the requirements of the Paperwork Reduction Act of 1980, as amended. The Commission's intensified rulemaking activity during the fiscal year required the performance of clearance actions in an extremely short time frame, which included close coordination with OMB representatives.
- Continued upgrading the Commission's Records Management Program, including issuing revised instructions for the Forms Control Program.
- Provided systems integration and testing of all new microcomputers and associated hardware prior to installation at headquarters or shipment to district offices, provided telephonic user support and instructional manuals for the district offices, and had anti-virus software installed on all Commission computers.
- The Office Director functioned as staff to the Commission's ADP Committee Chairman, and acted as Co-Contracting Officer's Technical Representative for Technical Matters on the ATFI contract.

**(c) Future Plans**

In addition to implementing ongoing office programs and providing extensive technical support for the ATFI program mentioned above, major initiatives for fiscal years 1993 and 1994 include: finalizing the Commission's Computer Security Plan, IRM Policy Guide, and the 5-Year IRM Plan; conducting

in-house computer training, including computer security training, for all employees; initiating electronic records management; performing the GSA IRM triennial review; developing Commission-wide LAN-based multi-user database systems to provide agency-wide access to all Commission databases; and initiating inter-agency E-mail/files transfer capability.

#### **4. Office of Personnel**

##### **(a) General Office Responsibilities**

The Office of Personnel plans and administers a complete personnel management program including: recruitment and placement, position classification and pay administration, occupational safety and health, employee counseling services, employee relations, workforce discipline, performance appraisal, incentive awards, retirement, and personnel security.

##### **(b) Achievements**

During fiscal year 1992, the Office:

- **Worked closely with the Commission's Executive Resources Board to implement the Senior Executive Service ("SES") Recertification Program and to plan and implement an SES Candidate Development Program designed to meet the Commission's SES requirements through fiscal year 1994 or 1995;**
- **Amended the Commission's Drug-Free Workplace policy to incorporate new guidance issued by the Interagency Coordinating Group governing identification and selection of positions designated for the random testing program;**

- Continued a program to revise and update major program policies which are published as Commission Orders; as a part of this effort, the following Commission Orders were revised or finalized: Commission Order 54, *Clearance of Employee Accountability*; Commission Order 88, *Position Classification*; Commission Order 97, *Probation Upon Initial Appointment to a Supervisory or Managerial Position*; Commission Order 65, *Administrative Grievance System*; Commission Order 109, *Guidelines for Dismissal and Leave Treatment of Employees During Emergency Situations*; Commission Order 64, *Employee Absence and Leave*; Commission Order 92, *Flexitime Program*; Commission Order 114, *Voluntary Annual Leave Transfer Program*; Commission Order 62, *Incentive Awards*; Commission Order 61, *Merit Staffing Program*; and Commission Order 82, *Position Management*;
- Completed a review of supervisory and managerial positions in the Performance Management and Recognition System ("PMRS") and implemented a recommendation that only individuals who formulate, determine or influence policy for Commission-wide programs be included in the system by virtue of their meeting the "management official" definition;
- Implemented pertinent portions of the Pay Comparability Act of 1990, such as geographic pay for New York, Los Angeles and San Francisco; new SES pay rates; and a new Administrative Law Judge pay system;

- Worked to identify no-cost training programs for the Commission's senior executives, SES candidates, and PMRS managers and supervisors (responsibility for management of the training program was transferred to a staff member in the Bureau Director's office in June 1992);
- Conducted nationwide programs to recruit investigators, transportation specialists, SES candidates, an administrative law judge, and telecommunications and contract specialists;
- Coordinated with the Advisory Commission at DOT to conclude Advisory Commission activities and return detailed employees to their regular positions;
- Maintained the Commission's high standing among all agencies in percentage of employees with targeted disabilities, and offered special salary rates to clerical employees in Washington, D.C., New York, Florida, and California;
- Administered a Summer Youth Employment Program in cooperation with the District of Columbia Government;
- Monitored employee counseling services contracts in Washington, New York, Miami, San Francisco, and Los Angeles, advised supervisors and employees of services provided by those contractors, and distributed a bimonthly counseling services newsletter to all employees;
- Conducted a Health Benefits Open Season; two Thrift Savings Plan Open Seasons; sponsored the Annual Employee Health Fair; and made the *Check*

*Book Health Benefits Guide* available to employees at no charge;

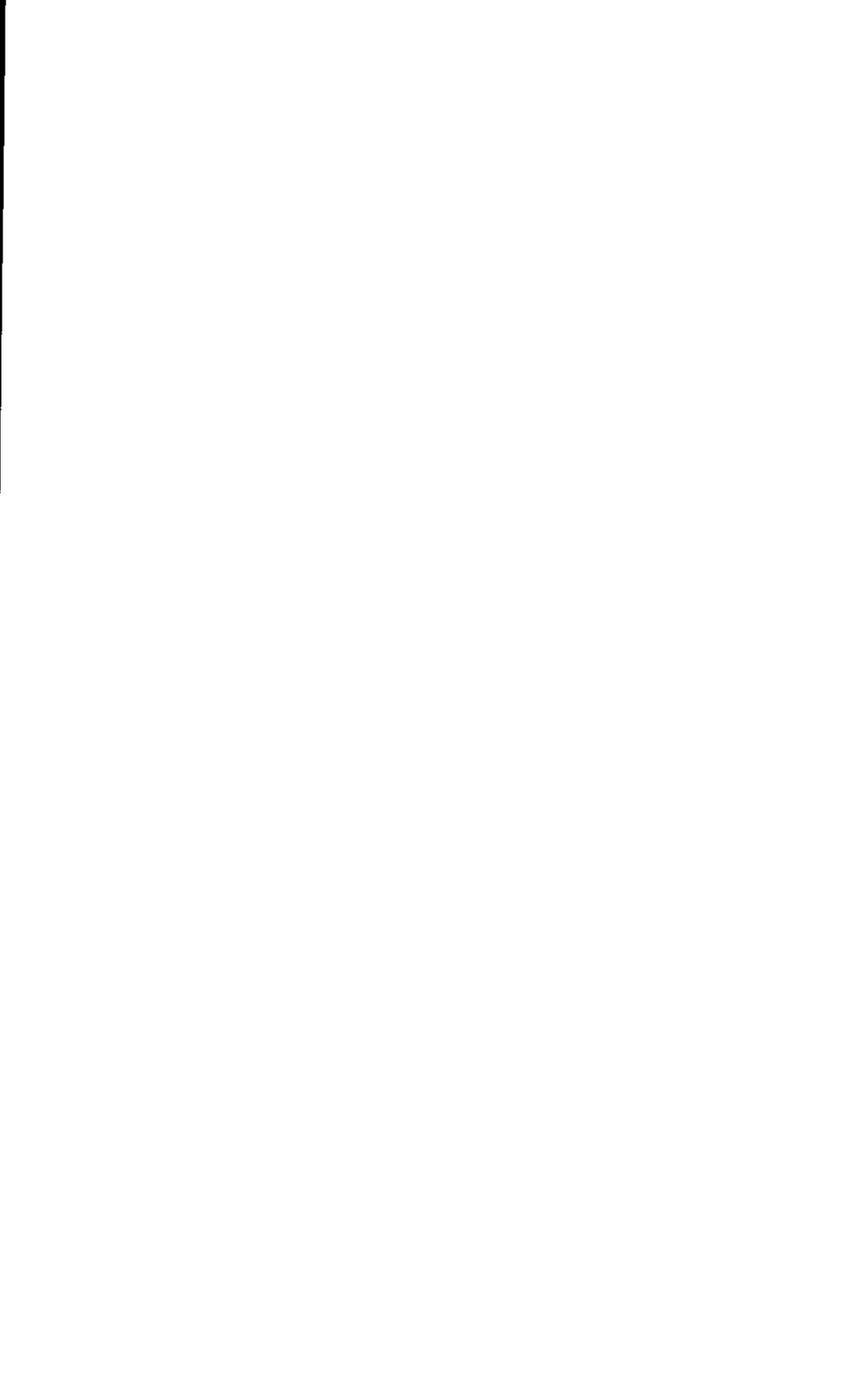
- Continued to advise supervisors concerning their responsibilities in the areas of employee conduct and performance, including the granting of within-grade increases and awards, and correcting discipline and other problems; in seeking to resolve performance or conduct-related problems, worked closely with Commission legal advisors to ensure that employees affected by adverse actions were accorded their due rights (all employee relations cases were successfully resolved);
- Continued to operate its very successful Annual Leave Transfer Program which makes it possible for employees to donate annual leave to qualified leave recipients who are experiencing serious illness and financial hardship because they are out of leave;
- Charged SES, PMRS, and Performance Management System performance appraisal milestones, issued reminders and instructions concerning midyear progress reviews, performance appraisals, and performance plans to supervisors, and required supervisors to certify that midyear progress reviews were conducted;
- Conducted the Commission's performance and incentive awards program; and
- Issued decisions in a number of difficult and sensitive classification cases.

**(c) Future Plans**

During 1993, the Office will continue to advise the Commission on all major personnel matters and ensure the maintenance of a progressive personnel management program within the Commission. Major activities for the coming year include: continuing revision of most of the major internal program plans published as Commission Orders, and full implementation of the Commission's Drug-Free Workplace Program.



## **APPENDIXES**





# APPENDIX B

## COMMISSION PROCEEDINGS Fiscal Year 1992

### *Formal Proceedings*

Decisions .....	17
Discontinuances & Dismissals .....	46
Initial Decisions Not Reviewed .....	15
Rulemakings - Final Rules .....	16
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Total .....	94
 <i>Special Dockets</i> .....	 221
 <i>Informal Dockets</i> .....	 15
 <i>Oral Arguments</i> .....	 2

# APPENDIX C

## CARRIER AGREEMENT FILINGS AND STATUS Fiscal Year 1992

### *Carrier Agreements Filed in FY 1992 (including modifications)*

*Foreign and Domestic Commerce* . . . . . 242

### *Agreements Processing Categories in FY 1992\**

*Forty-Five Day Review* . . . . . 122  
*Shortened Review* . . . . . 52  
*Exempt-Effective Upon Filing* . . . . . 90  
*Rejection of Filing* . . . . . 0  
*Formal Extension of Review Period* . . . . . 4  
*Approved Under Shipping Act, 1916* . . . . . 3

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271

### *Carrier Reports Submitted for Commission Review*

*Shippers' Requests & Complaints & Consultations* . . . . . 70  
*Minutes of Meetings* . . . . . 1693  
*Operating and Ad Hoc Reports* . . . . . 35  
*Index of Documents* . . . . . 114

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1912

### *Carrier Agreements on File as of September 30, 1992*

*Conference* . . . . . 59  
*Interconference* . . . . . 16  
*Pooling & Equal Access* . . . . . 17  
*Joint Service* . . . . . 34  
*Sailing & Charter* . . . . . 122  
*Cooperative Working, Agency, & Equipment Interchange* . . . . . 129

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377

### *Terminal Agreements Received (including amendments)* 335

*On Hand 10/1/91* . . . . . 725  
*On Hand 10/1/92* . . . . . 833

\* Includes Terminal Agreements sent to Commission

# APPENDIX D

## TARIFF AND TERMINAL FILINGS AND STATUS FISCAL YEAR 1992

### *Tariff Filings (Pages)*

Foreign Filings .....	841,900
Domestic Filings .....	40,398
Terminal Filings .....	<u>5,723</u>
TOTAL .....	888,021

### *Tariff Publications*

Foreign:	On Hand 10/1/91 .....	6,268
	On Hand 10/1/92 .....	5,105
Domestic:	On Hand 10/1/91 .....	193
	On Hand 10/1/92 .....	228
Terminals:	On Hand 10/1/91 .....	485
	On Hand 10/1/92 .....	515

### *Special Permission Applications*

Total Received - Foreign .....	116
Granted .....	90
Denied .....	24
Withdrawn .....	2
Total Received - Domestic .....	12
Granted .....	10
Denied .....	1
Withdrawn .....	1

### *Domestic Investigation and Suspension Memoranda*

Completed .....	3
Pending .....	0

<i>Service Contracts Filed</i> .....	6,364
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# APPENDIX E

## CIVIL PENALTIES COLLECTED Fiscal Year 1992

Costa Crociere spa .....	\$ 32,500.00
<b>Hellenic Company</b> .....	<b>30,000.00</b>
Igari & Company Ltd. ....	4,000.00
<b>Kasho Company</b> .....	<b>20,000.00</b>
LEP International Inc. ....	30,000.00
<b>Meyer Corp/Le Cook</b> .....	<b>20,000.00</b>
Mikasa Corporation. ....	150,000.00
<b>Milky Way Int'l.</b> .....	<b>40,000.00</b>
New Bright Industrial. ....	28,800.00
<b>Nozaki America Inc.</b> .....	<b>2,000.00</b>
Pacific Champion Service. ....	2,000.00
<b>Rocheux International</b> .....	<b>20,000.00</b>
Roland Corporation US. ....	99,275.00
<b>Royal Caribbean Cruises.</b> .....	<b>135,637.39</b>
Transworld Freight System. ....	7,500.00
<b>Trifair International.</b> .....	<b>9,500.00</b>
Utoku Express (USA), Inc. . . . .	15,000.00
<b>Welgrow International</b> .....	<b><u>7,500.00</u></b>

Total Civil Penalties Collected

\$653,712.39

# APPENDIX F

## INVESTIGATIONS Fiscal Year 1992

<i>Investigative Cases Opened:</i>		308
<i>Investigative Cases Completed:</i>		
<i>Reports of Investigation</i>	303	
<i>Enforcement Reports</i>	38	
	<hr/>	
	<i>Total Reports</i>	341
<i>Reports Referred for Action:</i>		39

# APPENDIX G

## STATEMENT OF APPROPRIATIONS, OBLIGATIONS AND RECEIPTS FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1992

### *APPROPRIATIONS:*

Public Law 102-140, approved November 12, 1991: For necessary expenses of the Federal Maritime Commission as authorized by section 201(d) of the Merchant Marine Act of 1936, as amended (46 App. U.S.C. III), including services as authorized by 5 U.S.C. 3109; hire of passenger motor vehicles authorized by 31 U.S.C. 1343 (b); and uniforms or allowances therefor, as authorized by 5 U.S.C. 5901-5902; Provided, that not to exceed \$2,000 shall be available for official reception and representation expenses.

\$17,600,000

### *OBLIGATIONS AND UNOBLIGATED BALANCE:*

Net obligations for salaries and expenses for the fiscal year ended September 30, 1992. \$17,599,654

*STATEMENT OF RECEIPTS:* Deposited with the General Fund of the Treasury for the Fiscal Year Ended September 30, 1992:

Publications and reproductions, Fees and Vessel Certification, and Freight Forwarder Applications	\$177,319
ATFI Program	\$ 23,184
Fines and penalties	\$721,170
<b>Total general fund receipts</b>	<b>\$921,673</b>