

**DECISIONS OF THE
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FEDERAL MARITIME COMMISSION
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June 30, 1967

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DECISIONS OF THE
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

Docket No. 65-5

PROPOSED RULE COVERING TIME LIMIT ON THE FILING OF OVERCHARGE CLAIMS

Decided June 27, 1966

Proposed rule prohibiting limitation of time within which claims for adjustment of freight charges may be presented to carrier to less than 2 years after date of shipment not promulgated as there is no showing that carrier-imposed time limitations have operated in an unlawful fashion under sections 17, 22, or 18(b) (3) of the Shipping Act, 1916, or section 2 of the Intercoastal Shipping Act, 1933. Carrier-imposed time limitations are not to be construed as in any way affecting right of shipper to file claim for reparation under section 22, Shipping Act, 1916, within 2 years of accrual of cause of action. Commission's discontinuance of proceeding is without prejudice to institution of further proceedings with respect to carrier-imposed time limitations.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*; John S. Patterson, *Vice Chairman*; Ashton C. Barrett, James V. Day, George H. Hearn, *Commissioners*) :

The Commission by notice of proposed rulemaking published in the Federal Register on March 27, 1965, instituted the captioned proceeding to determine the legality under various sections of the Shipping Act, 1916 (the 1916 act), and the Intercoastal Shipping Act, 1933 (1933 act), of provisions in tariffs of certain common carriers by water imposing a time limit on the filing of claims less than the 2-year period provided in section 22 of the act. The Commission alleged that such tariff rules appear to be contrary to:

1. Section 22 of the 1916 act by establishing a period for limitation of claims other than the 2-year period provided therein.
2. Section 18(b) (3) of the 1916 act and section 2 of the 1933 act by allowing the carrier to retain freight charges greater than those specified in its tariff.

3. Section 17 of the 1916 act as constituting an unjust or unreasonable practice.

The Commission stated that it was considering promulgation of the following rule:

Common carrier by water as defined in section 1 of the Shipping Act, 1916, as amended (46 U.S.C. 801), shall not by tariff rule or otherwise limit to less than 2 years after the date of shipment the time within which claims for adjustment of freight charges may be presented.

A total of 23 comments were filed by, or on behalf of 44 steamship conferences, two independent water carriers and 17 shipper or other organizations.¹

Comments from the shipper groups were uniformly quite brief. All shipper groups commenting upon the proposed rule favored it maintaining that the Commission was correct that the conference provisions limiting the time within which claims might be made violated the statutes, and that practical necessity required that shippers be allowed 2 years in which to present claims. The specific contentions of the shipper groups may be summarized as follows:

1. The 6-months' limitation presently imposed by many carriers is unreasonable in that 6 months does not allow enough time to audit freight bills and submit claims.

2. Two years would provide ample time within which to make the audit and submit claims. Uniformity of time period to file claims against carriers is desirable.

3. The carrier-imposed time rules are contrary to section 22 of the Shipping Act, 1916, and to the interests of the shipping public.

4. A 6 months' tariff rule limitation misleads the shipping public as to their actual legal rights.

5. The Civil Aeronautics Board (CAB) and Interstate Commerce Commission (ICC) allow 2 and 3 years' time limitation, respectively, for filing claims with carriers.

On February 14, 1966, correspondence was received from the Assistant General Counsel of the General Accounting Office indicating that office's support of the proposed rule because of its practice of paying

¹ Alexander's Department Stores; Associated Dry Goods Corp.; Bloomingdale's; Burgess Cellulose Co.; Burroughs Corp.; Commerce and Industry Association of New York; Cyanamid International; Eastern Industrial Traffic League; Halliburton Co.; Ingersoll-Rand Co.; P. Lorillard Co., Inc.; McGreevey, Werring & Howell, Inc.; Mark Tennenbaum Co.; Mercos Wholesale Co., Inc.; Ocean Freight Consultants, Inc.; Radio Corp. of America; United States Borax & Chemical Corp.; Kirlin, Campbell & Keating, attorneys for the parties to Agreements Nos. 17, 59, 2744, 3863, 4189, 4490, 4610, 5700, 5850, 6080, 6190, 6200, 7100, 7540, 7550, 7590, 7650, 7670, 7690, 7700, 7890, 7980, 8040, 8054, 8080, 8120, 8240, 8300, and 8650; Lillick, Geary, Wheat, Adams & Charles, attorneys for the parties to Agreements Nos. 14 and 57; Terriberry, Rault, Carroll, Yancey & Farrell, attorneys for the parties to Agreements Nos. 134, 161, 5400, and 7780; Graham James & Rolph, attorneys for the parties to Agreements Nos. 93, 150, 3102, 5200, 5680, 6060, 6400, and 8660; Burlingham, Underwood, Barron, Wright & White, attorneys for the party to Agreement No. 8210; States Marine Lines and Isthmian Lines.

freight bills before performing audits on them and the necessity of allowing a considerable period for checking claims for overcharges. The letter further states that Government transportation officers cannot be expected as a routine matter to police errors in charges based on incorrect weight or measurement at their source, and tariff provisions requesting claims for adjustment of freight charges based upon such alleged errors to be submitted in writing before shipment leaves the custody of the carrier are, therefore, unreasonable.

The comments filed by the 44 steamship conferences and two independent carriers strongly object to the Commission's proposed rule. The various positions expressed in these comments may be summarized as follows:

1. The Commission has no authority to deal with carrier-imposed limitations on the presentation of claims for freight adjustment by rulemaking. The Commission has in effect already so held in its Docket No. 712, *Carrier-Imposed Time Limits for Freight Adjustments*, 4 F.M.B. 29 (1952). That case held that absent a showing on a record developed pursuant to hearing that such time limitations had operated in an unlawful manner there was nothing in sections 14, 14(a), 15, 16, 17, 18, and 22 that would allow the Commission to outlaw such time limitations in a rulemaking proceeding. The only section added to the Shipping Act since that proceeding and included here is section 18(b) (3), which does not allow the Commission to regulate in any way the substance of tariffs or other shipping documents, but only their form.

2. Section 22 of the Shipping Act, 1916, is a pure statute of limitations and does not inhibit the contractual freedom of carriers and shippers to set a period of less than 2 years for the adjustment of freight claims, either through filing of claims with the carrier or in actions before the Commission or the courts. Support for this position is found in the actions of the ICC prior to the amendment of its statute specifically forbidding the shortening of the statutory times for filing claims and bringing actions by carrier rule. The Carriage of Goods by Sea Act (COGSA), unlike the Shipping Act, also specifically forbids parties from stipulating for a lesser period of time for bringing suit than that contained in the statute. Prior to the passage of COGSA, parties were free to stipulate as to the time for filing claims and bringing suit.

3. In any case there is nothing in section 22 that would prevent a conference from controlling the time in which claims may be made before it rather than before the Commission or the courts. It is further contended by one party that a failure to file a claim with a conference within the conference-imposed time limit may be pleaded as a defense here or in a court.

4. Section 17 does not permit any regulation of the substantive provisions of the bills of lading or tariffs and was directed toward practices relating more directly to the handling of property by terminals. The first paragraph of section 17, moreover, deals only with rates, fares, or charges and not to practices, such as the one involved here.

5. An attempted rule of the sort the Commission proposed would be contrary to international law by running counter to the principle that the place of contracting controls the form and substance of a contract and the principle that in maritime contracts the law stipulated by the parties is to be controlling.

6. The proposed rule would preclude a reasonable and necessary investigation of claims. Conference tariffs as they now stand require claims based upon weight and measurement errors to be made while that shipment is still in custody of the carrier. This is reasonable because the carrier would have no way of checking upon such alleged errors once the cargo is removed from its custody. As far as other claims are concerned, it places no hardship on shippers to require them to file claims within a 6-month period.

7. The Commission-proposed rule is inconsistent with the requirements of section 22 because the statute of limitations period contained in section 22 has been construed as running from the date of freight payment while the rule would compute the limitation period as running from date of shipment.

Suggestions are made by one party that the Commission-proposed rule would be found less objectionable if it were (1) modified to exempt claims based upon alleged errors in weight, measurement, or description of cargo, or (2) modified to indicate that it refers only to claims filed with the Commission.

Suggestion is also made by one party that the Commission-proposed rule might be workable if limited only to carriers in the offshore domestic trades where section 18(a) suggests authority for the rule because the Commission is there granted power over the "substance" as well as the form of bills of lading.

Oral argument was heard on February 16, 1966, at which representatives of all but one of those who filed comments on behalf of the conference and two independent lines commenting on the proposed rule appeared. Ocean Freight Consultants (OFC) presented the shippers' position at the argument. Subsequent thereto OFC submitted to the Commission information purporting to substantiate its claim made at oral argument that several conferences were utilizing their self-imposed time limitations for filing of claims to discriminate as between shippers, sometimes paying and sometimes rejecting claims filed after the expiration of such time limitations.

DISCUSSION AND CONCLUSIONS

We have examined carefully the contentions of all parties to this rulemaking proceeding and in the light of such examinations and for reasons set forth below, will not promulgate our proposed rule at the present time.

We wish to make clear, however, that our failure to promulgate a rule at this time is not to be interpreted to allow carriers in anyway to limit the right of a shipper claiming injury under the 1916 act or the 1933 act to file a claim for reparation under section 22 of the Shipping Act with the Commission at any time within 2 years of accrual of the cause of action which is the basis of such injury and claim. We do not agree with the comments of the conferences and carriers which maintain that the 2-year statute of limitations contained in section 22 is a "pure statute of limitation" the purpose of which is merely to bar the bringing of stale claims, and which can be contracted away by agreement between shipper and carrier. The practice of the ICC prior to the amendments of the statutes under which it operates providing that claims against carriers and forwarders had to be made and that actions on such claims had to be brought within certain time limitations is not instructive for our purposes. Carriers and forwarders were allowed to stipulate as to the time within which actions could be brought at times when there were no time limitation provisions in the specific statutes under which they were regulated.² Once Congress had spoken, however, and had indicated a period during which actions could be brought, either before the Commission or the courts, a public policy with the force of law was established and such stipulations no longer had the sanction of law. The *Schou-Gallis* case cited in footnote 2 is particularly instructive in this respect. In that case the issue was the lawfulness of an attempt by a freight forwarder to limit the time within which claims could be filed with it. The ICC, although striking down the particular tariff rule by which the forwarder imposed such limitation as unlawful as too indefinite in form, upheld the validity of the principle of a time limitation for the filing of claims with forwarders. After a discussion of the loss and damage cases noted above, the ICC observes that part IV of the Interstate Commerce Act which regulates forwarders, unlike parts I and III regulating rail and water carriers respectively, "confers no specific authority upon this Com-

² See on loss and damage claims—*Northern Pacific Ry. v. Wall*, 241 U.S. 87, 92 (1916); *St. Louis & S.F. Ry. Co. v. Keller*, 90 Ark. 308 (1909); *St. Louis, D.M. & S.F. Ry. Co. v. Starbird*, 243 U.S. 592 (1917); *Southern Pacific Co. v. Steward*, 248 U.S. 446 (1918); *Adams Express Co. v. Cook*, 172 S.W. 1096 (1915). On overcharge claims see—*Schou-Gallis Co. v. International Forwarding Co.* 268 I.C.C. 591 (1947); *Sachs v. Universal Car Loading & Distributing Co.* 78 F. Supp. 619 (1948).

mission to award damages as such in respect of either overcharges or unlawful rates charged shippers by freight forwarders. Also, * * * no periods of limitation are prescribed therein, and no reference is made of record specifically to any other statute which limits the time within which claims arising in respect of charges for services subject to part IV may be filed here or in the courts" (at 595).³ The ICC thus allowed the forwarder to modify the time-limitation rule to make it lawful. The instant proceeding, however, presents an entirely different situation. This Commission is empowered by Congress to grant reparation for any violation of the statutes it administers. This was not the situation with respect to claims for forwarder overcharges before the ICC at the time of the *Schow-Gallis* case and has never been true with respect to claims for cargo damage. Such claims can only be brought in a court of law.⁴ There is also a statute of limitations governing the time within which such reparation may be sought embodied in our statute itself—no reference for the applicable time limitation need be made to principles of general law or State statutes of limitation as was necessary under ICC practice before the amendments to the Interstate Commerce Act discussed herein. No cases are advanced which hold that a common carrier or other person subject to similar regulation may by contract change a time limitation for bringing a claim for reparation which is embodied in a statute of an administrative agency, nor will we permit it here.

As we have observed above, however, we will not promulgate our proposed rule with respect to the time within which claims may be presented to the carriers at this time.

As our predecessor agency, the Federal Maritime Board, noted in its Docket No. 712, *Carrier-Imposed Time Limits for Freight Adjustments*, 4 F.M.B. 29 (1952) carrier-imposed time limitations like those under investigation here cannot be declared unlawful unless there has been a showing that they operated in a fashion contrary to some provision of the statutes we administer. The notice of proposed rulemaking in this proceeding alleged that carrier limitations appeared to be contrary to sections 22, 18(b), and 17 of the Shipping Act, 1916, and section 2 of the 1933 act.

It is, of course, true that carrier-imposed time limitations might be utilized in such a way as to prevent shippers from filing or recovering reparation pursuant to claims with us for injury caused by violation of

³ The Interstate Commerce Act has since been amended to provide for actions at law for recovery of overcharges made by forwarders. See 49 U.S.C. § 1006a.

⁴ I.C.A. § 20(11). See also *Reynolds v. Chicago M. St. P. & P. R. Co.*, 222 I.C.C. 42 (1937); *Fuel Sales Corp. v. Delaware L. & W.R. Co.*, 225 I.C.C. 288, 289 (1937); *Oneonta Fruit Co. Inc. v. Delaware & H.R. Corp.*, 269 I.C.C. 188 (1947).

our statutes. Such effect would, as noted above, be contrary to the public policy embodied by Congress in section 22 of the Shipping Act. There is no showing, however, that the limitations have had such effect.

Sections 18(b) (3) of the 1916 act and 2 of the 1933 act would not outlaw carrier-imposed time limitations as such. The statutory provisions merely prohibit a carrier from retaining freight charges greater than those specified in its tariff. A carrier could, of course, retain such charges if an action for reparation before the Commission were brought after 2 years from the time of accrual of the cause of action. The carriers' limitations would violate sections 18(b) (3) or 2 only if it could be shown that they had the effect of preventing shippers' recovery based on just claims prior to the expiration of the 2-year period. As noted above, there is no indication of such effect in this proceeding.

Finally, the second paragraph of section 17 of the Shipping Act, 1916, under which the carriers' limitations were alleged to be invalid by our notice of proposed rulemaking does not relate to the practices of the type here involved. It relates only to practices "relating to or connected with the receiving, handling, storing, or delivering of property," and its application has thus been confined to forwarding and terminal operations.⁵

Although there have been allegations from shippers and their representatives in this proceeding that the carrier limitation periods are insufficient and lend themselves to discriminatory treatment between shippers, there is no statutory provision in this proceeding which such conduct would, if existent, violate. Nor, moreover, does the information gathered in this proceeding substantiate such allegations. As we noted in *Carrier-Imposed Time Limits for Freight Adjustments, supra*, a rule like that here involved is not one which of itself "carries out the powers, duties, and functions" of this agency as provided in certain statutory sections. Such a rule can only be promulgated when both of the factors absent from this proceeding are present: (1) the allegation of a violation of a statutory provision under which practices, if proven to exist, would be unlawful and; (2) a finding that such practices did exist.⁶

⁵ "This paragraph relates to services performed at the terminal as distinguished from the carrying or transporting of the vessel." *Los Angeles By-Products Co. v. Barber S.S. Lines, Inc.*, 2 U.S.M.C. 106, 114 (1939).

⁶ "[U]pon findings of unlawfulness, we are authorized to issue rules under the act prescribing action for the future," *Freight Forwarder Investigation—Etc.*, 6 F.M.B. 327, 358 (1961); See also *California v. United States*, 320 U.S. 577, 582, 583 (1944). A distinction must be made between a rule of this sort and rules implementing certain statutory provisions, which need no such basis: e.g., the adoption and maintenance of reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints, section 15, Shipping Act, 1916, as implemented by G.O. 14, 46 CFR 527; the

We do not imply that carriers' limitations like those which are the subject of this proceeding might not be prohibited under sections of the 1916 act or the 1933 act not involved in this proceeding.⁷ Nor do we wish to indicate that violations of sections 22, 18(b) (3), or 2 could not be shown on a detailed record. The Commission does not, of course, prejudice itself by the discontinuance of this proceeding with respect to the institution of such further proceedings with respect to carrier-imposed time limitations on the presenting of claims as it may deem proper.

An appropriate order will be entered.

ORDER

Docket No. 65-5

PROPOSED RULE COVERING TIME LIMIT ON THE FILING OF OVERCHARGE CLAIMS

Notice of proposed rulemaking in the captioned proceeding having been published in the Federal Register, and the Commission having received comments from and heard oral argument by interested persons and having this day issued a report in this proceeding, which is hereby referred to and incorporated herein by reference,

Therefore, it is ordered, That this proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

policing of obligations under conference and other rate-fixing agreements, section 15, Shipping Act, 1916, as implemented by G.O. 7, 46 CFR 528. An exception does seem to exist to the requirement that a Commission-promulgated rule respecting carrier-imposed time limitations have a finding of unlawful conduct as its basis. The possibility exists as noted in *Carrier-Imposed Time Limits for Freight Adjustments, supra*, of promulgation of a rule under section 18(a) of the 1916 act, which grants the Commission power over the "substance" as well as the form of bills of lading of carriers in the offshore domestic trades. This section, however, was not included in this proceeding.

⁷ There is, for example, a possibility that such limitations may run afoul of the provision of section 14 making it a misdemeanor for a carrier to "unfairly treat or unjustly discriminate against any shipper in the matter of * * * the adjustment and settlement of claims."

FEDERAL MARITIME COMMISSION

Docket No. 66-12

APPROVED SCOPE OF TRADES COVERED BY AGREEMENT 7840, AS
AMENDED—ATLANTIC PASSENGER STEAMSHIP CONFERENCE

Decided June 28, 1966

Atlantic Passenger Steamship Conference and its member lines not required to delete portion of Agreement 7840 dealing with carriage of passengers between Europe and Canada.

Carl S. Rowe, Edward R. Neaher, and Lino A. Graglia for respondents, Atlantic Passenger Steamship Conference and its member lines.
Donald J. Brunner, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*; John S. Patterson, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners*).*

On March 10, 1966, we ordered respondents (the conference and its member lines) to show cause why their organic agreement governing Atlantic passenger traffic carried by the lines between ports of European, Mediterranean, and Black Sea countries, Morocco, Madeira, and the Azores, on the one hand, and all ports on the east coast of North America (United States, Canada, and Newfoundland), the St. Lawrence River, the Great Lakes, and U.S. Gulf ports, on the other hand, should not be modified to delete that portion covering the carriage of passengers between Europe on the one hand and Canada and Newfoundland on the other.¹ The order stated that since the Commission is without power to affect relationships and to grant immunities to the antitrust acts, pursuant to section 15 of the Shipping Act, 1916,

* Ashton C. Barrett, Commissioner, did not participate.

¹ As Newfoundland is now a part of Canada, the word "Canada" will be used herein to include it.

with respect to common carriers in foreign-to-foreign commerce and since, as a matter of policy, the scope of approved agreements should be coextensive with its jurisdiction, it appeared that the portion of the agreement dealing with the foreign commerce of Canada should be deleted. The matter of the scope of the agreement was said in the order not to involve any disputed issues of fact requiring an evidentiary hearing.

The conference filed affidavits of fact and memoranda of law as provided for in the order to show cause, and Hearing Counsel replied.² We have heard oral argument.

POSITIONS OF PARTIES

A. The conference maintains that this proceeding is unauthorized by law and, even if so authorized, should not be pursued as a matter of sound administrative discretion. Respondents argue:

1. The Commission's order to show cause fails to notify respondents of the factual and legal bases therefor. The conference alleges that the order contains no allegation of a violation of a section of the Shipping Act, and does not notify it of the matters of fact relied upon by the Commission in support of the proposed modification.

2. The Commission is not authorized to disapprove an agreement solely on the ground that it includes Canada within the scope. There has been no finding in this proceeding that an agreement including Canada is contrary to section 15, and agreements including Canada have been specifically approved by the Commission's predecessor agencies.

3. The modification proposed by the Commission would result in instability, probably leading to rate wars and complete disruption of the trade. Lower rates and fares at Canadian ports would cause diversion of traffic from American ports to the detriment of U.S. commerce and contrary to the public interest. Affidavits of fact submitted on behalf of the conference, the conference's member lines, United States Lines and American Export Isbrandtsen Lines indicate the existence of the following factors which show the inseparability of the Canadian and American trades in this conference:

a. The approved conference agreements between Europe and the United States have always included Canadian ports.

b. Only three member lines of the conference did not maintain a regular service to U.S. ports as well as Canadian ports in 1965, and only one line made no callings at U.S. ports.

² Respondents also filed another memorandum at the oral argument. See p. 5, *infra*.

c. All lines maintain appointed travel agents in the United States which book a large number of passengers on voyages from Canada.

d. All conference member lines, whether serving U.S. ports, Canadian ports, or both, maintain general offices and/or agencies in both the United States and Canada, as well as large numbers of travel agents for the solicitation and sale of passenger bookings.

e. The American Society of Travel Agents includes Canadian travel agents within its membership and executive organs.

B. Hearing Counsel argue that this proceeding is procedurally valid, as a matter of law, and that sound policy requires that the Canadian portion of the subject agreement be deleted. They maintain:

1. The order instituting this proceeding clearly sets forth sections 1 and 15 of the Shipping Act as the legal bases for this proceeding and indicated that the specific issue involved the "power to affect relationships and to grant immunity to the Antitrust Act with respect to common carriers in foreign-to-foreign commerce * * *." The Commission's authority to determine questions of law in a show cause proceeding has been upheld by the courts, and the jurisdictional question presented here involves no factual issues.

2. There are no cases dispositive of the issue of whether the Commission must approve agreements covering foreign-to-foreign as well as foreign-to-United States trades.

3. Jurisdiction cannot be conferred on the Commission by agreement of the parties. The Commission has no jurisdiction over Canadian foreign commerce or carriers engaged therein. Lines engaged in such commerce have no right to participate in conferences which fix or regulate rates or otherwise control competition in trades in our commerce. No longstanding policy requires approval of the foreign-to-foreign portion of this agreement. The Commission is empowered to protect our commerce under the Shipping Act whether one conference covering both Canadian and American trades or individual conferences covering these two trades exist. Sound regulatory policy requires that the Canadian portion of the subject agreement be deleted.

DISCUSSION AND CONCLUSIONS

It cannot be seriously maintained at this stage of the Commission's history that the order to show cause by which this proceeding was instituted was in any way unauthorized by law or procedurally defective. The power of the Commission to issue an order to show cause and the procedural sufficiency of an order substantially the same as that here in issue were upheld in *American Export and Isbrandtsen Lines v. Federal Maritime Commission*, 334 F. 2d 185 (9th Cir. 1964). Sections 1 and 15 of the Shipping Act are clearly set forth as the legal

bases for the order. The Commission's jurisdiction is referred to as limited to activities by "common carriers * * * engaged in the transportation by water * * * between the United States * * * and a foreign country," and the Commission describes itself as "without power to affect relationships and to grant immunities to the antitrust acts * * * with respect to common carriers in foreign-to-foreign commerce." The sole question of law is whether or not an agreement covering a foreign-to-foreign trade may be approved by the Commission. There appeared no disputed issues of fact. However, the order to show cause allowed respondents to submit affidavits of such facts as they thought relevant to the issues and memoranda of law. They submitted both. The affidavits of fact were not disputed by Hearing Counsel.

Moreover, in the interests of procedural fairness, respondents were allowed to submit at the oral argument an additional "reply memorandum" which was not provided for in the order to show cause and which was presented to the Commission at the argument without prior notice.³

On the question of the approvability under section 15 of the agreement in its present form, after careful consideration of the arguments of the parties, we find nothing in the record which constrains us to depart from the decision of our predecessor, the Federal Maritime Board, in *Maatschappij "Zeetransport" N.V. (Orange Line) et al. v. Anchor Line Limited et al.*, 5 F.M.B. 714 (1959), which we find dispositive of the issues raised herein. (See also *States-Marine Lines, Inc. v. Trans-Pacific Freight Conference*, 7 F.M.C. 204 (1962), aff'd *sub nom Trans-Pacific Freight Conference of Japan v. F.M.C.*, 314 F. 2d 928 (C.A. 9, 1963)). Accordingly, we will not order the deletion of that portion of the agreement covering the carriage of passengers between Europe and Canada.

Accordingly, the proceeding is discontinued.

(Signed) THOMAS LISI,
Secretary.

³ Respondents' only allegation of harm resulting from the alleged deficiency in the order is that they are unable to prepare "an effective reply and case in opposition" to the order. The two memoranda filed by respondents contain detailed and cogent arguments on precisely those issues raised by the order, thus demonstrating their complete awareness of the issues.

FEDERAL MARITIME COMMISSION

No. 65-7

IMPOSITION OF SURCHARGE AT UNITED STATES ATLANTIC AND GULF PORTS ON CARGO MOVING BETWEEN SAID PORTS AND LATIN AMERICAN PORTS

Decided June 29, 1966

Under uniform dual rate contract provision requiring 90 days' notice of rate increase unless "extraordinary conditions * * * impede, obstruct, or delay the obligations of the carrier", surcharge on 30 days' notice did not violate the contract where circumstances surrounding a strike of longshoremen and subsequent port congestion were so unprecedented as not to be foreseeable by respondent conferences by the exercise of a high degree of diligence.

Imposition of the surcharge by respondents did not violate sections 14b, 15, 16 First, 17, or 18(b) (5) of the Shipping Act, 1916.

David Orlin, John R. Mahoney, John G. McGarrahan, and Edmond Smith for respondent conferences and respondents Grace line and Royal Netherlands Steamship Company.

Donald Mcleay and Harold E. Mesirov for respondent Delta Steamship Lines, Inc.

Phillip G. Kraemer for intervener Traffic Board of the North Atlantic Ports Association.

Sidney Goldstein, General Counsel; *F. A. Mulhern*, Attorney; and *Arthur L. Winn, Jr., Samuel H. Moerman, J. Raymond Clark, and James M. Henderson* for intervener Port of New York Authority.

Don A. Boyd and F. P. Desmond, Commerce Counsel, for intervener E. I. du Pont de Nemours & Co.

J. E. Moody, General Counsel, *Thomas J. O'Reilly*, Assistant General Counsel; and *Paul J. Fitzpatrick*, Attorney for intervener General Services Administration.

Alfred K. Kestenbaum for witness E. R. Liggett.

Michael C. Bernstein and Phillip Weinstein for witnesses of New York Branch, U.S. Fresh Fruit and Vegetable Association.

Norman D. Kline, Robert J. Blackwell, and Donald J. Brunner for Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*; John S. Patterson, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners*):

The Commission initiated this proceeding on April 2, 1965, to determine the lawfulness of certain 10-percent surcharges imposed by nine steamship conferences operating between Atlantic and Gulf ports of the United States and the Caribbean Islands (excluding Puerto Rico and the Virgin Islands), the north coast of South America, Panama, the west coast of Central America, and the west coast of South America.¹ The Commission named these conferences as respondents as well as those independent lines which also imposed a surcharge. The proceeding contains five issues for determination involving sections 14b, 15, 16 First 17, and 18(b)(5) of the Shipping Act, 1916;² namely:

1. Whether the surcharges were imposed in violation of section 14b and the dual rate contracts approved thereunder, especially with respect to the application of the term "extraordinary condition" to the longshore strike;
2. Whether the imposition of the surcharges by the respondent conferences is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, between exporters from the United States and their foreign competitors, or operates to the detriment of the commerce of the United States, or is contrary to the public interest, as proscribed by section 15;
3. Whether the imposition of the surcharges at all U.S. Atlantic and Gulf ports makes or gives any undue or unreasonable preference or advantage to any person, locality, or description of traffic in any respect whatsoever, or subjects any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, in violation of section 16 First;
4. Whether the surcharges are rates, fares, or charges, which are unjustly discriminatory between shippers or ports in violation of section 17; and
5. Whether the surcharges are rates or charges which are so

¹ The conferences are: Atlantic and Gulf/West Coast of South America Conference; Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference; U.S. Atlantic and Gulf-Jamaica Conference; Leeward and Windward Islands and Gulanas Conference; East Coast Colombia Conference; West Coast South America Northbound Conference; U.S. Atlantic and Gulf/Haiti Conference; Atlantic and Gulf/West Coast of Central America and Mexico Conference, and U.S. Atlantic and Gulf/Santo Domingo Conference.

² 46 U.S.C. 813a, 814, 815, 816, and 817(b)(5), respectively.

unreasonably high or low as to be detrimental to the commerce of the United States in violation of section 18(b)(5).

This proceeding is before us now on exceptions in the Initial Decision of Examiner E. Robert Seaver.

On March 5, 1965, the conferences, except the Venezuelan Conference, announced the 10-percent surcharges to be effective April 5, 1965, on all shipments to or from the U.S. Atlantic and Gulf ports.³ The surcharge was to expire not later than October 3. On April 2, 1965, the Venezuelan Conference announced its 5-percent surcharge, effective May 3, 1965. The Venezuelan Conference had initially decided to adopt the 10-percent surcharge, but due to the opposition of the Venezuelan Government the conference decided to adopt a 5-percent surcharge. The nonconference carriers adopted a 10-percent surcharge on 30 days' notice, but approximately eight nonconference lines did not adopt a surcharge.⁴

Toward the end of May, the conference decided to terminate the surcharges as of August 30, 1965, and to adopt a permanent rate increase in the amount of 6 to 7½ percent of normal rates, effective August 30, 1965, to cover their added costs resulting from the new labor contract with longshoremen.⁵

For many years the successive labor contracts between the steamship lines and the longshoremen have been entered into for periods of 2 years each. A strike of longshoremen has occurred every time the contract expired, or nearly every time. After the strike of 1963, a panel appointed by the President devised certain guidelines for future negotiations between labor and management for the longshore contract. The contract was again due to expire on September 30, 1964, so in order to avoid last-minute bargaining, negotiations for a new contract were begun in June 1964. Negotiations were predicated upon the formula devised by the President's panel. Bargaining on behalf of management was conducted by representatives of the New York

³ In the absence of the authority to suspend rates, *pendente lite*, the Commission sought an injunction against respondents' imposition of the surcharges in order to maintain the status quo until this proceeding could be completed. The court refused to enter the injunction but declared that its decision covered only the question whether irreparable harm to shippers would result if the surcharges were permitted to become effective and was not to be considered a precedent governing the issues in the instant proceeding. *Federal Maritime Com'n. v. Atlantic & Gulf/Panama Canal Zone*, 241 Fed. Supp. 766 (S.D.N.Y. Apr. 27, 1965).

⁴ Hereafter, discussion relating to the conference lines is equally applicable to those nonconference lines which established a surcharge. The Commission named individually as respondents American Plate Line, Atlantic Lines, Ltd., Azta Line, Delta Steamship Lines, Inc., Grace Line, Ozark Navigation, Inc., Peruvian State Line, Royal Netherlands Steamship Co., Surinam Navigation Co., Ltd., and Tica Line.

⁵ Other conferences affected by the strike adopted rate increases and gave 90 days' notice, with the average effective date sometime in May 1965.

Shipping Association (NYSA), and the longshoremen were collectively represented by the International Longshoremen's Association (ILA).

NYSA represents 145 American and foreign steamship lines and contract stevedores in the Port of New York. NYSA is empowered to negotiate the entire contract for New York and the master contract, which covers the essential items of wages, fringe benefits, the duration of the contract, and the hours to be worked for North Atlantic ports from Searsport, Maine, to Hampton Roads, Va.

In other Atlantic and Gulf ports the ILA negotiates with other representatives of steamship lines. However, the master contract worked out in New York is usually adopted in these other ports, except as to questions peculiar to a local port which are negotiated locally.

The NYSA and ILA had not reached agreement when the longshoremen's contract expired on September 30, 1964, so the Government sought and obtained the 80-day injunction against a strike under the provisions of the Taft-Hartley Act, and work was not interrupted when the contract expired. Negotiations continued. Also, a panel headed by Assistant Secretary of Labor James Reynolds made a series of recommendations in line with those made earlier by the President's panel. On December 16, 1964, 4 days before the injunction was to expire, the Reynolds' recommendations were accepted by both sides.

The NYSA negotiators had previously obtained their principals' approval of the terms that were ultimately agreed upon between the negotiating groups on December 16, 1964. It remained, however, for the terms to be ratified by the rank and file membership of the union. Neither management, its bargaining representatives, nor the union representatives doubted that this approval would be forthcoming as a matter of course, after the necessary time had expired to conduct the voting. In the meantime, the Taft-Hartley injunction had expired on December 20, 1964, but, contrary to experience in previous strikes, the longshoremen had agreed to stay on the job. Despite the confidence of the bargaining representatives, the longshoremen refused to accept the agreement, a unique situation in collective bargaining in the steamship industry.

The strike of longshoremen started on Monday, January 11, 1965, in substantially all Atlantic and Gulf ports. On January 21, 1965, the ILA membership in the Port of New York, and some other ports, voted again and ratified the same agreement, but local disputes which were interfering with settlement of the negotiations in certain South Atlantic and Gulf ports prevented the termination of the strike. In

order to cause pressure to be put on these ports to come to a settlement, the ILA invoked an "all-port-no-port" rule under which the union refused to return to work at any port until agreement was reached and the dispute settled at all the ports. This came as a complete surprise to management because of a permanent injunction of many years' standing against the ILA demanding that NYSA bargain for all Atlantic and Gulf ports.

At this time President Johnson issued a statement critical of the failure to terminate the strike and mobilizing Government forces to attempt to bring the parties to agreement. The National Labor Relations Board obtained an injunction against the ILA on the ground that it was engaging in an unfair labor practice by the all-port tactics, and the court directed the union to return to work in the Port of New York. As a result of this and the President's appeal, the strike ended in North Atlantic and some of the Gulf ports on February 12, 1965. Negotiations over local disputes continued for as long as a month in the other ports, the strike being settled on various intervening dates at the remaining Gulf and Atlantic ports. The last of the ports to settle was Miami, Fla., where the longshoremen returned to work on March 13, 1965.

The combination of the strike and lack of anticipation and preparation for the strike by the carriers resulted in congestion of cargoes and ships at the various ports after the strike that exceeded any such congestion that had previously been experienced. The degree of congestion varied from port to port, of course. In the worst places, the condition was chaotic; in other ports, the congestion was severe; and in a few ports, the congestion was substantially less.

Incoming cargoes were impeded by export cargoes accumulated on the piers during the strike. Severe demands were made on longshoremen after work commenced because of the backlog. Parcels of cargo were shortloaded, out of conformity with the bills of lading. The storage of cargo was a severe problem. This congestion prevented the orderly loading of cargoes for ease of discharge as the various ports of call were reached, with the result that in many instances cargoes had to be offloaded to reach deeper stored cargoes destined for the port, and then reloaded. Extensive vessel delays were experienced at the various ports in waiting for berths and because of delays in loading and unloading, the delay running in some instances in excess of 3 weeks. The additional costs incurred as a result of the strike and the congestion were quite substantial to the respondents because the trades included here involve comparatively short sea runs and more frequent loading and discharge than in most other trades. The congestion grad-

ually decreased after a time and came back to normal proportions at varying times in the respective ports. There is some controversy about the time of return to normal, but the record shows that all was normal by June 15, 1965.

Carriers are normally able to anticipate the occurrence of a strike long enough in advance to take action to minimize the resulting expenses and losses. Ships are quickly loaded and dispatched from the strike ports. Other ships are laid up or sent in for periodic inspection, surveys, drydocking, and repairs. Crews are dismissed and office help is sent on annual vacations. Carriers adjust sailing schedules so as to balance the placement of the ships at the strike's end, and they place ships in other trades. They do not charter additional tonnage on the eve of the strike or dispatch vessels to the area of the labor dispute.

The carriers experienced losses during the strike and its aftermath through lost vessel days resulting from the strike, and the port congestion, shortage of berths, increased expense of loading and discharging due to the congestion, shortage of longshore workers, off-loading and reloading improperly stowed cargo, and other abnormal expenses.

The shipper testimony established the fact that shippers in these trades frequently quote prices 60 days, 90 days, or even longer in advance of delivery of the merchandise and that, because of one factor or another, shippers cannot in many instances pass along to the purchaser increased costs resulting from the surcharges. This would be the case when goods are sold c.i.f., or other basis where the seller pays the freight, in the absence of an escalator clause. Likewise, the difficulty in amending import licenses granted by some of the Latin American countries, or changing letters of credit, caused shippers to absorb the increase in some instances. The shippers absorbed the surcharges in other instances because competition required that they do so. Several shippers testified that it is their practice when they quote a price to a customer to make good that quotation when costs, such as freight rates, have gone up in the meantime, even though they are not legally bound to do so. The record does not establish the total amount of those freight increases that could not be or were not passed along to the ultimate consumers of the commodities, but a fair sampling was brought out.

As a result of the port congestion and the strike, shippers suffered expenses in addition to the amount of the surcharges. In some instances, they had to pay for additional storage during the time their commodities were waiting to be loaded, and for waiting time of

truckers. One or two of the shippers believed that they lost business by reason of the surcharges, but no particular sales were lost outright.

Dual-rate contract systems are in use by the conferences in all of the outbound trades. The only import trade where dual-rate contracts are employed is that from the east coast of Colombia, and only coffee shipments are covered there.

Under article 9(a) of the dual-rate contract, the conferences are prohibited from making rate changes except as provided by section 18(b) (2).

In addition, this article requires the conferences to give 90 days' notice of rate increases, insofar as such increases are under the control of the carriers. If the increase is not acceptable to the contracting shipper, this article permits him to tender notice of termination of the agreement at least 30 days before the effective date of the increase, and the termination shall be effective as of the date of the proposed increase, unless the conference, having received such notice, shall elect to maintain the existing rates.

Article 10(a) permits the carriers to suspend the agreement in the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from these conditions, which affect the operations of the carriers. Article 10(b) provides that, in the event of any of the conditions enumerated in article 10(a), the carriers may increase any rates affected thereby on not less than 15 days' written notice to the shipper. The shipper is allowed to suspend the agreement if an increase is imposed in these circumstances unless the carrier's notice of increase is rescinded.

The article directly involved in this proceeding, being the one relied upon by the respondent conferences as authority for the present rate increase on less than the 90-day notice, is article 10(c), which provides:

In the event of any extraordinary conditions not enumerated in article 10(a), which conditions may unduly impede, obstruct, or delay the obligations of the carriers, the carriers may increase any rate or rates affected thereby, in order to meet such conditions: *Provided, however,* That nothing in this article shall be construed to limit the provisions of section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The merchant may, not less than 10 days before increases are to become effective, notify the carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increase, unless the carriers shall give notice that such increase or increases have been rescinded and canceled.

The number and size of the nonconference carriers are somewhat inexact, but apparently there are some 15 to 18 nonconference lines that serve one or more of the trade routes. The largest of these lines makes

27 calls per year in the Venezuela trade; for example, as compared to Grace's 52 calls per year. Another comparatively large nonconference line, the Peruvian State Line, has a total of 20 sailings in these trades in 1964, as contrasted with 100 for Grace Lines. That particular nonconference carrier, and some of the others, adopted a 10-percent surcharge on 30 days' notice, like that adopted by the conferences. An executive of one conference line and the conference chairman as much as admitted that they consider the nonconference service to be inadequate, although they did testify that there was extensive nonconference competition. About 98 percent of the shippers using the conference lines have signed dual-rate contracts. If the conferences had ceased to function on April 5, 1965, the nonconference lines that had not adopted a surcharge could not have provided adequate service for all the shippers in these trades during the period of the surcharge. In this sense the nonconference service could be deemed to be inadequate, even though the independent lines undoubtedly could have adequately served some of the shippers who might have elected to terminate their dual-rate agreements.

Under article 10(c) of the contract, dual-rate shippers were entitled to withdraw from the dual-rate contract upon the announcement of the surcharges. One out of the 7,000 dual-rate shippers in these trades exercised that right. The parties are in disagreement as to whether this opportunity afforded any relief since there is a question whether nonconference service is adequate to meet the needs of shippers.

DISCUSSION

The Examiner found that there is no showing of prejudice or disadvantage to any person, locality, or description of traffic as prohibited by section 16 First and no showing of unjust discrimination between shippers or between ports as prohibited by section 17. Neither, according to the Examiner, will the record support a finding that the level of the surcharge was so unreasonably high as to be detrimental to the commerce of the United States contrary to section 18(b) (5) since the surcharge did not cause loss of sales or prevent the movement of cargo. No exceptions were filed to these conclusions, and we sustain them.

Hearing Counsel, however, except to the Examiner's finding that the longshoremen's strike and its aftermath were the "extraordinary conditions" within the meaning of article 10(c) of the dual-rate contract.

The Examiner resolved the issue of whether "extraordinary conditions" existed to the factual determination of whether the carriers "in the exercise of a high degree of diligence in the exercise of business

judgment" should have foreseen or anticipated the conditions upon which the surcharges are based. If the carriers could have foreseen the consequences of the strike through such diligence, they would be required to give 90 days' notice.

Using this test, the Examiner found the events involved here could not have been foreseen by the exercise of this high degree of diligence. On the contrary, he found that during the negotiations ending on December 16, 1964, and thereafter, until the longshoremen walked out on January 11, 1965, a decision that a strike was imminent would have been unwarranted. The unprecedented refusal of the union members to accept the contract, the insistence of the union on all-ports-or-none rule despite the existing court injunction against all-port bargaining, and the unprecedented port congestion that followed the strike could not have been foreseen by the exercise of a high degree of diligence, as these factors were outside the control of the carriers. The Examiner, therefore, concluded that these occurrences constitute extraordinary conditions within the meaning of article 10(c), justifying the imposition of the surcharges on 30 days' notice.

Hearing Counsel contend that emergency rate changes on short notice are exceptional and disturbing in foreign trade; therefore, the provisions of dual-rate contracts which grant authority for such changes should be strictly construed. Hearing Counsel point out that longshoremen's strikes occur regularly upon the expiration of the contract and that congestion occurs after every longshoremen strike, although in the past strike, it appears to have been somewhat more severe because of the length of the strike. Likewise, conditions returned to normal at the latest in most ports by mid-May. Consequently, Hearing Counsel contend that the strike and subsequent congestion have not been shown to be the type of conditions contemplated by the Commission when it drafted article 10(c). Hearing Counsel also argue that the surcharge was improperly imposed because it was not limited to the duration of the condition which impaired the obligation of the carrier but continued afterward into a period of normal operation.

Respondents argue that the strike certainly was extraordinary as the term is generally understood, since both the NYSA and ILA negotiators were uniformly confident that the strike would be averted. And the carriers acted upon this assumption to their later disadvantage. Furthermore, respondents assert that the strike itself, the disruption of schedules, the costs to carriers, and the ensuing congestion meet the test of extraordinariness as compared with previous longshoremen's strikes. Respondents also state that they were justified in imposing a surcharge which continued to apply after the termination of the

congestion because this permitted them to recoup their losses with a 10-percent surcharge while a surcharge, limited to the actual period of the extraordinary condition, would have been considerably higher and considerably more disastrous to shippers.⁶

Under section 14b, the Commission may authorize the use of dual-rate contracts which meet certain standards. In *The Dual Rate Cases*, 8 F.M.C. 16 (1964), the Commission approved the contract of the respondent conferences.⁷ In drafting the contract, the Commission recognized that while the dual-rate contract bound shippers to patronize only conference carriers, in exchange for the shipper's promise of exclusive patronage the carriers should agree to give 90 days' notice of rate increases, subject to the proviso in article 10(c) which permits 30 days' notice of rate increases in the event of extraordinary conditions which may unduly impede, obstruct, or delay the obligations of the carrier.

In *The Dual Rate Cases*, 8 F.M.C. 16 (1964), the Commission described the conditions which justify rate increases on short notice as follows:

Rate increases necessitated by emergency conditions outside the control of the carriers are permitted under a separate contract provision which will be discussed below. 8 F.M.C. at 28.

The proposed contracts generally contain provisions which would permit the suspension of service or rate increases on short notice where abnormal conditions beyond the control of the carriers are present. 8 F.M.C. at 47.

The approved clause would also permit the continuation of the contract system at higher rates imposed in compliance with section 18(b) of the Shipping Act in other extraordinary circumstances which unduly impede or delay the carrier's service. 8 F.M.C. at 48.

The key words, therefore, are "emergency conditions outside the control of the carriers", "abnormal conditions beyond the control of the carriers", and "extraordinary circumstances which unduly impede or delay the carrier's service." The criteria are apparent: the condition must be outside or beyond the carrier's control, the condition must impede or delay the carrier's service, and there must be an emergency, an abnormal condition, or an extraordinary circumstance. The language of article 10(c) reflects the Commission's intent:

In the event of any extraordinary conditions not enumerated in article 10(a), which conditions may unduly impede, obstruct, or delay the obligations of the carriers, the carriers may increase any rate or rates affected thereby, in order to meet such conditions * * *.

⁶ In effect, the conferences claim that once rate action was authorized under art. 10(c), they were free to select any reasonable device, surcharge, or rate increase, to meet the extraordinary condition.

⁷ Therefore, we are not here concerned with the approvability of the contract; rather, we are interpreting certain language in the contract, specifically, art. 10(c).

The longshoremen's strike was beyond the control of the carriers, and it unduly impeded and delayed the carrier's service. Consequently, we need only be concerned with the question of whether the strike and its aftermath constitute emergencies, abnormal conditions, or extraordinary conditions.

The words—emergency, abnormal, extraordinary—are subjective; they presuppose some lack of foreseeability.⁸

Thus, the carriers must provide 90 days' notice of rate increases to dual-rate shippers if the conditions that give rise to the need for the increase are "normal"; that is, foreseeable by the carriers. For example, where such conditions as rising salaries, costs of vessels, fuel, or increased stevedoring expense require additional freight revenue, then 90 days' notice is required because the carrier is expected to anticipate these needs. This is so because exporters, in conducting their business, need the stability afforded by a guarantee of 90 days' notice. Indeed, this is one of the most important inducements to shippers to commit themselves to an exclusive patronage contract with a conference. In this context, under the dual-rate contract, the notice requirement is highly important. Carriers have a strict duty to anticipate the need for rate increases and give timely notice thereof to dual-rate signatories.

The factual question, therefore, is whether the carriers, in the exercise of a high degree of diligence should have foreseen or anticipated the conditions which unduly impeded, obstructed, or delayed the obligations of the carriers.

A preponderance of the evidence establishes that the events involved here could not have been foreseen by the exercise of this high degree of diligence. During the negotiations ending on December 16, 1964, and thereafter, until the longshoremen walked out on January 11, 1965, a decision that a strike and the ensuing severe congestion were imminent; that the carriers should lay off crews, furlough office-workers, drydock and layup ships, and take other steps to mitigate the full thrust of the strike would have been unwarranted. The unprecedented refusal of the union members to accept the contract their leaders had worked out for them, the ensuing intransigence of the union in insisting on all-ports-or-none rule despite the existing injunction against all-port bargaining, and the unprecedented port congestion that followed the strike could have not been foreseen by the

⁸ Webster's New Collegiate Dictionary (G. & C. Merriam Co., 1961):

emergency—an unforeseen combination of circumstances.

abnormal—deviating from the normal condition or from the norm or average; markedly or strangely irregular.

extraordinary—beyond or out of the common order or method, not ordinary; exceeding the common degree, measure, or condition; remarkable.

exercise of a high degree of diligence. We, therefore, conclude that these occurrences constitute extraordinary conditions within the meaning of article 10(c), justifying the imposition of the surcharges on 30 days' notice.

As noted above, Hearing Counsel argue that the longshoremen's strike was not the type of condition contemplated by article 10(c) and that the surcharge itself was not a proper rate because it was not limited to the duration of the impairment of the carriers' obligation.⁹ Thus, Hearing Counsel assert that since shippers were compelled to absorb the surcharge because it was imposed on 30 days' notice, imposition of the surcharge was contrary to the public interest. According to Hearing Counsel, the 90-day notice provision in the dual-rate contracts was an important inducement for shippers to execute such contracts and should not be readily avoided. This is, of course, true. This is the rationale of the Commission's requirement of 90 days' notice in the dual-rate cases.¹⁰ But this requirement is subject to article 10(c). Therefore, if the carriers met the prerequisites of article 10(c), they were justified in exercising their contractual right to adjust rates on 30 days' notice.

While Hearing Counsel would invoke the public interest because some shippers as a business necessity absorbed the surcharge, it is clear that the Commission determined in *The Dual Rate Cases* that the overall public interest required some flexibility under the contracts in extraordinary circumstances. Furthermore, the Commission permitted shippers as well to avoid strict adherence to the contract by the exercise of the right to cancel the contract if the rates were increased on short notice.¹¹ The flexibility thus provided was a recognition by the Commission that both carriers and shippers should not be required to adhere to dual-rate contracts under conditions of an abnormal nature to which neither party agreed or for that matter could have foreseen.

Hearing Counsel basically rely on the contention that the strike was not the type of condition contemplated by article 10(c). We agree that strikes per se do not automatically invoke the exception of article

⁹ The General Services Administration, although it did not except to the Initial Decision, filed a brief to the Examiner and argued orally before the Commission that the 1965 longshoremen's strike was not an "extraordinary circumstance" because such strikes have occurred in 10 of the last 15 years. Therefore, GSA contends that not only did the respondents violate the Shipping Act and the terms of the dual-rate contract by imposing a surcharge on 30 days' notice, but also that the imposition of the surcharge was not warranted regardless of notice.

¹⁰ Sec. 14b itself does not require such notice. However, the Commission added the clause because of its recognition that many mercantile transactions require rate stability for at least 90 days.

¹¹ In view of the somewhat inferior nonconference service, this right was illusory to some extent here.

10(c). However, as we found above, this strike was indeed extraordinary and unforeseeable.

Hearing Counsel further aver that the surcharges are in reality permanent rate increases effectuated on 30 days' notice and later adjusted downward to a 6 to 7½ percent increase over the prestrike rates. Consequently, Hearing Counsel claim that the net result was a permanent rate increase implemented on less than 90 days' notice.¹² This argument fails to appreciate the true import of article 10(c). If conditions warrant, carriers may increase rates. This may be done by increases of regular rates or by surcharges. As we have said, the carriers were justified in imposing a surcharge to meet unforeseen additional costs. Actually Hearing Counsel do not allege that the present rates are inordinate. Therefore, the fact that these rates were later adjusted does not render the original rate less justifiable. Hearing Counsel also argue that a proper balancing of the equities will reveal the Examiner's error. For instance, the Examiner found that carriers are entitled to adopt rates that are adequate to cover expenses and return a profit, and that respondents in the present case would be unable to recoup a substantial portion of expenses if the surcharges were disapproved. However, Hearing Counsel advocate that, while everyone suffered losses as a result of the longshoremen's strike and subsequent congestion, shippers suffered additional expenses for trucking, storing, etc.; but, unlike the carriers, shippers are unable to assess temporary charges to recoup their losses because, for business reasons, shippers are frequently unable to pass last-minute expenses on to their customers. The argument is illusory. Of course, the Commission recognized the needs of shippers for long-range rate stability. On the other hand, the entire regulatory scheme of the Shipping Act is based upon the recognition that carriers are obliged to observe reasonable, non-discriminatory standards, but they are also entitled to fair remuneration for their services. Here, there is no indication that the carriers assessed rates which were other than reasonably compensatory.

We also must reject the argument that the surcharge violates the public interest because it remained in effect for a time after the port congestion ended. The conferences here decided to spread the surcharge over a longer period than the duration of the congestion in order to reduce the rate of the surcharge. This was a reasonable means of recouping the losses occasioned by the strike. The Commission recently considered the legality of a surcharge imposed at the Port of Manila

¹² Hearing Counsel alluded to the actions of other conferences—establishing general rate increases on 90 days' notice as support for their argument. This is irrelevant since there was no proof concerning conditions in other trades and since, if respondents qualify under art. 10(c), it does not matter what other conferences do.

because of congestion and delay in unloading cargo there. In *Surcharges on Cargo to Manila*, 8 F.M.C. 395 (1965), the Commission found that, "the basic purpose behind surcharges such as those in issue here is to reimburse the carriers for additional costs temporarily incurred by the performance of their services, and which costs the carriers are not recovering through their basic freight rates." Revenue to be derived from the surcharge at Manila was found to be a "reasonable approximation" of the costs incurred in calling at that port. In effect, the Commission simply permitted the carriers to recover their additional expenses. That is precisely the situation here; the carriers increased their rates a reasonable amount over a reasonable period to the extent necessary to recoup their losses.

For the aforementioned reasons, the surcharges are not contrary to the dual-rate contract or section 14b nor are the surcharges contrary to the public interest or other standards of section 15. Therefore, Hearing Counsel's exceptions are overruled.

ULTIMATE CONCLUSIONS

Respondents have acted in accordance with the provisions of the dual-rate contract and the Shipping Act, 1916, in imposing a surcharge on 30 days' notice. This proceeding is hereby discontinued.

(Signed) THOMAS LISI,
Secretary.
10 F.M.C.

FEDERAL MARITIME COMMISSION

No. 873

INVESTIGATION OF PASSENGER STEAMSHIP CONFERENCES REGARDING TRAVEL AGENTS

*Decided July 14, 1966**

Provisions of Conference Agreement No. 7840 requiring unanimous accord of the member lines in deliberations to raise or lower the maximum commission rate payable to the lines' agents on sales of passenger transportation (unanimity rule) found detrimental to the commerce of the United States and contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916, and disapproved.

Provision of Conference Agreement No. 120 and rules adopted thereunder prohibiting the member lines' agents from selling, without prior permission, transportation on competitive nonconference lines (tieing rule) found unjustly discriminatory as between carriers, detrimental to the commerce of the United States and contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916, and disapproved.

Carl S. Rowe, Frank B. Stone, Edward R. Neaher, Lino A. Graglia, and Joseph Mayjer for Trans-Atlantic Passenger Steamship Conference and Atlantic Passenger Steamship Conference, respondents.

Robert J. Sisk and Harold S. Barron, for American Society of Travel Agents.

Norman D. Kline and Donald J. Brunner, Hearing Counsel.

REPORT ON REMAND

BY THE COMMISSION (John Harlee, *Chairman*; Ashton C. Barrett, George H. Hearn, *Commissioners* :

The proceeding is before us again upon remand from the U.S. Court of Appeals for the District of Columbia Circuit, *Aktiebolaget Svenska Amerika Linien (Swedish American Line), et al. v. Federal Maritime Commission*, 352 F. 2d 756 (1965).¹ Originally instituted by our predecessor the Federal Maritime Board, the proceeding was the out-

*Jan. 30, 1964, decision is reported at 7 F.M.C. 737.

¹ Unless the context of this report requires otherwise, the Court of Appeals for the District of Columbia Circuit and its decision in *Svenska* will be referred to simply as "the Court of Appeals" and "the opinion."

growth of a petition filed with the Board by the American Society of Travel Agents. The Society (or ASTA) requested the institution of an investigation into certain activities of two conferences, the Trans-Atlantic Passenger Steamship Conference (TAPSC) and the Atlantic Passenger Steamship Conference (APSC), established and governed by Agreements 120 and 7840, respectively, both of which were approved by a predecessor agency under Section 15 of the Shipping Act, 1916. The inquiry thus begun was the first comprehensive investigation of the relationship between passenger conferences and travel agents since the passage of the Shipping Act in 1916.

After extensive hearings, an initial decision by Examiner E. Robert Seaver and exceptions thereto, we heard oral argument and served our final decision in February 1964. While we disapproved several other practices of respondent conferences, they sought judicial review of our order only insofar as it disapproved two provisions of their agreements: (1) The provision of the Atlantic Passenger Steamship Conference's agreement requiring unanimous vote of the membership to fix or alter the maximum commission payable to travel agents appointed by the conferences to sell passenger bookings on conference vessels (the unanimity rule); and (2) the provision of the Trans-Atlantic Passenger Steamship Conference agreement which prohibits travel agents appointed by the respondents from selling passenger bookings on competing nonconference steamship lines without prior permission from respondents (the tying rule).

In June of last year, the Court of Appeals issued its decision reversing our disapproval of the unanimity and tying rules and remanding the proceeding to us: (1) "to either make supporting findings which adequately sustain the ultimate finding that the unanimity rule operates to the detriment of the commerce of the United States, or if this cannot be done, to vacate that ultimate finding * * *" and approve the rule, and (2) to either make "an adequately supported ultimate finding * * * which warrants disapproval under the statute or if such finding can not be made on the record" to approve the tying rule under section 15. We ordered reopening of the proceeding on the remanded issues. The reopening was limited to the filing of briefs and oral argument by the parties. Respondent conferences, ASTA and Hearing Counsel filed opening briefs, the conferences and Hearing Counsel replied, all parties argued orally.

The Operation and Effect of the Unanimity Rule Provisions of Agreement 7840

The Atlantic Passenger Steamship Conference came into being in 1946 with the approval under section 15 of the Shipping Act of Agree-

ment No. 7840.² The APSC's current voting membership is identical with that of the Trans-Atlantic Passenger Conference, except that APSC includes American President Lines and does not include Spanish Line. The conference is headquartered in Folkstone, England, and six of its member lines serving only Canadian ports do not render passenger service at any port on the U.S. Atlantic coast.

Article 6(a) of Agreement 7840 sets forth the unanimity rule and provides:

(a) Rates of commission and handling fees which Member Lines may pay to their general agents or subagents shall be established by unanimous agreement of the Member Lines.

Conference meetings, including those at which agents' commissions were dealt with, were conducted on an informal basis and votes by the members were neither recorded nor filed with the Commission. Prior to the meetings of the principals, a committee of the conference, called the A.C. Subcommittee, which has initial responsibility on commissions and rates, meets to consider matters which it may present or recommend to the principals. Article 3(d) of Agreement 7840 provides:

* * * Conference action shall be by unanimous agreement of the member lines, except as may be otherwise provided herein.

This has been construed by the conference to require that all recommendations by the A.C. Subcommittee must be based upon the unanimous accord of its members.

In 1950 the maximum rate of commissions payable to travel agents was 6 percent. The minutes of March 8, 1950, show that lack of unanimity prevented the A.C. Subcommittee from recommending an increase in commissions. The minutes of March 9, 1950, demonstrate that again lack of unanimity prevented a recommendation to increase commissions even though "all lines expressed a willingness in principle to an increase in agency commission" and "the majority of the lines * * * were prepared to increase the commission to 7½ percent all classes all seasons." A year later, on March 1, 1951, when commissions were finally increased to 7½ percent, the increase excluded, again against the views of the majority, sales made in the so-called high or summer season. On these sales the 6-percent commission remained in effect.

In October of 1951, a majority of the lines again attempted to increase the commission level, but "it was not possible to reach unanimous agreement," and again the failure to increase commissions was in the face of "a strong majority in favor of applying 7½-percent commission to all classes through the year." Lack of unanimity pre-

² For the full text of sec. 15, see app. A.

cluded any recommendation by the Committee to the principals on commission increases and the matter was "deferred for consideration at the Statutory Meeting in March 1952." At the March 1952 meeting the principals deferred the matter of agents' commissions for consideration in June of that year by the A.C. Subcommittee, but in June the Subcommittee deferred it again for consideration at the conference meeting to be held in October 1952. In October, when the Subcommittee finally took up the matter of commission levels, it was again unable to make a recommendation to the principals because "unanimity could not be reached on a proposal to extend the off-season basis to bookings for seasonal sailings."³

The record sheds no light on any further conference action on the level of commissions until a 7-percent year-round commission was set at a special meeting in May 1956. Prior to this the matter had been discussed at a regular February-March meeting in 1956, but apparently no minute was kept on this meeting and none was filed with the Federal Maritime Board. However, the records of United States Lines, a member of the conference, reveal that at this meeting one of the lines exercised its veto power under the unanimity rule to prevent the conference from at once putting into effect "an immediate adjustment in commission to 7 percent all year."

At the time of the hearing in this proceeding, the airlines paid a 10-percent commission on the air portion of foreign inclusive tours; i.e., selling air tickets in conjunction with a land tour. At this same time APSC members paid only 7 percent on the water portion of such tours. At the APSC meeting in October 1957, Cunard Line complained that "the steamship lines are seriously handicapped by not giving this (10 percent tour commission) concession." The travel agents themselves pointed out that the difference in tour commission levels was a factor contributing to the "definite tendency to sell air travel." In May 1960 a majority of the principals favored establishment of a 10-percent commission for tours. However, it was not until December 1962, 2½ years later and after close of hearings in this proceeding but before initial decision, that the percentage level for sea portion of tours was increased to equal that of the airlines.

At the present time the percentage level of commissions for booking sea passage is the same as that paid for booking air travel, 7 percent for point-to-point bookings and 10 percent for tours. But as we pointed out in our previous opinion in this proceeding, the effective level of

³ The matter of commissions was on the principals' agenda for a meeting in March of 1953, but action was deferred to the Subcommittee meeting to be held in June 1953. The matter was again deferred by the Subcommittee in June. In these two instances the reason for deferral does not appear.

commission for sea passage is less because the many unique arrangements which must be made when booking sea passage consume three to four times as much of the agent's time as is spent booking air travel. Many potential travelers (the record shows somewhere between 15 and 60 percent) come to travel agencies undecided as whether to go by air or sea. The travel agent is, of course, in a position to influence such a traveler's decision. As the Examiner found there is no question but that there is "an economic advantage * * * to the agent in selling air transportation instead of steamship passage * * *." Thus, while we do not mean to imply that the agent in this situation is unmindful of the traveler's interest, he, the traveler, is nevertheless confronted with an agent whose economic self-interest would make him desire that the client chose air travel rather than sea travel. The record discloses no evidence that a specific traveler has been persuaded to air travel against his desires or to his disadvantage. But this is not surprising and such a showing in our view is not necessary to a disapproval of the unanimity rule. Any such testimony by an agent would inevitably place him in an unfavorable position with his steamship employers.⁴ As a consequence of this dilemma, the record reveals a "definite tendency" on the part of agents to push air over sea travel in such cases.⁵

Since May of 1956 the agents have actively sought increases in the general level of commissions. They were told by the representatives of the conference members that the difficulty in securing unanimity of the membership prevented any increase in commissions.

⁴ An example of this unhappy dilemma is found in the following testimony excerpted from the record.

"* * * (Agent) * * * . Q. Would it be fair to say that primarily in recommending whether a patron go by sea or by air you try to find out what he really wants to do most?

"A. That's right.

* * * * *
 "Q. And not necessarily your own pecuniary profit?"

"A. Well, both things are considered * * * .
 * * * * *

"We walk a tightrope, let's say. We have the profit motive."

⁵ See the following statement by Ralph Edell, conference appointed travel agent :

"Q. What is your personal policy regarding potential clients who do not manifest a particular desire to go to Europe either by plane or ship? A. There is no policy involved, but if it is easier to sell someone an airline ticket and if it is a tour where you make more money, there is a definite tendency to sell air travel.

"Q. Is it in fact more difficult and does it take more time to sell a steamship ticket than an air ticket? A. We would estimate generally speaking three time as long overall."

In this regard the Examiner stated, "* * * The record itself does not establish precise data on the extent of this (diversion) because it is not the sort of activity one would volunteer to disclose in detail, but it is clear that this practice is prevalent enough to constitute a substantial competitive disadvantage for the shiplines and an interference with a free and objective choice between the two modes of transportation by potential travelers."

The Operation and Effect of the Tying Rule Provision in Agreement No. 120

The Trans-Atlantic Passenger Steamship Conference began operation in 1929 with the approval of Agreement No. 120 by a predecessor agency. The tying rule has been a part of the agreement since 1933 and has never been amended. The conference is headquartered in New York and its membership comprises all of the lines operating regular passenger vessels in the Trans-Atlantic trade and some lines operating freighters which can accommodate up to 12 passengers. These lines carry about 99 percent of all of the passengers traveling by sea between the United States and Europe. The remainder of the passenger traffic is handled by nonconference lines operating freighters which can carry a limited number of passengers. Like the conference lines, they must rely upon the travel agents for passenger bookings.

The tying rule is found in article E (e) of Agreement No. 120 which provides:

(e) *Subagencies selling tickets for nonmember lines.*—A subagency shall be prohibited from selling passage tickets for any steamer not connected with fleets of the member lines for which it has been duly appointed or from representing in any capacity any steamship company operating such a steamer, if such steamer is operating in any competitive Trans-Atlantic trade (unless written permission to do so is first obtained from the member lines), or acting or representing itself as agency for, or as entitled to do business with any member line it does not represent by regular appointment. This rule shall not prevent any subagent from booking for any U.S. Government Line.

The record contains the admission by respondents that the tying rule is intended to eliminate nonconference competition. Both the conference and the agents treat the rule as an absolute prohibition on the sale of nonconference passenger transportation, and agents have lost some prospective bookings because the rule prevented them from selling nonconference passage desired by the traveling public.

DISCUSSION AND CONCLUSIONS

The briefs of the parties in this proceeding contain widely differing interpretations of the Courts' opinion remanding this case to us. Respondents on the one hand contend that the remand was for the limited purpose of finding or specifying additional facts demonstrating that both the unanimity rule and the tying rule violate one of the standards of section 15. According to respondents' reading of the decision we are precluded from "rearguing * * * questions already decided by the Court * * * ." Thus, any expansion of our previous discussion as to why the already existing facts of record dictate disapproval of both rules under section 15 is, according to respondents,

prohibited by the remand. Hearing Counsel and ASTA take precisely the opposite position.

We do not find any such restriction in the Courts' opinion, nor do we read the opinion as precluding us from expanding and clarifying our perhaps too brief discussion of the law, nor even from disagreeing with the Court where the clear intent of Congress and our own experience and best judgment dictate. From our reading of the opinion we are sure the Court would welcome such an approach and because we read the Courts' opinion this way nothing need be said about the powers of an administrative agency when a proceeding has been remanded to it by a court.

Section 15 of the Shipping Act exempts steamship conferences and other anticompetitive groups from the antitrust laws when and only so long as the agreements establishing such groups are approved by us under that section, *Carnation Company v. Pacific Westbound Conference*, No. 20, Supreme Court 383 U.S. 213 (1966). Section 15 further provides that:

The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations * * * .

In deciding whether continued approval should be allowed the unanimity and tying rules they must be examined in the light of the four criteria enumerated in section 15. Before applying these criteria to the individual rules in question a word about our general powers and responsibilities under section 15 would seem appropriate.

In determining whether to approve initially or to allow continued approval of an agreement under section 15 we are called upon to reconcile, as best we can, two statutory schemes embodying somewhat incompatible policies of our country—the antitrust laws, designed to foster free and open competition and the Shipping Act which permits concerted anticompetitive activity which in virtually every instance, if not unlawful under the antitrust laws, is repugnant to the basic philosophy behind them. While it is valid to say that the congressional policy is that of encouraging or at least allowing the conference system in the steamship industry it is less than valid to contend that this represents a complete and unqualified endorsement of the system. One committee of Congress, after a recently conducted and exhaustive investigation of monopoly problems of the steamship industry concluded:

10 F.M.C.

The Shipping Act of 1916 * * * constituted a cornerstone of American maritime policy for almost half a century. It rests upon the assumption that the prosperity of our foreign commerce and the maintenance of a strong and independent merchant marine can best be secured through strict administrative surveillance of shipping conferences, agreements, and operations, insistence upon fair play and equal treatment for shippers large and small, protection of cargo and ports against unfair discrimination, and prevention of practices designed to eliminate or hamper independent carriers. (The Ocean Freight Industry, Report of Antitrust Subcommittee, House Committee on the Judiciary, H. Rept. No. 1419, 87th Cong. 2d sess., page 381, often referred to as the Celler report.)

One needs only a hasty review of the history of the congressional investigations and agency reorganizations under the Shipping Act, the most recent of which created the present Commission, to conclude that the experience under the shipping Act has been a good deal less than satisfactory at least from Congress' standpoint.⁶

The task of reconciling the desire to preserve open competition with section 15's exemption from the antitrust laws which Congress has entrusted to us is, at best, a delicate one and difficult of discharge with precision.

The determination to approve or to allow continued approval of an agreement requires, on the one hand, consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws, and, on the other, a consideration of the circumstances and conditions existing in the particular trade in question which the anti-competitive agreement seeks to remedy or prevent. Thus, before we legalize conduct under section 15 which might otherwise be unlawful under the antitrust laws, our duty to protect the public interest requires that we ". . . scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." *Isbrandtsen Co. v. United States*, 211 F. 2d 51, 57 (C.A.D.C. 1954); cert. denied *sub nom Japan-Atlantic & Gulf Conf. v. U.S.*, 347 U.S. 990

Section 15's authorization of agreements "pooling or apportioning earnings," for instance, does not dictate approval simply because such an agreement is filed and approval is desired by the parties to the agreement. The parties seeking exemption from the antitrust laws for their agreement must demonstrate that the agreement is required

⁶ In this regard "a history of prior approvals" no matter how long, may be an indication of nothing more or less than a failure to scrutinize operations under the particular agreement, which failure may or may not have been justified in the particular case. (See Celler report, ch. XI, the Federal Maritime Board—A Study in Desultory Regulation.) In any event the difficulties encountered by the member lines under the unanimity rule far outweighs any prior approval of it. Moreover, a prior approval under sec. 15, no matter how long ago granted, may not be converted into a vested right of continued approval simply because the parties to the agreement desire continued approval.

by a serious transportation need, or in order to secure important public benefits. Otherwise, and whatever may have been the policy of our predecessors, it is our view that the public interest in the preservation of competition where possible, even in regulated industries, is unduly offended, and the agreement is contrary to that interest within the meaning of section 15. *Mediterranean Pools Investigation*, F.M.C. Docket No. 1212 9 F.M.C. 264. *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75 (1962). This is equally true where the agreement in question has received prior approval and the determination to be made is whether to allow that approval to continue unmodified. Disapproval of an agreement on this basis is not grounded on any necessary finding that it violates the anti-trust laws but rather because the anticompetitive activity under the agreement invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the Shipping Act and is therefore contrary to the public interest.⁷ The foregoing, in our view, constitutes the basic policy to be applied in determining whether to initially approve or to allow continued approval of any section 15 agreement. With this in mind we proceed to a consideration of the rules in question.

The Unanimity Rule

Respondents begin their argument for approval of the unanimity rule by urging that the proper context for our consideration of the rule was that framed by the Courts' opinion remanding the case, wherein it was noted that,

* * * our country has adopted a policy in the international transportation field, of encouraging, or at least allowing U.S. carriers to participate in steamship conferences, and to be governed by unanimity in respect of matters covered by conference agreements, barring disapproval under the standards prescribed by (sec. 15) * * *.

We have already noted that congressional allowance of the conference system was and is conditioned on the subjection of conferences, agreements, and operations under such agreements "to strict administrative surveillance," to insure fair play, equality of treatment, and protection from discrimination.⁸ As to the congressional policy of encouraging or at least permitting carriers "to be governed by unanimity in respect of matters covered by conference agreements," the

⁷ For a similar construction of sec. 412 of the Federal Aviation Act which was modeled after sec. 15 see *Local Cartage Agreement*, 15 C.A.B. 815 (1952); *North Atlantic Tourist Commission Case* 15 C.A.B. 225 (1952); *Six Carrier Mutual Aid Pact*, 29 C.A.B. 168 (1959).

⁸ See also in this regard the Alexander report, H. Doc. No. 805, 63d Cong., 2d sess. 1914), vol. 4, p. 418, where the Committee stated its belief "* * * that the disadvantages and abuses connected with steamship conferences * * * are inherent, and can only be eliminated by effective Government control * * *."

Court of Appeals on remand to us footnoted a statement made by the then Chairman of the Civil Aeronautics Board in an article entitled the "Future of the International Carrier," appearing in *Flight Forum* 7 (September 1964), wherein he said:

IATA [International Air Transport Association, an organization somewhat similar to the conferences presently before us] will continue to be the machinery for developing fares and rates * * *. This will be true whether or not the unanimity voting rule continues to apply as it has in the past. This rule, originally adopted and insisted upon by the United States to protect each carrier's right of individual action, admittedly has its deficiencies. However, I am inclined to conclude these are less than those which would stem from a form of majority vote. (Bracketed material the Court's.)

Unanimity in respect of matters under agreements of international air carriers may well be the policy of the United States, but we do not find such to be the policy which governs water carriers under section 15 agreements. Additionally, it would appear that it was not an unqualified unanimity which received this country's encouragement for air carriers. For in *IATA Conference Resolution*, 6 C.A.B. 639 (1946) the proceeding in which the Civil Aeronautics Board approved the IATA resolution authorizing international air carriers to fix rates in concert and the one apparently discussed in the statement quoted above, the Board, after observing that unanimity was necessary to insure preservation of the American air carrier's right of individual action, said at page 645:

It is further understood that it is not intended that a rate established by a conference agreement thereafter can be changed only by unanimous action. Such a requirement would enable a single carrier to freeze the rate structure, and would create an intolerable situation.

Moreover, the CAB apparently reserved unto itself the power to disapprove any rate fixed by agreement under the IATA resolution.⁹ Our problems under the Shipping Act would appear quite different from those of the Civil Aeronautics Board under the Federal Aviation Act, 1958. Steamship conferences are not required to submit their individual rates and fares to us for our approval. Indeed, it was not until 1961 that conferences were by statute required to file their rates with us. Whatever may have prompted a policy of encouraging or allowing unanimity in international air transportation, such is not in our view the policy of this country in international transportation by sea. In the Senate report which accompanied H.R. 6775, the bill which

⁹ We note with interest that the maximum levels of agents' commissions paid by airlines, which are also apparently fixed by unanimous vote appear to be subject to approval by the CAB which has made it quite clear on any number of occasions that it will not approve a rate or commission resolution which is not limited in duration to "a reasonable period of time." *North Atlantic Tourist Commission Case*, 16 C.A.B. 225 (1952).

became Public Law 87-346, a recent comprehensive amendment to the Shipping Act, the Senate explained its failure to enact legislation on voting requirements in section 15 agreements in the following way:

And a third matter which, it seems to us, should be handled by Commission rule or regulation, is one which is not limited to the question of dual-rate contracts but rather Commission approval of section 15 agreements. For some time shippers and shipper groups have been urging Congress to amend section 15 so that no conference agreement could be approved which on rate matters required more than a majority vote of the voting carriers. Because of the widely varying needs and membership of the many conferences serving ports of the United States, and because of the detailed studies which should be made . . . before any such decision were reached we think it would be most unwise to legislatively mandate an answer. (S. Rept. No. 860, 87th Cong., 1st sess. at p. 15.)

Thus, far from encouraging unanimity for steamship conferences Congress has expressed doubt as to its worth in the conference system and has left resolution of the question to us to be settled by rule or regulation if we determine it necessary to resolve the issue on an industrywide basis.

The remainder of respondents' argument for approval of the unanimity rule may be summarized as follows: (1) The rule "is merely the procedure" by which the level of commissions is fixed and in the absence of a finding that the particular level is "unreasonably low" or "detrimental to commerce" the "procedure" may not be disapproved; (2) the fact that "the wishes of the majority may be blocked temporarily or in an extreme case even permanently" is not a sufficient reason to disapprove the rule under section 15; (3) our own statements in our previous report in this proceeding lead inevitably to the conclusion that "economic factors entirely beyond the control of respondents" and not the unanimity rule account for the trend away from sea travel, and (4) no other basis exists for disapproval.

ASTA on the other hand contends that the rule has caused detriment to commerce and injury to the public interest; represents an excessive and unwarranted invasion of antitrust principles and, since no justification or need for its continuation has been shown, should be and was properly disapproved. Hearing Counsel in a somewhat similar vein contend that the unanimity rule should be disapproved as contrary to the public interest and detrimental to the commerce of the United States because it has frustrated or delayed all attempts by the majority to raise commission levels, thereby keeping the steamship lines at a competitive disadvantage vis-a-vis the airlines, and because it encourages the travel agents' economic self-interest at the expense of the agents' duty to the public.

While it may be correct in one restricted sense to say that the rule

is "merely the procedure" by which a given maximum level of commissions is fixed, it is entirely incorrect to conclude that the particular level fixed must be found unlawful before the "procedure" itself can be ordered modified. In dealing with the unanimity rule itself we are faced with a consideration as to what degree we will permit the respondents to go in rigidifying or circumscribing the flexibility of their operations under an anticompetitive agreement—a far different substantive determination than one as to whether a given rate, fare, charge, or commission fixed under a particular procedure is itself valid under the law. The former goes to what conditions in furtherance of the purposes and policies of the act we will impose upon the continued enjoyment of antitrust immunity under an approved section 15 agreement. The latter goes to whether or not a given rate, etc., fixed under the procedures we authorize under such an agreement runs counter to the statute's prohibition against rates, etc., which are detrimental to our commerce. The one is not dependent upon the other.

All the record need show is that the rule itself has resulted in activity unlawful under section 15. Indeed the record clearly shows that this rule, as implemented contrary to the considered business judgment of nearly all of the conference members, has worked to the detriment of the commerce of the United States.

As heretofore noted, the booking of sea passage takes three to four times longer than air passage for an agent to handle, consequently, the effective rate of commission on sea travel is much lower than on air passage. The recognition by the member lines of the diversion from sea to air caused by the lower rate of commission on sea bookings has long led the majority of the lines to attempt to solve the diversion problem by trying to increase the levels of commissions paid to their travel agents. As Cunard Line stated in its letter of February 15, 1951, urging an increase in the commission :

Evidence is mounting to confirm our belief that the higher rate of commission paid by the Airlines on Trans-Atlantic bookings is strongly influencing agents toward increasing their business for Air Services, and we feel that the steamship lines can only continue to disregard this fact to their detriment.

The unanimity rule clearly has had an effect inconsistent with the desires of most of the steamship lines to meet the air challenge. The "lack of unanimity" has on several occasions prevented the conference's subcommittee, which has the initial responsibility for commissions, from even reporting the positions of the member lines to the principals, respondents' assertions to the contrary notwithstanding.

The subcommittee minutes for the meeting of October 1951 show that although "there was a majority in favor" of a commission increase,

“it was not possible to reach unanimous agreement,” and the matter was “deferred for consideration at the statutory meeting in March 1952.” Again in June 1952 the subcommittee deferred the matter of commissions “for consideration at the meeting of principals in October 1952.” The subcommittee a third time deferred the matter of agents’ commissions in June 1953.

While it may be true as an abstract proposition that any matter could be placed on the agenda by a member line, and that the matter of commissions was held “always in mind” by the principals, the facts remain that there is no instance in the record of action taken by the principals without strong concurrence by the subcommittee and that the present agents’ commission is below the level advocated by a majority of the conference lines as long ago as March 1950.

If the subcommittee is as unimportant as petitioners claim, one is inclined to question the application of the unanimity rule to its deliberations and the necessity for unanimous accord by its members before any recommendation can be made to the principals. Moreover, it is of no significance that the principals have at times taken positions opposed to those of the subcommittee, for these have been in the nature of a watering down of actions favored by at least a majority of the lines. Nor is it any answer to say that had the lines really wanted to raise the commission they could have eliminated the unanimity rule, because elimination of that rule itself required unanimous vote under the conference agreement.

Respondents’ references to conference consideration of commission levels “in virtually every year covered by the Commission’s investigation” are not impressive. There appear to be few years in which the matter of commissions was in any real sense “considered,” due no doubt to the stultifying effect of the unanimity rule and the necessity for subcommittee approval as a condition precedent to conference action. In fact, the conference minutes indicate only six instances in which the principals considered the problem of commission levels since March 1950: Minutes of meeting March 1951; March 1952; minutes of meeting May 1956; minutes of meeting March 5, 1953; minutes of meeting October 1953; minutes of meeting of May 3, 1960. Moreover, the meeting of October 1953 related to an interpretation of the previously set commission level in reference to prepaid commissions.

The effect of the rule on the deliberations of the principals is thus clearly shown by the many instances in which the rule defeated the subcommittee’s referral of, or prevented it from making recommendations to, the principals on the matter of commission.

Respondents’ contention that “the record fails to show a single example of the unanimity rule frustrating a desire of a majority of the

lines as authoritatively expressed by the principals," is not accurate. The principals' meeting of May 3, 1960, shows such an instance. Moreover, the principals' meeting of February-March 1956, shows a case in which the principals were unable to act because of the action of one line. As has been noted, there is no conference minute on the matter of commissions for this meeting. Determining the effect of the unanimity rule upon actions of the principals, as we pointed out, has been rendered difficult because of the conference's failure to keep complete minutes of its meetings and to file them with us. Votes of the principals were neither taken, recorded, nor filed with the Commission, although the approved agreement of the conference required it to furnish the Commission with full records of its activities.¹⁰ The conference's own failure to keep and provide the requisite records has caused whatever evidentiary sketchiness exists in this proceeding as to the effect of the unanimity rule, and the responsibility for that failure cannot be shifted to the Commission.

The unanimity rule blocked attempts by a majority of the lines to change the general commission level for at least 6 years and the tour commission level for over 2½ years. The general commission level was still below the 7½ percent advocated by a majority of the lines 13 years before 1963, the last year of record in this proceeding. Since the increase to 7 percent in 1956, the record shows several attempts to increase the commission level. The logical inference to be drawn from all of this may well be that the present level of commission is still, because of the unanimity rule, frozen at a level undesired by a majority of the conference members. The fact, however, that the record does not affirmatively show whether or not a majority of the conference members would decide not to raise the commission level is irrelevant. If the rule has been shown to operate to the detriment of the commerce of the United States, to wait until there is evidence that it again operates in that fashion before the rule is outlawed would be to suggest that illegal actions cannot be disapproved once they may have ceased. This reasoning would destroy the purpose of regulation.

The evidence of the blocking of the desires of a majority of the member lines to achieve their goal present in this proceeding is a sufficient reason for declaring the unanimity rule detrimental to the commerce of the United States.

Conference procedures must be reasonably adapted to the goal of conference activity; namely, the voluntary effectuation of the desires

¹⁰ Art. 9(j) of exhibit 2, provides that "copies of all minutes and true and complete memoranda record of all agreed action which is not recorded by minute shall be furnished promptly to the governmental agency charged with the administration of sec. 15 of the U.S. Shipping Act, 1916, * * *

of the member lines in achieving the concerted action which they, within the limits of the law, feel is appropriate. An essential factor in achieving this goal, is, of course, sufficient flexibility under the conference agreement to alter action which the members may have once found desirable but later appears to thwart their desires. At one time 6 percent appeared to the members of the conference to be an appropriate maximum commission level to be paid to their agents. For at least some 6 years, however, this no longer seemed to be the case, so far as a majority of these lines were concerned. The level was finally raised to 7 percent. It was still below the level advocated by a majority of the lines 13 years before and may well be, as noted above, below the level which they now desire.

Outlawing of unanimous voting requirements, because they failed voluntarily to effectuate the desires of the conference members, has often occurred.¹¹ A predecessor of this very Commission had occasion to examine an agreement which contained a unanimous voting requirement which enabled one party to prevent changes in port differentials desired by the other parties. Such effect of the unanimity rule was there said to defeat the purpose of the conference—the carrying out of the voluntary action of its members, “[W]hen a rate or rule is once adopted and one party consistently and selfishly refuses to cast its consenting vote which would remove or change that rule or rate the conference to all intents and purposes ceases to be voluntary.”¹² The agreement, with its unanimity provision, was thus declared unlawful as being “unfair as between carriers” and “detrimental to the commerce of the United States.”

Such results, moreover, have not been limited to situations where the desired freezing effect was caused by a veto. In *Status of Car-loaders and Unloaders*, 2 U.S.M.C. 761, 774 (1946), a voting rule “providing that no change shall be made affecting rates unless agreed to by not less than 75 percent of water carrier members” was declared unlawful as “unfair as between such carriers and other members” and “detrimental to commerce.”

In the instant proceeding evidence exists of both veto usage and blocking of the desires of a strong majority of the member lines for many years. Such results are clearly detrimental to the commerce of the United States as inimical to the very nature of the conference as a voluntary association and unfair as between the majority of carriers

¹¹ We have already observed that a sister agency has had occasion to review the freezing of the rate structure caused by a unanimity rule and has condemned such freezing as “an intolerable situation.” *IATA Conference Resolution*, *supra*, at 645.

¹² *Port Differential Investigation*, 1 U.S.S.B. 61, 72 (1925).

which desired the change and those few who blocked it.¹³ For these reasons the unanimity rule must be declared unlawful under section 15.

There are, moreover, additional reasons why the unanimity rule must be disapproved. The unanimity rule has resulted in maximum level of commissions which places the booking of steamship travel at a competitive disadvantage with airline travel. The record clearly shows, contrary to respondents' contention, it is not economic factors entirely beyond their control that have caused this competitive disadvantage but the unanimity rule itself.

There are two economic factors appearing in the record: (1) The speed and seating capacity of the new jet aircraft which result in reduced travel time and added convenience, extensive advertising by airlines and certain other factors inherent in air travel, and (2) the additional time which must be spent by the travel agent to book sea passage—the record shows that it takes three to four times as long to book sea passage as it does to book air passage. The former is admittedly not the fault of the unanimity rule, but the latter is an "economic factor" which the substantial evidence of record indicates that but for the unanimity rule could have been overcome by respondents themselves. The purely superficial equilibrium between commissions for booking air and sea passage (both now stand 7 percent for point-to-point bookings and 10 percent for tours) would, the record indicates, have been replaced by the majority of conference lines by a higher "percentage level" of commissions for sea passage which, at the very least, would have reduced the disparity in the respective "effective levels" of commissions. And again, the record before us indicates that until this much is done, the economic self-interest of travel agents will serve to foster the definite tendency to sell air passage over sea passage—a situation clearly contrary to the public's interest in the Shipping Act's declared purpose of "encouraging and developing * * * a merchant marine adequate to meet the requirements of the commerce of the United States * * *" with foreign countries. Thus, our responsibility for protecting that interest requires that we not grant continued approval to anticompetitive conduct which tends to reduce the effectiveness of our merchant marine, otherwise we would fail in our duty of "strict administrative surveillance over conferences" to insure: (1) The continued prosperity of that portion of our foreign commerce placed in our charge, and (2) the maintenance of a strong and independent merchant marine. Moreover, the traveling public has

¹³ The fact that the record is unclear as to whether or not the same carriers consistently blocked the desires of the majority is not important. What is important is that there existed a consistent freezing of commissions at a level which was always contrary to the wishes of some majority.

a right when selecting a mode of transportation to deal with an agent as free as possible from any motivation to influence that choice because of economic self-interest in booking air travel. Since the unanimity rule creates the situation which tends to foster airline bookings at the expense of potential steamship bookings it is detrimental to the commerce of the United States within the meaning of section 15.

Significantly, respondents do not here on remand urge a single statutory aim or purpose which is fostered or served by the unanimity rule, nor do they point to a single important public benefit which is secured by the rule.¹⁴

The Court noted in footnote 7 of its opinion, that the Examiner found that in view of the small minority of American-flag lines in the conference, the unanimity rule was "of substantial value to the American-flag lines" preventing "travel agents from playing one line against another." This is apparently so because "when all lines participate in the selection of rates of commission, no line is in a position to say that it is favoring agents more than another." (Initial Decision of Examiner Seaver at p. 40.) Taken at face value this statement is, at best, confusing. It would seem obvious that all lines can "participate in the selection of rates of commission" whether unanimity or a simple majority is required to set the rate. It would seem equally obvious that whether or not unanimity is required, any individual line may, if it chooses to do so, tell an agent that it voted in favor of an increase, thus, indicating that it is "favoring the agents more than another" which presumably voted against the increase. We find this reasoning somewhat less than persuasive, and far short of constituting a showing that the rule is required by some serious transportation need or necessary to secure important public benefits.

The impact of the unanimity rule is clear from the record which shows that since the 7-percent commission level finally adopted in 1956 no further increases were made, at least as of 1963, the last year of record here, and that the level of commissions in that year was lower than that actively sought by the majority of the lines 13 years earlier.

The unanimity rule has prevented a majority of the members of ASPC from raising the levels of travel agents' commission and has periodically worked to freeze commissions at levels which are effectively lower than commissions paid by airlines to travel agents when

¹⁴Nothing demonstrates that the unanimity rule is necessary to preserve or encourage the right of American-flag carriers to take independent action as was the case of unanimity under IATA see pp. 12-13 supra. Indeed, lack of unanimity in IATA leaves the individual carrier free to initiate its own rates (IATA Traffic Conference Resolutions, 6 C.A.B. 639, 645), while under the conference agreement here lack of unanimity serves to freeze the level of commissions and does not permit the individual carrier to initiate its own increases in commissions. Moreover, the rule places the power of potential veto in the hands of each member, six of whom do not even serve American ports.

booking air passage. This disparity in the effective level of commissions for booking air and sea passage fosters a tendency on the part of the travel agent to push the sale of air travel which in turn deprives the undecided traveler of his right to deal with an agent free of any motivation based on economic self-interest. We find this situation detrimental to the waterborne foreign commerce of the United States in that it fosters the decline in travel by sea and contrary to the public interest in the maintenance of a sound and independent merchant marine.

Moreover, from the substantial evidence of record it is reasonable to conclude that but for the unanimity rule the majority of the member lines of ASPC would have increased agents' commissions, and it is reasonable to conclude from the record before us that an increase would have enhanced the competitive position of the steamship lines. Had there been a showing that the rule was required by some serious transportation need, or necessary to secure an important public benefit, or in furtherance of some purpose or policy of the statute, we might have required more before disapproving the rule.¹⁵ But, in view of our responsibilities under section 15, disapproval of the rule is required in order to protect the public interest against an unwarranted invasion of the prohibitions of the antitrust laws, since it has not been shown to be necessary in furtherance of any valid regulatory purpose under the Shipping Act.

Because of its effect noted above, the use of the rule must be outlawed in deliberations by any group having final or recommendatory power over levels of commissions to travel agents. Accordingly, article 6(a) of Agreement No. 7840 must be modified to remove the unanimity requirement, and article 3(d) must be modified to show that it does not apply to any deliberations by recommending or enacting bodies on levels of agents' commissions.

The Tying Rule

Respondents insist that continued approval must be given the tying rule since section 15 will not allow disapproval merely because it "runs counter to antitrust principles" or has not been shown "necessary" to protect respondents from outside competition—the only bases which may be advanced on the record in this proceeding, argue respondents.

The record in this proceeding shows that approximately 99 percent of all Trans-Atlantic steamship passengers are carried by conference lines. In 1960, not an unusual year, approximately 80 percent of all Trans-Atlantic passenger steamship bookings made in this country, other than on cruises, were sold by appointed agents. Both the agents

¹⁵ *Mediterranean Pools Investigation*, supra. See also *Six Carrier Mutual Aid Pact*, supra.

and respondents treat the tying rule as an absolute prohibition against the sale of nonconference passage. The only vessels whose operators are not members of the conference are freighters which can carry a limited number of passengers. These lines, like the conference lines, are dependent upon travel agents for the sale of ocean transportation. Thus, as a consequence of the tying rule, the travel agents have been prevented from performing their function of selling ocean transportation, passengers have been denied the services of travel agents precluded from booking passage upon the means by which they preferred to travel, and the nonconference lines have been denied access to channels which control some 80 percent of all Trans-Atlantic passenger business. The fact that there are conference freighters capable of carrying passengers who wish to travel to Europe is unimportant here.

The important questions here are: should prospective passengers be denied the right to utilize the valuable services of agents in fulfilling their desires to travel on nonconference vessels; should agents be denied the right to book them by the means of their choice, and should nonconference lines be denied the use of agents upon whom they, like the conference lines, must depend for the sale of ocean transportation. The answer to these questions must be no.

Respondents admit that the purpose of the tying rule is to eliminate outside competition, and that purpose has obviously been achieved.¹⁶ Whether or not the rule resulted in reducing nonconference competition to its present minimal amount, it is plain that it keeps it there. The tying rule imposes restraints upon three groups not parties to the conference agreement, the agents, the nonconference carriers, and the traveling public. The record here demonstrates that these restraints have operated against the best interests of all three of these groups. Once this was shown, it was incumbent upon the conferences to bring forth such facts as would demonstrate that the tying rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.

No convincing arguments were advanced. Respondents, in the light of their almost complete monopolization of the trade, could hardly make the claim that the rule is necessary to protect the conference from outside competition, and has in fact admitted that it is not.

¹⁶ The Supreme Court has indicated that restraints on third parties are to be viewed with extreme distrust. It has been held that the "Freedom allowed conference members to agree upon terms of competition subject to Board approval is limited to the freedom to agree upon terms regulating competition among themselves," * * * and that "Congress struck the balance by allowing conference arrangements passing muster under 15, 16, and 17 limiting competition among the conference members while flatly outlawing conference practices designed to destroy the competition of independent carriers." *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 491 492-3 (1958).

The conference, accordingly, attempts to justify the tying rule by stating that it is necessary to maintain conference stability. In contrast to this bold assertion, however, the Caribbean cruise trade operates efficiently without either rule or conference. While conditions in the Caribbean cruise trade may indeed be somewhat different, the absence of both conference and rule therein is enough to show that neither is self-evidently necessary for trade stability.

Respondents finally point to the services performed for the agents as cause for continued approval of the rule. Although it is true that the conference does perform services for the agents through its bonding and other selective activities, these services are paid for by the agents through annual fees. Any additional promotional services performed by lines are made on a line-by-line basis and ordinarily require matching contributions by the agents. In light of the facts that many of these services are performed on an individual-line basis, rather than as a conference activity, the services are paid for by the agents, and the agents are not the lines' employees but deal at arm's length with them, as well as the airlines, the conference, although entitled to exercise some control over agents' activities, has made no showing that it is entitled to maintain a complete foreclosure over agents' services for nonconference lines.¹⁷

The tying rule of the TAPSC operates to the detriment of three relevant portions of the commerce of the United States, inasmuch as it is an unjustified restraint upon the activities of travel agents which prevents them from selling ocean transportation. It is detrimental to the interest of the agents, one part of our commerce, because it denies them the right to book passengers who desire to travel by non-conference vessels by the means they desire and thus live up to their duty as agents. It is detrimental to the interests of the nonconference carriers, another part of our commerce, because it denies them the use of agents upon whom, they, like the conference lines, must depend for the sale of ocean transportation. Lastly, it is detrimental to the interests of the traveling public, still another part of our commerce, in that it denies prospective passengers the right to utilize the valuable services of agents in fulfilling their desires to travel on nonconference vessels. Nothing has been brought forward which, in spite of these detrimental consequences, could justify the rule. Therefore, it must be disapproved under section 15 as operating to the detriment of the commerce of the United States.

¹⁷ Of interest in this regard is the recommendation of the Antitrust Subcommittee of the House Judiciary Committee appearing at p. 388 of the "Celler report," "The Federal Maritime Commission should prohibit conferences from regulating the activities of agents. Passenger conferences should not be permitted by the Commission to regulate the business activities of their ticket agents.

Additionally, the tying rule is unjustly discriminatory as between carriers, within the meaning of section 15.

In *Pacific Coast European Conf.—Payment of Brokerage*, 5 F.M.B. 225 (1957), our predecessor, the Federal Maritime Board, declared unlawful, under section 15 of the Shipping Act as “unjustly discriminatory as between carriers” a provision which had the effect of prohibiting payment of “brokerage” by conference lines to any forwarder-broker who served nonconference lines. The nonconference lines depended upon the forwarder-brokers for the majority of their cargoes, and the conference lines carried most of the cargo in the trade. The purpose of the prohibition was admitted to be the reduction or elimination of nonconference competition. The Board concluded that the provision in question “would foreclose a nonconference line from obtaining cargoes through forwarders in this trade, and shippers who desire to ship nonconference in this trade would be deprived of the services of freight forwarders.” It therefore found the provision to be prima facie unjustly discriminatory as between carriers and shippers and struck it down as it found nothing in the record which would justify it.

Here the admitted intent of the tying rule is to eliminate nonconference competition. Agents have lost prospective bookings because the tying rule prevented them from making nonconference bookings desired by the traveling public. And nonconference lines have been denied even access to channels controlling 80 percent of the business. We think the reasoning in the *Pacific Coast* case is persuasive, and we find the tying rule to be unjustly discriminatory as between carriers. It requires disapproval under section 15.

Finally, the tying rule is contrary to the public interest because it invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the regulatory statute and there has been no showing that the rule is required by a serious transportation need or is necessary to secure important public benefits.

On the basis of the foregoing we conclude that the unanimity rule and the tying rule are detrimental to the commerce of the United States and contrary to the public interest, that the unanimity rule is unfair as between carriers, and that the tying rule is unjustly discriminatory as between carriers, within the meaning of section 15, and both rules should be disapproved under that section.

An appropriate order will be entered.

VICE CHAIRMAN JOHN S. PATTERSON, dissenting:

INTRODUCTION

The Commission has been directed by the U.S. Court of Appeals for the District of Columbia Circuit either to make supporting findings which adequately sustain the ultimate findings that the unanimity rule and the tying rule in an agreement of a conference of common carriers by water operate to the detriment of the commerce of the United States, or, if no such finding can be made on the record, approve the agreement containing these two rules.

The majority's report responds to the Court's order by deciding that the direction to make supporting findings does not require supporting facts, but permits supporting rationalizations which expand and clarify a "perhaps too brief discussion" and even "disagreeing with the Court where * * * our own experience and best judgment dictate."

Two introductory comments are needed. *First*, I believe that findings have always been understood to refer to the end product of looking over, locating, or finding and then assembling in summary form particular facts thought to be most relevant from a record of miscellaneous verbal testimony and written information collected by an Examiner in an agency proceeding.¹⁸ In a way our task is very simple once the facts are assembled. All we have to do is marshal the facts into findings and then show how the findings conform to or vary from what the statute requires by means of reasoning that will appeal to everyone, including the Courts, as convincing. I doubt if the Court of Appeals expected anything more complicated than this, and certainly not substitution of a long discussion for a "perhaps too brief" one. *Second*, my reading of Judge Washington's opinion on behalf of the Court of Appeals discloses nothing with which to agree or disagree, contrary to the majority's assumption. We are not required to argue with the Court of Appeals, but only to state our own case as reasonably as possible. The judge simply gave examples to illustrate why he had concluded that statutory requirements had not been linked with asserted facts and expressed the difficulties he was having in understanding the report, and then gave us the opportunity to remove his doubts by findings based on facts, not arguments.

The majority presents, in the name of facts, conjecture and opinion taken from the record (e.g., "the considered business judgment of nearly all the conference members"). Conjecture and opinion do not become fact by being asserted by witnesses or by attorneys and recorded in docketed papers. I might agree that fostering a tendency as shown

¹⁸ *Morgan v. United States*, 298 U.S. 468, 480 (1936). Possibly informed speculations in rate cases and established rules of law or ethics are acceptable as facts, but there is no need here for this type of finding.

by the record is possible, and that preventing of changes has occurred. I do not agree there are record facts to sustain the ultimate finding there is discrimination between carriers, or the public interest suffers, or there is detriment to commerce just because selfish tendencies are fostered or water carriers have lost sales and the prevented changes are the real causes. If there are any facts in the 2,618 pages of transcript and 141 exhibits, of the type I consider needed to connect the rules with the selfishness and the losses and with discrimination or detriments to commerce or contrariety with public interest, such facts have escaped my review. I do not agree that the alleged harm to some elements of commerce, without more evidence, is a detriment to commerce, nor that such harm is automatically against the public interest.

By my dissent in our first review of this proceeding, I concluded on the record before me that approval should be given, pursuant to section 15 of the Shipping Act, 1916, as amended (Act), to the carriers' agreements containing the unanimity voting rule in connection with regulating the level of travel agents' commissions and the rule requiring agency contracts to contain an obligation to sell only passenger tickets issued by the conference carriers and prohibiting sale of passenger tickets issued by competing carriers.

The reasons for my renewed dissent are :

1. Instead of making supporting findings of factual evidence from the record, the majority has only developed supporting rationalizations based on conjecture and opinion. In my opinion, the Court's instructions have not been complied with.
2. The rationalizations do not supply the evidence and reasoning needed to relate record information to nonconformity with standards of disapproval of agreements in the second paragraph of section 15 of the act.

DISCUSSION

1. Lack of evidentiary findings.

There is just as much lack of evidence now as when we made the decision in the same Docket No. 873, reported in 7 FMC 737 (1964): There is still no proof in the form of evidence summarized in findings that the agreements may be found—

- (a) to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors;
- (b) to operate to the detriment of the commerce of the United States;
- (c) to be contrary to the public interest; or
- (d) to be in violation of the act.

It has been conceded the reopened proceeding was limited to the filing of briefs and oral argument by the parties: i.e., no new evidence was gathered by the Examiner. As a result of examining the old papers and listening to new arguments, the majority has developed a new rationale.

2. The rationale of the majority, as I interpret it, is as follows:

a. The unanimity rule has prevented changed commission percentages and "such results are clearly detrimental to the commerce of the United States as inimical to the very nature of the conference as a voluntary association and unfair as between the majority of carriers which desired the change and those few who blocked it."

b. The unanimity rule has resulted in a level of commissions "which places the booking of steamship travel at a competitive disadvantage with airline travel" and the record shows the rule, not economic factors, cause the disadvantage.

c. Until commission levels are raised "the economic self-interest of travel agents will serve to foster the definite tendency to sell air passage over sea passage" contrary to the public's interest of encouraging and developing the merchant marine.

d. The tying rule is detrimental to commerce and contrary to public interest because it prevents: (1) Travel agents from performing their function of selling ocean transportation; (2) passengers from obtaining services of agents if the agents are precluded from booking passage by the passengers' preferred means of travel; and (3) nonconference carriers from having access to "channels which control some 80 percent of all Trans-Atlantic passenger business." Harm to the three elements of commerce is equivalent to detriment to foreign commerce and against public interest.

The rationalizations of the majority are justified by what are thought to be the results in relation to the four section 15 tests referred to by the Court of Appeals. The resulting rules may be plausible and reasonable as stated and abstractly considered might be very good policy, but they achieve the status of an order changing respondents' rights only if they are associated with facts showing the results really will occur. If the rules prohibiting unanimity or tying obligations are intended, section 4 of the Administrative Procedure Act must be followed. Reference is made to my dissent in this same docket for my arguments indicating the claimed results are by no means certain and may be just the opposite of what is claimed.

Summarized, my arguments were that:

1. The unanimity rule controlling commissions resulted in no proven detriment to commerce because: (a) Passenger diversion may have other causes, and (b) the percentage levels are only a transitory economic factor subject to competitive change by airlines.

2. The tying rule resulted in no proven detriment to commerce caused by lack of competitive necessity for the rule evidenced by either: (a) Denial of competing services of nonconference carriers, or (b) harmful effects on other carriers or (c) restraint on travel agents in violation of antitrust principles.

3. I agreed that certain rules concerning prior approval of business decisions of travel agents were against public policy.

There was no doubt in my mind that the unanimity and tying rules had prevented changes and had prevented certain ticket-selling services, but this result only showed the rules had been successful in doing what they were intended to do, not that they were unlawful by virtue of the mere fact of success. I might have been wrong. Judge Washington's speculations and examples may be wrong too. The different viewpoints must be resolved with more facts, not longer discussion. I don't want to rely on my own experience or best judgment unless supported by basic facts. I need the facts and must weigh them before I can rely on my own experience in solving a problem with which I have never before been confronted.

Certainly no one should, nor do I, expect a reviewing court to sustain my reasoning and ultimate conclusions without supporting facts just because as a presidentially appointed Commissioner, contributing competence and expertise in the carrying out of my duties, I say new standards of conduct are proper and that rules embodying those standards shall be applied to invalidate the agreement provisions, based solely on the dictates of my own experience and judgment, supported only by conjecture and opinion from a record.

I hold that record deficiencies may not be replaced by such conjecture-supported findings as the unanimity rule is a detriment to commerce because it is effective in preventing increased commissions. What is needed, but totally lacking, in this particular case is record support sufficient to make findings of fact which show how the conference's rule blocking or preventing change in commission percentages is incompatible with prohibitions against detriments to commerce as a result of specified facts rather than opinions, speculations, or conjecture substantiated by a rationalizing process. The Commission may not rely merely on "the evidence of the blocking of the desires of a

majority of the member lines to achieve their goal present in this proceeding" without intervening factual detail as sufficient reason for the flat conclusion that the unanimity rule is "detrimental to the commerce of the United States." A court has recently condemned this sort of reasoning. *U.S. Atlantic & Gulf/Australia New Zealand Conference v. FMC and USA*, 364 F. 2d 696 (1966).

The deficiencies in using a rationalizing process to meet the requirements of the U.S. Court of Appeals for the District of Columbia on remand are the same as those pointed out to the Securities and Exchange Commission (SEC) on remand by this same Court of Appeals in *Chenery Corp. v. Securities and Exchange Commission*, 80 U.S. App. D.C. 365, 154 F. 2d 6 (1946); reversed, *Securities Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947). The issues were also before the Court of Appeals for the second time. An order holding certain financial transactions unlawful and approving a plan of reorganization of a holding company had been issued by the Commission. On petition for review the Court of Appeals held the order invalid, 75 U.S. App. D.C. 374, 128 F. 2d 303 (1942). On appeal the Supreme Court subsequently held as the Court of Appeals had held "that the Commission's order on this record could not be sustained" for want of supporting facts showing public harm and directed the Court "to remand the case to the Commission for further proceedings not inconsistent with its opinion" (*id.*, p. 8), *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943). This action is what happened here except for the Supreme Court appeal. On rehearing before the Commission no new or additional evidence was adduced. The SEC reexamined the problem, recast its rationale, reached the same result, and likewise reaffirmed its former order. The case again was appealed and the same Court of Appeals stated, referring to its prior review, and with exact relevance here, "we had then as we have now a case in which there is not one jot or tittle of evidence tending to contradict petitioner's declared purpose * * *". If the majority's report is subjected to another review, the Court will have the same problem described by Justice Groner as follows in reversing the order a second time:

"Certainly, a reasoned conclusion must be based on evidence, and may not be pitched alone on unresolved doubts, nor upon weaknesses or selfishness which the Commission believes is inherent in human nature. The construction advanced by the Commission would permit it to exercise a power of disapproval free of judicial review, and the notice and hearing required by the statute would become an empty form. The Commission, free of the inhibitions imposed by the particular facts, would be left to roam the widest possible area of authority influenced and impelled only by its own doubts.

“Thus considered, it is apparent that the Commission has made its present order without reliance upon such evidence or findings as would warrant our affirmation.

* * * * *

“In laying down, as it does, a rule of fiat unassociated with the facts in this case, the Commission has strayed from the course laid out and charted by the opinion of the Supreme Court, and accordingly we must refuse to give it effect.” 154 F. 2d 6 (1946) at p. 11.

The *Chenery* case was decided before the enactment of the Administrative Procedure Act on June 11, 1946, and we now have the latter act defining even more precisely our decision-making responsibilities and separating our adjudication and rulemaking procedures.

The rationalizing problems and the rulemaking effect were the same as here—

- (1) no new evidence,
- (2) unresolved doubts,
- (3) human weakness and selfishness is relied on in the new rationale,
- (4) there is no showing how the conduct would be detrimental to public interest, and
- (5) There is a laying down of rules of fiat unassociated with the facts in this case.

The Supreme Court reversed the Court of Appeals, but did not invalidate these five elements of deficiency. The Supreme Court decided there were facts showing violation of fiduciary obligations through purchase of company securities by management during reorganization sufficient to sustain the order. The character of the conflicting interests, created by the program of stock purchases while plans for reorganization of a large-multistate utility system were under consideration, was thought to influence adversely accomplishment of the objectives of the Public Utility Holding Company Act of 1935, where control by management whose influence “permeated down to the lowest tier of operating companies” was present. Conflict of interest as an ethical principle was used as a basis of decision. Ethical principles are frequently based on philosophy and become accepted through changes in public attitudes. Consequently, the principles are not susceptible of proof by evidence usually gathered in agency adjudications. The SEC used such principles as findings to support its conclusions, so the Supreme Court was probably justified in not going behind the SEC reasoning and insisting on evidence in this particular instance. The Supreme Court found the deficiencies of the first SEC decision had been overcome. What we have to overcome by adverse facts is a long history of operations under the conferences’ unanimity and tying rules

without complaint of harm to carriers or disadvantage to the public. We may not rely on ethical considerations. We have to show with new facts how times have changed.

The standards of the Court of Appeals are still valid, and the majority's report does not accomplish what the SEC report accomplished when it substantiated its order using the presence of conflict of interest.

The deficiency tests apply as follows :

(1) The lack of new evidence is admitted.

(2) When we say ocean carriers are at a competitive disadvantage because of commission levels or the public has a right to deal with agents free of motivation to influence choice of air or water carriers, we have only begun the analyzing process. The propositions only point the way to further inquiry to remove doubts. Unresolved are the questions of what carriers have been harmed by airline competition caused by passenger agent activity and how badly, and whether commission levels are the real cause of harm. Reference was made to congressional "doubt" about how to proceed. The majority refers to a lack of evidence "that a specific traveler has been persuaded to air travel against his desires or to his disadvantage." What influence does changing passenger preference have on the disadvantage rather than competition? Have any travel agents disclosed a motivation to disfavor water carriers? What are the consequences of any deviation from the agents' duties to their water carrier principals by such motives? The real objection was said to be the "disparity in the effective level of commissions." This objection means the issue is neither the rule nor how the level got where it is. The rule may just as easily increase the disparity, and if the rule diminishes the disparity what proof is there the airlines won't retaliate with higher commissions? What effect do all these potential shifts have? The question is asked whether "prospective passengers should be denied the right to utilize the valuable services of agents in fulfilling their desires to travel on nonconference vessels" and is answered "no" as though the answer is so obvious as to prove all that is necessary. The question should be whether the denial of the right to utilize the valuable services of agents to fulfill desires to travel on nonconference vessels is a detriment to commerce or contrary to public interest. We need facts to find out and to resolve doubts, and not just a "yes" or "no" answer.

Offsetting the claimed denial of rights of agents to serve and the traveling public to receive is a claim by the carriers to full loyalty of

agents to the carriers as principals without conflicting interests to serve competitors. Where is the balance to be struck? Until we have more facts to show a direct relation between voting and between exclusive agency and detriments to commerce, we ought not to use speculation and personal or fictitious experience or "yes" or "no" answers to alter respondents' rights to managerial control over their business assured by the unanimity and exclusive-agency rules. Speculations and personal or fictitious experience do not resolve doubts by being asserted in the name of our own experience and best judgment.

(3) Human weakness and selfishness appear in the form of an attribution of "the economic self-interest of travel agents" to "foster the definite tendency to sell air passage over sea passage." There is no proof, but only the assumption based on personal experience about human greed and a desire to protect people from avaricious influences.

(4) An explanation of how conduct is related to detriments to commerce is not supplied by the speculative results said to have constituted detriments. In place of explanation, we have a statement that it is "clearly contrary to the public's interest" in the purpose of the act to develop the merchant marine to let anything "foster the definite tendency to sell air passage", but we are not told how this result is achieved. It has to be assumed that anything that helps airlines hurts the merchant marine, but for all I know it may be a part of the public's interest not to hurt airlines by helping the merchant marine. Neither one interest or the other is to be protected or harmed as far as the public is concerned. The same tendency to "foster" is also said to be "detrimental to the commerce", but it is equally vague as to why detriment to commerce is linked with either the airlines or the merchant marine. Other reasons for a lack of connection to public interest and detriments are discussed in items (2) and (3) above.

(5) At least four rules have been laid down unassociated with facts as a result of the majority's reasoning. Item 2c, for example, refers to the public's right to deal with an agent free from motivation to influence choices. It is to be concluded from the majority's rhetoric that the public's right to freedom from motivations influencing choices will be examined into and the "right" is a matter of general applicability and future effect. For the present proceeding, however, there are no facts proving the assumed motivation, nor its effect on travelers' rights to choose. This statement and items 2 a, b, and d, if they won't stand up as findings supported by facts, require proof and public comment if they are to become rules instead.

CONCLUSION

In conclusion, I find it extraordinarily difficult to reason from this record now after the Court's remand as I did before it was remanded, without more facts. I conclude that the record lacks the facts from which the findings could be formulated in order to determine if the findings support the conclusions advanced by the majority opinion. Lacking the needed facts, I hold the conclusions expressed by the majority to be in error.

The public, reading our respective reports and struggling to understand what we have done with this record in deciding why a conference of carriers should have adopted an agreement requiring a unanimous vote before any change is made in the commissions each carrier must allow to be taken out of the price of a passenger ticket, or requiring an agent to represent his principal only and not a competitor, might well wish we would say either a lot more or a little less. A lot more might supply facts from the record showing exactly how such agreements discriminate or harm the public or commerce. A lot less would be a relief if all that is really possible is a statement of position or of ethical principles. But no one is to be spared and the public is to get a restated rationalization of a position in the form of an unneeded justification based on personal experience rather than on a record.

Since the proceeding is before us on remand by a court and will very likely go back again, the majority might at least have been alert about abstracting some facts which bolster a position, facilitate judicial review, and improve chances of success in litigation. But when all that is done is to offer a statement of why the agreements are bad for the public because of uncontroverted principles about our general powers and responsibilities under section 15, speculations about competition between airlines and water carriers in relation to the decline in ocean travel, unproven motives and assumed rights of passengers to buy tickets of competing principals from an agent of both, the task of meeting the Court's requirements and hence obtaining court support of our reasons inducing understanding is made difficult indeed. One would expect more facts enabling a decision without the strain of complete reliance on personally perceived intangibles to tell us whether the decision is the right one or the wrong one.

If for no other reason than that section 15 of the Act authorizes the Commission to disapprove agreements only if any of the four conditions exist in fact and "shall approve all other agreements", the agreements before us should be approved.

I conclude—

1. That findings of fact supporting: (a) Discrimination and unfairness, (b) detriments to commerce, (c) contrariety with public interest, or (d) violation of law required by section 15 of the Act in relation to agreements of the respondents have not been proven and may not be made on the basis of the record in this proceeding, and

2: that the agreements authorizing unanimous approval of commissions to be paid to travel agents and obligating travel agents not to act as agents for competing carriers must be approved.

COMMISSIONER JAMES V. DAY dissenting:

Consonant with the decision of the Court of Appeals this matter has been reviewed for the purpose of making certain findings respecting the illegality of the unanimity and tying rules or, lacking this, to approve them. I would maintain the latter course.

In my opinion the record does not support disapproval. The evidence is lacking. Conjecture is not enough.

With regard to the unanimity rule, I would note that conference agreements are not unfair as between carriers or otherwise detrimental merely because of unanimous vote procedures maintained by the conference in the absence of sufficient evidence concerning the actual results of operations under such voting rules. See *Maatschappij Zeetransport" N. V. (Oranje Line) v. Anchor Line Ltd.*, 5 FMB 713 (1959). The lawfulness of conference voting rules, whether requiring unanimous, two-thirds, three-fourths, or majority approval must be determined on the basis of evidence introduced at a hearing as to their use in practice, and not on the basis of organizational procedure, etc. See *Pacific Coast European Conference Agreement (Agreements Nos. 5200 and 5200-2)*, 3 USMC 11 (1948). The record here is lacking in support of the majority position. Indeed, there is evidence of the value of the longstanding unanimity rule to conference carriers (Examiner's decision at pp. 40 and 65).

There is also evidence that frustration of the desires of a majority of the conference carriers is not the real factor which places the lines at a competitive disadvantage. Other economic factors are the controlling cause (e.g., the speed of airline service itself). Thus, the majority opinion's claim that the agents' commission level fosters a tendency for agents to sell air over sea travel is hardly compelling. Indeed, the proof is lacking that ocean carrier business has been diverted in any real sense because of agent commission levels. Aside from this, one can hardly rest on the assumption that a rule permitting a majority of conference members to raise the sea commission as high as they might

actually decide, would make any real and lasting difference. Any such raising would hardly be expected to correct the cited competitive disadvantage and the possibility is present that air commissions could be raised in return.

With respect to the traveling public, there is likewise inadequate proof that any cognizable rights of prospective travelers were actually violated because of conference agents advocating air travel over sea travel. I am not persuaded that such advocating as may have been done actually resulted in any substantial diversion of people to air against their best interests and judgment. The majority opinion would in this instance attempt to insure the existence of only liner agents who have no proclivities; proclivities which, in this case, would also be adverse to the interests of their principals. As the Examiner noted (Examiner's decision at p. 70) correction of an advocacy of air by ship agents in this instance is better left to the managerial discretion of the ocean carriers in their dealings with their agents.

As regards the tying rule, again, conjecture, inferences, and assumptions cannot here substitute for record proof.

There is inadequate proof that passengers have been denied the use of travel agents in obtaining passage pursuant to their choice. The record shows that 99 percent of all Trans-Atlantic steamship passengers go conference and that the only vessels whose operators are not members of the conference are freighters which can carry a limited number of passengers. The record also indicates that there are both conference and nonconference travel agents. The evidence is not persuasive that the percentage of passengers able and wishing to travel nonconference were significantly injured because of any lack of opportunity to deal with agents (where the passengers preferred not booking passage directly with a particular line).

Neither is the evidence persuasive as to any cognizably harmful effect of the tying rule on nonconference operators. There are nonconference agents. No nonconference carrier intervened in this case to complain against the rule.

Nor is the tying rule unduly restrictive on the agents in my opinion. The record indicates there are some services performed by the carriers for their agents—a justification for restricting agents' services in return.

Further, the carriers believe the tying rule is necessary to protect conference stability. I am not persuaded that the conference assertion of need is invalidated merely by the majority's reference to the Caribbean cruise trade where no conference exists and conditions "may indeed be somewhat different."

The majority assert that the tying rule is unjustly discriminatory as between carriers within the meaning of section 15; citing *Pacific Coast European Conf.—Payment of Brokerage*, 5 F.M.B. 225 (1957). In that case the Maritime Board outlawed a provision (in the absence of justification therefor) which prohibited payment of brokerage by conference lines to any forwarder-broker who served nonconference lines. Of the two nonconference carriers in the trade, one depended upon forwarder-brokers for all cargo and the other for 80 percent of its cargo. Both nonconference carriers appeared in the case. The Board concluded that all forwarder-brokers in the trade would refuse to serve the nonconference lines and these nonconference carriers would be foreclosed from obtaining their cargo through brokers or forwarders. Here, there appear distinctions (e.g., there remain non-conference agents who can serve nonconference carriers and no non-conference carrier has intervened to assert its dependent need of agents now subject to the tying rule).

Finally, and in essence, I am not persuaded that the opinion and reasoning of the majority reveals a sufficient record basis for disapproval of the unanimity or the tying rule as being contrary to the standards of section 15.

10 F.M.C.

FEDERAL MARITIME COMMISSION

No. 873

INVESTIGATION OF PASSENGER STEAMSHIP CONFERENCES REGARDING TRAVEL AGENTS

ORDER

This proceeding having been remanded by the Court of Appeals for the District of Columbia Circuit and briefs and oral argument having been made by the parties, the Commission on this date issued a report in this proceeding which is hereby referred to and incorporated herein by reference.

Therefore, It Is Ordered That:

(1) All provisions of Conference Agreement No. 7840 requiring unanimous accord of the member lines in deliberations by any group having final or recommendatory power over levels of commissions to travel agents, including article 6(a) and article 3(d), be modified to remove the requirement of unanimity in such deliberations; and

(2) Article E(e) of Conference Agreement No. 120 and the rules adopted thereunder prohibiting the member lines' agents from selling, without prior permission, transportation on competitive nonconference lines be eliminated.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

Docket No. 66-27

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE (AGREEMENT 7700)—ESTABLISHMENT OF A RATE STRUCTURE PROVIDING FOR HIGHER RATE LEVELS FOR SERVICE VIA AMERICAN-FLAG VESSELS VERSUS FOREIGN-FLAG VESSELS

Decided July 21, 1966

Two-level rate structure based upon vessel flag not authorized by basic conference agreement (Agreement 7700). Two-level rates stricken from conference tariff and carriage under such rates forbidden prior to approval under section 15, Shipping Act, 1916, of two-level rate structure.

Elmer C. Maddy and William Peter Kosmas for respondents, Persian Gulf Outward Freight Conference and its member lines, Central Gulf Steamship Corp. and Isthmian Lines, Inc.

Donald J. Brunner and Norman D. Kline, Hearing Counsel.

REPORT

BY THE COMMISSION. (John Harlee, *Chairman*; John S. Patterson, *Vice Chairman*; George H. Hearn, *Commissioner*): *

The Commission instituted the subject proceeding by order served April 19, 1966, requiring the Persian Gulf Outward Freight Conference (Agreement 7700) (the Conference) and its member lines to show cause why their two-level rate structure based upon vessel registry should not be declared unlawful and such two-level rates ordered stricken from the Conference's tariff.

STATEMENT OF FACTS

By Agreement No. 7700, approved May 28, 1946, the basic conference agreement of the Persian Gulf Outward Freight Conference, the two members of the Conference, Isthmian Lines, Inc., and Central Gulf Lines, both American flagship lines, derive their authority to act

*Commissioners Ashton C. Barrett and James V. Day did not participate.

and function as a conference in the trade from the U.S. Atlantic and Gulf ports to ports in the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden (but excluding Aden and Karachi).

On March 10, 1966, the Conference filed with the Commission revisions to its Freight Tariff No. 8, F.M.C. No. 1, effective March 11, 1966, affecting the rates on certain specified commodities. The revisions establish for each of the commodities concerned one rate if shipped via U.S.-flag vessel, and another lower rate if shipped via foreign-flag vessel. No commodities have been added or removed from the tariff, no rates have been increased, and there is no requirement that any shipper be signatory to any contract in order to avail itself of the revised rates. As indicated in the Commission's order, the tariff revisions are not an implementation of the Conference's approved dual-rate system.¹

Article 1 of Agreement 7700, which the Conference alleges is the authority for establishing the two-level rate system, provides that:

This agreement covers the establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members of this Conference.²

The show cause order stated the legal basis for the institution of this proceeding as follows:

It appears that the above-quoted language of Agreement No. 7700 (article 1) does not encompass the authority to establish a two-level rate structure which provides for higher rates on cargo transported in American-flag vessels than for cargo transported in foreign-flag vessels and that the establishment of such rates introduces an entire new scheme of ratemaking and discrimination not embodied in the basic agreement requiring specific approval pursuant to section 15 of the Shipping Act, 1916.

The conference has not submitted to the Commission a request for the modification of its organic agreement to specifically set forth therein the authority required to establish and maintain the two-level rate structure at issue pursuant to Section 15, Shipping Act, 1916, which rate structure is being effectuated by the member lines.

Section 15 provides in part that:

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; * * *

¹ This paragraph and the one preceding it have been taken verbatim from respondents' Reply to Order To Show Cause, 2-3, and constitute the entire section captioned Statement of Facts.

² See respondents' Reply to Order To Show Cause, 13-14.

It, therefore, appears that the publication and effectuation of the two-level rate structure herein at issue by the member lines of the Persian Gulf Outward Freight Conference may constitute the carrying out of an unfiled, unapproved agreement in violation of the terms of section 15.

A memorandum of law captioned "Reply to Order To Show Cause" was filed by respondents, and a reply to this "Reply" was filed by Hearing Counsel.³ We have heard oral argument.

POSITIONS OF THE PARTIES

A. The Conference maintains that the show cause form of investigation in this proceeding is unauthorized by the Shipping Act, the Administrative Procedure Act, and the Commission's own rules of practice and procedure and that, even if authorized, it could not terminate in a determination of the unlawfulness of the two-level rate structure, because such structure is authorized by the present terms of Conference Agreement 7700. More specifically, the Conference alleges:

1. The Commission is empowered to issue cease and desist orders, but only upon findings pursuant to full evidentiary hearing. The use of the show cause order in this proceeding is an attempt to declare the system here under investigation unlawful and prohibit its use without providing the required opportunity for hearing and is an unjustified attempt to place the burden of proving the legality of the system upon respondents.

2. Even if the proceeding were properly instituted, the two-level rate system is authorized by the basic Conference agreement and cannot here be declared unlawful. The two-level rate system is a "routine" rate change which does not require Commission approval prior to its effective date. It is similar to a system of project rates which does not require separate Commission approval where the basic Conference agreement has a provision like that for rate establishment in Agreement 7700. The two-level rate system is necessitated because without it the Conference is unable to compete successfully with the 8900 Group (another conference in the same trade operating foreign-flag vessels exclusively) for the carriage of commercial cargo.

B. Hearing Counsel maintain that the show cause form of investigation is justified in this proceeding because the issues raised do not involve any disputed questions of fact, and the subject rate structure is not a routine arrangement and therefore requires additional Com-

³ The Commerce and Industry Association of New York, Inc., intervened but did not otherwise participate in the proceeding.

mission approval before it may be instituted. More specifically, they allege:

1. The show cause proceeding has repeatedly been used by the Commission where, as here, the questions to be resolved involved only issues of law and there was no dispute as to material questions of fact. The use of a show cause order has, moreover, recently been upheld by the Court of Appeals for the Ninth Circuit in a case similar to the instant one in which the Court affirmed the Commission's determination in a show cause proceeding that a port equalization system was unauthorized by general ratemaking provisions in a basic conference agreement. Although the Commission is not empowered to issue cease and desist orders prohibiting the parties from carrying out an approved agreement prior to findings of violations, there is no authority for the proposition that the Commission may not issue such orders prohibiting the carrying out of unapproved agreements, and the Commission has been forbidden to allow dual-rate contracts to go into effect prior to approval.

2. The two-level rate system established by respondents is no more "routine" than port equalization systems, dual-rate contracts, and agreements to prohibit brokerage, all of which the Commission has required to be filed for separate approval under section 15. It may well be that trade factors are such that the system should be granted approval. However, approval of the system is not the question here. An agreement like the one in question cannot be instituted prior to approval, and such approval would require full evidentiary hearing on the merits, especially since the two-level rate system appears to be discriminatory with reference to Government cargoes which must under cargo preference laws move on American-flag vessels.

DISCUSSION AND CONCLUSIONS

The use by the Commission of an order to show cause to resolve the legal question of whether or not a certain type of arrangement is authorized by the wording of an approved conference agreement has been recognized as proper by the courts. *Pacific Coast Port Equalization Rule*, 7 F.M.C. 623 (1963), *aff'd sub nom. American Export & Isbrandtsen L. v. Federal Maritime Com'n*, 334 F. 2d 185 (9th Cir. 1964).⁴

⁴ Respondents attempt to distinguish the order used in the instant case from that used in the *Pacific Coast* case on the ground that the order which forms the basis of this case did not provide for the submission of affidavits of fact. This is a distinction without a difference. The "order to show cause" in this proceeding recited that "[t]he issues raised

It is clear from a reading of section 1 of Agreement 7700 and a review of the applicable case law that the two-level rate system here involved is one which cannot be effectuated prior to separate section 15 approval. Separate section 15 approval has been required by the Commission and its predecessors of arrangements (1) introducing an entirely new scheme of rate combination and discrimination not embodied in the basic agreement (the dual-rate contract);⁵ (2) representing a new course of conduct (prohibition of brokerage on a particular shipment);⁶ (3) providing new means of regulating and controlling competition (port equalization system);⁷ (4) not limited to the pure regulation of intraconference competition;⁸ or (5) constituting an activity the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement.⁹

The effectuation of conduct following under only one of the above criteria would require separate prior section 15 approval. The two-level rate system here involved comes within all five of them. No mention is made in the basic agreement of a system of rates based upon vessel flag; the institution of such new system of rates would, of course, represent a new course of conduct; the conference, moreover, admits that the purpose of the system is "to maximize interconference competition in the trade while at the same time, regulating and minimizing business confusion and intraconference competition";¹⁰ finally, it cannot be contended that a mere reading of article 1 of Agreement 7700, the sole provision under which the conference alleges it has authority to institute the system, indicates that the conference is to be

herein do not involve any disputed issues of fact requiring an evidentiary hearing * * *." Respondents have set forth the material facts on pages 2 and 3 of their reply to the order to show cause. These facts are not in dispute and have been, as noted above, incorporated verbatim into this report. Respondents' contention that the show cause order in this proceeding improperly attempts to shift to them the burden of proof is irrelevant. The doctrine of burden of proof has no application in proceedings in which there are no material facts in dispute. Respondents do request a full evidentiary hearing "to develop the facts relating to whether the two-level rate structure at issue here is employed now, or was recently employed in the foreign commerce of the United States, as well as other facts bearing on the allegedly anticompetitive nature of these tariff revisions and their effect on the foreign commerce of the United States." Such additional facts bearing on the operation or probable operation of a two-level rate system may well be important in a proceeding to determine the approvability of the system. They are, however, irrelevant in the resolution of the only issue involved in this proceeding—the legal question of whether or not the two-level rate system is authorized by approved Agreement 7700.

⁵ *Isbrandtsen Co. v. United States*, 211 F. 2d 51, 56 (D.C. Cir. 1954).

⁶ *American Union Transport v. River Plate & Brazil Confs.*, 5 F.M.B. 216, 221 (1957), *aff'd sub nom. American Union Transport v. United States*, 257 F. 2d 607, 613 (D.C. Cir. 1958).

⁷ *Pacific Coast Port Equalization Rule*, *supra*, at 630.

⁸ *Id.*

⁹ *Joint Agreement-Far East Conf. and Pac. W.B. Conf.*, 8 F.M.C. 553, 558 (1965).

¹⁰ See Respondents' Reply to Order To Show Cause, 24.

empowered to institute any system of two levels of rates for the carriage of the same commodities, much less one based on vessel flag.¹¹

We do not mean to imply that "routine operations relating to current rate charges and other day-to-day transactions between the carriers under conference agreements" need separate approval under section 15. See *Ex Parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). In fact Congress, in enacting Public Law 87-346¹² which amended section 15, specifically stated that "tariff rates, fares, and charges, and classifications, rules and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval * * *."

A review of the legislative history of this provision and the cases construing it, however, indicate that "it is intended absent additional approval to limit conference authority, such as that contained in section 1 of respondents' basic agreement, strictly to the ratemaking authority therein provided for."¹³ As the House Merchant Marine and Fisheries Committee stated in reporting on what eventually became Public Law 87-346: "[W]e construe the purpose of this provision to be that individual rate changes by Conferences need not be approved * * *. The difficulty stems from the fact that in many instances conferences may insert rules and regulations in their tariffs which have the effect of restricting competition in a manner not reasonably to be inferred from the basic agreement."¹⁴

We conclude that the two-level rate system based upon vessel flag is unauthorized by Agreement 7700 and cannot be effectuated prior to Commission approval. Should the Conference wish to effectuate this system, it must submit an agreement embodying it for, and receive, our approval.

The Conference's contention that the Commission cannot issue a

¹¹ Respondents' analogy of their two-level rate system to project rate systems is at best not in point. The proceeding cited by respondents for the analogy, *Fact Finding Investigation No. 8, May 24, 1965, Report of E. Robert Seaver, Investigating Officer*, does not indicate that project rate systems may lawfully be carried out without special section 15 authority. That proceeding is just what its name implies—a factfinding investigation. It is not adjudicatory in nature. It indicates that some conference agreements do not contain separate authorization for project rate systems. It also indicates that the Commission has approved in a docketed proceeding a conference agreement containing a separate provision authorizing project rates. In *the Matter of Agreement No. 6870*, 3 F.M.B. 227 (1950). Project rate systems have never been held by the Commission or its predecessors not to require specific authorization in a section 15 agreement.

¹² 75 Stat. 762, 764.

¹³ *Pacific Coast Port Equalization Rule, supra*, at 632.

¹⁴ H. Rept. 498, 87th Cong., p. 19. Because of this "difficulty," the Committee suggested striking of the words "tariffs of" preceding "rates, fares, and charges." As enacted, in accordance with this recommendation, the provision reads simply "tariff rates, fares, and charges * * *."

cease and desist order and require the two-level rates stricken from the Conference's tariff in this proceeding is without merit. *Trans-Pacific Freight Conference of Japan v. Federal Maritime Board*, 302 F. 2d 875 (D.C. Cir. 1962), relied upon by respondents for support of this position is inapposite. That case merely held that the Commission could not issue cease and desist orders against the implementation of provisions in a conference agreement which had been approved by the Commission and had not thereafter been found to be unlawful. The Court in that very case stated :

In *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 65 (1956), the Board asserted the authority to issue a cease and desist order prohibiting the parties from carrying out an unapproved agreement. We need not express a view as to whether such an order is within the Board's authority. But we note that different considerations might well be involved in such a case. Cf. *Isbrandtsen Co. v. U.S.* 211 F. 2d at 57 (Board not allowed to let dual-rate contract go into effect prior to approval). At 879, footnote 8.

That the power of this Commission to issue cease and desist orders preventing the carrying out of unapproved agreements is a necessary corollary to the requirement that such agreements obtain approval before they may be carried out has been recognized by the Courts.¹⁵

The assertion of such power and the requirement by the Commission pursuant to its exercise that authorizing matter be stricken from a tariff have, moreover, specifically been affirmed in a proceeding instituted by an order to show cause. In *American Export & Isbrandtsen L. v. Federal Maritime Com'n*, *supra*, the Commission was upheld by the Court of Appeals for the Ninth Circuit in requiring the respondent conference in a proceeding instituted by order to show cause to cease and desist from effectuating a port equalization system without specific prior approval and to strike the rule implementing that system from its tariff.

Respondents will be required to cease and desist from carrying out the two-level system here at issue until such time as it may be specifically authorized by an agreement approved by the Commission.

The two-level rates contained in the Conference's tariffs are not in accordance with the presently authorized conference agreement. As only those tariff modifications "in accordance with law" may take effect upon filing, these rates cannot be given effect and must be stricken from the Conference tariff until such time as approval may be obtained for the two-level rate system based upon vessel flag.

An appropriate order will be entered.

¹⁵ See e.g., *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n*, 314 F. 2d 928, 935-936 (9th Cir. 1963) upholding the Commission's issuance of a cease and desist order against the carrying out of modification of neutral body system without prior Commission approval.

FEDERAL MARITIME COMMISSION

Docket No. 66-27

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE (AGREEMENT 7700)—ESTABLISHMENT OF A RATE STRUCTURE PROVIDING FOR HIGHER RATE LEVELS FOR SERVICE VIA AMERICAN-FLAG VESSELS VERSUS FOREIGN-FLAG VESSELS

ORDER

This proceeding having been instituted on order to show cause, the Commission having received memoranda of law and heard oral argument on such order and having pursuant thereto issued on this date a report in this proceeding, which is hereby referred to and incorporated herein by reference,

Therefore, it is ordered, That,

- (1) Respondents Persian Gulf Outward Freight Conference and its member lines, Central Gulf Steamship Corp. and Isthmian Lines, Inc., cease and desist from carrying out prior to Commission approval its two-level system of rates based upon vessel flag; and
- (2) Any and all tariff rates implementing such system be stricken from the Conference tariffs.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 66-42

IN THE MATTER OF THE CARRIAGE OF MILITARY CARGO

Decided August 9, 1966

The Cargo Commitment Contract found not to be a dual-rate contract within the meaning of section 14b of the Shipping Act, 1916.

Item No. 1 of Local Freight Tariff No. 1-Y-FMC-1 of the Pacific Westbound Conference and Agreement 8086 construed not to prohibit certain petitioners from participation in the proposed competitive procurement program of the Military Sea Transport Service, Department of Defense in its present form and coverage.

The requirement that bidding under the proposed procurement program be under seal and "secret" does not constitute an "unjust or unfair device or means within" the first paragraph of section 16.

Warner W. Gardner, Robert T. Basseches and James B. Goodbody for petitioners American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Lines, Inc., States Steamship Co. and Waterman Steamship Corp.

George F. Galland, Robert N. Kharasch, Philip F. Hudock, and J. K. Adams for petitioners States Marine Lines, Inc., Isthmian Lines, Inc., Global Bulk Transport, Inc., Bloomfield Steamship Co.

Richard W. Kurrus for petitioner American Export Lines, Inc., *Wilbur L. Morse, William W. Parker and Howard A. Levy* for the Military Sea Transport Service, Department of Defense.

Donald J. Brunner, Hearing Counsel.

Mitchell W. Rabbino for intervenor Sapphire Steamship Lines, Inc., *Elmer C. Maddy and John Williams* for intervenor Atlantic & Gulf American Flag Berth Operators.

REPORT

BY THE COMMISSION (John Harlee, *Chairman*; Ashton C. Barrett, George H. Hearn, *Commissioners*):*

This proceeding is before us on petitions seeking orders declaring unlawful the proposed competitive procurement program of the Mili-

*Vice Chairman John S. Patterson did not participate.

tary Sea Transportation Service Department of Defense. In all, 12 U.S.-flag steamship lines filed five petitions for declaratory order,¹ and still others intervened.² By order served July 19, 1966, we agreed to hear three of the issues raised in the petitions and declined to entertain the other issues urged therein because they were premature and did not present us with justiciable controversies.³

THE PROPOSED COMPETITIVE PROCUREMENT PROGRAM

On June 16, 1966, the Military Sea Transportation Service (MSTS) issued Request for Proposals No. 100 (RFP 100) containing the terms and conditions under which the Department of Defense proposed to extend its competitive procurement program to ocean transportation. The program is open to U.S.-flag steamship lines only.⁴

Under RFP 100, any line desiring to carry military cargo (offeror) must submit a "basic offer" which is simply a quotation of the rates at which the offeror will carry military cargoes. These rates must be guaranteed for a period of 1 year. The basic offer must be submitted under seal and the offeror certifies that he has reached his bid independently without consultation with or disclosure to any other offeror, or he must certify as to the conditions and circumstances of the consultation or disclosure, if any, has occurred.

Upon analysis of all basic offers, MSTS will enter into Shipping Agreements with the selected offerors.⁵ Shipping Agreements are awarded on the basis of the lowest rates offered, but there does not appear to be any limit to the number of Shipping Agreements which may be awarded on any given trade route. The award of a Shipping

¹ States Marine Lines, Inc., Isthmian Lines, Inc., Global Bulk Transport Inc. and Bloomfield Steamship Co., joint petition filed June 30, 1966; American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Lines, Inc., States Steamship Co. and Waterman Steamship Corp. joint petition filed June 30, 1966; American Export Isbrandtsen Lines, Inc. single petition filed July 11, 1966; Lykes Brothers Steamship Co. single petition filed July 11, 1966; United States Lines Co., single petition filed July 11, 1966.

² Intervenor were: Sapphire Steamship Lines, Inc. and the U.S.-flag lines parties to Atlantic & Gulf American Flag Berth Operators, Agreement No. 8186: Alcoa Steamship Co., Inc.; American Export Isbrandtsen Lines, Inc.; American President Lines, Ltd.; American Union Transport, Inc.; Bloomfield Steamship Co.; Central Gulf Steamship Corp.; Farrell Lines, Inc.; Grace Line Inc.; Great Lakes Bengal Lines, Inc.; Isthmian Lines, Inc.; Lykes Bros. Steamship Co., Inc.; Moore-McCormack Lines, Inc.; Pacific Seafarers, Inc.; Prudential Steamship Corp.; States Marine Lines—Joint Service; United States Lines Co.

³ Our disposition of the various issues raised in the petitions is discussed *infra*.

⁴ Department of Defense Cargo is reserved to U.S.-flag carriers by the Cargo Preference Act, 1904 (10 U.S.C. 2631).

⁵ The Shipping Agreement is the standard contract of MSTS for ocean transportation and is in three parts: Part I, Description of Services; Part II, Standard Maritime Clauses, and Part III, Standard Government Clauses.

Agreement does not constitute the allocation to the selected offeror of any specific amount or portion of the cargo to be shipped in the trade. Actual bookings of cargo under Shipping Agreements are made first with the rate-favorable carrier, provided he offers suitable space and an acceptable schedule of delivery. Failing this, the cargo is booked with the line offering the next highest rate, and so on.

The holder of a Shipping Agreement is "protected from competition" of other common carriers on the route in question including those who hold Shipping Agreements as well as those who do not. Thus, if another holder of a Shipping Agreement reduces his rate, his competitive position vis-a-vis other holders is considered on the basis of the rate originally bid; and, while a carrier new to the trade may be awarded a Shipping Agreement, his service is used only if the original holders on that route cannot provide suitable service; and, finally, lines who either did not bid or were not awarded Shipping Agreements will be used only if the services or capabilities of the holders on the route are inadequate.

Any line which makes a basic offer may also, if it feels that "a firm commitment to ship a minimum volume of cargo on each sailing in order to enable it to offer its best rates, or to establish service on a particular route," submit an alternate offer. Offers based on minimum volume will not be considered unless the line has also submitted a "basic offer." If an alternate offer is accepted, a "Cargo Commitment" is entered into.

Under the Cargo Commitment, the line agrees to furnish space in specified amounts on each of its sailings and the Government agrees to provide a minimum volume of cargo for each sailing. Default on the part of either party results in payment of "dead freight" under the terms and conditions set forth in the contract.⁶

The Government does not contemplate, except possibly for special services that Cargo Commitments will be awarded to exceed 50 percent of the total Government requirement on any given route or that any individual Cargo Commitment will result in the use of more than 50 percent of the space of any single carrier on a given route.

⁶ Article 4b provides: "Should the Government fail to ship cargo to fulfill its commitment on a particular sailing by a deficit of more than five (5) percent of the total cargo required to meet its commitment, it shall pay for the full deficit in its commitment at the rate stated for dead freight in annex A". Similarly, article 4d provides: "To the extent the carrier fails for any reason to make acceptable space available to the Government on a sailing of its ships on the route in an amount required for the Government to meet its requirement to ship cargo, the carrier shall pay the Government for its default at the rate per MT of such deficit as stated in annex A; provided, however, that the carrier shall be excused from its commitment to furnish ship capability to the extent that its default is caused by force majeure including strikes."

When awards are made, either on basic offers or under Cargo Commitments all rates must be filed with the Commission.

THE ISSUES

In the order instituting this proceeding, we declined to consider the lawfulness of the proposed procurement program under sections 14 Fourth, 16 First 17 and 18(b) (5) of the act because the issues raised under those sections were premature and did not present us with justiciable controversies. Certain petitioners view our denial improper, at least insofar as sections 14 Fourth and 16 First of the act are concerned.

The relevant portion of section 14 Fourth makes it unlawful for any common carrier by water to "make any unfair or unjustly discriminatory contract based on volume of freight offered * * *." Since no particular contract for any stated volume of cargo at a fixed rate had, as yet, been made, we declined to speculate on the validity under section 14 Fourth of contracts to be made in the future.

In a similar vein, section 16 First makes it unlawful for a common carrier by water to give any undue or unreasonable preference or advantage to any person, locality, or description of traffic or to subject any person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Here, pointing out that as yet no rates had been fixed under the proposed procurement program, we again declined to speculate as to validity of nonexistent rates under section 16 First.

It is argued, however, that what we were asked was "to determine the legality of the system, and not to measure the precise injury it inflicts." Or, as one petitioner would put it, "we are not, at the moment, complaining about rates but about a practice or device proposed by MST'S in its Request for Proposal No. 100." We are referred to the fact that neither section 14 Fourth nor section 16 First makes specific reference to rates. An analysis of their arguments will clearly reveal their legal insufficiency.

The basic premise upon which the entire argument is grounded is that the Department of Defense through MST'S proposes by the "device" of competitive bidding to reduce ocean transportation rates on military cargo by 25 percent. Thus, we are variously told:

There is no question that the new competitive procurement device is intended to drive common carrier rates for MST'S cargoes to rock-bottom levels or perhaps below. The Department of Defense has boasted widely about the anticipated 25 percent reduction in ocean transportation costs.

* * * * *

The Department of Defense, recognizing the large volume of the MSTS cargoes and their importance to the carriers * * * expects a reduction in MSTS rates of at least 25 percent * * *. It will accept an use the lowest rate, whether or not it is compensatory, and recognizes that this may well result in some lines going out of business.

* * * it must be remembered that the announced purpose of the competitive bidding system is to drive rates down as much as 25 or 30 percent in favor of the world's largest shipper. The disastrous effects of such a rate slash are evident.

The thread of the "25-percent reduction" runs throughout every argument of petitioners. This is their prime concern. It is also the key to their allegations of unlawfulness under the provisions of the Shipping Act cited to us. Thus, the "contract" is an unjust one under section 14 Fourth because the reduction in rates would not be based "upon a recognition that MSTS cargoes, by their volume and their concentrated location, presented different shipping characteristics," but would be the product solely of competitive bidding. Whatever the validity of this latter assumption, it is itself precisely the reason why there can be as yet no determination made under section 14 Fourth. The section doesn't outlaw all contracts based on volume of freight offered; it proscribes only those which are unfair or unjustly discriminatory. But how is such a contract to be unfair or unjustly discriminatory? Obviously, if the advantages offered under it are not based upon transportation factors which are altered by the "volume of freight offered." Here, the Cargo Commitment is sought if the offeror needs a fixed volume to provide his "best rate." By its very terms, the contract in question is geared to a rate. It is on the basis of rates that the contracts, if any, are to be awarded. To argue now that no specific contract, nor any specified volume, nor any fixed rate is needed to declare the Cargo Commitment unlawful is to ignore legal realities * * *. Not even the most strained reading of section 14 Fourth can render unlawful the mere pro forma solicitation by a shipper, no matter how large, of contracts based on volume of freight and this is how petitioners would have us read the section.

It should be equally clear that any consideration of the "system" under section 16 First is just as premature. Again, the "preference" to MSTS is a reduced rate. It is nothing else. And yet again, not all preferences or prejudices are outlawed by that section but only those which are undue or unreasonable. How the undueness or unreasonableness of the rate preference is to be determined until the particular rate is in existence is never made clear nor indeed can it be at this time.

Certain petitioners point out that our order of July 19, 1966, failed to deal specifically with two issues raised in their petitions, i.e. that the competitive bidding system was unlawful (1) because it "violated the policies of the merchant marine statutes," and (2) the Commission "lacked statutory authorization" necessary for the establishment of preferential rates for Government cargo.

While we did not read petitioners' references to "policy" as asserting a "violation," one is now specifically asserted. To the extent that this assertion is divorced from specific allegations of violation of particular substantive provisions of the statutes, we are charged with administering, it should only be necessary to point out that expressions of policy are nothing more than the goals sought to be achieved by Congress in the enactment of the particular substantive provisions of law which the statement accompanies. Standing alone a statement of policy grants no substantive power and prohibits no specific conduct. It is an aid in the construction of the substantive provisions of a statute, and it is not "violated" in the sense that those substantive provisions of a statute are violated. The "policies of the maritime statutes" as an aid in statutory construction, wherever relevant, are discussed in connection with the specific issues dealt with herein. However, some preliminary considerations are necessary to place the "policy" question in its proper perspective.

We are urged not to confuse our determination of the validity of RFP 100 under the Shipping Act with "such foreboding and seemingly omnipresent spectres as the Douglas Committee or a putative policy conflict with the Department of Defense." We need only say that petitioners' "trust" that we would not so confuse our deliberations and determinations was well placed. But we would that petitioners had rendered our tasks less difficult by restricting their arguments to us to particular provisions of the Shipping Act.⁷ In resolving the issues before us, we are told that it is mandatory that we consider the objective of promoting the American Merchant Marine. We are cited to the preamble to the Merchant Marine Act of 1920 (46 U.S.C. 861) which states that it is:

* * * the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of * * * a (privately owned American Merchant Marine) and insofar as it may not be inconsistent with the provisions of the Act, the United States Shipping Board (now the Federal Maritime Com-

⁷ Thus, we are offered arguments such as the program proposes a practice which is "revolutionary and improper deviation from Anglo-American transportation law;" that such a practice has never been sanctioned under the "venerable Interstate Commerce Act;" and that the practice calls for a "diabolical form of Russian roulette," but it is the application of the law only that is germane in our deliberation herein.

mission) keep always in mind this purpose and object as the primary end to be obtained.

"Thus," it is argued, "the objective of promoting and maintaining an adequate and well balanced American Merchant Marine pervades the functions of the Commission under the regulatory provisions of the Shipping Act," and "In considering whether a practice is 'unfair' or 'detrimental to commerce,' the Commission must properly be influenced in its determinations by the resulting effect that such a practice would have on the American Merchant Marine." There is very little in this latter conclusion with which we could disagree. However, a cautionary word or two is called for.

Volumes have been written in the annals of Congress concerning our national shipping policy. The topic is traditionally a favorite one for patriotic addresses throughout the country, yet the interrelationships between the dual elements of our national shipping policy, both promotional and regulatory has never at any time been clearly articulated or well defined. It can only be deduced from a careful and painstaking study of our shipping laws and administrative practices which are neither consistent nor codified.⁸

This national shipping policy which is to be ultimately deduced from a study of the shipping laws and past administrative practices, is a synthesis in which there is found "nothing inconsistent with regulatory policy in U.S. promotional policy." (Cellar Report 25 and 26.) Indeed, "[t]he development and maintenance of a sound maritime industry require that the Federal Government carry out is dual responsibilities for regulation and promotion with equal vigor."⁹ The history of past organizational arrangements for carrying out these dual responsibilities had proved inadequate and the Government's experience under them culminated in Reorganization Plan No. 7. The purpose of the plan was to provide the most appropriate organizational framework for each of the functions—regulatory and promotional—thus:

Regulation would be made the exclusive responsibility of a separate commission organized along the general lines of other regulatory agencies. On the other hand, nonregulatory functions, including the determination and award of subsidies and other promotional and operating activities would be concentrated in the head of the Department of Commerce * * * (House Doc. No. 187, 87th Cong. 1st sess., 1961, p. 2).

This Commission is, of course, the result of Reorganization Plan No. 7, and its responsibilities are exclusively regulatory. We may not "promote." Neither may we "regulate" without regard to the consequences

⁸ Report of the Antitrust Subcommittee of the Committee on the Judiciary, on the Ocean Freight Industry, House of Representatives, 82 Cong. 2d sess. 1962, p. 5 (Celler report).

⁹ Message of the President Transmitting Reorganization Plan No. 7 of 1961, House Doc. No. 187, 87th Cong., 1st sess. 1961, p. 2.

of that regulation on our merchant marine, because the American merchant marine is itself a part of the foreign commerce of the United States and, as such, is entitled to the full protection of the Shipping Act. But the act does not stop with the merchant marine, it extends its protections to shippers and "other persons" subject to its provisions. Just as we must "scrupulously insure that all carriers, regardless of flag, are accorded equal treatment under the laws we administer;"¹⁰ we must be equally scrupulous lest our concern for our merchant marine lead us to a construction of the act which dilutes the protection afforded by it to shippers and "other persons." For, under the act, such persons as shippers, forwarders, terminal operators, and the like, are just as much a part of national maritime industry as are the ships which carry the cargo. The act does not afford degrees of protection based upon differences of identity alone. It is based upon the assumption that adherence to the "rules of the game" will of itself aid in promoting our merchant marine and it is our sole responsibility to insure that these "rules" are observed. With this in mind, we turn to a consideration of the issues at hand.

DISCUSSION AND CONCLUSIONS

The Cargo Commitment Under Section 14b

The petitioners urge that the only type contract lawful under the Shipping Act where a shipper commits himself to "give all or a fixed portion of his patronage" to a particular carrier is one approved by the Commission under section 14b of the act.

Indeed a dual rate contract is nothing but a cargo commitment by a shipper to a carrier or group of carriers. The heart of the definition (of a dual-rate contract) is the commitment by the shipper of a fixed portion of patronage to the carrier. This is done by MSTTS form 4280/2T. (The Cargo Commitment.) It follows that the form is a dual-rate contract.

Thus, would petitioners bring the Cargo Commitment within the purview of section 14b which provides in relevant part:

Notwithstanding any other provisions of this act, on application the Federal Maritime Commission, shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract * * * which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers * * *.

It is by a literal reading and application of this language that petitioners conclude that the Cargo Commitment is a contract covered

¹⁰ *Northern Pan-American Line A/S v. Moore McCormack Lines, Inc.*, 8 FMC 213 at 229 (1964).

by section 14b. We may not, according to petitioners, resort to the legislative history because the language of the statute is clear and unequivocal on its face and the intent of Congress is relevant only to resolve ambiguities. We shall have more to say about this later, but for the moment, we shall restrict ourselves to a literal reading of the statute.

As petitioners point out, the critical language is "all or any fixed portion of his patronage." The Cargo Commitment deals with "minimum amounts." Under RFP 100, no Cargo Commitment would be for "all" of MSTs's "patronage" on a given route. Thus, we have the problem of equating "fixed portion" with "minimum amount." In our view, they are not synonymous.

The "patronage" referred to in section 14b is quite obviously the sum total of the particular merchant's foreign exports. Ideally, the dual-rate contract commits all of these exports to move on conference vessels. The very purpose of the exclusive patronage or dual rate system is to tie to the conference as much of the total export movement in a given trade as possible. In this way, the conference counters competition from the so-called independent or nonconference operator.¹¹ Where the contract calls for "all" of the merchant's patronage, no problem is presented. But what of the "fixed portion" referred to in 14b? How is this to be determined? Petitioners would equate "fixed portion" with "minimum amount." We don't find them synonymous, however.

A portion is "an allotted part" or "a part of the whole."¹² The whole is, of course, everything exported by the merchant in the trade and the "portion" to be "fixed" is a part of that whole. Let us see what happens if we accept petitioners' reading of "fixed portion" as "minimum amount." A merchant agrees to commit to a carrier 1,000 tons of cargo under a contract running for a year. Clearly, this is some "portion" of his patronage, but is it "fixed" within the meaning of the statute? Obviously not. If the merchant exports a total of 2,000 tons over the duration of the contract, the "portion" represented by the 1,000 tons is 50 percent or one-half of his patronage but if the merchant exports 10,000 tons, the "portion" represented by the 1,000 tons committed under the contract is only 10 percent or one-tenth of the whole. Clearly, the 1,000 tons cannot represent any "fixed portion" of the merchants' patronage. However, if the same merchant agrees to give the carrier 50 percent (one-half) or 10 percent (one-tenth) of his patronage, the "portion" remains "fixed" whatever his total exports may be for the

¹¹ See *Federal Maritime Board v. Isbrandtsen Co.*, 354 U.S. 481 (1958).

¹² *Webster's New Collegiate Dictionary*, p. 658.

period of the contract. Thus, it is clear that "fixed portion" does not equate with a specified or "minimum amount" stated in terms of tons, rather as used in section 14b "fixed portion" is synonymous with a percentage or an invariable part of the whole. A consideration of section 14 in its entirety buttresses this conclusion.

Section 14 Fourth makes it unlawful for a common carrier by water to "make any unfair or unjustly discriminatory contract based on volume of freight offered * * *." If every contract calling for a "minimum amount" of volume is a contract for a "fixed portion" and included within 14b, what is the contract which may be made under 14 Fourth?¹³ Are we now to assume that contracts originally unlawful only if "unfair or unjustly discriminatory" must now, because of 14b, be filed for approval and contain provisions concerning such things as the prompt release of the shipper; or who has the legal right to select the carrier with whom the goods are shipped; or diversion of goods from natural routings? And all this without any reference to 14 Fourth in the newly enacted 14b. This is, of course, the way petitioners would have us read the section. If Congress had intended to alter the status of contracts based on volume of freight offered, they certainly would have made such an intention clear. Amendments to statutes are not to be implied. Wherever possible, a statute is to be construed so as to preserve intact all its provisions. If section 14b is read as petitioners urge, then section 14 Fourth would at the very least take on a meaning different than it originally had. That petitioners misread section 14b becomes even clearer when resort is had to the background and legislative history of that section.

In 1958, the Supreme Court in *Federal Maritime Board v. Isbrandtsen Co.*, 354 U.S. 481, struck down the so-called exclusive patronage dual-rate contract of the Japan-Atlantic and Gulf Freight Conference as unlawful under section 14 Third of the Shipping Act.¹⁴ In *Isbrandtsen, supra*, the Board had argued that the contracts in question had to be lawful because the legislative history of the Shipping Act clearly demonstrated that Congress was well aware that

¹³ That the Cargo Commitment is a volume contract would seem beyond dispute. Thus, the Cargo Commitment will be awarded where the contracting officer finds it to be in the best interest to commit the Government "to ship a minimum volume of cargo for a specified number of sailings on a particular route." Thus, if a carrier can offer his best rate if he is guaranteed say a minimum of 500 tons for each of his sailings, he would seek a Cargo Commitment. Here there is no difficulty in equating minimum volume and minimum amount. Thus, contracts calling for a stated volume and contracts calling for a stated amount are but different ways of stating the same thing.

¹⁴ Section 14 Third makes it unlawful for a carrier to "Retalliate against any shipper by refusing or threatening to refuse, space accommodations when such are available or to resort to other discriminating or unfair methods because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reasons."

the use of such contracts as a tying device was widespread in the foreign commerce of the United States and it had not outlawed such contracts even though it had specifically outlawed other tying devices such as the deferred rebate prohibited in section 14 Second. In rejecting this contention, the Court pointed out that the contracts "recognized" by Congress had been described as follows:

Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers, at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity shipped in ample time to allow for the proper supply of tonnage.

The rates are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e. are willing to contract with all shippers on the same terms.

In distinguishing these contracts from the exclusive patronage dual rate contract then before it, the Court said:

These contracts were very similar to ordinary requirements contracts. They obligated all members of the Conference to furnish steamers at regular intervals and at rates effective for a reasonably long period sometimes a year. The shipper was thus assured of the stability of service and rates which were of paramount importance to him. Moreover, a breach of the contract subjected the shipper to ordinary damages.

By contrast, the dual-rate contracts here require the carriers to carry the shipper's cargo only "so far as their regular services are available;" rates are "subject to reasonable increase" within 2 months plus the unexpired portion of the month after notice of the increase is given;" [e]ach Member of the Conference is responsible for its own part only in this Agreement;" the agreement is terminable by either party on three months' notice; and for a breach, the shipper shall pay as liquidated damages to the Carriers fifty (50) per centum of the amount of freight which the shipper would have paid had such shipment been made in a vessel of the Carriers at the Contract rate currently in effect." Until payment of the liquidated damages the shipper is denied the reduced rate, and if he violates the agreement more than once in 12 months, he suffers cancellation of the agreement and denial of another until all liquidated damages have been paid in full.

Almost immediately after the Supreme Court's decision in *Isbrandtsen*, the Congress moved, through "moratorium" or "interim" legislation, to preserve the legality of the dual-rate system until such time as it could enact permanent legislation.¹⁵ In 1961, Congress enacted Public Law 87-346 (75 Stat. 762) which, among other things, added section 14b to the Shipping Act. The connection between *Isbrandtsen* and Public Law 87-346 is too well known to warrant detailing here.¹⁶ A

¹⁵ Public Law 85-626, 85th Cong., S. 2916 (Aug. 12, 1958) amended by Public Law 86-542, 86th Cong. H.R. 10840 (June 29, 1960), further amended by Public Law 87-75, 87th Cong. 32154 (June 30, 1961).

¹⁶ See however, House Report No. 498, 87th Cong. 1st sess., 1961, pp. 3-7 and Senate Report No. 842, 87th Cong. 1st sess., 1961, pp. 1-11.

simple reading of the provisions of 14b makes it patently clear the contract which was to be legal under the Shipping Act "notwithstanding any other provisions of (the) Act,"¹⁷ was the dual-rate contract before the Supreme Court in *Isbrandtsen*. But what of that contract which the Supreme Court had found to be something distinct and different from the dual-rate contract—the contract of which Congress expressly stated its awareness of but did not outlaw—the contract which the Supreme Court found similar to "ordinary requirements contracts." Such contracts had, since 1916, been lawful under section 14 Fourth so long as they were not unfair or unjustly discriminatory. We will not now read section 14b as altering the longstanding status of these contracts.

Just as it is clear that section 14b deals with the dual-rate or exclusive-patronage contracts, it would seem equally clear that the Cargo Commitment is just that kind of contract which the Supreme Court found similar to an ordinary requirements contract. Thus, it obligates the carrier to furnish steamers (a specified amount of space) at regular intervals (by sailing) and at rates effective for a reasonably long period, sometimes a year (the specified period in the Cargo Commitment is 1 year). We conclude that the Cargo Commitment is not an exclusive patronage or dual rate contract the use of which is to be permitted subject to the provisions of section 14b but is a contract "based on volume of freight offered" within the meaning of section 14 Fourth. Whether a particular Cargo Commitment is unfair or unjustly discriminatory and thus unlawful under 14 Fourth is, as we have already pointed out, dependent upon such things as the particular amount of cargo committed and the specific rate fixed under it.

What we have thus far said is, of course, in no way concerned with any special status of the Government as a shipper under the act and would apply to all shippers. Petitioners, however, make much of the absence from the Shipping Act of any express provision in the act for reduced rates to the Government. Although, petitioners' contentions are made in the context of their arguments under section 14b, they entail much more as we read them. Petitioners point out that in 1961, the Comptroller General, in letters to the House Merchant Marine and Fisheries Committee and the Senate Committee on Commerce, urged inclusion in the legislation enacting 14b of a provision similar to section 6 of the Intercoastal Shipping Act, 1933.¹⁸ At one point, the

¹⁷ For the full text of sec. 14b, see appendix.

¹⁸ Actually, the requested provision would have added to the present tariff filing requirements now in section 18(b) a proviso to appear in subsection (3) thereof stating:

"Provided that nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State or municipal governments, or for charitable purposes."

Senate Committee acceded to the request and added the reduced rate provision, but this was deleted without explanation from the final act as passed. (See Index to the Legislative History Senate Doc. No. 100, 87th Cong. 1st sess. p. 218.)

Petitioners' argument, reduced to its essentials, is: no exemption, no reduced rates to the Government. In his letters, the Comptroller General cited *United States v. Associated Air Transport*, 275 F. 2d 837 (C.A. 5, 1950); and *Slick Airways v. United States*, 292 F. 2d 515 (Ct. Cl. 1951), and it is upon these cases that petitioners rely.

The *Slick* and *Associated* cases both involved the proper charges to be imposed for services already performed. The issue in both cases was the applicability of the carriers' already published and filed tariff rates to the particular services rendered. In each case, the Court's decision rested upon the simple proposition that the filed tariff rate alone governed the dispute. Thus, in the *Associated* case, the Court refused to consider "contracts or agreements or understandings or promises" which had not been filed with the Civil Aeronautics Board declaring "The tariffs are both conclusive and exclusive" (275 F. 2d at 827). Again in *Slick*, the Court of Claims held that the rate specified in a contract was superseded by a new rate when the new rate was properly filed with the Civil Aeronautics Board, stating, "The tariff must control in the event of an inconsistency between it and the contract of carriage" (292 F. 2d at 519). Neither case denied the right of the Government to reduced rate transportation when the reduced rate was properly filed and a part of the published tariff of the carrier; thus:

* * * under the Civil Aeronautics Act, the Government had the right to reduced rates only pursuant to tariffs lawfully published and filed by a carrier under section 403 of the Act. *Slick, supra* at 518.

Here there can be no question of a conflict between the tariff rate and actual rate paid by the Government. Under RFP 100 itself, all rates agreed upon are to be published and filed with the Commission under section 18(b) of the act. The authorities of the petitioners are not relevant to the issue here.¹⁹

¹⁹ At common law, the sovereign was, of course, entitled to reduced rate transportation, and any statute which would tend to restrain or diminish the sovereign's powers, rights, or interest is not binding unless the sovereign is named therein. *Emergency Fleet Corporation v. Western Union*, 275 U.S. 415 (1927). Thus, it would seem that any denial of reduced rate transportation to the Government would have to be based on express statutory language. See also *Guaranty Co. v. Title Guaranty Co.*, 224 U.S. 152 (1912); *United States v. California*, 297 U.S. 175 (1936); *Guaranty Trust Co. v. U.S.*, 304 U.S. 126 (1938); *Public Utilities Commission of California v. U.S.*, 335 U.S. 543 (1958); and *Paul v. U.S.* 371 U.S. 245 (1963).

¹⁰ F.M.C.

Petitioners' contentions are based upon the assumption that unless the Government is some type of preferred status shipper under the act, it is a "shipper" within the meaning of section 14b and thus the Cargo Commitment is a dual-rate contract. The legislative history makes it clear to us, that shipper and consignee as used in section 14b have a distinct and somewhat limited frame of reference.

In the so-called interim or moratorium legislation by which Congress preserved the legality of the dual-rate system until the enactment of Public Law 87-346, (see note 15, *supra*), the term "merchant" is used throughout.²⁰ Even the most cursory examination of section 14b itself reveals the "commercial" nature of the problems dealt with therein. For example, section 14b(2) provides that a rate, insofar as it is under the control of the carrier must remain in effect for at least 90 days. This was the period uniformly urged by exporters as necessary to their doing business abroad. Section 14b(3) deals with the legal right of the contract shipper to select the vessel. Here again, sale and purchase are involved, and the provision relieves the shipper from liability under the dual rate contract when the terms of sale vest the right to select the vessel in the purchaser or consignee.

Hearing Counsel, MSTS, and intervenor Sapphire Steamship Lines, Inc., all urge that Congress could not have intended that so large a part of the total carriage of the American-flag lines²¹ be the subject of section 14b without extensive hearings on the matter. These parties were able to unearth only a single reference to military cargo—a letter from the Secretary of the Navy in which he declined to comment on a predecessor bill of Public Law 87-346 because it "would have no effect on Department of Defense shipments and appears to be of primary importance to the Department of Commerce."²²

Moreover, that the industry has long viewed the dual-rate system as a purely "commercial" tying device would appear from the historical treatment of "project rates." The Report of the Investigating Officer in Fact Finding Investigation No. 8—*Project Rates and Related*

²⁰ Indeed in our original rules dealing with the dual-rate system under 14b, we expressed our understanding of the intent of Congress when we termed the contract provided for a "Uniform Merchants Rate Agreement," and used the term "merchant" throughout. In addition, the uniform agreement expressly provided in article 7(b) that "goods not intended for commercial or industrial use" shipped by governments or charitable institutions could take rates "lower than contract rates" and not constitute a violation of the agreement so long as those rates were filed with the Commission.

²¹ Sapphire points out MSTS cargo amounted to \$282.6 million out of a total of \$646.8 million of earnings for the U.S.-flag merchant marine in 1964. See the Impact of Government Generated Cargo on the U.S. Flag Foreign Trade Fleet for Calendar Year 1964, Office of Program Planning Maritime Administration, Department of Commerce, October 1965, published by the Joint Economic Committee, 89th Cong., 1st sess. p. 6.

²² On the other hand, an appendix to the Opening Brief of Hearing Counsel lists references to the legislative history too numerous to mention here, all demonstrating the "commercial" nature of the problems and solutions under 14b.

Practices (May 24, 1965), shows that presently and over the past there have been innumerable contracts between ocean common carriers and shippers for the transportation, at discount rates, of volume movements of cargoes that are not for resale.²³ The Investigating Officer, at page 14 of his report, stated :

One test universally applied is the requirement that the commodities shipped under project rates may not be for resale by the shipper, consignee, or anyone else. The cargoes do not enter the "stream of commerce". Shippers and carriers alike feel that this is an essential characteristic of project rates and that it prevents unfair competition and unjustly discriminatory or preferential treatment between shippers.

But if petitioners' construction of section 14b is now adopted, it would seem obvious that project rate agreements as they have existed historically would be illegal under that section.²⁴ Indeed, petitioners' sole reply to all arguments of past practice is that all of this was before the law was changed. Petitioners would have us conclude that Congress by preserving the legality of one traditional and historic practice, intended by implication to outlaw still another historic and, it would appear, equally venerable practice. We will not attribute such an intent to Congress nor do we feel that even petitioners really desire such a conclusion.

On the basis of the above we conclude that the Cargo Commitment proposed by MSTs is not a contract within the meaning of section 14b, approval, of which by the Commission is required before its use may be permitted in the foreign commerce of the United States. Insofar as the petitions herein seek an order declaring the Cargo Commitment a contract within the meaning of section 14b they are denied.

Competitive Bidding Under the First Paragraph of Section 16

Petitioners would also have us declare that the requirement that bids in response to RFP 100 must be submitted under seal constitutes the use by a shipper of an unjust device or means for obtaining or attempting to obtain transportation at less than the regular rates and charges which would otherwise be applicable on the lines of petitioners within the meaning of the first paragraph of section 16,²⁵ which provides :

That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly

²³ As MSTs points out, the military cargoes shipped under Cargo Commitments would not be for resale by anyone.

²⁴ They normally contain few or none of the required provisions under section 14b and it does not appear that they could and still accomplish the desired result.

²⁵ Petitioners seek the same declaration under section 16: Second which makes it unlawful for a carrier to allow a shipper to use such a device. Resolution of the issue under the first paragraph of section 16 will dispose of the issue under 16 Second.

and willfully, directly or indirectly by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Petitioners begin with the premise that this provision is designated to protect carriers from the loss of a "rightful source of revenue" through shipper "coercion." They point out that under RFP 100 "none of the lines will know the rates which its competitor is bidding." The procedure is, the petitioners argue, "essentially the same as requiring of each line that it submit a secret promise of a rebate." Thus, petitioners urge "a 'device or means' which accomplishes a rate departure through the use of concealment is automatically the 'unfair device or means' contemplated by the statute."

It is difficult to conceive of a greater misapplication of the first paragraph of section 16. Under the terms of RFP 100 the rates established must be filed with the Commission. They are then of course available to the public, both shipper and carrier alike. Admittedly, no one will know the rates before they are published, but it must be asked how else can there be competition among the bidders? It is precisely because "none of the lines will know the rates which its competitor is bidding" that the proposed program achieves its stated purpose of placing the carriage of military cargoes on a competitive basis.²⁶ It is easy to see that by reading section 16 first paragraph as affording carriers a right to know what their competitors are willing to offer by way of rates, petitioners have changed the provision from one designed to eliminate certain competitive practices which were deemed unfair or unjust into one that would eliminate virtually all competition.

Certainly it is true that carriers may restrict competition among themselves under the Shipping Act, but they may do so only under the terms and conditions of section 15 of the act. There is nothing in the act which requires them to restrict competition just as there is nothing in the act which gives an individual carrier the right to know what rate a competitor may be willing to negotiate with a shipper in order to get that shipper's patronage. All that the act requires is that when a carrier and a shipper have agreed on a rate it must be published in its tariff, filed with the Commission and made available to all in a way which is not unjustly discriminatory or unduly prejudicial, etc.

By the same token there is nothing in the act which requires a shipper to deal with any anticompetitive combination of carriers

²⁶ As petitioners themselves have pointed out we are not here concerned with whether the new program with its insistence on competition is "good or bad" but only its lawfulness under the Shipping Act.

established under section 15. The act leaves the shipper free to seek the best rate he can get subject only to the act's prohibitions against preference, prejudice, and discrimination and further provided that the means employed by the shipper is not unjust or unfair within the meaning of section 16.

The basic purpose of section 16 is to insure adherence by a carrier to his publicly announced rates, not to foreclose any change in those rates at the behest of an individual shipper. Thus, the first paragraph of section 16 makes it unlawful for a shipper to submit a false classification of the goods contained, for example, in a sealed carton in order to bring his shipment within a commodity class taking a lower rate under the tariff thereby "depriving the carrier of a rightful source of revenue." It is equally unlawful for the shipper to submit a false statement of weight. The purpose behind these prohibitions as well as those of section 16 Second is not far to seek. It was stated by Congress:

Section 16 of the Shipping Act of 1916, as amended, among other things, provides that it shall be unlawful for any common carrier by water, or other person subject to that act, to allow the transportation of property at less than the regular rates then in force by the common carrier by means of false billing or other misclassification of freight, false claims, etc. Thus it will be seen, that while the carrier is prohibited from allowing favoritism or partiality as among competing shippers, the carrier itself is afforded no protection against the practice of an unscrupulous shipper, forwarder, broker, or other delivering goods to the carrier for transportation, in deliberately misclassifying packages of freight for the purpose of obtaining a lower transportation rate at the expense of the carrier.

The Senate measure, therefore, strengthens this portion of the Shipping Act of 1916, and goes further in providing that such a practice shall neither be engaged in by a common carrier by water nor by any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof; and provides a penalty for violations of from \$1,000 to \$3,000, thereby effectually removing the means left open to dishonest shippers or consignees whereby they may take advantage not only of their competitors who do not indulge in the practice of false billing and misclassification in order to receive a lower transportation rate for their freight, but also of the carrier itself by depriving the carrier of a rightful source of revenue.

The section clearly contemplates, not that the tariff rate will not be changed, but rather that the tariff rate will ostensibly remain in effect while some other rate is actually paid by the shipper. Thus it is unlawful to misclassify an article to obtain a lower rate;²⁷ to rebate a portion of the freight rate to a particular shipper;²⁸ to withhold information from the carrier essential to a determination of the proper rate,²⁹ or

²⁷ *Royal Netherlands S.S. Co. v. FMB*, 304 F. 2d 928 (C.A.D.C., 1962).

²⁸ *U.S. v. Peninsular & Occidental S.S. Co.*, 208 F. Supp. 957 (S.D.N.Y. 1962).

²⁹ *Prince Line Ltd. v. American Paper Exports, Inc.*, 55 F. 2d 1053 (C.A. 2, 1932).

to seek a lower rate or rebate by false billing.³⁰ In all of these instances the tariff rate remained unchanged even after the unlawful practice was employed. Indeed it was essential to the particular scheme that the tariff rate not be changed. Under RFP 100 the rates will, as we have already pointed out, be filed with the Commission, it is therefore, impossible for the shipper to obtain transportation at less than the rates otherwise applicable i.e. the rates that the carrier is bound to charge under section 18(b) (3).

Moreover, no straining of the principle of *ejusdem generis* can equate the competitive bidding called for in RFP 100 with the type of "unjust or unfair device or means" contemplated in the first paragraph of section 16. On the basis of the foregoing we conclude that the competitive bidding embodied in RFP 100 is not an unjust or unfair device or means within the meaning of the first paragraph of section 16³¹ and to the extent the petitions here seek an order declaring RFP 100 unlawful thereunder they are denied.

Competitive Bidding Under the Pacific Westbound and AGAFBO Agreements

Certain petitioners³² urge that their participation in the proposed competitive procurement program would place them in violation of their obligations under Agreement No. 57 which establishes the Pacific Westbound Conference. Article 1 of Agreement No. 57 requires that "[a]ll freight or other charges for the transportation of cargo (in the trade) shall be charged and collected (by the members) strictly in accordance with the tariff." Item No. 1 of Local Freight Tariff No. 1-Y-FMC-1, the tariff which these petitioners are bound to observe under the agreement, provides that "Member lines are permitted to negotiate special rates or charters with the Military Sea Transportation Service." Petitioners argue, however, that this provision "cannot be distorted to authorize the type of competitive dealings with the military called for in the MSTs invitation for competitive proposals."

It is difficult to determine just what petitioners seek from us under this argument for they go on to say:

These lines recognize that this issue is necessarily subsidiary to the statutory issues. We would assume that the conference would revise the relevant tariff rule to authorize response to RFP 100 should this Commission conclude that the practice is not violative of the Shipping Act. Alternatively, if the Commission were to conclude that the practice is violative of the Shipping Act, the meaning of the tariff provision would be moot.

³⁰ *Hohenberg Bros. Company v. FMC*, 316 F. 2d 381 (C.A.D.C. 1963).

³¹ It is therefore lawful under section 16 Second as well.

³² American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Line, Inc., States Steamship Co. and Waterman Steamship Corp.

At first blush this would appear a simple straightforward statement. Under it, should we, as we have, find RFP 100 lawful the conference at petitioners' request would simply substitute some appropriate language in the tariff rule to render clear the U.S.-flag lines freedom to respond to RFP 100. The argument, however, does not stop here. In arguing that "negotiate" could not be read to include "competitive bidding" petitioners state that the conference did not intend to sanction "the advent of a competitive innovation such as RFP 100, with its highly disruptive potential in the trade." Indeed, petitioners argue that it is highly unreasonable to conclude that the conference intended any such thing. Moreover, petitioners indicate that their assumption that the conference will amend the rule is placed on shaky ground by our "bifurcated decision" on their petition for declaratory order. Thus, their assumption is stated yet another way:

If competitive bidding for MSTs cargo were finally held lawful we should suppose it likely that the PWC tariff rule would be amended to permit its U.S.-flag member lines to compete. We have, however, no idea what its membership would conclude if competitive bidding for MSTs cargo were held lawful with respect to three arguments with decision deferred to another proceeding upon another three.

Whatever petitioners' precise position may be the implications involved are quite clear: That the foreign-flag segment of the conference may restrict or refuse to sanction a particular method by which its "U.S.-flag member lines" may deal with the U.S. Government on the terms under which cargo reserved by law to those U.S.-flag lines is to be carried. We think it patently clear that any agreement or any rule promulgated under it which could properly be construed to achieve such a result would be contrary to the public interest within the meaning of section 15. It would seem equally clear that under such circumstances we should have to withdraw our approval of the agreement. In all fairness, however, it should be remembered that no amendment has yet been sought. We assume that these petitioners will now seek prompt amendment of Item No. 1.³³

The Atlantic & Gulf American Flag Berth Operators³⁴ intervened in this proceeding apparently for the sole purpose of asserting that we may not disapprove, cancel or modify the AGAFBO agreement in this proceeding, i.e. a full evidentiary hearing would be necessary before any such action could be taken. We say this is apparently their only purpose because they do not stop here, or at least it would seem that

³³ This is of course not to be taken as a determination on our part that the construction placed upon Item No. 1 by petitioners is the proper one. Since RFP 100 does not as yet extend to the trade covered by the PWC, petitioners would have ample time to obtain an amendment.

³⁴ Established pursuant to Agreement FMC No. 8086.

they do not. For while they admit that article 1 of the agreement is permissive and merely provides that the member lines "may" negotiate rates with MSTs, they further point to article 2(a) which provides that all actions taken under the agreement "shall be binding on all parties" thereto. As these petitioners themselves admit the rates negotiated with MSTs are embodied in contracts between MSTs and the individual operators, the fact that these contracts have not as yet been canceled by MSTs although they provide for cancellation on 60 days' notice by either party is we think irrelevant in this proceeding. The outstanding contracts certainly do not prohibit agreement upon new contracts and we can only assume that the present contracts will be canceled before or at the time of entry into the agreements. In any event there is nothing in Agreement 8086 as we read it to prohibit the parties thereto from responding to RFP 100 nor does it appear that they themselves view it as a bar thereto. Since we find it unnecessary to take any action with respect to Agreement 8086, the issue of what type of proceeding is necessary before such action may be taken is moot.

For the above-stated reasons, the petitions before us insofar as they request that we issue an order declaring any of the petitioners herein prohibited from responding to RFP 100 because of any agreement approved under section 15 of the act, are denied.

Therefore, for the reasons stated herein we find that RFP 100 is not unlawful under section 14b or the first paragraph of section 16; and further that no agreement approved under section 15 and cited to us herein, would prohibit any of the petitioners from responding to RFP 100 in its present form and coverage.

Accordingly the petitions for declaratory order are denied.

JAMES V. DAY, concurring:

I concur that RFP 100, containing the terms and conditions under which the Department of Defense proposed to extend its competitive procurement program to ocean transportation, is not unlawful under section 14b or the first paragraph of section 16; and further that no agreement approved under section 15 and cited in this proceeding, would prohibit any of the petitioners from responding to RFP 100 in the form and coverage described in this record. I would emphasize, however, that in our concern with shippers (as well as "other persons") covered by the shipping laws which we administer we must also maintain a vigilant watch over the consequences of regulatory determinations on our carriers. As part of our commerce the carriers are entitled

to the full protection of the Shipping Act. In this regard with the establishment of competitive bidding for low cost service to the Government we should be constantly mindful of the longer run, as well as the immediate results. Further, in future determinations of the reasonableness of rates filed with us relative to the competitive bidding procedures as they may be developed, it is pertinent to weigh the effect on U.S.-flag carriers not contracting for cargo as well as to consider the effect on the financial prospects of those carriers so contracting.

(Signed) Thomas Lisi,
Secretary.

APPENDIX

SEC. 14b. Notwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and provided the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than 90 days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages

may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon 90 days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however,* That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however,* That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-14

AGREEMENTS No. 4188, No. 4189, No. 5080, No. 7550, No. 7650,
AND No. 7997

Decided August 17, 1966

The discontinuance of the trade involved is solely due to governmental embargo and on the facts and circumstances of this record approval of the agreements is continued.

Pooling Agreement No. 7997 disapproved and canceled because of withdrawal of members.

John R. Mahoney and John G. McGarrahan, for respondents.¹
Donald J. Brunner and Samuel B. Nemirow, as Hearing Counsel.

REPORT

BY THE COMMISSION (John Harlee, *Chairman*; James V. Day, George H. Hearn, *Commissioners*):²

This proceeding was instituted on March 10, 1966, to determine whether these conference and pooling agreements all involving the trade between the United States and Cuba remain subject to the protection of section 15 of the Shipping Act, 1916, as amended, since the circumstances warranting their continued approval have apparently ceased to exist. The conferences by affidavit and memorandum of law urge continued approval of the agreements. Hearing Counsel say the agreements should be disapproved. Neither the conferences nor Hearing Counsel sought oral argument and accordingly none was heard.

FACTS

The conference and pooling agreements in question are domiciled in the United States. All the agreements have U.S. flag carrier mem-

¹ No. 4188, Havana Steamship Conference; No. 4189, Gulf and South Atlantic Havana Steamship Conference; No. 5080, Havana Joint Agreement; No. 7550, Havana Northbound Rate Agreement; No. 7650, Santiago de Cuba Conference; and No. 7997, West Gulf-Havana Pool Agreement.

² Commissioner Ashton C. Barrett did not participate.

bership. The approved agreements have covered the Cuban trade for periods extending from 11 to 31 years. Trade with Cuba had been substantial prior to the ascendancy of the present *de facto* regime. Despite the fact that trade ceased between Cuba and the United States in 1962, the conferences maintain offices, current tariffs on file with the Commission, and residual funds on deposit in New York and New Orleans banks. Dual rate contracts as approved by the Commission have been printed and filed. All the general orders promulgated by the Commission have been complied with and recently amendments were filed in accordance with the latest general order. Some of the conferences have been participating in proceedings before the Commission during the embargo, the latest having been served on June 28, 1966. (Proposed Rule Covering Time Limit On The Filing Of Overcharge Claims, 10 F.M.C. 1, Docket No. 65-5.) Everything has been maintained in conformity with the Commission's directive in *The Dual Rate Cases*, 8 F.M.C. 16, (1964), and related proceedings.

DISCUSSION AND CONCLUSION

The conferences argue essentially that approval should be continued on a "stand-by" basis until resumption of the trade. It is averred that precedent may be found in the suspension of operations of certain conferences serving Spain during the Spanish Civil War, or in the abeyance of service under the Trans-Atlantic Passenger Conference Agreement and through stand-by arrangements maintained for other conferences affected by the outbreak of hostilities in the Second World War.

Hearing Counsels' position is that approved section 15 agreements may not be suspended or stayed, citing as authority *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 65 (1956). Hence, they assert nothing can be done but to disapprove these agreements. The resolution of this primary issue will be dispositive of the proceeding.

The cessation of trade to which these conference agreements are applicable would under *Mediterranean Pools Investigation*, 9 F.M.C. 264, Docket No. 1212, and *Agreement No. 8765—Order to Show Cause*, Docket No. 65-42, 9 F.M.C. 333, certainly seem to constitute that "lack of transportation circumstances" which would warrant disapproval of the agreements. Add to this the dictum in *Pacific Coast*, *supra*, that suspension or stay of section 15 agreements would be "tantamount to disapproval," and there would appear to be no option but to disapprove these agreements on the basis of the facts presented and the ostensibly applicable law. Such is not the case, however.

While *Mediterranean Pools* is appropriate to determinations whether agreements are to be accorded continued approval, as well as initial approval, yet both it and *Agreement 8765* are not precedent with respect to the issue at hand. The situation in *Mediterranean Pools* and *Agreement 8765* arose because of voluntary action of the conference members. The situation presently being considered is due to circumstances outside the control of the conference members. *Mediterranean Pools* dealt with a proposed pooling agreement designed to curb malpractices in the trade and *Agreement 8765* concerned a defunct agreement contrived originally to suppress a rate war. Here the cessation of trade was brought about by sovereign act. It would be illogical and indeed inequitable for an agency of the very government which imposed the embargo to disapprove the agreements of the conferences involved in the trade when they were totally without responsibility for any part of the embargo. As the conference activity before the trade ceased was within the standards of the Shipping Act, there is no reason to presume that there will be anything objectionable about it when the trade begins again. Finally, the continued approval of the agreements will facilitate the rapid resumption of service when the embargo is lifted. Accordingly, and for the reasons stated herein, approval of the conference agreements is being continued.

With regard to the West Gulf-Havana Pool Agreement, Agreement No 7997, as only one carrier remains, the approval hitherto accorded it is being withdrawn, and it is herewith disapproved.

An appropriate order will be entered.

Vice Chairman JOHN S. PATTERSON, concurring separately:

I concur in the conclusion that reasons for disapproval have not been proven.

ORDER TO SHOW CAUSE

ORDER

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That Agreements No. 4188, No. 4189, No. 5080, No. 7550, and No. 7650, shall continue to be approved, and

It is further ordered, That Agreement No. 7997, be disapproved and is hereby canceled.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 916

INVESTIGATION OF PRACTICES, OPERATIONS, ACTIONS AND AGREEMENTS WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS/NORTH ATLANTIC RANGE TRADE

Decided August 19, 1966

Three carriers, by entering into and carrying out an agreement to pay a 3-percent commission to certain selected forwarders, which was unauthorized by any section 15 agreement, violated section 15 by failing to file the agreement and carrying it out prior to approval.

No other violations have been shown.

Warner W. Gardner and *Robert T. Basseches* for respondent American President Lines, Ltd.

Ralph D. Ray, Carl S. Rowe, Paul M. Bernstein, Thomas F. Daly, Franklin G. Hunt, and Rainer N. Greeven for respondent American Export-Isbrandtsen Lines, Inc., formerly American Export Lines, Inc.

Francis J. Greene and *George F. Roberts* for respondent Prudential Steamship Corp.

Horace M. Gray for respondent Home Lines, Inc.

Herman Goldman and *Seymour H. Kliger* for respondent Fern-Ville Mediterranean Lines.

Thomas K. Roche, Sanford C. Miller, and William F. Faison for respondents Concordia Line and Torm Lines.

Edwin Longcope and *David I. Gilchrist* for respondents Hellenic Lines, Ltd., and Zim Israel Navigation Co.

Burton H. White and *Elliott B. Nixon* for respondent Fabre Line.

Robert J. Nicol and *Joseph J. Lombardi* for respondent Fassio Line.

Leonard G. James, Robert L. Harmon, and F. Conger Faircett for respondents Costa Line and Italian Line.

Edward Aptaker, John E. Cogrove, Farnk Gormley, Harold L. Witsaman, H. B. Mutter, Robert J. Blackwell, Donald J. Brunner and *Norman D. Kline* as Hearing Counsel.

REPORT

BY THE COMMISSION

The Federal Maritime Board instituted this proceeding on September 19, 1960, to investigate certain alleged violations of the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*), by members or former members of the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC). The proceeding was specifically designed to determine (1) whether respondents violated section 14 First of the Act (46 U.S.C. 812) by paying or agreeing to pay deferred rebates, (2) whether respondents violated section 15 of the Act (46 U.S.C. 814) by entering into and carrying out agreements concerning deferred rebates, special rates, or other preferential arrangements, or (3) whether respondents violated section 16 First or Second of the Act (46 U.S.C. 815) by discriminating between persons or allowing persons to obtain transportation at less than the regular rates by an unjust or unfair device or means.

FACTS

From the very beginning of the WINAC Conference in 1934, the trade has been characterized by unrest. The source of this unrest stems from rebating and continuous rumors of malpractices. Many factors aggravate the situation. The trade has not grown and yet an excess number of carriers has participated in it. The number of forwarders servicing Italian shippers is excessive. Competition among forwarders and carriers is consequently intense. Traditionally, rebating and other concessions are widely employed. Italian law specifically sanctions such practices.

The Italian forwarder has played perhaps the most significant role in history of the troubled WINAC trade.¹ Because of congested facilities at Italian ports, considerable care must be exercised in scheduling cargo for loading aboard vessels. Goods are transported from inland points by rail, truck, or horse cart, and it is imperative that arrival be coordinated properly with vessel schedules. For these reasons, the Italian exporter relies almost completely on the forwarder to expedite shipment of his merchandise. The forwarder performs a variety of services, including reserving space aboard ship, arranging for transportation from shipper's warehouse to vessel, arranging custom clearance, preparing shipping documents, and providing weighing and marking. Exporters customarily pay to forwarders a single lump sum payment or "forfait," which includes payment for the above services

¹ In Italy, the forwarder is known as a "caricatore," which, literally translated, means "loader." Although sometimes the word is translated "shipper," the actual shipper or owner of the cargo is designated as the "exporter."

as well as ocean freight. The forwarder generally assumes responsibility for the transfer of the goods from interior point of origin in Italy to ultimate destination abroad and usually selects the ocean carrier. This control over the routing of cargo places the forwarder in an advantageous bargaining position with the carrier with respect to brokerage and rebates. The forwarder's position is further strengthened by Italian law which requires the employment of a licensed broker in the exportation of goods from Italy and treats the forwarder as the owner of the merchandise for customs purposes. Italian law does not prohibit rebating which has traditionally been employed in the Italian trades.

Competition among forwarders in Italy is intense with the number of forwarders servicing the WINAC trade greatly in excess of the needs of the market. In 1952, the conference listed 152 forwarders for the ports of Genoa, Leghorn, and Naples. Approximately 10 percent of these accounted for about 50 percent of the business. At other ports, a small minority of forwarders also handle the bulk of the business, which forces many small firms to compete intensely for the residue. Forwarders, therefore, are induced to seek reductions and concessions from carriers and have maintained that such measures are necessary in order to stay in business.

In Italian trades other than those involving the United States, deferred rebate systems are common. Despite the fact that the WINAC Conference Agreement forbids discounts, payments, or returns to shippers without unanimous consent of all parties and provides that tariffs shall be strictly observed, concessions and rebates of one type or another have consistently plagued the WINAC trade. These practices are traditional in Italy with respect to transportation generally and are not unlawful under Italian law. Effective curtailment of such practices in the WINAC trade is hindered because of their existence elsewhere, since forwarders can be rewarded for WINAC cargo by large rebates, concessions, and commissions in other trades.

Each of the respondents was, at least for part of the period under investigation, a member of WINAC.²

Prior to World War II, conference members paid a standard 4 percent brokerage to Italian freight forwarders. In addition, the mem-

² The Commission approved the basic agreement on Mar. 23, 1934. Originally, there were nine member lines, but membership has fluctuated since, ranging from a low of five members before the war to 24 in 1960. Originally, the Board named over 30 carriers as respondents, but only 14 remain: 12 foreign flag lines (Torm Lines; Hellenic Lines, Ltd.; Concordia Line; Fern-Ville Mediterranean Lines; Italian Line (Italia); Costa Line; Home Lines; Achille Lauro; Zim Israel American Lines; Fabre Lines; Fasio Line; and United Arab Maritime Co.) and three U.S.-flag lines (American Export-Isbrandtsen Lines, Inc. (Export); American President Lines (APL); and Prudential Steamship Corp.).

bers paid a special commission in varying amounts to certain forwarders. The members also operated under a deferred rebate system.³

In 1947, foreign flag lines again began to enter the trade and, as before, WINAC authorized payments to forwarders of 4 percent brokerage, the standard amount in Italian export trades.

Between 1948 and 1952, conference members authorized an additional commission of 3 percent to forwarders. The avowed purpose of the 3 percent commission was to tie the forwarders to the member lines or to insure their loyalty. The carriers made payments through the conference office sometime after due; for example, the commissions for 1952 were not paid until 1955. Before forwarders could be paid, the conference secretary was obliged to obtain freight reports from each line at each port, compile them, and bill and receive funds from the carriers. The system did not work smoothly and considerable time elapsed before the information could be compiled. Although the member lines were not too happy with the system and considered its termination after 1950, it was allowed to continue for the benefit of the forwarders.

The commission was to be paid only to those forwarders who generated at least \$5,000 of business. However, the conference administered this rule flexibly and paid commissions to many forwarders who did not reach the minimum requirement. The conference did not pay commissions on certain low-rated tariff items and goods of Swiss origin.

In addition to the regular 3 percent commission, some forwarders received extra payments if a surplus accumulated in the carriers' commission account. Although the conference filed nothing pertaining to the 3 percent commission with the Federal Maritime Board, the staff was generally aware of it.

The smaller lines opposed the 3 percent system. One Scandinavian line believed that it was contrary to the Shipping Act, 1916. However, an official of APL believed that these lines opposed the system because it limited their ability to offer special concessions.

The last year in which the commission system operated with conference support was 1952. Although forwarders encouraged its continuation, on three occasions, the conference rejected proposals to pay the commission for the year 1953. The conference formally voted down the system at an owners' meeting on May 1, 1956, despite opposition by APL and Export who wanted commissions paid openly, not covertly.

With the termination of the 3 percent commission system, the three major lines in the trade, APL, Export, and Italia, became fearful of

³ The U.S. Maritime Commission was apparently informed of this on at least three separate occasions.

their competitive position. The "Big Three" believed that rebating was rife among their smaller competitors. The excessive number of carriers in the trade created an atmosphere of suspicion with respect to malpractices. Because of the elimination of the 3 percent commission, the forwarders who were favorable to any arrangement which would authorize additional commissions, put additional pressure on the carriers for rate concessions. Because of these conditions, on January 20, 1954, representatives of the "Big Three" agreed to pay a commission of 3 percent to seven forwarders mutually agreed upon in lieu of the discontinued conference 3 percent commission. Although the forwarders selected were not the largest in the business, they were old and valued firms which had been loyal to these lines in the past and, it was hoped, would provide a nucleus of high-paying cargo.

As with the defunct conference commission system, commissions were to be paid on a deferred basis in the expectation that the forwarder would remain loyal to the carrier. For example, commissions that accrued to forwarders for 1954 were paid in August 1955. Although the agreement was designed to secure a tie to the carriers, forwarders who routed cargo via other carriers were not necessarily barred from receiving accrued commissions. Moreover, the list of recipient forwarders was subject to enlargement and four new beneficiaries were added in 1955. The "Big Three" also agreed to treat each forwarder on the list identically. The agreement was not filed with the Federal Maritime Board.

The "Big Three" entered into this agreement in order to combat the other carriers in the trade who were rebating and to preserve their positions in the trade. To some extent, this was accomplished. For the year ending April 30, 1956, APL and Export were first and second in tonnages loaded per sailing at Genoa and Leghorn.

Despite the beneficial effects of the initial three-line agreement in preserving their competitive positions, forwarders continued to pressure the lines for further concessions during 1956.⁴ APL's agents in Italy reported that foreign flag lines were already paying brokerage to replace the conference's terminated commissions. APL was informed that Export and Italia had offered to pay commissions even if the conference did not. Thus, APL was concerned not only with the practices of the smaller lines, but also with the conduct of the parties to the 1954 "Big Three" agreement. Furthermore, rumors, circulated concerning 10 percent rebates and other concessions offered by the smaller lines. Consequently, the "Big Three" felt compelled again to act in concert to protect themselves.

⁴ The conference commission system continued only through 1952 and was formally terminated in 1956.

Representatives of Export and APL conferred in Genoa in an effort to ameliorate these aggravated competitive conditions. On October 20, 1965, these lines (and shortly thereafter, Italia) agreed to pay additional commissions not in excess of 3 percent to selected forwarders. The parties prepared schedules for payments, alterable only by agreement. Although the three lines attempted to limit the amount of payment and the number of recipient forwarders, nine of the forwarders included in the 1956 agreement were still participating in the earlier agreement so as to be eligible to receive an aggregate of 6 percent in commissions in addition to the standard 4 percent brokerage. The agreement was not filed with the Federal Maritime Board.

The "Big Three" designed this agreement to preserve their positions in the trade, and again to some extent they were successful. For the year ending April 1957, APL and Export lifted 59 percent, 83 percent, and 60 percent of the cargo at Genoa, Leghorn, and Naples, respectively.

Mr. Frazier Bailey, who was appointed Managing Director of Export in late 1957, provided stimulus for the termination of the "Big Three" agreements. Mr. Bailey felt that the "Big Three" commission system was illegal and took steps to eliminate it. Export and Italia terminated the agreements on December 31, 1957. APL agreed to terminate but preferred a later date either out of fear of business losses or consideration to forwarders who had made bookings in reliance on the commissions. APL also had misgivings since reports were circulating which indicated that carriers might continue to grant concessions. Nevertheless, APL selected January 31, 1958, for termination. It is not clear when final payments were actually made by Export and Italia. However, APL's last payment under the system occurred in August 1958.

Both APL and Export hoped that the conference would reestablish a commission system to offset the demise of the "Big Three" agreements, but the conference took no action.

Therefore, the elimination of the "Big Three" commissions not surprisingly was followed by forwarder complaints. For instance, forwarders informed APL that other carriers would resort to concessions, that the Swiss traffic would be lost, and that loss of extra commissions would jeopardize APL's operations in such a highly competitive business.

Without extra commissions, APL was convinced that it would lose cargo. From 1958 through 1960, a period during which no extra commission systems were in effect, APL's share of WINAC cargo declined from 16 percent to 14 percent to 10 percent. Export also suffered a noticeable decrease in tonnages loaded at Genoa, Leghorn, and Naples

in the summer of 1960, although carryings of other lines declined as well. APL believed that the attractiveness of its superior service was being offset by malpractices of the foreign flag lines. Other lines were also disturbed over the existence of malpractices among conference members during the period 1958-60.

In December 1960, the conference secretary advised the Federal Maritime Board that the trade was experiencing difficulty, particularly because of "the overwhelming excess of the services offered by the Member Lines in respect of the necessities of the trade."⁵ Conference statistics showed an increasingly excessive number of calls by conference vessels at Italian ports of loading.

By the end of 1960, unrest among WINAC members had become intense. One foreign flag carrier representative notified the Federal Maritime Board that malpractices were continuing among the carriers and were causing instability in rates.⁶ He described the situation to be so bad "that the WINAC is being looked upon in many quarters as a farce."

Even prior to 1958, when the "Big Three" agreements were still in effect, WINAC took certain steps to effect reform. For instance, the conference appointed a Controller of Cargo to verify descriptions and valuations of cargo made by shippers. The Controller, since he could but make random checks on rare occasions, was ineffective. A "Sole Arbiter" was also considered but this plan failed to win necessary support among member lines. Cancellation of contracts with persistently dishonest forwarders was suggested but never carried out.⁷ Finally, the conference placed payment of "extra loading" and "overtime" expenses by carriers to shippers under conference control.

These attempts at reform were followed by more vigorous efforts after 1957, when the "Big Three" agreements terminated. In 1958, the conference engaged the Atlantic Cargo Inspection Corp. (ACIC) to conduct spot checks on weights, measurements, and classifications. ACIC reports indicated that violations were widespread. The conference reported to the Federal Maritime Board, on July 31, 1961, that ACIC uncovered 325 misdeclarations out of 923 spot checks. ACIC further discovered instances of mismeasurement at Italian ports of loading, although the conference had supposedly engaged sworn measurers at Leghorn and Genoa.

⁵ The conference frequently notified the staff of the Federal Maritime Board of the unrest due to malpractices during 1958-60.

⁶ The alleged malpractices were mismeasurement of cargo, reduction of values of cargo in the case of *ad valorem* payment of freight, improper classification, absorption of demurrage of lighters and trucks, and financing forwarders and shippers without interest.

⁷ The Federal Maritime Board's staff informally indicated that this action might be unjustly discriminatory and suggested arbitration.

An owner's Police Committee was next established by the conference to investigate allegations of malpractices, determine violations, and impose fines. The only proceeding of record brought before the Police Committee, however, was dropped for lack of evidence.

On January 22, 1958, a special owner's meeting was held in which a pledge to observe all conference rules, regulations, and tariffs was unanimously adopted. Similar pledges were adopted at subsequent meetings, but were not heeded in practice. On October 20, 1960, the conference appointed the accounting firm of Price, Waterhouse & Co. as a neutral body to police and enforce WINAC regulations. The idea was suggested several years earlier at conference meetings, but some time elapsed before the conference could obtain the approval of the Federal Maritime Board, which required certain alterations in the proposed agreement. The system did not work as well as had been expected and the resignation of the accounting firm was accepted March 26, 1962. No successor was appointed.

Widespread rumors regarding continued malpractices persuaded Export and APL, among others, to tender their resignations from WINAC. On September 8, 1960, these lines and Prudential and Concordia gave the required 90 days' notice of resignation. Other lines indicated their intent to resign unless rates were opened or the existing resignations were withdrawn. A series of special meetings were held in an effort to prevent dissolution of WINAC. The establishment of a neutral body, pledges of adherence to conference regulations, and expressed intentions to seek reform persuaded the resigning members to reconsider and the resignations were withdrawn.⁸ This was done although APL was advised by its agent in Italy not to remain in the conference until rebating by other lines ceased.

Early in 1961, the conference approved a plan to pay extra commissions to all forwarders in exchange for compliance by forwarders with WINAC regulations. Payment of commissions was to be deferred and forwarders were expected to remain faithful to conference regulations. Some time elapsed pending consideration of the system by the Federal Maritime Board. It was then dropped.

One of the most serious steps taken to reform the trade was the opening of rates among the conference members in 1961 which permitted each member to fix rates independently. APL believed that open rates would curtail rebating and would restore it to a position of prominence based upon its superior service. To some extent this was realized. APL's share of total WINAC traffic rose from 10 percent in 1960 to 11 percent the following year, despite a general decrease in total

⁸ WINAC on Oct. 1, 1961, established a body of sworn measures at Leghorn in hopes of eliminating a large proportion of mismeasured shipments.

tonnage in the trade. However, open rates did not prove to be a satisfactory solution because of the resulting revenue losses and the fact that some rebating still continued. Because of the losses and because of the anticipation of the formation of a pool, rates were closed by the end of the year.

The final conference effort to reform was the pooling agreement of 12 lines approved by the Commission on March 6, 1962, which guaranteed a fixed percentage of revenue to each line. APL entered the pool despite the fact that its share was considerably below its historic participation in the trade.

Not all the WINAC member lines were parties to the pool; thus, there was no restraint on malpractices by nonmembers. Rebating to some extent continued even among the pool members. Since the pool could be renegotiated, it was advantageous to a line to increase its participation over its original allocation. In particular, on high-rated cargo, temptations to rebate were still present. Early studies following execution of the pooling agreement show that the pool operated more to the benefit of nonmembers than members. Nevertheless, APL, as well as many others in the trade, believed the pool to offer perhaps their only salvation.

While much of the record is devoted to competitive activities in Italy, one instance occurred in this country. National Silver Co., an importer of glassware, ceramics, and other products, maintained a warehouse in New Bedford, Mass., about 60 miles from the Port of Boston. Cargo destined from Italy to the New Bedford warehouse is booked for Boston discharge. However, if there were inadequate Boston cargo aboard to justify a Boston call, the vessel would discharge the cargo at New York and truck the cargo to New Bedford at the vessel's expense thereby in effect giving National Silver free overland transportation although when the cargo was discharged in Boston, overland transportation was for the account of the cargo. This was a common practice and occurred during the period of record. Indeed, National Silver made every effort to avail themselves of this concession. It became an important point in the solicitation. An official of Fassio Line discussed this concession with National Silver but indicated this free transportation would not be granted unless the vessel did not call at Boston.

DISCUSSION

The foregoing facts, as well as the exceptions and replies to exceptions, present the following issues for our consideration and decision:

1. Whether the agreement among the WINAC members to pay a 3-percent deferred commission to Italian freight forwarders

- from 1947 to 1952 was an unfiled and unapproved agreement in violation of section 15.
2. Whether the 1954 agreement between APL, Export, and Italia, to pay a 3-percent deferred commission to certain forwarders was an unfiled and unapproved agreement in violation of section 15.
 3. Whether the 1956 agreement between APL, Export, and Italia, to pay a 3-percent deferred commission to certain forwarders was an unfiled and unapproved agreement in violation of section 15.
 4. Whether pursuant to any of the above agreements, respondents entered into and effectuated deferred rebating systems in violation of section 14 First.
 5. Whether any respondent violated section 16 First by the absorption of trucking charges.
 6. Whether any respondent violated section 16 Second by allowing persons to obtain transportation of property at less than the regular rates by paying commissions to forwarders.

With respect to Issue No. 1, a majority of the Commission (composed of Vice Chairman Patterson and Commissioners Barrett and Day) finds that the members of WINAC were authorized by their conference agreement to pay commissions to forwarders and accordingly did not violate section 15. With respect to Issues Nos. 2 and 3, a majority (composed of Chairman Harllee, Vice Chairman Patterson, and Commissioner Hearn) finds that respondents APL, Export, and Italia violated section 15 by entering into and carrying out unfiled and unapproved agreements to pay a 3-percent commission to selected forwarders. With respect to Issues 4 and 6, a majority (composed of Vice Chairman Patterson and Commissioners Barrett and Day) finds that none of respondents violated sections 14 First or 16 Second. With respect to Issue No. 5, the Commission (Chairman Harllee, Vice Chairman Patterson, and Commissioners Barrett, Day and Hearn) finds that respondent Fassio Line did not violate section 16 First by absorbing certain trucking charges.

Examiner Charles E. Morgan issued an initial decision in which he absolved the carriers of any improper conduct. The Examiner emphasized that it was difficult to obtain documents regarding the competitive activities of foreign flag lines from abroad; indeed, in some cases, foreign flag lines were forbidden by their governments to furnish these documents to the Commission. Conversely, the Examiner points out that Export and APL had furnished detailed information during the course of the investigation, and yet they were

denied discovery against the foreign flag respondents; he, therefore, considered it unfair to prosecute the U.S.-flag lines alone.

In addition to his emphasis upon the difficulty of obtaining foreign documents, the Examiner stressed that the activities under investigation occurred on foreign soil in an environment where such activities are considered lawful. Export and APL, in order to maintain their positions in the WINAC trade, were forced to join the customary practices of granting rebates to Italian forwarders. Consequently, the Commission should not judge these activities too harshly. Furthermore, the Examiner stated that the Commission cannot as a practical matter enforce the Shipping Act against transactions which occurred in Italy.

In further exoneration of respondents, the Examiner noted generally that the statute of limitations of 5 years had run against the assessment of any fine or penalty. In particular, in mitigation and extenuation of the activities of APL and Export, the Examiner alluded to the claim of these lines that being subsidized they would be discriminated against indirectly, since a finding that either acted unlawfully might lead to a disallowance by the Maritime Administration of "commission" expenses, already suspended, in the computation of operating-differential subsidy.

Regarding the merit of the investigation, the Examiner found that the 3-percent WINAC commission was in accord with the WINAC agreement, which authorized payments to brokers if unanimously agreed upon by the members. With respect to the "Big Three" agreements, the Examiner considered them as generally reconfirming the WINAC proviso not to pay commissions not endorsed by the full WINAC membership. To the extent the "Big Three" agreements provided for optional payments to selected forwarders, the Examiner found that "technically" the agreements should have been filed under section 15. Nevertheless, since the Federal Maritime Board knew of the agreements and neither requested that they be filed nor instituted an investigation, since no data from foreign lines were available, and since the statute of limitation had expired, the only effect of a "technical" finding of violation of section 15 would be to penalize Export and APL under their subsidy contracts. Thus, the Examiner found no "substantial" violation of section 15.

The Examiner also found no violation of section 14 First by the respondents by use of deferred rebates. The holding is based upon a finding that generally commissions were paid to forwarders, not shippers. Furthermore, the Examiner finds no proof that a shipper or a forwarder booked cargo with the assurance of the payment of a deferred rebate. Next the Examiner says that the commissions were not neces-

sarily deferred rebates, since to qualify as such an illegal scheme, payment must be made "only if, during both the period for which computed and the period of deferments, the shipper has complied with the terms of the rebate agreement or arrangement." Since the 3 percent WINAC commissions and the "Big Three" commissions were computed on a yearly basis and the duration of deferments varied, and also, since forwarders were apparently paid commissions even though they routed cargo via other carriers, the Examiner found that the commissions were not violative of section 14 First.

The Examiner found no absorption of trucking charges in the United States and, accordingly, no violation of section 16 First. Regarding section 16 Second, he concluded that, since the commissions paid to Italian forwarders were in fact well-known devices, rather than unfair devices or means, plus the "lack of technical proof of specific instances of passing on the rebates from forwarders to shippers," there were no violations of section 16 Second.

In support of his findings of no violations or of no "substantial" violations, the Examiner qualifies the Commission's jurisdiction as follows:

If the arrangements entered into overseas operate in the United States so as to affect the foreign commerce of the United States directly and materially, then jurisdiction of American law results. If there is no direct and substantial effect in the United States on our foreign commerce, then jurisdiction does not apply. There must be direct and substantial consequence within our borders resulting from the conduct overseas if our jurisdiction is to apply.

Using this test, the Examiner found that commissions paid in Italy to Italian forwarders did not affect our commerce more than remotely. Even if the activities of respondents were in violation of the literal terms of the Act, the Examiner found that the Commission was nevertheless without jurisdiction over the practices occurring in Italy because of lack of direct and material effect upon the foreign commerce of the United States.

Hearing Counsel have excepted to the Examiner's findings of no violations of sections 14 First, 15, and 16 Second. Hearing Counsel also challenge the jurisdictional standard imposed by the Examiner.

Hearing Counsel contend that the record supports a holding that respondents entered into agreements subject to section 15 which were neither filed with nor approved by the Federal Maritime Board. Specifically, Hearing Counsel except to the Examiner's finding that the WINAC commission system of 1947-52 was authorized by the conference agreement. Hearing Counsel argue that the WINAC agreement did not and could not authorize payments under a commission system, since the scheme was in reality an unlawful deferred rebating

system, not a simple decision to pay brokerage; it, therefore, could not be authorized by a section 15 agreement. Likewise, Hearing Counsel assert that the WINAC commission system was an entirely new scheme not contemplated by the basic agreement, which was discriminatory on its face, and certainly not permitted by language in the WINAC agreement which merely provides "that the parties hereto undertake not to * * * make any discount, payment or return * * * unless unanimously agreed upon by the parties * * *."

With respect to the "Big Three" agreements, Hearing Counsel argue that there can be no question that these were agreements in violation of section 15, even the Examiner made this finding. However, Hearing Counsel attack the Examiner's description of these agreements as technical violations only. Hearing Counsel point out that in *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295 (1962), and *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962), the Commission refused to distinguish substantial and technical offenses and gave no heed to extenuating circumstances.

Hearing Counsel also oppose the theory offered by the Examiner that, since the Federal Maritime Board knew of the use of the commission system, the Commission should find no violation here. On the contrary, it is clear, say Hearing Counsel, that the Commission is free to act as it sees fit in the public interest, regardless of what its subordinates may have done or not have done in the past.

With respect to the Examiner's finding that no violation should be found because of the possible repercussions upon APL and Export by the Maritime Administration, Hearing Counsel state that the Examiner has made an unsupported assumption as to what course of action the Maritime Administration would follow. The decision here does not control the administration of the subsidy program. Hearing Counsel concede that APL and Export were subjected to considerable pressure to rebate, in order to remain competitive, but this is something for the Maritime Administration to consider. It has no bearing on the Commission's responsibility under the Shipping Act.

Hearing Counsel except to the Examiner's failure to find that the various commission systems were unlawful under section 14 First. Hearing Counsel argue that the WINAC commission system provided for the payment of 3 percent commission sometime subsequent to the date of shipment. In addition, the admitted purpose of the system was to tie forwarders to the conference. The "Big Three" agreements likewise were deferred and were paid with the understanding that the recipient forwarder would remain loyal to the lines. According to Hearing Counsel, under these schemes, respondents by paying deferred rebates or agreeing to pay deferred rebates violated section 14 First.

The Examiner refused to find violations of section 14 First where payments were directed to forwarders, not shippers. According to Hearing Counsel, this construction would frustrate the aim of Congress by reading the section to exclude payments to forwarders particularly where, as here, forwarders have preempted the role of shipper. Furthermore, Hearing Counsel submit that it would be naive not to infer that the rebates in some significant manner redounded to the benefit of the exporter. Thus, Hearing Counsel conclude that the commission systems were indeed unlawful deferred rebate systems. Hearing Counsel also object to the Examiner's finding that the commission systems were lawful because the system was violated by the parties who created it; i.e., commissions were paid to forwarders who did not remain loyal to the carriers.

Hearing Counsel contend that respondents allowed persons to obtain transportation at less than the regular rates by an unfair device or means in violation of section 16 Second. They assert that while the system was widespread and apparently well known, the amounts of the concessions and the names of the beneficiary forwarders have been shrouded in secrecy, thus constituting unfair devices or means. Therefore, the commission system, which was designed to preserve the position of the carrier and which, in fact, treated shippers and forwarders in a discriminatory manner, was the type of practice prohibited by section 16 Second.

APL excepts to the Examiner's failure to hold that these proceedings are barred by the statute of limitations. APL also excepts on the ground that the Shipping Act is not intended to apply to the conduct of U.S.-flag lines abroad where the Act cannot also be applied with equal force to foreign flag lines. APL considers this to be unconstitutionally discriminatory. Finally, APL alleges that the Examiner erred in finding that the "Big Three" agreements were more than agreements not to pay commissions.

Section 15 Violations

As set forth above, besides the 4 percent brokerage paid to forwarders, WINAC members between 1947 and 1952 authorized an additional 3 percent commission to forwarders, with payments made through the Conference office. Under this additional commission arrangement, the Conference Secretary obtained freight reports from each line at each port, billed and received funds from the member lines, and disbursed the amounts to the forwarders. The system was cumbersome and the 3 percent commissions were not paid until long after they were due. Those for 1952 were not paid until 1955, for example. Originally, it was intended that the 3 percent commission be paid only

to those forwarders which generated at least \$5,000 of business but this rule was flexible, and commissions were paid to many forwarders which did not reach the minimum. No commissions were paid on certain low-rated freight and goods originating in Switzerland and other goods on which the shipper already had received tariff benefits of some other sort.

The agreement to pay commissions to forwarders, within the WINAC machinery, was not a violation of section 15 (Issue No. 1). The terms of the WINAC agreement expressly referred to payments to brokers, in that no such payments were to be made unless unanimously agreed upon by the parties. This agreement to pay commissions was reached unanimously. Therefore, when the WINAC Conference 3 percent commission system was in effect, it was in accord with the WINAC agreement.

We have held that while an agreement fixing or regulating the amounts of brokerage was an agreement within the meaning of section 15 that had to be filed for approval, once a conference agreement had been approved, conference arrangements regarding brokerage payments to forwarders were permissible without separate section 15 approval. *Agreements and Practices Pertaining to Brokerage*, 3 U.S.M.C. 170, 177 (1949). *American Union Transport v. River Plate & Brazil Conferences*, 5 F.M.B. 216, 221 (1957); affirmed *American Union Transport, Inc. v. United States*, 257 F. 2d, 607 (1958), cert. denied 353 U.S. 828 (1958). Therefore, no filing under section 15 was necessary with regard to the 3 percent Conference commissions.

Upon the demise of the WINAC commission payments in 1952, the two largest American lines, Export and APL, together with Italia, were persuaded that an additional commission arrangement was imperative in order to preserve their positions against the increased rebating of their competitors. The American lines believed that their superior service alone could not retain the patronage of forwarders who were offered concessions by other lines. In 1954 and again in 1956, the "Big Three" entered into agreements to pay additional 3 percent commissions. As with the earlier conference commission system, these commissions were paid some time after they were due in order to secure the continued patronage of forwarders. The "Big Three" agreement of 1954 called for the payment of 3 percent deferred commission to seven, mutually agreed upon, forwarders. The agreement was not authorized by, in fact it was in derogation of, the WINAC agreement. The second "Big Three" agreement of 1956 was the same type of arrangement. Again the agreement called for an additional 3 percent commission paid to nine forwarders on a deferred basis. These agreements were not filed with the Federal Maritime Board.

The agreements between APL, Export, and Italia, were unfiled and unapproved section 15 agreements (Issues No. 2 and 3). Both the failure to file the agreements immediately and the effectuation of the agreements without approval are violations of section 15.⁹ Both commission agreements were the type described in section 15 as agreements "giving or receiving special rates, accommodations, or other special privileges or advantages controlling, regulating, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The two "Big Three" agreements should have been filed with the Commission as required by section 15. These agreements cannot be described as merely reiterations of the WINAC requirement not to pay rebates as argued by APL. Rather these agreements affirmatively contemplated payments of commissions to selected forwarders. APL's exception in this respect is overruled.

The Examiner concedes that technically the "Big Three" agreements should have been filed; however, the Examiner concluded that there was "no substantial violation of section 15 for failure to file the agreements to pay commissions to Italian forwarders." We reverse the Examiner in this respect. The Examiner's exoneration of respondents cannot be premised upon the mere designation of the failure to file as technical or insubstantial. As we have held before, there is no room in the proper enforcement of section 15 for technical violations. Section 15 requires absolute compliance. *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 179 (1962); *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295 (1962).¹⁰ As stated in the *South African* case:

It goes without saying that we find untenable the suggestion that respondents' arrangement constituted a "technical" violation of the law. It should be noted, furthermore, that section 15 affords little room for so-called technical violations. To us the breadth and force of its language literally implore attention and obe-

⁹ See: *Unapproved Section 15 Agreements, South African Trade*, 7 F.M.C. 159, 192 (1962); *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295, 301-302 (1962); *Unapproved Section 15 Agreements—Spanish/Portugese Trade*, 8 F.M.C. 596, 614 (1965).

¹⁰ The Examiner supports his "technical" violation theory by stating that the Federal Maritime Board's staff knew of the agreements. This is immaterial. Section 15 requires that all agreements subject thereto be filed. These agreements were not filed. The record simply does not reflect that the Board's staff advised respondents to ignore section 15 or that the staff were actually aware of the breadth and scope of the concerted activity. Cf. *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 196 (1962) in which the Commission stated that an allegation that certain Board personnel were cognizant of the arrangements was immaterial. The ramifications of our holding upon the subsidy program is also immaterial to the question of whether the agreement was subject to section 15 and was filed. We have stated above that APL and Export were subjected to intense pressure, in climate favorable to such commission agreements, and that APL and Export took the lead in ending the agreements and otherwise regularizing the trade.

dience, or at the very least inquiry if any doubt as to the propriety of proposed conduct. 7 F.M.C. at 197.

We have previously acknowledged the attempts of APL and Export to normalize the trade; nevertheless we must, in consonance with our responsibilities under the Shipping Act, define the law consistently. In *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962) the Commission found that respondents entered into and carried out agreements subject to section 15. In making this finding, the Commission strongly emphasized that section 15 requires government supervision of concerted activities and that consequently rigid compliance with the filing and approval provisions of section 15 is mandatory.¹¹ The opinion points out that a Commission investigation is an administrative proceeding looking to the regulation of present and future activity; the proceeding is not a penal or criminal trial for past violations of law and should not be conducted as such. In fact, the Commission held that matters in mitigation and extenuation were immaterial:

Respondents' argument that the arrangement "promoted stability," aided the subsidy program was "in the public interest," and not objectionable under section 15, is quite beside the point. Such matters were for the Board, the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves. Respondents prevented any Board consideration by ignoring the eminently clear requirements of section 15 and thus frustrated it for years. We think it impossible for anyone now to state that what transpired between respondents was all well and good but even if this were not so, the impact of the statute manifestly cannot be made to depend on the *ex post facto* chance that the violation was not harmful. Section 15 may as well be scrapped as to attempt to administer it in this fashion. 7 F.M.C. at 196-97.

The Examiner was also swayed by the fact that only the U.S.-flag carriers were effectively regulated. However, in *Unapproved Section 15 Agreements—Japan, Korea, et al.*, 8 F.M.C. 503 (1965), the Commission rejected the argument of a U.S.-flag carrier that the administration of section 15 was discriminatory to it since the proceeding did not have coextensive thrust against foreign-flag carriers. The Commission held as follows:

Thus, the essence of respondent's argument is that all must "hang" or all must "go free." This is simply not the law and the adoption of any such philosophy would make effective regulation a practical impossibility. 8 F.M.C. 512.¹²

¹¹ Compare: *In re: Pacific Coast European Conference*, 7 F.M.C. 27 (1961); *Isbrandtsen Co. Inc. v. United States*, 211 F. 2d 51 (D.C. Cir. 1954), cert. den. *sub nom. Japan-Atlantic & Gulf Conf. v. U.S.*, 347 U.S. 990 (1954); *Calif. S. & B. Co., et al. v. Stockton Port Dist. et al.*, 7 F.M.C. 75 (1962).

¹² See also: *Unapproved Section 15 Agreements—Spanish Portuguese Trade*, 8 F.M.C. 596, 613-14 (1965); *U.S. v. Wabash R. Co.*, 321 U.S. 403, 413-14 (1944).

APL's exception that it is being discriminated against is overruled for these reasons.

We turn now to the allegation that the Commission either has no jurisdiction or should not exercise jurisdiction because the subject activities occurred abroad. We believe the Examiner has ignored the clear language of section 15 and has drawn an improper analogy from the antitrust laws. While the acts under investigation occurred in Italy, they nevertheless had some effect on the commerce of the United States. There can be no doubt that the agreements to pay commissions abroad had some resulting impact on the landed costs of goods in this country. Furthermore, these practices had significant effect upon the competitive positions of the carriers in this trade who are undoubtedly subject to our jurisdiction. But more importantly, the Shipping Act itself specifically has extraterritorial application; it does not require demonstrable impact on our commerce. It simply refers to all agreements of a competitive nature between common carriers by water in the foreign commerce of the United States. Under this statute, the Commission cannot divest itself of its responsibility because it is difficult to investigate and regulate misconduct which occurred abroad. We have considered this contention before. As we said in *Unapproved Section 15 Agreements-Spanish/Portuguese Trade*, 8 F.M.C. 596 (1965):¹³

Respondents' arguments to the contrary notwithstanding, there can at this late date be no serious question as to the so-called "extra-territorial" application of the Shipping Act. *Kerr Steamship Co. v. United States*, 284 F. 2d 61 (2d Cir., 1960); *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F. 2d 147 (D.C. Cir., 1961), *Hellenic Lines, Ltd. v. Federal Maritime Board*, 295 F. 2d 138 (D.C. Cir., 1960); *United States v. Anchor Line, Ltd.*, 232 Fed. Supp. 379 (S.D.N.Y. 1964).

* * * * *

Respondents are all common carriers by water in foreign commerce within the meaning of the Act, and there is no question that the agreements in issue are of the kind covered by section 15; i.e., agreements fixing or regulating transportation rates or fares and regulating, preventing, or destroying competition in our foreign commerce. These facts having been established, nothing more is needed and the failure to file such agreements results in a violation of section 15. For in requiring the filing and approval of such agreements as a condition precedent to their lawfulness, Congress itself has determined that the agreements by their very nature have an "effect" on our foreign commerce. The precise nature and degree of that effect is irrelevant to any determination as to the applicability of the filing requirements of section 15. 8 F.M.C. at 600-01.

Section 16 Violations

The record shows that Fassio discharged cargo consigned to Boston at the Port of New York and then trucked that cargo free of charge

¹³ Cf. *Unapproved Agreements—Spanish Portuguese Trade*, 6 F.M.B. 103 (1960); *Unapproved Section 15 Agreements—Japan-Korea-Okinawa Trade*, 6 F.M.B. 107 (1960); *Agreements Etc. of N. Atl. W. B. Freight Assn.*, 7 F.M.C. 228 (1962).

to National Silver's warehouse at New Bedford, Mass. The record, however, does not show that National Silver was unduly or unreasonably preferred or advantaged in violation of section 16 First. This absorption of inland transportation charges was alleged as a solicitation factor, but this allegation was not established on the record. Consequently, this alleged absorption was not proven to be a violation of section 16 First. (Issue No. 5.)

Hearing Counsel urge that the payments to forwarders were unlawful under section 16 Second, because they allowed persons to obtain transportation at less than the regular rates by an unfair device or means.

The record does not disclose sufficient details of the arrangements between forwarders and carriers. We simply cannot ascertain whether the rates charged by respondents were other than the regular rates.¹⁴ (Issue No. 6.) We, therefore, overrule Hearing Counsel's exceptions as to section 16 Second.

Section 14 First Violations

Section 14 First of the Act bans deferred rebates to shippers. The commission payments of record generally were not made to shippers (the exporters in Italy), but to the Italian forwarders. Even if the commissions had been made to shippers or if we should consider the forwarder to be the shipper, they were not necessarily "deferred rebates" prohibited by section 14 First which speaks in terms of payments made "only if, during both the period for which computed and the period of deferments, the shipper has complied with the terms of the rebate agreement or arrangement."

There must be proof that the deferred rebate payments were conditioned upon compliance by the shipper with the rebate agreement both during the period for which the payment was computed and during the period of deferment. The 3 percent conference commissions and the payments under the "Big Three" agreements were computed on a calendar year basis whereas the periods of deferment were of varied lengths. Concerning the Conference 3 percent commission, although forwarders were expected to remain loyal, commission payments to Italian forwarders were not conditioned upon continued loyalties or other arrangements. Therefore, there is no showing of unlawfully deferred rebates because there is inadequate proof that the deferred commissions met the technical requirements of the Act that the shipper be required to comply with certain conditions during both of the two periods of shipment and of deferment (Issue No. 4). It does not matter that the carriers or the forwarders designated the rebates

¹⁴ Of course, this record predates section 18(b) which requires the filing of rates with us, thus accounting for the lack of technical proof of the regular rates.

as "deferred rebates," and it does not matter that the payments were deferred, because the Act requires that there be a particular type of deferred payment, of which there is inadequate proof herein, to make the deferred rebates unlawful. The missing ingredient in the Conference 3 percent commission system and in the "Big Three" agreements was the continued obligation of the shipper to remain loyal. Hearing Counsel's exceptions regarding section 14 First are accordingly overruled.

Miscellaneous Contentions

APL and Export argue that the proceeding is barred by the statute of limitations. However, as the Commission has consistently held, the statute of limitations pertains to actions for the collection of civil and criminal penalties, not to investigations instituted by the Commission.¹⁵ We overrule APL's exception and hold that the proceedings here are not barred.

APL and Export continue to argue that the "Big Three" agreements were merely agreements not to pay commissions in excess of 3 percent—they did not require that commissions be paid. According to APL and Export, this simply reconfirmed the promises made in the WINAC agreement not to pay commissions, but with the qualification that none of the lines would consider itself aggrieved if one of the others paid commissions up to 3 percent. However, the argument is without merit. As we have found, the "Big Three" in order to preserve their positions in the trade, set about to insure the patronage of important forwarders by paying commissions. The agreements were not routine and not mere confirmations of the WINAC agreement; they were prohibited under WINAC.

Export contends that there is insufficient evidence against it to warrant findings of violations against it. Such is not the case, however. Our factual findings are supported by the record and indeed are, for large measure, those found by the Examiner. The record will support, with evidence properly admissible against the appropriate respondents, our holding that the "Big Three" agreements were unfiled and unapproved section 15 agreements. Export also argues that the parties made inquiry of the Board regarding the commission agreements, and the Board confirmed that no approval was necessary. We have already overruled this argument in considering Hearing Counsel's argument. We reaffirm that ruling; the argument is meritless. Suffice it to say that the record shows that the Board's staff had an inkling of the general status of the trade. There is no showing that the staff

¹⁵ See: *Agreements, etc. of N. Atl. W. B. Freight Assn.*, 7 F.M.C. 228, 237 (1962). Indeed, the Commission has already considered and rejected the plea that this investigation is barred by the statute of limitations (Order of Oct. 20, 1961).

decided that it was unnecessary to file the "Big Three" agreements, and we know of no such decision. In addition, the argument is somewhat contrived because the demise of the agreements was the direct result of the pronouncement of an Export official that the commission agreements were illegal.

We have already ruled in considering Hearing Counsel's exceptions on Export's technical violation argument. Likewise, we overrule Export's jurisdictional contentions for the reasons previously stated. Export argues that, while we have jurisdiction to investigate the activities reflected in the record, the reach of the prohibition of the Act is another matter entirely. This is, of course, a distinction; however, our holding herein involves anticompetitive activity among carriers serving an important inbound U.S. trade. The impact of this anticompetitive activity permeates the entire trade. The carriers themselves have admitted the impact of malpractices on the trade. Competition substantially affected the relationship between carriers in U.S. foreign commerce and necessarily reflected itself in the landed price of goods here. The record also shows that competition, as well as anticompetition, had a clearly discernible effect upon the level of freight rates which were paid directly or indirectly by purchasers in this country. We, therefore, overrule the arguments that the "Big Three" agreements were too remote from our commerce to be amenable to section 15.

Italia also has contended that the Commission is without jurisdiction. In substance, the contentions are the same as those already discussed and rejected.¹⁶ Italia contended at oral argument that an agreement to pay commissions to forwarders does not require section 15 approval. This is so because an agreement to pay deferred rebates could not be approved under section 15; therefore, it need not be filed. This is fatuous. If an agreement falls within the scope of section 15, it must be filed, whether approvable or not.

Because of our decision in this proceeding, it is unnecessary to consider in detail the arguments of other respondents, Fabre Line, Concordia Line, Torm Line, and Costa Line. While no violations were found against these respondents, we have in ruling upon Hearing Counsel's exceptions also considered and ruled upon these arguments. We will not repeat them here.

ULTIMATE CONCLUSIONS

For the aforementioned reasons, we find that APL, Export, and Italia in 1954 and 1956 entered into and carried out unfiled and un-

¹⁶ Italia filed no exceptions or replies to exceptions. Accordingly, they have waived their arguments on brief to the Examiner in favor of the Initial Decision.

approved agreements to pay a 3-percent commission to selected forwarders in violation of section 15.

We find that these unlawful activities have been voluntarily terminated by the appropriate respondents. Consequently, no order will be entered. This proceeding is discontinued.

Chairman HARLEE and Commissioner HEARN, concurring and dissenting:

It is our view that the Commission's decision here is correct in finding that the "Big Three" agreements were unfiled and unapproved section 15 agreements. The "Big Three" agreement of 1954 between APL, Export, and Italia called for the payment of a 3-percent commission to seven mutually agreed upon forwarders. The "Big Three" agreement of 1956 was the same type of agreement, between the same carriers, and called for the payment of a 3-percent commission on a deferred basis to nine selected forwarders. It is our opinion that each agreement was the type contemplated by section 15; that none was authorized by the WINAC agreement; that the agreements called for affirmative anticompetitive action by the parties; and that the agreements were unlawfully carried out. These agreements cannot be characterized as technical.

We also concur in the majority decision to the extent that there is insufficient evidence to find unlawful absorptions of trucking charges on the shipments by National Silver.

With respect to the other issues, we must dissent from the position taken by the majority. We would find that the members of WINAC violated section 15. The record shows, and there seems to be no disagreement, that during the period 1948-1952 the WINAC members agreed to pay, and did pay, a commission of 3 percent to forwarders in addition to the regular 4 percent brokerage. The carriers paid these commissions through the conference office on a deferred basis to forwarders who booked cargo amounting to \$5,000 in freight charges within a year. The purpose of the agreement was to insure the loyalty of forwarders to the conference carriers as a means of fighting the encroachment of nonconference carriers. The agreement was anticompetitive and subject to section 15. We do not consider this or any other discriminatory commission system to be authorized by the WINAC agreement which provides merely "that the parties hereto undertake not to * * * make any discount, payment or rate * * * unless unanimously agreed upon by the parties * * *." This language prohibits individual rebating. It does not authorize any commission system not properly set forth in a conference tariff and, more importantly, the language does not permit a commission system paid on a deferred basis

to selected forwarders. Although the Commission does not require the filing and approval of routine conference action, the agreement is far more than a routine or simple decision to pay brokerage. Indeed, for the reasons set forth below, the agreement was not and could not be authorized by the WINAC agreement, because it was also unlawful under section 14 First and section 16 Second.

We believe that the commission system set up by the WINAC members during the 1948-52 period, as well as the systems under the "Big Three" agreements, were illegal arrangements to pay deferred rebates. In each instance, the commissions were paid to selected forwarders on a deferred basis. This much is clear. It is likewise clear to us that the motivation of the carriers in paying the forwarders on a deferred basis was to secure as much cargo from the favored forwarder as possible. As we see it, the only questionable ingredient of the scheme was exactly what the forwarder promised in return for the commission, or what the forwarder was supposed to do during the period the commission was deferred. The record does not reveal an unequivocal promise of the recipient forwarders to give all or a fixed portion of the cargo to the carrier. We do not even know if there was a written contract between carrier and forwarder. Nevertheless, we do know that there was intense competition among forwarders and that this competition forced forwarders to reduce the price of the transportation package in order to retain their customers. This in turn makes any reduction in ocean freight, which is paid by the forwarder, a critical element in the forwarder's profit margin. Thus, we find an overtoned trade in need of high paying cargo and forwarders anxious to maintain their accounts by reducing the overall price to their customers. In this context, the commission arrangements take on their true significance. The carriers agree to rebate to favored forwarders on a deferred basis in order to guarantee to themselves cargo from these important forwarders. It is reasonable to infer, because of the cut-throat competition among forwarders, that the opportunity to obtain the revenue of the 3 percent deferred rebates would not be readily jeopardized. It is thus reasonable to believe that a deferred rebate was a consideration for future patronage. In fact, no other explanation is plausible.

With respect to the contention that the commissions could not be deferred rebates because the statute speaks in terms of shippers and the commissions were paid to forwarders, we disagree. First, the record reflects the extreme competition between forwarders for the available accounts. This competition resulted in reduction of the forwarder's price. Thus, some of the benefit of the commission found

its way to the "shipper." Second, and more important, the forwarder was, as a practical matter, the actual shipper. He selected the carrier, booked the cargo, paid the freight, was considered the shipper by Italian customs, etc. Under these circumstances, we believe it appropriate to consider the forwarders to be the shippers, particularly where it is clear that section 14 First is speaking of an arrangement between a carrier and a person with control over the booking of cargo where a deferred rebate is paid in exchange for patronage. Accordingly, we would find that the carriers violated section 14 First by paying, and by entering into a combination to pay, deferred rebates.

We also would find that the same commission system and payments to forwarders pursuant to these systems resulted in violations of section 16 Second, which makes it unlawful for a common carrier to allow any person to obtain transportation at less than regular rates by means of an unjust or unfair device or means. Our view is based upon the fact that the commissions were paid on a selective basis and resulted in a cheaper net freight rate to the recipients of the commission. The central fact is that the carriers had tariffs setting forth the purported cost of transportation, yet these rates were discounted by various and varying percentages. In *U.S. Lines and Gondrand Bros. Sect. 16 Violation*, 7 F.M.C. 464 (1962), the Commission found a carrier to be in violation of section 16 Second by rebating a portion of the freight charges in order to meet nonconference freight levels.

The Commission held:

United States Lines was bound by its conference agreement to observe the rates in the conference tariff. These were the only rates filed and published by it or on its behalf. The rates so reported and published were its regular or established rates which it was bound to charge and shippers were bound to pay. *Prince Line, Ltd. v. American Paper Exports, Inc.*, 45 F. 2d 242, aff'd 55 F. 2d 1053 (C.A. 2, 1932); *Compania Anonima Venezolana de Navegacion v. A. J. Perez Export Co., et al.*, 303 F. 2d 692 (C.A. 5, 1962), 7 F.M.C. at 469-70.

Therefore, the command of section 16 Second is absolute that a carrier shall not by false means allow any person, including a forwarder, to obtain transportation at less than the regular rates. The policy underlying this command prohibits the carrier from deviating from its tariff.

The record here shows that commissions were paid and that the commissions were not contained in any tariff provision. The exact amounts of the commissions were undisclosed to competing carriers and to all shippers and forwarders. This is demonstrated by the evidence of continuous rumors of malpractices and pressures from forwarders who were frequently able to play one carrier against another because the carriers themselves were not cognizant of the actual discounted

rates charged by their fellow carriers. While everyone knew there was rebating, the details of the various payments were definitely clandestine. Consequently, we hold that the payment of commissions as set forth in the record were "unfair devices or means" prohibited by section 16 Second.

Admittedly, the record here does not include every detail of every rebate paid in this trade. However, it does disclose that the practice of rebating was widespread. We would, therefore, condemn the practice of paying certain commissions to selected forwarders as the type of unfair activity prohibited by section 16 Second.

Commissioner BARRETT, concurring and dissenting :

I must disagree in part from the decision of the majority and find that no violation of the Shipping Act has occurred. In regard to the alleged unfiled and unapproved agreements in 1954 and 1956 of APL, Export, and Italia, I share the views expressed by the Hearing Examiner. I can find no substantial violation of section 15. Furthermore, I can find no support from the record that the criteria for violation have been met or that the arrangements entered into overseas materially affected the foreign commerce of the United States.

Commissioner JAMES V. DAY, concurring and dissenting :

I concur with the majority opinion except in the following respects:

The majority interprets our past decisions as holding that Section 15 requires absolute and rigid application and that "there is *no room*—for technical violations." I do not quite read the cases that way. In the *South African*¹⁷ case we held, rather, that Section 15 affords "*little room* for so-called technical violations. To us the breadth and force of its language literally implore *attention* and obedience, or at the very least *inquiry* if in any doubt as to the propriety of proposed conduct."

Here, the Board apparently was aware not only of the Commission system but also of the "Big-Three" agreements and did not request the agreements be filed. (Exhibit 181 Annex 15.) Aside from the contention that respondents could reasonably construe their contact with the Board as producing recognition on its part that no filing and approving of the "Big-Three" agreements were necessary, the minimum standards relative to recognition of technical violations set forth in the *South African* case, *supra*, would nonetheless appear to be met (i.e., "attention" and "inquiry"). The technical aspects of the "Big-Three" violations should thus be recognized in these circumstances.

In the past there have been distinctions in the treatment of Section

¹⁷ *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 197, (1962). See also *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295, 304 (1962).

15 violations. In the two cases cited by the majority (at page 21) the violations there involved agreements fixing rates—somewhat more substantial than the violations here present. In those cases the violations were not excused as technical. On the other hand, the Commission or its predecessors has merely, in other cases, noted a failure to file an agreement or declared that no further action was required because the agreement had expired. *Massachusetts v. Columbia S. S. Co., Inc.*, 1 U.S.M.C. 711 (1938), and *Associated Banning Co. v. Matson Nav. Co.*, 5 F.M.B. 336 (1957). In this case the violations as to the “Big-Three” agreements, now no longer in effect, should be recognized as not substantial. The Examiner so held. I agree with his conclusion on this point.

(signed) THOMAS LISI,
Secretary.
10 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-4

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION,
JAMES J. BOYLE & Co., 507 WASHINGTON STREET, SAN FRANCISCO,
CALIF.

Decided August 24, 1966

Applicant for freight forwarder license held unfit for licensing in view of fact the record shows that applicant knowingly and willfully operated as a forwarder without lawful authorization.

Clarence Morse for James J. Boyle & Co., applicant.

Robert Reed Gray for World-Wide Services, Inc., respondent.

Donald J. Brunner and *Thomas Christensen*, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*; Ashton C. Barrett, James V. Day, *Commissioners*):*

This proceeding was instituted by Commission order to determine whether James J. Boyle & Co. (applicant) qualifies for an independent freight forwarder license, and whether the freight forwarding license of World-Wide Services, Inc. (World-Wide), should be revoked pursuant to the provisions of section 44 of the Shipping Act, 1916 (Act).

Upon completion of hearings, World-Wide filed a motion to dismiss the proceedings as to it upon the ground, *inter alia*, of failure of proof. Hearing Counsel agreed that the motion should be granted. Accordingly, the Examiner dismissed the proceeding as to World-Wide.

All interested parties have been heard and the proceeding is now before us upon exceptions to the Initial Decision of Examiner Paul D. Page, Jr., holding applicant Boyle fit for licensing as an independent ocean freight forwarder.

*Vice Chairman John S. Patterson and Commissioner George H. Hearn did not participate.

FACTS

Applicant, James J. Boyle & Co. was established as a partnership on July 29, 1964, to act as a customhouse broker, foreign freight forwarder, air freight forwarder, and consolidator. Three of the partners, James J. Boyle, Dale Zerda, and Terry Hatada, were formerly employed by James Loudon & Co., a licensed forwarder. Boyle had been employed as the Vice President and Manager of Loudon's San Francisco office. The fourth partner, Howard Cheung, was employed by World-Wide as its District Manager in San Francisco and handled the freight forwarding business for World-Wide there. When Loudon & Co. encountered financial difficulties, Boyle, Cheung, Zerda, and Hatada offered to assume the management of Loudon's San Francisco office and when this offer was declined, the partnership of James J. Boyle & Co. was formed.

The partners, in July 1964, entered into an oral agreement whereby Cheung, purporting to act with the consent of his employer, World-Wide, authorized the partnership to perform freight forwarding activities in San Francisco under the firm name of World-Wide and using the license number of World-Wide. Pursuant to this agreement, all freight brokerage and forwarding fees were to be billed in the name and for the account of World-Wide. Applicant was to be compensated on the basis of 25 percent of the total forwarding fees, excluding all ocean freight brokerage revenue.

Although this agreement was entered into orally in July 1964, the terms of the agreement, which are embodied in Exhibit I, dated July 29, 1964, were only reduced to writing in September of 1964. The agreement was reduced to writing at that time because:

* * * Mr. Cheung and I [Boyle] agreed we should get something in our files of a working agreement such as this [Exhibit I] in order to satisfy the Maritime Commission agents should they come in the office to investigate our activities. (Tr. 59.)

Mr. Boyle further testified that it was reduced to writing "about the time Mr. Kerttu [FMC investigator] called on us."

Exhibit 1 was drafted by Boyle and executed by him on behalf of the partnership. Cheung supplied the World-Wide letterhead.

Neither Boyle nor Cheung advised World-Wide of the existence of the agreement represented by Exhibit 1, and World-Wide was unaware of its existence until March 29, 1966, the day before the hearing in this proceeding. Cheung in fact did not have the authority to sign the letter of July 29, 1964.

By an oral agreement not reduced to writing, Boyle and Cheung

amended Exhibit 1 to allow Boyle to retain approximately 75 to 80 percent of the forwarding fees billed in World-Wide's name.

Applicant began its forwarding business on August 1, 1964, using the name and number of World-Wide. Applicant applied to the Commission for an ocean freight forwarder's license on August 6, 1964.

A notice to prospective clients (import-export firms) announced that Boyle & Co. would open its offices on August 3, 1964.

The announcement stated:

James J. Boyle & Co.
is pleased to announce the
opening of its offices on
August 3, 1964, providing customs
brokerage, foreign freight for-
warding and air freight
forwarding services
Associated with James J. Boyle & Co.
are:
Mr. Terry Hatada Mr. Dale Zerda
Miss Alice Young
Mrs. Elizabeth De Maree
507 Washington St., San Francisco
Yukon 6-5516

The announcement omitted any reference to its alleged connection with World-Wide.

Applicant, using World-Wide's name and license number, billed shippers for forwarding fees and steamship lines for brokerage. All such moneys collected by applicant were retained by it and no money was remitted by the partnership to World-Wide.

Applicant continued to operate pursuant to this agreement and on December 31, 1964, Cheung withdrew from the partnership, purporting, however, to authorize the continued usage by applicant of the name and license of World-Wide until such time as applicant received its own license, but for a period not to exceed 4 months. By this agreement, applicant bound itself to cease using World-Wide's name and license as of May 4, 1965; nevertheless, applicant continued to use World-Wide shipping forms until July 31, 1965, in known disregard of the agreement.

Although Cheung withdrew from the partnership on December 31, 1964, he retained office space on the partnership premises until July 31, 1965. When, on the latter date he moved out, Cheung notified the partners that applicant could no longer use the name and license of World-Wide. Applicant ceased performing forwarding services under World-Wide's name and number as of July 31, 1965; it did use

the World-Wide name and number, however, through August 1965, to bill shippers and steamship lines for services performed in July 1965.

Boyle's application for a forwarder license (Form FMC-18) (Exh. 2) discloses he had 7 years of experience as Export Traffic Manager of an industrial company and 2 years of experience as Assistant Traffic Manager, Export Department, of a Customs Brokers and Foreign Freight Forwarding firm and 8 years of experience as Vice President and Manager of another Customs Broker and Foreign Freight Forwarding firm directly supervising as many as 23 employees in all phases of customs brokerage and freight forwarding activities. Boyle formerly held a forwarder registration number issued by predecessor agencies.

Boyle was aware in July 1964 when the partnership was formed that he and the partnership required a license to engage in ocean freight forwarding.

Applicant maintains that it informed the Commission of all the facts involving its relationship with World-Wide and that the Commission never indicated to applicant that such relationship was improper. In its application for license, applicant stated that Cheung was presently the San Francisco representative on an agency basis of World-Wide. The partnership agreement which was attached to the application states in Article 9 thereof that if the partnership were to be dissolved, Howard Cheung "will be allowed to withdraw from the assets of the partnership, the business account and franchise of World-Wide Services, Inc."

Applicant further states that it disclosed all the facts to Mr. Kerttu, a Commission investigator, in September of 1964, and received no indication that its operations might be illegal.

By letter of August 6, 1965, a few days after applicant ceased its forwarding activities, this Commission notified applicant of its intent to deny the application for license; the grounds for denial being that applicant appeared to have been operating as a forwarder without a license or other proper authorization. Applicant requested a hearing.

DISCUSSION

Hearing Counsel except to the Examiner's failure to hold that applicant's operation renders it unfit for licensing. Hearing Counsel do not challenge applicant's "willingness" or "ability" to act as an

ocean freight forwarder, but they do contend, however, that applicant is not "fit" to so act.¹

Hearing Counsel seek to show that applicant knowingly and willfully operated without a license or other lawful authorization, and contend that such a showing will furnish sufficient grounds for denying applicant's license for lack of fitness to carry on the business of forwarding.

Hearing Counsel view the resolution of the question of whether applicant knowingly and willfully operated without lawful authorization as being dependent upon a determination of the force and effect to be given the agreement between applicant and Cheung; which agreement purports to authorize applicant to operate under the name of World-Wide. Hearing Counsel feel that said agreement, by its terms alone, may have created an acceptable employment relationship,² but that applicant's conduct thereunder demonstrates that such relationship was neither created in fact nor intended to be created.

In support of their contention that no meaningful employment relationship was meant to be created, Hearing Counsel offer the following:

1. By terms of the agreement, applicant was to perform a complete forwarding service and was to receive only 25 percent of the forwarding fees as compensation therefor. Seventy-five percent of forwarding fees and all brokerage were to be remitted to World-Wide. Such a low level of compensation indicates that no meaningful employment relationship existed.

2. Applicant billed forwarding fees and brokerage on all services performed by it, using World-Wide's name and license number. Contrary to the terms of the agreement, applicant retained all monies received from shippers and steamship lines. Even when the agreement was subsequently orally amended to allow applicant to retain 75-80 percent of forwarding fees, applicant in fact retained *all* forwarding fees and brokerage. This is strong circumstantial evidence that applicant intended to disregard its obligations under the agreement with World-Wide and that no employment relationship ever existed.

3. By written agreement upon Cheung's withdrawal from the partnership, applicant bound itself to cease using World-Wide's name

¹ The pertinent language of section 44 of the Act provides: "A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be an independent ocean freight forwarder as defined in this Act and is *fit, willing, and able* properly to carry on the business of forwarding * * *." (Emphasis supplied)

² Section 510.4(b) of General Order 4 (46 CFR 510.4(b)) provides: "An employee of a licensed independent ocean freight forwarder is not required to be licensed in order to act solely for his employer * * *."

and license as of May 4, 1965. Despite this agreement, applicant continued to act as a forwarder, using World-Wide's name and license, until July 31, 1965. No good faith intention to operate lawfully can be inferred from applicant's knowing disregard for an agreement of its own making.

Hearing Counsel contend that this evidence compels a conclusion that applicant never entered into an employment relationship with World-Wide; that applicant never intended to enter into such a relationship; and that applicant's arrangements with Cheung amounted to nothing more than a scheme whereby applicant attempted to begin forwarding operations before obtaining a license and without other lawful authorization.

Hearing Counsel contend further that a finding that applicant operated without authority warrants a conclusion that applicant is unfit for licensing, citing *Johnson & Son, Inc., Common Carrier Application*, 79 MCC 362 (1959).

FINDINGS

The facts permit findings that:

1. Applicant, engaged in carrying on the business of forwarding between July 1964 and July 31, 1965, without a license issued by the Federal Maritime Commission and during such period operated through the use of guile and deception.
2. Applicant was not authorized to use the license of a licensed independent ocean freight forwarder.
3. Applicant is not qualified as an independent ocean freight forwarder because the applicant is not fit properly to carry on the business of forwarding and to conform to the provisions of the Act and rules of the Commission issued thereunder.

CONCLUSION

In our opinion, the record of facts before us and our interpretation of them in findings support beyond a reasonable doubt that the applicant knowingly and willfully operated as an ocean freight forwarder without lawful authorization; hence, in violation of the law; and therefore the applicant is not fit to be licensed as a forwarder by this Commission.

It is not disputed that the respondent was engaged in dispatching of shipments on behalf of others by oceangoing common carriers in commerce from the United States and handling the formalities incident

to such shipments and was therefore carrying on the business of forwarding as defined in the first section of the Shipping Act, 1916.

Boyle is a trained, knowledgeable person, who knew the requirements of law and ethics pertaining to his profession.

The fact that World-Wide did not employ the applicant nor appoint it as its agent and the conduct of the applicant show there was no true operation pursuant to World-Wide's freight forwarder license.

The initial decision bypassed a central issue in this case, i.e. whether applicant held itself out as an employee as opposed to an agent of World-Wide. This issue is one of primary importance to be decided at this time. Section 44(a) specifies that "No person shall engage in carrying on the business of forwarding * * * unless such person holds a license issued by the FMC * * *." Sections 510.4(b) and 510.23(a) provide that an employee of a licensed forwarder need not himself be licensed. Certainly nothing in this record indicates Boyle was an "employee" of World-Wide. The facts in this case indicate that Boyle had a very loose arrangement with Cheung to act as *Cheung's agent* rather than the agent of World-Wide Services, Inc.

The pertinent statutory provision and our rules clearly state that only a bona fide employee of a licensee need not himself be licensed. There appears nowhere any provision in the statute or our rules imputing the authorization of a license to carry over to any or all "agents."

The facts showing applicant agreed to take only 25 percent of forwarding fees and later 75 to 80 percent, but in all cases retained all money received, without objection or claim by others, and showing a partnership with a person purporting to confer right to use another's license, proves the arrangement was a sham to make the public believe applicant was operating with a license when he was not. The actions of devising such a plan and carrying it out and operating beyond the time applicant agreed to stop show guile and deceit, and such a person is not a fit licensee.

The profession of ocean freight forwarding is a highly responsible one requiring honorable conduct by all of its practitioners. Past malpractices disclosed by our predecessor agencies induced Congress to enact licensing requirements imposing on us responsibility for reviewing and limiting access to the profession to those fit, willing, and able, and of sufficient financial standing to be able to provide a fidelity bond. Existing licensed professionals are entitled to protection as part of the public just as much as shippers, but we can make our influence felt only by establishing and maintaining high quality standards of access to licenses. To grant the license would ignore significant aspects

of applicant's past conduct and permit a lowering of standards of access to this distinguished and honorable profession and in fact diminish forwarder's own ability to protect and serve the public in line with their professed high and worthy ideals.

Our ultimate conclusion is that respondent's application for a license as an independent ocean freight forwarder should be denied.

ORDER

DOCKET No. 66-4

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION,
JAMES J. BOYLE & Co., 507 WASHINGTON STREET, SAN FRANCISCO,
CALIF.

The Commission having fully considered the above matters and having this date made and entered of record a Report containing its conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That the application for license of James J. Boyle & Co. is hereby denied pursuant to section 44(b), Shipping Act, 1916.
By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 66-30

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION No.
654, E & R FORWARDERS, INC., 150 BROADWAY, NEW YORK, N. Y.

Applicant for license as ocean freight forwarder found not to be an "independent ocean freight forwarder" as defined by section 1 of the Act though a holder of "grandfather" rights; found to be a "dummy" freight forwarder of the kind that Congress intended to eliminate by the enactment of P.L. 87-254. Application denied.

Philip G. Maron, attorney for Applicant.

Donald J. Brunner and *Samuel Nemirow* as Hearing Counsel.

INITIAL DECISION OF BENJAMIN A. THEEMAN, EXAMINER¹

The order in this proceeding served March 2, 1966, by the Federal Maritime Commission on E & R Forwarders, Inc. (Applicant), stated as follows:

By letter dated March 14, 1966, E & R Forwarders, Inc., was notified of the Federal Maritime Commission's intent to deny its application for an independent ocean freight forwarder license. The ground for denial is that applicant's association with Romerovski Bros., Inc., Remor Waste Material Corp., and Romer Export Corp., shippers and sellers of merchandise to foreign countries, precludes it from qualifying as an independent ocean freight forwarder as defined in Section 1, Shipping Act, 1916 (46 U.S.C. 801). Applicant has now requested the opportunity to show at a hearing that denial of the application would be unwarranted.

The hearing was held in New York City, on June 20, 1966. The parties stipulated the facts into the record and agreed upon the exhibits placed in evidence. Applicant made an opening statement on the record, but has filed no brief although given the opportunity to do so.

From the record as a whole it is found:

1. Applicant, E & R Forwarders, Inc., a New York corporation, has been operating as an ocean freight forwarder with the permission of the Commission since 1957.

¹ This decision became the decision of the Commission on Sept. 13, 1966.

2. After the Shipping Act of 1916 (the Act) was amended on September 19, 1961, by the passage of P.L. 87-254,² the Applicant pursuant to section 44(b) of the amended Act (See Appendix) filed an application for a freight forwarder's license on January 17, 1962.

3. On January 27, 1962, the Application was given Application No. 654 by the Commission.

4. Applicant is presently conducting its business at 450 Westfield Avenue, Roselle Park, N.J. Its three directors are its officers: Fred Udelsman, president; Eva Romer, treasurer; and Rose Romerovski, secretary. The 20 outstanding shares of Applicant's stock are held equally by Eva and Rose; and the letters E and R in the Applicant's name stand for the first names of these two ladies.

5. Eva Romer is the wife of Harry Romer, and Rose Romerovski is the wife of Martin Romerovski. These four established the Applicant. Mr. Romer and Mr. Romerovski are brothers and the owners of all the stock of Romerovski Bros., Inc.³ Romerovski Bros., Inc. (the Shipper), is a shipper of shipments to foreign countries in that it is a corporation engaged in the export of used clothing and rags at the Roselle Park address. Applicant's president, Udelsman, is the Traffic and Export Manager of the Shipper and is paid by the latter corporation.⁴

6. All office facilities utilized by the Applicant belong to, and are on the premises of, the Shipper. The bills of lading and other necessary shipping documents are prepared by paid employees of the Shipper at the offices of the Shipper. Applicant's files are kept by employees of, and its books by the bookkeeper of, the Shipper. Applicant pays no compensation of any kind to either the Shipper or the Shipper's employees for the work done, or for the use of the office facilities. Applicant has no capital equipment or any office facilities of its own. Applicant's only paid employee is a messenger named Daniel Fabrisko.

7. There is no evidence to show that either the secretary or the treasurer perform any services for the Applicant. Applicant paid each \$5,000 per year until 1965. That year each received \$6,000.

8. Applicant's entire forwarding operation consists of handling from 70 to 100 shipments per month for the Shipper. Applicant bills the Shipper monthly for these services at the rate of \$7.50 per shipment. Applicant also collects ocean freight compensation from the

² Entitled, "An Act to amend the Shipping Act, 1916 to provide for licensing independent ocean freight forwarders, and for other purposes." Pertinent provisions of the amended Act are contained in the Appendix.

³ Romerovski Bros., Inc., came into being in 1966 as a result of a merger of three corporations wholly owned by the brothers. They were Romerovski Bros., Inc., Romer Export Corp., and Romer Waste Material Corp. See quotation from the Commission's order in the opening paragraph.

⁴ Official notice is taken of (a) Udelsman's position with the Shipper; and (b) of the data in paragraphs 2 and 3.

steamship carrier. Applicant's gross receipts for the fiscal year ending June 30, 1965, were \$16,334.89. Carriers paid approximately \$10,000 of this sum; the Shipper paid the remainder as forwarding fees.

9. Ocean freight charges are paid directly to the carriers by the Shipper.

10. Applicant maintains a telephone-answering service and a mailing address at 150 Broadway, New York City. There is no evidence that any forwarding business is transacted at this address.

11. Applicant's board of directors has never held a meeting.

DISCUSSION

There is no question and it is found that the Applicant doing business as shown herein is not an "independent ocean freight forwarder" within the meaning of section 1 of the Act. Applicant is subject to effective control by Romerovski Bros., a shipper of shipments to foreign countries; the Shipper has a beneficial interest in the Applicant.

The brothers Romer and Romerovski own all the stock of Romerovski Bros., the Shipper. The wives of the brothers own all the stock of the Applicant. Each corporation is a closed one-family corporation. There is no evidence that the wives in any way participate in, engage in or exercise any control over the affairs of the Applicant. Accordingly, although the Applicant and the Shipper are separate corporations it is found that the real parties at interest behind both corporations are the brothers Romer and Romerovski.

Applicant has no paid employees other than the messenger Fabriso. All the work of freight forwarding is done by employees of the Shipper under the guidance and control of an executive of the Shipper. All the operating costs of the Applicant including labor costs (except the messenger) are paid for by the Shipper. The wives, as already stated, other than receiving certain payments from the Applicant, neither engage in nor take any interest in the affairs, business or operations of the Applicant. Thus, it is clear that the only persons in charge or performing the operations of Applicant are personnel of the Shipper. Though as asserted by Applicant, there may exist a technical and legal distinction between the Applicant and the Shipper, nevertheless, under the circumstances of this case, the conclusion is inescapable that the Applicant is under the effective control of the Shipper.⁵ I so find.

⁵ This control is considered none the less effective because the stock of the Applicant is in the names of the wives and not in the names of the brothers. Cf. *In the Matter of Luis (Louis) A. Pereira, etc.*, 5 FMB 400, 405, etc.; also *Investigation of Ocean Freight Forwarders, etc.*, 6 FMB 327, 345.

In addition to the facts stated in the above paragraph, the record shows the Shipper was instrumental in the organization of the Applicant; and the Applicant does no ocean freight forwarding for any other concern than the Shipper. The Applicant receives payments from carriers for services rendered in connection with the shipments of the Shipper. The Shipper also pays the Applicant forwarding fees. These monies are paid by the Applicant to the wives of the two stockholders of the Shipper. The record contains no evidence as to what the wives do with the money. But in view of the marital relationship between the stockholders of the Applicant and the stockholders of the Shipper, it is easily concluded that the brothers receive financial advantage from the payments received by the wives; i.e., from the Shipper's shipments. It follows, contrary to the contention of the Applicant, that the Shipper (wholly owned by the two brothers) has a beneficial interest in the Applicant.⁶

There is little question that under the circumstances of this case the Applicant is a "dummy" forwarder whose collection of compensation from carriers redounds to the benefit of the Shipper.⁷ It is this type of freight forwarder that P.L. 87-254 was enacted to eliminate.⁸

CONCLUSION

Section 44 of the Act is a licensing statute. Like other licensing statutes it should be approached with a liberal attitude to the end that licenses may be granted to qualified applicants. *Application for Freight Forwarders License—Dixie Forwarding Co., Inc.*, 7 FMC 109, 122, 167 (1965). The Commission in keeping with this policy has given applicants an opportunity to remove from their operations or organizations such aspects as may be offensive to the Act.⁹ Applicant at the hearing stated that it would meet with the Bureau of Domestic Regulations "to make any changes that may be agreed upon with them as to the manner in which the operations of the [Applicant] should be continued, so that it may be in full compliance with all the rules and regulations of

⁶ The Commission's Regulations Title 46 CFR 510.21 contain the following: "(1) The term 'Beneficial interest' for the purpose of these rules includes, but is not limited to * * * right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising * * * by operation of law or by agreement, express or implied * * *."

⁷ No finding is made concerning the possibility that the shipper may be obtaining an unlawful rebate. That aspect of this proceeding is outside the scope of this proceeding.

⁸ H.R. Rept. No. 2939, 84th Cong., 2d sess., July 26, 1956, p. 53, etc.

⁹ See *Application etc., Morse Shipping Co., etc.*, 8 FMC 472 (1965); *Application etc., Del Mar Shipping Corporation, etc.*, 8 FMC 493 (1965).

the Maritime Commission." As of the date of this decision, Applicant has not advised the Commission of any corrective steps taken.

The Application is denied.¹⁰

(Signed) BENJAMIN A. THEEMAN,
Presiding Examiner.

APPENDIX

PERTINENT PROVISIONS OF THE ACT

Sec. 1 * * * when used in this Act: * * *

An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

Section 44(a) provides that a person desiring to engage in the carrying on of the business of forwarding must first secure a license from the Commission.

Section 44(b) requires the Commission to issue the license to any qualified applicant who is found by the Commission to be "an independent ocean freight forwarder as defined in this Act and [to be] fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder * * * otherwise such application shall be denied." Also by section 44(b), the Congress granted so-called "grandfather rights" to those independent ocean freight forwarders who, on the effective date of the Act, were "carrying on the business of forwarding under a registration number issued by the Commission." Such forwarders were allowed to continue in business for a period of 120 days after September 19, 1961, without a license, and if the forwarder applied for a license within the 120 days he could "under such regulations as the Commission shall prescribe, continue such business until otherwise ordered by the Commission."

¹⁰ Conclusions and contentions not discussed or embraced in this decision have been considered and are not justified by the record, or are considered unnecessary for the determination of the issues.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-29

AGREEMENT No. 9431, HONG KONG TONNAGE CEILING AGREEMENT

Decided September 15, 1966

The Commission has no authority to compel a carrier to participate in a section 15 type agreement against its will.

When one of the original parties to an agreement filed for approval under section 15 withdraws from such agreement prior to Commission approval thereof the document so filed no longer constitutes an agreement of all of the carriers within the meaning of section 15.

Where, in the course of considering an agreement filed for approval under section 15, it is established that the document does not constitute a true copy of the continuing agreement of the original parties thereto such document will be rejected.

If one of the parties to an agreement submitted for approval under section 15 withdraws from the agreement prior to the time Commission approval is had, the document so filed ceases to constitute a "true copy" of the agreement within the meaning of section 15 of the Shipping Act, 1916, as amended, in that it purports to include the party which has withdrawn.

Charles F. Warren and John P. Meade for respondents, New York Freight Bureau (Hong Kong).

George F. Galland and J. Donald Kenny for States Marine Lines.

Donald J. Brunner and Samuel B. Nemirow as Hearing Counsel.

REPORT

BY THE COMMISSION (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day and John S. Patterson, *Commissioners*)*:

This proceeding was instituted on April 28, 1966, by our Order to Show Cause why a document designated Agreement No. 9431 as originally filed on March 4, 1965, should not be rejected as failing to constitute an agreement within the meaning of section 15 of the Shipping Act, 1916, among all of the parties which had signed it, or, in the al-

*Commissioner Hearn did not participate.

ternative, why this document should not be disapproved under section 15 for the same reason and for the additional reasons that the document no longer constitutes a "true copy" of the agreement between only the carriers party thereto and that the Commission is without statutory authority to compel a common carrier by water to participate in an agreement to which it is not a party and against its will.

BACKGROUND FACTS

The New York Freight Bureau (Hong Kong) (hereinafter called the "Bureau") is a conference which operated under approved Agreement No. 5700-4.¹ It is composed of 17 carriers and is concerned with the inbound trade between Hong Kong and United States East and Gulf Coasts.

This agreement provided in pertinent part as follows:

(1) This agreement covers the establishment and maintenance of agreed rates and charges for or in connection with the transportation of all cargo in vessels owned, controlled, chartered and/or operated by the parties hereto in the trade covered by this agreement.

The agreement's voting provisions were set forth in paragraph (10) (a) and stated:

(10) (a) Changes in tariff rates and conditions (and all other matters voted upon, with exception of changes in the arrangement) shall be effected and/or decided by the affirmative vote of not less than two-thirds of the parties hereto.

Any change in this arrangement shall be made only by the unanimous vote of all the parties to the arrangement.

The members of this conference were parties to a previous cargo apportionment agreement (No. 5700-5) which placed a ceiling on the number of revenue tons of cargo which any member line could lift during any one loading at Hong Kong. This agreement expired by its own terms on January 6, 1965.

On January 14, 1965, the members of the Bureau unanimously entered into an agreement designated No. 9431, *supra*, which was a new tonnage ceiling agreement similar to No. 5700-5 which had expired 8 days earlier. Section Fifth of this agreement calls for a three-fourths majority vote to change the tonnage of cargo which may be lifted on each sailing. Section Eighth specifies that the agreement shall continue in effect for a period of 1 year beginning on the date approved by the Commission unless, by unanimous vote of the parties, it is extended further.

¹ On May 13, 1966, Agreement No. 5700-8 was approved in part (as to noncontroversial sections). The contested portions have been made the subject of an investigation, Docket 66-32.

Agreement No. 9431 was filed with the Commission on March 4, 1965, with a letter of transmittal which stated in part, "this is a separate agreement and does not amend Agreement No. 5700." On September 28, 1965, the Commission issued its order of conditional approval. This order approved the agreement upon the condition that sections Fifth and Eighth of the agreement be modified so as to permit closer continuing surveillance over the operation of the agreement by the Commission by requiring the submission of all changes in tonnage ceilings and, in the case of decreases in such ceilings, advance approval under section 15. It also limited renewal of the agreement by unanimous vote to one additional period of 1 year.

The parties to the agreement were allowed 60 days within which to accept the changes specified in the order of conditional approval. The period was extended an additional 60 days at the request of Mr. D. Parker, Chairman-Secretary of the parties to the agreement. This would have allowed the lines involved until February 3, 1966, to comply.

On January 21, 1966, however, States Marine Lines, one of the original parties to the agreement, sent a telegram to the Commission in which it noted its opposition to the agreement and requested a hearing in the event that the Commission intended to consider the agreement further. The Commission thereupon withdrew its order of conditional approval on January 24, 1966.

On February 3, 1966, a document purporting to accept the conditions specified in the order of conditional approval on behalf of the parties was tendered to the Commission for filing.

On February 4, 1966, the matter became the subject of an order of investigation and hearing (Docket No. 66-6). On the same date, the Bureau filed a petition for reconsideration asking the Commission to vacate its order withdrawing conditional approval. This petition was denied on February 16, 1966, and the proceeding was discontinued.

THE PRESENT PROCEEDING

This proceeding arose as a result of a petition filed by the Bureau on March 25, 1966, asking for "immediate section 15 action" on Agreement No. 9431 in its original form.

In a reply filed on April 14, 1966, States Marine Lines, one of the original signatories to Agreement No. 9431, opposed the petition on the ground "that there is no such agreement before the Commission for approval."

The New York Freight Bureau (Hong Kong) filed a further pleading on April 18, 1966, in reply to States Marine's opposition to the

petition in which it contended that States Marine Lines could not legally back out of the agreement which it had signed and, in any event, that the agreement came within the scope of Agreement No. 5700-4 (the basic conference agreement of the New York Freight Bureau) and, as such, was governed by the two-thirds vote rule of that agreement thereby binding States Marine.

Since there was no issue of fact as to States Marine's opposition to Agreement No. 9431 the Commission, in an Order to Show Cause served on April 28, 1966, directed the common carriers by water involved in the purported agreement to show cause why the document designated as No. 9431 should not be:

* * * rejected as failing to constitute an agreement between all of the said carriers within the meaning of section 15,

or, in the alternative,

disapproved under section 15 for the same reason and for the additional reasons that the document no longer constitutes a "true copy" of the agreement between only the carriers party thereto, and that the Commission is without authority to compel a common carrier by water to participate in an agreement to which it is not a party and against its will.

In our Order to Show Cause, we invited the parties to brief the following five questions as an aid to our resolution of the issues presented:

1. May the Commission reject a document purporting to be an agreement filed for section 15 approval when it is established that a carrier signatory thereto is, at the time approval is to be granted, no longer a party thereto, or must the Commission "disapprove" such a document within the meaning of section 15?

2. What effect does the failure of a carrier originally a party to an agreement filed under section 15 to accept modifications imposed by the Commission as a condition precedent to its approval have—

a. On the agreement itself, and

b. On the dissenting carrier's status under the agreement?

3. Under what statutory provision, if any, may the Commission compel the participation by a common carrier by water in foreign commerce in an agreement to which it is not a party or against its will?

4. May the Commission modify Agreement 9431 so as to delete therefrom any carrier not a party to the agreement and then proceed to a determination of what action to take under section 15?

5. Is Agreement 9431 governed by any of the provisions of Agreement 5700 as amended to date?

POSITIONS OF THE PARTIES

Briefs and affidavits have been filed by the New York Freight Bureau (Hong Kong), States Marine Lines, and Hearing Counsel. The positions of each of the parties on these issues are set out below :

A. The New York Freight Bureau

1. The Bureau contends that the Commission may neither reject nor disapprove Agreement No. 9431. It argues that once a carrier signs an agreement subject to section 15 approval, it may not unilaterally repudiate its action but that it remains a party to the agreement until such time as the Commission gives its approval or, after hearing, disapproves it.

2. It is the Bureau's position that Agreement No. 9431 is a supplement to the basic Conference Agreement No. 5700-4 governed by that agreement's voting provisions. Accordingly, it argues, a two-thirds vote was sufficient for approval of the ceiling agreement as submitted originally as well as for acceptance of the modifications imposed by the Commission in its order of conditioned approval. The attempted withdrawal of States Marine Lines from the original agreement and its failure and refusal to accept the modifications imposed by the Commission has no effect on the agreement itself or States Marine's status thereunder.

3. The Bureau contends that this is not an appropriate case to test the question of whether the Commission may compel a carrier to participate in an agreement against its will because States Marine is a party to Agreement No. 9431. Moreover, the Bureau is not asking the Commission to compel participation but merely for approval under section 15 of the Shipping Act. After approval, the Bureau will take appropriate steps to force States Marine to abide by the terms of the agreement.

4. The Commission may not modify Agreement No. 9431 by deleting States Marine Lines because the adoption of this agreement was a valid Bureau action and States Marine as a member is bound thereby. Moreover, even if this were not a Bureau action, States Marine remains a party to the original agreement as unanimously adopted.

5. The Bureau contends that Agreement No. 9431 is a "supplement" of the type contemplated in Article 9 of Agreement 5700-4 and under Article (10) (a) thereof only a two-thirds vote is required for adoption.

B. States Marine Lines

1. States Marine has no preference as to whether Agreement No. 9431 is rejected or disapproved.

2. The nonacceptance by States Marine of the modification imposed by the Commission in its order of conditional approval kills the agreement or, in any event, liberates the dissenter whether the agreement is killed or not.

3. The Commission has no statutory authority to compel participation in an agreement by a common carrier by water against its will.

4. States Marine has no interest in the disposition of the cargo ceiling agreement as long as States Marine is out of it.

5. States Marine Lines contends that Agreement No. 9431 is wholly separate from Agreement 5700. But even if No. 9431 were to be governed by No. 5700, the result would be the same since Agreement 5700 requires unanimity where a "change in this arrangement" is proposed.

C. Hearing Counsel

1. Since the document bearing identification No. 9431 is no longer an "agreement" due to the withdrawal of States Marine, it does not come within the aegis of section 15 and is unapprovable as a matter of law. It must, therefore, be rejected.

2. Since a dissenting carrier must be permitted to withdraw on 30 days' notice from an approved agreement without penalty under General Order 9, it follows that it should be allowed to withdraw from an unapproved, executory agreement. This should not affect approvability provided that the dissenting carrier's name is stricken from the agreement.

3. No provision of the Shipping Act, 1916, nor any interpretation of its legislative history authorizes the Commission to compel a common carrier by water to participate in an agreement against its will.

4. The "agreement" identified as No. 9431 purports to be an arrangement among the carriers who are signatories thereto. Since a section 15 agreement is a voluntary endeavor, the Commission may not subtract carriers from the membership against their will any more than it can add carriers to it against their will.

5. The ceiling agreement (No. 9431) is a separate and distinct arrangement which must stand or fall on its own merit even though the parties are the same in each. It is not governed by any of the provisions of Agreement No. 5700 as amended to date.

DISCUSSION AND CONCLUSIONS

Section 15 of the Shipping Act, 1916, authorizes common carriers by water and other persons subject to the Act to enter into certain types of anticompetitive agreements subject to the approval of the Commission. When such an agreement is filed, the Commission must

approve it unless, after notice and hearing, it finds that it would be unjustly discriminatory or unfair, operate to the detriment of the foreign commerce of the United States, be contrary to the public interest or be in violation of the Act. Upon such a finding, the Commission may disapprove, cancel or modify the agreement.

Among the agreements which become the subject of a hearing, there are usually two broad classes of issues presented :

1. Whether the Commission has jurisdiction over the agreement; and
2. Whether the agreement ought to be approved.

The instant proceeding is concerned only with the jurisdictional question. Thus, the merits of the agreement are not reached.

In order for the Commission to have jurisdiction, there are three necessary elements. There must be :

1. an *agreement* among
2. common carriers by water or other persons subject to the Act
3. to engage in anticompetitive or cooperative activity of the types specified in section 15.

If one or more of these elements is lacking, we have no jurisdiction to consider the matter under section 15. For example, unless two or more of the parties to an agreement are common carriers by water or other persons subject to the Act, the agreement is not subject to filing under section 15 no matter how anticompetitive it may be. *Grace Line, Inc. v. Skips A/S Viking Line, et al.*, 7 F.M.C. 432, 447 (1962). Similarly, where there is an agreement between persons subject to the Act, but the cooperative conduct is not of the type specified in section 15, the agreement is also beyond the reach of our jurisdiction. *D. J. Roach, Inc. v. Albany Port District, et al.*, 5 F.M.B. 333 (1957). Finally, and most fundamental of all is the requirement that there be an actual, viable agreement to which all of the parties have given and continue to give their assent until approval is had.

The purported Agreement No. 9431 in this case fails to meet this latter criterion.

When a group of carriers files a new agreement with the Commission, it is fundamental that each member of this group must give its individual assent to the document purporting to represent the agreement of the parties. If at any time prior to approval by the Commission, one of the parties to the agreement changes its mind and withdraws from the agreement, the document previously filed becomes at that moment obsolete. It no longer constitutes a fair and accurate description of the agreement between the parties.

Accordingly, where as here, one of the parties to the agreement withdraws from the agreement as filed, that act destroys the subject matter of the Commission's jurisdiction.

We can only consider *agreements* for approval under section 15. What we have before us is manifestly a nonagreement.

The Bureau argues that a party to an agreement may not repudiate the agreement or withdraw until the Commission has acted. The major portion of the Bureau's argument is an attempt to show that States Marine is bound by Agreement No. 9431 under the principles of private contract law. The difficulty in the Bureau's premise is that we have stated that a section 15 agreement is not a private contract but "* * * a public contract impressed with the public interest and permitted to exist only as long as it serves that interest." *In Re: Pacific Coast European Conference*, 7 F.M.C. 27, 37 (1961). Thus, the rights of the parties as against each other for breach of their "contract" must be distinguished from the question of whether there is in existence an approvable agreement under section 15.

Significantly, States Marine Lines does not argue that it has an absolute, unqualified right to withdraw from a section 15 type of agreement prior to Commission approval. It argues, rather, that the passage of time and material changes in circumstances, including the inauguration of "direct service," warrant its withdrawal from an agreement which is now nearly a year and a half old, especially where the agreement, by its own terms, was limited to a year's duration following approval. The Bureau attempts to show that States Marine's increased carryings are due not to the inauguration of a "direct" service but to "rebating."

These arguments are disregarded because they are totally irrelevant to the issues raised in the order to show cause. Such "evidence" might be relevant to a determination of whether any ceiling agreement in the Hong Kong trade should be approved by the Commission, but it is not relevant or material to the determination of the current status of No. 9431.

We take no position on the question of whether States Marine Lines' withdrawal or repudiation of Agreement No. 9431 was justified or not. It is the fact of this withdrawal and not the reasons therefor which concerns us. As to this fact, there is no dispute among the parties.

The Bureau asks us to approve Agreement No. 9431 as submitted notwithstanding States Marine's withdrawal. This we cannot do.

The role of the Commission with respect to agreements requiring approval under section 15 is essentially a passive one. We neither encourage nor discourage such agreements. The function of the Com-

mission is to examine such agreements in the light of the legal criteria imposed by the Shipping Act. If the agreement meets these criteria, the agreement is approved. If there is some question as to whether the agreement should be approved, the matter is set down for hearing.

We have no general equity authority to compel specific performance on the part of a recalcitrant party. Put another way, the Commission's initial task under section 15 is to deal with *agreements* among or between carriers or other persons subject to the Act, not *disagreements*.

The Bureau argues that it is not asking us to compel participation by States Marine but only to approve the agreement which States Marine had signed. To approve the agreement in question in the circumstances of this case would be to do by indirection that which we could not do directly. Approval of the agreement would be tantamount to compelling participation of States Marine Lines against its will.

While it is true that Congress intended, by the Shipping Act, to allow carriers to enter into anticompetitive combinations (subject of course to approval and regulation by the Commission), it is equally true that Congress has zealously written safeguards into the law which are designed to protect the rights of a carrier to pursue an independent existence.

The Bureau objects to the conditional approval procedure, characterizing it as "disapproval by delay." The conditional approval procedure is intended as a mechanism whereby quick approval of a section 15 agreement may be had where the Commission has some objections to an agreement as filed. If the parties to a proposed agreement do not wish to avail themselves of this purely procedural short cut to approval, the Commission will, of course, set the matter down for hearing. But this is a time-consuming process, the very thing which the Bureau objects to.

What the Commission is, in effect, saying when it issues an order of conditional approval is:

Your proposed agreement as it stands must be set down for hearing. However, if you make the following changes it will be approved without a hearing.

The Bureau seems to take the position that the Commission must, in the discharge of its statutory obligations under section 15, either approve a proposed agreement instantly or set it down immediately for a hearing.

It loses sight of the fact that many of the agreements filed for approval as, for example, No. 9431, require hours of economic study in addition to a legal review before the Commission is in a position to make the determination to approve, conditionally approve, or set down for hearing.

The Bureau alleges that the Commission went back on its word when it withdrew its order of conditional approval prior to the expiration of time for acceptance of the conditions.

If the Bureau had, subsequent to the Commission's withdrawal of its order of conditional approval, submitted its acceptance of the conditions specified, and if this acceptance clearly represented the position of all of the parties to the agreement, then there is little doubt that the order of withdrawal would have been vacated and the agreement permitted to become effective in accordance with the terms of the original order of conditional approval. However, the events which followed the withdrawal of the order of conditional approval demonstrate amply that our withdrawal was fully warranted. At most, it could be argued that the withdrawal was a few days premature. But this error, if error it was, was clearly harmless since the Bureau admittedly was, and is, unable to secure the requisite unanimous approval of its members.

The basic conference agreement of the New York Freight Bureau (Honk Kong) in effect at all times pertinent herein is Agreement No. 5700-4. This agreement is limited by its own terms to ratemaking. Nevertheless, the Bureau argues at some length that Agreement No. 9431 is tied to Agreement No. 5700-4.

For reasons which are best known to the Bureau members, the instant agreement was carefully insulated from conference activity (unlike the earlier tonnage ceiling agreement which had been filed as a supplement). Agreement No. 9431 by its own terms does not purport to be a modification to or an amendment of No. 5700-4. Moreover, the letter of transmittal accompanying Agreement No. 9431 specifically stated that it was separate from No. 5700. Since this letter of transmittal is a required document under the Commission's regulations, Title 46, C.F.R. § 522.1, any representation made therein is entitled to be given some weight in construing or explaining the agreement which it accompanies particularly if there is ambiguity in the contract itself. Moreover, since the tonnage ceiling agreement is a temporary expedient, it is not the type of agreement which is usually incorporated in a permanent conference agreement. We hold, therefore, that Agreement No. 9431 is separate and distinct from Agreement No. 5700-4.

However, even if No. 9431 were considered to be a part of No. 5700-4 (whether characterized as supplemental, ancillary or any other terminology), the voting rules of No. 5700-4 clearly require a unanimous vote whenever a change in the arrangement is contemplated. Since this unanimous vote was lacking, the result is the same.

The Bureau, however, argues that unanimity is not required because Agreement No. 9431 is ancillary or supplementary to the conference Agreement No. 5700-4 and that conference voting rules require only a two-thirds vote. The only matters under Agreement No. 5700-4 which could be done by two-thirds vote were changes in rates and ordinary internal housekeeping functions. Whenever an anticompetitive scheme other than ordinary ratemaking was contemplated, a change in the arrangement was called for and this required unanimity by the clear and unequivocal terms of the agreement.

Of course, if Agreement No. 9431 had been submitted as a supplement (i.e., a change in the arrangement) to Agreement No. 5700-4, and if the voting rules under No. 5700-4 permitted a change in the arrangement by something less than a unanimous vote, then a situation similar to that presented in Docket 1095 might be before us. *Agreement No. 150-21, Trans-Pacific Freight Conference of Japan and Agreement No. 3103-17, Japan-Atlantic and Gulf Freight Conference*, decided March 24, 1966, 9 F.M.C. 355.

In our view, it is immaterial whether No. 9431 is considered to be separate and distinct from No. 5700-4 or an amendment (or supplement) thereto. If it is separate, then clearly, it requires continuing agreement on the part of all whom it purports to bind. This must be so or it simply is not an agreement; it is a disagreement.

If, on the other hand, it is considered to be a part of No. 5700-4, it is, nevertheless, governed by that agreement's unanimous vote provision since it involves a basic change in the scope of the agreement.

In either event, unanimity is lacking. If one fact is utterly beyond dispute, it is that States Marine Lines is now opposed to the tonnage ceiling agreement. There is, therefore, no "agreement" before the Commission at this time upon which any action may be taken.

Upon consideration of the briefs and affidavits of the parties and for the reasons set forth in this report, it is ordered that this proceeding be, and the same hereby is, discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 65-1

MATSON NAVIGATION COMPANY, REDUCED RATES ON FLOUR FROM PACIFIC COAST PORTS TO HAWAII

Decided September 15, 1966

Respondent, in the carriage of flour from Pacific Coast port to Hawaii as a common carrier, found to be in competition with an unregulated barge line carrying wheat in the same trade.

Respondent's reduced rate on flour found to be compensatory, and justified as a means of meeting barge line competition.

Norman E. Sutherland, Alan F. Wohlstetter and Martin Sterenbuch for petitioner Hawaiian Flour Mills, Inc., intervener Hawaiian Manufacturer's Association.

A. R. Allen for intervener Portland Freight Traffic Association.

Arthur S. K. Fong for intervener State of Hawaii.

David F. Anderson for respondent Matson Navigation Co.

Robert N. Lowry for interveners General Mills, Inc., and Fisher Flouring Mills Co.

Paul Stepner for the Pillsbury Co.

H. E. Franklin, Jr., for Seattle Traffic Association, Port of Seattle and Seattle Chamber of Commerce.

James R. Cunningham for Washington Utilities and Transportation Commission.

R. Stanley Harsh and Donald J. Brunner, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harlee, *Chairman*; James V. Day, George H. Hearn and John S. Patterson, *Commissioners*):*

This proceeding was instituted by us as a result of petitions filed by Hawaiian Flour Mills, Inc., petitioner) and Hawaiian Grain Corp.¹

*Vice Chairman Ashton C. Barrett did not participate.

¹ Hawaiian Grain advised the Commission by letter dated Mar. 24, 1965, that it would not further participate in the proceeding.

protesting a reduction in rates on flour carried from Pacific Coast ports to Hawaii by Matson Navigation Co. (Matson). Petitioner also sought a suspension of the rate reduction.

By order of January 7, 1965, we instituted an investigation to determine whether the reduced rates were unjust, unreasonable or otherwise unlawful as alleged by petitioner. Matson was named as respondent in this proceeding. We did not grant the requested suspension.

Intervening on behalf of petitioner were Hawaiian Manufacturers Association, Fred L. Waldron, Ltd.,² Portland Freight Traffic Association and the State of Hawaii. Intervening for respondent were the (State of) Washington Utilities and Transportation Commission, Port of Seattle, Seattle Traffic Association, Seattle Chamber of Commerce, and the following mainland flour mills: General Mills, Inc., Fisher Flouring Mills Co. (Fisher) and The Pillsbury Co. (Pillsbury). Hearing Counsel also participated.

All interested parties have been heard and the proceeding is now before us upon exceptions to the Initial Decision of Chief Examiner Gus O. Basham.

FACTS

Historically, mainland millers such as General Mills, Fisher, and Pillsbury have been the sole suppliers of flour to the islands of Hawaii. These millers have for years shipped their finished flour product to Hawaii via respondent Matson Navigation Co. (Matson).

Recently, a new source of flour for the island has been created by the establishment of petitioner in Honolulu. Petitioner receives wheat transported in unregulated barges from Portland, Oreg., to Honolulu and mills it into flour (and mill feed) for the Hawaiian market where it competes with mainland millers.

Petitioner, organized in 1963, operates in close connection with various other related corporate entities. Pursuant to a 10-year contract, petitioner purchases whatever wheat it needs for milling from Hawaiian Grain in Honolulu. Hawaiian Grain previously acquired the wheat from Kerr Grain in Portland, Oreg., and has it shipped to Honolulu via Hawaiian Tug & Barge, an unregulated carrier.³ Hawaiian Grain stows the wheat in its elevators in Honolulu which are located adjacent to the mill which petitioner uses in its flour milling operation. The mill is not owned by petitioner but is leased to it by Oahu Railway & Terminal Warehousing Co.⁴ pursuant to

² Waldron did not appear at the hearing.

³ Petitioner and Kerr Grain are both owned by Thomas Kerr.

⁴ Dillingham Corp. is the owner of Hawaiian Tug & Barge, Oahu Railway, and 40 percent of Hawaiian Grain. Carnation Co. owns 60 percent of Hawaiian Grain.

a 20-year lease. The total cost of construction of the mill together with the waterfront land on which it is located was \$1,500,000.

Petitioner Hawaiian Mills commenced operation on August 27, 1964, of this new modern mill which has the capacity for supplying all of the Hawaiian flour market. It has a favored location by virtue of being in close proximity to deep water, to its grain supply, and to its purchaser of mill-feed. It has a specially designed trailer equipped to load and discharge flour pneumatically which it uses to transport flour to bakeries. It produces only bakery flour now, but has not ruled out the possibility of producing family flour. Its customers enjoy the advantages of having deliveries on a 24-hour basis, without having to carry large inventories. Petitioner employs 16 people with an annual payroll of \$87,000.

Petitioner's competitors from the mainland, Fisher, Pillsbury, and General Mills, have served Hawaii since the early 1900's. These mainland millers have seen their business in Hawaii decrease since the institution of petitioner's business there. Because of this loss of business and fear of further loss, the mainland millers sought to have Matson decrease its rates on flour to Hawaii. Matson's rate prior to the reduction was \$516 per container or \$22.43 per ton of flour.

The first request for a rate reduction was made by General Mills in September 1963, when it first learned of the proposed establishment of petitioner's business. General Mills had concluded that petitioner would have a cost advantage ranging from 45 cents to 91 cents a hundred pounds of flour. This was based on an estimated rate on wheat of \$10.69 per long ton, which in turn was the equivalent of the going common carrier rate on barley in bulk. Therefore, General Mills requested a container rate of \$15 per ton, which was denied by respondent as based upon speculative competition.

Upon the opening of petitioner's business (August 1964), General Mills learned that petitioner was quoting prices 40 to 50 cents per 100 pounds less than General Mills' prices to the retail bakery trade. Fisher encountered similar price competition in its sales to local Hawaiian bakeries. In August and September 1964, Fisher booked only 25 per cent of the volume it normally expected. Fisher's customers stated that Fisher's prices were too high. As a result, both mainland mills, in October 1964, renewed their request to Matson for a rate of \$15 per ton. They presented to Matson, in early November 1964, a study showing the estimated cost of wheat transportation to be \$10.62 per ton, consisting of a barge rate of \$8 per ton and accessorial charges of \$2.62 per ton.

Matson then decided to reduce the rate per container from \$516 to \$398, resulting in an equivalent rate of \$17.31 per ton, or a reduction of 26 cents per 100 pounds. The flour shippers were not satisfied with that rate but stated that they could "live" with it. Matson emphasizes that it reduced the flour rate to give its flour shippers rates which would preclude them from being forced completely out of the Hawaiian market solely because of the differential then existing between the unregulated barge charges for carrying wheat and respondent's flour rates. Matson disavowed any intention to put the new mill out of business, or to equalize other competitive factors such as a possible difference in the cost of producing flour in Honolulu and on the mainland, economic factors unrelated to transportation, or geographical disadvantage.

Matson transported 19,898 short tons of flour from Pacific Coast ports to Hawaii in 1964, 17,337 tons from the Pacific Northwest. It estimated that in 1965 it will have retained only about 61 per cent (12,300 short tons) of its total 1964 movement.

DISCUSSION

The Examiner recommended that the Commission find the reduced rate to be lawful. He found it would not be unduly preferential or prejudicial to any shipper and that it was not an unreasonable rate. He found the rate to be reasonable though not recovering fully distributed costs inasmuch as the reduction was necessitated by carrier competition. The Examiner also found the reduced rate to be compensatory and not contrary to the public interest.

Before reaching a discussion of the issues raised on exceptions, we wish to comment on certain aspects of the Examiner's decision to which no exception was taken.

The Examiner found no undue preference or prejudice in violation of section 16, First of the Act. Since we agree with this conclusion no discussion is here necessary.

There has been much discussion throughout this proceeding concerning what cost amounts need be recovered to enable the rate to be classified as reasonable. There was also much discussion about the reliability of the cost studies submitted by the two principal parties and whether either cost study would support their desired conclusion of reasonableness or unreasonableness of the rate.

We endorse the Examiner's findings concerning these problems. The Examiner first recognized that rates need not in every case recover fully distributed costs to be reasonable. This Commission has previously held that a carrier may establish rates below fully distributed

costs if special circumstances exist to justify them. *Investigation of Increased Rates on Sugar/Gulf Puerto Rico Trade*, 7 F.M.C. 404, 414 (1962); *Aleutian Marine Transport Co.—Rates Between Seattle and Ports in Alaska*, 7 F.M.C. 592, 596 (1963). Matson admitted its rates did not recover full costs but argued that special circumstances (carrier competition) justified the lower rates.

The Examiner then concluded that Matson's cost studies were based on proper considerations and that they were acceptable. Matson's studies showed that in 1964, its reduced rate on flour returned a "net-to-vessel"⁵ contribution of \$78.59 per container and that estimates for 1965 predicted an even higher return for that year. On the basis of this return, the Examiner determined the rates to be compensatory. Since no exception has been taken to any of these conclusions, it is not necessary to discuss them in any further detail.

Exceptions to the Examiner's decision filed by petitioner, the State of Hawaii, and Hearing Counsel raise the following issues for our consideration.

1. Whether the Examiner erred in finding the rate reduction to be necessitated by carrier competition.
2. Whether the Examiner properly treated the question of whether the rate reduction was necessary to enable the mainland mills to compete with petitioner in Hawaii.
3. Whether Matson's rate reduction unfairly distorts the existing rate structures, thereby resulting in unfair discrimination among shippers.
4. Whether the Examiner gave proper consideration to the public interest aspects involved.

We first consider whether the Examiner erred in finding the rate reduction to be necessitated by carrier competition.

Matson sought to establish justification for its rates which it admitted recovered less than fully distributed costs. Matson argued that Hawaiian Tug & Barge, the unregulated carrier employed by petitioner for the transportation of wheat, supplied meaningful competition so as to furnish justification for a reduced rate. The Examiner found such competition existed and that it was sufficient justification for rates recovering less than full costs.

Petitioner and Hawaii both except to the finding that Matson is in competition with the unregulated carrier. The substance of their position is that as a matter of law Matson, in the carriage of flour, cannot be competitive with Hawaiian Barge carrying wheat, because

⁵ A "net-to-vessel" rate of return recovers for the carrier all costs of handling the specific traffic and in addition contributes toward vessel and overhead expense.

they are not competing for the carriage of the same traffic of the same shipper. Petitioner cites *Board of Trade of Chattanooga v. East Tenn. Va. & Ga. R.C.*, 5 I.C.C 546 (1892) to support its theory that there can be no actual competition between carriers unless one line could and would perform the service alone if the other did not undertake it. This case, however, is not at all in point. It involved a proceeding under section 4 of the Interstate Commerce Act which prohibits railroads from assessing greater charges for transportation for a shorter than for a longer distance over the same line or route. Relief from this provision may be granted if the lower rate on the longer route is justified to meet water competition. The ICC merely held that in the proceeding before it, no water competition in fact existed to justify a lower rate. The Commission determined no water competition existed because none of the goods involved would reach the destination by water if the railroad withdrew from the business, and no competition can be said to exist unless one line would perform the service alone if the other did not do it. The case involved no question of different carriers transporting different types of commodities.

Petitioner further argues that because rates on raw materials are not comparable with the usually higher rates on the finished products manufactured therefrom, there can be no competitive relationship between them. We recognize that such a differential in rates exists between raw materials and the finished product, but we see no reason why this means the two commodities cannot be competitive. The Examiner cited two cases in which the ICC recognized such a competitive relationship; between wheat and flour,⁶ and between coal and fuel oil.⁷ This Commission has recognized a competitive relationship between logs and products therefrom.⁸

We agree with the Examiner that a competitive relationship can exist other than between carriers competing for carriage of the same product. Such a situation exists here. As Hearing Counsel suggested, what we have here are two competing systems involving supply of grain, milling, transportation, and the sale of flour; that flour and grain are competing products in this scheme; and that transportation rates and charges on one, by whatever type of ocean carrier, directly and vitally affect the other.

The fact that the competitive relationship between Matson and Hawaiian Barge is the outgrowth of a more direct competitive relationship between the local Hawaiian mill and the mainland mills for

⁶ *Grain and Grain Products*, 205 I.C.C. 301, 345 (1934).

⁷ *Fine Coal to Plymouth*, 280 I.C.C. 745 (1951).

⁸ *Nickey Bros. Inc. v. Associated Steamship Lines*, 5 F.M.B. 467 (1958).

the sale of flour does not, as petitioner suggests, detract from the fact that Matson is competing with Hawaiian Barge.

We conclude that the existence of carrier competition is convincingly established and its existence serves as sufficient justification for Matson's reduced rates which return less than fully distributed costs.

We turn then to a consideration of the Examiner's treatment of the question of whether Matson's rate reduction was necessary to enable the mainland mills to compete with petitioner for the sale of flour in Hawaii.

Petitioner suggests that since Matson's rate reduction was allegedly instituted to enable its shippers (mainland mills) to compete in Hawaii with petitioner, Matson is required to show that the reduction was necessary to achieve that goal. Petitioner maintains that Matson has failed to make this showing; that the Examiner erred in concluding that it had been shown; and that the Examiner improperly curtailed petitioner's attempt to show the opposite.

The record is clear that the mainland mills were losing their business in Hawaii to petitioner, and that a reduction in their price of flour was necessary to enable them to compete there.

The Examiner found:

Prior to seeking a rate reduction the second time, General Mills became aware of substantially lower price quotations by complainant [petitioner] than its own. Fisher had the same experience, losing 75 percent of its contract business during the first 2 months of complainant's [petitioner's] operation. It appears that Fisher has lost practically all of its Hawaiian trade. General Mills stands to lose only about 25 percent of its 1964-65 volume, due to the fact that complainant [petitioner] has not entered the family flour market or the Neighbor Islands market. At the time of hearing in May-June 1965, complainant [petitioner] had captured 48 percent of the market. Respondent expects to lose about 40 percent of its 1964 movement.

So it is clear that if the mainland mills are to retain a meaningful market in Hawaii it is necessary for them to lower their price of flour there.

The substance of petitioner's argument, however, is that the mainland mills should have met their competition in Hawaii by decreasing their own profit on the sale of flour instead of by asking Matson to lower its transportation rates applicable to the carriage of flour and, had they done this, Matson's reduction would not be necessary to enable the mills to compete with petitioner.

Petitioner says that it was precluded by the Examiner from developing facts in the record which would show that the mainland mills could have met the competition by lowering its profit margin. The Examiner

barred inquiry by counsel for the petitioner into the production costs and the profit and loss position of the mainland millers. The Examiner's decision in this respect was based partly upon the practical difficulties and delays inherent in taking a cost accounting excursion through the books, but was based primarily on the Examiner's conclusion that there is no requirement that cost of production or profit margin of shippers must be revealed to show a compelling necessity for a carrier's rate reduction below fully distributed costs.

We do not feel that the Examiner improperly barred the above-mentioned line of inquiry, since we agree with the Examiner that the important criteria to be considered here are the transportation considerations and not whether the mainland mills could compete by reducing their own profits.

The ICC in *State of Alabama v. New York Central*, 235 I.C.C. 255, 320, 321 (1939), quoted from an earlier case, *Cotton, Woolen, and Knitting Factory Products*, 211 I.C.C. 692, 786 (1935), as follows:

But the relation of such conditions [costs of production], whatever they may be, to transportation rates is remote * * *. *These factors are part of the industrial problems as distinguished from the strictly transportation problem with which we deal*, and their value in the consideration of the lawfulness of competitive rates is doubtful * * *. When left for determination by this Commission, *the decision must be governed by the circumstances and conditions directly or indirectly having to do with the transportation of the commodity.* (Emphasis supplied.)

This Commission has consistently refused to permit the "profitability" of a shipper's business to determine the reasonableness of a carrier's rates.⁹ The reason given for this rule is that ocean rates are but a single factor affecting "profitability," which is also affected by a narrowing market, increased cost of production, over production, and many other considerations.¹⁰

The true measure of petitioner's advantage then lies in its lower cost of transportation of flour in the form of wheat compared with the mainland mills' cost of transporting flour in finished form under Matson's rates. Prior to the rate reduction, petitioner enjoyed a favorable transportation cost advantage of \$14.48 per ton, and after the reduction it still retained an advantage of \$9.36 per ton.¹¹

In view of these differentials and in view of the fact that the evidence shows that mainland mills cannot compete with petitioner at this

⁹ *Intercoastal Cancellations and Restrictions*, 2 U.S.M.C. 397, 400 (1940); *Wool Rates to Atlantic Ports*, 2 U.S.M.C. 337, 341 (1940); *Eastbound Intercoastal Lumber*, 1 U.S.M.C. 608, 623 (1936); *Alaskan Rate Investigation*, 1 U.S.S.B. 1, 7 (1919).

¹⁰ *Eastbound Intercoastal Lumber*, *supra*.

¹¹ Petitioner paid a rate of \$7.95 per ton on wheat compared to Matson's rate of \$22.43 and \$17.31 per ton of flour before and after the reduction.

higher differential, and that they will have trouble continuing even their present level of flour shipments at the reduced differential, we cannot find that Matson's rate reduction was unnecessary.

We conclude that Matson's rate reduction was necessary to enable the mainland millers to compete in Hawaii with petitioner and that such necessity was created by the transportation cost advantage which petitioner held by virtue of the low rates of the unregulated carrier at which petitioner was able to transport wheat to Hawaii.

The third issue raised by exceptions is whether Matson's rate reduction unfairly distorts the existing rate structures, thereby resulting in unfair discrimination among shippers.

This issue is raised by exception of the State of Hawaii and the essence of their argument is that by allowing large shippers, such as the mainland mills, selective rate reductions which return less than full costs, without affording similar reductions to smaller shippers of other commodities, Matson places an undue burden on the shippers of the other commodities to cover costs of carriage. Such lack of precision in ratemaking and allocation of costs to specific classifications results in undue discrimination among shippers, according to the argument of the State of Hawaii.

This argument, however, is not valid in view of our conclusion that Matson's reduced rate does in fact return a net-to-vessel contribution of \$78.59 per container. This means that, although the shipments of flour did not return fully distributed costs, they do return a sufficient amount to cover the extra expenses incurred as a result of the particular flour shipment and they also contribute an additional \$78.59 per container toward administrative and vessel expense. In other words, if Matson did not carry these flour shipments (a likely result if no rate reduction is effected), the shippers of other commodities would have to bear an even larger burden in enabling Matson to meet its administrative and vessel expenses.

In view of this it cannot be said that the rate reductions distort the rate structure in such a way as to result in discrimination among shippers.

Finally, we will determine whether the Examiner gave proper consideration to the public interest aspects of the rate reduction.

The State of Hawaii and petitioner both state that the Examiner failed to properly consider whether the rate reduction was contrary to the public interest.

There can be no question that the Examiner did consider the public interest. The only question is whether he gave proper consideration to the proper aspects of the public interest.

The Examiner, in determining whether the reduction is contrary to public interest, would restrict himself to a consideration of transportation conditions and the effect the reduction might have thereon. Hearing Counsel endorses this position and we accept it as sound.

Each of the parties to this proceeding advanced its theory as to what a consideration of the public interest should entail, and as to why this reduction is not compatible with such considerations.

In the final analysis, each of the public interest factors urged by the parties (except one urged by the State of Hawaii discussed *infra*) involves transportation considerations and need be considered herein to determine if the rate reduction is reasonable.

Petitioner and the State of Hawaii fear that, if Matson prevails in the ratemaking theory here advanced, Matson will be able to prevent the entry of any new water carrier in the trade. This conclusion is based on the assumption that approval of the rate reduction involved here would amount to a condonation by this Commission of arbitrary rate reductions below compensatory levels, and that Matson could in the future employ such reductions to keep new carriers from competing in the trade. In view of our earlier determinations that the reduction here is compelled by competition and that it returns an amount in excess of out-of-pocket costs, such an assumption is unwarranted and the fears expressed by Hawaii and petitioner in this regard are unfounded.

Petitioner and the State of Hawaii also feel that this rate reduction will result in an unreasonable rate structure in Hawaii in which one commodity will be subsidized by another.

The effect of a rate reduction on other commodities and the over-all rate structure is important to a consideration of the public interest. However, we demonstrated earlier how this reduction, since it returns a net-to-vessel contribution, does not distort the rate structure in such a way as to place an undue burden on one commodity or one shipper.

We do not deny that Matson's rate reduction on flour affects its rates on other commodities. Every change in one rate causes a change in relationships or differentials with other commodity rates. At times, the public interest may require a change in rates because of their adverse effect on other rates on essential commodities. This Commission in fact has determined in a particular case that the public interest required that rates on a certain commodity be increased to return more than full costs in order that such rates might subsidize rates on basic foodstuff commodities which were sorely needed in Puerto Rico.¹²

¹² See *Reduced Rates on Automobiles—North Atlantic Ports to Puerto Rico*, FMC Docket No. 1145 and 1167, dated Feb. 4, 1965; *Reduced Rates on Machinery and Tractors—Atlantic Ports to Puerto Rico*, FMC Docket No. 1187 and 1187(1), 9 F.M.C. 465.

A third public interest factor urged by petitioner and the State of Hawaii is that, if Matson prevails in allowing a specific commodity rate reduction at the request of a large shipper, large influential shippers will always be able to gain similar concessions at the expense of smaller shippers.

We cannot assume that Matson will make indiscriminate rate reductions to please large shippers in view of Matson's treatment of the shipper's request here. Matson's traffic department would not even discuss rate reductions with the mainland mills until the new mill and barge were in operation, and then Matson gave the shippers only a rate of \$17.30 per ton, instead of the requested \$15 per ton rate, and then only when it was apparent they would lose cargo.

This argument also overlooks the fact that the reduced rate is justified because it returns an amount in excess of out-of-pocket costs, and because, as the Examiner found, if the reduction was not effected it is probable that Matson would lose most of its flour traffic.

We now turn to the final public interest consideration urged by the State of Hawaii; one that does not involve a transportation consideration.

Hawaii contends that the rate reduction will effectively deter the establishment of new industry in the State of Hawaii. This conclusion is based on the testimony of the Executive Vice President of the Hawaiian Manufacturers Association who feels that, if the spot rate reduction made here by Matson is approved, Matson will be able to control industry expansion in Hawaii in the future by making similar spot rate reductions on whatever commodities a new industry is seeking to market there. This witness related an instance where a manufacturer refused to locate a new industry in Hawaii because of Matson's rate policy as to flour.

We need only say that this manufacturer's fears cannot be based on petitioner's experience in Hawaii with Matson since petitioner, in spite of Matson's reduction, has not lost its competitive position in Hawaii. In fact, the President of the petitioner testified that his company will continue to make inroads into the market of the mainland mills even at the reduced flour rate.

In view of our determination that the record will not support a conclusion that Matson's reduced rate will prevent the entrance of new industry in the State of Hawaii, petitioner and Hawaii are in no way prejudiced by limiting the public interest consideration to transportation factors.

CONCLUSION

It is found and concluded that Matson's reduced rate on flour does not result in undue preference or prejudice to any shipper; that it is necessitated by unregulated carrier competition, is compensatory, does not disturb the existing rate structure, is not contrary to the public interest, and therefore is not an unreasonable rate within the meaning of the provisions of the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933.

This proceeding is hereby discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 399

JAVA PACIFIC RATE AGREEMENT

v.

NUMEROUS SHIPPERS IN THE TRADE FROM INDONESIA

Decided September 20, 1966

Application for leave to waive collection of undercharges denied.

REPORT

By THE COMMISSION (John Harlee, *Chairman*, Ashton C. Barrett, *Vice Chairman*; George H. Hearn, *Commissioner*):

Java Pacific Rate Agreement (the Conference), an inbound conference with office and principal place of business at Djakarta, Indonesia, applied on behalf of its members for permission, pursuant to Rule 6 (b) of the Commission's Rules of Practice and Procedure (46 CFR 502.92) to waive collection of undercharges representing the difference between rates on file with the Commission and lesser rates charged uniformly to all shippers during certain periods in 1964. The "numerous shippers" are the persons from whom undercharges would otherwise be collected and are nominal respondents in this proceeding. The application was verified before a United States Vice Consul in Djakarta.

An initial decision was issued by Examiner Walter T. Southworth denying the application for leave to waive collection of undercharges as inappropriate, but finding that undercharges were properly collectible. No exceptions or replies to exceptions to this decision were filed, and no oral argument was heard.

FACTS

1. On November 2, 1963, the Conference published from its Djakarta office and transmitted to the Commission a one-page "circular to shippers No. 13", announcing a general increase of 10 percent to become

effective February 1, 1964. The circular stated that in due course amendments to the freight tariff showing the new rates would be issued to tariff holders, and exporters not possessing a tariff might obtain further details from "the Secretariate".

2. On November 14, 1963, a copy of this circular was received and placed on file by the Commission.

3. On December 20, 1963, the Commission originally received and placed on file Conference Addendum No. 89 to Freight Tariff No. 10, issued as of December 1, 1963, and effective February 1, 1964, setting forth in detail the rate increase.¹

4. On February 1, 1964, the increased rates were put into effect pursuant to the circular to shippers.

5. On March 10, 1964, the Director of the Bureau of Foreign Regulation addressed a letter to the Conference as follows:

Gentlemen:

Reference is made to circular to Shippers No. 13, dated November 2, 1963, relating to a 10% general increase in tariff rates and to the filing of revised pages reflecting the increased rates effective February 1, 1964 in your currently effective Freight Tariff No. 10.

In view of the fact that this tariff provides both contract and non-contract rates in accordance with Agreement No. 191, it is thought advisable to inform you of the position adopted by the Commission with respect to changes in rates involving a dual rate contract system as reflected in your tariff so that such changes may be made in accordance with the provisions of Section 14(b)(2) and the tariff filing requirements of Section 18(b), Shipping Act, 1916.

Section 14(b)(2) reads as follows:

"provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days;"

In accordance with the cited Section of the Act, none of the contract rates subjected to the increase effective as of February 1, 1964, may be further increased prior to the expiration of the 90 day period, or prior to May 1, 1964.

Since the spread between contract and non-contract rates may not exceed 15% of the non-contract rates nor be altered without the approval of this Commission as required by Section 14(b), any change in contract rates must also be reflected in the corresponding non-contract rates. However, an increase in contract and non-contract rates may become effective if the previously effective lower rate has been in effect for the required 90 days, and providing an appropriate revision to the tariff is received by the Commission at least 30 days in advance of the effective date of the increase in rates in accordance with the requirements of Section 18(b). Section 14(b) does not preclude reductions in contract and non-contract rates at any time, providing an appropriate

¹ Final filing of the addendum was accomplished February 13, 1964.

amendment to the tariff is received by the Commission on or prior to the effective date of such reduction in accordance with the requirements of Section 18(b).

It is noted that on occasion your conference files certain emergency contract rates which are reductions from the rates contained in the tariff, but these emergency rates are filed for a limited period of time, generally less than the required period of ninety days. Upon expiration of such emergency rates, the rates would then revert to the higher tariff rate. In such instances these emergency rates must remain in effect for the minimum period of 90 days, otherwise they would contravene the requirements of Section 14(b) (2). In other words, temporary, special, or emergency rates, which are lower than the standard tariff rates, are considered to be the rates lawfully in effect and applicable to shippers and such rates must remain in effect for a period of least 90 days before they may be increased. Further reductions of such emergency contract and non-contract rates may become effective upon the proper filing of a tariff revision as pointed out above.

We trust that the foregoing information will assist your conference in submitting tariff matter in accordance with the statutory requirements.

6. The Conference construed the foregoing letter to mean that 90 days' prior notice to the Commission was required before its rate increase could become effective, and that its circular and Addendum No. 89 had been rejected as not submitted in accordance with statutory requirements. The Conference therefore published and transmitted to the Commission for filing:

(1) "Circular to Shippers No. 16" dated April 15, 1964, which referred to Circular No. 13 and stated that the general increase contained therein would become effective as per August 1, 1964, instead of February 1, 1964;

(2) "Agents Circular No. 173" which was to the same effect; and

(3) Addendum No. 93 to the tariff which stated that it was "issued in lieu of Addendum No. 89 rejected by the Commission".

Addendum No. 93 showed the issue date of May 1, 1964, and effective date of August 1, 1964.

7. On April 23, 1964, the aforementioned three documents were received by and placed on file with the Commission.

8. On June 8, 1964, the Director, Bureau of Foreign Regulation returned Addendum No. 93, and addressed a letter to the Conference stating that the rates reflected in Circular No. 13 and Addendum No. 89 were the lawful rates effective February 1, 1964, "and are the only rates which could thereafter be assessed . . ., except as may have been altered by subsequent revisions to the tariff consistent with . . . Section 18(b), Shipping Act, 1916". The letter further stated that the Bureau's former letter was "intended merely as a means of informing you of the position of this Commission with respect to the requirements of Section 14(b) (2), Shipping Act, 1916, as it appeared to relate to

the general increase . . ." and should not have been construed as a rejection of the rates involved in Circular No. 89. Full particulars were requested with respect to the rates assessed by the member lines since February 1, 1964.

9. In the meantime, the Conference had reverted to the rates in effect prior to February 1, 1964, which it maintained through July 31, 1964.² The member lines had made adjustments in rates applied to shipments made between February 1, 1964, and April 15, 1964, so that all relevant shipments made during that period were made under rates which had been in effect prior to February 1, 1964.

10. On July 21, 1964, the Conference refiled Addendum No. 93. The Commission did not return this addendum, but notified the Conference that it could not accept it and that the rates effective February 1, 1964, were still in effect.

11. On July 29, 1964, the Conference wrote the Commission requesting a "dispensation" to apply the increased rates effective August 1, 1964.

12. On September 3, 1964, the Commission notified the Conference that the increased rates were in effect and had been in effect since February 1, 1964, and notified the Conference of the procedure for application for waiver of collection of undercharges.

13. On September 9, 1964, such application was filed with the Commission.

THE INITIAL DECISION

The Examiner treated the question of what rates were on file with the Commission and duly published and in effect between February 1, 1964, and July 31, 1964, as the sole issue in this proceeding. Hence, he treated *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965) and other cases dealing with circumstances under which collection of undercharges on rates in effect at the time might be waived as inapplicable. The Examiner concluded that the publication and filing of the new rates contained in Circular No. 13 was treated by the Commission as a sufficient filing of a "new tariff" in compliance with section 18(b)(2), and that Circular No. 16 and Addendum No. 93 were sufficient, as evidenced by the Bureau's conduct, to constitute an amendment to the Conference tariff in conformity with section 18(b)(2), insofar as it effected a reduction in existing rates from the date of filing to August 1. The adjustments against the rates paid or charged for shipments made between February 1 and April 15, the Examiner concluded, were made pursuant to tariffs published and filed when the adjustments were

² This reversion was made pursuant to Circular No. 16 and Agents Circular No. 173.

made. These tariffs were unlawful insofar as their retroactive dates were concerned and the adjustments, therefore, constituted unlawful rebates under section 18(b)(3). The rates contained in them were nevertheless, he concluded, the applicable rates because they were the only filed rates, citing *Chicago, M. St. P. & P. R. Co. v. Alouette Peat Products*, 253 F. 2d 449 (1957). Moreover, he asserted, a shipper cannot be required to pay a rate higher than the filed rate even though the filed rate is unlawful because improperly filed. Therefore, the Examiner concluded that no sums could be collected on account of freight shipments made during the period February 1, 1964, through July 31, 1964, in excess of amounts based upon the rates in effect immediately prior to February 1 and denied the application for leave to waive collection of undercharges as inappropriate.

DISCUSSION AND CONCLUSIONS

The original filing of the increased rates was accomplished either on November 14, 1963, the date of receipt of Circular No. 13 by the Commission, or December 20, 1963, the original date of receipt by the Commission of Addendum No. 89 to Freight Tariff No. 10. It is unnecessary for us to determine which of the above dates to consider for this purpose. Either of them fulfills the requirements of 18(b) that rate increases in the foreign commerce of the United States not be effective until the passage of 30 days from the dates of publication and filing. In addition, both documents plainly indicated the changes proposed to be made in the tariff then in force and the time when the rate increases were to become effective.³

The rates filed through Circular No. 13 and Addendum No. 89 thus were the rates specified in the tariff on file with the Commission and duly published and in effect as of February 1, 1964.⁴ They were, ac-

³ Section 18(b)(2) provides:

"No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective: *Provided, however,* That the Commission may, in its discretion and for good cause, allow such changes and such new or initial rates to become effective upon less than the period of thirty days herein specified. Any change in the rates, charges, or classifications, rules or regulations which results in a decreased cost to the shipper may become effective upon the publication and filing with the Commission. The term 'tariff' as used in this paragraph shall include any amendment, supplement or reissue."

⁴ It is unnecessary for us to determine whether or not the rate filings involved in this proceeding would have complied with our regulations published pursuant to section 18(b)(4) governing filing of tariffs by common carriers in our foreign commerce (46 CFR 536), as such regulations did not become effective until July 1, 1965.

cordingly, the rates which were required by the statute to be charged and collected by the Conference as of that date.⁵

Similarly, the same rate increases when contained in Circular No. 16 and 173 and Addendum No. 93, which were received by the Commission on April 23, 1964, became the lawful rates as of August 1, 1964, the effective date named in these publications, having been published and on file with the Commission for more than 30 days prior to that date.

The problem arises with respect to the effect of the filings of April 23, 1964, upon the rates then in effect. The attempted result of these documents was to cancel the earlier filings, reinstate the rates on file and in effect prior to February 1, 1964, and postpone the rate increase until August 1, 1964.

The filings never legally accomplished this result. They were effective insofar as they attempted to become the filed rates as of April 23, 1964, the date of their receipt by the Commission. They were without effect insofar as they altered the rate to be charged and collected with respect to the period from February 1, 1964, to April 23, 1964. Although the Examiner correctly cites *Chicago, M. St. P. & P. R. Co. v. Alouette Peat Products*, 253 F. 2d 449 as supporting the proposition that illegally filed rates are nevertheless the applicable rates simply because they are the filed rates, we are aware of no case in which retroactive rates were held to be the "applicable" rates. The *Alouette* case involved increased rates which were published on 5 days' notice rather than the 30 days' notice required by the Interstate Commerce Act.⁶ That Act, like the Shipping Act, 1916, allows carriers to obtain permission to effectuate rate increases upon less than 30 days' notice if certain statutory requirements are met. No provision is made, however, in either the Interstate Commerce Act or our own statute for the effectiveness of

⁵ Section 18(b) (3) provides:

"No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs."

⁶ Section 6 of the Interstate Commerce Act provides in pertinent part:

"(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid . . . *Provided*, That the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified . . ."

retroactive rates. In fact, section 18(b) (2) clearly nullifies the retroactive application of rates by requiring that increased rates "shall become effective not earlier than thirty days *after* the date of publication and filing thereof with the Commission . . . [and] any change in the rates . . . which results in a decreased cost to the shipper may be effective *upon* the publication and filing with the Commission". (Emphasis supplied.) We will not extend the proposition of the *Alouette* case, *supra*, to cover retroactive changes in rates for in our view such an extension would circumvent the clear meaning of section 18(b). Therefore, the increased rates remained in effect until April 23, 1964.

The refunds made to shippers for the period between February 1, 1964, and April 23, 1964, were thus refunds of a portion of the rates duly published and in effect during this period within the meaning of, and contrary to, section 18(b). However, because the illegal manner of filing was the result, at least in part, of the actions of the Commission as reasonably (if not accurately) interpreted by the Conference, the Commission will not seek penalties from respondent for the "refunds" made under the erroneous filing.

The application for leave to waive collection of undercharges is denied.

COMMISSIONER JAMES V. DAY CONCURRING:

In this case the Conference refunded part of its charges to shippers in reliance upon the validity of a change in its tariff which it had filed with the Commission. Then the Government, whose prior position regarding the Conference's tariff was misleading to the Conference, declared the tariff change invalid. Thus faced with the impractical task of having to persuade its shippers that they should pay a higher rate after all and that they must return the refunds, the Conference has sought our permission to waive recapture of the refunds.

The majority deny the relief the Conference has sought. They affirm that the tariff change was invalid and the original higher rates should have been charged.

However, they also state that they will not seek penalties from the Conference for the refunds made.

Administrative discretion may be exercised to achieve an equitable result. Cf. *Mueller v. Peralta*, 8 F.M.C. 361, dissent; *Tank Car Corp. v. Terminal Co.*, 308 U.S. 422, 432. The majority decision would accomplish this. No further determination on my part is necessary. I thus concur in denying the application.

COMMISSIONER JOHN S. PATTERSON, DISSENTING:

In the absence of exceptions, the decision of the Examiner should become the decision of the Commission, and his findings that no undercharges are collectible on the facts shown should be sustained.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-52

IN THE MATTER OF THE PETITION OF NEW YORK FREIGHT BUREAU
(HONG KONG) FOR A DECLARATORY ORDER

Decided October 3, 1966

Where conference voting rules require unanimity whenever a change in the basic conference agreement is contemplated and where one of the original parties to such an amended conference agreement filed for approval under section 15 of the Shipping Act, 1916, withdraws from such agreement prior to the Commission's approval thereof, the effect of such withdrawal is to remove the document so filed from the Commission's consideration.

Approval accorded by the Commission to an amended conference agreement filed pursuant to section 15 is void *ab initio* where one of the parties thereto had withdrawn from such agreement prior to approval.

Charles F. Warren and *John P. Meade* for New York Freight Bureau (Hong Kong).

George F. Galland and *Amy Scupi* for States Marine Lines.

REPORT

BY THE COMMISSION: (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners*).

This matter comes before us on petition of the New York Freight Bureau (Hong Kong) for a declaratory order pursuant to section 5(d) of the Administrative Procedure Act [5 U.S.C. section 1004(d)] and rule 5(h) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.69).

THE CONTROVERSY INVOLVED

The New York Freight Bureau (Hong Kong) (hereafter called the Bureau) serves the inbound trade between Hong Kong and U.S. Atlantic and Gulf ports. It has been in existence since 1924 and since

1937 has operated under approved Agreement 5700. Until 1964 this agreement remained substantially unchanged (such changes as were made dealt with the rotation of the Chairmanship and minor changes in the geographic scope of the agreement, etc.). The modification approved on July 29, 1960, was designated Agreement No. 5700-4.

As a result of the 1961 amendments to section 15 of the Shipping Act (Act of October 3, 1961, Public Law 87-346, section 2, 75 Stat. 763) and our General Orders 7 and 9, conference agreements were required to contain reasonable provisions for the admission, withdrawal and expulsion of members and an adequate system of self-policing. The Bureau submitted two agreements to accomplish this purpose. Agreement No. 5700-6 filed on February 10, 1964, provided for a system of self-policing which generally complied with the requirements of section 15 and General Order 7. Agreement No. 5700-7 filed on June 17, 1964, contained amendments designed to bring their agreement within the requirements of General Order 9.

These agreements were never approved because after analysis of them, the staff suggested to counsel for the Bureau that certain clarifying and conforming changes be made and that the two agreements be consolidated in one. In response to these suggestions, counsel for the Bureau withdrew Agreements 5700-6 and 5700-7 and filed a third agreement designated 5700-8 which contained the changes suggested by the staff and repeated the remaining provisions of 5700-6 and 5700-7. We issued an order of conditional approval of this latter agreement in which the Bureau members were given 60 days within which to accept the modifications. Additional time for acceptance was sought by the Bureau and granted by us. The Order of Conditional Approval as extended was due to expire on May 2, 1966. However, on March 1, 1966, States Marine Lines sent a telegram to the Commission which stated in pertinent part: "* * * States Marine opposes the agreement and hereby withdraws same from Commission's consideration as far as States Marine is concerned. * * *" On May 2, 1966, the Order of Conditional Approval expired by its own terms since no notification had been received by the Commission of the acceptance by the Bureau membership. On May 13, 1966, at the Bureau's request we approved Agreement 5700-8 in part, i.e. as to those portions which were deemed noncontroversial because they had not been objected to by States Marine, and issued an order of investigation (Docket 66-32) with respect to the controversial portions. The original order of investigation set down three issues for determination: (1) the expansion of the conference trade area to include the Great Lakes; (2) the voting provisions; and (3) modification of the self-policing provisions to

include provision for reference of certain arbitration matters to the Federal Maritime Commission. On June 13, 1966, States Marine filed a petition to reconsider our order of May 13, *supra* and, after considering this petition and the Bureau's reply dated June 20, 1966, we issued an amended order in Docket 66-32 in which the issues raised in States Marine's petition for reconsideration were also set down for investigation. These amendments broadened the original order of investigation to include the following issues: (1) whether Agreement 5700-8 was properly before the Commission for its approval under section 15; (2) if Agreement 5700-8 was properly before the Commission for approval, should the approval granted in our order of May 13, 1966, be continued; (3) if Agreement 5700-8 was not properly before the Commission for approval and the approval thereto was without force and effect, were Agreements 5700-6 and 5700-7 properly withdrawn, and if not, what is their present status as representing true and complete agreement of the parties; and (4) whether there is in existence a presently approved agreement to which all the parties signatory thereto now agree and should approval thereto be continued or should the agreement be modified, disapproved, or canceled.

Hearings are now scheduled in Docket 66-32 to commence on October 13, 1966, and it appears that at least one witness is coming from as far away as Hong Kong. The Bureau, feeling that several of the issues specified in the amended order of investigation are pure questions of law involving no genuine issues of material fact, filed its petition for declaratory order for the "summary resolution of legal issues." This petition was filed on September 9, 1966, and a reply filed by States Marine Lines was received September 26, 1966. States Marine Lines joined the Bureau in requesting a declaratory order on one of the questions raised in the petition. Neither party requested oral argument and both urged a speedy resolution of the issues.

The question both parties agree is: "Did States Marine Lines' telegram protest of March 1, 1966 filed prior to approval operate to withdraw Agreement No. 5700-8 from the Commission's consideration?"

In its reply, States Marine Lines relies entirely upon the Commission's report in *Hong Kong Tonnage Ceiling Agreement*, Docket 66-29 (involving the same parties) decided September 19, 1966, after the Bureau's petition for a declaratory order but before States Marine's reply. We there held substantially that where one of the parties to an agreement which has been filed for approval with the Commission under section 15 withdraws from said agreement prior to the time approval is given, the agreement ceases to exist.

DISCUSSION

States Marine Lines argues that it withdrew from Agreement 5700-8 by its telegram dated March 1, 1966, and that this was complete and unqualified opposition to the entire agreement. We agree. While the telegram in question goes on to "oppose particularly" certain specific provisions in the agreement a fair reading of the telegram supports States Marine's contention that its opposition to the whole agreement was unqualified and that its withdrawal was complete. It appears therefore that States Marine's position with respect to applicability of our report in Docket 66-29, *supra*, is well taken.

While it is true that in Docket 66-29 the agreement in question was found to be a new agreement and not a modification of an existing agreement, as is the case here, we feel that this is a distinction without a difference, particularly in view of the fact that the voting provisions of Agreement 5700-4 require unanimity whenever a change in the arrangement is contemplated.

It appears that Agreements 5700-6 and 5700-7 were withdrawn by counsel for the Bureau at the same time as Agreement 5700-8 was offered for approval. In any event States Marine's reply to the instant petition states on page 8, "we do not understand that either 5700-6 or 5700-7 is presently before the Commission for approval. If they are before the Commission, States Marine Line now withdraws them." Thus, if these two earlier agreements had any residual sparks of life, the above-quoted statement would effectively extinguish them.

It follows that Agreement 5700-4 as approved on January 20, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.¹

The other issues raised in the petition for declaratory order are moot as a result of our holding with respect to the effect of States Marine's telegram protest of March 1, 1966. Our holding also is entirely dispositive of the issues now pending in Docket 66-32 and that proceeding will therefore be discontinued.

The entire relationship between the Bureau and States Marine Lines has presented and does present a continuing problem to the Commission. The 1961 amendments to section 15, *supra*, clearly require us to disapprove any agreement in which no proper provisions for self-policing or admission or withdrawal have been made. Similarly General Orders 7 and 9 require appropriate amendments to existing agree-

¹ Agreement 5700-5 was a temporary ceiling tonnage agreement which expired by its own terms in January 1965.

ments in order to effect these changes if continued approval is to be had.

Agreement 5700-4 does not meet the criteria imposed by amended section 15 and General Orders 7 and 9.

We can only conclude from past history in this matter that the Bureau and States Marine Lines are either incapable or unwilling to resolve their differences. On the other hand, the Bureau has been in operation for over 40 years. We, therefore, will issue an order to show cause why Agreement No. 5700-4 should not be modified by us so as to include amendments providing for an adequate system of self-policing and acceptable standards for admission, withdrawal, and expulsion. The language of such amendments will be taken from the relevant portions of Agreement 5700-8 since all of the members of the Bureau, including States Marine Lines, agreed to it up to March 1 of this year.

CONCLUSIONS

In summary, we conclude that:

1. States Marine Lines' telegram protest of March 1, 1966, filed prior to approval of Agreement 5700-8 operated to withdraw Agreement No. 5700-8 from the Commission's consideration.

2. Our order of May 13, 1966, which approved Agreement 5700-8 in part was void *ab initio* since said agreement was not properly before the Commission for approval.

3. Agreements 5700-6 and 5700-7 had been withdrawn prior to approval.

4. That Agreement 5700-4 as approved on July 29, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.

5. Agreement 5700-4 does not satisfy the requirements of section 15 and General Orders 7 and 9 promulgated thereunder in that it does not contain a satisfactory system of self-policing and does not meet the required criteria for admission, withdrawal, and expulsion of members.

6. Proceedings in Docket No. 66-32 should be discontinued.

7. That the members of the New York Freight Bureau (Hong Kong) should be required to show cause why Agreement No. 5700-4 should not be modified by us or, in the alternative, why continued approval of said agreement should not be withdrawn.

An appropriate order will be entered.

By the Commission.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-52

IN THE MATTER OF THE PETITION OF NEW YORK FREIGHT BUREAU
(HONG KONG) FOR A DECLARATORY ORDER

ORDER

Upon consideration of the petition of the New York Freight Bureau (Hong Kong) for a declaratory order and the reply of States Marine Lines (a member of said conference), there having been no request for oral argument, and the Commission on this day having made and entered of record a report stating its findings, conclusions, and decisions thereon, which report is hereby referred to and made a part hereof;

Therefore, it is ordered and declared, That :

1. States Marine Lines' telegram protest of March 1, 1966, filed prior to approval of Agreement No. 5700-8, operated to withdraw Agreement No. 5700-8 from the Commission's consideration;
2. The order of May 13, 1966, which approved Agreement No. 5700-8 in part was void *ab initio*, since said agreement was not properly before the Commission for approval;
3. Agreement Nos. 5700-6 and 5700-7 were withdrawn prior to approval;
4. Agreement No. 5700-4, as approved on July 29, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.

By the Commission.

(Signed) THOMAS LIST,
Secretary.

NOTICE OF INTENT TO MODIFY AGREEMENT NO. 5700-4 AND ORDER TO
SHOW CAUSE WHY SUCH MODIFICATIONS SHOULD NOT BE INCORPORATED
INTO SAID AGREEMENT

Decided October 3, 1966

By declaratory order served this date,¹ we decided that:

1. States Marine Lines' telegram protest of March 1, 1966, filed prior to approval of Agreement 5700-8 operated to withdraw Agreement 5700-8 from the Commission's consideration.

2. Our order of May 13, 1966, which approved Agreement 5700-8 in part, was void *ab initio* since said agreement was not properly before the Commission for approval.

3. Agreements 5700-6 and 5700-7 have been withdrawn prior to approval.

4. That Agreement 5700-4 as approved on July 29, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.

5. Agreement 5700-4 does not satisfy the requirements of section 15 and General Orders 7 and 9 promulgated thereunder, in that it does not contain a system of self-policing and does not meet the required criteria for admission, withdrawal, and expulsion of members.

The members of the New York Freight Bureau (Hong Kong) were able to agree upon amendments to this conference agreement which would satisfy the requirements of General Orders 7 and 9. Agreements 5700-6 and 5700-7 received the unanimous support of all the Bureau members. Similarly, Agreement 5700-8 was approved unanimously by the Bureau. Nevertheless, States Marine Lines has chosen to withdraw from these amended agreements prior to approval, thereby removing them from the Commission's consideration.

There are only two courses of action now open to the Commission. The first would be to withdraw approval of Agreement 5700-4. Unless satisfactory self-policing and membership provisions are added to the agreement, this course is clearly necessary under section 15.

The second would be to modify Agreement 5700-4 by adding amendments which would give the conference an adequate system of self-policing and proper provisions for the admission, withdrawal, and expulsion.

¹ In the Matter of the Petition of New York Freight Bureau (Hong Kong) for a Declaratory Order.

Under section 15, we are empowered "by order, after notice and hearing," to modify or disapprove any agreement found to be in violation of the act.

Accordingly, the members of the New York Freight Bureau (Hong Kong) are hereby notified, pursuant to our authority under section 15 of the Shipping Act, 1916, that we intend to modify Agreement 5700-4 by deleting subparagraphs 10(b), 10(c), 10(d), and 10(e) and by adding new paragraphs 12 through 16, as set forth in the Appendix A hereto.

We see no need for the taking of evidence in this proceeding since no genuine issues of material fact are presented. The modifications to Agreement No. 5700-4, which the Commission proposes to make as specified in his notice, have twice been considered and "approved" by the Commission as satisfying the requirements of section 15 and General Orders 7 and 9. Should any of the parties to this proceeding consider that there are disputed issues of fact which are relevant to this proceeding, such facts shall be specified with particularity by means of affidavits setting forth such facts, together with a statement of their relevance to the issue in question. Should any other parties dispute these facts by a similar affidavit, the disputed issues of fact, if relevant, will be set down for an evidentiary hearing.

Now therefore, pursuant to sections 15 and 22 of the Shipping Act, 1916, as amended,

It is ordered, That the common carriers by water designated in Appendix B hereto show cause why Agreement No. 5700-4 should not be amended in the manner proposed in this notice or, in the alternative, why approval of Agreement No. 5700-4 should not be withdrawn on the grounds that:

1. It fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal, as required by section 15 of the act and General Order 9; and

2. Fails to contain provisions for adequate policing of the obligations under it, as required by section 15 of the Shipping Act, 1916, and General Order 7 of the Federal Maritime Commission promulgated thereunder.

It is further ordered. That this proceeding shall be limited to the submission of affidavits and memoranda and oral argument. The affidavits of fact and memoranda of law shall be filed by respondents no later than close of business October 18, 1966, replies thereto shall be

filed by Hearing Counsel and interveners, if any, no later than close of business October 28, 1966. An original and 15 copies of affidavits of fact, memoranda of law, and replies are to be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Copies of any papers filed with the Secretary should also be served upon all parties hereto. Oral argument, if granted, will be heard at a date and time to be announced later.

It is further ordered, That the carriers indicated in Appendix B are hereby made respondents in this proceeding,

It is further ordered, That this order be published in the FEDERAL REGISTER and a copy of such order be served upon each respondent.

Persons other than respondents and Hearing Counsel who desire to become a party to this proceeding shall file a petition for leave to intervene in accordance with Rule 5(1) (46 CFR 502.72) of the Commission's Rules of Practice and Procedure no later than the close of business October 11, 1966, with a copy to respondents.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

12. Copies of the minutes of all meetings, including meetings of the committees authorized to take final action as well as those of the conference shall be promptly furnished to the Federal Maritime Commission. These minutes shall be authenticated by the Chairman/Secretary or other duly authorized New York Freight Bureau (Hong Kong) official.

13. *Faithful Performance: Bond.*—As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award or judgment which may be rendered against them hereunder, the parties hereto agree to deposit with the New York Freight Bureau Chairman/Secretary the sum of US\$30,000 (thirty thousand) or its equivalent in Hong Kong currency or a confirmed irrevocable letter of credit, in such form as may be approved by the New York Freight Bureau, in the aforesaid sum of US \$30,000 (thirty thousand) or its equivalent in Hong Kong currency established by a bank being a member of the Hong Kong Exchange Banks Association and which is acceptable to the New York Freight Bureau, providing that it may be drawn upon by draft signed in the name of the New York Freight Bureau by the Chairman/Secretary and by the authorized representatives of any two member lines and payable to the New York Freight Bureau to which there shall be attached a certificate signed by the Chairman/Secretary to the effect that there has been assessed or adjudged against the party who shall have deposited the said letter of credit a penalty or penalties in the amount of the said draft. Such depositing party undertakes and agrees in the event of the payment of the said draft to cause a new letter of credit in the sum of US\$30,000 (thirty thousand) or its equivalent in Hong Kong currency, similar in its terms, to be issued immediately in replacement for that upon which the draft has been made. Among other such provisions as the New York Freight Bureau may require, the New York Freight Bureau may insist upon provisions in such letter of credit which will render it most certain that payment must be made by the bank immediately upon the compliance by the Chairman/Secretary with the aforesaid conditions.

14. *Self-Policing System.*—It is thereby agreed and declared by and between the parties hereto that:

(a) A report shall immediately be made in writing to the Chairman/Secretary in respect of any information which appears to such party hereto to be reasonably reliable of the commission by any other party hereto of a violation of this agreement.

(b) A report shall immediately be made in writing to the Chairman/Secretary in respect of any information which such party hereto shall have received from any shipper or from any other source considered to be reliable that any party hereto has committed a violation of this agreement.

(c) It shall be the duty of the Chairman/Secretary to investigate immediately all such reports submitted by parties hereto in addition to any such reports in writing he may receive direct from shippers or from any other source considered to be reliable, for which purpose the Chairman/Secretary shall hereby be authorized to engage the services of such qualified persons as he may consider necessary for a thorough and complete investigation to be made.

(d) It shall also be the duty of the Chairman/Secretary to ascertain, on his own initiative, whether or not the parties hereto have strictly complied with the terms of this Agreement, the provisions incorporated in the

New York Freight Bureau tariff and all other decisions regularly and properly made by the parties hereto and, in the event that there is any reason to believe that there has been a violation of any of the aforesaid obligations, he shall file a complaint with respect thereto as above provided.

(e) The Chairman/Secretary shall be furnished such pertinent records of the parties hereto, their agents, sub-agents, affiliates, subsidiaries, freight brokers, compradores and/or Chinese Freight Agents, wherever located, as may be required in the enforcement of this Agreement and the decisions of the New York Freight Bureau, and the failure of any party hereto either on their own behalf or the aforementioned additional parties shall constitute a violation of this agreement.

(f) Upon the completion of such investigations, the Chairman/Secretary shall lay before the membership his written report thereon, and such report shall include all relevant particulars thereto other than the identity of the party hereto or other person from whom the report originated.

(g) Such written reports shall constitute and are hereafter referred to as complaints. A copy thereof shall be furnished to the accused party not less than 20 days prior to the time that the matter is submitted to a vote of the parties as provided in subparagraph (h), of the paragraph.

(h) All such complaints shall be submitted to a vote of the parties hereto other than the party charged with the violation, after giving the party charged in the respective complaint an opportunity to adduce evidence in its defense. If the parties hereto, other than the party so charged shall, by a three-fourths affirmative vote of all parties entitled to vote, determine that the violation or violations alleged in the complaint have been proved, the party charged with the violation or violations shall be subject to liquidated damages as hereinafter provided in respect of each and every violation so proved; but if the party accused is dissatisfied with the decision reached as aforesaid, such party shall have the right to appeal, it being incumbent upon the accused party to make any such appeal within 10 days following the aforementioned determination. In which event the question of violation shall be left to the determination of a majority of three arbitrators, one arbitrator to be nominated by the accused, the second by a three-fourth affirmative vote of the remaining parties, and the third arbitrator to be nominated by the arbitrators so chosen, it being incumbent upon the parties concerned to nominate the first and second arbitrators within 30 days of the appeal being made by the accused party. In the event the accused party does not appoint an arbitrator within the said 30 days, the accused party will thereby forfeit its right to appeal. Such arbitrations shall take place in Hong Kong and any decision so arrived at shall be binding and final, and the parties hereto agree that such decision shall be equivalent to a legal judgment given by the highest court of law, and the parties to this agreement hereby waive and abandon every right to take any legal action to obtain a review or reversal of the decision so made.

However, it shall not be a breach of this agreement for any line to refer any matter arbitrated to the Federal Maritime Commission for a decision as to whether or not the matter arbitrated was within the jurisdiction of the arbitrators in the terms of this agreement; or, as to whether or not any decision rendered constitutes a modification of this agreement.

(i) Inasmuch as it will be impossible to ascertain or measure the amount of damages which the parties hereto will suffer by reason of the breach of this

Agreement, the parties hereto expressly agree that the damages suffered thereby by each party hereto shall be assessed on the basis of a three-fourths majority vote as above provided but that, in any event, such damages shall be subject to the undernoted maxima, exclusive of any arbitration costs which may accrue to the accused party:

(i) First offence—up to a maximum of US\$10,000.00 or its equivalent in H.K. currency.

(ii) Second offence—up to a maximum of US\$15,000.00 or its equivalent in H.K. currency.

(iii) Third offence—up to a maximum of US\$20,000.00 or its equivalent in H.K. currency.

(iv) Fourth and any subsequent offences—up to a maximum of US\$30,000.00 or its equivalent in H.K. currency.

(j) The Chairman/Secretary shall notify in writing the party against whom a violation shall have been found of the decision against it and the amount of liquidated damages which shall have been assessed against it. In the absence of any appeal by such notified party in accordance with the provisions of Article 14(h) hereof, the party thus notified shall pay the amount of such liquidated damages within a period of ten (10) days. In the event that it shall fail or refuse to make such payment within said period, the other parties may have resort to the performance bond which such party shall have deposited in accordance with the provisions contained in Article 13 of this Agreement; and each party hereto hereby authorizes the Chairman/Secretary, in case that a decision shall be made against it, to the effect that it has violated this Agreement, and in case liquidated damages are assessed against it and it shall fail to pay said damages within the period of ten (10) days after such notice has been given to it by the Chairman/Secretary, to pay the amount of said liquidated damages to the other parties hereto from the cash which it shall have deposited or, if its performance bond shall be by way of a confirmed irrevocable letter of credit, to draw upon the letter of credit and pay the amount of such liquidated damages to the other parties from the proceeds thereof, such payments to the other parties being on a pro-rata basis. The costs incurred in arbitration proceedings shall be dealt with in the award.

(k) It is hereby agreed and declared by and between the parties hereto that each party hereto shall be fully responsible for the acts and omissions of its parent companies, agents, sub-agents, affiliates, subsidiaries, freight brokers, compradores and/or Chinese Freight Agents, and an act done or omitted to be done by an agent, sub-agent, affiliate, subsidiary, freight broker, compradore and/or Chinese Freight Agent, which would constitute a violation of this Agreement, if done or omitted to be done by the party itself, shall for all purposes hereof, constitute a violation of this Agreement by such party, for which such party shall be liable for damages in the same amount as if it had done or omitted the said act.

(1) In the event of the termination of this Agreement or the expulsion or voluntary withdrawal of any of the parties hereto, the performance bond deposited by the parties concerned shall be returned to them, together with accrued interest, but only after any complaints which may be pending against the parties concerned at the time of its expulsion or withdrawal or at the time of the termination of this Agreement, as the case may be, have been satisfied.

15. *Admission to Membership.*—(a) Any common carrier by water which has been regularly engaged as a common carrier in the trade covered by this Agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain such a common carrier service between ports within the scope of this Agreement, and who evidences an ability and intention in good faith to abide by all the terms and conditions of this Agreement, may hereafter become a party to the New York Freight Bureau, promptly following written application to the New York Freight Bureau for membership, such application to set forth evidence demonstrating compliance with the foregoing requirements, by affixing its signature hereto, or to a counterpart hereof, and by payment to the New York Freight Bureau of any outstanding financial obligation arising from prior membership of the New York Freight Bureau, and by posting with the New York Freight Bureau security for faithful performance of its obligations as provided in Article 13 hereof.

(b) Every application for membership shall be acted upon promptly.

(c) No carrier which has complied with the conditions set forth in paragraph (a) of this Article, shall be denied admission or readmission to membership.

(d) Prompt notice of admission to membership shall be furnished to the Federal Maritime Commission and no admission shall be effective prior to the post-mark date of such notice.

(e) Advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Federal Maritime Commission.

16. *Withdrawal and Expulsion of Membership.*—(a) Any party may withdraw from the Conference without penalty by giving at least sixty (60) days' written notice of intention to withdraw to the Conference; *Provided, however,* That action taken by the Conference to compel the payment of outstanding financial obligations by the resigning Member shall not be construed as a penalty for withdrawal.

(b) Notice of withdrawal of any party shall be furnished promptly to the Federal Maritime Commission.

(c) No party may be expelled against its will from this Conference except for failure to maintain a common carrier service between the ports within the scope of this Agreement, or for failure to abide by all the terms and conditions of this Agreement.

(d) No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished to the expelled Member and a copy of such notification submitted to the Federal Maritime Commission.

10 F.M.C.

APPENDIX B

New York Freight Bureau, Hong Kong	c/o Furness, Withy & Co., Ltd.
D. Parker, Chairman/Secretary	34 Whitehall Street
P & O Building	New York, New York 10004
Des Voeux Road Central	Mitsui O.S.K. Lines, Ltd.
Hong Kong, B.C.C.	17 Battery Place
American President Lines, Ltd.	New York, New York 10004
29 Broadway	Moller-Maersk Lines, A.P.
New York, New York 10006	c/o Moller Steamship Company, Inc.
Barber-Wilhelmsen Line—Joint	67 Broad Street
Service	New York, New York 10004
c/o Barber Steamship Line, Inc.	Nedlloyd Lines, Inc.
17 Battery Place	25 Broadway
New York, New York 10004	New York, New York 10004
Blue Sea Line	Nippon Yusen Kaisha, Ltd.
c/o Funch, Edye & Co.	25 Broadway
25 Broadway	New York, New York 10004
New York, New York 10004	States Marine Lines—Joint Service
Central Gulf Steamship Corporation	c/o States Marine-Isthmian Agency,
One Whitehall Street	Inc.
New York, New York 10004	90 Broad Street
Japan Line, Ltd.	New York, New York 10004
c/o A. L. Burbank & Co., Ltd.	United Philippine Lines, Inc.
120 Wall Street	c/o Stockard Shipping Co., Inc.
New York, New York 10005	17 Battery Place
Kawasaki Kisen Kaisha, Ltd.	New York, New York 10004
c/o Kerr Steamship Company	United States Lines Company (Ameri-
51 Broad Street	can Pioneer Line)
New York, New York 10004	One Broadway
Lykes Bros. Steamship Co., Inc.	New York, New York 10004
17 Battery Place	Yamashita-Shinnihon Steamship Co.,
New York, New York 10004	Ltd.
Marchessini Lines	c/o Texas Transport & Terminal Co.,
c/o P. D. Marchessini & Co., Inc.	Inc.
26 Broadway	52 Broadway
New York, New York 10004	New York, New York 10004
Maritime Company of the Philippines,	
Inc.	

IN THE MATTER OF THE MODIFICATION OF AGREEMENT 5700-4

A conference self-policing system must provide specific and realistic guarantees against arbitrary and injurious action.

Where a self-policing system allows the conference itself to sit in judgment upon the accused member both the question of violation of the conference agreement as well as the penalty to be imposed must be subject to review upon arbitration.

Charles F. Warren and *John P. Meade* for New York Freight Bureau (Hong Kong).

George F. Galland and *Amy Scupi* for States Marine Lines.

Donald J. Brunner and *Samuel B. Nemirow*, Hearing Counsel.

SUPPLEMENTAL REPORT

Decided August 11, 1967

BY THE COMMISSION: (John Harlee, *Chairman*; George H. Hearn, *Vice Chairman*; Ashton C. Barrett, James V. Day, *Commissioners*.)*

In our order served May 19, 1967, we reopened this proceeding for the limited purpose of reconsideration of the amendments to Agreement 5700-4 contained in our report served February 1, 1967, in the light of the guidelines set down by the U.S. Court of Appeals for the District of Columbia Circuit in *States Marine Lines and Global Bulk Corp. v. F.M.C. et al.*, 376 F. 2d 230, Dec'd. March 8, 1967.

The parties were invited to file memoranda and (if appropriate) affidavits of fact.

In response to this invitation, memoranda were filed by Hearing Counsel, the New York Freight Bureau (Hong Kong) and States Marine Lines. No affidavits purporting to raise factual issues were filed.

Hearing Counsel's position is that the self-policing provisions contained in our report served February 1, 1967, conform fully with the standards prescribed by the Court of Appeals. Therefore, they recommend no further modifications.

States Marine Lines¹ agrees with Hearing Counsel with one exception, and that is the "apparent lack of authority of the arbitrators to consider the equity of the fine imposed". This deficiency could be

*Commissioner Fansen did not participate.

¹In so doing, States Marine Lines does not abandon or waive its earlier position that the Commission may not directly modify the terms of an agreement.

remedied, according to States Marine, by adding appropriate language to Article 13(h) of the modified agreement.

The New York Freight Bureau (Hong Kong) filed a memorandum containing a number of suggested modifications. These changes had previously been submitted to the conference membership as a proposed amendment to the basic conference agreement. Two members (States Marine Lines being one of them) voted against the proposal and it was therefore defeated.² These amendments form the basis of the Bureau's suggested changes to bring Agreement 5700-4 in conformity with the court's guidelines.

Unlike the single change suggested by States Marine Lines, the Bureau's proposals would go far beyond merely bringing Agreement 5700-4 into compliance with the guidelines of the court. Among other things they would completely change the arbitration procedure, severely limiting the scope of review by the arbitrator to a determination of whether the membership "could have reasonably reached the result set forth in its decision applying the standard . . . (of) common sense". The arbitrator would be forbidden "to make any decision on the level of assessment" (of penalties). In addition, the Bureau proposes a great number of so-called "clarifying, housekeeping changes".

In our order served May 19, 1967, we reopened this proceeding for the limited purpose of considering whether the amendments to Agreement 5700-4 prescribed in our report of February 1, 1967, comply with the guidelines of the U.S. Court of Appeals in the *States Marine Lines and Global Bulk Transport* case, *supra*. The memoranda of the parties were to be limited to that question. The Bureau's memorandum goes far beyond the limited scope of this issue.

It seems that the major concern of the Court of Appeals in the *Global Bulk* case, *supra*, was that "this kind of self-regulatory process must provide specific, realistic guarantees against arbitrary and injurious action", 376 F. 2d at 236.

Arbitrary and injurious action can flow equally from an unsupported finding of guilt or an unconscionably large penalty. We believe that both the finding of violation as well as the level of the penalty should be included in the arbitrator's scope of review. While there is language in the court's opinion which tends to support the view that "an independent check of the disclosed evidence" is sufficient, it is our conclusion that a fair reading of the court's opinion as a whole requires the result we have reached.

² The New York Freight Bureau (Hong Kong) requires unanimity under its voting procedure in Agreement 5700-4 whenever a change in the basic conference agreement is contemplated.

There are important differences between the self-policing systems in the *Global Bulk* case, *supra*, and the instant case. In *Global Bulk*, the tribunal in the first instance is a "neutral body", while in the system under consideration here the conference itself sits in judgment upon the accused member. Since the conference members are clearly interested parties, it is essential to provide a safeguard against arbitrary action both as to a finding that a member has violated the conference agreement as well as the penalty to be imposed.

CONCLUSION

We conclude upon reconsideration that the modifications to the self-policing system prescribed in our report and order served on February 1, 1967, should be further modified by adding the words "and the amount of the fine, subject to the maxima set forth in Article 13(i)" after the word "violation" contained in the third sentence of Article 13(h).

An appropriate order will be entered.

10 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-52

IN THE MATTER OF THE MODIFICATION OF AGREEMENT 5700-4

ORDER UPON RECONSIDERATION

This proceeding having been reopened by the Commission on its own motion, the Commission having received memoranda of law and having pursuant thereto issued on this date a supplemental report in this proceeding which, in addition to the report and order served on February 1, 1967, is hereby referred to and incorporated herein by reference,

Therefore, it is ordered, That Agreement No. 5700-4 be and the same hereby is further modified by adding the words "and the amount of the fine, subject to the maxima set forth in Article 13(i)" after the word "violation" contained in the third sentence of Article 13(h) as set forth in the Appendix A of the report served February 1, 1967.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 65-17

TRANSSHIPMENT AND APPORTIONMENT AGREEMENTS FROM INDONESIAN PORTS TO U.S. ATLANTIC AND GULF PORTS

Decided October 13, 1966

The entire movement of cargo on a through bill of lading transported from an Indonesian outport by originating carriers (First Carriers) and transhipped at an Indonesian base port or at Singapore/Penang and on-carried to a U.S. port by JNYRA members (Second Carriers) found to constitute the transportation by water of property between the United States and a foreign country in the import trade within the intent and meaning of the Shipping Act, sec. 1.

First Carriers which engage in the movement of through cargo from Indonesian outports to base ports whether in Indonesia or at Singapore/Penang held to be common carriers by water in foreign commerce within the intent and meaning of sec. 1 of the Shipping Act where such movement forms a part of a continuous line over which through traffic flows from a foreign country to the United States.

An exclusive transshipment agreement between originating or First Carriers and Second Carriers whereby a continuous line for the movement of through cargo from a foreign country to the United States is formed held to constitute an agreement which must be filed under sec. 15 of the Shipping Act.

Exclusive dealing provisions in a transshipment agreement found to be contrary to the public interest where the effect of such provisions is or may be to eliminate the possibility of competition by carriers not a party to the agreement in the trade involved.

Provisions of section 15 agreements relating to transshipment of Indonesian cargo at Singapore/Penang where such transshipment has ceased due to strained political relations held not to be contrary to the public interest where there is a reasonable probability of resumption of normal relations and where the cessation was due to a sovereign act.

The proposed transshipment agreement, No. 9222, if modified, found not to violate any of the standards of section 15 and it is therefore approved.

Agreements among Second Carriers to enter into a transshipment agreement found not to be subject to section 15 of the act.

The proposed agreement, No. 9202, providing for the apportionment of cargo originating at Indonesian outports and transshipped at Singapore/Penang found not to violate the standards of section 15 and it is therefore approved.

Elkan Turk, Jr. for respondents designated as "Second Carriers".

Leonard G. James and *F. Conger Fawcett* for intervenor, Holland-America Line.

Donald J. Brunner and *Roger A. McShea III*, Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners*)

This proceeding involves two agreements which have been filed for approval under section 15 of the Shipping Act, 1916.

Agreement No. 9222 calls for an exclusive transshipment arrangement between four carriers which served the coastwise and interisland trade in Indonesia (First Carriers) and the members of the Java/New York Rate Agreement¹ (Second Carriers).

Agreement No. 9202 provides for the apportionment among the Second Carriers of some of the transshipment cargo carried under above arrangement.

DESCRIPTION OF THE INDONESIAN TRANSSHIPMENT TRADE

Indonesia is a vast island nation stretching from New Guinea on the East beyond the Malay peninsula on the West. It is composed of hundreds of islands including Sumatra, Java and the Celebes. Indonesia was formerly a part of the Netherlands until it gained its independence in 1949. Among Indonesia's major export commodities are: rubber, coffee, tea, spices and tin.

Because of its geography, Indonesia relies heavily upon transportation by water, both in its foreign and interisland/coastwise trades. Many of the commodities which Indonesia exports originate in places which are remote from good harbor facilities. As a result, a large portion of the goods which move into Indonesia's export trade can be transported initially only by shallow draft vessels which can be ac-

¹ Agreement No. 90.

commodated at the small ports serving the areas where the cargo originates. Such ports are called "outports". The harbor or river depth is insufficient for the draft of ocean-going vessels and in most cases dock and warehouse facilities are also inadequate. Up-river outports usually have no harbor facilities and cargo is lightered directly to the vessel. These shallow draft ships which originally lift cargo at the Indonesian outports are referred to in Agreement No. 9222 as "First Carriers".

The First Carriers transport the cargo from the outport to a transshipment port or "base port". These ports have harbors sufficient to accommodate ocean-going vessels as well as good storage and terminal facilities. Among the base ports located in Indonesia are Surabaya, Tanjung Priok and Belawan. A great volume of transshipment was formerly done at ports of Singapore and Penang.

Upon arrival at the base port, the cargo is normally lightered from the First Carrier vessel directly onto the slings of an ocean freighter which, in turn, completes the transportation of the cargo to a port located in the United States. The lines operating these ocean freighters are the members of the Java/New York Rate Agreement and are referred to in Agreement No. 9222 as "Second Carriers".

Because of their geographic convenience and excellent harbor facilities, the ports of Singapore and Penang have traditionally been the base ports for much of the Indonesian export cargo destined for the United States. However, in September 1963, Indonesia severed all trade relations with the Federation of Malaysia, which then contained the ports of Singapore and Penang. Since that time, there have been no transshipments of Indonesian cargo at either Singapore or Penang. Instead, Indonesian through cargo has been transhipped exclusively at base ports located in Indonesia. In the latter part of 1965, Singapore broke away from Malaysia and became independent.

Since the date of the initial decision on August 11, 1966, Indonesia and Malaysia entered into an agreement, of which we take official notice, formally ending the period of "confrontation" between the two nations. Moreover, we are advised that Singapore is now permitting Indonesian vessels to use some of its harbor facilities.

Transshipment cargo is shipped on a through bill of lading issued by the First Carrier and covers the transportation from the outport beyond the transshipment port to the ultimate destination in the United States. Through cargo is considered by all the nations involved, the carriers, the purchasers and the sellers as a direct export to the United States. Indonesian regulations governing export li-

censes, exchange control and customs require that the foreign exchange and letter of credit covering the shipment emanate from the United States. The same requirements existed when Singapore or Penang were the transshipment ports. At Singapore, through cargo from Indonesia entered under a transshipment permit requiring no entry declaration or export formalities. Under the foregoing system, the merchandise is considered to move directly to the United States and is never deemed to have entered into a third country.

Local cargo differs from transshipped or through cargo in that it originates in an outport of Indonesia and is destined either for another outport or a base port. At the base port, local cargo is usually processed or warehoused instead of being transferred to a Second Carrier. If it is shipped to a foreign destination, a new bill of lading is issued with the base port as the port of origin. When shipped to Singapore, local Indonesian cargo also required an export permit from the Indonesian Government. The exporter was required to obtain foreign exchange from Singapore and to export on a Singapore local bill of lading. If this cargo was shipped from Singapore, it had to be exported as local merchandise and foreign exchange was required to pay for it.

Up until 1960, the transshipment arrangements between the First Carriers and Second Carriers were handled on an individual letter of intent basis. Each member of the Java/New York Rate Agreement actively solicited the various First Carriers for transshipment cargo. This system was utilized prior to World War II and resumed after the war. By 1960, the members of JNYRA felt that it would be more orderly to enter into a formal agreement with the First Carriers as a group rather than continue on an individual letter of intent basis. After negotiations, a preliminary agreement was executed and filed with the Commission in March 1962, as FMC Agreement No. 8916.

In August 1963, Agreement No. 9222 was filed with the Commission for approval under section 15 of the Act replacing No. 8916, *supra*.² This agreement provides that the First Carriers will present all the cargoes, which they lift at Indonesian outports for transshipment to U.S. Atlantic and Gulf ports exclusively to members of JNYRA. The members of JNYRA in turn agree to use the services of the First Carriers exclusively. The individual First Carriers which executed Agreement No. 9222 were P. N. "Pelajaran Nasional Indonesia" (Pelni), Straits Steamship Co., Ltd., Kie Hock Shipping Co., Ltd., and Guan Guan, Ltd. Pelni is owned by Indonesia and maintains a fleet of about 90 vessels. At the time of the execution of the agreement,

² Action on Agreement No. 8916 was closed before approval in July 1963.

these carriers transported all of the transshipment cargo from the Indonesian outports.

After September 1963, when Indonesia proclaimed its "confrontation" policy with regard to Malaysia, the transshipment of Indonesian through cargo at Singapore and Penang ceased. Trade between the United States and Indonesia continued but through cargo was transhipped at Indonesian base ports only. As a direct result of this change, First Carriers, Straits Steamship, Kie Hock and Guan Guan left the Indonesia trade. They either sold their ships or employed them in other trades. By the time of the hearing, Pelni remained as the only First Carrier serving the Indonesia trade.

Second Carriers also decided to enter into Agreement No. 9202 as a means of distributing the through cargo equitably among the JNYRA members. This agreement deals with trade between the U.S. Atlantic ports and Indonesia, excluding U.S. Gulf ports; and affects only through cargo which is transhipped at Singapore and Penang. The apportionment is made among the Second Carriers based on their respective sailing frequencies.

ISSUES INVOLVED

In our order of investigation dated May 17, 1965, we specified the following eight issues for determination:

1. Whether First Carriers, parties to Agreement No. 9222, are common carriers by water in the foreign commerce of the United States as defined in section 1 of the Shipping Act, 1916.

2. Whether Agreement No. 9222 is subject to the requirements of section 15 of the Shipping Act, 1916.

3. Whether Agreement No. 9222, if subject to section 15, should be approved, disapproved, or modified pursuant to section 15.

4. Whether the arrangement between Second Carriers to enter into Agreement No. 9222 is an agreement subject to the requirements of section 15.

5. Whether the arrangement between Second Carriers to enter into Agreement No. 9222, if subject to section 15 should be approved, disapproved, or modified pursuant to section 15.

6. Whether Agreement No. 9202 should be approved, disapproved, or modified pursuant to section 15.

7. Whether Agreements No. 9222 and 9202 represent the complete understanding between the parties.

8. Whether Agreement No. 9222, Agreement No. 9202, or the arrangement between the Second Carriers to enter into Agreement No.

9222 have been carried out in whole or part without approval of the Commission as required by section 15.

THE INITIAL DECISION

The Hearing Examiner, Benjamin A. Theeman, did not pass on whether or not the First Carriers are common carriers by water in the foreign commerce of the United States within the meaning of section 1 of the Shipping Act on the grounds that such a decision was neither "essential nor necessary" but held that Agreement No. 9222 was subject to the requirements of section 15 for other reasons.³

The Examiner reasoned that since Agreement No. 9222 is an agreement signed by each of the Second Carriers individually (all of whom are clearly subject to the act), it is subject to the requirements of section 15 of the Shipping Act, 1916. The fact that other persons (who may or may not be subject to the act) also signed is of no consequence.

In considering whether Agreement No. 9222 should be approved or not, the Examiner pointed out that the only protest was filed by Orient Overseas Line which is not engaged in the Indonesian trade. This protest was rejected and the Examiner approved the agreement except as to those portions dealing with transshipment at Singapore and Penang. These were disapproved as being contrary to the public interest, since transshipment of Indonesian cargo at these ports had ceased.

The Examiner rejected the proposition advanced by Hearing Counsel that the "arrangement" entered into by the Second Carriers to conclude a transshipment agreement with the First Carriers was subject to section 15 on the grounds that the effects of such an arrangement were only potential and that further negotiations with the First Carriers were necessary before an agreement came into being.

The Examiner decided that Agreement No. 9202 should be disapproved *in toto* since it deals only with transshipment at Singapore and Penang and no Indonesian cargo is transshipped at these ports at the present time. However, he found that the agreement was otherwise approvable.

Finally, he concluded that Agreements No. 9222 and 9202 represented the complete understanding of the parties and that there was insufficient evidence to support a finding that either agreement was carried out in whole or in part without Commission approval.

³ In a "discussion" found in the initial decision, however, the Examiner indicates that he would hold that the First Carriers are common carriers by water within the meaning of section 1 if a decision on this issue were found to be necessary.

EXCEPTIONS OF THE PARTIES

The exceptions of the parties to the initial decision may be summarized as follows:

Intervenor: Intervenor, Holland-America Line, excepts to the Examiner's failure and refusal to rule on the issue of whether the First Carriers are common carriers by water in the foreign commerce of the United States within the intent and meaning of section 1. Its position is that the Commission has no jurisdiction over the First Carriers because they do not come within the meaning of section 1 of the act.

Intervenor also contends that the Examiner erred as a matter of law in concluding that Agreement No. 9222 is subject to section 15.

Second Carriers: Respondents, Second Carriers except only to the Examiner's disapproval of Agreement No. 9202 and those portions of Agreement No. 9222 which deal with transshipment at Singapore and Penang. They contend that there is nothing to indicate that these agreements are not in the public interest and, moreover, that there is a likelihood that the transshipment of Indonesian cargo at Singapore and Penang will resume in the near future.

Hearing Counsel: Hearing Counsel except to the Examiner's failure and refusal to make an affirmative ruling on the question of whether First Carriers come within section 1 of the act and argue that this ruling should be in the affirmative on the basis of *Restrictions on Transshipments at Canal Zone*, 2 U.S.M.C. 675 (1943) which holds that the Commission has jurisdiction over the entire through movement. However, Hearing Counsel oppose "actual assertion" of this jurisdiction.

It is urged rather that the Commission should assert its jurisdiction over the "arrangement" and not the agreement itself, relying on *Anglo-Canadian Shipping Co. v. U.S.*, 264 F. 2d 405 (9th Cir. 1959) and *Isbrandtsen v. U.S.*, 211 F. 2d 51 (D.C. Cir., 1954) in support of this position.

Hearing Counsel oppose the Examiner's approval of Agreement No. 9222 (under any theory of jurisdiction) on the grounds that it effectively precludes independent competition with the parties to the agreement. They reach the same conclusion with respect to Agreement No. 9202 because of its predatory effect on independents.

Finally, Hearing Counsel urge that since Agreement No. 9222 is a mere formalization of a practice that has long existed through the device of letters of intent between individual parties to the agreements, the record shows that parties have implemented a section 15-type arrangement without prior Commission approval.

DISCUSSION

1. *First Carriers Are Common Carriers by Water in the Foreign Commerce of the United States.*

We believe that it is both essential and necessary in this case to determine whether the First Carriers satisfy the definition of "common carrier by water in the foreign commerce of the United States". In this respect, we differ somewhat with the Examiner. However, we agree with the conclusion contained in his "discussion" of this question that these:

. . . activities may be interpreted to make Pelni a common carrier within the meaning of the language in section 1 reading "engaged in transportation by water of . . . property between the United States . . . and a foreign country in the import or export trade". This finding is supported by long standing Commission decisions.

In *Restrictions on Transshipment at Canal Zone*, 2 U.S.M.C. 675 (1943), the United States Maritime Commission held that:

Section 15 applies to every "common carrier by water". This term as defined in section 1 of the Shipping Act, 1916, includes a "common carrier by water in foreign commerce," which is defined as "a common carrier . . . engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade . . ." The transportation in question does not end at Cristobal. It is through transportation from Colombia and Ecuador to United States ports on the Atlantic or Gulf. When the lines operating up to the Canal enter into the carriage of commerce of the United States by agreeing to receive the goods by virtue of through bills of lading, and to participate in through rates and charges, they thereby become part of a continuous line, not made by consolidation with the on-carrying lines, but made by an arrangement for the continuous carriage or shipment from a foreign country to the United States. *Cincinnati, N.O. & T.P. Ry. Co. v. Interstate Commerce Commission*, 162 U.S. 184, 192. Clearly, therefore, the former, being part of the continuous line over which the through traffic moves, are "engaged in the transportation by water of . . . property between the United States . . . and a foreign country." *Norfolk & Western R.R. Co. v. Pennsylvania*, 136 U.S. 114, 119. Indeed, they are no less a factor in such transportation than the on-carrying lines.

We do not rely upon any language contained in the Interstate Commerce Act to support our view that the First Carriers come within the definition of a common carrier by water in the foreign commerce of the United States. The reason for the inclusion of the language concerning continuous carriage in the Interstate Commerce Act is, as intervenor correctly points out:

. . . to deprive the individual states of jurisdiction over . . . transportation wholly intrastate wherever intrastate carriers participate in transportation between the states under an "arrangement for continuous carriage".

Absent this language, there might have been a question of dual jurisdiction by the states and the Federal Government.

Since the Shipping Act deals with the foreign commerce of the United States, this problem does not arise since the Constitution has always vested the plenary power over foreign commerce in the Federal Government.⁴

Under the plain language of the act and the decisions cited, there is no doubt that the First Carriers are "engaged in the transportation . . . of property between the United States and a foreign country". Where there exists a unitary contract of affreightment such as a through bill of lading by which two or more carriers or conferences of carriers hold themselves out to transport cargo from a specified foreign point to a point in the United States with transshipment at one or more intermediate points from one carrier to another, each of the carriers so involved is "engaged in" transporting cargo by water from a foreign country to the United States.

Intervenor contends that the First Carriers cannot be subject to the act because they are foreign and that it would be impossible to obtain *in personam* jurisdiction over them since they do not actually bring cargo to ports in the United States. But there is no need for us to do so in order to carry out our regulatory obligations under section 15 of the act. It is enough that the First Carriers satisfy the definition formulated by Congress, i.e. being engaged in the transportation by water of property between a foreign country and the United States, in order for such carriers to be subject to the act at least to the extent that they are so engaged.

Of critical importance is the fact that we are able to discharge our regulatory duties over those activities of legitimate interest to us without attempting to exercise personal jurisdiction upon a foreign entity. The only activities of the First Carriers with which we are concerned are their contracts, agreements or understandings of the type specified in section 15 with other carriers or persons subject to the act over whom we do have *in personam* jurisdiction.

2. Agreement No. 9222 is Subject to the Requirements of Section 15.

Having determined that the First Carriers come within the definition of common carrier by water in the foreign commerce of the United States, we turn to Agreement No. 9222 to see if it is the kind of agreement which must be filed for approval under section 15 of

⁴ See *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1870) cited with approval in *Norfolk & Western R.R. Co. v. Pennsylvania*, *supra*.

the Shipping Act. We hold that it is subject to the requirements of section 15 for three reasons.

a. Agreement No. 9222 is an agreement between First Carriers and Second Carriers. Since both of these groups are subject to the act, any agreement among them meets the criteria of section 15 as to parties to the agreement;

b. Agreement No. 9222 is an agreement “. . . fixing or regulating transportation rates or fares . . . preventing or destroying competition . . . allotting ports . . . (and) providing for an exclusive, preferential, or cooperative working arrangement”. It is manifestly the type of agreement which is contemplated by section 15; and.

c. Since the Second Carriers actually serve ports located in the United States under Agreement No. 9222, effective, practical regulation of the agreement can be achieved without *in personam* jurisdiction over the First Carriers.

The Commission, in the exercise of its regulatory duties under section 15 of the Shipping Act, directs its attention more to the agreement—*a res*—and not so much to the parties to that agreement. As long as the parties satisfy the definition of common carriers by water engaged in the transportation of goods from a foreign country to the United States, we have jurisdiction over the agreement.

The Examiner was correct in concluding that we have jurisdiction over Agreement No. 9222. We have gone somewhat further than the Examiner in defining our reasons why this jurisdiction exists. We do this in order to prevent any misunderstanding on the part of the shipping industry and to insure that transshipment agreements concluded between individual carriers are also filed for approval under section 15.

Actually, there is nothing new about requiring the filing of transshipment agreements. In *Intercoastal Rates From Berkeley*, 1 U.S.S.B. 365, 367 (1935), the Board held that transshipment agreements must be filed under section 15. See also *Commonwealth of Massachusetts et al. v. Colombian SS Co. et al.*, 1 U.S.M.C. 711 (1938) and the *Canal Zone* case, *supra*. In *Common Carriers by Water*, 6 F.M.B. 245 (1961), the Federal Maritime Board noted that, if respondents were held to be common carriers, a through transportation agreement would require section 15 approval.⁵

Under long established policy and consistent practice, the Commission and its predecessors have always required approval of trans-

⁵ The case of *B. M. Arthur Lumber Co., Inc. v. American-Hawaiian SS Co.*, 2 U.S.M.C. 6 (1939) cited by Intervenor as contrary to *Canal Zone* is inapposite. The Shipping Act and the Intercoastal Shipping Act were not mutually exclusive. The shipment in question in that case was foreign commerce and, at the same time, intercoastal.

shipment agreements under section 15. The fact that in many instances the carrier or carriers on one side of the agreement do not touch United States territory is immaterial. There are more transshipment agreements on file and presently in operation, under section 15, than any other type of agreement and many of them involve arrangements where the carriers on one side never call at ports in the United States. This consistent administrative construction of the act is entitled to great weight. *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959).⁶

3. Agreement No. 9222, if Modified, is Approved.

In his initial decision, the Examiner found that Agreement No. 9222 was approvable under the criteria of section 15 except for those portions dealing with transshipment at Singapore and Penang. We reject these conclusions for the following reasons.

As we have noted above, there has been a decided relaxation of the tensions between Indonesia and Malaysia since the date of the initial decision and there is every reason to believe that normal trade relations will be resumed in the very near future. The same holds true for Singapore which is now independent. It would serve no useful purpose to disapprove those portions of the agreement dealing with transshipment at Singapore and Penang in these circumstances and would, on the contrary, place an unreasonable burden on the carriers involved to require them to wait until transshipment at these ports has again become an accomplished fact. This same reasoning applies to Agreement No. 9202 which the Examiner also disapproved for the same reasons (although finding it otherwise approvable).

Moreover, in Docket No. 66-14—Agreements No. 4188, No. 4189, No. 5080, No. 7550, No. 7650 and No. 7997, served August 17, 1966, we held that where a cessation of a trade is brought about by a sovereign act, this fact will not constitute grounds for modification or disapproval of an otherwise acceptable agreement involving that trade. We believe that this rationale is equally applicable here.

However, we do have a grave difficulty with another portion of Agreement No. 9222. These are the exclusive dealing requirements found in paragraphs 2a and 2b of the agreement which read as follows:

2a. Second carriers undertake not to accept cargo from nor close contracts with other Shipping Companies for the conveyance of through cargo to ports

⁶ Intervenor argues that the inclusion of the phrase "... on its own route or any through route which has been established" in section 18(b) added in 1961 shows Congress' intent to exclude jurisdiction over such "through routes" in the original act. Such an inference is unwarranted. See *Federal Maritime Commission v. Ludlow Corporation*, (2nd Cir., decided August 29, 1966, slip opinion, p. 16).

within the Java/New York Rate Agreement sphere without the written consent of First Carriers.

b. First Carrier undertakes not to close contracts for the conveyance of through cargo to ports within the Java/New York Rate Agreement sphere from ports in Indonesia with other Shipping Companies not members of the Rate Agreement, nor to deliver such through cargo to other Shipping Companies not members of the Rate Agreement, without the written consent of Second Carriers.

The limitation on Second Carriers expressed in paragraph 2a, *supra*, is meaningless. Pelni is a state-owned monopoly and no transshipment cargo is now available from any other First Carrier. There is nothing in the record to indicate that any other First Carriers will be permitted in the trade in the foreseeable future. Indeed, there were four First Carriers when Agreement No. 9222 was executed. Now there is only one.

Since Pelni is the only First Carrier in the trade, if it agrees to patronize the JNYRA Second Carriers exclusively, the possibility of any independent Second Carrier's entering the trade is utterly precluded. We believe that this provision goes far beyond the permissible limits of section 15, unduly prevents competition, and is therefore contrary to the public interest.

If we are to discharge our regulatory obligations under section 15, we must be especially wary of any agreement which places restraints upon third parties. The Supreme Court in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 491, 493 (1958) stated:

Freedom allowed conference members to agree upon terms of competition subject to Board approval is limited to freedom to agree upon terms regulating competition among themselves.

In the particular factual circumstances of this case, the exclusive dealing paragraph would achieve for the Second Carriers an absolute monopoly of an important segment of the foreign commerce of the United States. We would be derelict in our duties if we were to sanction such an arrangement by approving it under section 15.

As we said recently in our Report in Docket No. 873, "Investigation of Passenger Steamship Conferences Regarding Travel Agents," served July 20, 1966 (offset report pp. 9-10):

In determining whether to approve initially or to allow continued approval of an agreement under section 15 we are called upon to reconcile, as best we can, two statutory schemes embodying somewhat incompatible policies of our country—the antitrust laws, designed to foster free and open competition and the Shipping Act which permits concerted anticompetitive activity which in virtually every instance, if not unlawful under the antitrust laws, is repugnant to the basic philosophy behind them.

* * * * *

Thus, before we legalize conduct under section 15 which might otherwise be unlawful under the antitrust laws, our duty to protect the public interest requires that we ". . . scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." *Isbrandtsen Co. v. United States*, 211 F. 2d 51, 57 (C.A.D.C. 1954) ; cert. denied *sub nom. Japan-Atlantic & Gulf Conf. v. U.S.*, 347 U.S. 990.

In a companion case also decided this date, *Transshipment and Through Billing Arrangement Between East Coast Ports of South Thailand and U.S. Ports*, Docket No. 65-19, we approved a similar exclusive dealing provision between the First and Second Carriers. The critical difference between the two cases lies in the fact that in the *Thailand* case *supra*, there are a number of other First Carriers serving the trade which may be utilized by any independent Second Carrier which seeks to compete with the New York Lines Agency members. In the instant case, there are no other First Carriers.

Even though we approved the exclusive dealing provisions in the *Thailand* case, the language of the Examiner (whose initial decision we have adopted) is extremely guarded:

The exclusive arrangement goes far beyond the elimination of intraconference competition, usually accomplished by section 15 agreements, and attempts to restrict the competition of independent carriers. Without surveillance under section 15, such predatory devices are obviously capable of being discriminatory, of detriment to our foreign commerce, and contrary to the public interest.

The fact that no independent competitors of JNYRA members appeared to protest the approval of Agreement No. 9222 is not controlling. Indeed, if JNYRA now enjoys a *de facto* monopoly of the transshipment cargo originating in Indonesia, there is no need for an exclusive arrangement clause in their contract with Pelni. But the inclusion of such a clause leads inescapably to the conclusion that the JNYRA members are concerned that some independent competition may be inaugurated. We find, therefore, that there is no present need for this provision in Agreement No. 9222 and that its only purpose is to foreclose completely the possibility of any independent competitor's ever entering this trade. To approve such a provision would be clearly contrary to the public interest. At best, the provision is meaningless; at worst it would constitute our sanction of an absolute monopoly in an important segment of a trade in the foreign commerce of the United States.

We recognized that conditions may change and that other First Carriers may one day again compete with Pelni for the transportation of transshipment cargo destined for the United States from Indonesian outports to transshipment ports. In that case, if JNYRA should

desire to enter into an exclusive arrangement with one or the other of such competing First Carriers, we would be willing to reexamine our position. The principle which must control is that we will not permit any greater invasion of the antitrust laws than is necessary to serve the public interest with due recognition of the fact the shipping industry world wide is regulated by means of conference arrangements.

4. The Arrangement Among Second Carriers to Enter Into Agreement No. 9222 is Not Subject to the Requirements of Section 15.

In this case as well as in Docket 65-19, *supra*, we specified in our order of investigation the question of whether the "arrangement between Second Carriers to enter into Agreement No. 9222 is an agreement subject to the requirements of section 15" and if so, whether it should be approved.

Both Examiners concluded, and we agree, that the "arrangement" is in the nature of an agreement to agree, a mere preliminary step which may lead to a section 15 agreement but which, in and of itself, does not constitute such an agreement. It is only when a final agreement has been concluded with the First Carriers that the requirements of section 15 come into play. The question of approving such arrangements under section 15, of course, becomes moot.

5. The Apportionment Agreement, No. 9202 is Approved.

We agree with the Examiner that the apportionment agreement, No. 9202 does not violate the standards of section 15 and should be approved. The Examiner disapproved the agreement solely because of the non-existence of transshipment of Indonesian cargo at Singapore and Penang. As we pointed out above, there is a strong probability that this trade will resume in the immediate future and that, in any event, we will not disapprove an agreement which cannot be implemented where the reason for this impediment is a sovereign act.⁷

We reject Hearing Counsel's contention that the agreement should be disapproved because of its predatory effects on independent competitors. This agreement is of a type which, by its very nature, operates almost entirely upon the agreeing parties. It can have little or no effect upon an independent competitor. This is in sharp contrast to the exclusivity portions of Agreement No. 9222 discussed above where the very reason for these provisions is to keep independent competitors out of the trade.

There has been an adequate showing on the record that Agreement

⁷ Our Report in Docket No. 66-14 was served on August 17, 1966, and the treaty ending "confrontation" between Indonesia and Malaysia was dated August 11, 1966. Both events occurred long after the date of the Initial Decision.

No. 9202 will tend to eliminate wasteful practices and promote orderly continuity in the flow of cargo in this trade. It is therefore approved.

6. *Other Issues.*

None of the parties contends that the agreements filed for approval do not represent the complete understanding among the parties. There is no evidence in the record that it does not. We therefore conclude, as did the Examiner, that the agreements in question represent the complete understanding of the parties.

Similarly, there is insufficient evidence of record to warrant a conclusion that either of the agreements have been implemented in whole or in part prior to approval. The individual letters of intent by which transshipment arrangements were handled by the parties in the past were never introduced in evidence. Whether they might have constituted agreements requiring filing under section 15 is beyond the scope of this inquiry. It is clear that they did not call for concerted activity among the Second Carriers as do Agreements No. 9222 and 9202.

CONCLUSIONS

1. First Carriers, parties to Agreement No. 9222, are common carriers by water as defined in section 1 of the Shipping Act, 1916, because they are engaged in the transportation by water of property between the United States and a foreign country in the import trade;
 2. Agreement No. 9222 is subject to the requirements of section 15 of the Shipping Act, 1916;
 3. Agreement No. 9222, if modified as required herein, is approved pursuant to section 15;
 4. The arrangement among Second Carriers to enter into Agreement No. 9222 is not subject to the requirements of section 15;
 5. Agreement No. 9202 is approved pursuant to section 15;
 6. Agreements No. 9222 and 9202 represent the complete understanding of the parties and neither agreement has been carried out in whole or in part prior to Commission approval as required by section 15.
- An appropriate order will be entered.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65-17

TRANSSHIPMENT AND APPORTIONMENT AGREEMENTS FROM INDONESIAN PORTS TO U.S. ATLANTIC AND GULF PORTS

ORDER

The Federal Maritime Commission instituted the proceeding to determine whether Agreements No. 9222 and No. 9202 should be approved pursuant to section 15 of the Shipping Act, 1916, and the Commission having this date made and entered its Report stating its findings and conclusions, which Report is made a part hereof by reference:

Therefore, it is ordered, That (1) Agreement No. 9222 be and the same hereby is approved pursuant to section 15 of the Shipping Act, 1916, on condition that it be modified by deleting in its entirety paragraph 2b; and (2) Agreement No. 9202 be and the same hereby is approved.

It is further ordered, That the approval herein ordered with respect to Agreement No. 9222 shall become effective at such time as the Federal Maritime Commission receives written notice that the parties have agreed to the foregoing modification except that such approval shall become null and void unless the agreement so modified is filed with the Commission not later than sixty (60) days from the date of service of this order.

By the Commission.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 65-19

TRANSSHIPMENT AND THROUGH BILLING ARRANGEMENT BETWEEN EAST
COAST PORTS OF SOUTH THAILAND AND UNITED STATES ATLANTIC
AND GULF PORTS

Decided October 13, 1966

Elkan Turk, Jr., for respondent carriers designated "Second Carriers."

Leonard G. James and *F. Conger Fawcett* for Intervener Holland-America Line.

Donald J. Brunner and *Roger A. McShea III*, Hearing Counsel.

REPORT

BY THE COMMISSION (*John Harlee, Chairman; Ashton C. Barrett, Vice Chairman; James V. Day, George H. Hearn, Commissioners*):

This is an investigation on our own motion to determine whether or not an exclusive transshipment arrangement between a group of originating or First Carriers, which operate exclusively between ports on the east coast of south Thailand and Singapore, and a group of Second or oncarriers, which operate from Singapore to United States Atlantic and Gulf ports, is subject to the filing requirements of section 15 of the Shipping Act, 1916, and if so, whether the agreement should be approved.

In his initial decision, Examiner E. Robert Seaver concluded (1) that the First Carriers are common carriers by water in the foreign commerce of the United States as defined in section 1 of the Shipping Act, 1916; (2) that a transshipment agreement between First and Second Carriers is subject to the requirements of section 15 of the Shipping Act, 1916; (3) that the agreement in question is not contrary to the public interest and will promote a more efficient and orderly shipment of rubber to the United States; (4) that the arrangement

among the Second Carriers to enter into a transshipment agreement is not subject to the requirements of section 15; (5) that Agreement No. 9311 represents the complete understanding of the parties; and (6) that Agreement No. 9311 has not been implemented in whole or in part without approval by the Commission.

We have considered the exceptions of the parties and find that they are essentially a reargument of issues which were fully briefed and treated by the Examiner in his initial decision. Upon careful examination of the record, we conclude that the Examiner's disposition of these issues was well founded and proper. See also Docket 65-17 FMC Reports 10 FMC 183 decided October 13, 1966.

Accordingly, we adopt the Examiner's initial decision as our own and make it a part hereof, and for the reasons stated therein, Agreement No. 9311 is hereby approved pursuant to our authority under section 15 of the Shipping Act, 1916, as amended.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

No. 65-19

TRANSSHIPMENT AND THROUGH BILLING ARRANGEMENT BETWEEN EAST COAST PORTS OF SOUTH THAILAND AND UNITED STATES ATLANTIC AND GULF PORTS

Agreement No. 9311 between two groups of carriers providing for transshipment of rubber at Singapore found to be subject to the requirements of section 15 of the Shipping Act, 1916.

The proposed transshipment agreement not found to violate any of the standards of section 15 and it is therefore approved.

Elkan Turk, Jr., for respondent carriers designated "Second Carriers."

Leonard G. James and *F. Conger Fawcett* for Intervener Holland-America Line (filed briefs but did not appear at hearing).

Donald J. Brunner and *Roger A. McShea III*, Hearing Counsel.

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER ¹

1. THE INVESTIGATION

Agreement No. 9311 was filed for Commission approval under section 15 ² of the Shipping Act, 1916 (the Act). The agreement creates an exclusive arrangement between two groups of carriers for the carriage of cargo (rubber) on through bills of lading from ports on the east coast of south Thailand to ports on the Atlantic and gulf coasts of the United States with transshipment at the port of Singapore. The two parties to the agreement are described therein as (1) the "First Carriers," ³ the steamship lines that bring the rubber to the roadstead at Singapore, and (2) the "Second Carriers," ⁴ those that transport the rubber on to the United States.

¹ This decision was adopted by the Commission Oct. 13, 1966.

² Sec. 15 is set out in appendix A, attached.

³ These are Straits Steamship Co., Ltd. (Straits), N. V. Koninklijke Paketvaart-Maatschappij (N. V. K.), and Heap Eng Moh Steamship Co., Ltd.

⁴ These are the 9 member steamship lines of New York Lines Agency, discussed later.

The Commission instituted this proceeding under the authority of sections 15 and 22 of the Act to determine whether the proposed agreement should be approved, disapproved, or modified under section 15. In its Order of Investigation the Commission also required investigation of the questions as to whether First Carriers, the agreement itself, or the arrangement among Second Carriers to enter into it are subject to section 15. The questions to be investigated are set forth in the following language quoted from the Order :

1. Whether First Carriers, parties to Agreement No. 9311, are common carriers by water in the foreign commerce of the United States as defined in section 1 of the Shipping Act, 1916 ;
2. Whether Agreement No. 9311 is subject to the requirements of section 15 of the Shipping Act, 1916 ;
3. Whether Agreement No. 9311, if subject to section 15, should be approved, disapproved, or modified pursuant to section 15 ;
4. Whether the arrangement between Second Carriers to enter into Agreement No. 9311 is an agreement subject to the requirements of section 15 ;
5. Whether the arrangement between Second Carriers to enter into Agreement No. 9311, if subject to section 15, should be approved, disapproved, or modified pursuant to section 15 ;
6. Whether Agreement No. 9311 represents the complete understanding between the parties ; and
7. Whether Agreement No. 9311 or the arrangement between the Second Carriers to enter into Agreement No. 9311 have been carried out in whole or part without approval of the Commission as required by section 15.

Second Carriers appeared at the hearing, represented collectively by counsel, presented evidence, and filed a brief in support of approval of the proposed agreement.⁵ Hearing Counsel participated in the proceeding and urge, in their brief, that while First Carriers are not necessarily subject to section 15, section 15 approval is required. They take the position that the standards of section 15 will not be violated and that approval should therefore be granted. Intervener Holland-America Line came into the proceeding because they participate in transshipment arrangements in various trades and state that they have an interest in the outcome. They did not appear at the hearing, but counsel filed briefs urging that section 15 approval is not required.

The disposition of these issues calls for a somewhat detailed con-

⁵ Second Carriers take the position that the agreement is not subject to sec. 15 but state that if the Commission determines that sec. 15 approval is required the agreement must be approved because it has not been shown that the agreement would violate the standards of sec. 15.

sideration of the facts surrounding the cargo, the shippers, and the carriers involved in the trade that is the subject of Agreement No. 9311. In order to provide the necessary background of the proposed agreement, the following findings have been extended beyond those facts that would be considered essential under a strict application of the rules of evidence.

2. THE FACTS

During the season of the northeast monsoon, which extends from November through March, considerable difficulty is experienced in attempting to load cargo on large vessels at the ports on the east coast of south Thailand (Songkla, Patani, and Narahdivas). At all times the loading of large vessels at these ports is somewhat inefficient because there are no docks with berths for loading. Large ships stand off the shore several miles, at anchor, where they are loaded from lighters. Rubber moves from these ports in about the same volume the year around.

Crude rubber is exported from these ports to Japan, Europe, and the United States. Today, substantially all of the rubber destined for the United States moves on the respective vessels of both groups of respondents. The lines which will make up the First Carrier group (under Agreement 9311) transport the rubber to Singapore.⁶ There it is discharged into lighters and reloaded onto vessels of one of the Second Carriers for carriage to Atlantic and gulf ports. The cargo is not landed at Singapore. It is intended to and it does move from south Thailand to the United States in continuous carriage in a direct, through movement. The carriers who make up the First Carrier group, as well as the Second Carriers, are common carriers by water.

Several nonconference lines operate vessels inbound to the United States from Singapore who are ready and willing to serve the rubber exporters. The three originating carriers are faced with even greater potential competition because there are many other carriers serving routes that include both Singapore and the ports on the east coast of south Thailand. Still others ply between Bangkok and Singapore. Any of these could easily serve the ports on the east coast of south Thailand because these ports are on nearly a direct line between Bangkok and Singapore. The success of the three First Carrier lines over their competition in the rubber trade to the United States apparently results from the fact that they actively solicit the cargo from shippers and also because the conference carriers presently patronize only these three lines for the first leg of the journey. The

⁶ Singapore, today, is an independent, sovereign nation.

American purchaser bids on the rubber on a cost-and-freight basis, but he pays the freight charges on delivery. The letter of credit is therefore made out for the f.o.b. price. The shipper in Thailand does not always nominate the carriers. While the record is not entirely clear on this point, it would seem from this that the American cost-and-freight purchaser would sometimes select the carrier, as is usually the case on cost-and-freight shipments.

A conference presently made up of nine steamship lines serving this trade (who will make up the Second Carriers) was formed in 1951 under Agreement No. 8100, duly approved under section 15. In 1954 some of the lines resigned from the conference and reduced their rates. The resulting instability of rates led the conference lines in 1955 into Agreement No. 8061 providing for the apportionment of rubber cargo among the members. Under the terms of that agreement, the members (each of whom must be a member of the conference) discontinued the use of their respective local agents in south Thailand. A joint agency was set up to serve all the members, collectively, with its main office at Haadyai, south Thailand, which is near the port of Songkla, on the east coast, and a branch at Singapore. This agency is referred to as New York Lines Agency (NYLA). The group of carriers that are members of the apportionment agreement is also referred to by that name. The rubber shipments are apportioned among the members by the Agency in accordance with fixed percentage shares stated in the agreement, but the earnings are not pooled.

At the time NYLA was formed, a much greater quantity of rubber was imported from Siam through Atlantic and gulf ports than is imported today. In 1956, the first year of operation under the NYLA arrangement, 106,147 long tons moved. This dropped to 50,720 in 1960; 14,166 in 1963; 5,867 in 1964; and only 1,288 tons moved from January to September 1965. The conference witness testified that this decrease occurred because of higher prices paid for rubber in Japan and Europe. There is no evidence in the record that the formation or operation of NYLA led to this decrease in traffic. The conference carriers expect our imports of rubber from Thailand to increase in the near future. They say the traffic has "bottomed out."

Rubber in Thailand is produced by small holders, as distinguished from the large plantations found in some places in Southeast Asia. The shippers of rubber are, normally, consolidators who buy rubber from the growers, for export. There are many of these shippers in Thailand, so that the ship of one of the First Carriers does not load only the rubber of one shipper on one voyage, nor even the rubber available at one of the three ports. The ships sail north from Singapore light and

normally load at all three ports in order to obtain sufficient cargo to make the voyage worthwhile. On each voyage, then, the rubber of many shippers, destined for many ports and consignees, and covered by separate shipping documents will be on board.

The shipper usually books the cargo with one of the First Carriers and notifies the NYLA office at Haadyai. In some instances the cargo is booked directly with NYLA. The first carrier issues a "mate's receipt" or "boat note," as a receipt for the cargo, rather than a bill of lading. This serves the same purpose as a dock receipt. The NYLA office at Haadyai notifies their Singapore office of the movement and it is then allocated to one of the Second Carriers under the apportionment agreement. NYLA issues to the shipper a transshipment bill of lading of the designated Second Carrier in exchange for the mate's receipt and the shipper then draws down from the bank about 70 percent of the purchase price covered by the letter of credit. Under Agreement 9311, the bill of lading will be issued by one of the Second Carriers to cover the entire trip from south Thailand to the United States. Thus it is issued on behalf of the originating carrier as well as the oncarrier.

When the rubber has been loaded aboard one of the oncarrier's ships at Singapore, that carrier cables NYLA at Haadyai so advising them and reporting any exceptions. NYLA Haadyai then places the onboard endorsement on the bill of lading, and notes any exceptions. The bank, upon receipt of the onboard bill, pays the balance to the shipper under the letter of credit and sends the bill of lading "on to New York." The shipment is made on a "freight collect" basis.

The freight rate for the entire service from south Thailand to the United States port is that shown in the tariff of the conference. The rate at present is \$50.25 for 2,500 pounds of sheet rubber or 2,240 pounds of crepe. The rate is the same when the conference line calls direct at the south Thailand port during the open season. The conference member presently pays freight charges of approximately US\$10 per ton to the line that brings the rubber to Singapore as well as the cost of lighterage at Singapore. The conference line charters the lighters at present. The apportionment of freight under Agreement 9311 will continue in this same proportion.

Under Agreement 9311 the First Carrier will arrange and pay for the lighterage at Singapore. Second Carriers will reimburse First Carriers at the rate of 5 Malayan dollars per ton for this service. This is US\$1.67. First Carriers are also required by Agreement No. 9311 to sort the rubber by marks, bills of lading lots, and destinations, before delivery to Second Carriers. This is an important feature of the

agreement and reflects one of the main reasons why the conference members see a need for it.

On occasion, in the past, rubber cargo of various shippers that was transshipped at Singapore was hopelessly mixed. In one instance a vessel came into Singapore with 18,000 bales of rubber on board, 10,000 of which were for transshipment to various American ports via NYLA and 8,000 destined for ports in Europe and Latin America. The NYLA carrier could not distinguish most of the marks and the cargo was inextricably mixed, so most of it was left behind. This resulted in the payment of large claims to the importers. Under Agreement 9311 the sorting responsibility is that of the First Carrier, on whose vessel the cargo is loaded.

Second Carriers testified that the arrangement will promote more orderly and efficient transshipment. The agreement provides that the Second Carriers shall receive rubber for transshipment in this trade only from First Carriers and First Carriers agree to transship only via Second Carriers. Second Carriers are allowed to load direct at the south Thailand ports during the open season and each of them may transship rubber at Singapore on its own vessels during the open season.

The three lines that make up the First Carriers were selected by the Second Carriers because they are the most experienced and dependable carriers in this service. Second Carriers are similarly the most experienced carriers in the transportation of rubber in the second leg of the route. Experience in the transport of rubber enables the carrier to provide better service because it calls for special skill and experience. The arrangement will tend to provide shippers with efficient and stable service. By dealing exclusively with First Carriers, rather than dealing with all carriers in the trade indiscriminately, Second Carriers believe that they and the shippers will be assured of stability of service "through thick and thin." That is, if the rubber trade diminishes, or more attractive cargoes are offered elsewhere, these three carriers will have a motive to stay in the trade. There is no evidence to the contrary, and since this prediction accords with history in the field of ocean transport, it is accepted as valid.

Speed of transshipment service is important to shippers because it permits them to receive payment under letters of credit earlier and avoid their working capital being tied up. This cooperative working arrangement between the two groups of carriers will expedite the transshipment service. As noted above, it will eliminate the problem of resorting the cargo at Singapore. It will also promote stability of rates, which is equally important to shippers. There is no dual rate system in effect in this trade. NYLA vessels make 15 calls a month

in this service. No question was raised as to the adequacy of the conference service. Due to their know-how, their length of service, and frequency of service they carry all the rubber in this trade. It can be concluded from this that they have found no need for a dual rate system.

The freight rate on rubber from south Thailand to Japanese and European ports is roughly half of that to United States ports. The price of a ton of rubber is about \$500 on a cost-and-freight basis. It seems unlikely that a \$25 rate disparity would be the cause of the decrease in the exports of rubber to the United States. There is no evidence in the record, one way or the other, as to whether the difference is justified. The relative distance would tend to justify it, of course. The question of rate levels is not directly in issue here, in any event. It is not expected that Agreement 9311 will result in a change in the conference rate either upward or downward. Orient Overseas Line (O.O.L.), one of the independent carriers in this trade, has a rate on rubber from Singapore of \$42 per 50 cu. ft. plus an arbitrary of \$1.25. The conference rate is \$45.50. They would come out better on shipments from Singapore under this rate than they will under the transshipment arrangement contemplated by Agreement 9311.

The shippers who expressed themselves on the subject do not oppose the approval of the agreement. Central Gulf Steamship Co., an independent carrier in the trade, stated that it did not oppose the agreement. However, this carrier also said it soon may join the conference, so this position cannot necessarily be taken as typical of the independent carriers. O.O.L. opposes the agreement on the ground that its exclusive provisions would prevent O.O.L. participation in the rubber cargoes transported by First Carriers. No other independents have expressed a view in this proceeding. The government of south Thailand has not indicated an interest in the agreement either in communications with the carriers or in the course of this proceeding.

3. DISCUSSION AND CONCLUSIONS

The first and second issues to be resolved, as stated in the Order of Investigation, can be treated together:

Question No. 1: Whether First Carriers, parties to Agreement No. 9311, are common carriers by water in the foreign commerce of the United States as defined in section 1 of the Shipping Act, 1916.

Question No. 2: Whether Agreement No. 9311 is subject to the requirements of section 15 of the Shipping Act, 1916.

Section 15 requires "every common carrier by water, or other person subject to this Act" to file with the Commission for approval all agreements of the type described in that section with another such carrier or person. Section 1 defines "common carrier by water" to mean, for our purpose in this proceeding, a "common carrier by water in foreign commerce" which, in turn, is defined in section 1 to mean:

A common carrier engaged in the transportation by water of passengers or property between the United States . . . and a foreign country.

First carriers are common carriers. The record clearly establishes this fact. The Holland-American brief contains an innuendo that there is no such thing as a common carrier outside common law countries. For whatever relevancy this factor has, every country recognizes the common carrier concept. See "Report of United Nations Conference on Trade and Development," January 28, 1964. On page 14 the report states—

Whereas the tramp owner is only bound to carry a cargo from one place to another after he has engaged himself by charter party to do so, the liner is legally defined as a 'common carrier' in all countries.

The point here, in any event, is that the First Carriers are acting as common carriers within the meaning of section 1, so that part of the definition is satisfied.

The question, then, is whether these carriers are engaged in the transportation of property between the United States and a foreign country, either by virtue of their actual carryings or because of their joint activity with Second Carriers covering the whole route from south Thailand to the United States. The answer is that they are so engaged, on both counts.

In *Restrictions on Transshipment at Canal Zone*, 2 U.S.M.C. 675- (1943), the U.S. Maritime Commission held unequivocally that carriers transporting cargo destined for the United States between two foreign ports, the cargo being transshipped to other carriers at the second port, were engaged in the transportation of property between the United States and a foreign country, within the meaning of section 1, and that the agreement covering the transshipment was subject to section 15.

For rather widely varying reasons, the parties herein argue that First Carriers are not so engaged. In order to sustain these arguments, the *Canal Zone* case and a continuous line of other precedents going back to the beginning would have to be overturned, even though there has been no change in the statutes or the circumstances. Intervener

Holland-America Line acknowledges that the *Canal Zone* case is in point but urges that the Commission should reverse its predecessor. Respondent attempts to distinguish the case on the ground that some of the carriers involved in *Canal Zone* made direct calls at U.S. ports on other routes and that the first carriers in the instant case do not do so. This is by no means a distinguishing feature. The sole operation of the carriers involved in the *Canal Zone* ruling was the transshipment service. Other activities of the carriers have no bearing on the legal status of the transshipment agreement. Likewise, the fact that here the Second Carriers issue the through bill of lading, rather than the originating carriers, does not distinguish the cases, as contended by counsel. In most, if not all transshipment agreements either the originating carrier or the oncarrier issues a through bill for the whole trip, but this has never been held to prevent the agreement being subject to section 15.

After speaking of earlier decisions that such a transshipment agreement was subject to section 15, the Commission stated on page 678: . . . These administrative determinations, which have stood for years without challenge, rest upon sound reason.

Section 15 applies to every "common carrier by water." This term as defined in section 1 of the Shipping Act, 1916, includes a "common carrier by water in foreign commerce," which is defined as "a common carrier . . . engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade . . ." The transportation in question does not end at Cristobal. It is through transportation from Colombia and Ecuador to United States ports on the Atlantic or Gulf. When the lines operating up to the Canal enter into the carriage of commerce of the United States by agreeing to receive the goods by virtue of through bills of lading, and to participate in through rates and charges, they thereby become part of a continuous line, not made by consolidation with the on-carrying lines, but made by an arrangement for the continuous carriage or shipment from a foreign country to the United States. *Cincinnati, N.O. & T.P. Ry. Co. v. Interstate Commerce Commission*, 162 U.S. 184, 192. Clearly, therefore, the former, being part of the continuous line over which the through traffic moves, are "engaged in the transportation by water of . . . property between the United States . . . and a foreign country." *Norfolk & Western R.R. Co. v. Pennsylvania*, 136 U.S. 114, 119. Indeed, they are no less a factor in such transportation than the on-carrying lines.

The lawyers for Holland-America argue, in effect, that the decision was erroneous because the two Supreme Court cases cited in the above quoted portion of the decision were decided under the Interstate Commerce Act and that therefore the Commission decision was based on the Interstate Commerce Act rather than the Shipping Act. This argument is unacceptable because it is evident that the Commission cited the Supreme Court cases as involving generally analogous situations where the Supreme Court reiterated the well established prin-

ciple that any local carrier becomes a part of the continuous line of carriage when he enters into a through route arrangement. It is quite evident that the Commission was aware of the applicable language of the Shipping Act for they quoted the relevant portion of it in the same passage. The other cases decided by the Commission (and its predecessors and successors) on this point do not even mention those Supreme Court cases.

Hearing Counsel urge that the arrangement between the Second Carriers to enter into Agreement 9311 is a section 15 agreement. They say that "the effect is practically the same [as the result in *Canal Zone*]" and that they "are really doing through the back door what the Commission in that case [*Canal Zone*] did, so to speak, through the front door; . . ." page 181 of transcript. They state that *Canal Zone* "settled" the proposition that First Carriers fall within the definition of section 1 of the Act, yet they say in their opening brief that when that case is looked at with a "degree of penetration" it can be distinguished from the case at hand.⁷

They say the following factors distinguish the cases: 1. In *Canal Zone* the transshipment points were in territory leased and administered by the United States. 2. The *Canal Zone* agreement did not involve exclusive dealings between the two groups and it included through movements by single member carriers as well as transshipment.

None of these points distinguish the instant case from the *Canal Zone* case. The two cases are on all fours. The Commission treated the *Canal Zone* case as a situation where the originating carriers did not touch a port of the United States. Commerce between the U.S. ports and the *Canal Zone* has always been treated as foreign commerce. *Sigfried Olsen v. W. S. A. and Grace Line, Inc.*, 3 F.M.B. 254, 259 (1950). First carriers in the *Canal Zone* case plied between foreign ports just as they do in the instant case.

The fact that the carriers who were parties to the agreement involved in *Canal Zone* were permitted to carry cargo over the entire route, if they chose, is not a distinguishing factor. Under Agreement 9311, any of the Second Carriers can make direct calls at south Thailand ports during the open season. The *Canal Zone* agreement had exclusive features, too.

⁷ In their answering brief, Hearing Counsel have apparently sensed the weakness of this position because they urge the Commission not to make a decision that would disclaim jurisdiction over the originating carriers in a through movement. In Docket No. 65-17, "Transshipment and Apportionment Agreements From Indonesian Ports to United States Atlantic and Gulf Ports" decided by Examiner Benjamin A. Theeman on Mar. 24, 1966, Hearing Counsel take the position that First Carriers are subject to sec. 15.

Other, even less pertinent distinctions are attempted to be made, but these need not be discussed further because the preoccupation of counsel with attempts to distinguish this case from the *Canal Zone* case has caused them to miss or to obscure the point. The briefs treat the *Canal Zone* case as an isolated and unique incident and treat the whole area of transshipment agreements as rather novel, innocuous arrangements that really haven't received much, if any, serious consideration until this proceeding came along. The transportation of property to and from the United States by means of transshipment arrangements is, in fact, a major element in the foreign commerce of the United States. To remove it from regulatory control would obviously have a profound impact on our foreign commerce. Holland-America even seems to argue that no transshipment agreement is a section 15 agreement.

The point is that under frequent rulings and decisions, long established policy, and consistent practice, the Commission and its predecessors have always required approval of transshipment agreements under section 15. The fact that in many instances the carrier or carriers on one side of the agreement do not touch U.S. territory has not been deemed and is not now deemed to make a distinction in this policy or these decisions. The briefs of counsel (except intervener Holland-America) give the impression that their authors are unaware that the regulatory supervision and processing of such agreements has been and is today one of the largest areas of concern of this Agency. More transshipment agreements are on file and presently in operation, under section 15, than any other type of agreement. They constitute more than half of the section 15 agreements presently on file and many, probably most of them, involve arrangements where the carrier or carriers on one side never call at ports in the United States. The Examiner takes official notice of the facts stated in this paragraph.

Like Agreement 9311, some transshipment agreements contain exclusive features which prohibit either side dealing with other carriers in through shipments in the particular trade. Others do not contain the exclusive feature. Contrary to the contention of Holland-America, all such agreements have been held to fall within section 15. See *Intercoastal Rates From Berkeley*, 1 U.S.S.B.B. 365, 367 (1935) and the cases cited later herein. Such agreements are invariably "cooperative working arrangements" under section 15 and, like Agreement 9311, frequently cover aspects of rate fixing and/or provide for exclusive dealing among the parties. Agreement 9311 is patently subject to the statute. To treat it as an innocuous, incidental facet of the overall activities of these carriers would overlook the spirit as well as the

letter of the Act. The exclusive arrangement goes far beyond the elimination of intraconference competition, usually accomplished by section 15 agreements, and attempts to restrict the competition of independent carriers. Without surveillance under section 15, such predatory devices are obviously capable of being discriminatory, of detriment to our foreign commerce, and contrary to the public interest.

The first time the matter was mentioned in a formal decision was in 1935 in *Intercoastal Rates From Berkeley*, 1 U.S.S.B.B. 365, 367. This decision recognizes that transshipment agreements must be filed under section 15. Next came *Commonwealth of Massachusetts et al. v. Colombian SS Co. et al.*, 1 U.S.M.C. 711, in 1938, and the *Canal Zone* case in 1943. If the case of *B. M. Arthur Lumber Co., Inc. v. American-Hawaiian SS Co.*, 2 U.S.M.C. 6 (1939) cited by Holland-America as contrary to *Canal Zone* has any bearing on this proceeding it is the fact that the through route transshipment arrangement involved there was filed and approved under section 15, as Agreement No. 4970. The Examiner finds nothing in that decision that is at odds with the other precedents cited here.

The converse of the instant situation was present in *Boston Wool Trade Assn. v. Oceanic, et al.*, 1 U.S.S.B. 86 (1925), where wool from Australia destined for Boston was transshipped at San Francisco to an oncarrier who carried the wool through the Panama Canal to Boston. The Shipping Board held that the San Francisco to Boston leg of the through transportation was foreign commerce rather than interstate. They looked at the whole through route as a unit. This must be done here, as well, with the result that the entire through transportation is part of "the transportation of property" between the United States and a foreign country. As said in the *Boston Wool* case, page 87, the stop at the transshipment point is only incidentally a part of the movement and does not change its character. In *Common Carriers by Water*, 6 F.M.B. 245 (1961), the Federal Maritime Board noted that, if respondents were held to be common carriers, a through transportation agreement would require section 15 approval. The proposition was apparently deemed to be so well established that neither the Board nor any of the parties raised any question on that score.

Recent actions of the Commission have confirmed this unvarying policy and decision. On July 15, 1964 the Commission mailed to all affected carriers a notice of the delegation of authority to the Bureau of Foreign Regulation to approve under section 15 the more routine transshipment agreements filed for approval. A copy is attached, marked "Appendix B." This notice was given pursuant to Commission Order No. 1 which was amended at about that time to provide for this

delegation of authority to approve transshipment agreements. This recognizes, of course, that such agreements require section 15 approval. No distinction is made as to those involving only carriers that call at U.S. ports. Obviously, by their very nature such through shipment arrangements normally involve transshipment at a foreign port with one carrier or group of carriers plying between that port and other foreign ports.

Even more recently, in *Pacific Seafarers, Inc. v. AGAFBO*, 8 FMC 461, the Commission recognized that section 15 jurisdiction would lie if the carriers involved there, who traded between ports in Thailand and Taiwan, had been transporting cargo transshipped from the United States. The decision states, "Further, the record is bereft of any evidence that the cement involved was cement transshipped from the United States," so the Commission determined that it did not have jurisdiction.

Section 18(b), added to the Act in 1961, requires common carriers in foreign commerce and conferences of such carriers to file their rates with the Commission "for transportation to and from United States ports and foreign ports between all points on its own route *and on any through rate that has been established,*" and it gives the Commission jurisdiction over the rates so filed. Congress cannot be charged with the futile action of assigning this responsibility to the Commission to regulate rates on a through route if the Commission had no authority over intercarrier agreements under the terms of which such rates are established and applicable. The Holland-America argument that the inclusion of the italicized words somehow shows a congressional intention to omit them from sections 1 or 15 is unacceptable. In the first place, we are considering the enactments of two different Congresses. Beyond this, the 87th Congress can be deemed to have been aware of the long and unvarying Agency policy, decision, and practice requiring the filing of through transportation arrangements. The 1961 amendments did nothing to bring this decision and practice into question, they confirm it. In any event, the intention of a 1916 Congress can hardly be ascertained by looking at a statute enacted in 1961.

The effect of a contrary holding must be considered. If Agreement 9311 were not subject to the Act the parties thereto would be at liberty to engage in any discriminatory, monopolistic, predatory practice they wish⁸ (at least in the Singapore/Thailand leg of this continuous journey), to the detriment of shippers and the destruction of competing carriers in our foreign commerce who call or may wish to call at these

⁸ To the extent that the antitrust laws might not be applicable. If they are considered to be applicable, this does not solve the problem since Congress intended the sec. 15 standards to apply to situations falling within its coverage, rather than the antitrust laws.

Thailand ports direct. This would be true in all trades where through transportation is practiced. It is not conceivable to the Examiner that Congress intended such a result.

First carriers are literally "engaged in" (participating in) "the transportation—of property—between the United States and a foreign country" within the meaning of section 1 when they carry the rubber on the initial leg of the through route. Equally important, they are also constructively "engaged" in the whole trip from Thailand to New York by entering into Agreement 9311 because the carriage on the entire trip then becomes a joint and common undertaking between the two groups of carriers. It is not open to question, at this late date, that the transport of cargo between the United States and Thailand is part of the foreign commerce of the United States. Switching the cargo to a different vessel in the roads at Singapore does not change this.

Counsel mistakenly look at the problem strictly as one of jurisdiction over the person, where the First Carriers are concerned, and they worry about theoretical aspects of enforcement. What we are primarily concerned with is jurisdiction over the agreement between these two groups. Enforcement poses no problem for if the requirements of the Commission are not met by the parties and the section 15 standards are violated the agreement will be disapproved.

For the foregoing reasons, the first two issues are answered in the affirmative.

Question No. 3: Whether Agreement No. 9311, if subject to section 15 should be approved, disapproved, or modified pursuant to section 15.

The parties agree that there has been no showing that the agreement will be unjustly discriminatory or unfair, that it will operate to the detriment of the commerce of the United States, be contrary to the public interest or in violation of the Act. On the positive side, the evidence shows that the agreement will promote a more efficient and orderly transshipment of rubber in this trade. It will tend to provide service to shippers in lean times because the three First Carriers, being assured of the exclusive transshipment of through cargo with the conference lines, will develop an interest in the trade and will be motivated to stay there and serve the trade even though greener fields elsewhere might otherwise lure them away. The arrangement for sorting the cargo by First Carriers will speed the transshipment process. This will be of benefit to shippers as it will allow them to recoup their investment sooner.

There was no evidence that the agreement will result in increased rates. Importers of rubber did not oppose approval of the agreement.

One of the independent carriers in the trade between Singapore and the United States, O.O.L., testified that the agreement is discriminatory as to it because it will be prevented from transporting through cargo under transshipment arrangements with any of the First Carriers. There is no question that the agreement will place some restrictions on competition, but this factor alone does not prevent approval under section 15. The First Carriers are not transshipping cargo at present with O.O.L., so that carrier will be no worse off under the agreement except insofar as it eliminates the prospect of their doing so in the future. There is nothing to prevent O.O.L. working out transshipment arrangements with other first carriers, or calling direct at Thailand at least in the open season.

Since the agreement will not violate any of the standards of section 15, and it will serve valid transportation purposes, it should be approved.

Question 4: Whether the arrangement between Second Carriers to enter into Agreement No. 9311 is an agreement subject to the requirements of section 15.

Question 5: Whether the arrangement of Second Carriers to enter into Agreement No. 9311, if subject to section 15, should be approved, disapproved, or modified pursuant to section 15.

Question No. 4 requires a decision as to whether a preliminary agreement, presumably entered into by the members of the conference, an "agreement to agree," has to be submitted for approval under section 15. The answer is in the negative. Respondents argue with some fervor, and the Examiner agrees, that a requirement that every preliminary "agreement to negotiate" be submitted for approval is not contemplated by the statutes and would lead to the hopeless congestion of the Commission's docket. Under a contrary rule, every time a section 15 agreement between two groups were filed, the separate agreement between the members of each group also would have to be filed. In addition, each separate agreement among the members of each group would have to have section 15 approval as negotiations progressed and as each side altered its position on various points. Such an absurd result was surely not contemplated.

The short answer is that a mere agreement to negotiate, among the members of just one side of the ultimate bargain, cannot, standing alone, accomplish those things covered by section 15 and therefore such an "agreement" does not come within the section. It cannot fix or regulate rates, give special rates, control competition, pool earnings, allot ports, et cetera. The colloquial expression, "It Takes Two to Tango," is so entirely appropriate that its use here hopefully will be

excused. For these reasons, among others, section 15 approval is not required for the agreement (if any) between Second Carriers.

However, Hearing Counsel attempt to place some different interpretation on Question No. 4 and, comparing transshipment arrangements to dual rate arrangements, say that the decision, among themselves, of Second Carriers to enter into Agreement 9311 requires section 15 approval. They cite *Anglo Canadian Shipping Co. v. United States*, 264 Fed. (2d) 405 (C.A. 9, 1959), and *Isbrandtsen v. United States*, 211 Fed. (2d) 51 (C.A.D.C., 1954), as authority for this point. Insofar as they may have any relationship with the situation here, those two cases hold that the action of a group of carriers (members of a conference) in initiating a "scheme" of dual rates in a particular trade requires Commission approval under section 15 before it can be carried out because the basic conference agreement does not provide a "cover of authority" (as decided by the Board) to adopt such a "scheme."

By means of an alleged analogy with these cases, Hearing Counsel seek to bring Agreement 9311 under section 15 through the "back door," as they say. The foregoing decision on Question No. 1 that the agreement between the two groups of carriers is subject to section 15 makes it unnecessary to decide the "back door" question, of course. However, the Examiner is constrained to take it up since the question was included in the Commission's Order of Investigation, or something like it.

Hearing Counsel find themselves in a dilemma as a result of (1) their conviction that transshipment agreements must be regulated, and (2) their assertion (which has been shown above to be erroneous) that First Carriers are not subject to section 15. Their attempt to solve this dilemma has led them into further difficulty. They seize upon the *Isbrandtsen* and *Anglo Canadian* cases as authority for the proposition that an "arrangement" can be one subject to section 15 even though there may be a party to it who is not subject to the Act. This, they apparently feel, will get them off the first horn of their dilemma. This nonsubject party, in the case of the dual rate contract, is the shipper, they say. The corresponding party in the 9311 Agreement would be the First Carriers (assuming, for the sole purpose of this discussion, that they are not subject to section 15). The analogy might be tenable if the shippers were party to the "arrangement" the courts were considering in the *Isbrandtsen* and *Anglo Canadian* cases. However, they were not parties. Section 15 requires that common carriers by water and other persons subject to the Act file for approval agreements "with another such carrier . . ." or person. The courts in those two cases would have had to repeal the statute to reach the result urged by Hearing Counsel.

The alleged analogy breaks down when the nature of a dual rate system is compared with that of a transshipment arrangement. Under the *Isbrandtsen* and *Anglo Canadian* decisions, the Commission approves the "scheme" of the carriers, entered into among themselves, to institute a dual rate system. Thereafter, the conference enters into uniform dual rate contracts with the individual shippers—thousands of them—under which each shipper is given a reduced freight rate in exchange for his promise of exclusive patronage of the conference members. The act of entering into these individual shipper contracts does not require approval. That act is nothing more than a ministerial function, once the "scheme" is settled. Approval of the "scheme" gives blanket authorization for the execution of the individual contracts.

Now, it is certain that the Commission could not and would not give such blanket authorization to a conference or any other group of carriers to enter into any and all transshipment agreements thereafter. On the contrary, unlike the individual shipper dual rate contracts, the Commission must, of necessity, scrutinize each and every proposed transshipment agreement in order to see if the special terms of the particular agreement, in the special circumstances of the trade involved, are compatible with the standards of section 15. The distinction lies in the fundamental difference between these two categories of section 15 undertakings.

The heart of the dual rate situation lies in the arrangement between the conference members to adopt the system itself. Even the form of uniform contract with shippers is approved as a part of this arrangement. When this arrangement comes to the Commission, all of the ramifications of the plan are available for study and approval, disapproval or modification under section 15. The actual signing up of the shippers thereafter is actually only incidental. On the other hand, the mutual decision among a group of carriers to enter into a transshipment arrangement in a particular trade tells only a minor part of the story. At the heart of this transaction is the identity of the other carrier or group of carriers that will sign, the exclusivity of the particular arrangement, the form of the contract, and other unique incidents of the arrangement that must be subjected to the test of section 15 for ad hoc determination. If blanket consent were given, none of these things would receive regulatory attention.

Counsel for Holland-America call this approach of Hearing Counsel the "half-agreement" approach and correctly point out a result which alone would render it unworkable and in violation of the spirit of the 1916 Act as well. They point out that only those transshipment ar-

rangements involving more than one carrier on a side would be brought under section 15. Where one leg of the voyage (that which touches American shores) was performed by a single carrier (regardless of the number of lines that might be acting jointly on the other side of the agreement) such arrangements would be "utterly immune from such control."⁹ "In short," they say, "individual carriers could and would monopolize the transshipment business to and from the United States . . . a result which could hardly be considered conducive to the well-being of the commerce of the United States." The Examiner agrees.

Hearing Counsel are aware of this problem. They feel that transshipment agreements are at the most restrictive extreme of the spectrum of the anticompetitive devices covered by section 15 and, apparently, they do not wish to exclude from regulation every such device not having multiple parties on a side. In their reply brief they wisely urge the Commission not to make a "determination in this case which would have the effect of disclaiming jurisdiction over originating local segments of through movements to the United States . . .". And they urge the Commission to adopt "a flexible rule as to jurisdiction, based upon the exigencies of particular trades." At another point they propose that the Commission "not make the broad determination in this case that all first carriers are jurisdictional or nonjurisdictional."

Hearing Counsel are perfectly correct that each and every transshipment agreement should be looked at on its own merits. However, this cannot be achieved by a flexible and varying approach to Question No. 1, as cases arise in the future. The Act must be applied uniformly to all carriers. The dilemma seen by Hearing Counsel stems from their attempt to treat a single transshipment agreement in the same way as the adoption of an entire dual rate system. The needed "flexibility" is achieved by accepting Agreement 9311 for what it is—a single contract between a group of carriers acting as one, as the party of the first part, and another group of carriers acting as one, as the party of the second part, both of which groups are subject to section 15. In this way, and no other, the entire arrangement can be scrutinized, as intended by Congress in the enactment of section 15.

The incidental agreement between the members of each group, first to negotiate and then to sign, are merged into Agreement 9311 and every facet of those individual agreements can be examined by the Commission as a part of its scrutiny of Agreement 9311. The converse does not hold true, however, for, standing alone, the agreement among

⁹ The initial decision served Mar. 24, 1966, in Docket No. 65-17, 10 FMC 183 "Transshipment, etc., From Indonesia," would have this result.

the conference members to enter into Agreement 9311 is not the same contract as Agreement 9311. It is a different contract because it involves different parties, the former does not necessarily contain or reflect the terms and conditions of the latter, and (under the erroneous theory that First Parties are not subject to section 15) would cover only a portion of the geographic area covered by Agreement 9311.

It covers a different geographic area, if First Carriers are held not to be subject to the Act, for this reason: First Carriers can be found not to be subject to the Act only if they are deemed not to be participating in the transportation of property between the United States and a foreign country. Such a decision would require, out of consistency in the use of language, that Second Carriers not be deemed to be participating in the transportation of property between the Thai ports and Singapore in their transshipment operations. Thus the agreement among each set of carriers would be confined to that route in which they are said to be participating, under this theory. Regulation would necessarily start at Singapore, even though the cargo never touches the soil there but instead moves from south Thailand in a continuous line of direct transport to the United States.

If it were possible in some way to isolate the arrangement between the one set of the carriers—rather, if a case should arise where this were required or permitted—the arrangement would undoubtedly be subject to section 15. In answer to Question No. 5, then, if the arrangement between Second Carriers could be isolated in this way it would appear to be approvable under section 15. The Examiner is not sure just how far such a limited and partial inquiry would go, but surely if the entire Agreement 9311 is approvable (as decided under question 3) one of its antecedent parts, standing alone, could not be found to create evils that would contravene the statute. This arrangement among Second Carriers, if there was one, has not been submitted for approval, of course. Under this initial decision it need not be.

Question No. 6: Whether Agreement No. 9311 represents the complete understanding between the parties.

None of the parties contend that the document filed for approval does not represent the complete understanding between the parties. A conference witness testified that Agreement 9311 represents the complete understanding of the parties. There is no evidence in the record that it does not. This finding has reference to the written Agreement 9311 between the First Carriers, on the one hand, and the Second Carriers, on the other. The record is wholly inadequate to form the basis for a decision as to whether there was some other agreement or

agreements among the shiplines that make up Second Carriers or what the terms of it might have been. This matter was raised after the record was closed. However, the Examiner does not feel that this raises any problem, since the agreement among the Second Carriers to negotiate and to enter into Agreement 9311 was merged into Agreement 9311. Question No. 6 is answered in the affirmative.

Question No. 7: Whether Agreement No. 9311 or the arrangement between the Second Carriers to enter into Agreement No. 9311 has been carried out in whole or part without approval of the Commission as required by section 15.

There is no evidence in the record that Agreement 9311 has been carried out in any way. The conference witness testified that it has not. Under this initial decision, no other agreement between or among these parties requires section 15 approval. Therefore there has been no violation of the Act on this score. However, this Question No. 7 tends to point up another weakness in the theory that an "agreement-to-agree," "agreement-to-negotiate" or a "half-agreement" among the conference members is subject to the Act. These so-called agreements necessarily have been carried out before Agreement 9311 was presented to the Commission for approval. In this case, it is apparent that none of the evils sought to be prohibited by section 15 could be perpetrated at least until there was a meeting of the minds and a contract arrived at between the two groups of carriers. These groups submitted their Agreement 9311 for approval when this occurred and this must be taken as timely submission. That agreement has not been carried out.

4. SPECIAL COMMENT

The question at the core of this proceeding is whether First Carriers fall within the definition of section 1 of the Act, so that the agreement between that group and the group known as Second Carriers requires approval under section 15 before it lawfully can be carried out. The Examiner is convinced that this straightforward issue must be answered in the affirmative. Since there is no evidence that the agreement will run afoul of the standards of section 15, this disposes of the proceeding.

The Order of Investigation does not disclose reasons for the inclusion of Questions No. 4 and 5, having to do with some agreement other than No. 9311. Such questions could be asked as appropriately in any section 15 proceeding involving more than one carrier or person on one side or the other. It has been pointed out that the record herein is inadequate to provide a basis for a meaningful decision as to such questions.

It would also be a mistake to attempt to joust with the strawmen built up by the parties in connection with the question whether First Carriers are subject to section 15; e.g., whether terminal operators in the Thailand ports fall within section 15. These questions are not involved here and they only cloud the issue, but there may be incidental problems of a corollary nature in this general area that need answers. For example, some kind of rule might be devised whereby the run-of-the-mill transshipment agreement would be deemed to pass muster under the Act if no objection to it is voiced; perhaps some so-called transshipment arrangements, where the originating leg falls entirely within the domestic area of one foreign country and that are actually concerned with little more than lighterage there, could be excluded. This entire area might be an appropriate subject for an evidentiary rulemaking proceeding where, once the Commission lays Question No. 1, above, to rest, all interested parties could be heard, a proper record of the facts developed, and these peripheral issues resolved. In the instant proceeding, however, it would involve considerable risk for the decision to go beyond the real issue. The Examiner has attempted to decide all the questions included in the Order simply because the questions were asked by the Commission or its staff. He would not otherwise have gone into Questions 4 and 5.

5. ULTIMATE CONCLUSION

First Carriers and Second Carriers are common carriers by water within the meaning of section 15 of the Act. Agreement No. 9311, a transshipment agreement between these two groups, is subject to section 15.

Agreement No. 9311 has not been shown to be unjustly discriminatory or unfair as between the interests named in section 15, to operate to the detriment of the commerce of the United States, to be contrary to the public interest, or to be in violation of the Act. The agreement should therefore be approved, as it will serve valid transportation purposes.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

WASHINGTON, D.C., *March 31, 1966.*

10 F.M.C.

APPENDIX A

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not in-

volve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

APPENDIX B

FEDERAL MARITIME COMMISSION,
Washington, D.C.

IN REPLY REFER TO:

Foreign Trade
Circular Letter No. 64-1

To: All carriers subject to section 15 and/or 18(b) of the Shipping Act, 1916.
Subject: Delegation of authority by the Federal Maritime Commission to approve unprotested transshipment agreements.

In an effort to expedite the handling of requests for approval of routine transshipment agreements, under Section 15 of the Shipping Act, 1916, the Federal Maritime Commission has delegated authority to the Director, Bureau of Foreign Regulation, to approve such agreements under Section 15, when they contain certain provisions and are found not inconsistent with the standards for approval contained in that section.

The Director of the Bureau of Foreign Regulation is delegated authority to approve transshipment agreements which contain the following provisions:

1. Complete name of the parties entering into the arrangement and specifically setting forth the portion of the trade that each party will cover, including: ports or areas of origin and destination; cargo to be carried; and ports or ranges of ports at which cargo will be transhipped;
2. Responsibility of parties for establishing and filing the applicable through rates, rules, regulations and other tariff matters;
3. Provisions for the apportionment of the through revenue and transshipment expenses stated in percentages, or specific dollar amounts;
4. When applicable, provisions for application and apportionment of other expenses such as wharfage, special handling, lighterage, tonnage dues, surcharges, and other such charges assessed by a governmental authority;

5. When desired by the parties, provisions for indemnification between the parties for liabilities incurred from loss, damage, delay or misdelivery of goods;

6. Provision for the termination of the agreement within a stated notice period; and

7. Provisions for the submission to the Federal Maritime Commission for approval of any modification or addition to the agreement.

To qualify for action under this delegation of authority, transshipment agreements should not contain any additional substantive provisions, or provisions which create any exclusive rights or which in any manner restrict competition.

If carriers engaged in the foreign commerce of the United States desire to have the processing of routine transshipment agreements under Section 15 of the Shipping Act, 1916, handled expeditiously under this newly delegated authority, they should make every effort to see that their filed transshipment agreements comply with the above criteria. Any such agreements which fail to include any of the required provisions or which include exclusive or anti-competitive provisions beyond those listed above, will require exchanges of correspondence between the staff and the parties, and/or final action by the Commission itself rather than the more expeditious handling at the staff level.

Sincerely yours,

WILLIAM A. STIGLER, *Director, Bureau of Foreign Regulation.*

JULY 15, 1964.

10 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 1007

PACIFIC COAST EUROPEAN CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

SUPPLEMENTAL ORDER ON REMAND

Decided October 20, 1966

On March 27, 1964, we issued our report entitled "The Dual Rate Cases," 8 FMC 16, together with an order in Docket No. 1007, which approved a form of dual rate contract to be used by the Pacific Coast European Conference for the purpose of according contract rates.

On February 3, 1965, the U.S. Court of Appeals for the Ninth Circuit in *Pacific Coast European Conference v. United States*, 350 F. 2d 197, set aside our order and remanded the proceeding with directions to allow respondent to be heard as to certain provisions which we had required in the contract. The court concluded in its opinion that:

... opportunity must be afforded petitioners to participate in rule making in such manner as the Commission may direct pursuant to § 4(b) [of the Administrative Procedure Act]; such participation, however, to be limited to such clauses of the proposed contract as were not, in subject matter, dealt with in the hearings in petitioners' adjudicatory dockets or in Docket 1111. 350 F. 2d at 206.¹

The court added, however, that:

... as to that portion [of the contract, in which petitioners have already participated], the Commission is, of course, free forthwith to promulgate rules and establish the substance of approved contracts as to petitioners. 350 F. 2d at 206.

On June 24, 1965, pursuant to the direction of the court of appeals, we issued a Notice of Proposed Rulemaking and an Order on Remand in Docket No. 1007. The Notice of Proposed Rulemaking allowed opportunity for comment by interested parties on two contract provi-

¹ By order dated May 28, 1963, we severed 5 issues common to all dual rate proceedings from the issues in Docket No. 1007 and other similar proceedings. The Commission directed that these issues be consolidated for hearing before a panel of 5 examiners in Docket No. 1111, "Dual Rate Contracts, 1963—Adjudication of Major Issues."

sions which we found had not been noticed according to the requirements of the Administrative Procedure Act.² The Order on Remand reapproved for use by respondent a dual rate contract, in the same form appended to our order in The Dual Rate Cases, *supra*, less the two clauses which were the subject of our proposed rulemaking notice.

On July 26, 1965, respondent filed a Petition for Reopening and Reconsideration of Orders on Remand. Respondent alleged therein that the Commission had "misinterpreted its duty on remand" in that (1) the court had directed the Commission to forthwith promulgate "rules" and the Commission had instead issued "orders" and (2) contract clauses which had not been the subject of prior Commission proceedings had been included in the prescribed contracts. In order to be as completely informed on the subject as possible, the Commission, on February 16, 1966, invited the Conference to submit comments and to specify just what clauses, in its opinion, had not been dealt with in either Docket No. 1007 or Docket No. 1111.

In response to the Commission's invitation, the respondent specified three clauses which, in its opinion, were not "dealt with according to the law," conceding, however, that the clauses were dealt with "in the purely lay sense in Docket 1111. . . ."³

By order served on September 22, 1966, the Commission denied respondent's petition to reopen and reconsider the Order on Remand. The Commission determined that "all three clauses which the Conference contends were not dealt with in the administrative proceedings were indeed dealt with and 'according to law'." The Commission, however, concluded that final action on the matter would be held in abeyance for 20 days to allow respondent the opportunity to file any appropriate comments relative to the two clauses noticed in the Commission's Notice of Proposed Rulemaking of June 24, 1965.

Subsequently, by telegram dated and received on October 11, 1966, Conference counsel informed the Commission that there were "no objections to clauses proposed in rulemaking of June 24, 1965."

THEREFORE, IT IS ORDERED, That the agreement submitted to the Commission by the respondent in the above proceeding is hereby approved by us in the form attached to this order, the Commission having found, for reasons stated in our report entered on March 27, 1964, that

² The only response to our notice was a letter from U.S. Borax & Chemical Corp., which favored the adoption of the 2 clauses set out in the notice. The Conference submitted no comments.

³ The 3 clauses specified by respondent related to (1) the provision for exclusion for cargo carried in merchant-owned vessels where the term of the charter is for 6 months or longer, (2) those provisions dealing with termination for breach, and (3) the provision dealing with the opening of rates.

approval should be conditioned on the inclusion of certain modifications made by the Commission; and

IT IS FURTHER ORDERED, That the terms of the agreement attached hereto (subject to our order of July 31, 1964, making certain enumerated clauses optional rather than mandatory) be used by the respondent to the exclusion of any other terms and provisions for the purpose of according contract rates.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

APPENDIX A
APPROVED CONTRACT FORM
(Docket 1007)

PACIFIC COAST EUROPEAN CONFERENCE
417 Montgomery Street, San Francisco 4, California

SHIPPER RATE AGREEMENT

THIS AGREEMENT, made as of the day and date set forth below, by and between the SHIPPER named below and the several steamship lines named at the end hereof, hereinafter called the CARRIERS,

WITNESSETH:

1. (a) The Shipper undertakes to ship or cause to be shipped all of its ocean shipments, for which contract and non-contract rates are offered, from Pacific Coast ports of the States of Washington, Oregon and California, to ports of call in the United Kingdom of Great Britain and Northern Ireland, Ireland, the Scandinavian Peninsula, Continental Europe, including ports on and in the Baltic and the Mediterranean Seas, as well as the seas bordering thereon (except the Black Sea), and Morocco, on vessels of the Carriers unless otherwise provided in this agreement.

The term "Shipper" shall include the party signing this contract as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Shipper" any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Shipper" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Shipper promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Shipper.

The Carriers agree that they will not provide contract rates to anyone not bound by a shippers rate agreement with the Carriers. The Shipper agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person. The contract rates shown in the applicable tariff shall be less than the non-contract rates by 15% of the non-contract rates.

(b) This Agreement excludes cargo of the Shipper which is loaded and carried in bulk without mark or count, except liquid bulk cargoes, other than chemicals

and petroleum products, in less than full shipload lots, or cargo carried in merchant-owned vessels or merchant-chartered vessels where the term of the charter is for six months or longer.

(c) (1) If the Shipper has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Shipper shall select one or more of the Carriers.

(2) If Shipper's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Shipper to select the carrier, Shipper shall be deemed to have the legal right to select the carrier.

(3) It shall be deemed a breach of this Agreement, if before the time of shipment, the Shipper, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(4) For the purposes of this Article, the Shipper shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment.

(a) with respect to which the Shipper arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(b) with respect to which the Shipper's name appears on the bill of lading or export declaration as shipper or consignee.

(5) Nothing contained in this Agreement shall require the Shipper to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

(d) This agreement does not require the Shipper to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. Provided, however, that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Shipper shall be obligated to select the Carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Shipper intends to assert his rights under this article to use a carrier who is not a party hereto, and the port through which Shipper intends to ship or receive his goods is within the scope of this Agreement, Shipper shall first so notify the conference in accordance with the provisions of Article 4 hereof.

2. (a) If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impractical to determine. Such liquidated damages shall be paid in the amount of freight which the Shipper would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate in effect at the time of the shipment less the estimated cost of loading and unloading which would have been incurred had the shipment been made on a Conference vessel.

(b) (1) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within 30 days after receipt of notice by registered mail from the Conference that they are

due and payable the Conference shall suspend the Merchant's rights and obligations under the contract until he pays such damages.

(2) If, within 30 days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article 9, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages.

(3) No suspension shall abrogate any cause of action which shall have arisen prior to the suspension.

(4) Payment of damages shall automatically terminate suspension.

(5) The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

(c) Except as hereinabove provided, damages for breach of this Agreement shall be actual damages to be determined after breach in accordance with the principles of contract law.

(d) In order that the conference may investigate the facts as to any shipment of the Shipper that has moved, or that the Shipper or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Shipper, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Shipper where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Shipper and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

(e) Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the conference in writing of this fact, giving the names of the merchant and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however,* That where the activities of Merchants are so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

3. This agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of them. Shipments under this Agreement are subject to all the terms and conditions of the current Conference Tariff on file with the Federal Maritime Commission and the respective Carrier's engagement note, permit, dock receipt, mate's receipt and bill of lading regularly in use by the individual Carrier when shipments are tendered. With respect to contracts of carriage made between the Shipper and one of the Carriers, none of the other companies referred to as Carriers shall be liable jointly or severally, or in any way or to any extent.

4. The Carriers severally agree to furnish from time to time, when requested, at the applicable contract rates and subject to the conditions hereafter stated, space for the aforesaid shipments of the Shipper to the discharging ports of the

Carrier(s), provided that such space is available when the Shipper makes application therefor. In the event that none of the Carriers is able to furnish reasonably prompt space for specific shipments when requested by the Shipper, the latter will be free to forward such shipments by any vessel other than those of the Carriers without violating this Agreement, provided that the Shipper first notifies the Conference at San Francisco in writing of its inability to obtain space required, and allows the Conference forty-eight hours after receipt of such notice to confirm that the space is not available.

5. For the purpose of giving Shipper notices of changes in rates, the Shipper may furnish the Conference a list of commodities in which the Shipper is interested. If requested by the Shipper (but not otherwise) the Shipper shall thereafter receive written notice of changes of rates applicable to said commodities.

6. (a) The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Shipper, except as provided by Section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however*, the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the Pacific Coast European Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Shipper, the Shipper may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however*, that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Shipper in writing that they elect to continue this Agreement under the existing effective rates and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Shipper's notice of termination had never been given.

(b) The Conference shall offer to the Shipper a subscription to its tariffs at a reasonably compensatory price, however, the Shipper shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the Shipper's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date through filing with the Federal Maritime Commission rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this agreement.

7. (a) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the carriers in the trade covered by this Agreement, the carrier or carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the shipper

of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by any carrier or carriers, said carrier or carriers shall forthwith reassume its or their rights and obligations hereunder and notify the Shipper on fifteen (15) days' written notice that its suspension is terminated.

(b) In the event of any of the conditions enumerated in Article 7a, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the Shipper, who may notify the carrier or carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the carrier or carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(c) In the event of any extraordinary conditions not enumerated in Article 7a, which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The Shipper may, not less than 10 days before increases are to become effective, notify the carrier or carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the carrier or carriers shall give notice that such increase or increases have been rescinded and cancelled.

8. (a) The Shipper and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual-rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Shipper and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety days' notice by the Carriers through the filing of contract-non-contract rates in their tariff.

(b) Additional commodities may be placed on a contract rate basis from time to time.

9. Should the Carriers during the period of this Agreement reduce rates on any commodity on which contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates during the period same remains in effect.

10. In case of dispute, the Shipper and the Carrier(s) each agree to submit the matter under dispute to arbitration, each appointing an arbitrator and the two so chosen shall select an umpire to which Arbitration Committee all data requested in connection with the matter in dispute shall be made available. Decision of two or more members of the said Committee shall be binding on the parties and the arbitration shall be made under and pursuant to the terms and conditions of the United States Arbitration Act, 9 U.S.C. 1 et seq., all of which

terms and conditions shall be binding upon the parties hereto. Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.

11. Unless earlier terminated as herein provided, this Agreement shall remain in effect indefinitely, provided, however, it may be terminated by either party giving to the other ninety (90) days written notice of intention to terminate the same.

12. This agreement shall be construed in the light of the Shipping Act, 1916, and the Rules and Regulations of the Federal Maritime Commission.

13. This agreement may be amended from time to time with the permission of the Federal Maritime Commission.

*-----
 SHIPPER (Show full Corporate, Company or
 Individual Name)

*-----
 (Street Address)

*-----
 (City, Postal Zone and State)

*By-----
 (Signature of Company Official and Title)

*-----
 (Typed Name of Official and Title)

*-----
 (Dated as of)

For and on behalf of the Carriers shown on the reverse
 hereof:

By-----

SHIPPER is requested to fill in the required data in spaces indicated by stars (*)

CARRIERS

Referred to on face hereof (List of Conference Members)

FEDERAL MARITIME COMMISSION

DOCKET NO. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING PRACTICES AT NEW YORK HARBOR

Decided December 15, 1966

Agreements between respondents and ocean carriers whereby revenue collected from lightermen is refunded to carriers found to exist.

Agreements between respondents and ocean carriers whereby revenue collected from lightermen is refunded to carriers do not violate Article 2 of respondent's conference agreement.

Record is not adequate to determine whether agreements between respondents and ocean carriers whereby revenue collected from lightermen is refunded to carriers are subject to section 15 of the Shipping Act.

Mark P. Schlefer, John Cunningham, Richard J. Gage, and Robert J. Nolan for respondents.

Herbert Burstein, Samuel B. Zinder, and Arthur Liberstein for intervenor Empire State Highway Transportation Association, Inc.

Arthur Liberstein, and Charles Landesman for intervenor Wm. Spencer & Son Corporation.

Christopher E. Heckman for intervenors Harbor Carriers of the Port of New York, James Hughes, Inc., Henry Gillen Sons' Lighterage, Inc., McAllister Lighterage Line, Inc., and Petterson Lighterage & Towing Corporation.

Thomas M. Knebel for intervenor Middle Atlantic Conference.

James M. Henderson, Douglas W. Binns, and Jacob P. Billig for intervenors Port of New York Authority and Export Packers Association of New York, Inc.

D. J. Speert for intervenor Brooklyn Chamber of Commerce.

Leo A. Larkin, and Samuel Mandell for intervenor The City of New York.

Thomas R. Matias, Robert J. Blackwell, Roger A. McShea and Donald J. Brunner as Hearing Counsel.

SUPPLEMENTAL REPORT*

BY THE COMMISSION (John Harlee, *Chairman*, Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners*).

On May 16, 1966, we served our report in the above-entitled docket. Our report culminated an extensive investigation into the practices of the New York Terminal Conference (respondent) in regard to the loading and unloading services its members provide for trucks and lighters at the various terminals in the port of New York. In our report we condemned certain practices and tariff provisions of respondents as contrary to sections 16 and 17 of the Shipping Act, 1916 (Act).

We reserved decision, however, on certain aspects of the investigation. This report disposes of those issues upon which decision was previously reserved.

FACTS

The issues upon which we deferred decision in our previous report are raised by part (6) of the order of investigation. They are: (1) Whether agreements exist between respondent terminal operators and the ocean carriers using respondent's facilities whereby part of the revenues collected by respondents from lighter operators is refunded to the carriers; (2) whether such agreements are subject to section 15 of the Act; and (3) whether such agreements violate Article 2¹ of respondents' conference agreement which prohibits refunds "in any manner or by any device."

Intervenor, Empire State Highway Transportation Association, Inc. (Empire), sought to obtain certain terminal and stevedoring contracts from respondents in an attempt to gain information concerning any such refund agreements. Upon the request of Empire, the Examiner issued a subpoena to respondents which requested:

* * * all contracts and agreements with or between any steamship company concerning or dealing in any way with terminal operators, terminal service, and/or the loading and unloading of trucks and lighters in New York Harbor.

In response to the subpoena, respondents' conference chairman, Richard J. Gage, produced seven stevedoring contracts. Mr. Gage stated that he considered this to be compliance with the subpoena. The Examiner, however, ruled that since there was evidence that as many

*First Report: Vol. 9, F.M.C. Reports, p. 505.

¹ The pertinent part of Article 2 of respondents' conference agreement No. 8005 states: " * * * and no rates or charges assessed or collected pursuant to such tariffs shall be directly or indirectly refunded or remitted in whole or in part in any manner or by any device."

as 500 such contracts were in existence, this could not be deemed compliance with the subpoena. The Commission therefore sought further enforcement of the subpoena in the District Court for the District of Columbia. On July 28, 1965, the court dismissed the petition for enforcement without stated reasons.

Subsequently, on January 28, 1966, upon request of Empire, new subpoenas were issued to certain respondents requiring them to produce the same documents which had been requested in the original subpoena. The new subpoenas were issued to remedy certain alleged procedural defects in connection with the original subpoena.

Respondents failed to comply with the new subpoenas. Thereafter, on February 15, 1966, a petition was filed in the U.S. District Court for the Southern District of New York requesting enforcement thereof. This proceeding subsequently was transferred to the U.S. District Court for the District of Columbia. The later court by order dated April 29, 1966, denied the petition, while assuring the Commission that it would not be precluded from issuing new subpoenas narrower in scope and more specific with respect to the documents sought. Empire, however, advised the Commission that it would not request the issuance of any further subpoenas in this proceeding.

Upon the conclusion of the subpoena enforcement proceedings, the Chief Examiner ordered that a decision be reached on the remaining issues and ordered that briefs be filed by all parties.

Examiner A. L. Jordan subsequently issued his supplemental initial decision and the proceeding is now before us upon exceptions to his decision.

DISCUSSION

The Examiner concluded: (1) There are agreements between respondents and the ocean carriers whereby certain revenues collected from lighter operators are "refunded" to the carriers; (2) such agreements are not subject to section 15 of the Act; and (3) such agreements do not violate Article 2 of respondents' conference agreement.

No party to this proceeding excepts to the Examiner's conclusions (1) and (3). We are also in agreement with the Examiner on these two conclusions and adopt them as our own.

Intervenors Empire and Middle Atlantic Conference, however, both except to the Examiner's conclusion that the refund agreements are not subject to section 15 of the Act. Alternative exceptions have been offered by these parties. They suggest first that the record in this proceeding is inadequate for making a determination about the applicability of section 15 to these refund agreements. They suggest, in the alternative, that if the Commission finds the record to be adequate, it

requires a finding that the refund agreements are subject to section 15.

Upon review we find the record to be inadequate to determine the applicability of section 15 to these agreements. We conclude that the Examiner erred in determining that the agreements were not subject to section 15.

There has been some confusion among the parties and also by the Examiner as to how many or what kind of contracts are in the record, and also as to which contract provisions are the subject of this proceeding.

It should be stressed that the order of investigation refers specifically to agreements concerning refund of revenue collected from *lighter* operators.² Accordingly, we are not here concerned with any contract provisions which pertain to disposition of money collected from *truck* operators.

The Examiner refers to seven contracts which have been furnished by respondents and quotes provisions from them. It is true that respondent produced seven contracts in compliance with the subpoena.³ However, none of these seven contracts contains provisions for refund to a carrier of money collected from lightermen. In fact, six of the seven specifically provide for the collection and *retention* by the terminal operator of all revenue provided in connection with loading and unloading lighters. The seventh contract is not between a terminal operator and a steamship line and therefore is not of the type under investigation here.⁴

Even though none of the contracts produced in compliance with the subpoena contain provision for refund of lighter revenue, nevertheless the record does contain some evidence that such refund arrangements exist. At the prehearing conference, Hearing Counsel requested respondents to produce all contract provisions which vary from the normal provision whereby a respondent retains the money collected under the lighterage tariff. Counsel for the respondents agreed to provide copies of such contract provisions but declined to provide the entire stevedoring contracts. In response to Hearing Counsel's request, counsel for the respondents produced Exhibit 24. This exhibit purports to contain all existing provisions which provide for refund of lighter revenue by any respondent. Two such provisions are quoted in the exhibit as follows:

Income from handling lighters to be remitted to Steamship Line when collected by Contractor (terminal).

² The order reads: "Whether any agreements exist * * * whereby part of the revenues collected from *lighter* operators is refunded to the carriers * * *." [Emphasis supplied.]

³ These seven contracts were introduced as Exhibits C-3, C-4, C-5, C-12, C-13, C-14, and C-15.

⁴ Exhibit C-3 is the contract which is not of the type under investigation.

All monies received as reimbursement or compensation for the use of labor on lighters * * * shall accrue to the Steamship Company and shall be refunded to the latter in due course.

Another respondent has an arrangement by which lighterage tariff revenues are refunded to the ocean carriers less 10 percent for book-keeping expense. This arrangement has not been reduced to a contract provision, however.

It is also stated in this exhibit that these provisions are employed because the stevedoring and terminal services in these instances are performed by the terminal operator for the ocean carrier on a cost-plus basis. Remissions of lighter revenue are said to be made to the ocean carrier because the ocean carrier has paid the terminal operator for this service in its cost-plus arrangement and is believed to be entitled to reimbursement. The exhibit contains no other part of any contract except the bare refund provisions above quoted. Nowhere does the record contain any contracts which include this type of provision.

We can conclude from the record that some stevedoring contracts do exist between respondents and the ocean carriers whereby money collected from lighter operators is refunded to the ocean carriers. We have not seen such contracts, however. We have seen the refund provisions but have not seen them in the context of the entire stevedoring contract. We are unable to determine the effect of such provisions until we see the context in which they actually appear and are used. To say one way or another what competitive effect such a provision has on a lighterman, or an ocean carrier, would be pure conjecture at this point.

The Examiner offered no reasons for his conclusion that the refund agreements are not subject to section 15. We do not agree with this conclusion. The record will not support a finding that the refund agreements are subject to section 15. Neither will the record support a finding that the agreements are not subject to section 15. Accordingly, we can make no finding on this point.

Additional justification exists for making no findings as to section 15 applicability to the refund agreements. In our previous report in this same docket, we found the provisions of respondents' Lighterage Tariff No. 2 which imposed direct transfer loading and unloading charges on lightermen to be contrary to section 17 of the Act. We also ordered respondents to delete this charge from their tariff. The revenue collected pursuant to this tariff is the same revenue which is the subject of the refund arrangements between respondents and the ocean carriers. Since respondents should no longer assess a charge against the lightermen for this service, it follows quite simply that respondents should not receive this revenue from lightermen. Consequently, no rev-

enue can be refunded to the ocean carriers pursuant to the refund agreements involved here. Since no future refunds can be made pursuant to these agreements, the question of the applicability of section 15 to these agreements becomes moot.

CONCLUSION

We agree with the Examiner's findings that agreements exist between respondents and steamship lines whereby certain revenues collected from lighter operators are to be refunded to the ocean carriers; and that such agreements do not violate Article 2 of respondents' conference agreement. We do not make a finding, however, on the question of the applicability of section 15 to such agreements. The Examiner's finding that section 15 is not applicable is reversed.

Since this report disposes of all the remaining issues, the proceeding in Docket No. 1153 is hereby discontinued.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

No. 1166

AGREEMENTS No. 6200-7, 6200-8, AND 6200-B

UNITED STATES ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE

Decided December 16, 1966

A modification to the basic agreement of a conference operating outbound from U.S. Atlantic and Gulf ports to Australia-New Zealand, which provides for the establishment of a separate Great Lakes section to establish rates from the Great Lakes upon the affirmative vote of three-fourths of the members of the section, is approvable under section 15 of the Shipping Act, 1916 because the arrangement will effect administrative economies by bringing separate trades under a single conference administration.

A provision in a modification to a conference agreement, establishing a separate section to cover the Great Lakes trade, which requires that a rate established by the Great Lakes section lower than the comparable rate from the Atlantic and Gulf must be approved by a two-thirds vote of the members of the conference, is detrimental to the commerce of the United States and contrary to public interest because it is harmful to shippers using the Great Lakes and would handicap the growth and development of the Great Lakes trade.

Elmer C. Maddy, Paul F. McGuire, and Baldwin Einarson for U.S. Atlantic & Gulf/Australia-New Zealand Conference, respondent.

Jerome H. Heckman, Robert Tiernan, and Vincent D. Simmons for the Dow Chemical Company and Dow Chemical International S.A., interveners.

James M. Henderson, Arthur L. Winn, Jr., Samuel H. Moerman, and J. Raymond Clark for the Port of New York Authority and North Atlantic Ports Association, interveners (with *Sidney Goldstein*, General Counsel, and *F. A. Mulhern*, Attorney, for the Port of New York Authority).

Warren A. Jackman, Stuart B. Bradley, and Daniel K. Schlorf for Federal Commerce and Navigation Company Limited and Federal Commonwealth Line, interveners.

Robert Jorgensen for International Association of Great Lakes Ports, intervener, and *Ronald Parizek* for Port of Chicago, a member of said association.

J. Scot Provan and *Robert J. Blackwell*, Hearing Counsel.

REPORT ON REMAND

BY THE COMMISSION: (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day and George H. Hearn, *Commissioners*).

This proceeding is before the Commission upon remand from the U.S. Court of Appeals for the District of Columbia Circuit in *U.S. Atl. & Gulf/Australia-N.Zea. Con. v. F.M.C.*, 364 F. 2d 696 (D.C. Cir. June 30, 1966). The Commission instituted this investigation on December 23, 1963, to determine whether three amendments to the organic agreement of the U.S. Atlantic & Gulf/Australia-New Zealand Conference (Agreement No. 6200) should be approved under section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) and whether the conference should be permitted under section 14b of the Shipping Act, 1916 (46 U.S.C. § 813(a)) to extend its dual rate contract system to include shipments through Great Lakes ports.

Agreement No. 6200 covers the establishment of rates, charges, and practices for the carriage of cargo from Atlantic and Gulf ports of the United States to ports in Australia, New Zealand, and certain South Pacific Islands. The amendments to the basic agreement would:

1. Add Great Lakes and St. Lawrence River ports of the United States to the trade covered by the conference and extend the scope of the dual rate contract to shipments from these ports (Agreement No. 6200-8, par. 1);

2. Establish a separate "Great Lakes section" within the conference, to be composed of member lines operating regular services or member lines demonstrating an intent to operate in the Great Lakes from Great Lakes ports, which would establish rates and conditions applicable to carriage from Great Lakes ports, subject to the consent of two-thirds of all conference members to any rate lower than the corresponding rate from any other conference area.¹ (Agreement No. 6200-8, par. 2); and

3. Change the present requirement of unanimous assent to any action under the agreement to two-thirds assent, except as otherwise

¹ As originally submitted, the consent of three-fourths of the conference members was required. The Examiner, however, while approving this provision in principle saw no reason for requiring a greater majority to ratify a lower rate from the Lakes than for ordinary conference action. Accordingly, his recommended approval was subject to the conference's modifying their agreement to require approval only by a two-thirds majority. The conference has indicated their assent to this modification.

specifically provided and except that any modification of the basic agreement would require unanimous consent (Agreement No. 6200-7, par. 2).

In our previous decision, *Agreement—U.S. Atlantic & Gulf/Australia-N. Zealand Con.*, 9 F.M.C. 1 (1965), we recognized that members of steamship conferences could effect certain administrative economies by bringing separate trade areas under a single conference administration, thereby permitting the use of one office and one staff where several might otherwise be required. Thus, the Commission approved the establishment of a single administration, the U.S. Atlantic and Gulf/Australia-New Zealand Conference, to handle both the Atlantic and Gulf trade and the Great Lakes trade. However, the Commission found that the trade from the Great Lakes to Australia-New Zealand was naturally competitive with the trade from the Atlantic and Gulf and that section 15 required that the rates from each area should be set independently. In addition, the Commission refused to extend to the Great Lakes the dual rate contract applicable at Atlantic and Gulf ports because the extension of the contract system would be detrimental to the commerce of the United States, discriminatory against Great Lakes ports in favor of Atlantic and Gulf ports, and contrary to the public interest. The Commission also refused to approve the three-fourths voting provision within the Great Lakes section and substituted a two-thirds vote because the Atlantic and Gulf section of the conference utilizes a two-thirds vote, and a three-fourths vote, since it appeared that only three carriers would be eligible for membership in the Great Lakes section, was tantamount to a veto in the hands of a single member.²

Upon appeal respondents argued that the Commission erroneously interpreted section 15. Respondents argued that section 15 does not require the right of independent action by carriers in the Great Lakes because the Atlantic and Gulf trade and the Great Lakes trade are supplementary, not competitive. Secondly, the conference argued that the Commission failed to make proper findings as a basis for changing the three-fourths voting provision to two-thirds in the Great Lakes section. Finally, the conference argued that the Commission erred in disapproving Agreement No. 6200-8 and in refusing to permit the use of one dual rate contract in all trades covered by the conference.

The Court of Appeals sustained the Commission's refusal to allow the conference to extend the coverage of the established dual rate system to the Great Lakes. However, the court held that, with respect

² As a result of these findings, the Commission approved Agreement No. 6200-7 (par. 2) and disapproved Agreement No. 6200-8 with permission to the conference to submit a new amendment, consistent with the Commission's report, for consideration.

to the disapproval of the three-fourths voting rule, the Commission failed to identify which of one or more of the statutory standards in section 15 is transgressed by the voting rule. The court, therefore, remanded the issue to the Commission for reconsideration.

Similarly, the court had difficulty with the handling of the proposal that the Atlantic and Gulf section of the conference retain the right to veto any rate set by the Great Lakes section which was below the Atlantic and Gulf rate. Since the court had remanded the case with respect to the voting requirements in the Great Lakes section, it decided also to remand the independent action issue to the Commission to make more explicit findings and conclusions.

In this report we shall reconsider the two remanded issues as directed by the court.

FACTS

In the past, Great Lakes ports of the United States were a relatively unimportant shipping area because of adverse conditions inherent in the Lakes—inadequate port facilities, a short navigation season, and limited common carrier service. With the opening of the St. Lawrence Seaway in 1959, however, the Lakes became the fourth sea coast of the United States. Since the opening of the Seaway, the movement of cargo has steadily increased.

At present, many shippers move their goods from the Great Lakes. Nevertheless, certain inherent disadvantages limit the ability of Lakes ports to attract cargo. Goods can move from Lakes ports only during a 6–7 month sailing season. Consequently when the Lakes are closed to navigation, all shippers, regardless of their loyalty to or preference for Lakes ports, must look to the Atlantic or Gulf for service. In addition, transit time from Atlantic ports to Australia and New Zealand varies, depending upon the ports involved, from 25 to 35 days, while transit time from Chicago to the first port in Australia is about 54 days, and from Detroit it is about 43 days. And the length of voyages from the Lakes may be increased by congestion in the locks. Where speed is essential, therefore, shippers must rely on the Atlantic or Gulf.

Despite these difficulties, however, Lakes ports have certain advantages over the Atlantic and Gulf. Shippers with plants on or near the Lakes find that common carrier service at their doorstep saves the cost of inland transportation to Atlantic or Gulf ports, a factor which is a strong inducement to ship from the Lakes despite the lengthy transit time and limited service.

At the close of the record in this proceeding, the conference had six members. Three of these—A/B Atlantrafik; American and Australian Steamship Line, Joint Service (A & A); and Port and Asso-

ciated Lines, Joint Service (Port)—would be eligible for membership in the proposed Great Lakes section according to the eligibility requirements set forth in Agreement 6200-8. The individual tariffs filed by these lines for transportation of cargo from the Lakes to Australia and New Zealand generally provide for a differential or arbitrary over conference rates applicable at Atlantic and Gulf ports of \$5.00 per ton for ports in the Detroit-Toledo range and \$6.00 for ports in the Chicago-Milwaukee range. If the conference is extended to the Lakes, the members will maintain as a general rule some differential over Atlantic and Gulf rates to compensate for the additional steaming time and other costs incurred in serving the Lakes.

Of the three conference lines who have expressed an intent to serve the Lakes, only Atlantrafik has actually made a sailing. During 1963, it made 11 sailings out of the Great Lakes port of Detroit. Of these, 8 also called at Chicago. Atlantrafik, however, has not attracted sufficient cargo to fill its vessels from Lakes ports alone, and it has found it necessary to call at Montreal, other St. Lawrence River ports, and U.S. Atlantic Coast ports.

A & A and Port collectively propose to provide monthly service from the Lakes through a sailing arrangement pursuant to FMC Agreement No. 7996-3. In conjunction with this proposed Lakes service, A & A and Port will call at Montreal and Canadian ports east thereof but will not call at U.S. Atlantic or Gulf ports. A & A and Port would continue their present separate service from U.S. Atlantic and Gulf ports.

Although A & A and Port have filed tariffs covering the Great Lakes, and have solicited cargo, they have not as yet secured cargo sufficient to justify a sailing from the Lakes. Most of their solicitation has been directed to automobile shippers who account for about 70% of the revenue in the Great Lakes trade. Competition for this cargo is keen between the conference members and with independent carriers as well.

Carriers in the Lakes compete for the same types of cargoes as carriers serving seaboard ports. Indeed, practically all commodities moving through the Lakes are also exported through other ranges. In many instances, shippers located at interior points may have a choice of moving cargo from the Lakes or seaboard. Frequently a shipper will use both the Lakes and the Atlantic and Gulf during the navigation season. While some shippers require this flexibility, other shippers prefer to use the Lakes on a regular basis even though the rates from this area might be higher than seaboard rates. In fact, some products move only during the navigation season. On the other hand, some shippers from interior points rely entirely on the Atlantic and Gulf

to take advantage of the better service and faster transit even though overland transportation costs are higher. In summary, there is direct competition between the Great Lakes and the Atlantic and Gulf from the viewpoint of carriers, shippers, and ports. Because of this competition, cargo is diverted from one range to another to take advantage of various savings in the cost of transportation, including lower ocean rates.

DISCUSSION

We will consider initially the provision of Agreement No. 6200-8 (par. 2) which provides that rates shall be established within the Great Lakes section upon the affirmative vote of three-fourths of the members of that section. In our previous decision, we altered the agreement to provide for a two-thirds rather than a three-fourths vote. The Court of Appeals stated (364 F. 2d at 699) :

The rationality of the Commission's disapproval of the $\frac{3}{4}$ voting requirement within the Section is not, however, so readily apparent. The Commission's discussion of this matter is as sparing in detail as it is flat in conclusion. After noting that the record disclosed three carriers as potential members of the Section, the Commission observed that the $\frac{3}{4}$ requirement "permits one carrier to exercise a practical veto over the rate making decisions of that section. We cannot approve such an agreement . . ." This says no more to us than that, where unanimity is made the order of the day, approval must be withheld. In particular, the Commission does not identify which one or more of the statutory standards is transgressed by this provision; and those standards are embedded in a statute which says in terms that the Commission shall disapprove those agreements which conflict with the enumerated standards "and shall approve all other agreements, modifications or cancellations."

Our further review of the record discloses little evidence upon which the Commission could find that a three-fourths voting rule for the Great Lakes section might be expected to operate in violation of section 15. Under the circumstances, we shall reverse our holding that the voting requirement within the Great Lakes section be changed. Accordingly we approve the establishment of a Great Lakes section to be governed by a three-fourths voting rule. In this connection it should be noted that if the three-fourths vote is later found to be unduly restrictive of ordinary conference business, the Commission may take steps based upon actual experience rather than speculation to change the voting rule.

We consider now the provision of Agreement No. 6200-8 (par. 2) which provides that in no case shall a rate on a given commodity from a Great Lakes port of the United States be less than the corresponding rate from other conference areas except with consent of two-thirds of the conference members.

The Examiner approved the provision. Considering the fact of substantially higher cost of service from the Lakes, the Examiner could find no reasonable excuse for a rate from the Lakes ever to be lower than the corresponding rate from the Atlantic and Gulf. If it became necessary to meet competition in the Lakes the Examiner found no reason to assume that the non-Lakes members of the conference would take a purely dog-in-the-manger attitude to prevent a Lakes carrier from meeting the competition. In addition, the Examiner reasoned if the Lakes rate were cut to meet foreign competition, propriety would suggest that the Atlantic and Gulf rate be cut to at least as low a point, in order to avoid putting a shipper from the Lakes in a preferred position with respect to its seaboard competition. Finally, the Examiner found that any general, sustained reduction of Lakes rates below Atlantic and Gulf levels would not only require subsidization of Lakes service by Atlantic and Gulf cargo, but might well lead to general instability of rates.

Thus, the Examiner concluded that proper provision for over-all conference consent to Great Lakes rates fixed by the Great Lakes section at a point below Atlantic and Gulf rates is not unreasonable in the circumstances and would not unjustly affect shippers, ports, or carriers. It does not substantially detract from the salutary effect of the Great Lakes section provision, and it would tend to maintain a fair relation between Lakes rates and Atlantic and Gulf rates.

The Commission in its earlier report recognized that certain administrative economies can be effected by permitting separate trade areas to be brought under a single conference administration and, therefore, authorized the conference to extend its administration to the Great Lakes area. However, the Commission disapproved the proposed conference amendment requiring the approval of two-thirds of all conference members to set a rate for the Lakes section lower than that applicable to Atlantic-Gulf shipments.

The Court of Appeals remanded this issue to the Commission for reconsideration because the Commission erroneously interpreted the independent action language in section 15 to dictate automatic disapproval.

Upon reconsideration, we are convinced that the result reached in our earlier decision was correct. In reaffirming our previous holding, we find that the arrangement would be detrimental to the commerce of the United States and contrary to the public interest and must therefore be disapproved under section 15.

As found above, carriers in the Lakes compete for the same types of cargoes as carriers serving seaboard ports. Shippers at inland points

have an option during the navigation season of using either range depending upon a balance of myriad transportation factors, including the level of rates. Cargo is diverted from one range to the other in response to the competitive factors.

Witnesses for the conference recognized the existence of competition between the two trading areas. One witness was opposed to the creation of a separate Great Lakes conference because this would "create further competition for us which we wish to avoid". Another witness stated that some shippers shipped both from Atlantic-Gulf as well as from Lakes ports, which is further indication that competition between the two areas exists.

While a lower rate from the Lakes would seldom be established because of the additional expenses in carrying cargo out of the Lakes, the Great Lakes carriers should nonetheless be free to set such rates. The free exercise of rate-making initiative by Lakes carriers will, as it has in the past, continue to promote and strengthen commerce moving through the Lakes. On the other hand, the situation proposed by the conference would be harmful to shippers who use or may wish to use the Great Lakes by depriving them of freedom to negotiate rates with carriers serving the Lakes and by ameliorating a carrier's incentive to serve the Lakes. Likewise, the arrangement, by its tendency to encourage cargo to move overland to seaboard ports, frustrates the full utilization of Great Lakes ports.

Therefore, the provision, which allows the existence of a veto power in carriers serving only Atlantic and Gulf ports poses a threat to the commerce of the United States and to public interest far greater than any rate competition that may ensue between the two trades. Great Lakes ports are developing into the fourth coast of this country and have already obtained an important position in our commerce. Any rate control over common carrier operations in the Lakes by Atlantic and Gulf carriers, who are principally if not exclusively motivated by the best interests of their own trades, would handicap the growth and development of the Lakes trade by encouraging cargo to move overland to seaboard ports and by tending to discourage the establishment of better and more frequent service from the Great Lakes. We, therefore, find on this record that the agreement in this respect is detrimental to the commerce of the United States and contrary to the public interest. It, therefore, must be disapproved under section 15.

The conference may submit a revised agreement, not inconsistent with the terms of this report, for our consideration.

By the Commission.

(Signed) THOMAS LIST,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 1187

REDUCED RATES ON MACHINERY AND TRACTORS FROM UNITED STATES
ATLANTIC PORTS TO PORTS IN PUERTO RICO

DOCKET No. 1187 (SUB. 1)

FURTHER REDUCTION IN RATES ON MACHINERY AND TRACTORS FROM
UNITED STATES PORTS TO PORTS IN PUERTO RICO

Decided January 12, 1967

Authority reaffirmed to require that (1) in the absence of valid transportation ratemaking factors militating against such result, cargo move through naturally tributary areas, and (2) where it becomes necessary in the public interest, high-value commodities move at rates high enough to enable the carriage of essential low-value commodities at rates lower than those at which said essential commodities would be carried in consideration of the usual transportation factors alone.

No need demonstrated to assert such authority on present state of record in this proceeding.

Carrier's present rates found to be lawful as just and reasonable.

Homer S. Carpenter and *Edward T. Cornell* for respondent TMT Trailer Ferry, Inc. (C. Gordon Anderson, Trustee).

John Mason and *Edward M. Shea* for respondent South Atlantic & Caribbean Line, Inc.

J. S. Provan and *Warren Price, Jr.* for respondent Sea-Land Service, Inc.

Amy Scupi for respondent American Union Transport, Inc.

Joseph Hodgson, Jr. for respondent Seatrain Lines, Inc.

William L. Marbury, *Donald MacLeay*, and *Harold E. Mesirov* for intervener Maryland Port Authority.

John T. Rigby for intervener Commonwealth of Puerto Rico.

Sidney Goldstein, General Counsel, *F. A. Mulhern*, Attorney, *Arthur L. Winn, Jr.*, *Samuel L. Moerman*, *J. Raymond Clark*, and *James M. Henderson* for intervener Port of New York Authority.

Donald J. Brunner and *Thomas Christensen*, Hearing Counsel.

REPORT ON REMAND*

BY THE COMMISSION (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, *Commissioner*):

PROCEEDINGS*

On May 10, 1966, the Commission entered its Report and Order in the captioned proceedings setting the minimum rates of 50 cents per cubic foot on heavy machinery moving from United States North Atlantic ports to Puerto Rico and 48 cents per cubic foot on the same commodity moving from United States South Atlantic (Florida) ports to Puerto Rico. It also approved (but did not fix) a 28 cents per cubic foot rate on "road scrapers," a very large form of roadbuilding machinery, for the two carriers from Florida ports, South Atlantic and Caribbean Lines, Inc. (SACL) and TMT Trailer Ferry (TMT). The basis for this decision was that the proposed rates of SACL and TMT, 37 cents per cubic foot, or for that matter, any rates lower than 48 cents per cubic foot on the subject commodity, would be unjust and unreasonable within the meaning of section 4 of the Intercoastal Shipping Act, 1933 (the 1933 Act), because such rates would unreasonably prejudice North Atlantic ports by drawing away, in the absence of "transportation conditions" justifying such diversion, cargo "naturally tributary" to such ports in violation of section 16, First of the Shipping Act, 1916. Such determination was made irrespective of the fact that the 37-cent rates had been shown to be fully compensatory. An additional ground for the fixing of a 48-cent minimum rate for the South Atlantic carriers was that such a rate would enable the North Atlantic carriers to move at lower rates commodities essential to the welfare of the Commonwealth of Puerto Rico. The minimum rates of the North Atlantic carriers had been set at 50 cents per cubic foot because rates below that level would not have been compensatory.

On May 25, 1966, TMT filed a Petition to Review the Commission's decision with the Court of Appeals for the District of Columbia Circuit. The Commission moved the court to remand the proceeding to it to "reconsider the issues after the taking of further evidence and opportunity to the parties to reargue the legal issues involved." The motion requested the court to remand "to enable the Commission to forthwith vacate the order under review and to reopen the proceeding for the taking of further evidence and for such further action as may be appropriate in the circumstances." On November 14, 1966, the Court of Appeals granted the motion, conditioned upon the filing with it of

*See vol. 9, FMC Reports, 465.

our report on the proceedings on remand within 60 days from the date of the court's order.

On November 23, 1966, the Commission vacated its order and reopened these proceedings and requested evidence and argument on the issues stated below. Hearings were held before Examiner Herbert K. Greer on December 13-15, 1966, after which, with the concurrence of all parties and pursuant to order of the Commission, the record was certified to the Commission for decision. Briefs have been received from all parties; oral argument was held.

ISSUES FOR RESOLUTION

The Commission sought to resolve the following issues:

1. Prejudice to New York resulting from diversion of traffic due to TMT's rates;
2. The Commission's authority to set rates which will enable New York and Florida ports to each get the traffic originating in territory from which inland freight costs are lower to the respective ports;
3. Whether high value commodities should take a high rate in order to enable New York carriers to secure some of the high value commodity traffic and thus to be able to carry goods essentials to the needs of the Commonwealth of Puerto Rico at a low rate; and
4. Are the lesser distances from Florida ports to Puerto Rican ports than from North Atlantic ports to Puerto Rican ports a factor which alone or in conjunction with the other matters in this proceeding warrant a differential in rates between the aforementioned continental ranges of ports to Puerto Rican ports on the commodities under investigation and, if so, in what amounts?

DISCUSSION AND CONCLUSIONS

A. *The Legal Issues*

The above issues upon which evidence was received and argument made in this remanded proceeding are primarily matters involving the authority of this Commission to utilize certain principles in determining the reasonableness of rates and, if necessary, in fixing minimum reasonable rates. Basically, the Commission, in its prior report in this proceeding, asserted its authority to insure that, in the absence of valid transportation ratemaking factors militating against such result (including cost of transportation to carrier, value to shipper and distance between transit points as further discussed under issue (4) below), cargo move through naturally tributary areas (issue (2), supra). It also asserted its authority to insure that, where it becomes necessary in the public interest, high value commodities move at rates

high enough to enable the carriage of essential low value commodities at rates lower than those at which the low value commodities would be carried solely in consideration of the usual transportation factors alone (issue (3)).

The Commission is still of the opinion that it possesses such authority. The cases cited in our prior report amply indicate the legal bases for these positions.¹ TMT contests our power to increase rates which are compensatory and the validity of our determination that it unreasonably prejudices North Atlantic ports when it does not serve such ports. The *New York* and *Ayrshire* cases, *supra*, both indicate that TMT is incorrect. *New York* does not depend upon the 1940 amendment to the Interstate Commerce Act as TMT asserts, insofar as its application to the instant proceeding is concerned. Perhaps prior to 1940 the Interstate Commerce Commission could not correct unlawful discriminations against "regions," but mere "regions" are not involved in this proceeding—"ports" and "port areas" are. As TMT conceded in its petition to the court to review our prior report:

The purpose of Section 16 First was "to prevent discrimination by the water carriers between ports and port districts since those are the only points served by such water lines."

Furthermore, the *Ayrshire* case, not dealt with at all by TMT, does not even mention the 1940 amendment.

Hearing Counsel maintain that any reliance upon "equalization" cases like *Portland*, *supra*, is wrongly placed as the instant proceeding is not an equalization case, and that TMT's minimum rate should be fixed at 48 cents merely because a lower rate would be "wasteful of revenue." Firstly, we never contended that this proceeding was an equalization case. It does not involve, as Hearing Counsel correctly indicate, varying rates for an identical service. Nevertheless, the policy of promoting the movement of cargo through ports through which it should normally move applies equally to equalization cases and the instant case. Moreover, section 16, First of the Shipping Act, 1916, doesn't say only unreasonable prejudice which comes about as the result of an equalization system is unlawful—it says *all* unreasonable prejudice is unlawful. Insofar as a carrier utilizes rates to enable it unreasonably to prejudice a port locality, the carrier's conduct is unlawful whether it is the result of an unlawful equalization or a single unjustifiably low ocean rate which has the same effect.

¹ [Issue (2).] *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955); *United States v. Illinois Cent. R.R.*, 263 U.S. 515 (1924); *New York v. United States*, 331 U.S. 284 (1947); *Ayrshire Corp. v. United States*, 335 U.S. 573 (1949).

[Issue (3).] *Reduced Rates On Autos—N. Atl Coast to Puerto Rico*, 8 F.M.C. 404 (1965); *B. & O.R. Co. v. United States*, 345 U.S. 146 (1953); *Government of Guam v. Federal Maritime Commission*, 329 F. 2d 251 (D.C. Cir. 1964).

Secondly, insofar as the "wastefulness of revenue" argument is concerned, we must disagree that such "wastefulness" alone is unlawful. Wastefulness in the context of this proceeding, and stripped of its evil connotations, merely means the failure to charge what the traffic will bear. We know of no principle which would require a carrier to charge rates higher than he chose to charge unless (1) the carrier's level of rates was so low that it or other carriers were about to be driven from a trade which would be left with inadequate service (*Intercoastal Rate Structure*, 2 U.S.M.C. 285, 301-303 (1940)); or (2) the carrier's rates had an unlawful impact upon someone or thing, e.g., another carrier, shipper, or port. TMT's 37-cent rate was, as Hearing Counsel admit, fully compensatory, and, as we noted in our initial report in this proceeding, "the 37-cent rate would not drive any of the respondents out of the business [Puerto Rican trade], particularly in light of the fact that the North Atlantic carriers had carried only about 5.5% of the heavy machinery traffic." Hence, in order for a 48-cent minimum rate to be fixed for TMT, it became necessary to discover an unlawful impact that the 37-cent rate had. The rate had an unlawful impact upon the North Atlantic port locality. The 37-cent rate was found to be unlawful by the Commission in part because of an effect the "wastefulness of revenue" achieved. It was found unlawful not simply because TMT could have earned as much revenue at 48 cents as at 37 cents but because it had earned this revenue at the 37-cent rate by attracting cargo which should have moved through the port of New York area.

With regard to issue (4), what use may be made of distance in determining rates is indicated in many cases, including *United States v. Illinois Cent. R.R.*, *supra*. Particularly, distance has an important bearing where because of a shorter distance between transit points a carrier incurs lesser costs.²

B. *The Factual Issues*

The factual issues involved in this proceeding are "prejudice" to the port of New York (issue (1)) and the necessity to invoke the authority which is the subject matter of the remaining three issues, and which authority we have affirmed above.

The North Atlantic carriers have since our order of May 10, 1966, maintained rates of 50 cents per cubic foot on heavy machinery and the

² SACL's Exhibit 22, excluded by the Examiner and not made the subject of an offer of proof, was utilized in portions of SACL's brief, and a motion to strike those pages of the brief dealing with it was made at oral argument. Exhibit 22 purported to show that the lesser distance between the South Atlantic and Puerto Rico vis-a-vis the North Atlantic and Puerto Rico was responsible for lower costs of the South Atlantic carriers. Because of our disposition of the issues in this proceeding, it becomes unnecessary for us to rule on the motion to strike.

South Atlantic carriers have maintained rates at 48 cents per cubic foot. Since our order was vacated on November 23, 1966, they have voluntarily maintained such rates.

The result of the carryings for the first three quarters of 1966 indicates a movement of naturally tributary cargo back through the port of New York, and there is no indication that the port is being unlawfully prejudiced at the present time.

There additionally appears to be no need to act with respect to the public interest at it relates to the needs of the Puerto Rican economy in this proceeding as the Commonwealth itself has pointed out. As the Commonwealth highlights, in this proceeding there is no justification for adjusting the machinery rates to insure the movement of low value essential commodities inasmuch as the reopened record here does not indicate the need of the North Atlantic carriers for a revenue "cushion" from the movement of heavy machinery or even that such cushion would increase their carriage of commodities essential to Puerto Rico.³

TMT, in its brief to the Commission on remand states that:

We feel sure that the lessons of the litigation have not been lost on the carriers and that restraints will be exercised in the future.

It is to be hoped that TMT is correct and that all parties in this proceeding have learned the lessons to be gained from, and the dangers inherent in, unreasonably low rates.

There appearing no necessity on the current record in this proceeding to set minimum rates, and no evidence having been presented on remand which would indicate a contrary conclusion, the rates currently in effect are found lawful as just and reasonable, and the proceeding is discontinued.

SEPARATE OPINION OF COMMISSIONER GEORGE H. HEARN

Now that my colleagues have had another opportunity to review the issues in this proceeding, I am delighted to see that they agree with the conclusion expressed in my original dissent⁴ concerning the important issue in this rate case, to wit, not setting a minimum rate or floor. Another look at the case indicates that this is the prime issue.

To deny the shipping public the benefit of lower rates which the carriers are willing and able to offer, in my opinion, is appalling.

The reopening of this record does not reflect any evidence which will allow me to make a determination on the other questions raised

³ It thus becomes unnecessary to deal further with Sea-Land's Exhibit 3, excluded by the Examiner, which purported to indicate the extent to which Sea-Land carried certain low-rated commodities.

⁴ Commissioner Hearn's dissent, vol. 9, FMC Reports, p. 498.

by the parties and the Commission, consequently, I reiterate the reasoning and position outlined in the dissent, supra.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

No. 65-48

NORTH ATLANTIC PORTUGAL FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (TRIPLE RATE) SYSTEM AND CONTRACT

Proposed exclusive patronage (triple rate) system and contract found unjustly discriminatory between shippers and exporters, detrimental to the commerce of the United States, and contrary to the public interest; the contract also found unlawful because providing for more than one spread between ordinary rates and rates charged contract shippers. Application disapproved.

Richard W. Kurrus and James N. Jacobi for respondents.

Francis P. Desmond and Don A. Boyd for intervener, E. I. du Pont de Nemours and Company, and *Jerome H. Heckman and Robert R. Tiernan* for intervener, The Dow Chemical Company and Dow Chemical International, S.A.

Howard A. Levy, E. Duncan Hamner, Jr., and Donald J. Brunner as Hearing Counsel.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER¹

This proceeding was instituted by the Commission pursuant to sections 14b and 22 of the Shipping Act, 1916, as amended (the Act), to determine whether:

(1) the proposed system and form of exclusive patronage (triple rate) contract of the member lines of the North Atlantic Portugal Freight Conference meet the requirements of Section 14b, or will be detrimental to the commerce of the United States, contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; and (2) the application of the Conference for permission to institute the proposed system should be granted pursuant to said Section 14b, and if so (3) the proposed form of exclusive patronage (triple rate) contract should be approved, disapproved or modified in accordance with the requirements of Section 14b and the Commission's decision in *The Dual Rate Cases*.

¹ This decision became the decision of the Commission on January 17, 1967. Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227.

The respondents are the North Atlantic Portugal Freight Conference and its six member lines, namely, American Export Isbrandtsen Lines, Inc.; Companhia de Navegacao Carregadores Acoreanos (Portuguese Line); Fabre Lines; Fresco Line; and Italian Line. Service is provided from United States North Atlantic ports in the Hampton Roads/Maine range to ports in Portugal. Italian Line serves Portugal for the carriage of cargo only with its passenger vessels. The other five conference lines operate regularly in the trade. Collectively the conference lines offer about 9 sailings a month.

E. I. du Pont de Nemours and Company (du Pont), and Dow Chemical Company and Dow Chemical International, S.A. (Dow), interveners, oppose the proposed exclusive patronage (triple rate) system. Hearing Counsel also oppose the proposed system. The opposition of these parties is to the triple rate feature of the proposed article 6 of the merchant's rate agreement. The other clauses of the proposed agreement conform generally with the clauses approved in *The Dual Rate Cases*, 8 F.M.C. 16 (1964).

Under the proposed article 6, freight rates would be set at three levels. The ordinary rate, that is the maximum, or tariff, rate would be charged where neither the shipper nor the consignee of a shipment is a signer of the proposed agreement. A rate based on a 7.5 percent discount would be charged where either the shipper or the consignee but not both, is a signer of the agreement. A rate based on a 15 percent discount would be charged where both the shipper and the consignee of a shipment are signers.

There was a steamship conference in this trade prior to 1955. From 1955 to September, 1964, there was no conference, and the trade was beset by instability. The present North Atlantic Portugal Freight Conference was approved by the Commission on July 22, 1964, and began functioning on or about September 15, 1964. Prior to the formation of the present conference in 1964, the rates were at low, depressed, and unprofitable levels. Many rates were noncompensatory. The new conference has been successful in stabilizing the trade. The low rates no longer exist, and the rates as a whole are back to the 1955 level or higher. The 1955 rates are considered to have been at a reasonably profitable level. In November, 1965, there was a general increase in conference rates of 10 percent. The conference presently has no open rates other than on bulk commodities.

The cargo in this trade to Portugal amounts to about 30,000 long tons yearly, including manufactured items, steel products, agricultural products, oils, wax, auto parts, cosmetics, cigarettes, tobacco, food-stuffs, airplane parts, and others. Portugal has a population about the same as that of New York City.

There is no regular non-conference competition in this trade. Within the past year there were said to be non-conference sailings to Portugal on four or five occasions. The record instances only three sailings, but with few details. One lot of 550 tons of tobacco was shipped via Jugolinja (the Yugoslav Line) at a rate about 10 percent below the conference rate. Butter of unspecified tonnage was shipped via Concordia or Costa lines. There was also a shipment of steel, tonnage not specified, which may have been a part of the Tagus River project. This project involved the movement of parts of a prefabricated bridge. The respondents believe that there are about 35 steamship lines operating from United States Atlantic ports to Mediterranean Sea ports, or operating through the Mediterranean eastward, which lines might arrange to serve Portugal if the cargoes were attractive. The respondents also believe that there is potential competition from cargo shipped from United States North Atlantic ports to the European gateway ports of Antwerp, Amsterdam, and Rotterdam, or to the French Atlantic ports of the Bordeaux-Dunkirk range, with subsequent transshipment either overland or by water to Portugal, but the record discloses no specific instances of such competition. Transshipment is not a unique feature of the Portugal trade.

One fact about this trade stands out. The trade has been stable since the conference was reformed in 1964. And this trade has been stable notwithstanding the fact that the conference has had no exclusive patronage system, that is, the conference has no dual rate system or comparable exclusive patronage system. Although the conference now seeks a triple rate system, it has not tried a dual rate system.

There are between 200 and 300 consignees in Portugal receiving cargo shipped in this trade on a relatively regular basis. The conference lines have considered the adoption of an exclusive-patronage dual-rate system, but believe that it would be extremely difficult to sign any considerable number of consignees under a dual-rate system.

Although most of the cargo moving in this trade is sold under FOB or FAS terms, with the consignees having control of the routing, the respondents believe that an exclusive patronage system which would contract only with consignees would not be feasible. Respondents' reason is their view that a significant portion of the cargo is routed by shippers, or that the routing could be controlled by the shippers, citing as examples the shipments of du Pont and Dow.

On the other hand, the respondents seemingly refute their own contention of significant routing by shippers, by contending also that the expressed forebodings of Dow and du Pont relate not to the use of the proposed exclusive patronage (triple rate) contract in this trade, but to its possible use in other trades. Respondents refer to the facts,

that Dow shipped 191,139 tons of cargo on conference vessels throughout the world in the year 1965, but with only 10 tons shipped in this U.S. Atlantic-Portugal trade; and that du Pont annually exports 25,000 shipments which generate ocean freight revenues in excess of \$10,000,000, but with only 700 tons (weight) or 770 tons (freight) shipped in the U.S. Atlantic-Portugal trade.

Under the proposed triple-rate contract, the respondents expect to sign about 75 percent of the regular consignees in Portugal. Respondents believe that the shippers would have neither obligation nor reason to solicit contract signers in Portugal, inasmuch as such solicitation would be done by the sales representatives of conference lines. It is intended that the conference office in New York City maintain a complete and current record of all contract signatories, and that this record would be available to interested inquirers. The proposed exclusive patronage system and contract, however, contain no requirement that the conference office maintain such a record and make it available.

The proposed triple rate system is new and different from any such system now in effect in our foreign commerce. The suggestion of a triple-rate exclusive patronage system was not raised throughout the legislative history of the Dual Rate Act, section 14b, Public Law 87-346, 75 Stat. 762, October 3, 1961.

The record contains no evidence that any specific shipper in the United States supports the proposed triple rate exclusive patronage system.

The proposed triple-rate system is designed by the conference to curb or to eliminate nonconference competition. By tradition in Portugal and in many other European countries, discounts to consignees are consistent with usual business methods. Respondents have not tried to sign the consignees in Portugal to a dual rate contract, so they cannot be certain that the consignees would not sign this type of contract.

One of the underlying reasons assigned by the respondents for their proposal, and probably a principal reason, is that the triple rate system is expected to eliminate legal questions that have arisen under dual-rate contract systems concerning the question of who has the legal right to route the cargo, particularly in connection with the so-called "FOB/FAS loophole." For example, if a consignee were not a signatory to a dual rate contract, but had the right to route the cargo, he might route an FOB or FAS shipment by a nonconference carrier even though the shipper was a contract signer.

Du Pont sells much of its cargo shipped to Portugal on CIF terms to its Portugal affiliate. The remainder of its cargo to Portugal is purchased by non-affiliates on an FOB/FAS basis, but carrier selection

by these consignees occurs infrequently. Dow's export sales wherever possible are made on CIF terms.

The ability of du Pont and Dow to quote firm delivered prices will be greatly impeded under the proposed triple-rate system because of the need of first ascertaining whether the Portuguese customer has signed the conference contract. In other words, a signatory shipper in the United States shipping cargo to an unsigned consignee will be charged under the triple rate system the tariff rate less 7.5 percent, whereas another signatory shipper in the United States making a competitive shipment to a signatory consignee will benefit by a 15 percent discount from the tariff rate.

In contrast, a signatory shipper under a dual-rate system will know exactly what his freight costs will be, and more importantly, he will know what his shipper-competitor's freight costs will be. One of the principal purposes of a tariff is to make freight costs definite and certain, thereby avoiding unjust discrimination as between shippers.

Adoption of the proposed triple rate contract system would produce the result that a shipper would have to know whether the consignee is a contract signatory, or the signatory shipper would have to quote three prices on his goods, namely (1) an FOB price, (2) a CIF price allowing 7.5 percent discount on the ocean freight if the consignee is not a signatory, and (3) a CIF price allowing 15 percent discount on the ocean freight if the consignee is a signatory.

Doing business abroad is a difficult undertaking for United States exporters, and the quotation of three prices on the exported goods certainly would not simplify the job, and more likely would be an undue burden on the exporter trying to develop the foreign commerce of the United States.

Under the circumstances, particularly in view of the present stability of the trade, no need has been shown for an exclusive patronage contract as proposed in this trade, and in particular it is clearly evident that the proposed triple rate contract will lead to uncertainty as to the ocean freight charges which the contract shippers from the United States will pay. Therefore, it is concluded and found that the proposed exclusive patronage (triple rate) system will be unjustly discriminatory and unfair as between shippers and exporters from the United States, and that the proposed system because it will inhibit export shipments will be detrimental to the commerce of the United States, and contrary to the public interest of encouraging exports and fostering a favorable balance of trade. Accordingly, article 6 of the proposed system (the clause relating to triple rates) is disapproved, and the application of the North Atlantic Portugal Freight Confer-

ence for permission to institute an exclusive patronage triple rate system and contract is denied.

Disapproval of the proposed triple rate system, regardless of the merits of the proposal as discussed above, also appears to be required as a matter of law under section 14b(7) of the Act.

The statute requires that the Commission shall approve any exclusive patronage contract * * *, and provided the contract * * * (7) provides:

for a *spread* between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which *spread* shall in no event be more than 15 per centum of the ordinary rates; * * *
.[Emphasis supplied.]

The respondents' proposal provides not for a spread but for two spreads. Therefore the proposal is barred by section 14b(7), and it is so concluded and found.

(Signed) CHARLES E. MORGAN,
Presiding Examiner.

10 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-52

IN THE MATTER OF THE MODIFICATION OF AGREEMENT 5700-4

Decided January 30, 1967

The Federal Maritime Commission is not required under the Administrative Procedure Act or the Shipping Act to hold an evidentiary hearing where no genuine or material issue of fact is presented.

Under the 1961 amendment to section 15 of the Shipping Act and General Orders 7 and 9 promulgated thereunder, conference agreements must contain adequate provisions for self-policing and the admission, withdrawal, and expulsion of members.

Agreement No. 5700-4 found to be in violation of section 15 and General Orders 7 and 9 and contrary to the public interest for failure to contain adequate provisions for self-policing and the admission, withdrawal, and expulsion of members.

The Commission may, in the exercise of its broad regulatory discretion, modify a conference agreement which, after notice and hearing, is found to be in violation of the Act or contrary to the public interest by ordering the addition of provisions which will bring such agreement into compliance with the requirements of the Act.

Charles F. Warren and *John P. Meade* for New York Freight Bureau (Hong Kong).

George F. Galland and *Amy Scupi* for States Marine Lines.

Donald J. Brunner and *Samuel B. Nemirow*, Hearing Counsel.

REPORT

BY THE COMMISSION (*John Harlee*, *Chairman*; *Ashton C. Barrett*, *Vice Chairman*; *George H. Hearn*, *Commissioner*) :

This proceeding was instituted by our Notice of Intent to Modify Agreement No. 5700-4* and Order to Show Cause Why Such Modifications Should Not Be Incorporated Into Said Agreement. This notice advised the parties that the Commission intended either to modify Agreement No. 5700-4 by adding provisions for self-policing and ad-

*See decision of Oct. 3, 1966, at p. 165.

mission, withdrawal and expulsion of members or to withdraw approval of the agreement for failure to contain such provisions.

BACKGROUND FACTS

In order to understand this proceeding and the conclusions we have reached it is necessary to relate in some detail the events which have gone before. The New York Freight Bureau (Hong Kong) (hereafter referred to as the "Bureau") is a ratemaking conference serving the inbound trade from Hong Kong to U.S. Atlantic and Gulf ports. It has been in existence since 1924 and since 1937 has operated under approved Agreement 5700. Until 1964 this agreement remained substantially unchanged. (Such changes as were made dealt with the rotation of the Chairmanship and minor changes in the geographic scope of the agreement, etc.) The modification approved on July 29, 1960, was designated Agreement No. 5700-4.

The 1961 amendment to section 15 of the Shipping Act (act of October 3, 1961, Public Law 87-346, section 2, 75 Stat. 763), requires the Commission, after notice and hearing, to "disapprove, cancel or modify" any agreement:

* * * which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

and provides further that:

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Pursuant to this amendment and our general rulemaking authority under the Act, we promulgated General Order 7 on August 22, 1963 (28 F.R. 9257) and General Order 9 on May 1, 1964 (29 F.R. 5797), which deal respectively with self-policing systems and conference membership requirements.

General Order 7 states in pertinent part (46 C.F.R. 528.2):

Conference agreements * * * shall contain a provision describing the method or system used by the parties in policing the obligations under the agreement, including the procedure for handling complaints and the functions and authority of every person having responsibility for administering the system * * *.

Similarly, General Order 9 (46 C.F.R. 523) specifies that conference agreements must contain certain provisions insuring reasonable standards for the admission, withdrawal and expulsion of members.

In compliance with the amendment to section 15 and the General Or-

ders referred to above, the Bureau filed two modifications to its basic agreement for our approval under section 15. Agreement No. 5700-6¹ filed on February 10, 1964, provided for a system of self-policing which generally complied with the requirements of section 15 and General Order 7. Agreement No. 5700-7 filed on June 17, 1964, contained amendments designed to bring their agreement within the requirements of General Order 9.

These agreements were withdrawn before approval because after analysis of them the staff suggested to counsel for the Bureau that certain clarifying and conforming changes be made and that the two agreements be consolidated into one. In response to this suggestion, counsel for the Bureau withdrew Agreements 5700-6 and 5700-7 and filed a third agreement designated 5700-8 which contained the changes suggested by the staff but substantially repeated the provisions of 5700-6 and 5700-7.

We issued an order of conditional approval of Agreement 5700-8 in which the Bureau members were given 60 days within which to accept the modifications. Additional time for acceptance was sought by the Bureau and granted by us. The Order of Conditional Approval as extended was due to expire on May 2, 1966. However, on March 1, 1966, States Marine Lines (one of the member lines of the conference) sent a telegram to the Commission which stated in pertinent part: "* * * States Marine opposes the agreement and hereby withdraws same from Commission's consideration as far as States Marine is concerned * * *." On May 2, 1966, the Order of Conditional Approval expired by its own terms since no notification had been received by the Commission of acceptance by the Bureau membership.

On May 13, 1966, at the Bureau's request we approved Agreement 5700-8 in part, i.e. as to those portions which were deemed non-controversial because they had not been objected to by States Marine, and issued an order of investigation (Docket 66-32) with respect to the controversial portions.

The original order of investigation set down three issues for determination: (1) The expansion of the conference trade area to include the Great Lakes; (2) the voting provisions; and (3) modification of the self-policing provisions to include provision for reference of certain arbitration matters to the Federal Maritime Commission.

On June 13, 1966, States Marine filed a petition to reconsider our order of May 13, supra and, after considering this petition and the

¹ Agreement 5700-5 was a tonnage ceiling agreement of a temporary nature approved on September 21, 1962. It expired by its own terms on January 6, 1966. See our report in Docket 66-29, *Agreement No. 9431 Hong Kong Tonnage Ceiling Agreement*, served September 19, 1966, 10 F.M.C. 134 (1966).

Bureau's reply dated June 20, 1966, we issued an amended order in Docket 66-32 in which the issues raised in States Marine's petition for reconsideration were also set down for investigation. These amendments broadened the original order of investigation to include the following issues: (1) Whether Agreement 5700-8 was properly before the Commission for its approval under section 15; (2) if Agreement 5700-8 was properly before the Commission for approval, should the approval granted in our order of May 13, 1966 be continued; (3) if Agreement 5700-8 was not properly before the Commission for approval and the approval thereto was without force and effect, were Agreements 5700-6 and 5700-7 properly withdrawn, and if not, what is their present status as representing true and complete agreement of the parties; and (4) whether there is in existence a presently approved agreement to which all the parties signatory thereto now agree and should approval thereto be continued or should the agreement be modified, disapproved, or canceled.

Shortly before the time for hearings in Docket 66-32 the Bureau, feeling that several of the issues specified in the amended order of investigation were pure questions of law involving no genuine issues of material fact, filed its petition for a declaratory order for the "summary resolution of legal issues" on September 9, 1966. States Marine Lines joined the Bureau in requesting declaratory relief in its reply received on September 26, 1966.

Oral argument was waived and in our report issued on October 4, 1966, we decided that:

1. States Marine Lines' telegram protest of March 1, 1966, filed prior to approval of Agreement 5700-8 operated to withdraw Agreement No. 5700-8 from the Commission's consideration.

2. Our order of May 13, 1966, which approved Agreement 5700-8 in part was void *ab initio* since said agreement was not properly before the Commission for approval.

3. Agreements 5700-6 and 5700-7 had been withdrawn prior to approval.

4. That Agreement 5700-4 as approved on July 29, 1960, is presently in full force and effect and constitutes the basic agreement under which the New York Freight Bureau (Hong Kong) is permitted to operate.

5. Agreement 5700-4 does not satisfy the requirements of section 15 and General Orders 7 and 9 promulgated thereunder in that it does not contain a satisfactory system of self-policing and does not meet the required criteria for admission, withdrawal, and expulsion of members.

6. Proceedings in Docket No. 66-32 should be discontinued.

7. That the members of the New York Freight Bureau (Hong

Kong) should be required to show cause why Agreement 5700-4 should not be modified by us or, in the alternative, why continued approval of said agreement should not be withdrawn.

On the same date we issued our Notice of Intent to Modify and Order to Show Cause. This notice and order repeated conclusions set forth in our report of October 4, 1966, *supra* and stated further that:

The members of the New York Freight Bureau (Hong Kong) were able to agree upon amendments to this conference agreement which would satisfy the requirements of General Orders 7 and 9. Agreements 5700-6 and 5700-7 received the unanimous support of all the Bureau members.

We pointed out that there are only two courses of action available to the Commission. The first is to withdraw approval of Agreement 5700-4 and unless satisfactory self-policing and membership provisions are added to the agreement, this course is clearly necessary under section 15.

The second is for us to modify Agreement 5700-4 by adding amendments which would give the conference an adequate system of self-policing and proper provisions for admission, withdrawal, and expulsion.

Accordingly, the members of the Bureau were notified:

* * * pursuant to our authority under section 15 of the Shipping Act, 1916, that we intend to modify Agreement 5700-4 by deleting subparagraphs 10(b), 10(c), 10(d), and 10(e) and by adding new paragraphs 12 through 16, as set forth in the Appendix A hereto.

We expressed the view that there was:

* * * no need for the taking of evidence in this proceeding since no genuine issues of material fact are presented. The modifications to Agreement 5700-4, which the Commission proposes to make as specified in this notice, have twice been considered and "approved"² by the Commission as satisfying the requirements of section 15 and General Orders 7 and 9.

POSITIONS OF THE PARTIES

New York Freight Bureau (Hong Kong)

The Bureau supports generally the Commission's proposal to modify Agreement 5700-4 by adding self-policing and membership provisions. It points out, however, that the proposed modifications depart from the text of Agreement 5700-8 in three particulars: (1) By adding the requirements of General Order 18 in proposed Article 12; (2) by

² Agreements 5700-7 and 5700-8 received informal staff approval and Agreement 5700-8, which was substantially similar in all material respects has twice been approved by the Commission as to form.

adding a 20-day notice provision in proposed Article 14(g); and (3) by revising the language of proposed Article 14(h) relating to matters which may be referred to the Commission.

The Bureau does not object to the 20-day notice provision. It argues that General Order 18 exempts existing agreements from the requirement that a provision be incorporated for the filing of minutes. It contends that the language of Article 14(h) should conform to that which was approved in the Commission's order of May 13, 1966.

In a letter to the Secretary, dated November 23, 1966 (following oral argument), counsel for the Bureau suggests that the term "Secretary" be deleted whenever the term "Chairman/Secretary" is used in the proposed modifications. He notes States Marine's objection to the language "It is hereby agreed and declared by and between the parties hereto that:" and advises that the Bureau has no objection to the deletion of this or similar phrases formed in the text of the modifications.

States Marine Lines

States Marine Lines contends:

1. That the Commission may not "disapprove, cancel or modify" an agreement except after notice and hearing, and upon findings made on the basis of such hearing in accordance with the Administrative Procedure Act.

2. That even where all procedural directions are followed the Commission's power to "modify" an agreement is merely the power to disapprove it where the parties refuse to modify it in required particulars.

3. That the proclamation of passivity in Docket 66-29 is contrary to the present assertion of authority to rewrite carrier agreements to which the parties refuse concurrence.

4. That the use of such language as "It is hereby agreed * * *" in the proposed modifications is an anomaly and a contradiction in terms where one of the parties does not, in fact, agree.

5. That the law does not require a self-policing clause in the conference agreement.

6. That the law permits only disapproval of an agreement, "after notice and hearing, on a finding of inadequate policing of the obligations under it * * *."

7. That if a self-policing formula is required in all conference agreements by the self-policing provision of section 15, then a shippers' requests and complaints formula is also required.

8. That the self-policing system proposed by the Commission does not meet the procedural requirements of General Order 7 or the fundamental requirements of fairness.

9. That this proceeding should be suspended pending the outcome of the appeal from Docket 1095 now pending in the Court of Appeals.

States Marine Lines indicates its willingness to negotiate with the other members of the Bureau or, in the alternative, suggests that the Commission inaugurate a rulemaking proceeding with a view to work-out a self-policing formula applicable to all conferences.

Hearing Counsel

Hearing Counsel support the Commission's proposal to modify Agreement 5700-4. They contend that:

1. A section 15 agreement is not a mere private agreement but a public contract impressed with the public interest and permitted to exist only so long as it serves that interest.

2. The plain language of section 15 allows the Commission to modify an agreement without further reference to the parties in an appropriate case provided that notice and opportunity for a hearing is afforded the parties.

3. The provision in amended section 15 calling for the disapproval of any agreement upon a finding of inadequate policing of the obligations under it presupposes that some system for self-policing is in existence.

4. In order to qualify for continued section 15 approval a conference agreement must contain a formula by which self-policing of the obligations arising under the agreement will be accomplished.

5. The power to modify an agreement is not inconsistent with the so-called "proclamation of passivity" (Docket 66-29)³ since the decision in that case was that there was no agreement before the Commission for approval whereas in the instant case there is an approved agreement in existence albeit a patently defective one.

6. Hearing Counsel distinguish the requirements for a self-policing system from provisions for entertaining shippers' requests and complaints by pointing out that the New York Freight Bureau (Hong Kong) is meeting this requirement by setting forth such procedures as part of its tariff as filed with the Commission.

7. Hearing Counsel oppose States Marine's contention that the Commission is attempting to modify Agreement 5700-4 "without a hearing." They note that States Marine refused to avail itself of the opportunity afforded to file affidavits of fact which might establish some basis for such a request.

8. Hearing Counsel join with the Bureau in suggesting that Article 12 (requiring the filing of minutes) be deleted from the proposed amendments.

³ *Hong Kong Tonnage Ceiling Agreement No. 9431*, served April 28, 1966.

DISCUSSION

There are only three fundamental questions presented in this case:

1. Whether the Commission has the legal authority, after notice and hearing, to modify a section 15 agreement by adding provisions without further reference to the parties to the agreement to obtain their assent.
2. Whether the procedural requirements of "notice and hearing" have been met.
3. Whether the modifications to the agreement ordered herein are within the sound discretion of the Commission.

The Commission's Legal Authority to Modify

States Marine Lines is correct when it pointed out that the Commission has never previously used its statutory authority to modify an agreement directly. The usual practice has been, and is, to issue an order of conditional approval, i.e., the changes are referred back to the conference membership for acceptance and upon the filing of evidence of such acceptance, the modifications proposed by the Commission stand approved.

Nevertheless, the language of section 15, which provides in pertinent part:

The Commission shall by order, after notice and hearing, disapprove, cancel or *modify* any agreement, or any modification or cancellation thereof, that it finds to be * * * contrary to the public interest, or to be in violation of this Act * * *. [Emphasis added.]

is in our view clear and unequivocal. There is nothing to construe. As the Court said in *Caminetti v. U.S.*, 242 U.S. 470, 485 (1916):

Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion.

States Marine Lines suggests that because the Commission has never before modified an agreement directly it is somehow foreclosed from doing so at this time. We know of no rule of statutory construction which would operate to "repeal" a portion of a statute simply because of nonuse and States Marine has cited none.

Moreover, as early as 1933 the Commission's predecessor expressed the view that it could, under the authority of section 15, order a modification⁴ of a conference agreement:

Upon a showing * * * that * * * modification of any section 15 agreement will remove a detriment to the commerce of the United States, the * * * [Commission] will, of course, take proper corrective action.

⁴ *In Re: Rates in Canadian Currency*, 1 U.S.S.B. 264, 281 (1933).

Similarly in our report in Docket 1095⁵ we repeated the view that :

* * * Our authority under section 15 of the Act is not simply the sterile power to accept or reject that which the parties to agreements file with us. Section 15 expressly grants us the power to modify agreements filed with us.

States Marine Lines argues that we cannot modify *sua sponte* an agreement without further reference to the parties for approval (*viz* a conditional approval) because such a modification does not comport with the definition of the word "agreement." This argument verges on frivolous. Of course, such an instrument is no longer the "agreement" of all of the members.

We do not pretend that the agreement (5700) as modified by us is acceptable to all of the parties to the agreement. On the contrary, our earlier report in this case makes it clear that we understand States Marine's position completely.

States Marine Lines is quite correct when it contends that when the Federal Maritime Commission modifies a section 15 agreement by direct action it ceases to be an "agreement of the parties". It becomes a *modified* agreement. In our opinion Congress vested in the Commission this authority to *modify* in order to meet the kind of situation which is here presented.

As we stated in *In Re: Pacific Coast European Conf.*:⁶

"Respondents' conference agreement is not some sacrosanct private arrangement but a public contract, impressed with a public interest and permitted to exist only so long as it serves that interest.

The District of Columbia Court of Appeals reinforced this position in *Swift and Co. v. F.M.C.*,⁷ saying that a section 15 agreement:

* * * is not simply a private contract between private parties, the intent of the parties is only one relevant factor, and the * * * [Commission] not only can, but must, weigh such considerations as the effect of the interpretation on commerce and the public. Moreover, the agreement existed legally only because approved by the * * * [Commission]. The * * * [Commission] must be given reasonable leeway in delineating the scope of the agreement and therefore the extent of its prior approval.

Respondent, States Marine Lines' reliance upon our report in Docket No. 66-29 and the so-called "doctrine of passivity" is misplaced. In that case we decided that when one of the original parties to a new agreement filed for approval under section 15 withdraws from the

⁵ *Agr. No. 150-21, T.P.F.C.J. and Agr. No. 3103-17, Japan-Atl. and Gulf Frt. Conf.*, Dkt. 1095, 9 F.M.C. 355.

⁶ 7 F.M.C. 27, 87 (1961). (See also, *States Marine Lines v. Trans-Pacific Freight Conf.*, 7 F.M.C. 257 (1962); and *Mediterranean Pools Investigation*, Docket 1212, 9 F.M.C. 264.

⁷ 306 F. 2d 277, 281 (1962).

agreement prior to approval, "that act destroys the subject matter of the Commission's jurisdiction." In other words, we cannot create or impose an agreement where none existed before.

However, where, as here, there is in existence an approved conference agreement the Commission's role is not and cannot be passive for we have an affirmative obligation under the Shipping Act to maintain a continuing surveillance over every approved agreement and the manner in which such agreements are implemented.

Several important distinctions must be made between Docket No. 66-29 and the instant case.

In Docket No. 66-29 we held that the so-called agreement under consideration was a new agreement—separate and distinct from the basic conference agreement. It was neither an amendment to nor a modification of Agreement No. 5700. We decided, therefore, that before we could even consider that instrument as an "agreement" within the meaning of section 15 of the Act there would have to be a showing that there was a continuing assent of all of the purported parties signatory to the agreement. Moreover, the scheme involved in the ceiling tonnage agreement was a voluntary undertaking and was not required by the Act or any of the Commission's General Orders.

Before it receives section 15 approval a conference agreement is no more than a contingent agreement depending for its vitality upon the happening of a condition subsequent, i.e., Commission approval.

However, once a conference agreement is approved the conference assumes a quasi-public character. It is more than a mere private association. A conference is accorded a privileged status under the law. It is permitted to do things in concert which, absent approval and regulation by the Federal Maritime Commission, would be in violation of the Shipping Act and, in most instances, the antitrust laws as well.

It is true that where a conference with a unanimous voting rule files an amendment to its basic agreement with us for approval and one of the members withdraws from the amendment prior to approval the amendment no longer may be considered by us as a *conference generated modification*. This is precisely the position we took in our earlier report in this case. In many cases this would end the matter.

However, the instant case presents a different problem. The modifications originally proposed by the conference membership and later rescinded by the unilateral fiat of one of its members were not optional kinds of changes which a conference could adopt or ignore at will, but rather were in compliance with the clear mandate of Congress and our General Orders 7 and 9,

Where a conference is a going concern, establishing rates for its members, operating under dual rate contract privileges and otherwise

regulating the terms and conditions for the movement of ocean freight in a particular trade, we have a clear duty under the Shipping Act to exercise our regulatory authority to the full extent indicated by the Act.

The Show Cause Procedures

In our notice and order to show cause we apprised the parties of our tentative view that Agreement No. 5700-4 was in violation of section 15 and General Orders 7 and 9, and *notified* them of our intent either to *modify* the agreement by adding certain provisions which were appended to the notice or to *withdraw* approval of the agreement altogether.

We expressed the opinion that there were no genuine issues of material fact and, therefore, no need for an evidentiary hearing. However, the door was left open when we said :

Should any of the parties to this proceeding consider that there are disputed issues of fact which are relevant to this proceeding, such facts shall be specified with particularity by means of affidavits setting forth such facts, together with a statement of their relevance to the issues in question. Should any other parties dispute these facts by a similar affidavit, the disputed issues of fact, if relevant, will be set down for an evidentiary hearing.

Since the parties filed only memoranda of law but no affidavits of fact as allowed by the language in the order to show cause, we hold that there is no reason for an evidentiary hearing. For example, there is no question of fact as to the deficiency of Agreement 5700-4 with respect to provisions for self-policing and membership. The agreement as it stands simply contains no such provisions.

States Marine Lines argues that the Commission is attempting to modify Agreement 5700-4 "without a hearing." They demand an evidentiary hearing while at the same time refusing to avail themselves of the opportunity afforded them to file affidavits of fact which might establish some basis for such a request.

States Marine was afforded a hearing as required by the Shipping Act and the Administrative Procedure Act, through this show cause proceeding. It is well established that :

* * * the Supreme Court has defined full hearings as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law of the step asked to be taken * * *. Where no genuine or material issue of fact is presented, the court or administrative body may pass upon the issues of law after affording the parties the right of argument * * *.⁸

⁸. *Producers Livestock Marketing Assoc. v. U.S.*, 241 F. 2d 192 (10th Cir., 1957) aff'd 346 U.S. 282 (1958). See also : *American Airlines, Inc., v. C.A.B.*, 359 F. 2d 624 (D.C. Cir., 1966) at pp. 632, 633.

Respondents have been given ample opportunity to present any "genuine or material issue of fact" and were granted oral argument. The parties' procedural rights to notice and hearing have been scrupulously observed.

Self-Policing Procedures:

In promulgating General Order 7 on August 22, 1963 (28 F.R. 9257) we said in part:

Some comments also challenged the Commission's authority to require the inclusion of self-policing as a condition precedent to approval (or continued approval) of an agreement under section 15. As amended by section 2 of Public Law 87-346 (75 Stat. 763-4), section 15 provides: "The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it * * *" This provision, in demanding the adequate policing of the obligations under the agreement, clearly presupposes the establishment of some procedure for that purpose. And the establishment of the self-policing procedure is necessarily predicated upon an agreement between the parties. It has been the consistent position of the Commission that such an agreement is a modification which is within the purview of section 15, and this is now expressly fortified by the statute itself. Under section 15, a "true and complete copy, or if oral a true and complete memorandum" of all agreements within the purview of the section must be filed with and approved by the Commission. An agreement which does not contain the procedure for self-policing which has been adopted by the parties is an incomplete agreement within the meaning of section 15. Conversely, it would seem to be obvious that if the parties make no provision for self-policing, they are ignoring the statute. In either case, their section 15 agreement would have to be disapproved unless the situation were corrected.

Earlier we held in *States Marine Lines v. Trans-Pacific Freight Conference*, 7 F.M.C. 257 (1962), affirmed *Trans-Pacific Freight Conference of Japan v. F.M.C., et al*, 314 F. 2d 928 (9th Cir. 1963), that a system of self-policing is a necessary part of a basic conference agreement since it vitally affects the interrelationships of the parties.

Thus, States Marine's position that the law does not require a formula for self-policing to be included in the basic agreement is without merit.

The self-policing requirements of section 15 consists of two parts: (1) adequate *procedures* must be set forth in the basic conference agreement whereby the machinery for self-policing is established; and (2) there must be an *implementation* of that machinery in practice. By modifying respondents' agreement as proposed in the order to show cause, we are furnishing only the first element of this requirement, i.e., providing of the necessary machinery. The implementation of this machinery will be up to the conference and if it is not accomplished in good faith, then the requirements of the 1961 amendment to section

15 clearly dictate withdrawal of approval of the conference agreement. The approval of the agreement as modified will not preclude a subsequent finding of "inadequate policing of the obligations under it." However, unless the agreement is amended so as to include a system of self-policing, there is no possibility that the conference can legally police itself.

States Marine further argues that requiring of self-policing provisions in all section 15 agreements, without requiring such agreements to have provisions for the consideration of shippers' requests and complaints, is inconsistent under the language of amended section 15.

The requirement that conferences "adopt reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints" is procedural only and, unlike a self-policing system, does not effect a substantive change in the scope of the conference agreement. Such procedures neither create nor destroy rights. They merely prescribe how such rights as already exist may be exercised. Accordingly, such provisions are normally contained in the conference tariff schedules. Put another way, a conference can adopt and implement adequate procedures for dealing with shippers' complaints and requests without obtaining prior approval under section 15. Self-policing procedures, however, require our specific approval.

The Modified Agreement

A conference agreement must contain satisfactory self-policing and membership provisions and, since Agreement 5700-4 does not meet those requirements, we were faced with making a choice between cancellation or direct modification. In the circumstances of this case either course could be justified. However, on balance we believe that the public interest will be better served by modifying the conference agreement as ordered herein thereby making its continued approval possible, subject, of course, to continue surveillance as to the manner in which the self-policing and other provisions are carried out.

If we were to withdraw our approval we would be penalizing 16 out of 17 member lines which have indicated their willingness to comply with General Orders 7 and 9 and, in fact, have so agreed. In the instant case, it became abundantly clear that the conference was being thwarted at every turn by the recalcitrance of a single member, States Marine Lines. Governed as the conference is by a unanimous voting procedure, it is powerless to accept modifications proposed by the Commission in an order of conditional approval because this single member refuses to give its assent (even though earlier voting for the changes proposed).

As to the actual modifications which are being ordered, it appears that there is no dispute among the parties as to the membership provisions (Articles 14 and 15 in the Appendix hereto). States Marine Lines has indicated its willingness to agree to such provisions.

There is no single self-policing system which we consider best, and we have purposely left this to the individual conferences in General Order 7 to allow them to work out the formula which will best suit their purposes. We have indicated only in general terms what such systems shall include as a minimum.

We have selected the particular self-policing system we did simply because *all* of the members of the New York Freight Bureau (Hong Kong) at one time agreed substantially to it (Agreement No. 5700-7) and all but States Marine Lines agree to it at the present time.

More importantly we have examined the self-policing system carefully and found, as a matter of law, that it satisfies the requirements of General Order 7.

States Marine Lines objects to the system and calls for an evidentiary hearing to determine such questions of fact as "conditions of the Hong Kong trade, the number of carriers in and out of the conference, the volume of cargo offering, the space available to carry it, and intensity of competition." States Marine would also have this evidentiary hearing go into such issues as the competence and character of the Chairman. In the first place, our order to show cause clearly specified that if an evidentiary hearing was desired, affidavits and supporting memoranda of relevance would have to be submitted. States Marine ignored this directive and has no standing now to complain. Secondly, the economic conditions in the Honk Kong trade are irrelevant to the question of the legal sufficiency of a self-policing system. The remaining reasons advanced by States Marine for an evidentiary hearing are premised on the assumption that the self-policing formula will not be applied justly and in good faith. This is mere speculation on the part of States Marine.

In short, States Marine's objections to the self-policing system consist mainly of conjectures as to how the self-policing system might be used as an instrument of oppression. We are duly concerned about the rights of an individual member of a conference and the doors of the Commission are always open to anyone with a legitimate complaint. If a conference does not administer its approved system of self-policing in a fair manner this would surely support a finding of " * * * inadequate policing of the obligations under it * * *" for which the mandatory penalty is disapproval of the entire conference agreement.

We have wide discretion in fashioning remedies. As the Supreme Court has said:⁹

Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing.

In our opinion the circumstances of this case call for the modification of respondents' basic conference agreement in the manner set forth in the order and Appendix¹⁰ hereto.

CONCLUSION

In summary, we conclude:

1. That this case presents no genuine issues of material fact and, therefore, there is no necessity for an evidentiary hearing.

2. The respondents have been furnished with a proper notice of our intent to modify or, in the alternative, withdraw approval of Agreement No. 5700-4 and a hearing thereon as required by section 15 of the Shipping Act.

3. That Agreement No. 5700-4 is in violation of section 15 of the Shipping Act in that it "fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal."

4. That Agreement No. 5700-4 is in violation of General Order 9 in that it fails to contain standard provisions required thereby.

5. That Agreement No. 5700-4 is contrary to the public interest in that it fails to provide for a system of self-policing of its members' obligations under it.

6. That Agreement No. 5700-4 is in violation of General Order 7 in that it fails to provide for a system of self-policing of its members' obligations under it.

⁹ *California, et al. v. U.S., et al.*, 320 U.S. 577, 583-584 (1944); *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 393 (1959).

¹⁰ The Bureau requested that the following changes be made in the modification as proposed in the order to show cause:

1. Deletion of Article 12;

2. Substitution of the term "Chairman" wherever the term "Chairman/Secretary" appears;

3. Deletion of a portion of the arbitration provision relating to Federal Maritime Commission jurisdiction; and

4. Deletion of the expression, "It is hereby agreed * * * etc." found in the beginning of Article 13 and other words of like effect.

No objections have been interposed. Accordingly, these changes have been made in the amended text of the modifications. (See Appendix hereto.)

7. That Agreement No. 5700-4 should be modified by deleting paragraphs 10(b), 10(c), 10(d) and 10(e) and by adding new paragraphs 12 through 15, as set forth in the Appendix A hereto.

An appropriate order will be entered.

Commissioner James V. Day Concurring:

I concur in the majority opinion except that I would defer the effective date of the order for 30 days. I would thus give the parties an opportunity, if they should now prefer upon review of the order herein, to reach an independent accord among themselves and to submit the same for Commission approval.

APPENDIX A

12. FAITHFUL PERFORMANCE: BOND

As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award of judgment which may be rendered against them hereunder, the parties hereto shall deposit with the New York Freight Bureau Chairman the sum of US\$30,000 (thirty thousand) or its equivalent in Hong Kong currency or a confirmed irrevocable letter of credit, in such form as may be approved by the New York Freight Bureau, in the aforesaid sum of US\$30,000 (thirty thousand) or its equivalent in Hong Kong currency established by a bank being a member of the Hong Kong Exchange Banks Association and which is acceptable to the New York Freight Bureau, providing that it may be drawn upon by draft signed in the name of the New York Freight Bureau by the Chairman and by the authorized representatives of any two Member Lines and payable to the New York Freight Bureau to which there shall be attached a certificate signed by the Chairman to the effect that there has been assessed or adjudged against the party who shall have deposited the said letter of credit a penalty or penalties in the amount of the said draft. Such depositing party shall, in the event of the payment of the said draft, cause a new letter of credit in the sum of US\$30,000 (thirty thousand) or its equivalent in Hong Kong currency, similar in its terms, to be issued immediately in replacement for that upon which the draft has been made. Among other such provisions as the New York Freight Bureau may require, the New York Freight Bureau may insist upon provisions in such letter of credit which will render it most certain that payment must be made by the bank immediately upon the compliance by the Chairman with the aforesaid conditions.

13. SELF-POLICING SYSTEM

(a) A report shall immediately be made in writing to the Chairman in respect of any information which appears to such party hereto to be reasonably reliable of the commission by any other party hereto of a violation of this Agreement.

(b) A report shall immediately be made in writing to the Chairman in respect of any information which such party hereto shall have received from any shipper or from any other source considered to be reliable that any party hereto has committed a violation of this Agreement.

(c) It shall be the duty of the Chairman to investigate immediately all such reports submitted by parties hereto in addition to any such reports in writing he may receive direct from shippers or from any other source considered to be reliable, for which purpose the Chairman shall hereby be authorized to engage the services of such qualified persons as he may consider necessary for a thorough and complete investigation to be made.

(d) It shall also be the duty of the Chairman to ascertain on his own initiative, whether or not the parties hereto have strictly complied with the terms of this Agreement, the provisions incorporated in the New York Freight Bureau tariff and all other decisions regularly and properly made by the parties hereto and, in the event that there is any reason to believe that there has been a violation of any of the aforesaid obligations, he shall file a complaint with respect thereto as above provided.

(e) The Chairman shall be furnished such pertinent records of the parties hereto, their agents, sub-agents, affiliates, subsidiaries, freight brokers, compradores and/or Chinese Freight Agents, wherever located, as may be required in the enforcement of this Agreement and the decisions of the New York Freight Bureau, and the failure of any party hereto either on their own behalf or the aforementioned additional parties shall constitute a violation of this Agreement.

(f) Upon the completion of such investigations, the Chairman shall lay before the membership his written report thereon, and such report shall include all relevant particulars thereto other than the identity of the party hereto or other person from whom the report originated.

(g) Such written reports shall constitute and are hereafter referred to as complaints. A copy thereof shall be furnished to the accused party not less than 20 days prior to the time that the matter is submitted to a vote of the parties as provided in subparagraph (h) of this paragraph.

(h) All such complaints shall be submitted to a vote of the parties hereto other than the party charged with the violation, after giving the party charged in the respective complaint an opportunity to adduce evidence in its defense. If the parties hereto, other than the party so charged shall, by a three-fourths affirmative vote of all parties entitled to vote, determine that the violation or violations alleged in, the complaint have been provided, the party charged with the violation or violations shall be subject to liquidated damages as hereinafter provided in respect of each and every violation so proved; but if the party accused is dissatisfied with the decision reached as aforesaid, such party shall have the right to appeal, it being incumbent upon the accused party to make any such appeal within ten days following the aforementioned determination. In which event the question of violation shall be left to the determination of a majority of three arbitrators, one arbitrator to be nominated by the accused, the second by a three-fourth affirmative vote of the remaining parties, and the third arbitrator to be nominated by the arbitrators so chosen, it being incumbent upon the parties concerned to nominate the first and second arbitrators within thirty days of the appeal being made by the accused party. In the event the accused party does not appoint an arbitrator within the said thirty days, the accused party will thereby forfeit its right to appeal. Such arbitrations shall take place in Hong Kong and any decision so arrived at shall be binding and final, and such decision shall be equivalent to a legal judgment given by the highest court of law, and the parties to this Agreement thereby waive and abandon every right to take any legal action to obtain a review or reversal of the decision so made.

However, it shall not be a breach of this agreement for any line to refer any matter arbitrated to the Federal Maritime Commission for a decision as to whether or not the matter arbitrated constitutes a modification of this agreement.

(i) Inasmuch as it will be impossible to ascertain or measure the amount of damages which the parties hereto will suffer by reason of the breach of this Agreement, the damages suffered thereby by each party hereto shall be assessed on the basis of a three-fourths majority vote as above provided but that, in any event, such damages shall be subject to the undernoted maxima, exclusive of any arbitration costs which may accrue to the accused party:

- (i) First offence----- up to a maximum of US\$10,000.00 or its equivalent in Hong Kong currency.
- (ii) Second offence----- up to a maximum of US\$15,000.00 or its equivalent in Hong Kong currency.
- (iii) Third offence----- up to a maximum of US\$20,000.00 or its equivalent in Hong Kong currency.
- (iv) Fourth and any subsequent offences. up to a maximum of US\$30,000.00 or its equivalent in Hong Kong currency.

(j) The Chairman shall notify in writing the party against whom a violation shall have been found of the decision against it and the amount of liquidated damages which shall have been assessed against it. In the absence of any appeal by such notified party in accordance with the provisions of Article 13 (h) hereof, the party thus notified shall pay the amount of such liquidated damages within a period of ten (10) days. In the event that it shall fail or refuse to make such payment within said period, the other parties may have resort to the performance bond which such party shall have deposited in accordance with the provisions contained in Article 12 of this Agreement; and the Chairman is hereby authorized, in case that a decision shall be made against it, to the effect that it has violated this Agreement, and in case liquidated damages are assessed against it and it shall fail to pay said damages within the period of ten (10) days after such notice has been given to it by the Chairman, to pay the amount of said liquidated damages to the other parties hereto from the cash which it shall have deposited or, if its performance bond shall be by way of a confirmed irrevocable letter of credit, to draw upon the letter of credit and pay the amount of such liquidated damages to the other parties from the proceeds thereof, such payments to the other parties being on a pro-rata basis. The costs incurred in arbitration proceedings shall be dealt with in the award.

(k) Each party hereto shall be fully responsible for the acts and omissions of its parent companies, agents, sub-agents, affiliates, subsidiaries, freight brokers, compradores and/or Chinese Freight Agents, and an act done or omitted to be done by an agent, sub-agent, affiliate, subsidiary, freight broker, comprador and/or Chinese Freight Agent, which would constitute a violation of this Agreement, if done or omitted to be done by the party itself, shall for all purposes hereof, constitute a violation of this Agreement by such party, for which such party shall be liable for damages in the same amount as if it had done or omitted the said act.

(1) In the event of the termination of this Agreement or the expulsion or voluntary withdrawal of any of the parties hereto, the performance bond deposited by the parties concerned shall be returned to them, together with accrued interest, but only after any complaints which may be pending against the parties concerned at the time of its expulsion or withdrawal or at the time of the termination of this Agreement, as the case may be, have been satisfied.

14. ADMISSION TO MEMBERSHIP

(a) Any common carrier by water which has been regularly engaged as a common carrier in the trade covered by this Agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain such a common carrier service between ports within the scope of this Agreement, and who evidences an ability and intention in good faith to abide by all the terms and conditions of this Agreement, may hereafter become a party to the New York Freight Bureau, promptly following written application to the New York Freight Bureau for membership, such application to set forth evidence demonstrating compliance with the foregoing requirements, by affixing its signature hereto, or to a counterpart hereof, and by payment to the New York Freight Bureau of any outstanding financial obligation arising from prior membership of the New York Freight Bureau, and by posting with the New York Freight Bureau security for faithful performance of its obligations as provided in Article 13 hereof.

(b) Every application for membership shall be acted upon promptly.

(c) No carrier which has complied with the conditions set forth in paragraph (a) of this Article, shall be denied admission or readmission to membership.

(d) Prompt notice of admission to membership shall be furnished to the Federal Maritime Commission and no admission shall be effective prior to the post-mark date of such notice.

(e) Advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Federal Maritime Commission.

15. WITHDRAWAL AND EXPULSION OF MEMBERSHIP

(a) Any party may withdraw from the Conference without penalty by giving at least sixty (60) days' written notice of intention to withdraw to the Conference: *Provided, however,* That action taken by the Conference to compel the payment of outstanding financial obligations by the resigning Member shall not be construed as a penalty for withdrawal.

(b) Notice of withdrawal of any party shall be furnished promptly to the Federal Maritime Commission.

(c) No party may be expelled against its will from this Conference except for failure to maintain a common carrier service between the ports within the scope of this Agreement, or for failure to abide by all the terms and conditions of this Agreement.

(d) No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished to the expelled Member and a copy of such notification submitted to the Federal Maritime Commission.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-52

IN THE MATTER OF THE MODIFICATION OF AGREEMENT 5700-4

ORDER

This proceeding having been instituted on order to show cause, the Commission having received memoranda of law and heard oral argument on such order and having pursuant thereto issued on this date a report in this proceeding, which is hereby referred to and incorporated herein by reference,

Therefore, it is ordered, That Agreement No. 5700-4 be and the same hereby is modified by deleting paragraphs 10(b), 10(c), 10(d), and 10(e) and by adding new paragraphs 12 through 15 as set forth in the Appendix A.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-17

INDEPENDENT OCEAN FREIGHT FORWARDER, LICENSE APPLICATION No.
552, HESKEL SALEH DOING BUSINESS AS EASTERN FORWARDING
SERVICE

Initial Decision Adopted February 14, 1967

Applicant found technically competent and able to engage in the business of an independent ocean freight forwarder.

Application by holder of "grandfather rights" for license as independent freight forwarder denied. However, effective date of denial postponed to allow applicant to establish his own freight forwarding office and cease use of office equipment of shipper.

Applicant ordered to cease and desist from the collection of unearned commissions from carriers.

Applicant, in person.

Donald J. Brunner and *Samuel Nemirow* as Hearing Counsel.

REPORT

BY THE COMMISSION (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners*):

This proceeding is before us upon Hearing Counsel's exceptions to the supplemental initial decision of Examiner Benjamin A. Theeman.¹ The Examiner, in his initial decision found the following facts of record:²

1. The Commission's files show that Respondent operated under FMB Registration No. 1715 since July 11, 1958; on January 17, 1962, Respondent filed an application for a forwarder's license pursuant to section 44(b) of the Act, as amended; the application was given the number contained in the title of this proceeding.³

¹ After the issuance of the initial decision, we remanded the proceeding to the Examiner for further findings and conclusions as to the technical competence and ability of the applicant to engage in the business of an independent ocean freight forwarder.

² No exceptions were taken to these findings. Quotation marks have been omitted for the sake of convenience.

³ Official notice is taken of the facts contained in this paragraph.

2. Respondent testified that he has read and is familiar with the amendment to the Shipping Act, 1916 (Public Law 87-254) dealing with independent ocean freight forwarders, enacted on September 19, 1961, containing the above-cited sections.

3. Respondent has been carrying on two businesses at 152-08 Jamaica Avenue, New York. One business, under the name of Jamaica Nylon Center, is the operation of a ladies specialty store. The other business, under the name of Eastern Forwarding Service is the subject of this proceeding.

4. Respondent has performed freight forwarding services for only one client, P. S. Saleh, Inc. (hereinafter Saleh, Inc.). Saleh, Inc., engaged in the business of exporting cars and trucks to the Middle East, is wholly owned by Respondent's brother, Philip.

5. Respondent has been performing the limited type of freight forwarding services set forth herein for about 15 years. At an unspecified period, and for about 6 months he was an exporter.

6. Eastern operates from a back room of the specialty store. The equipment consists of a desk, a typewriter, a case (not a filing cabinet) for account books, freight forwarding forms, letterheads and other necessary papers. The telephone is also located there. There is one telephone number for both businesses, but each business is separately listed in the telephone book.

7. The front of the building occupied by Eastern has no indication of any kind that Eastern is an occupant or that freight forwarding services were being offered there. Respondent did no public advertising nor in any other way offered his freight forwarding services to the public.

8. Respondent has no employees. Because Respondent has no copying machine, his daughter does the necessary work on customs declarations, Bills of Lading and the required copies of each.⁴ This work is done at the office of Saleh, Inc. and not at the office of Eastern. Up to about 7 months ago, Respondent employed a messenger, who was not fully employed but was used "most of the time."

9. Respondent "very rarely" communicates with, or receives a communication from the carrier.

10. The usual procedure by which a shipment of Saleh, Inc. is put aboard a common carrier and the organizations that take part in the movement are as follows:

a. Saleh, Inc. books the cargo with the common carrier.

b. Independent packers prepare the shipment for transportation, prepare the dock receipt, move the cargo either to the pier or the vessel and bring the dock receipt to Saleh, Inc.

⁴ The record contains no information as to the daughter's employment.

c. The particulars of the shipment are transmitted to Respondent usually at the office of Saleh, Inc.

d. On behalf of Respondent, Respondent's daughter prepares customs declarations and Bills of Lading at the place of business of Saleh, Inc. Respondent does not prepare consular documents, if any are needed.

e. Customarily, the "Line Copy"⁵ of the Bill of Lading is signed or initialed at the place of business of Saleh, Inc. Respondent did not know who signed or initialed the Line Copy for Eastern.⁶

f. The packers deliver the cargo to the common carrier.

g. Respondent procures the carrier's signature on the Bill of Lading. (No detail is given as to the means by which this step is accomplished.)

h. Respondent has insufficient funds to cover freight costs. Saleh, Inc. sends to Respondent a check made out to Respondent in the amount of the freight. Respondent deposits the check in its account and issues a check in the same amount to the common carrier in payment for the freight.

i. Respondent retains one copy of the Bill of Lading and gives two copies to Saleh, Inc.

11. Respondent has a "Line Copy" stamp in his office and another in the office of Saleh, Inc. Customarily, the stamp in the office of Saleh, Inc. is used. Respondent has no recollection when the stamp in his office had last been used.

12. Respondent charges and collects from the common carrier, a commission at the rate of 2½ percent for the shipments booked by Saleh, Inc. At 6 month intervals, Respondent charges and collects from Saleh, Inc. his freight forwarding fee at the rate of \$5 per shipment. There is no evidence to show that the "rate of \$5.00 per shipment" is in any way unreasonable.

13. During 1965, Respondent handled between 80 and 100 shipments. The combined income from carrier commissions and forwarding fees totalled \$1,800. This amount represented about 40 percent of Respondent's gross income; the other 60 percent came from his specialty shop. Respondent's income from the shop has always been greater than from the forwarding activities and for several years before had been greater than 60 percent.

14. Respondent devotes about 20 percent or less of his time to forwarding activities. Until recently he solicited no business from any shipper other than Saleh, Inc. Within the last few months he has solicited business from three other exporters friendly to him. Two of them indicated that they might give him some forwarding business later in

⁵ The Line Copy of the Bill of Lading contains the certification by the freight forwarder of services rendered to the carrier in connection with the shipment as required by section 510.24(e) of General Order No. 4, as amended, and section 44(e) of the Act.

⁶ There may have been occasions when Respondent was present at the preparation of the "Line Copy." Then he would personally sign or initial it. In Respondent's opinion the signing of the line copy was not important: "the main thing is preparing these two items . . . those that are checked." Respondent is referring to subitems (1) through (5) of the line copy certification.

1966, and requested that he get in touch with them again. They advised Respondent that if he were "in a regular office in [New York] city, that would help a lot", particularly if he gave up the ladies specialty business.

15. There is no evidence that Eastern at any time shared directly with Saleh, Inc. any part of the commission paid by the common carriers, or indirectly by reduced rates for the forwarding services rendered.

DISCUSSION AND CONCLUSIONS

On the basis of the foregoing, the Examiner concluded that applicant should be granted a license subject to the following conditions:

a. Respondent immediately cease from billing carriers for freight forwarding services not rendered to carriers by Respondent and cease accepting payment from them for such unperformed services.

b. Respondent shall (1) forthwith certify to the Commission that he is attempting to and will establish his own freight forwarding office and perform his freight forwarder's services independently of the use of the office facilities or employees of Saleh, Inc. or any other shipper; and (2) establish said independent office not later than September 1, 1966.⁷

Hearing Counsel excepted to the initial decision on two grounds:

a. The Initial Decision errs in granting a freight forwarder license subject to certain Examiner-imposed conditions.

b. The Initial Decision errs in granting a freight forwarder license to an unqualified applicant in terms of sections 1 and 44 of the Shipping Act, 1916, as amended.

As to the second exception, Hearing Counsel urged that "The record is pregnant with facts which demonstrate that this applicant has performed little, if any, 'actual work' concerning shipments of P.S. Saleh, Inc. . . ." and further that:

The booking of cargo is essential to the operation of a freight forwarder service. There is doubt whether this respondent has ever engaged in this activity or in fact he has the ability to book cargo. Therefore, there is considerable doubt, if called upon today to do so, he would be capable of handling this basic matter.

The order instituting this proceeding alleged but two grounds for denying applicant a license. They were:

. . . that Hesel Saleh doing business as Eastern Forwarding Service does not hold himself out to the shipping public to perform ocean freight forwarding services and that his close association with P. S. Saleh, Inc., his only shipper client, destroys his independence and thereby precludes him from licensing . . .⁸

⁷ The Initial Decision was served June 22, 1966, thus the September 1 date would have provided sufficient time for applicant to comply with the conditions.

⁸ Concerning the failure of applicant to "hold its services out to the public," the Examiner noted that "No source for this requirement was given," nor was any "statute regula-

Since it seemed to us that Hearing Counsel were for the first time raising the question of applicant's "technical competence" or ability to perform fundamental forwarding services, we remanded the proceeding to the Examiner "in order that applicant may have an opportunity to demonstrate on the record that he possesses sufficient technical competence and ability to qualify as a licensed freight forwarder under sections 1 and 44 of the Act."

Subsequent to the remand, on October 7, 1966, Hearing Counsel submitted a memorandum to the Examiner signed by Robert G. Drew, Chief, Division of Freight Forwarders, Federal Maritime Commission. This memorandum set forth facts brought out by Mr. Drew's interview with the applicant concerning the latter's technical competence. No hearings were had, but the Drew memorandum was received in evidence with opportunity afforded applicant to comment or request further hearing. Applicant made no response. The Examiner issued his supplemental initial decision concluding that applicant possessed sufficient technical competence and should be licensed subject, however, to the conditions set forth in his initial decision of June 22, 1966.

Hearing Counsel excepted to the Examiner's supplemental decision again on the same two grounds previously urged, i.e. (1) the granting of a license subject to certain Examiner-imposed conditions; and (2) the granting of a license to an unqualified applicant in terms of sections 1 and 44 of the Act.

As we read these latest exceptions of Hearing Counsel, they do not go to the Examiner's conclusion that applicant is technically competent and able. Rather, they restate Hearing Counsel's position that the record herein demands "a denial of the instant application and if the applicant can subsequently establish that he is qualified for a license, then and only then should he be granted a license."

We think the Examiner's discussion of the issues well founded and dispositive, and we adopt it as our own except as may be otherwise indicated.⁹

It is clear from the foregoing that Respondent for the past 15 years has been "carrying on the business of freight forwarding" in a circumscribed manner limited to a few of the services usually performed

tion or case" either "cited or referenced" to him. The Examiner then concluded that even though such a "holding out" was not required, the applicant was in fact attempting to solicit other clients and thus could be considered as trying to comply with the demand. Hearing Counsel took no exception to the Examiner's conclusions. In view of the applicant's attempted solicitation, we see no reason to adopt or reject the Examiner's conclusion on this question.

⁹ Here, again, for the sake of convenience quotation marks have been omitted, and, of course, all footnotes have been renumbered.

by freight forwarders.¹⁰ There appears to be no question that Respondent is "fit, willing and able properly to carry on the business of forwarding" as required by the statute. Hearing Counsel does not intend to the contrary. However, there are certain circumstances under which Respondent has carried on his forwarding business that must be rectified in order that his application for a license may be properly granted.

Respondent, as to the shipments of Saleh, Inc., has not and does not perform "with respect to such shipment[s] the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo" as required by section 44(e). Despite this nonperformance, Respondent has been billing the carrier for commission and receiving payment from the carrier. It is this type of unearned payment (the legislative history calls it "unearned brokerage" or "automatic unearned brokerage fees") that section 44(e) was enacted specifically to eliminate.¹¹ The receipt of such unearned payments is improper under section 44(e). Respondent will be required to refrain from requesting or receiving such payments from carriers unless he actually performs those services set forth in and otherwise complies with section 44(e) as prerequisite to such payment.¹²

The record shows that Respondent has been dependent upon Saleh, Inc. for certain office equipment and accommodations in order to complete the limited freight forwarding services that he performs. The record does not show that Saleh, Inc. has exerted any control over Respondent, or is there sufficient evidence in the record to support a finding that Respondent is shipper connected. Nevertheless, this type of operation is not consistent with the concept of an "independent ocean freight forwarder" as contemplated by the statute. Such arrangements may easily lead to control of the forwarder by the shipper. Respondent has stated that he intends to open an office in downtown Manhattan and

¹⁰ For a listing of the divers services performed by freight forwarders, see General Order 4, 46 CFR Sec. 510.2(c); *United States v. American Union Transport Co.*, 327 437 U.S. (1945); *N.Y. Foreign Freight Bureau Assn. v. F.M.C.*, 337 F.2d 289, 292 (1965); Docket No. 765/831 *Freight Forwarder Investigation, etc.*, 6 FMB 327, 334/5.

¹¹ See particularly House Report No. 2939, 84th Cong., 2d sess., July 26, 1956, page 54, paragraph (2) *Unearned brokerage*, page 55, paragraph (8), *Is remedial action required in connection with the Shipping Act?*

¹² Section 44(e) refers to a "licensed" forwarder. It is applicable to forwarders holding "grandfather rights" by the following series of steps. Section 44(b) sets forth that the "grandfather rights" may be continued "under such regulations as the Commission shall prescribe." The Commission issued a regulation on May 1, 1963, as Amendment No. 1 to General Order 4. Section 510.21(a) of Title 46 CFR contains the following definition:

§ 510.21 Definitions.

(a) The term "licensee" means any person licensed by the Commission as an independent ocean freight forwarder, or any independent ocean freight forwarder who, on September 19, 1961, was carrying on the business of freight forwarding under a valid registration number issued by the Commission, or its predecessors, who filed an application for such a license (Form FMC-18) on or before January 17, 1962, and whose application has not been denied.

to devote full time to his forwarding business. It is assumed that Respondent will cease using the office and office equipment of Saleh, Inc. In any event, as hereinafter stated, a condition to the granting of Respondent's application is the complete severance from, and discontinuance of the use of, the office and office equipment of Saleh, Inc. or any other shipper.¹³

Respondent is not a "dummy forwarder" in the sense that that term is used in connection with freight forwarders. Under Commission decisions¹⁴ and the legislative history¹⁵ rebating has been inextricably connected with a "dummy forwarder". The Commission has defined a "dummy forwarder" as one "organized for the sole purpose of collecting compensation from carriers which would find its way back in whole or in part to the shipper."¹⁶ The record is bare of any evidence to show that the payments made by the carriers to Eastern redounded in any way to the benefit of Saleh, Inc., or in any way offended the rebating provisions of the existing law.¹⁷

The Congress has listed 10 instances of facts and circumstances whose existence, Congress states, "raise at least an inference of the existence of [rebating] arrangements." As pointed out by Hearing Counsel, five of them exist in this case.¹⁸ Despite the existence of these items, Hearing Counsel do not contend that any of the carrier's payments made to Eastern have found their way back to Saleh, Inc. Nor does the existence of these five items when considered in the light of the entire record constitute sufficient evidence to support a conclusion to the effect that rebating has occurred.

As already noted, the Examiner concluded that applicant should be granted a license provided he (1) immediately ceased collecting unearned brokerage, and (2) forthwith certify that he is attempting and will establish his own freight forwarder office and perform his freight forwarder services independently of the use of the office facilities or

¹³ See *Application etc., Morse Shipping Co., etc.*, 8 FMC 472 (1965); *Application etc., Del Mar Shipping Corporation, etc.*, 8 FMC 493 (1965).

¹⁴ Docket No. 1192, *Application etc., Wm. V. Oady, etc.*, 8 FMC 352, 358; Docket No. 1201, *Application etc., Morse Shipping Co., etc.*, 8 FMC 472; Docket No. 1196, *Application etc., Del Mar Shipping Corporation*, 8 FMC 493, 496.

¹⁵ Testimony of Thomas E. Stakem, page 836, Hearings before the Special Subcommittee on Freight Forwarders and Brokers, 84th Cong., 1st and 2d sess.; H.R. No. 2939, *supra*, at page 54; H.R. No. 2333, 85th Cong., 2d sess., July 31, 1958; H.R. No. 798, 86th Cong., 1st sess., August 6, 1959; S.R. No. 1682, 86th Cong., 2d sess., June 24, 1960; and H.R. No. 1096, 87th Cong., 1st sess., August 31, 1961.

¹⁶ Docket No. 1192, *supra*, at page 358.

¹⁷ H.R. No. 2939, *supra*, page 54 (2) *Dummy forwarders*.

¹⁸ They are specifically: (a) the members of the family or close relatives of officials of the shipper corporation are appointed to act as forwarders or brokers . . . (c) The shipper and its forwarder share the same offices . . . without reimbursement . . . and (f) the forwarder is a one-man concern . . . (h) The forwarder is designated to collect brokerage on a single account . . . (j) The forwarder is engaged in another business for his primary occupation, which appears to be unrelated to the business of forwarding.

employees of Saleh, Inc., or any other shipper.¹⁹ We agree with these conditions and impose them as our own. However, in application, etc., *Del Mar Shipping Corporation etc.*, 8 F.M.C. 493, we found that an incorporated forwarder which has 50 percent of its stock owned by a shipper in the foreign commerce of the United States was not an independent ocean freight forwarder, notwithstanding the intention of the shipper not to exercise any control over the forwarder. We thus denied applicant Del Mar a license. However, we postponed the effective date of the denial to allow time for divestiture by the shipper of control of the forwarder. Since the applicant does not now qualify for a license, we think this the better procedure. Accordingly, the application here under consideration is denied; however, the effective date of the denial is postponed until August 1, 1967 to enable the applicant to comply with the above conditions, in which event the denial order would not be entered.

INITIAL DECISION OF BENJAMIN A. THEEMAN,
PRESIDING EXAMINER¹

The order in this proceeding served on March 29, 1966, by the Federal Maritime Commission (Commission) on Heskell Saleh doing business as Eastern Forwarding Service (Respondent or Eastern) stated as follows:

By letter dated February 2, 1966. Heskell Saleh doing business as Eastern Forwarding Service was notified of the Federal Maritime Commission's intent to deny his application for an independent ocean freight forwarder license. The grounds for denial are that Heskell Saleh doing business as Eastern Forwarding Service does not hold himself out to the shipping public to perform ocean freight forwarding services and that his close association with P. S. Saleh, Inc., his only shipper client, destroys his independence and thereby precludes him from licensing. Applicant has now requested the opportunity to show at a hearing that denial of the application would be unwarranted.

The hearing was held in New York City pursuant to Sections 22 and 44 of the Shipping Act of 1916, as amended (the Act), to determine whether Eastern qualified for a license pursuant to Sections 1 and 44 of the Act.² Respondent appeared and participated in person. Testimony of Respondent was placed in the record mainly through questions by Hearing Counsel. Respondent offered no substantial additional data though given the opportunity to do so.

¹⁹ The Examiner would have given the applicant until September 1, 1966, see footnote 7, *supra*.

¹ This decision became the decision of the Commission on February 14, 1967.

² These sections are contained in Public Law 87-254 enacted September 19, 1961, providing for the licensing of independent ocean freight forwarders. See portion of this decision, *infra*, headed, Pertinent Provisions of the Act.

From the record as a whole it is found:

1. The Commission's files show that Respondent operated under FMB Registration No. 1715 since July 11, 1958; on January 17, 1962 Respondent filed an application for a forwarder's license pursuant to Section 44(b) of the Act, as amended; the application was given the number contained in the title of this proceeding.³

2. Respondent testified that he has read and is familiar with the amendment to the Shipping Act, 1916 (Public Law 87-254) dealing with independent ocean freight forwarders, enacted on September 19, 1961, containing the above-cited sections.

3. Respondent has been carrying on two businesses at 152-08 Jamaica Avenue, New York. One business, under the name of Jamaica Nylon Center, is the operation of a ladies specialty store. The other business, under the name of Eastern Forwarding Service is the subject of this proceeding.

4. Respondent has performed freight forwarding services for only one client, P. S. Saleh, Inc. (hereinafter Saleh, Inc.). Saleh, Inc., engaged in the business of exporting cars and trucks to the Middle East, is wholly owned by Respondent's brother, Philip.

5. Respondent has been performing the limited type of freight forwarding services set forth herein for about 15 years. At an unspecified period, and for about 6 months he was an exporter.

6. Eastern operates from a back room of the specialty store. The equipment consists of a desk, a typewriter, a case (not a filing cabinet) for account books, freight forwarding forms, letterheads and other necessary papers. The telephone is also located there. There is one telephone number for both businesses, but each business is separately listed in the telephone book.

7. The front of the building occupied by Eastern has no indication of any kind that Eastern is an occupant or that freight forwarding services were being offered there. Respondent did no public advertising nor in any other way offered his freight forwarding services to the public.

8. Respondent has no employees. Because Respondent has no copying machine, his daughter does the necessary work on customs declarations, Bills of Lading and the required copies of each.⁴ This work is done at the office of Saleh, Inc. and not at the office of Eastern. Up to about seven months ago, Respondent employed a messenger, who was not fully employed but was used "most of the time."

³ Official notice is taken of the facts contained in this paragraph.

⁴ The record contains no information as to the daughter's employment.

9. Respondent "very rarely" communicates with, or receives a communication from the carrier.

10. The usual procedure by which a shipment of Saleh, Inc. is put aboard a common carrier and the organizations that take part in the movement is as follows:

- a. Saleh, Inc. books the cargo with the common carrier.
- b. Independent packers prepare the shipment for transportation, prepare the dock receipt, move the cargo either to the pier or the vessel and bring the dock receipt to Saleh, Inc.
- c. The particulars of the shipment are transmitted to Respondent usually at the office of Saleh, Inc.
- d. On behalf of Respondent, Respondent's daughter prepares customs declarations and Bills of Lading at the place of business of Saleh, Inc. Respondent does not prepare consular documents, if any are needed.
- e. Customarily, the "Line Copy"⁵ of the Bill of Lading is signed or initialled at the place of business of Saleh, Inc. Respondent did not know who signed or initialled the Line Copy for Eastern.⁶
- f. The packers deliver the cargo to the common carrier.
- g. Respondent procures the carrier's signature on the Bill of Lading. (No detail is given as to the means by which this step is accomplished).
- h. Respondent has insufficient funds to cover freight costs. Saleh, Inc. sends to Respondent a check made out to Respondent in the amount of the freight. Respondent deposits the check in its account and issues a check in the same amount to the common carrier in payment for the freight.
- i. Respondent retains one copy of the Bill of Lading and gives two copies to Saleh, Inc.

11. Respondent has a "Line Copy" stamp in his office and another in the office of Saleh, Inc. Customarily, the stamp in the office of Saleh, Inc. is used. Respondent had no recollection when the stamp in his office had last been used.

12. Respondent charges and collects from the common carrier, a commission at the rate of 2½ percent for the shipments booked by Saleh, Inc. At 6 months intervals, Respondent charges and collects from Saleh, Inc. his freight forwarding fee at the rate of \$5.00 per shipment. There is no evidence to show that the "rate of \$5.00 per shipment" is in any way unreasonable.

13. During 1965, Respondent handled between 80 and 100 shipments. The combined income from carrier commissions and forwarding fees totaled \$1,800. This amount represented about 40 percent of Respondent's gross income; the other 60 percent came from his specialty shop.

⁵ The Line Copy of the Bill of Lading contains the certification by the freight forwarder of services rendered to the carrier in connection with the shipment as required by Section 510.24(e) of General Order No. 4, as amended, and Section 44(e) of the Act.

⁶ There may have been occasions when Respondent was present at the preparation of the "Line Copy". Then he would personally sign or initial it. In Respondent's opinion the signing of the line copy was not important: "the main thing is preparing these two items . . . those that are checked." Respondent is referring to sub-items (1) through (5) of the line copy certification.

Respondent's income from the shop has always been greater than from the forwarding activities and for several years before had been greater than 60 percent.

14. Respondent devotes about 20 percent or less of his time to forwarding activities. Until recently he solicited no business from any shipper other than Saleh, Inc. Within the last few months he has solicited business from three other exporters friendly to him. Two of them indicated that they might give him some forwarding business later in 1966, and requested that he get in touch with them again. They advised Respondent that if he were "in a regular office in [New York] city, that would help a lot", particularly if he gave up the ladies specialty business.

15. There is no evidence that Eastern at any time shared directly with Saleh, Inc. any part of the commission paid by the common carriers, or indirectly by reduced rates for the forwarding services rendered.

POSITIONS OF THE PARTIES

Respondent stated that he intends to devote more of his time to freight forwarding; and to approach other exporters; if he gets some more business he will dispose of his specialty store and open an office in Manhattan, New York. Respondent requests until approximately the end of 1966 to accomplish this plan. Then, if the freight forwarding business does not prosper he offers to consent to the cancellation of his license. Hearing Counsel takes no position in regard to this request.

Hearing Counsel contend that Respondent maintains a "dummy forwarder" operation such as Congress intended to eliminate when it passed Public Law 87-254.

PERTINENT PROVISIONS OF THE ACT

Sec. 1 . . . when used in this Act: . . .

The term "carrying on the business of forwarding" means the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.

An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

Section 44(a) provides that a person desiring to engage in the carrying on of the business of forwarding must first secure a license from the Commission.

Section 44(b) requires the Commission to issue the license to any qualified applicant who is or will be "fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied." Also by Section 44(b), the Congress granted so-called "grandfather rights" to those independent ocean freight forwarders who, on the effective date of the Act, were "carrying on the business of forwarding under a registration number issued by the Commission." Such forwarders were allowed to continue in business for a period of 120 days after September 19, 1961 without a license, and if the forwarder applied for a license within the 120 days he could continue to operate "under such regulations as the Commission shall prescribe" until otherwise ordered by the Commission.

Section 44(e) provides in pertinent part:

(e) A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, such person is licensed hereunder and has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services:

- (1) The coordination of the movement of the cargo to shipside;
- (2) The preparation and processing of the ocean bill of lading;
- (3) The preparation and processing of dock receipts or delivery orders;
- (4) The preparation and processing of consular documents or export declarations;

- (5) The payment of the ocean freight charges on such shipments:

Provided, however, . . . Before any such compensation is paid to or received by any person carrying on the business of forwarding, such person shall, if he is qualified under the provisions of this paragraph to receive such compensation, certify in writing to the common carrier by water by which the shipment was dispatched that he is licensed by the Federal Maritime Commission as an independent ocean freight forwarder and that he performed the above specified services with respect to such shipment. Such carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect.

DISCUSSION

It is clear from the foregoing that Respondent for the past 15 years has been "carrying on the business of freight forwarding" in a circum-

scribed manner limited to a few of the services usually performed by freight forwarders.⁷ There appears to be no question that Respondent is "fit, willing, and able properly to carry on the business of forwarding" as required by the statute. Hearing Counsel does not contend to the contrary. However, there are certain circumstances under which Respondent has carried on its forwarding business that must be rectified in order that his application for a license may be properly granted.

Respondent, as to the shipments of Saleh, Inc., has not and does not perform "with respect to such shipment[s] the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo," as required by Section 44(e). Despite this non-performance, Respondent has been billing the carrier for commission and receiving payment from the carrier. It is this type of unearned payment (the legislative history calls it "unearned brokerage" or "automatic unearned brokerage fees") that Section 44(e) was enacted specifically to eliminate.⁸ The receipt of such unearned payments is improper under Section 44(e). Respondent will be required to refrain from requesting or receiving such payments from carriers unless he actually performs those services set forth in and otherwise complies with Section 44(e) as prerequisite to such payment.⁹

The record shows that Respondent has been dependent upon Saleh, Inc. for certain office equipment and accommodations in order to complete the limited freight forwarding services that it performs. The record does not show that Saleh, Inc. has exerted any control over Respondent, nor is there sufficient evidence in the record to support a finding that Respondent is shipper connected. Nevertheless, this type of operation is not consistent with the concept of an "independent

⁷ For a listing of the divers services performed by freight forwarders, see General Order 4, 46 CFR Sec. 510.2(c); *United States v. American Union Transport Co.*, 327 U.S. 437 (1946); *N. Y. Foreign Freight Bureau Assn. v. F.M.C.*, 337 F. 2d 289, 292 (1965); Docket No. 785/831 *Freight Forwarder Investigation, etc.*, 6 FMB 327, 334/5.

⁸ See particularly House Report No. 2939, 84th Congress, 2d sess., July 26, 1956, page 54, paragraph (2) Unearned brokerage, page 55, paragraph (8), *Is remedial action required in connection with the Shipping Act?*

⁹ Section 44(e) refers to a "licensed" forwarder. It is applicable to forwarders holding "grandfather rights" by the following series of steps. Section 44(b) sets forth that the "grandfather rights" may be continued "under such regulations as the Commission shall prescribe." The Commission issued a regulation on May 1, 1963, as Amendment No. 1 to General Order 4. Section 510.21(a) of Title 46 CFR contains the following definition:

§ 510.21 Definitions.

(a) The term "licensee" means any person licensed by the Commission as an independent ocean freight forwarder, or any independent ocean freight forwarder who, on September 19, 1961, was carrying on the business of freight forwarding under a valid registration number issued by the Commission, or its predecessors, who filed an application for such a license (Form FMC-18) on or before January 17, 1962, and whose application has not been denied.

ocean freight forwarder" as contemplated by the statute. Such arrangements may easily lead to control of the forwarder by the shipper. Respondent has stated that he intends to open an office in downtown Manhattan and to devote full time to his forwarding business. It is assumed that Respondent will cease using the office and office equipment of Saleh, Inc. In any event, as hereinafter stated, a condition to the granting of Respondent's application is the complete severance from, and discontinuance of the use of, the office and office equipment of Saleh, Inc. or any other shipper.¹⁰

Respondent is not a "dummy forwarder" in the sense that that term is used in connection with freight forwarders. Under Commission decisions¹¹ and the legislative history¹² rebating has been inextricably connected with a "dummy forwarder". The Commission has defined a "dummy forwarder" as one "organized for the sole purpose of collecting compensation from carriers which would find its way back in whole or in part to the shipper".¹³ The record is bare of any evidence to show that the payments made by the carriers to Eastern redounded in any way to the benefit of Saleh, Inc., or in any way offended the rebating provisions of the existing law.¹⁴

The Congress has listed 10 instances of facts and circumstances whose existence, Congress states, "raise at least an inference of the existence of [rebating] arrangements." As pointed out by Hearing Counsel five of them exist in this case.¹⁵ Despite the existence of these items, Hearing Counsel does not contend that any of the carrier's payments made to Eastern have found their way back to Saleh, Inc. Nor does the existence of these five items when considered in the light of the entire record constitute sufficient evidence to support a conclusion to the effect that rebating has occurred.

The Commission's Order herein and Hearing Counsel make a point of the fact that Respondent "does not hold its services out to the pub-

¹⁰ See *Application etc., Morse Shipping Co., etc.*, 8 FMC 472 (1965); *Application etc., Del Mar Shipping Corporation, etc.*, 8 FMC 493 (1965).

¹¹ Docket No. 1182, *Application etc., Wm. V. Cady, etc.*, 8 FMC 352, 358; Docket No. 1201, *Application etc., Morse Shipping Co., etc.*, 8 FMC 472; Docket No. 1196, *Application etc., Del Mar Shipping Corporation*, 8 FMC 493, 496.

¹² Testimony of Thomas E. Stakem, page 836, Hearings before the Special Subcommittee on Freight Forwarders and Brokers, 84th Cong., 1st and 2d sess.; H.R. No. 2939, *supra*, at page 54; H.R. No. 2333, 85th Cong., 2d sess., July 31, 1958; H.R. No. 798, 86th Cong., 1st sess., August 6, 1959; S.R. No. 1682, 86th Cong., 2d sess., June 24, 1960; and H.R. No. 1096, 87th Cong., 1st sess., August 31, 1961.

¹³ Docket No. 1196, *supra*, at page 358.

¹⁴ H.R. No. 2939, *supra*, page 54 (2) *Dummy forwarders*.

¹⁵ They are specifically: (a) the members of the family or close relatives of officials of the shipper corporation are appointed to act as forwarders or brokers . . . (c) The shipper and its forwarder share the same offices . . . without reimbursement . . . and (f) the forwarder is a one-man concern . . . (h) The forwarder is designated to collect brokerage on a single account . . . (j) The forwarder is engaged in another business for his primary occupation, which appears to be unrelated to the business of forwarding.

lic." It is indicated that this lack is a cause for denial of Respondent's application. No source for this requirement is given. No statute, regulation or case is either cited¹⁶ or referenced. Absent such basis, this requirement is not considered sufficient cause to deny the application. In any event, Respondent has stated that he intends to close his specialty shop if the forwarding business warrants, open an office for freight forwarding in a building in downtown Manhattan, and has already solicited other clients than Saleh, Inc. These actions proposed and past show that Respondent is attempting to perform services for more than one client; and may be considered an attempt to comply with the demand, even though not required, that "he hold himself out to the public."

CONCLUSION

Section 44 of the Act is a licensing statute. Like other licensing statutes it should be approached with a liberal attitude to the end that licenses may be granted to qualified applicants. *Application for Freight Forwarders License—Dixie Forwarding Co., Inc.*, 7 FMC 109, 122, 167 (1965). If the Respondent refrains from receiving payment from carriers for unearned commissions, and severs his office connections with the establishment of Saleh, Inc., the Respondent would come within the definition of an independent freight forwarder contained in Section 1 of the Act. The application will therefore be granted subject,¹⁷ however, to the following conditions:¹⁸

a. Respondent immediately cease from billing carriers for freight forwarding services not rendered to carriers by Respondent and cease accepting payment from them for such unperformed services.

b. Respondent shall (1) forthwith certify to the Commission that he is attempting to and will establish his own freight forwarding office and perform his freight forwarder's services independently of the use of the office facilities or employees of Saleh, Inc. or any other shipper; and (2) establish said independent office not later than September 1, 1966.¹⁹

BENJAMIN A. THEEMAN,
Presiding Examiner.

WASHINGTON, D.C., June 22, 1966.

¹⁶ It is noted that in Docket No. 1201, *Morse Shipping Co.*, *supra*, the Bureau of Domestic Regulation and the freight forwarder stipulated in an agreement "(e) Morse expresses the intention to hold herself out to the shipping public as an independent ocean freight forwarder and actively solicit shipper clients in addition to Freiberg and its affiliates." No more is said.

¹⁷ Subject also, of course, to the regulations of the Commission prescribed for freight forwarders.

¹⁸ See *Dixie Forwarding Co., Inc.*, *Morse Shipping Co.* and *Del Mar Shipping Corporation*, *supra*, for similar action by the Commission.

¹⁹ This time is considered adequate in view of the fact that the Public Law 87-254 became effective September 19, 1961, and Respondent first considered the establishment of a Manhattan office in early 1966.

REMAND OF PROCEEDING TO EXAMINER

This proceeding is before us on exceptions of Hearing Counsel to the Initial Decision of Benjamin A. Theeman in which the Examiner granted applicant a license subject to the following conditions:

a. Respondent (applicant) immediately cease from billing carriers for freight forwarding services not rendered to carriers by Respondent and cease accepting payment from them for such unperformed services.

b. Respondent shall (1) forthwith certify to the Commission that he is attempting to and will establish his own freight forwarding office and perform his freight forwarder's services independently of the use of the office facilities or employees of Saleh Inc., or any other shipper; and (2) establish said independent office not later than September 1, 1966.

As we read their exceptions, Hearing Counsel except to granting applicant a license on the grounds that applicant is not ". . . qualified in terms of sections 1 and 44 of the Shipping Act, 1916, as amended". The order instituting this proceeding alleged but two grounds for denying applicant a license. They were:

. . . that Heskel Saleh doing business as Eastern Forwarding Service does not hold himself out to the shipping public to perform ocean freight forwarding services and that his close association with P. S. Saleh, Inc., his only shipper client, destroys his independence and thereby precludes him from licensing . . .

While the transcript of hearing in this proceeding demonstrates that Hearing Counsel's concern with applicant's technical competence and ability to engage in the business of forwarding is not unwarranted, a denial of applicant's license on this ground would, in our view, deprive the applicant of the notice of "the matters of fact and law asserted" to which he is entitled by section 5(a) of the Administrative Procedure Act. Therefore, in order that applicant may have an opportunity to demonstrate on the record that he possesses sufficient technical competence and ability to qualify as a licensed freight forwarder under sections 1 and 44 of the Act, we will amend the order instituting this proceeding to include the issue of applicant's technical competence, and remand the proceeding to the Examiner for a further hearing on this issue.

Therefore, it is ordered, That this proceeding be and hereby is remanded to the Examiner in order that he may determine whether applicant possesses sufficient technical competence and ability to qualify as a licensed independent ocean freight forwarder.

It is further ordered, That the first ordering paragraph of the Commission's order served March 29, 1966, in Docket No. 66-17 be deleted, and the following paragraph substituted therefor:

Therefore, it is ordered, pursuant to Sections 22 and 44 of the Shipping Act, 1916 (46 U.S.C. 831, 841b), That a proceeding is hereby instituted to determine whether applicant is or will be an independent

ocean freight forwarder as defined in the Act, and whether applicant possesses sufficient technical competence and ability to qualify as a licensed independent ocean freight forwarder, or otherwise qualifies for a license pursuant to Sections 1 and 44 of the Shipping Act, 1916 (46 U.S.C. 801, 841b).

SUPPLEMENTAL INITIAL DECISION OF BENJAMIN A. THEEMAN,
PRESIDING EXAMINER

On August 26, 1966, the Commission remanded this proceeding to the Examiner to determine whether applicant possesses sufficient technical competence and ability to qualify as a licensed independent ocean freight forwarder. This supplemental decision results.

On June 22, 1966, the Examiner in his Initial Decision granted applicant a license subject to the regulations of the Commission prescribed for freight forwarders and the two following conditions:

a. Respondent (applicant) immediately cease from billing carriers for freight forwarding services not rendered to carriers by Respondent and cease accepting payment from them for such unperformed services.

b. Respondent shall (1) forthwith certify to the Commission that he is attempting to and will establish his own freight forwarding office and perform his freight forwarder's service independently of the use of the office facilities or employees of Saleh Inc., or any other shipper; and (2) establish said independent office not later than September 1, 1966.

Hearing Counsel filed exceptions to the Initial Decision that gave rise to this remand. In the remand, the Commission specified that the exceptions brought into question applicant's "technical competence and ability"; pointed out that these grounds were not listed in the order initiating this proceeding; and stated that a denial of application on the ground of incompetence would deprive the applicant of notice to which he is entitled under Section 5(a) of the Administrative Procedure Act.¹

The Examiner duly set a hearing on remand for October 10, 1966 in New York City.

On October 7, 1966, Hearing Counsel submitted to the Examiner (by covering memorandum with copy to applicant) a memorandum dated October 6, 1966 signed by Robert G. Drew, Chief, Division of Freight Forwarders, Federal Maritime Commission. The memorandum set forth facts brought out by Mr. Drew's interview with the applicant concerning the latter's technical competence. Based thereon, Mr. Drew stated in his memorandum that applicant possessed the necessary technical competence.

Hearing Counsel, in their covering memorandum, requested that the Drew memorandum be received in evidence as an exhibit in lieu of the

¹ Now Sec. 554(b) of Title 5 U.S.C.

hearing; and stated that this action was not meant to imply that Hearing Counsel had in any way receded from the positions already taken in respect to the other issues in this proceeding.

In view of Hearing Counsel's action the October 10, 1966 hearing was cancelled.

By order dated October 11, 1966 applicant was given through October 24, 1966 to comment on the receipt in evidence of the Drew memorandum, or to request a further heading. Applicant made no response. Accordingly, the Drew memorandum is received in evidence as Exhibit No. 4.

The parties were given an opportunity to file briefs with regard to the issue raised by the remand. None did so.

The Drew memorandum details the examination made into applicant's technical competence and shows that he has been and is capable of carrying on the business of ocean freight forwarding for others.² Therefore, on the record as a whole it is concluded that applicant possesses sufficient technical competence and ability to qualify as a licensed independent ocean freight forwarder; subject to compliance with the various conditions of the Initial Decision set forth in the second paragraph of this Supplemental Decision.

Accordingly, the granting of the application subject to the conditions set forth in the Initial Decision of June 22, 1966 is confirmed.

BENJAMIN A. THEEMAN,
Presiding Examiner.

WASHINGTON, D.C.,
November 1, 1966.

DENIAL OF APPLICATION
AND
DISCONTINUANCE OF PROCEEDING

In its Report served February 15, 1967, the Commission postponed the effective date of the denial of the application herein, in order to permit applicant to establish his own office and perform forwarder services independently of Saleh, Inc., or any other shipper.

Applicant has informed the Commission that he has decided to discontinue his forwarding activities. Accordingly,

It is ordered, That the application is denied and this proceeding is discontinued.

By the Commission.

THOMAS LISI,
Secretary.

² See page 7 of the Initial Decision in this proceeding where the Examiner found "that the Respondent . . . 'has been carrying on the business of freight forwarding' in a circumscribed manner limited to a few of the services usually performed by freight forwarders."

FEDERAL MARITIME COMMISSION

DOCKET No. 66-15

IN THE MATTER OF AGREEMENT 9448—JOINT AGREEMENT BETWEEN
FIVE CONFERENCES IN THE NORTH ATLANTIC OUTBOUND/EUROPEAN
TRADE

INITIAL DECISION ADOPTED

February 17, 1967

Agreement No. 9448, as modified herein creates a cooperative working arrangement under which five member steamship conferences share office space and services and meet together to discuss mutual problems in specified areas. As modified, said agreement is approved conditioned upon the filing of evidence of acceptance by the member conferences.

Burton H. White and *Elliott B. Nixon* for respondents.
Donald J. Brunner, Samuel B. Nemirov, and Roger A. McShea III,
Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners*.)

This is an investigation on our own motion to determine *inter alia* whether a cooperative working arrangement (No. 9448) filed for approval under section 15 of the Shipping Act, 1916, should be approved, disapproved, or modified.

In his initial decision, Examiner E. Robert Seaver concluded that the subject agreement—even as amended in the course of the hearings—could not be approved under the criteria of section 15 and the cases thereunder because the agreement was too general and the Commission could not know with sufficient particularity the activities that might be engaged in under its terms. We agree.

The respondent conferences appealed from this initial decision and Hearing Counsel generally supported the position of the Examiner in his initial decision.¹

¹ Hearing Counsel take the position that the agreement which was the subject matter of the investigation may not be amended during the course of the hearings without our amending the order of investigation. We reject this view. It is entirely proper for an Examiner to encourage modifications which might reasonably lead to an agreement so long as such modifications are within the scope of the original inquiry.

We have considered the exceptions of respondents and find that they are essentially a reargument of issues which were fully briefed and treated by the Examiner in his initial decision. Upon careful examination of the record, and the briefs and argument of counsel, we conclude that the Examiner's disposition of these issues was well founded and proper.

We depart from the Examiner's ultimate conclusion only to the extent that on the basis of the record in this case, we have modified Agreement No. 9448 and, as modified, given it our approval conditioned upon respondents' acceptance within 60 days. These modifications specify the particular areas in which the member conferences are authorized to meet and discuss mutual problems. These correspond to the types of matters which the Conference Chairman testified are likely to be the subject of discussion.

We note that the agreement, as modified, does not authorize the parties to agree on anything (except housekeeping arrangements). Moreover, it limits discussions to four specified areas. If the parties desire to broaden the scope of the agreement, we have incorporated simple amendatory procedures which can initiate such action.

Accordingly, except as noted herein, we adopt the Examiner's initial decision as our own and make it a part hereof.

An appropriate Order will be entered.

By the Commission.

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER ²

Five steamship conferences,³ covering outbound trades between American North Atlantic ports on the one hand, and various ranges of ports in Western Europe, on the other, each of which operates under an individual agreement previously approved by the Commission under section 15 of the Shipping Act, 1916, filed Agreement No. 9448 for approval under section 15. The names of the conferences, set out in the margin, reflect the respective ranges of ports they serve. The agreement would establish a cooperative working arrangement between the five conferences. As originally submitted, the proposed agreement recited simply that the members would meet, consult, and

² See Commission report in Docket No. 66-15, served February 24, 1967.

³ North Atlantic Baltic Freight Conference (7670), North Atlantic Continental Freight Conference (9214), North Atlantic French Atlantic Freight Conference (7770), Chairman Barnett; North Atlantic Mediterranean Freight Conference (7980), Chairman MacNeil; North Atlantic United Kingdom Freight Conference (7100), Chairman Gage.

confer together regarding "common problems and issue joint reports and circulars relating to such problems."

The proposed agreement contained no limits on the scope of the matters that could be discussed, nor did it designate with particularity the matters that would be discussed. It contained no requirement for reporting activities under the agreement to the Commission. The Commission was concerned with the absence of any specific statement, in the agreement, of its objects and purposes so on March 24, 1966, it issued an order of investigation and hearing under the authority of sections 15 and 22 of the Shipping Act, to determine:

(1) whether the agreement should be approved, disapproved, or modified by the Commission, pursuant to section 15; (2) whether there are any unfiled agreements between the carriers which are being unlawfully implemented; and (3) whether the agreement submitted for approval is true and complete.

Section 15 requires every common carrier by water, or other person subject to the Act, to file with the Commission a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier or person which covers certain named anticompetitive activities or provides for an "exclusive, preferential, or cooperative working arrangement." The term "agreement" is defined so as to include understandings, conferences, and other arrangements.

The statute requires the Commission to disapprove, cancel or modify any agreement that it finds to be unjustly discriminatory or unfair as between the interests named in the statute, to operate to the detriment of the commerce of the United States, or to be contrary to the public interest or in violation of the Act. It requires the Commission to approve all such agreements that do not offend these statutory tests and exempts approved agreements from the antitrust laws.

A prehearing conference and hearing were held before the undersigned and, after an exchange of briefs, oral statements of counsel were heard by the Examiner, pursuant to the agreement of the parties. No shippers, carriers, or others who might have an interest in the agreement took part in the hearing or participated in any other way. Only the Chairmen of the respondent Conferences testified at the hearing. The facts, as disclosed by this testimony and the exhibits which were made part of the record, are as follows.

The five conferences share office space at No. 17 Battery Place, New York City. For some 60 years, a single chairman served all of these conferences and they were loosely connected together under F.M.C. Agreement No. 12, entered into in 1904 between the steamship lines that made up the membership of the respective conferences. That agreement was approved by a predecessor agency of the Commission

many years ago and had as its purpose "the consideration and adjustment of all non-competitive matters appertaining to their general interest, which shall simplify the conduct of the business, and the relations with shippers and their representatives, with connecting carriers, and with others." That agreement, unlike the one at hand, contemplated that the member lines would reach agreement with respect to those subjects, not merely discuss them.

In March, 1964, the respondent conferences decided that each should have greater autonomy and that the job of chairman of all of them was too burdensome for one man. A separate chairman was appointed for the North Atlantic Mediterranean Freight Conference and one for the North Atlantic United Kingdom Freight Conference. A single chairman continues to serve the other three. At the request of the members to Agreement No. 12, that agreement was cancelled by the Commission in August 1965. Agreement No. 9448 is sought as a partial substitute for Agreement No. 12.

Each of the respondent conferences has always held its own separate meetings and will continue to do so. Each adopts rates and publishes and files its own tariff. Each files its own separate minutes of its meetings with the Commission. Each has its own staff of employees, with minor exceptions such as a telephone operator who serves all of the respondents. The five member conferences serve different ranges of ports in Europe and the United Kingdom. For this reason, there is no direct competition between the members of one conference and the members of the other. A degree of competition between the groups exists insofar as a particular area in the hinterlands of Europe may be served by more than one range of European ports and, thus, is served by more than one of the conferences. Competition is also possible through transshipment, of course, but the extent of such competition was not shown. However, the discussions and activities under the agreement are not intended to have anything to do with this competition nor with competition from carriers outside the conferences. The matters to be discussed are those where the interests of the members coincide. The specific anticompetitive activities enumerated in section 15, including the discussion of rates, are explicitly excluded from the coverage of the agreement. The members do not seek authority to "agree" on anything—merely to confer. The agreement is considered by its proponents to be a cooperative working arrangement and since that is one of the types of agreement covered by section 15, they feel that some of the contemplated activities may require Commission approval in accordance with the statute. They seek exemption from the antitrust laws, through such approval, even though they feel that

there is some doubt as to the applicability of those laws to the contemplated activities.

The Conference Chairmen testified that, as far as they can visualize at present, the type of matters that will, or may, be brought up for discussion, are:

(1) Legal problems affecting all five conferences. Since all five employ the same law firm, they prefer to confer with their lawyers with respect to such common problems at one time, rather than at five separate consultations. (2) Problems arising from new or proposed legislation, regulations, court decisions. (3) Provisions of due bills, bills of lading, tariff rules, forwarder rules, container rules, shipping documents. (4) Innovations and changing conditions in ocean transport, such as containerization of cargo. (5) Issuance of joint reports and circulars and disseminating material such as speeches of Commission Members to the members of the proposed agreement.

It is conceded by the parties and found and concluded that the joint discussion of some of these matters falls within the coverage of section 15, and therefore within the jurisdiction of the Commission, because the agreement constitutes a cooperative working arrangement within the meaning of the statute. Hearing Counsel objected to approval of the agreement as initially submitted on the grounds that it was so general that the Commission would not know, with sufficient particularity, the activities that would be engaged in under the terms of the agreement. The Examiner shared this view. The difficulty of drafting an agreement that would specify every type of matter that might be discussed and every problem of mutual concern to the conferences that might be considered was recognized. The parties to the proceeding negotiated together to see if language could be found that would be agreeable to all concerned. The Examiner made an effort to assist in reaching this common ground because he believed then (and continues to believe) that the problem is not so much that the proposed activities must be prohibited, but merely that they are not described adequately. The objections to the form of the agreement resulted in revision in the agreement by the respondents so as to set forth those matters that will *not* be the subject of the interconference discussions. These exceptions cover every type of activity described in section 15 except "cooperative working agreements". The revision also attempts to describe a little more precisely the matters that will be discussed. However, the agreement is still "open-ended" because the members feel that they cannot presently anticipate and set forth every subject that may require discussion at some later date.

The revised form, as finally submitted for approval, is attached hereto as an appendix. This form is identified as Exhibit 10 in the record. Hearing Counsel continue to object to approval of the agree-

ment, in its revised form, on the ground that the agreement still does not define the conduct that will be permitted with as much particularity as is required by section 15.

DISCUSSIONS AND CONCLUSIONS

As originally submitted, the agreement contained no requirement for reporting activities undertaken thereunder to the Commission. Respondents were of the view that such reporting was not required, since no decisions or agreements on the subjects to be taken up were contemplated. As finally submitted, however, the agreement has been revised so as to require the keeping of minutes and submission of reports to the Commission of the meetings and the matters taken up and discussed. This provision satisfies the requirements of General Order 18 and would afford the necessary means for the Commission to maintain a continuing inspection of the activities under the agreement.

Section 15 of the Act forbids the approval of agreements between conferences unless each conference retains the right of independent action. This requirement is satisfied by the third paragraph of the agreement involved here, which provides such a reservation. Section 15 also requires that conferences adopt and maintain reasonable procedures for promptly and fairly dealing with shipper requests and complaints. The individual agreements and procedures of the member conferences establish the machinery to handle such requests and complaints. This will fulfill the statutory requirement since the dealings with shippers will be through individual conferences. Similarly, the question of self-policing, required by section 15, was not raised. This, too, can be left to the individual conferences. Since the parties to the agreement apparently will not make joint decisions, at present there is nothing to police.

It is seen, then, that the crux of the case involves the question whether the Commission can or should approve an agreement under section 15 that states, in essence, what activities the parties will not engage in but does not set out, in detail, the activities that *will* be engaged in. The question is probably not one of earthshaking importance to respondents, nor in the over-all scheme of things. However, no cases have been decided on this rather puzzling point, so considerable care has been taken not only to see that respondents' proposal receives full and fair consideration but also to see that the result of this proceeding will not establish an unworkable precedent.

Both Hearing Counsel and the Examiner held the tentative view, after the evidence was in, briefs were filed, and oral argument was

heard, that the revised agreement was about as specific as you could make it and still accomplish the desires of the respondents and that the agreement was probably approvable. However, when Hearing Counsel submitted their final position, they urged that the agreement cannot be approved. Respondents are adamant in the view that a simple agreement to discuss mutual problems has to be approved. After further deliberation, and in the light of the Commission policy reflected in the recent decision in Docket No. 66-27, *infra*, the Examiner shares the view of Hearing Counsel, although not entirely for the reason advanced by them.

Respondents argue that in Docket No. 883—*Unapproved Section 15 Agreements—West Coast South American Trade*, 7 F.M.C. 22 (1961), the Commission found that there was not a violation of section 15 where two conferences got together, with no approved section 15 agreement, and discussed mutual problems—even rates. Respondents state that they submitted this “extremely simple” agreement for approval out of an abundance of caution. They argue that agreements must be approved unless they are found to violate the specific standards of section 15. *Aktiebolaget Svenska Amerika L. v. Federal Maritime Commission*, 351 F.2d 756 (1965); *Alcoa S.S. Co. v. Cia. Anonima Venezolana*, 7 F.M.C. 345 (1962). Respondents also cite the rule that agreements should not be disapproved “on the bare possibility that they could violate the Act. At the least there ought to be substantial likelihood of such conduct.” *Agreement 8492—Alaskan Trade*, 7 F.M.C. 511 (1963). They allege that there has been no showing that the proposed activities under the agreement will be discriminatory, detrimental to commerce, or contrary to the public interest, and that it therefore must be approved. They point out that the Commission can disapprove the agreement at any time in the future if the activities under the agreement go beyond those that are authorized, citing the *Agreement 8492* decision, *supra*.

Respondents urge, further, that the anticompetitive aspects (if any) of their proposed agreement do not approach the extent of those practiced in trades where all of the carriers are members of one conference serving all of the ranges of ports, such as the conference that covers the entire trade between the Pacific Coast and Europe. They say, in effect, that if the Commission’s aim is to minimize the inroads on anti-trust principles, it should permit this kind of “discussion” agreement, rather than risk driving the conference carriers all into one super-conference in the North Atlantic.

Hearing Counsel argue that agreements approved under section 15 must be precise in the description of the authorized activities in order

that the Congressional policy underlying the statute may work. That policy contemplates continuous administrative supervision over those shipping activities exempted from the antitrust laws. They cite *Anglo-Canadian Shipping Co. v. United States*, 264 F.2d 405 (1959). They also cite cases holding that the Commission must have the means of obtaining information and data if it is to properly carry out this supervision; e.g. *Unapproved Section 15 Agreements, supra*; and *Mediterranean Pools Investigation*, 9 F.M.C. 264, Docket No. 1212, decided January 19, 1966. The latter point appears to be of somewhat limited relevance.

The thrust of Hearing Counsel's argument is that the standard for approval of section 15 agreements is "based on the contents of the agreement." *Joint Agreement Between Far East Conference and Pacific Westbound Conference*, 8 F.M.C. 553, 561 (1965). In that case, the Commission held that an agreement must be sufficiently precise to permit any interested party to ascertain how the agreement is to work by reading it, "without resorting to inquiries of the parties . . ." In short, Hearing Counsel say that the proposed agreement here is so general in its terms that *anything* could be taken up and considered by the conferences (except those things specifically excluded, of course). The testimony of the conference chairmen bear this out.

The arguments of respondents are, at first blush, most persuasive. Upon closer scrutiny, though, it is seen that their arguments support the legality under section 15 of the things their witnesses said respondents intended to do under the agreement. This is not the question. The question is the legality of the Commission giving section 15 approval (and antitrust immunity) to anything the respondents might decide to do under the broad wording of the agreement. The Commission simply does not know, at this time, the extent and identity of the areas of mutual concern these carriers might confer about. Yet the Commission is under a mandate, under section 15, to know what it is approving at the time it does so. It is not enough that the agreement can be thrown out later if the activities prove to be beyond the pale. For example, if the members discuss vessel utilization, free space, and the like, this could lead to the spacing of the sailings of all the carriers, either by design or simply because the minds of the members were similarly influenced by the discussions. If circulars are issued jointly, this in itself would tend to indicate that there was some agreement as to their content. In turn, the content of such circulars could influence or affect concerted action. These are examples of many subjects, presently unknown to the Commission, that might be taken up by the members with results that are either anticompetitive or which would have other

consequences, in transportation and commerce, of direct concern to the Commission and the public.

In addition to the reasons given by Hearing Counsel, approval of the agreement must be denied because it runs counter to the policy of the Commission evidenced in Docket No. 66-27—*The Persian Gulf Outward Freight Conference*, 10 F.M.C. 61, decided since this instant proceeding was submitted for decision. In that case, the Commission decided that a conference cannot establish joint freight rates on cargoes transported on foreign flag vessels that are lower than those applicable to cargoes carried on American flag ships under the terms of an approved section 15 agreement authorizing its members to establish joint rates, charges, and practices. That decision, and other court and Commission cases cited therein, evidence a growing policy to restrict activities under approved section 15 agreements closely to those specified in the agreement. This policy excludes many practices that are claimed to be “interstitial”, or included in the “cover of authority” of the underlying section 15 agreement.

This line of cases provides a strong analogy to the present situation, for if conferences are to be held strictly to the activities explicitly authorized in their agreements, then great care must be taken when the agreements are approved to see that (1) the Commission knows precisely what it is approving, and (2) the agreements set forth clearly, and in sufficient detail to apprise the public, just what activities will be undertaken. It is manifest that this requirement of clarity in the agreement will inure to the benefit of the conference concerned.

Finally, the respondents correctly state that section 15 requires approval of proposed agreements unless they offend the statutory tests. The agreement proposed by respondents fails to comply with these standards, however, on several counts. It would be contrary to the public interest to approve an agreement whose coverage is so vague that the public cannot ascertain the coverage by reading the agreement. The approval of such an agreement would deprive the public of the protection, afforded by statute, of the Commission's surveillance over conference activities. The blank check that would be afforded by the approval of this agreement would simply fail to protect the public interest and the flow of commerce in the manner contemplated by Congress in the enactment of section 15.

Furthermore, the proposed agreement is not the “true and complete” agreement of the parties thereto. The conference witnesses admitted that even they do not know what subjects they might get into as time goes on. It is patently incomplete because it does not adequately describe the activities that will be pursued under its terms. Written,

as well as oral, agreements must be "complete" as well as "true", as evidenced by the Commission's Order of Investigation in this very proceeding. For this reason and those previously discussed, the agreement cannot be approved.

If, as a result of this decision, the respondent conferences decide that they will seek to join together in a "super-conference", the issues incident to the application for approval of such a proposal would be decided at that time on their own merits. Those issues are not present here.

There is no contention that there are any unfiled agreements between the respondents that are being unlawfully implemented and the record herein would not support a finding that such agreements exist.

Other contentions of the parties are either irrelevant, in view of the decision herein, or they are not supported by substantial, reliable, or probative evidence.

ULTIMATE CONCLUSION

1. Agreement No. 9448 is hereby disapproved pursuant to section 15, Shipping Act, 1916, for the reasons set forth in this decision.
2. Agreement No. 9448 is not the true and complete agreement among respondents.
3. There are no unfiled agreements between the carriers which are being unlawfully implemented.

An appropriate order will be entered.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-15

IN THE MATTER OF AGREEMENT 9448—JOINT AGREEMENT BETWEEN
FIVE CONFERENCES IN THE NORTH ATLANTIC OUTBOUND/EUROPEAN
TRADE

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether Agreement No. 9448 should be approved pursuant to section 15 of the Shipping Act, 1916, and the Commission having this date made and entered its Report adopting the Examiner's Initial Decision (except as to disapproval of the subject agreement), which Report and Initial Decision are made a part hereof by reference.

Therefore it is ordered, That Agreement No. 9448 be and the same hereby is approved pursuant to section 15 of the Shipping Act, 1916, on the condition that it be modified by substituting the language contained in Appendix B hereto.

It is further ordered, That the approval herein ordered with respect to Agreement No. 9448 shall become effective at such time as the Federal Maritime Commission receives written notice that the parties have agreed to the foregoing modification except that such approval shall become null and void unless the agreement so modified is filed with the Commission not later than sixty (60) days from the date of service of this order.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

F.M.C. DOCKET No. 66-15

APPENDIX TO INITIAL DECISION

AGREEMENT No. F.M.C. 9448

The undersigned Conferences, by their respective Chairmen thereunto duly authorized, hereby enter into a cooperative working agreement in consideration of the mutual benefits resulting therefrom. It is the intention of the parties, through their respective Chairmen or other representatives, to confer and meet with one another in respect of common problems where their interests coincide and issue joint reports and circulars relating to such problems. Since it is not possible to foresee in detail all the subjects that will be discussed under the terms of this Agreement, they cannot be enumerated here.

Nothing herein shall authorize or permit the parties hereto to directly or indirectly consult, meet or confer with one another with respect to fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; or limiting or regulating in any way the volume or character of freight or passenger traffic to be carried.

Each Conference shall always retain the right of independent action, and any action taken by a member of this Agreement on matters discussed or conferred upon shall be taken solely by the individual Conferences and reported upon by them in accordance with the terms of their approved agreements.

The parties hereto shall within 30 days file with the Federal Maritime Commission a report of each meeting held pursuant to this Agreement, describing all matters that were discussed or taken up as to which one of the Chairmen shall certify as to its accuracy and completeness. Copies of all reports or circulars, in whatever form, issued under this Agreement shall be retained by the parties for at least two years.

This Agreement shall amend and supersede the Agreement between the undersigned Conferences filed with the Federal Maritime Commission on or about April 15, 1965. This Agreement shall not become effective until it is approved by the Federal Maritime Commission in accordance with section 15 of the Shipping Act, 1916.

Dated: NEW YORK, N.Y., *July 18, 1966.*

APPENDIX B

AGREEMENT No. F.M.C. 9448

The undersigned Conferences, by their respective Chairmen thereunto duly authorized, hereby enter into a cooperative working agreement in consideration of the mutual benefits resulting therefrom and agree as follows:

1. The member conferences are authorized to participate jointly in the lease of office space and in connection therewith to utilize common telephone, mailroom, receptionist, duplicating, photostat, storage, library and other similar routine office services which can better be accomplished jointly and shall apportion the expenses for the operation of such joint services and facilities as may be mutually agreed upon.

2. The member conferences through their respective Chairmen or other duly designated representatives are authorized to confer and meet with one another with respect to the following common problems where their interests coincide and issue joint reports and circulars relating to such problems.

(a) Common legal problems;

(b) Problems arising from proposed legislation and Court decisions;

(c) Standardization of terminology and provisions in bills of lading and other documents commonly used in connection with ocean shipping;

(d) Technological developments and changes affecting ocean transportation such as containerization.

3. This agreement may be amended upon a majority vote of its member conferences provided, however, that no amendment shall become effective unless and until it has been approved by the Federal Maritime Commission pursuant to section 15 of the Shipping Act, 1916.

4. Nothing herein shall authorize or permit the parties hereto to directly or indirectly consult, meet or confer with one another with respect to fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages, controlling regulating, preventing or destroying competition; pooling or apportioning earnings, losses or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; or limiting or regulating any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement, except as authorized in Paragraphs 1 and 2 of this Agreement.

5. Each conference shall always retain the right of independent action, and any action taken by a member of this Agreement on matters discussed or conferred upon shall be taken solely by the individual conferences and reported upon by them in accordance with the terms of their approved agreements.

6. The parties hereto shall within 30 days after each meeting file with the Federal Maritime Commission a report of such meeting held pursuant to this Agreement, describing all matters that were discussed or taken up as to which one of the Chairmen shall certify as to its accuracy and completeness. Copies of all reports or circulars, in whatever form, issued under this Agreement shall be retained by the parties for at least two years and copies thereof shall be filed with the Commission in the same manner as reports required by this paragraph.

This Agreement shall amend and supersede the Agreement between the undersigned Conferences filed with the Federal Maritime Commission on or about April 5, 1965.

DOCKET No. 66-15

ON PETITION FOR RECONSIDERATION

In our Report and Order in this docket served on February 24, 1967, we approved Agreement 9448 on the condition that it be modified as set forth in Appendix B to the Report.

Respondents have filed an amended agreement which differs from that specified in our Order in two respects:

1. It does not contain paragraph 1 which relates to joint participation in office services;
2. It does not contain the last two lines of paragraph 6 which relate to the filing of reports and circulars with the Commission.

In an accompanying letter respondents' attorney argued that agreements relating to joint office sharing arrangements and the pooling of secretarial services have not, in the past, been considered as subject to the requirements of section 15, even though they might literally be deemed "cooperative working arrangements." See: *Volkswagenwerk, A.G. v. Marine Terminals Corporation, et al.*, 9 F.M.C. 77, 82 (1965). Counsel also contends that the requirement of filing circulars and reports goes beyond the terms of General Order 18. We have treated this letter and the amended agreement as a petition for reconsideration, and so advised counsel for the respective parties. Hearing Counsel, in their reply, state that they have no objection to the proposed changes.

Upon consideration of respondents' petition for reconsideration and Hearing Counsel's reply thereto, we conclude that the points raised in said petition are well founded.

Accordingly, **IT IS ORDERED:**

1. That respondents' petition be and the same hereby is granted; and
2. That the amended Agreement No. F.M.C. 9448 (a copy of which is annexed hereto and made a part hereof by reference) be and the same hereby is approved pursuant to our authority under section 15 of the Shipping Act, 1916.

By the Commission.

(Signed) **THOMAS LISI,**
Secretary.

AGREEMENT No. F.M.C. 9448

The undersigned Conferences, by their respective Chairmen thereunto duly authorized, hereby enter into a cooperative working agree-

ment in consideration of the mutual benefits resulting therefrom and agree as follows:

1. The member Conferences through their respective Chairmen or other duly designated representatives are authorized to confer and meet with one another with respect to the following common problems where their interests coincide and issue joint reports and circulars relating to such problems:

- (a) Common legal problems;
- (b) Problems arising from proposed legislation and Court decisions;
- (c) Standardization of terminology and provisions in bills of lading and other documents commonly used in connection with ocean shipping;
- (d) Technological developments and changes affecting ocean transportation such as containerization.

2. This agreement may be amended upon a majority vote of its member Conferences provided, however, that no amendment shall become effective unless and until it has been approved by the Federal Maritime Commission pursuant to section 15 of the Shipping Act, 1916.

3. Nothing herein shall authorize or permit the parties hereto to directly or indirectly consult, meet or confer with one another with respect to fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; pooling or apportioning earnings, losses or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; or limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement, except as authorized in Paragraph 1 of this Agreement.

4. Each Conference shall always retain the right of independent action, and any action taken by a member of this Agreement on matters discussed or conferred upon shall be taken solely by the individual Conferences and reported upon by them in accordance with the terms of their approved agreements.

5. The parties hereto shall within 30 days after each meeting file with the Federal Maritime Commission a report of such meeting held pursuant to this Agreement, describing all matters that were discussed or taken up as to which one of the Chairmen shall certify as to its accuracy and completeness. Copies of all reports or circulars, in whatever form, issued under this Agreement shall be retained by the parties for at least 2 years.

This Agreement shall amend and supersede the Agreement between the undersigned Conferences filed with the Federal Maritime Commission on or about April 5, 1965. ●

FEDERAL MARITIME COMMISSION

DOCKET No. 66-33

AGREEMENT No. 8005-4: MODIFICATION OF NEW YORK TERMINAL
CONFERENCE AGREEMENT

ADOPTION OF INITIAL DECISION AND ORDER OF APPROVAL

Adopted February 28, 1967

BY THE COMMISSION (John Harlee, *Chairman*; Ashton C. Barrett,
Vice Chairman; James V. Day, George H. Hearn, *Commis-*
sioners):

This proceeding is before us for review on our own motion. No excep-
tions were filed to the Initial Decision and we decided to review that
decision, because we disagree with the Examiner's ultimate conclusions
numbered 2 and 3:

In his decision, the Examiner quite correctly states that the rules
and regulations by which the authority to charge demurrage on export
cargo is to be implemented are not an issue in this proceeding. There-
fore, we would substitute the following for said ultimate conclusions:

2. The said Agreement will not make or give any undue or unreasonable
preference or advantage to any particular person, locality, or description of
traffic, or subject any of these to any undue or unreasonable prejudice or disad-
vantage in violation of section 16 First of the Act.

3. Neither will the said Agreement constitute an unjust or unreasonable prac-
tice as contemplated by section 17 of the Act.

In all other respects we find the Examiner's decision, which is at-
tached hereto and made a part hereof, well founded and proper and,
with the deletion of the words "when implemented" from ultimate
conclusions numbered 2 and 3, we hereby adopt it as our own.
Therefore,

It is ordered, That Agreement No. 8005-4, as it appears in Appendix
A, is hereby approved, and this proceeding is hereby discontinued.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

DOCKET No. 66-33

AGREEMENT No. 8005-4; MODIFICATION OF NEW YORK TERMINAL
CONFERENCE AGREEMENT

Agreement No. 8005-4, which modifies the New York Terminal Conference Agreement so as to permit the charging of demurrage and the establishment of free time on export cargoes, will not violate sections 15, 16, or 17 of the Shipping Act, 1916, and it is approved.

Joseph A. Byrne for New York Terminal Conference, respondent.
James M. Henderson and *Douglas W. Binns* for Port of New York Authority, petitioner.

Elkan Turk, Jr., for New York Committee of Far East Lines, petitioner.

Philip G. Kraemer for Maryland Port Authority.

Blair P. Wakefield for Virginia State Port Authority.

Roger A. McShea, III, appeared as Hearing Counsel; *Donald J. Brunner*, Chief, Office of Hearing Counsel, F.M.C., on the brief.

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER¹

The purpose of this investigation is to determine whether Agreement No. 8005-4 between the members of the New York Terminal Conference, which has been submitted to the Commission for approval under section 15 of the Shipping Act, 1916 (the Act) would violate the provisions of sections 15, 16, or 17 of the Act and whether the agreement should be approved under section 15. The Commission has jurisdiction to conduct the investigation under sections 15 and 22 of the Act.

The New York Terminal Conference operates pursuant to Agreement No. 8005, as amended, which authorizes its members to establish and maintain joint rates, rules, and regulations applicable to truck loading and unloading at piers in New York harbor and vicinity and to fix free-time and demurrage rates and practices on import cargoes in trades not otherwise covered by an approved section 15 carrier agreement.² The Conference consists of marine terminal operators, contract stevedores, and common carriers by water who furnish marine terminal facilities and services in the Port of New York and vicinity.

As originally submitted for approval, Agreement No. 8005-4 would have modified the basic agreement by providing for the following:

1. Clarification of the Conference's ratemaking authority for loading and unloading lighters;
2. Ratemaking authority covering free time and demurrage on export cargo;

¹ See Commission Order in Docket 66-33, *supra*, initial decision adopted Feb. 28, 1967.

² The Conference has not yet established free-time rules nor fixed demurrage rates because, in New York, this has been done by the carriers. It is anticipated that as to the export cargoes the terminals will take this action, rather than the carriers.

3. A change in language with respect to free time and demurrage on import cargo;
4. Ratemaking authority for sorting import cargo; and
5. Preservation of the right of any member to charge rates different than those in the Conference tariffs (except the truck loading and unloading tariff).

Protests against approval of the proposed agreement were filed by the Port of New York Authority and by the New York Committee of Inward Far East Lines.³ The Authority and the Committee were named as petitioners in the order of investigation in accordance with Rule 3(a) of the Commission's Rules of Practice and Procedure. The Maryland Port Authority and the Virginia State Port Authority intervened in the proceeding. Their interest in the proceeding was largely based on a desire to be sure that the approval of the proposed agreement would not place the Port of New York in a competitive advantage.

The subject matter involved in the first modification mentioned above was considered by the Commission in Docket No. 1153—*Truck and Lighter Loading and Unloading Practices in New York Harbor*, decision served May 16, 1966. The Conference therefore dropped that proposal from Agreement No. 8005-4 in the course of this proceeding. In addition, the Conference abandoned its request for approval of the fourth and fifth modifications set out above because these modifications met with considerable objection from other parties in the proceeding and apparently were not of as great importance to the Conference as the remaining two items.

This left as practically the sole issue in the proceeding the question whether the modification which would grant to the Conference rule- and rate-making authority over free time and demurrage on export cargo is lawful under the Act and whether it should be approved by the Commission under section 15. The remaining modification, being the third one set out above, is incidental to the requested authority to establish joint tariff provisions covering free time and demurrage on export cargo.

So many of the issues having been eliminated by the respondents, counsel for the petitioners and the interveners expressed the view at a prehearing conference that if the Conference could amend the remaining two proposals to clarify certain provisions the protests might be withdrawn. Hearing Counsel also expressed the view that the remaining issues might be disposed of amicably but he desired to complete a canvass of shippers and associations of shippers in the New

³ The Committee is a group of carriers serving various inbound trades from the Orient naming free time and demurrage on inbound cargo at New York harbor operating under the authority of FMC Agreement No. 6015.

York area to be sure that the ratemaking authority covering free time and demurrage on exports would not raise protests among and problems for the shippers. Counsel for all of the parties felt that it would be possible and desirable to avoid an evidentiary hearing and the Examiner agreed. It was therefore decided that efforts to dispose of the proceeding in this way would be pursued and that a second prehearing conference would be held.

At the second prehearing conference Hearing Counsel reported that the associations of shippers and the individual shippers with whom he had communicated had not raised protests to the proposed modification, as amended in the course of the proceeding, and that Hearing Counsel did not object to approval of the proposed modifications. In the meantime, counsel for the parties had agreed upon revisions of the language of the proposed modifications and counsel for all of the remaining parties withdrew their objection to approval of the agreement.⁴ It remained incumbent upon the Examiner to review the proposed modification, as amended, and make recommendations to the Commission regarding its approvability. Hearing Counsel suggested that in view of the circumstances the most expeditious way of accomplishing this would be through the issuance of an initial decision after briefs were filed by the parties expressing their position and their views. The other parties and the Examiners agreed to this course.

DISCUSSION AND CONCLUSIONS

The facts incident to this initial decision are not extensive. They were brought out by counsel for the parties in the course of the prehearing conferences and in their memoranda submitted to the Examiner. No issue has been raised as to these facts by any of the parties. The statutory requirements and prohibitions involved in this proceeding are as follows:

1. Section 15 of the Act requires that the Commission disapprove, cancel, or modify the proposed modifications if they are found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act. Agreement No. 8005-4 will not violate these standards.

2. Section 16 First of the Act makes it unlawful for any common carrier by water, or other person subject to the Act, either alone or in conjunction with any other person to make or give any undue or unreasonable preference or advantage to any particular person, local-

⁴The modifications, in their final form, are set out in Appendix A, attached.

ity, or description of traffic, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage. The Agreement will not bring about such a preference, advantage, prejudice or disadvantage.

3. Section 17 requires that every such carrier and every other person subject to the Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property and authorizes the Commission to determine, prescribe, and order enforced a just and reasonable regulation or practice whenever it finds that any such regulation or practice adopted by a carrier or other person subject to the Act is unjust or unreasonable. The modifications under consideration will not, ipso facto, constitute unreasonable regulations or practices.

It has long been an approved practice for marine terminals or ocean carriers to assess a charge for demurrage against a shipper who leaves his cargo at the terminal for a period beyond the "free time" established by the terminal.⁵ In New York Harbor, such charges are assessed by the carriers in connection with the transportation of import cargo. However, no such charges are assessed in New York by anyone in connection with the storage at the terminal of export cargo. However, such cargoes are frequently allowed to remain on the piers for extended periods of time, for the benefit of the shipper, prior to export shipment. This occurs, for example, when a shipper desires to assemble several parcels at the pier for shipment under a single bill of lading. This is referred to as the "hold-on-dock" practice.

It is apparent that these practices inevitably bring about a disparate treatment as between import and export cargo and that it very likely could lead to discriminatory treatment as to different shippers of export cargo. That is, in the absence of an expressed period of free time in the tariffs of the terminal conference or the carriers, the cargo of one shipper will remain in the terminal for a greater length of time, without charge, than the cargo of other shippers. This is a valuable right to the shipper, of course, and results in an expense to the terminal operator.

Piers and terminals are constructed for use as the transient repository of goods rather than a longtime storage shed. The valuable working space on the piers is restricted if the owners of cargo, either inbound or outbound, are allowed to leave the cargo on the pier indefinitely. In addition to its paying the terminal operator for a valu-

⁵ See *Storage of Import Property*, 1 U.S.M.C. 676 (Docket No. 221; 1937); *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89 (Docket No. 659; 1948); *Practices at San Francisco Terminals*, 2 U.S.M.C. 588 (Docket No. 555; 1941); and General Order 8, Part I, 46 C.F.R. 526.1.

able service, demurrage is permitted, indeed required, by the Commission in order to discourage the owners from leaving their cargoes on the pier for excessive periods of time. Export cargo congests the piers just as much as import and there is an equal need to discourage shippers leaving their export cargo on the piers for extended periods of time.

The Port of New York is unique in that the carrier, rather than the terminal operator, designates the free time and assesses the demurrage charges on import cargo. New York is also the only major port, except Philadelphia, where there is no free-time rule and no charge for demurrage or storage on export cargoes. Official notice is taken of the facts stated in this paragraph, which are based, in part, on a sampling of the tariffs on file with the Commission.

It cannot be concluded that the proposed authority to charge demurrage on export cargo would result in any undue or unreasonable preference, advantage, prejudice, or disadvantage in violation of section 16 First. On the contrary, it is designed to eliminate such results and can be expected to do so if properly administered. Similarly, the regulations and practices contemplated by the proposed modifications are more just and reasonable, within the meaning of section 17, than the present system which allows unlimited free time to certain export shippers. The detailed method of implementing this authority is not in issue in this proceeding, of course. These methods, including the extent of free time and the level of demurrage that will be set forth in respondents' tariffs on file with the Commission, will be subject to continuing Commission surveillance under the provisions of the Act. They will have to meet the standards and will be subject continuously to the requirements and prohibitions of sections 15, 16, and 17.

Neither the petitioners, the interveners nor Hearing Counsel suggest that the proposed modifications would be unjustly discriminatory or unfair as between the interests named in section 15 or that they would operate to the detriment of our foreign commerce or be contrary to the public interest or in violation of the Act. The Examiner knows of no reason to suspect that the modifications would violate these standards of section 15 of the Act. As stated earlier, the practices contemplated in the proposed modifications will be more likely to eliminate discrimination.

The Maryland Port Authority stated on the record that it had no objection to approval of the Agreement. However, in the memorandum which it filed with the Examiner the Authority advanced certain observations that deserve comment here even though, as the Authority states, "* * * it can be argued that this goes far beyond the scope of this proceeding, * * *."

The Authority states, in effect, that rules of general applicability are needed in this area of demurrage on export cargoes. It points out that, unlike the importer, the exporter does not always have control over the length of time his cargo reposes on the pier before it is loaded on the vessel and suggests that perhaps the ship should pay the bill if it causes the delay. Clarification of the status of terminal operators generally, in relation to ship operators, is needed, the Authority suggests, in order to prevent competitive advantages to particular carriers who allow or require the shipper to bring his cargo to the pier far in advance of the actual sailing. It also suggests that the fact that carriers operate many of the terminals aggravates the competitive situation arising out of free storage of export cargo. The Authority suggests that this raises a need for rules requiring separate tariffs covering terminal charges.

These are real problems that deserve careful attention. An evidentiary rulemaking proceeding in this area might be advisable, as suggested, when the Commission's schedule and its facilities permit.⁶ In the meantime, however, these considerations do not require or even permit the disapproval of Agreement No. 8005-4. It must be assumed that by ordering this investigation the Commission decided that, at least for the present, the proposed agreement involved here is to be considered, ad hoc, on its own merits, rather than awaiting the adoption of rules of general applicability in this area. As stated earlier, there has been no showing nor even a suggestion that 8005-4 will violate the standards of section 15.

It is evident, however, that until general rules are established considerable caution will have to be exercised by respondent in adopting fair standards for assessing demurrage charges and establishing free time on export cargo, within the framework of the guidelines announced in the cases cited in footnote 5, above, and General Order 8, Part I. The Commission staff will use diligence, of course, in reviewing the tariffs to see that the particular standards adopted by respondents are fair and that they are clearly set forth in respondents' tariffs. Their review will also insure that the general guidelines heretofore adopted by the Commission and its predecessors are complied with. In this way, the dangers feared by the Maryland Port Authority will be minimized.

Modification No. 3, described above, merely makes it clear that the Conference's tariff filing authority will not conflict with such authority possessed by the steamship conferences. It is incidental to the principal modification which grants the authority to adopt tariff charges and rules incident to demurrage and free time on export cargoes. It has

⁶ Docket No. 965 is a nonevidentiary rulemaking proceeding in this general area. When completed, that proceeding may help settle some of the questions raised by the Maryland Port Authority even though it is concerned directly with only the Pacific coast ports.

not been questioned by the parties and no reason is perceived as to why it should be disapproved. The portion enclosed in brackets (see Appendix A) has been added by the Examiner in order that the provision will accurately express the intention of the parties. Also, without the change no demurrage could be charged by the terminals if a carrier had on file a tariff of rates that did not include demurrage. This would result in unjust discrimination between shippers, and was simply not intended by the parties.

ULTIMATE CONCLUSION

1. Agreement No. 8005-4, as set forth in Appendix A, will not violate the standards of section 15 of the Act.
2. The said Agreement, when implemented, will not make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic, or subject any of these to any undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Act.
3. Neither will the said Agreement, when implemented, constitute an unjust or unreasonable practice as contemplated by section 17 of the Act.
4. An appropriate order will be entered approving Agreement No. 8005-4 and discontinuing this proceeding.

E. ROBERT SEAVER,
Presiding Examiner.

APPENDIX A

REVISED COPY OF FEDERAL MARITIME COMMISSION AGREEMENT No. 8005-4

Agreement entered into at the City of New York, New York, on the 31st day of January, 1964, and modified on the 30th day of June, 1966, by and between the undersigned, parties to Federal Maritime Commission Agreement No. 8005.

WITNESSETH :

Whereas, at meetings duly held on the 31st day of January, 1964 and the 30th day of June, 1966, at the office of the New York Terminal Conference in the City of New York, the parties hereto considered and voted in favor of certain amendments to said Agreement No. 8005, as hereinafter set forth.

Now, THEREFORE, the parties do hereby mutually agree as follows :

First: Clause One, as amended, is hereby further amended to read as follows :

1. The parties shall establish, publish and maintain a *tariff and/or** tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to the services of

Loading and unloading of waterborne freight on to and from trucks, lighters and barges :

Storage of waterborne import *and export* freight *on pier facilities, including the flaying of free time and demurrage thereon, provided, however, that no tariff or tariffs so issued shall include trades covered by tariffs now or hereafter published and filed by, or pursuant to agreements among, common carriers by water, [insofar as the latter tariffs cover free time and demurrage;]**

Second: Except to the extent as amended hereby, said Agreement No. 8005 shall remain in full force and effect as heretofore approved pursuant to Section 15 of the Shipping Act, 1916.

Third: This Agreement shall become effective at such time as it shall be approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 1916.

Filed on behalf of the following parties comprising the membership of the New York Terminal Conference :

American Export-Isbrandtsen Lines, Inc.
 American Stevedores, Inc.
 Bay Ridge Operating Co., Inc.
 Chilean Line Inc.
 Grace Line Inc.
 International Terminal Operating Co., Inc.
 Maher Stevedoring Co., Inc.
 Marra Bros., Inc.
 Maude/James, Inc.
 John W. McGrath Corporation.
 Nacirema Operating Co., Inc.
 Northeast Marine Terminal Co., Inc.
 Norwegian America Line.
 Pioneer Terminal Corporation.
 Pittston Stevedoring Corporation.
 Reliable Marine Service Co., Inc.
 Universal Terminal & Stevedoring Corporation.

*NOTE.—*Underlined* portions designate amended provisions of Agreement 8005.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-52

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE AND TRANS-PACIFIC
FREIGHT CONFERENCE OF JAPAN—MODIFICATION OF DUAL RATE
CONTRACT

Decided March 23, 1967

Permission is granted Conferences to (a) modify the prompt release clause;
(b) add a false declaration clause; and (c) delete certain references to the
Federal Maritime Commission, in their approved dual rate contract form.

Petition to make further modifications, deletions and additions denied.

Ellean Turk, Jr. for respondents.

Donald J. Brunner, Howard A. Levy, and E. Duncan Hamner, Jr.,
Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harlee, *Chairman*; Ashton C. Barrett,
Vice Chairman; James V. Day and George H. Hearn,
Commissioners.)

This proceeding arises out of a petition filed by the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan (Conferences), pursuant to section 14b of the Shipping Act, 1916, requesting permission to modify certain provisions of their Commission-approved dual rate contracts. We instituted this investigation to determine (1) whether departures from the contract language approved for use by respondent Conferences in *Exclusive Patronage Contracts*, 8 F.M.C. 337 (1964), are necessitated by conditions in the trade and, if so, (2) whether the changes proposed meet the standards of section 14b of the act and can be permitted pursuant to that section.

In his Initial Decision, Examiner Herbert K. Greer approved certain changes to respondents' approved contract form, namely (1) use of an "all-affiliates" clause, (2) modification of the present prompt release

clause, and (3) addition of a false declaration clause. All other requested changes, modifications and deletions were denied by the Examiner. This proceeding is now before us on exceptions to the Initial Decision.

Respondent Conferences are engaged in the inbound trade to the United States from the Far East, principally from Japan.

On October 30, 1964, the Commission issued its Report and Order in Dockets No. 1078 and 1080—*Exclusive Patronage Contracts, supra*—granting permission to the respondent Conferences to institute a dual rate contract system in their respective trades and approving for use by them a form of dual rate contract. Since the form of contract, which was approved, was different from that which had been submitted by them, the Conferences submitted the approved form to committees for study. After several months of study, these committees concluded that the dual rate contract form approved by the Commission would not be adaptable to conditions existing in the trade and recommended that these contract forms not be utilized. On the basis of these findings and recommendations, respondents' approved contract form has never been put into effect. The Conferences now seek permission allowing them to make the modifications to the approved form which they deem necessary to create contract systems which in their view would be effective in their trades. These proposed changes will now be considered.

A. *The Chartered-Vessel Exclusion Clause*

Respondents propose by their present application to delete that provision in their approved contract form which excludes from contract coverage:

* * * shipments on vessels owned by the Merchant or chartered solely by the Merchant where the term of the charter is for six months or longer, and the chartered vessels are used exclusively for the carriage of the Merchant's commodities.

They contend that there is no need for a charter-exclusion clause in their dual rate contracts in view of the fact that there are no merchant shippers in Japan who own vessels capable of use in trans-Pacific voyages to the United States and no movement of bulk cargo in the trades. They take the position that the principal reason the Commission initially adopted a charter-exclusion clause in *The Dual Rate Cases*, 8 F.M.C. 16, 42 (1964), was to protect the "vested interests" of American shippers who had invested in the construction of vessels or long term charters for the carriage of their products. They maintain that, since there are "no such vested interests in trades here involved to be protected," as there were in *The Dual Rate Cases, supra*, "the

economic need for charters of six months' or longer duration is absent."

Respondents explain that, although there is no evidence that any merchants trading from Japan to the United States presently own vessels or are chartering vessels, they fear the inclusion of the charter exclusion in their contracts will be to suggest to the signatory merchants ways to avoid their dual rate contracts. They contend:

There are a substantial number of vessels arriving in Japan to complete chartered voyages for bulk cargo, and which seek employment from Japan to another point where further tramp cargoes are available. At present, a number of these vessels obtain one-way trip charters to the United States with iron and steel items as their nucleus cargo. There is no need now for merchants to commit themselves any further than to a one-way trip charter. However, the inclusion in the JAGFC and TPFJC contracts of an exception for cargoes moving on vessels chartered for six months or more would be an invitation to merchants to do what they are not now doing. Although a merchant might lose some flexibility, he could always find other employment for the chartered vessel when a voyage in these trades is not needed.

On the basis of the foregoing, the Conferences conclude that the putting into effect of the contract system will create a "motive for large merchants, whose volume of activities makes it economically feasible for them to indulge in chartering, to seek to obtain an advantage over their less fortunate competitors." In this regard, respondents also allege that Conference representatives have been advised by small shippers that they consider the chartering privilege discriminatory and object to its inclusion in their contracts.

In his Initial Decision, the Examiner found that the respondents had failed to justify the deletion of the charter-exclusion clause prescribed by the Commission in *The Dual Rate Cases, supra*. Respondents except to the Examiner's rulings and reargue the same contentions made before the Examiner. We agree with the Examiner's disposition of respondents' contentions. Indeed, we find that the arguments advanced by the Conferences are either grounded on completely erroneous assumptions or totally unsupported on the basis of the record before us.

Although the charter-exclusion clause was not created by statute, but rather arose from an exercise of our authority under section 14b(9) of the Shipping Act, 1916,¹ the legislative history of section 14b makes it abundantly clear that a limited exemption for merchant-owned or chartered vessels was one of the matters which Congress intended that the Commission should deal with in its approval of dual rate systems. In its report on the bill which ultimately became Public Law 87-346, the Senate Committee on Commerce stated:

¹Section 14b(9) gives us authority to require or permit such other provisions in dual rate contracts as are not inconsistent with section 14b.

A second matter which the Commission should resolve by rule or regulation involves the extent to which, if at all, dual rate contracts should exclude full cargoes which move in shippers' private or chartered vessels. Obviously, unless this question is carefully considered, it is quite possible that one of two things might result: First, large shippers would be able to gain substantial competitive advantage over their smaller competitors; or second, contract shippers could not make fair and legitimate use under certain circumstances of their own or chartered vessels. S. Rept. No. 860, 87th Cong., 1st Sess. (1961), p. 15.

The charter-exclusion clause as finally formulated by the Commission strikes what we believe to be a fair balance between carrier and merchant interests and to be in the best interest of the parties concerned, the public, and the commerce of the United States. *Pacific Westbound Conference—Amendment to Dual Rate Contract*, 9 F.M.C. 403, 409 (1966).

Although the present clause did permit shippers, who already owned or chartered vessels to continue doing so, its "principal justification" was not, as respondents suggest, to protect the "vested interests" of a few American companies who had invested in the construction of their own vessels or had committed themselves to long-term charters of vessels for the carriage of their products. Rather it was the Commission's recognition of the overall philosophy of the Shipping Act, 1916, which prompted it to include into dual rate contracts a clause which accords to merchants the right to engage in bona fide proprietary carriage under reasonable conditions. The philosophy of permitting dual rate contracts under the statute was not to create a complete monopoly for conferences, but rather to assure them a "nucleus" of cargo. Or, as we elaborated in *The Dual Rate Cases, supra*, at page 43:

An important purpose of the Shipping Act is to facilitate the flow of commerce, and while it recognizes that a proper conference system can contribute to this end, it does not undertake to give the conference prior claim on all cargoes nor afford the conferences protection from all possible competition. 8 F.M.C. 16; 43 (1964).

It was not then, nor is now our intention, to deny contract-signatories the privilege of chartering vessels merely on the basis of the fact that they are "large merchants, whose volume of activities makes it economically feasible for them to indulge in chartering."² This Commission was quite well aware that exclusion from contract coverage of a merchant's goods moving on the merchant's owned or chartered vessels would primarily benefit larger shippers. We also realized, however, that neither the economic philosophy of the United States nor section 14b of the Shipping Act requires that merchants be de-

² We advise respondents, as the Examiner did below, to "take note of the possibility that certain shippers could be deterred in entering into dual rate contracts if this privilege was withdrawn."

prived of all normal economies which go along with largeness. *The Dual Rate Cases, supra*, at page 42. Indeed, the foreign commerce of the United States benefits by virtue of the economies made available to American merchants.

Respondents' alternate argument that the inclusion of a charter-exclusion clause in their contracts will create a motive for large merchants to engage in either the ownership or the long-term chartering of vessels to the detriment of the stability of the Conferences' rate structure is likewise without merit.³ Their claim is based exclusively on the fact that vessels now arriving in Japan to complete chartered voyages for bulk cargoes, and seeking some employment from Japan as an alternative to a voyage in ballast, are obtaining *one-way trip* charter to the United States with iron and steel as a nucleus. To conclude therefrom that "conditions exist which would make it easy for merchants to engage in chartering for *six months or longer*" is *non sequitur*. Indeed, it is quite improbable from an economic standpoint that a shipper would, in effect, enter the shipping business. Testimony shows that Japanese shippers operate on a small margin of profit and that it is extremely doubtful that they would want to assume the additional risk of voyage operation. In any event, the Conferences have not produced one iota of substantial evidence to demonstrate that, even if signatory-shippers were to take advantage of the charter-exclusion privilege, they would be adversely affected thereby. See *Pacific Westbound Conference—Amendment to Dual Rate Contract*, 9 F.M.C. 403 (1966).

In light of the foregoing, we find that respondents have failed to sustain their burden of proof. They have failed to show that a deviation from the uniform charter-exclusion clause is necessitated by conditions particular to their trade.

B. *The Affiliates Clause*

By the present application, respondents also propose to delete the affiliates clause approved by the Commission in *Exclusive Patronage*

³ In this regard, consider what we state in *Pacific Westbound Conference—Amendment to Dual Rate Contract*, 9 F.M.C. 403, 410 (1966), where we had occasion to rule on a contention quite similar to that advanced by respondents above. There, Conference representatives had also voiced fears that, although certain commodities had not yet moved on chartered vessels, it was very likely that they would unless the Conference was allowed to amend the approved charter-exclusion clause. In dismissing this contention, we explained that:

• • • whether or not there will be further charter movements in the Conference trade cannot be determined from the record and a finding one way or the other would be the product of unalloyed speculation. This Commission has said that the mere possibility that a conference agreement may result in a violation of the Act is insufficient reason to disapprove the agreement [citations omitted]. Likewise, the mere possibility that large traders may utilize the charter-exclusion clause would not justify the granting of the present petition.

Contracts,⁴ *supra*, and substitute therefor an "all-affiliates" provision, which would bind *all* affiliates, as well as agents, regardless of whether the contract signatory regularly exercises working control in relation to shipper matters.⁵

Respondents' position is that the present affiliates clause was approved by the Commission with United States business and trading conditions in mind and that there is justification for the proposed modification because substantially different economic and legal relationships are found among enterprises in Japan which sell for export to the United States. These differences were explained in detail by witnesses for respondents.

The Japanese corporate structures were described as "spherical," rather than "pyramidal," as we know them in the United States. Individual companies, much like U.S. corporations, are interrelated into large industrial, financial and commercial groups, not only by stock ownership, but also by interlocking directors and by "management councils." The latter consists of the top management of all the entities of a corporate complex who confer from time to time for the purpose of maintaining overall control and establishing general group policy. One large corporate complex might include various corporations involved in the manufacture of automobiles, chemicals, and electronic products, as well as various real estate, warehousing and banking enterprises.

As a result of these "flexible and fluid" interrelationships, respondents maintain that, in Japan, it would be very difficult to prove the

⁴ The affiliate clause approved by us for use by the Conferences reads in pertinent part, as follows:

2. (a) The Merchant shall ship or cause to be shipped all of its ocean shipments moving in the Trade on vessels of the Carriers unless otherwise provided in this agreement.

(b) The term "Merchant" shall include the party signing this Agreement as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this Agreement and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant," any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this Agreement and be fully bound thereby, are listed at the end of this Agreement. The party signing this Agreement as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this Agreement on behalf of the said related companies and entities so listed. (Article 2(b) optional.)

This is the same uniform affiliates clause adopted by us in *The Dual Rate Cases*, 8 F.M.C. 16 (1964).

⁵ The provision proposed by respondents would provide that:

2. (a) The Merchant shall ship or cause to be shipped exclusively by vessels of the Carriers all goods shipped in the Trade directly or indirectly by the Merchant, and any of its agents, parent, subsidiary, associated or affiliated companies (all of which are hereinafter included in the term, "Merchant").

regular exercise of working control by the contract signatory in relation to shipping matters; that this working control is not regularly exercised by one related company over another but exercised only when deemed necessary by the management counselors who determine group policy.

In his Initial Decision, the Examiner concluded that the present record disclosed circumstances peculiar to respondents' trades which justified a departure from the standard form of affiliates clause adopted by the Commission in *The Dual Rate Cases, supra*. Accordingly, he granted respondents permission to use an all-affiliates clause. Hearing Counsel except on the grounds that respondents have failed to demonstrate a necessity for deviation from the standard affiliates clause. We agree.

Respondents' request for an all-affiliates clause has previously been considered by this Commission and denied in *Exclusive Patronage Contracts, supra*. In specifically rejecting the very clause which the Conferences again seek to institute, we stated:

It was abundantly clear * * * that respondents desire the all inclusive affiliates clause as an aid to their policing of the contract. As we pointed out in *The Dual Rate Cases*, "no words in any agreement can assure that the parties will not breach their contract" and that the affiliates clause there—and here—approved "includes a specific provision regarding various subterfuges." In short, the easing of carrier sales effort and the aiding in strict observance of the contract offered by an all inclusive clause, is far outweighed by the legitimate business interests of autonomous subsidiaries or affiliates. 8 F.M.C. 340 (1964).

The Examiner, while cognizant of all the above concluded that:

* * * findings of fact in such [earlier] proceeding relating to the Japanese "corporate jungle" and the unworkability of the presently approved affiliates clause were not made in the detail permissible on the record in this proceeding.

Hearing Counsel maintain that it is not enough to merely say that that record in the proceeding is different or more detailed than the record in Docket Nos. 1078 and 1080, but that it is incumbent on respondents to demonstrate that conditions in the trades have changed since the making of the record in Docket Nos. 1078 and 1080; otherwise this proceeding is in essence a reopening of those dockets. We find considerable merit in Hearing Counsel's objections.

In *Pacific Westbound Conference-Amendment to Dual Rate Contract, supra*, at page 409, we emphasized that:

* * * departures from the clauses prescribed [in *The Dual Rate Cases*] * * * will be allowed to suit "the reasonable commercial needs of a particular trade" upon a showing by substantial evidence that such a change is needed or warranted. (Emphasis added).

And we pointed out there that it was "incumbent upon the Conference to come forward with such facts and circumstances peculiar to its trade as would warrant a departure from the uniform clause." While the instant record does admittedly provide more details concerning the nature of corporate relationships in Japan than did the record in the earlier proceeding in Docket Nos. 1078 and 1080, nevertheless, the record in those dockets does sufficiently describe the conditions existing. In sum, there has been no showing that conditions and circumstances in the trades have changed since the making of the record in the earlier proceedings. Any determination that the approved form of contract is "unworkable" and that the "all-affiliates" clause would be easier to enforce is at best a calculated guess.

Hearing Counsel, citing *Pacific Coast European Conference—Exclusive Patronage Contract*, Order on Reconsideration, Docket 1007 (served September 22, 1966), would have us deny the proposed modification for the additional reason that respondents have had no actual operating experience upon which to base the requested relief. Respondents, however, suggest that our decision in *North Atlantic Westbound Freight Association—Dual Rate Contract*, 8 F.M.C. 387, makes it clear that actual experience or operation is not a prerequisite to deviation from the approved form of contract. While our decision here is based on other grounds, actual operating experience, or the lack of it, may or may not be determinative of the disposition of a particular clause in a contract. In the *NAWFA case*, 12 years of operation without a charter-exclusion clause, when coupled with substantial shipper support, justified deviation from the standard contract. In the instant case respondents have had no operating experience under any form of contract and, aside from an unsupported allegation that unspecified small shippers consider the charter-exclusion clause discriminatory, there is nothing in the record which would warrant the proposed deletion. Had they shown by evidence of record that the proposed modification of the all-affiliates clause was in fact warranted, the absence of actual operating experience would not preclude the granting of the requested relief.

Accordingly, we find that the respondents have failed to show that a deviation from the standard affiliates clause in these trades is warranted. Consequently, respondents' request to delete the affiliates clause of their presently approved form of dual rate contract is denied.⁶

⁶ Respondents' basic objection to the presently approved affiliates clause, and their justification for the clause they propose, is their conviction that under the former it would be difficult or impossible to prove that a signatory merchant "regularly exercised working control" over the related company. It is clear on the record, however, that respondents' proposed clause would be far less than a panacea to their enforcement problems. In fact, the Conferences are quite obviously aware of the difficulties which would be encountered in determining, under their proposed clause, which affiliates are bound, and

C. *The Suspension Provisions*

Article 10(b) of the Conferences' approved contract presently provides that:

(b) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within thirty (30) days after receipt of notice by registered mail from the Conference that they are due and payable, the Carriers shall suspend the Merchant's rights and obligations under the contract until he pays such damages. *If within thirty (30) days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within thirty (30) days thereafter proceed in accordance with Article 14, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within thirty (30) days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages. No suspension shall abrogate any cause of action which shall have arisen prior to the suspension. Payment of damages shall automatically terminate suspension. The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within ten (10) days after the event.*

Respondents now proposed to delete the italicized portion of this article. Respondents' objection to this part of the clause is the provision forever barring damage claims where the Conference does not proceed to adjudication within 30 days after receipt of notice from the merchant that he disputes the claim, and the requirement of notification to the Commission of each suspension and termination of suspension.

The "forever barred" provision is deemed objectionable on two counts. First, respondents complain that it leaves insufficient time to resolve the dispute without recourse to adjudication. The Conferences make much of the fact that recourse to litigation is not as common in Japan as it is in the United States and that more time to settle disputes would serve to avoid legal proceedings and the expense involved.⁷

the difficulties of enforcing the contract. Witnesses for respondents testified that the practice of other conferences in Japan is to require a signatory merchant's affiliate to also execute a contract in order to obtain the contract rate. They anticipate that respondent Conferences would also follow this practice. As Hearing Counsel have stated:

One may logically ask why have such a clause at all if it is still necessary to require each affiliate to execute the contract before he is allowed the contract rate? The Examiner also conceded that:

There are inconsistencies in respondents' position. It is difficult to understand how any affiliates clause could be workable in an industrial system where it is very difficult for a signatory to list all affiliates. If a parent company has no control over a subsidiary in relation to shipping matters, it is questionable whether they would be bound by the parent's entering into a shipping contract. The Commission has often commented on the fact that no contract language will prevent avoidance of a contract obligation. (I.D. 9).

⁷ Witnesses testified that in Japan the objective is to settle disputes without the necessity of direct confrontation between the parties, for Japanese businessmen do not like to be in the position of having been declared publicly to be wrong.

Secondly, respondents question the Commission's right to establish periods of limitations other than those established by the Federal Government or the legislatures of the several states, even with respect to contracts which are entered into principally in the United States. They urge that, in any event, the Commission is without authority to impose a period of limitations with respect to contracts to be entered into predominantly in a "friendly foreign nation."

Moreover, the Conferences take the position that notifications to the Commission in cases of suspensions and terminations of suspensions "serve no practical purpose" since the likelihood that Japanese merchants will be counting on the vigilance of the Commission for protection of their interests is rather small.⁸

The Examiner concluded that no valid reason appeared on this record for deletion of all but the first sentence of Article 10(b) of respondents' approved contract form and, accordingly denied the request. Respondents except to a majority of the Examiner's findings and conclusions and reargue many of the points advanced below. They request, however, that in the event their contentions be again rejected that the period of time in Article 10(b) (line 10) allowed the Conference to proceed to arbitration once the merchant notifies the Conferences that he disputes the claim, be enlarged from thirty (30) to ninety (90) days. We find that the Examiner's denial of respondents' request to delete all but the first sentence of their approved suspension clause was proper and well founded. Respondents' alternative request for an enlargement of time from 30 to 90 days in which to proceed to arbitration is granted.

Respondents have offered no evidence of anything unusual about these trades which would necessitate a departure from the standard suspension clause. Their objection to the "forever barred" provision on the grounds that it leaves insufficient time to resolve the dispute without recourse to adjudication falls of its own weight since it is the Conferences themselves which set things in motion and control the time periods. They can negotiate for as much time as they want before they send the *initial* notice to the merchant that damages are due. Thus, as Hearing Counsel has pointed out, they can "be prepared to expect a notice of dispute, more or less at their convenience."

Respondents' second objection to the forever barred provision on the grounds that we are without authority to set "periods" of limitations is equally untenable. As Hearing Counsel have pointed out, the Commission is not compelling anyone to abide by a "period" of

⁸ The Conferences believe that any disputes regarding the propriety of a suspension will most likely arise in Japan between one of the Conferences and a Japanese merchant.

limitation other than that established by the law of the jurisdiction. Since the suspension provisions were made optional by the Commission in *The Dual Rate Cases, supra*, no conference is compelled to adopt it. If a conference does, however, choose to have its form of contract contain an express provision giving it the right to suspend a merchant's rights and obligations under the contract for failure to pay adjudged damages, that conference must use the provision prescribed by the Commission unless it can show that circumstances particular to the conference trade necessitate another clause, or none at all.

Section 14b of the Shipping Act, 1916, permits the use of dual rate contracts but only if the Commission finds that certain safeguards have been met. In adopting this course, Congress, in a sense, reaffirmed the earlier philosophy of section 15 of the Shipping Act which, by authorizing supervised competition—restricting agreements among carriers—recognizes that there is some justification in the waterborne commerce for making exception to our normal policies. *The Dual Rate Cases*, 8 F.M.C. 16 at 24 (1964). A uniform suspension provision was one of the safeguards which Congress advocated and which the Commission adopted to insure against punitive suspensions or terminations by the conferences of merchants' contracts.

In *The Dual Rate Cases*, the Commission was mindful of the desire of Congress that "insofar as was possible, dual rate contracts should be standard or uniform." Therefore, we required that those conferences desiring suspension provisions employ the clause prescribed by us. This, it is felt would greatly simplify the problem of shippers regarding the meaning and application of contract provisions. Public interest also dictated that there be an end to adjudication. Therefore, in prescribing a period of time within which a conference must proceed to arbitration, the Commission insured that submission of the claim to legal process would not be delayed an inordinate amount of time. Respondent has failed to demonstrate that our reasoning in *The Dual Rate Cases* is inapplicable here.

We also reject respondents' contention that notification of suspensions to the Commission serves no useful purpose and should not be required. As we pointed out earlier, section 14b, like section 15 of the Shipping Act, is a limited legislative grant of an antitrust exemption. In granting carriers permission to engage in certain forms of activity which would otherwise be unlawful under the antitrust laws, Congress, however, made it clear that these exemptions must be accompanied by effective governmental supervision and control. Thus, this Commission must:

* * * scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary

to serve the purposes of the regulatory statute. *Isbrandtsen Co. Inc. v. United States*, 211 F. 2d 51 at 57 (D.C. Cir. 1954).

The requirement that notification of suspensions be given to the Commission serves the very useful and necessary function of providing us with information vital to our duty of administering the Shipping Act effectively. It enables us to determine whether conferences are abiding by the terms of their contracts or whether they are engaging in any activities that might be detrimental to the commerce of the United States or contrary to the public interest.

On the basis of all the foregoing, we find that respondents have failed to support their claim that deletion of all but the first sentence of their presently approved suspension clause is necessitated by the conditions in their trades. Respondents, however, are free to enlarge from 30 to 90 days the period of time within which they must proceed to arbitration. The Uniform Merchant's Contract appended to our General Order 19, 31 F.R. 12523, 12526, allows a conference to use anywhere between a minimum period of 30 days and a maximum period of 90 days "without further permission from the Commission." Accordingly, no further discussion is required.

D. *The Prompt Release Clause*

Respondents propose to delete the "prompt release clause" of their presently approved contract⁹ and substitute therefore, the following language:

5. The Merchant has the option of selecting any of the vessels operated by the Carriers, subject to agreement with the particular Carrier as to quantity, and agrees to make application for space as early as possible before the selected vessel's advertised sailing date. In the event that the Merchant is unable to secure space on the selected vessel, he may request the assistance of the Conference in securing space on the selected vessel or on a vessel sailing from the chosen port at or about the same time as the selected vessel. If within three (3) business days of such request, the Conference fails to secure space on a vessel scheduled to sail within fifteen (15) days of the date of the request from the Merchant as

⁹ Article 5 of the presently approved dual rate contract provides:

5. The Merchant shall have the option of selecting any of the vessels operated by any of the Carriers. The Merchant agrees to request space with the carrier he desires as early as practicable and not less than five (5) days before the earliest date he wishes to have the cargo loaded aboard the vessel. The Merchant shall not be obligated to select a Conference carrier or carriers for any shipment which the Carrier cannot suitably accommodate within a ten (10) calendar day period requested by the Merchant for loading; provided, however, that the Merchant shall first promptly notify the Conference of such unavailability of space and if within two (2) business days after receipt of such notice, the Conference shall not have advised the Merchant that his entire shipment can be suitably accommodated by a vessel or vessels (if the merchant by contract is obligated to make the shipment on a single vessel, suitable space shall be provided on a single vessel) of the Carriers within said ten (10) calendar day period, the Merchant shall be free with respect to such shipment to secure space elsewhere within a reasonable time.

aforesaid, the Merchant shall be at liberty to secure such space on any vessel whatsoever.

The Conferences' position is that the 2-day period presently allowed the Conferences to advise a shipper that a Conference vessel can accommodate the shipment, when the one selected by him is unavailable, is unreasonably short because of time differences between Japan and the cities in Europe and the United States. Since the executives of various member lines are located in the United States or Europe, respondents fear that it would experience difficulty, particularly on weekends, in contacting the home office of the European and U.S. member lines on such short notice. Respondents also point out that Japanese holidays are different than holidays elsewhere; Saturday is a working day in Japan but not customarily in the United States.

The Examiner pointed out the *The Dual Rate Cases* did not prescribe a definite form for the prompt release clause and that contract forms approved by the Commission show prompt release clauses which vary in many respects other than in stating time periods and concluded therefore that permission should be granted respondents to modify the "prompt release clause" of their contract, in accordance with their request. In this regard the Examiner found that:

In this proceeding, the evidence of time differences, differences in holidays and working days in the various countries wherein contact may be required to determine the availability of a vessel warrants increasing the time in which the conference may advise the merchant that his shipment can be accommodated on a vessel other than the one he has selected. With regard to the increase from 10 to 15 days in which the conference must furnish space, no shipper has appeared to object to the increase and in view of the wide range of ports served by respondents, this period appears to be reasonable.

While uniformity in contract clauses is to be attained whenever possible, the question of uniformity is not present as to the prompt release clause. Contract forms approved by the Commission show prompt release clauses which vary in many respects other than in stating time periods. Thus, it cannot be said that the present clause is uniform or that the advantages of uniformity require adhering to the language now found in that clause. The proposed clause meets the requirements of the first numbered paragraph of Section 14b of the Act * * *

No exceptions have been taken.

We agree with the Examiner that respondents proposal be granted. In view of the fact that Commission General Order 19, published in the Federal Register, 31 F.R. 12525 on September 22, 1966 (21 days after the initial decision in this proceeding was served) adopts as standard for all future applications for dual rate contracts a "prompt release clause" identical to that proposed by respondents, no further discussion is required.

E. *The Natural Routings Clause*

The Conferences sought permission to delete the "natural routings clause" prescribed by the Commission in *The Dual Rate Cases* and substitute therefor the following provisions:

6. The Merchant is not required to divert shipment from a natural route not served by the Carriers where direct carriage is available; provided, however, that where shipment is to be made via any port within the range of ports served by the Carriers and more than one port is available to the Merchant as a natural route, the Merchant shall route his cargo to such of those ports as the Carriers may serve. If, for any particular shipments, the Merchant shall contend that the service provided by the Carriers is not the natural route, the Merchant shall, by written notice, advise the Conference of the service which the Merchant contends is the natural route and the name of the carrier or carriers not a party to this Agreement who are providing or will provide such service. If within three (3) business days after receipt of such notice, the Conference advises the Merchant that a vessel operated by the Carriers will provide such service within fifteen (15) days after receipt by the Conference of such notice as aforesaid, the Merchant shall be obligated to select the Carrier's service. Service so provided shall not constitute a precedent or otherwise be construed as a concession that it is a natural route.

Respondents' major objection to the present clause before the Examiner related to the definition of factors to be considered in determining what is a natural route. They stated that the Conference members have the impression that the Commission's definition would be interpreted as requiring consideration of economic criteria entirely from the Merchant's point of view; that under such an interpretation, ports which are not considered "natural" might be so considered solely because a non-conference vessel might go there to try to get cargo which would be otherwise subject to the contract.

The Examiner found that the Conferences had failed to support their position that the "natural routings clause" proposed in the present application is more suitable for administration in the light of conditions in Japan than is the presently approved clause. In denying the proposed changes, he further determined that the Conferences' impression that the presently approved clause could be interpreted as relating economic conditions solely to the merchants' interest was erroneous in view of the Commission's comments in *The Dual Rate Cases*, at page 35:

There is no justifiable need served by relieving the merchant of his obligation to use conference vessels merely because a nonconference carrier is calling at one of the several ports through which a particular shipment could "naturally" move, and the conference calls at another port of equal natural routing but not the port served by the nonconference line.

* * * * *

As we have construed the "natural routing" provision of section 14b the merchant will be free under his contract to use nonconference vessels if in fact the use of conference vessels would require him to divert his cargo to unnatural routes. The merchant will not be permitted to escape his contract obligations, however, when the nonconference service is no more natural, as it were, than that of the conference.

The Examiner concluded:

In *Exclusive Patronage Contracts, supra*, the Commission found that the facts disclosed did not make inappropriate the conclusions and reasoning followed in *The Dual Rate Cases*, and denied permission to deviate from the standard clause. Nor can circumstances be found in this record which would render former reasoning inapplicable. The definition of "natural routing" was included in the approved clause to simplify shipper problems. Respondents desire to eliminate a definition and permit arbitrators to decide, in case of dispute, what the term means. If respondents consider their proposed clause would simplify the "natural route" determination in case of dispute, they overlook the practical aspect of the problem. The guidelines provided by the approved clause eliminate at least some of the indefiniteness rather than leave it entirely open to one interpretation by the carrier, another by the shipper, and possibly a third by arbitrators. Their concern that interpretation of the clause would relate economic conditions solely to the merchant's interests cannot be accepted as a proper interpretation in view of the Commission's comments in *The Dual Rate Cases*.

Respondents' reference to the similarity between their proposed clause and the clause approved by the Commission for the North Atlantic Westbound Freight Association (Association) has been considered. If there is a similarity in circumstances in these trades and the trade in which the Association operates, it has not been disclosed.

No exceptions were taken to this aspect of the Examiner's decision.¹⁰ Since no exceptions have been filed to the Examiner's findings and conclusions and since we fully agree with these rulings, it is not necessary to discuss them in any further detail. We conclude, therefore, that respondents' request to substitute their own natural routings clause for the one presently approved for use by the Conferences be denied.

F. False Declarations

Respondents propose to modify Article 11 of their approved contract by adding the following clause:

It shall be a breach of this Agreement for the Merchant or any person, firm, or company acting or purporting to act on behalf thereof, to make a false declaration or representation in respect of the kind, quantity, weight, measurement; or value of the cargo covered by this Agreement, unless the Merchant shows that such false declaration or representation was made accidentally and without the intent to avoid the payment of the proper amount of freight on such

¹⁰ Respondents explained that they were "motivated" in not taking exception to the Examiner's denial of their proposed clause by his observation regarding the proper interpretation of the natural routings clause approved in *The Dual Rate Cases* and in *Exclusive Patronage Contracts*.

cargo and that, immediately upon learning of such false declaration or representation, the Merchant tendered the balance (if any) of the amount of freight properly due to the Carrier concerned.

There is testimony in the record to the effect that the Conferences have experienced difficulty in dealing with shippers engaged in the Japan-United States trades due to false declarations. Respondents state that the additional wording proposed is not with the end purpose of winning law suits but is intended as a supplement to the existing program of policing false declarations and to act as a deterrent against forbidden conduct.

The Examiner after considering all the evidence, found as follows:

The fact that the conferences experience unusual difficulty in their trades in dealing with the problem of false declarations warrants a contract article specifically relating to the problem. Hearing Counsels' proposal that damages in event of breach shall be determined by the principles of contract law is only a repetition of language used in Article 10(a) of the approved agreement. Their concern that a false declaration might be considered grounds for suspension of the shippers rights and obligations under the contract relates to Article 10(b) under which the conferences may suspend if a shipper fails to pay adjudicated damages. Other suspension provisions are Article 15(a) relating to war, hostilities, warlike operations, embargoes, or other interferences with commercial intercourse and Articles 15(b) and 15(c) relating to increased rates made under special circumstances. The contract does not provide for suspension in event of breach. Inasmuch as damage in event of breach of contract is covered under existing clauses and there is no provision which would permit suspension because of breach of contract, it would appear unnecessary to add the language proposed by Hearing Counsel.¹¹

It is concluded that the record supports respondents' request to add paragraph 11(b).

No exceptions to any of the Examiner's rulings have been taken.

We find that the Examiner's findings and conclusions with regards to the addition of a "false declaration" clause are proper and well-founded, and we adopt the same as our own. Accordingly, permission is granted respondents to add a false declaration provision to their presently approved form of contract.

G. References to the Federal Maritime Commission

Respondents also seek to delete from Article 7 (contract rates and rate spread) and Article 11(a) (contracts of carriage) references to the fact that tariffs are on file with the Federal Maritime Commission. The Conferences recognize that the omission of these expressions

¹¹ Hearing Counsel had proposed that the following language be added at the end of Article 11.(b) of the Conferences' contract:

In the event of such breach, damages resulting therefrom shall be determined in accordance with principles of contract law, and nothing contained in this contract shall be construed to permit the suspension of the merchant's rights and obligations under this contract.

would in no way relieve them of the obligation to file the tariffs pursuant to section 18(b) of the Shipping Act.

The Examiner concluded that the record did not support respondents' request and denied the proposed deletions. The Conferences have excepted on the grounds that General Order 19, 31 F.R. 12525, appears to give them blanket permission to omit these references. This exception is well taken.

General Order 19, referred to earlier in this Report, provides that certain "specific references in the contract provisions to Federal Maritime Commission * * * [are] optional and may be deleted without further permission from the Commission."

In view of the above, respondents are free to omit the references to the Federal Maritime Commission and no further discussion on our part is needed.

ULTIMATE CONCLUSIONS

On the basis of all the foregoing, we find and conclude that:

1. Respondents' request to substitute an "all-affiliates" clause for the affiliates clause presently approved for use by the Conferences is denied.

2. Respondents' request to delete the presently approved charter-exclusion clause is denied.

3. Respondents' request to modify the suspension provision of their approved contract form is denied.

4. Respondents' request to modify the natural routings clause of their contract is denied.

5. Permission is granted respondents to (a) modify the prompt release clause, (b) add a false declaration clause, and (c) delete certain references to the Federal Maritime Commission, in their approved contract form.

The Conferences' dual rate contract form as modified will not be contrary to the public interest, unjustly discriminatory or unfair as between shippers or exporters from the United States and their foreign competitors, and will comply with section 14b of the Shipping Act, 1916.

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof:

It is ordered, That the Conferences' requests to (1) substitute an "all-affiliates" clause for the affiliates clause presently approved for use by the Conferences; (2) delete the presently approved owned, chartered-vessel exclusion clause; (3) modify the suspension clause of their approved contract form; and (4) modify the natural routings clause of their contract, be and hereby are, denied.

It is further ordered, however, That permission be, and hereby is granted to the Conferences to (1) modify the prompt release clause of their approved contract form to read as follows:

5. The Merchant has the option of selecting any of the vessels operated by the Carriers, subject to agreement with the particular Carrier as to quantity, and agrees to make application for space as early as possible before the selected vessel's advertised sailing date. In the event that the Merchant is unable to secure space on the selected vessel, he may request the assistance of the Conference in securing space on the selected vessel or on a vessel sailing from the chosen port at or about the same time as the selected vessel. If within three (3) business days of such request, the Conference fails to secure space on a vessel scheduled to sail within fifteen (15) days of the date of the request from the Merchant as aforesaid, the Merchant shall be at liberty to secure such space on any vessel whatsoever.

(2) add the following false declaration clause to their approved form of contract:

It shall be a breach of this Agreement for the Merchant or any person, firm, or company acting or purporting to act on behalf thereof, to make a false declaration or representation in respect of the kind, quantity, weight, measurement, or value of the cargo covered by this Agreement, unless the Merchant shows that such false declaration or representation was made accidentally and without the intent to avoid the payment of the proper amount of freight on such cargo and that, immediately upon learning of such false declaration or representation, the

Merchant tendered the balance (if any) of the amount of freight properly due to the Carrier concerned.

and (3) delete the references to the Federal Maritime Commission found in Articles 7 and 11(a) of their approved contract form.

It is further ordered, That the terms and conditions of the form of the dual rate contract attached hereto shall be used by the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX
APPROVED AGREEMENT FROM—DOCKET No. 65-52

Agreement No. _____

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AND THE JAPAN-
ATLANTIC AND GULF FREIGHT CONFERENCE

Merchant's Agreement

Memorandum of Agreement entered into at _____
this _____ day of _____ 19____, by and between _____
_____, having (its) (his) principal
place of business at _____, (here-
inafter called the "Merchant") and the carriers who are parties to the United
States Federal Maritime Commission Agreement No. _____, as amended,
providing for the (Name of Conference) hereinafter called the "Conference" or the
"Carriers"), and which Agreement has been duly filed with the Ministry of Trans-
portation of the Japanese Government.

For their mutual benefit in the stabilization of rates, services, and practices
and for the development of international maritime commerce in the trade defined
in Article 1 of this Agreement, the parties hereby agree as follows:

1. The Conference undertakes, throughout the period of this Agreement, to
maintain common carrier service which shall, so far as concerns the frequency
of sailing and the carrying capacity of the vessels of the Carriers, be adequate
to meet all the reasonable requirements of the Merchant for the movement of
goods in the trade from Japan, Korea and Okinawa to (Pacific Coast ports of
California, Oregon, Washington, Canada and the ports of Hawaii and Alaska)
or (United States Atlantic and Gulf Coast ports) (hereinafter called the
"Trade"); and the Conference further agrees that, subject to the availability
of suitable space in the vessels of the Carriers at the time when the Merchant ap-
plies therefor, said vessels shall transport the goods of the Merchant in the
Trade upon the terms and conditions herein set forth. Ports from and to which
service is offered by the Carriers shall be set forth in the Conference tariff.

2. (a) The Merchant shall ship or cause to be shipped all of his ocean ship-
ments moving in the Trade on vessels of the Carriers unless otherwise provided
in this Agreement.

(b) The term "Merchant" shall include the party signing this Agreement as
shipper and any of his parent, subsidiary, or other related companies or entities
who may engage in the shipment of commodities in the trade covered by this
Agreement and over whom he regularly exercises direction and working control
(as distinguished from the possession of the power to exercise such direction and
control) in relation to shipping matters, whether the shipments are made by or
in the name of the "Merchant," any such related company or entity, or an agent
or shipping representative acting on their behalf. The names of such related

companies and entities, all of whom shall have the unrestricted benefits of this Agreement and be fully bound thereby, are listed at the end of this Agreement. The party signing this Agreement as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this Agreement on behalf of the said related companies and entities so listed. (Article 2(b) optional.)

(c) In agreeing to confine the carriage of its shipments to the vessels of the Carriers the Merchant promises and declares that it is his intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Merchant.

(d) The Carriers agree that they will not provide contract rates to anyone not bound by a Merchant's Rate Agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this Agreement, by making shipments under this Agreement on behalf of any such person.

3. (a) If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.

(b) If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.

(c) It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(d) For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment:

(1) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(2) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.

(e) Nothing contained in this Agreement shall require the Merchant to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

(f) In order that the conference may investigate the facts as to any shipment of the Merchant that has moved, or that the Merchant or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Merchant, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Merchant where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Merchant, and there shall be no disclosure of such information without the consent of the merchant except that nothing

herein shall be construed to prevent the giving of such information (1) in response to any legal process issued under the authority of any court, or (2) to any officer or agent of any government in the exercise of his powers, or (3) to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or (4) to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers, or (5) to arbitrators appointed pursuant to this agreement.

(g) Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the conference in writing of this fact, giving the names of the merchant and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however*, That where the activities of Merchants are so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

4. This Agreement excludes: (1) cargo of the Merchant which is loaded and carried in bulk without mark or count except liquid bulk cargoes (other than chemicals and petroleum products) in less than full ship load lots; (2) shipments on vessels owned by the Merchant or chartered solely by the Merchant where the term of the charter is for six months or longer, and the chartered vessels are used exclusively for the carriage of the merchant's commodities; and (3) shipments of cargoes for which no contract rate is provided.

5. The Merchant has the option of selecting any of the vessels operated by the Carriers, subject to agreement with the particular Carrier as to quantity, and agrees to make application for space as early as possible before the selected vessel's advertised sailing date. In the event that the Merchant is unable to secure space on the selected vessel, he may request the assistance of the Conference in securing space on the selected vessel or on a vessel sailing from the chosen port at or about the same time as the selected vessel. If within three (3) business days of such request, the Conference fails to secure space on a vessel scheduled to sail within fifteen (15) days of the date of the request from the Merchant as aforesaid, the Merchant shall be at liberty to secure such space on any vessel whatsoever.

6. This agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. *Provided, however*, that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the Carrier's service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert his rights under this article, to use a carrier who is not a party hereto, and the port through which Merchant intends to ship or receive his goods is within the scope of this agreement, Merchant shall first so notify the conference in accordance with the provisions of Article 5 hereof.

7. The rates applicable to shipments made under this Agreement shall be the contract rates lawfully in effect at the time of shipment as set forth in the tariff

or tariffs of the Conference. Contract rates on every commodity or class of commodities shall be lower than the ordinary rates set forth in the Carriers' tariff by a fixed percentage of fifteen (15) per centum of the noncontract or ordinary rates. The rates may be rounded out to the nearest multiple of five (5) cents (not including additional handling or accessorial charges) which will not result in the difference between the rates exceeding fifteen (15) per centum of the ordinary rates.

8. (a) The rates of the freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance in the _____

Conference tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Merchant, the Merchant may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid of the proposed increase: *Further provided, however*, that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Merchant in writing that they elect to continue this Agreement under the existing effective rates, and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Merchant's notice of termination had never been given.

(b) The Conference shall offer to the Merchant a subscription to its tariffs at a reasonably compensatory price; however, the Merchant shall be bound by all notices accomplished as aforesaid without regard to whether he subscribes to the Conference tariff. Tariffs shall be open to the Merchant's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this Agreement.

(d) The Merchant and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual-rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Merchants and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety (90) days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate, and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety (90) days' notice by the Carriers through the filing of contract-noncontract rates in their tariff.

9. (a) The Merchant may terminate this Agreement at any time without penalty upon the expiration of ninety (90) calendar days following written

notice to the Conference of intent to so terminate. *Provided, however, that the Merchant may terminate this agreement upon less than said ninety (90) days' notice pursuant to Article 8(a) hereof.*

(b) The Conference may terminate this Agreement at any time without penalty upon the expiration of ninety (90) calendar days following written notice to the Merchant. Termination by the Conference may be in whole or with respect to any commodity; *Provided, however, that Agreements with similarly situated Merchants are also so terminated.*

(c) Termination as provided in this Article shall not abrogate any obligation of any party or parties to any other party or parties hereto which shall have accrued prior to termination.

10. (a) In the event of breach of this Agreement by either party, the damages recoverable shall be the actual damages determined after breach in accordance with the principles of contract law: *Provided, however, that where the Merchant has made or has permitted a shipment on a vessel of a carrier not a party hereto in violation of this Agreement, and whereas actual damages resulting from such a violation would be uncertain in amount and not readily calculable, the parties hereby agree that a fair measure of damages in such circumstances shall be an amount equal to the freight charges of such shipment computed at the Carriers' contract rates in effect at the time of shipment, less the estimated cost of loading and unloading which would have been incurred had the shipment been made on a vessel of a Carrier party hereto. Such amount, and no more, shall be recoverable as liquidated damages.*

(b) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within thirty (30) days after receipt of notice by registered mail from the Conference that they are due and payable, the Carriers shall suspend the Merchant's rights and obligations under the contract until he pays such damages. If within thirty (30) days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within thirty (30) days thereafter proceed in accordance with Article 14, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within thirty (30) days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages. No suspension shall abrogate any cause of action which shall have arisen prior to the suspension. Payment of damages shall automatically terminate suspension. The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within ten (10) days after the event.

11. (a) This Agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of them. Shipments under this Agreement are subject to all the terms and conditions and exceptions of the then current Conference tariff, and of the permits, dock receipts, bills of lading and other shipping documents regularly in use by the individual Carriers and to all laws and regulations of the appropriate authorities.

(b) It shall be a breach of this agreement for the Merchant or any person, firm, or company acting or purporting to act on behalf thereof, to make a false declaration or representation in respect of the kind, quantity, weight, measurement, or value of the cargo covered by this Agreement, unless the Merchant shows that such false declaration or representation was made accidentally and

without the intent to avoid the payment of the proper amount of freight on such cargo and that, immediately upon learning of such false declaration or representation, the Merchant tendered the balance (if any) of the amount of freight properly due to the Carrier concerned.

12. Receipt and carriage of dangerous, hazardous, or obnoxious commodities shall be subject to the special facilities and requirements of the individual Carrier.

13. The Conference shall promptly notify Merchant of changes in the Conference membership, and any additional carriers which become members of said Conference shall thereupon become parties to this Agreement, and the Merchant shall thereupon have the right to avail himself of their services under the terms of this Agreement. Any Carrier, party to this Agreement, which for any reason ceases to be a member of the Conference shall thereupon cease to be a party to or participate in this Agreement and the Merchant shall not be entitled to ship over said Carrier under this Agreement after such Carrier ceases to be a member of the Conference or after having fifteen (15) calendar days' written notice of the termination of such Carrier's membership, whichever is later. The Merchant may, at any time after notice that a carrier has ceased to be a member of the Conference, cancel without penalty or liability for damages any outstanding forward booking with such withdrawing Carrier.

14. All disputes arising in connection with this Agreement shall be submitted to arbitration by any party and any dispute so submitted to arbitration shall be finally settled under the Commercial Arbitration Rules of the Japan Commercial Arbitration Association. At the time a party makes a demand for arbitration to the Japan Commercial Arbitration Association it shall also submit the name of its arbitrator, and the other party shall have fourteen (14) calendar days thereafter to name its arbitrator and file same with the Japan Commercial Arbitration Association. The Japan Commercial Arbitration Association shall, within fourteen (14) calendar days thereafter, or within such other period as the parties may agree, name the third arbitrator, who shall act as chairman. Any sum required to be paid by an award of the arbitrators shall be paid within thirty (30) calendar days after a copy of the award has been mailed by the arbitrators to the parties. Judgment upon the arbitration award may be rendered in any court having jurisdiction thereof or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be. In the event an action for judgment of execution is brought in a court of competent jurisdiction on the arbitration award or on the judgment rendered thereon, the parties waive all rights to object thereto insofar as permissible under the laws of the place where the enforcement action is instituted. The place of arbitration referred to in this paragraph shall be Tokyo, Japan, unless otherwise mutually agreed upon by parties concerned. The foregoing provisions regarding arbitrations shall apply unless the parties mutually agree to have any dispute settled pursuant to the rules of any other arbitration society and at any other place, or in any other manner.

If the intention with which any party hereto did or omitted, or caused or permitted to be done or omitted, any act or thing shall be an issue in any arbitration proceedings hereunder, and such party shall have failed, refused, or omitted to furnish to any other party or to the arbitrators any information, document, or data, required to be furnished by it in accordance with this agreement, the arbitrators may draw from such failure, refusal, or omission, the inference

that the information, documents or data contain facts adverse to the position of the party who so failed, refused or omitted.

15. (a) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the Carriers in the trade covered by this Agreement, the Carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the Merchant of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by the Carriers, said Carriers shall forthwith re-assume their rights and obligations hereunder and notify the Merchant on fifteen (15) days' written notice that the suspension is terminated.

(b) In the event of any of the conditions enumerated in Article 15(a), the Carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than fifteen (15) days' written notice to the Merchant, who may notify the Carriers in writing not less than ten (10) days before increases are to become effective of its intention to suspend this Agreement insofar as such increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the Carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(c) In the event of any extraordinary conditions not enumerated in Article 15(a), which conditions may unduly impede, obstruct, or delay the obligations of the Carriers, the Carriers may increase any rate or rates affected thereby, in order to meet such conditions; *provided, however*, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The Merchant may, not less than 10 days before increases are to become effective, notify the Carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the Carriers shall give notice that such increase or increases have been rescinded and cancelled.

For and on behalf of the Members of
the Conference

By _____
Chairman or Secretary pro-tem
(List of Carriers)

Merchant
(Full Corporate, Company or
Individual Name)

By -----
(Title)

(Address of Merchant)

FEDERAL MARITIME COMMISSION

DOCKET No. 66-36

ADMISSION, WITHDRAWAL AND EXPULSION. SELF-POLICING REPORTS.
SHIPPERS' REQUESTS AND COMPLAINTS. OUTWARD CONTINENTAL
NORTH PACIFIC FREIGHT CONFERENCE

Decided March 23, 1967

Agreement No. 93 found not to comply with requirements of section 15 of the Shipping Act, 1916, and General Orders 7, 9, and 14.

Outward Continental North Pacific Freight Conference ordered to amend Agreement No. 93 to comply with General Orders 7, 9, and 14, and section 15 of the Shipping Act, 1916; otherwise the Commission will withdraw approval of its basic conference agreement.

General Orders 7, 9, and 14 are reasonable and valid promulgations of rules pursuant to sections 15 and 43 of the Shipping Act, 1916, and the Commission is authorized to disapprove Agreement No. 93 for noncompliance therewith.

Leonard G. James for Outward Continental North Pacific Freight Conference, respondent.

Donald J. Brunner and *Richard S. Harsh*, Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day and George H. Hearn, *Commissioners*.)

PROCEEDINGS

By order served June 6, 1966, we directed the Outward Continental North Pacific Freight Conference (Conference) and the member lines thereof to show cause why Agreement No. 93, as amended, should not be disapproved pursuant to section 15 of the Shipping Act, 1916 (Act) because of the Conference's failure to comply with the requirements of that section and our General Orders 7, 9, and 14. The Conference filed its opening memorandum and Hearing Counsel replied. We heard oral argument.

FACTS

The Outward Continental North Pacific Freight Conference is an association of common carriers by water serving the trade from Scandinavian, Baltic, German, Dutch, Belgian, and French Atlantic ports to all Pacific Coast ports north of the United States-Mexican border, and to the Hawaiian Islands with transshipment at Los Angeles Harbor and/or San Francisco. The Conference operates pursuant to its basic agreement No. 93 which was originally approved under section 15 of the Act in 1927. Subsequent to this approval, section 15 of the Act was amended by Public Law 87-346¹ to provide that continued approval shall not be permitted for any conference agreement:

which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

Public Law 87-346 further amended section 15 to provide that:

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The Commission's General Orders 7, 9, and 14 were subsequently adopted to implement the above-mentioned requirements of section 15.² These General Orders contain rules and regulations which specifically delineate minimum requirements imposed on a conference by the above-quoted provisions of section 15. The rules were duly adopted by the Commission pursuant to its rulemaking authority contained in section 43 of the Act.³ Each General Order allowed conferences subject to the Commission's jurisdiction a fair amount of time to file any amendments to their agreements or whatever was required by General Orders 7, 9, and 14.

Respondent subsequently was advised by the Commission that its agreement did not conform with the self-policing and admission and withdrawal requirements of General Orders 7 and 9.

Respondent was advised by letter of April 29, 1965, that its agreement was not in accord with the requirements of section 528.2 of General Order 7, which provides that conference agreements between

¹ 87th Cong., H.R. 6775. Oct. 3, 1961.

² General Orders 7, 9, and 14 pertain respectively to self-policing, admission and withdrawal requirements, and shippers' requests and complaint procedures.

³ Section 43 was also enacted by Public Law 87-346 and reads as follows: "The Commission shall make such rules and regulations as may be necessary to carry out the provisions of the Act."

common carriers by water in the foreign commerce of the United States, whether or not previously approved, shall contain a provision describing the method or system used by the parties in policing their obligations under the agreement, including the procedure for handling complaints and the functions and authority of every person having responsibility for administering the system. Respondent did not reply to this notice or take any action on this matter.

Respondent was twice reminded by letter (November 24, 1964 and February 16, 1965) that it had not submitted the required self-policing reports, the first of which was due in July 1964 (Sec. 528.3). No reports were filed in response to these letters.

Upon notification of the requirements of General Order 9 (November 5, 1964), respondent replied that it felt its agreement complied in all respects. Respondent was subsequently advised by letter of April 29, 1965, of the specific areas in which it was believed its agreement did not comply :

- (a) "Just and reasonable cause" is not adequate criteria for denial of admission to membership (Sec. 523.2(c)).
- (b) There is no provision for expulsion for failure to abide by all the terms and conditions of the agreement (Sec. 523.2(h)).
- (c) The agreement fails to provide that no expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished the expelled member and a copy of notification submitted to the Commission (Sec. 523.2(i)).

No response was received to this notice, and no action was taken thereon by respondent.

Respondent was also advised by letter of January 7, 1966, that it had not complied with the requirements of General Order 14. The requirements with which respondent had not complied were specified:

- (a) The conference has not filed a statement with the Commission outlining in detail procedures for the disposition of shippers' requests and complaints as provided in Sec. 527.3.
- (b) The conference has not filed a report on or before October 31, 1965, covering all shippers' requests and complaints (and the information requested with respect thereto), which were received during the preceding calendar quarter or pending at the beginning of such calendar quarter as provided in Sec. 527.4.
- (c) The conference has not advised us of the appointment of a resident representative in the United States on or before September 9, 1965, as provided in Sec. 527.5.

No response was received to this letter.

The Commission thereupon on June 6, 1966, issued to respondent an order to show cause why Agreement No. 93 as amended should not be disapproved by the Commission pursuant to section 15 of the Act

because of respondent's failure to comply with section 15 and because of its failure to comply with General Orders 7, 9, and 14.

DISCUSSION

Respondent in its memorandum of law states: "It may be, as the Commission alleges * * * that they have not complied with General Orders 7, 9 and 14." Nevertheless, respondent seeks to establish that we can not disapprove its conference agreement as a result of such failure to comply. Its argument consists of the following five points, which we will discuss in order:

1. Section 15 does not give the Commission authority to disapprove a conference agreement without a specific finding as a fact that the agreement operates in one of the four ways set out in the section.

2. The Commission's attempt to enforce its General Orders by threat of disapproval of the conference agreement is an illegal sanction in violation of section 9 of the Administrative Procedure Act (APA).

3. The Commission's show cause procedure precludes the admission of any facts relating to the reasonableness of respondent's procedures or operations in these three areas, and accordingly no adverse conclusion can be reached.

4. General Orders 7, 9, and 14 are invalid in any event and unenforceable.

5. General Orders 7, 9, and 14 cannot be applied extraterritorially.

Respondent cites *Aktiebolaget Svenska v. F.M.C.* 351 F. 2d 756 (D.C. Cir. 1965) and *U.S. Atlantic and Gulf/Australia-New Zealand Conference v. F.M.C.* 364 F. 2d 696 (D.C. Cir Nos. 19637, 19704, decided June 30, 1966) as the basis for its contention that we cannot disapprove its agreement without a specific finding as a fact that the agreement operates in one of the four ways set out in section 15.⁴

The above-cited cases, however, in no way concerned either the self-policing requirements, conference admission requirements, or shippers' requests and complaints procedures which are involved here. In addition to the four general grounds for disapproval of a conference agreement which governed in the *Svenska* case, section 15 specifically provides for disapproval of conference agreement for failure of a conference to maintain adequate policing, reasonable procedures for

⁴ Section 15 reads in pertinent part:

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act . . .

hearing shippers' complaints, and reasonable and equal provisions governing conference membership.⁵ When examining a conference agreement, we must first determine if these three standards are met. If so, we then proceed to see if the effect of the agreement will be such that it "as a fact * * * operates in one of the four ways set out in that section by Congress." *Svenska*, 351 F. 2d at 766. If, however, our first analysis of the agreement shows that any or all of the three requirements of policing, admission procedures, and shippers' complaints are not met, disapproval is warranted on that basis alone and no further inquiry as to general effect of the agreement is necessary.

We reached the same conclusion in *Admission to Conference Membership—Pacific Coast European Conference*, 9 F.M.C. 241 (1966), and most emphatically stressed it later in our Denial of Petition for Rehearing in the same docket, served March 22, 1966. We stated:

In our report and order on this proceeding we found that respondents' agreement failed to meet the requirements of General Order No. 9. Therefore, since General Order No. 9 was, as we took care to point out, in explanation and effectuation of the "reasonable and equal" provision of section 15, we found that the agreement failed to meet the requirements of section 15. Nothing more was required, certainly not a further finding of detriment to commerce or one of the other alternative grounds for disapproval of a conference agreement. Section 15 could not be more specific when it states "*nor shall continued approval be permitted for any agreement . . . which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership . . .*"⁶

Respondent also seeks to establish that the Commission's attempt to enforce its general orders by threat of disapproval of the conference agreement is an illegal sanction in violation of section 9 of the APA.

Section 9 reads that "no sanction shall be imposed or substantive rule or order issued except * * * as authorized by law." Respondent argues that we have no statutory penalty for enforcement of our general orders.

In *Admission to Conference Membership—Pacific Coast European Conference, supra*, the respondent conference there argued that it was unlawful to withdraw approval of the conference agreement for failure to comply with General Order 9. We rejected that argument and ordered the disapproval of the agreement, upon the failure to amend, for noncompliance with the requirements of section 15. We further held that, inasmuch as General Order 9 is a valid promulgation of rules interpreting and explaining the statutory terms contained in section 15, noncompliance with that General Order constitutes noncompliance

⁵ See p. 350, *supra*, for section 15 language.

⁶ Emphasis supplied.

with the statute and accordingly is a proper ground for disapproval of a conference agreement.

What we said in *Admission to Conference Membership—Pacific Coast European Conference, supra*, about General Order 9 has equal applicability to General Orders 7 and 14. These rules are also issued to explain, interpret, and give substance to section 15.

Failure to meet the minimum requirements of the rules results in failure to abide by section 15. The sanction authorized for violation of section 15 is also applicable to a violation of the rules which are validly issued pursuant to that section. Accordingly, disapproval of respondent's agreement for failure to comply with General Orders 7, 9, and 14 will not result in a sanction unauthorized by law.

Respondent cites *Unapproved Section 15 Agreements—Gulf/United Kingdom Conference*, 7 F.M.C. 536 (1963), for the proposition that the Commission has previously stated that violation of a general order is not the equivalent of violating section 15. We need only point out that the general order involved in that case was not one issued to explain, interpret, or implement section 15. It is not inconsistent to say that violation of such a general order need not be a violation of section 15. We are dealing here, however, with general orders adopted to explain, interpret, and implement section 15, and violation thereof results in violation of section 15.

Respondent maintains that the show cause procedure has precluded it from establishing any facts which might prove that its operations in these three areas meet the requirements of the statute. It is respondent's contention that, although it does not comply with the general orders, it has nevertheless not operated in a manner inconsistent with the statute. It maintains that its policing has been "adequate," that it has adopted "reasonable and equal" conditions for conference admission, and that its shippers' complaint procedures have been "reasonable." It claims to have been precluded from showing the same, however, by the Commission's use of the show cause procedure which forecloses a hearing on the subject.

Respondent's contention would be valid were we attempting to show that its actual operations did not meet the statutory requirements. Such is not the purpose of this proceeding, however. As a result of the promulgation of General Orders 7, 9, and 14, conferences are obliged to inform the Commission of the procedures they have adopted in the areas of policing, conference admission, and shippers' complaints. Conferences are also required to submit periodic reports on actions taken by them pursuant to their established procedure. Although we realize that compliance with these general orders does not guarantee

that a conference is operating in a fair manner, consistent with the statute, it does nevertheless guarantee that each conference has established a general framework under which the mandates of the statute can be carried out. We have determined that, if a conference has not satisfied us that it has established such a suitable framework, it has not taken the necessary first step toward assuring the protections outlined in the statute.

In view of the fact that we conclude that respondent has not properly met this initial requirement, there is no need to have a full evidentiary hearing to determine whether respondent's actual operations meet the statutory requirement. No genuine issue of fact is presented and, accordingly, there is no need for an evidentiary hearing. We recognized this same point very recently in Docket No. 66-52, *In the matter of the Modification of Agreement 5700-5*, in which case we noted language from *Producers Livestock Marketing Assoc. v. U.S.*, 241 F. 2d 192 (10th Cir. 1957), *Aff'd*. 346 U.S. 282 (1958) :

* * * the Supreme Court has defined full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law of the step asked to be taken * * *. Where no genuine or material issue of facts is presented, the court or administrative body may pass upon the issues of law after affording the parties the right of argument * * *.

Respondent was given an opportunity to submit affidavits of fact, memoranda of law, and to present oral argument. Nothing further is required in this proceeding.

Respondent has also challenged the validity of General Orders 7, 9, and 14.

There can be no dispute that the rules were issued pursuant to proper procedure. When the Commission proceeded to adopt its rules implementing the statutory requirements with respect to self-policing, admission of conference members, and shippers' complaints, a separate rulemaking proceeding was instituted for each of the three areas. In each instance lengthy proceedings were held with opportunity given to interested parties to participate. These proceedings resulted in the adoption of General Orders 7, 9, and 14.

The gist of respondent's challenge to the validity of the rules is that the Commission cannot by use of such a rule prescribe the system to be used by a conference in fulfilling the statutory requirements in these three areas. Respondent feels that each conference should be allowed to choose its own form of meeting the requirements and the Commission should only be concerned with the fairness of actual operations under whatever form of compliance is chosen.

An analysis of the three general orders will show that respondent's fears on this matter are without basis, inasmuch as the general orders do not dictate any single form of compliance.

General Order 7 pertains to self-policing and requires that a provision for self-policing be contained in the Conference Agreement. It requires a provision describing the method or system used by the parties in policing the obligations under the agreement; a description of the procedures for handling complaints; and a description of the functions and authority of every person having responsibility for administering the system. Conferences are required to file reports twice a year showing nature of complaints, action taken, notice of violations found, and penalties imposed. General Order 7 in no way dictates what method or system of self-policing is to be used. It merely requires a description of the system and a minimum of reporting concerning the operation of the system to aid the Commission in discharging its responsibility to insure adequate policing.

As we noted in the prefatory language of General Order 7, in response to objections voiced to the possibility of requiring specific types of provisions: "Nothing in the rules specifies the particular method or procedure which must be used for self-policing."⁷

General Order 9 pertains to admission, withdrawal and expulsion provisions of conference agreements. It requires that conference agreements contain provisions in *substantially* the form of the nine provisions enumerated therein. These nine provisions contain standards designed to guarantee that the essential elements of qualification for admission and safety from expulsion are met. Such provisions are designed to prevent arbitrary conference action which would be possible under respondent's suggested provisions which allow, for example, denial of admission for "just and reasonable cause." General Order 9 does not require that the enumerated provisions be incorporated verbatim. It does require, however, that all the protections contained therein be present in some form in that which the conference adopts. Only if these protections are included is it possible that the terms and conditions for admission, etc., of a particular conference are reasonable and equal within the meaning of section 15. These are the minimum safeguards. The mere statement of these procedures in the agreement will not, however, guarantee reasonableness and equality of treatment. General Order 9, therefore, also contains reporting requirements as to actions taken under the agreement to enable us to determine the extent of compliance.

⁷ See General Order 7, 28 F.R. 9257: Aug 22, 1963.

In drafting this rule we were faced with objections on both ends calling for either greater generality or more specificity in spelling out the criteria for admission. We stated in the final order :

The rule as drafted is neither extremely general nor overly specific, but rather it attempts to strike a balance giving the conferences some discretion in submitting for approval other conditions on admission to membership.⁸

General Order 14 pertains to conference procedures for hearing and considering shippers' requests and complaints. It requires that procedures adopted by a conference be reasonable. It defines shippers' requests and complaints. It requires that conferences file with the Commission a statement outlining in complete detail their procedures for handling shippers' requests and complaints. Conferences must also file a quarterly report describing all requests and complaints received and the nature of action taken. Conferences domiciled outside the United States are required to designate a resident representative in the United States with whom shippers situated in the United States may lodge their requests and complaints. General Order 14 does not specifically dictate the type of procedures to be adopted. It only requires that the Commission be informed of the type procedure used. The requirements of General Order 14 are designed to enable the Commission to determine whether such procedures are reasonable as required by the statute.

As in General Orders 7 and 9, objection was made to adoption of rigid requirements in formulating General Order 14, and once again we noted that we were not attempting to adopt any such rigid requirements. We said in the prefatory language to General Order 14:

Because of the many ramifications which may arise in dealing with these matters, we agree that set and rigid procedures cannot be applied in all cases.⁹

It is obvious from the preceding discussion of the three general orders that respondent has completely distorted the picture when it claims that these general orders limit a conference to a single method of compliance with the statute.

A further aspect of respondent's attack on the validity of the general orders is that conference compliance with the general orders is no guarantee that the fairness required by the statute is being upheld. We are well aware that we have no guarantee that conferences which inform us of their procedures and report on actions taken thereunder have necessarily operated fairly. Compliance with the general orders does guarantee, however, that conferences have established a general framework under which the mandates of the statute can be carried out.

⁸ See General Order 9, 29 F.R. 5797 ; May 1, 1964.

⁹ See General Order 14, 30 F.R. 7490, June 8, 1965.

Also, by use of the reporting requirements we can easier look at the actual operations of a particular conference. One of respondent's objections here is that we cannot condemn its actions, since we have not observed or have not taken evidence concerning respondent's actual operation in these three areas. Such, however, is not necessary since respondent has not satisfied our initial requirements of reporting its actions to us. Once we receive such reports, we can decide whether to make further investigation to determine if a conference's operations are proper.

In *Admission to Conference Membership—Pacific Coast European Conference, supra*, we reviewed the history of the Commission's policy toward conference admissions in view of the "reasonable and equal" provisions of the statute and concluded that General Order 9 is in complete harmony with section 15; merely seeks to realize the Congressional intent behind that section; and is necessary to carry out the provisions of the Shipping Act. The same is true of General Orders 7 and 14.

Respondent has expounded at length on the proposition that we cannot enforce our general orders abroad. In so doing, respondent attacks our decision in Docket No. 916, *Investigation of WINAC*, decided August 22, 1966,¹⁰ in which we determined the provisions of the Act extend to conduct abroad performed by persons engaged in the foreign commerce of the United States. Respondent cites several cases which it says are *contra* our decision in Docket No. 916, and which should preclude us from attempting to enforce these general orders against respondent.

Among the cases cited by respondent are: *Empresa Hondurena De Vapores v. McLeod*, 300 F. 2d 222 (2d. Cir. 1962), 372 U.S. 10, and *Lauritzen v. Larsen*, 345 U.S. 571 (1953). These two cases, however, involved a question of whether a statute of the United States may be applied to regulate the internal activities of a foreign nation. In neither instance would the activities sought to be regulated have affected U.S. interests or U.S. commerce. The U.S. district court of New York recognized this distinction in *U.S. v. Anchor Line Ltd.*, 232 F. Supp. 379 (1964) at p. 384.

Respondent, however, would have us believe that our attempts to enforce these general orders upon it is an attempt to regulate activities which have no effect on our foreign commerce or on U.S. interests. This simply is not true.

Respondent does not deny that it serves the foreign commerce of the United States. Respondent has operated under an approved basic con-

¹⁰ 10 F.M.C. 95.

ference agreement since 1927. The mere fact that its conference agreement is subject to our jurisdiction should preclude it from questioning the applicability of these general orders to its activities. These general orders are designed to assist this Commission in carrying out its statutory duty to insure that the basic protections sought to be achieved by requiring section 15 approval are retained. We cannot see how the activities of a conference serving the U.S. foreign commerce can have no effect on U.S. shippers, or U.S. carriers which might seek to join the conference.

On the basis of the foregoing, and after analysis of respondent's agreements, we find and conclude that respondent has failed, on the specific respects enumerated above, to meet the requirements of General Orders 7, 9 and 14, and further that respondent has failed to show why Agreement No. 93, as amended, should not be disapproved. An appropriate order will be entered.

10 F.M.C.

FEDERAL MARITIME COMMISSION

ORDER

This proceeding having been initiated by an Order to Show Cause issued by the Federal Maritime Commission upon its own motion, and the Commission having fully considered the matter and having this day made and entered of record a Report containing its findings and conclusions, which Report is hereby referred to and made a part hereof;

It is ordered, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 93 be disapproved, effective 60 days from the date of this Order, unless within that time the Outward Continental North Pacific Freight Conference and its member lines shall have:

(a) amended the conference agreement to comply with the requirements of section 15 of the Shipping Act, 1916, and the requirements of the Commission's General Order 7 by inserting a provision describing the method or system used by the parties in policing their obligations under the agreement, including the procedure for handling complaints and the functions and authority of every person having responsibility for administering the system;

(b) submitted to this Commission a report satisfying the requirements of Section 528.3 of General Order 7 covering the period from January 1, 1964, to January 1, 1967.

It is further ordered, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 93 be disapproved, effective 60 days from the date of this Order, unless within that time the Outward Continental North Pacific Freight Conference and its member lines shall have amended the conference agreement to comply with the requirements of section 15 of the Shipping Act, 1916, and the requirements of the Commission's General Order 9 in the following respects:

(a) by deleting the phrase "just and reasonable cause" from Article 3 and substituting the phrase "to carriers meeting the above requirements" therefor (Sec. 523.2(c));

(b) to provide that no party may be expelled against its will except for failure to maintain a common carrier service between the ports

within the scope of the agreement or for failure to abide by all the terms and conditions of the agreement (Sec. 523.2(h));

(c) to provide for furnishing a detailed statement of the reasons for expulsion to the party expelled (Sec. 523.2(i)).

It is further ordered, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 93 be disapproved, effective 60 days from the date of this Order, unless within that time the Outward Continental North Pacific Freight Conference and its member lines shall have complied with the requirements of section 15 of the Shipping Act, 1916, and the requirements of the Commission's General Order 14 in the following respects:

(a) by filing a statement with the Commission outlining in detail procedures for the disposition of shippers' request and complaints as provided in Sec. 527.3;

(b) by publishing in the tariff full instructions as to where and by what method shippers may file their requests and complaints as provided in Sec. 527.6;

(c) by designating a resident representative in the United States with whom shippers situated in the United States may lodge their requests and complaints as required by Sec. 527.5;

(d) by submitting to this Commission a report satisfying the requirements of Sec. 527.4 of General Order 14 covering the period from July 1, 1965, to January 1, 1967.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-16

PORTALATIN VELAZQUEZ MALDONADO, ET AL.

v.

SEA-LAND SERVICE, INC., ET AL.

Truckers performing the pickup and delivery portion of a door-to-door contract of ocean transportation on behalf of a common carrier by water found not subject to the Shipping Act, 1916.

Complainants having failed to establish that a respondent has violated any provision of the Shipping Act, 1916, found not entitled to reparation.

Complaint dismissed.

Samuel M. Cole and *John Glynn* for complainants.

Warren Price, Jr. and *Hugh H. Skull* for respondent Sea-Land Service, Inc.

Herbert Burstein for respondent truckers.

Donald J. Brunner and *Thomas Christensen*, Hearing Counsel.

REPORT *

BY THE COMMISSION: (*John Harllee, Chairman; Ashton C. Barrett, Vice Chairman; James V. Day, Commissioner.*)

This proceeding is before us on exceptions of Hearing Counsel to the initial decision of Examiner Herbert K. Greer. Hearing Counsel's exceptions merely constitute a reargument of the same issues, allegations and contentions considered by the Examiner in his initial decision. Hearing Counsel cite one additional case not mentioned in their prior briefs, *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 539 (1924), but this case does not support the conclusion that the trucker complainants and respondents in this proceeding are "other persons" subject to the Shipping Act, 1916, any more than the cases previously cited to the Examiner to support this conclusion and rejected by him.

After a careful review and consideration of the record in this proceeding, we conclude that the Examiner's disposition of the issues

* Note.—This decision became the decision of the Commission on Apr. 13, 1967.

herein was well founded and proper. Accordingly, we hereby adopt the Examiner's decision which is set forth below.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER ¹

Complainants ² are Puerto Rican truckers engaged in the business of hauling goods between ocean terminals and inland points. They seek reparation in the amount of \$900,000.00 from four trucking corporations operating in competitions with them and from Sea-Land Service, Inc., a common carrier by water. The claim for reparation is founded on alleged violations of sections 14, 15, 16, 17 and 18 of the Shipping Act, 1916. Complainants further ask for the issuance of an order requiring respondents to cease and desist from continuing violations of the Act and for such further relief as may appear proper.

THE FACTS

1. Respondent Sea-Land Service, Inc. (Sea-Land) is a common carrier by water and in 1958 began providing service between U.S. ports and ports in the Commonwealth of Puerto Rico. At all material times, this respondent offered a door-to-door service which included ocean transportation and the pickup and delivery of cargo to and from its terminals and shippers' and consignees' places of business. It also offered a port-to-port service under which the shipper or consignee picked up or delivered its own goods at Sea-Land's terminals.

2. Respondents Valencia Service Co., Inc., Valencia Baxt Express, Inc., Maritime Trucking Co., Inc., and Francisco Vega Otero, Inc. (herein collectively referred to as respondent truckers or Big Four), operate a trucking business in the Commonwealth of Puerto Rico and engage in hauling goods between Sea-Land's terminals and inland points.

3. Truckers operating commercially within the Commonwealth are subject to regulation by the Public Service Commission of Puerto Rico.³

4. From 1958 to June 1962, Sea-Land carried out the Puerto Rican portion of its pickup and delivery service under individual agreements with Puerto Rican truckers, including but not limited to, complainants and respondent truckers. Three pickup and delivery zones were established with different rates for each zone.

¹ This decision was adopted by the Commission on Apr. 13, 1967.

² Portalatin Velazquez Maldonado, Ramon Gonzalez Diaz, Santos Soto Rivera, Ismael Almodovar, Angel L. Rios, Torbec Trucking, Inc., Metropolitan Confidential Corporation, Justo Torres Gutierrez, Carlos Crespo, Carlos Lopez, Ramon Narvaez, Adolfo Villalobos.

³ The record does not disclose whether the Public Service Commission acted on the rates agreed upon between the truckers and Sea-Land for performance of a pickup and delivery service. However, the truckers were licensed to operate by that Commission.

5. During April of 1962, a new manager took over Sea-Land's Puerto Rican operation. He met with a delegation of truckers to assist them in the formation of an association which would be operated and controlled by the truckers and have for its purpose the establishment of a common understanding and cooperative working agreement. Subsequently, the United Freight Haulers Association, Inc. (the association) was formed. Complainants and respondent truckers were, together with other truckers, members of the association.

6. On October 16, 1962, the association entered into a so-called Trailer Interchange Agreement with Sea-Land which was designed to govern the relations between individual members of the association and Sea-Land with respect to the pickup and delivery service incidental to Sea-Land's door-to-door full trailerload contracts of transportation. Eight pickup and delivery zones were established in lieu of the existing three zones, it being agreed that truckers would be compensated at the same rate Sea-Land charged shippers or consignees, which rate was set forth in the tariff filed by Sea-Land with the Federal Maritime Commission. These zones and the rates applicable to each zone were established by Sea-Land after negotiations with association members and the Puerto Rican Port Authority and were based on distance, condition of the roads, traffic congestion, and truckers' maximum costs. Under the terms of the agreement, the trucker provides the tractor and Sea-Land leases to him an individual trailer (sometimes referred to as a van), the lease to be effective during the time the trailer is away from Sea-Land's premises. The trucker lessee, among other things, agrees to retain possession of the trailer, to promptly make delivery to a shipper or consignee and return to Sea-Land's terminal. The lessee assumes complete control and supervision of the trailer during the lease period and the lessor relinquishes any right to control the work of any lessee employee or agent operating or using the trailer or in possession of it, the agreement providing that such persons are not "the agent or employee of the lessor for any purpose whatsoever." The trucker lessee agrees to hold the lessor harmless for damage to the Sea-Land trailer, from all liability for damages to persons or property arising out of the operation, to assume all legal responsibility for cargo loss or damage, and to maintain insurance covering the cargo, all owned, hired and nonowned vehicles involved, personal or property damage to third persons. Sea-Land is to be named in the policies as an additional insured.

7. Subsequent to its execution, the agreement was modified to relieve association members from responsibility for damage to cargo in excess of the limits described in the insurance policies; to obligate

Sea-Land not to sign agreements with nonmembers except when shippers or consignees transported trailers with their own equipment and provided the same insurance coverage required of association members; and obligating individual association members to be personally responsible for full compliance with the agreement. An additional modification provided that the insurance requirements would be satisfied by Sea-Land under policies held by McLean Industries, Inc., in consideration of a premium which "shall be charged at a combined rate of 3 percent that will be applied against the cost of hire for all operators hauling Sea-Land container and chassis units." This latter modification followed Sea-Land's offer to help truckers in obtaining better insurance coverage at less cost.

8. Individual association members may solicit shippers and consignees in Puerto Rico to obtain the privilege of hauling their shipments to and from Sea-Land's terminal. In connection with this full trailerload door-to-door service, Sea-Land honors a request from the shipper or consignee to permit a designated trucker to perform the pickup or delivery service. There are shipments as to which the shipper or consignee has not designated a trucker (herein referred to as unassigned or unrouted shipments). Originally, Sea-Land agreed to rotate such shipments among association members but this arrangement did not materialize.

9. Sea-Land was experiencing difficulty in connection with the pickup and delivery of less than trailerload (LTL) cargo. The agreement between Sea-Land and the association did not cover such cargo and individual members would accept for hauling only such LTL cargo as they elected to carry. Many association members did not own the type of equipment designed to handle LTL cargo and did not desire to purchase additional equipment in view of a possible loss which might develop because of the high cost involved in hauling LTL cargo. To solve this problem, Sea-Land approached the association to determine which members would be willing to make available equipment for handling LTL cargo in return for the privilege of hauling unassigned or unrouted full trailerload cargo. Only respondent truckers, the Big Four, accepted and thereafter Sea-Land gave them the privilege of hauling full trailerloads except for those trailers as to which a shipper or consignee had stated a preference for another trucker. When the volume of full trailerload cargo exceeded the ability of the Big Four to handle, Sea-Land would designate another association member as the hauler.

10. Sea-Land will enter into a Trailer Interchange Agreement with any Puerto Rican trucker provided he has a license to operate from

the Public Service Commission, presents evidence of proper insurance coverage, and has customers specifying the use of his services. Presently, approximately one hundred truckers have signed agreements with Sea-Land. (See finding No. 16 as to complainant Villalobos.)

11. Any trucker may bring his equipment to Sea-Land's terminal to pick up or drop a trailer he has been selected to transport. At other times, truckers are required to keep their tractors outside the terminal because of space limitations. Truckers handling LTL cargo are permitted to keep equipment involved in such transport inside the terminal area for convenience in loading and for the protection of the cargo. The Big Four are accorded telephone, office and yard privileges not available to other truckers.

12. Truckers do not own or control facilities located on Sea-Land's terminal. They enter the terminal with their tractors to pick up or deliver Sea-Land trailers. In connection with the handling of LTL cargo, they furnish the trucks necessary to haul the cargo and the labor to load or unload their trucks. The cargo is either "delivery service cargo" which it is Sea-Land's responsibility to deliver to a consignee's premises or pick up at a shipper's premises, or, "nondelivery cargo" as to which the shipper or consignee has the responsibility to pick up or deliver.

13. The arrangement between Sea-Land and the association remained in effect for approximately 2 years. Complainant Maldonado (sometimes referred to on the record as Velazquez) became president of the association. He and other association members met with Sea-Land representatives for the purpose of discussing changes in their agreement to include increased rates and a different method of distributing among truckers the privilege of hauling unassigned or un-routed cargo. Sea-Land refused to modify the existing arrangements and advised association members to "take or leave" the existing contract.

14. By letter dated June 2, 1964, and signed by complainant Maldonado as president of the association, Sea-Land was advised that the agreement would be cancelled effective midnight, June 12, 1964. Sea-Land then reverted to the system used between 1958 and October, 1962, and entered into Trailer Interchange Agreements with individual truckers.

15. On June 13, 1964, association members formed a picket line at Sea-Land's terminal. A truck driven by an employee of respondent Valencia Baxt attempted to run down Maldonado, who was in the picket line, and forced him to seek safety by getting out of the street. After several of such occurrences, Maldonado went to his home and re-

turned armed. He recognized the driver of the truck, fired at him, missed, but the bullet struck a Sea-Land employee. Maldonado was tried for the offense and convicted. He did not apply to Sea-Land for an individual Trailer Interchange Agreement and has been unable to transport Sea-Land trailers for that reason. Maldonado has lost his equipment and no longer operates as a trucker.

16. Complainant Villalobos executed an individual agreement with Sea-Land on June 13, 1964 and continued to haul trailers destined for his customer Pueblo Supermarket. Subsequently, a strike by the Teamsters Union involved a picket line at Sea-Land's terminal and Villalobos could not get into the terminal to receive trailers containing Pueblo Supermarket cargo. A Sea-Land employee dispatched a trailer to Pueblo Supermarket by another trucker and Villalobos complained. A fight ensued and the Sea-Land employee was severely beaten. Villalobos was convicted of simple assault. One week after the altercation, Villalobos presented himself at the Sea-Land terminal to pick up a trailer destined for one of his customers (not Pueblo Supermarket). After an argument which involved calling the police, Sea-Land gave Villalobos a letter terminating his contract with them and they have not permitted him to enter the terminal from that time on. His business has substantially decreased.

17. At all material times, complainant Ramon Gonzales Diaz has hauled Sea-Land trailers under a Trailer Interchange Agreement, as an individual or as an association member. He has been charged and has paid 3 percent of the revenue received for hauling a trailer as insurance premium and has been required to pay for damage to a Sea-Land trailer. He has at times been delayed at least an hour in picking up a trailer because other trailers in the line ahead of him were being subjected to inspection by Sea-Land personnel to determine whether they were in condition to be moved.

18. Sea-Land Sales of Puerto Rico is a sales agency owned by Alfonso Valencia who owns part interest in respondents Valencia Service Co., Inc., and Valencia Baxt Express, Inc. Sea-Land does not own or control the sales agency but pays the agency a fee on business produced.

19. Sea-Land does not retain any portion of the 3 percent insurance charge paid by truckers but passes the entire amount on to the insurance carrier. No charge is made by Sea-Land for administrative service involved in handling the insurance.

DISCUSSION

The primary issue is the Commission's jurisdiction over the respondent truckers. Sea-Land is a common carrier by water and does not contest the Commission's jurisdiction.⁴ Respondent truckers are not common carriers by water. They do not carry on the business of forwarding nor do they furnish wharfage, dock, or warehouse facilities. If jurisdiction attaches, they must be found to be "other persons" who furnish "other terminal facilities in connection with a common carrier by water."⁵

Complainants take the position that respondent truckers furnish terminal facilities in connection with a common carrier by water because their "work was totally intertwined with the shipping operation in the light of the door-to-door service offered by Sea-Land" and that the service "involved a single inseparable transaction, conducted, maintained and exclusively controlled through Sea-Land and its agents."

Hearing Counsel argue that all truckers involved, both complainants and respondents, furnish labor and equipment in the performance of the pickup and delivery service which, regardless of their contractual relationship with the ocean carrier, amounts to the performance of a "link" in the interstate commerce intended to be covered by the Shipping Act. They cite *U.S. v. American Union Transport*, 327 U.S. 437 (1946) to support the position that if the Commission is to effectively regulate water carriers, it must have supervision of all incidental facilities connected with the main carriers. They argue that a pickup and delivery service has been held to be a terminal facility incidental to ocean commerce by the courts and the Commission and cite *American Trucking Association v. U.S.*, 17 F. 2d 655 (1963); *Certain Tariff Practices of Sea-Land Service, Inc.*, 7 F.M.C. 504 (1963); *Pickup and Delivery Service in Official Territory*, 218 I.C.C. 441 (1936); and *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946).

Respondent truckers contend that they do not, as principals, furnish any service whatsoever and that in their capacity as Sea-Land agents, they are exempt from this Commission's jurisdiction in accordance

⁴The controversy between the parties hereto was originally submitted to the U.S. District Court for the District of Puerto Rico. The court granted respondents' motion to dismiss on the ground that primary jurisdiction was with the Federal Maritime Commission.

⁵Section 1 of the Shipping Act, 1916, in pertinent part provides:

The term "other person subject to this act," means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

with the decision in *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480 (1963). Complainants also rely on this decision but take a diverse view as to its meaning and effect.

The *Matson* decision does not support complainants' position that truckers performing a pickup and delivery service on behalf of, or under contract with, a common carrier by water become subject to the provisions of the Shipping Act. The Commission did not assume jurisdiction over the land carriers but made clear that its regulatory authority attached only to the water carrier, stating:

The service is offered by Matson in its capacity as a common carrier by water and it is in this capacity that Matson is subject to the regulatory jurisdiction of the Commission.

Further:

We are merely subjecting to regulation a service authorized by the provisions of the Shipping Act offered by a common carrier subject to that act. If a portion of that service is conducted by a carrier subject to another agency's regulation and the carrier performs that service in violation of the laws administered by that agency, that is a matter for the agency concerned. Practical difficulties may arise but jurisdictional conflicts should not.

Moreover, the Commission did not attempt to regulate the rates agreed upon between the ocean carrier and the land carrier for performance of the pickup and delivery service, stating:

Once the charge of the motor carrier to Matson becomes fixed it is like any other fixed cost of a water carrier and is to be considered as such in determining the reasonableness of the rate which that water carrier charged the shipping public.

Hearing Counsel do not consider the *Matson* decision as applicable to the situation here because the truckers performing the pickup and delivery service for Matson were subject to the regulatory authority of the Interstate Commerce Commission (ICC) and this Commission is precluded by section 33 of the Shipping Act from exercising any concurrent jurisdiction over ICC regulated carriers; but that in this proceeding, the truckers are subject to regulation by the Public Service Commission of Puerto Rico, an agency not specifically excluded from this Commission's jurisdiction by statute. They reason that if, as they contend, the truckers furnish "other terminal facilities" and are for that reason subject to the provisions of the Shipping Act, this Commission's jurisdiction is not diminished because of the Public Service Commission's concurrent jurisdiction.

Quoted above is the Commission's comment in the *Matson* decision that in connection with a pickup and delivery service performed by truckers subject to another agency's regulatory authority, "Practical difficulties may arise but jurisdictional conflicts should not." The

matter of concurrent or conflicting jurisdiction is not deemed decisive of the issue here presented. In any event, the issue would not arise unless it was determined that the truckers are subject to this Commission's jurisdiction because they furnish terminal facilities as that term is used in the act.

The truckers involved in this proceeding enter the ocean terminal for the purpose of picking up or delivering cargo which they transport between the terminal and a shipper's or consignee's place of business. They do not furnish labor or equipment to transfer the cargo from one place on the terminal to another place thereon as in *Carloaders and Unloaders, supra*. They do not furnish labor or equipment to load or unload a vessel as did the contractor in *Philippine Merchants Steamship Co. v. Cargill, Inc.*, FMC Docket [996] 9 FMC 155. In those two proceedings the contractor's service was performed entirely within the terminal area and was a function necessary to the terminal's operation. Here, the truckers do no more than any other person who brings cargo to an ocean terminal or comes to the terminal to take delivery of an ocean shipment. Sea-Land unloads the vessels. It places inbound cargo on the terminal and it is from this place of rest that truckers pick up a trailer or LTL cargo and transport it inland. Outbound cargo is brought to the terminal from inland origins, placed on the terminal and from this place of rest, Sea-Land takes over to load the full trailer on a vessel or to stow LTL cargo in trailers for subsequent loading on a vessel. Equipment furnished by the truckers is limited to tractors for hauling Sea-Land trailers or trucks for hauling LTL cargo. The truckers do not furnish labor for loading or unloading full trailerload cargo, although they do load and unload LTL cargo at a place of rest on the terminal.

The term "other terminal facilities" is not defined by statute. In *Status of Carloaders and Unloaders, supra*, the Commission adopted the definition of terminal facilities as "All those arrangements, mechanical and engineering, which make easier transfer of passengers and goods at either end of a stage of transportation service." A common carrier by water has only the obligation to provide a reasonably available place for the receipt and delivery of property, and has no obligation to deliver the cargo to its ultimate destination. *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887 (1962). Thus, the transportation service offered by a water carrier, when viewed as an obligation which attaches to common carriage, begins or ends at the place provided on a terminal for the receipt or delivery of property. The Commission, and the courts, have recognized that a common carrier by water may, by contract, extend its obligation to a

shipper to include a pickup and delivery service. The fact that an ocean carrier employs a land carrier to perform this contractual obligation does not place such land carrier in the position of performing an obligation imposed by statute on a common carrier by water.

A person, by virtue of a contract with a water carrier or terminal operator, may become subject to the Commission's jurisdiction provided the contract involves an activity covered by the act. But entering an ocean terminal for the sole purpose of picking up or delivering cargo does not amount to the furnishing of a terminal facility within the purview of section 1 of the Shipping Act. The cases cited to support the principle that a pickup and delivery service is a terminal facility involve the question of a Federal agency's regulatory authority over the activity of a carrier otherwise subject to its jurisdiction. The Federal agency regulates the carrier's service to the public, including its activities incidental to the common carriage of goods. But no authority is found to support the proposition that a contractor who carries out a pickup and delivery service, independently or on behalf of an ocean carrier, is subjected to the Commission's jurisdiction.

Alleged Violations of the Shipping Act.

Section 22 of the act provides that reparation may be awarded for injury caused by persons subject to the act and as respondent truckers are not within that category, the right to reparation would depend on proof of a violation of the act by respondent Sea-Land.

Complainants' brief furnishes but little guidance in relation to the evidence they adduced and their allegations that sections 14, 15, 16, 17, and 18 of the Shipping Act, 1916, have been violated. Counsel's preliminary statement at the hearing indicated an intent to prove that the rates applied to the pickup and delivery service were less than properly applicable; that Sea-Land required a rebate from the truckers for insurance, tires, repairs and demurrage, which, although counsel did not so specifically state, might amount to Sea-Land receiving more from the shippers than the applicable rate; that undue and unreasonable preference was given to certain persons by Sea-Land in connection with the pickup and delivery service, particularly respondent truckers to whom Sea-Land paid a higher rate than to other truckers; and that the pickup and delivery zones established by Sea-Land and the rates charged were "improper."

Hearing Counsel find no violations of the act except that all parties failed to file their interchange agreement as required by section 15 of the act. Inasmuch as the truckers have been found to be persons not subject to the act and, as the statute requires only the filing of agree-

ments between persons subject to the act, that issue has been disposed of above.

Section 14 of the act prohibits deferred rebates to any shipper and complainants presented no evidence whatsoever to establish that any shipper received a rebate from Sea-Land, much less the particular kind of rebate to which this section relates.

Section 16, First, makes it unlawful to give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever. The only evidence which might relate to preference or advantage is that Sea-Land assigned a greater portion of the cargo involved in its door-to-door service to the so-called Big Four than to other truckers. Even if section 16 could be extended to include a requirement that an ocean carrier must equally distribute the hauling of its cargo between inland truckers, which certainly the provision does not require, any preference shown was neither undue nor unreasonable. Under the circumstances shown on the record, it was reasonable for Sea-Land to agree with truckers that in return for accepting LTL cargo which required the purchase of additional equipment and was, at best, a marginal operation from a financial viewpoint, those truckers would be permitted to carry so-called "unassigned" or "unrouted" cargo.

Complainants' evidence does not even remotely relate to any charge, rate or fare which is unjustly discriminatory between shippers or port or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. The allegation that pickup and delivery zones and rates therefor were improper or unlawful is not borne out by the evidence. Sea-Land established the zones and rates after consultation with Puerto Rican Port Authority representatives and certain truckers. The zones and rates were based on maximum trucker costs, distance, road conditions, and traffic congestion within the various areas. No violation of section 17 has been shown in the absence of proof of unjust or unreasonable practices in connection with receiving or delivery of property.

Section 18 requires reasonable rates, just and reasonable regulations and practices in all matters relating to or connected with the receiving, handling, transporting, storing or delivery of property. The zones and rates in connection with the receipt and delivery of cargo were not shown to be other than just and reasonable.

Complainants' evidence that Sea-Land required a 3 percent deduction from the rate established for pickup and delivery service does not establish that Sea-Land received more than the tariff rate required to be paid by shippers or consignees. The record clearly establishes that

this insurance premium was passed on by Sea-Land to an insurance agent and that instead of profiting thereby, Sea-Land assumed the cost of administering the insurance program for the benefit of the truckers.

Complainants have failed to substantiate their allegations that respondents have violated the provisions of the Shipping Act as set forth in the complaint.

ULTIMATE CONCLUSIONS

1. Truckers performing the pickup and delivery portion of an ocean carrier's door-to-door contract of carriage with shippers, the services of the truckers being limited to entering an ocean terminal for the purpose of picking up or delivering cargo and transporting the cargo between a place of rest on the terminal and shipper's or consignee's inland establishment, do not furnish terminal facilities in connection with a common carrier by water within the purview of section 1 of the Shipping Act, 1916.

2. In the absence of proof to support the allegations of the complaint that a person subject to the act has violated a provision of the Shipping Act, 1916, complainants are not entitled to reparation.

The complaint is dismissed.

(Signed) HERBERT K. GREER,
Presiding Examiner.

COMMISSIONER HEARN, dissenting:

I disagree with the opinion of the majority in its discussion of the Federal Maritime Commission's jurisdiction over the truckers and the conclusions following therefrom.

There is today a tremendous amount of discussion in the shipping and transportation industries about the revolutionary changes arising from increased usage of containerization. There can be little doubt that containerization offers substantial benefits to the transportation industry and the general business community. Neither can it be doubted that containerization requires significant revision of traditional transportation concepts to meet the requirements of effective movement of containerized cargo. It is, therefore, essential that we do not seek to perpetuate old strictures intended to meet the needs and problems of cargo movement of yesteryear.

I find the reasoning of the majority shortsighted in respect to the Commission's jurisdiction over the Puerto Rican truckers. The facts and circumstances of this case are sufficiently set forth in the Presiding Examiner's Initial Decision and I shall therefore proceed to the discussion.

I take issue first of all with the Examiner's reading of the decision in *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C., 480

(1963). The Examiner states that the *Matson* case does not stand for the proposition that truckers performing a pickup and delivery service are subject to the Shipping Act of 1916. That decision neither, however, supports the position of the Examiner and the Respondent truckers, i.e., that such truckers are *not* subject to the act. In this regard the decision stands solely for the proposition that the Commission is "merely subjecting to regulation a service authorized by the provisions of the Shipping Act offered by a common carrier subject to that act." 7 F.M.C. 480, 491.

More specifically, the Commission said in the *Matson* decision that the motor carriers did not by their actions "remove themselves from the jurisdiction of the Interstate Commerce Commission." 7 F.M.C. 480, 491. (Emphasis supplied.) Section 33 of the Shipping Act prohibits usurpation or concurrence of jurisdiction by the Federal Maritime Commission of matters within the jurisdiction of the Interstate Commerce Commission. It does not follow, however, that the Commission would not have been prepared, in *Matson*, to extend its jurisdiction over the truckers were it not for the limitations of section 33, and should be similarly prepared here since the Interstate Commerce Commission admittedly has no jurisdiction over the truckers herein.

In fact the *Matson* decision states that "[p]ractical difficulties and problems may arise but jurisdictional conflicts should not." 7 F.M.C. 480, 492. The Commission was apparently anxious to avoid or prevent regulatory inconsistencies but was unable to do so by law. No such jurisdictional restriction is present here. Although the Public Service Commission of Puerto Rico has jurisdiction over the truckers, there is no legal restriction to the concurrent jurisdiction of the Federal Maritime Commission. It is not at all clear, as stated by respondent truckers, that "the Commission may not pre-empt the jurisdiction of the Public Service Commission of Puerto Rico." Brief, p. 7. Moreover, there is reason to favor extension of the Federal Maritime Commission's jurisdiction.

Pickup and delivery services which are presently beyond the reach of any Federal agency are not limited to Puerto Rico; and it cannot be disputed that uniformity of regulatory control over such services (especially when involving federally regulated carriers) is desirable. Even were this not so, it should not be left open to such agencies as the Public Service Commission to create hindrances to the movement of cargo by carriers regulated by the Federal Maritime Commission, Interstate Commerce Commission, etc. Containerization and intermodal movements should not be handicapped by outmoded, unrealistic and/or inapplicable regulatory schemes.

I also take issue with the argument of the Examiner that the truckers are not "other persons" within the meaning of the Shipping Act. The Examiner acknowledges that pickup and delivery services are terminal services, but concludes that the truckers performing the services are not subject to Federal Maritime Commission jurisdiction absent authority to the contrary. Admittedly, there is no administrative or judicial decision which holds such truckers to be subject to the act, but neither is there any decision that holds them not to be so subject. The Examiner's reasoning in support of his conclusion serves to require the opposite conclusion as well. As the Examiner states, prior cases have not presented the question of the Commission's jurisdiction over truckers furnishing pickup and delivery services. (Initial Decision, p. 12.) Those cases dealt solely with the lawfulness of tariffs and other issues.

This is a case of first impression. As such it should not be decided on the basis of principles formulated without consideration of present conditions. The law is not static. As circumstances change so must the law. Technological advances in the transportation of cargo should not outstrip advances in regulatory practices.

The Examiner's statement that a common carrier by water "has no obligation to deliver the cargo to its ultimate destination" (Initial Decision, pp. 11, 12) exemplifies the parochial nature of the decision. The phrase "or other terminal facilities" in section 1 of the Shipping Act should not be limited by the preceding words "wharfage, dock, warehouse * * *." Such limitation attributes to the wording a redundancy which the act cannot have been intended to convey. A more realistic reading of the words is that other terminal facilities include not only those related to wharfage, dock and warehouse facilities, but also such others as may become current in the development of water transportation.

I admonish the Commission not to lose sight of its purposes "to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries * * *." (Preamble, Shipping Act, 1916.) In conclusion, I cannot overemphasize the need for progress in regulatory thinking to keep pace with progress in cargo transportation.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1182

RATES FROM JACKSONVILLE, FLORIDA TO PUERTO RICO

Decided May 8, 1967

Sea-Land, because its Jacksonville operation is profitable and its continued operation is not threatened, has shown no competitive necessity for eliminating TMT's differential. Since rate parity would probably drive TMT out of the trade, TMT may maintain its differential.

Sea-Land has not justified its proposed differentially lower rates between Jacksonville and Puerto Rico as compared with its rates between other Atlantic ports and Puerto Rico by sufficient proof of advantages in cost of operation, value of service to shippers, or other transportation conditions warranting such reduction.

As Sea-Land's lower rate on scrap metal from Puerto Rico to Jacksonville was not suspended, Sea-Land did not have the burden of proving its lawfulness and in the absence of evidence to support a finding that the rate is unlawful, it is lawful.

Warren Price, Jr., Hugh H. Shull, Jr., and J. Scot Provan for respondent Sea-Land Service, Inc.

Homer S. Carpenter, John C. Bradley, and Edward T. Cornell for respondent TMT Trailer Ferry, Inc. (C. Gordon Anderson, trustee).

Sidney Goldstein, General Counsel, *F. A. Mulhern*, attorney, *Arthur L. Winn, Jr., Samuel H. Moerman, J. Raymond Clark, and James M. Henderson* for intervener Port of New York Authority.

John Rigby for intervener Commonwealth of Puerto Rico.

Donald J. Brunner and Thomas Christensen, Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, *Commissioner*.)

THE PROCEEDINGS

The general purpose of this proceeding is to examine the competitive relationship between Sea-Land Service, Inc., Puerto Rican division

and TMT Trailer Ferry, Inc. (C. Gordon Anderson, trustee). The specific issues are as follows:

1. Whether TMT may maintain rates differentially lower than Sea-Land's rates from Jacksonville because of TMT's method of service or level of cost.
2. Whether Sea-Land may charge different rates from Jacksonville to Puerto Rico than it charges from other Atlantic ports to Puerto Rico.
3. The lawfulness of Sea-Land's rate on scrap or used metal northbound from Puerto Rico.

FACTS

TMT commenced the original roll-on/roll-off trailer service in the Florida-Puerto Rico trade in 1954.¹ TMT serves only the port of San Juan in Puerto Rico. It offers two sailings each week from Jacksonville; alternate voyages include a stop at Miami, Fla. Transit time for direct sailings to San Juan from Jacksonville is approximately 7 days and from Jacksonville via Miami to San Juan approximately 9 days. Because of the nature of the tug and barge operation, scheduled service is frequently delayed from 1 to 3 days.

Sea-Land began its service between Jacksonville and Puerto Rico in 1959 with transshipment at Port Newark, N.J. In April 1963, Sea-Land instituted a direct weekly service between Jacksonville and Puerto Rico, and except for a temporary reversion to the indirect service due to vessel damage, Sea-Land has continued this service.² It serves, in addition to San Juan, the Puerto Rican ports of Ponce, Arecibo, and Mayaguez and operates terminals at each Puerto Rican port as well as at Jacksonville. Transit time between Jacksonville and San Juan is 3 days. Sea-Land uses containerships which are loaded by crane. Not all of Sea-Land's vessels return to North Atlantic ports via Jacksonville.

Upon entering the Jacksonville-Puerto Rico trade, Sea-Land filed rates based on the existing rates of other carriers. TMT thereupon filed lower rates which motivated Sea-Land to reduce its rates. Sea-Land has not fully met the most recent TMT reduction.

On the 11 major-moving commodities via TMT's southbound service, its truckload rates are lower than Sea-Land's corresponding rates with the exception of the rate on tin plate. For the year 1964, approximately

¹ TMT offers a tug and barge service, the barges being LSTs which have been modified to permit the movement of highway trailers on their own wheels between the dock and the deck of the vessel. The tugs operated in the service are chartered and owned by the Florida Towing Co.

² Sea-Land also operates out of the North Atlantic ports of Elizabeth, N.J. and Baltimore, Md., and recently began operating out of the South Atlantic port of Charleston, S.C.

20 percent of TMT's revenue from major-moving commodities came from cargo originating in areas rail-rate-favorable to North Atlantic ports, 37 percent from origins rail-rate-equal to North Atlantic ports and Jacksonville, and 32 percent from origins rail-rate-favorable to Jacksonville; the balance of cargo originating in areas rate favorable to Miami or from other sources.

The preponderance of Sea-Land cargo moving through Jacksonville originates in areas rail-rate-favorable to Jacksonville.³ Sea-Land's major commodities moving through Jacksonville are paper and paper products, animal feed, food products, beer, sand and clay, iron and steel products, piece goods, and refrigerator cargo of poultry, eggs, ice cream, fish, produce and frozen foods. TMT carries small amounts of these commodities. Sea-Land's rates on bottles and paper products southbound are lower than the TMT rates on such commodities. Because of TMT's lower rates, Sea-Land has been unable to participate in the carriage of certain commodities.

The rates of Sea-Land from Elizabeth to Puerto Rico and from Jacksonville to Puerto Rico are on parity, with the principal exceptions of stoves and ranges southbound and rum, coconuts, and pineapples northbound, the latter rates being lower to Jacksonville than to Elizabeth. These northbound rates were reduced to meet TMT competition.

In establishing rates, TMT's principal consideration is the necessity to maintain a differential under the prevailing rates of Sea-Land because it feels it could not remain in business without a differential due to its inferior service as compared to the service offered by competitors operating self-propelled vessels.

The trade between the United States and Puerto Rico has grown rapidly from 1952 to 1964. Both Sea-Land and TMT have increased their tonnage during this period and have expanded their services. Sea-Land, upon entering the Jacksonville-Puerto Rico trade, developed new cargo and also obtained cargo formerly handled by other carriers. Sea-Land has become the dominant carrier in the trade.

Sea-Land established its present rate on scrap or used metal for the purpose of meeting TMT competition northbound. Now the rates are identical except that TMT absorbs insurance costs. As the southbound traffic substantially exceeds the northbound traffic, revenue derived by Sea-Land on the carriage of scrap and used metal serves to defray a portion of round voyage expenses. TMT does not carry scrap or used metal northbound.

³ Sea-Land carries furniture out of Jacksonville from origins rail-rate-favorable to North Atlantic ports.

At rate parity with Sea-Land, TMT probably would lose all cargo from origins rate favorable to North Atlantic ports, approximately 20 percent of its major moving commodities based on 1964 data, and would lose substantial amounts of cargo it has handled from origins rate equal to Jacksonville and other ports served by Sea-Land. At rate parity, TMT's ability to compete probably would be seriously crippled. Elimination of TMT from the Jacksonville-Puerto Rico trade would leave Sea-Land in virtual control of that trade.

DISCUSSION

Examiner Herbert K. Greer issued an initial decision in this proceeding. Examiner Greer decided that TMT was entitled to set rates differentially lower than Sea-Land. Although the Examiner approved Sea-Land's northbound rate on scrap metal to Jacksonville, he refused to permit Sea-Land, as a general practice, to charge rates lower between Jacksonville and Puerto Rico than between other Atlantic ports and Puerto Rico. Sea-Land excepted to the initial decision and we heard oral argument.

TMT's Rates

Generally TMT quotes rates on important commodities lower than Sea-Land's, and under this rate structure, TMT has retained a significant share of the traffic offered at Jacksonville. Indeed, TMT by this lower rate policy has attracted cargo from inland points that could also readily be served by North Atlantic ports.

TMT's ratemaking practices present several important questions:

1. May we permit a carrier to fix rates differentially lower than its competitor's rates because of a service disability?
2. Is TMT amenable to section 16 First which prohibits undue preference to one locality (port) and undue prejudice to another locality (port) where TMT does not serve the area which is allegedly prejudiced?
3. If so, has TMT, through its ratemaking practices, unlawfully prejudiced other ports?

TMT attempted to justify its rates on important commodities because of its inferior service, specifically slower transit time and inability to maintain a regular schedule. TMT simply contends that it cannot compete with Sea-Land at rate parity.

Sea-Land argues that TMT is not entitled to a differential as a matter of law. It contends that TMT's rates are unjust and unreasonable in violation of section 18(a), Shipping Act, 1916 and section 4, Intercoastal Shipping Act, 1933, to the extent that they are lower than

Sea-Land's rates or the rates applicable generally in the North Atlantic-Puerto Rican trade because TMT's rates (a) are lower than necessary to meet the competition, (b) result in needless dissipation of carrier revenue, and (c) are destructive of an entire rate structure.

The Examiner found that TMT's competitive position depends on its lower level of rates, and, given rate parity, TMT's survival would be improbable. Consequently, the Examiner concluded that TMT is entitled to a rate differential to prevent its elimination from the trade.⁴

The Examiner concluded that while TMT attracted cargo from areas from which the inland rail rate was lower to a North Atlantic port than to Jacksonville, this diversion of cargo does not amount to an unlawful preference or prejudice in violation of section 16 First. Nor did the Examiner find that the prospect of a rate war between TMT and Sea-Land would be so imminent as to require rate parity between the two.

Under the system of regulation of domestic offshore commerce enunciated in the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933, carriers have the initiative to set rates which fall within a general range of reasonableness and are not otherwise unlawful. Thus, various levels of rates in a single trade, or differentials, are not unlawful as such.⁵ Consequently, TMT, if it meets the broad statutory standards, may set rates lower than a competitor's. On the other hand, Sea-Land has the right to initiate rates to meet competition provided that the rates are compensatory and not lower than necessary to meet the competition. *Alabama G.S.R. Co. v. United States*, 340 U.S. 216, 224 (1951); *Eastern-Central Association v. U.S.*, 321 U.S. 194, 200-02 (1944) (and cases cited at note 8); *U.S. v. Chicago, M., St.P. & P.R. Co.*, 294 U.S. 499, 507 (1935); *Oleomargarine, Cincinnati and Columbus to the East*, 294 I.C.C. 349 (1955). But a carrier's right to meet competitive rates is not absolute, *Atl. Refining Co. v. Ellerman & Bucknall S.S. Co., et al.*, 1 U.S.S.B. 242 (1932); *Switching Rates in Chicago Switching District*, 220 I.C.C. 119 (1937); *Foodstuffs Between Mich. and Pa. and to N.J. and N.Y.*, 310 I.C.C. 343 (1960). Rate

⁴ However, the Examiner stated that the record would not support the conclusion that TMT is entitled to lower rates as the low cost carrier. Cost-wise, the Examiner could go no further than to indicate that TMT operates profitably and its rates are not wasteful of revenue. We concur.

⁵ Originally the Commission regarded the offering of differentially lower rates as *per se* subjecting competing carriers to undue and unreasonable prejudice and disadvantage. See *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935). However, the Commission subsequently departed from this strict approach as explicated in *Anglo-Canadian Shipping Co., Ltd., et al. v. Mitsui Steamship Company, Ltd.*, 4 F.M.B. 535, 540 (1955). See also: *Huber Mfg. Co. v. N.V. Stoomvaart Maatschappij "Nederland"*, 4 F.M.B. 343 (1953) and *Eden Mining Co. v. Bluefields Fruit and S.S. Co.*, 1 U.S.S.B., 41 (1922).

reductions for that purpose must be just and reasonable and not discriminatory. Regulation of rates should not only prevent discrimination and prejudice but should prevent destructive and unfair competition as well, including competition which threatens the traffic or financial position of another carrier. A rate reduced for a destructive purpose is neither just nor reasonable "and the law will interfere * * * when competition * * * becomes destructive and wasteful." *Intercoastal Investigation, 1935*, 1. U.S.S.B.B. 400, 430 (1935); see also: *Canned Goods in Official Territory*, 294 I.C.C. 371, 390 (1955).

Whether TMT may preserve its rate differential depends upon its ability to attract cargo at rate parity with Sea-Land. Of course, a primary shipper consideration in selecting a carrier is total cost of transporting a commodity from origin to destination.⁶ Where ocean freight rates are equal, minor considerations assume a major role. For instance, with slower transit time TMT's vessels are exposed to the hazards of ocean transportation for approximately twice the time experienced by Sea-Land's vessels. And hazard and the probable condition of the cargo upon arrival is a shipper concern.⁷ Furthermore, a tug and barge service is inherently less stable and less reliable. Sea-Land's service is modern and efficient. TMT's vessels are not particularly modern or, in view of the inability to adhere to a schedule, efficient. We find that shippers would as a rule prefer the more modern, faster, and more dependable service of Sea-Land if rates were equal.⁸ Sea-Land argues, however, that we must consider frequency of service as a factor inducing shippers to patronize a particular carrier. Sea-Land contends that since it has a weekly service and TMT has a twice-weekly service, Sea-Land operates under a service disability. We cannot agree. Because TMT's service is quite erratic, we find that at rate parity, shippers would prefer Sea-Land's dependable service.

TMT's service with respect to the commodities in question is not of such value to shippers that they would continue to patronize TMT irrespective of higher rates. Indeed, TMT will be injured if its rates

⁶ *Reduced Rates on Autos—N. Atl. Coast to Puerto Rico*, 8 F.M.C. 404 (1965).

⁷ *Sea-Land Service, Inc. v. S. Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338 (1966), where a shipper of trucks to Puerto Rico used another carrier because "TMT's * * * service exposed the trucks to a greater risk of damage."

⁸ Sea-Land moved to strike an attachment to TMT's reply to exceptions which contained a statement of a Sea-Land official in a proceeding before the Interstate Commerce Commission. Since the foregoing discussion of the requirements of shippers in ocean commerce rests, not upon the attachment of TMT's paper, but upon this record and our general knowledge of the subject derived over the years, it is unnecessary to rule on the motion. Likewise, it is unnecessary to rule upon the propriety of the Examiner's exclusion from the record of letters from shippers because such letters would not change the above findings. We also overrule Sea-Land's exceptions that the Examiner erred in making similar findings in the absence of shipper testimony. Such testimony is not indispensable for a discussion of the general needs of shippers.

are increased through loss of traffic upon which the inland rail rate is favorable to North Atlantic ports. TMT would also be deprived of a substantial portion of its cargo from inland-rate-equal origins and from the Jacksonville area as well. At rate parity with Sea-Land, TMT would in all probability be forced out of business. Therefore, TMT's rates must serve as its inducement to shippers.

Furthermore, Sea-Land has no competitive necessity for lowering its rates and eliminating the TMT differential. Its Jacksonville operation is profitable and its continuance in the trade is not threatened. It carries substantial volumes of cargo in the Jacksonville trade despite TMT's rate advantage. In the face of these facts, Sea-Land would, in establishing rate parity, drive TMT out of business, and thus obtaining virtual control for itself of the trade between Jacksonville and Puerto Rico.⁹ We, therefore, will not on this record permit Sea-Land to lower its rates to TMT's levels nor will we order TMT to increase its rates to the levels prevailing in the North Atlantic.

Sea-Land also asserts that the Examiner should have found that Sea-Land is the low cost carrier. We agree with the Examiner that the cost data of record are inadequate to determine which is the low cost carrier. The Sea-Land study purports to show the cost per box while TMT shows cost per measurement ton. A comparison of these data is meaningless and no restatement of these figures is particularly trustworthy. Accordingly we cannot decide this issue on the basis of cost data in this record.

Sea-Land also argues that cargo is diverted to Jacksonville from origins inland-rate-favorable to Elizabeth and Baltimore in violation of section 16 First.¹⁰ In response TMT argues that as a matter of law it cannot be held to have violated section 16 First because it does not serve the ports in the North Atlantic which it allegedly has prejudiced.

We cannot agree with TMT's reading of section 16 First which reads:

That it shall be unlawful for any common carrier by water * * *

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

This provision turns upon the correlatives, preference and prejudice. A violation depends upon these ingredients, not whether a car-

⁹ See: *Alcoholic Liquors in Official Territory*, 283 I.C.C. 219 (1951).

¹⁰ Sea-Land cites *Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Ports in Puerto Rico*, 9 F.M.C. 465 (1966), to support the argument that such a diversion subjects North Atlantic ports to undue prejudice and disadvantage in violation of section 16 First.

rier serves both ports. Thus: TMT erroneously contended that as a matter of law it cannot be held to have violated section 16 First. As we stated in a similar context in *Reduced Rates on Machinery and Tractors, supra*, at 481, if any injury to a port is caused by the rate-making practices of a carrier, section 16 First may be applicable.¹¹

Under these circumstances it is appropriate to determine whether TMT's rates prefer Jacksonville and prejudice other ports.

Undoubtedly, the existing TMT rates attract cargo from origins which, based upon inland rail rates, are tributary to North Atlantic ports. This does not itself establish a violation of section 16 First. Whether the drawing away of traffic results in unjust or unfair discrimination or undue or unreasonable preference is a question of fact for determination in each instance. *City of Portland v. Pacific West-bound Conference*, 4 F.M.B. 664 (1955); *Beaumont Port Commission v. Seatrains Lines, Inc.*, 3 F.M.B. 556 (1951). Thus we must determine whether the rates of TMT divert traffic from a port to which the area of origin is naturally tributary, to a port to which the area is not naturally tributary. *Sea-Land Service, Inc. v. S. Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338 (1966). "Naturally tributary" is an economic concept. It depends upon the shipper's cost, the value of a carrier's service to a shipper, or other factors. Here the paucity of the record is patent. The record shows only that TMT, pursuant to an apparently reasonable rate structure, attracts cargo overland from areas which could be served by other ports. Those persons who would attack TMT's rates, must show more.¹² We will not find a violation of section 16 First on such a meager showing. Nor will we artificially allocate cargo among ports particularly where that course would have a disastrous impact on TMT.¹³

It is argued that TMT is a marginal operator with little promise for the future, and that to base port relationships on TMT's survival would be inappropriate. The Commission is not fixing port relationships. Rather, it is regulating competition between Sea-Land and TMT. TMT's entitlement to a differential is not based on TMT's right to survive lawful competition. Nor does slow transit time alone support our endorsement of TMT's differential. No transportation condition

¹¹ Accord: *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48, 54-55 (1960); *Beaumont Port Commission v. Seatrains Lines, Inc.*, 3 F.M.B. 556, 565-66 (1951). Cf: *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 139 (1965). But Cf: *California Packing Corp. v. States Steamship Co. et al.*, 1 U.S.S.B.B. 546 (1936); *Sugar from Virgin Islands to United States*, 1 U.S.M.C. 695 (1938); *American Peanut Corp. v. M. & M.T. Co. et al.*, 1 U.S.S.B. 78 (1925).

¹² *U.S. v. American Export Lines, et al.*, 8 F.M.C. 280, 290 (1964) and cases cited there.

¹³ TMT competes at rate parity with South Atlantic & Caribbean Lines, Inc. (SACL) out of another Florida port. To require TMT to raise its rates would destroy its ability to compete with SACL.

warrants rate parity, but to the contrary the elimination of a differential would result in TMT's inability to remain competitive, thus leaving to Sea-Land the virtual control of the trade between Jacksonville and Puerto Rico. We believe that the Puerto Rican trade is best regulated and coordinated by the preservation of TMT's service.¹⁴ The lack of a compelling transportation condition here serves to distinguish this proceeding from *Reduced Rates on Machinery and Tractors, supra*.

Sea-Land's Rates

Generally speaking, Sea-Land maintains uniform rates from Atlantic ports, including Jacksonville, to Puerto Rico. Sea-Land, however, contended that because it must meet TMT's competition out of Jacksonville, it should be allowed to publish lower rates from Jacksonville than from North Atlantic ports. The Examiner, using as a test whether Sea-Land was unable to compete with TMT, concluded that the record would not support a finding of competitive necessity to justify a difference in Sea-Land's rates between various Atlantic ports. The Examiner based the determination upon the fact that Sea-Land is a strong competitor of TMT and has obtained its full share of business out of Jacksonville.

Sea-Land, because of competition, charges a lower rate on scrap or used metal to Jacksonville than it charges to North Atlantic ports. The Examiner stated that a difference in the rates on one commodity to different destinations is not unlawful per se, and since there was no evidence upon which he could otherwise find the rate to be unlawful, he found it to be lawful. In effect, the Examiner found no explicit evidence one way or the other as to the proper level of the northbound rate on scrap metal.¹⁵

Sea-Land's proposed rate structure presents the following question: To what extent may Sea-Land charge different rates at Jacksonville than other Atlantic ports in order to meet local competition?

¹⁴ This philosophy was expressed in *Intercoastal Rate Structure*, 2 U.S.M.C. 285, 311 (1940):

* * * the record points clearly to the almost inevitable result of a one rate level—a gradual mastery of the trade by carriers furnishing the better service. We should not ignore the fundamental fact that shippers will pay only in proportion to the value of the service rendered. In recognition of this principle the carriers have always found it necessary to establish differentials in order to bring about a fair distribution of intercoastal traffic. When these differentials have been narrowed or abolished, the traffic has invariably gravitated to the better equipped lines. The question posed therefore is whether a merchant marine is best promoted and encouraged by a few strong lines with a monopoly of the traffic, or a larger number offering a variety of services at rates based on the value and cost of such services.

¹⁵ No exceptions were filed to this holding. Therefore, we will not disturb this result.

As stated, Sea-Land maintains a single level of rates between Atlantic ports, including Jacksonville, and Puerto Rico. It contends, however, that the necessity of meeting TMT competition out of Jacksonville is a transportation condition warranting modification of this rate structure. In effect, Sea-Land proposes that if the Commission does not order TMT to increase rates to the prevailing level out of North Atlantic ports, Sea-Land has the right to reduce its rates out of Jacksonville to TMT's level without alteration of the rates out of North Atlantic ports. Sea-Land does not present as justification any difference in distance between North Atlantic ports to Puerto Rico than from Jacksonville, nor does it rely on any cost difference in relation to carriage between Jacksonville or between North Atlantic ports and Puerto Rico. Sea-Land propounds only its legal right to meet competition as the basis for its proposed rate policy.

Sea-Land's avowed purpose in seeking approval of different rates between North Atlantic ports and Jacksonville to Puerto Rico is to meet TMT's competition. Certainly no carrier should be required to maintain unreasonably high rates for the purpose of protecting the traffic of a competitor.¹⁶ As a general rule, each carrier should have the opportunity to set rates which reflect the inherent advantages each has to offer so that the public may exercise its choice on cost and service. *West-bound Alcoholic Liquor Carload Rates*, 2 U.S.M.C. 198, 205 (1939). And carriers may reduce rates to a reasonable level to meet competition if they do not create undue preference or prejudice. *Iron and Steel to Iowa, Minn., Mich., and Wisc.*, 297, I.C.C. 363 (1955); *Brick from Mason City, Iowa, to La Crosse, Wisc.*, 251 I.C.C. 267 (1942); *Macaroni Between L.T.L. and S.W. Territories*, 238 I.C.C. 121 (1940). Furthermore, a carrier may set rates in order to retain or secure traffic which might otherwise move via a competitor provided the rate is lawful.

However, Sea-Land has not demonstrated its cost capacity to reduce rates out of Jacksonville. Thus, the Commission may not lawfully permit such a reduction without a concurrent reduction in Sea-Land's rates out of North Atlantic ports without a showing that cost or other transportation conditions justifies a rate policy which on its face works a preference to Jacksonville and prejudice to other Atlantic ports served by Sea-Land. The burden of showing these circumstances is upon Sea-Land, the carrier applying to change its rates.¹⁷

¹⁶ *Seatrains Lines, Inc. v. Akron C. & Y. Ry. Co.*, 243 I.C.C. 199, 214 (1940); *New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945).

¹⁷ Where the Commission has instituted an inquiry into the lawfulness of proposed rates, the carrier must produce evidence to justify them. Financial data relating to operations and reasons which impelled proposed rates are in the carrier's sole possession. *Puerto Rican Rates*, 2 U.S.M.C. 117, 124 (1939).

With regard to the cost data that should be adduced in justification of a proposed differential, there must be more than just a showing that the cost of operation at one port is greater than that at another competing port. Volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and others are properly to be considered in arriving at adjustment of rates between ports. *Port Differential Investigation*, 1 U.S.S.B. 61, 69 (1925); *Port of New York Authority v. Ab Svenska et al.*, 4 F.M.B. 202, 209 (1953).

Had Sea-Land adduced evidence of the difference in cost of operation between North Atlantic ports and Puerto Rico as compared to cost of operation between Jacksonville and Puerto Rico, it might have been determined that a rate difference was justified on the basis of costs of the respective services. However, the only issue of fact presented for determination is whether a rate difference between ports is justified by competitive necessity.

Competitive necessity should be approached from the standpoint that a carrier finds itself unable to compete, and not on its ability to deprive a competitor of cargo. *Intercoastal Investigation, 1935, Supra.*

Here Sea-Land is a strong competitor. Sea-Land, in competition with TMT out of Jacksonville, has obtained its share of cargo.¹⁸ Sea-Land's operation is profitable. Undoubtedly, TMT's lower rates have prevented Sea-Land from capturing cargo from TMT, but Sea-Land also obtains a share of cargo from inland-rate-equal origins regardless of rate differences. Therefore, the probable result of permitting Sea-Land to maintain lower rates for its Jacksonville service than for its North Atlantic service would: (1) seriously impair TMT's ability to attract cargo, and (2) induce the movement of cargo from Sea-Land's service at North Atlantic ports to its service at Jacksonville. On this record we find that Sea-Land has not justified its proposed rate policy.

COMMISSIONER HEARN dissenting:

I would remand this case to the Examiner for the further taking of evidence.

The majority states that the basic question is the competitive relationship between TMT and Sea-Land, and sets forth the three specific issues involved.¹⁹ It then engages in a discussion of the issues, replete with admissions of insufficiency of evidence to support satisfactory conclusions.²⁰ The parties are, therefore, now left in *status quo ante* because the record is devoid of evidence to warrant any satisfactory conclusions as to the basic issues.

¹⁸ Sea-Land excepted to the Examiner's finding that Sea-Land can compete with TMT despite the latter's lower rates. We overrule this exception.

¹⁹ Majority Opinion, page 376.

²⁰ See for example, Majority Opinion, page 380, footnote 4; page 382, and page 383.

These issues are of substantial significance. They involve fundamental principles of rate regulation and economics and should not be treated so ineffectually as they are herein. I do not think the Commission should have attempted to decide this case on this incomplete record when further production of evidence would doubtless have permitted the development of a more productive case and a more meaningful and instructive decision.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

No. 66-66

CORN PRODUCTS COMPANY

v.

HAMBURG-AMERIKA LINES

(HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN-GESELLSCHAFT)

Proceeding determined under Shortened Procedure, Rule 11 of the Rules of Practice and Procedure.

Hamburg-Amerika Lines, a common carrier by water, found to have violated section 18(b) (3) of the act by charging a higher rate for a shipment in foreign commerce than the rate on file in its tariff properly applicable at the time.

Pursuant to section 22 of the act, complainant is entitled to payment of reparation in the amount of \$2,477.84.

Complainant is entitled to interest at 6 percent per annum on the amount found due as reparation.

Samuel W. Earnshaw, attorney and *M. A. Greene*, for the complainant.

Burton H. White, *Elliott B. Nixon* and *Randolph W. Taylor*, attorneys for respondent.

INITIAL DECISION OF EXAMINER BENJAMIN A. THEEMAN ¹

The complaint herein filed under Rule 11 (Shortened Procedure) of the Rules of Practice and Procedure of the Federal Maritime Commission (the Commission) alleges that respondents violated sections 18(b) (3) and 22 of the Shipping Act of 1916, as amended (the act) by charging and receiving payment of an inapplicable rate for the ocean transportation of 195 drums of dried onion powder. Complainants allege an overpayment of \$2,764.57 and request reparation, with interest thereon at six (6) percent per annum. The respondent generally denied the allegations.

All necessary parties have consented to the application of Rule 11. Accordingly, this proceeding has been conducted without oral hearing and upon written submission of facts and arguments.

¹ This decision became the decision of the Commission on May 9, 1967.

A. The Undisputed Facts Are:

1. Respondent, Hamburg-Amerika Lines (Hamburg-Amerikanische Packetfahrt-Actien-Gesellschaft) is a common carrier by water in foreign commerce as defined in section 1 of the act.

2. On or about October 22, 1965, complainant shipped prepaid from New York to Rotterdam, via the respondent, 195 drums of dried onion powder weighing 62,650 pounds. The cargo designation in the bill of lading was "Drums Dehydrated Onion Powder."

3. Respondent billed complainant and the latter on November 10, 1965 paid \$3,575.66 for ocean freight at the general cargo rate of \$72.75 per 40 cu. ft.

4. Respondent's tariff on file with the Commission, applicable to said shipment, was North Atlantic Continental Freight Conference, Tariff 26, FMC-1. The tariff contained the following items:

Item 5175----	Condiments, Packed, N.O.S-----	\$39.25 per 2,240 pounds
Item 5287----	Onions, N.O.S. Freight Must Be Pre-	29.00 per 2,240 pounds
	paid.	
Item 9161----	General Cargo * * * N.O.S-----	72.75 W/M

5. The shipment was dry dehydrated onion powder, without additives or other processing than dehydration.²

6. On or about December 27, 1965, complainant filed a claim with respondent alleging an overcharge. Respondent denied that claim.

DISCUSSIONS

Complainant's request for reparation is stated as though the applicable rate was Item 5287 "Onions, N.O.S." However, complainant's entire presentation shows that the request was being made in the alternative with the greater emphasis on Item 5175, "Condiments, Packed N.O.S." or "seasoning" as it is also referred to by complainant. Respondent has chosen to respond as if the request was only on the basis of Item 5287. In its answering brief, respondent states:

Complainant has incidentally urged some alternative classifications for the dried onion powder in drums * * *. Complainant has not raised the question as to the applicability of "seasoning," although complainant has distinctly stated that the powder was, and was intended, for use as a seasoning. If overcharges are alleged on the basis of these alternative classifications, respondent would wish to meet whatever arguments are subsequently raised.

Examination of the record shows that the alternative classification (Item 5175) has not been "incidentally" urged but has been substantially presented. Item 5175 was the basis upon which complainant

² The manufacturing process as described by complainant involved peeling fresh onions, slicing them, and dehydrating them with warm air; then grinding them without any additive to the dry powdered product.

requested payment in a letter to the conference dated June 23, 1966, attached as an exhibit to respondent's answering brief. Item 5175 is dealt with fully in complainant's opening brief, and is the obvious purpose for the attachment of Exhibits II and III. In its opening brief, complainant states that, "the shipment here was both a 'condiment' and a product within the description of 'Onions, N.O.S.'" Complainant then continues with an entire paragraph to show why the shipment was a condiment. Complainant's reply brief again stated the alternative classification. Paragraph 1 reads as follows:

The sole issue before the Commission here is whether the North Atlantic Continental Tariff No. 26 description and rate on "General Cargo, N.O.S.," or on "Onions, N.O.S.," or on "Condiments" applied on complainant's shipment of dehydrated onion powder, in drums, freight charges prepaid.

The respondent has shown that it is fully aware of complainant's alternative classification contention. As stated above, one of respondent's exhibits is a copy of a letter from complainant demanding reparation on the basis of the condiment rate. In its answering brief, respondent makes specific reference to complainant's Exhibit II which contains an opinion that onion powder is commercially considered "seasoning." Neither respondent nor the conference is naive in tariff matters or in proceedings of this nature before the Commission.

The purpose of shortened procedure is self evident, to save time and money for all parties including the Government. As of the time of the issuance of this decision nothing further has been heard from respondent, nor under the rules is a reply to a reply permitted. The record clearly shows that respondent has in no way been misled by the papers submitted by the complainant in this case. In failing to respond to the alternative classification contention, respondent has not exercised due diligence. To permit further presentation under shortened procedure would be unreasonable.

In *Ludwig Mueller Co. Inc. v. Peralta Shipping Corporation, etc.*, 8 FMC 361 (1965), the Commission laid down the rule that it has since consistently adhered to: section 18(b) (3) shall be strictly applied. In *Peralta*, the Commission stated that the clear obligation imposed by section 18(b) (3) is:

No common carrier by water in foreign commerce * * * shall charge or demand or collect or receive a *greater or less or different compensation* for the transportation of property * * * than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; * * * [Emphasis added.]

The Commission stated on page 364:

Moreover, an unintentional failure to file a particular rate, a bona fide rate mistake, a hardship visited upon an innocent shipper by inadvertence of a carrier,

or a stenographic omission are not sufficient reasons for departing from the requirements of section 18(b)(3). [Footnotes omitted.]

In a recent case *Ocean Freight Consultants v. Bank Line, Ltd.* 9 FMC 211, decided January 11, 1966, the Commission citing court precedent reaffirmed (p. 213) that "the principle is firmly established that the rate of the carrier as duly filed is the only lawful charge."

In keeping with the foregoing, this case boils down to one issue. To determine the rate in Tariff 26 applicable to the 195 drums of "dried onion powder."

Complainant contends, though not too strongly, that Item 5287 "Onions, N.O.S." is the applicable rate. In support of this contention, complainant urges a copy of a letter signed by the Chief, Division of Tariffs and Informal Complaints of the Commission. The letter states in part:

If in fact the commodity shipped was onions, dehydrated, powdered, without additives, it is our informal opinion that in the absence of a specific rate named in the tariff for dehydrated onion powder, the description provided in the tariff for Onions, N.O.S. is broad enough to cover the commodity in question.

This informal opinion states a conclusion but the facts upon which it is based are not in the record. Respondent contends that Onions, N.O.S. dealt generally with fresh onions and not onion powder. Complainant in the past showed agreement with respondent's contention. In the above-mentioned letter to the conference first presenting complainant's claim, the latter stated, that it had "noted the Onion, N.O.S. rate, but felt that it had reference to fresh onions and therefore did not seek adjustment of the freight based on this latter rate."

The Dictionary of Commodities Carried by Ship, Captain Pierre Garoche, published 1952 (Cornell Maritime Press) contains on page 204 the following information concerning "onions" as merchandise transported by ship:

ONIONS * * * Dry onions amount to a big item in shipping. Packing: bags or crates. Exported from Italy, Spain, Portugal and East Europe. Must be thoroughly dry before shipping. Green onions heat and yield a considerable amount of moisture. They are satisfactorily carried only in refrigerated compartments. Smelly. Affected by heat; crushing due to pressure or shock. Sometimes the packing is deteriorated by contents. They require careful through-ventilation stowage in a dry and cool place, preferably 'tweendecks' or in a refrigerated compartment, away from products affected by smells and moisture. Careful handling to avoid shocks. Do not overstow.

In view of the foregoing in which no reference is made to powder and the substantial evidence shown in the next paragraph that onion powder is a condiment, it is concluded that the rate for Onions, N.O.S. Item 5287 was not the applicable rate for this shipment.

Complainant offers undisputed evidence to show that the cargo was a condiment, to-wit: A letter from the U.S. Department of Agriculture, Consumer and Marketing Service signed by the Head, Standardized Section, Processed Products Standardization and Inspection Branch, Fruit and Vegetable Division states that in the United States there are no mandatory or legal standards for the product commercially known as "Onion Powder"; that the United States purchases onion powder (by means of Federal specification); that the latter is not mandatory; nor does the specification refer to onion powder as a condiment per se. The letter continues as follows:

Nonetheless, in a generic sense onion powder is an aromatic or savory vegetable substance used to impart a special taste to food. It is not used as a single article of food nor is it used to garnish foods, as are some other dehydrated vegetables (diced green or red pepper, for example).

In commercial trade, onion powder is grouped with other "styles" of dehydrated onion products, regardless of the kind of packing, and sold as seasoning for foods.

As "seasoning" onion powder is unquestionably a "condiment."³ Complainant points out that in Rogets International Thesaurus (Third Edition, Page 182) onion is listed as a condiment. Webster's Third New International Dictionary Unabridged shows seasoning and condiment to be in effect interchangeable. The definition of condiment on page 473 states:

condiment: * * * Something usually pungent, acid, salty, or spicy added to or served with food to enhance its flavor or to give added flavor: SEASONING: *a*: an appetizing and usually pungent substance of natural origin (as pepper, vinegar or mustard) *b*: any of various complex compositions, having similar qualities (as curry or chili powder, pickles, or catsup).

The definition of seasoning on page 2049 states:

seasoning *1*: Something that serves to season as *a*: an ingredient (as a condiment, spice, or flavoring) added to food primarily for the savor it imparts * * *.

In light of the foregoing it is reasonable that onion powder be classed as a condiment.⁴

The Commission laid down the rule of reasonability in dealing with the interpretation of tariff terms many years ago in *National Cable and Metal Co. v. American Hawaii S.S. Co.* 2 U.S.M.C. 471 (1941). At page 473 it stated:

³ The Chief, Division of Tariffs and Informal Complaints of the Commission indicated that onion powder was not a condiment. However, when he rendered his informal opinion, he did not have the benefit of the letter from the Department of Agriculture; and as his informal opinion indicates, he was under the erroneous impression that the manufacture of a condiment required addition of another substance or an additive process to the basic component.

⁴ Cf. *Atlantic Bridge Co. v. Atlantic Coast Line R. Co.* 56 F(2d) 163 (D.C.S.D. Fla.) 1932.

In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers could be permitted to urge for their own purposes a strained and unnatural construction. Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of construction. A proper test is whether the article may be reasonably identified by the tariff description.

In any event, it is evident that the General Cargo, N.O.S. rate is inapplicable to the shipment because of the existence of the condiment rate in the tariff.⁵ Accordingly it is found that Item 5175 is the tariff rate applicable to the shipment herein.

It is clear that the collection by respondent of the rate of \$72.75 is not in accord with the tariff on file with the Commission. This action constitutes a violation of section 18(b) (3). Section 22 of the act provides for the payment of "Full reparation to the complainant for the injuries caused by said violation." In this case full reparation represents the difference between the rate that complainant should have paid on Item 5175 for 195 drums and the rate it actually paid, or the sum of \$2,477.84, with interest at six (6) percent per annum from November 10, 1965. See *States Marine Lines, Inc. v. F.M.C.*, 313 F.2d 906, 909 (CA DC, 1963) and cases cited therein; *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 312 (1934).

ULTIMATE FINDINGS AND CONCLUSIONS

On the record as a whole, it is found and concluded:

(a) The applicable rate in Tariff No. 26 in effect at the time of the shipping of 195 drums of dehydrated onion powder is Item 5175 Condiments, Packed N.O.S. at \$39.25 per 2,240 pounds.

(b) Respondent violated section 18(b) (3) of the act by charging a rate of \$72.75 per 40 cu. ft.

(c) Complainant is entitled to reparation under section 22 of the act in the amount of the overcharge.

(d) Pursuant to section 22 of the act, respondent is directed to pay to complainant the sum of \$2,477.84 representing the difference between the rate charged and the applicable rate, with interest thereon at six (6) percent per annum from November 10, 1965.

(Signed) BENJAMIN A. THEEMAN,
Presiding Examiner.

APRIL 10, 1967

⁵ Cf. *Cone Brothers Const. Co. v. Georgia R.R. Co. et al.* 159 ICC 342 where on page 343, the ICC set out two principles: (1) as between two unequal commodity rates, both adequately descriptive, the applicable rate is the lower; (2) where a commodity shipped is included in more than one commodity description in the same tariff, that description which is more specific will be found applicable.

FEDERAL MARITIME COMMISSION

ADOPTION OF INITIAL DECISION

May 9, 1967

By THE COMMISSION: (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; George H. Hearn, *Commissioner*.)

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(g) of the Commission's Rules of Practice and Procedure (46 CFR 502.227), that the initial decision became the decision of the Commission on May 12, 1967.

This proceeding is hereby discontinued.

JAMES V. DAY, COMMISSIONER, concurring:

The Commission has laid down the rule of reason in dealing with the interpretation of tariff items. In this case the evidence shows that cargo was a condiment. Therefore, tariff Item 5175 (condiments) should apply and not Item 5287 (onions) or Item 9161 (general cargo). In charging the general cargo rate, the respondent overcharged complainant. Reparation should be awarded in the amount of \$2477.84, with interest thereon, at 6 percent per annum.

(Signed) FRANCIS C. HURNEY,
Special Assistant to the Secretary.

FEDERAL MARITIME COMMISSION

No. 1218

SEA-LAND SERVICE, INC.

v.

TMT TRAILER FERRY, INC.
(C. GORDON ANDERSON, TRUSTEE)

Decided May 11, 1967

Section 18(a) of the Shipping Act, 1916, requires a common carrier by water to make an affirmative disclosure in its tariffs of the fact that it is offering to transport refrigerated cargo whenever such is the case.

Respondent, TMT, found to have violated section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, by failing to disclose the availability of refrigerated cargo service and by charging, demanding and collecting compensation different from the greater than that specified in its tariff legally on file with the Commission.

Experimental services are not exempt from the operation of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

Record in this case does not support a finding of violation of section 16, First.

Homer S. Carpenter, Esq. and Edward T. Cornell, Esq. for TMT Trailer Ferry, Inc.

J. S. Provan, Esq. and Warren Price, Jr., Esq. for Sea-Land Service, Inc.

REPORT

BY THE COMMISSION: (John Harlee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day and George H. Hearn, *Commissioners*.)

Complainant, Sea-Land Service, Inc., a common carrier by water in the domestic offshore trade between Florida and Puerto Rico, alleges that respondent, TMT Trailer Ferry, Inc., a competing carrier in the same trade, is in violation of section 2 of the Intercoastal Shipping Act, 1933 and sections 16 First and 18(a) of the Shipping Act, 1916, by initiating and operating a refrigerated cargo service without having first published and filed rates applicable to the carriage of such commodities with the Commission. Respondent, TMT, joins issue in its

answer admitting that it does not publish a specific tariff for refrigerated cargo but asserting that its "Cargo, N.O.S." (Cargo, Not Otherwise Specified) rate is the legally applicable rate especially where the service is experimental in nature.

THE FACTS¹

TMT is a common carrier by water operating between ports in Florida and Puerto Rico. This carrier utilizes seagoing tugs which tow unmanned barges (converted LSTs) which, in turn, carry trailers in a roll-on, roll-off operation. Since there are no personnel aboard the barge during the voyage to service and tend machinery or electrical systems, this type of operation in the past did not lend itself to the carriage of refrigerated cargo and, prior to 1964, TMT did not hold itself out to the shipping public, by tariff publication or otherwise, as engaging in reefer service.

In October 1964, however TMT embarked upon an experimental program by which specially equipped, insulated trailers could be transported safely even though there was no one aboard the barges to service the machinery for a period of several weeks.

TMT publishes two freight tariffs in the Florida-Puerto Rico trade. Freight Tariff No. 1 (FMC-F No. 2) names rules, regulations and charges; and Freight Tariff No. 4 (FMC-F No. 5) names class and commodity rates. Freight Tariff No. 4 makes no provision for commodities requiring refrigeration or controlled temperature protection. Item No. 1, subparagraph G of Freight Tariff No. 1, provides that where freight is not

* * * susceptible of being loaded in carriers standard equipment, by reason of weight, size of other characteristics, special arrangements must be made with the carrier and cargo must bear all additional expenses incident to the furnishing of equipment and transportation of such cargo. Quotation of charges will be made for furnishing of such special equipment.

The minimum ocean freight charge assessed by TMT on refrigerated cargo is \$866.40 per trailer, which is the "Cargo, Not Otherwise Specified" rate of \$.60 per cubic foot subject to 1,444 cubic feet minimum. In addition, TMT assesses a "special equipment charge" of \$33.60 per trailer for the insulated trailer and liquid nitrogen used in the refrigeration process. This "charge" is assessed pursuant to the provisions of the special equipment regulation quoted above.

Between October 1964 and March 31, 1966, TMT carried more than

¹ By agreement of the parties there were no evidentiary hearings. The record, therefore, consists solely of the uncontroverted assertions of the parties, admissions and stipulations as to the facts.

2,411,000 pounds of refrigerated cargo,² for which it has collected a total in charges of some \$67,000. TMT has never charged less or more than \$866.40 for the movement of the refrigerated cargo in each of its trailers plus the \$33.60 special charge referred to above.

Sea-Land is also a common carrier by water between ports in Florida and Puerto Rico. It maintains a weekly sailing from Jacksonville to Puerto Rico and carries refrigerated cargo. It has specific refrigerated cargo rates on file with the Federal Maritime Commission.

From October 1964 to the present time there has been an increase in the number of refrigerated containers that Sea-Land transports from the Jacksonville area to Puerto Rico and during the same period, Sea-Land has also increased the number of refrigerated trailers that it owns.

THE INITIAL DECISION

In his initial decision served February 2, 1967, Examiner Edward C. Johnson concluded that TMT's failure to file specific refrigerated cargo rates and assessment of unspecified special equipment charges constitute violations of section 2 of the Intercoastal Shipping Act and section 18(a) of the Shipping Act and that TMT's failure to file refrigerated cargo rates is a violation of section 16, First of the Shipping Act. He rejected TMT's argument that experimental services are exempt from the operation of the Shipping Acts.

EXCEPTIONS TO THE INITIAL DECISION

TMT excepts to each of the conclusions contained in the initial decision. Sea-Land has filed its reply in opposition. Neither party requested oral argument and none was held.

ISSUES INVOLVED

This case presents three basic questions:

1. Whether a carrier which engages in the carriage of refrigerated cargo is required to establish and file a specific tariff or classification for such cargo.

2. Whether TMT collects a rate different from or greater than that specified in its tariff; and

3. Whether TMT's practices constitute a violation of section 16, First of the Shipping Act in that it gave a preference to shippers who used TMT's refrigerated service and prejudiced those shippers who were unaware that the service was available.

These issues are discussed seriatim below.

² The cargo moving by TMT is primarily frozen poultry, fresh eggs, frozen seafood and meat, and some frozen citrus concentrates and ice cream.

DISCUSSION

1. *Establishment of a Specific Tariff or Classification for Refrigerated Cargo.*

Section 18(a) of the act provides in pertinent part that "every common carrier by water in interstate commerce shall establish * * * just and reasonable classifications * * * regulations and practices relating thereto * * *."

Section 2 of the Intercoastal Shipping Act, 1933 requires that carriers subject to its provisions shall file with the Commission all the "rates, fares and charges for or in connection" with the transportation offered and makes it unlawful for a carrier to engage in transportation until its tariffs are filed.

As was said in *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400 (1935) at 447:

It cannot be too strongly stressed that every transportation service, or service in connection therewith, must be clearly shown in the tariff before a carrier may lawfully engage therein, and this applies with equal force to services for which a charge is made as well as to services for which no charge is made * * *.

Prior to October 1964, TMT was not equipped to and did not carry refrigerated cargo, and as has already been noted, TMT's tariffs contained no rate, rule or regulation specifically covering the carriage of such cargo. When in October of 1964, TMT achieved refrigerated cargo carrying capability, no change was made in its existing tariff to reflect this significant change in service.³

TMT insists that the application to refrigerated cargo of the Cargo, N.O.S. rate coupled with the special handling charge satisfies the requirements of the statutes. But the fact remains that nothing in the tariffs of TMT would disclose the fact that it carried refrigerated cargo. The very nature of its operation would lead to the opposite conclusion; and as for shippers who had sought refrigerated space in the past and found that none was available with respondent, no change was made in the tariff to reflect the change in service.⁴ The failure of TMT to apprise the public of its newly acquired capability for handling refrigerated cargo constituted a failure to establish just and reasonable

³ TMT would no doubt contend that because it was only an "experimental" or "pilot" program, its refrigerated cargo service, consisting as it did then of only one trailer was not significant. Indeed, TMT offers the experimental nature of the service as a defense for its failure to establish a specific refrigerated cargo tariff or classification. The significance of refrigerated capability is not founded on the amount of space afforded but rather upon the addition of another and specialized service to the total capabilities of the carrier. As for the defense posed by the experimental nature of the program, it is sufficient to point out that the statutes make no exception for experimental or pilot programs.

⁴ See *Puerto Rican Rates*, 2 U.S.M.C. 117, 130 (1939), where the failure of respondents to affirmatively disclose the maintenance of precooling plants and the charge therefore in their tariffs was found contrary to section 2 of the 1933 act.

classifications, regulations and practices within the meaning of section 18(a).

2. *Charging Rates Not on File*

As we noted above, in addition to charging the basic Cargo, N.O.S. rate, TMT assesses a surcharge of \$33.60 per trailer under the authority of its "special equipment" regulation. Section 2 of the 1933 act requires every common carrier in domestic commerce to file with the Commission "all rates, fares and charges for or in connection with transportation on its own routes * * *."

The language of section 2 is clear and specific, the precise rates and charges for transportation must be filed, at least where they are known or knowable.⁵ No other reading of the language will achieve the purpose sought—that of closing the door on possible unlawful rebates or concession to favored shippers. See *Matson Navigation Company*, 7 FMC 480 at 488. But the regulation relied upon by respondent to justify this extra charge does not specify any charges; it says merely that, "Quotation of charges will be made for furnishing such special equipment."

Moreover, it is our view that the so-called "special equipment" charge was in this instance nothing more than a portion of the basic rate, which did not become a "charge" merely by labeling it so. TMT charged exactly the same amount for each trailer carried. The \$33.60 was a constant and unvarying additive to the cargo N.O.S. rate. This can only lead to the conclusion that the proper rate for the movement was the N.O.S. rate plus \$33.60.⁶

On the basis of the foregoing, we conclude that TMT has charged a rate for refrigerated cargo which is other than and greater than that specified in its tariff in violation of section 18(a) of the Shipping Act, and section 2 of the Intercoastal Shipping Act, 1933.

3. *Section 16, First Allegation*

Sea-Land argues that TMT's use of its Cargo, N.O.S. rate to cover the shipment of refrigerated cargo violates section 16 First,⁷ because it constitutes an unjust or unreasonable preference to shippers actually

⁵ See *Intercoastal Rates of Nelson S.S. Co.*, 1 U.S.S.B.B. 326, where rules authorizing port equalization, but which failed to specify the actual amount of equalization, were condemned.

⁶ Its validity under the rule relied upon by TMT becomes even more doubtful when it is considered that there is nothing unusual or extraordinary about the furnishing of the refrigerated trailers by TMT. They are a part of the "carrier's standard equipment." No "special arrangements" had to be made by the shipper with the carrier, since TMT chose to equip itself with trailers which could accommodate refrigerated cargo.

⁷ Section 16 First of the Shipping Act forbids any common carrier by water:

to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever * * *.

using the service and its prejudicial to shippers who did not know about the availability of this service, but would have used it had they known, and the Examiner so found in his initial decision.

While the record would indicate the possible existence of shippers who were unaware of TMT's refrigerated service but who would have used it had they known, a violation of section 16 First, should not be based on such speculation. It may well be that were there actual evidence of such shippers and such a lack of knowledge worked a prejudice, a violation of the section could be found. However, we reserve that question for the proper case.

CONCLUSIONS

In summary, we conclude:

(1) That the failure of respondent TMT to make affirmative disclosure in its tariff that it is engaging in the carriage of refrigerated cargo violates section 18(a) of the Shipping Act, 1916, in that it constitutes a failure to establish a just and reasonable classification.

(2) That the practice of respondent TMT, whereby it assesses an unspecified special handling and equipment charge in addition to its Cargo, N.O.S. rate, is in violation of section 2 of the Intercoastal Shipping Act in that it constitutes a charge other than that on file with the Commission.

(3) That this record contains insufficient evidence to support a finding that section 16 First has been violated.

An appropriate order will be entered.

s/ THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

DOCKET No. 1218

SEA-LAND SERVICE, INC.

v.

TMT TRAILER FERRY, INC.

(C. GORDON ANDERSON, TRUSTEE)

ORDER

This proceeding having been instituted on the complaint of Sea-Land Service, Inc., and the Commission on this day having made and entered of record a Report stating its findings, conclusions, and decisions thereon, which Report is hereby referred to and made a part hereof:

Now, therefore, it is ordered: That respondent TMT Trailer Ferry, Inc. (C. Gordon Anderson, Trustee), cease and desist from:

(a) engaging in the carriage of refrigerated cargo or in any other specialized class of service unless and until the availability of such services and the terms and conditions pertinent thereto are affirmatively disclosed in the applicable tariff;

(b) failing to specify with particularity in its tariffs all rates, charges or assessments made in connection with the performance of such services where such charges are of a recurring, ordinary or regular nature or where they may be reasonably predicted in advance;

(c) charging, demanding or collecting or receiving a greater, or less or different compensation for the transportation of property or for any service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the Commission in compliance with section 2 of the Intercoastal Shipping Act, 1933.

It is further ordered: That said respondent shall within thirty (30) days of the service hereof file an amended tariff with the Commission.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 401 AARMO BRISTLE PROCESSING & BRUSH CO.

v.

ZIM ISRAEL NAVIGATION CO., LTD.

Decided June 6, 1967

Application to charge shipper in foreign trade less than specified in tariff on file denied.

REPORT

BY THE COMMISSION: (John Harlee, *Chairman*; George H. Hearn, James F. Fansen, *Commissioners*.)

Zim Israel Navigation Co., Ltd. (Zim), a member line of the North Atlantic Israel Eastbound Freight Conference, has filed this application for an order authorizing adjustment of ocean freight charges in the sum of \$1,224.08 in connection with a shipment of horsehair from New York, New York, to Haifa, Israel.

Examiner Paul D. Page, Jr., issued an initial decision denying Zim's application. This proceeding is now before us on our own motion to review.

The facts alleged in the verified application and found by the Examiner are substantially as follows:

Historically, the Conference has maintained a rate of \$8.50 per 100 lbs. for the carriage of horsehair from the east coast of the United States to Israel. The Conference, however, inadvertently deleted the horsehair item and the corresponding \$8.50 rate from its tariff when it prepared a new tariff to comply with the Commission's General Order 13 (46 CFR 356).¹

Subsequently, but before it realized that the \$8.50 rate had been deleted, Aarmo Bristle Processing and Brush Co., by bill of lading dated February 10, 1966, consigned a shipment of horsehair to Halvaave-

¹ General Order 13, which was published in the Federal Register on May 27, 1965, governs the form and manner of filing tariffs by common carriers by water in the foreign commerce of the United States and conferences of such carriers.

kisachon Jaffa Tel Aviv Cooperative Society, Ltd. The shipment was carried on the Zim vessel SS *Israel* Voy. 87. Since Zim had no rate on file for horsehair, the appropriate tariff classification for this commodity was the General Cargo rate of \$81.50 w/m. Therefore, Zim had no choice but to assess freight in the amount of \$2,294.23 based on that rate.

The freight was to be paid at destination in Israel by Messrs. Zipim, the receivers of the shipment. When the shipment arrived, however, these receivers declined to take delivery. They advised Zim that they considered the freight charges excessive and that they were not in a position financially to pay the freight as billed. Zim alleges that they have been advised that unless the charges are reduced, the shipment, which remains in custom custody at the Port of Haifa, will be abandoned.

As soon as the Conference realized its tariff error, it immediately filed and reinstated its \$8.50 per 100 lbs. rate on horsehair.

Zim now requests that "the \$8.50 rate be regarded as continuously in effect and governing the above-mentioned shipments," and that the Commission authorize it to charge and collect freight based on this rate in order to meet the good faith intentions and expectations of all concerned. Freight based on the \$8.50 rate would amount to \$1,070.15, whereas freight based on the General Cargo rate of \$81.50 w/m, the rate legally in effect at the time of shipment, produces an additional charge of \$1,224.08.

In his initial decision, the Examiner denied Zim's application and determined that the Commission's decision in *Ludwig Mueller Co., Inc. v. Peralta Shipping Corporation, Agents of Torm Line*, 8 FMC 361 (1965) was controlling and required the denial of the application.

DISCUSSION AND CONCLUSION

Our decision in *Ludwig Mueller, supra*, wherein we held that we were without authority to permit deviations from field tariffs in the foreign trades, is clearly dispositive of this proceeding.

Zim recognizes that *Ludwig Mueller* is applicable here. It nevertheless takes the position that since the "shippers shipped in reliance upon historical rate levels" and the "carriers carried at a rate caused by inadvertence", the Commission should waive its holding in *Ludwig Mueller* and grant the relief requested.

In *Ludwig Mueller*, we specifically stated that "an unintentional failure to file a particular rate * * * [is] not sufficient [reason] for departing from the requirements of section 18(b) (3)",² which reads:

² 8 F.M.C. 361 at 364.

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time * * *.

Zim characterizes our holding in *Ludwig Mueller*, as "a rather stern rule". We are well aware of that fact. In this regard, however, we can merely reiterate what we stated in *The East Asiatic Co. Inc.—Application for Permission to Waive Collection of Undercharges*, Special Docket 382, 9 F.M.C. 169.

We are well aware now, as we were in *Ludwig Mueller*, that this strict interpretation of our statutes with respect to special docket applications, may result in hardship in certain instances but the statutes, enacted by Congress and administered by this Commission are abundantly clear and we must adhere to them.

An order denying this application will be entered.

VICE CHAIRMAN BARRETT and COMMISSIONER DAY dissenting:

Upon ascertainment that no other shipments of horsehair were carried under similar circumstances, we would grant the relief prayed for in accord with our position in *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp., etc.*, 8 F.M.C. 361, 367.

ORDER

In the absence of exceptions to the initial decision in this proceeding, the Commission served notice of its intention to review the decision.

The Commission having reviewed the decision and, on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the application of Zim Israel Navigation Co., Ltd., to waive the collection of certain freight charges be, and hereby, is denied.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 402

AYRTON METAL AND ORE CORP. AND ASSOCIATED METALS AND
MINERALS CORP.

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Decided June 13, 1967

Application to charge shippers in foreign trade rates less than specified in tariff on file, denied.

REPORT

By THE COMMISSION: (John Harlee, *Chairman*; George H. Hearn, James F. Fansen, *Commissioners*.)

American Export Isbrandtsen Lines, Inc., has filed this application for approval to pay a total of \$5,861.62 to the nominal complainants herein, Ayrton Metal and Ore Corp. and Associated Metals and Minerals Corp., as alleged overcharges on shipments of brass and/or copper scrap from New York and Baltimore to ports in Italy.

Examiner Benjamin A. Theeman issued an initial decision denying the application. This proceeding is now before us on exceptions filed jointly by the nominal complainants and applicant, and by Ayrton individually.

The exceptions are but a restatement of the arguments made in the application. These arguments were properly rejected by the Examiner in line with our decision in *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965). Accordingly, we hereby adopt the Examiner's decision which is set forth below.

INITIAL DECISION OF BENJAMIN A. THEEMAN,
PRESIDING EXAMINER¹

This application under rule 6(b) signed by the steamship company, requests on behalf of the steamship company and the shippers, ap-

¹ This decision was adopted by the Commission on June 13, 1967.

proval for the voluntary payment by American Export Isbrandtsen to Ayrton of \$2,468.65 and to Associated of \$3,392.97 as alleged overcharges on 5 shipments of brass and/or copper scrap. Three shipments went from New York to Venice, one from New York to Genoa, and one from Baltimore to Naples.

All the shipments moved during the month of February 1966, pursuant to B/Ls dated during that month. The charges were paid during March 1966.

The applicable and existing tariff rate for each shipment was the general cargo rate of \$81.50 (w/m) as set forth in the North Atlantic Mediterranean Freight Conference Tariff No. 9, FMC 2² filed with the Commission by the Conference on December 10, 1965, effective January 1, 1966.

Historically, the Conference has maintained a rate on the brass scrap of \$31.75 per long ton. When the Conference prepared and filed Tariff No. 9 it deleted the brass scrap item and the corresponding \$31.75 rate from the tariff.

Tariff No. 9 was filed by American Export Isbrandtsen to comply with FMC General Order No. 13 (30 F.R. 7138, 5/27/65) establishing rules dealing with the codification of tariffs. Nothing in the general order required the steamship company to delete the brass scrap item from its tariff.

American Export Isbrandtsen alleges that the deletion was error; that as soon as the tariff discrepancy was called to the attention of the Conference, the latter filed with the Commission and duly made public the reinstated rate of \$31.75 per long ton.

The freight collected totalled \$8,439.55; the freight sought to be applied totals \$2,577.93. The difference of \$5,861.62 is the refund sought to be made.

In support of their position the parties state:³

Respondent American Export Isbrandtsen Lines, Inc. recognizes that the Commission has held in several recent cases that in the foreign trade governed by section 18(b)(3) of the Shipping Act it is without statutory authority to allow the voluntary payment by a steamship line to a shipper of the difference in the amount between the higher rate on file in the tariff and the lower rate which the carrier and the shipper jointly agree should have been on file for the commodity. *Ludwig Mueller Co v. Peralta Shipping Corp.*, 9 FMC 361; *Tilton Textile Corp., et al. v. Thai Lines, Ltd.*, 9 FMC 145. We submit that this is a rather harsh and stern rule which in this instance should be waived in an enlightened exercise of the administrative discretion which the Commission must be endowed with to administer its regulatory duties. Accordingly, it is

² American Export Isbrandtsen at all times mentioned was a member of the Conference.

³ There is no contention made nor evidence submitted to show that the filed rate is "unreasonably high" within the meaning of section 18(b)(5).

respectfully requested that the \$31.75 rate be regarded as having been continuously in effect and as governing the brass scrap movement.

But for the requirements of the Commission's own new foreign tariff circular the \$31.75 rate for brass scrap would have been applied. Similarly, if the tariff rate situation had been called to the Conference's attention prior to these shipments it would have corrected the tariff provision by publishing the lower rate. These two complainant shippers shipped in reliance upon the well-known and historical rate level. To disallow the requested refund would not, in our considered judgment, serve any regulatory purpose. To allow the refund and issue an order of payment would merely conform to the Commission's earlier practice in special docket applications under Rule 6(b) (46 CFR 502.92) which the Commission's recent action pursuant to Rule 13(g) in giving notice of intention to review the Initial Decision in Special Docket No. 401—*Aarmo Bristle Processing & Brush Co., v. Zim Israel Navigation Co., Ltd.* suggests may be about to be resurrected.

DISCUSSION

In the *Peralta* case (Special Docket No. 377)⁴ cited above by the steamship company, the Commission laid down the principle that by virtue of section 18(b)(3), the Commission has no authority as to shipments in foreign commerce to permit deviations from rates on file, or to give effect to an unfiled or unpublished tariff regardless of the equities involved.⁵ The Commission has since adhered to that principle. Until the Commission holds otherwise, there is no basis under the act to grant special docket relief as to foreign commerce shipments.

Accordingly, it is concluded that the decision on Special Docket No. 377 is dispositive of the application herein. An order denying the application will be entered.

(Signed) BENJAMIN A. THEEMAN,
Presiding Examiner.

NOVEMBER 18, 1966

ASHTON C. BARRETT, VICE CHAIRMAN, and JAMES V. DAY, COMMISSIONER, dissenting:

In accord with our position in *Ludwig Mueller Co. v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965), we would grant the relief requested upon ascertainment that there were no other shippers similarly situated.

⁴ 8 F.M.C. 361.

⁵ See Special Docket No. 400, *Waterman Steamship Corporation v. Chrysler International S.A.*, decided by the Commission Apr. 21, 1966. 9 F.M.C. 428.

ORDER

The Commission having this date entered a report in this proceeding, adopting the initial decision of the Examiner herein, which report is hereby referred to and made a part hereof:

It is ordered, that the application of American Export Isbrandtsen Lines, Inc. to refund certain freight charges is denied.

By the Commission.

(Signed) THOMAS LISI,
Secretary.
10 F.M.C.

FEDERAL MARITIME COMMISSION

No. 66-28

THE BOSTON SHIPPING ASSOCIATION, INC., ET AL.

v.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.

Decided June 23, 1967

Assessment of "strike storage" charges for cargo remaining on premises of terminal during longshoremen's strike is subject to the jurisdiction of the Commission as a practice within the meaning of section 17 of the Shipping Act, 1916.

A change in the terminal tariff rule governing the assessment of "strike storage" which shifted charge from cargo to vessel did not require prior approval by the Commission under section 15, Shipping Act, 1916, where rule is contained in a tariff filed with the Commission under an existing approved section 15 agreement; such change constituting neither a modification to the already approved basic agreement nor a new agreement within the meaning of section 15.

The assessment of the "strike storage" against the vessel for cargo still in "free time" when the strike begins does not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

While the assessment by a terminal of a charge against the vessel for services rendered to the cargo for benefit of the consignee raises issues under section 17 as to the justness and reasonableness of the allocation it does not constitute an undue or unreasonable prejudice under section 16 since the cargo and vessel are not users of the same service.

Cargo of the consignees was "prevented from removal" within the meaning of the strike storage provision of respondents' tariff by the longshoremen's strike and the application of that provision for the period in question did not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

Leo F. Glynn, Esq., attorney for the complainants.

John M. Reed, Esq., attorney for respondents other than Massachusetts Port Authority.

George W. Stuart, Esq. and *Neil L. Lynch, Esq.*, attorneys for Massachusetts Port Authority.

Donald J. Brunner, Esq. and *Samuel B. Nemirow, Esq.*, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, George H. Hearn, *Commissioners*):*

This proceeding arises out of a complaint filed April 21, 1966, by the Boston Shipping Association. Hearings were held before Examiner Benjamin A. Theeman who issued his decision February 17, 1967. Oral argument was held May 11, 1967. The complainant, the Boston Shipping Association, Inc., is a nonprofit Massachusetts corporation, whose members are ocean steamship companies, their agents, or stevedores, while the respondent (PBMTA) is an association of "other persons" subject to the Shipping Act, 1916, each of which owns or operates a marine terminal in connection with a common carrier by water. The complainant alleges that respondent has violated section 15 of the Act by putting certain tariff modifications into effect without first securing the approval of the Commission, and sections 16 and 17 of the Act by unjustly assessing against the vessel the charge for so-called "strike storage" of cargo during strikes of the vessel employees instead of assessing it to the cargo as had previously been the practice. The Examiner found violations of sections 16 and 17, but not section 15. Respondent and intervenor hearing counsel have taken exception to the Initial Decision and complainant has replied. Our conclusions differ somewhat from those of the Examiner.

FACTS

Respondent PBMTA operates under approved Agreement No. 8785, Article Third of which provides that the agreement authorizes the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, and all terminal facilities and services. Article Sixth of the agreement provides that rate charges, classifications, rules and regulations adopted under the agreement and any additions or changes in them will be promptly filed with the Commission.

Pursuant to Agreement No. 8785, PMBTA issued Terminal Tariff No. 1, effective July 1, 1962. This tariff provided, among other things, for wharfage,¹ wharf demurrage,² dockage,³ and free time.⁴ It con-

*Commissioner Fansen did not participate.

¹ The term "wharfage refers to the charge assessed against all cargo passing or conveyed over, onto or under wharves or between vessels or overside vessels when berthed at pier or wharf. Wharfage is solely the charge for use of pier or wharf and does not include charges for any other service."

² The term "wharf demurrage refers to the charge assessed against cargo remaining on a pier or wharf after the expiration of free time."

tained no provision specifically dealing with strike storage. Under the tariff as originally filed, dockage was assessed against the vessel on general cargo at 20 cents a ton; wharf demurrage was assessed on import cargo at 21½ cents per 100 pounds per day. Free time of 5 days was allowed on import cargo, and 7 days allowed on export cargo. There is no issue presented as to the reasonableness of these periods.

When cargo was "prevented from removal by factors beyond the consignees' control such as strikes, weather conditions, or similar situations affecting the entire Port area" wharf demurrage was assessed on cargo at a reduced rate of 1 cent per 100 pounds per day.⁵ All the services at the terminals operated by respondents were governed by these provisions and subsequent amendments made during the period of record.

Ocean freight rates on general cargo into the Port of Boston cover transportation from a place of rest to a place of rest which is generally a point and place in a designated area inside the pier shed to which cargo is removed from where it has been landed under ship's hook. It is the vessel's obligation to move the cargo to the place of rest. This is accomplished by stevedoring companies performing under contract with the vessels and under the direction of the chief clerk, an employee of the vessel. The longshoremen employees of the stevedore and the clerks belong to union locals affiliated with the ILA.

On inbound shipments, the vessel sends an arrival notice to the consignee who usually receives it the morning the vessel docks, but in no event later than the time the vessel finishes unloading. The notice contains the date that free time will expire. The major portion of the cargo is picked up by the consignee during free time. The usual procedure is for a truckman or a railroad freight handler on the consignee's behalf to arrive at the pier with an order for the cargo; the cargo is tallied by a clerk, an employee of the vessel; and while being tallied, the cargo is loaded by the consignee's representatives, one of whom signs the tally. The procedure is reversed but substantially similar in the case of export cargo. Wharf demurrage is assessed against the consignee for cargo left on the pier after free time expires. In some instances, cargo in demurrage is not moved from the place of rest. In others, the terminal moves the cargo to another area of the terminal to place it in demurrage or storage.

³ The term "dockage refers to the charge assessed for the service of providing space alongside of wharf, pier or seawall structure for the docking or berthing of watercraft, or for the mooring thereof, or other watercraft docked."

⁴ The term "free time refers to the period which cargo is allowed to remain on a pier free of charge, immediately prior to loading of the vessel or subsequent to its discharge from a vessel."

⁵ The terminal tariff further provided that "When removal of cargo is prevented by strike of terminal employees no wharf demurrage will be assessed." (Emphatic ours).

Each of the complainants enjoys the continuous or exclusive use of an assigned pier for the berthing of its vessels. Before all the cargo unloaded from one vessel is delivered or removed from the pier, another vessel will have berthed and unloaded its cargo. This process is repeated as succeeding vessels unload. Thus, there regularly exists on the pier a mix of general cargo in different stages of discharge and delivery, some in free time and some in wharf demurrage. Because of this, complainants do not consider that their responsibility toward the cargo on their piers ends at the expiration of free time. Rather, they believe that they should use average care to see that cargo is delivered in the same condition in which it was received. Complainants employ watchmen to guard against such things as pilferage, and complainants insure the cargo while it is on their piers. Complainants consider delivery takes place when they receive a signed receipt of some kind from the party that next takes over the cargo. The record reveals that complainants consider that when this occurs, their obligation ceases.⁶

The terminal maintains guards to police the terminals, and service employees for the upkeep and maintenance of the terminal piers and premises. Both the terminal's guards and the complainant's watchmen belong to unions not affiliated with the ILA.

In August of 1964, PBMTA received a letter from one of its members, the Massachusetts Port Authority, stating in part:

Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times, it seems almost useless to advise them that a reduction in charges is established in the tariff for that purpose.

Shortly after this letter, PBMTA decided to reduce wharf demurrage to $\frac{1}{2}$ cent per 100 pounds per day and to assess it against the vessel instead of the consignee. In September 1964, BSA found out about the proposal to shift the charge to the vessel and protested by telegram to PBMTA. In the next few months, two or three meetings took place, which ended with the parties still at odds. PBMTA told BSA that it would continue to assess the charge against the vessel and that if there was any complaint to file it here with the Commission. BSA's reply was that it would not pay the charge. A longshoremen's strike that had been brewing for about a month in the Port of Boston commenced on September 30, 1964. Tally clerks and other clerks of the

⁶ Other common carriers in Boston whose schedules provide only an occasional call at a particular pier operate differently and discharge at the pier ends their operation there. Cargo left on the pier at the end of free time would be turned over to the terminal for storage.

BSA also struck. On November 18, 1964, wharf demurrage assessed against the vessel for cargo remaining on the pier during a strike of the vessel's employees or employees of the agent of the vessel was re-named "strike storage." On December 21, 1964, this "strike storage" charge was eliminated from the wharfage section of the tariff and set aside as a separate item. On October 1, 1964, a court injunction stayed the strike, but it began again on January 11, 1965, and lasted 33 days. During this time, truckmen and railroad men representing the consignees refused to enter the terminal and pick up cargo. All guards and watchmen remained on duty during the strike.

Pursuant to the tariff, strike storage was assessed against complainants. Upon refusal of complainants to pay the assessed charges, PBMTA brought an action in the U.S. District Court, District of Massachusetts. The Court stayed proceedings, holding that the matter was within the primary jurisdiction of the Commission. The present complaint resulted.

DISCUSSION

A. Prior Approval of the Strike Storage Provision Under Section 15

A threshold issue⁷ to be disposed of before dealing with the validity of the strike storage charge under sections 16 and 17 is the question of whether the tariff revisions containing the present strike storage rule required our approval under section 15 prior to their implementation. The Examiner found no merit in this contention of complainant and we agree.

Prior to the present rule, the tariff contained a provision providing for reduced "wharf demurrage" to be assessed against the cargo in the event removal of it was prevented by a strike. The present charge is in effect this same wharf demurrage though now called strike storage. Thus, the only real change effected by the controversial provision is the shift of the charge from cargo to vessel.

Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services. The authority granted under the agreement to jointly fix charges carried with it the continued authority to properly allocate those charges,

⁷ Taking the position that this is a ratemaking case, complainants also contended that we were without jurisdiction. They do not, however, challenge the level of the strike storage charge and their only concern is with its assessment against them. That the proper allocation of the costs of providing terminal services as between users of those services is a matter within our jurisdiction under section 17 is too well settled to be disputed now. *Practices, etc., San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) aff'd *California v. U.S.*, 320 U.S. 577 (1944); *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).

and while a particular change in allocation may be an unreasonable practice under section 17 or unlawful under section 16 or some other section of the Act, it does not constitute a new agreement or a modification to the existing agreement calling for a new anticompetitive, monopolistic or rate-fixing scheme not contemplated in the original agreement. See *International Packers, Ltd. v. F.M.C.*, 356 F. 2d 808, 810 (C.A.D.C. 1966); *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement*, 8 F.M.C. 381, 384 citing *Empire State Highway Transportation Association v. Federal Maritime Board*, 291 F. 2d 336 (C.A.D.C. 1961) c.d. 368 U.S. 931 (1961). For changes outside the scope of approved agreements and needing prior approval, see those items listed in *The Persian Gulf Outward Freight Conf. (Agr. 7700)—Establishment of a Rate Structure Providing for Higher Rate Levels for Service via American-Flag Vessels versus Foreign-Flag Vessels . . .* Docket 66-27—10 FMC 61; and the discussion on the subject in *Contract Between the North Atlantic Mediterranean Freight Conference and the United Arab Co. etc.*, Docket No. 66-3, 9 FMC 431. No prior approval under section 15 was required.

B. *The Allocation of the Strike Storage Charge Under Section 17*

As "other persons subject to [the Shipping] Act"⁸ terminals are required by section 17 of that Act to establish "just and reasonable regulations and practices relating to or connected with the receiving handling or storing of property". We are authorized by section 17 whenever we find a regulation or practice to be unjust or unreasonable, to prescribe a just and reasonable one.

Terminal operators form an intermediate link between the carriers and the shippers or consignees. In consequence the terminal operators perform some services for the carriers and other services for the shippers. *Terminal Rate Increases-Puget Sound Ports*, 3 U.S.M.C. 21, 23 (1948). A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service. *Practices, Etc. San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) aff'd. *California v. United States*, 320 U.S. 577 (1944); *Investigation Free Time Practices-Port of San Diego*, 9 F.M.C. 525 (1966). Where the users of a particular service do not provide their share of essential

⁸ Section 1 provides:

"The term 'other person subject to this Act' means any person not included in the term 'common carrier by water' carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

terminal revenues a disproportionate share of the burden is unjustly and unreasonably shifted to users of other terminal services. *Practices, Etc. San Francisco Bay Area Terminals, supra*, see also *Terminal Rate Structure-California Ports*, 3 U.S.M.C. 57 (1948). In view of the multiplicity of methods used by terminal operators in furnishing facilities to carriers, shippers and consignees, it is essential, in considering whether a particular allocation or assessment is just and reasonable, to first determine for whom the service is performed. The necessary distinction to be made is between those services which are attributable to the transportation obligation of the carrier and those which are not, the latter normally being performed for the shipper or consignee. *Terminal Rate Increases-Puget Sound Ports, supra*. This, of course, involves a clear delineation of the obligations of the carrier to the shipper or consignee in performing its transportation service.

Complainants' simplistic characterization of a common carrier's duty as the "duty to carry" does not go far enough, and the carrier's obligation does not end with the deposit of the goods upon a "reasonable pier." The carrier must also "tender for delivery" which obligation requires that the carrier unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. *American President Lines, Ltd. v. Federal Maritime Board*, 317 F. 2d 887, 888 (D.C. Cir. 1962). Once this has been done, and absent a special contract, the carrier's transportation obligation is discharged.

In discharging its obligation to tender for delivery, the carrier must provide a convenient and safe place to receive the cargo from the shipper and for the consignee to accept delivery. *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21 (1948). Thus, the carrier must provide adequate terminal facilities *Intercoastal Rates to and from Berkeley*, 1 U.S.S.B.B. 365 (1935), *Intercoastal Investigation 1935*, 1 U.S.S.B.B. 400 (1935). A carrier may not divest itself of this obligation, *Terminal Rate Increases—Puget Sound Ports, supra*, though it may contract for the facilities of another person such as a terminal operator in which case the terminal operator is in effect the agent of the carrier. *Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966).

At Boston, "free time", or the period reasonably required to allow a consignee to pick up his cargo, appears in the respondent terminals' tariff and no comparable provision appears in the carrier's tariff. The piers and wharfs are actually provided by respondents. The obligation to provide free time and effective facilities to make that free time

meaningful and realistic remains the carrier's. At Boston, the free time period is 5 days. Once the cargo has remained on the pier for these 5 days, the transportation obligation of the carrier is ended and the services performed by the terminal for the carrier are also at an end. Any other services performed by the terminal in receiving, handling, storing, or delivering the property are normally performed for the consignee or the shipper.

With the foregoing in mind, we move to a discussion of the application of the strike storage provision during the period in question. The strike storage rule clearly would apply to (1) cargo on the pier which is in free time when the strike begins; and (2) cargo which is on the pier in wharf demurrage when the strike begins.⁹

1. *Cargo in Free Time*

When the cargo is in free time, the terminal facility—the pier—is being provided by the terminal to the carrier so that the carrier may discharge its full transportation obligation to the consignee. It is the duty of the carrier to provide this service to the consignee and it has chosen to do so through an arrangement with the terminal. No one would argue that the carrier should pay the terminals' cost of providing the pier for the free time period itself. Why then should the consignee pay for the interim period of the strike? The Examiner would appear to conclude that the consignee should pay for two reasons (1) that "the terminal services rendered, that is, the supplying of the pier and the attendant services as well as the free time involved were being supplied to the cargo"; and (2) that "the reasons advanced by PBMTA for making the change [from consignee to vessel] were not valid".

That the services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the "vessel" and those performed for the "cargo". While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate

⁹ The Examiner concluded that a broad reading of the rule could lead to its application to cargo the terminal had signed for and removed from the pier used by the vessel, presumably, to another pier, since strike storage is defined as a "charge assessed against cargo on the pier at the commencement of a strike." (Emphasis ours). We do not read the rule as applying to cargo removed from the pier by the terminal itself after it has signed for the cargo. In any event, as will appear later, an attempt to apply the rule to such cargo would, as respondents themselves appear to recognize, constitute a reasonable practice.

entity which is itself capable of paying for services rendered. The charges must always be paid by some person standing in a prescribed relationship to the cargo.¹⁰ Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's cost of providing the services rendered. The question here is which of these two should pay the charge in issue.¹¹ We would place the burden upon him who at the time of the strike owes an undischarged obligation to the cargo. Thus, where the cargo is in free time and a strike occurs, it is the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders the discharge of that responsibility impossible.

After reviewing respondents' past practices under the old reduced wharf demurrage provision which governed charges for storage during a strike, the Examiner concluded that the reasons advanced by respondents for shifting these charges from the consignee to the vessel were invalid. Thus, in the Examiner's view, "The terminals are arbitrarily and unfairly charging the vessel strike costs * * * for services not rendered to them." Respondents contend that the Examiner has misconceived the past practice. We find it unnecessary to resolve this dispute.

We have already concluded that the charge in question was for a service rendered the vessel in order to allow the vessel to discharge its duty to tender for delivery. Therefore, the practice is a just and reasonable one under section 17. Its validity under section 17 is not affected by respondents' motives. A bad motive does not make a reasonable allocation unreasonable just as a good motive does not make an unreasonable allocation reasonable. The nature of the practice itself is of course controlling.

2. *Cargo in Demurrage*

Once free time has expired, the vessel's transportation obligation has ended. Absent a special contract, the carrier has done all that its transportation obligation requires it to do. Thus, in our view, it is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear

¹⁰ We can only assume that convenience alone led to the substitution of "cargo" for the term "shipper or consignee" depending *inter alia* whether the shipment was outbound or inbound.

¹¹ No party to this complaint case has argued that the terminal itself should absorb the cost of providing strike storage and the record here is silent as to the terminal's ability to do so.

the risk of any additional charges resulting from a strike occurring after free time has expired. The fact that the carrier may remain liable for loss or damage to the cargo due to its own negligence, *American President Lines v. F.M.B.*, 317 F. 2d 887 (C.A.D.C. 1962) in no way relieves the consignee of its duty to pick up the cargo or bear those risks attendant to a failure to do so. Thus, we conclude that as to cargo which is in demurrage when the strike begins, it is an unjust and unreasonable practice within the meaning of section 17 to assess strike storage against the vessel.

C. *Application of the Strike Storage Rule as a Violation of Section 17*

The Examiner further concluded that the language of the strike storage itself rendered it inapplicable to the situation here in question. Pointing to the fact that under the rule itself, strike storage was assessable only on cargo "prevented from removal" by a strike, the Examiner found that "The refusal by consignee's employees was voluntary, and evidently was not pressed, possibly in order to avoid further complications and danger." The key to the Examiner's conclusion would seem to be his finding that a "longshoremen's strike does not present a legal obstacle preventing the agents or employees of the consignee from picking up its cargo."¹²

To adopt the Examiner's conclusion is to place a strained and unnatural interpretation upon the language of the rule. As the Examiner himself points out, "The parties to this proceeding have been acting under the assumption that the longshoremen's strike prevented the consignee from receiving his cargo." Thus, only the Examiner has construed the language to mean "legal obstacle." Giving the language "the fair and reasonable construction required," *Thomas G. Crowe v. Southern S.S. Co.*, 1 U.S.S.B. at 147 (1929), we do not agree that the language "prevented from removal" means or was intended to mean "prevented from removal by a legal obstacle." We have long ago recognized the "physical and moral force of picket lines" and the impact of a strike which effectively prevents consignees from removing their shipments," *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).¹³ When the truckers and railroad men upon whom the consignees must rely to pick up their cargo refuse to enter the terminal because of the longshoremen's strike, it can hardly be said that the consignee's "refusal" to pick up their cargo was "voluntary." We

¹² The Examiner cited section 8(b)(4) (i) and (ii) (B) of the National Labor Relations Act and certain cases dealing with "secondary boycotts" in support of this conclusion.

¹³ That the *Free Time and Demurrage* case involved a trucker's strike as opposed to a longshoremen's strike is of no consequence to our conclusions here.

therefore conclude that the strike storage rule was applicable to the situation in issue and of itself did not constitute an unreasonable practice under section 17.

D. *The Assessment of Strike Storage Under Section 16 First*

There remains only the Examiner's conclusion that a violation of section 16 first had been committed. Citing only our recent decision in *Investigation of Free Time Practices—San Diego*, 9 F.M.C. 525 (1966), the Examiner concluded that the *San Diego* decision "would seem to make any undercharge or overcharge to any user, preferential or prejudicial * * * ." To the Examiner, "It follows that a section 16 violation exists in the present instance since the vessel is being charged for a service to the cargo even though the cost allocation system under which the terminal operates has not been shown." The Examiner then suggests that we " * * * may wish to consider whether a distinction should be drawn between the *San Diego* case and the present one" insofar as at least as *San Diego* would appear to apply to different classes of users of terminal services, i.e. between cargo and vessel.

The distinction to be drawn is not between the *San Diego* case and this one but between section 16 and section 17.¹⁴ The practice involved in *San Diego* was the granting of excessive free time to shippers and consignees. We discussed the validity practice under both sections 16 and 17. Under section 16, we stated that because the business practices of some shippers would not allow them to take advantage of the full free time granted, the ostensible offer to all shippers was illusory and the practice worked preference and prejudice within the meaning of section 16.¹⁵ We further pointed out that the practice could be an unreasonable one under section 17 since by providing valuable services free or at reduced rates, the terminal was placing a disproportionate share of the burden of providing essential terminal revenues upon users of other services.

Thus, under section 16, there were two users of the same service—free time. In the present case, this ingredient is missing for the very question in issue is which of the two interests, cargo or vessel, is the actual user of the service in question. The distinction to be made is not between classes of users¹⁶ but whether there are two interests seeking

¹⁴ The Examiner felt that "Under such circumstances, any distinction between section 16 and section 17 seems to be eliminated insofar as terminals are concerned."

¹⁵ We also pointed out that because of the nature of the service free time or free storage, it was unnecessary to show any competitive relationship between particular shippers or consignees, See e.g. *New York Foreign Freight F. & B. Assn. v. F.M.C.*, 337 F. 2d 289 (1964).

¹⁶ We can for example see no reason for a terminal to charge say a shipper one rate for pure storage and carrier yet another rate for such storage.

the same or substantially the same service. Here the service is for either the consignee or the vessel depending upon whether the particular cargo is in free time or demurrage. While the particular assessment of strike storage may result in an unreasonable practice under section 17, it does not in the situation at hand result in a violation of section 16.

On the basis of the foregoing, we conclude that the assessment of strike storage against the vessel for cargo on which free time has expired constitutes an unjust and unreasonable practice under section 17 of the Shipping Act, 1916, and respondents will be ordered to amend their strike storage rule accordingly.

By the Commission.

ORDER

The Commission has this day made and entered a report stating its findings and conclusions herein, which report is made a part hereof by reference, and

It is ordered, That respondents herein shall amend their Terminal Tariff No. 1 in a manner not inconsistent with the Commission's decision herein.

By the Commission.

[SEAL]

(Signed) THOMAS LIST,
Secretary.

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ABSORPTIONS.

Where a carrier discharged cargo consigned to Boston at the Port of New York and then trucked the cargo free to an importer's warehouse in Massachusetts; the evidence did not show that the importer was unduly or unreasonably preferred or advantaged; and the absorption of inland transportation charges was not established as a solicitation factor, the absorption was not proven to be a violation of section 16 First. Practices, Etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade, 95 (112-113).

ADMINISTRATIVE PROCEDURE ACT. See Practice and Procedure.

ADMISSION TO CONFERENCE MEMBERSHIP. See Agreements under Section 15.

AGREEMENTS UNDER SECTION 15.

—In general

Where a party withdrew from a section 15 agreement prior to approval, arguments that the passage of time and changes in circumstances warranted withdrawal, or that the carrier was now "rebating", were totally irrelevant to a determination of the status of the agreement. Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement, 134 (141).

Where the parties to a conference agreement filed a tonnage ceiling agreement which by its terms did not purport to be a modification or amendment of the conference agreement; and the letter of transmittal specifically stated that it was separate from the conference agreement; and the conference agreement was limited to rate making, the tonnage ceiling agreement was a separate and distinct agreement. A representation made in a letter of transmittal, a required document, is entitled to some weight in construing the accompanying agreement particularly if there is ambiguity in the agreement itself. Moreover, since the tonnage ceiling agreement was a temporary expedient, it was not the type of agreement usually incorporated in a permanent conference agreement. In any event, it was immaterial whether the tonnage ceiling agreement was considered to be a separate agreement. If separate, it required continued agreement on the part of all whom it purported to bind; if it was considered as part of the conference agreement, it was governed by that agreement's unanimous vote provision since it involved a basic change in the scope of the agreement. *Id.* (143-144).

An agreement may be amended during the course of hearings without amendment of the order of investigation. It is entirely proper for a Hearing Examiner to encourage modifications which might reasonably lead to an agreement so long as such modifications are within the scope of the original inquiry. Agreement 9448—Joint Agreement Between Five Conferences in the North Atlantic Outbound/European Trade, 299.

Violation of a general order of the Commission which was not issued to explain, interpret, or implement section 15 need not be a violation of section 15. Outward Continental North Pacific Freight Conference, 349 (354).

—*Admission to conference membership*

The Commission is not precluded from disapproving a conference agreement for failure to comply with self policing requirements, conference admission requirements, or shippers' requests and complaints procedures, on the ground that it can only disapprove an agreement if it finds that the agreement operates in one of the four ways set out in section 15. Section 15 specifically provides for disapproval of an agreement for failure to maintain adequate policing, reasonable procedures on shippers' complaints, and reasonable and equal membership provisions. If these standards are not met, no further inquiry as to the general effect of the agreement is necessary. Outward Continental North Pacific Freight Conference, 349 (352-353).

General Orders 7, 9, and 14 are not invalid on the ground that the Commission cannot by rule prescribe the system to be used by a conference in fulfilling the statutory requirements in the areas of the Orders. The Orders do not dictate any single form of compliance with the statute. *Id.* (355-356).

General Order 9 requires a conference agreement to contain provisions in substantially the form of the nine provisions enumerated therein. These provisions contain standards designed to guarantee that the essential elements of qualification for admission and safety from expulsion are met. The Order does not require that the enumerated provisions be incorporated verbatim. Mere statement of the procedures in the agreement will not guarantee reasonableness and equality of treatment and, therefore, reports of actions taken are required. *Id.* (356).

The Commission has no guarantee that conferences which inform it of their procedures and reports on actions taken thereunder have necessarily operated fairly, with respect to General Orders 7, 9, and 14. Compliance with the orders does guarantee that conferences have established a general framework under which the mandates of section 15 can be carried out. As to actual operations, once the Commission receives reports it can decide whether to investigate further to determine if a conference's operations are proper. *Id.* (357-358).

The Commission's attempt to enforce its General Orders 7, 9, and 14 against a conference was not an attempt to enforce the orders abroad. The conference served the foreign commerce of the United States and operated under an approved basic conference agreement for many years. The mere fact that the conference agreement is subject to Commission jurisdiction should preclude the conference from questioning the applicability of the general orders to its activities.

The Commission cannot see how the activities of a conference serving U.S. foreign commerce can have no effect on U.S. shippers, or U.S. carriers which might seek to join the conference. *Id.* (358-359).

—*Antitrust laws*

Section 15 of the 1916 Act exempts steamship conferences and other anti-competitive groups from the antitrust laws when and only as long as the agreements establishing such groups are approved by the Commission. In deciding whether continued approval should be allowed unanimity and tying rules they must be examined in the light of the four criteria of section 15. Passenger Steamship Conferences Regarding Travel Agents, 27 (33).

In determining whether to approve initially or to allow continued approval of an agreement under section 15 the Commission must reconcile, as best it can, two statutory schemes embodying somewhat inconsistent policies, the antitrust laws and the Shipping Act. It is valid to say that congressional policy is that of encouraging or at least allowing the conference system; it is less than valid to contend that this represents a complete and unqualified endorsement of the system. *Id.* (33).

The determination to approve or to allow continued approval of an agreement requires consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws and a consideration of the circumstances and conditions existing in the particular trade in question which the anticompetitive agreement seeks to remedy or prevent. Before legalizing conduct under section 15, which might otherwise be unlawful under the antitrust laws, the Commission's duty to protect the public interest requires that it scrutinize the agreement to make sure that the conduct legalized does not invade the prohibitions of the antitrust laws more than is necessary. *Id.* (34).

Parties seeking exemption from the antitrust laws must show that their agreement is required by a serious transportation need, or in order to secure important public benefits. Otherwise, and whatever may have been the policy of the Commission's predecessors, it is the Commission's view that the public interest in the preservation of competition where possible, even in regulated industries, is unduly offended, and the agreement is contrary to that interest within the meaning of section 15. This applies equally where the question is whether to allow prior approval of an agreement to continue unmodified. *Id.* (34-35).

—Approval of agreements

A prior approval under section 15, no matter how long ago granted, may not be converted into a vested right of continued approval simply because the parties to the agreement desire continued approval. *Passenger Steamship Conferences Regarding Travel Agents*, 27 (34).

The Commission cannot approve a new agreement under section 15 if, prior to approval, one of the parties withdraws. The Commission's initial task under section 15 is to deal with *agreements* among or between carriers or other persons subject to the Act, not disagreements. The Commission cannot compel a carrier to participate in a section 15 type agreement against its will. Approval of an agreement after withdrawal of a participant would be tantamount to compelling the withdrawing party to participate. *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement*, 134 (141-142).

The Commission's conditional approval procedure is not contrary to its obligations under section 15. If the parties to a proposed agreement do not wish to avail themselves of this purely procedural short cut to approval, the Commission will set the matter down for hearing. The Commission is not required to approve a proposed agreement instantly or set it down immediately for a hearing. *Id.* (142).

Where a conference filed a modification to its basic agreement (to include self-policing and admission and withdrawal provisions) and prior to approval a conference member withdrew from the modification agreement, no agreement existed for the Commission to act upon. A fair reading of the telegram of withdrawal to the Commission was that its opposition to the whole modification agreement was unqualified and its withdrawal was complete. The decision in *Hong Kong Tonnage Ceiling Agreement*, 10 FMC 134, was applicable. The agree-

ment in that case was found to be a new agreement and not a modification, but this was a distinction without a difference, particularly in view of the fact that the voting provisions of the basic agreement required unanimity whenever a substantial change in the arrangement was contemplated. *Petition of New York Freight Bureau (Hong Kong) for Declaratory Order*, 165 (168).

Where a conference member withdrew from an agreement amending the basic conference agreement prior to approval of the amendment, the approval given by the Commission was void *ab initio*. *Id.* (169).

When one of the original parties to a new agreement filed for section 15 approval withdraws from the agreement prior to approval, the Commission's jurisdiction is destroyed. Before approval a conference agreement is no more than a contingent agreement depending for its vitality on Commission approval. *Modification of Agreement 5700-4*, 261 (269-270).

A joint agreement between five conferences in the North Atlantic Outbound/European Trade, providing for meetings and consultations on common problems, excepting matters described in section 15 other than "cooperative working arrangements", could not be approved. The Commission must know precisely what it is approving and the agreements must set this forth clearly, and in sufficient detail to apprise the public, just what activities will be undertaken. The agreement also failed to comply with section 15 standards in that it would be contrary to the public interest to approve an agreement whose coverage was so vague that the public could not ascertain the coverage by reading it, and in that the agreement was not "true and complete". *Agreement 9448—Joint Agreement Between Five Conferences in the North Atlantic Outbound/European Trade*, 299 (306-307).

Agreement between conferences setting forth in detail activities to be undertaken jointly is approved, and elimination of provisions relating to joint participation in office services and the filing of reports and circulars with the Commission is permitted. *Id.* (312-313).

The Commission is not precluded from disapproving a conference agreement for failure to comply with self-policing requirements, conference admission requirements, or shippers' requests and complaints procedures, on the ground that it can only disapprove an agreement if it finds that the agreement operates in one of the four ways set out in section 15. Section 15 specifically provides for disapproval of an agreement for failure to maintain adequate policing, reasonable procedures on shippers' complaints, and reasonable and equal membership provisions. If these standards are not met, no further inquiry as to the general effect of the agreement is necessary. *Outward Continental North Pacific Freight Conference*, 349 (352-353).

—*Cessation of trade*

The Commission is not required to and will not disapprove agreements involving the trade between the United States and Cuba because of the cessation of trade. The situation, unlike that in prior cases, was not due to the voluntary action of the conference members. Cessation of trade was brought about by sovereign act. It would be illogical and inequitable for an agency of the government which imposed the embargo to disapprove the agreements. Continued approval would facilitate resumption of service when the embargo was lifted. *Agreements Nos. 4188, Etc.*, 92 (94).

A transshipment agreement would not be disapproved as to the portions dealing with transshipment at Singapore and Penang on the ground that the trade at those ports was nonexistent, due to the confrontation between Indonesia and Malaysia. There was every reason to believe that normal trade relations would

be resumed in the near future. It would place an unreasonable burden on the carriers involved to require them to wait until transshipment at the ports had again become an accomplished fact. Moreover, where a cessation of a trade is brought about by a sovereign act, this fact does not constitute grounds for modification or disapproval of an otherwise acceptable agreement involving that trade. Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports, 183 (193).

—*Conference tying rule*

Restraints imposed by conference tying rule, prohibiting travel agents appointed by conference members from selling passage on nonconference lines, on the agents, the nonconference lines, and the traveling public have operated against the best interests of all three groups. Once this was shown, the conference was required to demonstrate that the rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act. The rule was not shown to be necessary to maintain conference stability and was not justified by the services performed for the agents by the conference. Passenger Steamship Conferences Regarding Travel Agents, 27 (46-47).

—*Detriment to commerce*

Passenger steamship conference rule as implemented contrary to the business judgment of nearly all conference members, requiring unanimous vote of the membership to fix or alter the maximum commission payable to travel agents appointed by the conference to sell passenger bookings has worked to the detriment of the commerce of the United States. Passenger Steamship Conferences Regarding Travel Agents, 27 (38).

Passenger steamship conference rule requiring unanimous vote of members to fix or alter the maximum commission payable to travel agents has had an effect inconsistent with the desires of most members to meet the air challenge. Lack of unanimity has on several occasions prevented the conference's subcommittee, which has initial responsibility for commissions, from even reporting the positions of member lines to the principals. *Id.* (38).

Conference unanimity rule with respect to the maximum commission payable to travel agents blocked attempts by a majority of the member lines to change the general commission level for at least 6 years and the tour commission level for over 2½ years. The logical inference may as well be that the present level is frozen at a level undesired by a majority of the conference members. The fact that the record does not show whether or not a majority would decide to raise the commission level is irrelevant. If the rule has been shown to operate to the detriment of commerce, to wait until there is evidence that it again operates in that fashion before the rule is outlawed would be to suggest that illegal actions cannot be disapproved once they may have ceased. This reasoning would destroy the purpose of regulation. *Id.* (40).

Evidence of the blocking of the desires of a majority of the member lines to achieve their goal present in the proceeding is a sufficient reason for declaring conference unanimity rule, with respect to the maximum commission payable to travel agents, detrimental to the commerce of the United States. *Id.* (40).

The "economic factor" that it takes travel agents more time to book sea passage than air passage could have been overcome but for conference unanimity rule requiring unanimous vote of membership to fix or alter the maximum commission payable to travel agents. The purely superficial equilibrium between commissions for booking sea and air passage would have been replaced by the majority of

conference members by a higher "percentage level" of commissions for sea passage. The record indicates that until this is done, the economic self-interest of travel agents will serve to foster the definite tendency to sell air passage over sea passage—a situation contrary to the public's interest on the Shipping Act's declared purpose of "encouraging and developing . . . a merchant marine adequate to meet the requirements of the commerce of the United States . . . with foreign countries". The Commission's responsibility for protecting that interest requires that it not grant continued approval to anticompetitive conduct which tends to reduce the effectiveness of our merchant marine. Since the unanimity rule creates the situation which tends to foster airline booking at the expense of potential steamship bookings it is detrimental to commerce of the United States within the meaning of section 15. *Id.* (42-43).

Conference unanimity rule has prevented a majority of members from raising the levels of travel agents' commission and has periodically worked to freeze commissions at levels effectively lower than commissions paid by airlines. This disparity fosters a tendency on the part of travel agents to push air travel, thus depriving the undecided traveler of his right to deal with an agent free of any motivation based on economic self-interest. This situation is detrimental to the waterborne foreign commerce of the United States and contrary to the public interest in the maintenance of a sound and independent merchant marine. *Id.* (43-44).

Passenger steamship conference rule which prohibits travel agents appointed by conference members from selling passenger bookings on competing nonconference lines without prior permission from the members operates to the detriment of the commerce of the United States and has to be disapproved under section 15. The rule prevents travel agents from selling transportation on nonconference lines, denies the nonconference carriers the use of agents on whom they had to depend for the sale of transportation, and denies prospective passengers the right to use the valuable service of agents in fulfilling their desires to travel on nonconference vessels. *Id.* (46).

—Discrimination

Congressional allowance of the conference system was and is conditioned on subjection of conferences, agreements, and operations under agreements to strict administrative surveillance to insure fair play, equality of treatment, and protection from discrimination. *Passenger Steamship Conferences Regarding Travel Agents*, 27 (35).

Passenger steamship conference rule prohibiting travel agents from selling passage on nonconference lines is unjustly discriminatory as between carriers within the meaning of section 15. The admitted intent of the rule is to eliminate nonconference competition. Agents have lost prospective bookings. Nonconference lines have been denied access to channels controlling 80 percent of the business. Rule must be disapproved. *Id.* (47).

—Filing requirements

Where an approved conference agreement expressly referred to payments to brokers if unanimously agreed on by the parties, an agreement reached unanimously to pay a 3 percent commission to forwarders was not required to be filed under section 15. *Practices, Etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade*, 95 (109).

While an agreement fixing or regulating the amounts of brokerage is an agreement within the meaning of section 15 that has to be filed for approval, once a conference agreement has been approved, conference arrangements regarding

brokerage payments to forwarders are permissible without separate section 15 approval. Id. (109).

Agreements between three members of a conference to pay commissions to forwarders on a deferred basis were unfiled and unapproved section 15 agreements. Both the failure to file immediately and the effectuation of the agreements without approval are violations of section 15. The agreements cannot be described as merely reiterations of the conference requirement not to pay rebates. Id. (109-110, 114).

Section 15 requires absolute compliance. There is no room for technical violations. Exoneration of respondents cannot be premised on the mere designation of failure to file agreements as technical or insubstantial. It is immaterial that agency personnel knew of the agreements. Ramifications of the decision upon the subsidy program is also immaterial to the question of whether the agreements were subject to section 15 and were filed. Nor was a U.S.-flag carrier being discriminated against because the proceeding did not have coextensive thrust against foreign-flag carriers. Id. (110-111, 114-115).

Transshipment agreements concluded between individual carrier must be filed for approval under section 15. Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports, 183 (192).

An agreement between a number of carriers to agree to enter into an agreement with other carriers for the transshipment of cargo was not subject to section 15. It was only when a final agreement had been concluded that the requirements of section 15 came into play. Id. (196).

An agreement between a number of carriers to agree to enter into an agreement with another group of carriers for the transshipment of cargo is not subject to section 15. A mere agreement to negotiate, among the members of one side of the ultimate bargain, cannot, standing alone, accomplish those things covered by section 15 and therefore such an "agreement" does not come within the section. Transshipment and Through Billing Arrangement Between East Coast Ports of South Thailand and United States Atlantic and Gulf Ports, 199 (215).

Court decisions holding that the action of a group of carriers (members of a conference) in initiating a "scheme" of dual rates in a particular trade requires approval under section 15 before it can be carried out because the basic conference agreement does not provide a "cover of authority" to adopt such a "scheme", do not by analogy require that an agreement between a number of carriers to agree to enter into an agreement with another group of carriers for transshipment of cargo be submitted for Commission approval. In the dual rate situation the Commission approves the "scheme" and the conference then enters into thousands of uniform dual rate contracts. Unlike the individual dual rate contracts, the Commission must scrutinize each proposed transshipment agreement to see if the special terms, in the special circumstances of the trade, are compatible with section 15 standards. Id. (216-217).

An interchange agreement between a carrier and truckers who performed a pickup and delivery service on behalf of the carrier was not required to be filed with the Commission. The truckers were not subject to the Shipping Act. *Portalatin Velazquez Maldonado v. Sea-Land Service, Inc.*, 362 (372).

No prior approval under section 15 was required for terminals to revise a tariff to make strike storage payable by the vessel rather than the cargo. Approval of the basic agreement under which the terminals operated carried with it continued authority to jointly fix charges and properly allocate them. While a particular change in allocation may be an unreasonable practice under section 17 or unlawful under section 16 or some other section, it does not constitute a new

agreement or a modification to the existing agreement. *Boston Shipping Assn., Inc. v. Port of Boston Marine Terminal Assn.*, 409 (413-414).

—*Foreign-to-foreign commerce*

A conference agreement covering passenger traffic between European ports, on the one hand, and United States and Canadian ports, on the other hand, was approvable, even through foreign-to-foreign commerce was involved. The Commission would not depart from the decision in *Oranje Line v. Anchor Line Ltd.*, 5 FMB 714 [in which case the Maritime Board held that it had jurisdiction under section 15 over an agreement covering both foreign commerce of the United States and the intimately related foreign commerce of Canada]. *Approved Scope of Trades Covered by Agreement 7840, as Amended—Atlantic Passenger Steamship Conference*, 9 (12).

—*Jurisdiction of Commission*

The Commission had jurisdiction over a proceeding involving agreements of carriers to pay commissions to foreign freight forwarders. The agreements had an impact on the landed cost of goods in this country. More importantly, the Shipping Act specifically has extra-territorial application and does not require demonstrable impact on our commerce. The Commission cannot divest itself of its responsibility because it is difficult to investigate and regulate misconduct which occurred abroad. *Practices, Etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade*, 95 (112, 115).

For the Commission to have jurisdiction there must be (1) an *agreement* among (2) common carriers by water or other persons subject to the Act (3) to engage in anticompetitive or cooperative activity of the types specified in section 15. If one or more element is lacking, the Commission does not have jurisdiction under section 15. Most fundamental is the requirement that there be an actual, viable agreement to which all the parties have given and continue to give their assent until approval is had. *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement*, 134 (140).

If at any time prior to approval by the Commission, one of the parties to a new agreement filed with the Commission changes its mind and withdraws from the agreement, the document previously filed becomes obsolete. The act of withdrawal destroys the subject matter of the Commission's jurisdiction. A section 15 agreement is not a private contract but a public contract. The right of the parties as against each other for breach of "contract" must be distinguished from the question of whether there is in existence an approvable agreement under section 15. *Id.* (140-141).

First Carriers (under a transshipment agreement) were subject to the Shipping Act, notwithstanding that they were foreign and it would be impossible to obtain *in personam* jurisdiction over them. There was no need for the Commission to do so in order to carry out its regulatory obligations under section 15. It was enough that First Carriers were engaged in the transportation by water or property between a foreign country and the United States. The Commission did have *in personam* jurisdiction over the other carriers involved. *Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports*, 183 (191).

The Commission, in exercising its regulatory duties under section 15, directs its attention more to the agreement and not so much to the parties thereto. As long as the parties satisfy the definition of common carriers by water in the transportation of goods from a foreign country to the United States, the Commission has jurisdiction over the agreement. *Id.* (192).

Section 18(b), added to the 1916 Act, requires common carriers in foreign commerce and conferences of such carriers to file their rates with the Commission "for transportation to and from United States ports and foreign ports between all points on its own route *and on any through route which has been established*", and gives the Commission jurisdiction over the rates so filed. Congress cannot be charged with the futile action of assigning this responsibility to the Commission to regulate rates on a through route if the Commission had no authority over inter-carrier agreements under which such rates are established. Argument that inclusion of the italicized words shows a congressional intention to omit them from sections 1 and 15 is unacceptable. Transshipment and Through Billing Arrangement Between East Coast Ports and South Thailand and United States Atlantic and Gulf Ports, 199 (213).

—Modification of agreement—Commission authority

Section 15 clearly gives the Commission authority, after notice and hearing, to modify agreements without consent of the parties. Prior non-use of the power did not operate to "repeal" it. When the power is exercised by direct action, the agreement ceases to be an "agreement of the parties". It becomes a modified agreement. Modification of Agreement 5700-4, 261 (268-269).

Where a conference with a unanimous voting rule files an amendment to its basic agreement for approval and one of the members withdraws from the amendment prior to approval, the amendment no longer may be considered as a *conference generated modification*, Id. (270).

Conference agreement will be modified to add self-policing and membership provisions. Withdrawal of approval would penalize 16 out of the 17 member lines who indicated their willingness to comply with General Orders 7 and 9. Since the conference had a unanimous voting procedure, it was powerless to accept modification proposed in order of conditional approval. Id. (273).

Initial Decision is adopted, with the exception that the agreement involved is modified and, as modified, approved. The modifications specify the particular areas in which the member conferences are authorized to meet and discuss mutual problems. Agreement as modified does not authorize the parties to agree on anything except housekeeping arrangements. Agreement 9448—Joint Agreement Between Five Conferences in the North Atlantic Outbound/European Trade, 299 (300).

—Public interest

From substantial evidence of record it is reasonable to conclude that but for conference unanimity rule the majority of member lines would have increased travel agents' commissions, and that an increase would have enhanced the competitive position of the steamship lines. In the absence of a showing that the rule was required by some serious transportation need, or was necessary to secure an important public benefit, or was in furtherance of some purpose or policy of the Shipping Act, disapproval of the rule is required to protect the public interest against an unwarranted invasion of the prohibitions of the anti-trust laws, since it was not shown to be necessary in furtherance of any valid regulatory purpose under the Act. Passenger Steamship Conferences Regarding Travel Agents, 27 (44).

Passenger steamship conference rule prohibiting travel agents from selling passage on nonconference lines is contrary to the public interest because it invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the Shipping Act and there has been no showing that the rule is

required by a serious transportation need or is necessary to secure important public benefits. *Id.* (47).

Conference agreements providing that member lines may negotiate rates with MSTs do not prohibit the conference members from responding to the MSTs competitive bidding plan. Any agreement or rule promulgated thereunder, which could properly be construed as permitting the foreign-flag segment of a conference to refuse to sanction a particular method by which the U.S.-flag member lines may deal with the government for cargo reserved by law to U.S.-flag section 15. If one or more element is lacking, the Commission does not have lines, would be contrary to the public interest within the meaning of section 15. *Carriage of Military Cargo*, 69 (86-88).

—Rates

Provision of conference agreement covering "establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members" did not authorize a two-level rate structure based on vessel flag. The system (1) introduced an entirely new scheme of rate combination and discrimination not embodied in the basic agreement, (2) represented a new course of conduct, (3) provided new means of regulating and controlling competition, (4) was not limited to the pure regulation of intraconference competition, and (5) constituted an activity the nature and manner of effectuation of which could not be ascertained by a mere reading of the basic agreement. Separate approval is required. *Persian Gulf Outward Freight Conference (Agreement 7700)—Rate Structure*, 61 (65).

Project rate systems have never been held by the Commission or its predecessors not to require specific authorization in a section 15 agreement. *Id.* (66).

Legislative history of Public Law 346, amending section 15, and cases construing it, indicate that it is intended absent additional approval to limit conference authority, such as contained in conference agreement provision covering establishment and maintenance of agreed rates, charges and practices, strictly to the rate making authority contained therein. A two-level rate system based upon vessel flag is not authorized by such a provision and cannot be effectuated prior to Commission approval. *Id.* (66).

—Self-policing

A conference self-policing system must provide specific and realistic guarantees against arbitrary and injurious action. Arbitrary and injurious action can flow both from an unsupported finding of guilt or an unconscionably large penalty. Both the finding of violation as well as the level of the penalty should be included in the arbitrator's scope of review. This is essential where the conference itself sits in judgment upon an accused member. *Modification of Agreement 5700-4*, 179 (180-181).

Section 15 of the Shipping Act requires that conference agreements contain a system for self-policing, and the Commission has the authority to require inclusion of self-policing as a condition precedent to continued approval of an agreement. Adequate procedures must be set forth in the basic agreement whereby the machinery for self-policing is established; and there must be implementation of that machinery in practice. If the conference does not implement the machinery in good faith, withdrawal of approval is indicated by the 1961 amendment to section 15. A conference cannot legally police itself unless the basic agreement includes a self-policing system. *Modification of Agreement 5700-4*, 261 (272-273).

There is no single self-policing system which the Commission considers best and this is left to individual conferences to work out for their own purposes. Self-policing system at one time agreed to by all members of conference is selected by the Commission for the New York Freight Bureau (Hong Kong) Conference. Objections of one member consist of conjectures as to how the system might be used as an instrument of oppression. If the system is not administered in a fair manner, a finding of "inadequate policing" would be supported for which the mandatory penalty is disapproval of the entire conference agreement. *Id.* (274).

The Commission is not precluded from disapproving a conference agreement for failure to comply with self-policing requirements, conference admission requirements, or shippers' requests and complaints procedures, on the ground that it can only disapprove an agreement if it finds that the agreement operates in one of the four ways set out in section 15. Section 15 specifically provides for disapproval of an agreement for failure to maintain adequate policing, reasonable procedures on shippers' complaints, and reasonable and equal membership provisions. If these standards are not met, no further inquiry as to the general effect of the agreement is necessary. *Outward Continental North Pacific Freight Conference*, 349 (352-353).

General Orders 7, 9, and 14 are not invalid on the ground that the Commission cannot by rule prescribe the system to be used by a conference in fulfilling the statutory requirements in the areas of the Orders. The Orders do not dictate any single form of compliance with the statute. *Id.* (355-356).

General Order 7 requires that a provision for self-policing be contained in a conference agreement. The method or system used, the procedures for handling complaints, and the functions and authority of persons having responsibility for administering the system must be described. Reports must be filed twice a year. The Order does not dictate what method or system is to be used. *Id.* (356).

The Commission has no guarantee that conferences which inform it of their procedures and reports on actions taken thereunder have necessarily operated fairly, with respect to General Orders 7, 9 and 14. Compliance with the Orders does guarantee that conferences have established a general framework under which the mandates of section 15 can be carried out. As to actual operations, once the Commission receives reports it can decide whether to investigate further to determine if a conference's operations are proper. *Id.* (357-358).

The Commission's attempt to enforce its General Orders 7, 9, and 14 against a conference was not an attempt to enforce the Orders abroad. The conference served the foreign commerce of the United States and operated under an approved basic conference agreement for many years. The mere fact that the conference agreement is subject to Commission jurisdiction should preclude the conference from questioning the applicability of the General Orders to its activities. The Commission cannot see how the activities of a conference serving U.S. foreign commerce can have no effect on U.S. shippers, or U.S. carriers which might seek to join the conference. *Id.* (358-359).

—Shippers' requests and complaints

Requiring of self-policing provisions in section 15 agreements, without requiring such agreements to have provisions relating to shippers' requests and complaints, is not inconsistent under the language of section 15. The requirement with respect to shippers' requests and complaints relates to adoption of reasonable procedures for hearing requests and complaints and does not effect a substantive change in the scope of the conference agreement. A conference can adopt and

implement adequate procedures for dealing with shippers' complaints and requests without obtaining prior approval under section 15. Self-policing procedures, however, require specific approval. Modification of Agreement 5700-4, 261 (273).

The Commission is not precluded from disapproving a conference agreement for failure to comply with self-policing requirements, conference admission requirements, or shippers' requests and complaints procedures, on the ground that it can disapprove an agreement if it finds that the agreement operates in one of the four ways set out in section 15. Section 15 specifically provides for disapproval of an agreement for failure to maintain adequate policing, reasonable procedures on shippers' complaints, and reasonable and equal membership provisions. If these standards are not met, no further inquiry as to the general effect of the agreement is necessary. Outward Continental North Pacific Freight Conference, 349 (352-353).

General Orders 7, 9, and 14 are not invalid on the ground that the Commission cannot by rule prescribe the system to be used by a conference in fulfilling the statutory requirements in the areas of the Orders. The Orders do not dictate any single form of compliance with the statute. *Id.* (355-356).

General Order 14 requires that procedures adopted by a conference, with respect to hearing and considering shippers' requests and complaints, be reasonable. It defines shippers' requests and complaints. Conferences must file a statement outlining in complete detail procedures adopted and quarterly reports describing requests and complaints received and action taken. The Order does not specifically dictate the type of procedures to be adopted. *Id.* (357).

The Commission has no guarantee that conferences which inform it of their procedures and reports on actions taken thereunder have necessarily operated fairly, with respect to General Orders 7, 9, and 14. Compliance with the Orders does guarantee that conferences have established a general framework under which the mandates of section 15 can be carried out. As to actual operations, once the Commission receives reports it can decide whether to investigate further to determine if a conference's operations are proper. *Id.* (357-358).

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—Transshipment agreements

A carrier transporting cargo from Indonesian outports to Indonesian base ports under an exclusive arrangement with other carriers for on-carriage to United States ports is a common carrier by water in the foreign commerce of the United States. Where there exists a unitary contract of affreightment such as a through bill of lading by which two or more carriers or conferences of carriers hold themselves out to transport cargo from a specified foreign port to a point in the United States with transshipment at one or more intermediate points from one carrier to another, each of the carriers so involved is "engaged in" transporting cargo by water from a foreign country to the United States. Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports, 183 (190-191).

First Carriers (under a transshipment agreement) were subject to the Shipping Act, notwithstanding that they were foreign and it would be impossible to obtain in personam jurisdiction over them. There was no need for the Commission to do so in order to carry out its regulatory obligations under section 15. It was enough that First Carriers were engaged in the transportation by water of property between a foreign country and the United States. The Commission did have in personam jurisdiction over the other carriers involved. *Id.* (191).

Transshipment agreements concluded between individual carriers must be filed for approval under section 15. *Id.* (192).

An agreement between carriers transporting cargo from foreign outports to foreign base ports and other carriers for on-carriage of the cargo to United States ports is subject to section 15 for three reasons: (1) Since both groups of carriers are subject to the Act, any agreement among them meets the criteria of section 15 as to parties to the agreement; (2) the agreement is one "fixing or regulating transportation rates or fares . . . preventing or destroying competition . . . allotting ports . . . (and) providing for an exclusive, preferential, or cooperative working arrangement; and (3) since the on-carriers actually serve United States ports, effective, practical regulation of the agreement can be achieved without in personam jurisdiction over the originating carriers. *Id.* (192).

Under long established policy and consistent practice, the Commission and its predecessors have always required approval of transshipment agreement under section 15. The fact that in many instances the carrier or carriers on one side of the agreement do not touch United States territory is immaterial. The consistent administrative construction of the Act is entitled to great weight. Inference that inclusion of the phrase "on its own route or any through route which has been established" in section 18(b) shows Congress' intent to exclude jurisdiction over such "through routes" in the original Act, is unwarranted. *Id.* (192-193).

Exclusive dealing provision of a transshipment agreement requiring the only originating carrier in the trade to patronize exclusively conference carriers on-carrying the cargo involved to United States ports must be disapproved, since the possibility of any independent on-carrier entering the trade was utterly precluded. Such a provision went far beyond the permissible limits of section 15, unduly prevented competition, and was therefore contrary to the public interest. A similar agreement was approvable where there were other originating carriers which could be utilized by an independent on-carrier. The Commission will not sanction an absolute monopoly in an important segment of a trade in United States foreign commerce. *Id.* (193-195).

An agreement providing for the apportionment among conference carriers of some of the transshipment cargo carried under a transshipment agreement was approved. The agreement could have little or no effect upon an independent competitor. It was shown that the agreement would tend to eliminate wasteful practices and promote orderly continuity in the flow of cargo in the trade. *Id.* (196-197).

Carriers transporting cargo from Thailand to Singapore under an exclusive arrangement with other carriers for on-carrying the cargo to the United States are common carriers by water in the foreign commerce of the United States, both by virtue of their actual carryings and because of their joint activity with the on-carriers covering the entire route. Transshipment and Through Billing Arrangement Between East Coast Ports of South Thailand and United States Atlantic and Gulf Ports, 199 (208).

A transshipment agreement between carriers transporting cargo from Thailand to Singapore and other carriers for on-carriage to United States ports is not

exempt from section 15 because the originating carriers do not make any direct calls at United States ports on other routes, or because the through bills of lading are issued by the on-carriers. Other activities of carriers have no bearing on the legal status of the transshipment agreement. In most, if not all transshipment agreements either the originating carrier or the on-carrier issues a through bill for the whole trip, but this has never been held to prevent the agreement being subject to section 15. *Id.* (209).

A transshipment agreement involving exclusive dealings between the two groups of carriers is not exempt from section 15 because the transshipment points (unlike those in the *Canal Zone* case, 2 USMC 675) are in foreign territory and the Canal Zone agreement did not involve exclusive dealings and included through movements by single member carriers as well as transshipment. The Commission treated the *Canal Zone* case as a situation where the originating carriers did not touch a United States port and the Canal Zone has always been treated as foreign commerce. The *Canal Zone* case also had exclusive features. *Id.* (210).

Under frequent rulings and decisions, long established policy, and consistent practice, the Commission and its predecessors have always required approval of transshipment agreements under section 15. The fact that in many instances the originating carriers do not touch U.S. territory makes no difference. All transshipment agreements, whether or not they contain exclusive features, fall within section 15. They are invariably "cooperative working arrangements". *Id.* (211).

An exclusive transshipment agreement between carriers transporting cargo from Thailand to Singapore and carriers on-carrying the cargo to U.S. ports is subject to section 15. To treat it as an innocuous, incidental facet of the overall activities of the carriers would overlook the spirit as well as the letter of the Act. The exclusive arrangement goes far beyond the elimination of intraconference competition and attempts to restrict the competition of independent carriers. Without surveillance under section 15, such predatory devices are obviously capable of being of being discriminatory, of detriment to our foreign commerce, and contrary to the public interest. *Id.* (211-212).

Section 18(b), added to the 1916 Act, requires common carriers in foreign commerce and conferences of such carriers to file their rates with the Commission "for transportation to and from United States ports and foreign ports between all points on its own route *and on any through route which has been established*", and gives the Commission jurisdiction over the rates so filed. Congress cannot be charged with the futile action of assigning this responsibility to the Commission to regulate rates on a through route if the Commission had no authority over intercarrier agreements under which such rates are established. Argument that inclusion of the italicized words shows a congressional intention to omit them from sections 1 and 15 is unacceptable. *Id.* (213).

First Carriers under a transshipment agreement are "engaged in" (participating in) "the transportation of property between the United States and a foreign country" within the meaning of section 1 of the 1916 Act when they carry rubber on the initial leg of the through route. They are also constructively "engaged" in the whole trip from Thailand to New York by entering into the agreement because the carriage on the entire trip then becomes a joint and common undertaking between two groups of carriers. Switching the cargo to a different vessel at Singapore does not change the fact that the transportation is part of the foreign commerce of the United States. *Id.* (214).

Exclusive transshipment arrangement between a group of originating carriers which operate exclusively between Thailand ports and Singapore, and a group of on-carriers which operate from Singapore to U.S. ports, was not shown to be

unjustly discriminatory or unfair or detrimental in its operation to United States commerce, or contrary to the public interest or in violation of the 1916 Act. It would promote a more efficient and orderly transshipment of rubber in the trade and provide service to shippers in lean times. Arrangement for sorting the cargo by the originating carriers would speed the transshipment process. The factor that there would be some restriction on competition did not prevent approval under section 15, and the agreement should be approved. Id. (214-215).

Each and every transshipment agreement should be looked at on its own merit. This cannot be achieved by a flexible and varying approach to the question of whether originating carriers under such agreements are common carriers by water in the foreign commerce of the United States. The Act must be applied uniformly to all carriers. Each agreement between originating carriers and on-carriers is subject to section 15. The incidental agreements between the members of each group, first to negotiate and then to sign, are merged into the transshipment agreement and every facet of individual agreements can be examined as part of the scrutiny of the transshipment agreement. Id. (218).

If an arrangement between on-carriers under a transshipment agreement to enter into the transshipment agreement could be isolated from the agreement itself it could be approvable under section 15. Certainly, if the entire agreement is approvable, one of its antecedent parts, standing alone, could not be found to create evils that would contravene the statute. Id. (219).

Exclusive transshipment arrangement represented the complete understanding between the parties and had not been carried out without Commission approval. Id. (219-220).

—Voting requirements

Unanimity in respect of matters under agreements is not the policy of the United States which governs water carriers under section 15 agreements. Congress has left resolution of the question to the Commission to be settled by rule or regulation if the Commission determines it necessary to resolve the issue on an industry-wide basis. Passenger Steamship Conferences Regarding Travel Agents, 27 (36-37).

Passenger steamship conference rule as implemented contrary to the business judgment of nearly all conference members, requiring unanimous vote of the membership to fix or alter the maximum commission payable to travel agents appointed by the conference to sell passenger bookings has worked to the detriment of the commerce of the United States. Id. (38).

Passenger steamship conference rule requiring unanimous vote of members to fix or alter the maximum commission payable to travel agents has had an effect inconsistent with the desires of most members to meet the air challenge. Lack of unanimity has on several occasions prevented the conference's subcommittee, which has initial responsibility for commissions, from even reporting the positions of member lines to the principals. Id. (38).

Passenger steamship conference rule requiring unanimous vote of membership to fix or alter the maximum commission payable to travel agents may be "merely the procedure" by which a maximum level of commissions is fixed, but it is entirely incorrect to conclude that the level fixed must be found unlawful before the "procedure" itself can be ordered modified. In dealing with the rule itself the Commission must determine to what degree it will permit rigidifying or circumscribing of the flexibility of operations under an anticompetitive agreement—a far different determination than one as to whether a given rate, fare, charge or commission fixed under a particular procedure is itself valid under the law. The one consideration is not dependent upon the other. Id. (38).

Conference unanimity rule with respect to the maximum commission payable to travel agents blocked attempts by a majority of the member lines to change the general commission level for at least 6 years and the tour commission level for over 2½ years. The logical inference may well be that the present level is frozen at a level undesired by a majority of the conference members. The fact that the record does not show whether or not a majority would decide to raise the commission level is irrelevant. If the rule has been shown to operate to the detriment of commerce, to wait until there is evidence that it again operates in that fashion before the rule is outlawed would be to suggest that illegal actions cannot be disapproved once they may have ceased. This reasoning would destroy the purpose of regulation. *Id.* (40).

Evidence of the blocking of the desires of a majority of the member lines to achieve their goal present in the proceedings is a sufficient reason for declaring conference unanimity rule, with respect to the maximum commission payable to travel agents, detrimental to the commerce of the United States. *Id.* (40).

Record shows that conference unanimity rule with respect to the maximum commission payable to travel agents frustrated the desire of the majority of the member lines. Determination of the effect of the rule upon actions of the principles has been made difficult by failure of the conference to keep and file complete minutes of its meetings. This failure has caused whatever evidentiary sketchiness exists as to the effect of the rule, and the responsibility for this failure cannot be shifted to the Commission. *Id.* (40).

Conference procedures must be reasonably adapted to the goal of conference activity; namely, the voluntary effectuation of the desires of the member lines in achieving the concerted action which they, within the limits of the law, feel is appropriate. An essential factor in achieving this goal is sufficient flexibility under the conference agreement to alter action which the members may once have found desirable but later appears to thwart their desires. *Id.* (40-41).

Outlawing of unanimous voting requirements, because they failed voluntarily to effectuate the desires of conference members, has often occurred. Evidence exists in this proceeding of both veto usage and blocking of the desires of a strong majority of member lines for many years to raise the level of travel agents' commissions. Such results are clearly detrimental to commerce as inimical to the very nature of the conference as a voluntary association and unfair as between the majority of carriers which desired the change and those few who blocked it. For these reasons the unanimity rule must be declared unlawful under section 15. *Id.* (41-42).

Conference unanimity rule with respect to maximum commissions payable to travel agents must also be disapproved because it resulted in maximum level of commissions which places bookings of steamship travel at a competitive disadvantage with airline travel. The record clearly shows that it is not economic factors entirely beyond conference members' control which have caused this competitive disadvantage but the rule itself. *Id.* (42).

The "economic factor" that it takes travel agents more time to book sea passage than air passage could have been overcome but for conference unanimity rule requiring unanimous vote of membership to fix or alter the maximum commission payable to travel agents. The purely superficial equilibrium between commissions for booking sea and air passage would have been replaced by the majority of conference members by a higher "percentage level" of commissions for sea passage. The record indicates that until this is done, the economic self-interest of travel agents will serve to foster the definite tendency to sell air passage over sea passage—a situation contrary to the public's interest in the

—*Fixing of rates*

In determining the reasonableness of rate and, if necessary, in fixing minimum reasonable rates, the Commission has authority to insure that, in the absence of valid transportation ratemaking factors militating against such result (including cost of transportation to carrier, value to shipper and distance), cargo move through naturally tributary areas. It also has authority to insure that, where it becomes necessary in the public interest, high value commodities move at rates high enough to enable the carriage of essential low value commodities at rates lower than those at which the low value commodities would be carried solely in consideration of the usual transportation factors alone. *Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Ports in Puerto Rico*, 248 (250-251).

The Commission has authority to increase rates which are compensatory. *Id.* (251).

In determining rates distance has an important bearing particularly where because of a shorter distance between transit points a carrier incurs lesser costs. *Id.* (252).

A minimum rate will not be fixed merely because a lower rate would be wasteful of revenue. There is no principle which would require a carrier to charge rates higher than he chooses to charge unless the carrier's level of rates is so low that it or other carriers are about to be driven from a trade which will be left with inadequate service, or unless the carrier's rates have an unlawful impact upon someone or thing, e.g., another carrier, shipper, or port. *Id.* (252).

Where carriers from North Atlantic ports to Puerto Rico maintained rates of 50 cents per cubic foot on heavy machinery and South Atlantic carriers maintained rates of 48 cents, voluntarily since vacation of a Commission order; the results indicated a movement of naturally tributary cargo back through the port of New York; and there appeared to be no need to act with respect to the needs of the Puerto Rican economy, there was no need to set minimum rates, and the rates currently in effect were found to be lawful as just and reasonable. *Id.* (253).

—*Pickup and delivery service*

The *Matson* decision, 7 FMC 480, does not support the position that truckers performing a pickup and delivery service on behalf of, or under contract with, a common carrier by water become subject to the 1916 Act. The Commission made it clear that its regulatory authority attached only to the water carrier. The Commission did not attempt to regulate the rates agreed upon between the ocean carrier and the land carrier for performance of the service. *Portalatin Velazquez Maldonado v. Sea-Land Service, Inc.*, 362 (369).

The transportation service offered by a water carrier, when viewed as an obligation which attaches to common carriage, begins or ends at the place provided in a terminal for the receipt or delivery of property. A common carrier by water may, by contract, extend its obligation to a shipper to include a pickup and delivery service. The fact that an ocean carrier employs a land carrier to perform this contractual obligation does not place such land carrier in the position of performing an obligation imposed by statute on a common carrier by water. A person by virtue of a contract with a water carrier or terminal operator may become subject to Commission jurisdiction provided the contract involves an activity covered by the 1916 Act. Truckers who enter an ocean terminal for the sole purpose of picking up or delivering cargo are not furnishing terminal facilities within the purview of section 1 of the Shipping Act. Such

truckers, acting independently or on behalf of an ocean carrier, are not subject to the Commission's jurisdiction. *Id.* (370-371).

Even if section 16 could be extended to include a requirement that an ocean carrier must equally distribute the hauling of its cargo between inland truckers, assignment by the carrier of a greater portion of cargo involved in its door-to-door service to truckers who agreed to accept less-than-trailerload cargo would not be undue or unreasonable preference. Trucking of less-than-trailerload cargo represented, at best, a marginal operation from a financial viewpoint. *Id.* (372).

Evidence failed to show any violation of section 17 of the Shipping Act in connection with a carrier's pickup and delivery service performed for it by truckers. *Id.* (372).

Evidence failed to show any violation of section 18 of the Shipping Act in connection with a carrier's pickup and delivery service performed for it by truckers. The zones and rates in connection with the receipt and delivery of cargo were not shown to be other than just and reasonable. *Id.* (372).

—Policies of merchant marine laws

To the extent that MSTs competitive bidding system is asserted to be unlawful, as violating the policies of the merchant marine statutes, without specific allegations of violation of particular substantive provisions of the statute, the Commission points out that expressions of policy are nothing more than the goals sought to be achieved by Congress. Standing alone a statement of policy grants no substantive power and prohibits no specific conduct. It is not "violated" in the sense that substantive provisions of a statute are violated. *Carriage of Military Cargo*, 69 (74).

The national shipping policy which is to be ultimately deduced from a study of the shipping laws and past administrative practices is a synthesis in which there is found "nothing inconsistent with regulatory policy in U.S. promotional policy". The Commission's responsibilities are exclusively regulatory. The Commission may not "promote". Neither may it "regulate" without regard to the consequences on our merchant marine, because the merchant marine is itself a part of United States foreign commerce and, as such, is entitled to the full protection of the Shipping Act. Shippers and "other persons" are also entitled to protection afforded by the Act. *Id.* (75-76).

—Preference or prejudice

Consideration of lawfulness under section 16 First of MSTs proposed procurement program is premature. The "preference" to MSTs is a reduced rate and nothing else. Only undue or unreasonable preferences are outlawed by section 16 First. Undueness or unreasonableness cannot be determined at this time. *Carriage of Military Cargo*, 69 (72-73).

Carrier's reduced rate on flour from the mainland to Hawaii, to meet competition from an unregulated barge line carrying wheat in the same trade, did not result in undue preference or prejudice in violation of section 16 First of the 1916 Act. *Matson Navigation Company, Reduced Rates on Flour from Pacific Coast Ports to Hawaii*, 145 (148).

Section 16 First of the 1916 Act says that *all* unreasonable prejudice is unlawful. Insofar as a carrier utilizes rates to enable it unreasonably to prejudice a port locality, the carrier's conduct is unlawful whether it is the result of an unlawful equalization or a single unjustifiably low ocean rate which has the same effect. *Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Ports in Puerto Rico*, 248 (251).

A carrier may violate section 16 First even though it does not serve ports which it allegedly prejudices. A violation depends on preference and prejudice, not whether a carrier serves both ports. A carrier whose rates from Jacksonville to Puerto Rico attract cargo from origins which, based on inland rail rates, are tributary to North Atlantic ports is not necessarily in violation of section 16 First. Whether the drawing away of traffic results in unjust or unfair discrimination or undue or unreasonable preference is a question of fact for determination in each case. Where the record shows only that the carrier, pursuant to an apparently reasonable rate structure, attracts cargo overland from areas which could be served by other ports, no finding of a violation of section 16 First can be made. *Rates From Jacksonville, Florida To Puerto Rico*, 376 (382-383).

A carrier's rate on scrap metal from Puerto Rico to North Atlantic ports, which was higher than the rate from Puerto Rico to Jacksonville, was not unlawful per se, and in the absence of proof that the rate was unlawful, it was lawful. *Id.* (384).

A carrier maintaining uniform rates from Atlantic ports including Jacksonville, to Puerto Rico would not be permitted to lower its rates from Jacksonville to meet competition out of Jacksonville. The Commission may not lawfully permit such a reduction without a reduction in rates out of North Atlantic ports without a showing that cost or other transportation conditions justify a rate policy which on its face works a preference to Jacksonville and prejudice to other Atlantic ports served by the carrier. There must be more than just a showing that the cost of operation at one port is greater than at another competing port. Volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and other matters are properly to be considered in arriving at adjustment of rates between ports. The probable result of permitting the proposal would be to seriously impair the low rate carrier's ability to attract cargo, and induce movement of cargo from the higher rate carrier's service at North Atlantic ports to its service at Jacksonville. This was not justified on the record. *Id.* (385-386).

—Reduced rates to government

Absence in the Shipping Act of any express provision for reduced rates to the government does not bar MSTTS competitive bidding procedure designed to reduce cargo rates. Court cases involving tariffs filed with the CAB did not deny the right of the government to reduced rates when the reduced rate was properly filed and part of the published tariff of the carrier. Under the MSTTS procedure, all rates agreed upon are to be published and filed under section 18(b) of the Shipping Act. *Carriage of Military Cargo*, 69 (80-81).

—Reduced rates to meet competition

A regulated carrier's reduced rates (which returned less than fully distributed costs) on flour from the mainland to Hawaii was necessitated by competition with an unregulated large line carrying wheat in the same trade. The fact that a differential in rates exists between raw materials and the finished product does not mean that the two commodities cannot be competitive. The fact that the competitive relationship between the carriers was an outgrowth of a more direct competitive relationship between a local Hawaiian mill and mainland mills for the sale of flour did not detract from the fact that the carriers were in competition. *Matson Navigation Company, Reduced Rates on Flour from Pacific Coast Ports to Hawaii*, 145 (149-151).

A regulated carrier's rate reduction on flour from the mainland to Hawaii was necessary to enable mainland mills to compete with a mill in Hawaii for

the sale of flour in Hawaii, in view of evidence that the mainland mills were losing their business in Hawaii, and that a reduction in their price of flour was necessary to enable them to compete there. It was not necessary to permit an inquiry into the cost of production or profit margin of the mainland mill shippers to show a compelling necessity for the rate reduction below fully distributed costs. The important criteria to be considered were the transportation considerations and not whether the mainland mills could compete by reducing their own profits. The Commission has consistently refused to permit the "profitability" of a shipper's business to determine the reasonableness of a carrier's rates. The true measure of the advantage of the Hawaiian mill lay in its lower cost of transportation of flour in the form of wheat (via an unregulated barge carrier) compared with the mainland mills' costs of transporting flour in finished form under the regulated carrier's rates. *Id.* (151-153).

Carrier's rate reduction on flour from the mainland to Hawaii, to meet competition with an unregulated barge line carrying wheat in the same trade, did not unfairly distort the existing rate structures, thereby resulting in unfair discrimination among shippers. Argument that by allowing barge shippers selective rate reductions which return less than full costs, without affording similar reductions to smaller shippers of other commodities, the carrier was placing an undue burden on the latter shippers, was not valid in view of the conclusion that the reduced flour rate did in fact return a net-to-vessel contribution of \$78.59 per container. The shipments returned a sufficient amount to cover extra expenses incurred as the result of a particular flour shipment and also contributed an additional \$78.59 per container toward administrative and vessel expense. *Id.* (152-153).

In determining whether a carrier's rate reduction on flour from the mainland to Hawaii was contrary to the public interest, it was sound and proper to restrict the consideration to transportation conditions and the effect the reduction might have thereon. *Id.* (154).

Carrier's rate reduction on flour from the mainland to Hawaii was not unlawful because it would enable the carrier to prevent entry of a new carrier in the trade. In view of the determinations that the reduction was compelled by competition and that it returned an amount in excess of out-of-pocket costs, the assumption that approval of the reduction would amount to a condonation of arbitrary rate reductions below compensatory levels, and that the carrier could employ such reductions to keep new carriers out of the trade, was unwarranted. *Id.* (154).

Carrier's rate reduction on flour from the mainland to Hawaii was not unlawful on the ground that it would result in an unreasonable rate structure in Hawaii in which one commodity would be subsidized by another. The effect of a rate reduction on other commodities and the overall rate structure is important to a consideration of the public interest. However, the reduction, since it returned a net-to-vessel contribution, did not distort the rate structure in such a way as to place an undue burden on one commodity or one shipper. *Id.* (154).

Carrier's reduced rate on flour from the mainland to Hawaii was not unlawful because, if the carrier prevailed in allowing a specific commodity rate reduction at the request of a barge shipper, large influential shippers would always be able to gain similar concessions at the expense of small shippers. It could not be assumed that the carriers would make indiscriminate rate reductions to please large shippers. In the present case, the carrier had given the shipper a rate reduction less than requested, and then only when it was apparent that the cargo would be lost. Also, the reduced rate was justified because it returned

more than out-of-pocket costs and because it was probable that the carrier would otherwise have lost most of the flour trade. *Id.* (155).

Carrier's reduced rate on flour from the mainland to Hawaii to meet the competition of an unregulated barge line carrying wheat in the same trade was not contrary to the public interest on the ground that it would effectively deter the establishment of new industry in Hawaii, since the carrier could control industry expansion by making spot rate reductions on whatever commodities a new industry was seeking to market in Hawaii. Experience with the reduced flour rate did not support any such fear. *Id.* (155).

Domestic offshore carriers have the initiative to set rates which fall within a general range of reasonableness and are not otherwise unlawful. Various levels of rates in a single trade, or differentials, are not unlawful as such. Where a carrier lawfully sets rates lower than a competitor's the competitor may initiate rates to meet competition provided the rates are compensatory and not lower than necessary to meet the competition. The right to meet competitive rates is not absolute. Rate reductions to meet competitive rates must be just and reasonable and not discriminatory. *Rates From Jacksonville, Florida To Puerto Rico*, 376 (380-381).

Whether a carrier may preserve its rate differential lower than its competitor's rates depends upon its ability to attract cargo at rate parity. A primary shipper consideration in selecting a carrier is total cost of transportation. Where rates are equal, minor considerations assume a major role. With slower transit time the lower rate carrier's vessels were exposed to the hazards of ocean transportation for a longer period. Hazard and probable conditions of the cargo upon arrival is a shipper concern. A tug and barge service, offered by the lower rate carrier, was inherently less stable and less reliable. The higher rate carrier's service was modern and efficient compared to the lower rate carrier's. Shippers would as a rule prefer the more modern, faster and more dependable service if rates were equal. The lower rate carrier's service, while twice weekly, was quite erratic and the other carrier's service, though only weekly, was dependable. *Id.* (381).

Carrier whose rates were differentially lower than those of its competitor from Jacksonville to Puerto Rico would be injured if its rates were increased through loss of traffic upon which the inland rail rate was favorable to North Atlantic ports. The carrier would also be deprived of a substantial portion of its cargo from inland-rate equal origins and from the Jacksonville area as well. At rate parity the carrier would be forced out of business. Therefore, the carrier's rates must serve as an inducement to shippers. The higher rate carrier had no competitive necessity to lower its rates and eliminate the differential. Rate parity would drive the low rate carrier out of the trade. On the record, the high rate carrier would not be permitted to lower its rates to the levels of the low rate carrier and the latter would not be ordered to increase its rates to levels prevailing in the North Atlantic. *Id.* (381-382).

—Undercharges

Where a carrier properly filed rate increases to become effective on February 1, 1964; and on April 23, 1964, filed the same increases to become effective August 1, 1964, and at the same time attempted to cancel the earlier filing, reinstate the rates in effect prior to February 1, 1964, and postpone the rate increase until August 1, 1964, the result was that the higher rates were the applicable rates from February 1, 1964, to April 23, 1964 (and from and after August 1). Retroactive application of rates was clearly nullified by section 18(b)(2). Refunds made to shippers for the period between February 1 and April 23 were thus refunds of a

portion of rates duly published and in effect during this period within the meaning of, and contrary to, section 18(b). However, because the illegal manner of filing was the result, at least in part, of actions of the Commission as reasonably interpreted by the conference, the Commission would not seek penalties from the conference for the "refunds." Application for leave to waive collection of undercharges was denied. *Java Pacific Rate Agreement v. Numerous Shippers in the Trade from Indonesia*, 157 (161-163).

—Unfair device or means

MSTS competitive bidding procedure, under which bids for cargo must be submitted under seal, is not an unfair device or means to obtain transportation at less than rates which would otherwise be applicable within the meaning of the first paragraph of section 16. Whatever rates are established must be filed with the Commission, published in a tariff, and made available to all in a way which is not unjustly discriminatory or unduly prejudicial, etc., and this is all that the Shipping Act requires. *Carriage of Military Cargo*, 69 (83-84).

Section 16 of the Shipping Act clearly contemplates, not that a tariff rate will not be changed, but rather that the rate will ostensibly remain in effect while some other rate is actually paid by the shipper. Thus it is unlawful to misclassify an article to obtain a lower rate, to rebate a portion of the freight rate to a particular shipper, to withhold information from the carrier essential to determination of the proper rate, or to seek a lower rate or rebate by false billing. Under MSTS bidding procedure the rates will be filed with the Commission and it will be impossible for the shipper to obtain transportation at less than the rates otherwise applicable, i.e., the rates that the carrier is bound to charge under section 18(b) (3) of the Shipping Act. *Id.* (85-86).

MSTS competitive bidding procedure cannot be equated with the type of "unjust or unfair device or means" contemplated in the first paragraph of section 16. It is therefore lawful under section 16 Second as well. *Id.* (86).

—Volume rates

Consideration of lawfulness under section 14 Fourth of MSTS proposed procurement program is premature, since no particular contract for any stated volume of cargo at a fixed rate had been made. Prime concern of carriers was that rates would be reduced 25 percent as the product solely of competitive bidding. Whatever the validity of this assumption, it is itself precisely the reason why there can be as yet no determination under section 14 Fourth. That section does not outlaw all contracts based on volume of freight only, but only those which are unfair or unjustly discriminatory. Such a contract is unfair or unjustly discriminatory if the advantages offered under it are not based on transportation factors which are altered by the "volume of freight offered". MSTS Cargo Commitment contract is sought if the offeror needs a fixed volume to provide his "best rate". The contract is geared to a rate. Not even the most strained reading of section 14 Fourth can render unlawful the mere pro forma solicitation by a shipper, no matter how large, of contracts based on volume of freight. *Carriage of Military Cargo*, 69 (72-73).

Section 14 Fourth is not, because of the newly enacted section 14b, to be read as requiring that contracts originally unlawful under 14 Fourth only if "unfair or unjustly discriminatory" must now be filed for approval and contain provisions concerning such things as prompt release of the shipper. If Congress had intended to alter the status of contracts based on volume of freight offered, it would have made its intention clear. *Id.* (78).

The MST'S Cargo Commitment contract is a volume contract. The contract will be awarded where the contracting officer finds it to be in the best interest to commit the government "to ship a minimum volume of cargo for a specified number of sailings on a particular route." *Id.* (78).

The dual-rate contract struck down by the Supreme Court in *FMB v. Isbrandt-sen Co.*, as unlawful under section 14 Third is not like the MST'S Cargo Commitment contract. The Court distinguished dual rate contracts from ordinary requirements contracts under which conference members are obligated to furnish ships at regular intervals and at rates effective for a reasonably long period. Such contracts had, since 1916 been lawful under section 14 Fourth so long as they were not unfair or unjustly discriminatory. Section 14b will not be read as altering the longstanding status of these contracts. MST'S Cargo Commitment is the kind of contract which the Supreme Court found similar to an ordinary requirements contract. Whether a particular Cargo Commitment is unfair or unjustly discriminatory and thus unlawful under 14 Fourth is dependent upon such things as the particular amount of cargo committed and the specific rate fixed. *Id.* (78-80).

REBATES.

Commission paid to foreign forwarders, even if considered to be paid to shippers, were not necessarily "deferred rebates" prohibited by section 14 First which speaks of payments made "only if, during both the period for which computed and the period of deferments, the shipper has complied with the terms of the rebate agreement or arrangement". The missing ingredient in the agreements to pay commissions was the continued obligation of the shipper to remain loyal. *Practices, Etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade*, 95 (113-114).

Section 14 of the Shipping Act prohibits deferred rebates to any shipper but truckers presented no evidence to establish that any shipper received a rebate from a carrier in connection with an agreement between the carrier and truckers under which the truckers performed the pickup and delivery portion of a door-to-door contract of ocean transportation on behalf of the carrier. *Portalatin Velazquez Maldonado v. Sea-Land Service, Inc.*, 362 (372).

PREPARATION.

Failure of the Commission to promulgate a proposed rule, prohibiting limitation of the time within which claims for adjustment of freight charges may be presented to a carrier to less than two years after date of shipment, is not to be interpreted to allow carriers in any way to limit the right of a shipper claiming injury under the 1916 Act or the 1933 Act to file a claim for reparation under section 22 of the 1916 Act with the Commission at any time within two years of accrual of the cause of action which is the basis of such injury and claim. The two-year statute of limitations in section 22 is not a "pure statute of limitations" the purpose of which is merely to bar the bringing of stale claims, and which can be contracted away by agreement between shipper and carrier. *Time Limit on the Filing of Overcharge Claims*, 1 (5).

Practice of the ICC, prior to amendments of the statutes under which it operates, providing that claims against carriers and forwarders had to be made and that actions on such claims had to be brought within certain time limitations is not instructive for Maritime Commission purposes. The Maritime Commission is empowered by Congress to grant reparation for any violation of the statutes it administers, and there is a statute of limitations governing the time within which such reparation may be sought embodied in the 1916 Act itself.

No reference for the applicable time limitation need be made to principles of general law or State statutes of limitations as was necessary under ICC practice before the statutes were amended. No cases are advanced which hold that a common carrier or other person subject to similar regulation may by contract change a time limitation for bringing a claim for reparation which is embodied in a statute of an administrative agency, and the Commission will not permit it. Id. (5-6).

A carrier-imposed time limitation for the filing of claims for freight adjustments cannot be declared unlawful unless shown to operate in a fashion contrary to some provision of law administered by the Commission. Id. (6).

Carrier-imposed time limitations might be utilized in such a way as to prevent shippers from filing or recovering reparation pursuant to claims with the Commission for injury caused by violation of the Commission's statutes. Such effect would be contrary to the public interest embodied in section 22 of the Shipping Act. No showing was made, however, that carrier-imposed time limitations have had such effect. Id. (6-7).

Sections 18(b) (3) of the 1916 Act and 2 of the 1933 Act would not outlaw carrier-imposed time limitations as such. They merely prohibit a carrier from retaining freight charges greater than those specified in its tariff. A carrier could retain such charges if a claim for reparation before the Commission were brought after two years from time of accrual of the cause of action. The carrier's limitations would violate the sections only if it could be shown that they had the effect of preventing shippers' recovery based on just claims prior to expiration of the two-year period. Id. (7).

The second paragraph of section 17 of the 1916 Act, under which carriers' time limitations on filing of freight adjustment claims were alleged to be invalid does not relate to such practices. It relates only to practices "relating to or connected with the receiving, handling, storing, or delivering of property", and its application has thus been confined to forwarding and terminal operations Id. (7).

Where a carrier had a tariff rate for "Condiments" and a rate for "Onions, n.o.s.", the applicable rate for a shipment of dehydrated onion powder was the rate for "Condiments". Complainant, which was charged the general cargo, n.o.s. rate, a violation by the carrier of section 18(b) (3), was entitled to the difference between the rate charged and the applicable rate, with interest at six percent. *Corn Products Co. v. Hamburg-Amerika Lines*, 388 (392-393).

The Commission has no authority to permit deviations from filed tariffs in the foreign trades. Unintentional failure of a carrier to file a particular rate is not sufficient reason to depart from the requirements of section 18(b) (3). *Aarmo Bristle Processing & Brush Co. v. Zim Israel Navigation Co., Ltd.*, 402 (403-404).

The Commission has no authority as to shipments in foreign commerce to permit deviations from rates on file, or to give effect to an unfiled or unpublished tariff regardless of the equities involved. *Ayrton Metal & Ore Corp. v. American Export Isbrandtsen Lines, Inc.*, 405 (407).

SELF-POLICING. See Agreements under Section 15.

SHIPPERS' REQUESTS AND COMPLAINTS. See Agreements under Section 15.

SHOW CAUSE ORDERS. See Practice and Procedure.

STATUTE OF LIMITATIONS. See also Reparation.

The Commission was not barred by the statute of limitations from investigating violations of the Shipping Act. The statute applies to the collection of

civil and criminal penalties, not to investigations instituted by the Commission. Practices, Etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade, 95 (114).

STEVEDORING. See Terminal Operators.

STORAGE CHARGES. See Terminal Operators.

SURCHARGES. See also Dual Rates.

Conclusions of the Examiner, to which no exceptions were filed, that there was no showing of prejudice or disadvantage to any person, locality, or description of traffic as prohibited by section 16 First and no showing of unjust discrimination between shippers or ports as prohibited by section 17 in connection with imposition of a surcharge on 30 days' notice, and no showing that the level of the surcharge was so unreasonably high as to be detrimental to commerce contrary to section 18(b), are sustained. Imposition of Surcharge at United States Atlantic and Gulf Ports, 13 (20).

In view of the unprecedented refusal of longshoremen to accept a contract agreed to by their leaders, the ensuing intransigence of the union in insisting on an all-ports-or-none rule despite an existing injunction against all-port bargaining, and the unprecedented port congestion that followed the longshoremen's strike in 1965, occurrences which could not have been foreseen by the exercise of a high degree of diligence, extraordinary conditions existed justifying imposition of surcharges on 30 days' notice. *Id.* (23-24).

Carriers, in imposing surcharges on short notice, as a result of a longshoremen's strike, and in later adopting a permanent rate increase, were not in effect increasing rates permanently on less than 90 days' notice. Carriers may increase their regular rates or impose surcharges, if conditions warrant. The entire regulatory scheme of the Shipping Act is based on the recognition that carriers are obliged to observe reasonable, nondiscriminatory standards, but they are also entitled to fair remuneration for their services. *Id.* (25).

Surcharges imposed by carriers as a result of a longshoremen's strike did not violate the public interest because they remained in effect for a time after port congestion ended. Spreading of the surcharge over a longer period than the duration of the congestion, in order to reduce the rate of the surcharge, was a reasonable means of recouping the losses occasioned by the strike. *Id.* (25).

TARIFFS. See also Rates and Ratemaking; Reparation; Terminal Operators.

Failure of a carrier to apprise the public in its tariffs of its newly acquired capability for handling refrigerated cargo constituted a failure to establish just and reasonable classifications, regulations and practices within the meaning of section 18(a). As for the defense that the program was experimental in nature, the statutes make no exception for experimental or pilot programs. Application to refrigerated cargo of the cargo, n.o.s. rate coupled with a special handling charge did not satisfy statutory requirements. Nothing in the tariffs of the carrier disclosed the fact that it carried refrigerated cargo and the nature of its operation (tug and barge) would lead to the opposite conclusion. *Sea-Land Service, Inc. v. TMT Trailer Ferry, Inc.*, 395 (398-399).

A carrier which, in addition to charging the basic cargo, n.o.s. rate for refrigerated cargo, assessed a surcharge of \$33.60 per trailer, under the authority of its "special equipment" regulation, charged a rate for refrigerated cargo which was other than and greater than that specified in its tariff in violation of section 18(a) of the Shipping Act and section 2 of the Intercoastal Shipping Act. The "special equipment" regulation merely stated that "quotation of charges will

be made for furnishing such special equipment". The "special equipment charge" was a constant and unvarying addition to the n.o.s. rate, and this could only lead to the conclusion that the proper rate for the movement was the n.o.s. rate plus \$33.60. Id. (399).

Carrier's use of its Cargo, n.o.s. rate to cover shipment of refrigerated cargo could not be found to violate section 16, First as constituting an unjust or unreasonable preference to shippers actually using the service and prejudice to shippers who did not know about the availability of the service, but would have used it had they known, since there was no actual evidence of shippers who lacked knowledge and would have used the service. Id. (399-400).

TERMINAL OPERATORS. See also Free Time.

There are agreements between New York terminal operators and carriers whereby certain revenues collected from lighter operators are "refunded" to the carriers. Truck and Lighter Loading and Unloading Practices at New York Harbor, 234 (236, 239).

Agreements between New York terminal operators and carriers whereby certain revenues collected from lighter operators are "refunded" to the carriers do not violate provision of conference agreement that "no rates or charges assessed or collected pursuant to such tariffs shall be directly or indirectly refunded or remitted in whole or in part in any manner or by any device". Id. (236, 239).

No finding is made as to whether agreements between New York terminal operators and carriers, whereby certain revenues collected from lighter operators are "refunded" to the carriers, are subject to section 15. Some stevedoring contracts do contain refund provisions, but the Commission has not seen these in the context the entire contracts. The Commission is unable to determine the effect of such provisions without seeing the context. In any event, the operators had been ordered to change their tariff in such manner that no future refunds were possible. Id. (237-238).

Assessment of strike storage charge for cargo remaining on the premises of a terminal during a longshoremen's strike was a practice subject to Commission jurisdiction under section 17. Proper allocation of costs of providing terminal services as between users of the services is a matter within the Commission's jurisdiction. Boston Shipping Assn. v. Port of Boston Marine Terminal Assn., 409 (413).

Terminal operators perform some services for carriers and other services for shippers. A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the cost to the terminal of providing the service. In considering whether a particular allocation or assessment is just and reasonable, it is essential to first determine for whom the service is performed. The necessary distinction to be made is between those services which are attributable to the transportation obligation of the carrier and those which are not, the latter normally being performed for the shipper or consignee. Id. (414-415).

Assessment of a strike storage charge against the vessel for cargo in free time when a strike begins is not an unjust or unreasonable practice under section 17. It is the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders discharge of that responsibility impossible. Id. (417).

Assessment of a strike storage against the vessel for cargo in demurrage when a strike begins is an unjust and unreasonable practice under section 17. It is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear the risk of any additional charge resulting from a strike occurring after free time has expired. Id. (417-418).

Application of strike storage rule, under which a strike storage charge was assessable on cargo "prevented from removal" by a strike, to a situation involving a longshoremen's strike was proper and did not of itself constitute an unreasonable practice under section 17. The language "prevented from removal" did not mean and was not intended to mean "prevented from removal by a legal obstacle". When truckers and railroad men on whom consignees must rely to pick up their cargo refused to enter the terminal because of a longshoremen's strike, it could hardly be said that the consignee's "refusal" to pickup cargo was "voluntary". Id. (418-419).

Assessment of strike storage charge against the vessel was not a violation of section 16 First. The ingredient of two users of the same service, free time, was missing. The question was whether the cargo or the vessel was the actual user of the service. The service was for either the consignee or the vessel depending on whether the particular cargo was in free time or demurrage. The *San Diego* case, 9 FMC 525, involved the granting of excessive free time to shippers and consignees and the practice worked preference and prejudice as between shippers. Id. (419-420).

TRANSSHIPMENT. See Agreements under Section 15.

TRAVEL AGENTS. See Agreements under Section 15.

UNDERCHARGES. See Rates and Ratemaking.

UNFAIR DEVICE OR MEANS. See Rates and Ratemaking.

VOLUME RATES. See Rates and Ratemaking.